IN THE SUPREME COURT OF FLORIDA

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CASE NO. SC05-1986

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**JEFFREY WOODARD** AND **CAROL GLOAD,**

PETITIONERS,

VS.

**JUPITER CHRISTIAN SCHOOL, INC.,**

RESPONDENT.

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# AMICUS BRIEF OF ACADEMY OF FLORIDA TRIAL LAWYERS, IN SUPPORT OF THE PETITIONERS

FILED BY CONSENT OF ALL PARTIES

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ON A CERTIFIED QUESTION
FROM THE FOURTH DISTRICT COURT OF APPEAL

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Florida cases**

**Other states**

**Other authorities**

## IDENTITY AND INTEREST OF AMICUS

The Academy of Florida Trial Lawyers is a voluntary statewide association of lawyers specializing in litigation in all areas of the law, including personal injury litigation. The lawyer members of the Academy are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts.

## SUMMARY OF THE ARGUMENT

The Court should acknowledge that its attempt to adhere to the "impact rule" has been unsuccessful.

The rule actually contains two requirements—that a person seeking recovery must have suffered a physical impact, and that there must be a discernible physical manifestation of the distress. This Court, in repeatedly refusing to apply the rules, has acknowledged that the requirements do not serve the goals of the rules.

In place of the current rules, we suggest that the court adopt a rule permitting recovery for emotional distress damages where the severe emotional distress was both foreseeable and actually occurred. This rule will provide limits on liability, and is flexible enough so that the Court will not have to repeatedly create exceptions to the new rule.

## ARGUMENT

Florida's law on the recovery of emotional distress damages—known as the

"impact rule"—is in disarray. The clearest evidence of this is the fact that when an issue involving emotional distress damages reaches the district courts of appeal, the courts have essentially been unable to guess what this Court might do. This is the reason why the district courts have certified eleven "impact rule" cases to this Court in the last eleven years.

Indeed, the pace of certified questions has increased. Five such cases have been before this Court in the past year, and three remain pending. *See Woodard v. Jupiter Christian School*, 30 Fla. L. Weekly D2406 (Fla. 4th DCA Oct. 12, 2005) (case no. SC05-105); *Abril v. Department of Corrections*, 884 So. 2d 206 (Fla. 2d DCA 2004) (case no. SC04-1747); *Willis v. Gami Golden Globes*, 881 So. 2d 703 (Fla. 3d DCA 2004) (case no. SC04-1929); *Thomas v. Ob/Gyn Specialists*, 889 So. 2d 971 (Fla. 4th DCA 2004), *appeal voluntarily dismissed*, No. SC05-105 (Fla. Sept. 7, 2005); *Welker v Southern Baptist Hospital*, 864 So. 2d 1178 (Fla. 1st DCA 2004), *aff'd in part, rev'd in part*, 908 So. 2d 317 (Fla. 2005).

In these opinions, the district courts have been at a loss to determine when the impact rule applies, and when it does not. This uncertainty is most clearly illustrated in the present case. The district court majority concluded that the task of determining whether a set of circumstances should be exempted from the impact rule is exclusively within the domain of this Court. The majority, echoing prior case law, stated that "is a task best suited for our supreme court." *Woodard v. Jupiter Christian School*. *See also Thomas v.*

*Ob/Gyn Specialists*, 889 So. 2d 971, 972 (Fla. 4th DCA 2004) ("It is for that court to determine when public policy dictates that an exception be created."). In contrast, Judge Farmer in dissent in the present case concluded that this Court had *not* "indicated that the impact rule is presumptively applicable to all torts." He concluded that "[a]n essential part of common law judging is to recognize the essential reasons for a rule and apply the rule only when those reasons—or functionally equivalent ones—are present."

In short, we don't know what the impact rule is, and we don't know how to apply what we think the rule might be.

In several of the recent cases before this Court, the Academy of Florida Trial Lawyers has submitted amicus briefs, asserting that the Court's impact rule jurisprudence has failed, and suggesting an alternative to the current morass. We respectfully submit that the first point—that the Court has failed in its attempt to adhere to the impact rule—is now established beyond dispute. The remaining issue is what should replace the Court's current approach. We submit the following, as we did in our prior amicus briefs.

