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FLORIDA TORT LAW: KEEPING FLORIDA'S IMPACT RULE IN STEP WITH SOCIETY

Gracey v. Eaker, 837 So. 2d 348 (Fla. 2002)

*Whitney Carson Harper**

Petitioners, a married couple, sought the help of Respondent, a licensed psychotherapist, in resolving their marital troubles.¹ Each of the Petitioners visited Respondent individually, and at Respondent's request divulged highly sensitive and personal information during their sessions with Respondent.² Although Respondent was under a statutory and common law fiduciary duty to hold the disclosed information in confidence,³ Respondent told each Petitioner what the other Petitioner had said.⁴ Petitioners alleged that Respondent breached the statutory duty of confidentiality imposed by section 491.0147 of the Florida Statutes and should therefore be held liable for the emotional distress which ensued.⁵

At trial, Respondent made a motion for dismissal on the grounds that Florida's impact rule precluded recovery for Petitioners in the absence of a physical injury or impact.⁶ The trial court granted Respondent's motion⁷

* For my family, whose love and support have never wavered, and for Greg—for all that you are to me, I am legally yours.

1. *Gracey v. Eaker*, 837 So. 2d 348, 351 (Fla. 2002).

2. *Id.*

3. Respondent was under a statutory duty imposed by section 491.0147 of the Florida Statutes, which provides that "any communication between any person licensed or certified under this chapter and her or his patient or client shall be confidential." FLA. STAT. § 491.0147 (2002) (psychotherapists are licensed under chapter 491).

4. *Gracey*, 837 So. 2d at 351. Apparently, Respondent Eaker told Mr. Gracey that his wife was "'trailer trash' with low moral standards" and told Mrs. Gracey that her husband was not smart enough for her. Laurie Cunningham, *The Impact of Betrayal*, MIAMI DAILY BUS. REV., Feb. 10, 2003, at A15.

5. *Gracey*, 837 So. 2d at 351 & n.2. Petitioners asserted that Respondent was attempting to end Petitioners' marriage by convincing them to divorce, rather than trying to mend the marriage. *Id.* at 351. In addition to emotional distress damages, Petitioners sued to recover fees for further therapeutic counseling to repair the damage done by Respondent's breach. *Id.*

6. *Id.* When a plaintiff is seeking damages for emotional distress, the impact rule permits recovery in two situations. First, a plaintiff may recover damages for emotional distress when it is caused by an actual physical impact. *See Champion v. Gray*, 478 So. 2d 17, 18 (Fla. 1985). Alternatively, in the absence of a physical impact upon the plaintiff, when a plaintiff suffers emotional distress which is brought about by the sight or sound of physical impact upon another (or the immediate aftermath of that impact), and the actually-impacted person and the plaintiff share a close emotional bond such that one would expect such an event to have a severe effect on the plaintiff, the plaintiff may recover damages if he experiences physical manifestations of his emotional distress. *See id.* at 18-20.

7. *Gracey*, 837 So. 2d at 350.

and the Fifth District Court of Appeal affirmed the dismissal, certifying a question of great public importance to the Florida Supreme Court: whether Florida should recognize an exception to the impact rule in the instance of a breach of a statutory duty of confidence which causes emotional injuries.⁸

The Florida Supreme Court rephrased the question certified by the district court to be more specific to the facts before the court: whether the impact rule should apply when emotional injuries result from a psychotherapist's breach of the statutory duty of confidentiality.⁹ The Florida Supreme Court answered this question in the negative, and HELD that the impact rule did not apply to a suit for emotional distress damages when a psychotherapist breached the statutorily imposed duty of confidentiality that existed between the psychotherapist and patient.¹⁰

As early as 1893, the Florida Supreme Court recognized the impact rule as governing recovery for mental and emotional distress.¹¹ In *International Ocean Telegraph Co. v. Saunders*, the recipient of a telegraph sued the telegraph company for the mental and emotional damages which ensued when the company failed to promptly deliver the news of the recipient's wife's near-death condition.¹² By the time the telegraph was delivered to the recipient, his wife had already died.¹³ Had the telegraph company promptly delivered the telegraph, the recipient would have had enough time to go to his wife and be by her side in her last hours.¹⁴ The recipient sued the telegraph company for its infliction of "great mortification, anguish and pain of mind and injury to his feelings and affections."¹⁵

