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

**********

# INITIAL BRIEF BY PETITIONER


CHARLES J. CRIST, JR.
FLORIDA ATTORNEY GENERAL
Attorney for Petitioner, State of Florida Department of Corrections

David J. Glantz, Assistant Attorney General
110 SE 6th Street, 10th Floor
Fort Lauderdale FL 33301-5001
Telephone: (954) 712-4608
Fax: (954) 712-4700
E-mail: david_glantz@oag.state.fl.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Florida cases



Florida Statutes

Florida Rules



Other authorities

## STATEMENT OF THE CASE AND FACTS

### Nature of the case

Respondents Lisa M. Abril and Roberto Abril (Mr. and Mrs. Abril) filed suit for medical malpractice, negligence, and loss of consortium. They allege that a clinical laboratory, acting within the scope of agency with Respondent Florida Department of Corrections (FDOC), unlawfully disclosed to others the results of a human immunodeficiency virus (HIV) test performed on Mrs. Abril, causing her and Mr. Abril to suffer emotional distress.

### Course of the proceedings [1]

According to the First Amended Complaint (complaint), Mrs. Abril was a nurse in FDOC's employ. She performed unprotected mouth to mouth resuscitation on an inmate. Mrs. Abril later learned that the inmate had hepatitis C and was being tested for HIV. She gave a blood sample, which was sent to Continental Laboratory (the laboratory) for testing at the direction of an FDOC physician. (R. 83).

The complaint alleged that the laboratory "was under contract with the State of Florida to provide clinical services on behalf of [FDOC's] inmates." (R. 83). It

[1] "R." will introduce references to the record on appeal, while "A." will refer to the Appendix containing the opinion of the district court.

alleged that pursuant to § 768.28(10)(a), Fla. Stat.,[2] the laboratory's employees "are considered agents of [FDOC] for actions taken within the scope of their contract with the State." (R. 84). The complaint further alleged that the laboratory was licensed under Florida law to provide clinical laboratory medical services to the public. (R. 84)

The laboratory's test of Mrs. Abril's blood revealed that she was HIV reactive, an indication that she had contracted AIDS. (R. 85).

According to the complaint, the laboratory faxed Mrs. Abril's test results to the prison's business office. The laboratory also faxed the test to the office of FDOC's Chief of Health Services in Tallahassee at the specific request of an FDOC employee there. As a result, the test became known to FDOC employees who were not authorized by law to learn of it. (R. 84).

Mrs. Abril underwent subsequent blood tests and three weeks later, learned that in fact she was not HIV positive. (R. 85).

The complaint presented four claims for relief:

Count I, sounding in medical malpractice, alleged that the laboratory had a "professional duty" to provide services to Mrs. Abril consistent with the prevailing

[2]The First Amended Complaint refers to "Section 68.28(10)(a)." (R. 84). Apparently this is intended to refer to § 768.28(10)(a).

professional standard of care for medical clinical laboratories. The complaint alleged that this duty was breached when the laboratory revealed Mrs. Abril's HIV test to persons who were not authorized to receive it. The complaint alleged that as a direct result of the laboratory's negligence, Mrs. Abril suffered "mental anguish and emotional distress" when she learned of the breach of confidentiality. (R. 86). Further, the complaint alleged that FDOC was vicariously liable for the laboratory's actions within the scope of agency, pursuant to § 768.28(10(a). (R. 86–87).

Count II, sounding in negligence, sued FDOC directly for the action of the FDOC employee who directed the laboratory to fax Mrs. Abril's test to FDOC's Chief of Health Services in Tallahassee. This count alleged that Mrs. Abril suffered "mental anguish and emotional distress" as a result. (R. 87).[3]

Count III, also sounding in negligence, was brought on behalf of Mr. Abril (also an FDOC employee, R. 85) for "mental anguish and emotional distress" he suffered when his wife told him that the HIV test results had been disclosed to unauthorized FDOC employees. (R. 87–88).

Count IV, brought by Mr. Abril, alleged that he suffered "loss of [his wife's] affection and consortium" due to the laboratory's "professional negligence." (R.

[3]Mrs. Abril did not argue on appeal that dismissal of this claim was improper, and the district court did not address it.

88).

