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Is General Negligence the New Exception to the Florida Impact Rule?

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Many thanks to Professor Markita Cooper for her guidance in writing this article.

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Is General Negligence the New Exception to the Florida Impact Rule?

Stephan Krejci[A]

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Introduction

A man watched his sister die in front of him as a result of a car accident, but he could not get relief because Kansas subscribes to the impact rule.[1] Developers cut into a private burial plot, but the family could not bring a negligent infliction of emotional distress (NIED) claim because Georgia follows the impact rule.[2] A mother had to abort

[A] J.D., Florida A&M University College of Law, 2015. Many thanks to Professor Markita Cooper for her guidance in writing this article.

1. Tucker v. United Parcel Serv., Inc., CIV.A. 06-1204-MLB, 2007 WL 2155658, at *4 (D. Kan. July 25, 2007).

2. Ryckeley v. Callaway, 412 S.E.2d 826, 827 (Ga. 1992).

her pregnancy because of her doctor's negligence, but she could not get relief because of the Kansas impact rule.[3] Florida subscribes to the impact rule too, but the Florida impact rule would not bar any of the above claims.[4]

The impact rule is an ancient torts doctrine that precludes recovery for emotional distress unless the victim has been physically impacted by the tortfeasor and the emotional distress grew out of that physical impact.[5] The first enunciation of this rule is found in the *Victorian Railways* case.[6] In this case, a gatekeeper invited a coach, which was transporting a pregnant woman, to cross train tracks.[7] The coach was nearly struck by a train and the pregnant woman/mother suffered a miscarriage from the shock.[8] In the ensuing litigation, she was denied relief because "damage arising from shock or fright, without impact, was too remote to sustain the action."[9] With this, the impact rule was created.[10]

American courts widely adopted the impact rule and it persists in a handful of states to this day.[11] Courts give several reasons for denying such NIED claims and these reasons fall into three broad categories: judicial efficiency, evidence concerns, and foreseeability.[12] Judicial efficiency concerns the flood of litigation that will result if claims for emotional damages could go forward. How would courts sort meritorious claims from frivolous claims?[13] Evidence concerns deal with proving the damages. How should a court distinguish a sensitive person from someone with a tougher constitution? And when some emotional harm can be acknowledged, how can it be valued by a

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3. Humes v. Clinton, 792 P.2d 1032, 1034-35 (Kan. 1990).

4. *See* Tanner v. Hartog, 696 So. 2d 705, 706 (Fla. 1997); Zell v. Meek, 665 So. 2d 1048, 1054 (Fla. 1995).

5. Willis v. Gami Golden Glades, LLC, 967 So. 2d 846, 850 (Fla. 2007); RESTATEMENT (SECOND) OF TORTS § 436A (1965); 38 AM. JUR. 2D *Fright, Shock, Etc.* § 12 (2014); Charles E. Cantu, *An Essay on the Tort of Negligent Infliction of Emotional Distress in Texas: Stop Saying It Does Not Exist*, 33 ST. MARY'S L.J. 455, 460-61 (2002).

6. Victorian Railway Comm'rs v. Coultas, [1888] 13 App. Cas. 222, 224 (P.C. appeal taken from Austl.), *available at* http://swarb.co.uk/victorian-railway-commissioners-v-coultas-pc-21-jan-1888/.

7. *Id.*

8. *Id.*

9. *Id.*

10. *See id.*

11. Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. ST. L.J. 805, 815 (2004); *see infra* Part II.

