IN THE SUPREME COURT OF FLORIDA

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,

v. CASE NO.: 83,806

GAYLYNN SUE MEEK and **BARRY M. MEEK**,

Respondents.
_____/

ON APPEAL FROM THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENTS GAYLYNN SUE MEEK AND BARRY M. MEEK

ROGERS, TOWERS, BAILEY, JONES & GAY
Christopher C. Hazelip
Florida Bar No. 438049
Clinton A. Wright, III
Florida Bar No. 933406
1301 Gulf Life Drive
Suite 1500
Jacksonville, Florida 32207
(904) 398-3911

ATTORNEYS FOR RESPONDENTS
GAYLYNN SUE MEEK and
BARRY M. MEEK

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PRELIMINARY STATEMENT

For consistency and ease of reference, Respondents **Gaylynn Sue Meek and Barry M. Meek** hereby adopt the references to the parties established by Petitioners in the Preliminary Statement of their Initial Brief. Meek would add that references to the Appendix will be by the symbol "A: __" and First Property's brief will be cited "Initial Brief at __".

MEEK'S STATEMENT OF THE CASE

Meek adopts as essentially accurate First Property's Statement of the Case set forth in its Initial Brief with the following exceptions. First, in footnote 1 on page 2, First Property references a separate wrongful death action against it which "remains pending in the Circuit Court." Since the time First Property filed its Initial Brief, that wrongful death claim has been settled. Meek was not a party and had no claim in that case. Second, First Property's statement on page 3 of the Initial Brief that the First District Court "felt that the facts of the present case gave sufficient indicia of genuineness to preclude summary judgment notwithstanding the lengthy time interval involved" is accurate but incomplete. The First District Court specifically found that based on the record, "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." Meek v. Zell, 636 So. 2d 105, 108 (Fla. 1st DCA 1994) (A: 114). Further as a result of its de novo review, the court found:

> 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. Id. at 6-7.

Id. Finally, the court found:

> 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." Id.

MEEK'S STATEMENT OF FACTS

The facts of this case, for purposes of summary judgment, are not in dispute. The grounds for First Property's Motion for Summary Judgment are essentially that the facts as alleged by Meek in her Amended Complaint, and as established in the record, are not actionable, and First Property is entitled to a judgment as a matter of law (R: 30-32; A: 97-98).

Accordingly, Meek largely accepts the Statement of Facts set forth by First Property in its Initial Brief, with the following exceptions. First, it is insufficient to describe the condition of Meek's father, which she personally observed as she knelt by his side, as "mortally wounded" (Initial Brief at 5). Since the observation of her father is largely the source of Meek's significant emotional distress, it would be appropriate to note her allegation that her father was mutilated and scorched as a result of the explosion (R: 19 ¶ 9; A: 105), and that he was lying in a "huge pool of blood." (R: 80; A: 27).

Additionally, Meek remains on prescribed medication (Prozac) for her depression (R: 121; A: 68), and has not ceased using it

as implied in First Property's past tense use of the word "took" on Initial Brief, page 5. She also continues to take Halcion intermittently for her insomnia (R: 122; A: 70). Along those lines, Meek's fear of being alone, anxiety attacks and recurring thoughts of the bombing are not past problems as implied by the use of the word "had" on Initial Brief, pages 5 through 6, but remain ongoing (R: 139; A: 87).

Also, First Property's statement that "it was not until Christmas of 1990, some nine months after her father's death, that Meek claims to have sustained any significant physical impairment", (Initial Brief, at 6), begs a question addressed in the briefs filed before the First District Court and this Court of whether Meek's insomnia, depression, memory loss, dreams, etc., are physical impairments. See infra at 30 n. 13.

Lastly, the cite to the record at the top of page 6 of the Initial Brief, "R: 193", is a transposition error and should be R: 139.

SUMMARY OF ARGUMENT

I. THIS COURT SHOULD ACCEPT JURISDICTION OF THIS CASE SO AS TO CLARIFY AND REFINE THE LAW OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS AND FURTHER THE UNIFORM ADMINISTRATION OF JUSTICE

The evolution of the law of negligent infliction of emotional distress reveals the current policies of assuring that only genuine emotional distress claims which are causally connected to a negligent act are actionable in Florida, and placing some boundaries on "indefinable" and "unmeasurable" psychic claims. The impact rule and its modifications are

"tools" to these ends. These tools, however, are subservient to the policies which they safeguard. This Court is committed to analyzing emotional distress claims on a case-by-case basis, to assure that the policies underlying impact rule analysis are addressed under the facts of a specific case. There is confusion among the appellate courts, however, as to what constitutes a legally sufficient impact, and whether, in an actionable claim, only parasitic emotional distress damages can be recovered. This Court should accept jurisdiction of Meek's case because it presents the opportunity to clarify and refine the law in this area.

II. THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION BY HOLDING THAT THERE IS NO ARBITRARY TIME PERIOD UNDER CHAMPION V. GRAY AFTER WHICH MANIFESTATIONS OF PHYSICAL IMPAIRMENT WILL CONCLUSIVELY BE PRESUMED TO HAVE NOT BEEN CAUSED BY THE PSYCHIC TRAUMA, AND THAT ANY TIME PERIOD IS MERELY ONE ISSUE FOR THE TRIER-OF-FACT'S CONSIDERATION

Temporal proximity between psychic trauma and the resulting physical injury is not an independent element of the cause of action established in Champion vs. Gray, 478 So. 2d 17 (Fla. 1985). The three elements established in Champion are: 1) a significant, discernible physical injury (resulting from the emotional distress); 2) the psychically injured party should be directly involved in the event causing the original injury (to the other person); and 3) the secondarily injured party must have an especially close emotional attachment to the directly injured person. Id. at 20. Temporal proximity, while not an independent element of the cause of action, is a factor to be considered by the trier-of-fact in determining whether the first element

(physical injury resulting from the psychic trauma), has been met. As the First District Court correctly found, Meek's claim is obviously genuine and supported by undisputed, competent medical testimony, and fulfills the elements of Champion and the underlying policies the elements were formulated to safeguard. If her claim is nevertheless evaluated in the context of an arbitrary time interval, then that interval should be established by this Court as two years.

III. MEEK SATISFIES THE REQUIREMENT OF CHAMPION THAT SHE SUFFER CAUSALLY CONNECTED, CLEARLY DISCERNIBLE PHYSICAL INJURIES

This Court has also not created a minimum severity of injury requirement for an actionable emotional distress claim. Both Champion and Brown require only a "significant, discernible physical injury" resulting from the emotional distress or psychic trauma. Meek's conditions, which are supported by her deposition testimony and the affidavit testimony of her treating physician, are objectively discernible, and significant. The First District Court properly found in its de novo review of the record that Meek's physical condition, which progressively deteriorated from the time shortly after the bombing, satisfies the Champion requirement of significant, discernible physical injuries resulting from her emotional distress.

IV. WHETHER OR NOT MEEK SATISFIES THE REQUIREMENTS OF CHAMPION, SHE EXPERIENCED A LEGALLY SUFFICIENT PHYSICAL IMPACT TO RECOVER FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Meek was present during the bombing, and was struck by shattered glass and billowing black smoke at the scene. These constitute legally sufficient impacts under Florida law so as to

render her claim for emotional distress actionable, irrespective of the requirements of Champion. Accordingly, although Meek has suffered resulting significant and discernible physical injuries from her emotional distress, such injuries are not necessary to make her claim actionable. Under Florida law, the requirement of a physical impact, and alternatively the requirement of a resulting physical injury, are tools to help assure that claims for emotional distress are genuine and causally connected to the negligent act. Since Meek has experienced a legally sufficient physical impact, she is entitled to recover damages for all of her resulting emotional distress from the incident in which she suffered the psychic trauma. She is not limited, as First Property contends, to recovering only parasitic emotional distress.

