IN THE SUPREME COURT OF FLORIDA

CASE NO: SC04-1929

MARJORIE WILLIS and RAY WILLIS, her husband,

Petitioners,

vs.

GAMI GOLDEN GLADES, LL., a Florida corporation
d/b/a HOLIDAY INN and AMERICAN KNIGHTS SECURITY, INC. ,

Respondents.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ON REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL
CASE NOS.: 3D03-2657

HINDA KLEIN, ESQUIRE
CONROY, SIMBERG, GANON, KREVANS & ABEL, P.A.
3440 Hollywood Boulevard
Second Floor
Hollywood, Florida 33021
(954) 961-1400 (Broward)
(305) 940-4821 (Dade)

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

OTHER AUTHORITIES **PAGE**

PREFACE

Petitioners, MARJORIE WILLIS and RAY WILLIS will be referred to as WILLIS in this brief. Respondent GAMI GOLDEN GLADES, LL will be referred to as HOLIDAY INN in this brief.

References to the Record will appear as follows:

(R. ___)

STATEMENT OF THE CASE AND FACTS

The Appellants MARJORIE and RAY WILLIS sued the Appellee HOLIDAY INN for simple negligence. (R.23-30) The WILLIS' alleged that HOLIDAY INN negligently failed to take reasonable precautions to protect MARJORIE from criminal attacks on its premises and that, as a result, MARJORIE was attacked by an unknown assailant. (R.23-30) The Second Amended Complaint alleged that she had suffered bodily injuries in the attack. (R.23-30) These allegations were denied by HOLIDAY INN. (R.32-35)

During discovery, MARJORIE WILLIS was served with the Interrogatory asking them to "[d]escribe each injury for which you are claiming damages in this case, specifying the part of your body that was injured, the nature of the injury, and, as to any injuries you contend are permanent, the effects on you that you claim are permanent." (R.88) In response, MARJORIE answered: "My life is shattered, my marriage is shattered, my sex life is shattered." (R.88)

MARJORIE WILLIS was also deposed, and her deposition was filed with the Court for summary judgment purposes. (R.104-211) During her deposition, WILLIS described the incident that was the subject of her complaint. (R.140-141) WILLIS recounted that she was on her way to the HOLIDAY INN

and parked in an adjacent lot, pursuant to the instructions of a security guard. (R.137) When she got out of her car, a person approached her with a gun and ordered her to empty her pockets. (R.140) MARJORIE WILLIS testified that she froze and:

> A: . . . He said – he said it again. "Empty your pockets." And I had my pocketbook on my arm. And I step out of the car because I didn't know what he meant and then he said, "I said empty your pockets?" And I heard the gun click. So then, I take my pocketbook and I stepped out and then I start to move and I couldn't. It happened so fast.
>
> Then when I started to walk away, he take the gun and he wave me back. He wave me back to the car. He did this, and "I say empty your pockets." And then I though he was really going to kill me because – so I told him, "Everything I got is in my pocketbook." And he still said again to empty my pockets, so he point to here. And I stood up like this, and I said, "I don't have no pockets."
>
> And he told me to lift my clothes and he made me lift by clothes up and he take his hand and patting me on the back because I had pants on.
>
> Q: After he patted you –
>
> A: He patted me. I was so scared. Then he told me – he told me again, then he said, "Give me your keys." I don't even know I had the keys in my hand. And I take the keys and I throw my keys in the car. And then with that – with that, I start my foot – I start to move and he went in the car. And I said – run over screaming and calling to the

> security guard and tell him, “Help me. My car, someone took my car.” He act like he never saw me.

(R.140-141) According to MARJORIE, the assailant only touched her one time when he “patted her” down to ensure she had no valuables on her person. (R.191-192)

MARJORIE did not go to the hospital after the incident, but instead, went to the emergency room the next day. (R.155) She was treated by a psychologist, Dr. George Lindenfield, and a psychiatrist, Dr. Victoria Dimayuga and, at her deposition, she was asked if she had been or was currently being treated by any other physicians, to which she responded in the negative. (R.156-157) At the conclusion of her deposition, MARJORIE testified that she had been diagnosed with post-traumatic stress disorder, anxiety and depression. (R.199) After the accident, she had been prescribed Zoloft, Paxil, Buspar and Welbutrin by her psychiatrist. (R.180)

HOLIDAY INN moved for Final Summary Judgment on the grounds that the WILLIS’ claims were barred by Florida’s “Impact Rule”. (R.86-89) HOLIDAY INN set forth that MARJORIE WILLIS did not sustain any physical injury during the incident that was the subject of her complaint and was only seeking damages for her alleged psychological trauma. (R.86-89) As grounds for

the Motion, HOLIDAY INN relied upon MARJORIE WILLIS' deposition and her answers to interrogatories, as set forth above. (R.86-89)

