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Donna Gracey vs Donald Eaker

FINAL CASE ON THE COURT'S ORAL ARGUMENT CALENDAR THIS MORNING IS GRACEY VERSUS EAKER. MR. CARTER.

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. MY NAME IS NOLAN CARTER. I REPRESENTED MR. AND MRS. GRACEY IN THE TRIAL COURT BELOW. THIS IS THE SITUATION WHERE MR. AND MRS. GRACEY HAD GONE TO DR. HE CAN LETTER. -- TO DR. ECKLER. THEY HAD MARITAL PROBLEMS. HE REPRESENTED TO BE A MARITAL SPECIALIST, A COUNSELOR SPECIALIST AT RESOLVING THESE MATTERS. HAD HE JOINT SESSIONS INITIALLY, AND THEN HE STARTED HAVING INDIVIDUAL SESSION WITH THEM OVER PERIOD OF TWO YEARS. DURING THAT TWO-YEAR PERIOD OF TIME, HE BEGAN TO TELL EACH OF THE SPOUSES MATTERS THAT THEY HAD TOLD HIM IN CONFIDENCE, IN TO GET CONFIDENCE, AT THE TIME THAT THEY WOULD GO IN FOR SESSIONS. HE WOULD QUESTION THEM ABOUT SPECIFIC THINGS, AND THEY WOULD DISCLOSE THINGS, AND THEN HE STARTED DISCLOSING THINGS TO EACH OF THE SPOUSES AND TELLING THEM THAT THEY WERE WRONG FOR EACH OTHER, AND THAT THE ONLY WAY THAT THEY NEEDED TO DIVORCE AND GET AWAY FROM EACH OTHER. FINALLY, AT THE END OF THIS PERIOD OF TIME, THEY CONFRONTED EACH OTHER ABOUT THIS, AND FOUND WHAT HE WAS DOING, AND, IN FACT, HE WAS DISCLOSING THIS CONFIDENTIAL INFORMATION THAT NEITHER OF THEM WERE WANTING TO BE DISCLOSED TO THE OTHER. AND THEY HAD GONE TO HIM, SPECIFICALLY TO TRY TO SAVE THEIR MARRIAGE, AND THIS INFORMATION WAS DOING NOTHING BUT TEARING THEM APART, AND THAT IS WHEN THEY FIGURED OUT THAT HE WAS, IN FACT, TRYING TO GET THEM TO DIVORCE FROM EACH OTHER. THEY IMMEDIATELY FIRED HIM AND WENT TO A SECOND PSYCHOLOGIST, WHO THEY HAVE INCURRED A GREAT DEAL OF EXPENSES IN THE TREATMENT, TRYING TO UNDO THE THINGS THAT HE HAS DONE. THAT HE HAD DONE. WE FILED SUIT, ALLEGING A BREACH OF CONFIDENTIALITY. THERE IS A SPECIFIC STATUTE THAT SAYS THAT ANY COMMUNICATION GIVEN TO A PERSON LICENSED UNDER THE STATUTE IS CONFIDENTIAL.

COUNSEL, HAVE YOU DONE AN ANALYSIS OF OTHER TYPES OF LEGISLATION, WHERE A LEGISLATURE HAS MADE THE STATEMENT ABOUT A CERTAIN SUBJECT. IT NEED NOT BE CONFIDENCE YAFULTIALITY, BUT SOME -- CONFIDENTIALITY, BUT SOME SUBJECT IN A STATUTE BUT HAS NOT PROVIDED FOR A STATUTORY CAUSE OF ACTION OR REMEDY BY STATUTE, WHERE THE COURTS WOULD, THEY, GO IN AND CREATE A COMMON LAW CAUSE OF ACTION, BASED UPON A STATUTORY PRONOUNCEMENT, SO TO SPEAK?

JUDGE, ONLY JUST IN DOING THE RESEARCH IN THE CASE. I HAVEN'T LOOKED AT THAT SPECIFICALLY. I KNOW THERE IS AN UP COUPLE OF CASE THAT THIS -- A COUPLE OF CASES WHERE THIS COURT HAS DECIDED, HAS ANALYZED THE PARTICULAR STATUTE AND SAID THAT THEY ARE NOT -- THE COURT IS NOT LIMITED TO FASHIONING A REMEDY, JUST BECAUSE THE LEGISLATURE DIDN'T PROVIDE ONE, AND THAT IS A FAIRLY RECENT CASE THAT THE COURT HAD DONE THAT, AND SO I DIDN'T, WHEN I GOT TO THAT CASE, I DIDN'T GO ANY FURTHER, IN ANY PART OF THAT ANALYSIS, BECAUSE I WAS, REALLY, DOING MORE TO LOOK AT THE IMPACT DOCTRINE AND TO LOOK AT WHAT WAS, REALLY, THE POLICY BEHIND THE IMPACT DOCTRINE AND THE POLICY BEHIND THIS. MY ARGUMENT, AT THE TRIAL COURT LEVEL, WAS THAT THE IMPACT DOCTRINE HAD NOTHING TO DO WITH THIS CASE, THAT THAT WAS SOMETHING THAT WAS TOTALLY AND APART, A SITUATION WHERE THE PERSON -- THE ONLY REASON THAT THESE PEOPLE GO TO A PSYCHOLOGIST IS BECAUSE THEY HAVE GOT SOME SORT OF MENTAL ANGUISH GOING ON IN THEIR LIFE, WITH THEIR INTERPERSONAL RELATIONSHIPS, AND WHENEVER THEY GO THERE, THEY KNOW

THAT THEY AREAL LEWD TO TELL HIM THINGS OR TELL HER THINGS THAT THEY WOULDN'T DISCLOSE, OTHERWISE, TO ANYONE. OTHERWISE THEY COULD JUST GO AND DISCLOSE THEM TO THE PERSON. SO THEY ARE GOING TO HIM OR HER FOR HELP. IT IS A MENTAL ANGUISH. IT IS SOME SORT OF MENTAL SUFFERING THAT THEY ARE GOING THERE FOR AND WANTING HELP FOR, AND WHEN THERE IS A BREACH OF THE DUTY OF CONFIDENTIALITY, THEY ARE JUST EXACERBATING THE MENTAL ANGUISH THAT IS ALREADY THERE, WHENEVER THEY WENT TO THE HEALTH CARE PROVIDER, TO START WITH.

IF THIS HAD BEEN SOMETHING WHERE, INSTEAD OF THE CONFIDENCES BEING RELIED FROM SPOUSE TO SPOUSE, CONFIDENCE Z HAD BEEN HAD BEEN BREACHED TO AN OUTSIDE THIRD PARTY, YOU WOULD, THEN, HAVE CLAIMS FOR INVASION OF PRIVACY OR SOME OTHER TYPE OF TORT? IS IT BECAUSE -- I GUESS WHAT I AM TRYING TO FIGURE OUT IS YOU ARE ONLY PLEADING THE BREACH OF STATUTORY DUTY. YOU ARE NOT ALLEGING A TAPE OF MALPRACTICE ACTION, IN TERMS OF THE CARE THAT HE RENDERED TO YOUR CLIENT, SO YOU WOULD, IF THIS CASE WAS ALLOWED TO PROCEED, I UNDERSTAND THAT THE ALLEGATION THAT ALL YOU WOULD FEEL THAT YOU WOULD HAVE TO PROVE FOR YOUR CAUSE OF ACTION WAS THAT THERE WAS A VIOLATION OF THE STATUTE, THAT THAT IS THE CAUSE OF ACTION?

THAT'S CORRECT. THAT THERE WAS A DUTY -- HE OWED THEM A DUTY OF CONFIDENTIALITY, AS SET FORTH IN THE STATUTE.

