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.

INITIAL BRIEF OF PETITIONERS

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PRELIMINARY STATEMENT

In this brief, the parties will generally be referred to by name. Gaylynn Sue Meek, plaintiff in the trial court, appellant in the District Court of Appeal, and respondent here, will be referred to as "Meek." Any reference to her co-plaintiff, Barry Meek, whose claim is a derivative consortium claim, will be to "Mr. Meek." Petitioners in this Court, who were defendants in the trial court and appellees in the District Court of Appeal, will be collectively referred to as "First Property." References to the Record on Appeal will be by the symbol "R: ."

All emphasis herein is supplied unless otherwise indicated.

STATEMENT OF THE CASE

This case comes to this Court on certification by the District Court of Appeal, First District, that its opinion passes upon a question of great public importance. As phrased by the District Court, that question is:

> 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?

That question arose as follows.

Meek filed a Complaint (R:1) and an Amended Complaint (R:18) alleging that First Property owned and managed an apartment complex and that First Property had negligently failed to take reasonable steps to protect tenants and invitees from reasonably foreseeable

crime; as a result, the complaints alleged, Meek's father was killed by a bomb left on his front doorstep by some unknown person,[1] and Meek sustained psychic trauma from seeing her father as he lay mortally wounded.

First Property moved for summary judgment (R:30), asserting that Meek suffered no physical impact or injuries from the inhalation of smoke or from the shards of a light bulb which fell on (but did not cut or injure) her at the time of the explosion (R:31, ¶2), that she did not suffer significant discernible physical injury so as to permit recovery for any psychic trauma (R:32, ¶5), and that the physical symptoms she did eventually suffer did not occur within a "short time" of the infliction of her psychic injury. (R:32, ¶6).

Based on the filed discovery, the trial court granted summary judgment (R:149, 151), finding first that there had been no "physical impact" upon Meek within the meaning of the "impact rule" 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). The trial court further found 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 'discernible physical impairments' under Florida law" (R:149). Finally, the trial court

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[1]A separate wrongful death action against First Property remains pending in the Circuit Court.

found that if these items did constitute "'demonstrable physical injuries' or 'discernible physical impairments,' then such injuries or impairments did not accompany or occur within a short time of the psychic injury" and that an "eight- or nine-month lapse between the occurrence and the injuries is too long a period of time to meet the temporal proximity requirement of Florida law." (R:149-150).

On appeal, the District Court reversed. Although agreeing with the trial court that Meek had not suffered an "impact" within the meaning of the traditional impact rule (slip opinion at 5), the District Court held that, for purposes of summary judgment, Meek's claim met the requirements of the cause of action recognized by this Court in Champion v. Gray, 478 So.2d 17 (Fla. 1985). Noting (slip opinion at 5) that the time interval between the psychic injury and the resulting significant physical impairment was the principal issue in this case, and that Champion had emphasized the requirement that the physical impairment must accompany or occur within a short time of the psychic injury, the District Court characterized that temporal proximity requirement as a "concern" designed to curb the potential for fraudulent claims and place boundaries on psychic claims, but felt that the facts of the present case gave sufficient indicia of genuineness to preclude summary judgment notwithstanding the lengthy time interval involved. The District Court vacated the summary judgment, but certified that its opinion passed on a question of great public importance, as set forth above.

Following the denial of a timely motion for rehearing, First Property timely filed its Notice invoking this Court's discretionary jurisdiction. By order dated June 20, 1994, this Court postponed its decision on jurisdiction and established a briefing schedule.

STATEMENT OF THE FACTS

Zell was the owner of the Cedar Cove apartment complex in Jacksonville, Florida; First Property managed and operated Cedar Cove. (R:27).

Meek resides with Mr. Meek and their two daughters in Illinois. (R:128-129, 143). Meek's parents, Dorothy and Sherwin Finlay, were tenants of Cedar Cove. (R:131). In the spring of 1990, Meek was visiting them for the weekend. (R:71). After an overnight boating excursion, Meek and her parents returned to Cedar Cove on March 19, 1990 and were unpacking their vehicle and carrying items into the apartment. (R:74-76).

As they entered the apartment, they noticed a small box which had been left on the doorstep of the Finlay's apartment. (R:76-77). Stepping over the box and into the apartment, Meek and her mother went into the kitchen (across the dining room from the front door) and unpacked the food from the trip. (R:77-78, 79). Suddenly, there was an explosion. (R:78). The force of the explosion blew objects off the walls and ceilings and caused light fixtures in the kitchen to shatter, scattering glass, which fell on Meek's head but did not cut or otherwise injure her. (R:78). Meek screamed, then proceeded through billows of black smoke to the

front door, where her father lay mortally wounded. (R:78-80). The person who left the bomb on the Finlay's doorstep has never been apprehended.

First Property had allegedly received threats prior to the bombing, but did not warn their tenants or invitees, or take other steps to provide for the safety and security of their tenants.[2] (R:92, 131).

Prior to the bombing, Meek did not suffer from any physical infirmity or disability. (R:130). Shortly after the accident, Meek began having insomnia and depression (for both of which she took prescribed medication) (R:59, 97-98, 144), trouble with her short-term memory (R:102, 139), a strong reaction to loud noises (R:115), bad dreams (R:116), and an inability to stop reliving the events. (R:115-116). Since the accident, she has seen three psychologists: Mary Horgan once a week for three or four weeks beginning in April, 1990 (R:109-110), Ron Maier off and on over a period of six to eight months (R:110-111), and Lori Bergner for six to eight weeks beginning in December, 1991 or January, 1992. (R:112-113).

Meek was often fatigued and underwent personality changes which led to family group counseling. (R:113, 139). Her sexual relationship with her husband suffered. (R:117-118). Meek had a

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[2]Since this is an appeal from a summary judgment, all facts are stated herein in the light most favorable to Meek. Serious factual issues exist as to whether First Property ever did receive any such warnings prior to the explosion, for instance. For present purposes, we resolve all such issues in Meek's favor.

fear of being alone, suffered anxiety attacks and was bothered by recurring thoughts of the bombing which killed her father. (R:115, 193). For months after the bombing, Meek attempted to cope with her nightmares by closing herself in the closet. (R:115).

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. (R:95, 97). At that time, she developed severe pains in the upper area of her stomach for which she was prescribed Pepcid, an ulcer medication. (R:95, 104, 107). In January of 1991, ten months after her father's death, the pain below her rib cage became worse. (R:100). On the first anniversary of her father's death, Meek became very ill, with the pain spreading into her chest area. (R:99, 100). Her treating physician, Dr. Weaver, suspected an ulcer and prescribed Pepcid, which has been very helpful in controlling the pain. (R:103, 104).

Around Thanksgiving of 1991, some twenty months after her father's death, Meek developed a blockage in her esophagus, was unable to swallow, and occasionally had difficulty breathing. (R:97-98, 106-106a). Dr. Weaver sent Meek in for an esophagram, which came back negative. (R:106).

At the beginning of May, 1992, more than two years after her father's death, Meek developed problems with her hip joints (R:107-108) and, in the third week of that month, her elbow joints (R:108). She treats these problems solely with Ibuprofen. (R:108).

