

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CHERIE WILSON-WATSON,

Plaintiff/Petitioner,

vs.

Case No. SC00-1989

DCA No. 2D99-3521

Lower Case No. 96-0674-CA-01

DAX ARTHRITIS CLINIC, INC.,
a Florida Corporation, and RICHARD A.
SAITTA, M.D.,

Defendants/Respondents.

FILED
THOMAS D. HALL
OCT 06 2000
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PETITIONERS' JURISDICTIONAL BRIEF

On Review from the District Court of Appeal, Second District
State of Florida

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STATEMENT OF THE CASE AND FACTS

Petitioner appealed the judgment of the Circuit Court for Collier County, Florida, granting partial final summary judgment against her in her negligence action seeking to recover damages for fear of contracting AIDS. The Second district Court of Appeals affirmed.

Petitioner was working as an emergency medical technician when she responded to a medical emergency at Respondents' clinic. When she arrived, a clinic employee handed her a red contamination bag used to dispose of medical debris accumulated during the emergency.

Contrary to accepted medical standards, the contamination bag had been employed by the clinic to store used hypodermic needles. Such needles are required to be stored in a "sharp's" container, a hard case designed to prevent accidental punctures because of the high degree of hazard associated with such incidents.

Some time later, Petitioner's leg was punctured by a used, discarded hypodermic needle concealed inside the bag. The multiple punctures broke the skin and caused bleeding. The needle was not tested for HIV contamination, but Petitioner underwent multiple HIV tests over a two-year period. To date, the tests have produced negative results.

Petitioner filed an action against Respondents' clinic for negligence, seeking to recover damages for bodily injury and all other damages reasonably flowing from the negligence, including fear of contracting AIDS. Petitioner settled with Respondents as to all elements of her damages except the fear of contracting AIDS. Petitioner did prove that her contact with the needle was a medically and scientifically accepted channel for the transmission of AIDS, but because the needle was not tested before it was discarded, she was unable to prove that the virus was present in the needle. On appeal from the trial court's order, the Court of Appeal, applying the "impact rule" held that Petitioner's fear of contracting AIDS was unreasonable as a matter of law and not a legally compensable injury, because she did not prove that the virus was present in the needle, and on August 23, 2000, the District Court affirmed the order of the trial court. (Appendix)

SUMMARY OF ARGUMENT

In this case, the district court of appeal held that a plaintiff who has been negligently stuck with a hypodermic needle, while able to recover damages for pain and suffering and economic damages, may not recover damages for emotional distress resulting from fear of contracting aids absent proof of actual exposure to the virus.

The decision of the district court cannot be reconciled with the decision of the Supreme Court of Florida in the case of *R.J. v. Humana of Florida Inc.*, 652 So.2d 360 (Fla 1995) which holds that a plaintiff may recover damages for emotional distress caused by the negligence of another, when the emotional distress flows from physical injuries sustained by the plaintiff in an impact. Indeed the decision conflicts with the very essence of the laws of Florida regarding recovery of emotional distress in tort cases as embodied in the Standard Jury Instructions adopted by this Court.

The district court of appeal has carved out an exception to the rule allowing recovery of mental suffering as a result of physical traumatic injury as established by this Court, by holding, in effect, that mental distress is compensable in all cases of physical impact, except when such mental distress consists of fear of contracting aids. The district court has created this exception to the rule in the absence of any compelling necessity for it, in spite of the fact that public

awareness of aids and its ability to be transmitted by needles is so great as to have been a catalyst for aids prevention to permeate the safety standards of American life, and in spite of the fact that the first thought that would cross the mind of any reasonably intelligent person when accidentally stuck by a needle of unknown origin, would be the specter of HIV infection leading to AIDS.

In so holding, the district court has overridden the well-established criteria for jury evaluation of tort cases. The decision fails to take into account the fact that the context of a needle stick will give rise to jury questions of foreseeability and reasonableness that preclude the application of a bright line rule barring a claim for fear of contracting aids. The trial court and the district court have thus preempted the role of the trier of fact in these cases.