A physician's affidavit was attached to the complaint. The affidavit stated the physician's opinion that the laboratory "acted irresponsibly" and in violation of § 381.004, Fla. Stat. when it disclosed Mrs. Abril's test results to FDOC. (R. 102).

The complaint also included an affidavit from a licensed health care risk manager, who opined that the employees of the laboratory and "the institute" (the prison) who disclosed the HIV test results violated § 381.004, Fla. Stat., committing a misdemeanor and subjecting themselves to disciplinary action. (R. 106).

Two more physicians' affidavits were attached to the complaint. (R. 109–119). Both affidavits stated that the laboratory breached a duty of confidentially when it disclosed Mrs. Abril's test results. Unlike the first two affidavits, these made no reference to § 381.004, Fla. Stat. They asserted instead, in conclusory terms, that it was a "breach of [the laboratory's] duty to maintain confidentiality," and that the laboratory's action was "a gross departure of [*sic*] the standard of care in any setting." (R. 109, 116).

FDOC moved to dismiss the complaint on the ground that there was no recognized duty of care requiring a laboratory to maintain the confidentiality of HIV test results and therefore FDOC could not be held liable for disclosing Mrs. Abril's

test results. (R. 121–124).

Disposition in the lower tribunals

Following a hearing, the trial court entered an order dismissing the complaint with prejudice, finding "that there has not been established in the State of Florida any common law or statutory duty of care which requires a governmental entity to protect the confidentiality of HIV test results." The trial court also found that while § 381.004, Fla. Stat. provided criminal penalties for improperly disclosing HIV test results, it "does not authorize a private cause of action for such disclosure." (R. 125–126). Appellants moved for reconsideration, which was denied. (R. 127–138). A timely appeal was taken. (R. 139–140).

The Second District Court of Appeal reversed the order of dismissal. *Abril v. Department of Corrections*, __So.2d__, 2004 WL 1698066, 29 Fla. L. Weekly D1745 (Fla. 2d DCA, July 30, 2004). (A. 1–15).

The district court summarized the confidentiality provisions contained in § 381.004 and noted that administrative and criminal penalties were provided for violating those provisions. The district court also observed: "The statute makes no mention of private causes of action arising from violations of its provisions." (A. 5).

Having found that § 381.004 creates a duty of confidentiality – punishable criminally and administratively but without mention of a private cause of action (A.

5) – the district court then stated: "When a statute creates a clear duty of care, the violation of that duty can 'generate[ ] a viable cause of action in tort,' " and cited a number of cases for that proposition. (A. 6).

The district court also referred to the Restatement (Second) of Torts, section 286 (1965), which provides circumstances when a court "may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment." (A. 6–7). The Restatement provides that a court may look to legislative enactment statute as establishing a standard of conduct when the enactment's purpose "is found to be exclusively or in part (a) to protect a class of persons which includes the one whose interest is invaded, and (b) to protect the particular interest which is invaded, and (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results." (A. 6–7).

As an initial matter, the district concluded that the complaint contained factual allegations

> that would be sufficient to establish that Continental Laboratory violated a duty imposed on it by section 381.004 to maintain the confidentiality of HIV test results and to disclose those results only as authorized by law. The issue presented for resolution thus is not

> whether the complaint's allegations are sufficient to establish the necessary elements of the existence of a duty and the breach of that duty. The dispositive question is whether the damages alleged–for mental anguish and emotional distress caused by Continental Laboratory's breach of its duty–are cognizable under Florida law. The answer to this question depends on whether the impact rule is applicable to the claims at issue.

(A. 7).

Having thus found at the outset that the plaintiffs could bring a civil action based on the statutory duty of confidentiality and that "[t]he dispositive question is whether the [resulting mental and emotional] damages...are cognizable under Florida law" (A. 7), the district court then turned to a discussion of the impact rule.

Acknowledging that "[t]here are no cases directly addressing the application of the impact rule to a claim arising from the alleged violation of the confidentiality provision of section 381.004(3)(f)," (A. 9), the district court turned to *Gracey v. Eaker,* 837 So. 2d 348 (Fla. 2002), which it found analogous. (A. 9). The analogy, in the district court's reasoning, was that the psychotherapist-patient relationship in *Gracey v. Eaker* was for practical purpose the same as the laboratory-patient relationship here, in that both were statutorily-imposed confidential, hence fiduciary,

relationships. (A. 9–10).

