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IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,012

2ND DCA NO 94-00833

JOHN RUSSO,

Petitioner

vs.

SERA-TEC BIOLOGICALS, INC., ET AL,

Respondents

INITIAL BRIEF OF
JOHN RUSSO

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PRELIMINARY STATEMENT

This Petition is taken from an appeal affirming a Final Judgement of Dismissal in favor of Respondents. The Respondent, SERA-TEC BIOLOGICALS, INC., will be referred to as SERA-TEC. The Respondent, DR. GEORGE M. REIS, will be referred to as DR. REIS. Petitioner, JOHN RUSSO, shall be referred to as MR. RUSSO. All references to the record shall be designated (R.). All references to the appendix shall be designated (A.). All references to the transcript shall be designated (T.).

STATEMENT OF FACTS

On August 21, 1989, Petitioner, John Russo, presented himself to the Respondent, Sera-Tec for the purpose of voluntarily donating blood. At that time, blood was extracted from Mr. Russo. The blood was subsequently tested for the HIV virus. On October 26, 1989, Mr. Russo again returned to the Sera-Tec clinic for the purpose of donating blood. At this time, Respondent, Dr. Reis, informed Mr. Russo that his previous blood donation had tested positive for the HIV virus and that he had contracted AIDS. (R. 2-3)

In October of 1992, Mr. Russo presented himself to the Uncas On the Thames Hospital with severe cold symptoms. He sought treatment because of his fear that he may die as a result of his immune system being affected by AIDS. Mr. Russo's blood was tested by Uncas on the Thames Hospital for the HIV virus. On November 15, 1992, he was informed that his blood tested negative for the HIV virus and that he did not have AIDS (R. 4-5).

On June 7, 1993, Mr. Russo's counsel mailed, by certified mailing, a Notice of Intent to Initiate Litigation for Medical Malpractice to each Appellee (R. 17-26). Following the Respondent's notice of the rejection of the claim and the pre-suit discovery period, Mr. Russo brought an action against Respondents for medical malpractice (A. 1; R. 1-11). Mr. Russo's Complaint alleged that Sera-Tec and Dr. Reis breached their duty to him by doing or failing to do one or more of the following acts, any, some or all of which were and are departures from the prevailing standard of care for similar health care providers:

a. by failing to utilize proper procedures for informing blood donors of a positive test for the HIV virus;

b. by failing to properly select, monitor and supervise the personnel which interpreted and diagnosed test results;

c. by failing to properly diagnose and treat Plaintiff;

d. by informing Plaintiff that he was HIV positive, when in fact, he was not;

e. by informing Plaintiff that he had AIDS, when in fact, he did not;

f. by failing to properly evaluate or interpret the test results from HYLAND;

g. by failing to order or perform corroborating or confirmatory diagnostic tests on Plaintiff;

h. by failing to re-evaluate or review the HYLAND test results;

i. by failing to obtain informed consent prior to having Plaintiff's blood tested for the HIV virus;

j. by failing to offer Plaintiff the immediate opportunity for counseling about the meaning of the test results, the possible need for additional testing, measures for prevention of the transmission of the virus, and the availability of appropriate health care services including public health care authorities;

k. by otherwise failing to meet the standard of care for similar health providers of ordinary skill and learning in the care and treatment of Plaintiff. (R. 1-11)

As a result of the above listed breaches of duty, Mr. Russo

alleged that he suffered damages including damages for mental pain and suffering. Additionally, Mr. Russo alleged that he had separated with his wife, attempted suicide, became homeless and continued to remain homeless. (R. 1-11)

Sera-Tec and Dr. Reis subsequently filed a Motion to Dismiss in which they asserted that the Mr. Russo's Complaint failed to satisfy the impact rule (R. 33-38). At the Hearing on Respondent's Motion to Dismiss, Respondents' counsel argued that the decision of R.J. and P.J., 625 So.2d 116 (Fla. 5th DCA 1993) was directly on point and that Mr. Russo's claim was precluded in the absence of impact (T. 7-10). Mr. Russo's counsel stipulated that Mr. Russo did not suffer a physical impact at the time of the alleged misdiagnosis (T. 6). The Trial Judge ruled that he was bound to follow the Fifth District Court's opinion in R.J. and P.J. and dismissed Appellant's claim with prejudice (T. 15-16). On Appeal, the Second District Court of Appeal affirmed the Dismissal of Mr. Russo's Complaint and cited to R.J. and P.J. as controlling authority (A. 2).

SUMMARY OF ARGUMENT

The reasons for the underlying theory of the impact rule are to prevent subjective and speculative damages for psychic trauma alone, to curb the potential of fraudulent claims, and to place some boundaries on the indefinable and unmeasurable claims. However, such underlying policy considerations should not be applied where emotional and psychological distress is not only likely to occur, but is definitely and understandably the result of certain negligent conduct. Misdiagnosis of the HIV virus and/or AIDS is one of those instances where the emotional and psychological distress is not trivial and untrustworthy, but is otherwise substantial and real. Accordingly, the impact rule should be modified to allow a claim for such a misdiagnosis.

