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EROSION OF THE IMPACT RULE
by Ted Babbitt

Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974) is the seminal case requiring a physical touching to recover damages in Florida. See also Pazo v. Upjohn, 310 So. 2d 30 (Fla. 2nd DCA 1975) and Zell v. Meek, 665 So. 2d 1048 (Fla. 1995). However, the Courts of Florida have gradually eroded the requirement for a physical touching.

In Eagle-Pitcher Industries, Inc. v. Cox, 481 So. 2d 517 (Fla. 3rd DCA 1985), rev. denied 492 So. 2d 1331 (Fla. 1986), the Court held:

“The essence of impact, then, it seems, is that the outside force or substance, no matter how large or small, visible or invisible, and no matter that the effects are not immediately deleterious, touch or enter into the plaintiff’s body.”

That case found impact existed based upon the inhalation of asbestos fibers, which, over time, caused serious lung damage.

What is sufficient to constitute an impact seems to be in the eye of the beholder. In R.J. v. Humana of Fla., Inc., 652 So. 2d 360, 362 (Fla. 1995) the Supreme Court found that “touching of a patient by a doctor and the taking of blood for ordinary testing would not qualify for a physical impact, other more invasive medical treatment or the prescribing of drugs with toxic or adverse side effects would so qualify.” In Jones v. Dept. of Health and Rehabilitation Services, 661 So. 2d 1291 (Fla. 4th DCA 1995), the District Court held that making a diagnosis of HIV and prescribing caustic medication was sufficient to constitute

an impact. On the other hand in Ellington v. United States, 404 F. Supp. 1165, 1166, 1167 (M.D. Fla. 1975), the Federal Court held that a plaintiff who was on the ground in the vicinity of a plane crash and felt a mild change in temperature and pressure and heard the explosion did not suffer an injury that was cognizable in law based upon a lack of impact. In Davis v. Sun First National Bank, 408 So. 2d 608 (Fla. 5th DCA 1981), rev. denied 413 So. 2d 875 (Fla. 1985), a bank teller's case against her employer for failing to take reasonable security measures failed when the only impact alleged was the bank robber handing the teller a note. In Ruttger Hotel Corp., v. Wagner, 691 So. 2d 1177 (Fla. 3rd DCA 1997), the Court held that being pushed by robbers while a robbery takes place was not sufficient impact because no physical injury was suffered. In Tanner v. Hartog, 696 So. 2d 705 (Fla. 1997) a cause of action for negligent stillbirth was upheld for the mental pain and anguish suffered by the parents.

The Supreme Court has gradually removed the burden of showing an impact. In Gracey v. Eaker, 837 So. 2d 348 (Fla. 2002), the Court held that where a psychologist breached his fiduciary relationship with a patient the patient had a cause of action notwithstanding the lack of impact. In Hagan v. Coca-Cola Bottling Co., 803 So. 2d 1234 (Fla. 2001) the Court held that physical injuries were unnecessary to have a cause of action for ingestion of a foreign object.

Two recent cases underscore the Supreme Court's willingness to erode and perhaps eliminate the necessity for impact in Florida. In Fla. Dept. of Corrections v. Abril, 32 Fla. L. Weekly S635 (Fla. Oct. 18, 2007) the Supreme

Court held that a cause of action arose as the result of the negligent dissemination of information concerning a positive HIV test even though the only claim was for emotional damages and there was no impact. The Court pointed out that the impact rule did not apply to intentional torts such as defamation, invasion of privacy or intentional infliction of emotional distress and analogized the case to that of Gracey v. Eaker, supra.

“Because the only reasonable damages arising from a breach of section 381.004(3)(f) are emotional distress, and because this emotional damage would be akin to that suffered by victims of defamation or invasion of privacy, we conclude they should not be barred by the impact rule, *See Gracey*, 837 So. 2d at 356-57 (holding that the impact rule should not bar recovery because ‘[t]he emotional distress that [plaintiffs] allege they have suffered is at least equal to that typically suffered by the victim of a defamation or an invasion of privacy’ and that ‘[i]mposition of the impact rule in this context would render the legislative intent and its statutory implementation meaningless and without substance’). Thus, based on our recent precedent in *Gracey* we agree that an exception to the impact rule should be made when a laboratory or other health care provider is negligent in failing to keep confidential the results of an HIV test.”

In Willis v. Gami Golden Glades, LLC, 32 Fla. L. Weekly S643 (Fla. Oct. 18, 2007), the Supreme Court held that being “patted down” during a robbery was sufficient impact to satisfy the rule. Citing Zell v. Meek, supra, the Court concluded “ for a plaintiff to have endured an impact or contact sufficient to render an action sustainable ‘the plaintiff may meet rather slight requirements.’”

Some might argue that the time has long since past for abolition of the impact rule in Florida. For the time being, it is apparent that the rule is being gradually eroded and will eventually be eliminated.

Note Bene: In last month's Bar Bulletin this author wrote an article entitled "Insured Physician's Bad Faith Action" based upon the Fourth District's ruling in Rogers v. Chicago Ins. Co., 32 Fla. L. Weekly D1280 (Fla. 4th DCA 2007). It should be noted that on rehearing in Rogers v. Chicago Ins. Co., 964 So. 2d 280 (Fla. 4th DCA 2007), that opinion was withdrawn and an opposite holding resulted which concluded no cause of action exists on behalf of a doctor for alleged bad faith in settling a case within the doctor's policy limits.

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