## I. EMOTIONAL DISTRESS DAMAGES, THE "IMPACT RULE," AND THE PHYSICAL INJURY REQUIREMENT

We start with this Court's oft-repeated statement of the rule governing damages for emotional distress: "before a plaintiff can recover damages for emotional distress caused by the 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). *See*

*also Southern Baptist Hospital v. Welker*, 908 So. 2d 317, 320 (Fla. 2005). The rule is commonly referred to as the "impact rule," but in fact it has two requirements. First, the emotional distress must flow from ***physical injuries***. Second, those physical injuries must have been ***sustained in an impact***.[1]

Some of the confusion in this Court's case law on recovery of damages for emotional distress is based on the Court's reference to these two separate requirements as the "impact rule." In fact, only one portion of the rule requires an impact. The other part of the rule requires a physical injury.

We will address each of these two requirements—impact and physical injury. We hope to demonstrate to the Court that the requirement of impact makes no sense, and accomplishes nothing other than the need to create repeated exceptions to the general rule. The "impact" requirement should be abolished.

The other requirement, of a physical injury, is not as absurd as the impact

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[1]While this is the most common statement of the "impact rule," the Court has in other cases described the rule differently. *See Time Insurance Co. v. Burger*, 712 So. 2d 389, 393 (Fla. 1998) (the impact rule "holds that in the absence of a discernable physical injury a person cannot recover compensatory damages for mental distress or psychiatric injury"; impact requirement not mentioned in statement of rule); *Gonzalez v. Metropolitan Dade County Public Health Trust*, 651 So. 2d 673, 674 (Fla. 1995) (the impact rule "requires that a plaintiff sustain actual physical impact in order to recover for the negligent infliction of emotional distress"; physical injury requirement not mentioned in statement of rule); *Gracey v. Eaker*, 837 So. 2d 348, 355 (Fla. 2002) (the impact rule requires "***either impact*** upon one's person ***or***, in certain situations, at a minimum the manifestation of emotional distress in the form of a discernable ***physical injury*** or illness"; emphases added).

requirement. But there are better rules which better achieve the Court's stated goals.

## II. THE PHYSICAL IMPACT REQUIREMENT

Although the Court has purported to adhere to the impact requirement, the Court has repeatedly found the requirement to be inapplicable.

In *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985), this Court for the first time held under the common law that a person could recover emotional distress damages for negligence, even though the plaintiff—who saw the corpse of a close family member—did not experience an impact. Since then, the Court has found many other circumstances in which a plaintiff could recover emotional distress damages without an impact: the failure to diagnose an inheritable genetic impairment, the negligent handling of a dead body, the stillbirth of a baby, the breach of confidentiality during counseling, and legal malpractice resulting in further imprisonment. *See Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992); *Gonzalez v. Metropolitan Dade County Public Health Trust*, 651 So. 2d 673 (Fla. 1995); *Tanner v. Hartog*, 696 So. 2d 705 (Fla. 1997); *Gracey v. Eaker*, 837 So. 2d 348 (Fla. 2002); *Rowell v. Holt*, 850 So. 2d 474 (Fla. 2003).

In addition to these cases, this Court has noted that there are other circumstances in which the impact requirement has traditionally been held to not apply, even though the plaintiff may seek damages only for emotional distress. For example, a plaintiff can recover emotional distress damages for loss of consortium, negligent defamation, invasion

of privacy, or intentional infliction of emotional distress, even if there has been no impact. *See Rowell v. Holt*, 850 So. 2d at 478 n.1; *Gracey v. Eaker*, 837 So. 2d at 356 nn.12 & 13; *Kush v. Lloyd*, 616 So. 2d at 422. *See also* D. DOBBS, THE LAW OF TORTS 829-32 (2000) (noting that emotional distress damages based on discrimination, harassment, and assault are permitted without an impact).

In these situations, this Court has found the impact requirement to be inapplicable, and created exceptions to the rule. These conclusions by the Court are the most powerful evidence against the rule. In these cases, the Court found that the impact requirement accomplished nothing other than to serve as a bar to potentially meritorious claims. As a state supreme court has noted, "[t]he fact that courts have repeatedly found it necessary to craft formal exceptions to the rule suggests that the physical impact rule provides an arbitrary and inadequate means of reconciling the competing concerns of the law." *Camper v. Minor*, 915 S.W.2d 437, 441-42 (Tenn. 1996).

