

SUPREME COURT OF FLORIDA

**CASE NO: SC00-153**

Lower Tribunal No.: 5D99-1075

DONNA GRACEY, ET AL., vs. DONALD W. EAKER

---

Petitioners

Respondent

AMENDED INITIAL BRIEF ON MERITS OF PETITIONERS

NOLAN CARTER, ESQUIRE  
Florida Bar Number: 103730  
KAREN R. WASSON, ESQUIRE  
Florida Bar Number: 0117587  
1218 East Robinson Street  
Post Office Box 2229  
Orlando, Florida 32801  
[407] 898-3535  
ATTORNEYS FOR  
PETITIONER/PLAINTIFF

DATED: March 9, 2000

**TABLE OF CONTENTS**

<b><u>Description</u></b>	<b><u>Page</u></b>
Table of Authorities . . . . .	iii
Statement of the Case. . . . .	1
Statement of the Facts. . . . .	3
Summary of Argument . . . . .	6
 <b>ARGUMENT</b>	
SHOULD FLORIDA RECOGNIZE A CLAIM FOR MENTAL ANGUISH WHERE THERE HAS BEEN A BREACH OF A STATUTORY DUTY OF CONFIDENTIALITY BY A HEALTH CARE PROVIDER . .	8
Certificate of Font . . . . .	13
Certificate of Service . . . . .	13

**TABLE OF AUTHORITIES**

**Cases**

**Page**

*Kush v. Lloyd*, 616 So.2d 415 (Fla. 1992). . . . 8, 9, 10

**STATUTES**

Florida Statute, §490 . . . . . 3

Florida Statute, §491 . . . . . 3

**STATEMENT OF THE CASE**

This is an action filed by Plaintiffs Donna Gracey and Joseph Gracey, against Defendant Donald W. Eaker, a psychologist, for breach of his duty of confidentiality owed to them. Plaintiffs sought treatment from Defendant in an effort to save their marriage. During private, individual sessions with the Defendant, each Plaintiff was asked and did disclosed confidential information to him that they had never disclosed, nor ever intended to disclose, to each other. Without their permission and without any justification, Defendant disclosed this confidential information to the other spouse. As a result, each Plaintiff has sustained severe mental anguish and suffering that required further extensive psychological counseling and may have totally thwarted their efforts to save their marriage.

After several efforts to state a cause of action, Plaintiffs elected not to amend their Complaint further and the Complaint was dismissed with prejudice because of the "impact doctrine" (RA 54-55). References to the record will be to the Fourth Amended Complaint (R.A. 47-50).

Appeal was taken to the Fifth District Court of Appeals which affirmed but certified the following question to this Court as being one 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.”

### STATEMENT OF THE FACTS

In 1993, Donna and Joseph Gracey, Appellants/Plaintiffs herein, sought the services of Appellee/Defendant Donald W. Eaker, Ph.D. ("Eaker") because of marital difficulties. Eaker is a licensed psychotherapist pursuant to *Florida Statutes, §491*, and represents to the public that he is a Psychotherapist, Sexologist, and Mental Health Counselor.

From 1993 through 1995, Eaker first held joint sessions with Donna and Joseph Gracey and then had them continue treatment with him in individual sessions. During the individual sessions, Eaker would inquire about very sensitive and personal information that neither Donna nor Joseph had ever disclosed to each other during their relationship. Both would freely disclose these very personal matters because they were led to believe, by Eaker, that the information was necessary as part of his treatment. Both relied on their individual belief that matters they were confidentially disclosing to Eaker would never be disclosed to the other spouse without their prior consent.

*Florida Statutes, §490.017* specifically provides that any communication between any person licensed pursuant to *Florida Statutes, §490* shall be confidential. In spite of this provision, and without obtaining consent or approval from either patient, at any time during his treatment of the Graceys, Eaker began disclosing these confidential matters,

telling each Plaintiff that the information he was disclosing demonstrated that neither was the right spouse for the other and that the only way to find happiness was for them to divorce each other.

