IN THE SUPREME COURT OF FLORIDA

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CASE NO. 85,012
SECOND DCA CASE NO. 94-00833

JOHN D. RUSSO,

Petitioner,

vs.

SERA-TEC BIOLOGICALS, INC., and
GEORGE M. REIS, M.D.,

Respondents.

**ANSWER BRIEF OF
RESPONDENTS, SERA-TEC BIOLOGICALS, INC.
AND GEORGE M. REIS, M.D.**

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<u>STATEMENT OF CASE AND FACTS</u>*

This is an appeal from a dismissal of a complaint with prejudice. [R. 59-60] The trial court ruled that the complaint could not state a cause of action under the decisional law. The Second District originally entered a *per curiam* affirmance without citation or opinion. In response to a motion for clarification, the District Court substituted a "citation PCA" decision referencing the case of *R.J. v. Humana of Florida, Inc.*, 625 So.2d 116 (Fla. 5th DCA 1993), *rev. granted* 634 So.2d 626 (Mar. 4, 1994). [Aff'd. 20 Fla. L. Weekly S103 (Fla. March 2, 1995)]

Russo's complaint alleged that he donated blood at Sera-Tec, a blood donor clinic, on August 21, 1989. [R. 1-11] A portion of this blood was sent to the Highland division of Travenal Laboratory, Inc., Plasma Screening Laboratory for various screening, including a test for the HIV virus. Highland's screening tests were positive for HIV on both August 29, 1989 and again on September 5, 1989 when a duplicate screening was performed. Russo alleged that these results were reported to Sera-Tec. [R. 1-11]

On October 26, 1989, Russo again returned to Sera-Tec to donate blood. Russo alleged that he was told he could not donate blood and must speak with Dr. Reis, a Sera-Tec employee. [R. 1-11] Russo claimed that Dr. Reis told him

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* The Symbol "R" refers to the Index to the Record on Appeal.

The Symbol "T" refers to the transcript of the January 26, 1994, hearing.

that he had tested positive for HIV and gave him instructions for clinical follow up. [R. 1-11] Dr. Reis did not retest Russo.[1]

Three years later, Russo sought treatment in a Connecticut hospital for a cold and sore throat. Blood drawn in Connecticut showed that Russo was not HIV positive and did not have AIDS. This information was communicated to Russo, who then filed suit.

Dr. Reis and Sera-Tec moved to dismiss the complaint on the ground that it was barred by the impact rule. [R. 33-35, 36-38] As support for the motion, the case of *R.J. v. Humana of Florida, Inc. supra,* was cited in which a claim for misdiagnosing a plaintiff as HIV positive was dismissed with prejudice on the grounds it was barred by the impact doctrine. At the hearing on the motion to dismiss, Russo stipulated to the absence of impact and acknowledged that the *R.J.* case was controlling. [T. 6] The trial court, acknowledging case law which requires a trial judge to follow the decisional law of the District Court of Appeal, granted the motion to dismiss with prejudice. [T. 15-16, R. 59-60] Following affirmance by the Second District, this petition followed.

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[1]Although not germane to this appeal, Sera-Tech and Dr. Reis assert that Russo was not told that he tested positive for HIV; rather, Russo was told that he could no longer donate plasma because he cohabited with another person who had in fact tested positive for the HIV virus. (1/26/94 transcript, page 8)

ISSUES

I. WHETHER THE TRIAL COURT AND DISTRICT COURT PROPERLY FOLLOWED SETTLED LAW BY HOLDING THAT THE IMPACT RULE BARS RUSSO'S CLAIM THAT HE WAS NEGLIGENTLY ADVISED THAT HE TESTED HIV POSITIVE.

II. WHETHER THE COMPLAINT WAS PROPERLY DISMISSED WITH PREJUDICE WHERE IT WAS CLEARLY NOT AMENDABLE.

ARGUMENT SUMMARY

Russo's claim was properly dismissed. Russo conceded that he suffered no physical trauma or injury and cannot satisfy the impact rule.

The parties and all lower courts acknowledge that the *R.J. v. Humana* case is controlling. In that decision, issued approximately two months ago, this Court reaffirmed the ongoing validity of the impact rule and specifically held that it applies to bar a claim for damages from a negligent HIV diagnosis. This Court said it rejected the "argument that, as a matter of public policy, this Court should create a limited exception to the impact rule for a negligent HIV diagnosis." The issue does not require further review. Russo's prior stipulation that the *R.J. v. Humana* decision is binding should prevent him from attempting to avoid that case now.

