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Fla. Dept. of Corrections v. Lisa M. Abril

CHIEF JUSTICE: NEXT CASE ON THIS MORNING'S CALENDAR IS FLO RIDA DEPARTMENT OF CORRECTIONS VERSUS L ISA ABRIL

MAY IT PLEASE THE COURT. GOOD MORNING. MY NAME IS D AVID GLANTZ REPRESENTING THE DEPARTMENT 6 CORRECTIONS . THE DEPARTMENT OF COR RECTIONS . THE RULE OF LI NITY PROVIDES THAT RULE 3.404 B E CR UCIAL IN ADMINISTRATIVE PUNISHMENT.

WHY DON'T W E ANALYZE THIS CASE ON THE BASIS R A THER THAN, AS THIS COURT HAS SINCE THE 1930s , ON THE BASIS OF WHETHER A VIOLATION OF THE STATUTE IS NEGLIGENCEPER SE .

BECAUSE , JUSTICE WEL LS, IN MURPHY VERSUS SINNHOFF, THIS COURT STATED THAT LEGISLATIVE INTENT RA THER THAN THE DUTY TO PROTECT A CLASS OF INDIVIDUALS , BE THE TEST BY WH ICH A COURT CAN INFER WHETHER A STATUTE SUPPORTS A PR IVATE

SO IT I S YOUR POSITION THAT MUR PHY REREADED FR OM DEJESUS?

YES , YOUR HONOR.

DID IT SPECIFICALLY DO THAT?

NOT

DID IT MENTION IT?

NOT IN SPECIFIC TERMS, YOUR HO NOR, BUT IN MURPHY VSINNHOFF, THE COURT SAID , WE WILL NOT LOO K TO WHETHER, WHICH , BY THE WAY, IS ESSENTIALLY THE SAME AS THE RESTATEMENT TESTIMONY. WE WILL NOT LOOK T O WHETHER A STATUTE IS DESIGNED TO PRO TECT A CL ASS OF INDIVIDUALS.WE WILL LOOK TO WHETHER THE LEGISLATURE INTENDED TO CREATE A REME DY. AND THE DEJESUS CASE , I BELIEVE, TALKED MORE ABOUT USING A STATUTE AS A STANDARD OR EV IDENCE OF NEGLIGENCE AND NOT, AS O PPOSED TO W HETHER IT SPECIFICALLY CREATED A CAUSEOF ACTION , S O THE PROPOSITION THERE IS VIOLATION OF A STATUTE , IS IT EVI DENCE OF SOME NEGLIGENCE OR CAN IT BE USED TO CREATE A PRESUMPTION OF NEGLIGENCE?

NEGLIGENCE PER SE.

CORRECT , YOUR HONOR.

RIGHT. WHICH HAS BEEN THE LAW EVER SINCE I PRACTICED LAW IN FLORIDA.IT COMES AS SOMEWHAT OF A SURPRISE TO ME THAT MURPHYRECEDED FROM THAT.THAT IS WHAT I AM HAVING TROUBLE WITH . I WOULD LIKE YOUR HELP ON THAT SPECIFIC POINT. I MEAN, WAS IT SUBSALENT-RESCISSION?

IT WAS NOT SPECIFIC. IT WAS NOT EXPRESS WITHIN THAT DE CISION . IT IS CLEAR FROM THE MURPHY CASE THAT, THE COURT HAS TO CON SIDER WHETHER THE LEGISLATURE INTENDED TO CREATE A REMEDY , AND THE DISTRICT COURT DID THOUGHTCONSIDER THAT TEST. IT CONSIDERED A R E STATEMENT OF THE TEST IN F AVOR OF A CAUSE OF ACTION FROM THIS STATUTE .

DID THE COMPLAINT ALLEGE A VIOLATION OF STATUTE OR DID IT ALLEGE COMMON LAW AND NEGLIGENCE OR BOTH?

JUSTICE CANTERO, THE TEXT OF THE COMPLAINT DID NOT. IT DID, HOWEVER, INCORPORATE TWO AFFIDAVITS AT 104 AND 106 OF THE RECORD, AND THOSE AFFIDAVITS, ONE FROM A PHYSICIAN AND ONE FROM A LICENSED HEALTH CARE MANAGER, SPECIFICALLY REFER TO THIS STATUTE.

WHAT CAUSE OF ACTION DID THE COMPLAINT ALLEGE?

MEDICAL MALPRACTICE. IT FOUNDED UPON MEDICAL MALPRACTICE. IT IS ALLEGED THAT THE LABORATORY WAS A PROVIDER AND THAT ITS STANDARD OF CARE SHOULD HAVE PREVENTED IT FROM DISCLOSING MRS. ABRIL'S IDENTITY AND THE RESULT OF HER TEST, OUTSIDE OF THE PEOPLE WHO WERE AUTHORIZED TO LEARN OF IT.

WHAT IS WRONG WITH THAT? IN OTHER WORDS, WHY CAN'T, REGARDLESS OF THE STATUTE, WHY ISN'T THERE A CAUSE OF ACTION FOR A LABORATORY BREACHING A DUTY TO ACT AS A REASONABLY CAREFUL PROFESSIONAL LAB, NOT TO DISCLOSE THIS TYPE OF HIGHLY CONFIDENTIAL INFORMATION?

IT IS SUCH IF SUCH A DUTY EXISTED, THERE WOULD BE NOTHING WRONG WITH, IT AND THAT IS WHERE WE HAVE THE PROBLEM IN THIS CASE. THE DUTY ELEMENT, DOES IT EXIST? THERE IS CERTAINLY NO COMMON LAW PRECEDENT, NO COMMON LAW TRADITION ESTABLISHING THAT THERE IS A SPECIAL DUTY OF CONFIDENTIALITY BETWEEN LABORATORY AND A LABORATORY PATIENT, AND THERE IS CERTAINLY NO EXPRESS STATUTORY CAUSE OF ACTION.

IF WE ASSUME THAT THAT IS CORRECT IN THE LAB, COULD SEND THE REPORTS TO THE TALLAHASSEE DEMOCRAT AND WE COULD PUBLISH THOSE IN THE UP IN. I MEAN, THAT JUST, THAT IS WHAT YOU ARE SAYING IS THAT THERE IS NOTHING IN THE WORLD THAT WOULD STOP THEM FROM DISSEMINATING WHENEVER, WHEREVER, THEY DESIRE, ANY INFORMATION. WHETHER IT HARMS SOMEONE OR NOT. ANOTHER COMPLAINT WAS PLEADED AS A NEGLIGENT TORT, AND THAT IS REALLY WHY WE ARE HERE, BECAUSE IF IT WERE NOT PLEADED AS A NEGLIGENT TORT, THE "IMPACT RULE" QUESTION WOULD NOT BE BEFORE THIS COURT.

AGAIN, IT COMES BACK THAT JUST IN THE ABSTRACT, THAT THEY CAN DO WHAT EVER THEY WANT WITH THAT INFORMATION, AND THERE IS NO RECOURSE UNDER ANY COMMON LAW THEORY IS REALLY WHAT THE ESSENCE OF YOUR ARGUMENT IS. JUST FOR GOT THE STATUTE. ABSOLUTELY IN THE FIELD OF HUMAN EVENTS, UNDER THESE CIRCUMSTANCES, THAT THEY CAN JUST DO WHAT THEY WANT WITH THAT.

PERHAPS NOT UNDER A NEGLIGENCE NEARLY. A NEGLIGENCE THEORY, FOR EXAMPLE, A NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS, POSSIBLY UNDER, AS INTENTIONAL TORT, THAT, OF COURSE, IS NOT HOW THIS COMPLAINT WAS PLEADED.

