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: REPLY BRIEF ON THE MERITS

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REPLY TO STATEMENT OF THE CASE AND FACTS

Marjorie Willis was assaulted, battered and robbed at gunpoint while a guest at a Holiday Inn, after she parked where a security guard directed her to park. Neither the motel owner, Gami Golden Glades, nor the security company, American Knights Security, disputes the terrifying armed robbery committed against Marjorie Willis. But both try to minimize it by stating that Athe assailant only touched her one time when he >patted her= down . . . .@ (Gami Brief p. 4; American Knights Brief p.2). This is not what the evidence shows.

The evidence shows that the robber forced Marjorie Willis to lift her clothes, exposing her body; patted her down; and that he put the gun up to her head, touching her head, and clicked it (R.139-40; 190-191):

> 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* **B** yeah, when he said Aempty your pockets,@ hesitate, then he, yeah, did **B**
>
> 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 **B** 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 . . .

.

(R.190-191).

ARGUMENT

INTRODUCTION: THIS COURT SHOULD ACCEPT JURISDICTION

Gami, it its brief at p. 12, urges this Court to deny review, arguing that the decision below was correct, and that, therefore, there is no reason to review it. We, of course, disagree with Gami=s contention that the decision was correct. But even if it were, the purpose of this Court=s jurisdiction to answer certified questions of great public importance is not just to correct error. The purpose is to deal with questions that have an importance to the public, not just to the parties. Thus, while it is appropriate for this Court to consider whether the decision below was correct or not, that does not alone determine whether this Court should exercise its discretionary jurisdiction.

One commentator, now a member of this Court, has suggested a number of reasons why questions might appropriately be certified for this Court=s consideration. Raoul G. Cantero, III, Certifying Questions to the Florida Supreme Court: What=s So Important?, 76 Fla. B. J. 40 (May 2002)[1]. Issues that arise frequently, issues involving

[1] The focus of that article was why district courts certify questions, not why this Court accepts them; but the article also noted that this Court accepts most questions that are certified to it.

unclear or confused case law, and issues of public policy are all appropriate for certified questions. There are good reasons for this Court to answer the questions certified in this case.

Difficult questions involving the impact rule arise so frequently that this Court has considered almost a dozen cases involving the impact doctrine in the past decade. The lower appellate courts are so perplexed that, on its own motion, not the motion of any party, the court below certified four questions in this case; and this is one of four cases which we believe are presently pending before this Court in which a district court has certified a question involving the impact rule.

The questions presented are not purely legal. They involve determinations and interpretation of public policy. E.g., Gracey v. Eaker, 837 So. 2d 348, 352 (Fla. 2002); Hagan v. Coca-Cola Bottling Co., 804 So. 2d 1234, 1238 (Fla. 2001). As Prosser and Keaton observed, there are Abasic policy issues with which the courts continue to struggle in defining the limits of liability for negligently inflicted emotional harm.@ Prosser and Keeton on Torts, '54, p.361 (5th ed. 1984). In the more than 20 years since those words were written, the struggle has continued. These are exactly the kind of questions that this Court should decide.

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.

Gami does not dispute that this Court stated, in Gracey v. Eaker, 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." 837 So. 2d at 355 (emphasis added). However, Gami argues that the Court was referring only to the "bystander" cases, in which the plaintiff has witnessed an injury to a relative.

In fact, this "hybrid" nature was explained long before Gracey, in Eagle-Picher Industries v. Cox, 481 So. 2d 517 (Fla. 3d DCA 1986), where the court explained:

> In Florida, the prerequisites for recovery for negligent infliction of emotional distress differ depending on whether the plaintiff has or has not suffered a physical impact from an external force. If the plaintiff has suffered an impact, Florida courts permit recovery for emotional distress stemming from the incident during which the impact occurred, and not merely the impact itself. See Gilliam v. Stewart, 291 So. 2d 593 (Fla.1974). If, however, the plaintiff has not suffered an impact, the complained-of mental distress must be "manifested by physical injury," the plaintiff must be "involved" in the incident by seeing, hearing, or arriving on the scene as the traumatizing event occurs, and the plaintiff must suffer the complained-of mental distress and accompanying physical impairment "within a short time" of the incident.