Denying the telegraph recipient any recovery for his mental and emotional distress, the court invoked the impact rule and held that in the absence of physical injury or incidental damage to the claimant there was no cause of action and measure of damages for mental suffering alone.¹⁶ The court refused to adopt a significant body of case law from courts in other states allowing recovery in such a situation, noting that none of those

8. *Id.* The reference of this question to the Florida Supreme Court evidences the concern that the rule is inappropriate and overly harsh for the instant situation and the desire for an outcome which is contrary to that required under the correct impact rule.

9. *Id.* at 350-51.

10. *Id.* at 351.

11. *Int'l Ocean Tel. Co. v. Saunders*, 14 So. 148 (Fla. 1893). The Florida Supreme Court's decision in *International Ocean* is accepted as the beginning of Florida's impact rule. *R.J. v. Humana of Fla., Inc.*, 652 So. 2d 360, 362 (Fla. 1995); *see also Zell v. Meek*, 665 So. 2d 1048, 1053 n.7 (Fla. 1995); *Gilliam v. Stewart*, 291 So. 2d 593, 601 (Fla. 1974) (Adkins, J., dissenting).

12. *Int'l Ocean*, 14 So. at 148-49.

13. *Id.* at 148.

14. *Id.*

15. *Id.* at 148-49.

16. *Id.* at 151-52.

opinions provided a means by which the damages could accurately be determined.¹⁷ The court also noted that it would be impossible to prove a mental injury without physical evidence.¹⁸ In the face of these two perceived impossibilities, the court expressed grave doubts in the ability of a jury to make a just and fair decision that was not “dictated by whim or arbitrary caprice.”¹⁹ Thus, the court declined to allow recovery for mental injury alone.²⁰

More than ninety years after *International Ocean*, the Florida Supreme Court modified the impact rule²¹ to fit the contemporary public policy of the state.²² In *Champion v. Gray*, the court loosened the definition of the traditional impact rule to allow recovery for mental stress in the absence of a physical impact when the plaintiff showed a severe physical manifestation of that mental stress.²³ In *Champion*, a mother heard a car hit her daughter and immediately thereafter arrived on the scene to find her daughter dead.²⁴ At the sight of her dead child, the mother suffered such severe sadness and shock that she “collapsed and died on the spot.”²⁵

The court was extremely reluctant to bar recovery for such an extreme injury as death, and created a limited exception to the impact rule.²⁶ The

17. *Id.* at 150-51.

18. *Id.*

19. *Id.* at 151. In its opinion the court expressed an overt distrust of the jury’s ability to decide anything that was not blatantly obvious. *See id.*

20. *Id.* at 151-52.

21. After *International Ocean*, the impact rule required a plaintiff to prove that his emotional distress flowed from a direct physical impact upon his person in order for the plaintiff to recover for emotional distress. *See R.J. v. Humana of Fla., Inc.*, 652 So. 2d 360, 362 (Fla. 1995) (discussing the history of the impact rule in Florida). In *Champion v. Gray*, the court broadened the impact rule to allow recovery for emotional distress when the plaintiff did not actually suffer an impact, so long as the plaintiff suffered a physical injury or manifestation of his emotional trauma and other foreseeability factors were met. *See Champion v. Gray*, 478 So. 2d 17, 20 (Fla. 1985). Note that Florida’s impact rule was judicially-created, so the court can modify or even eliminate it at will. *Gilliam v. Stewart*, 291 So. 2d 593, 595 (Fla. 1974).

22. *Champion*, 478 So. 2d at 20. The court noted “that the public policy of this state is to compensate for physical injuries, with attendant lost wages, and physical and mental suffering which flow from the consequences of the physical injuries.” *Id.* To meet these goals, the court was willing to modify the impact rule, although not to the point that the rule would allow “purely subjective and speculative damages for psychic trauma alone.” *Id.* The court recognized the arbitrary nature of any such limitation, but found the undesirability of an arbitrary limitation to be outweighed by the need to prevent fraudulent claims and to limit claims that have no definable measure of damages. *Id.*

23. *Id.* Specifically, the court held “that a claim exists for damages flowing from a significant discernible physical injury when such injury is caused by psychic trauma resulting from negligent injury imposed on another who, because of his relationship to the injured party and his involvement in the event causing that injury, is foreseeably injured.” *Id.*

24. *Id.* at 18.