V. MEEK PROPOSES A TEST FOR EVALUATING ALL NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIMS

This Court should adopt a test expressly applicable to negligent infliction of emotional distress claims whether they involve a by-stander, or involve fear for one's own safety. With one modification to the Champion elements, a workable test would require: 1) a significant, objectively discernible physical injury resulting from the emotional distress; 2) involvement by the claimant in the event caused by the negligence of another; and 3) **EITHER** a close emotional relationship to the injured person (by-stander circumstance) **OR** presence within a zone of danger (fear for one's own safety circumstance).

This test would be a "boundary" that would adequately safeguard the policies, as determined on a case-by-case basis, of permitting only genuine and causally connected claims for emotional distress, while avoiding arbitrary exclusion of genuine and provable claims. Accordingly, it would better serve the policies underlying Florida's tort system.

ARGUMENT

I. THIS COURT SHOULD ACCEPT JURISDICTION OF THIS CASE SO AS TO CLARIFY AND REFINE THE LAW OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS AND FURTHER THE UNIFORM ADMINISTRATION OF JUSTICE.

As noted by First Property, the First District Court certified that its decision passes upon a question of great public importance, which triggers this Court's discretionary review jurisdiction pursuant to Art. V, § (3)(b)(4), Florida Constitution, and Fla. R. App. P. 9.030(a)(2)(A)(v). While the decision of the First District Court fits within the framework of the law previously handed down by this Court in Champion v. Gray, 478 So. 2d 17 (Fla. 1985), so that review by this Court is not essential to an orderly application of the law, the instant case nevertheless presents a unique opportunity for this Court to clarify and refine the law of negligent infliction of emotional distress in Florida, both within and without the context of the "modified impact rule" announced in Champion.

This Court has stated that "the central policy of all tort law is to place a person in a position nearly equivalent to what would have existed had the defendants' conduct not breached a

duty owed to plaintiffs, thereby causing injury." Kush v. Lloyd, 616 So. 2d 415, 424 (Fla. 1992). It is proper that this Court consider from time to time whether rules of law which it has adopted and developed, such as the impact rule, are furthering that policy. As corollaries to that general question are the specific questions of whether the rule needs to be "fine-tuned", restructured, or replaced altogether. If the administration of justice be the goal of our court system, it seems that this Court serves its highest purpose when it "takes inventory" of the law in the context of an ever-changing society[1] to see if that goal is being efficiently pursued. Though Meek disagrees with many of First Property's contentions, she shares with First Property the desire to gain clarity and dispel confusion both as to the merits of her claim, and those of other potential plaintiffs within the state. To illustrate the need for clarity, it is essential to take an overview of the development of the law of negligent infliction of emotional distress in Florida. Some evolving principles are clear, others are not.

The seminal case in Florida for the proposition that emotional distress which is not accompanied by physical impact is non-compensable (the "impact rule") is International Ocean Telegraph Co. v. Saunders, 32 Fla. 434, 14 So. 148 (1893) in which the Court refused to allow recovery for emotional distress

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[1] As observed recently, "This Court has repeatedly recognized that our common law 'must keep pace with changes in our society'." United States of America v. Dempsey, 19 FLW S198, S199 (Fla. April 21, 1994).

in a breach of contract case. This Court subsequently applied this principle in a number of simple negligence cases. *See, e.g.,* Clark v. Choctawhatchee Electric Co-operative, Inc., 107 So. 2d 609 (Fla. 1958); Crane v. Loftin, 70 So. 2d 574 (Fla. 1954). The Court clarified and succinctly summarized the impact rule in Clark v. Choctawhatchee Electric Co-operative, Inc., supra, when it stated:

> [W]hen there is no direct physical impact or trauma, recovery may not be had for damages resulting from fright and anguish....

107 So. 2d at 611.

The first major reaffirmation of the impact rule by this Court in the face of a serious challenge to its continued legitimacy occurred in Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974). In that case, which involved automobiles colliding and striking the plaintiff's house, the lower appellate court rejected the requirement of impact since the plaintiff, Mrs. Stewart, suffered a heart attack as a result of the emotional distress caused by the defendant's negligence. Stewart v. Gilliam, 271 So. 2d 466 (Fla. 4th DCA 1972). In so holding, the Gilliam lower court relied upon the weight of authority among commentators and courts in other jurisdictions assailing the three arguments or policies underpinning the impact rule:

> It is our view that the impact requirement is "at variance with modern-day needs and with concepts of justice and fair dealing" and should be rejected. As the more recent cases point out, supra, there have been at least three basic arguments which have served as the underlying reasons for adhering to the impact

> doctrine: the difficulty in proving causation between the claimed damages and the alleged fright or shock; the fear of fraudulent or exaggerated claims; and the possible flood of litigation.

Id. at 472. (emphasis supplied) The Fourth District Court of Appeal concluded that modern medicine and the collective efforts of the legal and medical professions would overcome any difficulty in proving causation and weeding out fraudulent or exaggerated claims. Id. at 472 and 475. It then observed that those states which have followed the "majority rule" allowing recovery for psychic injuries without impact have not experienced the feared flood of litigation. Id. at 475.[2]

A divided Florida Supreme Court reversed the district court's holding and expressly reaffirmed the requirement of physical impact in order to recover for the negligent infliction of emotional distress, even where that distress later manifests itself in a physical injury. Gilliam, 291 So. 2d at 595. In so holding, this Court reasoned that only it could overrule its own decisions concerning the impact rule. Id. at 594-95. This Court further reasoned that "especially under the facts in this case there is [not] any valid reason to recede from the long standing decisions of this Court in this area." Id. at 595. However,

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[2] The concern regarding a "flood of litigation" has apparently been resolved as this Court has not disputed the observation of Judge Mager, reiterated by Justice Adkins in his Gilliam dissent, 291 So. 2d at 602, that there has been no flood of litigation in jurisdictions where the impact rule has been abrogated. Other jurisdictions have accepted the reality that this is not a valid concern. See, e.g., James v. Lieb, 375 N.W. 2d 109, 117 (Neb. 1985); Schultz v. Barberton Glass Co., 447 W.E. 2d 109, 111 (Ohio 1983).

this Court was careful to emphasize that, should it at some point determine that the impact rule is "inequitable, impractical or no longer necessary," it would be free to abolish the rule. Id. Justice Adkins filed a lengthy dissent, agreeing with the district court that the three policies underlying the impact rule "no longer exist." Id. at 602.

This Court over the years has sanctioned a number of exceptions or modifications of the impact rule which, under the current status of the pleadings, are not applicable to Meek's claim. An exception or modification to the impact rule which is applicable to Meek's claim was established in Champion v. Gray, 478 So. 2d 17 (Fla. 1985), in which the Court considered a suit by the personal representative of the estate of a woman who suffered a heart attack and died on the spot immediately after coming upon the scene of an accident where her daughter was struck and killed by a drunk driver. Id. at 18. The trial court dismissed the complaint since there was no physical impact to the mother, and the Fifth District Court of Appeal affirmed. Id.

In quashing the district court's holding, this Court noted that:

> "the price of death or significant discernible physical injury, when caused by psychological trauma resulting from a negligent injury imposed upon a close family member within the sensory perception of the physically injured person, is too great a harm to require direct physical contact before a cause of action exists.

Id. at 18-19. Accordingly, this Court held that even in the absence of physical impact:

> 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.

Id. at 20. Recognizing a need to curb the potential of fraudulent claims[3] and to place some boundaries on the "indefinable and unmeasurable psychic claims", the Court was unwilling to expand the impact rule analysis to "purely subjective and speculative damages for psychic trauma alone." Id. at 20. The Court also fashioned three requirements for recovery under its "modified impact rule": (1) a significant discernible physical injury [resulting from the emotional distress]; (2) the psychically injured party should be directly involved in the event causing the original injury [to the other person]; and (3) the secondarily injured party must have an especially close emotional attachment to the directly injured person. Id.[4]

Though not expressly stated by the majority in Champion, its decision revealed a commitment by this Court to a case-by-case approach and analysis to determine viable emotional distress

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[3] The term "fraudulent claims" appears now to include two of the three concerns underlying the "traditional" impact rule, i.e. claims which are not genuine and claims for damages not causally connected to the negligent act.

