

IN THE SUPREME COURT  
OF THE STATE OF FLORIDA

John C. Rowell,

Plaintiff/Petitioner,

v.

Case No. SC01-2010

District Court No. 2D00-2685

Julianne M Holt,

Office of the Public Defender,

Defendant/Respondent./

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ON PETITION FOR DISCRETIONARY REVIEW  
OF A DECISION OF THE SECOND DISTRICT COURT OF APPEALS

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BRIEF OF AMICI CURIAE  
IN SUPPORT OF PETITION ON THE MERITS

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### SUMMARY OF ARGUMENT

Wrongful conviction and confinement deprive their victims of liberty and are personal injuries from which emotional anguish and distress flow as direct, logical, natural and highly foreseeable consequences. They constitute a concrete set of personal injuries akin to the category arising out of the negligent invasion of the physical integrity of the body by actual physical impact. Accordingly, the rule that "no-duty is owed for *pure* emotional distress" has no application to this case.

Just as this Court has never applied the rule that "no-duty is owed as to negligently inflicted *pure* emotional distress" to deny recovery for emotional harm in cases in which the defendant's negligent act caused a *primary personal injury* such as bodily impact, neither has it ever applied that rule to deny recovery for emotional and mental injury arising out of deprivation of liberty by wrongful conviction or imprisonment, such as involved in this case. Wrongful deprivation of liberty cases are concrete in their factual contexts, involve a limited number of specifically known or readily identifiable victims, and pose a known risk of highly foreseeable harm. Emotional injury is directly parasitic to primary injuries of this kind and is not speculative. Furthermore, the validity and extent of

the injuries are readily determinable under legal tests and rules routinely applied in other cognizable emotional injury cases. Accordingly, Amici respectfully submit that this Court should apply the orthodox rules of tort liability in this case and not the impact rule.

Alternatively, Amici submit that this Court should acknowledge negligently inflicted emotional distress caused by wrongful conviction or confinement to be a limited exception to the impact rule. Mental and emotional injuries are a highly foreseeable consequence of a free-standing tort of wrongful conviction or imprisonment, the category of potential plaintiffs is small, and the particular plaintiffs are highly foreseeable. Accordingly, in the alternative, this Court should grant relief by acknowledging a limited exception to the impact rule.

## **ARGUMENT**

### **ISSUE PRESENTED:**

**DOES THE RULE THAT NO-DUTY IS OWED FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS (i.e., THE "IMPACT RULE") APPLY WHEN THE DEFENDANT'S NEGLIGENT ACT CAUSED A PRIMARY INVASION OF A KNOWN OR READILY IDENTIFIABLE PLAINTIFF'S RIGHT TO BE FREE OF WRONGFUL CONVICTION OR IMPRISONMENT?**

**I. THE "IMPACT RULE" DOES NOT APPLY TO ACTIONS ARISING OUT OF WRONGFUL CONVICTION OR IMPRISONMENT.**

The "impact rule" terminology is a shorthand way to express the tort doctrine that no-duty is owed for the negligent infliction of *pure* emotional distress arising from fright or

excitement alone. Gilliam v. Stewart, 291 So.2d 593 (1974), is the leading Florida impact rule case. In Gilliam, the victim's injuries (death) arose from fright and fear to her personal safety she experienced when a negligently driven automobile crashed into her home. See Stewart v. Gilliam, 271 So.2d 466 (Fla. 4<sup>th</sup> DCA 1973). The decedent suffered no physical impact and no confinement. Under these orthodox "impact rule" facts, this Court applied the "impact rule" and denied recovery.

All of the cases that this Court and the district court relied upon in Gilliam to support the view that no-duty is owed for emotional distress arising from fright or excitement *alone* fit in one of these categories: the defendant's negligent act had placed the victim in fear of imminent personal harm; or the defendant's negligent act placed the victim in fear of imminent harm to the safety of another nearby person; or, the victim suffered shock from seeing grievous harm done to another person. Neither Gilliam nor any case it relied upon purported to apply the no-duty rule to deny recovery for emotional or mental distress when the defendant's negligent act had actually invaded the plaintiff's bodily integrity either by directly harmfully impacting the plaintiff's body or by depriving the plaintiff of personal liberty by wrongful conviction or imprisonment. *Id.*, at 469, 70. In either of these two instances, the primary consequence of a defendant's negligent act is a cognizable free-standing *personal injury* to the plaintiff from which emotional injury logically and naturally flows. These consequences are fully compensable under the law.