481 So. 2d at 526.

It cannot be disputed that Mrs. Willis was "involved" in this incident. She was the victim. She had a gun held to her head; her body was exposed and the robber patted her

down against her will. Gami=s attempt to limit the Aphysical manifestation@ prong of the rule to Abystander@ cases would give less legal protection to the person directly affected by an attack than would be allowed to a relative witnessing it. The impact rule should not be applied in such a capricious fashion.

Nor is Gami correct in arguing, at p. 14-16, that the cases involving slight impact, such as Cox and Clark v. Choctawhatchee Elec. Coop., 107 So. 2d 609 (Fla. 1958), require that the injury Aresult from@ the impact; nor that they require a threshold degree of injury, not a threshold degree of impact. As the court stated in Cox, AIf the plaintiff has suffered an impact, Florida courts permit recovery for *emotional distress stemming from the incident during which the impact occurred, and not merely the impact itself.*@ (Emphasis added).

The distinction Gami urges, between emotional distress arising from the impact and emotional distress arising from the incident, is neither sensible nor meaningful. It is impossible to distinguish between injury resulting from the impact and injury merely resulting from the incident. Anyone reading Marjorie Willis= deposition (R.104, et seq.) would not doubt that Mrs. Willis can still feel the cold steel of the gun against her head and hear it click; that she can still feel the assailant=s hands running up and down her exposed body. Mrs. Willis= injuries **B** her emotional distress and its physical manifestations **B** result no less from the multiple impacts inflicted on her than they do from the incident in which the impact occurred.

Gami incorrectly argues at p. 19 that recovery should be denied to Mrs. Willis because she did not experience the physical manifestations of her psychological injuries at the time of the attack. The record does not state when her symptoms began, but it must have been early on. She was in the emergency room the next day, after spending the night in Aagony@ (R.140-146, 154).

Furthermore, this Court has specifically rejected any requirement that the manifestations occur at the time of the attack. A**Temporal proximity will usually be an important factor for the judge or jury to consider in resolving the factual question of causation. Its importance will vary depending on the facts of each case. . . . [T]he important question is whether the psychic impact caused the physical injury, whether that injury be manifest immediately, or days, weeks, or months later. . . .@** Zell v. Meek, 665 So. 2d 1048, 1053 (Fla. 1995). **It is true that the plaintiff in Zell was a bystander who observed an attack on her father. But there is no principled reason why a bystander should receive more protection under the law than the person who actually was the victim of the crime that the defendant had a duty to prevent.**

The impact rule should not be construed to deny Marjorie Willis relief because she was the victim instead of the bystander.

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

Defendants did not assault Marjorie Willis. But they are responsible for it, because it was their negligence that caused the assault. Gami concedes that, Ahad she sued the robber, her claim would not be barred by the impact rule . . . @ Gami brief at 17. Defendants argue that, nevertheless, the impact rule should bar Mrs. Willis= claim against them for breaching their nondelegable duty to protect her from the assailant=s attack, because they are not the ones who wielded the gun. See American Knights brief p. 11-12.

This distinction is unreasonable and not consistent with the law. One who has a duty to protect the plaintiff from a foreseeable intentional tort is liable for the damages caused by the intentional tort. E.g., Merrill Crossings Associates v. McDonald, 705 So. 2d 560 (Fla. 1998) (rejecting apportionment of fault between negligent premises owner and intentional tortfeasor). Despite Defendants= protests that Mr. and Mrs. Willis are seeking to hold them Avicariously liable for the robber=s actions@ (Gami brief p. 25, American Knights brief p. 11), Plaintiffs in fact seek to hold Defendants liable for the results of their own negligence. A[N]egligent tortfeasors . . . should not be permitted to reduce their liability by shifting it to another tortfeasor whose intentional criminal conduct was a foreseeable result of their negligence. . . . [I]t would be irrational to allow a party who negligently fails to provide reasonable security measures to reduce its liability because there is an intervening intentional tort, where the intervening intentional tort is exactly what the security measures are supposed to protect against.@ Merrill Crossings, 705 So. 2d at 562-563.

Defendants argue that Mrs. Willis should not be permitted to sue *them* because of the risk that her injury might be feigned. But Mrs. Willis= damages from the assault are no more likely to be feigned in an action against these Defendants than they would be in an action against the assailant.