The district court observed that "no allegations have been made that a fiduciary relationship existed between the Abrils and Continental Laboratory." (A. 13). It found, however, that a fiduciary relationship was not necessary to its disposition of the case:

> Whether or not Continental Laboratory had a fiduciary relationship with the Abrils, the existence of a duty on the part of Continental Laboratory to maintain the confidentiality of information relating to Mrs. Abril's HIV test is unquestioned. Mrs. Abril's interest in Continental Laboratory's compliance with that duty was as compelling as the interests of the Graceys in the compliance by their psychotherapist with the duty of confidentiality which arose in the context of a fiduciary relationship.

(A. 13–14).

The district court concluded that "the close similarity of the interests involved here with the interests at issue in *Gracey*, the rationale of *Gracey* requires that the impact rule not be applied in the instant case. We therefore conclude that the trial court erred in dismissing the claims that the Abrils have argued were improperly dismissed." (A. 14).

Citing what it termed "the incremental approach the supreme court has adopted in addressing limitations on the application of the impact rule," (A. 14), the District court certified the following question of great public importance:

> 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?

(A. 15).

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

## SUMMARY OF ARGUMENT

The trial court correctly found there was no common law cause of action for disclosure of an HIV test. The district court erred when it reversed this finding.

The trial court also correctly found that the duty of confidentiality contained within § 381.004 does not create a cause of action for the laboratory's disclosure of Mrs. Abril's HIV test. The district court's decision which reversed this finding should be reversed because there is no evidence of legislative intent that § 381.004 create a private cause of action. The statute does not expressly create civil liability, and being penal in nature, must be strictly construed against imposing a penalty, or inferring a cause of action, which is not provided within its four corners.

This case is clearly distinguishable from *Gracey v. Eaker*, 837 So. 2d 348 (Fla. 2002), where the statute in question imposed a duty for psychotherapists to keep patient communications confidential, without providing penalties of any kind for a breach of that duty. Moreover, whereas in *Gracey* the Court relied on a long common law history of confidentiality between psychotherapist and patient, in the present case, clinical laboratory-patient confidentiality is a statutory creation. Based on the particular facts of this case, the Court should find the impact rule is applicable and accordingly, answer the certified question in the affirmative.

## ARGUMENT

### I. SECTION 381.004, A PENAL STATUTE, DOES NOT CREATE A CAUSE OF ACTION FOR DISCLOSING AN HIV TEST RESULT.

#### 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).

This case also presents an issue of statutory interpretation, which is a pure issue of law likewise subject to de novo review. *State v. Glatzmayer*, 789 So. 2d 297, 301-02 n.7 (Fla. 2001).

#### Discussion

A. Lack of common law precedent

No reported appellate decision in Florida recognizes a common law duty of care to refrain from disclosing another person's HIV test, the breach of which can supply a cause of action. The trial court was correct when it found that no such duty had been established in Florida (R. 125), and it was correct when it dismissed the complaint on this ground. The district court, which relied upon the existence of § 381.004 in finding a duty, erred when it reversed the trial court on this ground.

B. Lack of legislative intent to create a cause of action

The trial court found that § 381.004 "does not authorize a private cause of action for such [improper] disclosure [of HIV test results]." (R. 125.) In reversing the order of dismissal, the district

court necessarily, albeit implicitly,[4] found that § 381.004 could support a private cause of action. It is necessary as a threshold matter, therefore, to address whether § 381.004 creates a private cause of action.

Section 381.004 contains detailed provisions making an HIV test and the identity of the person tested confidential except under carefully enumerated circumstances. *See*, for example, § 381.004(f), which enumerates twelve confidentiality exceptions.[5] When it enacted § 381.004 the Legislature expressed its intent as follows:

> (1) LEGISLATIVE INTENT.--The Legislature finds that the use of tests designed to reveal a condition indicative of human immunodeficiency virus infection can be a valuable tool in protecting the public health. 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 infection, many members of the public are deterred from seeking such testing because they misunderstand the nature of the test or fear that test results will be disclosed without their consent. The Legislature finds that the public health will be served by facilitating informed, voluntary, and confidential use of tests designed to detect human immunodeficiency virus infection.