WOULD THE DEFENSE BE -- YOU ARE, THEN, CLAIMING, AS DAMAGES, THAT THERE WAS INCREASED COSTS OF HAVING TO GO TO ANOTHER PSYCHOLOGIST? IS THAT PART OF YOUR --.

THOSE WOULD BE THE SPECIAL DAMAGES.

SPECIAL DAMAGES.

THE GENERAL DAMAGES WOULD BE THE SEVERE MENTAL ANGUISH THAT THE PARTIES SUFFERED, ON FINDING OUT THAT THESE THINGS HAD BEEN DISCLOSED TO EACH OTHER.

AND THE DEFENDANT WAS -- AND THE DEFENSE WOULD BE THAT SHE WAS ALREADY IN A HIGH DEGREE OF ANGUISH AND SHE WOULD HAVE NEEDED THIS ADDITIONAL PSYCHOLOGICAL CARE, EVEN IF I HADN'T BREACHED THIS CUTE DUTY?

RIGHT -- THIS DUTY?

RIGHT.

SO WHAT YOU ARE SAYING, HERE, IS THAT IT WOULDN'T BE DISPUTED THAT THERE WAS ANGUISH RELATED TO SEEING A PSYCHOLOGIST, OR TO BEING, HAVING THE CONFIDENCES REVEALED. THE QUESTION IS THAT THE EXTENT OF THE DAMAGES IS SOMETHING THAT SHOULD BE A JURY QUESTION NOT PREEMPTED AS A MATTER OF LAW, IN A CASE LIKE THIS.

THAT'S CORRECT. YOU COULD DRAW AN ANALOGY TO A PREEXISTING, A PERSON WITH A PREEXISTING PHYSICAL INJURY ORIFICECAL AILMENT, AND THEN THEY ARE INVOLVED IN SOME SORT AFTER ACCIDENT THAT TOTALLY EXACERBATES THAT, AND IT MAKES IT A MUCH WORSE SITUATION. YOU COULD DRAW A SIMILAR KNOWLEDGE HERE. -- A SIMILAR ANALOGY HERE.

YOU HAVE PLED A NEGLIGENT BREACH OF THE DUTY. IF YOU HAD PLED THAT HE INTENTIONALLY DID THIS, WOULD, AS YOU UNDERSTAND THE LAW IN FLORIDA, WOULD THAT ALLOW YOU TO CLAIM THESE SAME DAMAGES?

WELL, I THINK THAT HE INTENTIONALLY -- I THINK THAT THERE IS A INTENT, ON HIS PART, TO BREACH THAT CONFIDENTIALITY. I MEAN, HE IS FULLY FAMILIAR WITH THE STATUTE, AND YOU

KNOW, IT IS NEGLIGENCE ON HIS PART. I MEAN, IT IS A MIXED --

WHY DIDN'T YOU PLEAD IT, THEN, AS JUST AN INTENTIONAL TORT?

WELL, IF WE DO AN INTENTIONAL TORT, THEN WE ARE DEALING WITH INTENTIONAL INFLICTION OF SEVERE MENTAL DISTRESS, AND YOU HAVE TO SHOW MALICE, AND YOU HAVE TO SHOW OTHER SPECIFIC INTENTS TO DO HARM TO THE PEOPLE. IN THIS SITUATION, HE SIMPLY IS DOING WHAT HE THINKS IS THE BEST INTEREST OF THE PATIENT, IS THE WAY THAT I READ THE FACTUAL PATTERN THAT WE HAVE DONE SO FAR, IS HE FEELS LIKE HE IS ACTING IN THE BEST INTEREST OF THE PATIENT, IN DISCLOSING THIS INFORMATION TO THIS OTHER SPOUSE, AND HE DOES IT WITH BOTH OF THEM, AND THAT IS THE NEGLIGENCE PART, BECAUSE YOU KNOW, HE IS BREACH A GO DUTY THAT HE OWES TO THEM. HE OWES, AND HE KNOWS THAT HE OWES THIS DUTY TO THEM.

SO, THEN, YOU WILL HAVE TO PROVE SOME -- THEN, IF YOU ARE ALLEGING NEGLIGENCE, THEN THE BREACH OF THE DUTY, A LON, WON'T GIVE -- ALONE, WON'T GIVE RISE TO THE CAUSE OF ACTION. THEN YOU WILL HAVE TO SHOW THAT, IN DIVULGING THE SITUATION WHERE THEY ARE, BOTH, GOING TO THE SAME PSYCHOLOGIST, THAT IT WAS REASONABLE FOR HIM TO ASSUME THAT HE HAD THE PERMISSION, THE IMPLIED PERMISSION OF BOTH PARTIES TO DIVULGE INFORMATION TO ONE OR THE OTHER, THEN THAT WOULD BE A PROPER -- THAT WOULD BE ANOTHER DEFENSE THAT THEY WOULD BE ALLOWED?

I WOULD ASSUME, JUDGE, BUT I THINK THAT THE STATUTE IS CLEAR, AND I THINK THAT THE PSYCHOLOGIST WILL ADMIT THAT HE KNOWS THAT HE HAS A DUTY OF CONFIDENTIALITY. HE KNOWS THAT HE IS GETTING INFORMATION THAT THESE PEOPLE WOULD NEVER DISCLOSE TO ANYONE, OTHER THAN HIM, AND THAT IS PART OF HIS TRAINING, IS TO GET TO INFORMATION HE CAN, THEN, USE TO HELP THEM GET OVER WHATEVER MENTAL ANGUISH THAT THEY ARE SUFFERING, AT THAT POINT IN TIME, AND IF HE WANTS TO DISCLOSE THIS, HE NEEDS TO GET THEIR CONSENT, TO BE ABLE TO DO IT, AND WITHOUT GETTING THEIR CONSENT TO DO THAT, HE HAS BREACHED HIS DUTY, AND HE KNOWS, BETTER THAN ANYBODY ELSE, WHAT THE EFFECT OF THAT IS GOING TO BE, BECAUSE HE IS TRAINED TO KNOW WHAT FACTORS MENTAL AND I WISH PLACE IN A -- MENTAL ANGUISH PLAY IN HIS A PERSON'S LIFE, HOW IT AFFECTS THEIR HEALTH AND HOW IT AFFECTS THEIR LIFESTYLE, AND HE KNOWS, PERHAPS BETTER THAN ANYONE ELSE, WHAT IT IS GOING TO END UP CAUSING.

YOU AGREE THE CAUSE OF ACTION HERE IS NEGLIGENCE INFLICTION OF EMOTIONAL DISTRESS. IS THAT THE CAUSE OF ACTION WE ARE DEALING WITH?

JUDGE, I WOULD CALL THIS A BREACH OF THE DUTY OF CONFIDENTIALITY, PURE AND SIMPLE, AND, YOU KNOW, THERE IS A STATUTORY DUTY NOT TO DISCLOSE CONFIDENTIAL INFORMATION TO ANYONE, WITHOUT THE PATIENT'S CONSENT. YOU BREACH THAT DUTY, THAT IS WHY I HAVE ASKED THIS COURT TO USE THIS AS AN OPPORTUNITY TO CLARIFY WHAT THE COURT SAID IN CUSH V LLOYD AND, LATER, IN HAS NOTER V HARING TO. -- HARTOG.

WHAT IS CLASSICALLY NEGLIGENCE INFLICTION OF EMOTIONAL DISTRESS?