Gami concedes that assault has Aalways been excluded from the scope of the impact rule.@ Gami brief p. 24 n.5. The ancient roots of this long established tort should provide a sufficient guarantee of the genuineness of claims for failing to prevent the assault.

Gami goes on to argue that the impact rule Aonly applies in simple negligence cases.@ Id. This is not a Asimple negligence case.@ This is a case that arises out of and is Abased on an intentional tort.@ Merrill Crossings, 705 So. 2d at 562. Recovery should be no different here than in other assault and battery cases, whether against the attacker or against the one who had a duty to protect the plaintiff from him.

Defendants have not asserted any policy reason why they should be absolved from liability for this entirely foreseeable, and totally devastating, intentional tort, which is exactly the event from which they had a duty to protect Mrs. Willis.

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

Recognizing the special relationship between the innkeeper and the guest would neither excessively stretch the law nor require finding a special relationship in every negligence case.

To disparage the special nature of the innkeeper-guest relationship, Gami tries to limit the holding of Gracey v. Eaker, 837 So. 2d 348 (Fla. 2002) by characterizing it as strictly a statutory cause of action. On the contrary, Gracey involved not just a statutory claim, but a common law claim as well. In Gracey, the Court recognized a *common law* cause of action, for breach of a fiduciary duty, that was not barred by the impact doctrine. See Gracey, 837 So. 2d at 355 and n.10 (**AA breach of this duty not to disclose is therefore actionable under the common law cause of action for breach of fiduciary duty.@)**

The Defendants argue that recognition of a special relationship where the duty is not specifically created by statute would mean that any time there is a duty, there is a special relationship. They argue that it would include every negligence case, and the impact rule would effectively be abolished. The Defendants= fears are exaggerated. Not every relationship that creates a duty is a special relationship. For example, a driver has a duty not to collide with other drivers on the road, but their relationship could hardly be characterized as special. Drivers do not place special reliance on other drivers on the road B in fact, they are supposed to mistrust them and to be alert for their mistakes. In contrast, the relationship between innkeepers and guests is historically one of reliance and trust.

Gami tries to distinguish this special innkeeper-guest relationship from the kind of relationship in Gracey (therapist-patient) and in Rowell v. Holt, 850 So. 2d 474 (Fla. 2003)(attorney-client), by arguing that the facts of those cases do not

implicate the historic concerns put forth as justification for the impact rule, such as difficulty of proof, difficulty in quantifying emotional harm, and difficulty in determining the cause of the injury, and the risk of Aspeculative@ or fictitious injuries. But those difficulties are no more troublesome in the present case than in Gracey or Rowell. The Defendants do not contend that Mrs. Willis is feigning her injuries, and there is nothing in the record to suggest it. On the contrary, expert testimony supports it. It is no more difficult to quantify her damages than it would be in any assault and battery case. And, as Prosser and Keeton point out, Amental suffering is no more difficult to estimate in financial terms, and no less a real injury, than physical pain . . . .@ Prosser and Keeton on Torts, '54, p.360 (5th ed. 1984).

Nor should causation pose an insurmountable problem. Common sense and human experience are to the contrary. Anyone who had a gun held to her head and clicked, was forced to lift her clothing, and had her body exposed and felt by a total stranger, would be bound to suffer serious emotional damage. There is not one iota of evidence in this record to suggest that Mrs. Willis= injuries are fictitious or speculative. A jury should have no trouble figuring out whether they were caused by the attack, or in assessing their amount.

Mrs. Willis should be allowed to present her case to a jury.

IV. THE IMPACT RULE SHOULD BE ABOLISHED

For decades, commentators have urged abolition of the impact rule. It is Adistinctly the minority rule today@. 3 Harper, James & Gray, The Law of Torts, '18.4, p.686-687 (2d ed. 1986). AThe only one who is defeated [by the impact rule] is the honest litigant who will not falsify, and who, if he does not come squarely within an exception, will not obtain redress for an injury which everyone agrees was foreseeable and culpably caused by another.@ McNeice, Psychic Injury and Tort Liability in New York, 24 St. John=s L.Rv. 1, 80-81 (1949) cited in 3 Harper, James & Gray, The Law of Torts, '18.4, p. 686-687 n.17 (2d ed. 1986). Marjorie Willis is an honest litigant who deserves her day in court. This Court should abolish the impact rule.