In response, the WILLIS' filed a Memorandum of Law in opposition to the Motion, arguing, as she does here, that the Impact Rule only requires that the plaintiff have suffered an impact to her person **or** discernible physical injury arising from emotional distress. (R.97) The WILLIS' claimed that MARJORIE suffered both as a result of the incident. (R.97) The WILLIS' claimed that MARJORIE suffered the "impact" when the gunman touched her with the gun and patted her down, but the WILLIS' did not claim that MARJORIE suffered a physical injury as a result of either "impact." (R.97-98) Rather, the WILLIS' filed the affidavit of MARJORIE'S psychologist, who indicated that MARJORIE suffered "physical manifestation of injuries resulting from the attack", including sexual dysfunction, peripheral temperature changes, muscle tightening and increased sweat gland activity." (R.90-92) Thus, the WILLIS' claimed that MARJORIE WILLIS' emotional distress resulted in "physical manifestation" such that her claim satisfied the impact rule. (R.99) In the alternative, the WILLIS' argued that the HOLIDAY INN, as an innkeeper, had a "special relationship" with its guests, including MARJORIE WILLIS, such that the impact rule should not apply. (R.100-102)

The trial court considered argument on the Motion. (T.1-12) At that hearing, WILLIS' counsel conceded that WILLIS' psychologist could not "do a medical diagnosis", but argued that his affidavit was being offered to attest to MARJORIE WILLIS' "physical manifestations of the psychological injury." (T.10) The trial court stated, "I've read the case law. I've read the motion. I've read the affidavit of the psychologist[1] which is the only contravening submission and in it, much as I don't particularly like the impact rule, based upon the case law, I think I have to grant the motion for summary judgment." (T.12-13, R.217-218) This Order was timely appealed by the WILLIS'. (R.212-214)

On review, the Third District Court of Appeal affirmed the summary judgment, but "in light of the continuing uncertainty as to the content, scope and wisdom of the Florida impact rule, trial court's ruling, the appellate court certified the following four (4) questions to this Court as "matters of great public importance":

> 1) Is the evidence that the plaintiff was touched against her will by the pistol placed to her head and in 'patting down'

[1] At no time did the trial court strike the affidavit, or indicate that he was not considering that affidavit as evidence in opposition to the Motions for Summary Judgment.

her body sufficient to satisfy the Florida impact rule?

2) Is the evidence that the plaintiff was apparently the object of an assault and multiple batteries sufficient satisfy a 'free standing tort' exception to the impact rule which may exist in Florida?

3) Is the innkeeper-guest relationship involved in this case a 'special relationship' under an exception to the impact rule which may exist in Florida?

4) Should the impact rule be abolished?

(A.4-5) The Petitioners timely filed their Notice to Invoke this Court's jurisdiction and by order dated October 5, 2004, this Court postponed its decision on jurisdiction and ordered the parties to submit briefs on the merits.

SUMMARY OF ARGUMENT

The WILLIS' and Amici urge this Court to accept jurisdiction to consider this case as a matter of great public importance, asserting that the facts in this case are sufficiently compelling to justify this Court's reconsideration of the viability of the "impact rule". On the contrary, the facts in this case only serve to underscore the wisdom of this rule and we submit that, as a result, there is no need for this Court to revisit the rule for the purpose of clarifying or abolishing it.

The Third District Court of Appeal correctly affirmed the trial court's summary judgment in favor of HOLIDAY INN on the basis of the impact rule. The undisputed evidence, supplied by MARJORIE WILLIS herself, demonstrated that she suffered no physical injury in the robbery. Contrary to the WILLIS' argument, the existing law on the subject does not enable her to recover damages for alleged physical manifestations of her emotional distress, as such claims are only cognizable if brought by bystanders who witness severe injury to a loved one. Likewise, WILLIS' claim that the impact rule should not apply in this instance because she was the victim of an intentional tort committed by an unrelated third-party finds no support in precedent. In fact, the impact rule has been applied in two other cases with almost identical facts.

The WILLIS' argument that the "free-standing tort" exception to the impact rule should be applied here is groundless for the simple reason that there is no such exception. A review of the authorities cited by this Court in Kush v. Lloyd, 616 So. 2d 415 (Fla. 1993), the only case even mentioning such a concept, demonstrates that the alleged "exception" is actually the rule itself, in that it requires that a plaintiff demonstrate a physical injury as a predicate to the recovery of emotional distress damages in a negligence action. The WILLIS' assertion that they were the victims of a "free-standing tort", in the form of the assault by the robber is also misguided in that neither HOLIDAY INN nor its employees committed that "free-standing tort" and therefore, could not be subject to an exception, even assuming that it existed.

The WILLIS' third argument, that recent Supreme Court precedent has called the viability of the impact rule into question, is likewise unsupported by the very case law they cite for that proposition. While this Court carved out very narrow exceptions to the impact rule in both Gracey v. Eaker, 837 So. 2d 348 (Fla. 2002) and Rowell v. Holt, 850 So. 2d 474 (Fla. 2003), neither of these cases represents a "trend" towards a wholesale abolition, or even a revision, of the impact rule as we know it. Both cases were decided on their specific facts and public

policy concerns and in each case, this Court reaffirmed the impact rule, refusing to abolish or modify it in any way.

