047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,806

DCA Case No. 92-4189

Fla. Bar No. 137172

FILED
SID J. WHITE
SEP 26 1994
CLERK, SUPREME COURT
By ______
Chief Deputy Clerk

SAMUEL ZELL, Trustee under Trust Agreement dated April 3, 1972, and known as Trust Number 853, not individually, but solely as Trustee; and FIRST PROPERTY MANAGEMENT CORP., an Illinois corporation,

Petitioners,

vs.

GAYLYNN SUE MEEK and BARRY M. MEEK,

Respondents.

BRIEF OF AMICUS CURIAE
ACADEMY OF FLORIDA TRIAL LAWYERS

ACADEMY OF FLORIDA TRIAL LAWYERS
BY: PERSE, P.A. & GINSBERG, P.A.
410 Concord Building
66 West Flagler Street
Miami, Florida 33130
(305) 358-0427

TOPICAL INDEX

	Page No.
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	1-5
QUESTION PRESENTED	5
SUMMARY OF ARGUMENT	5-7
ARGUMENT	7-15
CONCLUSION	15-16
CERTIFICATE OF SERVICE	16

LIST OF CITATIONS AND AUTHORITIES

	Page No.
CHAMPION v. GRAY 478 So. 2d 17, 20 (Fla. 1985)	3
KEATING v. STATE 157 So. 2d 567 (Fla. App. 1st 1963)	11
MEEK v. ZELL 636 So. 2d 105 (Fla. App. 1st 1994)	2
PREMIER INDUSTRIES v. MEAD 595 So. 2d 122 (Fla. App. 1st 1992)	11
PUBLIC HEALTH TRUST OF DADE COUNTY v. VALCIN, 507 So. 2d 596 (Fla. 1987)	14
RUPP v. JACKSON 238 So. 2d 86 (Fla. 1970)	11
STRAUGHN v. K & K LAND MANAGEMENT, INC. 326 So. 2d 421 (Fla. 1976)	14
THING v. LA CHOSA 771 P. 2d 814 (Cal. 1989)	9

I.

INTRODUCTION

This amicus curiae brief is filed by the Academy of Florida Trial Lawyers in support of the positions advanced by the respondents, Gaylynn Sue Meek and her husband, derivative claimant, Barry M. Meek.

In this brief the parties litigant will be referred to either as they appeared in the trial court or, alternatively, by name. The proponent of this brief will be referred to as "THE ACADEMY."

The symbols "R" and "A" will refer to the record on appeal and the appendix which accompanied the respondents' answer brief. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

STATEMENT OF THE CASE AND FACTS

Those facts pertinent to the legal issues which will be herein addressed may be stated as follows:

A. On or about March 19, 1990, the plaintiffs were guests in the apartment premises of Dorothy and Sherwin Finlay (Gaylynn's parents) when an explosion occurred (A. 105-106).

B. The force of the explosion blew objects off the walls and ceilings. Light fixtures shattered. Gaylynn was struck by flying glass (A. 104-110; A. 79).

C. Immediately after the explosion Gaylynn ran to the front door of the apartment and observed her father who was mutilated,

scorched and dying from injuries received in the explosion (complaint, paragraphs 7-10; A. 104).

D. The explosion was the result of a bomb left on the door step of the premises. The defendants (the owners and/or operators of the apartment complex) had received threats prior to the bombing but neither warned their tenants and/or invitees of the danger nor took any reasonable steps to provide for their safety (A. 79).

E. Plaintiffs sued the defendants and sought money damages for those injuries sustained as a result of negligent infliction of emotional distress (R. 1; A. 104).