[4] In a companion case to Champion decided on the same day, Brown v. Cadillac Motor Car Division, 468 So. 2d 903 (Fla. 1985), the Court emphasized that although it created a "modification" of the impact rule in Champion, it did not abolish the requirement that "a discernible and demonstrable physical injury flow from the accident." Id. at 904. The claim of Mr. Brown, who ran over his own mother due to a faulty transmission on his vehicle (with no resulting impact to him), was disallowed because he failed to show a direct physical injury or resulting physical injury. Id.

claims. As expressed by Justice Alderman (joined by Justice Shaw) in his concurring opinion:

> 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 injury 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.

Id. at 21-22.

Calling Florida's approach to emotional distress claims a hybrid of both the common law impact rule and the "zone of danger" rule used in other jurisdictions, Kush v. Lloyd, 616 So. 2d 415, 422 n.4 (Fla. 1992), the majority of this Court recently quoted much of the above language of the Champion concurrence. Id. at 423 n.5. Even though the Court ruled in Kush that the impact rule did not apply to the tort of wrongful birth, Id. at 423, it clearly did embrace the principle of avoiding a "rigid hard and fast rule" applicable to every case, and determining the

outer limits of the permissible claims for emotional distress on a case-by-case basis. Id. at 423 n.5.

The impact rule has been described by this Court as "[a] convenient means of determining foreseeability [of an emotional distress claim]." Doyle v. Pillsbury Co., 476 So. 2d 1271, 1272 n.* (Fla. 1985) (ingestion requirement in contaminated food case is grounded upon foreseeability rather than impact rule). Id. Indeed, this Court recognized in Champion that "[f]oreseeability is the guidepost of any tort claim." Champion, 478 So. 2d at 20.[5]

To distill what is currently clear in Florida Supreme Court impact rule analysis:

(1) The impact rule in Florida is intended to:

(a) provide assurances that the claimed emotional distress is genuine; and

(b) provide assurances that the claimed emotional distress has a causal connection to the defendant's negligence; and

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[5] Contrary to the suggestion by First Property, the impact rule is not analogous to the economic loss rule, as it addresses the completely different policies underlying tort law. See Casa Clara Condominium Association v. Charley Toppino & Sons, Inc., 620 So. 2d 1244, 1246 (Fla. 1993).

(c) place boundaries on indefinable and unmeasurable psychic claims.[6]

(2) The rules developed by this Court concerning claims for emotional distress are to be applied in a case-by-case consideration of specific facts to determine the viability of a specific claim.

At its essence, then, the impact rule is a "tool" to corroborate a plaintiff's emotional distress claim as genuine by assuring that the emotional distress is a foreseeable, logical consequence of the defendant's negligence. The policy of evidencing the legitimacy of emotional distress claims is clearly more important than the tool itself. This can be seen both in this Court's refusal to strictly apply the requirement of impact in Champion in a manner which would cause it to act as an arbitrary tool of injustice where sufficient indicia of the genuineness of an emotional distress claim were present, see Champion, 478 So. 2d at 18-20, and in this Court's embrace in Kush of the principle of proceeding in the emotional distress arena on a case-by-case basis.

Much confusion remains, however, as to fundamental issues in claims for negligent infliction of emotional distress. The

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[6] First Property recognizes these policies underlying the impact rule in Florida. In its words, "[T]he requirement of a physical impact is intended to provide an assurance that the plaintiff's emotional distress is both genuine and related to the defendant's negligent act" (Initial Brief at 38), and the "elements of the Champion cause of action serve to place some boundaries on the indefinable and unmeasurable psychic claims"... (Initial Brief at 29).

confusion is not theoretical, and has manifested itself in conflicting district court opinions recognized by First Property.[7] Such issues include whether "impact", "injury" and "trauma" are synonymous and interchangeable terms; and whether compensable emotional distress is only that which is "parasitic", that is resulting from a physical injury, or whether negligently inflicted emotional distress is itself compensable, if its genuineness is verified by resulting in a physical injury.[8]

Meek urges this Court to address these issues because the lack of uniformity in the application of the law will work injustice and deny some citizens access to the Courts. Meek's case presents the vehicle to do that because whether her claim is actionable under the Champion elements or whether it is actionable because she suffered an impact herself, it is undeniable that the most significant emotional distress for which she seeks recovery was not as a result of her being present in the bombing (although it is inseparable), but rather as a result

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[7] See infra, beginning at 35 (Argument IV), for citations and analysis regarding the conflicting cases.

[8] This is a broader question, but inclusive of that recognized by First Property as an area of confusion in the law, specifically "whether an injury-producing impact to plaintiff will permit recovery for negligent infliction of emotional distress arising out of injury to another where the requirements of Champion v. Gray have not been met." (Initial Brief at 11). The broader issue exists both within and without the context of Champion v. Gray. See infra at 44.

of seeing her beloved father mutilated, scorched and mortally wounded.[9]

II. THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION BY HOLDING THAT THERE IS NO ARBITRARY TIME PERIOD UNDER CHAMPION V. GRAY AFTER WHICH MANIFESTATIONS OF PHYSICAL IMPAIRMENT WILL CONCLUSIVELY BE PRESUMED TO HAVE NOT BEEN CAUSED BY THE PSYCHIC TRAUMA, AND THAT ANY TIME PERIOD IS MERELY ONE ISSUE FOR THE TRIER-OF-FACT'S CONSIDERATION.

The First District Court below specifically noted this Court's emphasis in Champion that "physical impairment must accompany or occur within a short time of the psychic injury." Meek, 636 So. 2d at 108 (A: 114). The appellate court went on to correctly observe that this portion of the Champion opinion was dictum because there was no issue of temporal proximity in that case since the physical impairment (death) occurred almost simultaneously with the infliction of the emotional distress. Id. at 108 (A: 114). The only holding in Champion was as follows:

> 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.

Champion, 478 So. 2d at 20. Thus, any discussion of a temporal proximity requirement in Champion was not binding on the First District Court because it was not part of the ultimate holding

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[9] First Property correctly notes that in this sense, Meek's claim is that of a "by-stander." However, her presence at the scene and direct involvement in the incident understandably caused her terrible fright. In Meek's words, immediately after the "huge" and "deafening" explosion, she "screamed extremely loud" and was "absolutely frozen." (R: 78; A: 25).

and was unnecessary to the disposition of the case. See Anderson v. Miami, 101 So. 2d 612, 615 (Fla. 3d DCA 1958); Pell v. State, 97 Fla. 650, 122 So. 110, 112 (1929).

The obvious reason to consider temporal proximity between the psychic trauma and physical injury is to help curb fraudulent claims. As recognized by First Property, it helps provide an assurance of a causal connection between the claimed emotional distress and the resulting physical impairment, thereby demonstrating that the emotional distress is genuine. In the instant case, however, there is "little or no chance of malingering or other fraudulent conduct" on the part of Meek. Meek, 636 So. 2d at 108 (A: 114). It hardly strains the imagination to foresee that a person who was present at the time of a powerful bomb explosion which left, to her observation, her father mutilated, scorched and dying in a pool of his own blood, would suffer significant emotional distress. Moreover, as emphasized by the First District Court, Meek's treating physician testified by affidavit without opposition that there is a causal relationship between Meek's physical injuries and her emotional distress. Id. at 107-108 (A: 113-114). (R:59; A: 96). The court below also found that the manifestations of Meek's psychic injury began immediately with insomnia, depression, short-term memory loss, extreme fear of loud noises, bad dreams, and similar occurrences, resulting in professional treatment within three weeks of the bombing and continuing in a progressive pattern of exacerbation, eventually rising to the level of physical

impairment within nine months. Id. at 108 (A: 114). On this record, it is unreasonable to argue with the district court's conclusion that "there is a clear and definitive basis for a jury or a fact-finder to conclude that there is a causal connection between the psychic injury and the physical injury." Id. Thus, the passage of a period of nine months should not defeat, as a matter of law, Meek's claim.[10]