In late 1995, Donna and Joseph confronted each other with what they had learned about the other from Eaker. Only then did they determine that rather than trying to save their marriage, Eaker was, in fact, using the confidential information to try and convince each of them individually to divorce the other. Upon learning this, the Graceys immediately discharged Eaker and sought further psychotherapy treatment to try and undo the mental damage done by Eaker, and to try to save their marriage.

In their Complaint, the Graceys alleged that as a result of the breach of the fiduciary duty of confidentiality by Eaker, they have been forced to incur substantial expense for psychotherapy to attempt to undo the mental damage caused by Eaker's disclosures. Further, they have suffered great and severe mental anguish as a result of learning of the actions of the other, that they would never have disclosed to each other. Additionally, their trust for the other, and their trust in interpersonal relationships in general, has been irreparably damaged. Finally, that all damages above listed are permanent and continuing in nature.

After the Graceys' Fourth Amended Complaint was dismissed for failure to state a cause of action, the Graceys

elected not to amend further. As a result, the Trial Court entered a Dismissal with Prejudice finding that the Complaint failed to satisfy the "Impact Rule" established by the Florida Supreme Court. The Fifth District affirmed and certified the issue to this Court.

## SUMMARY OF ARGUMENT

In recent years, several states have abandoned the "impact doctrine" in mental anguish cases, and several other states now allow claims for mental anguish, absent "impact", where there has been a breach of the duty of confidentiality between the health care provider and the patient.

Florida has been reluctant to abolish the impact doctrine in its entirety in claims for mental anguish, instead deciding on a case by case basis whether the impact doctrine applied to bar the claim. Appellant submits that while the reasons to retain the impact doctrine may no longer exist, there is no good reason to abandon it altogether. Instead this Court should redefine the guidelines. Petitioner submits that this case provides this Court with the opportunity to establish a bright line division among those cases where the impact doctrine will apply and where it will not apply. Specifically, the impact doctrine should not apply to bar mental anguish claims in those cases where there was a preexisting duty owed to the victim and the mental anguish damages are reasonably foreseeable to flow from a breach of that duty. On the other hand, where there was no preexisting duty, even though it is reasonably foreseeable that mental anguish damages could result from a particular action, the impact doctrine would be applied because there was no preexisting duty to that person.

The safeguards sought by the impact doctrine would still apply because, like all other damage cases, the Plaintiff will be required to present reasonable medical testimony, at trial, in order to prove the mental anguish claim. Further, the question of legal duty owed is initially a question of law for the Courts; and, like other injury cases, foreseeability of harm from a breach of that duty will initially be a question of law.

Applying this redefined standard to this case, Dr. Eaker had a statutory duty of confidentiality to the Gracey's; he breached that duty; the Gracey's suffered severe mental anguish as a direct result of his breach of duty; and, this mental anguish was clearly foreseeable by Dr. Eaker. Accordingly this cause should be reversed and remanded for trial on the merits.

## ARGUMENT

### SHOULD FLORIDA RECOGNIZE A CLAIM FOR MENTAL ANGUISH WHERE THERE HAS BEEN A BREACH OF A STATUTORY DUTY OF CONFIDENTIALITY BY A HEALTH CARE PROVIDER

In the Index, Petitioner has listed case law from the states that have abolished the impact doctrine and case law from those states that allow a claim for mental anguish where there has been a breach of duty of confidentiality by a health care provider. Those cases provide insight as to the reasons for abolishing the impact doctrine and reasons for adopting a cause of action to allow mental anguish damages in a breach of confidentiality situation. However, this Court need only look to *Kush v. Lloyd*, 616 So.2d 415(Fla. 1992) for guidance in establishing a bright line standard to use in emotional injury cases. In *Kush* this Court recognized a cause of action for the mental anguish of the parents in a wrongful life situation and specifically held that public policy required that the impact doctrine not be applied in that context.