IF THERE WAS A PREEXISTING DUTY TO THE PERSON, WE TALK ABOUT IMPACT, AND WHAT WE, REALLY, ARE SAYING IS THAT THERE IS A PREEXISTING DUTY NOT TO IMPACT THAT PERSON NEGLIGENCE, THROUGH SOME NEGLIGENCE ACT, CAUSE AN IMPACT TO THAT PERSON, IS, REALLY, WHAT WE ARE SAYING, WHEN WE ARE TALKING ABOUT THE IMPACT DOCTRINE, ANYWAY. IT IS THE SAME THING HERE. IF YOU CALL IT NEGLIGENCE INFLICTION OF SEVERE EMOTIONAL DISTRESS, YOU STILL HAVE TO GET BACK TO DUTY. WAS THERE A DUTY OWED TO THAT PERSON? YOU KNOW HAD, IN A BYSTANDER SITUATION, THERE IS NO DUTY OWED TO THE BYSTANDER. THE PERSON MAY BE NEGLIGENCE IN KILLING HIS MOTHER OR KILLING THE MOTHER OF THE PERSON WHO IS OBSERVING THAT, BUT THERE IS NO DUTY OWED, BY THAT PERSON, TO THE OBSERVER, TO THE BISTANDER.

WELL, THE CONCEPT OF INFLICTION OF MENTAL DISTRESS, REALLY, COMES UP AS AN INTENTIONAL TORT, DOESN'T IT? NOT A NEGLIGENT ACTION. A NEGLIGENT --

THEORETICALLY, WE HAVE, ALWAYS, DONE THE INTENTIONAL INFLICTION OF SEVERE MENTAL DISTRESS.

I UNDERSTAND WHAT YOU ARE SAYING IS THAT THIS STATUTE GIVES YOU -- GIVES, TO A PATIENT, A STATUTORY CAUSE OF ACTION FOR NEGLIGENCE. THE VIGES OF THE STATUTE IN SOME -- THE VITAL OF THE STATUTE, IN SOME SORT OF CATEGORY, IN DESEEGIS VERSUS RAILROAD, SHOWS IT AS A NEGLIGENT ACT. IS THAT WHAT YOU SNEEN.

IN TERMS OF THERE IS A DUTY OWED THERE. THE DUTY IS SET OUT IN THE STATUTE, JUST LIKE WE FOUND IN CUSH V LLOYD, THERE WAS A DUTY THAT THE DOCTOR ADEQUATELY TESTED AND INFORM THE PARENTS. IT ALL TURNS BACK ON DUTY. THE DUTY WAS COMMON LAW DUTY THAT THIS COURT FOUND, IN CURB, AND IN THIS CASE IT IS -- IN CUSH, BUT IN THIS CASE IT IS A CONFIDENTIALITY BREACH OF DUTY, ABSENT THE STATUTE.

ABS THE STATUTE, WOULD YOU SAY THERE WOULD BE THIS DUTY?

CORRECT. THERE IS NO COMMON LAW DUTY OF CONFIDENTIALITY FOR ANY PHYSICIAN, LIKE -- I KNOW WE ALL SORT OF THINK THAT THERE IS A CONFIDENTIALITY BETWEEN DOCTOR AND PATIENT. WELL, THERE ISN'T. THE DOCTOR IS FREE TO DO WHAT HE WANTS TO AND DISCLOSE WHAT HE WANTS TO.

BUT THIS IS A PERSON WHO IS TREATING A PATIENT, SO I STILL HIM HAVING TROUBLE WITH WHY THIS ISN'T -- I, STILL, HIM HAVING TROUBLE WITH -- I, STILL, AM HAVING TROUBLE WITH WHY YOU ARE SAYING HE IS NEGLIGENT IN HIS TREATMENT OF HIS PATIENT AND THAT CAUSED HER DAMAGES. IF THE BREACH OF THE DUTY WAS JUST EXISTING OUT THERE AS, WELL, HE SHOULDN'T HAVE DONE IT, BUT IT HAD NO EFFECT, BUT WHAT I AM HEARING, I THOUGHT YOU SAID, WAS THAT IT WASN'T REASONABLE. THAT WAS NOT -- HE MIGHT HAVE HAD GOOD INTENTIONS, BUT THAT IS NOT WHAT A LICENSED PSYCHOLOGIST IS SUPPOSED TO DO. YOU ARE NOT SUPPOSE THE TO TAKE CONFIDENCE ENCES AND THEN USE IT BACK AND FORTH, SO WAS THERE A REASON, I GUESS, THAT YOU DIDN'T JUST PLEAD NEGLIGENCE IN THE TREATMENT OF HIS PATIENT AND THAT THAT WOULD GIVE RISE TO DAMAGES, OR WOULD THAT, ALSO, BE BARRED BY THE IMPACT RULE?

IT WOULD, STILL, BE BARRED BY THE IMPACT RULE. ANY TYPE OF NEGLIGENT WOULD HAVE TO BE, STILL, PART OF THE IMPACT RULE.

SO YOU ARE SAYING ALL PSYCHOLOGISTS' NEGLIGENCE, IN THEIR TREATMENT, THAT THEY HAVE GOT TO SHOW THAT THERE WAS PHYSICAL INJURY, BEFORE YOU CAN RECOVER, IN THE STATE OF FLORIDA?

THAT IS WHAT THE TRIAL COURT HELD, THAN IS WHY WE ARE HERE. BASICALLY THE TRIAL JUDGE SAID THAT, EVEN THOUGH THERE WAS A DUTY OWED AND THERE WAS A BREACH OF THE DUTY, AND THERE WERE RECOGNIZED DAMAGE THAT IS FLOWED FROM THAT, WE HAVE NO CAUTION, UNDER THAT -- NO CAUSE OF ACTION UNDER THAT STATUTE OR COMMON LAW, BECAUSE OF THE IMPACT DOCTRINE. THERE WAS NO IMPACT BETWEEN DR. IQUE LETTER AND THE PLAINTIFFS.

-- DR. EAKER AND THE PLAINTIFFS.

WOULD YOU -- I WOULD LIKE BOTH OF YOU TO RESPOND TO THIS ISSUE. WE HAVE RECOGNIZED, IN THE MID-FORTIES, FLORIDA RECOGNIZED A TORT OF PRIVACY, AND WE ARE TALKING ABOUT, THIS MORNING, A PRIVACY OF PATIENT RELATIONSHIPS. IF IT IS STATUTORY, IT WOULD SEEM TO

EXTEND, EVEN, BEYOND THE PERIOD OF PSYCHOLOGIST, PATIENT RELATIONSHIP, SO THAT COULD END, AND WE COULD, STILL, HAVE A BREACH OF THE STATUTE, FIVE OR SIX YEARS LATER, SO WOULD YOU ADDRESS HOW THIS IS LIKE OR DISSIMILAR TO THE TORT THAT FLORIDA HAS RECOGNIZED, IN THE INVASION OF PRIVACY AREA. IS IT SOMEHOW DIFFERENT? IS IT THE SAME? SHOULD WE FOLLOW THAT AS A PATTERN? IS IT NOT A PATTERN? JUDGE, LET ME JUST DIGRESS FOR A SECOND. THIS PSYCHOLOGY STATUTE IS, THE LANGUAGE IN IT ACTUALLY SAYS THAT THIS CONFIDENTIALITY EXISTS FOREVER AND EVER. SO THAT EVEN IF THE PATIENT IS NO LONGER A PATIENT OF THE DOCTOR, EVEN SOMETIME IN THE FUTURE, HE CANNOT HAVE -- HE CANNOT DISCLOSE THAT TYPE OF SITUATION. BUT ON THE INVASION OF PRIVACY, I PICTURE AN INVASION OF PRIVACY AS SOMEONE -- IS A SITUATION WHERE THE ACTOR COMES IN AND INTENTIONALLY TRIES TO FIND OUT INFORMATION THAT HE HAS AN INTENT TO, THEN, USE TO, SOMEHOW, HARM THE PERSON, SO IT IS AN INVASION OF YOUR RIGHTS OF PRIVACY.