12. Rhee, *supra* note 11, at 814.

13. *See id.*; 2 JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES TREATISE § 10:29 (3d ed. 2014).

court?[14] Foreseeability protects a tortfeasor from injuries that he could not have reasonably expected to result from his actions. However, when there is no physical contact, how can a person know to adjust their behavior to avoid liability?[15]

This paper proposes that Florida abrogate the impact rule and switch to using a general negligence approach for NIED claims. First, this paper gives an overview of the current state of the Florida impact rule, its exceptions, and why the rule exists. This overview shows that the policy benefits that justify the impact rule do not flow from the rule itself. Next, this paper discusses the impact rules as they stand in the four other states that still cling to them. Comparison of these jurisdictions with Florida reveals that Florida's impact rule is the least restrictive, appearing more like a general negligence analysis. With this background in mind, discussion of Kentucky's recent abrogation of the impact rule and Tennessee's overruling of the physical manifestation rule shows that foreseeability is the true core of the impact rule. Lastly, analysis of impact rule cases under a general negligence approach shows Florida already functionally uses general negligence principles in NIED claims. Thus, there is no loss in abrogating the impact rule because Florida is functionally already there.

I. Florida's Impact Rule

Florida is one of five remaining states that adheres to the impact rule.[16] Of these states, Florida's rule is the most complex and the most unlike the original impact rule.[17] To begin, an impact is only required in negligence actions where the plaintiff is suing for emotional distress.[18] However, an impact is not required if the victim can prove his emotional injury with some type of physical manifestation.[19] These cases are called direct victim cases.[20] Direct victims are harmed by the tortfeasor's negligent conduct and the victim brings suit for the resulting emotional harm.[21] Bystander cases stand in contrast to direct victim cases, in which a close family member perceives the injury of

14. John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 Marq. L. Rev. 789, 808 (2007).
15. *See id.*
16. *See infra* Part II.
17. *See Willis*, 967 So. 2d at 850.
18. *Id.*
19. *Id.*
20. Kircher, *supra* note 14, at 891.
21. *See id.*

another person.[22] In a bystander case, this close family member witnessing the injury is the plaintiff in the NIED claim.[23] Lastly, the impact rule does not apply in cases where the NIED claim is supported by facts showing some other freestanding tort.[24] In Florida, a freestanding tort occurs when the defendant should have foreseen the potential for emotional damage because of the underlying tortious conduct.[25] Usually, this exception pops up in special relationship situations, such as doctor-patient or attorney-client.[26] This section gives an overview of the Florida impact rule as it developed in parts: the direct victim cases, the bystander cases, and the freestanding tort cases.

A. *Direct Victim Cases*

Florida direct victim plaintiffs are directly harmed by the defendant's negligence. In these cases, a garden-variety negligence action is the main cause of action available.[27] *Crane v. Loftin*[28] and *Gilliam v. Stewart*[29] are good starting points for an overview of the direct victim cases. Both of these cases show rather mechanical applications of the impact rule under facts that would probably survive the rule's application today.[30] In *Crane*, a woman drove her car across a railroad crossing and was struck by a negligently operated train.[31] She was not physically hit because she leapt from the car in the nick of time, but she suffered from "fright and mental anguish."[32] The driver could not get relief for this distress because she was not physically impacted.[33] Without an impact, the court could not causally tie her emotional distress to the train.[34] This case is a notably old formulation because,

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22. *Zell*, 665 So. 2d at 1054.
23. *Id.*
24. Kush v. Lloyd, 616 So. 2d 415, 422-23 (Fla. 1992).
25. *Id.*
26. Rowell v. Holt, 850 So. 2d 474, 480 (Fla. 2003).
27. John M. Logsdon, *The Rise and Fall of Bystander Recovery for Negligent Infliction of Emotional Distress in North Carolina*, 21 N.C. CENT. L.J. 319, 323 (1995). This definition makes more sense when contrasted with the bystander rule. *See infra* Part II.B.
28. Crane v. Loftin, 70 So. 2d 574, 575-76 (Fla. 1954).
29. Stewart v. Gilliam, 271 So. 2d 466, 466 (Fla. Dist. Ct. App. 1972), *decision quashed*, 291 So. 2d 593 (Fla. 1974). *But see Willis*, 967 So. 2d at 850.
30. *See Crane*, 70 So. 2d at 575-56; *Stewart*, 271 So. 2d at 466.
31. *Crane*, 70 So. 2d at 576.
32. *Id.*
33. *Id.*
34. *See id.* In 1954, the driver could have gotten relief if she could have shown gross negligence or intent, as such conduct was never contemplated by the impact rule. *See id.*

