

IN THE SUPREME COURT OF FLORIDA

NO. SC04-1747

L.T.NO. 2D03-3123

STATE OF FLORIDA DEPARTMENT OF CORRECTIONS,  
Petitioner,

vs.

LISA M. ABRIL and ROBERTO ABRIL,  
Respondents.

\*\*\*\*\*  
ON DISCRETIONARY REVIEW OF AN OPINION  
OF THE SECOND DISTRICT COURT OF APPEAL  
\*\*\*\*\*

RESPONDENTS' AMENDED ANSWER BRIEF

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## STATEMENT OF THE CASE AND FACTS

### Nature of the case

This is a medical malpractice cause of action.

There are three counts remaining. Count I alleges malpractice by Continental Laboratories (Continental), a "health care provider" by definition. Continental was under contract with Petitioner, State of Florida Department of Corrections, (FDOC), to provide clinical laboratory services. The First Amended Complaint (Complaint) alleges that Continental breached its duty to Respondent, Lisa M. Abril, a nurse at the FDOC facility in Hendry County, when it negligently disclosed the results of Abril's blood tests for HIV.

Count II was dismissed by the trial Court, affirmed by the Appellate court and no appeal has been filed.

Count III and IV are actions by Abril's husband, Roberto Abril, who was a guard at the FDOC Hendry County facility. Count III is his own independent cause of action for the negligence of Continental and Count IV is a loss of consortium claim.

Pursuant to Florida Statute, Section 768.28 (10) (a), Continental, its employees, and its agents, are considered agents of FDOC for actions taken while acting within the scope of their contract with the state. Respondents, through discovery, have been provided a copy of the contract between the state and Continental in this matter.

Course of the proceedings and  
Disposition in the lower tribunals

The Complaint was dismissed at the trial court level because the Court could not find any precedent in Florida. The Court found "there has not been established any common law or statutory duty of care which requires a governmental entity to protect the confidentiality of HIV test results". (R.125).<sup>1</sup> Plaintiffs moved for reconsideration which was denied. (R.127-138). A timely appeal was taken. (R.139-140).

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1. "R" will introduce references to the record on appeal, while "A" will refer to the Appendix containing the opinion of the District Court and a copy of the Amended Complaint.

The Second District Court of Appeals reversed the order of dismissal indicating the Complaint did state a cause of action for which relief could be granted. (A.1-14). The District Court also certified the following question of great public importance to this Court:

IS FLORIDA'S IMPACT RULE APPLICABLE IN A CASE IN WHICH IT IS ALLEGED THAT THE INFLICTION OF EMOTIONAL INJURIES HAS RESULTED FROM A CLINICAL LABORATORY'S BREACH OF A DUTY OF CONFIDENTIALITY UNDER SECTION 381.004 (3) (f), FLORIDA STATUTES (SUPP. 1996), WITH RESPECT TO HIV TEST INFORMATION?<sup>2</sup>

The FDOC filed a timely notice to invoke this Court's discretionary jurisdiction. This Court ordered that merit briefs be filed, while postponing ruling on jurisdiction.

The issues which concerned the Circuit and District courts were (A) the availability of a civil remedy under Section 381.004 Florida Statute (HIV testing standards) and (B) whether or not the Respondents could recover damages in this matter in light of the impact rule.

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2. For the reasons stated in this Brief, Respondents do not believe this case concerns this certified question, because Respondents do not rely on Section 381.004 at all in their Amended Complaint. No oral arguments were presented to the District Court.

## SUMMARY OF ARGUMENT

Under Florida law, a common law cause of action exists for negligent disclosure of an HIV test.

Respondents' cause of action for medical malpractice relies upon expert witnesses who will testify, as they have indicated in their reports, that Continental violated prevailing standards of practice when its employees negligently disclosed results of confidential blood test results to persons not authorized to receive those results.

Respondents will not rely upon Section 381.004 to prove a breach of standards.<sup>3</sup> Respondents will rely upon the testimony of a medical expert (pathologist with clinical laboratory experience) who will testify concerning the breach of prevailing professional standards. As indicated by Dr. W. Pearson Clack, Chief Medical Examiner, District 12 for the State of Florida in his written

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3. The initial Complaint alleged a violation of Section 381.004. The First Amended Complaint alleges a violation of prevailing professional standards. The only reference to Section 381.004 violations are in some of the expert witness opinions which will not be relied upon in Respondents' cause of action. (See Appendix, Pg. 19 Par. 35,36 of First Amended Complaint)

opinion, Continental violated "the usual standard of care in their handling of the confidential HIV test result".(R. 102).