25. *Id.*

26. *Id.* at 18-19.

court held that a plaintiff could recover for a physical manifestation of a “psychic trauma” when there was no physical impact upon the plaintiff, so long as the trauma to the plaintiff was the direct result of an injury to another.²⁷ Additionally, it must be foreseeable that such an injury to another would cause the plaintiff’s injury.²⁸ Immediately after announcing its holding, the court explicitly clarified that it would not recognize a claim for mental or emotional injury without direct impact absent an accompanying physical injury.²⁹

Whereas in *Champion* the court recognized a specific exception to the impact rule and amended the rule to fit this exception, in *Kush v. Lloyd*,³⁰ the court used a different method to avoid application of the impact rule.³¹ In *Kush*, one of the issues the court addressed was whether parents could have a cause of action for the mental distress they suffered attendant to the

27. *Id.* The court “emphasize[d] the requirement that a causally connected clearly discernable physical impairment must accompany or occur within a short time of the psychic injury.” *Id.*

28. *Id.* at 20. In determining the foreseeability of the plaintiff’s injury, the court set forth two criteria. *Id.* First, the court required that the plaintiff have direct involvement in the event which caused the primary injury, and second, that the plaintiff share an emotionally close relationship with the primarily injured party. *Id.* The court expanded on the idea of a direct involvement with the event, noting that if a person “sees [the event], hears [the event], or arrives upon the scene while the injured party is still there, that person is likely involved.” *Id.* As to the close relationship between the directly injured party and the party claiming emotional distress, the court provided that certainly an immediate family member, such as “[a] child, a parent, or a spouse would qualify,” and that others may qualify depending on the circumstances of the relationship. *Id.*

The court based its foreseeability analysis on that of the California Supreme Court in *Dillon v. Legg*. *Champion*, 478 So. 2d at 19-20 (citing *Dillon v. Legg*, 441 P.2d 912, 920-21 (Cal. 1968)). *Dillon* required the court to consider the location of the plaintiff relative to the location of the impact; the method by which the plaintiff learned of the impact; and the closeness of the relationship between the plaintiff and the impacted party. *Dillon v. Legg*, 441 P.2d 912, 920 (Cal. 1968).

29. *Champion*, 478 So. 2d at 20 n.4. In *Brown v. Cadillac Motor Car Division*, 468 So. 2d 903 (Fla. 1985), decided on the same day as *Champion*, the Florida Supreme Court denied recovery to the plaintiff because he suffered no physical injury resulting from his mental and emotional trauma. *Brown*, 468 So. 2d at 904. The plaintiff in *Brown* struck and killed his own mother while he was driving a Cadillac with a faulty accelerator pedal. *Id.* at 903. Although the plaintiff was certainly involved in the primary impact to his mother, and had a close emotional tie to her, the court ruled that he had not met all of the *Champion* requirements. *Id.* at 904. In particular, the plaintiff suffered neither a direct physical injury, nor a physical manifestation of his emotional and mental distress, either one of which would have allowed him to recover damages. *Id.*

30. 616 So. 2d 415 (Fla. 1992).

31. *Id.* *Kush* is an oft-cited case in which the court found the impact rule to be inapplicable to the facts before it, rather than modifying the rule so that its application to the facts would not preclude recovery as the court did in *Champion*. See *Gracey v. Eaker*, 837 So. 2d 348, 355-56 (Fla. 2002); *Hagan v. Coca-Cola Bottling Co.*, 804 So. 2d 1234, 1237-38 (Fla. 2001); *Tanner v. Hartog*, 696 So. 2d 705, 708 (Fla. 1997); *Gonzalez v. Metro. Dade County Pub. Health Trust*, 651 So. 2d 673, 675 (Fla. 1995); *R.J. v. Humana of Fla., Inc.*, 652 So. 2d 360, 363 (Fla. 1995).

