IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,450

JANE DOE

Petitioner,

v.

WILLIAM DUNBAR EVANS, III, et al.,

Respondents.
_____/

PETITIONER'S SUPPLEMENTAL BRIEF

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SUMMARY OF THE ARGUMENT

This Court has adopted the view that where a recognized tort is predominantly "emotional" in nature, the impact rule should not apply. A marital counselor's malpractice in sexually exploiting a counselee is a paradigmatic example of a predominantly emotional tort.

The vulnerable state of counselees and the peculiar attendant risk of psychological damage arising therefrom justifies a special exception for such malpractice, especially this most egregious form, for which the Florida legislature has seen fit to impose felony sanctions. This view is at least implicitly shared by all foreign jurisdictions (who universally recognize such actions, despite the rarity of actual impact or physical injury) and is expressly shared by both foreign jurisdictions to have actually considered this question.

This Court has also recognized that the "impact rule" should not apply where the conduct in question constitutes a freestanding tort, independent of the negligent infliction of emotional distress. A marriage counselor's sexual exploitation of a patient is a clear violation of trust, constituting a freestanding "breach of fiduciary duty" as to which the impact rule would not apply. Such sexual exploitation would also constitute an intentional infliction of emotional distress (i.e. "outrage") which, by virtue of its intentional nature, would also be outside the contours of the impact

rule.

The Fifth District Court of Appeals has recently asked this Court to consider whether Florida ought not join the majority of American jurisdictions which have abandoned the impact rule, altogether. Should the foregoing reasons not satisfy this Court's impact rule concerns, then Doe would join in calling for such abolition.

SUPPLEMENTAL POINT ON APPEAL

A MARRIAGE COUNSELOR'S SEXUAL EXPLOITATION OF A COUNSELEE IS ACTIONABLE DESPITE THE PURELY EMOTIONAL NATURE OF THE COUNSELEE'S INJURIES.

Florida is among a minority of jurisdictions which has retained the impact rule in negligence cases. Coca Cola Bottling Co. v. Hagan, 24 F.L.W. D2688 (Fla. 5th DCA Dec. 3, 1999), citing Prosser and Keaton on Torts Sec. 54, Mental Disturbance, 363 (5th Ed.). Florida's impact rule requires that before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional distress must flow from physical injuries the plaintiff sustained in an impact. Tanner v. Hartog, 626 So.2d 705, 707 (Fla. 1997). While the outer limits of the impact doctrine are established by Florida's courts in the traditional common law (i.e.,case-by-case) manner, id. at 708 fn. 5, the essential core of the impact rule is not implicated where, as here, the tort is committed directly against the complaining party. See Kush v. Lloyd, 616 So.2d 415, 423 fn. 5 (Fla. 1992).

This Court recognized the tort of negligent retention in Mallory v. O'Neil, 69 So.2d 313, 315 (Fla. 1954), stating that the action was grounded on an employer's negligence in:

> . . . knowingly keeping a dangerous servant on the premises

> which defendant knew or should have known was dangerous and incompetent and liable to do harm to the tenants.

Because an individual seeking marital counseling is within the zone of foreseeable risk created by the employment of such counselors, employers owe potential counselees a legal duty to use due care in retaining those counselors. See Watson v. City of Hialeah, 552 So.2d 1146, 1149 (Fla. 3rd DCA 1989).

In applying the impact rule to a negligent retention claim, the focus is properly upon the "qualifying" nature of the agent's conduct. See Scelta v. Delicatessen Support Services, Inc., 57 F.Supp.2d 1327, 1348-49 (M.D. Fla. 1999) (implying that if plaintiff's negligent retention claim were premised upon agent's battery and intentional infliction of emotional distress, it would satisfy Florida law); and see generally, St. Anthony's Hospital, Inc. v. Lewis, 652 So.2d 386 (Fla. 2nd DCA 1995) (applying medical malpractice statute of limitations to claim against hospital for negligent selection and retention of physician who allegedly committed the malpractice).

