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FILED
SID J. WHITE
MAY 20 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

SUPREME COURT OF FLORIDA

CASE NOS.: 76,476; 77,135; 77,192; 77,193

DISTRICT COURT CASE NOS: 88-1419 & 87-2250

CIRCUIT COURT CASE NO: 85-52953

ARTHUR W. KUSH, M.D., ETC., ET AL.

PETITIONERS,

VS .

BRANDON DAVID LLOYD, A MINOR CHILD,
BY AND THROUGH HIS PARENTS,
ANTHONY D. LLOYD AND DIANE S. LLOYD,
AND ANTHONY D. LLOYD AND
DIANE S. LLOYD, INDIVIDUALLY,

RESPONDENTS.

REPLY BRIEF ON THE MERITS
OF PETITIONER, ARTHUR W. KUSH, M.D.

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INTRODUCTION

This brief is filed on behalf of Petitioner Arthur W. Kush, M.D., deceased, Appellee before the Third District Court of Appeal and Defendant in the trial court medical malpractice action. Respondents are Brandon David Lloyd, a minor child, by and through **his** parents Anthony D. Lloyd and Diane S. Lloyd, and Anthony D. Lloyd and Diane S. Lloyd individually. The Lloyds were Appellants before the Third District Court of Appeal, and Plaintiffs before the trial court. The remaining Defendants below were Appellees before the Third District Court of Appeal and are Petitioners before this Court. The parties will be referred to as Petitioners/Defendants and Respondents/Plaintiffs as well as by name.

The following symbols will be used for reference purposes:

"R" for references to the record on appeal.

Unless indicated to the contrary, all emphasis has been supplied by counsel.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN STRIKING MR.
AND MRS. LLOYD'S CLAIMS FOR MENTAL ANGUISH.

While Respondents have endeavored to explain why the impact rule should not be applied in this case and why, if the rule is applicable, it has been satisfied, Respondents have wholly failed to address Petitioner's argument that policy reasons exist why damages for mental anguish should not be recoverable in a case such as this. As Petitioner argued in his Initial Brief, allowing the Lloyds to seek damages for their mental anguish would place the jury in the untenable position of having to determine whether Mr. and Mrs. Lloyd suffered more mental anguish as a result of becoming parents to Brandon than they would have experienced had they been told that they should never have any more children because of the possibility that future children would have a defect similar to Brandon's. This moral dilemma was among the reasons cited by the Fifth District Court of Appeal in *MOORES v. LUCAS*, 405 So.2d 1022 (Fla. 5th DCA 1981) for refusing to recognize a cause of action for wrongful birth.

It is interesting to note that the holding of the Third District Court of Appeal in the instant case refusing to recognize Brandon's cause of action for wrongful life has not been challenged before this Court. The Third District's ruling on this point was premised largely upon this Court's decision in *FASSOULAS v. RAMEY*,

450 So.2d 822 (Fla. 1984) as well as the Fifth District's decision in MOORES. It is entirely inconsistent for Respondents to have accepted the Court's rejection of a **cause** of action on Brandon's behalf while continuing to assert Mr. and Mrs. Lloyd's right to recover damages for mental anguish. The same policy reason which prohibits the existence of a cause of action for wrongful life, i.e., the requirement that a moral decision be made as to whether no life is preferable to defective life, requires that the parents' claim for mental anguish be stricken.

A decision upholding the Lloyds' right to recover for their mental anguish will only undermine the principle that Florida does not recognize causes of action for wrongful birth. This principle can be protected and the Lloyds can receive compensation by ruling that the Lloyds' recovery is limited to those extraordinary expenses associated with raising Brandon while denying the Lloyds' recovery for their mental anguish. While the Lloyds will argue that this is not full compensation, this result will nonetheless achieve the paramount purpose of insuring the availability of funds for the continued care of Brandon.

Respondents argue that this Court has effectively declared the "impact rule" irrelevant to actions for "wrongful birth" by recognizing a cause of action for wrongful birth and allowing the recovery of extraordinary pecuniary losses without the requirement of proof of physical impact in FASSOULAS V. RAMEY, supra. Respondents' reasoning on this point is impossible to follow, as this Court has never applied the impact rule to the recovery of

demonstrable pecuniary losses, but has only imposed this requirement with respect to claims for psychic trauma unaccompanied by a discernable bodily injury. Accordingly, this Court's ruling in FASSOULAS in no way constitutes a waiver of the application of the impact rule with respect to the Lloyds' claim for mental anguish.

As noted previously, Respondents also argue that if the impact rule is found to apply, it has nonetheless been satisfied in this case. Specifically, Respondents **refer** to the fact that **the** treatment to which the Lloyds submitted to determine whether they should **attempt** to have another child involved the insertion of needles into them for the withdrawal of their blood. Additionally, Respondents assert that the Lloyds experienced the physical impact of three pregnancies - two miscarriages and a delivery of a baby - as a result of the Defendants' alleged negligence. It is not necessary to ascertain whether these alleged physical involvements of the Lloyds would in fact be considered an impact under the impact rule. The fact remains that the Lloyds are not claiming mental anguish because they underwent genetic testing or because Mrs. Lloyd experienced two miscarriages. Nor is Mrs. Lloyd seeking recovery for mental anguish as a result of the physical experience of Brandon.

Rather, the Lloyds are seeking to recover for "the horror of ... giving birth to a child with abnormal facies and severe psychomotor retardation" and "**the** mental anguish of symbolically watching the death of his [her] child everyday for the rest of his

[her] life." This mental anguish is not the direct result of the alleged impacts identified by the Lloyds so as to satisfy the impact rule.

In summary, this Court should refuse to allow the Lloyds to recover for the mental anguish arising out of the birth of their son. The recovery sought is prohibited by the impact rule and is contrary to the public policy of the State of Florida.

CONCLUSION

For the aforementioned reasons, the Petitioner ARTHUR W.KUSH, M.D., deceased, respectfully requests that this Court reverse the decision of the Third District Court of Appeal, and hold that as a matter of law Respondents DIANE and ANTHONY LLOYD cannot recover damages for mental anguish arising out of the birth of their son, BRANDON DAVID LLOYD.

Respectfully submitted,

DEBRA J. SNOW (331767)
ROBERT M. KLEIN (230022)

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 17 day of May, 1991, to: all counsel of record on attached service list.

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