wrongful birth of a child.³² The parents in *Kush* brought a wrongful birth claim against the physician who misdiagnosed their first child's disorder as non-genetic and led the parents to believe that they could safely bear more children without fear that future children would have the same disorder as the first child.³³ The parents relied on this diagnosis and bore a second child who did, indeed, have the same disorder as the first.³⁴ Tests later revealed that the children's disorder was genetic.³⁵

Upholding the district court's ruling on this point, the court held that the impact rule did not apply to a suit for emotional or mental distress attendant to a claim for wrongful birth.³⁶ The court reasoned that mental anguish was a natural side-effect of the facts underlying a claim for wrongful birth, and that it would be contrary to public policy and common sense to deny the existence of such a cause of action.³⁷ The court compared the wrongful birth claim to claims for defamation and invasion of privacy, causes of action which are outside the realm of the impact rule because the damages are primarily emotional.³⁸ The court reasoned that if emotional damages are recognized in a case against one who spreads lies about the plaintiff, then such damages must also be recognized in a case against one who negligently gives medical advice to parents, resulting in the birth of a child with a severe genetic disorder.³⁹ Thus, rather than amending the impact rule as it did in *Champion*, the court altogether declined to apply the impact rule to cases for emotional damages resulting from a wrongful birth.⁴⁰

32. *Kush*, 616 So. 2d at 421-22. An action for wrongful birth is "a lawsuit brought by parents against a doctor for failing to advise them prospectively about the risks of their having a child with birth defects." BLACK'S LAW DICTIONARY 1606 (7th ed. 1999).

33. *Id.* at 417-18.

34. *Id.* at 417.

35. *Id.*

36. *Id.* at 422-23. The court did not say that on these facts, if the plaintiff meets certain criteria, then he will have satisfied the impact rule, but rather the court declined to apply the impact rule to this brand of case entirely, creating a carve-out in the "jurisdiction" of the impact rule. *See id.*

37. *Id.*

38. *Id.*; *see also* Miami Herald Publ'g Co. v. Brown, 66 So. 2d 679, 681 (Fla. 1953) (including emotional damages as a part of that category of damages which need not be proved by evidence in a libel and defamation case, since they "necessarily result from the publication of the libelous matter"); *Cason v. Baskin*, 20 So. 2d 243 (Fla. 1944) (construing the word "person" to include the mental, as well as the physical person, which must be protected from invasions of privacy); RESTATEMENT (SECOND) OF TORTS §§ 569, 570, 652H cmt. b (1977) (noting that recovery for emotional damages may be had in cases of defamation/libel, slander, or invasion of privacy, respectively, without any requirement that the plaintiff show a physical injury).

39. *Kush*, 616 So. 2d at 422-23.

40. *Id.* at 423.

Mirroring its reasoning in *Kush*, the instant court declared the cause of action in the instant case, for emotional damages resulting from the breach of the statutory duty of confidentiality between a psychotherapist and patient, to be outside the coverage of the impact rule.⁴¹ Even so, the court reiterated the value of the impact rule as a general rule of tort law and declined to completely abrogate it.⁴² Thus, although the impact rule still stands as the general rule of recovery for emotional damages in Florida tort law, the cause of action for breach of the duty established by section 491.0147 is no longer subject to the requirements or application of the impact rule.⁴³

In addition to its prior decision in *Kush*, the court relied on an analysis of legislative intent in the creation of section 491.0147, Florida Statutes, ultimately concluding that the instant case should not be subject to the impact rule.⁴⁴ Giving effect to the legislature's intent in creating section

41. *Gracey v. Eaker*, 837 So. 2d 348, 357 (Fla. 2002). Note that section 491.0147 of the Florida Statutes creates exceptions in the duty of confidentiality for situations in which a danger to a third party (a spouse or another person) or to the patient exists, and provides that disclosure of confidential information to a spouse is permissible in these instances. FLA. STAT. § 491.0147 (2002). Specifically, the statute provides:

Any communication between any person licensed or certified under this chapter and her or his patient or client shall be confidential. This secrecy may be waived under the following conditions:

(1) When the person licensed or certified under this chapter is a party defendant to a civil, criminal, or disciplinary action arising from a complaint filed by the patient or client, in which case the waiver shall be limited to that action.