For these reasons, Petitioner contends that the decision of the district court in this case expressly and directly conflicts with the cited decision of the Supreme Court of Florida.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. Art. V § 3(b)(3) Fla.Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv).

ARGUMENT

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SUPREME COURT OF FLORIDA IN *R.J. V. HUMANA OF FLORIDA INC.*

The district court decision is in direct conflict with the Decision of this Court in *R.J. v. Humana of Florida Inc.*, 652 So.2d 360 (Fla 1995) which holds that a plaintiff may recover damages for emotional distress caused by the negligence of another, when the emotional distress flows from physical injuries sustained by the plaintiff in an impact. (at 362)

The Second District Court of Appeal incorrectly relied on the decision in *Coca-Cola Bottling Company v. Hagen*, 750 So.2d 83 (Fla 5th DCA 1999) that applied the impact rule to the facts of that case because, in that case, there was no impact. The plaintiffs had simply observed what they thought may have been a contaminated condom in a soft drink. The Fifth District applied *Humana* and held

there could be no recovery because there was no impact.

However in the instant case, the emotional distress suffered by Petitioner flows from the physical injuries sustained when the needles penetrated Petitioner's skin and flesh. That is an impact. There would have been no distress if there had been no such impact. Thus recovery of the damages meets the requirements of *Humana* because the "emotional distress suffered [flows] from injuries the plaintiff sustained in an impact." (at 362)

In applying *Coca-Cola* to the facts of this case, the Second District inverted the meaning of that case by applying it to a situation where impact did occur. Accordingly, the resulting decision directly and expressly conflicts with *Humana*.

This is simply not a case for the application of the impact rule because that rule requires some physical infirmity resulting from the psychological trauma in the absence of impact. This is a case of physical impact creating a foreseeable emotional injury just as though there was an automobile accident that caused among other things, emotional stress as an element of the damages.

In a case involving an attempt to recover damages for observing an insect in a can of peas and falling over a chair in alarm, *Doyle v. Pillsbury*, 476 So.2d 1271 (Fla 1985), this Court observed that "The ingestion requirement is grounded upon foreseeability rather than the impact rule. The impact rule itself is a convenient means of determining foreseeability." (at 1272) Because the insect was only

observed and the food was not ingested, there was a lack of foreseeability as to the resulting fall over the chair.

The impact rule only operates to bar recovery when there is no impact. If there is an impact then the rule does not come in to play and damages are simply a matter of foreseeability.

The district court of appeal has carved out an exception to the rule allowing recovery of mental suffering as a result of physical traumatic injury as established by this Court, by holding, in effect, that mental distress is compensable in all cases of physical impact, except when such mental distress consists of fear of contracting aids. The district court has created this exception to the rule in the absence of any compelling necessity for it, in spite of the fact that public awareness of aids and its ability to be transmitted by needles is so great as to have been a catalyst for aids prevention to permeate the safety standards of American life, and in spite of the fact that the first thought that would cross the mind of any reasonably intelligent person when accidentally stuck by a needle of unknown origin, would be the specter of HIV infection leading to AIDS.

The rationale for the application of the "impact rule" does not exist in this case. Justice Overton in writing the *Humana* decision, observes that the impact rule is designed to close the floodgates to recovery for purely emotional damages and to assure that only valid claims are presented. (at 363) But the Petitioner's

damages are not “purely emotional stress damages,” they are combined with real physical trauma. This is not an “invalid claim” for emotional damages; it is a valid foreseeable component of Petitioner’s injuries that she is entitled to have determined by a jury applying the standard jury instructions defining foreseeability and reasonableness.

The district court has overridden the well-established criteria for jury evaluation of tort cases. The decision fails to take into account the fact that the factual context of a needle stick will give rise to jury questions of foreseeability and reasonableness that preclude the application of a bright line rule barring a claim for fear of contracting aids. The trial court and the district court have thus preempted the role of the trier of fact in these cases and have attempted to change the impact rule set forth in *Humana*.

