

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC01-2010

JOHN ROWELL,

Petitioner,

vs.

**JULIANNE M. HOLT,
OFFICE OF THE PUBLIC DEFENDER,**

Respondent.

**PETITION FOR REVIEW
FROM THE SECOND DISTRICT COURT OF APPEAL**

**ANSWER BRIEF OF RESPONDENT
CIVIL CASE**

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE ISSUE	1
PRELIMINARY STATEMENT	1
STATEMENT OF THE FACTS	1
STATEMENT OF THE CASE	4
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
I. LOSS OF LIBERTY SHOULD NOT BE AN EXCEPTION TO THE IMPACT RULE	6
A. A LOSS OF LIBERTY EXCEPTION IS DIFFICULT TO PROVE	7
B. A LOSS OF LIBERTY EXCEPTION IS INHERENTLY DIFFICULT TO ASCERTAIN AND MEASURE	9
C. A LOSS OF LIBERTY EXCEPTION WOULD INCREASE TRIVIAL CLAIMS	10
D. PUBLIC POLICIES DO NOT SUPPORT NON- ECONOMIC DAMAGES FOR LOSS OF LIBERTY ...	12
CONCLUSION	15

CERTIFICATE OF SERVICE 16

CERTIFICATE OF COMPLIANCE 17

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE NO.</u>
<u>Champion v. Gray</u> , 478 So. 2d 17 (Fla. 1985)	7, 8
<u>Daniels v. Williams</u> , 106 S.Ct. 662 (1986)	9
<u>Gonzalez v. Metropolitan Dade County Public Health Trust</u> , 651 So. 2d 673 (Fla. 1995)	6, 7, 8, 9
<u>Holt v. Rowell</u> , 2001 WESTLAW 953501 (Fla. 2d DCA Aug. 22, 2001)	5
<u>International Ocean Tel. Co. v. Saunders</u> , 32 Fla. 434, 14 So. 148 (1893)	10
<u>Kirksey v. Jernigan</u> , 45 So. 2d 188 (Fla. 1950)	9
<u>Kush v. Lloyd</u> , 616 So. 2d 415 (Fla. 1992)	14, 15
<u>Metropolitan Life Ins., Co. v. McCarson</u> , 467 So. 2d 277 (Fla. 1985)	12
<u>R.J. v. Humana of Fla., Inc.</u> , 652 So. 2d 360 (Fla. 1995)	6, 8, 9, 10, 11
<u>Stewart v. Gilliam</u> , 271 So.2d 466 (Fla. 4th DCA 1972)	7
<u>Tanner v. Hartog</u> , 696 So. 2d 705 (Fla. 1997)	14, 15
<u>Wagenmann v. Adams</u> , 829 F.2d 196 (1 st Cir. 1987)	13

TREATIES

W. Keeton, Prosser and Keeton on Torts § 54 (5th ed. 1984) 10, 15

T. Cooley, 1 Cooley on Torts § 97 (3d ed. 1906)
9

STATEMENT OF THE ISSUE

DOES THE IMPACT RULE APPLY TO PROHIBIT THE RECOVERY OF NON-ECONOMIC DAMAGES IN A LEGAL MALPRACTICE CONTEXT WHEN THE NEGLIGENCE OF A CRIMINAL DEFENSE ATTORNEY RESULTS IN A LOSS OF LIBERTY AND RESULTING EMOTIONAL OR PSYCHOLOGICAL HARM?

PRELIMINARY STATEMENT

For clarity, the trial transcript will be cited separately from the rest of the record. A citation of "R1-100" will refer to Volume I of the record at page 100. A citation of "T-200" will refer to page 200 of the trial transcript. The trial transcript is located at the end of the record.

STATEMENT OF THE FACTS

John Rowell (hereinafter referred to as "ROWELL") was initially arrested and booked in Hillsborough County on July 6, 1995. T-244. ROWELL was arrested for

being in possession of a firearm as a convicted felon. T-244. ROWELL had been previously convicted of a felony in 1966. T-240. For ROWELL'S first appearance, which was held the following morning, the docket is prepared in the early morning hours by jail personnel based on all arrests which have occurred in the 24 hours prior to midnight and the docket is then distributed to the Clerk, the State Attorney and the Public Defender along with the Criminal Report Affidavits which are present in the courtroom of the presiding judge at the time of the preliminary presentation. R2-354 to 355.