F. Plaintiffs' lawsuit terminated upon trial court granting of the defendants' motion for summary final judgment. The trial court found:

> "...That there has been no 'physical impact' upon the plaintiff, Gaylynn Sue Meek, as that term is defined by Florida law and specifically that pieces of glass from a shattered light fixture falling upon a person without cutting that person or injuring that person does not constitute any 'physical impact.' The court further finds that unspecified stomach pains, insomnia, difficulty in swallowing and breathing, and unspecified pains in the hip and elbow joints do not constitute 'demonstrable physical injury' or 'discernable physical impairments' under Florida law..." (A. 5)

G. Upon entry of final judgment the plaintiffs appealed to the District Court of Appeal, First District, which court, in an opinion now reported, see: MEEK v. ZELL, 636 So. 2d 105 (Fla. App. 1st 1994), vacated the summary judgment entered by the trial court in favor of the defendants and in remanding, stated:

"Florida strictly followed the requirements of the impact doctrine in precluding recovery for psychic injury alone, until the Supreme Court modified this principle in Champion v. Gray, 478 So. 2d 17, 20 (Fla. 1985):

> "'We hold that a claim exists for damages flowing from a significant discernible physical injury when such injury is caused by psychic trauma resulting from negligent injury imposed on another who, because of his relationship to the injured party and his involvement in the event causing that injury, is foreseeably injured.'

"Meek's claim meets all of the requirements of the Champion holding. She suffered significant discernible physical injuries which consisted of severe pain in several areas of her body, an esophageal blockage rendering her unable to swallow, and pain in the joints of her hips and elbows. A causal relationship between these physical manifestations and the psychic injury is supported by competent medical evidence. Her relationship to the person involved in the original injury was that of daughter and father. Meek was directly involved in the event; she saw her father bleeding and dying. Thus, although we agree with appellees that the shattered glass which fell upon Meek without injuring her, and the black smoke which she breathed, did not constitute an impact within the meaning of that doctrine, we do not regard this as dispositive under Champion." 636 So. 2d at pages 107 and 108.

The District Court, satisfied that a prima facie case had been made and that genuine issues of material fact existed, turned to what it believed was a question left unanswered by this Court in CHAMPION v. GRAY, 478 So. 2d 17 (Fla. 1985):

"The interval of time between the psychic injury and the onset of a discernible physical impairment was not an issue in Champion v. Gray, in that the physical impairment (death) occurred within moments of experiencing the psychic injury. Neither was that issue included in the court's holding quoted above. The Champion court nevertheless, in dictum, emphasized that the 'physical impairment must accompany or occur within a short time of the psychic injury.' Id. at 19.

> The time interval in the instant case, in contrast, is the principal issue. The Champion court declined to adopt a pure foreseeability test, but recognized that the public policy of this State required an opportunity to seek compensation for legitimate damages flowing from physical injuries resulting from psychic trauma under some circumstances. The court's concern was expressed in part as follows:
>
> > "'For this purpose we are willing to modify the impact rule, but are unwilling to expand it to purely subjective and speculative damages for psychic trauma alone. We recognize that any limitation is somewhat arbitrary, but in our view is necessary to curb the potential of fraudulent claims, and to place some boundaries on the indefinable and unmeasurable psychic claims. Id. at 20.'
>
> We view the Champion court's concern with the need for a short time interval primarily in the terms expressed above. The shorter the interval of time between the psychic injury and the physical injury, the better opportunity there is for avoiding fraudulent claims and defining or measuring the extent of legitimate claims. In the instant case, there is a clear and definitive basis for a jury or fact-finder to conclude that there is a causal connection between the psychic injury and the physical injury. The manifestations of Meek's psychic injury began immediately with insomnia, depression, short term memory losses, extreme fear of loud noises, bad dreams and similar occurrences, resulting in professional treatment within three weeks of the bombing. They continued in a progressive pattern of exacerbation before rising to the level of physical impairment within nine months after the bombing. Thereafter, the resulting physical injuries continued to become more and more serious. The opinion of Meek's treating physician further strengthened her position that her claim of a causal connection is easily measured and defined, with little or no chance of malingering or other fraudulent conduct." 636 So. 2d at page 108.

