

IN THE SUPREME COURT OF FLORIDA

85,012 ✓

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CLERK, SUPREME COURT

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Chief Deputy Clerk

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

PETITIONER'S BRIEF ON JURISDICTION

**Proceedings to Invoke Discretionary Review from
the District Court of Appeal, Second District**

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PRELIMINARY STATEMENT

This is a Petition to Invoke the Discretionary Jurisdiction of the Supreme Court of Florida. The Petition is filed from the Second District Court of Appeal's affirmance of a Final Judgement of Dismissal in favor of Respondents/Defendants. 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 Appendix shall be designated (A.).

STATEMENT OF THE CASE AND FACTS

Petitioner/Plaintiff, JOHN RUSSO, brought an action for medical malpractice in the Tenth Judicial Circuit in and for Polk County, Florida. Mr. Russo's Complaint alleged that the Respondents negligently informed him that his blood tested positive for the HIV virus and that he had contracted the AIDS virus. In the Complaint, Mr. Russo alleged that Respondents 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;

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

h. by failing to re-evaluate or review the 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.

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.

The case was brought before the trial court on Defendants' Motion to Dismiss on the grounds that in order for a claimant to recover for emotional distress caused by the negligence of another, the claimant must suffer a physical impact (A. 1-3). After hearing argument of counsel and reviewing the caselaw cited at hearing, the Trial Judge granted Defendants' Motion to Dismiss and dismissed the Complaint with prejudice (A. 4-5). On Appeal by Petitioner, the Second District Court of Appeal per curium affirmed, citing to the case of R.J., P.J. v. Humana Of Florida, Inc., 625 So.2d 116 (Fla. 5th DCA 1993), rev. granted, 634 So. 2d 626 (Fla. Mar. 4, 1994) (A. 6-7).

Petitioner seeks this Court's review on the grounds that the decision of the Second District Court of Appeal is in direct

conflict with the decisions of this Court and/or the Fifth and Second District Courts of Appeal on the same question of law.

SUMMARY OF ARGUMENT

This Court is requested to invoke its jurisdiction to review the decision of the Second District Court of Appeal for the reason that the decision is in direct conflict with the decisions of this Court and/or the Fifth and Second District Courts of Appeal on the same question of law.

The reasons for the underlying theories 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 these instances where the emotional and psychological distress is not trivial and untrustworthy, but is otherwise substantial and real. Accordingly, the impact rule was never intended to apply to such cases.

Resolution of the conflict presented by the decision of the Second District Court of Appeal is of great public importance, not only to Petitioner, but to other members our society which will suffer real, not speculative damages, as a result of negligent conduct.

I. THE SUPREME COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO RESOLVE THE CONFLICT BETWEEN THE SECOND DISTRICT COURT OF APPEAL'S DECISION IN RUSSO V. SERA-TEC, et al, AND THE DECISIONS OF THE SUPREME COURT OF FLORIDA AND FIFTH DISTRICT COURT OF APPEAL, TO RESOLVE THE ISSUE OF WHETHER THE IMPACT RULE SHOULD APPLY TO A CLAIM FOR MEDICAL MALPRACTICE FOR THE NEGLIGENT DIAGNOSIS OF THE HIV VIRUS ON THE BASIS OF THE LACK OF A PHYSICAL IMPACT.

A. This Court has jurisdiction to review the decision of the Second District Court of Appeal on the grounds that the opinion cites as controlling authority a case which is currently pending review in this Court.

The Florida Supreme Court has the authority as the highest Court of the State of Florida to resolve legal conflicts created by the District Courts of Appeal. Article V Section 3 (b)(3) of the Florida Constitution (1980), enables the Supreme Court to review a decision of a District Court of Appeal that expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law. See also Florida Rules of Appellate procedure 9.030 (a)(2)(A)(iv).

This Court has previously held that a district court of appeal per curium opinion which cites as controlling authority a decision that is pending review in the Supreme Court constitutes prima facie express conflict and allows this Court to exercise its discretionary jurisdiction Jollie v. State of Fla., 405 So.2d 418 (Fla. 1981). The per curium opinion rendered in this case cites as controlling authority the case of R.J., P.J. v. Humana of Florida, Inc., 625 So.2d 116 (Fla. 5th DCA 1993), rev. granted, 634 So.2d 626 (Fla. Mar. 4 1994). Accordingly, this Court has jurisdiction to review the decision of the Second District Court of Appeal in Russo

for the reason that the case cited as controlling authority is currently pending review in this Court.

B. This Court has jurisdiction to review the decision of the Second District Court of Appeal on the grounds that the opinion cited as controlling authority conflicts with the prior decisions of this Court.

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). In Champion v. Gray, 478 So.2d 903 (Fla. 1985), the court modified the "impact rule" to a limited extent and recognized that,

" a claim exists for damages flowing from a significant discernable physical injury when such injury is caused by psychic trauma resulting from negligent injury imposed on another who, because of his relationship to the injured party and his involvement in the event causing that injury, is foreseeable injured. Id. at 20.

In R.J., P.J., the Fifth District Court of Appeal applied the impact to preclude recover for negligent diagnosis of the HIV virus where there was no physical impact. The R.J., P.J. Court stated that:

"Although we believe that the impact rule should not apply to a case of a negligent HIV diagnosis, we acknowledge that this case does not fall within the recognized exceptions to the impact rule and thus we are constrained to affirm the dismissal of appellant's complaint." Id at 117. (emphasis added)

This conclusion is in direct conflict with this Court's opinion in Kush v. Lloyd, 616 So.2d 415 (Fla. 1992), which modified the extent of the impact rule and reiterated the limitations of the

rule in citing to Justice Alderman's concurring opinion in Champion v. Gray, 478 So.2d at 17. In Champion, Justice Alderman stated:

"We today modify to a limited extent our previous holdings on the impact doctrine. In doing so, however, we are unable to establish a rigid hard and fast rule that would set the parameters for recovery for psychic trauma in every case that may arise. The outer limits of this cause of action will be established by the courts of this state in the traditional manner of the common law on a case-by-case basis." Kush v. Lloyd, 616 So.2d at 423, quoting Champion 478 So.2d at 21-22 (Alderman, J. concurring specially).

The opinion in R.J., P.J. directly conflicts with the Florida Supreme Court's conclusion that the courts of this State should apply the impact doctrine to each claim on a case-by-case basis. In essence, the Court in R.J., P.J. concluded that unless the Supreme Court of Florida creates an exception to the impact rule for the particular factual scenario, they are constrained to apply the rule. Furthermore, the conclusion to apply the rule and preclude the claim was made despite the acknowledgement that misdiagnosis of the HIV virus will "almost certainly cause severe emotional anguish." R.J., P.J. 625 So.2d at 117.

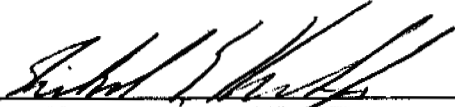
Based upon the conclusions of the Court in R.J., P.J. it appears that if the impact rule had been applied as the law requires on a case-by-case basis, it should not have precluded the claim where the underlying policy reasons for the rule simply did not apply. Accordingly, the decision of the Second District Appeal in Russo and the decision of the Fifth District Court of Appeal in R.J., P.J. directly conflict with the decisions of the Florida Supreme Court.

CONCLUSION

For the reasons stated herein, Appellant respectfully requests this Honorable Court to invoke jurisdiction under these compelling circumstances and to resolve the conflicts presented.

RESPECTFULLY SUBMITTED this 19th day of January, 1995.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition 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 19th day of January, 1995.

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