In Dr. Weaver's opinion, the psychological trauma Meek suffered as a result of her father's death contributed to her physical symptoms and her increased need for medical care. (R:59). Meek's insomnia and anxiety with depressed mood and situational depression was, in Dr. Weaver's opinion, secondary to her father's death. (R:59).

SUMMARY OF ARGUMENT

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.

Meek did not satisfy the elements of the cause of action recognized in Champion v. Gray, 478 So.2d 17 (Fla. 1985). That cause of action requires both (1) a significant discernible and demonstrable physical impairment resulting from the psychic injury, and (2) that the physical impairment accompany or occur within a short time of the traumatic event. Contrary to the District Court's opinion, Meek fails as a matter of law to meet either requirement.

None of Meek's discernible physical impairments first occurred until a full nine months after her father's death (when she first experienced stomach pain), and some did not occur until more than two full years after the traumatic event (a problem with her hip and elbow joints). The temporal proximity requirement of Champion v. Gray deals with the lapse of time between the traumatic event and the physical impairment. Meek's claim before the District Court that it is sufficient that plaintiff is still experiencing emotional distress when the physical impairment develops is contrary to the teaching of Champion and must be rejected.

The District Court erred in concluding that Champion's temporal proximity requirement was merely a "concern," and was but a single factor to be weighed in deciding whether a cause of action for negligent infliction of emotional distress had been established. This Court should reaffirm Champion by responding to the certified question that a sufficiently short time interval between the infliction of the psychic injury and the onset of a significant physical injury is an absolute prerequisite to the cause of action recognized in Champion -- and that the time interval in the present case is, as a matter of law, too long to meet Champion's requirement.

Even apart from the lapse of time, Meek has not sustained any significant discernible and demonstrable physical impairment so as to come within the Champion exception to the impact rule. Many of the conditions which Meek relies on as "physical injuries" (depression, insomnia, bad dreams, reaction to loud noises, etc.)

are simply not physical in nature, but are mental or emotional. Meek's other claimed physical impairments consist of contractions of the esophagus (which were not medically demonstrable, lasted about six weeks, and required no prescription medication), pain in her hip and elbow joints (for which she takes only an over-the-counter medication), stomach pain (which is fully treated with Pepcid prescribed by Dr. Weaver), and irritable bowel symptoms. These minor and transient conditions are a far cry from the significant impairment (such as death, paralysis, or muscular impairment) required under Champion v. Gray.

The only "impact" Meek claims to have sustained is that shards of glass fell on (but did not cut or otherwise injure) her and the fact that the apartment filled with black smoke from the explosion. Her claimed emotional distress was not the result of the falling glass shards or the smoke; rather, it resulted from her father's death. As the District Court correctly recognized, the requirements of Florida's impact rule are not met in these circumstances.

Contrary to Meek's contention, not every physical contact is sufficient to meet the requirements of the impact rule. Instead, the physical contact itself must cause injury. Since no injury-producing impact exists in this case, the trial court and the District Court of Appeal both correctly held that Meek failed to satisfy the requirements of Florida's impact rule.

The trial court's ruling was correct in all regards, and should have been affirmed. The District Court erred in vacating

the summary judgment, and its decision should be reversed and the cause remanded with directions to reinstate that summary judgment.

ARGUMENT

I. THIS COURT SHOULD ACCEPT JURISDICTION AND REVIEW THE DECISION OF THE DISTRICT COURT.

The District Court of Appeal has certified that its decision passes upon a question of great public importance. Accordingly, this Court has discretionary review jurisdiction pursuant to Article V, Section 3(b)(4), Florida Constitution, and Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure. This Court should exercise its discretion in favor of granting review in this case.

In Champion v. Gray, 478 So.2d 17 (Fla. 1985), this Court recognized a cause of action for negligent infliction of emotional distress caused by the injury or death of a close family member. In delimiting the elements of that cause of action, the Court stated (478 So.2d at 19, footnote omitted):

> We emphasize the requirement that a causally connected clearly discernible physical impairment must accompany or occur within a short time of the psychic injury.

In the present case, the District Court of Appeal held that a lapse of nine months between the psychic injury and the onset of the first significant physical impairment was not a sufficient length of time to permit a court to conclude, as a matter of law, that the impairment did not "accompany or occur within a short time of the psychic injury." Instead, the District Court held, the lapse of that length of time was simply one factor for the trier of fact

to consider in determining whether a cause of action under Champion had been established.

In so holding, the District Court has impermissibly departed from the controlling precedents of this Court by modifying the elements of the cause of action this Court recognized in Champion. Additionally, the District Court's opinion adds uncertainty and imprecision to a point that had previously been clear -- that temporal proximity is a required element of a Champion cause of action, not simply one factor in a balancing test. The District Court's decision also tends to frustrate this Court's effort in Champion "to place some boundaries on the indefinable and unmeasurable psychic claims." (478 So.2d at 20).

Moreover, granting review in this case will permit the Court to clarify the law in an area in which the District Courts are in conflict: 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. As discussed in Point III, infra, the First and Fourth District Courts of Appeal have answered that question in the negative, while the Third District Court of Appeal has answered affirmatively. The law on this point needs to be clarified so as to be consistent throughout the state.

The District Court was correct in one regard -- its decision does pass on a question of great public importance. This Court should exercise its discretion and review that decision.

II. MEEK FAILED TO DEMONSTRATE A SIGNIFICANT DISCERNIBLE PHYSICAL INJURY OCCURRING WITHIN A SHORT TIME OF THE PSYCHIC INJURY, AND HENCE CANNOT MEET THE REQUIREMENTS OF CHAMPION v. GRAY.

Under Florida law, a plaintiff traditionally could not recover damages for the negligent infliction of emotional distress unless plaintiff had suffered an injury-producing impact. This Court in Champion v. Gray, 478 So.2d 17 (Fla. 1985), recognized a cause of action for negligent infliction of emotional distress unaccompanied by personal injury to plaintiff in certain limited circumstances. To come within the Champion "exception"[3] to the impact rule plaintiff must demonstrate: (1) a significant discernible physical injury; (2) that the physical injury accompanied or occurred within

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[3]Conceptually, the traditional impact rule and the Champion v. Gray line of cases address two different situations. As this Court pointed out in Champion (478 So.2d at 19):

> There are at least two distinct emotional circumstances: one caused by fear for one's own safety and one caused by anxiety or stress for the injury or death of another. The former is basically that which existed in Gilliam v. Stewart, [291 So.2d 593 (Fla. 1974)] and is more readily recognized as a basis for a cause of action in other jurisdictions. The second is what exists here . . .

The traditional impact rule cases involve the first situation (fear for one's own safety); applicability of that line of cases is discussed in Point III, infra. Champion v. Gray and its progeny deal with the second situation (emotional distress due to the injury or death of another), which is the factual pattern of the instant cause.

Accordingly, since the "impact" in the present case is not claimed to itself have put Meek in fear for her own safety, it seems clear that the traditional impact rule is (as the District Court correctly held) inapplicable. Nonetheless, since Meek raised the issue below, since the courts have occasionally failed to appreciate the import of the distinction pointed out in Champion, and since the courts have often referred to the "Champion exception," we will use that same terminology.

a short time of the psychic trauma; (3) that the psychically injured party had an especially close emotional attachment to the directly injured person; and (4) that the psychically injured party was directly involved in the event causing the injury to the directly injured person. Champion v. Gray, supra; Brown v. Cadillac Motor Car Division, 468 So.2d 903 (Fla. 1985). It is the first two of these four elements which are the focus of this appeal.