Even though not specifically articulated, what this Court did in *Kush* was find that a preexisting duty was owed by the physician to the parents; that the mental anguish damages resulting from that breach, were clearly foreseeable; and, that the emotional injury was provable.

This Court also noted that generally the impact doctrine is not applicable in purely emotional torts such as Defamation or Invasion of Privacy, and cited case law. However, again, even

though not articulated as such, what this Court was actually saying was in Defamation and Invasion of Privacy cases, there is a duty owed, and emotional damages are reasonably foreseeable, and provable. Thus the victim can recover where there has been a breach of the duty owed.

In the instant case, Dr. Eaker had a statutory duty of confidentiality he owed to the Gracey's; he breached that duty when he revealed the sensitive information to each spouse, without justification or consent; and, the emotional havoc this information wrecked on the Gracey's, was clearly foreseeable and provable.

Petitioner submits that clarifying *Kush* as suggested, will redefine the guidelines for emotional injury cases without abandoning the impact doctrine and will result in this Court sending the case back for trial.

Specifically Petitioner submits *Kush* holds that where there is a duty owed, and the emotional damages are reasonably foreseeable to flow from the breach of the duty, the impact doctrine has no application. On the other hand, where there is no preexisting duty owed to the person claiming emotional injury, even though the emotional damages are reasonably foreseeable, there can be no claim for mental anguish, absent impact and physical injury. This places the burden where it should be placed: WAS THERE A DUTY OWED TO THE PERSON CLAIMING EMOTIONAL INJURIES AND ARE THE CONSEQUENCES FORESEEABLE?

As always, the initial questions of duty and foreseeability are questions of law for the Court, thus the protection from frivolous claims remains in place. Likewise, as in physical injury cases, competent proof of the emotional injury will also be an initial question of law. Thus, clarifying *Kush* as Petitioner suggests, leaves in place all safeguards sought by the adoption of the impact doctrine without abandoning that doctrine.

In conclusion Petitioner requests that this Court reverse and remand this case for trial on the merits.

**STATES THAT HAVE ABANDONED**

**THE IMPACT RULE**

Taylor v. Baptist Medical Ctr., 400 So.2d 369, 372-73 (Ala,1981); Milien v. Kaiser Found. Hosp, 27 Cal.3d 916, 167 Cal.Rptr. 831, 835-39, 616 P.2d 813, 817-21 (1980); Montinieri v. Southern New England Tel., 175 Conn. 337, 398 A.2d 1180, 1184 (1978); Rodrigues v. State, 52 Haw. 156, 283, 472 P.2d 509, 518021 (1970); Corgan, 574 N.E.2d at 608; Lejeune v. Rayne Branch Hosp., 556 So.2d 559, 570 (La. 1990); Gammon v. Osteopathic Hosp., 534 A.2d 1282, 1285 (Me.1987); Bass v Nooney Co., 646 S.W.2d 765, 771-73 (Mo.1983) (en hanc); Versland v Caron Transp., 206 Mont. 313, 671 P2d 583, 587 (1983); James v. Liev, 221 Neb. 47, 375 N.W.2d 109, 114 (1985); Johnson v. Ruark Ovstetrics, 327 N.C. 283, 395 S.E.2d 85, 97 (1990); Schultz v. Barberton Glass Co., 4 Ohio St.3d 132, 447 N.E.2d 109, 112-113 (1983).