Additionally, the Trial Judge erred in dismissing Mr. Russo's Complaint where there was no showing that he had abused the privilege to amend or that the Complaint was clearly not amendable.

I. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S COMPLAINT FOR THE NEGLIGENT DIAGNOSIS OF THE HIV VIRUS ON THE BASIS OF THE LACK OF A PHYSICAL IMPACT.

A. The impact rule should not apply to an action for negligent medical misdiagnosis of HIV as a matter of law and for public policy considerations.

In Florida, the courts have adhered to the long-standing rule that in order for a claimant to recover for emotional distress caused by the negligence of another, the claimant must suffer a physical impact. Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974); Champion v. Gray, 478 So.2d 17 (Fla. 1985).

There are essentially three reasons for the long-standing adherence to the "impact rule."

"(1) That emotional distress is inherently difficult to prove and therefore the physical manifestation requirement provides objective evidence;

(2) that, in the absence of guarantees of trustworthiness provided by bodily harm, the emotional distress can be too easily feigned or imagined; and

(3) where the defendant's conduct has merely been negligent, without any attempt to harm, his fault is not so great that he should be required to compensate for a purely mental disturbance." [Corgan v. Muehling, 574 N.E.2d 602, 607-608 (Ill. 1991).]

These same policy considerations were recognized in Champion, 478 So.2d at 20, when the court stated that they:

"are willing to modify the impact rule, but are unwilling to expand it to purely subjective and speculative damages for psychic trauma alone. We recognize that any limitation is somewhat arbitrary, but in our view is

necessary to curb the potential of fraudulent claims, and to place some boundaries on the indefinable and unmeasurable psychic claims."

In a recent Florida Supreme Court case, this court modified the impact rule by specifically recognizing an exception in a situation involving negligent misdiagnosis. In Kush v. Lloyd, 616 So.2d 415 (Fla. 1992), the Petitioner's first child was misdiagnosed as having an impairment caused by an accident of nature, not a genetic defect which could result in the same physical deformities in the birth of a subsequent child. As a result of the misdiagnosis, the Lloyds had a second child with the same physical deformities as the first. In discussing the creation of an exception to the impact rule, the court stated:

"we are not certain that the impact doctrine ever was intended to be applied to a tort such as wrongful birth. Prosser and Keeton state that the impact doctrine should not be applied where emotional damages are an additional 'parasitic' consequence of conduct that itself is a freestanding tort apart from any emotional injury..." Kush, 616 So.2d at 422.

Recently, this court in the case of R.J. and P.J. v. Humana of Fla., Inc., 20 Fla. L. Weekly S103 (Fla. 1995), reaffirmed the application of the impact rule in holding that the rule applies to a claim for damages from a negligent HIV diagnosis. This recent decision appears to contravene the doctrinal trend in Florida, as evidenced by this Court's decisions in Champion, to relax the rigidity of the impact rule in situations where the rule creates an arbitrary bar to those who should be compensated for emotional distress related injuries. Bodine v. Federal Kemper Life Assur. Co., 912 F.2d 1373 (11th Cir. 1990).

The grievousness of the mental and emotional injuries which are certain to result from a misdiagnosis of being infected with the HIV virus were expressly recognized by the Fifth District Court of Appeal in R.J. and P.J v. Humana, 625 So.2d 116 (Fla. 5th DCA 1993):

"If the purpose of the impact rule is to avoid fraudulent and purely subjective or speculative claims, there seems to be little likelihood of this in a case where someone is mistakenly told they are infected with the HIV virus. A person seeking an AIDS test will most likely have a reason for believing that he or she has been exposed to the virus, the tests are generally accurate and will most likely be believed and the news that one is HIV positive will almost certainly cause severe emotional distress...Id at 117 (footnote 1).

In the case at bar, the Trial Judge agreed with the 5th DCA's opinion in R.J. and P.J. when he stated that:

"I fully agree with the Judge's opinion in the R.J., P.J. case, and my gut feeling is this should be an exception, just as the Judges of the Fifth District did." (T. 16).

The reasons for the underlying theory of the impact rule, to prevent subjective and speculative damages for psychic trauma alone, to curb the potential of fraudulent claims, and to place some boundaries on the indefinable and unmeasurable psychic claims¹ simply do not apply to situations where a person is diagnosed with the HIV virus. The certainty that a person will suffer severe mental and emotional distress when incorrectly diagnoses with the HIV virus is undoubtedly real. In effect, a person misdiagnosed with the HIV virus AIDS is essentially being given a death

¹Champion v. Gray, 478 So.2d at 20.

sentence.

In an almost identical factual situation, the West Virginia Supreme Court concluded:

"This case involves a person erroneously diagnosed with AIDS. Given the well-known fact that AIDS has replaced cancer as the most feared disease in America and, as defendant SmithKline candidly acknowledges, a diagnosis of AIDS is a death sentence, conventional wisdom mandates that fear of AIDS triggers genuine - not spurious - claims of emotional distress. [Bramer v. Dotson, 437 S.E. 2d 773 (W. Va. 1993), citing AIDS Tops Cancer and Blindness as "Most Feared Disease" in Gallup Survey, 106 Atch. Ophthalmos. 1518 (Nov. 1988) and Social Science and the Citizen, 25 Society 2 (Jan./Feb. 1988)].