In Champion, this Court made it clear that temporal proximity between the psychic trauma and the resulting physical impairment was an essential element of the cause of action, stating (478 So.2d at 19, footnote omitted):

> We emphasize the requirement that a causally connected clearly discernible physical impairment must accompany or occur within a short time of the psychic injury.

The District Court in the present case noted (slip opinion at 6) that this requirement was set forth in dictum and, in quoting from this sentence, omitted this Court's reference to temporal proximity being a "requirement."

Instead, the District Court viewed the Champion court's statement about the need for a short time interval solely as a "concern" related to a need to curb the potential for fraudulent claims and to place boundaries on indefinable and unmeasurable psychic claims. After casting the matter in that light, the District Court found sufficient indicia of the genuineness of Meek's emotional distress to outweigh the extremely long lapse of

time (nine months) between the psychic trauma and any resulting significant physical impairment.

The District Court's approach is demonstrated by the very wording of the certified question, which inquires whether "the interval of time between a psychic trauma and the manifestation of physical trauma [is] merely one issue for the trier of fact's consideration" or whether there is some point after which the lapse of time is, in and of itself, sufficient to preclude a claim for negligent infliction of emotional distress under Champion as a matter of law.

We suggest that the certified question should be reframed in light of the facts of this case, as follows:

> IS THE LAPSE OF NINE MONTHS BETWEEN THE PSYCHIC TRAUMA AND THE FIRST MANIFESTATION OF A SIGNIFICANT, DISCERNIBLE PHYSICAL INJURY SUFFICIENT TO CONCLUDE, AS A MATTER OF LAW, THAT THE TEMPORAL PROXIMITY REQUIREMENT OF CHAMPION V. GRAY HAS NOT BEEN MET?

The answer to that question, we submit, is plainly in the affirmative.

Florida recognizes a cause of action for the intentional infliction of emotional distress in the absence of physical impact, but in order to recover on such a cause of action, the defendant's conduct must be truly outrageous (such as that of the bomber in this case).[4] In order to come within this line of cases, the

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[4]Eastern Airlines, Inc. v. King, 557 So.2d 574 (Fla. 1990); Crane v. Loftin, 70 So.2d 574 (Fla. 1954); Williams v. City of Minneola, 575 So.2d 683 (Fla. 5th DCA 1991), rev. den., 589 So.2d 289 (Fla. 1991); Lavis Plumbing Services, Inc. v. Johnson, 515 So.2d 296 (Fla. 3d DCA 1987); Claycomb v. Eichles, 399 So.2d 1050 (Fla. 2d DCA 1981); Stetz v. American Casualty Co. of Reading, Pennsylvania, 368 So.2d 912 (Fla. 3d DCA 1979); Butler v. Lomelo,

outrageous conduct involved must be that of the defendant (here, First Property as owner and manager of the apartment complex), not that of a third party (the bomber) whose outrageous conduct somehow became possible due to simple negligence on the part of the defendant. Squros v. Biscayne Recreation Development Co., 528 So.2d 376 (Fla. 3d DCA 1987), rev. den., 525 So.2d 880 (Fla. 1988).

In the instant case, Meek makes no claim that the elements of that cause of action are present. Rather, Meek seeks to assert a claim for negligent infliction of emotional distress under Champion v. Gray and its progeny. Meek's attempt falls short, however, because Meek cannot meet either the "temporal proximity" or the "significant injury" elements required under Champion.

Even if Meek's stomach pains, esophagus problems, and hip and elbow joint pains somehow rose to the level of a significant discernible and demonstrable physical impairment (a point discussed infra), Meek fails to meet the requirements of Champion v. Gray due to the lapse of nine months between her psychic trauma and the initial onset of any of these symptoms. (R:95, 97). Under Champion v. Gray, the causally connected, clearly discernible physical impairment "must accompany or occur within a short time of the psychic injury." Champion v. Gray, supra, at 19; Ledford v. Delta Airlines, Inc., 658 F.Supp. 540 (S.D. Fla. 1987). See

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355 So.2d 1208 (Fla. 4th DCA 1977); Saltmarsh v. Detroit Automobile Inter-Insurance Exchange, 344 So.2d 862 (Fla. 3d DCA 1977); Steiner and Munach, P.A. v. Williams, 334 So.2d 39 (Fla. 3d DCA 1976), cert. den., 345 So.2d 429 (Fla. 1977); Swerhun v. General Motors Corp., 7 F.L.W. Fed. D19 (M.D. Fla. 1993).

also, to like effect, Eagle-Picher Industries, Inc. v. Cox, 481 So.2d 517 (Fla. 3d DCA 1985), rev. den., 492 So.2d 1331 (Fla. 1986); Kingston Square Tenants Association v. Tuskegee Gardens, Ltd., 792 F.Supp. 1566 (S.D. Fla. 1992).

The temporal proximity requirement serves to demonstrate a causal connection between the original traumatic event and the physical injury allegedly resulting from the emotional distress. In Champion, for instance, the mother was so overcome with shock at seeing her daughter's body that she collapsed and died on the spot. It is difficult to imagine a more convincing demonstration of cause and effect than that. Had the mother's fatal attack occurred six months later (on her deceased child's birthday, perhaps) it would not have provided the same assurance that the physical injury was caused by the psychic trauma and emotional distress.

Indeed, it can fairly safely be said that the longer the interval between the initial psychic trauma and the onset of the physical impairment, the less assurance there is that the two are causally connected. The temporal proximity requirement was intended to allow recovery (where the other elements set forth in Champion are also present) in those cases where the physical impairment followed so soon after the initial psychic trauma as to provide reasonable assurance that the two are causally related. There comes a point where the onset of the physical impairment occurs so long after the initial psychic trauma that it provides

no such assurance. The nine-month delay in the present case presents exactly that situation.

A physical injury occurring four months after the traumatic event has been held, as a matter of law, to be not sufficiently close in time to satisfy the temporal proximity requirement of Champion v. Gray. Ledford v. Delta Airlines, Inc., supra (granting summary judgment for defendant on claim for negligent infliction of emotional distress on basis that lapse of four months between psychic trauma and physical impairment demonstrated, as a matter of law, lack of required temporal proximity).

In the instant case, the explosion occurred at about 8:00 p.m. on March 19, 1990 (R:2, 75), and Meek learned of her father's death within hours. (R:83). It was not until around Christmas of 1990, nine months after the psychic trauma, that any of her physical conditions first appeared. (R:95, 97). At that time, Meek developed severe pain in the upper area of her stomach. (R:95). When she came back to Jacksonville in January of 1991 (ten months after her father's death), the pain below her rib cage became worse. (R:100).

On the first anniversary of her father's death, she became very ill, with pain spreading into her chest area and becoming constant. (R:97, 100). Meek went back to Dr. Weaver, who suspected an ulcer and prescribed Pepcid. (R:103-104). Meek did not see any other medical doctors prior to March of 1991, a full year after her father's death. (R:104, 109).