The earliest "no impact"- "no duty" cases involved either negligently inflicted fright or excitement, Mitchell v. Rochester Railroad Co., 45 N.E. 354 (N.Y. 1896), expressly overruled by Battalla v. State, 176 N.E. 729 (N.Y. 1961), or, closely aligned with them, involved emotional suffering resulting from failure to receive timely notice of the final illness or death of a loved one as a result of a telegraph company's negligent delay in sending a message. Gulf C. Ry. v. Levy, 59 Tex. 563 (1883), is exemplary. It overruled So Relle v. Western Union Telegraph Company, 55 Tex. 308 (1881) which had permitted recovery under general negligence principles.

Perhaps International Ocean Tel. Co. v. Saunders, 14 So. 148 (1893), a negligent telegram case, was the earliest Florida no-duty for pure emotional distress decision. In Saunders, this Court relied upon the Texas Levy decision to hold:

In the case under consideration, the plaintiff's suit, though sounding in tort, is for compensation only, for the breach by the defendant telegraph company of its contract promptly to deliver a telegram summoning him to the deathbed of his wife. His only injury, resulting directly from such breach of contract, was mental suffering and disappointment in not being able to attend upon his wife in her last moments, and to be present at her funeral. The resultant injury is one that soars so exclusively within the realms of spirit land that it is beyond the reach of the courts to deal with, or to compensate by any of the known standards of value. It presents a class of cases where legislative action fixing some standard of recovery would be highly appropriate; but, until this action is taken, we do not feel that the courts are authorized to so widely diverge from the circumscribed limits of judicial action as to undertake to mete out compensation in money for the spiritually intangible. Under these circumstances, we do not think that the plaintiff was entitled to any other than nominal damages, or, at most, the cost of the

message whose delivery was delayed.

*Id.* at 153.

Similar to the telegraph-delay cases are those that deny recovery for *pure* emotional distress suffered by survivors of a deceased loved-one whose dead body had been negligently mishandled or embalmed. In Dunahoo v. Bess, 200 So. 541 (Fla. 1941), this Court denied recovery in such a case, primarily because the *only* cognizable injury suffered by the plaintiffs was pure emotional distress. No victim suffered a direct invasion of bodily integrity by physical impact and none was deprived of liberty by wrongful conviction or confinement.

This Court receded from Dunahoo in Gonzalez v. Metropolitan Dade County Public Health Trust, 651 So.2d 673, 676 (Fla. 1995), wherein it held that a plaintiff may recover for *pure* "mental anguish based on negligent handling of a dead body" upon proof of "either physical injury or willful or wanton misconduct" *even without physical impact or confinement*. Gonzalez makes plain that this Court's hesitance to permit recovery for emotional distress does not arise from any lack of capacity in courts and juries to determine the genuineness of the injury or to decide upon an appropriate remedy. Instead it arises from a prudential concern to limit cognizable emotional distress actions to factual categories in which defendants should foresee that a limited and easily identifiable class of victims will probably suffer severe emotional distress as an expected natural and logical consequence of the defendants' wrongful actions. These limitations avoid the typical concerns about *pure*

emotional distress cases voiced by many courts and repeated by this Court in R.J. v. Humana of Florida, Inc., 652 So.2d 360, 362 (Fla. 1995), as follows:

[t]he underlying basis for the rule is that allowing recovery for injuries resulting from purely emotional distress would open the floodgates for fictitious or speculative claims. 1 Thomas M. Cooley, *Cooley on Torts* 97 (3d ed. 1906).