The impact rule does not govern this cause of action because damages in this case are recoverable as an exception to the impact rule. Damages, with regard to torts that concern a right of privacy are, by definition, mental anguish and no impact is involved.

## ARGUMENT

### Standard of review

When an appellate court reviews a final order granting a Motion to Dismiss, the standard of review is de novo. The court is required to "treat the factual allegations of the complaint as true and to consider those allegations in the light most favorable to the plaintiffs". Siegle v. Progressive Ins. Co., 819 So. 2d 732, 734-735 (Fla. 2002) (internal citations omitted).

I. UNDER FLORIDA LAW, A COMMON LAW CAUSE OF ACTION EXISTS FOR NEGLIGENT DISCLOSURE OF AN HIV TEST RESULT.

The trial court erred when it ruled that Florida did not recognize a cause of action for negligent disclosure of an HIV test result. The trial court's decision was based upon a lack of precedent which authorized such a cause of action.

The Second District Court of Appeals reversed the trial court's decision.

The common law duty to protect the confidentiality of HIV test results in the possession of a health care provider is proven by testimony of expert witnesses who establish the prevailing standards of health care in the industry under similarly situated circumstances. The Complaint alleges such breach of prevailing standards of care in Paragraphs 35 and 36 (A. 19 and R.86) and the attached reports by various medical experts. (R 101-119)

Section 381.004 does not provide for a civil remedy for good reason.

Section 381.004 (1) Legislative Intent states:

The Legislature finds that despite existing laws, regulations and professional standards which require or promote the informed, voluntary and confidential use of tests designed to reveal human immunodeficiency virus infections, many members of the public are deterred from seeking such testing because they misunderstand the nature of the test or fear the test results will be disclosed without their consent. (Emphasis added)

Professional standards regarding confidentiality of HIV tests were already in existence when the legislature passed Section 381.004. These are the same standards relied upon by Respondents' expert witnesses.

II. EMOTIONAL DAMAGES ARE RECOVERABLE AS AN EXCEPTION TO THE IMPACT RULE WHERE, AS IN THIS CASE , THE DAMAGES RESULT FROM A BREACH OF THE PREVAILING STANDARDS OF CARE REGARDING THE CONFIDENTIALITY OF HIV TEST RESULTS.

Florida has adopted the impact rule which basically does not allow for recovery of mental anguish and suffering damages absent some sort of physical impact involved in the cause of action. The only way the Respondents can recover in this matter is that their damages are recoverable as an exception to the impact rule.

The Courts have carved out exceptions to the impact rule on a case-by-case basis.

Of particular relevancy is Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992), where this Court held that the impact rule does not apply to medical malpractice wrongful birth situations. The medical malpractice involved in wrongful birth is failure of the health care provider to recognize and explain to expecting parents the risks that a child will be born with physical or mental disabilities. There is no impact and the damages consist of economic medical expenses to raise the child and mental anguish that results from the child's birth. Additionally, it is well settled law in Florida that mental suffering damages are recoverable for negligent defamation and invasion of privacy claims. Miami Herald Publishing Co. v.

Brown, 66 So. 2d 679 (Fla. 1953) and Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (1944).

This cause of action involves negligence committed by employees of a health care provider during their course of employment and subsequent negligence by employees of the FDOC in furthering the breach of confidential information. This case is very similar to an action for invasion of privacy.

To hold under these circumstances that the health care provider is liable for damages is not an expansion of the exceptions to the impact rule. It simply is another instance where privacy rights of an individual have been violated. Invasion of privacy, defamation, wrongful birth are all torts which by their very nature do not include a physical impact but do include recoverable mental anguish and suffering damages.

## CONCLUSION

For the foregoing reasons, Respondents respectfully request this Honorable Court to affirm the decision of the Second District Court of Appeals that the Complaint states a cause of action for which relief can be granted.

Respondents further request that this Honorable Court rule that emotional damages resulting from a clinical laboratory's breach of prevailing standards of care with respect to the confidentiality of HIV test results are recoverable as an exception to the impact rule.

CERTIFICATE OF SERVICE/CERTIFICATE OF COMPLIANCE

I CERTIFY that on November 12, 2004, a copy hereof was forwarded to David J. Glantz, Assistant Attorney General, Attorney for Petitioner, electronically to david\_glantz@oag.state.fl.us and by regular mail to Office of Attorney General, Civil Litigation Division, 110 S. E. 6th Street, 10th Floor, Fort Lauderdale, Fl. 33301-5000.

I CERTIFY that in compliance with Fla. R. App. P. 9.210 (b), this computer generated brief is prepared in Times Roman 14-point font.

Respectfully submitted,

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APPENDIX

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