When ROWELL'S case was called on the docket, ROWELL informed the court that he had a restoration of his civil rights. R2-360. Judge Heinrich then requested that the Public Defender at the jail obtain a copy of the document and that it be provided to the Public Defender's office and then set the matter over for hearing for the following Tuesday, July 11 on the "turnaround" docket also known as Division O. R2-350, 353, 358. It is undisputed that the Clerk erroneously set a second bond hearing for July 15, 1995, which as a Saturday and would not have been Division O, rather than the July 11, 1995 date as instructed by the court. R-354 - 358. It is undisputed that it was the Clerk's responsibility to calendar the hearing for the correct date. R2-354 to 357.

At the time of ROWELL'S arrest, the intake unit at the Public Defender's office

performed various functions including covering preliminary presentations both at the courthouse and the jail, Division O motion hearings, and adversary preliminary hearings where no formal charges are brought by the State within 21 days of the date of arrest. T-131 to 132, R2-341. During that time frame, the intake unit was also assigned the responsibility of interviewing at the jail each arrestee following the preliminary presentation. T-132. These responsibilities were shared by all of the Public Defenders in the intake unit on a rotating basis. T-134.

None of the Public Defenders involved recall ROWELL or the circumstances of his case. T-118, 127, 178. Kathleen Ford was the Public Defender in the courtroom with Judge Heinrich on July 7, 1995 and was responsible for reviewing the Criminal Report Affidavits for the initial probable cause determination and seeing that the CRAs and arrest warrants were returned to the Office of the Public Defender. T-133, 284 to 285. Dillon Snyder was the Public Defender in the courtroom at the jail and was responsible for having all arrestees not represented by private counsel execute an Affidavit of Indigency, and an Invocation of Rights. T-132 to 134, 284 to 286. According to the videotape, ROWELL gave Snyder a copy of the restoration of his civil rights at the hearing on July 7, 1995. T-127. It is undisputed that neither Ford or Snyder had any actual case file at the time of the preliminary presentation. T-134, 156 to 157. According to Ford, there would be no need to set an additional hearing

because the Public Defender would not change the hearing time set by the court. T-183.

Since the hearing scheduled for July 11, 1995, did not occur as it was not set on the docket, the next activity by the Public Defender occurred on Tuesday, July 18, 1995, when Art Shiro interviewed ROWELL at the jail after having been assigned and received the file on Wednesday, July 12, 1995. T-108 to 109. Although it is unclear what actually happened to the restoration of rights document, we assume for the sake of this record that it first reached the Public Defender file at the time of Shiro's interview of ROWELL on July 18, 1995. T-111. As a result of the interview, the standard bail reduction motion was filed on July 19, and ROWELL was released on his own recognizance based on the restoration of rights document at a hearing held on July 20, 1995. T-115 to 116, 153. Subsequently, the Public Defender obtained a Letter of Release from the State Attorney and no formal charges were filed against ROWELL. T-119.

STATEMENT OF THE CASE

ROWELL sued the Public Defender alleging that he had sustained physical injuries as a result of the negligence of the Office of the Public Defender. R1-157. ROWELL alleged that he was illegally arrested as a convicted felon in possession of firearms following the sale of two firearms in Hillsborough County, Florida on the

basis that he had had a complete restoration of his civil rights dating from June, 1975. It is undisputed in this case that ROWELL'S damages were mental anguish, inconvenience, embarrassment, the so-called "loss of liberty" damages along with a claim for loss of "past earning capacity". T-5 to 6.

The issue was raised at trial when James Thomas, an expert witness for ROWELL, was asked whether in his opinion ROWELL had sustained a "loss of liberty." T-214. The Public Defender objected on the basis that there was no predicate for such a claim in the absence of a physical impact or injury. T-214. After a lengthy argument, the trial court overruled the Public Defender's objection. T-230.

On April 13, 2000, the jury returned a verdict in the amount of \$504.00 for loss of wage earning capacity and \$16,500.00 for mental anguish, pain and suffering. R2-313 to 314. The verdict was appealed by the Public Defender to the Second District Court of Appeal. *Holt v. Rowell*, 2001 WESTLAW 953501 (Fla. 2d DCA Aug. 22, 2001). The Second District Court of Appeal reviewed whether non-economic damages for loss of liberty fell outside the impact rule in a legal malpractice context and applied the impact rule. *Id.* The Second District Court of Appeal certified the question of great public importance before this Court. *Id.*

SUMMARY OF THE ARGUMENT

Florida adheres to the physical impact rule which prohibits a plaintiff in a simple negligence case from claiming damages for mental anguish, humiliation, pain and suffering, in the absence of physical or bodily injury. This Court has never recognized an exception for “loss of liberty” damages in an action against a criminal defense attorney and should not do so. A “loss of liberty” exception to the impact rule would be hard to prove; create purely subjective and speculative damages; flood the courts with trivial claims; and would not be supported by public policy.

