

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**

**REPLY BRIEF OF PETITIONER
CIVIL CASE**

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REBUTTAL ARGUMENT

Petitioner, John Rowell, rebuts two arguments of the answer brief. First and contrary to Respondent’s argument, the reasoning of R.J. v. Humana of Fla., Inc., 652 So. 2d 360 (Fla. 1995), *supports* an exception to the impact rule here. Second, the exception will apply to a very narrow branch of legal malpractice. Petitioner Rowell rebuts the arguments in detail below.

FIRST REBUTTAL ARGUMENT

Despite the holding in R.J.,¹ its reasoning supports carving an exception to the impact rule here. Justice Overton observed that a physical impact guarantees the genuineness of the injury — genuineness. 652 So. 2d at 362. A wrongful confinement

¹ Justices Grimes, Shaw, Harding, McDonald merely concurred in the result of R.J., which leaves open the question of how they would have analyzed the facts. 652 So. 2d at 364. Concurring specially, Justice Kogan went a step further and reasoned that the concepts of “impact” and “injury” should not be confused. Id. at 365. The instant case may provide a platform for clarification. Indeed, a wrongful confinement may be a far more stigmatizing injury in societal terms than many physical impacts. “Pretrial confinement may imperil the suspect’s job, interrupt his source of income, and impair his family relationships.” Gerstein v. Pugh, 420 U.S. 103, 114, 95 S.Ct. 854, 863, 43 L.Ed. 2d 54 (1975) (considering the Fourth Amendment right to be free from bodily seizure).

is a genuine, bona fide injury. Movement is impinged. Privacy is impinged. Personal choice is impinged. Further, Justice Overton observed that a physical impact permits a potential defendant to identify the injury — identification. Id. at 362-63. The negligent lawyer can identify the injury here. The record shows where the state jailed Petitioner Rowell and how long the state confined him. The length of confinement permits malpracticing lawyers to anticipate the extent of the detainee's suffering. The injury is identifiable both in character and in time. The answer brief cannot draw sustenance from the holding in R.J. alone. Following R.J.'s reasoning, confinement is a genuine, identifiable injury.

SECOND REBUTTAL ARGUMENT

Against the flood-of-claims argument made in the answer brief, Respondent overlooks numerous procedural stops. Weeding out all but the most compelling criminal malpractice claims, this Court issued a strong pronouncement in Steele v. Kehoe, 747 So. 2d 931 (Fla. 1999). In Steele, this Court stated:

We . . . hold that a convicted criminal defendant must obtain appellate or post-conviction relief as a precondition to maintaining a legal malpractice action.

Id. at 933. Respondent cannot forget Steele, which safeguards against trivial claims in **all** criminal cases where the individual has been convicted. Following Steele, no convict can even sue for malpractice, much less claim emotional damages, without first

lifting the conviction. Steele narrows the availability of emotional damages by narrowing the duty that gives rise to any harm. Like a dam stopping the river in a narrow gorge, Steele provides a reasonable limit on any claims under the requested exception.

Respondent glossed over the fact that Petitioner Rowell was a pretrial detainee, and the attendant safeguards which prevent malpractice in detainee cases. How many safeguards did the Public Defender fail to follow? The answer brief's own statement of the facts shows how many times this malpractice case could have been avoided. So states the answer brief, "Judge Heinrich then requested that the Public Defender at the jail obtain a copy" of the civil rights' restoration. See Answer Brief at Page 2. Ignoring this first safeguard, the Public Defendant failed to follow the judge's instructions in a timely manner. So states the answer brief, the Public Defender's "intake unit was also assigned the responsibility of interviewing at the jail each arrestee . . ." See Answer Brief at Pages 2-3. This second safeguard failed to get Petitioner Rowell out of jail within a reasonable time. So states the answer brief, "the standard bail reduction motion was filed on July 19." See Answer Brief at Page 4. Why did the Public Defender wait so long to invoke that "standard" safeguard? Criminal procedure builds safeguards into the pretrial detention process which would *normally* terminate a wrongful confinement. Bail, intake, and first appearances provide the safeguards. Yet while the Public Defender ignored the safeguards for days on end, Petitioner

Rowell languished in jail. If the Public Defender had followed the proper standard of care, then the safeguards would have prevented this case. In essence, the very criminal procedural safeguards, which the Public Defender neglected, will prevent a flood of pretrial detention malpractice cases from reaching the courts. Beyond the procedural safeguards, a trickle of justified cases remain. This case is one of those few, which is why the trial judge let the issue reach the jury; the jury awarded emotional damages; and the Second District Court of Appeal certified this case. Thus, Petitioner Rowell requests a narrowly-tailored exception to the impact rule which would only ripen after procedural safeguards had been ignored.

CONCLUSION

Petitioner, JOHN ROWELL, requests that the Second DCA's certified question be answered in the negative with a remand to reinstate the jury's verdict on non-economic damages.

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 28, 2001 to: Todd W. Vraspir, Esq. of Papy, Weissenborn, Poole & Vraspir, P.A., 5327 Commercial Way, Suite A101, Spring Hill, Florida 34606.

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CERTIFICATE OF COMPLIANCE

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

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