SUPREME COURT OF FLORIDA

CASE NO. SC04-1929
Lower Tribunal No. 3D03-2657

MARJORIE WILLIS and RAY WILLIS, her husband

Petitioners,

v.

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

Respondents.

_____/

RESPONDENT'S, AMERICAN KNIGHTS SECURITY, INC., ANSWER BRIEF

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PREFACE

The Petitioners, MARJORIE and RAY WILLIS, sued the Respondents, GAMI GOLDEN GLADES, LL., a Florida corporation d/b/a HOLIDAY INN (hereinafter "HOLIDAY INN") and AMERICAN KNIGHTS SECURITY, INC. (hereinafter "AMERICAN KNIGHTS"), for simple negligence arising out of an attack occurring in a parking lot at the HOLIDAY INN where MARJORIE WILLIS was staying.

Both Defendants moved for summary judgment, arguing that the "impact rule" barred MRS. WILLIS' claim. (R. 80, 86.) The trial court granted the motions. (R. 217.) The Third District Court of Appeal affirmed, but certified four questions to this Court: (1) whether the robber placing the pistol to MRS. WILLIS' head and patting her down satisfied the impact rule; (2) whether assault and battery satisfied the "freestanding tort" exception to the impact rule; (3) whether the innkeeper-guest relationship creates an exception to the impact rule; and (4) whether the impact rule should be abolished. Respondent, AMERICAN KNIGHTS, asks this Court to answer all four questions in the negative.

In this brief, the Petitioners, MARJORIE WILLIS and RAY WILLIS, will be referred to by proper name individually, and WILLIS collectively. The following symbols will be used: (R.) Record on appeal and (T.) Transcript of summary judgment hearing.

STATEMENT OF THE CASE AND FACTS

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

During discovery, the WILLIS were served with an 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, the WILLIS 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,

MRS. WILLIS described the incident that was the subject of her complaint. (R. 140-141) MRS. WILLIS recounted that she was on her way to the HOLIDAY INN and parked at an adjacent lot, pursuant to the instructions of an AMERICAN KNIGHTS 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) According to MRS. WILLIS, the assailant only touched her one time when he "patted her" down to ensure she had no valuables on her person. (R. 191 192)

MRS. WILLIS 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, MRS. WILLIS 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 and AMERICAN KNIGHTS moved for Final Summary Judgment on the grounds that the WILLIS' claims were barred by Florida's "Impact Rule". (R. 86-89) HOLIDAY INN and AMERICAN KNIGHTS 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 and AMERICAN KNIGHTS 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, 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 MRS. WILLIS suffered the "impact" when the gunman touched her with the gun and patted her down, but the WILLIS' did not claim that she suffered a physical injury as a result of either "impact." (R. 97-98) Rather, the WILLIS' filed the affidavit of MRS. WILLIS' psychologist, who indicated that she 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 MRS. 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 MRS. 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 MRS. WILLIS' psychologist could not "do a medical diagnosis," but argued that his affidavit was being offered to attest to MRS. 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 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) The 3d DCA affirmed, but certified four questions to this Court: (1) whether the robber placing the pistol to MRS. WILLIS' head and patting her down satisfied the impact rule; (2) whether assault and battery satisfied the "freestanding tort" exception to the impact rule; (3) whether the innkeeper-guest relationship creates an exception to the impact rule; and (4) whether the impact rule should be abolished.

SUMMARY OF THE ARGUMENT

The summary judgment should be affirmed. The questions posed by the 3d DCA should be answered in the negative. Supreme Court precedent has not altered the impact rule by carving out narrow fact-specific exceptions and those cases do not establish a "trend" toward abolishing the impact rule. The impact rule bars the WILLIS' claims in light of the fact that it was undisputed that MARJORIE

WILLIS did not suffer a physical injury during the alleged robbery. There are no countervailing and overriding public policy reasons for making an exception to the impact rule under the circumstances of the case at bar and the free-standing tort exemption does not apply. Further, a finding that the Plaintiff and Defendant were in a "special relationship" would eviscerate the "impact rule" because every negligence claim requires as a prerequisite that the Defendant owe the Plaintiff some duty. The impact rule should not be abolished because any alternative to the impact rule would necessarily encompass the same type of gradient evaluation of emotional distress necessitated by the current rule.

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).

ARGUMENT

I. THE IMPACT RULE BARS THE WILLIS' CLAIMS

There is no genuine issue of material fact as to whether MARJORIE WILLIS suffered a physical injury as a result of the incident in question—she clearly did not. The only real arguments raised by the WILLIS' involve their disagreement with the lower courts' application of the law to this undisputed fact.

As we will demonstrate, the lower courts' correctly held that the impact rule bars the WILLIS' claims.