Finally, the WILLIS' and Amici argue that the impact rule in its present form is "arbitrary and unworkable" and that it should be abolished or at least substantially revised. The mere fact that the rule has engendered appellate decisions does not, in an of itself, indicate that it should be revisited. The policy reasons underlying the impact rule still exist and in our litigious society, the rule is needed more now than ever. Moreover, this Court has recognized in several recent decisions on the subject that abolition of the rule could only have the effect of unnecessarily opening the floodgates for specious and expensive litigation, which would undoubtedly cost all citizens across the board. A line must be drawn somewhere and that line is the impact rule.

The Court should decline to reconsider that rule since there is nothing to be gained and the facts of this case simply do not compel an exception to the well-entrenched rule. Should the Court consider this case, it should affirm the Third District's decision and the underlying summary judgment.

POINTS ON APPEAL

I. EVIDENCE THAT THE PLAINTIFF WAS TOUCHED AGAINST HER WILL BY A PISTOL PLACED TO HER HEAD AND "PATTED DOWN" HER BODY IS INSUFFICIENT TO SATISFY THE FLORIDA IMPACT RULE.

II. EVIDENCE THAT THE PLAINTIFF WAS ALLEGEDLY THE OBJECT OF AN ASSAULT AND MULTIPLE BATTERIES IS INSUFFICIENT TO SATISFY THE "FREE STANDING TORT" EXCEPTION TO THE IMPACT RULE, ASSUMING THAT SUCH AN EXCEPTION EXISTS.

III. THE RELATIONSHIP BETWEEN AN INNKEEPER AND GUEST IS NOT A "SPECIAL RELATIONSHIP" JUSTIFYING AN EXCEPTION TO THE IMPACT RULE.

IV. THE IMPACT RULE SHOULD NOT BE ABOLISHED AS IT STILL SERVES THE USEFUL PURPOSE OF ENSURING THAT ONLY LEGITIMATE PERSONAL INJURY CLAIMS SURVIVE.

ARGUMENT

I. EVIDENCE THAT THE PLAINTIFF WAS TOUCHED AGAINST HER WILL BY A PISTOL PLACED TO HER HEAD AND "PATTED DOWN" HER BODY IS INSUFFICIENT TO SATISFY THE FLORIDA IMPACT RULE.[2]

Introduction

The WILLIS' urge this Court to accept jurisdiction to consider this case as a matter of great public importance, asserting that the facts in this case are sufficiently compelling to justify this Court's reconsideration of the viability of the "impact rule". On the contrary, the facts in this case only serve to underscore the wisdom of this rule and we submit that, as a result, there is no need for this Court to revisit the rule for the purpose of clarifying or abolishing it.

As the WILLIS' recognize, this Court has, in recent years, repeatedly reaffirmed the vitality of the rule and refused to abolish it, even in the face of facts far more egregious than those in this case. The rule, as succinctly stated by this Court in Rowell v. Holt, 850 So. 2d 474, 477-478 (Fla. 2003), requires that "before a plaintiff can recover damages for emotional distress caused by negligence of

[2] We have phrased our "Issues on Appeal" to mirror those certified by the District Court of Appeal.

another, the emotional distress suffered must flow from physical injuries sustained in an impact." While the WILLIS' and Amici argue that Gracey v. Eaker, 837 So. 2d 348 (Fla. 2002) somehow altered that rule when the Court observed in dicta that "Florida's version of the impact rules has more aptly been described as having a 'hybrid' nature, requiring **either** impact upon one's person or, in certain situations, at a minimum the manifestation of emotional distress in the form of a discernible physical injury or illness," the Court was obviously referring to the "bystander" version of the impact rule, which permits bystanders who witness a significant injury to their loved ones to recover damages for their own emotional distress if manifested by physical symptoms. See, Zell v. Meek, 665 So. 2d 1048 (Fla. 1996), Champion v. Gray, 478 So. 2d 17 (Fla. 1985). The Court's reference to "certain situations" was simply an acknowledgment that the impact rule applies differently depending upon whether the plaintiff was the victim of a tort or witnessed injury to a relative. Contrary to the argument of Amici, the Court's brief reference to the "hybrid" nature of the rule simply does not merit further review or clarification and this Court should dismiss the WILLIS' application for review.

A. Standard of Review

The standard of review from a trial court's order on summary judgment is de novo. Sierra v. Shevin, 767 So. 2d 524 (Fla. 3d DCA 2000).

B. The Merits

The Third District Court of Appeal correctly affirmed the Trial Court's summary judgment under existing law on the "impact rule". There is no genuine issue of material fact as to whether MARJORIE WILLIS suffered a physical injury as a direct result of the incident in question -- she clearly did not. The only real arguments raised by the WILLIS' involve their disagreement with the trial court's application of the law to this undisputed fact. As we will demonstrate, the trial court's order was eminently correct and was properly affirmed by the Third District.