(2) When the patient or client agrees to the waiver, in writing, or, when more than one person in a family is receiving therapy, when each family member agrees to the waiver, in writing.

(3) When there is a clear and immediate probability of physical harm to the patient or client, to other individuals, or to society and the person licensed or certified under this chapter communicates the information only to the potential victim, appropriate family member, or law enforcement or other appropriate authorities.

Id.

42. *Gracey*, 837 So. 2d at 358. The court stated:

Six years ago, this Court stated its belief in the overall efficacy of the impact rule:

We reaffirm . . . our conclusion that the impact rule continues to serve its purpose of assuring the validity of claims for emotional or psychic damages, and find that the impact rule should remain part of the law of this state.

Id. (citing *R.J. v. Humana of Fla., Inc.*, 652 So. 2d 360, 363 (Fla. 1995)).

43. *Id.*

44. *Id.* at 357-58.

491.0147,⁴⁵ the court found a private cause of action implicit in the statute, even though there was no cause of action explicitly created.⁴⁶ In order to give effect to the new-found cause of action, and following its reasoning in *Kush*,⁴⁷ the court mentioned that the damages resulting from a psychotherapist's breach of confidentiality would almost certainly be emotional rather than physical, and so the impact rule should not apply.⁴⁸ Through this analysis of authority,⁴⁹ the instant court declared the cause of action for a breach of the duty created by section 491.0147 not only to exist, but also to be outside the realm of Florida's impact rule, and thus to require no proof of physical impact or injury to allow recovery.⁵⁰

45. Section 491.002 of the Florida Statutes expresses the Legislature's intent in creating section 491:

The Legislature finds that as society becomes increasingly complex, emotional survival is equal in importance to physical survival. Therefore, in order to preserve the health, safety, and welfare of the public, the Legislature must provide privileged communication for members of the public or those acting on their behalf to encourage needed or desired counseling, clinical and psychotherapy services, or certain other services of a psychological nature to be sought out. The Legislature further finds that, since such services assist the public primarily with emotional survival, which in turn affects physical and psychophysical survival, the practice of clinical social work, marriage and family therapy, and mental health counseling by persons not qualified to practice such professions presents a danger to public health, safety, and welfare.

FLA. STAT. § 491.002 (2002).

46. *Gracey*, 837 So. 2d at 354-55. The court noted that in at least two other Florida cases, the plaintiffs were permitted to sue for breach of statutory duty when no cause of action was explicitly created in the statute imposing the duty. *Id.* at 355 n.10 (citing *Lewis v. City of Miami*, 173 So. 150 (Fla. 1937); *Alford v. Meyer*, 201 So. 2d 489 (Fla. 1st DCA 1967)). In addition, other jurisdictions have allowed suit for breaches of statutory duty without the explicit statutory delineation of a cause of action. *Id.* at 355.

47. The notion that the impact rule generally does not apply to torts like defamation, invasion of privacy, loss of consortium, and wrongful birth, in which the damages are primarily emotional, weighs heavily in favor of excluding this new-found cause of action from the scope of the impact rule. *Id.* at 356. For these causes of action, it makes sense that recovery for purely emotional injury must be allowed.

48. *Id.* (citing *Kush v. Lloyd*, 616 So. 2d 415, 422-23 (Fla. 1992) and *Tanner v. Hartog*, 696 So. 2d 705 (Fla. 1997) in support of this proposition). In reaching this conclusion, the instant court adopted the reasoning of the New York appellate court in *MacDonald v. Clinger*. *Gracey*, 837 So. 2d at 357 (discussing *MacDonald v. Clinger*, 446 N.Y.S. 801, 802 (N.Y. App. Div. 1982)). In *MacDonald*, which was based on facts nearly identical to those of the instant case, the New York court found a cause of action implied in the breach of a fiduciary duty, requiring no showing of physical impact or injury for recovery. *Id.* at 804.

49. In addition to the legislative intent and *Kush*, the court also relied on *MacDonald*, an out-of-state, but persuasive, authority in favor of its decision. *Gracey*, 837 So. 2d at 357.

