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

REPLY BRIEF OF JOHN RUSSO

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PRELIMINARY STATEMENT

This is an appeal from a Final Judgement of Dismissal in favor of Appellees. The Appellee, SERA-TEC BIOLOGICALS, INC., will be referred to as SERA-TEC. The Appellee, DR. GEORGE M. REIS, will be referred to as DR. REIS. Appellant, 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

Petitioner objects to the Statement of Case and Facts contained in the Answer Brief of Respondent with regard to two points. The first point regards Respondent's contention that Mr. Russo was tested twice for the HIV Virus and that on both occasions the tests were positive. This is quite contrary to the facts as contained in the Complaint. Mr. Russo's Complaint alleges that he donated blood at the Sera-Tec clinic on August 21, 1989. He further alleges that this blood was sent by Sera-Tec to Hyland Division of Travenol Laboratories for testing. The testing performed by Hyland included a screening test for the HIV Virus. The first test performed by Hyland indicated that Mr. Russo's blood was "Presumed Reactive" for the HIV Virus. A second confirmatory test was then performed by Hyland which unequivocally indicates that Mr. Russo's blood was "Non Repeative Reactive" or negative (R. 2-3).

Contrary to Respondents' contention, this case is not factual similar to that of R.J. v. Humana, 625 So.2d 116 (Fla. 5th DCA 1993), rev. granted 634 So.2d (Mar 4, 1994) affirmed, 20 F.L.W. S103 (Fla. Mar 2, 1995), in the which the doctors relied on the results of the lab. Mr. Russo's has alleged that Dr. Reis failed to properly evaluate and interpret the test results. The Complaint further alleges that Dr. Reis then misdiagnosed the HIV Virus even though the results clearly indicated that Mr. Russo's blood was not infected with the virus.

The second point concerns Appellees statement contained in footnote one on page Two of their Answer Brief regarding the reason for Mr. Russo's belief that he was HIV positive. In considering a Motion to Dismiss, it must be assumed that all allegations in the

complaint are true and all reasonable inferences must be drawn in favor of the pleader. Abruzzo v. Haller, 603 So.2d 1338 (1st DCA 1992). The attorney's statement at the Hearing on the Motion to Dismiss is irrelevant to the Lower Court's consideration of the Motion to Dismiss and should be stricken.

Additionally, Respondent's position that Mr. Russo was not misdiagnosed as being HIV positive, should be considered in light of the fact that Mr. Russo was given a plasma donor card after being informed that he was HIV positive. The front of this card contains the name and address of Sera-Tec Biologicals and the words "HIV (HTLV III) antibody reactive" together with Dr. Reis's signature written appear on the back of the card.

Accordingly, Appellant respectfully objects to those points contained in Appellees' Statement of the facts and those portions of the Brief which contain these inaccuracies.

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S COMPLAINT ON THE BASIS THAT THE IMPACT RULE PRECLUDES AN ACTION FOR MEDICAL MALPRACTICE FOR THE NEGLIGENT MISDIAGNOSIS OF THE HIV VIRUS IN THE ABSENCE OF PHYSICAL IMPACT.

A. The impact rule, although a long-standing rule adhered to by the courts of Florida, should not apply to the negligent misdiagnosis of the HIV virus.

The Impact Rule permits recovery of damages for mental distress when the mental distress results from a direct physical injury. Essentially, the impact rule developed to prevent recovery of spurious claims of third party witnesses of negligent acts. The fundamental basis for the Impact Rule is to insure that claims for

mental distress are genuine and not spurious. This Court and other courts throughout the country have recognized that certain exceptions to the impact rule should be created where the claim is genuine and not spurious.

Appellant has not requested this Court to abolish the impact rule, but to reconsider its recent decision of R.J. v. Humana, 625 So.2d 116 (Fla. 5th DCA 1993), rev. granted 634 So.2d (Mar 4, 1994) affirmed, 20 F.L.W. S103 (Fla. Mar 2, 1995), and to create an exception to the impact rule to allow recovery where a health care provider's conduct clearly and unequivocally falls below the acceptable standard of care and it is proximate and foreseeable that the conduct is certain to cause psychological trauma and mental distress.

The doctrinal trend in Florida, as evidenced by the Supreme Court's decisions in Champion v. Gray, 478 So.2d 903 (Fla. 1985) and Kush v. Lloyd, 616 So.2d 415 (Fla. 1992), is a relaxation 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). However, despite the Fifth District Court of Appeal's recognition of the grievousness of the mental and emotional injuries which are certain to result from a misdiagnosis of being infected with the HIV virus the issues of foreseeability and the obvious likelihood of severe emotional distress have merited little consideration. Neither has the issue of whether the health care provider's conduct fell below the applicable standard of care. The only issue which has merited consideration is the absence of an impact causing a physical injury.

This limited consideration appears to be inconsistent with this Court's holdings that the impact rule be examined on a case-by-case basis. Kush v. Lloyd, 616 So.2d at 423, quoting Champion v. Gray, 478 So.2d at 21-22 (Alderman, J. concurring specially). Accordingly, the application of the impact rule should be examined in light the fact that the physician's conduct fell below the applicable standard of care and his conduct proximately and foreseeable causing real and non-spurious injury including mental distress.

Examined in this light, it is clear that the impact rule was never intended to apply and should not apply to this case where the negligence is obvious and the injury is not only likely but also immediate and severe. Mr. Russo was effectively sentenced to death by a licensed physician and then sent out into a panicked and uninformed public in 1989. He has lost his family, his job, attempted suicide on a number of occasions and finally become homeless where he remains to this day.