ARGUMENT

I. LOSS OF LIBERTY SHOULD NOT BE AN EXCEPTION TO THE IMPACT RULE.

Despite several recent challenges, Florida continues to adhere, with some minor exceptions, to the requirement that there must be physical impact or physical injury in order to recover intangible, psychological, or mental distress damages in a negligence action. *See, R.J. v. Humana of Fla., Inc.*, 652 So.2d 360 (Fla. 1995); *Gonzalez v. Metropolitan Dade County Public Health Trust*, 651 So.2d 673 (Fla. 1995). Presently, there is no exception to the impact rule for professional negligence as opposed to any other form of negligence.

The loss of liberty which results in alleged physical and mental suffering, without a significant discernible physical injury, should not become an exception to the impact rule. Loss of Liberty is not a significant discernible physical injury. Loss of liberty does not rise to the level of a significant discernible injury such as death. Rather, loss of liberty and being misdiagnosed with a fatal disease are, in and of themselves, not significant discernible physical injuries. These type of alleged harms are those which must be absorbed without remuneration as the result of living in an organized society. To take a contrary position would undermine the rationale for the impact doctrine. The rationale for the impact doctrine has been held to be as follows:

[T]here is more underlying the impact doctrine than simply problems of proof, fraudulent claims, and excessive litigation. The impact doctrine gives practical recognition to the thought that not every injury which one person may by his negligence inflict upon another should be compensated in money damages. There must be some level of harm which one should absorb without recompense as the price he pays for living in an organized society.

Gonzalez v. Metropolitan Dade County Health Trust, 651 So.2d 673 (Fla. 1995) (quoting *Stewart v. Gilliam*, 271 So.2d 466 (Fla. 4th DCA 1972)).

A. A LOSS OF LIBERTY EXCEPTION IS DIFFICULT TO PROVE.

Mental distress without physical consequences is inadequate to support a claim. *Champion v. Gray*, 478 So.2d 17, 19 (Fla. 1985). However, “[n]onphysical

injuries must accompany and flow from direct trauma before recovery can be claimed for them in a negligence action.” *Id.* This Court has noted that the “zone of danger” test is not appropriate for emotional distress claims as opposed to “fright” claims. *Id.* Furthermore, this Court recognized that:

We perceive that the public policy of this state is to compensate for physical injuries, with attendant lost wages, and physical and mental suffering which flow from the consequences of the physical injuries. For this purpose we are willing to modify the impact rule, but are unwilling to expand it to purely subjective and speculative damages for psychic trauma alone. We recognize that any limitation is somewhat arbitrary, but in our view is necessary to curb the potential of fraudulent claims, and to place some boundaries on the indefinable and unmeasurable psychic claims. *Id.*

As foreseeability is the guide to tort claims, “some outward limitations need to be placed on the pure foreseeability rule.” *Id.* Once such limitation which this Court has placed on the foreseeability test is that there be a significant discernible physical injury. *Id.* A significant discernible physical injury is required because a pure foreseeability rule would be endless in the ability to capture almost any scenario. For example, it is not only foreseeable but absolutely certain that one is going to suffer serious mental distress and anguish as a result of being negligently advised that he has AIDS. For this reason, whether such injury is foreseeable is irrelevant and does not alter the policy considerations consistently expressed by this Court in its continued

reaffirmation of the physical impact rule. *See, R.J. v. Humana of Fla., Inc., supra; Gonzalez v. Metro Dade County Health Trust, supra.*

In the *Champion* case, the discernible physical injury was death. Here, in the matter before this Court, there is no discernible physical injury nor is it a “fright” claim. The reasoning for this limitation is because the scope would be endless and effectively abrogate the physical impact doctrine. Damages have not been recoverable for mental pain and anguish which is unconnected with physical injury in actions for simple negligence. *Gonzalez*, 651 So. 2d at 675. However, “where the wrongful act is such as to reasonably imply malice, or where, from the entire want of care of attention to duty, or great indifference to the persons, property, or rights of others, such malice will be imputed as would justify the assessment of exemplary or punitive damages.” *Id.* at 674 (citing *Kirksey v. Jernigan*, 45 So. 2d 188 (Fla. 1950)). The matter before this Court does not rise to the level of justifying the assessment of exemplary or punitive damages.