On page 15 of their Brief, the WILLIS' contend that "[o]ver the years the Courts have required different degrees of impact – holding that the slight touch of an asbestos fiber or an electric shock is enough, but that a gun held to one's back and a push is not." We submit that the WILLIS' are misreading the case law.

What the courts applying the impact rule have actually required is a physical injury arising from an impact. For example, in Eagle-Pilcher Industries,

Inc. v. Cox, 471 So. 2d 817 (Fla. 3rd DCA 1983), the Third District found that the inhalation of asbestos satisfied the impact rule not simply because it was an "impact", but because "asbestosis, caused by inhalation of asbestos fibers . . . 'begins when asbestos fibers become embedded in the lungs.'" Id. at 527. Similarly, in Clark v. Choctawhatchee Elec. Coop., 107 So. 2d 609 (Fla. 1958), this Court found that the impact rule was satisfied when an electrical shock internally injured the Plaintiff, even though she might have shown no outward manifestation of that injury. These Courts did not quantify the degree of the impact but simply determined whether the impact resulted in a threshold physical injury.

On the other hand, where, as here, the record clearly shows that in a simple negligence action, the Plaintiff suffered no internal or external physical injury arising from an alleged "impact", the Courts have consistently found that the impact rule barred the claim. See, e.g., Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974)(individual who allegedly suffered physical injuries resulting from emotional distress suffered when car struck her house could not recover because she was not physically injured in the accident); Rivers v. Grimsley Oil Co., 842 So. 2d 975 (Fla. 2d DCA 2003)(where store employee was emotionally traumatized by armed robbery but suffered no physical injury, impact rule barred claim against employer);

Ruttger v. Wagner, 691 So. 2d 1177 (Fla. 3rd DCA 1997)(where robbery victims were pushed by robber wielding a gun but suffered no physical injury as a result of that push, impact rule barred recovery for emotional distress), Jordan v. Equity Properties and Dev. Co., 661 So. 2d 1307 (Fla. 3rd DCA 1995)(where robbery victim fell to ground with her assailant, victim did not satisfy impact rule in the absence of resultant physical injury). The Courts have consistently recognized that a physical injury does not necessarily follow every touch, whether it be by a gun or some other mechanism, and in fact here, MARJORIE WILLIS freely admitted that she had no such injury resulting from her "pat down" .

Thus, contrary to the WILLIS' contention, on page 17 of their Brief, this Court does not require a "threshold degree of impact" – it simply requires a threshold degree of **injury** arising from that impact, in order to keep the courthouse doors open for recovery. That threshold has simply not been met here and the trial and appellate courts correctly determined that WILLIS' claims were barred by the impact rule.

The WILLIS' also contend that the impact rule should not apply here because MARJORIE WILLIS was the victim of an assault and battery, an intentional tort. We agree that had she sued the robber, her claim would not be

barred by the impact rule, which only bars claims sounding in negligence. See, Rowell, 850 So. 2d at 478, n. 1. Here, however, the only claim brought against the HOLIDAY INN sounded in simple negligence and the fact that a third party unrelated to the HOLIDAY INN may have intentionally assaulted her is of no moment because the HOLIDAY INN is no more or less negligent by virtue of the specific tort committed by the unrelated third-party tortfeasor. For that reason, there is simply no rational distinction between this case and Rivers, 842 So. 2d 975, Ruttger, 691 So. 2d 1177, and Jordan, 661 So. 2d 1307, all which involved armed robberies.

In recognition of the fact that the case law is squarely against them on this issue, the WILLIS argue in the alternative that MARJORIE WILLIS did, in fact, suffer a physical injury sufficient to withstand the impact rule and that HOLIDAY INN "utterly failed" to conclusively demonstrate that she did not suffer a physical injury "as a result of the attack". Initial Brief, p. 18. In doing so, the WILLIS' are ignoring MARJORIE WILLIS' own answers to interrogatories, in which they were expressly asked about the nature of MARJORIE WILLIS' injuries and to which she responded, "My life is shattered, my marriage is shattered, my sex life is shattered," but did not elaborate or specify any physical injury suffered

during the robbery itself.

Despite the clarity of the interrogatory and its response and the complete absence of any other record evidence of physical injury occurring during the robbery, the WILLIS' argue that HOLIDAY INN did not meet its burden on summary judgment because it did not affirmatively prove that MARJORIE WILLIS suffered no physical injury during the robbery. Given that MARJORIE WILLIS testified at her deposition that she suffered only psychological injuries and did not disclose any other physical injury in response to a direct interrogatory, the HOLIDAY INN more than met its burden of showing that there was no evidence that MARJORIE WILLIS suffered a physical injury. Surely MARJORIE WILLIS would know better than anyone whether she was physically injured during the alleged assault and her admission that she was not forecloses her from thereafter disavowing her sworn testimony and discovery responses.