Mr. Russo has not requested this Court to recede from a doctrine that has established principle and serves the real purpose of preventing an unrelenting sea of spurious emotional claims. Mr. Russo has requested this Court to reconsider its recent decision in R.J. v. Humana and to allow him the opportunity to establish that medical negligence resulted in his suffering real and cognizable injuries.

B. The principles of stare decisis do not require adherence to the impact rule where the creation of an exception for the misdiagnosis of the HIV virus follows established doctrine of reviewing the impact rule on a case by case basis to create those exceptions where the rule presents an arbitrary bar to those who should be compensated for emotional distress-related injuries.

Appellee would have this court apply the doctrine of stare decisis as an unwavering an ironclad rule preventing departure from prior precedent despite the demands of justice and public policy. It has long been the policy of the judiciary to not blindly adhere to the doctrine of stare decisis. The Florida Supreme Court has long since recognized that,

> "The great body of our laws is the product of progressive thinking which attunes traditional concepts to the needs and demands of changing times." Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957).

Appellees' assert that the doctrine of stare decisis should be applied to this case because Sera-Tec and Dr. Reis relied upon the impact rule as a well settled legal limitation of liability. This argument is wrought with contradiction and particularly inapplicable to the medical profession. Appellees' assertion that they have relied on the impact doctrine to conform their behavior to existing law and the current medical standards is incredulous. The failure to properly diagnose a medical condition has long since been recognized as failing 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 1992).

In order to bring a claim for medical malpractice it is necessary to obtain a verified written medical expert opinion from

a similar health care practitioner indicating that reasonable grounds exist to support a claim of medical negligence on the part of the treating health care provider. The standards applied to determine if such grounds exist are not and have never been mandated by the courts of this State. The standards applicable to health care providers are determined by the legislature and regulatory authorities of this State and the health care providers themselves. To even suggest that a health care provider relies upon or otherwise conforms his conduct to a certain standard based upon the impact is ridiculous.

The misreading of test results and misdiagnosis of a fatal disease without confirming the results has never conformed nor will it ever conform to acceptable medical standards. The impact rule is judicially created doctrine designed for the prevention of spurious claims. It has nothing to with the applicable standard of care for a licensed physicians in the State of Florida. Excepting of course when it presents a prime opportunity to shield the physician from what would have otherwise been unquestionable liability.

The Respondents have also raised the typical and hopefully someday outdated argument, of the impended health care crises as grounds for adhering to stare decisis. The argument typically begins with the catastrophic effects of malpractice litigation on the cost of medical care and ends with ultimate passage of the Medical Malpractice Reform Act in 1989. Section 766.201 (1)(a)(c), Florida Statutes, 1989. However, the argument is flawed in one very obvious respect. The passage of the Act is the Legislatures response to the "health care crisis." The use of the "health care crisis" argument is without merit unless includes a discussion of

the extent of the legislation, the effect on the occurrence of medical malpractice litigation and the extensive requirements which must be met to proceed with a claim against a medical practitioner.

The requirements of the Act are quite extensive and contain specific steps which must be complied with prior to proceeding with a claim against a medical practitioner. The purpose of the extensive requirements of the Act are to encourage the settlement of meritorious claims and to avoid frivolous claims in order to avoid expensive litigation and further increases in insurance premiums. Dressler v. Boca Raton Com. Hosp., 566 So.2d 571 (4th DCA 1990), rev. denied., 581 So.2d 164 (Fla. 1990). Since the Legislature has responded to the crises it appears that the utilization of the "health care crises" argument with mere citation to authority preceding the Act appears to be questionable and unsupportive.

Respondent has essentially requested that this court maintain the impact rule to allow health care practitioner to predict the future consequences of their conduct and to prevent the opening of the medical malpractice floodgates. However, neither of these arguments are supported. The doctrine of stare decisis allows for the law to change to meet the changes of society and the demands of public policy. The policy considerations behind the impact rule simply do not and should not apply to undeniable negligent conduct which proximately and foreseeable causes real and severe injuries. Blind adherence to prior precedent without regard for genuine mental anguish and distress resulting from a quite abhorrent act of negligence, would be in derogation to the reasoned principles of justice which the judiciary seeks to maintain.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING THE COMPLAINT WITH PREJUDICE WITHOUT ALLOWING AN OPPORTUNITY TO AMEND.

In this Court's recent decision of R.J. v. Humana, the Court recognized that invasive medical treatment or the prescribing of drugs with toxic or adverse side affects would have met the requirements of the impact rule. Previous decisions of this court have also recognized exceptions requiring a causally connected discernable physical impairment accompanying or otherwise occurring within a short time of the psychic injury. (Brown Champion).

Petitioner was never granted the opportunity to allege either of the above recognized exceptions to the impact rule. Without a showing that the Petitioner has abused the privilege to amend or that the Complaint was clearly not amendable the dismissal of the original was an abuse of the Trial Judge's discretion. Thompson v. McNeil Co., Inc., 464 So.2d 286 (Fla. 1st DCA 1990).

CONCLUSION

For the reasons stated herein, Appellant respectfully requests this Honorable Court to reverse the Dismissal of this action and remand for further proceedings.

RESPECTFULLY SUBMITTED this 9th day of June, 1995.

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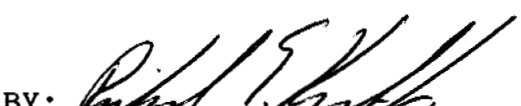
BY: 
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CERTIFICATE OF SERVICE

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 9th day of June, 1995.

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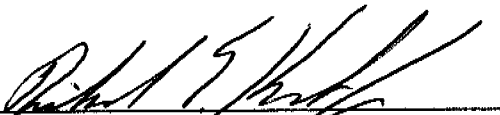
BY: 
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