Concerned as it was with what it believed was "dicta" in this Court's opinion in CHAMPION, the court certified to this Court as a question of great public importance the following:

"IS THE INTERVAL OF TIME BETWEEN A PSYCHIC TRAUMA AND THE MANIFESTATION OF PHYSICAL TRAUMA MERELY ONE ISSUE FOR THE TRIER OF FACT'S CONSIDERATION IN DECIDING WHETHER THE CAUSE OF ACTION RECOGNIZED IN CHAMPION v. GRAY HAS BEEN ESTABLISHED; OR IS THERE SOME ARBITRARY PERIOD AFTER WHICH THE MANIFESTATION OF PHYSICAL IMPAIRMENT WILL BE CONCLUSIVELY PRESUMED NOT TO HAVE BEEN CAUSED BY THE PSYCHIC TRAUMA?" 636 So. 2d at page 108.

F. This Court has tentatively accepted jurisdiction in order to review the First District's decision.

III.

QUESTION PRESENTED

WHETHER, AND TO WHAT EXTENT, IF ANY, THERE EXISTS IN THIS COURT'S OPINION IN CHAMPION v. GRAY A MANDATE THAT THE CLEARLY DISCERNIBLE PHYSICAL IMPAIRMENT THAT MUST ACCOMPANY, OR OCCUR WITH, A PSYCHIC INJURY [IN ORDER TO SATISFY THE REQUIREMENTS FOR A CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS] APPEAR WITHIN A DEFINITE PERIOD OF TIME.

IV.

SUMMARY OF ARGUMENT

The certified question asks in essence: is the interval of time between a psychic trauma and the manifestation of physical trauma bound by some arbitrary time period or is it merely another element for the trier of fact's consideration in deciding whether the cause of action recognized in CHAMPION v. GRAY has been established. THE ACADEMY would suggest that the question certified begs the issue. If the language utilized by this Court in CHAMPION is dicta, there is no such "time" requirement. If not dicta, then another series of questions may well arise. Given this observation the following is submitted:

1. The language utilized by this Court in CHAMPION was clearly dicta. There is no such "time" requirement.

2. If this Court were to "re-evaluate" the issue and inject into the already extant cause of action the requirement that physical impairment must accompany or occur within a short time of the psychic injury, the requirement of a "short time" be held to be elastic to be decided upon a case by case basis and not by utilization of some arbitrary period of time:

a. First, there already exists an arbitrary period of time in which all of the elements of the cause of action must concur. The parameters are governed by the requisite period of limitations as set by the Legislature.

b. Second, the alternative suggested by the First District allows for "conclusive presumptions" which are prohibited under Florida law. Moreover, presumptions cannot be utilized as an element of the cause of action requires medical testimony.

3. A review of the decisions rendered by the various courts in this State since this Court's decision in CHAMPION v. GRAY does not reveal any difficulty in applying the facts and circumstances of the particular case to the elements of the cause of action as set out in CHAMPION v. GRAY. As a consequence, and while THE ACADEMY endorses wholeheartedly the arguments advanced by the respondents herein, THE ACADEMY must

temper such endorsement with the recognition that many of the issues being discussed in all of the briefs presently filed are:

a. Not pertinent to the facts and circumstances of this case; or

b. Issues that were either never addressed below or issues that merely question the correctness, vel non, of the decision rendered by the First District. While this Court certainly has the discretion to review the subject record, there would appear to be no reason to do so once the issue of "dicta" is resolved.

V.

ARGUMENT

THE OPINION OF THE FIRST DISTRICT SHOULD BE APPROVED. THE QUESTION CERTIFIED SHOULD BE ANSWERED TO A LIMITED EXTENT ONLY.

In the opinion herein sought to be reviewed, the First District reversed a summary final judgment and remanded for a jury trial after determining that:

> "Meek's claim meets all of the requirements of the Champion holding. She suffered significant discernible physical injuries which consisted of severe pain in several areas of her body, and esophageal blockage rendering her unable to swallow, and pain in the joints of her hips and elbows. A causal relationship between these physical manifestations and the psychic injury is supported by competent medical evidence. Her relationship to the person involved in the original injury was that of daughter and father. Meek was directly involved in the event; she saw her father bleeding and dying. Thus, although we agree with appellees that the shattered glass which fell upon Meek without injuring her, and the black smoke which she breathed, did not constitute an impact within the meaning of that doctrine, we do not regard this as dispositive under Champion." 636 So. 2d at page 108.

