

**IN THE SUPREME COURT OF FLORIDA**

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**CASE NO. SC01-2010**

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**JOHN ROWELL,**

**Petitioner,**

**vs.**

**JULIANNE M. HOLT,  
OFFICE OF THE PUBLIC DEFENDER,**

**Respondent.**

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**PETITION FOR REVIEW  
FROM THE SECOND DISTRICT COURT OF APPEAL**

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**INITIAL BRIEF OF PETITIONER  
CIVIL CASE**

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### **STATEMENT OF THE ISSUE**

I. DOES THE IMPACT RULE APPLY TO PROHIBIT THE RECOVERY OF NON-ECONOMIC DAMAGES IN A LEGAL MALPRACTICE CONTEXT WHEN THE NEGLIGENCE OF A CRIMINAL DEFENSE ATTORNEY RESULTS IN A LOSS OF LIBERTY AND RESULTING EMOTIONAL OR PSYCHOLOGICAL HARM?

### **PRELIMINARY STATEMENT**

For clarity, the trial transcript will be cited separately from the rest of the record. A citation of “R1-154” will refer to Volume I of the record at page 154. A citation of “T-240” will refer to page 240 of the trial transcript. The trial transcript is located at the end of the record.

### **STATEMENT OF THE FACTS**

In 1966, John Rowell was convicted of a felony at the age of 22. T-240. On

June 18, 1975, his civil rights were restored. T-111. Having won restoration, John Rowell could own a firearm. T-243. In May of 1995, he sold a firearm at a pawn shop. T-243. On July 6, 1995, John Rowell was arrested and jailed for selling a firearm. T-244. At his first appearance on the following morning, a public defender represented John Rowell. T-244 to 245. When the case was called, John Rowell informed both the court and the public defender that he possessed a document proving that his civil rights had been restored. T-244 to 245. He handed the document to the public defender. R2-396; T-128. The public defender failed to act on the information, and John Rowell sat in jail for days. T-129.

On July 11, 1995, the court held hearings for pretrial detainees. T-142 to 143. Despite attending these hearings, the public defender did not represent John Rowell. T-109. John Rowell continued to sit in jail. T-245 to 246. On July 12, 1995, the public defender reviewed the case file for the first time. T-110. John Rowell sat in jail for another week while the public defender did nothing. T-245 to 246.

On July 18, 1995, the public defender contacted John Rowell. T-111. No action was taken, and John Rowell sat in jail on that day and the following day. T-156. On July 20, 1995, the public defender finally presented the document proving the restoration of John Rowell's civil rights to the state attorney. T-156. After a 5-minute hearing, the court released John Rowell on his own recognizance. T-116 to 117. The public defender's negligence caused John Rowell to languish in jail for two weeks on

a false charge. T-161; T-246 to 247. Even then, the public defender did not procure a letter of release from the state attorney until July 27, three weeks after the incarceration. T-161; Plaintiff's Exhibit 8.

### **STATEMENT OF THE CASE**

John Rowell sued the public defender for negligence, i.e. legal malpractice. R1-154 to 158. He specifically sought mental anguish for loss of liberty. R1-158. On April 12, 2000, a jury trial commenced. T-1. At trial, James Thomas testified as an expert on the standard of care for a criminal defense attorney. T-191; T-208. Objecting to the expert's testimony, the public defender attempted to argue the impact rule regarding noneconomic damages. T-214. The trial court overruled the public defender's objection. T-230. After hearing the evidence, the jury rendered a verdict in favor of John Rowell. T-346 to 348. The jury decided that the public defender's malpractice caused John Rowell's damages for loss of liberty. R2-313; T-346 to 348. The verdict included \$504.00 in damages for lost earning capacity and \$16,500.00 for loss of liberty. R2-313.

An appeal was taken. Holt v. Rowell, 2001 WESTLAW 953501 (Fla. 2d DCA Aug. 22, 2001). The Second District Court of Appeal [hereinafter "Second DCA"] reviewed whether noneconomic damages for loss of liberty fell outside the impact rule in a legal malpractice context. Id. With reluctance, the Second DCA applied the impact rule and certified the question of great public importance before this Court. Id.

