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.
_____/

PETITIONERS' INITIAL BRIEF ON THE MERITS

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INTRODUCTION

Marjorie Willis was the victim of an armed robbery, assault and battery in a parking lot at the Holiday Inn where she was a guest. The robber held a gun to her head. She heard it click. He grabbed her purse from her. He forced her to lift up her clothes, so her body was exposed. He patted her down. As a result, Mrs. Willis suffers severe psychological problems with physical manifestations. Under the treatment of a psychologist and a psychiatrist, as well as her family doctor, she must take medications with dangerous side effects. Mr. and Mrs. Willis sued the owner of the Holiday Inn and the employer of the security guard who directed her to the parking lot and refused to help her.

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 affirmed, but certified four questions to this Court:

1. Is the evidence that the plaintiff was touched against her will by the pistol placed to her head and in "patting down" her body sufficient to satisfy the Florida impact rule? See and compare, e.g., Gracey v. Eaker, 837 So.2d 348, 355 (Fla.2002); Zell v. Meek, 665 So.2d 1048 (Fla.1995); Eagle-Picher Industries, Inc. v. Cox, 481 So.2d 517 (Fla. 3d DCA 1985), review denied, 492 So.2d 1331 (Fla.1986).

2. Is the evidence that the plaintiff was apparently the object of an assault and multiple batteries sufficient to satisfy a "free standing tort" exception to the impact rule which may exist in Florida? See Kush v. Lloyd, 616 So.2d 415 (Fla.1992).

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? Rowell v. Holt, 850 So.2d 474 (Fla.2003); Gracey v. Eaker, 837 So.2d 348 (Fla.2002).

4. Should the impact rule be abolished?

Petitioners, Marjorie Willis and her husband, Ray, ask this Court to answer all four questions in the affirmative. Having a gun held to her head, and the trigger clicked, and being forced to lift her dress while the robber patted her down, should be sufficient impact to satisfy the impact rule, as should the physical manifestation of emotional distress Mr. Willis suffered as a result. The impact rule has never applied to cases of assault; it should not protect a defendant who breached a duty to

use reasonable care to prevent the assault. The impact rule should be inapplicable when the special relationship between an innkeeper and a guest exists between the parties.

Finally, the impact rule should be abolished. It has proven to be arbitrary and unworkable. It requires judges to perform work that should be performed by juries. It does not well serve its intended purpose. Other safeguards can adequately prevent false or speculative claims.

FACTS

Marjorie Willis was a guest (R.120-21, 125) at a Holiday Inn hotel owned by Defendant Gami Golden Glades, LLC. Gami contracted for security services with Defendant American Knights Security, Inc.

When Mrs. Willis arrived at the Holiday Inn, there was no room in the parking lot to park her car. A security guard instructed her to park in the lot across the street. Mrs. Willis expressed concern because the lot was dark and the neighborhood unfamiliar, but the guard assured her that it was "safe to park next door," (R.135) and instructed her to park there. The guard refused to park her car for her, or to go with her while she parked (R.136). Instead,

> He said, no, it's safe. He emphasize[d] it is safe. And then he [told] me to move my car, I got to move it. (R.136).

Mrs. Willis parked her car across the street, because the guard told her to (R.136).

As soon as Mrs. Willis parked and opened the door and put her foot out, "there was a gun to my head." (R.137).

The gun actually touched her head (R.190). The gunman instructed her to empty her pockets, but she froze (R.139). She stepped out of the car as the gunman continued to order her to empty her pockets.

> 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 say 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 thought he was really going to kill me . . . .

And he told me to lift my clothes and he made me lift my clothes up and he take his hand and patting me on the back because I had pants on.

* * *

He patted me. I was so scared. ...

(R.139-140). It is uncontroverted that Mrs. Willis actually experienced physical impact. The gun touched her head. The robber patted her down. He grabbed her purse from her.

Q. Was the gun actually placed to you or was it - did you notice it was being pointed at you?

A. *It was pointed at me and then it went there.*

Mr. Lister: Let the record indicate that she touched her head.

Q. Left temple?

A. *He touched - that the - touched* – yeah, when he said "empty your pockets," hesitate, then he, yeah, did –

Q. And you made mention that *he had you lift your skirt up* so he could pat you down.

A. *Yeah*, because he thought I had money in my pockets. Yeah.

Q. Was there any other time that he made contact with you, that he touched you in any way?

A. No. One was enough. No. He just *made me lift my clothes and he pat and all my body was exposed.* And he told me to see – I told him I didn't have pockets, but he didn't believe it and he did that with the gun. *Made me lift my clothes and pat both sides,* see if I have pockets because – and I had tights on.

(R.190-191).

Mrs. Willis was terrified. She feared for her life:

Q. Did you have any difficulty in actually seeing the man, once you got out of the vehicle?

A. The man who pulled a gun in [my] face?

Q. Yes, ma'am. I know you don't actually recall what you –

A. I try not to look at his face. I believe if he look at my face, I believe he would have killed me. I try not to look at his face.

(R.189-190).

The robber then took her rental car and drove off. (R.140).

