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.

REPLY BRIEF OF PETITIONERS

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ARGUMENT

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

The parties are in agreement that this Court has discretionary jurisdiction to review the District Court's decision in the instant case. Similarly, the parties agree (albeit for different reasons) that the Court should exercise that jurisdiction in this case. Accordingly, we will not belabor this point further.

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.

Meek argues that the temporal proximity requirement of Champion v. Gray, 478 So.2d 17 (Fla. 1985) (hereafter, "Champion"), is only a tool to assure that the emotional distress involved is real, and should therefore yield to sufficient indicia of genuineness. The case law, however, is to the contrary. It can hardly be disputed, for instance, that one would suffer genuine emotional distress from running over and killing one's own mother. In Brown v. Cadillac Motor Car Division, 468 So.2d 903 (Fla. 1985) (hereafter, "Brown"), decided by this Court the same day that it decided Champion, this Court declined to recognize a cause of action for emotional distress in those circumstances.

Similarly, no reasonable person would doubt the genuineness of an emotional distress claim by a young woman whose steady boyfriend of six years was killed while a passenger in the car she was driving. Yet, in Reynolds v. State Farm Mut. Auto. Ins. Co., 611 So.2d 1294 (Fla. 4th DCA 1992, rev. den., 623 So.2d 494 (Fla.

1993), it was held in precisely that situation that the young woman did not have a cause of action for her emotional distress due to his death.

Once again, there can be little doubt over the genuineness of a mother's emotional distress claim when her stillborn child's body was mutilated after being placed in a hospital laundry. Precisely that situation was held not to give rise to a Champion cause of action in Crenshaw v. Sarasota County Public Hosp. Board, 466 So.2d 427 (Fla. 2d DCA 1985).

These cases demonstrate that Champion's requirements[1] are intended to do more than simply demonstrate that there is genuine emotional distress. They also serve as limitations necessary "to place some boundaries on the indefinable and unmeasurable psychic claims." (478 So.2d at 20). Interestingly, although all three of these cases were discussed in our Initial Brief, neither Meek nor her amicus even mentions or Crenshaw. Meek notes Reynolds' existence in a footnote (at 43) without discussing it; the amicus brief ignores Reynolds. The amicus brief also ignores Brown. Meek candidly recognizes (Brief at 12) the fact situation in Brown, but never gives any reason why Brown and Reynolds should not control this issue.

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[1] Meek suggests (Brief at 47) that this Court modify Champion's requirements by adopting, in cases involving fear for one's own safety, a "zone of danger" test. This Court specifically rejected that test in Champion itself, and Meek has shown no reason for the Court to change that position -- especially since the present case does not involve any claim of damages resulting from Meek's fearing for her own safety.

Correctly recognizing that a crucial issue is whether the nine-month time lapse between Meek's father's death and the first physical manifestations of her claimed emotional distress meets the requirements this Court set forth in Champion (that physical injury appear "within a short time" of the psychic injury) both Meek and her amicus suggest that this Court should ignore its own prior pronouncements in Champion and hold that Meek has met that requirement. Meek argues that the "short time" requirement is not an independent requirement to stating a cause of action, but simply one factor in demonstrating the requisite causal relationship.[2] Her amicus argues that the "short time" requirement is dicta, and should either be ignored or evaluated on a case-by-case basis.

In Champion, a mother collapsed and died on the spot where her child had been killed in an auto accident; technically, the "short time" requirement in Champion is, indeed, dicta. However, it is also clear that this Court, in outlining the elements of the new

