

SUPREME COURT OF FLORIDA  
TALLAHASSEE, FLORIDA

SOUTHERN BAPTIST HOSPITAL  
OF FLORIDA, INC., a corporation,

CASE NO. SC04-380

Petitioner,

JEFFREY W. WELKER,

Respondent.

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On Appeal from the District Court of Appeal,  
First District, State of Florida  
on a Question Certified to be of Great Public Importance

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FLORIDA DEFENSE LAWYERS ASSOCIATION  
AS AMICUS CURIAE  
IN SUPPORT OF PETITIONER

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REBECCA O'DELL TOWNSEND, ESQUIRE  
Florida Bar No. 235090  
Haas, Dutton, Blackburn, Lewis & Longley, P.L.  
1901 N. 13<sup>th</sup> St., Suite 300  
Tampa, Florida 33605  
(813)253-5333

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## INTEREST OF AMICUS CURIAE

Florida Defense Lawyers Association (FDLA) is a statewide organization of defense attorneys with a membership of over 1,000 members. FDLA strives to promote a level playing field in civil litigation and to foster our members' growth as professionals. FDLA regularly and actively participates in amicus briefing in cases with a statewide impact involving tort issues, insurance issues and trial procedure.

FDLA believes that this case involves significant tort law issues with potentially statewide impact. FDLA's amicus brief addresses Florida's impact rule as it applies to this case. The impact rule is a recurring and important issue in tort cases handled by FDLA members. FDLA has briefed other cases for this Court involving Florida's impact rule, including Coca Cola v. Hagan, 804 So.2d 1234 (Fla. 2001).

FDLA files its amicus brief by leave of this Court.

## SUMMARY OF THE ARGUMENT

This is not a case where Plaintiff/Respondent should be permitted to avoid the impact rule. Respondent has failed to allege a legally recognized negligence claim. He has failed to allege a legally recognized relationship which would give rise to a duty owed to him. There is no previously recognized special relationship between himself and his children's therapist. He has also failed to allege a recognized duty. There is no previously recognized duty to validate or investigate a client's perceptions or experiences before giving a diagnosis. Florida does not recognize a cause of action for negligent interference of parental rights.

Furthermore, the cause of Respondent's alleged emotional damages are elusive. It is unclear whether his children's therapist, his children, his ex-wife, or Florida's Domestic Violence Statute caused his emotional distress. Finally, allowing Respondent to recover damages for the mental anguish that his ex-wife's use of a medical diagnosis caused him would open the floodgates for speculative claims. There is probably no end to the number of potential litigants who would wish to recover damages for the mental anguish caused by domestic violence disputes or child custody battles.

## ARGUMENT

### I. Plaintiff/Respondent's Negligence Suit Fails to Fall within any Exception to Florida's Impact Rule.

“For reasons both historical and practical,” negligence law imposes a duty upon a “protecting party” to exercise reasonable care to safeguard the physical well-being of a “protected party” and the physical security of the protected party’s property. Rivers v. Grimsley Oil Co., 842 So.2d 975, 976 (Fla. 2d DCA 2003), citing Monroe v. Sarasota County Sch. Bd., 746 So.2d 530 (Fla. 2d DCA 1999)(noting that bodily injury or property damage is an essential element of a cause of action for negligence)(other citation omitted). Negligence law does not generally impose a duty upon a party to safeguard the emotional well-being of another. Rivers, 842 So.2d at 976. As this Court has stated, “there must be some level of harm which one should absorb without recompense as the price he pays for living in an organized society.” Rowell v. Holt, 850 So.2d 474, 480 (Fla. 2003)(citation omitted). In order to preserve the “physical” aspect of negligence law, courts have developed certain doctrines such as the “impact rule.” Rivers, 842 So.2d at 976.

The impact rule usually requires a plaintiff to sustain some sort of physical impact as a result of a defendant’s negligence in order to maintain his or her action. Id. The impact rule has no application to intentional torts. Id. Intentional torts have

never imposed a duty restricted to protecting the physical person or his property. Id. If a person intentionally and maliciously interferes with another's legal right, emotional damages have always been recoverable.