WHAT CASE SAYS THAT THERE ISN'T SUCH A DUTY? PEOPLE HAVE THE LAB TESTS, WHETHER SOMEBODY HAS ANY NUMBER OF DISEASE OR CONDITIONS, DRUG SCREENING, AND ARE YOU SAYING THAT, UNDER NO CIRCUMSTANCES IS THERE A DUTY TO EXERCISE REASONABLE CARE TO MAKE SURE THAT THOSE TESTS GO TO EITHER THE, WHOEVER ORDERED THE TEST OR TO THE PATIENT, HIMSELF OR HERSELF, THAT THAT IS JUST NOT PART OF THEIR DUTY OF REASONABLE CARE?

I AM NOT SAYING THAT. IN THIS CASE THERE IS A DUTY ANY THE SENSE THAT THE LEGISLATURE HAS MADE IT A CRIME TO DO SO, AND HAS DONE SO IN ORDER TO PROTECT

THAT IS HOW MUCH THAT, IS A SUPER DUTY , BUT IRREGARDLESS OF WHAT THE LEGISLATURE WOULD SAY , WOULDN'T JUST A REASONABLY CAREFUL LAB NOT WANT LAB TESTS TO GO TO THOSE OTHER THAN THE INDIVIDUAL THAT ORDERED IT OR TO THE PATIENT ?

ONE WOULD THINK SO . A GAIN , IN THE COMMON LAW TRADITION , THERE HAS NEVER BEEN RECOGNIZED , A SPECIAL DUTY SUCH AS WOULD SUPPORT A CAUSE OF ACTION.

BUT EXPRESSLY EXCLUDED. IS THERE A CASE THAT SAYS IT DOESN'T EXIST OR MAYBE BEFORE FAX MACHINES, IT WAS JUST LESS LIKELY THAT THIS TYPE OF VIOLATION COULD OCCUR.

I AM NOT AWARE AFTER CASE THAT SETS IT IS I AM NOT AWARE OF A CASE THAT SAYS IT IS EXCLUDED.

ALL PART OF WHAT IS REASONABLE DUTY OF CARE UNDER THE CIRCUMSTANCES , JUST ORDINARILY JUST ORDINARY NEGLIGENCE.

PERHAPS IN THIS CASE THE COMPLAINT, ALTHOUGH THE PLAINTIFFS ARE NOT DEFENDING THE DISTRICT COURT'S OPINION AND AS I UNDERSTAND THEIR BRIEF, THEY ARE NOT CLAIMING THAT THE CAUSE OF ACTION RISES UNDER THE STATUTE. THEIR COMPLAINT NEVERTHELESS , IS BUILT UPON AFFIDAVITS , TWO OF WHICH SPECIFICALLY REFER AND REFER ONLY TO THE STATUTE .

ARE THESE THE AFFIDAVITS , SINCE THEY WERE TRAVELING UNDER THE MEDICAL MALPRACTICE STATUTE THAT , THEY FELT THEY NEEDED THE AFFIDAVITS.

THAT'S CORRECT. THEY ARE REQUIRED TO HAVE A PROFESSIONAL SHOW THAT THERE IS A RECORD REVIEW THAT HAS BEEN PERFORMED AND THERE IS SOME EVIDENCE OF NEGLIGENCE. THOSE AFFIDAVITS , THE FIRST TWO AT 104 AND 106 OF THE RECORD, DO NOT REFER TO ANY DUTY , OTHER THAN REFERRING TO THE STATUTE. THEY DO NOT SAY IT HAS LONG BEEN RECOGNIZED IN A CLINICAL LABORATORY, MUST SAFEGUARD THE PRIVACY

AREN'T WE GOING AROUND IN CIRCLES, HERE , THOUGH , STARTING WITH JUSTICE CANTERO 'S QUESTION , THAT HE ASKED YOU WHETHER OR NOT WASN'T , WHAT KIND OF CAUSE OF ACTION HERE, AND EVENTUALLY YOU SAID MEDICAL MALPRACTICE , BUT I THINK I HAVE HEARD YOU ARTICULATE LATER , THAT, REALLY, WHAT WE HAVE HERE IS A COMMON LAW NEGLIGENCE CLAIM. IS THAT CORRECT?

IS THAT CORRECT? YOU KNOW , YOU ARE SHIFTING , AND I AM HAVING DIFFICULTY WITH YOUR ARGUMENT , BECAUSE I DON'T KNOW WHAT YOU ARE FOCUSING ON . ARE WE TALKING ABOUT WHAT KIND OF CAUSE OF ACTION IS ALLEGED HERE, OR ARE WE TALKING ABOUT WHAT KIND OF PROOF IS SUBMITTED TO PROVE THE CASE? WHAT IS THE ISSUE INVOLVED THAT IS BEFORE THIS COURT?

WELL , WE ARE HERE ON A CERTIFIED QUESTION, OF COURSE.

WHAT IS THE CERTIFIED QUESTION. MAYBE I WILL - -

WHETHER THE "IMPACT RULE" APPLIES TO BAR A CLAIM FOR PURELY EMOTIONAL INJURIES , WHICH ARE CAUSED BY A BREACH OF SECTION 381.004.

WELL , IF WE HAVE A COMMON LAW CAUSE, WHY WOULDN'T THE BETTER POLICY BE TO RECOGNIZE A DUTY OF CONFIDENTIALITY UNDER THE CIRCUMSTANCES THAT ARE PRESENTED HERE ?

THE , UNDER THESE CIRCUMSTANCES?

RIG HT .

THERE HAS BEEN NO PRECEDENT. THIS COURT, OF COURSE , COULD RECOGNIZE SUCH.

I AM ASKING YOU POL ICY WEISS , WHY WOULDN'T IT BE A BETTER POLI CY TO RECOGNIZE A DUTY NOT TO BREACH THE CONFIDENCE Y AFT CONFIDENTIALITY OF THESE TEST RESULTS. SOMEBODY ASKED YOU A QUESTION ABOUT, WELL, CAN YOU JUST TAKE TEST RE SULTLIKE THIS AND PUBLISH THEM IN THE TALLAHASSEE DEMOCR AT. ALL RI GHT. AND ANY I THINK, OF COURSE, YOU REACTED T O THAT, NO , INSTINCTIVE LY, I DON'T THINK THAT WOULD , IT WOULD BE AN INVASION OF PRIVACY AND WHATEVER. SO WHY WOULDN'T THE BE TTER P OLICY BE TO RECOGNIZE A DUTY NOT TO DISCLOSE THIS CONFIDENTIAL INFORM ATION?

IT MIGHT WELL BE A GO OD POLICY. WE ARE TALKING

IF THAT IS THE CASE , THEN ISN'T THAT PRE TTY MUCH ACKNOWLEDGING THAT THERE PROBABLY IS A CAUSE OFACTION HERE, AND WHY WOULDN'T THE STATUTE COME INTO PLAY M UCH IN THE WAY JUSTICE WELLS ALL UDED TO , AND THAT IS THAT , IF YOU HAVE GOT THIS K IND OF A STATUTE , WHY COULDN'T THAT BE USED , THEN , IN THE TR IAL OF THE CASE , TO DEMONSTRATE AS EVID ENCE , OF A BREA CH OF THIS COMMON LAW DUTY ?

