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IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

CHERIE WILSON-WATSON,)
)
) Petitioner,)
)
v.)
)
)
DAX ARTHRITIS CLINIC, INC., a)
Florida Corporation, and)
RICHARD A. SAITTA, M.D.,)
)
) Respondents.)
)
)
_____)

Case No.: SC00-1989

RESPONDENTS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The Respondents adopt the Statement of the Case and Facts as set forth in the District Court's opinion below. In general, Petitioner's brief fairly describes the District Court's opinion,^{1/} with two exceptions noted below:

1. Paragraph 3 of Petitioner's statement of the case and facts contains irrelevant facts which are outside of the District Court's opinion. These facts appear to be nothing more than a bolstering of Petitioner's negligence case.

2. In the last paragraph of her statement of the case and facts, Petitioner states that the District Court applied the "impact rule" in holding that Petitioner's fear of contracting AIDS was unreasonable in this case. To the contrary, the District Court was not called upon to evaluate the "impact rule," which requires that there be impact before there can be injury. Indeed, the District Court's opinion specifically holds that the trial court correctly found that an impact had occurred. However, the District Court agreed that there was no compensable injury in light of the fact that all of Petitioner's HIV test results have been negative and she failed to have the needle tested. Thus, the "impact rule"

^{1/}Wilson Watson v. Dax Arthritis Clinic, Inc., 766 So. 2d 1135 (Fla. 2d DCA 2000).

(whether an impact occurred) is not a factor in the District Court's decision, as Petitioner claims.

ISSUE

WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN THIS CASE EITHER EXPRESSLY OR DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN R.J. V. HUMANA OF FLORIDA, INC.

SUMMARY OF ARGUMENT

This Court lacks discretionary jurisdiction to review the decision below, as it neither expressly nor directly conflicts with this Court's decision in R.J. v. Humana of Florida, Inc.. In R.J., the plaintiff was misdiagnosed as having been infected by HIV. However, he could not recover because he failed to satisfy the "impact rule." This Court found that the rule would have been satisfied if the plaintiff had been subjected to invasive medical treatment or the prescribing of drugs with toxic or adverse side effects so as to result in the plaintiff suffering bodily injury from that treatment. At no time did this Court hold that the plaintiff would have been entitled to recover for his fear of acquiring AIDS, even if he had had such invasive or toxic medical treatment. In other words, the emotional trauma must directly flow from a physical abuse. A subjective fear, alone, will not suffice.

In addition, the District Court's decision below does not involve the impact rule. Indeed, the court below acknowledged and approved the trial court's find that one may suffer impact without there necessarily being the compensable injury claimed. The "impact rule" raised in Petitioner's brief appears to be a red herring designed to entice this Court to accept jurisdiction in light of this Court's present interest in the rule. However, as the instant case does not involve the impact rule, nor demonstrate an express or direct conflict with this Court's decision in R.J., the petition should be denied.

ARGUMENT

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN THIS CASE NEITHER EXPRESSLY NOR DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN R.J. V. HUMANA OF FLORIDA, INC.

Petitioner's description of this Court's decision in R.J. v. Humana of Florida, Inc., 652 So. 2d 360 (Fla. 1995) is overly-simplified, incomplete, and inaccurate. In R.J., this Court disallowed the plaintiff's cause of action for emotional distress, which was based on an erroneous misdiagnosis that he had been infected by HIV. The opinion generally focused on the "impact rule," and the plaintiff's failure to satisfy that rule in that case. This Court found that the impact rule would have been

satisfied if, aside from the taking of blood for testing, the plaintiff had been subjected to invasive medical treatment or the prescribing of drugs with toxic or adverse side effects so as to have suffered bodily injury from that treatment. In such case, this Court ruled, "He would have met the requirements of the impact rule and would be able to recover for the emotional trauma suffered as a result of that treatment." Id. at 364 (emphasis added).

In R.J., the misdiagnosed plaintiff may have suffered a reasonable fear of AIDS, unlike the Petitioner did in this case. Nevertheless, and even more significant, it is clear that this Court in R.J. never held that the plaintiff was entitled to recover for his fear of acquiring AIDS. This Court held only that the plaintiff could have received emotional distress damages as a result of any emotional trauma he would have suffered because of invasive treatment or caustic medication. Invasive treatment or caustic medication in itself would be a form of physical trauma that could result in emotional distress, according to this Court. Consequently, Petitioner's description of this Court's conclusions in R.J. is not an accurate depiction of this Court's holding.

In addition, nothing in the District Court's decision below conflicts with this Court's decision in R.J., either expressly or directly. In R.J., this Court recognized that a negligent

misdiagnosis could result in unnecessary and harmful medical treatment resulting in emotional trauma suffered as a result of that medical treatment. The case at hand, to the contrary, involved nothing but a needle prick. The Petitioner did not claim below that the needle prick was, in itself, so harmful and caustic as to have caused emotional trauma. Instead, the only emotional trauma which the Petitioner had not already settled before summary judgment was the fear of acquiring AIDS. As such, this Court's decision in R.J. supports the Second District. It does not conflict with the holding below in any manner, including "application" of the "impact rule." Indeed, the court below acknowledged and approved the trial court's finding that one may suffer impact without there necessarily being the compensable injury claimed.

In addition, the Petitioner's brief misinterprets the holding in Coca-Cola Bottling Co. v. Hagan, 750 So. 2d 83 (Fla. 5th DCA 1999). The Hagan case clearly stands for the proposition that, even if there has been an impact, such as a needle prick, the great majority of decisions in the country hold that the plaintiff must show that the virus was present or, at minimum, that it was likely and probable to believe that the virus was present (along with a medically necessary channel for transmission of the disease) before

a cause of action for fear of AIDS is even viable. Id. at 90. To do otherwise, the Fifth District noted, would be to open up a "Pandora's box" of AIDS phobia claims. Id. at 91. Consequently, the Second District did not invert the meaning of the Fifth District's opinion in Hagan by erroneously applying it to a situation where impact existed, as claimed by Petitioner.

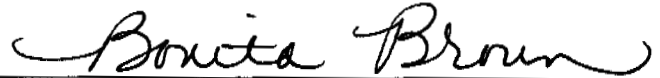
In sum, Petitioner's claim that the impact rule only operates to bar recovery when there is no impact is erroneous. To recover, there must be both impact and a compensable resulting injury. The only injury (or pain) suffered by Petitioner was a needle prick, any claim for which she settled along with all negligence claims prior to summary judgment. The only "injury" remaining for purposes of summary judgment was her "fear." Those damages are simply not forthcoming automatically upon a finding that there has been an impact.

Indeed, the "impact rule" is a red herring in this case and appears to be designed to entice this Court to accept jurisdiction in light of the certified question in Hagan. However, as the instant case does not involve the certified question raised in Hagan, nor does it demonstrate an express or direct conflict with this Court's decision in R.J. v. Humana of Florida, Inc., this Court should deny Petitioner's request for discretionary review.

CONCLUSION

This Court lacks discretionary jurisdiction to review the decision below, as it neither expressly nor directly conflicts with this Court's decision in R.J. v. Humana of Florida, Inc. The petition should be denied.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

In compliance with Rule 9.210(a)(2), the undersigned certifies that this brief is typed with Courier 12-point print, which has 10 characters per inch.

Respectfully submitted,




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I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail to:

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on October 30, 2000.



Attorney