The security guard refused to help Mrs. Willis. He acted "like he never saw me." (R.140). Mrs. Willis found no help from the hotel personnel, either (R.141-42). She spent a sleepless night in the room she shared with her friend, Debby, walking the floor in "agony", "scared"(R.146,154).

The next day, Mrs. Willis went to the emergency room. (R.142,154). Since then, she has been under treatment by a psychiatrist and a psychologist, as well as her general practitioner (R.155-57, 166), for anxiety, depression, panic attacks and post-traumatic stress disorder (R.198-199). She has been on medication, including Paxil, Buspar, Wellbutrin and Zoloft. (R.179,197).[1] She is afraid everywhere she goes; her relationship with her husband has deteriorated (R.159). She is "not like before." (R.159).

The defendants filed no affidavits or expert opinions in support of their motion. In fact, the only documents the defendants filed in support of their motion were Mrs. Willis' deposition and interrogatory answers. In her interrogatory

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[1] Without objection from the defense, Plaintiffs pointed out below that the side effects of these potent medications can include seizures, bleeding, liver impairment and weight loss or gains. See www.fds.gov/cder/foi/label/1999/203936lbl.pdf (Paxil); www.fda.gov/cder/foi/label/2001/20358s191lbl.pdf (Wellbutrin); www.fda.gov/cder/pediatric/labels/Buspiron.pdf (Buspar); and www.fda.gov/cder/foi/label/1999/20990lbl.pdf (Zoloft) (R.95).

answers, Mrs. Willis stated that her life, her marriage and her sex life were "shattered" (R.88). Even though the Defendants relied almost entirely on the deposition to support their motion for summary judgment, when they took Mrs. Willis' deposition, the Defendants chose not to ask her about any physical injuries or problems she may have suffered as a result of the attack. In fact, they seem to have studiously avoided the issue.[2] They did not support their motions with depositions of any of her treating doctors. The Defendants offered no evidence about the extent of Mrs. Willis' physical and psychological injuries.

Mrs. Willis offered the uncontradicted affidavit of her psychologist, who stated that her injuries:

> include, but are not necessarily limited to, the following physical manifestations of injuries resulting from the attack:
>
> a) sexual dysfunction;
>
> b) peripheral temperature changes;
>
> c) muscle tightening; and
>
> d) increased sweat gland activity.

(R.90)

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[2] In fact, the word "physical" appears only once in the deposition transcript, as reflected in the word index at the back of the deposition (R.207) – and there, only in reference to "the structure, the physical presence of the place . . . ." (R.196). Similarly, variations of the word "injury" appear only in the context of questions about whether Mrs. Willis, before the attack, ever sustained an injury, made a worker's compensation claim, or filed a lawsuit (R.119,171).

Nevertheless, the Defendants contended that Mrs. Willis' injuries do not satisfy the "impact rule".

The trial court rejected the qualifications of the plaintiff's psychologist to give an opinion on the physical consequences of Mrs. Willis' psychological trauma, stating, "He's no more qualified to do that than I am" (S.T.10)[3,4] .

To support their contention that the impact rule should not bar their claim, Plaintiffs asserted a number of arguments: They argued that the impact rule was satisfied because the robber touched Mrs. Willis with a gun, forced her to lift her clothes, and patted her down; all of this constituted impact (S.T.7-8). Further, Mrs. Willis' physical symptoms satisfied the injury component of the impact rule (S.T. 7-8). They contended that the assault and battery on Mrs. Willis constituted "freestanding torts," making the impact rule inapplicable (S.T.9). In addition, they argued that the innkeeper - guest relationship was a "special relationship" to which the impact rule should not apply (S.T.11). Finally, Plaintiffs asserted that the impact rule should be abolished:

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[3] The Third District granted Plaintiff's motion to supplement the record to include the summary judgment hearing transcript, to which we refer with the designation "S.T."

[4] Although the court stated it had read the affidavit (S.T. 13), it appears that the court rejected the psychologist's qualifications (S.T. 10).

> The other issue, and I know Your Honor doesn't have the ability to overrule the Florida Supreme Court, but I want to preserve the record, I believe that the impact rule should be abolished.

(S.T.10-11).

Over the Plaintiffs' objection that the Defendants had the burden of proof, and had not satisfied that burden (S.T.11), the trial court accepted the Defendants' argument, and granted the Defendants' motion for summary judgment (R.217). Mr. and Mrs. Willis appealed that order (R.212).

The Third District affirmed, but certified four questions: (1) Whether the robber placing the pistol to Mrs. Willis' head and patting her down satisfied the impact rule; (2) whether the assault and batteries 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.[5]

SUMMARY OF THE ARGUMENT

The summary judgment should be reversed. The questions posed by the Third District should be answered in the affirmative. The impact rule should not bar the claim of Mr. and Mrs. Willis for the damages Mrs. Willis sustained when she was robbed, assaulted and battered while a guest at the Defendant Hotel, in the

[5] These questions are quoted in full at pages 1-2 of this brief.

parking lot where the Defendants' security guard had directed her to go, falsely insisting it was safe.