WELL , I BELIEVE THAT THAT IS DIF FERENT FROM FI NDING THAT IT SUPP ORTS THE CA USE OF ACTION. THE

BUT DID THE SECOND DISTRICT ACT UALLY SAY THAT THE STATUTE CREATED A NEWCAUSE OF ACTION? AS I READ THEIR OP INION , THEY ARE S IMPLY SAYING THAT THE STATUTE CRE ATES BACK TO WHAT ALL THE OTHERS HAVE TALK ABOUT, A DUTY. THE STATUTE CREA TED FOR THE LAB, A DUTY OF CONFIDENTIALITY , NOT TO DISSEMINATE THE LAB RES ULTS, TO OTHERS , OTHER THAN THE P ERSON WHO , RE PORT IT WAS OR THE ONE WHO SE NT FOR THE LAB TO DO THE WORK, SO IF THE SECOND DISTRICT IS , REALLY , JUST SAYING THAT THE STATUTE CREATES A DUTY , WHERE IS THE PROBLEM HERE ? BECAUSE AS I UNDERSTAND YOUR BRI EF , ACTUALLY SAYS THAT THE SECOND DISTRICT CREATED A NEW CAUSE OF ACTION .

WE THINK IT IS IMPLICIT IN FOOT NOTE ONE OF THE COURT 'S DECISION, THAT CONFIDENTIALITY CREATED UNDER THE STATUTE IS APPLICABLE.

THAT IS TWO DIF FERENT THINGS. I THINK WHAT WE ARE HAVING A PROBLEM WITH HERE IS T HAT ADUTY AND A CAUSE OF ACTION ARE TWO DIFFERENT ENTI TIES. THE DUTY , OF COURSE , IS ONEOF THE ELEMENTS THAT YOU HAVE TO HAVE IN A NEGLIGENCE CAUSE OF ACTION . SO I AM ST IL L NOT SURE WHERE YOU ARE GOING WITH THIS.I AM HAVI NG THE SAME PROBLEM, I THINK , JUSTICE ANSTEAD IS HAVING, IS , ARE YOU ARGUINGTHERE IS NO CAUSE OF ACTION OR ARE YOU ARGUING THAT THE STATUTE DID NOT CREATE A DUTY?

WE ARE ARGUIN G THAT THE STATUTE DID NOT CREATE A DUTY FROM WHICH THE COURT COULD INFER A CAUSE OF ACTION. WE BELIEVE THAT IS WHAT THE DISTRICT COURT DID .

LET M E MOVE , IF YOU WOULD , TO THE CE RTIFIED QUESTION , AND TELL US YOUR PO SITION ON , IF THE F ASE CASE DOES NOT CONTROL THIS , WHAT CASE DO YOU CO NTEND CONTROLS THIS ON THE "IMPACT RU LE" ?

WE BELIEVE GRACIE IS NOT CONTROLLING , BECAUSE THE DISTRICT COURT USED GR ACIE TO EXPAND THE "IMPACT RU LE" , BEYOND BE YOND THE RELATIONSHIP THAT WAS AT ISSUE IN GRAC IE . IN GRAC IE IT WAS A COUNSELING RELATI ONSHIP , A ONE-ON-ONE RELATIONSHIP. HERE WE HAVE SOMETHING ELSE ENTIRELY. WE HAVE A RELATIONSHIP BET WEEN LABORATORY AND A PATIENT, AND WE , ALSO , HAVE A THIRD PARTY , THE DEPARTMENT OF CORRECTIONS IS BEING SUED , WHERE IT HAD NO RELINGTS SHIP WITH THE PLAINTIFF RELATIONSHIP W ITH THE PLAINT

IFF. SO WE THINK THAT GRACIE IS NOT ANALOGOUS FOR THAT REASON, BECAUSE IT SHOULD NOT APPLY TO THIS RELATIONSHIP. THE "IMPACT RULE" QUESTION, I THINK, WOULD BE CONTROLLED MORE BY CASES SUCH AS RJ, WHICH FOUND THAT AB SENT EITHER THE IMPACT OR THE ACTUAL PHYSICAL MANIFESTATION AFTER EMOTIONAL INJURY, WHICH SHOULD NOT BE APPLICABLE. THE GRACIE CASE, HOWEVER, WE BELIEVE WAS MISAPPLIED BY THE DISTRICT COURT.

ARE THERE OTHER CASES AROUND FLORIDA, WHERE THIS TYPE OF INFORMATION OR SIMILAR INFORMATION HAS BEEN INADVERTENTLY RELEASED, THAT THE "IMPACT RULE" HAS APPLIED TO, TO CAUSE A LOSS OF RECOVERY OR NONRECOVERY CIRCUMSTANCE THAT YOU ARE AWARE OF?

A RELEASE OF INFORMATION SUCH AS THIS?

RIGHT.

I AM NOT FAMILIAR WITH ONE.

NONE AT ALL. NO OTHER HIV CASES ANYWHERE?

WELL, THE RJ CASE DIDN'T INVOLVE A RELEASE OF INFORMATION. I BELIEVE THAT IT WAS ALLEGED THAT THERE WAS A MISDIAGNOSIS IN THAT CASE, WHICH CAUSED

IS THAT A DIFFERENCE, DO YOU THINK THAT IS A DIFFERENCE OR IS THAT THE SAME?

I THINK IT IS A DIFFERENCE, BECAUSE IN THIS CASE, THE, ALTHOUGH THERE WAS A MISDIAGNOSIS, IT WAS REALLY NOT A TISSUE IN THE CASE. IN THIS CASE IT WAS SIMPLY THE RELEASE OF THE INFORMATION.

BUT, AGAIN, SHOULD THERE BE A DIFFERENCE IN THE "IMPACT RULE", IF THE BASIS IS NOT A MISDIAGNOSIS, BUT THE RELEASE OF INFORMATION?

NO. THERE SHOULD NOT BE A DIFFERENCE. NO. THERE SHOULD NOT BE A DIFFERENCE.

WHY NOT?

THE COURT DOES REACH THE "IMPACT RULE" IN THIS CASE, IT SHOULD ADHERE TO THE "IMPACT RULE" AND FIND THAT IT IS NOT APPLICABLE TO THIS CASE.

WHY? YOU SAY THAT, BUT GIVE US SOME REASONS WHY YOU ASSERT THAT THAT SHOULD NOT BE THE CASE.

WELL, BECAUSE WE HAVE THE, IT GOES TO THE BASIC REASONS THAT THE "IMPACT RULE" EXISTS. IT IS TO SERVE AS A CHECK ON EMOTIONAL DAMAGES THAT COULD BE HARD TO ASCERTAIN OR HARD TO ESTABLISH.

HASN'T TRADITIONALLY, THE "IMPACT RULE" NOT BEEN APPLIED TO CAUSE OF ACTION SUCH AS INVASION OF PRIVACY? AND ISN'T THIS MORE ANALOGOUS TO THAT KIND OF TORT?

THIS A CASE WAS NOT TREATED AS SUCH. THE PLAINTIFFS DID NOT MAKE AN ANALYSIS THAT THE RELEASE OF THIS INFORMATION, ALTHOUGH IT WAS NEGLIGENT IN THE FACT THAT IT WAS NOT DONE WITHIN THE INTENT.

WHY ISN'T THAT A GOOD ANALOGY?

THE, ALL I CAN SAY IS, THAT, BECAUSE THE COMPLAINT WAS PLEADED, IN NEGLIGENCE IT IS MEDICAL MALPRACTICE AND NOT AS AN INTENTIONAL TORT. THE, IT IS ANALOGOUS. HOWEVER, AS THE COMPLAINT IS PLEADED, I THINK THE "IMPACT RULE" DOES HAVE TO APPLY.