Temporal proximity is but one factor which should be considered by the trier of fact in determining whether a causal link exists between the psychic injury and the resulting physical injury. This is consistent with Justice Alderman's inclusion of "time" as one of the factors to be considered in analyzing the merits of an emotional distress claim, and consistent with the principle which he recognized as inherent in the Champion Court's decision that such claims must be approached on a case-by-case basis. Champion, 478 So. 2d at 21-22 (Alderman, J., concurring). In other words, temporal proximity is not, and should not be, imposed as an independent element of the Champion cause of

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[10] In the workers compensation context, Florida courts have recognized that temporal proximity is not the controlling factor in determining a causal link between physical injury and emotional distress. Wal-Mart Stores v. Tomlinson, 588 So. 2d 276, 277 (Fla. 1st DCA 1991) (fact that mental condition did not manifest itself until almost a year after the physical injury not dispositive); Greater Miami Academy v. Blum, 466 So. 2d 1263, 1264 (Fla. 1st DCA 1985) (court refused to hold that a nine month interval between the date of the accident and manifestation of the mental disorder precludes compensability as a matter of law). Rather, it has been recognized that the question of whether a mental injury is the "direct and immediate result" of (or was caused by) the industrial accident generally is a question of fact as to which the more probative evidence is medical testimony as to the presence or absence of a causal link. Wal-Mart Stores, 588 So. 2d at 277-78.

action, but is, and should be, considered by the trier of fact as one factor in determining whether the element of a resulting physical injury has been shown. To impose temporal proximity as a strict condition of recovery, even where a causal connection can otherwise be proven, unnecessarily defeats patently meritorious claims for emotional distress.

First Property characterizes Meek's position to be that a factual question precluding summary judgment is always present regardless of how long a time period exists between the initial infliction of the psychic trauma and the onset of the resulting physical injury. (Initial Brief at 18-19). This is not so. The statute of limitations would bar any claim more than four years after the negligent act by which the psychic trauma was inflicted. Moreover, it is not difficult to imagine a factual scenario appropriate for summary judgment where years have passed before a plaintiff claims a resulting physical injury from emotional distress and uncontested medical testimony establishes that there is no causal connection between the physical injury and the alleged psychic trauma. However, that is not Meek's situation. Under a case-by-case approach, summary judgment would not be impossible; it would be difficult, but that is a policy long-recognized by this Court in negligence cases in general. See Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985).

Contrary to First Property's characterization, the First District Court did not resort to, and Meek does not advocate, that Champion be converted into a "four factor balancing test"

where the failure to satisfy one or more elements can be ignored so long as compensated for by the strength of others. Meek merely contends that temporal proximity is not an element of the Champion cause of action in the first instance, but rather is a factor to be considered in determining whether the element of a resulting, discernible physical injury is met. The weighing of factors within the context of each of the three required elements of Champion is appropriate, necessary, and consistent with the overall policies underlying this specific area of tort law in Florida, and the tort system in general.

First Property avoids the hard question addressed head-on in the First District Court's certified question concerning where to draw the line if temporal proximity is indeed an independent element of the Champion cause of action. After rewording the question, First Property admits that there will be situations where the lapse of time will present jury questions, but further contends that it "becomes a question of law at some point" (Initial Brief at 22). Meek's circumstances, First Property contends, have reached that point (wherever it is).

First Property's position essentially is that courts must view the length of time which has passed between infliction of emotional distress and a resulting physical injury in a vacuum, without reference to the other facts of the case, in determining whether it is a sufficiently "short time." Ignoring that the progressive exacerbation of Meek's symptoms began immediately after the bombing, First Property merely protests that nine

months is too long a time interval between psychic injury and physical injury. The position urged by First Property will inherently result in nine months becoming the rule of thumb for application to future claims. While not addressing the hard question posed by the First District Court, First Property requests this Court to establish by default a nine month "bright line" under which claims would be cut off if the psychic trauma had not yet manifested itself in physical injury even where (as here) there is competent and undisputed medical evidence of a causal connection between the psychic trauma and the resulting physical injury. Such an approach sacrifices the very purpose of a temporal proximity consideration for its form.

First Property justifies its position by pointing to a federal case which held that a four month lapse was too long as a matter of law. See Ledford v. Delta Airlines, Inc., 658 F. Supp. 540, 542 (S.D. Fla. 1987). Although the Ledford court provides no explicit analysis of why four months is too long a time as a matter of law to contribute to the proof of causation, the facts of the case provide some insight. In the year prior to the traumatic event (a crash of a plane on which the plaintiff's wife, but not the plaintiff, was a passenger), the plaintiff was treated by a psychiatrist for severe anxiety and panic attacks. Moreover, the physical injuries at issue in Ledford were suffered on the job, allegedly as a result of being inattentive due to plaintiff's emotional distress. Ledford, 658 F. Supp. at 541. Although not explicitly, the Ledford court must certainly have

taken this strong evidence of a lack of a causal connection between the claimed psychic trauma and physical injury into consideration in holding that four months was too long. It must also be noted that Ledford involved a summary judgment analysis under the federal rules where the weighing of evidence by the court is permitted. That approach has been specifically rejected as not applicable under Florida summary judgment analysis. See Bradford v. Bernstein, 510 So. 2d 1204, 1206 (Fla. 2d DCA 1987).

The elements set forth in Champion provide help in determining whether the psychic injury in question was foreseeable. Champion, 478 So. 2d at 22 ("we have held that the duty extends to persons in situations like Mrs. Champion's because it is reasonably foreseeable that such a person may suffer injury"). Logically, where a plaintiff such as Meek satisfies both the letter and spirit of the elements of the Champion cause of action, it makes no sense to bar her patently foreseeable and genuine emotional distress claim. Indeed, to impose an arbitrary temporal proximity element to cut-off Meek's cause of action would convert Champion into a blind instrument of injustice no less severe than the impact rule, the injustice of which Champion was designed to alleviate.

Applying temporal proximity as one issue, and not as an independent element, is consistent with the most fundamental purpose of Florida tort law - to place an injured person in a position as nearly equivalent as possible to what would have existed had the defendant's conduct not breached a duty thereby

causing an injury. Kush, 616 So. 2d at 424. It is also consistent with another policy underlying our civil tort system - deterrence. Of course, tortfeasors and their insurers dislike any sort of case-by-case analysis to be performed by the fact finder because they are less capable of budgeting such damage awards as a cost of doing business. Indeed, the only real benefit of an arbitrary "bright line" rule, in a case where evidence of a causal connection is otherwise substantial, is to provide increased certainty to underwriters. Meek submits that this is the overriding reason behind the interest of First Property and its amicus in both a temporal proximity requirement and severity of injury requirement (discussed infra at 27). However, to bend to such considerations and thereby countenance the wholesale dismissal of meritorious claims not only results in unnecessary instances of injustice, but also ignores the reality that this cost of unpredictability provides deterrence, a proper function of the civil jury system.

It is simply inconsistent with a policy of fact specific analysis to establish a "hard and fast rule" that the resulting physical injury requirement will be deemed to have not been satisfied as a matter of law where, as here, there is strong evidence of a causal link between psychic and physical injuries. This Court should therefore answer the certified question by holding that temporal proximity is not itself a required element of the Champion cause of action, but rather is simply one factor for the trier of fact to consider in determining whether the

resulting (causally connected) "discernible physical injury" element of Champion has been satisfied.