This Court has stated that the impact rule requires either impact or physical harm, but not necessarily both. Mrs. Willis suffered both impact and physical harm. The robber's actions in this case, including holding a gun to Mrs. Willis' head, grabbing her purse from her, forcing her to lift her clothes so her body was exposed, and patting her down in a most frightening and humiliating manner, constitute enough impact to satisfy the rule. Mrs. Willis has also suffered physical injuries. The medication she is taking for her psychological injuries can have serious side effects. And, according to Mrs. Willis' psychologist, she has suffered significant physical symptoms.

The impact rule should not prevent the Plaintiffs from recovering because the attack on Mrs. Willis constituted the freestanding torts of assault and battery. The Defendants had a nondelegable duty to prevent the attack on Mrs. Willis. Assault and battery have long been recognized as freestanding torts under Florida law. The principal reason for the impact rule is to prevent claims for damages that are false, speculative, or difficult to prove or ascertain. In an assault and battery, the plaintiff is permitted to recover for purely emotional damages. Such damages are no more likely to be false or difficult to ascertain in this case, against the innkeeper who breached the duty to prevent the assault, than they would be in an action against the assailant for committing the assault.

This Court has recognized that a special relationship between the defendant and the plaintiff may obviate the need to apply the impact rule. The relationship of the innkeeper and guest, including the nondelegable duty to protect the guest from foreseeable criminal attacks, should be treated as the kind of special relationship that precludes the application of the impact rule when a criminal assault occurs.

The impact rule should be abolished, because it is arbitrary, unworkable, and does not well serve its purpose. It has become so riddled with exceptions that it resembles Swiss cheese -- the holes are bigger than the thing itself. It requires courts to decide issues that should be left to juries. The law of proximate cause, the court's authority to direct a verdict when damages are not proved, and §57.105, Florida Statutes – and the common sense of jurors – should be adequate to prevent false or speculative claims, or those that are difficult to prove or ascertain.

The Third District's questions should be answered, "yes". The summary judgment should be reversed.

STANDARD OF REVIEW

The standard of review applicable to a summary judgment is *de novo*; the facts must be viewed in the light most favorable to the appellant, and if there is the slightest doubt, the summary judgment must be reversed. Sierra v. Shevin, 767 So. 2d. 524 (Fla. 3d DCA 2000).

ARGUMENT

THE IMPACT RULE SHOULD NOT BAR MR. AND MRS. WILLIS' CLAIM AND THE THIRD DISTRICT'S QUESTIONS SHOULD BE ANSWERED IN THE AFFIRMATIVE

Introduction

Over the past decade, this Court has decided almost a dozen impact rule cases. Two other cases of which we are aware are pending right now, in addition to this one.[6] The Court has stated the rule in different ways. Sometimes the Court states the rule as requiring both injury and impact; sometimes it refers only to injury or only to impact; and sometimes it requires not only that the plaintiff suffer both impact and injury, but that the injury flow from the impact, not just from the incident.

The Court has stated the rule as requiring that, "before a plaintiff can recover damages for emotional distress caused by negligence of another, the emotional distress suffered must flow from physical injuries sustained in an impact." Rowell v. Holt, 850 So.2d 474, 477-78 (Fla. 2003). But the Court has also stated that "Florida's version of the impact rule 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." Gracey v. Eaker, 837 So.2d 348, 355 (Fla.

[6] Welker v. Southern Baptist Hosp., 864 So. 2d 1178 (Fla. 1st DCA 2004, rev. granted, Case No. SC04-380, September 10, 2004); Abril v. Fla. Dept. of Corrections, 29 Fla. L. Weekly D1745 (Fla. 2d DCA 2004)(question certified); brief ordered, Case No. SC04-1747 (Sept. 14, 2004).

2002)(emphasis added). See also Kush v. Lloyd, 616 So.2d 415, 422 (Fla. 1993) (noting "hybrid" nature of impact rule in Florida). Some of the cases have been decided based not on whether impact or injury occurred, but on whether the impact or injury was severe enough. But a specific standard of severity has been elusive.

The Court should grant review to clarify exactly what it is that the rule requires.

In recent years, each time the Court has considered the impact rule, it has stopped short of abolishing the rule. But almost every time, it has created an exception, or has found the rule inapplicable, or has given the plaintiff an opportunity to try to fit into the rule's requirements. See Kush v. Lloyd, 616 So.2d 415 (Fla. 1993) (exception for "recognized tort" of wrongful birth); R.J. v. Humana of Florida, Inc., 652 So.2d 360 (Fla. 1995) (remand to allow plaintiff to try to satisfy rule by showing treatment with invasive procedures or toxic drugs); Tanner v. Hartog, 696 So.2d 705 (Fla. 1997) (exception for expectant parents' emotional distress due to negligent stillbirth); Time Ins. Co. Inc. v. Burger, 712 So.2d 389 (Fla. 1998) (emotional distress caused by failure to receive timely health care due to insurance bad faith, causing or aggravating a medical or psychiatric condition, when supported by expert medical testimony); Hagan v. Coca-Cola Bottling Co., 804 So.2d 1234 (Fla. 2001) (exception for ingestion of contaminated food or beverage); Gracey v. Eaker, 837 So.2d 348 (Fla. 2002) (exception for special relationship of psychotherapist and patient); Rowell v. Holt, 850 So.2d 474

(Fla. 2003) (exception for special relationship of attorney and client, with clear foreseeability of emotional harm).