§ 381.004(1), Fla. Stat. (1996).

Plainly, the Legislature intended to protect public health by encouraging individuals to come

---

[4]Nowhere in its opinion did the district court explicitly find that § 381.004 created a private cause of action. It implicitly did so, however, by reversing the order of dismissal which specifically found that § 381.004 does not authorize a cause of action (R. 125).

[5]It is not necessary to detail here the statutory exceptions to HIV test confidentiality, because at this stage it must be assumed that the factual allegations in the complaint are true and that no exception existed which would have authorized Mrs. Abril's HIV test to be faxed to the prison or to FDOC's Chief of Health Services in Tallahassee as alleged in the complaint.

forward for HIV testing secure in the knowledge that their identities and test results would not be disclosed except as authorized within the four corners of the statute.

To further its objective of protecting public health, the Legislature included penal provisions within § 381.004 designed to punish and deter unauthorized disclosures. Section 381.004(6) provides that any person who wilfully violates any statutory confidentiality provision commits a first degree misdemeanor, § 381.004(6)(b), while § 381.004(6)(c) provides that one who does so maliciously or for monetary gain is guilty of a third degree felony. Administrative punishment is also provided. Under § 381.004(6)(a), a licensed facility or provider that violates any statutory confidentiality provision is subject to discipline under its licensing chapter.[6]

Nowhere within § 381.004 is there any language creating a civil cause of action for a person whose HIV test or identity is revealed contrary to the statute's confidentiality provisions.

Where, as here, a statute does not create a private cause of action, "legislative intent, rather than the duty to benefit a class of individuals, should be the primary factor considered by a court in determining whether a cause of action exists when a statute does not expressly provide for one." *Murthy v. N. Sinha Corp*., 644 So. 2d 983, 985. (Fla. 1994). In *Murthy*, the issue before the Court was whether– a private cause of action could be inferred from Chapter 489, Fla. Stat. (1991), which licensed and regulated construction contracting. Chapter 489 imposed upon the qualifying agent for a corporation's construction a duty to supervise the corporation's projects. It did not, however, expressly

[6]Administrative discipline is punitive and can even amount to a professional death sentence. For example, at the time in question, administrative penalties against a clinical laboratory included suspension, revocation, or denial of renewal of its license, or a $1,000 fine for each violation. § 483.221, Fla. Stat. (19895).

create a cause of action for a breach of that duty. The Court observed:

> In the past, some courts dealing with this issue [whether to infer a private cause of action under a statute which dos not expressly provide one] have looked to whether the statute at issue imposed a duty to benefit a class of individuals. These courts simply concluded that a cause of action arose when a class member was injured by a breach of that duty. Today, however, most courts generally look to the legislative intent of a statute to determine whether a private cause of action should be judicially inferred.

*Murthy v. N. Sinha Corp.*, 644 So. 2d at 985 (internal citations omitted).

The Court proceeded to determine whether it could infer that Chapter 489 supported a private cause of action. First, the Court noted that while Chapter 489 established licensing procedures and regulatory duties, there was

> no evidence in the language of the statute or the statutory structure that a private cause of action against a qualifying agent was contemplated by the legislature in enacting this statute. In general, a statute that does not purport to establish civil liability but merely makes provision to secure the safety or welfare of the public as an entity, will not be construed as establishing a civil liability.

*Id*. at 986 (citing *Moyant v. Beattie*, 561 So. 2d 1319 (Fla. 4th DCA 1990)).[7]

---

[7]In *Moyant v. Beatie*, the Fourth District considered whether § 475.482, Fla. Stat. (1989), the Real Estate Recovery Fund (fund), created a cause of action in favor of persons who suffer monetary losses due to dishonest acts of licensed brokers or salespersons. The court found that it did because that was the very purpose for which the fund was created: "The legislative intent to authorize private actions is made clear by the condition imposed by section 475.483(1)(a), Florida

The Court next examined the history of Chapter 489 and found that it did not reveal an intent to create a cause of action against a qualifying agent.[8] To the contrary, a former provision which authorized private suits was moved to another chapter, leaving Chapter 489 with no reference to a cause of action against a contractor. The Court therefore "decline[d] to infer any civil liability as there is no evidence in the language or the legislative history of chapter 489 of a legislative intent to create a private remedy against a qualifying agent." *Id*. at 986.