If this Court is determined to establish an arbitrary interval of time between a psychic trauma and the manifestation of a physical impairment (in addition to the ever-present cut-off of the statute of limitations), which Meek opposes, then it should make this period of time at least two years. That would allow a minimally reasonable period of time to identify resulting physical impairments from a plaintiff's emotional distress. It would also be less than the negligence statute of limitations so as to guard against any concerns this Court might have of a person feigning minor injuries, such as the "headache" illustration presented by First Property, as an "after thought" in order to avoid any impending expiration of the statute of limitations. Again, Meek contends that such fraudulent claims can be more effectively and fairly addressed through other means, such as competent medical evidence. However, if an arbitrary line must be drawn, Meek does not want to limit its protest to an observation that the line is, in fact, arbitrary.[11]

III. MEEK SATISFIES THE REQUIREMENT OF CHAMPION THAT SHE SUFFER CAUSALLY CONNECTED, CLEARLY DISCERNIBLE PHYSICAL INJURIES

First Property and its amicus contend that this Court's decisions in Champion v. Gray, supra, and Brown v. Cadillac Motor Corp., 468 So. 2d 903 (Fla. 1985) require a plaintiff to show

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[11] Equally meaningless, of course, would be an attack by First Property that Meek's suggested time limit is arbitrary.

that her physical impairment resulting from the psychic trauma must rise to a minimum level of severity. Meek responds that neither Champion nor Brown establish a minimum severity of injury requirement.

The Champion opinion does not suggest that the injury resulting from the emotional distress must be as severe as that experienced by Ms. Champion (death). This Court's holding in Champion requires only that the discernible physical injuries resulting from the psychic trauma be "significant." See Champion, 478 So. 2d at 20. In support of its contention that the word "significant" as used by the Champion Court creates a minimum severity threshold, First Property resorts to Websters II New Riverside Dictionary (1984), which defines "significant" to mean "important" or "meaningful" (Initial Brief at 23). However, First Property fails to note that the same dictionary defines "severe" to mean "unsparing or harsh" and "extremely intense." The words "significant" and "severe" therefore carry different meanings. A particular physical injury can be "significant" in that it is an important or meaningful manifestation of the plaintiff's emotional distress, while at the same time not be an unsparing or harsh injury, or one that is extremely intense. And, whether a discernible physical injury is important or meaningful is best determined by the trier-of-fact on a case-by-case basis, as contemplated in Champion, and as later reemphasized in Kush v. Lloyd.

Likewise, Brown v. Cadillac Motor Car Division, 468 So. 2d 903 (Fla. 1985), does not establish a minimum severity of injury threshold for negligent infliction of emotional distress claims. In Brown, this Court did not use the word "significant," let alone the word "severe," anywhere in its opinion. The precise language of Brown referred to by First Property is:

> We hold that such psychological trauma must cause a demonstrable physical injury such as death, paralysis, muscular impairment, or similar objectively discernible physical impairment before a cause of action may exist.

Id. at 904. On its face, this language recognizes that the three impairments identified are not an exhaustive listing. Additionally, Meek contends that this language in Brown is intended to provide three examples of "demonstrable" and "objectively discernible"[12] injuries. That these three examples are not intended to illustrate a required level of severity is confirmed in that there is no common severity among the three examples. While death and paralysis obviously are severe, there is nothing inherent in "muscular impairment" to assume that it is as severe a condition.

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[12] At page 24 of its Initial Brief, First Property contends that under the rule of ejusdem generis, "physical impairments required to come within the Champion exception must be akin to death, paralysis, or muscular impairment; that is, they must rise to a certain minimum level of severity." Meek disagrees for the reason that there is no common severity between the listed injuries, and further because in its only specific reference to Champion, the Brown Court stated "We did not and do not, however, abolish the requirement that a discernible and demonstrable physical injury must flow from the accident ..." Brown, 468 So. 2d at 904. No mention is made of severity.

Moreover, any discussion of a minimum severity requirement in Brown would again be mere dictum since the facts of that case reveal that the plaintiff suffered no resulting physical injury at all. Id. Because only the existence, rather than the severity, of physical injuries was at issue, it is not proper to interpret the referenced language as establishing a minimum threshold of severity of injury.

In the instant case, Meek suffered as a result of her emotional distress "objectively discernible" and significant physical injuries or impairments. As revealed in Meek's deposition testimony and the affidavit of her treating physician, Dr. Galen F. Weaver, Meek developed the following significant impairments or injuries as a consequence of the explosion and her father's death: Stomach and chest pains and symptoms of a peptic ulcer (R: 95, 99, 104, 107; A: 42, 46, 51, 55); Uncontrollable muscular contractions in her esophagus causing her difficulty in swallowing and breathing (R: 106-106a, 144; A: 53-54, 92); Pain in her hip and elbow joints (R: 107-108; A: 55-56); Insomnia (R: 97-98; A: 44-45); Fatigue (R: 105; A: 52); Chronic memory loss (R: 102, 139; A: 49, 87); Anxiety with depressed moods (R: 59; A: 96); Situational depression (R: 59; A: 96).

Most, if not all of these medical conditions are "physical,"[13] and each clearly amounts to an impairment which is entirely "demonstrable" and "objectively discernible," as evidenced by the fact that Meek's physicians both diagnosed and treated her for these conditions. In fact, Meek still takes the prescribed ulcer medication, Pepcid (which helps her stomach pains), the anti-depressant Prozac, and intermittently takes the drug Halcion to help address her insomnia.

The injuries or impairments suffered by Meek are no less objectively discernible than the examples of death, paralysis or muscular impairment provided by this Court in Brown. Indeed, the uncontrollable esophagus contractions suffered by Meek can properly be characterized as muscular impairment. That these injuries or impairments are "significant" and were causally connected to Meek's emotional distress is demonstrated both by Meek's deposition testimony and the affidavit of Meek's treating

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[13] First Property and its amicus assert that certain of Meek's conditions do not qualify as physical impairments. However, the Restatement of Torts (second) at comment to § 436A cited by amicus recognizes that even long, continued mental disturbances may be classified by the courts as an illness notwithstanding their mental character, since this becomes a medical or psychiatric problem, rather than one of law. It has also been held that the word "physical" is not used in its ordinary sense for the purpose of applying a resulting physical consequences requirement. Petition of the United States of America as Owner of the United States Coast Guard Vessel CG-95321, 418 F. 2d 264 (1st Cir. 1969). "Rather, the word is used to indicate that the condition or illness for which recovery is sought must be one susceptible of objective determination. Hence, a definite nervous disorder is a 'physical injury' sufficient to support an action for damages for negligence." Id. (emphasis supplied) To the extent that the federal cases cited by First Property hold otherwise, they fail to recognize this principle.

physician, Dr. Weaver. The fact that they are not as severe as those suffered by the plaintiff's decedent in Champion, or two of the three examples of sufficiently discernible injuries presented in Brown (death and paralysis) does not render them insufficient as a matter of law.

The First District Court acknowledged Meek's satisfaction of the resulting physical injury requirement when it held 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, 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.

Meek, 636 So. 2d at 107-108 (A: 113-114).

Attempting to avoid such an obvious and reasonable conclusion, First Property resorts to the trivialization of Meek's symptoms, describing them as "minor, treatable and transient." (Initial Brief at 26). The description of Meek's impairments as "minor" amounts to no more than a conclusory characterization which conflicts with Meek's deposition testimony, the fact that many require the treatment of a physician, and the findings of the First District Court upon de novo review. As for Meek's symptoms being "treatable," it is unclear how this fact in any way reduces the significance of the injuries in question. If anything, the fact that Meek's injuries required treatment and medication, including prescription medication, confirms their significance, demonstrability, objective discernibility, and physical nature. The fact that

some of Meek's conditions responded favorably to medication serves to further confirm their demonstrability, objective discernibility and physical nature. Finally, as for the "transient" nature of some of Meek's injuries, Appellants apparently make reference to the fact that Meek's esophageal condition lasted about six weeks. Neither Champion nor Brown, however, impose a duration requirement upon otherwise sufficient physical impairments. The fact that this condition lasted about six weeks certainly does not reduce its significance while Meek experienced it.