The WILLIS' fault us from offering no other evidence supporting HOLIDAY INN'S contention that MARJORIE WILLIS suffered no physical injury in the robbery, but a close reading of their brief demonstrates that even now, they do not contend that she was injured in the robbery. Rather, their theory is that an injury allegedly suffered as a physical manifestation of psychic trauma or as a side

effect of medications taken to alleviate that alleged trauma constitute an injury sufficient to meet the impact threshold. That, however, is simply not the law. See, Gilliam v. Stewart, 291 So. 2d 593; Ruttger, 691 So. 2d 1307.

The WILLIS' claim that MARJORIE WILLIS' psychologists' affidavit demonstrates that she suffered physical injuries including sexual dysfunction, temperature changes, muscle tightening and increased sweat gland activity as a result of her attack. The affidavit, however, says no such thing. Dr. Lindenfeld only opined that the foregoing were "physical manifestation of injuries", in other words, **symptoms** of unspecified apparently psychological injuries MARJORIE WILLIS sustained in the attack. At no time did the WILLIS' offer any evidence that she suffered a physical injury when she was held up.[3]

The WILLIS' claim is indistinguishable from the Plaintiffs' claims in Ruttger, wherein one plaintiff claimed to have post-traumatic stress syndrome and the other plaintiff claimed that his diabetes had been exacerbated by their robbery. As is the case here, both plaintiffs in Ruttger claimed to have "physical manifestations" of their emotional distress sufficient to withstand the impact rule.

---

[3] While the WILLIS' argue, in passing, that there are potential side effects from the medication MARJORIE is taking, they did not offer any evidence that she suffered those side-effects, nor did she ever offer the testimony of a medical doctor addressing that issue.

As in Ruttger, that argument must be rejected because the impact rule, as it applies to plaintiffs who are not bystanders, requires that the physical injury be directly related to the incident in question and not simply a byproduct of emotional distress.[4] Id. See also, R.J. and P.J. v. Humana of Florida, Inc., 652 So. 2d 360 (Fla. 1995). Compare, Champion, 478 So. 2d 17 (bystander who witnessed death or injury to loved one may maintain cause of action for negligent infliction of emotional distress).

Given that there was no legitimate dispute on the issue of whether MARJORIE WILLIS sustained a physical injury during the subject incident, the question then becomes whether the absence of a physical injury resulting from an "impact" is fatal to her claim against HOLIDAY INN. We submit that, contrary to the WILLIS' argument, the impact rule itself has not been altered or abolished in any meaningful way and this Court's continuous and recent reaffirmance of the validity of the rule requires that if this Court considers this case, the Court should answer the first certified question in the negative and affirm the summary judgment.

---

[4] The WILLIS' rely in part on Zell v. Meek, 665 So. 2d 1048 (Fla. 1996) for the proposition that a physical manifestation of emotional distress is sufficient to avoid application of the impact rule. Initial Brief, p. 20. Zell has no application here because it involved a claim for emotional distress by a bystander who witnessed the serious injury of a family member, rather than the victim himself.

II. EVIDENCE THAT THE PLAINTIFF WAS ALLEGEDLY THE OBJECT OF AN ASSAULT AND MULTIPLE BATTERIES IS INSUFFICIENT TO SATISFY THE "FREE STANDING TORT" EXCEPTION TO THE IMPACT RULE, ASSUMING THAT SUCH AN EXCEPTION EXISTS.

The WILLIS' next argue that the impact rule should not apply in this case because MARJORIE WILLIS was the victim of the "free-standing tort" of assault and battery. The problem with this argument, of course, is that HOLIDAY INN did not assault and batter MARJORIE WILLIS – her assailant allegedly did. HOLIDAY INN is not vicariously liable for the assailant's actions and therefore, it has not committed any such intentional tort.

The "free-standing tort" exception to the impact rule may not even be an "exception". In fact, it has only been addressed in dicta in this Court's Kush v. Lloyd, 616 So. 2d 415 (Fla. 1993). In that case, this Court held that, as a matter of public policy, the impact rule does not bar claims for emotional distress arising from the "wrongful birth" of a child. Id. In reaching this conclusion, the Court surveyed case law throughout the country and observed "we are not certain that the impact doctrine ever was intended to be applied to a tort such as wrongful birth" because such a claim may exist even without the allegation of emotional injuries. Relying on the venerable authority Prosser and Keeton on the Law of Torts and the

Restatement (Second) of Torts, this Court found that "the impact 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. at 422.

In its opinion certifying the issue of whether the so-called "free-standing tort exception" to the impact rule should apply in this instance, the Third District broadly misconstrued the scope of that "exception", if indeed it even exists. A review of Prosser and Keeton's treatise on the subject, cited in Kush, reveals that those commentators simply recognized the obvious, namely, that "with a cause of action established by the physical harm, 'parasitic' damages are awarded, and it is considered that there is sufficient assurance that the mental injury is not feigned." Prosser and Keeton, Prosser and Keeton on Torts § 54 at p. 363 (5th ed. 1984). In other words, the "parasitic" damages referred to in the treatise are emotional distress damages that are **in addition** to damages for physical injury. This is not an "exception" to the impact rule; it **is** the impact rule.

