

### **III.STATEMENT OF THE CASE**

The Petitioners, Donna Gracey and Joseph Gracey, initiated an action against Respondent, Donald W. Eaker, by filing a three-count Complaint seeking damages under the theories of negligent infliction of emotional distress, intentional infliction of emotional distress and invasion of privacy. A. at 1-5. Respondent filed a Motion to Dismiss the Complaint, A. at 6-8, which was granted on September 11, 1997. A. at 9. Petitioners filed an Amended Complaint seeking damages against Respondent under the theory of intentional infliction of emotional distress. A. at 10-14. Petitioners also attempted to state a cause of action based upon Section 491.0147, Florida Statutes. Id. Respondent filed a Motion to Dismiss the Amended Complaint. A. at 15-18. The Court granted the motion on the basis that the Amended Complaint did not set forth the alleged causes of action in separate counts, but otherwise, denied the motion. A. at 19-20.

Petitioners then filed a two-count Second Amended Complaint seeking damages against Respondent for negligent infliction of emotional distress and breach of contract of confidentiality. A. at 21-25. With consent of counsel for Respondent, Petitioners filed a Third Amended Complaint which appeared to seek damages for negligent infliction of emotional distress and appeared to attempt to state a cause of action for breach of confidentiality/invasion of privacy rights. A. at 26-30. Respondent filed a Motion to Dismiss the Third Amended Complaint (A. at 31-33), which was granted on November 9, 1998. A. at 34-35.

Petitioners filed a Fourth Amended Complaint seeking only psychological damages against Respondent for an alleged breach of a fiduciary duty of confidentiality. A. at 36-39. Respondent filed a Motion to Dismiss the Fourth Amended Complaint. A. at 40-42. The Court granted the Motion to Dismiss on February 22, 1999, finding that the Petitioners failed to set forth allegations which would satisfy the Florida Supreme Court's requirement of the "impact rule". A. at 43-44. An Amended Order was entered on March 19, 1999, which dismissed the Fourth Amended Complaint with prejudice, "since [Petitioners] do not wish to further amend their complaint." A. at 45-

46. Petitioners appealed the Amended Order on Motion to Dismiss Plaintiffs' Fourth Amended Complaint. A. at 47-49. The Fifth District Court of Appeal affirmed the Trial Court's dismissal of the Fourth Amended Complaint and certified the following question to this court as being of great public importance:

WHETHER AN EXCEPTION TO FLORIDA'S  
IMPACT RULE SHOULD BE RECOGNIZED IN A  
CASE WHERE INFLICTION OF EMOTIONAL  
INJURIES RESULTED FROM THE BREACH OF  
A STATUTORY DUTY OF CONFIDENTIALITY.

A. at 50-53. Petitioners then moved to invoke the discretionary jurisdiction of this Court to review the decision of the Fifth District Court of Appeal. A. at 54-56.

On February 28, 2000, Petitioners filed their Initial Brief on the Merits with this Court. On that same date, the Acting Clerk of this Court informed the parties by letter that the Initial Brief on Merits of Petitioner is not in compliance with Florida Rule of Appellate Procedure 9.210(b), 9.220 and this Court's Administrative Order dated July 13, 1998, entitled "In Re: Briefs Filed in the Supreme Court of Florida" and instructed Petitioners to "immediately file an original and five copies of an amended brief with Argument, Appendix" and a statement certifying the size and style of type used. A. at 57. Petitioners served an Amended Initial Brief on Merits of Petitioners on or about March 9, 2000.

#### **IV. STATEMENT OF THE FACTS**

Petitioners are seeking review of the Fifth District Court of Appeal's decision affirming an Amended Order dismissing their Fourth Amended Complaint with prejudice. In their Fourth Amended Complaint, Petitioners allege that Respondent is a psychotherapist regulated by Chapter 491, Florida Statutes. A. at 36. Petitioners additionally allege that, from 1993 through September 1995, Petitioners underwent psychotherapy treatment, jointly and individually, with Respondent. A. at 37. Petitioners further allege that, during individual private sessions, Respondent told each of the Petitioners confidential information revealed to Respondent by the other Petitioner.<sup>1</sup> *Id.* Petitioners contend that Respondent's alleged actions are an actionable breach of Section 491.0147, Florida Statutes.<sup>2</sup> A. at 37-38. Contrary to the Petitioners' Statement of the Facts, the Petitioners did not allege in their Fourth Amended Complaint that they relied on their individual belief that matters they confidentially disclosed to Respondent would never be disclosed to the other spouse without their prior consent. Petitioners' Amended Initial Brief at 3. It is undisputed that the

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<sup>1</sup> Respondent filed motions to dismiss in response to Petitioners' Complaints and, thus, has not admitted the allegations of Petitioners' Fourth Amended Complaint.