The First District Court of Appeal had no difficulty in determining that under the facts and circumstances of this case, properly viewed, (an appellate principle seemingly ignored in the initial brief of amicus curiae, FLORIDA DEFENSE LAWYERS ASSOCIATION, see page 2 therein, "What Meek suffered as mental distress does not go beyond what a disinterested witness would suffer upon seeing Meek's father immediately after a bomb explosion had killed him. What Meek suffered would be normal under the circumstances.") that genuine issues of material fact existed regarding all elements of the cause of action. The First District apparently struggled with the following:

> "The interval of time between the psychic injury and the onset of a discernible physical impairment was not an issue in Champion v. Gray, in that the physical impairment (death) occurred within moments of experiencing the psychic injury. Neither was that issue included in the court's holding quoted above. The Champion court nevertheless, in dictum, emphasized that the 'physical impairment must accompany or occur within a short time of the psychic injury.' Id at 19. The time interval in the instant case, in contrast, is the principal issue..." 636 So. 2d at page 108.

The First District specifically expressed concern with the (purported) dicta in CHAMPION that the "physical impairment must accompany or occur within a short time of the psychic injury." Consistent therewith the District Court certified that particular question to this Court. THE ACADEMY has reviewed the several briefs filed to date:

A. The respondents (the plaintiffs below) suggest this Court should accept jurisdiction:

> "So as to clarify and refine the law of negligent infliction of emotional distress and further the

uniform administration of justice." See: Brief of Respondent at page 4.

B. The petitioners (the defendants below) suggest:

> "Since the District Court certified that its decision passed on a question of great public importance, this Court has discretionary review jurisdiction. The Court should exercise that discretion in favor of granting review because the District Court's opinion modifies the elements of the Champion cause of action, adds uncertainty to an area that had previously been clear, and frustrates this court's efforts to place boundaries on psychic injury claims. Moreover, granting review will give the Court an opportunity to resolve a conflict of decisions among the District Courts of Appeal." See: Brief of Petitioners at page 7.

C. Amicus curiae FLORIDA DEFENSE LAWYERS ASSOCIATION says it will limit its argument:

> "...Solely to the issue of whether or not Meek failed to demonstrate a significant discernible physical injury occurring within a short time of the psychic injury, thereby meeting the requirements of Champion v. Gray, supra..." See: Brief of Amicus, at page 1.

However, in presenting its argument (and especially in presenting the summary of its argument) the FLORIDA DEFENSE LAWYERS ASSOCIATION engages purely and simply in an exercise in intellectual misprision. Much of what the FLORIDA DEFENSE LAWYERS ASSOCIATION argues arises from the opinion rendered by the California Supreme Court in THING v. LA CHOSA, 771 P. 2d 814 (Cal. 1989). In its brief the FLORIDA DEFENSE LAWYERS ASSOCIATION subtly suggests that this Court recede from CHAMPION. Seizing upon the holding in THING v. LA CHOSA, defense amicus fails to inform this Court that in that case the California Supreme Court denied relief to a parent where the

undisputed facts established that <u>the parent was not present</u> at the scene of the accident in which her son was injured, <u>did not witness the conduct</u> complained of, and <u>was not aware</u> that her son was being injured. Under those circumstances the California Supreme Court ruled that no recovery would be allowed. Further, and in this vein, comment should be made concerning the rather outrageous comment made by the defense amicus at page 2 of its brief, to wit:

> "Even assuming arguendo that Meek's significant discernible injuries occurred within a short time of the psychic injury, the psychic injury allowed by Meek does not rise to the level of severe and debilitating mental distress that would allow her recovery. What Meek suffered as mental distress does not go beyond what a disinterested witness would suffer upon seeing Meek's father immediately after a bomb explosion had killed him. What Meek suffered would be normal under the circumstances."