This Court recently restated the importance of analyzing legislative intent when determining whether a statute creates a cause of action. In *Aramark Uniform and Career Apparel, Inc. v. Easton*, __ So. 2d __, 2004 WL 2251847 (Fla. Oct. 7, 2004), the statute under consideration allowed an action for damages resulting from pollution. The question before the Court was whether the statute created a new cause of action imposing liability without proof that the defendant caused the pollution, or whether it only modified existing common law causes of action which require proof of causation. *Id*., *1. The Court observed that the statute contained several provisions which were strong evidence that the Legislature intended to create a new, strict liability cause of action. Those provisions included (1) a damages remedy for non-negligent discharge of pollution; (2) defenses which were provided in the statute, including the inclusion of lack of causation as an affirmative defense; (3) the statute's title ("Nonexclusiveness of remedies and individual cause of action for damages under ss.

---

Statutes (1989), which allows recovery from the fund if 'such person has received final judgment . . . in any action wherein the cause of action was based on any violation proscribed in s. 475.25.'" *Id*., 561 So. 2d at 1320.

[8]"When scrutinizing the legislative history of a statute to determine legislative intent, courts may also look to acts passed at subsequent sessions." *Id*., 644 So. 2d

376.30–376.319"); (4) a cumulative remedies clause; (5) an attorney fee provision; and (6) a directive in the statute that it should be liberally construed.[9] These provisions led the Court "to the inevitable conclusion that the statute creates a cause of action for strict liability regardless of causation." *Id*., *5–6. Here, by contrast, § 381.004 contains no provisions which would be consistent with legislative intent to create a cause of action. This supports FDOC's contention that § 381.004 does not create a cause of action.[10]

The district court erred by not considering legislative intent as required by *Murthy* and *Aramark Uniform.* The district court erred by relying exclusively on the Restatement, (Second) of Torts, section 286 (1965).[11] The district court's

---

at 986, n. 8 (citations omitted).

[9]By contrast, a penal statute, such as § 381.004, must be strictly construed and cannot be extended by construction. This is discussed below.

[10] Examples abound of enactments where the Legislature expressly created civil remedies for criminal violations. *See* § 812.035(6), Fla. Stat. (2003) (creating civil remedies for theft-related crimes defined by § 812.012-812.037 and § 812.081, Fla. Stat. (2003)); § 895.05(6), Fla. Stat. (2003) (creating civil remedies for racketeering criminalized by § 895.03, Fla. Stat. (2003)); and § 68.065, Fla. Stat. (2003) (creating civil remedies for worthless checks criminalized by § 832.07, Fla. Stat. (2003)). This supports FDOC's contention that if the Legislature intended to create a civil remedy in § 381.004, it would have done so in express terms. *Cf. Fischer v. Metcalf*, 543 So. 2d 785, 790 (Fla. 3d DCA 1989) (en banc) ("unchanged nature of [statutory] penalty, in the face of repeated reenactments and revisions, implies an intention on the part of the legislature not to provide a private right of action.").

[11]The Court should further note that neither *Murth*y nor *Aramark Uniform*

decision is irreconcilable with this Court's precedents, and, if it is permitted to stand, will render nearly every statutory duty grounds for a private lawsuit.

Nothing in the history of § 381.004 reflects legislative intent to create a cause of action. It was created in 1988 as § 381.609 and was amended nineteen times between 1988 and 1996. Those revisions – none of which provide a civil cause of action – are summarized as follows:

| Session law | Description |
|---|---|
| 89-289 § 2 | Adds language now found in § 381.004 (3)(e)(10) regarding compensation claims |
| 89-350 §6 | Adds language now found in § 381.004(2)(a), (b) and (e)for the definition of "HIV test," "HIV test result," and "test subject" |
| 90-210 | Adds references to § 960.003 and § 951.27 now found in § 381.004(3)(f) and -§ 381.004(3)(h)(6) |
| 90-292 | Adds definition of "significant exposure" now found in § 381.004(2)(c). Also adds language now found in § 381.004(3)(d)(1) and (4); some of the language of § 381.004(3)(e)(11);– added language found in § 381.004(3)(e)(14); adds language found in § 381.004(3)(h)(10)–(12) |
| 90-344 | Adds language regarding § 119.07(1) and the Open Government Sunset Review Act (§ 119.14)to several sections |
| 91-297 | Renumbers statute to 381.004; eliminates some language found in § 381.609(3)(a) regarding the required explanation of the test including its purpose, potential uses, and limitations and the meaning of its results |

considered section 286 of the Restatement of Torts.