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[2]In pursuit of that theory, Meek attempts to factually distinguish Ledford v. Delta Airlines, Inc., 658 F.Supp. 540 (S.D. Fla. 1987), in which a four-month lapse between the traumatic event and the initial physical injury was held, as a matter of law, to be too long to meet Champion's "short time" requirement. Meek notes that plaintiff in Ledford was being treated by a psychiatrist before the traumatic event (his wife's involvement in an airplane crash) and that his injuries were suffered on the job as a result of being inattentive due to emotional distress. Meek admits (Brief at 22-23) that the Ledford court did not "explicitly" base its decision on these factors, but "must certainly have taken" this evidence into account. The Ledford court made no reference to this evidence in this regard, however, but rather simply held (at 542): "A lapse of four months does not, as a matter of law, satisfy this [temporal proximity] requirement." If a four-month lapse was too long to meet Champion's "short time" requirement as a matter of law in Ledford, the nine-month lapse in the instant case plainly fails, as a matter of law, to meet Champion's requirements.

cause of action it was recognizing, intended to do more than simply indicate that the time lapse between the traumatic event and the first physical manifestation of emotional distress was a factor to be considered (along with others) in determining if there is a causal relationship. This Court went out of its way to make that point clear, stating (478 So.2d at 19, emphasis added, 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.

If all this Court had intended was to note one factor to be considered in evaluating the causal connection, the words "or occur within a short time of" would have been wholly unnecessary, since the balance of the sentence plainly denotes the necessity for a causal connection. And, if that is all this Court meant, it seems highly unlikely that the Court would have begun that sentence with the words "We emphasize the requirement". (e.s.) Patently, this Court was delineating one of the requisite elements of the Champion cause of action -- temporal proximity between the psychic injury and a significant discernible physical impairment.

Meek and her amicus contend that the statute of limitations places the appropriate limit on the time lapse allowable between the traumatic event and the resulting physical injury. That claim suffers from a fundamental flaw: a statute of limitations (unlike a statute of repose) does not begin to run until the last element

of the cause of action has occurred.[3] In Champion, this Court made clear that a cause of action did not exist until plaintiff had suffered a significant discernible physical injury. Only then will the limitations period begin to run. In short, Meek suggests that the resulting physical injury must occur within four years[4] of the date the cause of action accrues, but ignores the fact that the cause of action does not accrue until there is a resulting physical injury. Meek's suggestion comes down to a claim that the physical impairment must occur within a short time of the physical impairment occurring -- an utterly meaningless statement.

This claim suffers from a related fundamental flaw as well: it would have the "short time" measured from the date the cause of action accrued (whenever the last of the elements of the cause of action came into being). In Champion, this Court clearly specified (478 So.2d at 19, footnote omitted, emphasis added) a different starting date: that the physical injury "must accompany or occur within a short time of the psychic injury."

Meek argues that we failed to say how long is "long enough," thus avoiding the question posed by the First District. True, we have not suggested any particular "cut-off date," other than to note that the court in Ledford v. Delta Airlines, Inc., 658 F.Supp. 540 (S.D. Fla. 1987), held as a matter of law that four months was

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[3]Kellermeyer v. Miller, 427 So.2d 343 (Fla. 1st DCA 1983); Birnholz v. Blake, 399 So.2d 375 (Fla. 3d DCA 1981).

[4]The statute of limitations for negligence actions is four years. Section 95.11(3), Florida Statutes.

too long to meet the "short time" requirement. Establishing a temporal "cut-off date" is not something which must be decided in this case -- all that need be decided here is whether a nine month interval is too long to meet Champion's "short time" requirement.

As we noted in our Initial Brief (at 21-22), there will be situations in which, as a matter of law, that requirement is met (for instance, the mother's collapse and death in Champion itself), and others in which the time lapse is clearly too great, as a matter of law, to meet that requirement (for instance, the nine-month lapse of time in the instant case). Other cases will present factual issues. As the case law develops, a narrowing and winnowing process will invariably establish the appropriate parameters for meeting Champion's "short time" requirement. But that issue need not be ultimately decided in the present case -- the issue in the instant case is simply whether a lapse of nine months is too long to meet Champion's "short time" requirement.