IT WOULD BE INTENTIONAL AS OPPOSED TO A NEGLIGENT?

I SEE INVASION OF PRIVACY AS AN INTENTIONAL TORT.

CAN YOU NEGLIGENT LIVE INVADE ONE'S PRIVATE -- NEGLIGENTLY INVADE ONE'S PRIVACY, UNDER FLORIDA LAW?

I THINK THINK OF A SITUATION, JUDGE. I WOULD ASSUME WOULD BE THAT THE INVASION WOULD BE IF YOU, THEN, DISCLOSED WHATEVER IT WAS THAT YOU HAD LEARNED. IF YOU JUST HAPPENED UPON A SITUATION THAT YOU HAPPEN TO WALK INTO A FRIEND'S HOUSE AND IS HE THERE WITH SOMEONE HE SHOULDN'T BE WITH, YOU KNOW, THAT IS INVADING HIS PRIVACY, BUT, YOU KNOW, UNLESS YOU DO SOMETHING WITH THAT INFORMATION, THEN I CAN'T SEE THAT IT -- THAT A CAUSE OF ACTION WOULD EXIST IN THAT ACTION, BECAUSE THERE ARE NO DAMAGES.

LET'S SAY THERE IS A DOCTOR, THEN, IN A SOCIAL GATHERING, DISCLOSES THAT ONE OF HIS PATIENTS HAS AIDS. WHAT WOULD BE -- WOULD THERE BE A CAUSE OF ACTION THERE?

I THINK THERE WOULD, BECAUSE OF THE --

AND HOW DO YOU DISTINGUISH -- HOW DO YOU DISTINGUISH THAT FROM YOUR SITUATION?

JUDGE, I BELIEVE THERE IS A SPECIFIC STATUTE ON DISCLOSURE OF INFORMATION ABOUT CONTAGIOUS DISEASE OR DISEASE LIKE THAT. IF THERE IS NOT, A SPECIFIC STATUTE ON THAT, THEN I DON'T KNOW THAT YOU WOULD HAVE A CAUSE OF ACTION FOR THEM DOING THAT, BUT IT SEEMS TO ME I HAVE -- I CAN RECALL, IN THE FIELD OF AIDS, THAT WE HAVE GOT SOME LEGISLATION.

I DON'T KNOW WHETHER THAT IS A STATUTE. MINE IS PREMISED ON THE FACT THAT THERE IS NO STATUTE. LET'S SAY THAT.

WELL, I THINK THAT, IF YOU HAD A SITUATION WHERE A DOCTOR GOES TO A -- IS IN A SOCIAL SITUATION, AND HE MAKES SOME DEROGATORY COMMENTS ABOUT ONE OF HIS FEMALE PATIENTS, I THINK THAT THAT WOULD BE A DIFFERENT CAUSE OF ACTION. I DON'T THINK IT WOULD BE SO MUCH A CONFIDENTIALITY QUESTION AS WHETHER OR NOT HE IS MAKING DEROGATORY COMMENTS TO OR DISCLOSING INFORMATION DEROGATORY.

WHAT WOULD BE THE CAUSE OF ACTION THERE, THOUGH? WHAT WOULD BE -- YOU HAVE TO --

I WOULD ASSUME DEFAMATION.

YOU HAVE TO HAVE SOMETHING TO HANG IT ON, SO WHAT THEORY WOULD YOU YOU --

I WOULD THINK SOME SORT OF DEFAMATION OR SOME SORT OF INFORMATION OF PRIVACY, BECAUSE IS HE USING INFORMATION THAT HE HAS OBTAINED IN THE TREATMENT OF HER, AND HE IS, THEN, YOU KNOW, DISCLOSING IT TO ANOTHER PERSON, SO HE IS DOING SOMETHING WITH THAT INFORMATION THAT WOULD --

YOU ARE INTO YOUR REBUTTAL TIME, MR. CARTER. MR. WINTHROP.

YES, YOUR HONOR. MAY IT PLEASE THE COURT. MY NAME IS GIVE WINTHROP, ON -- IS GRIFF WINTHROP, FROM WINTER PARK, FLORIDA, HERE ON BEHALF OF DR. EAKER IN THIS MATTER. I THINK WHAT HAPPENED BELOW WAS PROCEDURALLY WHAT HAPPENED TO THE COURT. KEEP IN MIND, WITH HONOR TO THE COURT, THIS WAS A CASE THAT WAS DISMISSED AT THE TRIAL COURT LEVEL, SO WHAT WE ARE TALKING ABOUT IS IN THE FOURTH AMENDED COMPLAINT. MR. CARTER PROVIDED US WITH ADDITIONAL FACTS THAT ARE NOT SET FORTH IN THE ORIGINAL AMENDED COMPLAINT. I WOULD ASK THAT WE RESTRICT OURSELVES TO THE FOUR CORNERS OF THE FOURTH AMENDED COMPLAINT. I, ALSO, WOULD POINT OUT THAT THERE WAS, AT LEAST AS I COUNT IT -- I MAY BE WRONG, MR. CARTER, BUT I COUNT AT LEAST TWO, MAYBE THREE OR FOUR TIMES, WITHIN THE PLEADINGS PROCESS BELOW, WHERE NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS, ACTUALLY, WAS SPECIFICALLY PLED. THE ONLY CHANGE TO THE FOURTH AMENDED COMPLAINT, AT THE END, IS THE TITLE OF THE COMPLAINT, BUT THE FACTS THAT ARE PLED IN THAT COMPLAINT REMAIN THE SAME. I, ALSO, WOULD POINT OUT TO THE COURT, PROCEDURALLY, AS WAS SET FORTH IN MR. CARTER'S BRIEF BEFORE THE FIFTH DISTRICT COURT OF APPEALS AND MR. CARTER'S BRIEF BEFORE THIS COURT THAT, IT IS ACKNOWLEDGED THAT THIS IS A NEGLIGENCE ACTION. AND MR. CARTER IS NOT JUST ACKNOWLEDGED IT, HIMSELF. THIS IS A CASE, ALTHOUGH HE TRIES TO COUCH IT, IT APPEARS, AND I THINK TO SOME CONFUSION, THAT THIS IS A CASE OF A NEGLIGENT BREACH AFTER DUTY. I DON'T KNOW WHAT THAT IS.

WHY SHOULDN'T WE TREAT THIS AS A FORM OF MALPRACTICE? THAT IS THAT WOULD YOU AGREE THAT DOCTORS, IN THE POSITION THAT YOUR CLIENT IS IN, CAN COMMIT PROFESSIONAL NEGLIGENCE?

I WOULD AGREE, YOUR HONOR, THAT, IF PLED PROPERLY, AND IF PLED APPROPRIATELY, THAT A CLAIM FOR MEDICAL MALPRACTICE CAN BE ALLEGED AGAINST PSYCHIATRISTS AND PSYCHOLOGISTS AND OTHER PROFESSIONALS WHO PRACTICE IN THE AREA OF MENTAL HEALTH. I DON'T THINK THAT WAS PLED IN THIS CASE.

BUT YOUR CLIENT IS, OBVIOUSLY, A PROFESSIONAL.

YES, YOUR HONOR.

AND HE IS SUBJECT TO, IF HE COMMITS MALPRACTICE, HE WOULD BE SUBJECT TO AN ACTION. WOULD YOU AGREE TO THAT?

I ABSOLUTELY WOULD, YOUR HONOR.