Within the realm of "ordinary" or simple negligence, this Court has carved out limited and specific exceptions to the physical requirement. Id. at 977. The "bystander" exception applies if a person suffers emotional trauma from witnessing an accident in which a family member is physically harmed. Id., citing Champion v. Gray, 478 So.2d 17 (Fla. 1985)(creating narrow claim for emotional distress that results in physical injury). Another exception is applicable when a doctor gives a misdiagnosis that causes a plaintiff to undergo invasive medical treatment. Rivers, 842 So.2d at 977, citing R.J. v. Humana of Fla., Inc., 652 So.2d 360 (Fla. 1995). If a psychotherapist breaches his fiduciary duty of confidentiality, his patient may avoid the impact rule and pursue a negligence claim for emotional damages. Gracey v. Eaker, 837 So.2d 348 (Fla. 2002). These narrow exceptions generally require a "freestanding" tort or a "special relationship" from which emotional damages are foreseeable. Rowell, 850 So.2d at 478 (involving an attorney/client relationship), citing Kush v. Lloyd, 616 So.2d 415 (Fla. 1992)(involving wrongful birth).

In this case, Welker's ordinary negligence claim for emotional damages fails to set forth the necessary elements to assert a valid negligence claim, fails to meet

negligence law's physical requirement, and fails to meet any exception to that requirement. First, Welker fails to allege any legally cognizable relationship between the children's therapist and himself. This suit was not brought on behalf of Welker's children, who were the mental health counselor's patients. This suit was brought by the patients' father on his own behalf. There was no special relationship between Welker and the counselor that made her a "protecting party" of Welker's physical well-being or property. Using Justice Pariente's parlance, there was no "clearly defined duty due to a direct relationship" between the children's counselor and the children's father. Rowell, 850 So.2d at 484 (Pariente concurring). Any "clearly defined duty due to a direct relationship" at issue in this case was between the children and their counselor. The only clearly foreseeable emotional or psychological harm for any breach of duty by the children's counselor would be to the children, not their father. There is no allegation that the children suffered any emotional or psychological harm as a result of their counselor's alleged breach of duty.

Second, Welker failed to allege a legally cognizable duty. In his Amended Complaint, Welker alleges that the mental health counselor breached her duty of reasonable care "to investigate or validate" "factual allegations." There is no recognized "duty to investigate or validate" "factual allegations" imposed upon mental health counselors in Florida. Nor should there be. In this case, a licensed mental



health therapist made a presumably legitimate diagnosis that her patients were suffering from post-traumatic stress syndrome. Psychological diagnoses, such as the one made in this case, are not necessarily made based upon verifiable facts. Instead, psychological diagnoses are usually based upon a patient's perceptions and symptoms. In this case, the mental health counselor made a diagnosis based upon what Welker's children had told her and presumably upon the children's displayed behaviors. There was no duty to verify the children's perceptions or behaviors.

Finally, Welker asserts that he alleged a cause of action for negligent "interference with parental rights." However, Florida does not recognize a cause of action for negligent interference with parental rights. Instead, Florida recognizes a cause of action for intentional interference with parental rights. Stone v. Wall, 734 So.2d 1038 (Fla. 1999)(recognizing a cause of action for intentional interference with custodial parent-child relationship by third-party non-parent).

As stated by this Court, the elements of tortious interference with parental rights include: (1) that the plaintiff had superior custody rights to the child; and (2) that the defendant intentionally interfered with those rights. Stone, 734 So.2d at 1042, citing Restatement (Second) of Torts § 700 (1977). Intentional interference does not provide for a cause of action against those who mistakenly or negligently interfere. If negligent interference were a recognized cause of action, any carpool driver or girl

scout leader or neighbor who accidentally dropped off a child to a noncustodial parent could be sued. One can imagine a whole host of unfortunate and undesirable “negligent interference” lawsuits. Although the counselor’s “to whom it may concern” letter in this case may have been ill advised, there is no allegation that it was an intentional or malicious attempt to interfere with anyone’s parental rights.

Welker’s Amended Complaint fails to allege a legally recognized freestanding tort apart from any emotional injury. See Rowell, 850 So.2d 479-80 (reasoning that the impact rule was not intended to embrace the tort of wrongful birth “where emotional damages are an additional or ‘parasitic’ consequence of conduct that itself is a freestanding tort apart from any emotional injury”). Welker’s Amended Complaint also fails to allege any legally recognized special relationship creating a special duty whose breach would cause foreseeable psychological injury. See id. at 480 (concluding that the impact rule had no application where an attorney’s breach of his special duty caused foreseeable psychological harm). Welker’s suit fails to fall within any recognized exception to the impact rule.