The different ways that the Court has stated the rule, and the many exceptions the Court has recognized, are difficult for the lower courts to apply. A microscopic fiber in the lungs is said to constitute impact, Eagle-Picher Industries, Inc. v. Cox , 481 So.2d 517 (Fla. 3d DCA 1985), cited with approval in Zell v. Meek, 665 So. 2d 1048, 1050 n.1 (Fla. 1995); but a gun held to the head, as in the present case, is not. A veterinarian may or may not be liable for the emotional distress caused by the death of a beloved pet. Compare Kennedy v. Byas, 867 So.2d 1195 (Fla. 1st DCA 2004) (impact rule bars claim against veterinarian for emotional distress caused by death of pet), rev. vol. dism. 879 So. 2d 622 (Fla. 2004), with Knowles Animal Hosp., Inc. v. Wills, 360 So.2d 37 (Fla. 3d DCA 1978) (impact rule did not bar dog owner's emotional distress claim against veterinarian). The side effects of some prescription medications but not others may satisfy the impact rule. Compare R.J. v. Humana of Florida, Inc., 652 So.2d 360 (Fla. 1995) ("caustic" medication such as AZT could satisfy the impact rule) with Rivers v. Grimsley Oil Co., 842 So.2d 975 (Fla. 2d DCA 2002) (side effects of medications prescribed for plaintiff's psychological injury did not satisfy impact rule).

Under any reasonable rule, Mrs. Willis' ordeal should merit recovery. But this case presents issues that could be decided differently depending on which

definition of the impact rule is used, what kind of impact or injury is required, or how broadly the exceptions are construed. Is a gun held to the head, or being forced to lift one's clothing for a pat-down search enough impact? Are sexual dysfunction, temperature changes, muscle tightening, increased sweat gland activity, and the prescription of dangerous medications enough injury? Do an assault and battery satisfy the "free-standing tort" exception when the defendant had a duty to prevent the attack? Is the innkeeper-guest relationship a special relationship justifying an exception?

Petitioners respectfully ask this Court to accept jurisdiction in this case to clear up some of the uncertainty by definitively articulating the impact rule, or by abolishing it entirely.

I. MRS. WILLIS SUSTAINED IMPACT AND INJURY SUFFICIENT TO SATISFY THE IMPACT RULE, WHEN SHE WAS TOUCHED AGAINST HER WILL BY THE PISTOL PLACED TO HER HEAD AND WAS FORCED TO LIFT HER SKIRT AND PATTED DOWN, WITH RESULTING EMOTIONAL INJURY AND PHYSICAL CONSEQUENCES.

The first question posed by the Third District involves the "impact" requirement of the rule -- whether the robber putting a gun to Mrs. Willis' head, forcing her to lift her skirt and patting her down, satisfied the impact requirement. The question is not a simple one. Over 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. The rule appears sometimes to require not just a touching, but a touching with a particular, but undefined, magnitude of force.

Although, under Gracey v. Eaker, 837 So. 2d 348, 355 (Fla. 2002) (emphasis added) it is only necessary to have "*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," Mrs. Willis experienced *both* during the course of the robbery, assault and battery.[7]

a. **Impact**

Mrs. Willis experienced impact on her person in several ways. The robber put a gun up to her head and clicked it. The gun actually touched her head (Depo. P. 87). He took her purse from her. He forced her to lift her clothing and patted her down to search for more money. The Third District essentially held that Marjorie Willis sustained impact, but not *enough* impact. Courts have found the impact requirement satisfied with far less. As this Court noted in Zell v. Meek, 665 So. 2d 348, 355 n.1 (Fla. 2002), "to suffer an impact, a plaintiff may meet rather slight requirements..."

"The essence of impact... is that the outside force or substance, no matter how large or small, visible or invisible, and no matter that the effects are not

[7] The impact rule does not apply to claims for loss of consortium; therefore, if Marjorie Willis' claim is not barred by the impact rule, Ray Willis' claim is not barred, either. Gracey v. Eaker, 837 So. 2d at 356.

immediately deleterious, touch or enter into the plaintiff's body." Eagle-Picher Industries, Inc. v. Cox, 481 So. 2d 517, 527 (Fla. 3d DCA 1985), quoted with approval in Zell v. Meek, 665 So. 2d at 1048 n. 1. In Eagle-Picher, the court held that inhalation of asbestos fibers which, over time, caused lung damage, constituted impact. And in Clark v. Choctawhatchee Electric Cooperative, 107 So. 2d 609 (Fla. 1958), the impact rule was satisfied by an electric shock, even though the plaintiff had no burns, bruises, or scars, where she suffered pains in her legs and a burning sensation.

If, as courts have done from time to time, this Court requires a threshold degree of impact, the attack on Mrs. Willis still satisfies the impact requirement. The attack on Mrs. Willis constituted the crime of battery – actual and intentional touching against her will. §784.03, Florida Statutes. Because a deadly weapon was used, the crime was aggravated battery, a felony. §784.045, Florida Statutes. The significance of the physical battery on Mrs. Willis should not be overlooked, even if, as in Clark, the impact did not cause any bruises. If the robber had raped Mrs. Willis while holding a gun to her head — also a felony — nobody could seriously argue that the impact rule was not satisfied, even if, as in Clark, Mrs. Willis suffered no bruises. Although she is fortunate that the assailant only forced her to lift her clothes and patted her down, Mrs. Willis is no less battered and her psychological wounds are no less real.