WHY DOESN'T THIS FALL IN THAT CATEGORY, DESPITE THE AWKWARD WAY THAT IT IS PLED, AND LET ME TRY SOME HYPOTHALWAYS, LET'S JUST SUPPOSE THAN HYPOTHETICALS. LET'S JUST SUPPOSE THAT YOU HAVE A CLIENT THAT HE IS TREATING, AND HE ADVISES A COURSE OF THERAPY THAT NO REASONABLE PROFESSIONAL, IN HIS POSITION, WOULD PRESCRIBE, AND AS A MATTER OF FACT, THE OTHER PROFESSIONALS FEEL THAT THAT COURSE OF THERAPY WAS ACTUALLY HARMFUL TO A CLIENT, AND LET'S SAY THAT THE THERAPY, THAT HE PRESCRIBED, WAS, WHETHER IT IS A MALE OR A FEMALE, AND THERE IS SOME DIFFICULTY IN A RELATIONSHIP, AND WHAT HE SAYS IS THAT YOU SHOULD GO OUT AND HAVE SEXUAL RELATIONS WITH AS MANY PEOPLE AS WILL HAVE SEXUAL RELATIONS WITH YOU. AND THE CLIENT ACCEPTS THAT FORM OF THERAPY, AND HAS AN ENORMOUS GUILT COMPLEX OR SOMETHING, AS A RESULT OF IT, ENDS UP HAVING A NERVOUS BREAKDOWN OUT OF THAT, AND SO ON AND SO ON. IN ANY CASE, YOU HAVE

GOT, ON THE ONE HAND, A COURSE OF THERAPY THAT OTHER PROFESSIONALS WOULD SAY IS TOTALLY OUT OF THE REALM OF ACCEPTABLE CARE. WOULD THAT HYPOTHETICALLY CONSTITUTE A CAUSE OF ACTION FOR MALPRACTICE AGAINST A PROFESSIONAL SUCH AS YOUR CLIENT?

ONLY IF THERE WAS THE ONE PART, YOUR HONOR, WHICH I THINK YOU INADVERTENTLY GLOSSED OVER, WHICH WOULD CREATE A CAUSE OF ACTION, THAN IS THE DAMAGES.

WELL, I SAID THAT, AS A RESULT OF THIS COURSE OF THERAPY, SHE HAD A NERVOUS BREAKDOWN, EXTENSIVE -- IN OTHER WORDS, NOW, AND THE OTHER DOCTORS RELATED THAT TO THIS IMPROPER THERAPY.

LET'S ASSUME THEY DID, YOUR HONOR, BUT MY QUESTION BACK TO THE COURT, AND I DON'T MEAN TO BELABOR THE POINT -- MY QUESTION BACK TO THE COURT WOULD BE DID IT RESULT IN SOME PHYSICAL MANIFESTATION OF HARM?

LET'S, NOW --

IF IT DID NOT RESULT IN SOME PHYSICAL MANIFESTATION OF HARM, WHETHER IT IS PLED AS A MEDICAL MALPRACTICE ACTION, WHICH WE ALL KNOW IS A PROFESSIONAL MALPRACTICE ACTION, AND WHETHER IT IS PLED EMOTIONAL DISTRESS, IF IT A HYPOTHETICAL SITUATION --

STICK WITH MY HYPOTHETICAL, AND MY HYPOTHETICAL HAS IT THAT THE PATIENT HAS A NERVOUS BREAKDOWN, AND THAT OTHER PHYSICIANS TESTIFY THAT THIS WAS AN IMPROPER COURSE OF THERAPY. AND THAT THE NERVOUS BREAKDOWN, AND ALL THE TREATMENT THAT SHE GOT FOR THE NERVOUS BREAKDOWN, WAS CAUSED BY THE IMPROPER COURSE OF THERAPY.

YOUR HONOR, I HAVE BEEN REPRESENTING PSYCHOLOGISTS AND PSYCHIATRISTS FOR YEARS. THERE ARE ABOUT 100 DIFFERENT WAYS OF DEFINING A NERVOUS BREAKDOWN. I DON'T MEAN TO BE FACETIOUS, YOUR HONOR, BUT THE FACT OF THE MATTER IS I DON'T KNOW WHETHER A NERVOUS BREAKDOWN IS SOMETHING TO BE FOUND AS A PHYSICAL MANIFESTATION OF HARM. LET ME PUT IT THIS WAY, IF THE PLAINTIFF PLED IT AS FACEICAL MANIFESTATION OF HARM, THEN IT ALLEGES A CAUSE OF ACTION, AND IF THE PLAINTIFF DOES NOT PLEAD IT AS A PHYSICAL MANIFESTATION OF HARM, THEN IT IS NOT AN ALLEGED CAUSE OF ACTION.

DID THIS MATTER GO THROUGH PRESCREENING?

I WAS NOT TRIAL COUNSEL BELOW.

THAT WOULD AND PART OF THE COMPLAINT. IT WAS NOT? MR. CARTER SAID IT DID NOT PROCEED AS A MEDICAL MALPRACTICE.

IF IT DID OR IF IT DIDN'T, YOUR HONOR, THE POINT IS THAT, IF IT HAD PROCEEDED THROUGH PRESUIT, AND OBVIOUSLY IF IT HAD BEEN ALLEGED AS A MEDICAL MALPRACTICE CASE, VERSUS AN INFLICTION OF EMOTIONAL DAMAGE CASE, I DON'T KNOW THAT THAT WOULD --

THIS IS PLEAD AGO CAUSE OF ACTION FOR BREACH OF A STATUTE, ISN'T IT?

IT IS ACTUALLY A PLEA FOR EMOTIONAL DISTRESS WITH A COMPONENT THAT IS ARGUED AS PART OF THE STATUTE. LET'S NOT GLOSS OVER THAT IT HAS, NOW, BEEN CUT AWAY FROM THE ARGUMENT, BUT IT HAS ALWAYS BEEN, THROUGHOUT THE BRIEF, AND ACKNOWLEDGED BY THE PETITIONER, THAT THIS IS A NEGLIGENCE CASE.

I THINK THAT, THOUGH, WHAT I AM INTERESTED IN IS WE GOT THIS STATUTE.

YES, SIR.

NOW, IT SEEMS TO ME THAT THE ULTIMATE QUESTION IS, IS -- DOES THIS GIVE RISE TO A PRIVATE CAUSE OF ACTION?

I THINK THAT IS ONE OF THE QUESTIONS, YOUR HONOR, BUT THE QUESTION THAT I HAVE BEEN -- I HAVE JUST BEEN ASKED WAS A QUESTION THAT HAD TO DO WITH THE IMPACT DOCTRINE.

I UNDERSTAND.

AND, AGAIN, AS JUDGE DOUCKS SAID BELOW, AT THE FIFTH THAT, IS A DAMAGES ISSUE, AND DAMAGE AS AN ELEMENT OF CAUSE OF ACTION. IF YOU CANNOT PLEAD PHYSICAL MANIFESTATION OF HARM, YOU CANNOT PLEAD NEGLIGENT ACTION OF -- OF HARM, YOU CANNOT PLEAD NEGLIGENT ACTION OF ANY KIND.

THE WAY THAT I SORT OF HAVE THIS IN MY HEAD RIGHT NOW IS THAT WHAT WE HAVE GOT TO GET TO IS THE QUESTION THAT, IF YOU HAVE GOT A PRIVATE CAUSE OF ACTION FOR A VIOLATION OF THIS STATUTE --

YES, SIR.

-- SORT OF IN THE SAME TERMS OF THE DEJESUS VERSUS SEABOARD COASTLINE -- SEABOARD COASTLINE, OR THE TIME INSURANCE COMPANY, WHERE WE FOUND THAT THERE WAS A CAUSE OF ACTION THAT AROSE OUT OF THAT STATUTE, THE INSURANCE STATUTE, THEN DOES THE IMPACT RULE HAVE -- DOES THE IMPACT RULE BAR THE RECOVERY OF WHAT IS OBVIOUSLY THE MOST USUAL TYPE OF DAMAGE THAT YOU WOULD HAVE, FROM A BREACH THIS STATUTE?