The other authority cited by this Court in Kush, the Restatement (Second) of Torts § 47, simply reaffirms that a physical injury is a necessary predicate to the recovery of emotional distress damages in a negligence claim.

Section 47, entitled "Conduct Intended to Invade Other Interests But Causing Emotional Distress" reads "[e]xcept as stated in §§ 21-34, and in § 46, conduct which is tortious because intended to result in bodily harm to another or in the invasion of any other of his legally protected interests does not make the actor liable for an emotional distress which is the only legal consequence of his conduct." Once again, this is simply another definition of the impact rule, but not, in and of itself, an exception to it.[5] As this Court noted in Rowell, 850 So. 2d at 478 n. 1, the rule does not apply to intentional torts that result in predominantly emotional damages, including intentional infliction of emotional distress claims. These types of claims are properly viewed as exclusions from, and not exceptions to, the impact rule. Id.

The WILLIS' construe the term "free-standing tort", as used by this Court in Kush, as any tort for which the common law has traditionally provided a damages remedy. In doing so, they have taken that phrase out of context and read more into it than this Court intended. By citing the foregoing authority in the Kush

[5] The other Restatement sections expressly excepted from Section 47, dealing with Assault and Outrageous Conduct Causing Severe Emotional Distress (termed Intentional Infliction of Emotional Distress by Florida courts) have always been excluded from the scope of the impact rule, which only applies in simple negligence cases.

case, this Court was not carving out an exception to the impact rule, but was simply reaffirming it.

The WILLIS' assert that the "free-standing tort" in this case was the robber's assault and battery, and that their emotional distress damages were proximately caused by those torts. Once again, however, the WILLIS' are seeking to essentially hold HOLIDAY INN vicariously liable for the robber's actions where there is no basis in law for doing so. HOLIDAY INN did not assault or batter MARJORIE WILLIS; an unrelated third-party tortfeasor did. The HOLIDAY INN was only alleged to have been negligent in failing to protect WILLIS from criminal activity on its premises. Since the WILLIS' claim is premised entirely on ordinary negligence and not intentional tort, that claim is barred by the impact rule because they are unable to allege physical injuries suffered as a result of that negligence. There was and is no "free-standing tort", as that phrase was used by the Kush court, sufficient to support their claim. The second certified question must therefore be answered in the negative.

III. THE RELATIONSHIP BETWEEN AN INNKEEPER AND GUEST IS NOT A "SPECIAL RELATIONSHIP" JUSTIFYING AN EXCEPTION TO THE IMPACT RULE.

Next, the WILLIS' claim that recent Supreme Court precedent has changed the law applied in Ruttger. The WILLIS' argue that Gracey v. Eaker, 837 So. 2d 348 (Fla. 2002) and Rowell v. Holt, 850 So. 2d 474 (Fla. 2003) have somehow altered the law by finding the impact rule inapplicable in situations where there exists a "special relationship".

In Gracey, the plaintiffs sued a psychotherapist for breaching his statutory duty of confidentiality and the trial court dismissed the case because the plaintiffs only sought damages for their emotional distress. Id. The Fifth District affirmed the dismissal on the basis of the impact rule. Id.

In reversing the appellate court, the Supreme Court explained that "[t]he 'impact rule' requires that a plaintiff seeking to recover emotional distress damages in a negligence action prove that 'the emotional distress . . . flow[s] from physical injuries the plaintiff sustained in an impact [upon his person]." Id. at 355 (citation omitted). However, the Gracey Court only found that the impact rule "does not accommodate the intent and purpose of section 491.0147 [the confidentiality statute] and renders its protection meaningless." Id. at 351. As a

result, the Court found that "the plaintiffs have presented a cognizable claim for recovery of emotional damages under the theory that there has been a breach of fiduciary duty arising from the very special psychotherapist-patient confidential relationship recognized and created under section 491.0147 of the Florida Statutes." Id. at 352.

The WILLIS' argue that the Gracey holding stands for the proposition that in any case where the Plaintiffs claim that there is a "special relationship" between the Plaintiff and Defendant, the impact rule does not apply. The WILLIS' have essentially extrapolated the demise of the impact rule from a case that is very clearly limited to its specific facts. In fact, this Court was careful to limit its holding in that case:

> **[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 at 363. **Today**

> **we simply hold that the impact rule is inapplicable under the particular facts of the case before us.**

Id. at 358 (emphasis added).

Similarly, in Rowell v. Holt, 850 So. 2d 474 (Fla. 2003), this Court carved out another narrow exception to the impact rule enabling a client to sue the Office of the Public Defender for negligence in the handling of his case. As a result of that negligence, the Plaintiff was wrongfully incarcerated and remained in jail for an inordinately long period of time as a result of the ineffective assistance of his counsel. Id.