The problems Meek claimed with her esophagus did not occur until around Thanksgiving of 1991, some twenty months after her father's death, when she developed a blockage in her esophagus, was unable to swallow, and occasionally had difficulty breathing. (R:97-98, 106).

Meek's problems with her hip and elbow joints first developed in May, 1992 (more than two full years after her father's death), with her hip problem beginning near the first of the month (R:107-108) and the elbow problem occurring in about the third week of May, 1992. (R:108).

In short, the physical impairments which Meek attributes to her psychological trauma did not begin until nine months after the psychic trauma, and some did not appear until more than two full years after the traumatic event. As a matter of law, this simply is not sufficiently close in time to meet the requirements of Champion v. Gray. Stomach pain which does not occur until nine full months after the trauma does not provide any reasonable assurance that there is a causal connection between the traumatic event and the belated pain. Chest pain developing a year after the trauma, a blockage of the esophagus twenty months after the trauma, and joint problems two years after the trauma provide even less of an assurance that there is a causal connection.

Meek argued in the District Court that the temporal proximity requirement of Champion v. Gray is met if the physical symptoms occur at any time while plaintiff continues to suffer from mental anguish. That claim wholly misunderstands the teaching of

Champion. Immediately after holding that a significant discernible physical injury must be caused by psychological trauma, this Court stated (478 So.2d at 19, footnote omitted):

> We emphasize the requirement that a causally connected clearly discernible physical impairment must accompany or occur within a short time of the psychic injury.

Patently, this Court in Champion was doing more than reiterating its requirement of a causal connection between psychic injury and resultant physical impairment; the Court was requiring that the onset of the physical impairment follow closely after the psychic injury was first sustained. To claim, as Meek did in the District Court, that it is enough if a physical impairment occurs at any time while plaintiff continues to suffer emotional or psychological effects from the original psychic trauma -- even if the physical impairment does not develop for many years -- is to eviscerate the temporal proximity requirement this Court established in Champion v. Gray.[5]

Moreover, such a misreading of Champion's requirements flies in the face of Champion's repeatedly-expressed concern for the necessity of curbing the potential for fraudulent claims. If a resulting physical impairment occurs within a few days of the

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[5]Meek's interpretation renders the temporal proximity requirement essentially meaningless. If the physical impairment develops at a time when plaintiff is no longer suffering emotional effects from the original trauma, it seems fairly obvious that there is no connection between the trauma and the impairment. Meek's suggested interpretation would permit recovery in all other situations. If that had been what the Champion court intended, there would have been no reason to impose a temporal proximity requirement in the first place.

traumatic event, there is some reasonable indicia of a causal connection; if the impairment first occurs many months (or even years) after the traumatic event, those indicia are absent.

In Ledford v. Delta Airlines, Inc., supra, plaintiff twice injured himself due to lack of concentration resulting from his emotional distress, with the first significant discernible physical injury occurring four months after the initial traumatic event. Even though this injury occurred while plaintiff was still suffering psychic distress (and was due to lack of concentration resulting from that psychic distress), and hence would be within the Champion exception under Meek's theory, the court granted a defense summary judgment on this issue, stating (658 F.Supp. at 542, citation omitted):

> The requirement of demonstrating temporal proximity to the accident is part of the showing the plaintiff must make to prove that the physical injury occurred as a result of the psychological trauma. Temporal proximity to the accident contributes to proof of causation. A lapse of four months does not, as a matter of law, satisfy this requirement.

This Court should reject (as the District Court implicitly did) Meek's claim that Champion's temporal proximity requirement is met if the physical impairment occurs at any time while plaintiff continues to suffer psychic distress.

To prevail on a claim for negligent infliction of emotional distress, each of the elements must be proven. Ledford v. Delta Airlines, Inc., supra. The only physical impairments Meek claims to have sustained were her stomach and chest pains, contractions of the esophagus, and pain in her hip and elbow joints. None of

these conditions manifested itself until nine months (and, as to some of these conditions, more than two full years) had passed since the psychological trauma. Physical impairments which did not occur until four months after the traumatic event were held, as a matter of law, not sufficiently close in time to meet the temporal proximity test in Ledford v. Delta Airlines, Inc., supra. Certainly, conditions which did not occur until nine months or more after the traumatic event are even further from meeting the requirements of Champion v. Gray.

Meek argued in the District Court that Champion v. Gray requires a case-by-case analysis under which the lapse of any given amount of time between the initial psychic trauma and the onset of a physical impairment presents a factual issue as to temporal proximity, precluding summary judgment. The District Court apparently agreed with that position. A moment's reflection, however, demonstrates the fallacy of that contention. Assume, for instance, that a parent suffered the psychic trauma of seeing his or her child horribly injured in an auto accident, but did not develop any resulting physical impairment until twenty years or more had passed. Plainly, Champion's requirement that the physical impairment "accompany or occur within a short time of the psychic injury," is not met in that situation as a matter of law. On the other hand, a physical impairment which develops only moments after the psychic trauma does meet the temporal proximity requirement as a matter of law.

Inevitably, there will be situations where the lapse of time involved will present factual issues for jury resolution. However, the amount of time which can elapse while still complying with Champion's temporal proximity requirement becomes a question of law at some point. The Ledford court held that a lapse of four months was long enough to require a holding that, as a matter of law, Champion's temporal proximity requirement had not been met. In the present case, the time lapse involved is more than twice that involved in Ledford -- nine months. Just as Ledford held that the requirements of Champion were, as a matter of law, not met where four months intervened, so too should this Court hold that a lapse of nine months, as a matter of law, does not meet Champion's temporal proximity requirement.

The summary judgment entered by the trial court should be affirmed for another reason as well. Even if the absence of the required temporal proximity between the psychic trauma and the resulting physical impairment did not mandate a summary judgment for First Property in this case, Meek's claim would still fail as a matter of law becasue there was no significant discernible physical injury. Thus, even apart from the issue raised in the certified question, the trial court properly entered final summary judgment, and the District Court erred in vacating that summary judgment.

Under Champion, "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 the injury, is foreseeably injured." (478 So.2d at 20, footnote omitted). A significant discernible and demonstrable physical injury must flow from the traumatic event before a cause of action exists under this theory. Brown v. Cadillac Motor Car Division, 468 So.2d 903 (Fla. 1985).

The psychological trauma caused by the tortious event must cause a significant demonstrable physical injury "such as death, paralysis, muscular impairment or similar objectively discernible physical impairment" before a cause of action exists. Brown v. Cadillac Motor Car Division, supra, at 904. See also, to like effect, Geller v. Delta Air Lines, Inc., 717 F.Supp. 213 (S.D. N.Y. 1989) (applying Florida law).

Webster defines "significant" to mean "important" or "meaningful." Webster's II New Riverside University Dictionary (1984). Thus, a "significant physical injury" is an "important physical injury" or a "meaningful physical injury." Patently, this Court's requirement in Champion that plaintiff in these cases prove a "significant discernible physical injury" imposes a severity-of-injury test under which recovery for emotional distress is not permitted in cases involving only de minimis physical injuries.

That understanding of Champion's requirement is confirmed by this Court's contemporaneous decision in Brown v. Cadillac Motor Car Division, supra, in which this Court stated (at 904) that there must be a physical injury "such as death, paralysis, muscular impairment or similar objectively discernible physical impairment"

before a claim can be made for negligent infliction of emotional distress under Champion. 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.