CONCLUSION

This court has discretionary jurisdiction to review the decision below, and the court should exercise that jurisdiction to consider the merits of the petitioners' argument because of the substantial conflict with *Humana* and because of the fact that AIDS is an insidious and epidemic disease permeating world society. It is absolutely foreseeable that the negligent storage of needles will lead to accidental punctures and the resultant terror to be experienced by any reasonable person with knowledge of the unthinkable consequences of exposure to the AIDS virus.

CERTIFICATE OF SERVICE

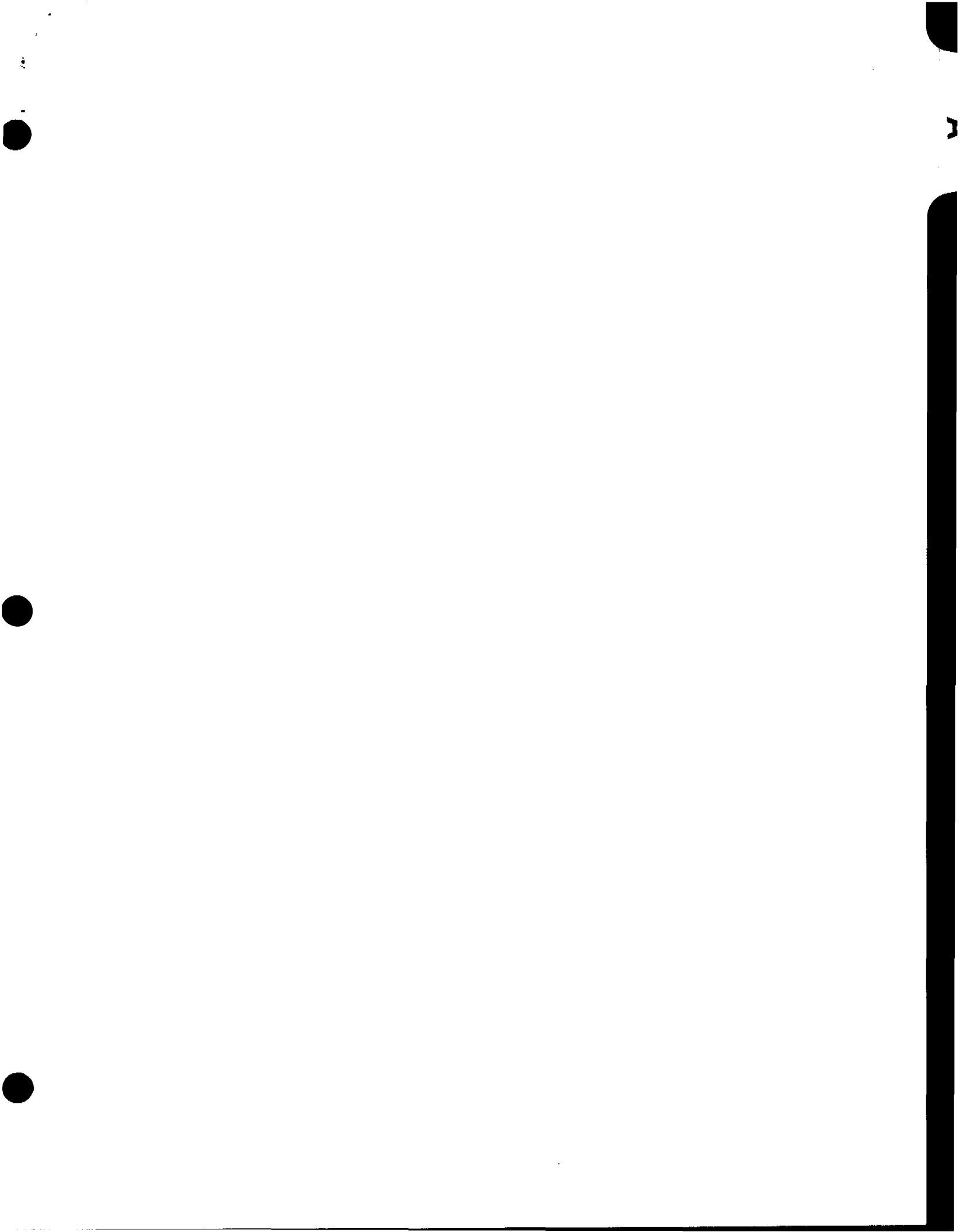
I HEREBY CERTIFY that the foregoing document has been prepared using font size Times New Roman 14.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular United States Mail this 5th day of October, 2000 to Bonita Kneeland Brown, Esquire, Fowler, White, Gillen, Boggs, Villareal & Banker, P. A., Post Office Box 1438, Tampa, Florida 33601.