## **SUMMARY OF THE ARGUMENT**

In a legal malpractice context, non-economic damages for loss of liberty should be excepted from the impact rule. A constitutional guarantee, liberty justifies an exception. The three public policies underlying the impact rule are absent. First, a loss of liberty yields mental distress which is provable. Second, a loss of liberty yields mental distress which is measurable. Third, loss of liberty deserves a unique status among malpractice cases, engendering its own analysis of mental distress damages. An exception to the impact rule should be carved. Petitioner Rowell requests remand with instruction to reinstate the verdict on noneconomic damages.

## **ARGUMENT**

### **I. PROTECTING LIBERTY: AN EXCEPTION TO THE IMPACT RULE.**

Where a loss of liberty is concerned, malpractice becomes a personal, not an economic, tort.<sup>1</sup> Liberty deserves the strongest protection afforded by law.<sup>2</sup> Scholars have repeatedly supported damages for mental distress where malpractice causes a loss of liberty. “Certainly where the malpractice entails a loss of liberty rather than

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<sup>1</sup> A personal tort involves “an injury to one’s person, reputation, or feelings, as distinguished from an injury or damage to real or personal property.” Black’s Law Dictionary 1497 (7th ed. 1999).

<sup>2</sup> “We hold these truths to be self-evident — That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.” The Declaration of Independence (July 4, 1776).

property, emotional distress damages are appropriate.” 2 Dobbs Law of Remedies § 6.11 at 247 (2d ed. 1993). The “strongest case for distress damages arises when the attorney’s malpractice has resulted in the client’s deprivation of liberty through incarceration.” J. Fischer, Understanding Remedies 611 (Matthew Bender 1999). The American Law Institute advises that:

emotional distress damages are ordinarily not recoverable when a lawyer’s misconduct causes the client to lose profits from a commercial transaction, but are ordinarily recoverable when misconduct causes a client’s imprisonment.

Restatement (Third) of the Law Governing Lawyers § 53 at Comment g. Caging a person may be **worse** than any physical impact.<sup>3</sup> Malpractice defies the impact rule where a loss of liberty has occurred. While public policy supports the impact rule in negligent infliction cases,<sup>4</sup> the rule collapses in a legal malpractice context where liberty is lost. First, a loss of liberty yields mental distress which is provable. Second, a loss of liberty yields mental distress which is measurable. Third, loss of liberty deserves

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<sup>3</sup> In analyzing whether the death penalty was more humane than life imprisonment, Justice Thurgood Marshall commented: “Admittedly, there are some persons who would rather die than languish in prison for a lifetime.” Furman v. Georgia, 408 U.S. 238, 345-46, 92 S.Ct. 2726, 2780, 33 L.Ed. 2d 346 (1972) (Marshall, J. concurring). Sound logic may be tested by extreme examples. If someone would rather die than be confined for life, then it logically follows that the act of confining someone is worse than the act of killing that person. In other words, physical confinement is worse than physical impact.

<sup>4</sup> R.J. v. Humana of Fla., Inc., 652 So. 2d 360, 362 (Fla. 1995) (discussing the public policies).

a unique status among malpractice cases, engendering its own analysis of mental distress damages. Petitioner Rowell analyzes the policies below. In the final analysis, public policies support mental distress damages for the wrongful deprivation of liberty caused by legal malpractice.

**A. LIBERTY OVERCOMES THE FIRST PUBLIC POLICY.**

Contrary to the first public policy underlying the impact rule, loss of liberty may be proven through traditional considerations of duty and causation. Unlike negligent infliction cases where the duty is **itself** not to cause distress, legal malpractice presents an independent duty of care to protect individual rights. In a criminal defense context, the protected right is liberty. If a defense lawyer fails to protect the right of liberty with reasonable skill, then tort law should fully compensate that loss. Society places intrinsic value upon freedom from confinement. Society concedes the trauma caused by loss of liberty.<sup>5</sup> Petitioner Rowell merely seeks redress for loss of his right to liberty which the public defender had a duty to protect. Where breaching an independent duty of care causes mental distress, this Court has been inclined to carve exceptions to the harsh impact doctrine. See, e.g., Cason v. Baskin, 155 Fla. 198, 20

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<sup>5</sup> Among other basic freedoms, a detainee cannot go where he wants to, eat what he wants to, and speak with those he wants to. A detainee must follow strict rules, be subjected to searches, and be exposed to various unsavory characters either in the same cell or in nearby cells. Privacy is gone. When confined in a jail, freedom becomes so important to a person that he can practically taste it.