<sup>2</sup> Petitioners incorrectly cite to "Florida Statute 490.0147" in the Fourth Amended Complaint (A. at 37) and to Section 490.017 in their Amended Initial Brief to this Court. Petitioners' Amended Initial Brief at 3.

Petitioners are seeking damages for psychological trauma only without physical impact.

A. at 38-39.

### **V.SUMMARY OF THE ARGUMENT**

Dismissal of the Petitioners' Fourth Amended Complaint must be affirmed since Florida does not generally recognize a cause of action for damages for negligent infliction of emotional distress without a physical injury. The "impact rule" is applicable to the facts alleged by the Petitioners in their Fourth Amended Complaint. Since the Petitioners have failed to allege that they have suffered any type of physical injury due to the alleged actions of the Respondent, dismissal of the Fourth Amended Complaint with prejudice must be affirmed by this Court.

An exception to Florida's "impact rule" should not be created to accommodate the circumstances alleged by the Petitioners since their alleged emotional damages are not based upon a recognized freestanding tort. Although this Court has recognized an exception to the "impact rule" where emotional damages are an additional consequence of conduct that is a freestanding tort apart from any emotional injury, Florida does not recognize a cause of action for breach of a fiduciary duty by a physician. The Petitioners have alleged that Respondent breached Section 491.0147, Florida Statutes, by disclosing confidential information from one spouse to the other spouse. However, neither Section 491.0147, Florida Statutes, nor Florida case law provides a means for the Petitioners to maintain a private cause of action against Respondent for such an alleged breach of confidentiality. Accordingly, dismissal of the Fourth Amended Complaint with prejudice must be affirmed by this Court.

Additionally, public policy does not support an expansion of Florida law to include an exception to the "impact rule" under the circumstances alleged by the Petitioners. This Court has previously stated that the public policy of preventing fictitious or speculative claims requires that Florida maintain the "impact rule". In the

absence of compelling and rational argument to the contrary, this Court should continue to follow the established case law of this jurisdiction, and dismissal of the Fourth Amended Complaint with prejudice must be affirmed.

Finally, Petitioners had a cause of action available to them without the need to seek an expansion of Florida law. The Petitioners had previously pled a cause of action for intentional infliction of emotional distress that withstood a Motion to Dismiss, but for a technical flaw. Petitioners abandoned that cause of action in pursuit of an action not recognized by Florida law. An expansion of Florida law was not needed to provide the Petitioners redress for the alleged wrong they claim to have suffered. Accordingly, dismissal of the Fourth Amended Complaint with prejudice must be affirmed.

#### **VIVI. ARGUMENT**

A. AN EXCEPTION TO FLORIDA'S IMPACT RULE SHOULD NOT BE RECOGNIZED IN A CASE WHERE THE ALLEGED INFLICTION OF EMOTIONAL INJURIES RESULTED FROM THE ALLEGED BREACH OF A STATUTORY DUTY OF CONFIDENTIALITY.

This Court must affirm the dismissal below as an exception to the "impact rule" is not warranted under the circumstances alleged in the Fourth Amended Complaint. Generally in Florida, before a cause of action may exist for psychological trauma, such trauma must cause demonstrable physical injury such as death, paralysis, muscular impairment, or similarly objectively discernible physical impairment. Brown v. Cadillac Motor Car Division, 468 So. 2d 903, 904 (Fla. 1985). *See also*, R.J. v. Humana of Florida Inc., 652 So. 2d 360 (Fla. 1995). In Florida, there is no cause of action for psychological trauma alone when resulting from simple negligence. Brown, *supra* at 904.

Petitioners are attempting to bring a negligence claim against Respondent. Petitioners admit throughout their Amended Initial Brief and their Fourth Amended Complaint that they are not claiming any physical injuries from the Respondent's alleged actions. Applying the holding of Brown v. Cadillac Motor Car Division, *supra*,

the Petitioners have failed to state a cause of action against Respondent upon which damages solely for psychological trauma can be awarded. Id. at 904.