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

CHERIE WILSON-WATSON,)

Appellant,)

v.)

DAX ARTHRITIS CLINIC, INC.,)
a Florida corporation, and RICHARD A.)
SAITTA, M.D.,)

Appellee.)

CASE NO. 2D99-3521

Opinion filed August 23, 2000.

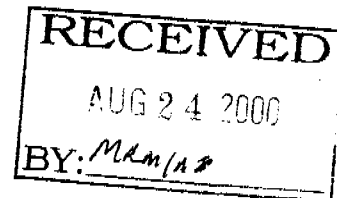
Appeal from the Circuit
Court for Collier County;
Hugh D. Hayes, Judge.

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Trial Lawyers, Naples, for
Appellant.

Bonita Kneeland Brown of Fowler,
White, Gillen, Boggs, Villareal &
Banker, P.A., Tampa, for Appellees.

WHATLEY, Judge.

Cherie Wilson-Watson appeals the partial final summary judgment
entered in favor of Dax Arthritis Clinic, Inc. and Richard A. Saitta, M.D. in her
negligence action. We affirm.



Wilson-Watson was working as an emergency medical technician when she responded to a medical emergency at Dax Arthritis Clinic, which is operated and supervised by Richard Saitta. When she arrived, a Dax employee handed her a red contamination bag used to dispose of medical debris accumulated during the emergency. Some time later, Wilson-Watson's leg was punctured by a used, discarded hypodermic needle concealed inside the bag. The puncture broke the skin and caused bleeding. The needle was not tested for HIV contamination, but Wilson-Watson underwent multiple HIV tests over a two-year period, all of which produced negative results. She filed an action against Dax for negligence seeking to recover damages for fear of contracting AIDS. The trial court entered the partial final summary judgment in favor of Dax in response to its renewed motion for summary judgment.¹ The court found that there were no factual issues in dispute because, although Wilson-Watson had suffered the impact of the needle puncture, there was no evidence that she had suffered an injury in light of the fact that all of her HIV test results had been negative.

The trial court's findings are correct and are supported by the first appellate decision in this state to address the elements of a negligence cause of action for fear of contracting AIDS. In Coca-Cola Bottling Co. v. Hagan, 750 So. 2d 83 (Fla. 5th DCA 2000), the Fifth District adopted the majority view and held that a "plaintiff's fear of contracting AIDS is unreasonable as a matter of law and not a legally

¹ Wilson-Watson's second amended complaint also included a count for intentional infliction of emotional distress. That claim was settled. The trial court entered a final judgment incorporating that settlement and disposing of the negligence claim by partial final summary judgment.

compensable injury," id. at 91, unless she proves both that the virus was present and that her contact with it "was a medically and scientifically accepted channel for the transmission of the disease." Id. at 90. Although Wilson-Watson proved the latter, she did not prove the former. She admits that the needle that punctured her was never tested for the presence of HIV. Moreover, her HIV test results have been negative for two years.

Accordingly, we affirm the partial final summary judgment in favor of Dax.

BLUE, A.C.J., and DANAHY, PAUL W., (SENIOR) JUDGE, Concur.