Although an earlier Third District case involving a robbery at a hotel found the impact rule was not satisfied, that case is distinguishable because of the degree and kind of impact suffered. In Ruttger Hotel Corp. v. Wagner, 691 So. 2d 1177 (Fla. 3d DCA 1997), the Third District held that the impact doctrine was not satisfied where the robber pushed the guests into the bathroom of their hotel room, and held a gun to one guest's back. Here, however, Mrs. Willis suffered much more impact: a gun was held to her head, her purse was grabbed from her, and she was forced to lift her clothing, exposing her body, and to endure being patted down by the robber. These impacts are more intrusive, intimate and offensive than the mere push involved in Ruttger. See generally, Jackson v. Sweat, 855 So. 2d 1151 (Fla. 1st DCA 2003)(collecting negligent security robbery cases in which claims were barred by impact rule).

If the basis of the impact rule is to ensure that the plaintiff's damages are real, and resulted from a serious event, Mrs. Willis' ordeal more than meets that requirement.

b. Physical Injury

Mrs. Willis also experienced discernible physical injury. On Defendants' motion for summary judgment, of course, it is the Defendants' burden to prove conclusively that Mrs. Willis did *not* sustain physical injury as a result of the attack. This, the Defendants utterly failed to do. Summary judgment should have been denied on that basis alone. Holl v. Talcott, 191 So. 2d 40 (Fla. 1955); See

generally, Zell v. Meek, 665 So. 2d 1048 (Fla. 1996 (reversing summary judgment where record suggested causal link between plaintiff's psychic trauma and physical manifestations).

In fact, the Defendants failed to offer any evidence in support of their motion, other than Mrs. Willis' interrogatory answers, in which she explained that her life was "shattered," and her deposition. During the deposition, they did not ask Mrs. Willis any questions about any physical manifestations of her injuries, or the side effects of her medications. That Mrs. Willis may not have been capable of medically diagnosing her own condition – at a deposition where she was not asked – does not conclusively demonstrate that she has not suffered an injury that is medically significant enough to satisfy the impact rule. Consequently, the record lacks evidence conclusively demonstrating the complete absence of any issue of material fact concerning Mrs. Willis' physical injuries.

Even though the Defendants did not meet their burden, the Plaintiffs filed the affidavit of one of Mrs. Willis' treating doctors, demonstrating that she has suffered physical injury as a result of the robbery. The doctor, a psychologist, was qualified to testify about physical symptoms connected with a psychological injury. Angrand v. Key, 657 So. 2d 1146, 1148-49 (Fla. 1995); See generally, Grenitz v. Tomlian, 858 So. 2d 999 (Fla. 2003). He testified that her symptoms include, but are not necessarily limited to, sexual dysfunction, temperature changes, muscle tightening and increased sweat gland activity.

In R.J. v. Humana of Florida, 652 So. 2d 360 (Fla. 1995), the Court considered the claim of a patient who had been misdiagnosed as having the HIV virus. The Court held that the touching of the patient by the doctor, and the taking of blood for ordinary testing, would not qualify as physical impact. However, more invasive testing, or the prescription of medication with toxic side effects, would satisfy the impact rule. 652 So. 2d at 364. In the present case, the record does not reflect whether Mrs. Willis' physical symptoms are a result of the attack, or of the toxic side effects of the medication prescribed by her doctors as a result. In either event, such physical symptoms are sufficient to satisfy the impact rule. See generally Zell v. Meek, 665 Sol. 2d 1048 (Fla. 1961)(sexual problems, joint pain, anxiety, depression, fibromyalgia and stomach problems sufficient to go to jury.)

In Rivers v. Grimsley Oil Co., 842 So. 2d 975 (Fla. 2d D CA 2003), the court held that the side effects of medication in that case were not sufficient to satisfy the impact rule. It is our position that Rivers was incorrectly decided, because the court looked at the *extent* of injury, and not just the *fact* of injury, in determining whether damages may be recovered at all. However, the side effects in Rivers were mild – nausea, cramps and confusion. The symptoms that appear in the record here — whether they are side effects of the medication or a direct result of the attack — are more severe. They should be enough to satisfy the impact rule, or at least to preclude summary judgment.

Moreover, the medication that has been prescribed for Mrs. Willis can cause serious side effects, including bleeding and liver failure. The potential side effects of the medication prescribed for Mrs. Willis are so severe that there is little danger of a false claim. No rational person would expose themselves to such side effects unless they had a legitimate psychiatric injury. Therefore, the main problem that the impact rule was designed to prevent — the risk of false claims — is not present here. The Defendants did not conclusively prove that Mrs. Willis did not suffer the kind of impact and injury that satisfy the impact rule. The summary judgment should be reversed.