As set forth by the United States Supreme Court, in *Daniels v. Williams*, 106 So. Ct. 662 (1986), the “mere lack of due care . . . does not ‘deprive’ an individual of life, liberty or property under the Fourteenth Amendment.”

B. A LOSS OF LIBERTY EXCEPTION IS INHERENTLY DIFFICULT TO ASCERTAIN AND MEASURE.

The damages caused by emotional distress have an inherent difficulty of being ascertained and measured. *Gonzalez*, 651 So.2d at 675. This inherent difficulty is the reason for requiring physical impact, physical injury, or malicious conduct to be present before a claimant can recover for emotional distress under Florida law. *Id.* As such, “[e]motional damages are easier to ascertain when they are attributable to a sole cause” such as a discernible physical injury. *Id.* Injuries resulting from purely emotional distress gives rise to fictitious or speculative claims. *R.J. v. Humana of Fla., Inc.*, 652 So.2d 360, 362 (Fla. 1995) (citing, Thomas M. Cooley, 1 *Cooley on Torts* § 97 (3d ed. 1906)). The threat of fictitious or speculative claims is precisely why this Court has limited the expansion of the impact doctrine. Emotional distress damages, without more, are “spiritually intangible”. *Id.* (citing, *International Ocean Tel. Co. v. Saunders*, 32 Fla. 434, 14 So. 148 (1893)). The requirement of having a physical impact to allow recovery for emotional distress damages is a guarantee or safeguard that the complained of injury is real and genuine. *Id.* (citing, W. Keeton , *Prosser and Keeton on Torts* §54, at 363 (5th ed. 1984)). An abrogation of the impact requirement would make defendants “[n]ot be sure whom they had injured or where they may have injured a person, thus paralyzing their ability to defend themselves.” *Id.* at 362-63 (citing, *Prosser*, at 364).

C. A LOSS OF LIBERTY EXCEPTION WOULD INCREASE

TRIVIAL CLAIMS.

In *Humana*, the plaintiff was negligently misdiagnosed as having tested positive for the HIV virus which resulted in alleged hypertension, medical treatment and mental anguish and pain and suffering. The suggestion that the physical impact rule be abolished or that some limited exception be carved out for a negligent HIV diagnosis was rejected. This Court noted that “[w]ithout question, allowing compensation for emotional distress in the absence of a physical injury under the circumstances of this case would have a substantial impact on many aspects of medical care, including the cost of providing that care to the public. *R.J. v. Humana of Fla., Inc.*, 652 So. 2d 360, 363-64 (Fla. 1995). Furthermore, to have created the exception requested by the plaintiff would have also allowed claims for emotional distress for any misdiagnosis as a result of negligent medical testing. *Id.* at 364. Alternatively, this Court noted that it would be improper to specifically limit an exception for negligent misdiagnosis pertaining to the HIV virus at the exclusion of the many other terminal illnesses. *Id.* It was found that under either scenario, it would be almost impossible to limit speculative claims for damages under such an exception. *Id.* As the underlying policy reasons for the impact rule still exists, this Court concluded that there was no justification to carve out another special exception to the impact doctrine. *Id.*

Likewise, as with the case of not being able to limit emotional distress damages

for misdiagnosis specifically involving HIV at the exclusion of other terminal illnesses, there could be no limit specifically for a person being incarcerated for failure to have his rights restored, when in fact they had been. Pandora's Box would be open to claims for emotional distress, unaccompanied by any physical injury, physical impact, or malice, for anyone who spent time in jail justifiably or not. This would involve the entire criminal context where the possibility of being incarcerated always exists. This would necessarily involve cases of ineffective assistance of counsel. The chilling effect would be for defense attorneys to be paralyzed.

Thousands of people are arrested in Florida every day. All are presumed innocent, and anyone familiar with the criminal system knows that many are wrongfully arrested based simply on predictable bureaucratic errors or misidentifications. To open the Public Defender and/or every criminal defense attorney to every claim by every person that was jailed for a period too long would obviously open the flood gates to excessive litigation.

D. PUBLIC POLICIES DO NOT SUPPORT NON-ECONOMIC DAMAGES FOR LOSS OF LIBERTY.

The public policy of the impact doctrine supports the practical recognition that not every injury caused by the negligence of another is compensable in money damages. To carve an exception into the impact doctrine, as suggested by ROWELL,

would allow purely subjective and speculative damages which this Court has been extremely careful to avoid.