ARGUMENT

II. THE TRIAL COURT PROPERLY FOLLOWED SETTLED LAW BY HOLDING THAT THE IMPACT RULE BARS RUSSO'S CLAIM THAT HE WAS NEGLIGENTLY ADVISED THAT HE TESTED HIV POSITIVE.

A. This Court has recently decided the precise issue presented in this case and has reaffirmed the applicability of the impact rule and this Court has specifically rejected arguments similar to Russo's.

In the case of *R.J. v. Humana of Florida, Inc.*, 625 So.2d 116 (Fla. 5th DCA 1993), *affirmed,* 20 Fla. L. Weekly S103 (Fla. March 2, 1995), this Court considered the precise issue presented in the instant case. In a unanimous decision, this Court affirmatively answered a certified question which asked "does the impact rule apply to a claim for damages from a negligent HIV diagnosis?"

The public policy and long history behind the impact rule was fully explained in the *R.J.* decision approximately two months ago. This Court stated:

> We reaffirm today our conclusion that the impact rule continues to serve its purpose of assuring the validity of claims for emotional or psychic damages, and find that the impact rule should remain part of the law of this state. Consequently, we reject *R.J.'s* request that abolish the impact rule. We also reject *R.J.'s* argument that, as a matter of public policy, this Court should create a limited exception to the impact rule for a negligent HIV diagnosis.

R.J. v. Humana, supra at S104.

This Court explained its decision that no cause of action can be stated for a complaint which alleges that the plaintiff was erroneously told that he has contracted the HIV virus. This Court said

> We could not limit an exception for negligent misdiagnosis to cases specifically involving the HIV virus while excluding other terminal illnesses. Moreover, it would be exceedingly difficult to limit speculative claims for damages in litigation under such an exception. Given that the underlying policy reasons for the impact rule still exists, we find that no special exception is justified under the circumstances of this case.

R.J. v. Humana, *supra* at S104.

Continued adherence to this rule and rationale is even more compelling in the instant case than in the *R.J.* decision. In *R.J.*, the plaintiff alleged that he was told he had contracted AIDS based upon a single blood test. In contrast, it is alleged that Russo's blood was tested on two occasions before the negligent diagnosis was communicated.

B. The impact rule is firmly established in Florida law and should not be abandoned or limited in this case.

Russo fails to cite or acknowledge this court's controlling opinion in the *R.J.* case which specifically addresses all issues raised in the instant appeal. Instead, Russo urges this court to create an exception to the impact rule for his claim. Russo's argument presents nothing that the courts have not already considered and rejected in earlier, carefully reasoned decisions. Russo fails to demonstrate any basis for creating an exception to the impact rule for his particular

claim. Further, Russo's prior stipulation that the *R.J. v. Humana* case is controlling should preclude him from now seeking to avoid this decision.

Florida's Impact Rule

The impact rule has been part of Florida law for over a century. *International Ocean Telegraph Co. v. Saunders,* 32 Fla. 434, 14 So. 148 (1893); *R.J. v. Humana, supra.* Under Florida law, a plaintiff seeking to recover damages for "mental" or "emotional" distress, must fit within one of two factual scenarios; (1) the defendant causes the plaintiff to suffer a direct, physical injury which then gives rise to mental distress. Where this occurs, the plaintiff may recover damages for the mental pain and anguish which accompanies the physical injury. *See Generally*: 17 FLA. JUR. 2d *Damages* § 85 (1980). Absent an initial physical injury, there is no compensation for mental anguish. *Butchikas v. Travelers Indemnity Co.,* 343 So. 2d 816, 817 (Fla. 1976); *Stetz v. American Gas. Co. of Heading Pa.*, 368 So. 2d 912, 913 (Fla. 3rd DCA) *cert. denied,* 378 So. 2d 349 (Fla. 1979); (2) a party witnesses an event or experiences something which causes emotional distress if there is a direct infliction of a contemporaneous "physical impact" upon the plaintiff. *See Gilliam v. Stewart,* 291 So. 2d 593, 594-595 (Fla. 1974); *Truesdell v. Proctor,* 443 So. 2d 107, 108 (Fla. 1st DCA 1983), *rev. denied,* 453 So. 2d 1365 (Fla. 1984); *Ellington v. United States,* 404 F. Supp. 1165, 1167 (M.D. Fla. 1975).