First Property cites policy reasons in support of its request for the imposition of an arbitrary minimum severity requirement. Specifically, First Property argues that the magnitude of a physical injury serves as a check on fraudulent claims since "[b]oth death and paralysis are difficult to 'fake'; headaches are not." (Initial Brief at 24). First Property correctly notes that the purpose of the resulting physical injury requirement is to reduce fraudulent claims. Champion, 478 So. 2d at 20. However, it would have this Court establish an arbitrary "hard and fast rule" that certain types of physical impairments are sufficiently "severe," while others are not as a matter of law. This would apparently be decided in a vacuum without any reference to the facts of the case to determine whether the particular injury was sufficient under the circumstances to assure that the claim for emotional distress was genuine. First Property's arguments on this point suffer from the same

deficiencies as First Property's argument that an arbitrary temporal cutoff point should be established. Both willingly throw the "baby" (genuine claims) out with the "bath" (the concern for fraudulent claims).

First Property implies that Meek's injuries are insufficient to assure that her claim is not fraudulent, while failing to explain why this is so in a case where the facts reveal that Meek witnessed her father mutilated, scorched and dying so that, as the First District Court observed, her "claim of a causal connection is easily measured and defined, with little or no chance of malingering or other fraudulent conduct." Meek, 636 So. 2d at 108 (A: 114). That a person would suffer severe emotional trauma under these circumstances hardly offends reasonable sensibilities. This is not the case of a "headache" and First Property knows it.

First Property references Judge Reed's dissent in Stewart v. Gilliam, 271 So. 2d 466, 477 (Fla. 4th DCA 1972) in which he gives:

> practical recognition to the thought that not every injury which one person may by his negligence inflict upon another should be compensated in money damages. There must be some level of harm which one should absorb without recompense as a price he pays for living in an organized society.

This has no application to the instant facts. Perhaps Judge Reed's example of a driver being "cut off" in traffic by a negligent pedestrian, and thereby caused momentary anxiety and stress, is that sort of injury which would readily fall within the price of living in an organized society. However, being

subjected to a bombing negligently caused by another, so that one fought her way through scattered glass and smoke to go to the side of her father who was mutilated, scorched and left dying in a pool of his own blood is under no stretch of the imagination a part of the price of living in an organized society.

First Property's amicus reveals its mindset[14] behind the contention that Meek's ailments are minor in the following statement:

> [T]he psychic injury alleged 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.

(FDLA Brief at 2) (emphasis supplied). Not only is such a statement outrageous, callous and contrary to human experience, it is also contrary to the spirit of those "legislative and judicial pronouncements [which] make clear that it is the policy of this state that familial relationships be protected and that recovery be had for losses occasioned because of wrongful injuries that adversely affect those relationships." United States of America v. Dempsey, 19 Fla. L. Weekly S198, S200 (Fla. April 21, 1994).

As in the case of temporal proximity, where the resulting physical injury requirement can be found to have been satisfied, it simply makes no sense to bar, as a matter of law, a claim where the emotional distress is foreseeable and genuine. Meek

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[14] Meek does not assume that First Property shares this mindset.

again does not suggest, as claimed by First Property, that this Court "ignore" the resulting physical injury requirement or perform a "four factor balancing test." Meek simply contends that the Court need not, and should not, arbitrarily bar her claim where there can be no dispute that the concerns which are the basis for the resulting physical injury requirement are satisfied. To ignore the facts of Meek's case and to hold otherwise would be to blindly draw a line with no consideration given to the purpose of that line.

IV. WHETHER OR NOT MEEK SATISFIES THE REQUIREMENTS OF CHAMPION, SHE EXPERIENCED A LEGALLY SUFFICIENT PHYSICAL IMPACT TO RECOVER FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

Since this Court has jurisdiction to review the entire case, Meek would reiterate its argument below that she suffered a legally sufficient impact in the bombing. At least two Florida appellate decisions recognize that the slightest physical contact brought about by the negligence of the defendant, even though not causing an immediately discernible physical injury, is sufficient to demonstrate an "impact." In Eagle-Picher Industries, Inc. v. Cox, 481 So. 2d 517 (Fla. 3d DCA 1985) *rev. denied,* 492 So. 2d 1331 (Fla. 1986), the Third District Court of Appeal, after reviewing a variety of cases, including Clark v. Choctawhatchee Electric Cooperative, supra, observed:

> The essence of impact, then, it seems, is that the outside force or substance, no matter how large or small, visible or invisible, and no matter that the effects are not immediately deleterious, touch or enter into the plaintiff's body.

481 So. 2d at 527. Accordingly, the inhalation of asbestos particles was held in Eagle-Picher to satisfy the impact requirement. Id.

Likewise, the First District Court has found sufficient impact where a plaintiff's car was struck by defendant's car, but the collision itself did not cause the plaintiff any physical injury. Hollie v. Radcliffe, 200 So. 2d 616 (Fla. 1st DCA 1967). By contrast, in situations in which no physical impact with plaintiff's person occurred, Florida courts have denied recovery. *See, e.g.,* Arcia v. Altagracia Corp., 264 So. 2d 865 (Fla. 3d DCA 1972) (ceiling tile fell without touching plaintiff); Woodman v. Dever, 367 So. 2d 1061 (Fla. 1st DCA 1979) (plaintiff witnessed assault on plaintiff's mother, but experienced no physical contact).[15]

Support for the sufficiency of minimal impact can also be seen in this Court's opinion in Clark v. Choctawhatchee Electric Co-operative, 107 So. 2d 609 (Fla. 1958). Citing previous Florida Supreme Court decisions, the Court in Clark reasoned:

> [W]hen there is no direct physical impact or trauma, recovery may not be had for damages resulting from fright and anguish in the absence of willful and wanton negligence....

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[15] The cases cited by First Property at page 36 of its Initial Brief all involve the receipt of a piece of paper (note, letter, notice), and illustrate the nature of an insufficient and de minimis "contact". Those facts are nothing like the instant case.

Id. at 611 (emphasis supplied). Although that case apparently involved a physical injury, this Court de-emphasized injury over impact in the following language:

> We think too much emphasis has been placed on the absence from the appellant's body of evidence of trauma such as burns, bruises or scars. In our opinion, an electrical shock, or trauma, or impact, may be administered and not leave an outward sign.

Id. at 612.

It is therefore arguable under Florida precedent that a slight impact, even if the impact does not cause physical injury, is sufficient to ratify the purposes of the impact rule and open the door to recovery for the negligent infliction of emotional distress. Such a rule is consistent with the law of other states. *See, e.g.*, Zelinsky v. Chimics, 175 A.2d 351, 354 (Pa. Super. Ct. 1961) ("any degree of physical impact, however slight"); Homans v. Boston Elevated Ry. Co, 62 N.E. 737 (Mass. 1902) (slight blow); Porter v. Delaware L. & W.R. Co. (73 N.J. L. 405, 63 A. 860 (N.J. Sup. 1906) (dust in eyes).

In the instant case, it is uncontested that the plaintiff suffered at least two impacts to her person as a result of the explosion. First, she was showered with shards of glass as a result of the shattering of an overhead light fixture caused by the percussion of the explosion which mortally wounded and mutilated her father within her sensory perception. Second, she inhaled and was temporarily blinded by smoke particles as she attempted to reach her dying father. Such physical impacts upon

Meek's body satisfy the standard recognized by the Eagle-Picher court. Likewise, these impacts are more severe than that sanctioned by the First District Court in Hollie.

Additionally, the character of these impacts, when considered in the context of the incident as a whole, clearly demonstrate that Meek was a direct victim of the explosion caused by First Property's negligence and that her emotional distress is genuine. The impacts experienced by Meek also demonstrate a causal connection between the explosion and Meek's emotional distress (which resulted in physical injuries). Accordingly, the policy concerns underlying the impact rule of guarding against fraudulent claims is addressed in this case.

Moreover, because Meek experienced a physical impact in the explosion, she is arguably not required to suffer a resulting physical injury.[16] As recognized by the Third District Court of Appeal in Eagle-Picher Industries, Inc. v. Cox, supra, the analysis of negligent infliction of emotional distress claims under Florida law is different in a situation in which there has been a physical impact:

> In Florida, the prerequisites for recovery for negligent infliction of emotional distress differ depending on whether the plaintiff has or has not suffered a physical impact from an external force. If the plaintiff has suffered an impact, Florida courts permit recovery for emotional distress stemming from the incident during which the impact occurred, and not merely the impact itself. *See* Gilliam v.