So. 2d 243 (Fla. 1944); Miami Publishing Co. v. Brown, 66 So. 2d 679 (Fla. 1953); Champion v. Gray, 478 So. 2d 17 (Fla. 1985); Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992); Tanner v. Hartog, 696 So. 2d 705 (Fla. 1997). A public defender's duty to protect the liberty of the client is not only well-defined, but also provable.

Causation supports mental distress damages here. Mental distress foreseeably flows from legal malpractice which results in wrongful confinement. Having breached the duty to use reasonable care in representing an accused, a lawyer can foresee incarceration flowing from that breach. Merely by looking at criminal charges, a defense lawyer should know whether someone will require high bail, low bail, or no bail. Merely by looking at criminal charges, a defense lawyer should know roughly the amount of jail time that the charges will carry. Merely attending a first appearance as here, a defense lawyer should know how long the client may be detained. In these circumstances, a defense lawyer can foresee that wrongful confinement will cause mental distress to the client. In fact, the chain of causation between breach of duty and mental distress is closer here than in Champion. Compare a public defender foreseeing the accused suffer mental distress here with a driver foreseeing the deceased's mother suffer mental distress in Champion, 478 So. 2d at 19-20. The public defender has a direct relationship to the accused, whereas a driver does not have a direct relationship to the deceased's mother. It makes little sense that Florida law would uphold economic damages of \$500.00 in this case without contemplating

the greater injury in this case, the mental injury. As the dissent asked in the seminal case regarding the impact rule: “Why, being entitled to some damage by reason of the other party’s wrongful act, should not the complaining party recover all the damages arising therefrom?” International Ocean Tel. Co. v. Sanders, 32 Fla. 434, 455, 14 So. 148, 154 (1893) (Mabry, J. dissenting).<sup>6</sup> Where professional negligence causes a reasonably foreseeable loss of liberty, the wronged individual should be compensated for the full measure of his injury, including mental distress.

## **B. LIBERTY OVERCOMES THE SECOND PUBLIC POLICY.**

Contrary to the second public policy underlying the impact rule, loss of liberty is measurable. Loss-of-liberty cases “are factually unique because of the physical confinement, affording protection from groundless claims and are similar to cases involving physical injuries.” R. Mallen and J. Smith, 3 Legal Malpractice § 20.11 at 146-47 (5th ed. 2000). Physical confinement is measurable, just as a physical impact is measurable. Where liberty is lost, a jury can measure that loss in terms of time. To measure the loss in temporal terms provides certainty. For example, spending 10 days in jail justifies a larger sum of mental distress damages than 1 hour in jail. This measure

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<sup>6</sup> In a recent case, this Court reasoned: “there is no accurate method of separating the natural grief resulting from the death of a loved one from the additional grief of mishandling of the body.” Gonzalez v. Metropolitan Dade County Public Health Trust, 651 So. 2d 673, 676 (Fla. 1995). Unlike Gonzalez, the grief here is entirely attributable to the confinement, as opposed to some independent cause.

offers at least as much certainty as the length of time needed to knit a broken bone. Whether mental pain is caused by a broken bone or by wrongful confinement, the mental suffering “is no more difficult to measure in financial terms.” W. Keeton, Prosser and Keeton on Torts § 54 at 360 (5th ed. 1984). In Petitioner Rowell’s case, the jury awarded a reasonable measure of damages (\$16,500) for mental distress after two weeks of wrongful confinement. The length of confinement provides a reasonable measure of the mental suffering.