50. *Id.*

By removing the cause of action from the scope of the impact rule's application, as it did in *Kush*, the instant court preserved the efficacy of the impact rule, while making a specific allowance for emotional distress damages in an instance in which reason demanded that recovery be permitted.⁵¹ Had the court attempted to rework the impact rule so that recovery would be permitted in the instant case, the impact or injury requirement would have become toothless and the impact rule would have been effectively erased from Florida's jurisprudence.⁵² However, if the court had simply applied the impact rule and refused to allow recovery in the instant case, the intent of the legislature in creating section 491.0147, the basic principles of tort law and several compelling public policy goals would have been thwarted.⁵³ Ultimately, the court took the only course of action practically available to it, and removed the cause of action from the scope of the impact rule.⁵⁴

If the instant court had amended the impact rule in order to accommodate the instant case and allow recovery, the effect of the rule would be greatly diluted.⁵⁵ In order to accommodate the instant case, the court would have had to accept the psychotherapist's breach of confidence as an impact, erasing the requirement that the impact be physical.⁵⁶ Without the central requirement of a physical impact or injury, the rule would effectively, if not explicitly, be abrogated entirely. The impact rule would simply have become a restatement of the elements of negligence, requiring only that the plaintiff prove that the defendant owed and breached a duty, and that the breach caused damage to the plaintiff.⁵⁷ This destruction of the impact rule would potentially permit the precise evil that

51. *See id.*

52. The purpose of the impact rule is to provide assurance, beyond the usual requirements of causation and damages, that the person upon whom liability is to be imposed actually caused the harm complained of, and that the damage is actually present. *See infra* note 58. Thus, the impact rule requires a layer of proof (proof of *physical* impact or injury) in addition to the elements of the underlying cause of action before liability will be imposed and recovery can be had. *See supra* note 6. Without the requirement of physical impact or injury, the impact rule would be a mere redundancy, as it would require nothing more to assure that the elements of causation and damages are met than does the underlying cause of action.

53. *See Gracey*, 837 So. 2d at 357-58.

54. *See id.*

55. If the court had amended the rule in this manner, it would have been following the *Champion* model of impact rule modification, reworking the definition of the rule. *See Champion v. Gray*, 478 So. 2d 17, 18-19 (Fla. 1985) (creating an exception to the impact rule to allow recovery for emotional distress which results from witnessing an impact, or the aftermath of that impact, on another with whom the plaintiff has a close relationship).

56. *See supra* note 6.

57. *See, e.g., Florida Power and Light Co. v. Lively*, 465 So. 2d 1270, 1273 (Fla. 3d DCA 1985) (stating that the "essential elements of negligence from which liability will flow are duty, breach of duty, legal cause and damage") (citing W. PROSSER, TORTS § 30, at 143 (4th ed. 1979)).

the rule was created to prevent: the floodgates of tort law would be flung wide open, and litigious individuals would be borne upon a swift stream to recovery, justified or not.⁵⁸

If the court had applied the impact rule as it stood after *Champion*, the dismissal of the instant case would have been upheld, even in the face of legislative intent and public policy which required the opposite result.⁵⁹ Applying the impact rule to the instant case would have precluded the court from finding a cause of action implied in section 491.0147, because the impact rule would not allow a cause of action for emotional damages only.⁶⁰ Common sense and public policy stand completely opposed to such

58. See 1 Thomas M. Cooley, A TREATISE ON THE LAW OF TORTS, OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT 96-97 & 97 n.83 (3d ed. 1906) (noting that the impact rule was created out of fear that allowing recovery for emotional distress without any physical component would open the floodgates for speculative and false claims); Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 817-18 (1985) (noting that the fear of "floodgate opening" exists, but suggesting that such a possibility could be precluded if the rules created to assuage those fears were more appropriately focused).