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[16] Meek reiterates that she has, however, suffered significant, discernible physical injuries. See supra at 31.

> Stewart, 291 So. 2d 593 (Fla. 1974). If, however, the plaintiff has not suffered an impact, the complained-of mental distress must be "manifested by physical injury", the plaintiff must be "involved" in the incident by seeing, hearing, or arriving on the scene as the traumatizing event occurs, and the plaintiff must suffer the complained-of mental distress and accompanying physical impairment "within a short time" of the incident. Champion v. Gray.

Id. at 526 (emphasis supplied). See also Kingston Square Tenants Ass'n v. Tuskegee Gardens, Ltd., 792 F. Supp. 1566, 1576 (S.D. Fla. 1992) (under Florida law, the prerequisites for recovery of mental distress damages under a simple negligence theory are different, depending on whether the plaintiff has suffered a physical impact from an external force). The facts of Champion and Brown provide ample support for the Eagle-Picher court's analysis. Both Champion and Brown involved plaintiffs who suffered no physical impact. In that context, those cases do not logically, or as a matter of precedent, extend the requirement of a discernible physical injury to situations like the instant case in which the plaintiff actually experiences a physical impact. This Court, in fact, stated in Champion that "no physical impact to [the plaintiff] need be alleged because she suffered discernible physical injuries...." Champion, 478 So. 2d at 20. The implication of this language is that the need to allege and prove discernible physical injuries arises only where there is no direct physical impact to the plaintiff. Moreover, Justice Ehrlich, who concurred in the Champion decision, later confirmed this interpretation when he wrote, "[I]n those situations where

impact is unnecessary, a clearly discernible physical impairment must accompany or occur with a short time after the negligently inflicted psychic injury." Eastern Airlines, Inc. v. King, 557 So. 2d 574, 579 (Fla. 1990) (Ehrlich, C.J., specially concurring). This makes sense because both the physical impact and resulting physical injury requirements are a means to assure that only genuine emotional distress claims are brought. After all, legal redress for genuine harm caused by another's wrongful act is the essence of our tort system.

While there are good reasons for applying different analyses of emotional distress claims depending on whether physical impact has occurred, there is no good reason for applying different tests depending on whether the psychic trauma was due to fear for one's own safety or due to fear for the safety of a loved one. First Property contends that "different tests [are] applied in cases where the emotional distress was caused by one's own injuries (in which case the impact rule applies) than in cases where the emotional distress was caused by injury or death of another (in which case the Champion test applies)" (Initial Brief at 32).

While Meek recognizes the two settings for emotional distress noted by the Champion Court, 478 So. 2d at 19, the dichotomy of analysis used by First Property does not necessarily follow from the distinction. Meek contends that this Court's analysis and result in Champion is an illustration of the case-by-case assessment of emotional distress claims and the avoidance

of a rigid, inflexible rule when the underlying policies which the impact rule was designed to serve (assuring the genuineness of a claim and a causal connection to the negligent act) are satisfied. This case-by-case consideration of facts is appropriate in every claim for negligent infliction of emotional distress, whether involving fear for one's own safety or "by-stander" circumstances. Indeed, Justice Alderman recognized in the Champion concurrence that the Court was proceeding on a case-by-case basis to determine the "outer limits" of a cause of action for psychic trauma. Champion, 478 So. 2d at 21. He did not say that the approach was limited to by-stander circumstances.

Moreover, First Property's bifurcated approach leads to confusing and inconsistent results. If it is the law, this Court should reconsider whether there are any current policy justifications for prohibiting recovery by a person involved in an accident created by another's negligence even though his emotional distress immediately caused him to have a heart attack (as in Gilliam v. Stewart), while the "by-stander" circumstance would allow recovery by a person involved in the same accident whose emotional distress at seeing injury to a loved one caused her to suffer a heart attack (as in Champion v. Gray). Meek contends there is no material difference. Even if there is some greater "nobility" in suffering a heart attack out of fear for a loved one's safety as opposed to suffering the same out of fear for one's own safety, it hardly seems like a distinction worthy

of determining who has an actionable claim. Both fact patterns provide a reasonable assurance for the genuineness of the emotional distress, and a causal link to the negligent act. Neither provides any basis to conclude that the heart attack was more foreseeable in one circumstance as compared to the other. A dichotomy of analysis based on whether one feared for himself or another as urged by First Property will produce ongoing disparity for no good reason.

Such disparity illustrates the wisdom of a case-by-case approach to negligent infliction of emotional distress claims, with evaluation of the specific facts to determine if the concerns previously addressed by the impact rule are adequately met. That is the significance of the Champion case. While the three-part test developed in Champion is important, the very action of the Court, as well as the language of the concurrence and the subsequent embracing of this language by the majority in Kush reveals that the policies underlying the test are more important than the test itself.

Because Meek has satisfied the requirements for an actionable negligent infliction of emotional distress claim, (whether through the physical impact she suffered or through fulfillment of the Champion elements), she is entitled to a full and complete recovery for her emotional distress. As noted by the Third District Court in Eagle-Picher, supra, the recoverable emotional distress is that stemming from the entire incident, not merely from the impact itself. 481 So. 2d at 526. Upon a

showing of impact, "the door opens to the full joy of a complete recovery [for mental distress]." Goodrich, Emotional Disturbance as Legal Damage, 20 Mich. L. Rev. 497, 504 (1922). See also Eyrich v. Dam, 473 A. 2d 539, 546 (N.J. 1984) (once a plaintiff has been negligently placed within the area of physical risk and has actually sustained a physical impact, his cause of action for emotional distress is not limited to the psychological sequelae of fear for himself, but rather comprehends all of the psychological sequelae which as a matter of reasonable foreseeability results from the episode as a whole).

Florida has long recognized that emotional distress results from physical injuries. Accordingly, juries are daily instructed throughout Florida that a plaintiff who has proved her personal injury claim is entitled to recover not only economic damages, but non-economic damages such as mental anguish, loss of enjoyment of life, etc. Fla. Std. Jury Inst. 6.2a. While acknowledging a split of appellate authority, First Property contends that under impact rule analysis in Florida, it is only such "parasitic" emotional distress which is compensable. (Initial Brief at 31).

The confusion as to whether only parasitic emotional distress damages are recoverable transcends any distinction between by-stander or "fear for one's own safety" circumstances. However, the significance of the different types of emotional distress is more readily illustrated in the by-stander situation. In fact, while First Property apparently attempts to confine its

argument in the last section of its Initial Brief to non-Champion circumstances, the conflicting authorities it cites nevertheless present mostly by-stander circumstances.[17] Such a by-stander circumstance involves the following natural progression: (1) a person is involved in an event caused by another's negligence; (2) the event causes the person to suffer emotional distress; (3) the emotional distress is demonstrated to be genuine by manifesting itself in significant discernible physical injuries; (4) the person suffers emotional distress from the physical injuries (mental anguish, loss of enjoyment of life, etc.). For purposes of this discussion, the emotional distress described in (4) which results from the physical injuries will be referred to as "Parasitic Emotional Distress." The emotional distress described in (2) which is independent in that it is not caused by any physical injuries, will be referred to as "Primary Emotional Distress". When assuming the elements set forth in Champion are met, is recovery only available to plaintiffs, including Meek,

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[17] See generally Selfe v. Smith, 397 So. 2d 348 (Fla. 1st DCA 1981) (denying primary emotional distress while allowing parasitic); Rivera v. Randle Eastern Ambulance Service, Inc., 446 So. 2d 200 (Fla. 3d DCA 1984) (allowing primary and parasitic emotional distress); Reynolds v. State Farm Mutual Automobile Insurance Co., 611 So. 2d 1294 (Fla. 4th DCA 1992), rev. den. 623 So. 2d 494 (Fla. 1993) (denying primary emotional distress); see also the following language in Eagle-Picher Industries, Inc. v. Cox, supra, a fear for one's own safety case: "If the plaintiff has suffered an impact, Florida Courts permit recovery for emotional distress stemming from the incident during which the impact occurred, and not merely the impact itself. [citing Gilliam v. Stewart, supra]" 481 So. 2d at 526.

for Parasitic Emotional Distress, or may they also recover for Primary Emotional Distress?[18]

Support for First Property's position that only Parasitic Emotional Distress is recoverable can be found in certain language in Champion and Brown. For example, this Court wrote in Champion:

> Non-physical injuries must accompany and flow from direct trauma before recovery can be claimed for them in a negligence action. 478 So. 2d at 19 n.1.
>
> We perceive that the public policy of this state is to compensate for physical injuries, with attendant lost wages, and physical and mental suffering which flow from the consequences of the physical injuries. Id. at 20.