This Court has previously held that the impact doctrine is inapplicable to recognized torts in which damages often are predominantly emotional. Kush, supra at 422. Although Florida law contains only one decision even marginally on point, see Anclote Manor Foundation v. Wilkinson, 263 So.2d 256, 258 (Fla. 2nd DCA 1972)

(approving legal determination that psychiatrist was guilty of malpractice for telling female patient he was going to divorce his wife and marry her), courts in other jurisdictions have uniformly held that it is malpractice or gross negligence for a marriage or other counselor to become sexually intimate with a counselee. See e.g. Roy v. Hartogs, 85 Misc.2d 891, 381NYS 2d 587, 588 (1976); Zipkin v. Freeman, 436 S.W.2d 753, 762 (Mo. 1968); St. Paul Fire & Marine Ins. Co. v. Mitchell, 296 S.E.2d 126 (Ga. App. 1982); Cotton v. Kambly, 300 N.W.2d 627 (Mich. App. 1980); Aetna Life & Casualty Co. v. McCabe, 556 F.Supp. 1342 (E.D. Pa. 1983); Andrews v. U. S., 732 F.2d 366 (4th Cir. 1984); Richard H. v. Larry D., 198 Cal. App. 3d 591, 243 Cal. Rptr. 807 (1988); Horak v. Biris, 474 N.E.2d 13 (Ill. App. 1985); Rowe v. Bennett, 514 A.2d 802 (Me. 1986); Mazza v. Huffaker, 300 S.E.2d 833 (N.C. App. 1983); Lenhard v. Butler, 745 S.W.2d 101 (Tex. App. 1988); Weaver v. Union Carbide Corp., 378 S.E.2d 105 (W.Va. 1989); Waters v. Bourhis, 709 P.2d 469 (Cal. 1985). This uniform judicial recognition is in accord with the longstanding, nearly unanimous medical consensus that sexual contacts between a therapist and a patient constitutes malpractice. L.L. v. Medical Protective Co., 362 N.W.2d 174, 176 (Wis. App. 1984) (citing various psychiatric journals and authorities).

Despite the rarity of any actual impact or physical injury in such cases, research discloses that (with only two exceptions) American courts have not felt it even

necessary to discuss possible impact rule concerns in cases of counselor sexual exploitation. See e.g. Roy v. Hartogs, supra, ("by alleging that his client's mental and emotional status was adversely affected by this deceptive and damaging treatment, plaintiff's counsel asserted a viable cause of action for malpractice. . ."); Omer v. Edgren, 685 P.2d 635, 638 (Wash. App. 1984) (patient sufficiently alleged damage, despite testimony that she suffered no medical expenses, lost earnings, or marital difficulties).

In addition to all of the courts who have implicitly assumed that the impact rule has no application to counselor sexual exploitation causes of action, both courts to have expressly considered the interplay between the two concepts have held that the impact rule is not a bar to such sexual exploitation actions. See Corgan v. Muehling, 574 N.E.2d 602 (Ill. 1991); Rowe v. Bennett, supra. Thus, if this Court were to hold such claims barred by the impact rule, Florida would stand alone among the fifty states in effectively insulating psychologists (and their employers) from liability for this extreme form of misconduct.

While the Illinois Supreme Court's impact rule analysis in Corgan, supra, is arguably more liberal than the current state of Florida law, the Maine Supreme Court's decision in Rowe v. Bennett, supra, dovetails neatly with the "predominantly emotional tort" analysis utilized by this Court in Kush, supra.

In Rowe , the defendant social worker had continued to treat the plaintiff after becoming involved in a relationship with the plaintiff's primary companion, causing plaintiff to suffer acute depression. Applying Maine's impact rule (which at the time was indistinguishable from current Florida law) the Maine Supreme Court stated its holding as follows:

> We hold that because of the unique nature of the psychotherapist-patient relationship, a patient may recover damages for serious mental distress resulting from the therapist's negligence despite the absence of an underlying tort.