In their Amended Initial Brief, Petitioners urge this Court to clarify its opinion in Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992). Petitioners' Amended Initial Brief at 8. Specifically, Petitioners assert that this Court meant to say, but did not specifically articulate in Kush, *supra*, that a preexisting duty was owed by the physician to the parents of a child born with a genetic impairment and that, due to that preexisting duty, the alleged mental anguish of the parents need not be accompanied by a physical impact to prove emotional injury. Petitioners' Amended Initial Brief at 8. Contrary to Petitioners' assertion, this Court's opinion in Kush, *supra*, clearly states an exception to the impact rule is warranted in wrongful birth claims "where emotional damages are an additional 'parasitic' consequence of conduct that itself is a freestanding tort apart from any emotional injury". It is equally clear that this exception does not apply to the instant case, and should not be expanded to include the alleged circumstances of the instant case.

In Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992), the parents of a child born with a genetic impairment sought damages for alleged mental anguish caused by the birth of the child. This Court held that public policy requires that the impact doctrine not be applied within the context of wrongful birth claims. Id. at 423. Contrary to Petitioners' assertion in their Amended Initial Brief that this Court based the exception to the

"impact rule" merely on a finding that a preexisting duty was owed by the physician to the parents, this Court actually stated:

Prosser and Keeton state that the impact doctrine should not be applied where emotional damages are an additional "parasitic" consequence of conduct that itself is a freestanding tort apart from any emotional injury.

Id. at 422. In Kush, the parents brought a claim for wrongful birth, which itself is a freestanding tort, even if no emotional injuries had been alleged. Id. Accordingly, this Court held that an exception to the "impact rule" was warranted under the circumstances alleged in Kush, as the basis of the parents' claim was the freestanding tort of wrongful birth. Id.

In the instant case, Petitioners have attempted to bring a claim based upon an alleged breach of Section 491.0147, Florida Statutes.<sup>3</sup> Florida law, however, does not recognize a cause of action for breach of a fiduciary duty of confidentiality by a psychologist. Chapter 491, Florida Statutes, and specifically Section 491.0147, Florida Statutes, does not provide for a private cause of action by a patient against a psychologist for a breach of confidentiality. § 491.0147, Fla. Stat. A careful reading of Section 491.0147, Florida Statutes provides only that any communication between any person licensed or certified under Chapter 491, Florida Statutes, and his patient

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<sup>3</sup> Petitioners incorrectly cite to "Florida Statute 490.0147" in the Fourth Amended Complaint (A. at 37) and to Section 490.017 in their Amended Initial Brief to this Court. Petitioners' Amended Initial Brief at 3.

shall be confidential. Section 491.0147, Florida Statutes, does not provide for a private cause of action by a patient against a person licensed under Chapter 491, Florida Statutes, for an alleged breach of Section 491.0147.<sup>4</sup> Accordingly, the Petitioners are not basing their claim for psychological damages on circumstances that constitute a recognized freestanding tort in Florida. Petitioners' alleged emotional damages clearly are not "an additional 'parasitic' consequence of conduct that itself is a freestanding tort"; therefore, the guidelines set forth in Kush, *supra*, for establishing an exception to the "impact rule" do not apply to the case at bar.

Moreover, the issue of negligent infliction of emotional distress premised upon a breach of confidentiality has already been addressed and rejected as a cause of action in Florida. In a case remarkably similar to the case at bar, the Third District Court of Appeal addressed whether a plaintiff can sue a television station for negligent infliction of emotional distress for disclosing facts the plaintiff considered private. Doe v. Univision Television Group, Inc., 717 So. 2d 63 (Fla. 3d DCA 1998). In Doe, the plaintiff agreed to be interviewed for a broadcast on the dangers of foreign plastic

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<sup>4</sup> If the rules are to be changed in regard to a psychologist's legal obligations to his patients, those changes and rules should come to fruition only after the matter has been exposed to the legislative fact-finding and policy-making process. See Green v. Ross, 691 So. 2d 542, 544 (Fla. 2d DCA 1997). See *also* Cruz v. Angelides, 574 So. 2d 278 (Fla. 3d DCA 1991), citing Coralluzzo v. Fass, 450 So. 2d 858, 859 (Fla. 1984) ("[w]hether [the defendant herein] has violated the ethical standards of his profession is a matter to be addressed by the [medical] profession itself,' rather than by the courts.")

surgery on the condition that her identity would be concealed by obscuring her face and electronically disguising her voice. Id. at 64. When the broadcast took place, her voice was not disguised and the special effect designed to conceal her face was not properly done, so that she was visually recognizable. Id. The plaintiff brought an action for invasion of privacy, negligent infliction of emotional distress, breach of contract, and promissory estoppel. The Third District Court of Appeal upheld the dismissal of the claim for negligent infliction of emotional distress. Id. In its reasoning, the Court stated:

The source of the plaintiff's emotional distress was the disclosure of private facts, contrary to the ground rules under which the plaintiff agreed to be interviewed. It is not independently actionable under the heading of negligent infliction of emotional distress.