In concluding that the impact rule did not bar the Plaintiff's claim for his emotional distress, the Court once again made it abundantly clear that the impact rule was alive and well in this state and that the exception made in this case where the emotional damages were both foreseeable and grievous. Id. Further, this Court noted that the facts in that case "neither implicate[d] nor called[ed] forth the legal and policy concerns that have been historically advanced as justification for the application of the impact rule", namely the difficulty in proof of the alleged emotional harm, difficulty in quantifying that harm and the "elusive" nature of the precise cause of the injury. Id. at 478, 479.

This Court, **once again**, reiterated the continued viability of the impact

rule and its role in protecting our legal system from fictitious claims based solely on alleged psychological injury. Id. at 478. This Court further cautioned:

> Our holding today is limited to matters involving wrongful, not justifiable, extended pretrial confinement where the incarcerated individuals' attorney holds the key to freedom, but fails to deliver material to a judge as instructed, and either discards or misplaces the evidence. It is beyond dispute that Rowell was innocent of the crime charged, should not have been arrested, and was wrongfully confined on a continuing basis in pretrial detention. Moreover, as previously expressed, the period of wrongful confinement in this case was lengthy. One whose arrest and imprisonment is even arguably justifiable, whose unjustified incarceration is relatively brief, or whose legal representative does not have the clear and uncontroverted evidence in hand which facially eliminates the basis for the charges, will find no succor in this decision.

Id. at 480-481. Obviously, this Court was not carving out a broad exception for any case in which a Plaintiff alleges that there is a "special relationship" between he/she and the Defendant. Rather, the Court focused on the specific harm and egregious facts at issue in Rowell and emphasized that it was those factors, and not the attorney-client relationship in general, which tipped the balance in favor of a narrow exception to the impact rule.

Neither Gracey nor Rowell are indicative of an "trend" in the law to exclude from the rule any case in which the parties are alleged to be in a "special

relationship. Gracey was concerned with a particular statute which not only recognized a preexisting special relationship between a psychotherapist and patient, but also created a specific statutory duty of confidentiality, the breach of which could **only** necessarily result in emotional distress. Rowell was concerned with a particular egregious instance of a breach of an attorneys' fiduciary duty to a client which resulted in a lengthy and unnecessary pretrial incarceration which foreseeably and legitimately caused the Plaintiff severe emotional distress. There is nothing in either decision which indicates that the Court intended to carve out an exception to the impact rule in every case where a "special relationship" exists and in fact, the Court's expressed cautionary limitations on these narrow exceptions demonstrate that no such broad exception was intended to result from these factually specific holdings.

Not only do these cases not indicate a "trend" toward further exceptions to the impact rule based solely on the relationship between the plaintiff and defendant, but such a trend would be contrary to the legal and policy concerns underlying the rule. The impact rule was designed to stem the tide of fictitious or speculative claims grounded solely on alleged emotional distress. Gracey, 837 So. 2d 355. A finding that in any case where a defendant has an alleged duty to protect

or warn the Plaintiff of a dangerous condition, the plaintiff and defendant have a "special relationship" which exempts the case from application of the impact rule would ultimately eviscerate the rule because **every** negligence claim requires as a prerequisite that the defendant owe the plaintiff some legal duty. Such a holding would only open the floodgates that the Supreme Court has time and again secured. See, e.g., Rowell, 850 So. 2d 474 (Fla. 2003); Gracey, 837 So. 2d 348; R.J., 652 So. 2d 360 (all reaffirming the validity of the impact rule). The third certified question must be answered in the negative.

IV. THE IMPACT RULE SHOULD NOT BE ABOLISHED AS IT STILL SERVES THE USEFUL PURPOSE OF ENSURING THAT ONLY LEGITIMATE PERSONAL INJURY CLAIMS SURVIVE.

The WILLIS' argue that the impact rule is "arbitrary and unworkable", as well as inconsistent with the state of the law and that it should be abolished. The WILLIS' urge abolition of the rule in part because "[a]ny rule that engenders that much appellate litigation deserves reflection." Initial Brief, p. 27. The same could be said of a number of rules and statutes, most notably the Offer of Judgment law.

It is not the amount of litigation engendered by a rule or statute which should be determinative of the issue of whether it should be abolished because any statutory or judicially created limitation on liability and/or damages always engenders repetitive challenges. See, e.g., Mizrahi v. North Miami Medical Center, 761 So. 2d 1040 (Fla. 2000)(addressing the constitutionality of a statute limiting liability for malpractice damages). Rather, the amount and nature of litigation which could be avoided should be, and has been, the real focus of any challenge to the validity of this well-established legal doctrine.

In Rowell, this Court explained the rationale behind the impact rule as follows:

> The impact rule has been traditionally applied primarily as a limitation to assure a tangible validity of claims for emotional or psychological harm. [citations omitted] Florida jurisprudence has generally reasoned that such assurance is necessary because, unlike physical injury, emotional harm may not readily align with traditional tort law damage principles. Our courts have explained that the existence of emotional harm is difficult to prove, resultant damages are not easily quantified, and the precise cause of such injury can be elusive. [citation omitted] This Court has also theorized that without the impact rule, Florida courts may be inundated with litigation based solely on psychological injury.