In *International Ocean Telegraph Co. v. Saunders*, *Champion v. Gray*, *Kush v. Lloyd*, and the instant case, the Florida Supreme Court emphasized the need for the impact rule to remain intact and effectual. See *Gracey*, 837 So. 2d at 358; *Kush v. Lloyd*, 616 So. 2d 415, 423 n.5 (Fla. 1992); *Champion*, 478 So. 2d at 20; *Int'l Ocean Tel. Co. v. Saunders*, 14 So. 148, 151-52 (Fla. 1893). The impact rule still serves to prevent fraud and unjustified recovery in those cases to which it applies, by requiring proof of an injury or impact either causing or caused by the emotional distress. This is an important function because juries are not presented with any standards to use in determining whether there has actually been an emotional injury caused by the defendant. *But cf. Gracey*, 837 So. 2d at 359 (Pariente, J., concurring) (asserting that the court should allow juries to "determine fault and damages surrounding claims of purely mental injuries," given that juries are already entrusted with the determination of damages for pain and suffering, both of which are certainly intangible, in cases where the underlying injury satisfies the impact rule).

In those cases where societal knowledge, science, and technology have not advanced far enough to permit a reasonably certain finding absent physical impact or injury, the court has left the impact rule in place to prevent abuse of the tort law system. See, e.g., *Brown v. Cadillac Motor Car Div.*, 468 So. 2d 903 (Fla. 1985) (denying recovery for emotional distress in the absence of physical impact or injury to the plaintiff). In those cases that the court has removed from the reach of the rule, the court apparently has found that the ordinary citizen possesses enough knowledge to make a competent decision on this point, guided by the available science and technology as presented by the parties. See, e.g., *Gracey v. Eaker*, 837 So. 2d 348 (Fla. 2002).

59. The impact rule as it stood after *Champion* would have required dismissal of the instant case because there was no primary physical impact to either plaintiff, and neither plaintiff exhibited any serious physical manifestations of the emotional distress he or she suffered. See *Champion*, 478 So. 2d at 17, 18. Even if the plaintiffs had exhibited such a physical manifestation, it is unclear under *Champion* whether recovery would be permitted, since there was no primary physical impact to another, at the sight of which the plaintiff became distressed and suffered physical injuries due to the distress. *Id.*

60. As mentioned above, the court examined legislative intent and found that for the statute to have any point at all there must be an implicit cause of action. *Gracey*, 837 So. 2d at 357. Otherwise, the statute is an empty mandate that psychotherapists not break confidence, with no

a result. Mental and emotional well-being is recognized as an immensely important aspect of human life,⁶¹ and to refuse to recognize a cause of action to protect the mental and emotional well-being of a plaintiff who claims injury would be to deny the importance of this aspect of humanity.⁶² A mental health provider—a psychotherapist, for example, can be held accountable for his negligent actions in his professional capacity only if recovery is permitted for emotional damages alone, since a psychotherapist’s job centers around the patient’s mental and emotional well-being.

The instant court took the only course of action that was appropriate in this case—to remove the cause of action from the scope of the impact rule. Allowing the instant case to go forward was a perfectly sensible decision, as the damages in this cause of action were almost certain to be emotional rather than physical.⁶³ Additionally, the court’s decision to exclude this cause of action from the impact rule’s scope allows the recognition of a legitimate claim⁶⁴ and permits the plaintiff to plead his case truthfully,

repercussions for disobedience. *See id.*

61. The importance of mental and emotional well-being is evidenced by the everyday public recognition of emotional distress as well as by the prevalence of healthcare providers in the field of mental health, *see* Ingber, *supra* note 58, at 773, and by the legislature’s action in creating section 491.0147 on behalf of the people of Florida. *See* FLA. STAT. § 491.002 (2002).

62. *See* Ingber, *supra* note 58, at 781. Ingber notes that “[t]o the extent that pain and suffering and emotional distress are real injuries, denial of compensation creates the appearance of legal and societal indifference to the victim’s plight,” and that the remedy to this appearance of apathy is for society to provide an award of damages to such victims. *Id.* The suggestion here is that such an award is a “put your money where your mouth is” form of evidence, solidifying the societal recognition of the great importance of mental health and elevating it from idle chatter to cash. *See id.*