Id. at 65.

The issue in the Doe case is similar to the case at bar. In Doe, the plaintiff alleged that she agreed to certain ground rules to protect her confidentiality before appearing on the show. In the instant case, the Petitioners allege that they believed that the information told to the Respondent during their individual sessions would be confidential. The Petitioners, like the plaintiff in Doe, attempted to bring a cause of action for negligent infliction of emotional distress for an alleged breach of confidentiality. Applying the holding of the Doe case to the instant case, the trial court

correctly dismissed the Petitioners' Fourth Amended Complaint since such an action is not independently actionable under the heading of negligent infliction of emotional distress. Accordingly, dismissal of the Fourth Amended Complaint with prejudice must be affirmed.

**B. PUBLIC POLICY DOES NOT SUPPORT AN EXPANSION OF FLORIDA LAW TO INCLUDE AN EXCEPTION TO THE "IMPACT RULE" UNDER THE CIRCUMSTANCES ALLEGED BY PETITIONERS.**

The "impact rule" remains in effect in Florida for actions alleging negligent infliction of emotional distress. As this Court has previously stated, public policy requires that the "impact rule" remain in existence to prevent fictitious, speculative and fraudulent claims, "and to place some boundaries on the indefinable and unmeasurable psychic claims." Champion v. Gray, 478 So. 2d 17, 20 (Fla. 1985) and R.J. v. Humana of Florida Inc., 652 So. 2d 360, 362 (Fla. 1995).

Notwithstanding the limited exception of the circumstances described in Champion v. Gray, *supra* and Kush v. Lloyd, *supra*, not applicable to the case at bar, this Court has reaffirmed that the "impact rule" continues to serve its purpose of assuring the validity of claims for emotional or psychic damage. Despite the repeated affirmation of the "impact rule" by this Court, Petitioners urge this Court to redefine the "impact rule". For support, Petitioners list cases from other jurisdictions. For

example, Petitioners cite the case of Boyles v. Kerr, 855 S.W. 2d 593 (Tex. 1993),<sup>5</sup> for the proposition that Texas recognizes that a therapist-patient relationship gives rise to a duty to refrain from activity which carries unreasonable and foreseeable risk of causing emotional or mental harm. Petitioners' Amended Initial Brief at 10. However, Boyles involved an invasion of privacy action by a former girlfriend against a former boyfriend who surreptitiously videotaped their sexual relations. Additionally, the Boyles court held that a claimant may only recover mental anguish damages in connection with a defendant's breach of some other legal duty. Boyles, 855 S.W. 2d 593 at 594. As discussed, more fully in § A of this Amended Answer Brief, Florida does not recognize a cause of action for breach of a fiduciary duty by a physician,<sup>6</sup> therefore, the instant case does not satisfy the "some other legal duty" requirement of Boyles.

Petitioners also cite Oswald v. Legrand, 453 N.W. 2d 634 (Iowa 1990). Oswald is a medical malpractice action involving crass comments and actions by the attending medical staff during the spontaneous abortion of a fetus. Id. at 635-636. The Oswald court specifically stated that "we hasten to emphasize that our decision in this case is

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<sup>5</sup> Petitioners also cite Corgan v. Muehling, 574 N.E. 2d 602 (Ill. 1991), for the same proposition.

<sup>6</sup> Since Florida does not recognize a cause of action for breach of confidentiality by a physician, the case of Chizmar v. Mackie, 896 P.2d 196 (Ala. 1995), cited by Petitioners is also distinguishable from the case at bar.

closely limited to its facts.” Id. at 639-640. Accordingly, the Oswald case has no applicability to the case at bar.

Additionally, Petitioners cite Johnson v. Ruark Obstetrics and Gynecology Assoc., P.A., 395 S.E. 2d 85 (N.C. 1990), which refers to a contractual relationship between the parties as providing the means to circumvent the “impact rule”. Turning to Florida case law, in Crenshaw v. Sarasota County Public Hosp. Bd., 466 So. 2d 427, 429 (Fla. 2d DCA 1985), the Court held that there is no recovery for mental distress caused by a breach of contract in the absence of an independent willful tort.