even though relief is denied, there is no discussion of any potential psychological harm, such as post-traumatic stress disorder or some type of anxiety.[35] *Gilliam* further exposes the harsh nature of the impact rule as the plaintiff did have a physical injury, just not an impact.[36] In *Gilliam*, an elderly woman suffered a heart attack when a car struck her home.[37] She was not physically hit by the car, but heard the crash, ran out the backdoor to assist, and then returned to bed due to chest pains.[38] The existence of a physically diagnosable injury, which a medical expert could tie to the car colliding with the house, went uncompensated because of the impact rule.[39]

Hagan v. Coca-Cola Bottling Co. broadened the definition of an impact when faced with a food contamination problem.[40] In *Hagan*, a consumer discovered what appeared to be a used condom in her bottle of Coke while drinking from it.[41] The plaintiff in *Hagan* actually ingested some of the contaminated soda and filed an NIED claim due to her fear of contracting HIV.[42] These facts forced the court to reconsider a question it addressed in *Doyle v. Pillsbury Co.* with dicta.[43] There, a woman saw an insect floating in a can of peas, jumped back in alarm, and fell over a chair.[44] In *Doyle*, the court denied relief because the consumer had not actually ingested the peas.[45] However, the court questioned the operation of the impact rule since ingestion of contaminated food provides a concrete connection for causation, particularly one that is foreseeable to the defendant.[46] *Hagan* gave this dicta some

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35. *See id.*
36. *Gilliam*, 271 So. 2d at 466.
37. *Id.*
38. *Id.*
39. *Gilliam*, 291 So. 2d at 595. *Gilliam* is noteworthy in Florida's impact rule history because the Fourth DCA actually rejected the impact rule. However, the Florida Supreme Court reversed this decision. *Id.* The reversal of the lower court's ruling in *Gilliam* is quite brief and cites to the lower court's opinion for the facts and dissent of the appellate judge for the reasoning. *Id.* at 595. The other apparent effect of this reversal is the Fourth DCA generating harsher impact rule case law than other DCA's. *See, e.g.*, Thomas v. OB/GYN Specialists of Palm Beaches, Inc., 889 So. 2d 971, 972 (Fla. Dist. Ct. App. 2004) (denying relief because stillbirth was not defined in *Tanner* despite the impact to the mother during the course of treatment). Ironically, *Gilliam* reaffirmed Florida's adherence to the impact rule, but after subsequent decisions, the case would no longer be barred by the rule because the homeowner had physical manifestations of her mental injury. *See Willis*, 967 So. 2d at 850.
40. Hagan v. Coca-Cola Bottling Co., 804 So. 2d 1234, 1236 (Fla. 2001).
41. *Id.*
42. *Id.* at 1235.
43. *See id.* at 1238.
44. Doyle v. Pillsbury Co., 476 So. 2d 1271, 1272 (Fla. 1985).
45. *Id.*
46. *Id.*

concrete facts from which to work.[47] Thus, the plaintiff could satisfy the impact requirement because she actually ingested the contaminated food.[48]

The *Hagan* holding had two effects on the Florida impact rule. First, the court construed ingestion of contaminated food as an impact.[49] While this leap in construction is not without its logic as contaminated food does literally impact the person eating it, it is nevertheless not a case envisioned in the classic *Gilliam* version of the rule.[50] Second, the court did not require any physical manifestation of the emotional injury.[51] These two modifications to the impact rule were acceptable in this case because a manufacturer of food products should be able to foresee a person becoming ill if they ingest contaminated food.[52] Even if that harm is purely emotional, the emotional harm that potentially flows from eating contaminated food is easily understood.[53] The experience is common to lawyers and laypersons alike.[54] Keep in mind the foreseeability analysis here as it plays a critical role in the other types of impact rule cases in Florida.