II. This Case Is Not the Type of Case for Which Plaintiff/Respondent Should Be Allowed to Elude the Impact Rule.

A. The Courts Would Be Inundated with Litigation Based upon the Emotional Injury Caused by Domestic Violence Disputes.

Welker alleges in his Amended Complaint that the children's mental health counselor prevented him from protecting his rights because she failed to report his conduct to Florida's Department of Children and Families. He alleges that his ex-wife's decision to obtain an injunction against him prevented him from protecting his rights. Welker has actually alleged that Florida's Domestic Violence Statute prevented him from protecting his rights. Southern Hospital cannot be legally held responsible for his ex-wife's legal choice to avail herself of Florida's Domestic Violence Statute. Additionally, it could not have been reasonably foreseeable by the children's mental health counselor that Welker would be injured by Florida's Domestic Violence Statute.

Contrary to Welker's allegations, Florida's Domestic Violence Statute provides for hearings and other proceedings and procedures to which Welker could have availed himself. See § 741.30 (3)(d)-(10), Fla. Stat. (2004). Under Florida's Domestic Violence Statute, if an ex parte injunction is obtained, it can only be effective for a maximum of fifteen days. §741.30 (5)(c), Fla. Stat. (2004). A full hearing must

be held within fifteen days and there must be reasonable notice and opportunity to be heard. §741.30 (5)(c) & (d)(3) &(8)(a)(c), Fla. Stat. (2004). Florida's Domestic Violence Statute provides an advocate from a state attorney's office, a law enforcement agency or a certified domestic violence center to be present with either the petitioner or respondent during any court proceedings or hearings related to an injunction for protection if requested. § 741.30 (7), Fla. Stat. (2004). The petitioner or respondent may move the court to modify or dissolve an injunction at any time. §741.30 (10), Fla. Stat. (2004).

Welker wishes to hold Southern Hospital responsible for the alleged mental anguish caused by Florida's Domestic Violence Statute. He attempts to hold Southern Hospital responsible because a diagnosis of one of its health care providers was used as evidence in a domestic violence dispute. If Welker is allowed to pursue this action, the floodgates of litigation would indeed be wide open. There is probably no end to the number of those willing to seek redress for the emotional toll that a domestic violence dispute causes. There is also probably no end to the number of litigants who would gladly sue a hospital for the emotional toll that the use of a diagnosis in prior litigation caused them.

B. The Precise Cause of Plaintiff/Respondent's Injury is Elusive.

Welker's Amended Complaint attempts to recover damages for his ex-wife's

use of a medical provider's diagnosis. This case could be analogous to an ex-wife's use of a doctor's prescription or referral. Suppose an ex-wife used a "to whom it may concern" medical referral in a child custody battle. Should the ex-husband have a cause of action for emotional injury against the hospital where the doctor worked? Did the doctor cause his alleged emotional injury or did his ex-wife? Suppose the referral was based upon a misdiagnosis. Should the ex-husband have a cause of action, absent any medical treatment, against the hospital for his emotional injury in fighting a child custody battle? Did the doctor or did the ex-wife cause his emotional damages? Suppose the ex-wife used a medical diagnosis of the children in the custody battle. Should the husband have a cause of action against the hospital for *his* emotional trauma?

In this case, Welker's ex-wife used their children's medical diagnosis as evidence in a domestic violence dispute. Did the therapist cause his alleged emotional injury? Did his ex-wife? Did his children who reported the alleged abuse to their therapist? Did Florida's Domestic Violence Statute cause his alleged emotional injury by allegedly denying him "advance notice of the injunction" and "an opportunity to defend against the allegations?" In this case, the impact rule serves an important function because the precise cause of Welker's "mental anguish, humiliation and embarrassment" is elusive. See Rowell, 850 So.2d at 478 (explaining that emotional

injury is difficult to prove, not easily quantified, and that the precise cause of the injury can be elusive).

### CONCLUSION

This Court should quash the First District's decision allowing Plaintiff/Respondent to recover emotional damages and reinstate the trial court's dismissal of this action.

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to: Harvey L. Jay, III, Saalfield, Coulson, Shad & Jay, P.A. (Petitioner's counsel), 1000 First Union Tower, 225 Water Street, Jacksonville, Florida 32202-4458 and Lawrence C. Datz (Respondent's counsel), One Independent Drive, Suite 2902, Jacksonville, Florida 32202-5022.

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REBECCA O'DELL TOWNSEND, ESQUIRE

Florida Bar No. 235090

HAAS, DUTTON, BLACKBURN, LEWIS & LONGLEY, P.L.

Post Office Box 1700

Tampa, FL 33601

813/253-5333

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was typed in Times New Roman 14 point font in compliance with Fla. R. App. P. 9.100(1) and 9.210(a)(2).

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Attorney