| | |
|---|---|
| 92-33 | Adds language permitting regulation by the Agency for Healthcare Administration in § 481.004(11) |
| 92-171 | Adds the term "nonmedical personnel" to sections which already contained the term "medical personnel" |
| 92-289 | Updates references from § 395.017 to §395.3025 |
| 92-227 | Updates references to §796.08 and makes minor changes to other sections |
| 93-230 | Reenacts provisions now found in § 381.004(3)(f) and(3)(h)(6) |
| 93-264 | Updates references to § 381.6105 to § 381.0041 |
| 94-218 | Updates two references to the Department of Business and Professional Regulation |
| 95-143 | Updated references to subsection numbers |
| 95-148 | Makes statute gender neutral |
| 95-308 | Adds language regarding telephonic post-test counseling |
| 95-387 | Reenacts language now found § 381.004(3)(g) |
| 96-178 | Adds language to § 381.004(4) regarding voluntary testing programs |
| 96-406 | Eliminates language regarding Open Government Sunset Review Act |

In sum, § 381.004 is devoid of language creating a private cause of action, and its text and history are devoid of evidence indicating legislative intent to create a cause of action. The trial court was correct that § 381.004 "does not authorize a private cause of action for such disclosure." (R. 125). The district court erred

when it reversed that judgment.

C. Penal statute must be strictly construed

As shown, § 381.004 imposes criminal and administrative penalties for unauthorized disclosure of an HIV test but does not create civil liability. This is another reason why a private cause of action must not be judicially inferred: "[S]tatutes imposing a penalty must always be construed strictly in favor of the one against whom the penalty is imposed and are never to be extended by construction." *Hotel & Restaurant Comm'n v. Sunny Seas No. One, Inc.*, 104 So. 2d 570, 571 (Fla.1958). *See also Fischer v. Metcalf*, 543 So. 2d 785, 788 (Fla. 3d DCA 1989) (en banc) (criminal statute must be strictly construed in favor of person against whom a penalty is to be imposed and "'nothing that is not clearly and intelligently described in [a statute's] very words, as well as manifestly intended by the Legislature, is to be considered as included within its terms.'") (quoting *Earnest v. State*, 351 So. 2d 957 (Fla. 1977)). *Cf. Holmberg v. Department of Natural Resources*, 503 So. 2d 944, 947(Fla. 1st DCA 1987) (statute which imposes civil penalty must be construed strictly in favor of person to be penalized and must never be extended by construction).

This settled principle applies here. Because § 381.004 is penal, the foregoing authorities require that it be strictly construed against inferring the existence of a

penalty (civil damages) which does not expressly appear within the statute's four corners.

## II. THE IMPACT RULE BARS EMOTIONAL DAMAGES FOR VIOLATING A STATUTORY DUTY OF CONFIDENTIALITY, WHERE THE DUTY ARISES UNDER A PENAL STATUTE WHICH OMITS A CIVIL REMEDY .

### Discussion

In finding the impact rule inapplicable in the instant case, the district court relied mainly on *Gracey v. Eaker*, 837 So. 2d 348 (Fla. 2002). There, the defendant-psychotherapist conducted separate sessions with the plaintiffs (a husband and wife), and encouraged them to reveal confidences to him which they had not revealed to each other. *Id*. at 351. The defendant thereby created a fiduciary relationship between himself and the plaintiffs, with himself as fiduciary. *Id*. at 354. The defendant then revealed to each plaintiff what the other had told him in confidence, causing them to suffer emotional harm. *Id*. at 351.