YES, IT DOES. THE IMPACT DOCTRINE WOULD VIOLATE IT, SIMPLY BECAUSE IT IS, STILL, PLED AS A NEGLIGENCE ACTION, AND EVEN IF YOU HAVE A NEGLIGENT BREACH AFTER DUTY, WHETHER YOU HAVE A NEGLIGENCE PER SE, BASED UPON A STATUTE, OR WHETHER YOU HAVE A STATUTORY CAUSE OF ACTION, PROVIDED BY A -- BY STATUTE, IT IS STILL A NEGLIGENCE ISSUE, AND IF IT IS A NEGLIGENCE ISSUE, YOU, STILL, HAVE GOT TO PLEAD YOUR DUTY, YOUR BREACH, YOUR CAUSATION AND YOUR DAMAGES. THE IMPACT RULE, CHAMPION VERSUS GRAY TELLS US THAT, IF YOU PLEAD PHYSICAL HARM, THAT POINT CANNOT SURVIVE. I ALSO POINT THE COURT TO THE GREEN VERSUS ROSS CASE, I HAVE OBVIOUSLY BRIEFED IT IN MY BRIEF, A SECOND DISTRICT COURT OF APPEALS CASE THAT ACTUALLY DEALS WITH THE STATUTE THAT WE ARE TALKING ABOUT THERE, AND THEY SAID, DOWN THERE THAT, THAT STATUTE DOES NOT HAVE A PRIVATE RIGHT OF ACTION. I WILL TELL THE COURT WHY, AND I ARGUED THIS AT THE FIFTH AS WELL. THE FACT OF THE MATTER IS THERE IS A RECOURSE FOR THIS TYPE OF BEHAVIOR BY A PSYCHOLOGIST OR A PSYCHIATRIST OR A MENTAL HEALTH PROFESSIONAL. THERE IS A MEANS BY WHICH THAT INDIVIDUAL IS PUNISHED BY SUCH BEHAVIOR, AND THAT IS FROM THE AGENCY FOR HEALTH CARE ADMINISTRATION.

I WANT TO MAKE SURE, ARE YOU ARGUING IN THE ALTERNATIVE THAT THERE SHOULD BE NO CAUSE OF ACTION, WHETHER THERE WERE, WAS OR WAS NOT PHYSICAL MANIFESTATION OF INJURY, THAT THIS CAUSE OF ACTION SHOULD NOT BE RECOGNIZED?

YOUR HONOR, WHAT I AM ARGUING IS WHAT WAS ARGUED AT THE GREEN VERSUS ROSS CASE. IT IS NOT AN ALTERNATIVE ARGUMENT. IT IS ACTUALLY JUST TWO ARGUMENTS. THEY ARE NOT MUTUALLY EXCLUSIVE OF EACH OTHER.

THEY ARE DIFFERENT ARGUMENTS.

DIFFERENT ARGUMENTS BUT NOT MUTUALLY EXCLUSIVE.

ONE IS YOUR CAUSE OF ACTION.

ONE IS, YOU ARE RIGHT, YOUR HONOR, THAT THERE IS NO CAUSE OF ACTION AS PROTECTED BY THE STATUTE, AS WAS HELD BY THE SECOND DISTRICT COURT OF APPEALS. THE OTHER ARGUMENT THAT I HAVE IS THAT, AS MR. CARTER ARGUED UP HERE AND I ARGUED IN MY BRIEF, IS THIS IS A NEGLIGENCE ACTION.

IS THERE A DUTY THAT I THE PSYCHOLOGIST OWES TO HIS OR HER PATIENT?

YES, THERE IS, YOUR HONOR.

AND YOU ARE SAYING THERE SHOULD BE NO RECOURSE FOR A BREACH OF THAT DIET.

NO, YOUR HONOR, I AM NOT SAYING THAT.

YOU ARE SAYING SOMEBODY WOULD HAVE HAD TO SUFFER. WOULD THEY HAVE TO KILL THEMSELVES, AND REALLY GONE OFF THE DEEP END, BEFORE WE ARE GOING TO ALLOW RECOVERY, WHEN A PSYCHOLOGIST BREACHES IMPOSED DUTY BY LAW?

I AM SAYING THERE MUST AND PHYSICAL MANIFESTATION FOR A CAUSE OF ACTION.

WHY IS THE CASE LIKE THIS? GOING BACK TO THE GILLIAM CASE, WHICH IS JOVED HAVE -- I WAS LOOK -- WHICH IS INVOLVED -- I WAS LOOKING AT THE FACTS WHICH INVOLVED, YESTERDAY, AND SAID THAT THERE WAS A CRASH OF THE CAR INTO THE SIDE OF THE HOUSE AND THEY WERE UP SET OF SOMEBODY SAYING THAT HAVING HAPPENED. WE HAVE THE ISSUE OF THAT HAVING HAPPENED TO THAT PERSON. WE HAVE THE ISSUE OF WHERE THERE IS NO IMPACT, AND IN THE PSYCHOLOGIST'S PATIENTS, EXCEPT FOR IMPROPER SEXUAL CONTACT THERE, IS NO IMPACT. WHAT IS THE CONTINUING VIABILITY OF THE IMPACT RULE IN A CASE SUCH AS THIS, WHERE CLEARLY WE HAVE GOT EMOTIONAL INJURIES THAT ARE GOING TO FLOW FROM THE KINDS OF TORTS THAT PSYCHOLOGISTS COMMIT?

YOUR HONOR, IT IF THE COURT -- JUSTICE PARIENTE, IF YOU ARE ASKING ME WHETHER THIS SHOULD BE THE EXCEPTION TO THE RULE, I WOULD ANSWER THE COURT EMPHATICALLY NO. I THINK THAT THE IMPACT DOCTRINE HAS A VERY VIABLE PLACE IN OUR JURISPRUDENCE HERE, IN FLORIDA, AND THERE ARE A MULTITUDE OF CAUSES OF ACTION THAT CAN BE BROUGHT AGAINST A PSYCHIATRIST OR PSYCHOLOGIST. THERE CAN BE NO NEGLIGENCE, IF THERE IS NO MANIFESTATION OF PHYSICAL HARM.

WHAT IS THE PUBLIC POLICY REASON FOR THAT?

THE PUBLIC POLICY REASON FOR THAT IS, ANNOUNCED IN THE CHAMPION VERSUS GRAY CASE, IF WE OPEN THAT, IT WILL BRING IN A MULTITUDE OF ALL SORTS OF CLAIMS, NONE OF WHICH WE CAN VERIFY.

IF WE ARE GOING TO CARVE OUT EXCEPTIONS, WOULDN'T WE WANT TO START WITH THE ONES THAT ARE THERE, BY PURELY THE NATURE OF THE TREATMENT, PSYCHOLOGICAL IMPACT TO THE PATIENT? THE DUTY THAT THE PSYCHIATRIST OWES TO THE PATIENT, THE DUTY THAT I THE PHYSICIAN OWES TO THE PATIENT, AND THE PHYSICAL DAMAGES CAUSE A CERTAIN AMOUNT OF MONEY, WHAT WOULD NOT CAUSE THAT TO BE BROUGHT TO THE STATE IN THE OVER SIMPLIFIED ACTION?

I THINK THAT, WHAT RESULTED IN A PSYCHOLOGICAL ENCOUNTER WITH A MENTAL HEALTH PROFESSIONAL, THERE ARE A NUMBER OF CASES OF MANIFESTATION OF HARM THAT DO NOT INVOLVE SEXUAL HARM.

THEY BREAK OUT IN HIVES? IS THAT A PHYSICAL MANIFESTATION?