THANK YOU .

THANK YOU.

GOOD MORNING. DICK MOUNTS FOR THE AB RILS .

CHIEF JUSTICE: AS I UNDERSTAND IT, YOU ARE GOING TO SPLIT SPLIT YOUR TIME TEN MINUTES AND TEN MINUTES. A RED LIGHT WILL COME ON .

DO YOU AGREE THAT YOU WILL NOT PLEAD AN INTENTIONAL TORT?

YES. I DO, SIR .

SO BASICALLY YOUR POSITION IS THAT THE "IMPACT RULE" SHOULD NOT APPLY IN THIS CASE.

YES, SIR.

AND WHY IS THAT?

THIS , I BELIEVE , THE "IMPACT RULE" SHOULD NOT APPLY , BECAUSE THE DAMAGES HERE THAT ARE FROM AN UNAUTHORIZED DISCLOSURE OF AN AIDS RECORD , IS BY DEFINITION, A PRIVACY ISSUE. AND I FEEL THAT THIS CASE FALLS IN LINE WITH PREVIOUS DECISIONS THAT THIS COURT

SO IT IS YOUR POSITION, NO MATTER HOW INADVERTENT THE DISCLOSURE, THAT IT IS SIMPLE NEGLIGENCE WOULD BE ENOUGH TO HAVE A CAUSE OF ACTION.

YES, SIR.

YOU WOULD AGREE THAT , IN FLORIDA , THAT THE , UP THROUGH TODAY , THE "IMPACT RULE" IS A GENERAL APPLICATION IN NEGLIGENCE CASES .

NO, SIR.

YOU WOULD NOT?

I WOULD DISAGREE WITH THAT.

OKAY. IT WAS MY , WHAT I AM TRYING TO GET TO , IS THE FACT THAT , IN, THE "IMPACT RULE" IS THE GENERAL APPLICATION, AND WE HAVE DRAWN SOME EXCEPTION TO SAY IT, CORRECT?

YES, SIR. YES, SIR.

OKAY. AND SO IT IS A GENERAL APPLICATION , BUT WE HAVE DRAWN SOME EXCEPTIONS.

YES, SIR.

BUT THAT A LINE OF DEMARCATION WHICH BEGAN THE "IMPACT RULE" , WAS A LINE BETWEEN INTENTIONAL TORTS AND NEGLIGENCE .

> THAT BEGAN , YES. NOW WE HAVE HAD CASES OF MEDICAL NEGLIGENCE, WHERE THE "IMPACT RULE" DID NOT APPLY . CUSH V ERSUS LLOYD IS THE CASE THAT I AM PRIMARILY RELYING ON, MEDICAL MALPRACTICE .

THE CASE WAS A CASE THAT HAD TO DO WITH A WRONGFUL LIFE THEORY.

YES, SIR.

AND , SO-CALLED WRONGFUL LIFE THEORY, AND IT WAS A N ACTION IN WHICH THIS COURT DREW AN EXCE PTION , BASED U PON THAT SPECIFIC THEORY OF TRYING TO DETERMINE WHETHER THERE COULD BE OR COUL DN'T BE A DAMAGE IN THAT SPECIFIC TYPE OF SITUATION . ISN'T THAT WHAT WE DID?

YES , IT IS.

NOW, HOW CAN YOU DISTINGUISH THE SITUATION IN R J, IN THE HUMANA CASE , WHERE THERE WAS HIV AND A MISDIAGNOSIS , AND THE MS. DIAGNOSIS , IT WAS A A MS. DIAGNOSIS , IT WAS A NEGLIGENCE CASE , A MALPRACTICE CASE, AND WE APPLIED IN THAT IN STANCE , THE IMPACT RULE , AND HOW CAN THAT CASE LEGITIMATELY BE DISTINGUISHED?

BECAUSE YOUR HONOR, THAT CASE DID NOT INV OLVE THERIGHT OF PRIVACY. THAT CASE INVOLVED THE MISDIAGNOSIS, THE RENDERINGOF THE MEDICAL CARE , AND WHAT OCCURRED SUBSEQUENT TO THAT.

IS THERE A TORT IN FLORIDA THAT HAS BEEN RECOGNIZED OF NEGLIGENT INVASION OF PRIVACY?

A S NEGLIGENT INVASION ? THERE ARE SOME ARTICLES ON THAT, AND I DON'T THINK THERE IS A SPECIFIC CASE THAT DI RECTS THAT TO THAT . B UT THERE HAVE BEEN CASES , AND I BELIEVE THAT IS THE REASON THE TRIAL COURT IN THE COURT OF APP EALS, HAS SENT THIS UP, WHERE NEGLIGENCE HAS BEEN A GROUNDS FOR APPLYING THE EXCEPTION TO THE "IMPACT RULE" . "THE MIAMI HERALD" CASEY CITED , CUSH INDICATES IN ONE OF THE FOOTNOTES, THAT THAT WAS A DEFAMATION , BUT IT WAS A NEGLIGENT CASE .

I GUESS BASICALLY I F WE ACCEPT YOUR ARGUMENT HERE , WE WOULD, IN ES SENCE , REALLY , BE CREATING A CAUSE OF ACTION FOR A COMMON LAW NEGLIGENT INVA SION OF PRIVACY.

YE S, YOU WOULD.

AND BASICALLY IT WOULD BE DOING AWAY WITH THE "IMPACT RULE".

NOT ON THE ISSUE OF PRIVACY, YOUR HON OR. THE ISSUE OF PRIVACY TO ME , HAS BEEN THERE ALL ALONG . I DON'T THINK , I THINK IF THIS CASE WERE DECIDED ON THE ISSUE OF PRIVACY OF THIS PARTICULAR CASE, BECAUSE THAT IS ALL WE ARE SAYING.

WHY SHOULD PRIVACY TR UMP OTHER INTERESTS , WHERE PEOPLE ARE HARMED BY NEGLIGENT ACTIONS?

BECAUSE

W E HAVEN'T RECOGNIZED A CAUSE OF ACTION .

YES. BECAUSE THE PRIVACY SUCH AS DEF AMATION AND THAT TYPE OF THING , YOUR DAMAGES ARE, AND I BELIEVE THE CUSH VERSUS L LOYD INDICATED THEY ARE PARACITIC. THOSE ARE THE DAMAGES YOU ARE GOING TO GET. I THINK IF YOU DON'T RECOGNIZE A NEGLIGENT PRIVACY INVASION AS AN EXC EPTION TO THE "IMPACT RULE" , THEN JUST OPPOSITE IS GOING TO OCCUR. YOU CAN INVADE PRIVACY WITHOUT HAVING ANY DAMAGES.

MAY I APPROACH THIS FROM JUST A LITTLE BIT DIFFERENT VANTAGE POINT T SEEMS TO ME THAT THE "IMPACT RULE" SEEMED TO DEVELOP FROM THOSE KINDS OF CASES THAT SOMEBODY DRIVING DOWN THE STREET AND YELLING SOMETHING FROM A CAR OR BLOWING A HO RN ,

SHOULD NOT BE USED AS A BASIS FOR SOMEBODY WALKING ALONG THE SIDEWALK SAYING I WAS EMOTIONALLY DISTRESSED BY WHAT OCCURRED. AND IT SEEMS AS THOUGH WE ARE, HAVE, MOST OFTEN WE HAVE CONSIDERED THIS "IMPACT RULE" OR WHETHER IT SHOULD NOT APPLY, FROM DOCTOR/PATIENT KINDS OF RELATIONSHIPS, FROM A VERY CLOSE KIND OF INTERACTION BETWEEN TWO PARTIES NOT JUST A GENERAL KIND OF AREA. SO WOULD YOU DISAGREE WITH THAT BACKGROUND AS TO WHERE FLORIDA LAW HAS BEEN OVER THE YEARS?