The defense amicus is arguing the California Supreme Court's observations regarding <u>why a disinterested witness cannot recover for negligent infliction of emotional distress</u>! The California Supreme Court did, however, allow recovery where the emotional distress goes beyond that which would be anticipated in a disinterested witness and defined same as <u>including a significant discernible physical injury</u> following the psychic injury. Defense amicus does not mention this at all. Defense amicus does not address the need for, or scope of, the certified question but merely seeks to question the correctness, vel non, of the District Court's opinion by questioning the wisdom of CHAMPION v. GRAY.

THE ACADEMY would respectfully suggest to this Court the certified question has apparently been ignored.

A.

While THE ACADEMY wholeheartedly endorses the arguments advanced by the respondents in support of their position, still, an amicus curiae serves as a friend of the court to offer its views on a particular issue pending. PREMIER INDUSTRIES v. MEAD, 595 So. 2d 122 (Fla. App. 1st 1992). Likewise, while an amicus is not at liberty to inject new issues into a proceeding, it is not confined solely to arguing the parties' theories in support of a particular issue. See, KEATING v. STATE, 157 So. 2d 567 (Fla. App. 1st 1963):

> "To so confine amicus would be to place him in a position of parroting 'me, too' which would result in his not being able to contribute anything to the court by his participation in the cause."

Given the above, THE ACADEMY would turn to the "Question Certified," bound--as is this Court, see: RUPP v. JACKSON, 238 So. 2d 86 (Fla. 1970)--by the fact that this Court:

> "...Has conceded to the District Court's absolute discretion in regard to determining the form of a certification..." 238 So. 2d at page 89.

The certified question asks, in essence: is the interval of time between a psychic trauma and the manifestation of physical trauma bound by some arbitrary time period or is it merely another element for the trier of fact's consideration in deciding whether the cause of action recognized in CHAMPION v. GRAY, supra, has been established! THE ACADEMY would first suggest that the question certified <u>begs</u> the issue. If the

language utilized by this Court in CHAMPION is dicta, there is no such "time" requirement. If not dicta, then another series of questions may well arise.

THE ACADEMY would suggest to this Court that the language utilized was dicta but has already been clarified by this Court. In CHAMPION, "on rehearing granted" this Court stated:

> "In this case we have emphasized that a psychically traumatized person must manifest a discernible physical injury before that person has a claim resulting from injuries inflicted on another. A separate and distinct physical injury is required. We have specifically rejected purely emotional distress claims. Brown v. Cadillac Motor Car Division, 468 So. 2d 903 (Fla. 1985)."

It is clear from an examination of this Court's "holding" on rehearing granted (as well as its holding in the body of the opinion itself) that the requirement that the physical impairment must accompany or occur "within a short time" of the psychic injury was merely dicta. There exists no reason for this Court to proceed any further. Simply stated, no such "arbitrary" time provision exists because no such arbitrary time provision was found by this Court to be required.

B.

In an abundance of caution THE ACADEMY would suggest to this Court that if this Court were to "re-evaluate" the issue and inject into the already extant cause of action the requirement that:

> "...Physical impairment must accompany or occur within a short time of the psychic injury..."

the requirement of a "short time" be held to be elastic to be decided upon a case by case basis and not by utilization of some arbitrary period of time. In his concurring special opinion in CHAMPION Justice Alderman stated:

> "We today modify to a limited extent our previous holdings on the impact doctrine. In doing so, however, we are unable to establish a rigid hard and fast rule that would set the parameters for recovery for psychic trauma in every case that may arise. The outer limits of this cause of action will be established by the courts of this State in the traditional manner of the common law on a case by case basis. Space, time, distance, the nature of the injuries sustained, and the relationship of the plaintiff to the victim of the accident must all be considered. We have listed several relationships which may qualify. These, however, are not exclusive; other relationships may qualify. Each one will be closely scrutinized on a case by case basis. The closer the tie in relationship or emotional attachment, the greater the claim for consideration will be. The requirement that the physically injured person be directly involved in the event causing the original injury must also be scrutinized on a case by case basis. Proximity to the accident in time and space does not necessarily mean only direct and immediate sight or hearing at the scene of the accident. Rather, there may be recovery in instances where there is a direct perception of some of the events making up the entire accident, including the immediate aftermath of the accident..." 478 So. 2d at pages 21 and 22.