Similar language can be found in Brown:

> We hold that there is no cause of action for psychological trauma alone when resulting from simple negligence. Brown, 468 So. 2d at 904.

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[18] That the distinction between primary emotional distress and parasitic emotional distress surfaces in a fear for one's own safety circumstance can be seen in the hypothetical case where a person driving over a railroad track gets stuck due to negligent maintenance of the same, and experiences a "near miss", being only nicked by the speeding locomotive so as to break his hand as he escaped from his car. After he has reached maximum medical improvement as to his hand, he receives a five percent (5%) impairment rating from his treating physician. However, during his rehabilitation period and beyond the point of his maximum medical improvement, he continues to experience flashbacks about the accident and periods of uncontrollable shaking. He resorts to the care of a psychiatrist who diagnoses his uncontrollable shaking as caused by his re-lived terror experienced in the accident. A contention that only parasitic emotional distress is recoverable would bar this hypothetical plaintiff from recovery for the more debilitating injury which is his psychic injury. Meek contends that is an unjust result, and unrequired by the policies the impact rule was designed to safeguard.

However, other language in Champion would seem to support the position that as long as physical injury flows from the psychic injury then recovery can be had for such Primary Emotional Distress. For example:

> We are thus presented the question of whether a person who suffers no physical injuries in an accident has a cause of action for mental distress or psychic injury caused by the tortious event. We hold that such psychological trauma must cause a demonstrable physical injury such as death, paralysis, muscular impairment, or similar objectively discernible physical impairment before a cause of action may exist. 468 So. 2d at 904.

The Champion Court thereby answered the question "Can one recover for psychic injury caused in an accident if she suffered no physical injury in that accident?" by saying in essence "Yes, if the psychic injury causes a demonstrable physical injury." The Champion court also wrote:

> In a collateral case issued this day, Brown ..., we held that Brown's judgment must be vacated because his psychic trauma was not manifested by physical injury and no cause of action lies for psychic trauma alone. 478 So. 2d at 19, n. 2.

This appears to be a clear statement that if Brown's psychic trauma had manifested itself in a physical injury, then he could have recovered for the [primary] psychic trauma, and not just for the Parasitic Emotional Distress which flowed from the physical injury itself. Thus, recoverable emotional distress damages arguably are not limited to those which flow from the physical injury, but rather include the emotional distress damages which caused the physical injury as well. This is consistent with the conclusions of the Third District Court in Rivera and Eagle-Picher.

It simply makes no sense to preclude recovery for emotional distress which the Court is satisfied is genuine. It is not enough to say that some genuine claims are excluded because psychic injury claims are "indefinable" and "unmeasurable". As mentioned before, juries are daily instructed to consider awarding emotional distress damages, and told "[t]here is no exact standard for measuring such damage. The amount should be fair and just in light of the evidence." Fla. Std. Jury Inst. 6.2a. While Meek acknowledges that some genuine psychic injuries will always not be actionable because they indeed are a part of the "price of living in an organized society", it is illogical to go the next step and hold that some genuine psychic injuries which are legally recognized as genuine and as a "separate and distinct" cause of action, Champion, 478 So. 2d at 22, nevertheless cannot be the subject of any recovery. This is the effect of allowing recovery for only Parasitic Emotional Distress as advocated by First Property. It is inconsistent with the policy of making whole those who have been injured by the negligence of others.

The trial court erred in its finding that Meek suffered no physical impact, 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'" (R: 149; A: 5) The various impacts sustained by Meek in the instant case are more than sufficient to satisfy the impact rule, thereby permitting her to seek recovery for her

emotional distress stemming from the bombing, and not merely the impact (or injuries) itself. Accordingly, the First District Court's implied affirmance of this ruling should be reversed.

V. MEEK PROPOSES A TEST FOR APPLICATION IN EVALUATING ALL NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIMS.

This Court has accurately recognized that the current status of the law of negligent infliction of emotional distress in Florida is a "hybrid" between the impact rule and the zone of danger rule. Kush v. Lloyd, 616 So. 2d at 422 n.4. Maintaining this hybrid approach, a slightly modified version of the Champion test could, and should, be applied to all negligent infliction of emotional distress claims, whether they involve a by-stander, or involve fear for one's own safety. That test is as follows:

(1) A significant objectively discernible physical injury resulting from the emotional distress;

(2) Involvement by the claimant in the event caused by the negligence of another; and

(3) **EITHER** a close emotional relationship to the injured person (by-stander circumstance) **OR** presence within the "zone of danger" (fear for one's own safety circumstance).

This test addresses the concerns of assuring the genuineness of claims (including a causal connection between the emotional distress and the negligent act), and placing some boundary on the "indefinable" psychic claims, while lessening the exclusion of genuine and provable claims. It also unifies any dichotomy in analysis of such claims resulting from the creation of the modified impact rule. This is as it should be, since the same

policy concerns exist in any circumstance in which a person has suffered psychic injury due to the negligence of another.

As Meek contends is present under the current law, factors within each of the three elements such as the nature of the relationship with the loved one injured, the time interval between the psychic injury and the manifestation of the physical injury, the degree of involvement of the claimant in the event, etc., should all be considered by the trier-of-fact. As an additional assurance of the genuineness of a claim, this Court could require competent medical evidence to support the relationship between the emotional distress and the resulting physical impairment (such as that required to establish threshold injuries in auto accident cases under Fla. Stat. § 627.737(2). See City of Tampa v. Long, 19 Fla. L. Weekly S278, S279 (May 26, 1994)).

CONCLUSION

For all the reasons set forth above, this Court should accept jurisdiction and respond to the certified question by holding that there is no arbitrary time period under Champion v. Gray after which manifestations of physical impairment will conclusively be presumed to have not been caused by the psychic trauma, and that any time period is merely one issue for the trier-of-fact's consideration. Therefore the decision of the First District Court of Appeal should be affirmed as to this point and the cause remanded to the trial court for proceedings consistent with the reversal of the trial court's summary

judgment. Moreover, this Court should reverse the summary judgment on the additional grounds that the trial Court's conclusion, and appellate court's affirmance, that Meek did not suffer legally sufficient impact in the bombing is in error.

ROGERS, TOWERS, BAILEY, JONES & GAY

By: _____

Christopher C. Hazelip
Florida Bar No. 438049
Clinton A. Wright, III
Florida Bar No. 933406
1301 Gulf Life Dr., Suite 1500
Jacksonville, Florida 32207
(904) 346-5502
Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Arnold R. Ginsberg, Esquire**, 410 Concord Building, 66 W. Flagler Street, Miami, Florida 33130; **Jack Shaw, Jr., Esquire,** OSBORNE, McNATT, SHAW, O'HARA, BROWN & OBRINGER, 225 Water Street, Suite 1400, Jacksonville, Florida, 32202; and **Sharon Lee Stedman,** Sharon Lee Stedman, P.A., 1516 E. Hillcrest Street, Suite 108, Orlando, Florida 32803 by U. S. mail, this 23rd day of September, 1994.

_____
Attorney