I WOULD THINK THAT THEY WOULD BE, YES.

IN OTHER WORDS SOMEONE THAT IS PRONE TO BREAK OUT IN HIVES, THAT IS SOMETHING THAT WE DON'T FEEL AS CONCERNED THAT THAT IS GOING TO BE FRAUDULENT, BUT IF SOMEBODY DOESN'T -- ISN'T PRONE TO HAVE A PHYSICAL MANIFESTATION BUT NEVERTHELESS SUFFERS THE SAME AMOUNT OF PSYCHIC HARM, THAT WE ARE NOT GOING TO ALLOW THAT?

YOUR HONOR, BREAKING OUT OF HIVES, I AM CERTAIN JUSTICE PARIENTE, MEANT IT AS AN EXTREME EXAMPLE, AND I UNDERSTAND THAT, BUT THERE ARE, ALSO, EXAMPLES WHERE INDIVIDUALS SUFFER CASHED YO PULMONARY PROBLEMS, INDIVIDUALS SUFFER ATTACKS AS ASTHMA, INDIVIDUALS SUFFER RHEUMATOID ARTHRITIS, AS A RESULT OF NEGLIGENCE.

SO, IF WE CAN TOUCH AND FEEL, IT WE ARE, REALLY, BEING THE GATE KEEPERS FROM FRAUDULENT CLAIMS. IS THAT WHAT WE ARE TRYING TO PREVENT?

YURNS YOUR HONOR THAT, IS WHAT CHAMPION VERSUS GRAY TRIED TO PREVENT.

AND THE PSYCHOLOGICAL HARM FROM WHAT THIS PSYCHOLOGIST DID?

IF SHE SOFERD PSYCHOLOGICAL HARM, THEN WE CANNOT, THE JUSTICE SYSTEM SHOULD NOT BE REQUIRED TO TRY TO QUANTIFY THIS.

HAS THERE BEEN ANY FLORIDA CASE WHICH HAS DEALT WITH THE ISSUE THAT JUSTICE PARIENTE IS TALKING ABOUT, IN A PROFESSIONAL MALPRACTICE CASE, THAT YOU ARE AWARE OF?

YOUR HONOR, I AM NOT SURE OF THAT EXACT ISSUE, BUT I WILL SAY, THIS AS WELL. I THINK WHAT WE ARE -- ONE OF THE THINGS THAT WE MIGHT BE UNINTENTIONALLY AGO NORING IS THE -- IGNORING, THE UNINTENTIONAL INFLICTION OF DISTRESS. I DO NOT KNOW WHERE MR. -- WHY MR. CARTER DID NOT PLEAD IT IN THIS CASE. THE TRIAL COURT BELOW SAID THAT IS A CAUSE OF ACTION IN THIS PARTICULAR CASE, AND AT ONE TIME IT WAS PLED IN ONE OF HIS COMPLAINTS, AS INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, SO IT WAS ABANDONED, AND THE MEANS BY WHICH THERE CAN BE A PRIVATE RIGHT OF ACTION AGAINST A PSYCHOLOGIST OR PSYCHIATRIST OR OTHER HEALTH CARE PROFESSIONAL, SIMPLY FOR EMOTIONAL OR PSYCHOLOGICAL DAMAGES THAT, IS EMOTIONAL DISTRESS. WHAT I AM TALKING ABOUT, HERE, A NEGLIGENCE CLAIM THERE. CAN BE NO EMOTIONAL NEGLIGENCE SHOWING, WITHOUT A SHOWING OF HARM. THAT IS LONG JURISPRUDENCE IN THIS CASE, AND THE RECOURSE PRIDED -- PROVIDED BY THE STATUTE, UNDER WHICH HE IS TRYING TO SUE, IS THE HEALTH CARE ORGANIZATION, WHICH PUNISHS THE DOCTORS FOR BREACH CONFIDENTIALITY. ANOTHER ISSUE IS NOT PUNISHING SOMEONE, IS IT? THE ISSUE THAT WE ARE TRYING TO DECIDE IS WHETHER THE COURTS ARE NOT TRYING TO PUNISH THE PSYCHIATRIST.

THAT IS WHAT THE SUPREME COURT SAID AND THIS COURT SAID, AND I HAVE A PROBLEM PRONOUNCING THE NAME. IN THE CORE A LOUISE A CASE, IT TOLD -- LUISA -- IN THE CORA LUIS A CASE, ON -- CORA LUIZA CASE, WE NEED TO TALK ABOUT A REMEDY OF IT. IF THIS COURT IS SITTING, AS PART OF ITS JURISDICTION, AS REMEDY, RATHER THAN JUST AWARDDING DAMAGES, THEN I WOULD POINT OUT TO THE COURT THAT THERE IS A MEANS AND PROCESS IN PLACE THAT DOES REMEDY THESE TYPES OF DOCTORS, PHYSICSS, PSYCHOLOGISTS OR PSYCHIATRISTS WHO STEP OUT OF LINE AND VIOLATE. AND THEY DON'T GO UNREMEDIED. THE STATUTES ARE THERE, AND IT IS REGULATED BY THE --

EVEN IF THIS PLAINTIFF HAD CLAIMED SOME PHYSICAL MANIFESTATION, YOU WOULD, STILL, BE ARGUING THAT THE UNDERLYING TORT SHOULDN'T BE RECOGNIZED. IN OTHER WORDS THAT THERE SHOULDN'T AND PRIVATE CAUSE OF ACTION FOR THE BREACH OF THE DOOTY?

I THINK I -- DUTYY?

I THINK I MISSED PART OF YOUR QUESTION, YOUR HONOR.

YOU ARE SAYING THAT THERE IS RECOURSE. THAT THERE CAN BE PUNISHMENT FOR VIOLATION OF THE STATUTE. MAYBE THIS IS GOING BACK TO MY EARLIER QUESTION. ARE YOU SAYING THAT WE SHOULD NOT EVEN RECOGNIZE THE CAUSE OF ACTION THAT IS ATTEMPTED TO BE PLED, WHICH IS A BREACH OF THE STATUTORY DUTY, EVEN IF IT HAD RESULTED IN PHYSICAL MANIFESTATION OF THE INJURIES?

WELL, NO, BECAUSE THERE YOU HAVE -- YOU DON'T NEED TO PLEAD -- YOU CAN PLEAD A NEGLIGENCE PER SE ACTION, BECAUSE YOU HAVE GOT A NEGLIGENCE COUNT WITH DAMAGES. THAT IS A LITTLE BIT DIFFERENT THAN JUST --

WHAT WOULD BE THE NEGLIGENCE BE?

