

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

REPLY BRIEF BY PETITIONER

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ARGUMENT

I. THERE IS NO PRIVATE CAUSE OF ACTION FOR NEGLIGENT DISCLOSURE OF AN HIV TEST

Respondents do not attempt to defend the district court's finding that ' 381.004 creates a private cause of action. Instead, Respondents contend their cause of action arises solely from a common law duty of confidentiality. Respondents= Brief at 11-12. This contention, however, was not addressed by the district court in the first instance. The district court instead expressly found Respondents= cause of action arises under ' 381.004: ¶The complaint filed by the Abrils alleges facts 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.¶*Abril v. Department of Corrections*, 884 So. 2d 206, 209-10 (Fla. 2d DCA 2004).¹ The opinion below is silent on the question of whether the complaint states a cause of action based upon a common law duty. No Florida court has recognized such a tort duty of care, *see* Petitioner's Brief at 11. If, as Respondents appear to suggest, the

¹The district court's application of Restatement (Second) of Torts, section 286 (1965), 884 So. 2d at 209, conflicts with decisions from this Court holding that legislative intent is the primary factor to be considered in determining whether a private cause of action arises under a statute which does not expressly provide for one. *Aramark Uniform and Career Apparel, Inc. v. Easton*, ___ So. 2d ___, 2004 WL 2251847 (Fla. Oct. 7, 2004); *Murthy v. N. Sinha Corp.*, 644 So. 2d 983 (Fla. 1994). This conflict provides a basis for review under Art. V, ' 3(b)(3), Fla. Const. independent of the certified question. Respondents do not attempt to defend the district court's application of the Restatement test.

district court misunderstood the legal theory of the complaint, the district court's decision should be vacated on this basis.

It is appropriate to discuss whether ' 381.004 creates a cause of action because, as Respondents correctly state in their answer brief, one of the issues which concerned the trial and district courts was 'the availability of a civil remedy under Section 381.004 Florida Statute (HIV testing standards).@ Respondent's Brief at 3. This issue appears within the four corners of the First Amended Complaint which incorporates two experts' affidavits² specifically referring to ' 381.004 as creating a duty of confidentiality on the part of the laboratory. *See* Affidavit of W. Pearson Clack, M.D., R. 101B104, and Affidavit of Stuart A. Weston, R. 105B108.

Respondents nevertheless dismiss this question, saying they 'will not rely upon Section 381.004 to prove a breach of [prevailing professional] standards.@ Respondent's Brief at 4. Instead, Respondents contend that their '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.@ Respondent's Brief at 4. This argument distinctly differs from, and does not attempt to support, the district court's finding that Respondent's cause of action

²Thereby making them a part thereof for all purposes. Fla. R. Civ. P. 1.130(b).

arises under ' 381.004. Necessary to this determination was the district court's conclusion that AContinental Laboratory violated a duty imposed on it by section 381.004.@*Abril v. Department of Corrections*, 884 So. 2d at 209-10. The district court did not address whether the First Amended Complaint states a cause of action under the common law. Indeed, the certified question refers solely to a duty of confidentiality under the statute. *Abril v. Department of Corrections*, 884 So. 2d at 213. Accordingly, this Court should address whether ' 381.004 creates a private cause of action, and for the reasons already argued, find that it does not.

Respondents=position (that their cause of action will be based on expert testimony to the applicable standard of care) is at odds with the affidavits attached to their First Amended Complaint, which as cited above, contain specific references to ' 381.004. Moreover, Respondents=proffer of what they will prove through expert testimony does not address the fundamental issue decided below and now before the Court, which is whether, in the absence of common law precedent or a statutorily authorized civil remedy, the Court should recognize tort liability for purely emotional damages caused by negligent revelation to third parties of an HIV test. For the reasons argued in the initial brief, the Court should not recognize such liability.

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

To avoid application of the impact rule, Respondents analogize their cause of action to invasion of privacy or defamation, arguing that A[t]his case is very similar to an action for invasion of privacy.@ Respondents= Brief at 9. The analogy is inapposite because Respondents have not sued for invasion of privacy or defamation; they have sued for medical malpractice. Invasion of privacy and defamation are intentional torts to which the impact rule does not apply: AThe impact rule does not apply to recognized intentional torts that result in predominantly emotional damages, including the intentional infliction of emotional distress, see *Eastern Airlines, Inc. v. King*, 557 So. 2d 574, 576-77 (Fla. 1990), defamation, see *Miami Herald Publishing Co. v. Brown*, 66 So. 2d 679, 681 (Fla. 1953), and invasion of privacy, see *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243, 251 (Fla. 1944).@*Rowell v. Holt*, 850 So.2d 474, 478, n. 1 (Fla. 2003). See also *Gracey v. Eaker*, 837 So. 2d 348, 356, n. 14 (Fla. 2002) (stating that Aemotional distress damages in invasion of privacy claims typically are not subject to the strictures of the impact rule.@).