What all courts look for is a set of factual circumstances that reasonably validate the genuineness of emotional injury without opening up the courts to an unlimited number of unbounded cases. Under this Court's prior decisions, physical impact and the wanton mishandling of a dead body validate actions as an appropriate ones to permit a remedy. Actions, such as this one, involving a primary deprivation of liberty by wrongful conviction or imprisonment also validate the emotional injury and do so in a highly restricted and limited set of factual circumstance. Under settled tort jurisprudence, these cases do not invoke the impact rule. See Little, "Erosion of No-Duty Negligence Rules in England, The United States, and Common Law Commonwealth Nations," 20 *Houston Law Rev.* 959, 984-87, 1010-1016 (1983) for a history of the development and "erosion" of this no-duty rule both in England and the United States. None of this history reflects a denial of recovery for emotional distress when the plaintiff suffered a primary personal injury in the form of either physical impact or wrongful conviction or imprisonment.

No prior decision of this Court has ruled on this question. Accordingly, in the absence of a controlling decision this Court

should direct the court to apply orthodox tort principles to resolve the damage issue presented. McCain v. Florida Power Corp., 593 So.2d 500, 503 (Fla. 1992), clarified and affirmed these principles as follows:

Where a defendant's conduct creates a foreseeable zone of risk, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses.... Thus, as the risk grows greater, so does the duty, because the risk to be perceived defines the duty that must be undertaken....

The statute books and case law, in other words, are not required to catalog and expressly proscribe every conceivable risk in order for it to give rise to a duty of care. Rather, each defendant who creates a risk is required to exercise prudent foresight whenever others may be injured as a result. This requirement of reasonable, general foresight is the core of the duty element. For these same reasons, duty exists as a matter of law and is not a factual question for the jury to decide: Duty is the standard of conduct given to the jury for gauging the defendant's factual conduct. As a corollary, the trial and appellate courts cannot find a lack of duty if a foreseeable zone of risk more likely than not was created by the defendant.

Amici respectfully submit that when a defendant knows or should know that a negligent act will threaten a known or readily identifiable person with wrongful conviction or imprisonment, then a duty arises to act without negligence. Deprivation of liberty, like invasion of bodily integrity, is a personal injury. Furthermore, just as emotional distress is a highly foreseeable concomitant to negligently inflicted bodily injury, so too are mental distress and anguish highly foreseeable concomitants to negligently inflicted conviction or

imprisonment. These injuries are the natural, logical and highly foreseeable consequence of the primary injury. Moreover, the historic absence of a wealth of these cases is ample proof that the category is small in size and easily confined in scope. It does not possess the limitless expanse of *pure emotional distress* arising from fright or excitement *alone*, which is a category in which almost every person is exposed virtually every day. Hence, to acknowledge the duty of care to avoid causing a known or readily identifiable person to be wrongfully convicted or imprisoned opens no floodgates and places no new or unmanageable burden upon the courts.

Leading cases in other jurisdictions have acknowledged that actions for emotional distress and anguish are sustainable when the negligence of a defense lawyer causes a person to be wrongfully convicted or imprisoned. Holliday v. Jones, 215 Cal. App.3d 103, 264 Cal. Rptr. 448 (1990)("in light of Holliday's liberty interests here, we believe California's general rule of damages applies and Jones should be liable for emotional distress damages he caused."); and Tara Motors v. The Superior Court, 276 Cal Rptr. 603 (1991)(Extending Holliday to emotional distress arising from damage to economic interests caused by a lawyer's negligence.) Other courts have applied orthodox negligence principles to permit recovery for emotional distress arising out of negligently caused arrests. Johnson v. Supersave Markets, Inc., 696 P.2d 209 (Mont. 1984)(action permitted for negligent continuation of wrongful check prosecution after check fully paid), and Collins v. City Nat. Bank & Trust Co. Of

Danbury, 38 A.2d 582 (Conn. 1944)(action permitted for wrongful detention arising out of negligent dishonoring of check). All of these cases acknowledge that orthodox tort principles, and not the exclusionary "impact rule," should be applied in cases in which the defendant should foresee that a known or readily identifiable person is placed at risk of wrongful arrest, conviction or imprisonment.

For all these reasons, Amici respectfully submit that this Court should grant the petition, quash the decision below, and direct that the action be reinstated for trial on whether or not the defendant's negligence wrongfully caused the plaintiff to be convicted or imprisoned and to suffer foreseeable damages including mental and emotional distress and anguish.