The "impact rule" requires a plaintiff to demonstrate that the defendant's negligent conduct inflicted a direct and injurious physical trauma on the plaintiff's

person. *R.J. v. Humana, supra*; *Champion v. Gray*, 478 So. 2d 17, 19 n. 1 (Fla. 1985); *Brown v. Cadillac Motor Car Div.*, 468 So. 2d 903, 904 (Fla. 1985); *Gilliam*, *supra* at 594-595; *Reynolds v. State Farm Mutual Auto Ins. Co.*, 611 So. 2d 1294, 1296 (Fla. 4th DCA 1992), *rev. denied,* 623 So.2d 494 (Fla. 1993) This requirement follows Florida's public policy to "compensate for physical injuries . . . [and the] physical and mental suffering which flows from the consequences of physical injuries." *Champion*, *supra* at 20. Absent a direct physical trauma or injury inflicted by the defendant's negligent act, the impact rule bars a plaintiff's recovery for emotional distress even where some derivative physical injury ultimately occurs from the negligently inflicted mental distress. *Gilliam*, *supra* at 594-595.

This Court has repeatedly ruled that plaintiff cannot recover where only emotional distress is claimed because "physical impact from an external force . . . imposed upon the injured person is an absolute prerequisite for any recovery from mental distress" *Gilliam*, *supra* at 594.[2] The Court expressly declared that there was no "valid justification to recede from the longstanding decisions of this court" upholding and applying the impact rule. *Id.* at 595

[2]On the same day, the court also reversed a second district decision that the impact rule was no longer valid. *Herlong Aviation Inc. vs. Johnson,* 291 So. 2d 603 (Fla. 1974).

Approximately a decade after *Gilliam*, this Court carved out a limited exception to the impact rule to permit recovery from mental distress without direct physical injury caused by a defendants negligent act only if

> 1. the mental distress resulted from the plaintiff's direct involvement in an event which inflicted injury upon a close family member; <u>and</u>
>
> 2. the mental distress caused the plaintiff to suffer contemporaneously a "<u>significant discernable physical injury</u>."

Champion, *supra* at 18-19, 20.

The exception carved by the court allowed the *Champion* plaintiff to recover. In that case, a mother heard the defendant's car strike her daughter, immediately went to the scene, then collapsed and died on the spot when she viewed her daughter's lifeless body. In allowing the mother's estate to proceed with a claim for emotional distress, this Court carefully emphasized the requirement of a "<u>causally connected clearly discernable physical impairment</u>," occurring instantaneously or within a very short time of the traumatic event claimed to cause the emotional distress. *Id.* at 19, 20. Moreover, in *Brown, supra,* this Court explicitly held that the emotional distress "must cause a demonstrable physical injury <u>such as death, paralysis, muscular impairment</u>, or similar objectively discernable physical impairment before a cause of action may exist. *Brown*, *supra* at 904.

There is no question that the impact rule remains the law of this state. The rule announced in the *Gilliam, Champion* and *Brown* cases was expressly

reaffirmed by the Court in the cases of *Eastern Airlines, Inc. v. King,* 557 So. 2d 574 (Fla. 1990), *Kush v. Lloyd,* 616 So. 2d 415 (Fla. 1992), and yet again in the *R.J. v. Humana* case.

C. The principals of *stare decisis* require application of the impact rule.

Although invited to abandon the impact rule on numerous occasions, this Court has consistently refused to do so. While it has carved out narrow exceptions to the rule for certain discrete types of cases, it has specifically applied the impact rule to a negligence claim which is factually identical to the one asserted against Sera-Tec and Dr. Reis. *R.J. v. Humana, supra.* By this action, this Court has followed the principle of *stare decisis,* which provides that a court should not lightly overrule past decisions to ensure that "the law will not merely change erratically, but will develop in a principled and intelligible fashion". *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

Adherence to *stare decisis* acknowledges the need for the law to furnish a clear guide to individuals so that they can plan their conduct without fear of unfair surprise. *Bonner v. City of Pritchard,* 661 F. 2d 1206, 1209-10 (11th Cir. 1991); *Vasquez, supra* at 265-266; *Strazzulla v. Hendrick,* 177 So. 2d 1, 3 (Fla. 1965). Because of the abundant precedent upholding the impact rule, Sera-Tec and Dr. Reis are plainly entitled to rely upon this rule as a settled legal limitation of liability. Because the extent of liability for a mental distress claim is wholly unpredictable is well recognized, the need for clear judicial guidelines on this type

of claim is particularly critical. Abandoning the impact rule, or creating the broad exception Russo seeks would necessarily introduce confusion into the law which would make it impossible for health care professionals and businesses to predict the future consequences of their alleged negligence so they could price their services to accommodate those costs.[3]

Stare decisis also advances the courts' interest in fair and timely adjudication because there is no need to relitigate every theory in every case. *Bonner*, *supra* at 1209-10; *Strazzulla*, *supra* at 3.