As a general proposition, it is the nature and character of the conduct alleged against the defendant which is the determining factor in whether a claim for intangible mental or emotional distress damages will be allowed. In Florida, this requires intentional, wanton, or outrageous conduct amounting to the tort of intentional infliction of emotional distress. *Metropolitan Life Ins. Co. v. McCarson*, 467 So. 2d 277 (Fla. 1985). Traditionally, legal malpractice actions involving property interests do not give rise to claims for emotional distress.

ROWELL relies on *Wagenmann v. Adams*, 829 F.2d 196 (1st Cir. 1987) for the proposition that a criminal defense lawyer should not be immune from damages in a malpractice suit for wrongful confinement. *Id.* at 222. However, ROWELL'S reliance is misplaced as the facts are distinguishable from the matter before this Court. In *Wagenmann*, the attorney did absolutely nothing to contest a mental health proceeding against the plaintiff which resulted in a ghastly commitment. *Id.* at 219. The conduct of the attorney was egregious as he refused to discharge himself on request; refused to demand to set a hearing; stipulated to the commitment; and ignored overwhelming psychiatric evidence that the plaintiff was sane and competent. *Id.* There is no record evidence before this Court which would support a theory that the

Public Defender was “egregious” to the extent of actually rising to a level to justify the assessment of exemplary or punitive damages. Furthermore, *Wagenmann* never directly addressed the physical impact rule and simply held that the emotional damages from the mental health commitment were reasonably foreseeable and therefore recoverable.

A lawyer’s negligent act which results in someone being put in jail should not be allowed to pave the way for emotional damages which would be purely subjective and speculative damages. Rather, if a lawyer’s negligent act rises to the level of being so malicious to justify the assessment of exemplary or punitive damages, then emotional distress damages should be awarded, which is the current law in Florida. The assessment of exemplary or punitive damages is not supported by the record before this Court involving ROWELL.

ROWELL also relies on this Court’s rulings in the cases of *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992) and *Tanner v. Hartog*, 696 So. 2d 705 (Fla. 1997). These cases are distinguishable from the record before this Court.

In *Kush*, this Court held that the impact rule was not applicable to the tort of wrongful birth. *Kush*, 616 So. 2d at 423. In doing so, this Court recognized that the parents of the child had gone to considerable lengths to avoid the precise injury they suffered. *Id.* The impact doctrine is not generally applicable in torts which cause

damages which are predominately emotional. See, *Miami Herald Publishing, Co. v. Brown*, 66 So. 2d 679 (Fla. 1953)(holding that mental suffering constitutes recoverable damages in cases of negligent defamation); *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1944)(holding that mental suffering constitutes recoverable damages in cases of invasion of privacy).

In *Tanner*, this Court held that the impact rule was not applicable in actions for emotional damages which resulted from the birth of a stillborn child because of the defendant's negligence. *Tanner*, 696 So. 2d at 708. It was conveyed that the "[i]mpact 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." *Id.* (citing, W. Keeton, *Prosser and Keeton on Torts* § 54, at 361-365 (5th ed. 1984)). However, this Court was careful to point out that the ruling was "[n]ot intended to depreciate the value of the impact rule." *Id.* Furthermore, it was noted that the impact rule should remain part of the law of Florida and "[c]ontinues to serve its purpose of assuring the validity of claims for emotional or psychic damages. . . ." *Id.*

As stated above, both the *Kush* and *Tanner* decisions are distinguishable from the record before this Court. In both of these cases the subject was a child - one stillborn and the other born with irreversible defects. Although public policy may have

dictated that in these two limited situations the impact rule should not be applicable, expounding on the theory of “parasitic” consequences to further deteriorate the impact rule is not the dictate of public policy. Almost any situation can be classified as a “parasitic” consequence of one’s conduct. Unlike wrongful births and negligent stillbirths, thousands of people are arrested in Florida every day. To carve an exception to the impact rule for loss of liberty would surely result in excessive litigation and claims that were purely subjective and speculative.

CONCLUSION

Respondent, Julianne M. Holt, Office of the Public Defender, respectfully requests that the Second DCA’s certified question be answered in the positive and its ruling be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail on December 21, 2001 to: Theodore E. Karatinos of Seeley & Karatinos, P., 3924 Central Avenue, St. Petersburg, Florida 33711 and James W. Holliday of Prugh, Holliday & Deem, P.L., 1009 West Platt Street, Tampa, Florida 33606.

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CERTIFICATE OF COMPLIANCE

Printed in Times New Roman 14-point font, this brief complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a)(2).

TODD W. VRASPIR, ESQUIRE