**II. AN ACTION FOR EMOTIONAL DISTRESS ARISING OUT OF A DEFENDANT'S NEGLIGENT ACTIONS THAT CAUSE A HIGHLY FORESEEABLE PLAINTIFF TO BE CONVICTED OR IMPRISONED SHOULD BE ACKNOWLEDGED AS AN EXCEPTION TO THE "IMPACT RULE."**

In the event this Court should reject Amici's primary submission that the "impact rule" does not apply when the primary harm caused by defendant's negligence was invasion of a known plaintiff's interest in being free of wrongful conviction or imprisonment, then this Court should acknowledge that this class of cases constitutes a limited exception to the impact rule.

This Court is mindful of its jurisprudence in this field. Tanner v. Hartog, 696 So.2d 705, 708 (Fla. 1997) is exemplary. There, this Court held that parents of "a stillborn child could

recover damages for mental pain and anguish caused by the negligence of another, even in the absence of evidence that the stillbirth caused any physical impact or injury to the mother." The key to the stillbirth exception was that the factual category is sufficiently confined and the likelihood of emotional injury to particular plaintiffs so highly foreseeable that "the impact rule is not required to control" fictitious or speculative claims. Other notable exceptions include Champion v. Gray, 478 So.2d 17 (Fla. 1985), wherein this Court held that "trauma and mental distress are recoverable as elements of damage without direct physical impact in cases where a plaintiff was in the sensory perception of physical injuries negligently imposed upon a close family member and where the plaintiff suffered a discernible physical injury,"<sup>1</sup> and Kush v. Lloyd, 616 So.2d 415, 422 (Fla. 1992), in which this Court held "the impact rule should not be applied to actions for wrongful birth where emotional damages are the "parasitic" consequence of conduct that itself is a freestanding tort'."<sup>2</sup>

By the same token, the category of actions based upon wrongful conviction or imprisonment is manageably small and the particular persons who are at risk so highly foreseeable that no exclusionary rule is needed. Moreover, in the terms of Kush v. Lloyd, emotional damages are a highly foreseeable "parasitic" consequence of the free-standing primary injury of wrongful

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<sup>1</sup>Quotations from R.J. v. Humana of Florida, Inc., 652 So.2d 360, 362, 3 (Fla.1995)

<sup>2</sup> *Id.*

conviction or confinement. Accordingly, Amici respectfully submit that this Court should acknowledge that actions based upon negligent conviction or imprisonment, such as this one, constitute exceptions to the impact rule.

#### **CONCLUSION**

Amici respectfully submit that this Court should quash the district court's decision on one or the other of two alternative grounds.

First, and primarily, this Court should acknowledge that wrongful conviction and wrongful imprisonment deprive victims of liberty and are personal injuries in the same category as wrongful invasions of bodily integrity. Hence, victims of these torts suffer primary personal injuries from which emotional distress and mental anguish flow as direct, logical and natural consequences. Accordingly, orthodox rules of negligent liability and damages apply, and the exclusionary rule that "no-duty is owed for negligent infliction of *pure* emotional distress" does not.

Alternatively, and secondarily, this Court should hold that negligent wrongful conviction or imprisonment cases constitute exceptions to the "impact rule" in factual circumstances such as presented here; i.e., the potential victims of the negligent wrongs are limited to a small class of readily identifiable persons and the likelihood of wrongful conviction or imprisonment and consequent emotional distress is highly foreseeable in the event of negligence. The basis of this exception is well founded on the prior "impact rule" exception

jurisprudence of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was served this 26 day of October, 2001, on James W. Holliday, Prugh & Associates, 1009 W. Platt Street, Tampa, Fl. 33606-2115, for Petitioner Rowell, and the office of Bruce A. Walkley, Walkley & Walkley, 102 S. Armenia Ave., Tampa, Fl., 33609-3308, for Respondent Holt.

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CERTIFICATE OF COMPLIANCE

I certify that this brief is presented in courier new font 12.

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Joseph W. Little

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