Contrary to Gami=s contention, Mr. and Mrs. Willis do not contend that it is the amount of litigation that supports the abolition of the impact rule. Rather, it is the amount of *appellate* litigation, evidencing the difficulty and arbitrariness of applying the rule, which has led so many courts to certify questions to this Court, or to make distinctions that, as a policy matter, are of dubious value or effectiveness.

A recent decision by the Third District is a case in point. In Arditi v. Grove Isle Assoc., Inc., 2004 WL 3000952 (Fla. 3d DCA 2004), the plaintiff was trapped inside an elevator and suffered a heart attack immediately after jumping from the elevator to the floor. Based on its understanding of the impact rule, the court felt compelled to hold that, if the plaintiff suffered the heart attack as a result of anxiety caused by being trapped in the elevator, she could not recover; but, if the heart attack was caused in part by the jump to the floor, the plaintiff could recover.

There is absolutely no principled reason for this distinction. It addresses none of the concerns supposed to be addressed by the impact rule. In fact, if anything, it encourages plaintiffs to try to squeeze and stretch the facts of their claims to fit into artificial categories. Such Procrustean efforts are hardly conducive to the integrity of the judicial system.[2]

Defendants argue nevertheless that the impact rule is necessary to prevent speculative claims. Defendants overlook other forces that discourage such claims. The expense of litigation will usually outweigh the potential recovery for anyone who is not really hurt. The Court could require expert testimony about damages (not incidentally, an additional expense) to further limit such claims. Section 57.105, Florida Statutes, is always available, and recently has been made even more stringent. The proposal for settlement statute and rule have been construed to allow sanctions for rejecting very low and even nominal offers, a further deterrent to trivial claims. The trial court has broad discretion to overturn a verdict that is contrary to the manifest weight of the evidence. And, after all, in our system, the jury is the most important arbiter of whether someone really should be compensated.

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[2] AProcrustes was a robber of Attica, who placed all who fell into his hands upon an iron bed. If they were longer than the bed, he cut off the redundant part; if shorter he stretched them till they fitted it...@ E. Cobham Brewer, Dictionary of Phrase and Fable, 712 (Clamson, Remson, & Haffelfinger, 9th ed. 1875), cited in Herzfeld v. Herzfeld, 732 So. 2d 1102, 1106 n.9 (Fla. 3d DCA 1999).

Gami argues finally in its brief at p. 35 at Ms. Willis= claim Amay well be legitimate,@ but that, Aas a matter of public policy, the impact rule bars both legitimate and illegitimate claims . . . .@ In other words, tough luck for Mrs. Willis, because someone else might assert an invalid claim, and that invalid claim might manage to overcome all the hurdles B the expense, the experts, the '57.105 sanctions, a low proposal for settlement, the judge and the jury. Are these safeguards of our legal system really so weak that Mrs. Willis= valid claim must be sacrificed?

The specter of a flood of speculative claims is itself speculative. Whatever the benefit of barring such claims, it is outweighed by the benefit of allowing legitimate claims like the claim of Marjorie Willis to be considered and tested by our courts and our juries.

Two decades ago, Prosser and Keeton laid out the case for abolishing the impact doctrine. They said,

> It is entirely possible to allow recovery only upon satisfactory evidence and deny it when there is nothing to corroborate the claim, or to look for some guarantee of genuineness in the circumstances of the case. The problem from this perspective is one of adequate proof, and it is not necessary to deny a remedy in all cases because some claims may be false. And where the concern is to avoid imposing excessive punishment upon a negligent defendant, it must be asked whether fairness will permit leaving the burden of loss instead upon the innocent victim.

Prosser and Keeton, supra. p. 361.

Mr. and Mrs. Willis= case is exactly why Prosser and Keeton were right then, and are right now. Their claim should not be denied merely because someone else might try

to make a false claim. As between the negligent defendants and Mrs. Willis, who has suffered a real injury through no fault of her own, the burden ought to fall on them, not on her.

CONCLUSION

Marjorie and Ray Willis respectfully ask this Court to answer the certified questions in the affirmative. The decision of the court below should be reversed. The impact rule should be satisfied by these egregious facts. If it is not, it should be abolished.

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 March, 2005.

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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