While in some cases the courts have simply refused to apply the impact requirement, in other cases the courts have watered it down to avoid an undesirable result. This Court has noted that "to suffer an impact, a plaintiff may meet rather slight requirements." *Zell v. Meek*, 665 So. 2d at 1050 n.1. The inhalation of fibers, or an electric shock, can satisfy the requirement. *Id.*

The central reason why courts have refused to apply the impact requirement under many circumstances, or watered down the requirement, is the recognition that the rule

frequently fails to accomplish its stated purpose of ferreting out fraudulent, frivolous, or otherwise unmeritorious claims. *See Rowell v. Holt*, 850 So. 2d at 478; *Gonzalez v. Metropolitan Dade County Public Health Trust*, 651 So. 2d at 674. The existence of a minimal impact—as required by the case law—is not much of an indicator that a claim is genuine. *Niederman v. Brodsky*, 261 A.2d 84, 87-88 (Pa. 1970). Conversely, where there is no impact, "the danger of illusory claims . . . is no greater than in cases where impact occurs." *Id.* at 88.

Indeed, the impact requirement can itself lead to fraud. "[T]here is good ground to believe that [the impact rule] breed[s] dishonest attempts to mold the facts so as to fit them within the grooves leading to recovery." *Battalla v. State*, 176 N.E.2d 729, 731 (N.Y. 1961).

Defenders of the impact requirement have also claimed that without the rule there will be a new avalanche of lawsuits for emotional distress. However, since the law in this area is so unclear, few plaintiffs are now being discouraged by the impact requirement. If a person has a claim, they will bring it, unless there is an on-point case from the Supreme Court. Furthermore, the evidence has not supported the claim that the abolition of the impact requirement will lead to a wave of new lawsuits. "[S]tates which have rules other than the physical impact rule have apparently not suffered any such flood of litigation." *Camper v. Minor*, 915 S.W.2d at 441. Finally, even if there were some additional lawsuits, that alone would not be a reason to deny access to the courts to meritorious

claims. It is the function of courts to provide a remedy to those who are injured. *Id. See also Niederman v. Brodsky*, 261 A.2d at 89.

All of these considerations have led all but a handful of jurisdictions to abandon the impact requirement. *Gonzalez v. Metropolitan Dade County Public Health Trust*, 651 So. 2d at 674. As the leading modern torts treatise explains, the impact requirement "did not draw the line against liability at a satisfactory place, and it has now been abolished in most states." D. DOBBS, THE LAW OF TORTS 837.

## III. THE PHYSICAL MANIFESTATION REQUIREMENT

A second requirement in Florida case law, often included as part of the "impact rule," is a requirement that a claimant seeking emotional distress damages establish a physical manifestation of the emotional distress.

The Court has struggled with this requirement. The Court has often stated that the "emotional distress suffered must flow from physical injuries." *Rowell v. Holt*, 850 So. 2d at 477-78 (citations omitted). But this seems incorrect. If the emotional distress flows from physical injuries—that is, if there are physical injuries, and emotional distress flows from them—then it is obvious that the plaintiff may recover for his or her emotional distress damages. In fact, it seems clear that the Court actually means that where the plaintiff is seeking emotional distress damages, those damages must manifest themselves in physical injuries.

This view—that there must be a physical manifestation of the emotional distress—has been stated in the handful of this Court's recent cases. In *Brown v. Cadillac Motor Car Division*, 468 So. 2d 903 (Fla. 1985), the Court held that to state a cause of action for psychological trauma, "such psychological trauma must cause a demonstrable physical injury such as death, paralysis, muscular impairment, or similar objectively discernible physical impairment." *Id.* at 904. In a companion case, the Court emphasized that there was no claim for "psychic trauma unaccompanied by discernible bodily injury. . . . A separate and distinct physical injury is required." *Champion v. Gray*, 478 So. 2d 17, 19 (Fla. 1985). *See also Zell v. Meek*, 665 So. 2d 1048, 1053 (Fla. 1995) ("The essence of our holding in *Champion* was to recognize a claim where an actual physical injury could be demonstrated to be caused by psychic trauma.").