Given the acknowledgment that the negligent misdiagnosis of HIV causes genuine injury, the requirement of a simultaneous physical impact or the manifestation of a physical injury arbitrarily denies access to the courts or otherwise encourages artful pleading to avoid the application of the impact rule. In discussing the physical manifestation requirement of the impact Rule, the Texas Supreme Court aptly stated:

"The requirement of physical manifestation of emotional distress is overinclusive because it permits recovery for mental anguish when the suffering accompanies or results in any physical impairment, regardless of how trivial the injury. More importantly, the requirement is underinclusive because it arbitrarily denies court access to persons with valid claims they could prove if permitted to do so.

Additionally, the requirement is defective because it 'encourages extravagant pleading and distorted testimony.' To continue requiring proof of physical injury when mental suffering may be equally recognizable standing alone would force 'victim[s] to exaggerate symptoms of sick headaches, nausea, insomnia,

etc., to make out a technical basis of bodily injury upon which to predicate a parasitic recovery for the more grievous disturbance, the mental and emotional distress she endured." (citations omitted)[St. Elizabeth Hospital v. Garrard, 730 S.W.2d 649, 652 (Tex. 1987), quoting Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv.L.Rev. 1033, 1059 (1936).]

Clearly, the underlying policy reason of the prevention of spurious claims simply does not and should not apply to cases of misdiagnosis of HIV. Furthermore, the fear that the creation of an exception to the impact rule for misdiagnosis of HIV would have a substantial impact on the medical community is simply unfounded.² The failure to properly diagnose a medical condition has long since been recognized as falling below the acceptable standard of care. See, Singleton v. West Volusia Hospital Authority, 442 So.2d 235 (Fla. 5th DCA 1983) and Mezrah v. Bevis, 593 So.2d 1214 (Fla. 2d DCA 1991).

In allowing a claim for misdiagnosis of HIV in the absence of harmful medical treatment, the medical community is not being held to any greater standard. The medical communities argument that the creation of an exception to the impact rule will open a floodgate of claims is unsubstantiated and nothing less than an attempt to avoid responsibility for unrefutable negligence under the guise of a legal theory designed to prevent spurious claims. Nowhere has it been denied that the misdiagnosis of HIV causes real and substantial psychological damage. The impact rule should be

²This is especially true in light of the elaborate requirements delineated in Section 381.004, Florida Statutes and Section 381.0041, Florida, regarding the testing for HIV.

maintained and adhered to in situations involving third party bystanders and other indirect negligent cases. However, the impact rule should be abolished or otherwise modified for victims this type of abhorrent act of direct negligent which causes the person to suffer very real and cognizable mental anguish and distress.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN
DISMISSING APPELLANT'S COMPLAINT WITH
PREJUDICE WHERE THERE WAS NO SHOWING THAT
APPELLANT HAD ABUSED PRIVILEGE TO AMEND OR
THAT THE COMPLAINT WAS CLEARLY NOT AMENDABLE

Dismissal with prejudice of a Complaint is an abuse of the trial judge's discretion where there is no showing that the plaintiff had abused the privilege to amend or that the complaint was clearly not amendable. Thompson v. McNeil Co., Inc., 464 So.2d 286 (Fla. 1st DCA 1990).

Neither of the above factors were established at the hearing on the Motion to Dismiss. Mr. Russo's original complaint was dismissed with prejudice without any opportunity to amend. Despite Mr. Russo's acknowledgment that there was impact, he should have been given the opportunity to amend in order to allege, if such were the case, that the negligent misdiagnosis caused a manifestation of a discernable physical injury.

Accordingly, the dismissal with prejudice of Mr. Russo's original complaint was an abuse of the trial judge's discretion.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests this Honorable Court to reverse the Second District Court of Appeals' affirmance of the Dismissal of his action and remand for further proceedings.

RESPECTFULLY SUBMITTED this 1st day of May, 1995.

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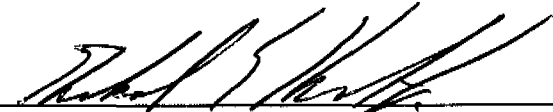
BY: 

RICHARD T. KOZEK, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief was furnished by U.S. Mail to Shelley H. Leinicke, Esquire, Wicker, Smith Tutan, O'Hara, McCoy, Graham & Lane, P.A., Attorney's for Appellees, P.O. Box 14460, Ft. Lauderdale, Florida 33302, on this 1st day of May, 1995.

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2ND DCA CASE NO. 94-00833
L.T. CASE NO. GC-G-93-2309

JOHN RUSSO,
Petitioner/Plaintiff

vs.

SERA-TEC BIOLOGICALS, INC., ET AL,
Respondents/Defendants

APPENDIX TO PETITIONER'S INITIAL BRIEF

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