THE NEGLIGENCE, PER SE, WOULD BE OBVIOUSLY JUST LIKE THERE IS NO PRIVATE RIGHT OF ACTION UNDER A TRAFFIC STATUTE, BUT YOU CAN PLEAD NEGLIGENCE, PER SE, AS A RESULT OF RUNNING A STOP SIGN. THERE IS NO PRIVATE RIGHT OF ACTION. YOU CAN'T SUE SOMEBODY FOR RUNNING A STOP SIGN. YOU SUE THEM FOR NEGLIGENCE, AS A NEGLIGENCE PER SE COUNT, USING THE STATUTE AS THE LEVEL OF NEGLIGENCE. IF MR. CARTER WERE TO HAVE PLED THIS CASE AS A NEGLIGENT, OR AS A NEGLIGENCE PER SE CASE, USING THE STATUTE AS THE STANDARD OF NEGLIGENCE THAT WAS VIOLATED, HE, STILL, WOULD BE STUCK WITH THE IMPACT DOCTRINE AT THE VERY END OF IT. IF HE COULD PLEAD, THOUGH, AS YOU JUST POINTED OUT, YOUR HONOR, IN YOUR HYPOTHETICAL, IF HE HAD PLED AND IF HE COULD HAVE PLED PHYSICAL MANIFESTATION OF HARM, USING THIS PARTICULAR STATUTE AS A NEGLIGENCE, PER SE, STATUTE, THEN HE WOULD HAVE HAD A CAUSE OF ACTION, BUT HE DIDN'T DO THAT. WHAT HE SAID WAS THIS IS A NEGLIGENT BREACH OF A DUTY OF CONFIDENTIALITY AND SHOULD BE ACTIONABLE UNDER THE STATUTE. IT IS A SUBTLE DIFFERENCE BUT A VERY IMPORTANT ONE. LIKE I POINTED OUT A MINUTE AGO, IN MY ANALOGY, THERE IS NO PRIVATE ACTION FOR RUNNING A STOP SIGN, BUT YOU CAN, ALWAYS, POINT AT THAT STATUTE AND USE IT AS A NEGLIGENCE PER SE LEVEL OF STANDARD THAT ONE SHOULD FOLLOW, IF THERE IS A PHYSICAL MANIFESTATION OF HARM.

WOULD YOU ADDRESS THE QUESTION I POSED EARLIER, WITH REGARD TO WHAT THE JURISPRUDENCE ACROSS THIS COUNTRY IS, ON PRIVACY. INVASION OF PRIVACY. IS IT ALWAYS IN THE INTENTIONAL REALM? CAN YOU HAVE A NEGLIGENT INVASION OF PRIVACY, BECAUSE CERTAINLY YOU AGREE THAT FLORIDA RECOGNIZES THE TORT OF INVASION OF PRIVACY AND HAS, SINCE THE EARLY '40s.

YOUR HONOR, I COULD ADDRESS THAT QUESTION, BUT I WANT TO BE ABSOLUTELY FRANK WITH THE COURT, BECAUSE THAT WAS NOT PLED BELOW, I REALLY COULDN'T ARGUE IT. I -- COULDN'T ARGUE IT. I DIDN'T RESEARCH IT. IF THE COURT WANTS ME TO ANSWER --

THAT IS WHAT HAPPENS IN A PRIVACY VIOLATION OR IN THE TORT OF THAT PRIVACY IS THAT YOU ARE EXPOSING THINGS TO THE PUBLIC THAT SHOULDN'T BE EXPOSED, SO I SEE IT AS BEING A SIMILAR CONCEPT. MAYBE IT IS THAT IT ISN'T AN INTENTIONAL TORT OR --

I WOULD THINK THAT MR. CARTER, AND I THINK, AND, AGAIN, I DON'T WANT TO MISLEAD THE COURT TO THINK THAT I HAVE RESEARCHED IT. I DO NOT KNOW WHAT THE ELEMENTS ARE FOR THIS PARTICULAR ARGUMENT, BECAUSE I HAVEN'T ADDRESSED IT, BUT I DO WANT TO POINT OUT, AND I DO THINK THAT IT IS AN INTENTIONAL TORT. I WOULD THINK THAT THERE SHOULD BE SOME ELEMENT THAT WOULD REQUIRE THE DEFENDANT OR THE VIOLATOR TO HAVE SOME KNOWLEDGE OF INACCURACY OR SOME KNOWLEDGE THAT THIS IS SOMETHING THAT COULD HARM THE PERSON BY REVEALING IT, BEFORE THERE COULD BE SOME CAUSATION OR DAMAGES.

AGAIN, I AM TALKING OFF THE TOP OF MY HEAD. IT WASN'T PLED BELOW, AND IT ISN'T AN ISSUE IN THIS CASE, AND I APOLOGIZE FOR NOT HAVING PREPARED FOR THAT. I DIDN'T KNOW IT. TO FINISH UP, MEMBERS OF THE PANEL, AS I HAVE ARGUED, I THINK, STRENUOUSLY HERE, THIS IS A CASE THAT INVOLVES, REALLY, TWO ISSUES, AND THE ISSUES, AS JUSTICE WELLS HAS JUST POINTED OUT, CHIEF JUSTICE WELLS HAS JUST POINTED OUT, AND AS JUSTICE PARIENTE HAS QUESTIONED ME EXHAUSTEDLY, THIS IS A CASE THAT IS ABOUT THE TWO ISSUES THAT HAVE TALKED ABOUT, WHICH IS WHETHER OR NOT THERE EXISTS A PRIVATE RIGHT OF ACTION UNDER THE STATUTE AND WHETHER OR NOT THERE IS A NEGLIGENCE CAUSE OF ACTION. IMPACT RULE BARS NEGLIGENCE THERE. IS NO PRIVATE RIGHT OF ACTION UNDER GREEN. I WOULD ASK THE COURT TO AFFIRM THE FIFTH DISTRICT COURT OF APPEALS BELOW. THANK YOU.

IN REBUTTAL, THE ONLY COMMENT THAT I WOULD, HAVE FOR THE COURT IS THAT THE WHOLE PURPOSE OF THIS STATUTE, AS YOU LOOK AT IT, IS TO HELP SOMEONE. THESE PEOPLE HAVE MENTAL PROBLEMS OR THEY HAVE SOME MENTAL ANGUISH GOING ON IN THEIR LIFE, THAN IS WHY THEY COME TO THIS PERSON. TO SAY THAT HE CAN BE PUNISHED BY THE STATE BEGS THE QUESTION. THE STATUTE IS ENACTED TO PROTECT THE PATIENT, SO THAT THE PATIENT CAN FLEELLY -- FREE DISCLOSE INFORMATION AND GET HELP FROM THIS PROFESSIONAL, WHO IS SPECIFICALLY AUTHORIZED TO PRACTICE IN THIS AREA.

IS HE A LICENSED PSYCHOLOGIST?

YES, SIR, IS HE, AND, JUNE -- HE IS, AND THEY ARE NOT PART OF THE PRESUIT. YOU DON'T HAVE TO PRESUIT A LICENSED PSYCHOLOGIST.

THEY ARE NOT COVERED BY 766?

NO.

YOUR CAUSE OF ACTION FLOWS FROM THE VIOLATION OF THE STATUTE. THAT IS THE PAGE THAT YOU WOULD HANG IT ON, HANG YOUR HAT ON.

THAT'S CORRECT, YOUR HONOR. THE STATUTE IS SET UP TO HELP THE PATIENT. PUNISHING HIM DOESN'T DO ANYTHING TO HELP HER AND HER HUSBAND, BECAUSE THEY ARE THE VICTIMS. THEY WENT THERE RELYING ON THE STATUTE, SO.

DO YOU AGREE THAT, IF THIS WAS SIMPLY PLED AS A NEGLIGENCE ACTION, THAT IS NEGLIGENCE IN THE TREATMENT OF THE PATIENT, THAT, UNDER OUR JURISPRUDENCE, THAT YOU WOULD HAVE TO HAVE ESTABLISHED THAT YOUR CLIENT HAD A PHYSICAL MANIFESTATION FROM THE NEGLIGENCE?

I WOULD, YOUR HONOR. IT IS THE SAME -- HOWEVER WE HAVE GOT IT PLED NOW. I MEAN, EVEN IF WE SAID THAT IT WAS, YOU KNOW, SOLELY STATUTORY, THE -- THERE WOULD, STILL, THE IMPACT DOCTRINE SAYS WE WOULD STILL HAVE HAD TO HAVE HAD A PHYSICAL MANIFESTATION.

THANK YOU, MR. CARTER.

THANK YOU.

THANK YOU, COUNSEL, TO YOUR HELP IN THIS CASE. THE COURT WILL BE IN RECESS. THE MARSHAL: PLEASE RISE.