II. THE ASSAULT AND MULTIPLE BATTERIES INFLICTED ON MRS. WILLIS WERE SUFFICIENT TO SATISFY THE "FREE-STANDING TORT" EXCEPTION TO THE IMPACT RULE.

The second question certified by the Third District is whether the attack on Mrs. Willis satisfies the free-standing tort exception to the impact rule, which this Court recognized in Kush v. Lloyd, 616 So. 2d 415 (Fla. 1993). The impact rule is designed to prevent the assertion of speculative or false claims, or claims of injury that are difficult to ascertain. But that policy loses its force where the facts show a specific, recognized, "free-standing tort," for which the common law traditionally has provided a damages remedy. Kush v. Lloyd, 616 So. 2d at 422. Mrs. Willis was the victim of multiple, free-standing torts that have long been recognized by

the common law. Her claim is not false, speculative or difficult to ascertain. The impact rule should not bar her claim.

In Kush, this Court held that the impact rule did not bar a claim for damages for negligence causing a wrongful birth, in part because wrongful birth is itself a tort. The Court observed:

> [T]he impact doctrine also generally is inapplicable to recognized torts in which damages often are predominately emotional, such as defamation or invasion of privacy. . . . This conclusion is entirely consistent with existing Florida law. For example, it is well settled that mental suffering constitutes recoverable damages in cases of negligent defamation, . . . or invasion of privacy. . . . If emotional damages are ascertainable in these contexts, then they also are ascertainable here.

616 So. 2d at 422 (citations omitted).

Assault and battery are torts that have always been recognized in Florida law, regardless of the difficulty of ascertaining the damages. Assault is "an intentional, unlawful offer of corporal injury to another by force, or force unlawfully directed toward another under such circumstances as to create a fear of imminent peril, coupled with the apparent present ability to effectuate the attempt." Lay v. Kremer, 411 So. 2d 1347, 1349 (Fla. 1st DCA 1982). Like the torts of defamation and invasion of privacy discussed in Kush, the damages resulting from

an assault are primarily emotional. The courts have never allowed that fact to preclude a jury from determining them.

In addition, Mrs. Willis was the victim of multiple batteries – touching, without her consent, in a most frightening and humiliating manner. A gun was held to her head; she was forced to lift her clothes so her body was exposed; the assailant patted her down. Courts have allowed battery victims to proceed with far less. See, e.g., Paul v. Holbrook, 696 So. 2d 1311 (Fla. 5th DCA 1997)(reversing defense summary judgment where defendant came up behind plaintiff and tried to massage her shoulders). The law provides a tort remedy for such touching without consent "to protect the integrity of the person." Id. Mrs. Willis' personal integrity was invaded in a most frightening and degrading way. In our system, juries traditionally have been allowed to determine the damages, if any, proximately caused by such an attack.

There is no strong public policy argument that would preclude the claim of a hotel guest like Mrs. Willis, who has been the victim of an assault and battery in which a gun was put up to her head. It cannot be disputed that Mrs. Willis would have assault and battery claims against the robber. No court would preclude such a claim on the grounds that it would be speculative or the damages would be difficult to ascertain, merely because the assailant did not beat her up or shoot her. The likelihood of a false or speculative claim would be no greater here. The damages Mrs. Willis sustained are no more difficult to ascertain in this case,

against those who breached the nondelegable duty to protect her from that assault and battery, than they would be against the perpetrator himself.

The impact rule should not bar Mrs. Willis' claim against those who had a nondelegable duty to protect her from the assault and battery.

III. THE INNKEEPER-GUEST RELATIONSHIP INVOLVED IN THIS CASE IS A "SPECIAL RELATIONSHIP" UNDER AN EXCEPTION TO THE IMPACT RULE.

In recent years, this Court twice has ruled that a special relationship between the defendant and the plaintiff may render the impact rule inapplicable. In Gracey v. Eaker, 837 So. 2d 348 (Fla. 2002), the Court held the impact rule inapplicable to a claim that a psychotherapist breached a fiduciary duty and a statutory duty of confidentiality to his patients. In Rowell v. Holt, 850 So. 2d 474 (Fla. 2003) this Court held that the impact rule does not apply in a legal malpractice action, where the attorney's failure to deliver a document resulted in the protracted wrongful pretrial imprisonment of the client.

It would be consistent with the trend and reasoning of these recent decisions to recognize an exception due to the special relationship between an innkeeper and a guest.[8]

An innkeeper has "a non-delegable duty to provide its guests with reasonably safe premises, including reasonable protection against third party

[8] This applies with equal force to the security service hired by the innkeeper specifically to protect the guests.

criminal attacks." U.S. Security Services Corp. v. Ramada Inn, Inc., 665 So. 2d 268, 269 (Fla. 3d DCA 1995); accord, Goldin v. Lipkind, 49 So. 2d 539, 541 (Fla. 1950) (innkeeper's duty to keep premises reasonably safe for guests "cannot be delegated to another"). The courts have recognized that an innkeeper has a "special relationship with his guests." Riedel v. Sheraton Bal Harbour Assoc., 806 So. 2d 530 (Fla. 3d DCA 2002). See generally Thompson v. Baniqued, 741 So. 2d 629, 631 (Fla. 1st DCA 1999) (listing innkeeper-guest as one of the "special relations [that] give rise to a duty to aid or protect"); see generally Prosser and Keeton On Torts, §56 at p. 376 (5th Ed. 1984).