Meek suggests that, if an "arbitrary" time limitation is to be imposed, that period should be two years. Meek provides no rationale for picking that particular length of time (during which the vast majority of Meek's physical impairments began), and no such rationale suggests itself. Two years may be a "short time" in the life of a redwood tree, but by the same token it is an eternity in the life of a butterfly. We do not mean to be flippant; rather, our point is that what is a "short time" depends largely on context. Here, the context is that of emotional trauma sufficient to cause a significant, discernible physical impairment.

We submit that an emotional trauma sufficient to cause a significant discernible physical impairment would, in the normal course of events, manifest itself physically within days, or at most, weeks. An emotional trauma sufficient to cause, for instance, a heart attack would, we submit, normally do so within a matter of days. It is in this context that a lapse of nine months (or more in the case of some of the claimed physical impairments) must be held, as a matter of law, not to meet Champion's requirement that the physical manifestations accompany or occur within a short time of the traumatic event.[5]

Meek's amicus asserts that, for constitutional reasons, there can be no conclusive presumption that any particular period of time is too long to meet Champion's "short time" requirement, and that the issue must always be decided based on medical testimony. To the extent that Meek's amicus suggests that the certified question was not extremely well drafted, we concur, and have suggested

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[5]Meek's reliance on Wal-Mart Stores v. Tomlinson, 588 So.2d 276 (Fla. 1st DCA 1991), and Greater Miami Academy v. Blum, 466 So.2d 1263 (Fla. 1st DCA 1985), is misplaced. Initially, both those cases arise in a workers' compensation context -- a context in which the statute is liberally construed in favor of the employee and dependents, with all doubtful constructions resolved in favor of the employee. Kerce v. Coca-Cola Company - Foods Division, 389 So.2d 1177 (Fla. 1980); Sharer v. Hotel Corp. of America, 144 So.2d 813 (Fla. 1962); McCall v. Motor Fuel Carriers, 155 Fla. 854, 22 So. 2d 153 (1945). Moreover, both of those cases involved physical injuries which manifested themselves very shortly after the industrial accident, the issue being whether subsequently-developing mental injuries were causally connected. Thus, the Champion requirement that significant physical injury accompany or occur within a short time of the psychic trauma was not involved in these cases.

(Initial Brief at 14) an alternative form of the question directed more precisely at the issues involved in this case.

More to the point, however, no "conclusive presumption" need be involved in any event. Many issues which courts routinely dispose of as a matter of law could be framed in terms of "conclusive presumptions," thus precluding the courts, under the Academy's theory, from disposing of them as a matter of law. For instance, a summary judgment based on the running of the statute of limitations could be viewed as involving a "conclusive presumption" that too long a time had expired to permit plaintiff to maintain suit. Yet the courts remain free to grant summary judgments on limitations grounds. Likewise, if a court can hold, in an appropriate factual setting, that defendant did not, as a matter of law, act negligently, the same court can hold, in an appropriate factual setting, that too long a time has passed to meet Champion's "short time" requirement.

Meek seeks to buttress the validity of her position by pointing out that she immediately began manifesting psychic injury in the form of insomnia, depression, memory loss, etc. Despite Meek's claim to the contrary, these emotional and psychological manifestations do not qualify as the significant, discernible physical injury required by Champion. Instead, they mark the beginning point for the "short time" within which such a physical injury must appear.

As the District Court noted, Meek suffered insomnia, depression, short-term memory loss, extreme fear of loud noises and

bad dreams shortly after the bombing. Complaints of poor sleep, fear (of flying), and depression have been held not to be physical manifestations of a psychological injury. Geller v. Delta Air Lines, Inc., 717 F.Supp. 213 (S.D. N.Y. 1989) (applying Florida law). 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). Crying episodes, fear (of a heart attack), and panic attacks do not constitute the required physical injury. Ledford v. Delta Airlines, Inc., supra. For the same reasons, Meek's insomnia, depression, and the like do not constitute the required physical injury. Meek's first physical injury did not occur until a full nine months after the traumatic event.