I WOULD AGREE WITH THAT, YOUR HONOR, AND THIS IS THAT TYPE OF CASE.

THAT IS WHERE I WANT TO GO, IF THAT KIND AFTER GENERAL WORLD THAT WE HAVE BEEN OPERATING IN, HERE WE HAVE A LAB AND THE DOC THAT ARE A LITTLE BIT MORE SEPARATED FROM THE HARM OR FROM THE INDIVIDUAL, FROM THE RELATIONSHIP WITH REGARD TO WHAT WE ARE DEALING WITH. MAYBE YOU SEE IT ABSOLUTELY THE SAME, BUT WOULD YOU DEAL WITH THAT ISSUE, THAT WHY WOULD NOT A LAB AND A D.O. C. BE A LITTLE DIFFERENT SITUATION THAN A PHYSICIAN/PATIENT AND THOSE, AND MAYBE THERE SHOULD BE A DIFFERENT RULE.

I THINK, YOUR HONOR, THERE ARE TWO ISSUES THERE INVOLVED. ONE, IS THE STATUTE ON THE STATE IMMUNITY, INDICATES THAT, IF A LAB IS DOING THIS, IN THE COURSE OF CONDUCT, OF THEIR TORT OF THEIR CONTRACT WITH THE CORRECTIONAL FACILITY, THEN THE CORRECTIONAL FACILITY HAS THE SAME LIABILITY AS THE LAB. THAT GOES BACK TO WHERE THIS CASE STARTED THIS. IS THIS THE FIRST COURT HEARING IN LIVE, THAT WE HAVE HAD IN THIS CASE AND THIS CASE ORIGINALLY STARTED AS MEDICAL MALPRACTICE CASE AGAINST THE LAB. WHEN THEY GOT ME LETTER OF THE PRE-SUIT AND WE FOLLOWED UP ON THE LETTER AND FOUND OUT THEY HAD GONE OUT OF BUSINESS AND THEN THE EMPHASIS SWITCHED TO THE ONLY DEFENDANT I HAD LEFT, WHICH WAS THE STATE, AND THE LIMITED LIABILITY. THAT IS WHERE WE ARE TO DAY.

BUT, A GAIN, ANALYZING THIS TORT RELATIONSHIP AND THE HISTORICAL, SHOULD THERE NOT AND DIFFERENCE BETWEEN THE DOC AND THE LAB AND A PSYCHOLOGIST OR PSYCHIATRIST WITH THAT DOCTOR/PATIENT RELATIONSHIP?

YES. I BELIEVE THERE SHOULD BE A DIFFERENCE EXCEPT FOR THE FACT THAT THE STATUTE SPECIFICALLY SAYS, THAT IN THIS CASE, OTHER THAN THAT, I DON'T THINK WE WOULD HAVE THAT TIE.

OKAY.

IS THERE ANY ALLEGATION

JUSTICE CANTERO.

IS THERE ANY ALLEGATION IN THE COMPLAINT ABOUT THE TYPE OF EMOTIONAL DISTRESS THAT WAS SUFFERED? IS IT SOMETHING THE SHAME INVOLVED IN HAVING THE DIAGNOSIS PUBLISHED TO OTHER PARTIES, OR IS IT THE ENSUING RELATIONSHIP WITH THE COLLEAGUES AT WORK THAT PRODUCED THE EMOTIONAL DISTRESS AND GETTING OSTRACIZED OR SOMETHING LIKE THAT?

THERE IS A LETTER AND AN AFFIDAVIT ATTACHED, BECAUSE I WAS WELL AWARE OF THE ISSUE, OKAY, OF YOU SAY THERE ARE EMOTIONAL ALL DAMAGES, ARE THERE EMOTIONAL DAMAGES, ARE THERE REALLY EMOTIONAL DAMAGES? AND I SENT HER TO DR. AFIELD IN TAMPA. SHE WAS ON XANAX OR ZOLOFT AND SEEING A DESCRIBE SKI TRIS WEEKLY. AT THAT TIME SHE A PSYCHIATRIST WEEKLY. AT THAT TIME SHE HAD A VERY INTENSE AMOUNT OF EMOTIONAL DISTRESS.

WHAT IS DR. AFIELD?

A PSYCHIATRIST.

WOULD YOUR ARGUMENT BE THE SAME IN THIS CASE? WE ARE DEALING WITH HIV HERE. WOULD YOUR ARGUMENT BE THE SAME, IF THE LAB HAD INADVERTENTLY, SAY, DISSEMINATED A REPORT THAT SAID THE PATIENT HAD CANCER. IS YOUR ARGUMENT BASED ON THE FACT THAT, IN OUR SOCIETY, HIV HAS CERTAIN CONNOTATIONS AND THINGS, AND WOULD WE HAVE THE SAME, WOULD YOU ARGUE THAT THE "IMPACT RULE" WOULD NOT BE APPLICABLE, IF THAT REPORT HAD BEEN A CANCER REPORT, SAY?

I THINK YOU WOULD STILL HAVE THE SAME INVASION OF PRIVACY, BUT, CERTAINLY, NOT AS A MEDICAL RECORD THAT IS TAGGED LIKE HIV, ALCOHOL, DRUG ABUSE, PSYCHIATRIC, THOSE FOUR. THEY HAVE SPECIFIC, IN FACT THE INTRODUCTORY PARAGRAPH TO THE HIV TESTING STATUTE, SAYS, THE LEGISLATURE SAID WE ALREADY HAVE STANDARDS FOR CONDUCT WITH REGARD TO THIS TESTING. WE WANT TO LET THE PUBLIC KNOW WE ARE TAKING IT SERIOUS, BECAUSE AS THE STATE'S BRIEF POINTS OUT, THERE ARE DEFINITE REPERCUSSIONS FOR THE PROVIDER TO VIOLATE THIS.

CHIEF JUSTICE: YOU ARE GOING TO BE IN HIS TIME, BUT I DO HAVE A QUESTION. YOU ARE NOT ALLEGING THAT THERE WAS A MISDIAGNOSIS BECAUSE THAT WOULD GET YOU INTO THE RJ CASE, RIGHT?

YES, YOUR HONOR.

BUT HOW DOES THE JURY, IT WOULD BE INCONCEIVABLE TO ME THAT SOME OF HER EMOTIONAL DAMAGES WOULD NOT FLOW FROM BEING TOLD THAT SHE HAD AIDS, UNTIL SHE ACTUALLY FOUND OUT THAT SHE DIDN'T, SO HOW WOULD, IF PART OF IT WOULD BE BARRED BY THE "IMPACT RULE" UNDER RJ AND THE OTHER WOULDN'T, HOW WOULD, HOW WOULD WE WRITE THAT OPINION?

YOUR HONOR, I FEEL THAT, IF THE CLINIC HAD NOT COMMITTED NEGLIGENCE, MISS ABRIL WOULD STILL HAVE FOUND OUT HER RESULTS, SO I THINK THAT ISSUE, THERE IS APPROXIMATE CAUSE. I DON'T THINK SHE FOUND OUT ABOUT IT BECAUSE OF THE NEGLIGENCE. SHE WOULD HAVE FOUND OUT ABOUT IT ANYWAY. SO I LIMITED THIS COMPLAINT STRICTLY TO THE PRIVACY ISSUE.

OKAY. THANK YOU.