Sound policy reasons support the requirement that the physical injuries must attain a certain minimum level of severity before they will support a recovery for negligent infliction of emotional distress. Both the magnitude of the physical injury and its objective verifiability serve as checks on fraudulent claims. Someone who dies or is physically paralyzed as a result of an overwhelming psychic trauma patently is not asserting a fraudulent claim and (assuming Champion's other elements are present) deserves to be compensated. On the other hand, someone who claims to have had severe headaches for a month could well be attempting to assert a fraudulent claim. Both death and paralysis are difficult to "fake"; headaches are not.

Additionally, a minimum-severity-level requirement serves "to place some boundaries on the indefinable and unmeasurable psychic claims," a concern this Court pointedly expressed in Champion. Permitting recovery for negligent infliction of emotional distress which resulted in death or paralysis provides a recovery in cases involving genuine and extreme emotional trauma. Forbidding recovery for negligent infliction of emotional distress which resulted in headaches precludes recovery where the emotional distress was far less severe. And, of course, by limiting recovery

to those cases in which the emotional trauma is extreme, and excluding cases involving more minimal levels of emotional distress, a minimum-severity-level test limits the danger of a flood of litigation.

Moreover, a minimum-severity-level requirement tends to alleviate the difficulty in proving causation. There can be little doubt of causation when, as in Champion, a mother collapses and dies upon seeing her child's body. A bruised arm sustained in an industrial accident, due to lack of concentration because of ongoing emotional distress (as in Ledford v. Delta Airlines, Inc., supra) provides little if any proof of the required causal connection.

Thus, the requirement of Champion that the resulting physical impairment must be "significant," and the elucidation in Brown that there must be "death, paralysis, muscular impairment or similar objectively discernible physical impairment" before a cause of action exists, impose a requirement that the resulting physical impairment reach some minimum level of severity before a claim for negligent infliction of emotional distress will be recognized. That minimum-severity-level requirement, moreover, advances several significant public policies. This Court had a sound basis for requiring, in Champion and in Brown, that the plaintiff have sustained a significant discernible physical injury before being allowed to recover for emotional distress.

In the instant case, Meek did not sustain any such significant discernible physical injury. Indeed, the only truly physical

injuries she claims to have sustained as a result of the psychological trauma are contractions of the esophagus (R:107), pain in the hip and elbow joints (R:107-108), stomach pains (R:109), and irritable bowel symptoms (R:59). None of these conditions rise to the level of a significant discernible and demonstrable physical impairment.

Meek treats her hip and elbow joint problems only with Ibuprofen, an over-the-counter medication. Her stomach and chest pains are fully controlled by the Pepcid Dr. Weaver prescribed. The problems relating to her esophagus only lasted about six weeks, and Meek never took any prescription medication for them -- and an esophagram came back negative. Patently, these minor, treatable, and transient conditions (only one of which even required a prescription medication) come nowhere close to the significant physical impairment required under Champion and Brown.

In addition to these belatedly-occurring physical problems, Meek claimed that, immediately after the accident, she began having insomnia (R:59, 97), depression (R:59), trouble with her short-term memory (R:102), a strong reaction to loud noises (R:115), bad dreams (R:116), and an inability to stop reliving the events in question. (R:115-116). None of these items, however, constitute a significant physical impairment within the requirement of

Champion v. Gray. These problems, rather, are psychological or emotional in nature.[6]

Thus, for instance, complaints of poor sleep, fear of flying, appetite disturbances and social withdrawal are not physical manifestations of a psychological injury, nor are depression and distractibility. Geller v. Delta Air Lines, Inc, supra. Loss of sleep, anxiety, and depression constitute emotional distress, not the required physical injury. Landry v. Florida Power & Light Corp., 799 F.Supp. 94 (S.D. Fla. 1992). Similarly, crying episodes, fear of a heart attack, and panic attacks do not constitute the required significant demonstrable physical injury. Ledford v. Delta Airlines, Inc. supra. Thus, Meek's insomnia, reaction to loud noises, depression, and the like do not meet the significant physical injury requirement of Champion v. Gray.

Meek argued in the District Court that her failure to meet the "significant injury" and "temporal proximity" requirements of Champion v. Gray should be overlooked because the circumstances of this case provided sufficient guarantees of the genuineness of her emotional distress. Fear of fraudulent claims, however, is only one of the public policies implicated. Certainly, no one would doubt the sincerity of an emotional distress claim by a woman whose stillborn child was negligently placed in a hospital's laundry bin

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[6]Meek has seen three psychologists for her emotional problems: Mary Horgan, whom she saw once a week for three or four weeks beginning in April, 1990 (R:109-110), Ron Maier, whom she saw off and on over a period of six to eight months (R:110-111), and Lori Bergner, whom she saw for about six to eight weeks beginning in December of 1991 or January of 1992 (R:112-113).

and taken to a commercial laundry, where the body was found several days later, mutilated from the action of the washing machine. Yet, precisely that claim was rejected in Crenshaw v. Sarasota County Public Hospital Board, 466 So.2d 427 (Fla. 2d DCA 1985), on the basis that, inter alia, she did not meet Champion's requirement of a resulting discernible physical injury.

The indicia of the genuineness of her emotional distress to which Meek points are (1) her close emotional attachment to her father, (2) the fact that she was "on the scene" at the time, and (3) the fact that she began showing the effects of her emotional trauma (insomnia, bad dreams, depression, etc.) immediately after the accident. The first two items, however, are already elements of the Champion cause of action,[7] and hence do not suffice to dispense with the other required elements of that same cause of action. Champion did not establish a four-factor "balancing test" under which the absence of one element could be compensated for by the strength of another element. Rather, each of the four required elements must be demonstrated. Ledford v. Delta Airlines, Inc., supra.

Nor does the fact that psychological effects of the emotional trauma (bad dreams, depression, etc.) manifested themselves shortly

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[7]The four elements a plaintiff is required to demonstrate are: (1) a significant discernible physical injury; (2) that the physical injury accompanied or occurred within a short time of the psychic trauma; (3) that the psychically injured party had an especially close emotional attachment to the directly injured person; and (4) that the psychically injured party was directly involved in the event causing the injury to the directly injured person.

after the explosion alter the fact that Champion requires a significant physical injury at or near the time of the psychic trauma. As noted above, the four elements of the Champion cause of action serve "to place some boundaries on the indefinable and unmeasurable psychic claims" (Champion, at 20), as well as addressing the difficulty in proving causation, the fear of fraudulent claims, and the potential for a flood of litigation. The "close emotional attachment" requirement limits the class of potential plaintiffs, restricting it to those most likely to truly suffer considerable emotional distress. The "direct involvement" requirement similarly limits the class of potential plaintiffs, confining it to those most likely (because of their presence at the scene) to suffer an unusual level of emotional distress. The "significant physical injury" and temporal proximity requirements not only serve to further restrict the class of potential plaintiffs, but also act as a check on fraudulent claims, and as an additional means of demonstrating the presence or absence of causal connexity, while at the same time permitting recovery in those situations in which an emotional distress claim is most likely to be both legitimate and of significant magnitude. Thus, it would be both improper and unwise to adopt a four-factor "balancing test" in which lack of temporal proximity could be ignored if the plaintiff was very directly involved in the incident and had an extremely close relationship to the directly injured party. Each of Champion's four elements serves a vital purpose, and each must be present in order to state a claim under Champion.