The latest in the line of direct victim cases is *Willis v. Gami Golden Glades, LLC*.[55] In *Willis*, a guest at a hotel asked a security guard for assistance in parking her car because the lot was dark and unfamiliar, and she feared for her safety.[56] The guard refused to help or even watch as she parked. While getting out of her car, a robber put a gun to her head.[57] The assailant took her purse and then patted her down after removing articles of her clothing.[58] After this traumatic event, the gunman stole her car and drove off.[59] The hotel guest collected herself and again asked the security guard for help, who

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47. *See Hagan*, 804 So. 2d at 1239.
48. *Id.* at 1241.
49. *Id.*
50. *See id. But see Gilliam*, 291 So. 2d at 595.
51. *Hagan*, 804 So. 2d at 1241.
52. *Id.*
53. *See id.*
54. *See id.* The advance of medical knowledge no doubt hurts the impact rule as well, as courts no longer are doubtful of injuries that are not physical in nature. *See* Kevin C. Klein & G. Nicole Hininger, *Mitigation of Psychological Damages: An Economic Analysis of the Avoidable Consequences Doctrine and Its Applicability to Emotional Distress Injuries*, 29 OKLA. CITY U. L. REV. 405, 426 (2004).
55. *Willis*, 967 So. 2d at 848.
56. *Id.*
57. *Id.* at 849.
58. *Id.*
59. *Id.*

pretended as if he had not seen her earlier.[60] The hotel office personnel also refused any assistance, so she went to her room and spent the night in sleepless agony.[61] Doctors later diagnosed her with anxiety, depression, and post-traumatic stress disorder, for which there are some physical symptoms.[62] The court resolved this case by holding the impact of the gun to her temple and the pat down she endured was more than enough.[63]

Willis is a milestone in Florida jurisprudence for a number of reasons. For purposes of the direct victim cases, the impact served a function of form and not substance.[64] While the gun being placed to the hotel guest's head is certainly a traumatic experience, there is no doubt that the psychological trauma that the "impact" produced is the harm at issue, not any harm flowing from a physical injury.[65] This holding leaves one wondering what would have happened in this case absent the gun actually touching the hotel guest and the pat down.[66] However, this is where direct victim cases stand in Florida. The impact need only be minimal, and it does not need to physically cause the emotional injury.[67] As discussed below, these physical manifestations of an emotional injury obviate the need for an impact completely.

B. Bystander Cases

Bystander cases are those in which the plaintiff witnesses harm being done to a third party by the defendant and sues for the resulting emotional distress.[68] Bystander cases began carving out exceptions earlier than the direct victim line, with the first major case being *Champion v. Gray*.[69] In *Champion*, a mother heard a car crash.[70] She

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60. *Id.*

61. *Willis*, 967 So. 2d at 849.

62. *Id.* These symptoms include sexual dysfunction, peripheral temperature changes, muscle tightening, and increased sweat gland activity. These symptoms are mentioned to show that the line between physical manifestation and purely psychic injuries is becoming quite blurred. However, some of the frivolous cases which will be mentioned later could no doubt point to similar symptoms. *See, e.g.*, Elliott v. Elliott, 58 So. 3d 878, 882 (Fla. Dist. Ct. App. 2011) (alleging stress, diabetes, and hair loss).

63. *Id.* at 851.

64. *See id.* at 850-51.

65. *See id.*

66. *See infra* Part IV. *Willis* also has some relevance to the freestanding tort exception found in Florida law, which will be discussed below. *Infra* Part II.C.

67. *See Willis*, 967 So. 2d at 850.

68. David Sampedro, *When Living As Husband and Wife Isn't Enough: Reevaluating Dillon's Close Relationship Test in Light of* Dunphy v. Gregor, 25 STETSON L. REV. 1085, 1086 (1996).