As with the impact requirement, the Court has indicated that the requirement of a physical manifestation of the emotional distress may be discarded in some circumstances. In *Tanner v. Hartog*, 696 So. 2d 705 (Fla. 1997), concerning a father's medical malpractice claim based on the stillbirth of a child, the complaint made clear that the father did not have a physical injury, yet the Court approved the claim. In *Hagan v. Coca-Cola Bottling Co.*, 804 So. 2d 1234 (Fla. 2001), the Court again approved a claim for emotional distress, even though there was no physical manifestation of the emotional distress. The Court held that "a cause of action for emotional distress caused by the ingestion of a contaminated food or beverage should be recognized despite the lack of an

accompanying physical injury." *Id.* at 1238. And in the two most recent emotional distress/"impact rule" cases, the Court has approved claims for emotional distress damages, even though there was no physical manifestation of the emotional distress. *See Rowell v. Holt*, 850 So. 2d 474 (Fla. 2003); *Gracey v. Eake*r, 837 So. 2d 348 (Fla. 2002). The Court in these cases simply found the entire "impact rule"—apparently including the physical manifestation requirement—to be inapplicable.

So the physical manifestation requirement exists much like the impact requirement—stated as the rule, but frequently ignored. This has happened in Florida, and it has happened in other states. Courts have found "exceptions" to the physical manifestation requirement. *Camper v. Minor*, 915 S.W.2d 437 (Tenn. 1996). Courts have also watered down the physical manifestation requirement, finding it satisfied by "fairly transient physical phenomena, as where one plaintiff, confronted with a shock, lost control of bladder and bowel." D. DOBBS, THE LAW OF TORTS 838 (2000). One court has held that a "physical injury" can be established by evidence "indicative of a mental state," acknowledging that it was not using "physical" in the ordinary dictionary sense, but rather as a way of saying that the "injury for which recovery is sought is capable of objective determination." *Benyon v. Montgomery Cablevision*, 718 A.2d 1161, 1182-83 (Md. 1998).

Courts have created exceptions to the physical manifestation requirement, and watered down the requirement, for a familiar reason: skepticism about whether the

requirement serves its stated purpose of weeding out frivolous and unmeritorious claims. Courts and commentators have concluded that the physical manifestation requirement excludes some meritorious claims, merely because there was no resulting physical injury, and also allows some claims for trivial injuries to proceed, simply by virtue of some physical manifestation. *Corgan v. Muehling*, 574 N.E.2d 602, 608 (Ill. 1991); *Sinn v. Burd*, 404 A.2d 672 (Pa. 1979); D. DOBBS, THE LAW OF TORTS 838. Furthermore, the physical manifestation requirement may serve to encourage plaintiffs to exaggerate symptoms of headaches and other reactions which may be found to satisfy the physical manifestation requirement. *Corgan v. Muehling*, 574 N.E.2d at 608.

Because of these concerns, an increasing number of states have abandoned the physical manifestation requirement. *See, e.g., Doe v. State*, 58 P.3d 545 (Hawaii 2002); *Burgess v. Superior Court*, 831 P.2d 1197, 1205 (Cal. 1992); *Paugh v. Hanks*, 451 N.E.2d 759 (Ohio 1983).

## III. MOVING PAST THE "IMPACT RULE": A RULE WHICH CAN BE FOLLOWED, RATHER THAN IGNORED

As we have explained, the physical impact and physical manifestation requirements—while purportedly the law in Florida—are not the law actually applied by our courts. The rules don't make much sense, and the best proof of this is the Court's repeated refusal to apply the rules to various circumstances.

We now suggest an alternative rule which we believe better addresses the concerns

stated in the Court's opinions in this area. We submit that a plaintiff should be able to recover for emotional distress where the plaintiff establishes that (1) it was reasonably foreseeable that he or she would suffer severe emotional distress caused by the defendant's negligent conduct, and (2) the plaintiff did in fact suffer severe emotional distress as a result of the conduct.

This two-part test sets reasonable, workable, fair standards for liability. Liability is limited to those situations in which it was reasonably foreseeable that a person would suffer severe emotional distress. There is no liability for unforeseeable distress claimed by distant plaintiffs. There is no liability because a person is hypersensitive. A person with an emotional eggshell skull will not be able to recover. Severe emotional distress must have been foreseeable. *See generally Sacco v. High Country Independent Press*, 896 P.2d 411 (Mont. 1995). *See also Camper v. Minor*, 915 S.W.2d 437 (Tenn. 1996).