In the present case, Meek has failed to meet two of the express requirements to establishing a cause of action under Champion v. Gray: there were no significant demonstrable physical impairments resulting from the psychic trauma, and those impairments which Meek relies on did not "accompany or occur within a short time" of the traumatic event. Accordingly, the trial court was correct in granting summary judgment that Meek had failed to fulfill the requirements of Champion, and the District Court erred in vacating that summary judgment.

III. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT SINCE MEEK FAILED TO SATISFY THE REQUIREMENTS OF FLORIDA'S IMPACT RULE.

The trial court held that Meek had not met the requirements of the traditional impact rule, and the District Court correctly agreed. Nonetheless, since this Court has jurisdiction to review the entire case,[8] and since a contrary holding might result in the certified question not being reached, we address that point as well. As shown below, both lower tribunals were correct on this point.

To briefly recapitulate, Meek's parents lived in an apartment complex managed by First Property. An unknown person left a bomb on their doorstep. The bomb exploded, mortally wounding Meek's father. The explosion occurred just outside the open front door of the apartment. (R:43). At the time, Meek was in the kitchen, across the dining room from the front door. (R:77-78, 79). The

[8] Marley v. Saunders, 249 So. 2d 30 (Fla. 1971); Zirin v. Charles Pfizer & Co., Inc., 128 So.2d 594 (Fla. 1961).

force of the explosion shattered the light fixture on the kitchen ceiling, and shards of glass fell on Meek, but did not cut or otherwise physically injure her. (R:43, 78). Black smoke from the explosion billowed into the apartment. (R:79). Meek relied on the smoke and falling pieces of glass in her attempt to satisfy Florida's impact rule.

Historically, Florida law has declined to permit recovery for negligent infliction of emotional distress unaccompanied by any physical injury; this position has come to be known as the "impact rule." The impact rule requires that there be a physical-injury-producing impact before plaintiff can recover for resulting emotional distress damages. Stated differently, the impact rule prohibits the recovery in negligence cases of emotional distress damages unaccompanied by personal injury[9]; where there is a personal injury, however, emotional distress damages can be recovered as a "parasitic" damage element.

Under the impact rule, psychic injury which is induced by the mere observance of a traumatic event is insufficient in and of itself to permit recovery of purely emotional damages; a physical injury is required. Sqiros v. Biscayne Recreation Development Co., supra. In essence, the impact rule requires that a plaintiff

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[9]In a sense, the impact rule is analogous to the economic loss rule: the impact rule prohibits recovery of emotional distress damages in a negligence case absent personal injury, while the economic loss rule prohibits recovery of purely economic loss damages in a negligence case absent personal injury or property damage. This Court recently reaffirmed the continuing vitality of the economic loss rule in Casa Clara Condominium Association, Inc. v. Charley Toppino and Sons, Inc., 620 So.2d 1244 (Fla. 1993).

either: (1) prove a physical impact on his or her person directly causing the emotional distress and a physical injury; or (2) prove that the defendant's tortious conduct was so egregious as to be deemed malicious, so as to warrant punitive damages. Swerhun v. General Motors Corp., supra. Meek makes no claim that First Property's conduct can be deemed malicious; accordingly, Meek must demonstrate a damage-causing impact.

As this Court pointed out in Champion (478 So.2d at 19), there are two distinct emotional circumstances: one caused by fear for one's own safety and one caused by anxiety or stress for the injury or death of another; it is the former situation to which the impact rule is addressed. So far as we are aware, the only Florida appellate decision applying the impact rule and permitting recovery where the emotional distress resulted from the injury or death of another is Rivera v. Randle Eastern Ambulance Service, Inc., 446 So.2d 200 (Fla. 3d DCA 1984), discussed infra. A year after Rivera, this Court in Champion made clear that different tests 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).

In the present case, Meek's emotional distress does not result from any injury she sustained from the falling glass shards or from smoke inhalation, but results from her father's death. Thus she has no claim for emotional distress under the impact rule line of cases. Moreover, as discussed infra, the falling glass shards and

billowing smoke are not sufficient to constitute an "impact" in any event.

Under the traditional impact rule, the emotional distress must be caused by plaintiff's own injury, not by injury to another, in order to be recoverable. Selfe v. Smith, 397 So.2d 348 (Fla. 1st DCA 1981), rev. den., 407 So.2d 1105 (Fla. 1981); Ellington v. United States, 404 F.Supp. 1165 (M.D. Fla. 1975). Although National Car Rental System, Inc. v. Bostic, 423 So.2d 915 (Fla. 3d DCA 1982), rev. den., 436 So.2d 97 (Fla. 1983), appears at first blush to be to the contrary, a closer reading demonstrates that in that case the plaintiff's own wounds caused his emotional distress because they prevented him from aiding and comforting his mother, who was mortally injured in the same accident.[10]

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[10]See, however, Rivera v. Randle Eastern Ambulance Service, Inc., 446 So.2d 200 (Fla. 3d DCA 1984), in which the Third District found National Car Rental System, Inc. v. Bostic, supra, controlling and rejected Selfe v. Smith, supra, to the extent of any conflict. In Rivera, plaintiff wife was permitted to recover for her emotional distress from her husband's death. An ambulance had smashed into the bench both plaintiffs were sitting on, throwing plaintiff wife backwards and injuring her head, and the husband lay pinned beneath the ambulance, bleeding profusely and mortally wounded.

We submit that the Rivera court failed to appreciate the distinction this Court would make the following year in Champion between distress caused by one's own injuries and distress caused by injuries to another. The Rivera court also failed to appreciate the significance of the fact that in National Car Rental the plaintiff's emotional distress was the result of his own wounds (which prevented him from helping his dying mother) and not solely the result of injuries to another. Since Rivera preceded Champion, there is no indication in the opinion as to whether plaintiff wife in Rivera met the "significant injury" and "temporal proximity" tests for recovery under Champion.

As recently pointed out in Reynolds v. State Farm Mutual Automobile Ins. Co., 611 So.2d 1294, 1296 (Fla. 4th DCA 1992), rev. den., 623 So.2d 494 (Fla. 1993):

> In essence, the impact rule stands for the proposition that before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional distress suffered must flow from physical injuries the plaintiff sustained in an impact. Thus, the impact rule precludes the recovery of damages for negligent infliction of emotional distress unless the emotional distress arises directly from the physical injuries sustained by the plaintiff in the impact.

In Reynolds, plaintiff and her "significant other" were involved in an auto accident. Plaintiff was knocked unconscious, and (among other things) suffered a concussion and a fractured clavicle; her "significant other" was killed in the accident. Plaintiff argued that her injuries clearly demonstrated that she had suffered an "impact," and hence that she should be permitted to recover for emotional distress arising out of her "significant other's" death in the same accident. The court rejected that claim, stating (671 So.2d at 1296):

> [Plaintiff's] first argument, that since she suffered an impact in the accident which killed Oswald, she can recover damages for emotional distress due to Oswald's death, is not supported by the law. To agree with her reasoning would create for every injured accident victim a cause of action for negligent infliction of emotional distress due to the death or injury of any other person involved in the accident.