69. Champion v. Gray, 478 So. 2d 17, 18 (Fla. 1985).

came running to the scene of the accident and, seeing her daughter's dead body, died from shock on the spot.[71] The mother was not physically impacted in any way, and she actually died from a heart attack.[72] However, the causal connection of her death to the driver's negligence was inescapable.[73] This left the court the options of reaffirming the harsh results of *Gilliam* or creating some type of exception to recognize the emotional distress of bystanders.[74] In choosing the latter course, the court adopted a bystander test similar to the famous *Dillon* rule.[75] The bystander test announced in *Champion* allows for an NIED claim to proceed when a person perceives the negligent injury of a close family member.[76] Thus, the mother is a bystander because she heard the car crash and subsequently died upon seeing the injury to her daughter.[77]

First, note the requirement of a physical injury. *Champion* was an easy case in one sense, because dying is the ultimate injury; the court did not need to contend with the additional complexity of purely mental damages, such as depression or post-traumatic stress disorder.[78] Second, the mother did not actually see the accident, she heard it.[79] Thus, in announcing this holding, Florida received a broader bystander rule than it otherwise might have if the mother had seen the accident.[80] Lastly, the court is clear to call this a factor test that is enveloped under the "guidepost" of foreseeability.[81] The presence of all these factors does not necessarily mean that the defendant is under a duty, only that the defendant may foresee emotional harm.[82]

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70. *Id.*
71. *Id.*
72. *Id.*
73. *See id.*
74. *Id.*
75. *Champion*, 478 So. 2d at 19. *Dillon v. Legg* is the seminal bystander case based not on the zone of danger, but a close relationship with the direct victim. There, a bystander claim was allowed to go forward for a mother that watched her daughter die in a car accident because she was closely related to the victim, saw the accident, and was close to the scene of the accident. 441 P.2d 912, 920 (Cal. 1968).
76. *Champion*, 478 So. 2d at 19. The distinction between bystander cases and direct victim cases is not as explicit as it is in other jurisdictions.
77. *Id.* This test is distinguished from the zone of danger test, which is noted for its poor application to bystander cases where the bystander has no fear for his own safety. *See, e.g.*, Vaillancourt v. Med. Ctr. Hosp. of Vermont, Inc., 425 A.2d 92, 95 (Vt. 1980) (showing the limitations to the zone of danger test as the only vehicle for bystander liability).
78. *See Champion*, 478 So. 2d at 18.
79. *Id.*
80. *See id.* at 19.
81. *See id.* at 19-20.
82. *See id.* at 20.

Zell v. Meek is the latest bystander case to leave its mark on the impact rule.[83] *Zell* added to *Champion* by stretching the length of time between the injury and its physical manifestation.[84] In *Zell*, a tenant picked up an unmarked package left on his doorstep.[85] The package was a bomb that exploded and killed the tenant.[86] His daughter had the misfortune of witnessing her father's dying moments.[87] Subsequent investigation revealed that the property manager had received bomb threats at this particular property in the past and made no warning to the family living there.[88] Immediately after this incident, the daughter experienced purely psychological injuries: insomnia, depression, fear of loud noises, bad dreams, and short-term memory loss.[89] Nine months later, she was diagnosed with a number of digestive ailments.[90] A medical expert traced these ailments to the daughter's anxious condition produced by the bombing.[91] The *Champion* court did not face such a difficult causation issue since the mother died shortly after seeing her daughter.[92] However, in this case, the nine-month interval forced the court to relax the short time requirement implicit in the *Champion* holding.[93] In so doing, the court acknowledged any bright line time requirement would be arbitrary.[94] The time between the physical manifestations of the injury and the incident is a factor bearing on causation, not the element of causation itself.[95]

Zell is not nearly as groundbreaking as *Champion*, then, as bystander actions were already permitted and physical symptoms of the injury are still required.[96] If *Zell* is groundbreaking, it is due to the absence of language limiting its holding to bystander cases.[97] Recall