Rowe, supra at 807. The Rowe court went on to explain its rationale for excepting the psychotherapist-patient relationship from the impact rule as resting upon: a) the increased likelihood of objective evidence of mental distress in such cases and, b) the psychiatric patient's unique vulnerability to mental harm if the therapist fails to adhere to the standards of care recognized by the profession. Id.

Because counseling frequently results in extreme emotional dependence on the therapist, such sexual liaisons have all the earmarks of exploitation. L.L., supra at 461 (quoting various psychological authorities). As one expert in the field explained:

> This is not simply because the things that are talked about are the secrets of the soul but because the patient's continued and embryonic stability may depend upon there being a reliable external source of meaning and later of identification and direction for him.

L.L., supra at 462, quoting , Dawidoff, The Malpractice of Psychiatrists, 6, 10 (1973).

By introducing sexual activity into the relationship, the therapist runs the risk of causing additional psychological damage. L.L., supra at 178. In a national random sample survey of 1,423 practicing psychologists, 97.4% believed that sexual contact between patient and therapist is usually or always harmful to the patient. Villiers, Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship, 74 Denv. U. L. Rev. 1, fn. 312 (1996), citing, Herman, et. al Psychiatrist-patient Sexual Contact: Results of a National Survey, II Psychiatrists Attitudes, 144 Am. J. Psychiatry 165 (1987).

Fully 90% of patients who engage in sexual relationships with their therapists are psychologically damaged – many severely. Villiers, supra at fn. 312, citing, Sherman, Behind Closed Doors: Therapist-Client Sex, Psychol. Today at p. 66 (May 1993). Most seriously, some 11% of sexually exploited victims are hospitalized and 1 % commit suicide as a result of their involvement. Id. Presumably, it would be only the latter 1 % (or more properly, their survivors) who would be entitled to any legal remedy were the impact rule to be applied to these cases.

Given these figures and authorities, it is difficult to imagine a more prototypical example of a "predominantly emotional tort" than a counselor's sexual exploitation. It was precisely this probability of serious emotional damage factor which motivated

this Court to find an exception for stillborn children cases. See, Tanner, supra at 708.

Moreover, because of the central relevance of public policy to such determinations, id., one must also consider the Florida legislature's decree that sexual relations between a psychotherapist and a patient shall constitute a felony, as to which the consent of the patient is no defense. See Fla. Stat. §491.0112.

In Shapiro v. State, 696 So.2d 1321, 1326 (Fla. 4th DCA 1997), the Fourth District Court upheld this sexual exploitation statute against constitutional attack, finding a "patently compelling state interest" supporting the statute. The Court explained:

> Clearly the state may enact laws to protect particularly vulnerable members of society from sexual exploitation. . . . Clients seeking psychological advice are frequently in a particularly vulnerable state and may develop a dependency relationship with their therapist. . . . The state has a legitimate interest in protecting psychotherapy clients from sexual exploitation and in maintaining the integrity of this important public health service.

Shapiro, supra at 1327(citation omitted). Thus, not only would non-recognition of this cause of action make Florida an anomaly in the law of the fifty states, it would also create an anomaly within Florida law, essentially barring the direct victims of felony conduct from any recompense for their injuries (in all but the rarest of cases).

It should also be pointed out that the Fifth District Court recently held that Florida's impact rule immunized the conduct of a licensed psychotherapist who had violated the State's confidentiality laws -- allegedly as part of a plan to get a married couple to divorce each other. See Gracey v. Eaker, 1999 WL1267236 (Fla. 5th DCA Dec. 30, 1999). In this opinion, the Fifth DCA certified to this court as a question of great public importance:

> Whether an exception to Florida's impact rule should be recognized in a case where infliction of emotional injuries resulted from the breach of a statutory duty of confidentiality.