Finally, *stare decisis* recognizes that public confidence in the judiciary can be maintained only through consistently reasoned, impersonal judgments. *Bonner*, *supra* at 1209-1210; *Vasquez*, *supra* at 265-266; *Strazzulla*, *supra* at 2. The doctrine of *stare decisis* "permits society to presume that bedrock principles are founded in the law rather then in the proclivities of individuals". *Vasquez*, *supra* at 265. Judicial decisions should be based upon application of well reasoned principles rather than on sympathy for a particular claim.

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[3]A fundamental consideration in imposing tort liability is the ability of a party, through prices, insurance, etc. "to distribute to the public at large the risks and losses which are inevitable in a complex civilization". W. Page Keeton, et al., *Prosser and Keeton On The Law Of Torts*, Section 4, at 24-25 (5th Edition 1984). Under the established precedent, Sera-Tec and Dr. Reis were clearly not subject to liability for a claim like Russo's. At the very least, equity would require making any such abrupt and dramatic change in the law prospective only. *Int'l Studio Apartment Ass'n, Inc. vs. Lockwood*, 421 So. 2d 1119, 1120-23 (Fla. 4th DCA 1982), *rev. den.* 430 So. 2d 451 (Fla.), *cert. den.* 464 U.S. 895 (1983); *Dep't of Revenue vs. Anderson,* 389 So. 2d 1034, 1037-1039 (Fla. 1st DCA 1980), *rev. den.* 399 So. 2d 1141 (Fla. 1981).

D. Russo presents no meritorious reason for abandoning or receding from the impact rule in this case.

Departure from the established precedent of this state "demands special justification". *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984). Russo bears a "heavy burden of persuading the court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective". *Vasquez, supra* at 266. Russo has failed to carry his burden. He has not provided an adequate justification for abandoning the impact rule or creating new exceptions to this established precedent which was again reaffirmed less than three months ago.

E. There is no policy justification for creating the exception sought by Russo.

In arguing that the impact rule should not be applied to his case as a "matter of public policy", Russo leans heavily upon the limited "wrongful birth" exception adopted in *Kush*. There is nothing "unique" about Russo's claim that justifies a special exception to the impact rule. Indeed, this Court has specifically rejected application of the *Kush* result in circumstances precisely like Russo's. *R.J. v. Humana, supra* at 6-7. As this Court explained, there can be no exception to the impact rule for a negligent diagnosis that should be logically limited to HIV. This Court explained that creating the exception Russo seeks would subvert the impact rule. If an exception were appropriate in the case of an erroneous HIV-positive diagnosis, there would be no reason to limit the exception to exclude the

misdiagnosis of any life-long condition or life threatening illness. The mental distress a person experiences upon being erroneously advised about the existence of cancer, other debilitating disease, the occurrence of a fetal deformity, or even the occurrence or non-occurrence of a pregnancy is felt just as sharply. The impact rule exists to insulate society from the tremendous cost such expansive and indefinite liability would impose. There is simply no reason to take any step down that "slippery slope" in the instant case.

Russo ignores the governing case law from this Court and relies on decisions from other states. None of the trio of foreign cases cited by Russo serve as a basis for overturning the well settled Florida law. The Illinois case of *Corgen v. Muehling*, 574 N.E.2d 602 (Ill. 1991), and *St. Elizabeth Hosp. v. Garrard.* 730 S.W.2d 649 (Texas 1987) are factually irrelevant. The *Corgen* case arose from a claim for emotional damages against a psychologist who "repeatedly engaged in sexual intercourse with [the plaintiff] 'under the guise of therapy'". The *St. Elizabeth Hospital* case stemmed from an improper disposition of the remains of a still born baby. Neither scenario has any relevance to the instant question. The case of *Bramer v. Dotson,* 437 S.E. 2d 773 (W. Va. 1993) is unpersuasive because West Virginia holds that a person may recover for the negligent infliction of emotional distress, without accompanying physical injury where there is a showing that the emotional distress claim is "not spurious". This nebulous standard is not the law in Florida.

Currently, Florida is suffering from a medical crisis and a lack of quality medical services. *University of Miami v. Escharte*, 618 So.2d 189 (Fla. 1993), *McGibony v. Florida Birth Related Compensation Plan*, 564 So. 2d 177 (Fla. 1st DCA 1990). This is the reason for the legislature's passage of the Comprehensive Medical Malpractice Reform Act. Florida Statute Section 766.201 (1)(a)(c) 1989) states: "the average cost of defending a medical malpractice claim has escalated in the past decade to the point where it has become imperative to control such costs in the interest of the public need for quality medical services". Continued strict adherence to these legal elements is essential to keep the flood gates closed and prevent exposing the judicial system to an unlimited number of claims from persons subject to the fear of a disease.