83. *Zell*, 665 So. 2d at 1054.
84. *Id.*
85. *Id.* at 1049.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Zell*, 665 So. 2d at 1049. This case would have presented a much more challenging question for the court if the claim would have been brought closer in time to the bombing. The injuries were squarely within the realm of the ad hoc exceptions the court had been creating up to this point due to the obvious credibility of the injury, but there were no physical symptoms yet. *See id.*
90. *Id.*
91. *Id.* at 1049-50.
92. *See Champion*, 478 So. 2d at 18.
93. *See Zell*, 665 So. 2d at 1053; *Champion*, 478 So. 2d at 20.
94. *Zell*, 665 So. 2d at 1052.
95. *See id.* at 1054.
96. *See id.*
97. *See* Julie H. Littky-Rubin, *So I Finally Understand the "Impact Rule" but Why Does It Still Exist?*, FLA. B.J., April 2008, at 20, 24.

from *Champion* that its factor test does not necessarily bring liability but, rather, only bears on the existence of foreseeability.[98] Florida does not clearly separate bystander cases from direct victim cases, so the physical manifestation requirement could potentially be applied to direct victim cases.[99] The import of this lack of separation would allow direct victims to bring suit absent an impact, so long as they have physical symptoms to evidence the emotional trauma. This proposition received support in *Willis*, where the court disapproved of language in *Ruttger Hotel Corp. v. Wagner* that limited *Champion* to bystander cases.[100]

C. Freestanding Tort Cases

The freestanding tort exception is a limitation on the impact rule.[101] When a freestanding tort is present in conduct that gives rise to an NIED claim, the impact rule has no application.[102] Generally, a freestanding tort is one where the plaintiff would be able to sue on a cause of action other than a negligence claim without having to prove emotional damages to prevail.[103] In Florida, when the facts support a freestanding tort, the impact rule does not apply because the tort other than the negligence claim creates foreseeability for the defendant.[104]

Kush v. Lloyd was the first case in this series.[105] In *Kush*, a couple had a baby who had the misfortune of being born with genetic abnormalities.[106] The couple wanted to have another child, but out of concern for his potential disabilities, they consulted a doctor.[107] Their doctor misdiagnosed a genetic disorder and incorrectly told the parents that they could have children free of genetic defects.[108] The parents conceived and gave birth to another baby with the same genetic abnor-

98. *See Champion*, 478 So. 2d at 19-20.
99. *See* Littky-Rubin, *supra* note 97, at 24.
100. Eagle-Picher Indus., Inc. v. Cox, 481 So. 2d 517, 526 (Fla. Dist. Ct. App. 1985) (extending the physical manifestation rule to direct victim cases), *quoted with approval in Willis*, 967 So. 2d at 850-51. *But see* Ruttger Hotel Corp. v. Wagner, 691 So. 2d 1177, 1179 (Fla. Dist. Ct. App. 1997) (calling *Champion* a bystander rule), *disapproved of by Willis*, 967 So. 2d at 851.
101. *Kush*, 616 So. 2d at 422.
102. *Id.*
103. *See id.*
104. *See id.*
105. *Id.* at 417.
106. *Id.*
107. *Kush*, 616 So. 2d at 417
108. *Id.*

malities.[109] Suing under a negligence theory, the parents sought damages for the mental anguish they now suffered.[110] In allowing for emotional damages, the court reasoned that freestanding torts, such as defamation and wrongful birth, stand apart from a negligence action, because these torts would lie even without the attendant emotional injury.[111] The emotional damages would then be parasitic to the damages otherwise recoverable in the claim of wrongful birth against the doctor.[112] This reasoning is buttressed by the availability of emotional damages in torts like defamation and invasion of privacy.[113] In those actions, it is wholly foreseeable to the tortfeasor that emotional damages could result.[114] Thus, the impact rule is not needed to prove foreseeability.[115]

Such reasoning applied to *Kush*, because the tort of wrongful birth compensates the parents for the additional cost of rearing a handicapped child.[116] The doctor is liable under such a theory because the parents might not have conceived had the doctor not been negligent.[117] The parents in *Kush* had a cause of action for those damages not because they could prove negligence as to their emotional state, but because of the doctor's actions giving rise to the wrongful birth claim.[118] The emotional damages were parasitic to that cause of action.