### C. LIBERTY OVERCOMES THE THIRD PUBLIC POLICY.

Contrary to the third public policy underlying the impact rule, loss-of-liberty malpractice cases will not flood the courts with trivial claims. During the past 23 years since mental distress damages were recognized for criminal malpractice, only a handful of analogous cases have been reported.<sup>7</sup> Beyond this historical indicator, one may note that mental distress damages are necessarily limited by the duty to be enforced. Where avoiding mental distress is **itself** the duty in negligent infliction cases, the factual scenarios which arise from that duty are limitless. Where a professional standard of care within the legal community is the duty however, the factual scenarios which arise from that duty are limited. As the Second District Court of Appeal

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<sup>7</sup> Singleton v. Stegall, 580 So. 2d 1242 (Miss. 1991); Holliday v. Jones, 264 Cal. Rptr. 448 (Cal. App. Ct. 1989); Snyder v. Baumecker, 708 F.Supp. 1451 (D.N.J. 1989) (applying New Jersey law); Wagenmann v. Adams, 829 F.2d 196 (1st Cir. 1987) (applying Massachusetts law); Geddie v. St. Paul Fire & Marine Ins. Co., 354 So. 2d 718 (La. App. Ct.), cert. denied, 356 So. 2d 1011 (1978).

observed in its well-reasoned opinion on review,

there is a clearly defined duty due to the direct relationship between the attorney and the client that, if breached, presents a substantial risk of emotional or psychological harm.

Holt v. Rowell, 2001 WESTLAW 953501, \* 5 (Fla. 2d DCA Aug. 22, 2001). In loss-of-liberty cases, foreseeable mental damages are limited to breach of a definable duty which is independent of the distress. A plaintiff must show that confinement was proximately caused by the negligent act or omission of counsel in order to prove damages for mental distress. See, e.g., Holliday v. Jones, 264 Cal. Rptr. at 457 (any concern about screening out speculative claims is “simply nonexistent” where loss of liberty is a foreseeable consequence of incompetent defense). Whereas negligent infliction cases might rush from the spigot of vague duty, loss-of-liberty malpractice cases drip imperceptibly from the spigot of defined duty.

**D. PUBLIC POLICIES SUPPORT NON-ECONOMIC DAMAGES FOR LOSS OF LIBERTY.**

Weakened in the criminal malpractice context, the impact rule does not deserve blind adherence. Important public policies justify the protection of individual liberty here. Petitioner Rowell does not ask the Court to join the majority of jurisdictions which have completely abrogated the impact rule. Petitioner Rowell merely seeks to carve an exception which has been recognized by the Restatement (Third) of the Law

Governing Lawyers § 53 at Comment g. The impact rule was never intended to deny full compensation to someone who was wrongfully confined. An exception should be carved.

By carving an exception to the impact rule here, the Court will champion a host of public policies. First, wrongful confinement should be compensable in a modern democratic society which values freedom. Although ethical rules demand zealous advocacy, ethical rules do not make a client whole after wrongful confinement. The law of torts must fill that gap. Second, malpractice law should deter lawyers from being lax, careless, or forgetful. P. Bell, “The Bell Tolls: Toward Full Tort Recovery for Psychic Injury,” 36 U. Fla. L. Rev. 333, 348 (1984) (discussing the public policy of deterrence). A criminal defense lawyer should not be immune from damages in a malpractice suit for wrongful confinement. Wagenmann, 829 F.2d at 222. Third, the judicial system should encourage full due process of law to those who are accused of crimes.<sup>8</sup> Pretrial detainees will not receive due process if the standard of care drops into an abyss. The Court merely has to look at Petitioner Rowell’s situation to see how low due process fell when a detainee’s lawyer “dropped the ball.” A trial judge permitted damages for mental distress to go to the jury. The jury assessed damages

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<sup>8</sup> “. . . nor shall any State deprive any person of life, liberty, or property, without due process of law[.]” U.S. Const. Amend. XIV, § 1. “All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty . . .” Art. I, § 2, Fla. Const.

for mental distress. The Second DCA agreed with their reasoning. Between the trial judge, the jury, and three appellate judges, this Court has heard from a microcosm of society. When a lawyer negligently puts someone in jail, the ensuing mental distress should be compensable. Outside the impact rule, public policy supports the jury's decision to award mental damages in this context.

As reasoned by Judge Villanti in the decision on review, Florida law provides the means to carve an exception to the impact rule in this case. Holt v. Rowell, 2001 WESTLAW 953501, \* 5 (Fla. 2d DCA August 22, 2001). Judge Villanti cited this Court's precedent in recognizing that Petitioner Rowell's "emotional damages are a 'parasitic' consequence of conduct that itself is a freestanding tort apart from any emotional injury." Tanner, 696 So. 2d at 708. The mental distress flowed from an independent duty to protect Petitioner Rowell's liberty. Further, physical confinement is a first cousin to physical impact. By its very nature, wrongful confinement is palpable. Supra Footnote 3. Although not suffering a physical impact, Petitioner Rowell's confinement was both immediate and continuing in nature.