Meek also contends that her stomach pains, chest pain, esophageal blockage, and joint problems constitute significant discernible physical impairment as required by Champion and Brown. In light of page limitations, we will not reiterate the argument contained in our Initial Brief (at 22-26), but rather adopt it by reference.

In the present case, the trial court correctly held that, as a matter of law, Meek had not met the "short time" and "significant physical injury" requirements of Champion. The District Court's contrary holding should be reversed.

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

Meek asserts that her inhalation of smoke and the shards of glass that fell on (but did not cut or otherwise injure) her constitute a sufficient "impact" for purposes of the impact rule, and hence that she is entitled to recover for the emotional distress she suffered -- even though that emotional distress is due to the death of her father, and not to the inhalation of smoke or the shards of glass. Florida law is to the contrary.

Meek cites (Brief at 34) Clark v. Choctawhatchee Electric Coop., Inc., 107 So.2d 609 (Fla. 1958), and Eagle-Picher Industries, Inc. v. Cox, 481 So.2d 517 (Fla. 3d DCA 1985), rev. den., 492 So.2d 1331 (Fla. 1986), for the proposition that even "the slightest physical contact" is "sufficient to demonstrate an impact"[6] -- and on the very next page dismisses Davis v. Sun First Nat. Bank of Orlando, 408 So.2d 608 (Fla. 5th DCA 1981), rev. den., 413 So.2d 875 (Fla. 1982), Saltmarsh v. Detroit Auto. Inter-Insurance Exchange, 344 So.2d 862 (Fla. 3d DCA 1977), and Steiner and Munach, P.A. v. Williams, 334 So.2d 39 (Fla. 3d DCA 1976), cert. den., 345 So.2d 429 (Fla. 1977), on the basis that the "impact" in those cases was "insufficient and de minimis."

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[6] As pointed out in our Initial Brief (at 37), the impact in Clark was far from minor or de minimis; that case involved a plaintiff who suffered a severe electrical shock as the result of the fall of a 7,200 volt electrical line, immediately causing her tongue to thicken and her legs to ache and buckle, causing her to fall to the ground.

More significantly, under the traditional impact rule, the emotional distress must result from the impact and not from surrounding events. Meek confuses the extent of emotional distress damages recoverable under Champion with the more limited extent of such damages recoverable under the impact rule. Under Champion a plaintiff may recover, in an appropriate case, all emotional damages resulting from the injury or death of a loved one. In conventional impact rule cases not meeting Champion's requirements, however, plaintiff's recoverable emotional distress is limited to that which results from plaintiff's own injuries.

As this Court phrased the point in Champion (478 So.2d at 19, n.1, emphasis added): "nonphysical injuries must accompany and flow from direct trauma before recovery can be claimed for them in a negligence action." Thus, in Reynolds v. State Farm Mut. Auto. Ins. Co., supra, plaintiff was injured and her fiance killed in an auto accident. Plaintiff argued that her injuries (she was knocked unconscious and, among other things, suffered a concussion and a fractured clavicle) demonstrated that she had suffered an impact, and hence should be permitted to recover for the emotional distress arising from her fiance's death in the same accident. The court rejected that claim as unsupported by law, noting that to agree with that rationale would create for every injured accident victim a cause of action for negligent infliction of emotional distress due to the death or injury of another person involved in the same accident.

Similarly, in Selfe v. Smith, 397 So.2d 348 (Fla. 1st DCA 1981), rev. den., 407 So.2d 1105 (Fla. 1981),[7] plaintiff and her infant son were both injured in a motor vehicle collision, and plaintiff sought to recover for her mental distress over the child's permanent facial injury, asserting that her own injury in the collision satisfied the impact rule. The trial court rejected that claim[8] and the District Court affirmed, holding (397 So.2d at 350) that satisfaction of the impact rule "has gained plaintiff damages for only that mental distress which is due to plaintiff's own injury, or to the traumatic event considered in relation to plaintiff alone." See also, Ellington v. United States, 404 F.Supp. 1165, 1167 (M.D. Fla. 1975) (even if burn to plaintiff's hand satisfied impact rule, Florida law would still deny recovery for mental anguish because it was not caused by plaintiff's own injury, but by injury to her brother in same incident).