A. RUMORS OF THE DEMISE OF THE IMPACT RULE HAVE BEEN GREATLY EXAGGERATED

The WILLIS' claim that recent Supreme Court precedent has changed the law applied in Ruttger v. Wagner, 691 So.2d 1177 (Fla. 3d DCA 1997), a case involving two Plaintiffs who were held up while staying in a hotel. In Ruttger, the 3d DCA held that where the Plaintiffs did not suffer a physical injury during the robbery, they could not recover damages for their emotional distress, even where that emotional distress resulted in a physical ailment.

The WILLIS' further argue that Gracey v. Eaker, 837 So.2d 348 (Fla. 2002) altered the law by finding the impact rule inapplicable to the specific facts in that case. Id. at 351. 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. The 5th DCA affirmed the dismissal on the basis of the impact rule. In reversing the appellate court, this 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 found that the impact rule "does not accommodate the intent and purpose of Fla. Stat. §

491.0147 [the confidentiality statute] and renders its protection meaningless." Id. at 351. As a result, this 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 a fiduciary duty arising from the very special psychotherapist-patient confidential relationship recognized and created by statute. Id. at 352.

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, the Supreme 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. Today we simply hold that the impact rule is inapplicable under the particular facts of the case before us. Gracey at 358. Contrary to the WiLLIS' contentions, Gracey is not indicative of a trend in the case law whereby a "special relationship" between the Plaintiff and Defendant renders the impact rule inapplicable. Contrary to the WILLIS' argument, the impact rule itself has not been altered or abolished since this Court decided Ruttger and, as a result, the summary judgment must be affirmed.

B. MRS. WILLIS DID NOT SUSTAIN A PHYSICAL INJURY RESULTING FROM AN IMPACT

The WILLIS' attempt to argue that because MARJORIE WILLIS experienced an "impact," she has satisfied the impact rule. In doing so, the WILLIS ignore the fact that the impact rule requires more than a simple touching;

it requires physical injury arising from that impact. R.J. v. Humana, (emotional distress damages only recoverable in negligence claims where physical injuries are sustained in an impact); Ruttger at 1178 (plaintiffs could not recover because they failed to demonstrate requisite physical impact that resulted in a physical injury); Jordan v. Equity Properties and Dev. Co., 661 So.2d 1307 (Fla. 3d DCA 1995)(where plaintiff was held up by gunman but sustained no physical injuries as a result of hold-up, summary judgment was properly granted on basis of the impact rule).

In Ruttger, as here, the hotel's guests were held up by a gun-wielding assailant who physically touched both of the guests, but did not physically harm them. As in this case, the guests claimed that the impact rule did not bar their claims because each claimed to have suffered a physical manifestation of their emotional injuries, although neither suffered a physical injury in the robbery. This Court held that where the evidence adduced conclusively proved that the guests did not suffer a physica1 injury when they were touched by the robber, the impact rule barred their claims.

Ruttger is virtually indistinguishable from this case and compels an affirmance of the summary judgment in favor of HOLIDAY INN and AMERICAN KNIGHTS. In this case, MARJORIE WILLIS testified in her deposition and by interrogatory, that her only ailments were psychological in

nature and her "expert" witness, a psychologist, only opined that she suffered a "physical manifestation of [unspecified] injuries" sustained in her attack. Since a physical manifestation of emotional injuries is not sufficient to withstand application of the impact rule, the lower courts correctly found that HOLIDAY INN and AMERICAN KNIGHTS were entitled to summary judgment.

The WILLIS' contend that the record does, in fact, disclose a physical injury. They claim that MRS. 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 injuries MARJORIE WILLIS sustained in the attack. At no time did the WILLIS' offer any evidence of a medical doctor attesting that MARJORIE WILLIS suffered a physical injury when she was held up. While the WILLIS' argue, in passing, that there are side effects from the antidepressants and anti-anxiety medication she is taking, she 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.

MRS. WILLIS' claim is therefore indistinguishable from the Plaintiffs' claims in Ruttger, whereby one plaintiff claimed to have post-traumatic stress

syndrome and the other plaintiff claimed that his diabetes had been exacerbated by the 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. As in Ruttger, that argument must be rejected because the impact rule requires that the physical injury be directly related to the incident in question and not simply a byproduct of emotional distress[1].

The WILLIS' claim that HOLIDAY INN and AMERICAN KNIGHTS did not meet their burden on summary judgment because they failed to prove conclusively that MRS. WILLIS did not sustain physical injuries as a result of her attack. The WILLIS' fail to note that HOLIDAY INN and AMERICAN KNIGHTS relied upon the WILLIS' *own* responses to defense interrogatories, in which they were expressly asked about the nature of MARJORIE WILLIS' injuries and to which MARJORIE WILLIS responded, "My life is shattered, my marriage is shattered, my sex life is shattered." 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, HOLIDAY INN and AMERICAN KNIGHTS did more than meet their burden of showing that there

[1] The WILLIS' rely heavily 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. Since Zell involved a claim for emotional distress by a bystander who witnessed the serious injury of a family member, rather than the

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 now disavowing her sworn testimony and discovery responses. The lower courts correctly determined that the impact rule barred the WILLIS' claim. The summary judgment must be affirmed in all respects.