MAY IT PLEASE THE COURT. MY NAME IS ROBERT GLAZIER. I REPRESENT THE ACADEMY OF FLORIDA TRIAL LAWYERS AND A MICUS CURIAE. I THINK THAT NOTHING COULD BETTER DEMONSTRATE THE FLAWS IN THIS COURT'S "IMPACT RULE" JURISPRUDENCE THAN THE DISCUSSION TO DAY. THERE HAS BEEN A VERY GOOD, PROBING DISCUSSION OF WHETHER A CAUSE OF ACTION SHOULD BE RECOGNIZED HERE, BUT THE "IMPACT RULE" REQUIREMENTS, REALLY, WE WERE NOT TALKED ABOUT. THERE WAS NO REAL, THERE IS NO ALLEGATION OF A PHYSICAL IMPACT HERE.

THE REASON THEY WERE NOT TALKED ABOUT IS BECAUSE GRACEY IS PRETTY MUCH ON POINT. ISN'T THAT WHY?

GRACIE, WELL, THERE HAS BEEN DISCUSSION OF WHETHER GRACIE OR RJ IS ON POINT. THERE ARE TWO CASES OUT THERE, BUT IN BOTH OF THOSE, THE QUESTION REALLY DOESN'T TURN ON WHETHER THERE WAS A FISCAL IMPACT, BECAUSE THERE ARE IMPORTANT POLICY CONSIDERATIONS. NONE OF US WANT MINOR SLIGHTS TO BE THE SUBJECT OF LAWSUITS OR PREVAILING LAWSUITS. WE DON'T WANT MINOR SLIGHTS THAT WE ALL PUT UP WITH IN SOCIETY TO BE RECOVERABLE, SO WE HAVE GOT THIS RULE, BUT THE RULE JUST DOESN'T WORK. GET OF WHETHER THERE IS AN IMPACT, THAT WAS NOT PART OF THE DISCUSSION TODAY. THE QUESTION

WAS THERE WAS A PHYSICAL MANIFESTATION AFTER INJURY , WHICH THAT IS WHAT I UNDERSTAND THE SECOND PART OF THE COURT'S TEST TO BE , THAT REALLY WAS NOT GOT INTO. WHAT THE COURT WENT INTO WAS MORE COMMON LAW NEGLIGENCE PRINCIPLES. THE FACT THAT THIS COURT IS HERE ON A CERTIFIED QUESTION, THE FACT THAT THERE WERE FOUR CERTIFIED QUESTIONS IN 2004, FROM THE DCA'S ON THE "IMPACT RULE" , SUGGEST THAT THERE IS A PROBLEM. THE PROBLEM IS THAT THERE IS A TEST OUT THERE. AND THE TEST DOESN'T REALLY LEAD US TO A RESULT , ONE WAY OR THE OTHER. WE COME UP HERE. WE ARGUE IT BACK AND FORTH , AND THEN THE COURT TELLS US WHETHER THERE IS AN EXCEPTION THAT THE IMPACT REQUIREMENT WILL IGNORE.

SO IT IS YOUR AGREEMENT BASICALLY WITH JUSTICE HARDING AND THE GRACIE DECISION AND HIS DISSENT , THAT THE CAMEL IS ALL OF THE WAY UNDER THE TENT AND WE JUST NEED TO DO AWAY WITH THE "IMPACT RULE"?

MY SUGGESTION IS THAT THIS COURT, LONG AGO, IN ESSENCE , STOPPED FOLLOWING AS CONSISTENT PRINCIPLE, THE IMPACT REQUIREMENT ON CONSISTENT MANIFESTATION.

HOW DO WE AVOID THE LITIGATION FOR SLIGHTS?

WHAT WE SUGGEST IS A TWO-PART TEST. ONE IS IT HAS TO BE REASONABLY FORESEEABLE THAT THE PERSON WOULD SUFFER SEVERE EMOTIONAL DISTRESS, SO THE PERSON WHO IS COMPLAINING ABOUT THING THAT IS WE AS LAWYERS , YOU , AS JUSTICES , ARE NOT CONCERNED ABOUT , IT WOULD HAVE TO BE SEVERE EMOTIONAL DISTRESS WAS REASONABLY FORESEEABLE AND THERE WOULD AND GATEKEEPER ROLE.

DOESN'T THIS GET BACK, THOUGH, TO THE SAME PLACE WE ARE NOW , THAT , YES, THIS IS SEVERE ON A CASE-BY-CASE BASIS? NO , THIS IS SEVERE. KNOW THE . THAT IS NOT SEVERE. THIS IS SEVERE. IT DOES. ARE THESE DISPUTES THAT HAVE SOME BASIS IN THE AUTOMOBILE DRIVING DOWN THE STREET AND BLOWING OF THE HORN OR YELLING AND A PEDESTRIAN SAYING MY GOODNESS , I HAVE BEEN DISTRESSED?

ACTUALLY THE "IMPACT RULE" , THE FIRST CASES INVOLVED FAILURE TO DELIVER TELEGRAMS. THAT IS IN FLORIDA , THERE ARE A NUMBER OF THOSE , BUT TO MAKE MY POINT , THE RULE DOES NOT MAKE CASES DECIDE THEMSELVES. THERE IS STILL GOING TO BE A RULE FOR JUDGE ANSWER THERE ARE STILL GOING TO BE QUESTIONS. THE DIFFERENCE AND THIS IS A CRUCIAL ONE , THOUGH, IS THAT THAT THAT WOULD BE A RULE APPLIED BY TRIAL JUDGE ANSWER DCA JUDGES. THAT IS NOT THE CASE. NOW CASES COME STRAIGHT TO YOU , BOND VALIDATION , AND I WOULD SUGGEST TO YOU THAT IN ESSENCE MOST OF THEM ARE GOING TO COME UP HERE BECAUSE THE DCA'S DON'T KNOW WHAT TO DO. THE RULE SEEMS TO BE WHAT WE ARE TALKING ABOUT, SORT OF A COMMON LAW NEGLIGENCE STANDARD BUT THAT IS NOT THE RULE THAT COURT HAS ESTABLISHED.

ARE YOU ALSO PROPOSING SOME PROOF REQUIREMENTS FOR EMOTIONAL DISTRESS, OTHER THAN SIMPLY A PLAINTIFF 'S TESTIMONY THAT I WAS OFFENDED THAT THERE BE SOME CLINICAL DIAGNOSIS NOTES OR TREATMENT?

WE HAVE TO ACCEPT THE FACT THAT THERE HAS TO BE EVIDENCE OF SEVERE EMOTIONAL DISTRESS.

HOW DO YOU PROVE THAT?

THE , I HAVE THOUGHT ABOUT THIS. SOME JURISDICTION HAS ESTABLISHED AN EXPERT TESTIMONY REQUIREMENT. THAT IS ONE WAY THE COURT CAN GO. THE, IT MAY BE THAT THERE ARE CASES THAT , EVEN IF SOME EXPERT SAYS THAT THIS WAS SEVERE EMOTIONAL DISTRESS , IN ESSENCE WHETHER SOMETHING IS EMOTIONAL DISTRESS IS PARTLY A LEGAL QUESTION WHICH

IS GOING TO HAVE TO BE CLARIFIED ON A CASE-BY-CASE ANALYSIS. THERE ARE DISCUSSIONS AROUND THE COUNTRY THAT TRIED TO DRAW THE LINE. IS ONE SLEEPLESS NIGHT SEVERE EMOTIONAL DISTRESS? IT MAY BE THAT WE WILL NEED SOME COMMON LAWING OVER TIME , TO DRAW COMMON LAW JUDGING OVER TIME, TO DRAW THAT LINE.