Doe respectfully questions whether the broader question should not be whether the misconduct of marital and other counselors ought not be excepted altogether from the impact rule, given the inherently predominant nature of emotional injury as a consequence of such counselor misconduct. See Rowe, supra. Regardless, and at a minimum, counselor sexual exploitation must be excepted if Florida is to avoid becoming a legal curiosity, as previously explained.

In addition to the fundamentally emotional nature of injuries arising from the subject tortious conduct, such conduct also may be deemed outside the impact rule because of the "freestanding" torts which independently arise in such situations (and which the Second Amended Complaint explicitly alleged). Compare, Kush, supra at

422 (". . . 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").

The term "fiduciary or confidential relation" is a very broad one. It exists, and relief is granted, in all cases in which influence has been acquired and abused, and in which confidence has been reposed and betrayed. Atlantic National Bank of Florida v. Vest, 480 So.2d 1328, 1332 (Fla. 2nd DCA 1985). Florida's courts have recognized that a fiduciary relationship arises in the course of psychiatric treatment. See O'Keefe v. Orea, 731 So.2d 680, 686 (Fla. 1st DCA 1998)(psychiatrist owed fiduciary duty to parents of minor patient).

Although research discloses no Florida decision directly on this point, case law from other jurisdictions unanimously supports the notion that where a social worker, physician, or therapist takes sexual advantage of patient vulnerability, such conduct constitutes a violation of trust and breach of fiduciary obligation which is actionable as an independent tort. See Hoopes v. Hammargren, 725 P.2d 238, 242 (Nev. 1986) (and cases cited therein); Horak v. Biris, supra at 17. As the latter court explained the matter:

> It was alleged that plaintiff went to defendant's office, at defendant's request, to receive counseling and guidance in his personal and marital relationships, ostensibly for the

> purpose of improving those relationships. Defendant held himself out as a social worker licensed by the State to render such assistance and insight. His license placed him in a position of trust, the violation of which would constitute a breach of the fiduciary relationship. Such a breach has been held on several occasions to be an actionable and independent tort.

Id.

Finally, one must not overlook the intentional nature of the predicate sexual exploitation at issue, as this Court has held that intentional infliction of emotional distress is actionable even without physical impact. See Eastern Airlines, Inc. v. King, 557 So.2d 574 (Fla. 1990); Metropolitan Life Ins. Co. v. McCarson, 467 So.2d 277 (Fla. 1985). Admittedly, such conduct must be so outrageous in character, extreme in degree, beyond the bounds of all possible decency, atrocious and utterly intolerable to a civilized community that it would lead an average member of the community to exclaim "outrageous!" See McCarson, supra at 278-279, citing Restatement (Second) of Torts, sec. 46(d)(1965). However, a marital counselor's felonious seduction should be held to independently meet that lofty standard.

Finally, it must be noted that the Fifth District Court of Appeals recently certified to this Court as a question of great public importance whether Florida's impact rule should be abolished or amended. See Coca-Cola Bottling Co., supra. In his concurring opinion, Judge Dauksch pointed to Post Traumatic Stress Syndrome

as an example of emotional injuries brought about in the absence of any actual impacts, yet which are recognized by the medical experts in the field as bona fide medical illnesses with specific traceable causes. Judge Dauksch concluded:

> Thus, to say emotional injury is different from pure physical injury is not fair or right. The law must be fair and right.

Judge Dauksch thus urged this Court to change Florida's impact rule so as to bring it into conformance with the majority view in the United States.

While this supplemental brief does not offer an opportunity for the full explication of the well-known reasons why the majority of jurisdictions have abandoned the impact rule, should the foregoing analysis somehow prove unpersuasive, then Doe would join Judge Dauksch in urging this Court to join the majority view throughout the United States by abolishing Florida's impact rule altogether.

CONCLUSION

The second amended complaint would state a cause of action against defendants who are not religious entities.

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