If, as Meek claims, the purpose of the impact rule is to provide some indicia of genuineness of the emotional distress claim, the "impact" in this case provides no such indicia. Momentary inhalation of black smoke and having the pieces of a shattered light fixture fall on one without causing injury provide no evidence of genuineness of a claim of severe resulting emotional

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[7]The fact that this Court denied review in both Reynolds and Selfe seems to indicate that this Court did not find their holdings to be in conflict with other impact rule decisions.

[8]Selfe predates Champion and was decided under the traditional impact rule. Under Champion, the Selfe plaintiff probably could have recovered for her mental distress over the child's injury.

distress. Indeed, Meek does not claim that they do. Meek candidly admits that the emotional distress damages she seeks to recover are for the death of her father, not for the results of the "impact."

As noted in our Initial Brief (at 32), this Court in Champion pointed out the dichotomy between claims for emotional distress resulting from the death or injury of a loved one (in which case Champion applies and plaintiff can recover for distress over the loved one's injuries) and emotional distress due to an impact to the plaintiff (in which case the impact rule applies and plaintiff can recover for distress resulting from plaintiff's own injuries). Despite Meek's protestations to the contrary,[9] that dichotomy makes

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[9]Meek protests (Brief at 40-41) that it makes no sense to permit recovery for emotional distress when a heart attack is caused by seeing one's child dead at an accident scene (as in Champion) but to prohibit recovery for emotional distress where the heart attack is caused by a car crashing into one's house (as in Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974)). Assuming arguendo that these situations should be treated the same way despite the difference in severity of the emotional trauma involved (seeing one's child dead from an auto accident versus having a car hit the house) and the difference in immediacy of the heart attack (Mrs. Champion collapsed and died on the spot, while Mrs. Stewart went outside to see what had happened, began suffering chest pains fifteen minutes after returning to the house, and was in the hospital two hours later), they can be easily reconciled without a wholesale abandonment of logic or precedent.

If this Court's 1974 Gilliam decision now seems too harsh in light of its 1985 Champion decision, a slight extension of Champion would eliminate any such harshness, while retaining the eminently-reasonable requirement of a causal connection between the impact or near-impact and the emotional distress. All that is required is a slight extension of Champion, consistent with Reynolds and Selfe, so as to permit plaintiff to recover (where Champion's other requirements have been met) where the emotional distress is due to fear for plaintiff's own safety, as well as where it is due to anguish over injury to a loved one. If the claimed emotional distress does not result either from impact or from fear for one's own safety (the situation in the present case), plaintiff would still be permitted to recover for emotional distress if the requirements of Champion have been met -- which has not been done

perfectly good sense. If the plaintiff's emotional distress is caused by something other than the direct results of the impact (in this case, for instance, the death of her father) the impact clearly is not causally connected to the emotional distress and the presence or absence of an impact is logically irrelevant. If the impact itself did not cause the emotional distress, the fact that there was an impact is irrelevant and should not open the door to recovery of emotional distress caused by other matters.

Both the trial court and the District Court correctly held that Meek was not entitled to recover under the impact rule. That portion of the District Court's holding should be affirmed.

CONCLUSION

For all the reasons set forth above and in the Initial Brief, 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, and that the nine-month interval in the present case is too long a period, as a matter of law, to meet that requirement. The decision of the District Court of Appeal should be reversed as to the asserted cause of action under Champion, and the cause remanded with directions to affirm the summary judgment entered by the trial court.

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in the present case.

Since the present case does not involve emotional distress resulting from Meek's fear for her own safety, however, the Court need not reach that issue in this case.

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 17th day of October, 1994.

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