MAYBE WHAT WILL BE THE CASE IS YOU ARE TRYING TO ENSURE THE VALIDITY , AND THIS IS WHAT RJ CLAIMS , THAT THERE IS EMOTIONAL OR PSYCHIATRIC DAMAGES THAT THERE IS MISTRUST WHEN SOMEBODY GOES TO SEE A PSYCHIATRIST, BECAUSE OF INABILITY TO SLEEP OR COPE AND PRESCRIBE MEDICATION, THAT SOMEHOW THAT IS NOT, THAT IS LESS VALID THAN IF SHE HAD DEVELOPED STOMACH PROBLEMS THAT HAD GIVEN HER SOME PHYSICAL MANIFESTATION,, WHICH UNDER OUR LAW WOULD HAVE BEEN A , RECOVERABLE UNDER THE "IMPACT RULE" OR EXCEPTION. SO I AM HAVING ACTUAL PROBLEM WITH THE IDEA THAT , YOU KNOW , BECAUSE YOU HAVE, LIKE, THE COCA-COLA CASE THAT WHAT SHE WOULD REALLY BE WHAT YOU WOULD REALLY BE HIM IMPOSING UPON HER WHEN THERE IS A CLEAR VIOLATION OF DUTY , IS THAT SOMEHOW THEY WOULD HAVE TO GO AND SEE A PSYCHIATRIST IN ORDER TO UNDERSTAND WHAT TO ME IS PLAIN, THAT IF SOMEBODY IS DIAGNOSED LIKE IN THIS CASE , IF YOU HAVE GOT A BREACH OF A DUTY OF CONFIDENTIALITY , ASSUMING THAT YOU HAVE IT , IT IS COMMON SENSE THAT SOMEBODY IS GOING TO BE EMOTIONALLY DAMAGED AS A RESULT HALF THAT, AND WHY WOULDN'T THAT BE A JURY ISSUE?

I THINK THERE HAS ALWAYS BEEN AND I THINK THERE WOULD BE AND MAYBE CASES THAT , IF THE FAX THAT GOT SENT OVER WAS THE CHOLESTEROL LEVEL. I DON'T WANT PEOPLE TO KNOW MY CHOLESTEROL LEVEL NECESSARILY, BUT I THINK THAT I WOULD BE HARD PRESSED TO SAY

MAYBE THERE IS NO DUTY. IN OTHER WORDS , DOESN'T IT REALLY GO BACK TO WHETHER THERE IS A CAUSE OF ACTION, THAN IS WHAT WE WERE DEALING WITH IN THE EARLIER PART. IT MIGHT NOT BE , AND I THOUGHT THAT WAS WHAT WAS CONCEDED THERE, IS NOT SOME GENERAL CAUSE OF ACTION THAT EVERY LAB RESULT IS CONFIDENTIAL .

SOME

TO THE CAUSE OF ACTION?

SOME LAB RESULTS ARE MORE CONFIDENTIAL THAN OTHERS. OBVIOUSLY HIV AND POSSIBLY TERMINAL ILLNESSES ARE GOING TO BE MORE OF THE SPECTRUM.

DO WE AGREE OR DISAGREE THAT THERE IS NO COMMON LAW DUTY HERE? THE DUTY AROSE OUT OF THE STATUTE PASSED BY THE LEGISLATURE?

NO. I HAVE NOT BRIEFED THAT ISSUE. I HAVE BRIEFED THE "IMPACT RULE" ISSUE. AND I AM HESITANT TO GO BEYOND THE SCOPE , BUT THE ANSWER, IN MY VIEW , AND I GUESS MY BRIEF PRESUMES THAT THERE WAS A BREACH MUCH A COMMON LAW, A BREACH OF A DUTY , AND IT SEEMS TO ME THAT, IF SOMEBODY FAXES HIV RESULTS NEGLIGENTLY

LOOK, I CAN GET BACK TO YOUR QUESTION. YOUR POSITION IS THAT ANY TIME , WHETHER UNDER COMMON LAW OR STATUTE , A DUTY IS IMPOSED , THAT IF THERE IS A BREACH OF THAT DUTY , THAT THERE SHOULD NOT BE A "IMPACT RULE" , THAT IF SOMEBODY ALLEGES SEVERE EMOTIONAL DISTRESS BECAUSE SOMEBODY HAS REACHED BREACHED EITHER A COMMON LAW HAS BREACHED EITHER A COMMON LAW DUTY OR STATUTORY REGULATORY DUTY THAT , IF SOMEONE CAN SHOW SEVERE EMOTIONAL DISTRESS, THAT THEY SHOULD HAVE A COMMON LAW CAUSE OF ACTION OR A CAUSE OF ACTION, BECAUSE IT IS A PER SE BREACH OF A DUTY I.

IT SEEMS TO ME THAT THE "IMPACT RULE" IS MORE OF A , I AM NOT SURE THE "IMPACT RULE" FOCUSES ON THE DUTY BUT IS ALMOST SORT OF A FREE STANDING TORT PRINCIPLE , A JUDGE MAY RULE THAT CERTAIN AREAS ARE BARRED, LIKE THE ECONOMIC LOSS RULE, A BAR THAT WE IN

SOCIETY WOULD

INTENSE EMOTIONAL DISTRESS AND INVASION OF PRIVACY, WE LIMIT THOSE TO INTENTIONAL CONDUCT, BECAUSE WE DON'T WANT TO OPEN THE FLOODGATES TO FRIVOLOUS LAWSUITS.

ASSUMING THAT THERE IS A DUTY, NOT A HYPOTHETICAL, ASSUMING THAT THERE IS A DUTY THAT WHAT WE CALL THE "IMPACT RULE", WHICH IS THE IMPACT REQUIREMENT AND THERE IS A REQUIREMENT, AS I UNDERSTAND IT, A PHYSICAL MANIFESTATION OF THE EMOTIONAL INJURY, THOSE WOULD NOT BE THE STANDARD. IT WOULD BE A STANDARD OF REASONABLY FORESEEABLE THAT THERE WOULD BE REASONABLE EMOTIONAL DISTRESS AND THERE IS, IN FACT, SEVERE EMOTIONAL DISTRESS.

WHY DON'T YOU DEFINE SEVERE. YOU TALK ABOUT THE "IMPACT RULE" HAVING A NEBULOUS CONCEPT. WHERE DOES ONE GET A GRIP ON SEVERE IN WHOSE EYES?

I CAN'T GIVE YOU A PERFECT DEFINITION. THE TOUGH THING IS IT IS A LOT EASIER TO DRAW THE LINE AT IMPACT, SEVERE EMOTIONAL DISTRESS IS WHAT WE ARE CONCERNED WITH RATHER THAN IMPACT. THAT IS AN EASILY APPLIED BUT NOT VERY ACCURATE TALISMAN. IT SEEMS TO ME THAT A SEVERE EMOTIONAL DISTRESS IS ONE THAT SIGNIFICANTLY FOR A PERIOD OF TIME, IMPAIRS ONE'S ABILITY TO FUNCTION. IT IS NOT, BOY, I HAVE THOUGHT ABOUT IT FOR A FEW DAYS. IT REALLY BOTHERED ME, BUT REALLY A SUBSTANTIAL, IT, INTERFERENCE WITH A PERSON'S ABILITY TO FUNCTION.