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 and AMERICAN KNIGHTS.

II. APPELLEES DIDN'T COMMIT ASSAULT & BATTERY

Undaunted, 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 and AMERICAN KNIGHTS did not assault and batter MARJORIE WILLIS - her assailant allegedly did. HOLIDAY INN and AMERICAN KNIGHTS are not vicariously liable for the assailant's actions and

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victim himself, it has no application to claims involving plaintiffs seeking recovery for their own direct injuries.

therefore, it has not committed any such intentional tort. This argument, like the others, is unavailing.

III. NO SPECIAL RELATIONSHIP EXISTED

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 no longer applies and that, under Gracey, they must only demonstrate an impact and not a physical injury arising there from. As discussed in II. A. above, Gracey does not so hold. More to the point, the impact rule was designed to stem the tide of fictitious or speculative claims grounded solely on alleged emotional distress. Gracey, at 355.

A finding that the Plaintiff and Defendant are in a "special relationship," in any case where a Defendant has an alleged duty to protect or warn the Plaintiff of a dangerous condition, would eviscerate the "impact rule," because every negligence claim requires as a *prerequisite* that the Defendant owe the Plaintiff some duty. Such a holding would only open the floodgates that the Supreme Court has time and again secured.

The impact rule has been traditionally applied primarily as a limitation to assure a tangible validity of claims for emotional or psychological harm. 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. This Court has also theorized that without the impact rule, Florida courts may be inundated with litigation based solely on psychological injury. See e.g. Hagan v. Coca-Cola Bottling Co., 804 So.2d 1234 (Fla. 2001); Rowell v. Holt, 850 So.2d 474 (Fla. 2003); Gracey; and R.J. v. Humana, (all also reaffirming the validity of the impact rule).

IV. THE IMPACT RULE REVISTED

In essence, Petitioners and amici argue that the impact rule should be abolished because it entangles the courts in questions of what *degree* of impact is "enough" under the rule in order to allow claims for emotional distress. Amici suggest a two prong rule in order to determine whether a Plaintiff may recover for emotional distress: (1) it was reasonably foreseeable that the Plaintiff would suffer severe emotional distress by the defendant's negligent conduct; and (2) the plaintiff did in fact suffer severe emotional distress as a result of the conduct.

Yet, *therein lies the rub!* Determining whether a Plaintiff has *actually* suffered severe emotional distress is a subjective question of degree not easily quantifiable; and this is exactly what led to the development of the impact rule. What amici and Petitioners propose is replacing one question of degree with another. This Court, while acknowledging exceptions, has accepted the impact

rule as a limitation on certain claims as a means for "assuring the validity of claims for emotional or psychic damages." R.J. v. Humana, 652 So.2d at 363; *accord* Tanner v. Hartog, 696 So.2d 705 (Fla. 1997); Gonzalez v. Metropolitan Dade County Public Health Trust, 651 So.2d 673, 674 (Fla. 1995); Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974).

Determining whether a person has suffered severe emotional distress is necessarily a fact specific question based on the person's own subjective assessment of what they feel. Two individuals may experience the same set of circumstances, and one may suffer severe emotional distress while the other does not. The purpose of the impact rule, or any other rule suggested to supplant it, is to assure the validity of claims for emotional or psychic damages. By its very nature, this will always be a question of degree.

There is a legitimate legal argument which can be directed against any particular theory upon which recovery in the instant case might be predicated; a hard and fast rule that would set the parameters for recovery for psychic trauma in *every* case that may arise does not exist. The outer limits of this cause of action have been established by the courts of Florida in the traditional manner of the common law on a case by case basis, as envisioned by Justice Alderman in Champion[2]. Any alternative to the impact rule would necessarily encompass the

[2] Champion v. Gray, 478 So.2d 17, 21-22 (Fla. 1985).

same type of gradient evaluation of emotional distress; for this reason the impact rule as it now stands should not be abolished and the certified questions should all be answered in the negative.

CONCLUSION

For all the foregoing reasons, the Respondent, AMERICAN KNIGHTS, respectfully requests that this Court affirm the summary judgment in its favor and answer the certified questions in the negative.

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that the foregoing brief has been computer generated in 14 point Times New Roman and complies with the requirements of Rule 9.210.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail to: David P. Lister, Esq., 7975 NW 154 St., Ste. 230, Miami Lakes, FL, 33016; Barbara Green, Esq., Gables One Tower, Ste. 450, 1320 S. Dixie Hwy., Coral Gables, FL, 33146 and Hinda Klein, Esq., 3440 Hollywood Blvd., 2nd Floor, Hollywood, FL, 33021 this _____ of December, 2004.

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