Petitioners have found no decision of any Florida court considering the issue of whether the innkeeper-guest relationship is sufficiently similar to the kind of special relationship recognized by this Court in Rowell and Gracey to justify the abrogation of the impact rule in cases where the innkeeper has breached its nondelegable duty to protect the guest from a foreseeable assault. However, the relationship between innkeepers and their guests is an ancient one. As Prosser has pointed out,

> One of the earliest appearances of what we now know as negligence was in the liability of those who professed to be competent in certain "public" callings. A carrier, *an innkeeper*, a blacksmith, or a surgeon, was regarded as holding oneself out to the public as one in whom confidence might be reposed, and hence as assuming an

> obligation to give proper service, for the breach of which, by any negligent conduct, he might be liable.

Prosser & Keeton on Torts, §28 p.161 (Fifth Ed., 1984)(emphasis added).

While Florida has never made an innkeeper an insurer of the safety of its guests, Florida has always recognized that an innkeeper has a duty to use reasonable care to protect guests from reasonably foreseeable injuries. E.g., Golden v. Lipkind, 49 So. 2d 539 (Fla. 1950). This rule should have special force with respect to protection from foreseeable criminal attacks. A traveler like Mrs. Willis, who visits a strange city, is not likely to know which areas are safe and which are not; the innkeeper is likely to know the area well. When the innkeeper, on its own volition, directs the guest to park in a particular place, the innkeeper may be expected to have vastly superior knowledge, and the guest has no choice but to rely on that knowledge. The guest is, in effect, at the mercy of the innkeeper, and the innkeeper knows it. If not exactly a fiduciary relationship, it is at least a special one. Black's Law Dictionary defines "fiduciary or confidential relation" as, in part, "A very broad term embracing both technical fiduciary relations and those informal relations which exist wherever one man trusts in or relies upon another." Black's Law Dictionary, Abridged Fifth Edition p.321 (1983). The guest in these circumstances is required to place her trust in the innkeeper, just as a patient must trust her doctor or a lawyer must trust a client.

Because of the special relationship between an innkeeper and a guest, and the Defendants' egregious breach of their nondelegable duty to protect Mrs. Willis, the impact rule should not bar this claim.

IV. THE IMPACT RULE SHOULD BE ABOLISHED

As this case demonstrates, the impact rule too often has entangled the courts in determining, not whether a plaintiff sustained an impact or injury, but whether the impact or injury sustained was "enough." It is impossible from the cases to articulate a consistent standard of what is "enough". The impact rule is arbitrary and unworkable. It is inconsistent with the current state of the law. It should be abolished.

Petitioners are aware that this Court, in Hagan v. CocaCola Bottling Co., 804 So. 2d 1234 (Fla. 2001), considered and rejected a certified question of whether the impact rule should be abolished. Since that time, this Court has addressed the impact rule in two more cases, and more are now pending in this Court.

Any rule that engenders that much appellate litigation deserves reflection.

"The impact rule is a judicial creation just as are many other substantive rules of tort law and, since it was judicially created, we are of the view that if this court should reach the conclusion that such rule was inequitable, impractical or no longer necessary, it may be, judicially, altered or abolished." Gilliam v. Stewart,

291 So.2d 593, 595 (Fla. 1974). It is time for the Court to give up carving holes in the doctrine, and to simply abolish it.

Such a change would be consistent with developments in the law of proximate cause. According to the history explained by the dissent in Gilliam, 291 So.2d at 596, the impact rule appears to have had its genesis in the realm of proximate cause. The leading case imposing the impact rule was the old English case of Victorian Railways Commissioners v. Coultas, 8 E.R.C. 405 (P.C. 1888). There, the plaintiff was almost involved in a collision with a train, but the collision was avoided at the last minute. The court held that "without saying that 'impact' is necessary," the damages were too "remote." By the time Gilliam was decided, the "impact doctrine" was firmly embedded in Florida law.

In the impact rule cases decided by this Court over the past decade, the analysis focused on causation: whether the damages caused were sufficient to satisfy the rule, or whether, if the damages caused did not satisfy the rule, some exception should be recognized to allow the claim. The duty of the defendant to the plaintiff was not in question, but was well established under Florida law.[9]

[9] Kush v. Lloyd. 616 So.2d 415 (Fla. 1993) (doctor's duty to patient to diagnose); Gonzalez v. Metropolitan Dade County Public Health Trust), 651 So.2d 673 (Fla. 1995) (duty of hospital and funeral home to next of kin to properly handle dead body); R.J. v. Humana of Florida, Inc., 652 So.2d 360 (Fla. 1995) (doctor's duty to patient to diagnose); Zell v. Meek, 665 So.2d 1048 (Fla. 1996) (landlord's duty to use reasonable care to protect tenant form foreseeable crime); Tanner v. Hartog, 696 So.2d 705 (Fla. 1997) (doctor's duty to patient); Time Ins. Co. v. Burger, 712 So.2d 389 (Fla. 1998) (insurer's statutory duty of good faith to insured); Crocker v. Pleasant, 778 so.2d 978 (Fla. 2001) (government's duty not to interfere with next

Thus, the impact rule may be viewed as a facet of proximate cause. Proximate cause is an issue that, in other areas of tort law, this Court wisely has left to the jury.