The plaintiff in Crenshaw, *supra*, the mother of a stillborn child, sued the hospital (and an individual named Willie Williams, whose relationship to the matter is not disclosed in the opinion) to recover damages for the purely mental and emotional distress she suffered after learning that her child’s body had been accidentally mutilated after being misplaced in a laundry bin. Id. at 28. As an alternative count to negligent infliction of emotional distress, the plaintiff sought recovery on the basis that the defendants negligently breached their contract with the plaintiff. The court affirmed the dismissal of both counts of the plaintiff’s complaint. Id. at 429. In light of the holding of the Florida case of Crenshaw, which provides that there is no recovery for mental distress caused by a breach of contract in the absence of an independent willful tort, the North Carolina Ruark Obstetrics case has no applicability to the instant case.

Clearly, the foreign cases cited by the Petitioners are not applicable to the instant case. Without compelling and rational argument to the contrary, this Court should continue to follow the established case law of its own jurisdiction. Accordingly, dismissal of the Fourth Amended Complaint with prejudice must be affirmed.

C. PETITIONERS HAD A CAUSE OF ACTION AVAILABLE TO THEM WITHOUT THE NEED TO SEEK AN EXPANSION OF FLORIDA LAW.

An expansion of Florida law to include an exception to the “impact rule” for a breach of a fiduciary duty of confidentiality is specifically not warranted under the facts of this case, as Petitioners had a recognized cause of action available to them. In the Petitioners’ Amended Complaint, the Petitioners alleged a cause of action for intentional infliction of emotional distress. The Amended Complaint was dismissed on a technicality. The Order dismissing the Amended Complaint stated:

ORDERED AND ADJUDGED that Defendant’s Motion to Dismiss is hereby GRANTED on the basis the Amended Complaint does not set forth the alleged causes of action in separate counts; otherwise, the Motion is DENIED.

This Order was not appealed by either party. The Petitioners, however, abandoned their claim for intentional infliction of emotional distress in their subsequent Third and Fourth Amended Complaints, for reasons not apparent on the face of the record. As the lower court found that the Petitioners alleged an action that was

recognized under the laws of Florida, and they subsequently chose to abandon that cause of action, circumstances do not exist that would require this Court to create a cause of action for the Petitioners out of a sense of justice or fair play. Accordingly, dismissal of the Fourth Amended Complaint with prejudice must be affirmed.

## **VII.CONCLUSION**

The Trial Court did not err in dismissing the Appellant's Fourth Amended Complaint with prejudice. Florida law does not recognize a cause of action based on negligence for breach of duty of confidentiality, seeking purely emotional damages without a physical injury, nor should such a cause of action be created under the circumstances alleged by the Petitioners. The "impact rule" is applicable to the facts alleged by the Petitioners in their Fourth Amended Complaint. Although this Court has been provided with opportunities to abolish the "impact rule," it has consistently reaffirmed the rule, as public policy finds it necessary to prevent fictitious or speculative claims based solely on emotional damages. Since the Petitioners have failed to allege that they have suffered any type of physical injury due to the alleged action of the Respondent, dismissal of the Fourth Amended Complaint with prejudice must be affirmed by this Court.

Additionally, an exception to the "impact rule" should not be created to accommodate the circumstances alleged by the Petitioners. The Florida Statutes and Florida case law do not provide the means for the Petitioners to maintain a private

cause of action against the Respondent for an alleged breach of confidentiality. Florida Courts have held that these matters should be addressed by the medical profession, and not by the courts. The Petitioners, however, urge this Court to ignore the well established Florida legal precedence on those issues in favor of extra-judicial jurisprudence not applicable to the facts of this case. Moreover, the Petitioners had a cause of action available to them without the need to seek an expansion of Florida law and decided to abandon that recognized cause of action; therefore, affirmation of the lower court's dismissal is required.

For all of the foregoing reasons, Respondent, Donald W. Eaker, respectfully requests this Court to affirm the dismissal of the Fourth Amended Complaint with prejudice.

**VIII.CERTIFICATE OF FONT**

I HEREBY CERTIFY that the font used in this Amended Answer Brief is Arial

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**SWANN, HADLEY & ALVAREZ, P.A.**

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**IX.CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to Nolan Carter, Esquire and Karen R. Wasson, Esquire, Law Offices of Nolan Carter, P.A., 1218 E. Robinson Street, P.O. Box 2229, Orlando, Florida 32802-2229 by U.S. Mail, postage prepaid, on this \_\_\_\_\_ day of March, 2000.

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