**STATES THAT ALLOW RECOVERY FOR MENTAL ANGUISH FOR**

**BREACH OF THE DUTY OF CONFIDENTIALITY**

*Chizmar v. Mackie*, 896 P.2d 196 (Supreme Court of Alaska 1995) (Psychiatrist liable for informing husband his wife had AIDS)

*Boyles v. Kierr*, 855 S.W.2d 593, 597 (Tex.1993) (holding that therapist-patient relationship gives rise to duty to refrain from activity which carries unreasonable and foreseeable risk of causing emotional or mental harm; Corgan, 574 N.E.2d at

606-07 (same) Oswald v. LeGrand, 453 N.W.2d 634, 639 (Iowa 1990) (holding that an exception to physical injury requirement exists where the nature of the relationship between the parties is such that there arises a duty to exercise ordinary care to avoid causing emotional harm); see also Ruark Obstetrics, 395 S.E.2d at 93-94 (noting that contractual relationship between the parties may serve to make "the plaintiffs' emotional distress all the more the proximate and foreseeable result of the defendant's negligence").

**CERTIFICATE OF FONT**

I HEREBY CERTIFY that the Font used in this Brief is  
Courier New 12.

---

NOLAN CARTER, ESQUIRE  
Florida Bar No.: 103730  
KAREN R. WASSON, ESQUIRE  
Florida Bar No.: 0117587  
1218 E. Robinson Street  
Orlando, Florida 32801  
(407) 898-3535  
Attorneys for  
Plaintiffs/Petitioners

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the  
foregoing has been furnished via U.S. mail to Griffith J.  
Winthrop, III, Esq., Jeffrey M. Thompson Esq., Swann, Hadley &  
Alvarez, P.A., 1031 W. Morse Blvd., Ste. 270, P.O. Box 1961,  
Winter Park, FL 32790.

---

NOLAN CARTER, ESQUIRE  
Florida Bar No.: 103730  
KAREN R. WASSON, ESQUIRE  
Florida Bar No.: 0117587  
1218 E. Robinson Street  
Orlando, Florida 32801  
(407) 898-3535  
Attorneys for  
Plaintiffs/Petitioners

**SUPREME COURT OF FLORIDA**

**CASE NO: SC00-153**

Lower Tribunal No.: 5D99-1075

DONNA GRACEY, ET AL., vs. DONALD W. EAKER

---

Petitioners

Respondent

**APPENDIX TO**  
**AMENDED INITIAL BRIEF OF PETITIONERS**  
**DONNA GRACEY and JOSEPH GRACEY**

Petitioners, DONNA GRACEY and JOSEPH GRACEY, hereby file this Appendix to Amended Initial Brief of Petitioners Initial Brief under certificate date of March 9, 2000.

**EXHIBIT**

A Opinion - District Court Of Appeals

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail to Griffith J. Winthrop, III, Esq., Jeffrey M. Thompson Esq., Swann, Hadley & Alvarez, P.A., 1031 W. Morse Blvd., Ste. 270, P.O. Box 1961, Winter Park, FL 32790, this 8th day of March, 2000.

---

NOLAN CARTER, ESQUIRE  
Florida Bar No.: 103730  
KAREN R. WASSON, ESQUIRE  
Florida Bar No.: 0117587  
1218 E. Robinson Street  
Orlando, Florida 32801  
(407) 898-3535  
Attorneys for  
Plaintiffs/Petitioners

SUPREME COURT OF FLORIDA

CASE NO: SC00-153

Lower Tribunal No.: 5D99-1075

DONNA GRACEY, ET AL., vs. DONALD W. EAKER

---

Petitioners

Respondent

REQUEST FOR ORAL ARGUMENT

**Petitioners/Plaintiffs, by and through their undersigned attorney, requests an Oral Argument of this cause.**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail to Griffith J. Winthrop, III, Esq., Jeffrey M. Thompson Esq., Swann, Hadley & Alvarez, P.A., 1031 W. Morse Blvd., Ste. 270, P.O. Box 1961, Winter Park, FL 32790.

---

NOLAN CARTER, ESQUIRE  
Florida Bar No.: 103730  
KAREN R. WASSON, ESQUIRE  
Florida Bar No.: 0117587  
1218 E. Robinson Street  
Orlando, Florida 32801  
(407) 898-3535  
Attorneys for  
Plaintiffs/Petitioners