Respondents rely on *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992) for the proposition that Athe impact rule does not apply to medical malpractice wrongful birth situations.@ Respondents= Brief at 7. Actually, in *Kush v. Lloyd*, the Court primarily found precedent

in numerous jurisdictions for parents of a severely deformed child to sue for emotional damages resulting from the child's birth due to medical negligence B the tort of wrongful birth. *Id.* at 422. In dicta, the Court said A we are not certain that the impact doctrine ever was intended to be applied to a tort such as wrongful birth. @*Id.* at 422. While the Court observed that the impact rule is inapplicable to torts such as defamation and invasion of privacy, citing *Miami Herald Publishing Co. v. Brown*, 66 So. 2d 679, 681 (Fla. 1953) and *Cason v. Baskin*, 155 Fla. 198 , 20 So. 2d 243 (1944), see *Kush v. Lloyd* at 422, these are intentional torts to which the impact rule traditionally does not apply. *Rowell v. Holt, supra.* 850 So.2d at 478, n. 1.

III. THE IMPACT RULE SHOULD NOT BE REPLACED

Amicus Florida Academy of Trial lawyers argues that Florida's law on the recovery of emotional distress damages is in disarray and the impact rule is highly-flawed. Brief of Amicus at 1, 2. Amicus argues that the impact rule must be replaced. Brief of Amicus at 11B14.

This argument should be rejected. This Court has consistently, and as recently as 2002, affirmed the validity of the impact rule:

[O]ur holding [in this case] 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.

Gracey v. Eaker, 837 So. 2d 348, 358 (Fla. 2002)(quoting *R.J. v. Humana of Florida, Inc.*, 652 So. 2d 360, 363 (Fla. 1995)).

Amicus contends that when an issue involving emotional distress damages reaches the district courts of appeal, the courts have essentially been unable to guess what this Court might do, as a result of which nine impact rule cases have reached this Court in the last eleven years, including three at this time. Brief of Amicus at 2.

FDOC does not share amicus's lack of confidence in the ability of Florida's appellate courts to apply the impact rule in a principled manner on a case by case basis. This is the essence of what appellate courts do: apply rules of law to the unique circumstances of

individual cases.

Amicus also maintains that A[w]hile in some cases the courts have simply refused to apply the impact requirement, in other cases the courts have watered it down to avoid an undesirable result.@Brief of Amicus at 6. FDOC certainly does not agree with amicus= suggestion that Florida=s courts are so result oriented that they water down or refuse to apply this Court=s precedent merely Ato avoid an undesirable result.@

Just a little over two years ago this Court declined an invitation to undertake Aa major revamping of the impact rule.@ *Gracey v. Eaker, supra*, 837 So. 2d at 356, n. 14.

The doctrine of stare decisis dictates that the current invitation also be declined:

This Court adheres to the doctrine of stare decisis. *See, e.g., Muhammad v. State*, 782 So.2d 343, 365 n. 16 (Fla.2001); *see also Tyson v. Mattair*, 8 Fla. 107, 124 (1858) (AIt is an established rule to abide by former precedents, stare decisis, where the same points come again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion....@). Stare decisis bends where there has been a significant change in circumstances since the adoption of the legal rule, *see Weiland v. State*, 732 So.2d 1044, 1055 n. 12 (Fla.1999), or where there has been an error in legal analysis. *See State v. Gray*, 654 So.2d 552, 554 (Fla.1995); *see also Brown v. State*, 719 So.2d 882, 890 (Fla.1998) (Wells, J., dissenting) (A[I]ntellectual honesty continues to demand that precedent be followed unless there has been a clear showing that the earlier decision was factually or legally erroneous or has not proven acceptable in actual practice.@).

State v. J.P., ___So.2d ___, 2004 WL 2609242, *5 (Fla. 2004).

There has not been a significant change in circumstances since 2002 when the Court reaffirmed the validity of the impact rule in *Gracey v. Eaker, supra.*, 837 So. 2d at

358. Nor did the Court err in its analysis when it reaffirmed that the impact rule continues to serve its purpose of assuring the validity of claims for emotional or psychic damages, and [therefore we] find that the impact rule should remain part of the law of this state. *Id.*

FDOC disagrees with the district court's decision not to apply the impact rule under the circumstances of this case. FDOC does not contend, however, and does not agree, that the district court's action is due to a highly flawed rule of law that needs replacement. Accordingly, the Court should decline the invitation of amicus to replace the impact rule.

CONCLUSION

For the foregoing reasons, the Court should find that ' 381.004 does not create a private cause of action. Alternatively, the Court should reverse the judgment of the District Court of Appeal.

The Court should decline to replace the impact rule as urged by amicus.

CERTIFICATE OF SERVICE / CERTIFICATE OF COMPLIANCE

I CERTIFY that on December 16, 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,

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