THE ACADEMY would suggest to this Court that the circumstances of the particular case dictate whether or not they meet the criteria and it is proper that same be done on a case by case basis. No other alternative is reasonably proper.

First, and foremost, there already certainly exists an "arbitrary period of time" in which all of the elements of the cause of action must concur. The parameters are governed by the requisite period of limitations as set by the Legislature.

Second, and turning for a moment to the alternative suggested by the First District in its certified question [OR IS THERE SOME ARBITRARY PERIOD AFTER WHICH THE MANIFESTATION OF PHYSICAL IMPAIRMENT WILL BE CONCLUSIVELY PRESUMED NOT TO HAVE BEEN CAUSED BY THE PSYCHIC TRAUMA?], this suggestion is simply legally impermissible. Florida does not recognize "conclusive presumptions." See: PUBLIC HEALTH TRUST OF DADE COUNTY v. VALCIN, 507 So. 2d 596 (Fla. 1987) and STRAUGHN v. K & K LAND MANAGEMENT, INC., 326 So. 2d 421 (Fla. 1976). In order for the injured plaintiff to establish the existence of a cause of action (not involving death but rather) involving significant discernible physical injury, medical testimony is necessary! As a consequence, and as extant here, "presumptions" are irrelevant. In this case, as in most cases, the plaintiffs claiming injury will be relying upon medical testimony "within a reasonable degree of medical probability" and will not be utilizing "presumptions." Therein lies the rub. The First District has certified to this Court a question of great public policy premised upon its concern with "dicta" in CHAMPION v. GRAY which this Court deemed as such by ultimately excluding such requirement from its "holding." In its concern for the "dicta" of CHAMPION the District Court presented to this Court an unworkable "alternative issue."

C.

THE ACADEMY would respectfully suggest to this Court that the certified question be answered in a limited manner and that

this Court clarify that the language "within a short time of the psychic injury" was merely dicta. Recognition of that fact will be consistent with the observations of Justice Alderman in his concurring opinion:

> "...The outer limits of this cause of action will be established by the courts of this state in the traditional manner of the common law on a case by case basis." 478 So. 2d at pages 21 and 22.

Likewise, a review of the decisions rendered by the various courts in this state since this Court's decision in CHAMPION v. GRAY does not reveal any difficulty in applying the facts and circumstances of the particular cases to the elements of the cause of action as set out in CHAMPION v. GRAY. While THE ACADEMY endorses wholeheartedly the arguments advanced by the respondents herein, THE ACADEMY must temper such endorsement with the recognition that many of the issues being discussed in the briefs presently filed are (1) not pertinent to the facts and circumstances of this case, or (2) issues that were either never addressed below or are issues that merely question the correctness, vel non, of the decision rendered by the First District. While this Court certainly has the discretion to review the subject record, there would appear to be no reason to so do once the issue of "dicta" is resolved.

VI.

CONCLUSION

Based upon the foregoing reasons and citations of authority, THE ACADEMY would respectfully urge this Honorable Court to accept jurisdiction of the subject cause, to clarify

that the language utilized was merely dicta, and to approve in all respects the decision of the First District Court of Appeal.

Respectfully submitted,

PERSE, P.A. & GINSBERG, P.A.
410 Concord Building
Miami, Florida 33130
(305) 358-0427

By: ______________________
Arnold R. Ginsberg, for
ACADEMY OF FLORIDA TRIAL LAWYERS

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Amicus Curiae Academy of Florida Trial Lawyers was mailed to the following counsel of record this 23rd day of September, 1994.

CHRISTOPHER C. HAZELIP, ESQ.
1301 Gulf Life Drive #1500
Jacksonville, Florida 32207

JACK SHAW, JR., ESQ.
Osborne, McNatt, Shaw, et al
225 Water Street #1400
Jacksonville, Florida 32202

SHARON LEE STEDMAN, ESQ.
1516 E. Hillcrest Street #108
Orlando, Florida 32803

Arnold R. Ginsberg