The Reynolds court concluded that plaintiff was not entitled to recover for emotional distress due to the death of her "significant other," reasoning that her claimed psychic injuries were not the

result of the impact, but rather were the result of the death of her "significant other."

Similarly in the present case, Meek's claimed psychic injuries are not the result of the "impact" of shards of glass falling on her, or of inhaling smoke, but rather are the result of her father's death. As the Reynolds court pointed out, the emotional distress must be the result of the impact; it is not sufficient that there be an impact and emotional distress. Before there can be a recovery for emotional distress, that distress must result from the impact. Reynolds v. State Farm Mutual Automobile Ins. Co., supra. Here, as in Reynolds, that requirement has not been met.

Just as the Champion line of cases requires the existence of significant physical impairment flowing directly (and with reasonable promptness) from the emotional distress, the impact rule cases require that the emotional distress flows directly from the physical impact. The impact rule prohibits the recovery of emotional distress damages unless they are accompanied by physical injury to the plaintiff. As the Reynolds court pointed out, a contrary holding would give every injured accident victim a cause of action for emotional distress due to the death or injury of other persons involved in the same accident.

In essence, the impact rule requires that, before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional distress suffered must flow directly from physical injuries the plaintiff sustained in the impact. Reynolds

v. State Farm Mutual Automobile Ins. Co., supra; Swerhun v. General Motors Corp., supra. Thus, for instance, the inhalation of radioactive asbestos dust was held in Landry v. Florida Power & Light Corp., supra, to satisfy the requirement of an "impact," but plaintiff's claim for negligent infliction of emotional distress was nonetheless disposed of by summary judgment because, although there was emotional distress, there had been no resulting physical injury.

Even apart from the fact that Meek's psychic injuries do not flow from the "impact" or any personal injury, but instead flow from her father's tragic death, Meek still cannot satisfy the requirements of the impact rule for a very fundamental reason; there simply was no "impact" here.

Contrary to Meek's contention, it is not every physical contact with the plaintiff, no matter how minor, which is sufficient to constitute an "impact." Thus, for instance, the "impact" of being handed a hold-up note by a bank robber does not meet the requirements of the impact rule. Davis v. Sun First National Bank of Orlando, 408 So.2d 608 (Fla. 5th DCA 1981), rev. den., 413 So.2d 875 (Fla. 1982). Likewise, receiving an unlawful cancellation notice for an insurance policy is not an "impact." Saltmarsh v. Detroit Automobile Inter-Insurance Exchange, 344 So.2d 862 (Fla. 3d DCA 1977). Again, receiving a copy of an unexecuted claim for non-payment for medical services does not constitute an "impact." Steiner and Munach, P.A. v. Williams, 334 So.2d 39 (Fla. 3d DCA 1976), cert. den., 345 So.2d 429 (Fla. 1977).

Meek relies on Clark v. Choctawhatchee Electric Cooperative, Inc., 107 So.2d 609 (Fla. 1958), and Eagle-Picher Industries, Inc. v. Cox, supra, for the proposition that any contact, no matter how minor, is in and of itself sufficient to satisfy the requirements of the impact rule. In Clark, the impact requirement was satisfied by the fact that plaintiff sustained an electrical shock. However, that electrical shock, resulting from a fallen 7,200 volt electric line, was strong enough to burn a hole in a nearby bucket, put pumps out of commission, and set afire the woods at some distance (107 So.2d at 611). It created a blinding flash that lit the building with "blue fire" and caused immediate physical injuries (plaintiff's tongue thickened, her legs began to ache, then buckled, and she fell to the ground), as well as directly resulting in emotional disturbance. That electric shock was hardly the "minimal" contact Meek seeks to portray. Here, in contrast, neither the shards of glass nor the billows of smoke caused any physical injury to Meek.

Eagle-Picher is the only case cited by Meek that lends any support whatsoever to Meek's claim that the most minor and technical contact can constitute an "impact" so as to support a claim for negligent infliction of emotional distress. In that case, the Third District found an "impact" in plaintiff's inhalation of asbestos fibers. We submit that Eagle-Picher was wrongly decided in this regard, and that the District Court was "reaching" for what it perceived to be a just result in finding that inhalation of asbestos fibers constituted an impact.

Moreover, in Eagle-Picher the emotional distress damages sought (for fear of contracting cancer) were the direct result of that "impact" -- unlike the instant case, in which emotional distress damages are sought as a result of something other than (and essentially unrelated to) the contact involved. Indeed, the court in Landry v. Florida Power & Light Corp., 799 F.Supp. 94, 96 (S.D. Fla. 1992), specifically distinguished Eagle-Picher on the basis that the plaintiff in Eagle-Picher suffered a physical injury (asbestosis) as a direct result of the "impact," while plaintiff in Landry had shown emotional distress but no resulting physical injury.

The teaching of these cases is that the impact must be significant in leading to the physical injury in order to constitute an "impact" for purposes of the impact rule. As this Court stated in Champion (478 So.2d at 19, fn. 1);

> Mental distress unaccompanied by such physical consequences, on the other hand, should still be inadequate to support a claim; nonphysical injuries must accompany and flow from direct trauma before recovery can be claimed for them in a negligence action.

Meek does not meet this test: the falling shards of glass did not themselves cause either psychic or physical injury.

As noted above, the 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. The falling shards of glass in this case do not provide any such assurance. The fact that shards of glass fell on Meek (but did not cut or otherwise injure her) does not assist in proving

causation between the claimed damages and the emotional shock, nor does it in any way demonstrate the genuineness of Meek's emotional distress claim. Calling this an "impact," in short, does not advance any of the policies of the impact rule.

Ellington v. United States, supra, is instructive concerning Meek's position regarding minor and technical "impacts." In that case, plaintiff sought to recover for the emotional damages she sustained as a result of the injury to, and death of, her brother.[11] An Air Force bomber had crashed approximately 430 feet from plaintiff's residence (she was inside the residence at the time) and plaintiff felt a temperature and pressure change and heard the explosion caused by the burning aircraft. She immediately went to look for her brother, who appeared shortly thereafter, badly burned by flames from the aircraft. Much of the brother's clothing had been burned off, and the remaining clothing was smoldering. Plaintiff touched her brother's clothes and sustained a minor burn to the hand which healed within a few days without medication or residual scars. The brother was hospitalized and died several days later as a result of his burns.

Like Meek, plaintiff in Ellington experienced nightmares, had trouble sleeping, and thought frequently of the accident, as well as being bothered by noises, and became withdrawn following the

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[11]Analytically, Ellington would not come within the traditional impact rule analysis, since it involved distress due to injury or death of another. However, Ellington was decided ten years prior to the Champion court's pointing out this distinction, and accordingly employed a traditional impact rule analysis.

incident. Relying on the impact rule, the court in Ellington refused to permit recovery for emotional distress damages, determining that the temperature and pressure changes which plaintiff felt as a result of the explosion, and the burn on her hand, were not sufficient to satisfy Florida's "impact" requirement. For precisely the same reasons, the shards of glass and billows of smoke on which Meek relies to satisfy the requirement of an "impact" are simply insufficient to meet the requirements of Florida's impact rule.