SO, UNDER YOUR DEFINITION, IT IS THE SAME CONDUCT THAT WERE DIRECTED TOWARD PLAINTIFF A WHO IS NOT VERY SENSITIVE AT ALL, PLAINTIFF A WOULD HAVE NO DAMAGES BUT THE SAME CONDUCT DIRECTED AGAINST PLAINTIFF B, A VERY HYPER SENSITIVE PERSON, THAT PERSON WOULD THEN HAVE A CAUSE OF ACTION.

NO. BECAUSE IT IS A TWO-PART TEST. ONE IS, IS THERE SEVERE EMOTIONAL DISTRESS AS A FACT OF THE MATTER OF THIS PLAINTIFF, AND THE OTHER ONE IS IT REASONABLY FORESEEABLE THAT A PERSON WOULD BE EMOTIONAL DISTRESSED BY THIS, SO PEOPLE WITH EGGSHELL SKULLS ARE NOT INCLUDED. I THINK IT IS UNDERLYING THE "IMPACT RULE" CASE LAW, THE POLICY. THERE ARE SOME THINGS WE ARE NOT WILLING TO ALLOW RECOVERY FOR. THAT COMES IN THE FIRST, AND MAYBE IT WOULD BE REASONABLY FORESEEABLE THAT SOMEBODY WOULD SUFFER REASONABLE EMOTIONAL DISTRESS BUT THEY HAVE GOT A THICK HIDE AND DON'T SUFFER, THAT PERSON DOESN'T RECOVER, EITHER. IT ADDRESSES BOTH CONCERNS, THE LAW THAT WE HAVE NOW, DOESN'T WORK, AND THAT IS WHY YOU HAVE COURT CASES HERE IN THE COURT NOW, ON "IMPACT RULE", AND THEY ARE GOING TO BE MORE, WE ASK THAT THE COURT RETHINK IT. WE SUGGEST RESPECTFULLY THAT THE RULE WE HAVE SUGGESTED WILL BE REASONABLE.

OF COURSE UNDER YOUR FORMULATION, IT WOULD OPEN THE FLOODGATES TO LAWSUITS. IT MAY NOT OPEN THE FLOODGATES TO DAMAGE AWARDS, BUT IT IS GOING TO OPEN THE FLOODGATES TO LAWSUITS, BECAUSE WHETHER A REASONABLY FORESEEABLE, WHETHER IT IS REASONABLY FORESEEABLE TO CAUSE EMOTIONAL DISTRESS, ISN'T THAT GOING TO BE A JURY ISSUE IN EVERY CASE?

NO.

NO?

LIKE IN ALL COMMON LAW

HAVEN'T WE SAID THAT FORESEEABILITY IS A COMMON LAW QUESTION.

IT IS A QUESTION , CERTAINLY NOT. BUT THERE WILL BE

CHIEF JUSTICE: ON THAT ONE I THINK YOU OUGHT TO SIT DOWN . REBUTTAL .

IN FACT THERE IS NO FREE STANDING DUTY NOT TO DISCLOSE HIV TEST RESULTS THERE. IS ALSO NO RECOGNIZED TORT OF THE INVASION OF PRIVACY. THAT TERM IS USED IN THE MIAMI HERALD CASE.

I AM LOOKING AT COUNT ONE AND WHAT IT PLED , WHAT IT SAYS CONTINENTAL FAILED TO PROVIDE THAT REASONABLE DUTY WHICH , IN LIGHT OF THE CARE AND TREATMENT AND CIVIL DUTY , RECOGNIZED AS ACCEPTABLE AND APPROPRIATE BY REASONABLY PRUDENT SIMILAR HEALTH CARE PROVIDERS, IN THAT IT REVEALED THE CONTENT OF ABRIL'S HIV TEST RESULTS TO PERSONS NOT AUTHORIZED TO RECEIVE IT. SO THEY ARE, THAT IS NOT PART OF THE CERTIFIED QUESTION, THE COUNT ONE IS PLED , IS , PLEADS A COMMON LAW DUTY OF REASONABLE CARE , NEGLIGENCE THEORY, NOT BASED ON THE STATUTE .

IT ATTEMPT TO DO SO. THE DEPARTMENT'S POSITION IS THAT THERE IS NO RECOGNIZED CAUSE OF ACTION SPECIFIC , SPECIFIC TO THIS CASE FOR THE NEGLIGENT REVELATION OR , IF YOU WILL , NEGLIGENT INVASION OF PRIVACY .

YOU ARE STILL BACK , NOW , ON THE CAUSE OF ACTION. YOU DON'T WANT US EVEN TO GET TO THE "IMPACT RULE".

IT MAY NOT BE NECESSARY.

IF WE GET TO THE "IMPACT RULE" , THEN WHAT IS YOUR ARGUMENT THERE? AGAIN, WHY IS THIS NOT LIKE GRACIE?

IT IS NOT LIKE GRACIE , BECAUSE OF THE DIFFERENCE IN THE RELATIONSHIPS . HERE WE HAVE THE DEPARTMENT , WHICH HAD NO RELATIONSHIP WITH THE PLAINTIFF , AND YOU ARE GOING BEYOND THAT COUNSELING RELATIONSHIP, THE ONE-ON-ONE RELATIONSHIP THAT YOU HAD IN GRACIE , AND SECOND , THE "IMPACT RULE" , I THINK, IS APPLICABLE IN THIS CASE, BECAUSE IT ILLUSTRATES THE DIFFICULTY IN ASCERTAINING THE DAMAGES. THE , LEARNING OF THE DIAGNOSIS , AS MRS. ABRIL , ACCORDING TO THE COMPLAINT FOR SOME THREE WEEKS , BELIEVED THAT SHE WAS HIV POSITIVE OR THAT SHE HAD ONE OF THE MARKERS FOR THIS DISEASE, WOULD CERTAINLY HAVE CAUSED HER SOME EMOTIONAL DISTRESS , FEAR , AND SO FORTH , AND HOW CAN YOU SEPARATE THAT THIS FROM WHAT WAS CAUSED BY THE TEST RESULT BEING FAXED WHERE IT SHOULD NOT HAVE BEEN FAXED?

BUT DIDN'T, I MEAN , THE "IMPACT RULE" WAS DEVELOPED, AGAIN, TO MAKE SURE THAT THERE WERE NOT CLAIMS THAT DID NOT HAVE A GENUINE BASIS IN THE LAW SO TO SPEAK , AND WHAT RIGHT NOW IN THIS KIND OF CASE IS SHE HAD DEVELOPED A SET OF STOMACH PROBLEMS BECAUSE SHE HAD A SENSITIVE STOMACH AND SHE ENDED UP HAVING AN ATTACK OF WHATEVER PEOPLE HAVE WITH SENSITIVE STOMACHS AND HAD TO GO TO THE EMERGENCY ROOM , SHE WOULD BE , THE "IMPACT RULE" WOULD NOT APPLY, CORRECT?

THAT'S CORRECT.

BUT IF SHE COULDN'T SLEEP FOR THREE WEEKS AND HAD TO GO TO A PSYCHIATRIST AND GET MEDICATION TO SLEEP , THAT THAT WOULD NOT BE COMPENSATED .

THAT IS TRUE. THAT IS ASSUMING THAT THERE IS A CAUSE OF ACTION IN THE FIRST PLACE. THAT'S RIGHT. IF YOU USE THAT SECOND ELEMENT OF THE PHYSICAL MANIFESTATION OF THE EMOTIONAL INJURIES .

CHIEF JUSTICE: YOUR TIME IS UP. THANK YOU VERY MUCH. THE COURT WILL TAKE ITS MORNING RECESS OF 15 MINUTES.

MARSHAL: PLEASE RISE.