In addition to the affirming nature of a favorable verdict, Ingber notes the possibility that a damages award for intangible injuries may provide further benefit, since the money a victim receives may actually encourage the victim to seek professional treatment. *Id.* at 781-82. The benefit of such a result accrues to the victim, in that the victim receives treatment to improve his condition and make him whole, and to the cause of recognition of intangible injuries as legitimate, since the victim’s use of the monetary award to cure his ills implies that there must have been an actual injury to the victim and not just a desire to secure a windfall. *Id.* In a sense, this is a self-legitimizing and self-fulfilling cycle: the victim receives a damages award, which affirms the victim’s belief that his injury is legitimate; the victim uses that award to pay for treatment to ameliorate his injury, reaffirming to society-at-large that his injury is real and significant since he would not likely use the money to treat a non-existent condition; and society thus becomes more willing to recognize intangible injuries as compensable in future cases, beginning the cycle again. *Id.* Of course, this cycle would likely not continue in the same direction if victims consistently used their damages awards to throw elaborate parties or put down payments on yachts or houses, among other examples of non-remedial uses. *See id.* at 783-84.

63. In this sense, the instant cause of action is similar to claims for defamation, invasion of privacy, or wrongful birth, to which the impact rule does not apply. *See supra* note 38 and accompanying text.

64. Tort law certainly does not require or allow recovery for every injury. There may be some

without encouraging the plaintiff to stretch the truth to meet the requirements of the rule.⁶⁵ The instant court's adoption of the *Kush* method, simply removing a cause of action from the scope of the impact rule's application rather than amending the rule itself, was a responsible choice which preserves the integrity of the tort system.⁶⁶

Future courts deciding whether or not to apply or amend the impact rule must carefully consider the implications of each choice on the continued efficacy of the rule. Until the time when the impact rule is completely unnecessary, courts must take care when amending the rule so that it does not become ineffectual and empty. The instant court's use of the *Kush* model of impact-rule avoidance was an appropriate and careful response to changes in society, which demanded analogous changes to the law. As all aspects of society continue to advance, the impact rule must also march along, but not ahead or behind.⁶⁷

legitimate claims for which the impact doctrine precludes recovery. *Stewart v. Gilliam*, 271 So. 2d 466, 477 (Fla. 4th DCA 1972) (Reed, C.J., dissenting). In *Stewart*, Chief Judge Reed notes:

The impact doctrine gives practical recognition to the thought that not every injury which one person may by his negligence inflict upon another should be compensated in money damages. There must be some level of harm which one should absorb without recompense as the price he pays for living in an organized society.

Id. However, the principles of the American legal system also do not permit the arbitrary denial of legitimate claims.

65. In the presence of a rule requiring an impact as a predicate for recovery, a plaintiff might be encouraged to exaggerate the severity of his minor bumps and bruises or to falsely claim the occurrence of even the most benign touch in order to surmount this obstacle to recovery. *See, e.g., Gracey*, 837 So. 2d at 359 (Pariente, J., concurring) (citing *Corgan v. Muehling*, 574 N.E.2d 602, 608 (Ill. 1991), which notes that the impact rule encourages dishonesty and exaggeration). This is especially true if, as is likely in the instance of a "sympathetic" case, the plaintiff suspects that the court will require him to show very little impact to satisfy the rule. In such a case, it is as if the impact rule encourages both the court and the plaintiff to exaggerate the actual impact and minimize the impact rule's requirement until the two, truth and the rule, meet at some point in the middle. *See PROSSER AND KEETON ON THE LAW OF TORTS* 363-64 (W. Page Keeton et al. eds., 5th ed., W. Publ'g Co. 1984) (pointing out the trifling contacts which have often been held to satisfy the "magic formula" of the impact rule). A rule which operates in this manner only degrades the integrity of the legal system, making the required elements of substantive law seem laughable and insignificant. When such flimsy requirements are discarded, however, the court and all who take part in the legal system can, and should, take the law much more seriously and hold it in higher esteem.

66. *See Gracey*, 837 So. 2d at 356. This method of avoiding the impact rule prevents the arbitrary denial of legitimate claims, while at the same time circumventing the potential flood of illegitimate claims that would result from a complete abrogation of the impact rule. *Id.*

67. *See Gilliam v. Stewart*, 291 So. 2d 593, 594 (Fla. 1974) (noting that "in this fast changing world the general welfare requires from time to time reconsideration of old concepts").