Key to the Court's analysis was the long common law history recognizing the a duty of confidentiality owed by mental and medical health practitioners to their patient. *Id*. at 353–354. By contrast, there is no common law history of clinical laboratory-patient confidentiality. Rather, such confidentiality is strictly a statutory creation under § 381.004.

Also key to the Court's analysis was that psychotherapists are licensed under a statute which requires them "to keep confidential the substance of patient

communications." *Id*. at 351. That statute, Chapter 491, Fla. Stat. (1997), entitled "Clinical, Counseling, and Psychotherapy Services," is not penal in nature and imposes no penalties or punishments against a licensee who violates a patient confidence.[12] It is clearly distinguishable from § 381.004 which is penal in nature.

Given the common law history of psychotherapist-patient confidentiality, as well as the confidentiality provision in Chapter 491, the Court concluded that "the impact rule is inapplicable in cases in which a psychotherapist has created a fiduciary relationship and has breached a statutory duty of confidentiality to his or her patient. *Id*. at 357. Accordingly, the Court answered, in the negative, the following rephrased certified question:

> WHETHER FLORIDA'S IMPACT RULE IS APPLICABLE IN A CASE IN WHICH IT IS ALLEGED THAT THE INFLICTION OF EMOTIONAL INJURIES HAS RESULTED FROM A PSYCHOTHERAPIST'S BREACH OF A DUTY OF CONFIDENTIALITY TO HIS PATIENT, WHEN THE PSYCHOTHERAPIST HAS CREATED A STATUTORY CONFIDENTIAL RELATIONSHIP.

---

[12] § 491.009, Fla. Stat. (1997) and § 491.012, Fla. Stat. (1997) provide administrative and criminal penalties and remedies for enumerated violations but breach of confidentiality is not one of them.

*Id.* at 351.

The Court confined its holding to "counseling relationships," *id.* at 353, and reiterated that the impact rule should continue to serve as a check and balance over emotional damage claims:

> [O]ur holding should not be construed as bringing into question the continued viability of the impact rule in other situations. Six years ago, this Court stated its belief in the overall efficacy of the impact rule:
>
> "We reaffirm . . . our conclusion that the impact rule continues to serve its purpose of assuring the validity of claims for emotional or psychic damages, and find that the impact rule should remain part of the law of this state." *R.J. v. Humana of Florida, Inc., 652 So. 2d* [360] *at 363* [Fla. 1995].
>
> Today we simply hold that the impact rule is inapplicable under the particular facts of the case before us.

*Id.* at 358.

*Gracey* is clearly distinguishable from the present case because the present case lacks two elements that, as shown by the rephrased certified question, were vital to the Court's analysis: common law history of psychotherapist-patient confidentiality, and a statutory confidentiality provision which was not penal and therefore not subject to rules of strict construction. Moreover, the Abril's complaint does not allege a fiduciary relationship, which is a further distinction from *Gracey*.

For the foregoing reasons, the district court erred when it found that the

impact rule did not bar the Abrils' claim for mental and emotional damages. The district court should have recognized that under the particular circumstances of this case, which are clearly distinguishable from *Gracey*, there was no cause of action for the revelation of Mrs. Abril's HIV test as alleged in the complaint. The judgment of the district court should be reversed and the certified question answered in the affirmative.

## CONCLUSION

For the foregoing reasons, this Court should answer the certified question in the affirmative and should reverse the judgment of the District Court of Appeal.

CERTIFICATE OF SERVICE / CERTIFICATE OF COMPLIANCE

I CERTIFY that on October 13, 2004, a copy hereof was furnished to Dick W. Mount, Attorney for Respondents, electronically to mountlaw7@yahoo.com, and by mail to P.O. Box 59, Minerva, Ohio 44657.

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,

CHARLES J. CRIST, JR.
FLORIDA ATTORNEY GENERAL

_____

David J. Glantz, Assistant Attorney General
Fla. Bar No. 504238
Attorney for Petitioner,
State of Florida Department of Corrections

OFFICE OF ATTORNEY GENERAL
Civil Litigation Division
110 S.E. 6th Street, 10th Floor
Ft. Lauderdale FL 33301-5000
Telephone: (954) 712-4608
Fax: (954) 712-4700
E-mail: david_glantz@oag.state.fl.us

## APPENDIX

The opinion of the district court is attached.