F. Russo's claim for emotional distress does not satisfy the impact rule as a matter of law.

Russo has readily acknowledged and stipulated to the fact that he has sustained no impact. This concession precludes Russo from either pleading or proving all of the essential elements for a claim for emotional distress.

G. Russo has not suffered any discernable physical injury as required by the impact rule.

Russo does not suffer from any debilitating physical trauma. Russo did not develop any infection at the site where the blood was withdrawn, nor did he require any care or treatment relating directly to the routine withdrawal of blood for laboratory analysis. Rather, his claim his claim stems from his alleged

emotional reaction as the result of what he claims he was told after the blood was analyzed. Russo's claim relates entirely to worry or concern when he allegedly thought he was HIV positive. In *Brown v. Cadillac Motor Car Div.*, *supra*, this Court stated that "to be actionable, the psychological trauma suffered must produce a demonstrable physical injury such as death, paralysis, muscular impairment or similarly objective discernable physical impairment". *Id.* at 904. When the elements of negligent infliction of emotional distress are applied to the instant case, Russo's alleged injuries do not meet the requirements of *Brown*. His complaint simply alleges that he incurred "unspecified mental pain and suffering". This allegation does not rise to the level of objectively discernable physical impairment as set forth by this Court's decisions.

Even a "fear of" claim cannot constitute an identifiable physical injury. *Burk v. Sage Products, Inc.*, 747 F. Supp. 285 (E.D. Pa., 1990); *Ledford v. Delta Airlines, Inc.*, 658 F. Supp. 540 (S.D. Fla., 1987). In *Ledford*, the trial court granted defendant's motion for summary judgment after concluding that the plaintiff had not adequately pled or proven the occurrence of either significant or objectively discernable physical injury. The *Ledford* plaintiff complained of elevated blood pressure, crying episodes, panic attacks, and fear of a heart attack. Russo's only claim is for "mental pain and suffering". This allegation does not meet the test of *Brown* or *Champion*, *supra*.

H. Russo does not meet the requirement of immediacy of alleged injury.

There are no allegations in Russo's complaint that he suffered from any physical symptoms immediately after the initial blood test and diagnosis. Standing alone, this absence of immediacy is sufficient to defeat his claim for negligent infliction of emotional distress. *Brown, Champion, supra.* Russo cannot comply with the case law which requires that a "causally connected discernable physical impairment must accompany or occur within a short time of the psychic injury". *Id.* at 19.

In the case of *Frame v. Kothari,* 528 A.2d 86 (N.J. 1987), the plaintiffs claimed negligent infliction of emotional distress where the parents alleged malpractice and sued following the death of a ten month old child. The court held that the doctor's failure to properly diagnose and treat the minor child did not satisfy the required showing of an "incident." The court continued by noting that if recovery for mental distress was allowed in every circumstance involving alleged malpractice, an entire family will sue in every medical negligence claim which ends in serious physical consequences. The court stated that limits must be set on liability and that this function is served an emotional distress claims by requiring the witnessing of an incident by a qualified plaintiff. This rationale is particularly applicable in the instant case, where there is a complete absence of serious physical injury.

II. THE COMPLAINT WAS PROPERLY DISMISSED WITH PREJUDICE WHERE IT WAS CLEARLY NOT AMENDABLE.

The facts of this case clearly establish that there was no manifestation of a discernable physical injury, nor did not undergo any "invasive medical treatment or prescriptions of caustic mediation [that would lead to] bodily injury from that treatment." *R.J. v. Humana*, *supra* at 8. Because the complaint was clearly not amendable, dismissal with prejudice was appropriate. *Thompson v. McNeil Co., Inc.*, 464 So.2d 244 (Fla. 1st DCA 1990).

CONCLUSION

For the reason set forth herein, it is respectfully requested that this Honorable Court affirm the dismissal of Russo's complaint for its inability to state a cause of action under the impact rule.

Respectfully submitted,

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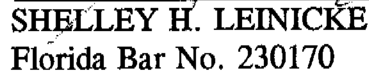
By: 

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 17th day of May, 1995, to: Richard T. Kozek, Jr., Esquire, 9100 South Dadeland Boulevard, Suite 400, One Datran Center, Miami, FL 33156, Attorney for Appellant.

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