Prior to Champion v. Gray, supra, the impact rule, although often criticized, was repeatedly recognized as being the law of Florida.[12] Even after Champion v. Gray, the impact rule continues to apply in those cases (such as the present one) where the requirements of Champion v. Gray are not met. Nadeau v. Costley, 19 F.L.W. D112 (Fla. 4th DCA 1994); Gonzalez v. Metropolitan Dade

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[12]Herlong Aviation, Inc. v. Johnson, 291 So.2d 603 (Fla. 1974); Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974); International Ocean Telegraph Co. v. Saunders, 32 Fla. 434, 14 So. 148 (1893); American Federation of Government Employees v. DeGrio, 454 So.2d 632 (Fla. 3d DCA 1984), approved, 484 So.2d 1 (Fla. 1986); Rivera v. Randle Eastern Ambulance Service, Inc., supra; Truesdell v. Proctor, 443 So.2d 107 (Fla. 1st DCA 1983); National Car Rental System, Inc. v. Bostic, supra; Davis v. Sun First National Bank of Orlando, 408 So.2d 608 (Fla. 5th DCA 1981), rev. den., 413 So.2d 875 (Fla. 1982); Moores v. Lucas, 405 So.2d 1022 (Fla. 5th DCA 1981); Claycomb v. Eichles, supra; Selfe v. Smith, supra; Woodman v. Dever, 367 So.2d 1061 (Fla. 1st DCA 1979); Butler v. Lomelo, supra; Saltmarsh v. Detroit Automobile Inter-Insurance Exchange, supra; Steiner and Munach, P.A. v. Williams, supra; Brooks v. South Broward Hospital District, 325 So.2d 479 (Fla. 4th DCA 1975), cert. den., 341 So.2d 290 (Fla. 1976); Pazo v. Upjohn Co., 310 So.2d 30 (Fla. 2d DCA 1975); Arcia v. Altagracia Corp., 264 So.2d 865 (Fla. 3d DCA 1972); Hollie v. Radcliffe, 200 So.2d 616 (Fla. 1st DCA 1967); Swerhun v. General Motors Corp., supra; Ellington v. United States, supra.

County Public Health Trust, 626 So.2d 1030 (Fla. 3d DCA 1993); Squros v. Biscayne Recreation Development Co., supra; Lavis Plumbing Services, Inc. v. Johnson, 515 So.2d 296 (Fla. 3d DCA 1987).

In late 1992, this Court once again reaffirmed the continuing vitality of the impact rule in Kush v. Lloyd, 616 So.2d 415 (Fla. 1992). In Kush, this Court created an exception to the impact rule for "wrongful birth" cases, but declined to abrogate the impact rule in its entirety; indeed the Court specifically pointed out (at 423, fn 5) that the "essence of the impact rule remains intact." The public policies supporting the impact rule remain viable. No reason exists for this Court to reverse the position so recently taken in Kush.

The impact rule gives practical recognition to the thought that not every injury one person may negligently inflict on another should be compensated in money damages; there must be some level of harm which one should absorb without recompense as the price for living in organized society. Champion v. Gray, 478 So.2d 17, 18 (Fla. 1985) (quoting with approval Judge Reed's dissent in Stewart v. Gilliam, 271 So.2d 466, 477 (Fla. 4th DCA 1972), quashed, 291 So.2d 593 (Fla. 1974)).

The impact rule demonstrates a recognition that awarding compensation for any injury imposes costs not only on the defendant, but on society as a whole. As a society, we have determined as a matter of policy that there are some injuries for which no compensation may be had or for which any remedy must be

severely limited. There is nothing especially novel about the concept of negligently-caused damages being unrecoverable in certain situations. For instance, there can be no recovery for an injury that was not a reasonably foreseeable consequence of the defendant's negligence, even though the negligence was a cause-in-fact of the injury.[13] Even if a person's negligence is a cause-in-fact of another's loss, that person will not be held liable if an independent unforeseeable act intervenes to also cause the loss.[14] Nor will a negligence action lie to recover solely economic losses where there is neither personal injury nor property damage.[15] In these situations and numerous others (such as workers' compensation or no-fault auto accident statutes), other public policies have been determined to outweigh the policy favoring full recovery of all negligently-caused damages. The same is true for the impact rule.

The three public policy reasons most often cited as supporting the impact rule are: (1) the difficulty in proving causation between the claimed damages and the alleged fright or shock; (2) the fear of fraudulent or exaggerated claims; and (3) the possible

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[13]Concrete Construction, Inc. v. Petterson, 216 So.2d 221 (Fla. 1968); Winn-Dixie Stores, Inc. v. Carn, 473 So.2d 742 (Fla. 4th DCA 1985), rev. den., 484 So.2d 7 (Fla. 1986); Atlantic Coast Line R. Co. v. Ponds, 156 So.2d 781 (Fla. 2d DCA 1963).

[14]Department of Transportation v. Anglin, 502 So.2d 896 (Fla. 1987); Nicholas v. Miami Burglar Alarm Co., 339 So.2d 175 (Fla. 1976).

[15]AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So.2d 180 (Fla. 1987); Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d 899 (Fla. 1987).

flood of litigation. Stewart v. Gilliam, supra, at 472. In addition, this Court has noted the need "to place some boundaries on the indefinable and unmeasurable psychic claims." Champion v. Gray, supra, at 20. Those public policies remain as viable and important today as they ever were. No reason exists to retreat from this Court's reaffirmation of the impact rule in Champion in 1985 and in Kush in 1992.

As noted in Eagle-Picher Industries, Inc. v. Cox, supra, the Florida courts in psychological injury cases have kept a vigilant -- and often inflexible -- watch over the floodgates. Before permitting recovery for emotional damages unconnected with physical injury, Florida courts have required that there be a recognizable impact.[16] A mere slight physical contact with some object is not sufficient. Absent a causal connection between the physical impact itself and a physical or psychological injury directly resulting from the impact (and no such connection is involved in this case), there is no cause of action for negligent infliction of emotional distress alone. The trial court correctly held that Meek had not sustained any "impact" sufficient to meet the requirements of Florida's impact rule, and the District Court of Appeal properly affirmed that holding.

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[16]As noted above, Florida law recognizes certain exceptions to the impact rule. The only exception Meek claims to apply here is the one established in Champion v. Gray, supra, discussed in Point II.

CONCLUSION

For all the reasons set forth above, the Court should accept jurisdiction and respond to the certified question by holding that temporal proximity between the initial psychic trauma and the onset of resulting significant physical impairment is an absolute prerequisite to establishing a cause of action under Champion v. Gray, and that the nine-month interval in the present case is too long a period, as a matter of law, to meet that temporal proximity requirement. The decision of the District Court of Appeal should be reversed as to the asserted cause of action under Champion v. Gray, and the cause remanded with directions to affirm the summary judgment entered by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished to Christopher C. Hazelip, Esquire, 1301 Gulf Life Drive, Suite 1500, Jacksonville, FL 32207; Sharon Lee Stedman,

Esquire, 1516 East Hillcrest Street, Suite 200, Orlando, FL 32803; and Arnold R. Ginsberg, Esquire, 410 Concord Building, 66 W. Flagler Street, Miami, FL 33130, by mail, this 15th day of July, 1994.

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