Id. at 478. While the WILLIS' and Amici take issue with the impact rule, they have not and cannot articulate what has changed in the year and a half since these words were written.

While it is true, as the WILLIS' argue, that the law on proximate cause has evolved somewhat in recent years, that has nothing to do with the policy reasons underlying the impact rule because it does not render proof of purely emotional damages and the cause and extent thereof less difficult to litigate fairly. The rule also "gives practical recognition to the thought that not every injury which one person may 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 Public Trust, 651 So. 2d 673, 675 (Fla.1995) (quoting Stewart v. Gilliam, 271 So. 2d 466 (Fla. 4th DCA 1972), quashed 291 So. 2d 593 (Fla. 1974)(Reed, C.J., dissenting).

Furthermore, permitting the recovery of emotional distress damages unaccompanied by physical injury establishing the legitimacy of those damages would have wide-reaching societal and economic implications. This Court, in R.J., recognized the proverbial slippery slope awaiting abolition of the impact rule in the context of a malpractice action:

> Without 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. Were we to create such an exception, we would, of necessity, also be allowing a claim for emotional distress for any misdiagnosis made from negligent medical testing. We could not limit an exception for negligent misdiagnosis to cases specifically involving the HIV virus while excluding other terminal illnesses. Moreover, it would be exceedingly difficult to limit speculative claims for damages in litigation under such an exception.

Id. 652 So. 2d at 363-364. This Court expressed similar concerns in Time Ins. Co., Inc. v. Burger, 712 So. 2d 389, 393 (Fla. 1998):

> To allow recovery of compensatory damages for mental anguish on the basis of lay testimony would subject health insurer to such claims every time such an insurer contest a claim. Insurers would be pressured into paying claims that the insurer legitimately should dispute because, if a jury disagreed with the decision not to pay, the insurer would have the additional exposure of a claim for mental distress. . . . Payment of illegitimate claims raises the cost of insurance for all policyholders.

While in some instances application of the rule may appear unfair, the rule exists for the greater good and for every legitimate claim that may be barred, dozens more illegitimate claims will not be clogging up our dockets. In this day and age when anyone can pay any "expert" to render an opinion on a plaintiff's emotional condition, the rule is needed now more than ever.

We do not seek to disparage MARJORIE WILLIS' assertion that she suffered emotional distress resulting from a robbery; her claim may well be legitimate. However, as a matter of public policy, the impact rule bars both legitimate and illegitimate claims for emotional distress if unaccompanied by a physical injury suffered in an impact. Without that physical injury it is difficult, if not impossible, for HOLIDAY INN to contest the validity of her claim or the extent of her alleged damages.

Neither the WILLIS' nor Amici have provided this Court with a valid

reason to abolish the impact rule and Amici's proposed revisions to the rule would unquestionably open the floodgates of litigation in the same way this Court has foreseen in R.J. and Time Ins.. The fourth and final certified question, like the others, must be answered in the negative.

CONCLUSION

For the foregoing reasons, the Respondent, HOLIDAY INN, respectfully submits that this Court should not consider this case and the issues raised herein as matters of great public importance. In the alternative, if this Court does consider this case, it is submitted that the summary judgment in the Respondent's favor should be affirmed.

Respectfully submitted,

HINDA KLEIN, ESQUIRE

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Barbara Green, Esq., Attorney for Appellants, Marjorie and Ray Willis, Barbara Green, P.A., 1320 South Dixie Highway, Gables One Tower - Suite 450, Coral Gables, Florida 33146; Robert S. Glazier, Esquire, 540 Brickell Key Drive, Suite C-1, Miami, FL 33131; Thomas J. Morgan, Jr., Esq., Attorney for Appellee, American Knights Security, Thomas J. Morgan, P.A., 3100 South Dixie Highway, Suite 310, Coconut Grove, Florida 33133, David P. Lister, Esquire, Sams, Martin, Lipsky 7975 NW 154 Street, Suite 230, Miami Lakes, FL 33016 by mail on January 10, 2005.

CONROY, SIMBERG, GANON, KREVANS & ABEL, P.A.
Attorneys for Respondent
Venture Corporate Center I
Second Floor
3440 Hollywood Boulevard
Hollywood, Florida 33021
(954) 961-1400 (Broward)
(305) 940-4821 (Dade)

BY:_____
HINDA KLEIN, ESQUIRE

CERTIFICATE OF TYPEFACE COMPLIANCE

The undersigned hereby certifies that this brief is filed in compliance with the requirements set forth in Rule 9.210 of the Florida Rules of Appellate Procedure. The brief is presented in the Times New Roman, 14-point font.

BY:_____

Hinda Klein, Esquire
Florida Bar No.: 510815