In his dissent in Gilliam, Justice Adkins cited from a law review article that advocated abandoning the impact rule in favor of a "zone of danger" analysis. 291 So.2d at 602. In fact, the law in this state has since adopted the "zone of danger" or "foreseeable zone of risk" theory in a vast number of cases. E.g., McCain v. Fla. Power Corp., 593 So. 2d 500 (Fla. 1992); Whitt v. Silverman, 788 So. 2d 210 (Fla. 2001); Clay Elec. Co-op v. Johnson, 873 So. 2d 1182 (Fla. 2003).

In McCain, this Court held that, where a defendant creates a zone of foreseeable risk of harm to others, the defendant has a duty to take reasonable steps to prevent the harm. The issue of duty is for the court, but the question of proximate cause almost always is for the jury. McCain, 593 So. 2d at 504. The impact rule should be replaced with a careful proximate cause foreseeability analysis. Like other issues of proximate cause, it should be determined by a jury.

Some of the arguments made in support of the impact rule suggest an underlying distrust of the jury system, a belief that a jury may not be competent to distinguish between authentic claims and illegitimate ones. See Time Ins. Co. v.

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of kin's right to dead body); Hagan v. Coca-Cola Bottling Co., 804 So.2d 1234 (Fla. 2001) (manufacturer's duty to consumer); Gracey v. Eaker, 837 So.2d 348 (Fla. 2002) (psychotherapist's duty to patient); Rowell v. Holt, 474 So.2d 474 (Fla. 2003) (attorney's duty to client).

Burger, 712 So.2d 389, 394 (Anstead, J., dissenting). Such arguments maintain that the claims are too "speculative," or that there is too much of a possibility of a fraudulent claim. In its present form, the rule requires courts to determine whether the degree of impact is sufficient to warrant compensation. This is the kind of issue our system has traditionally left to juries. The very foundation of our judicial system is that juries can be trusted – must be trusted – to determine which claims merit compensation, and which do not. See generally, ITT Hartford Ins. Co. v. Owens, 816 So. 2d 572, 576-577 (Fla. 2002) new trial alternative to additur is constitutionally required because damages must be determined by a jury).

In his dissent (later approved by this Court) in Insurance Company of North America v. Pasakarnis, 425 So.2d 1141 (Fla. 4th DCA 1983), rev'd, 451 So.2d 447 (Fla. 1984), Judge Schwartz discussed why jurors should be entrusted with the determination of societal standards of behavior. He observed:

> Because of the nature of this particular issue, each jury passing upon it would be serving as a representative of the community, possessing its common experience and knowledge – and thus as a mini-legislature – in determining whether society expects that a reasonable person should fasten his belt. In this respect, the jury would be performing one of its most basic and historically important functions – though one which has been pushed into undeserved obscurity by the welter of

> statutes and administrative regulations, not to mention judge-made rules of law, which have overwhelmed modern life.

425 So.2d at 1146. Similarly, juries in cases such as this, possessing their common knowledge and experience, should serve as representatives of the community in determining what degree of insult to personal dignity should be tolerated before society deems it worthy of compensation.

Abolishing the impact rule will not relieve plaintiffs of their burden to prove by the greater weight of the evidence that they sustained damages proximately and foreseeably caused by the Defendant's negligence. If damages are not proved, the court can direct a verdict. Western Union v. Taylor, 114 So. 529 (Fla. 1927) The Court may require expert medical or psychological testimony, as it did in Time Ins. Co. v. Burger. Frivolous claims can be prevented by §57.105, Florida Statutes.

> The fear of limitless liability and litigation has marked many advances in tort law. As we said in [a prior case], "[t]he answer to the allegation of unchecked liability is not the judicial obstruction of a fairly grounded claim for redress. Rather, it must be a more sedulous application of traditional concepts of duty and proximate causation to the facts of each case."

Clay Electric Co-Op v. Johnson, 873 So.2d 1182, 1190 (Fla. 2004)(citations omitted).

Courts should not be twisting precedent into pretzels trying to do the jury's work of determining whether the plaintiff's injuries are worthy of compensation. This Court should abolish the impact rule.

CONCLUSION

The Defendants did not meet their burden of showing conclusively that the impact rule bars the claims of Mr. and Mrs. Willis. The Third District's questions should be answered, "Yes." Mrs. Willis' ordeal satisfies any reasonable construction of the impact rule. The impact rule should be abolished. The summary judgment should be reversed.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail on: HINDA KLEIN, ESQUIRE, Conroy, Simberg, Ganon, Krevans & Abel, P.A., 3440 Hollywood Boulevard, Second Floor, Hollywood, FL 33021; and THOMAS J. MORGAN, ESQUIRE, Thomas J. Morgan, P.A., 3100 South Dixie Highway, Suite 310, Coconut Grove, FL 33133 this _____ day of November, 2004.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I 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.

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