Florida courts have recognized a need to compensate individuals for mental suffering under analogous circumstances. Years ago, this Court recognized that mental suffering which flows naturally from an invasion of privacy is compensable without any physical impact. Cason, 155 Fla. at 207-17, 20 So. 2d at 248-51. In constitutional terms, the right of privacy evolved from the right of liberty. Id. The

right of liberty should receive at least as much protection as the right of privacy. Where an impinged right rises to the level of a constitutional guarantee such as liberty, society should make every effort both to protect that right and to compensate for its loss. If close temporal proximity between the negligent act and the mental distress is any justification, then loss of liberty should be compensable without regard to any physical impact. Cf. Zell v. Meek, 665 So. 2d 1048, 1053 (Fla. 1995) (“Temporal proximity will usually be an important factor for the judge or jury to consider in resolving the factual question of causation.”). For example, mental suffering flows foreseeably from defamation without regard to physical impact. Miami Herald Publishing Co., 66 So. 2d at 680-81. The same can be said for a negligent criminal defense which causes confinement.

Petitioner Rowell seeks a limited exception which only pertains to loss of liberty for the malpractice of a criminal defense lawyer. The exception is limited, because one may distinguish a deprivation of liberty from a mere deprivation of property. Wagenmann, 829 F.2d at 222. This distinction flows from the difference between personal torts and economic torts. Supra Footnote 1. Both the physical limitation and the social “stigma” associated with incarceration are palpably personal. Incarceration is a deprivation of liberty; not property. Petitioner Rowell seeks only to carve an exception to the impact rule in this one personal tort -- where loss of liberty results from the malpractice of a criminal defense lawyer.

The facts here are analogous to cases where this Court has carved exceptions to the impact rule. Two exceptions have been carved in a malpractice context. Kush, 616 So. 2d at 422 (medical malpractice for wrongful birth); Tanner, 696 So. 2d at 708 (medical malpractice for negligent stillbirth). Since malpractice implicates so many types of legal rights, damages must flexibly account for the unique nature of each right lost. Given the variety of rights that malpractice may implicate, Florida courts seem to be struggling with the unnecessarily broad sweep of the impact rule. See, e.g., Gracey v. Eaker, 747 So. 2d 475 (Fla. 5th DCA 1999), rev. granted, 760 So. 2d 946 (2000) (questioning the impact rule in a medical malpractice context).<sup>9</sup> In a general tort context, the American Law Institute refuses to take any position as to damages for loss of liberty. Restatement (Second) of Torts § 905 at Comment g. In a specific legal malpractice context however, the American Law Institute squarely favors damages for mental distress. Restatement (Third) of the Law Governing Lawyers § 53 at Comment g. Florida commentators also suggest that damages for professional negligence should include mental distress. M. MacConnell, 1 Florida Negligence Law § 4.0161 (1997); 2 Florida Torts § 60.20 (Matthew Bender 1995). Falling outside the theoretical reach of the impact rule, a wrongful confinement caused by legal malpractice justifies non-

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<sup>9</sup> Of course, Gracey does not implicate the loss of a constitutionally-guaranteed right, such as liberty. Based on that fact alone, Petitioner Rowell's case is distinguishable from Gracey and more closely approximates the constitutional analysis in Cason, 155 Fla. at 207-17, 20 So. 2d at 248-51.

economic damages. Petitioner Rowell requests that a limited exception to the impact rule be carved in this context.

### **CONCLUSION**

Petitioner, JOHN ROWELL, requests that the Second DCA's certified question be answered in the negative with a remand to reinstate the jury's verdict on non-economic damages.

Respectfully Submitted,

Respectfully Submitted,

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. mail on October 19, 2001 to: Bruce A. Walkley, Esq. of Walkley & Walkley, 102 South Armenia Avenue, Tampa, Florida 33609.

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TED E. KARATINOS

**CERTIFICATE OF COMPLIANCE**

Printed in Times New Roman 14-point font, this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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TED E. KARATINOS