The requirement that a plaintiff must have actually suffered *severe* emotional distress also sharply limits liability. Lawsuits will not be permitted based on the small distresses which are part of life. The distress must be both severe and debilitating. *Paugh v. Hanks*, 451 N.E.2d 759 (Ohio 1983). Liability will be permitted "where a reasonable person, reasonably constituted, would be unable to cope with the mental stress engendered by the case." *Camper v. Minor*, 915 S.W.2d at 446 (citations omitted). *See also Sacco v. High Country Independent Press*, 896 P.2d 411. Some courts have required expert testimony or scientific proof to establish the severity of the distress. *See*

*Camper v. Minor*, 915 S.W.2d 437; *Bass v. Nooney Co.*, 646 S.W.2d 765, 772 - 773 (Mo. 1983).

Under this rule, courts will have an active role in determining whether the two-part test is satisfied. The court may in the first instance determine whether there is a jury question on the foreseeability of severe emotional distress, as well as on whether the plaintiff actually suffered severe distress. *Sacco v. High Country Independent Press*, 896 P.2d 411.

These requirements, and the room for courts to step in as a matter of law when appropriate, have led a number of states to adopt the two-part test which we urge. *See, e.g., Johnson v. Ruark Obstetrics and Gynecology Associates*, 395 S.E.2d 85 (N.C. 1990); *Sacco v. High Country Independent Press*, 896 P.2d 411; *Paugh v. Hanks*, 451 N.E.2d 759 (Ohio 1983); *Bass v. Nooney Co.*, 646 S.W.2d at 772 -773; *Rodrigues v. State*, 472 P.2d 509, 520 (Hawaii 1970).

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The rule which we propose would be firm enough to draw lines and provide guidance, and flexible enough to be applied to varying factual circumstances. Perhaps most importantly, the rule makes sense. The limitation to situations in which severe emotional distress is both foreseeable and actually occurs serves the Court's stated concerns in this area. This is a rule to which the Court will not need to create exceptions every few years.

We expect that this rule would not necessarily require the overruling of the holdings in this Court's recent cases on emotional distress damages. The Court's case law has not been based on the physical impact requirement or the physical injury requirements, as demonstrated by the frequency with which the Court has found those requirements to be inapplicable. In reality, we suggest, the Court's decisions have been based on a rule much like the one we propose—damages for emotional distress will be allowed where it was foreseeable that severe distress would occur, and such severe distress did in fact occur. We request that the Court now make this the law in Florida, and end Florida's unsuccessful attempt to adhere to the "impact rule."[2]

## CONCLUSION

The Court should recede from the physical impact and physical manifestation requirements, and in their place declare that claims for emotional distress shall be

[2]We suggest that the new rule need not apply to claims for *bystander* recovery for negligent infliction of emotional distress. Those cases, involving defendants whose negligence toward one person causes emotional harm to a third person, could be governed by the Court's existing case law. Over the last two decades, the Court has established sensible, workable guidelines to decide these cases. *See Champion v. Gray*, 478 So. 2d 17; *Zell v. Meek*, 665 So. 2d 1048; *Tanner v. Hartog*, 696 So. 2d 705. The Court might want to retain the existing law to govern such bystander claims. *See generally* D. DOBBS, THE LAW OF TORTS 839 ("Emotional harm resulting from risk or injury to another person is treated in a special category of its own.").

governed by the rule described on the preceding pages.

Respectfully submitted,

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**CERTIFICATE OF SERVICE AND COMPLIANCE**

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 28th day of November, 2005, to Bill Booth, Esq., and Michelle L. Hankey, Esq., Legal Aid Society of Palm Beach County, Inc., 423 Fern Street, Suite 200, West Palm Beach, FL 33401; W. Trent Steele, Esq., 721 U.S. Highway 1, Suite 217, North Palm Beach, FL 33408; and John L. Bryan, Esq., 4400 PGA Blvd., Suite 800, Palm Beach Gardens, FL 33410.

We hereby certify that this brief is in Times Roman 14 point, and in compliance with the type requirements of the Florida Rules of Appellate Procedure.

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