Again, the common theme of foreseeability arises in the analysis to trump the impact rule.[119] In freestanding tort cases, this happens because the tortfeasor can foresee the emotional damage that can result from the underlying tort.[120] However, when an action comes within the freestanding tort exception, that case is now a freestanding tort, creating a whole new cause of action.[121] Thus, after *Kush*, Florida

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109. *Id.*

110. *Id.* at 422.

111. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 47, cmt. b (1965)); W. PAGE KEETON ET AL., *Prosser & Keeton on the Law of Torts* 362 (5th ed. 1984).

112. *See* RESTATEMENT (SECOND) OF TORTS § 47, cmt. b. Freestanding torts, as referenced in the Restatement, contemplate a situation where the tortfeasor intended on committing one tort and incidentally invades another legally protected interest of the victim. *Id.*

113. *Kush*, 616 So. 2d at 422.

114. *Id.*

115. *See id.*; Dilan A. Esper & Gregory C. Keating, *Putting "Duty" in Its Place: A Reply to Professors Goldberg and Zipursky*, 41 LOY. L.A. L. REV. 1225, 1265-66 (2008).

116. *Kush*, 616 So. 2d at 422.

117. *Id.* at 417, n.2.

118. *See id.* at 422.

119. *See id.*

120. *See id.*

121. *See id.*; *Thomas*, 889 So. 2d at 972.

recognized a cause of action for wrongful birth outside the scope of negligence actions.[122]

Tanner v. Hartog presented a slightly different question when a doctor's alleged negligence caused a baby to be stillborn.[123] In *Tanner*, doctors sent the mother to a hospital for testing and the next day her baby was stillborn.[124] The mother and her husband asserted a claim of negligent stillbirth against the doctors.[125] This question is somewhat different than *Kush* for a couple of reasons. First, the baby was stillborn, so the wrongful birth cause of action created in *Kush* was unavailable.[126] Second, no cause of action for negligent stillbirth existed in Florida, so the parents here essentially brought a malpractice claim.[127] This was not a problem in *Kush*, because the tort of wrongful birth existed elsewhere, and that cause of action could be proven without a need to satisfy the impact rule.[128] But since *Tanner* is essentially a negligence action standing alone, it was a pure NIED claim.[129] Therefore, the foreseeability of emotional harm needed to be proven through the element of duty, placing the impact rule squarely in the father's path to relief.[130]

In working through *Tanner*, the court noted that some jurisdictions have disposed of this question by holding the doctor's treatment of the fetus as an impact.[131] In jurisdictions where the fetus is not considered a separate legal entity but instead a living tissue of the mother, any impact on the fetus is technically an impact on the mother.[132] Thus, the mother is impacted and the impact rule is not an obstacle.[133]

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122. *See Kush*, 616 So. 2d at 423.

123. *Tanner*, 696 So. 2d at 706. *Tanner* has a more limited factual background because the appeal originated from the motion to dismiss stage. *See id.* This appeal encompasses just the claim of the father and certifies a question to the Florida Supreme Court: "Does the law of this state support a cause of action for emotional damages of an expectant father and mother resulting from a stillbirth caused by the negligent act of another?" *Id.*

124. *Id.*

125. *Id.*

126. *See Kush*, 616 So. 2d at 417, n.2. The wrongful birth cause of action compensates the parents for the cost of raising a child they otherwise would not have conceived. Although this is a rather chilling distinction to draw, the parents would not have incurred those costs in *Tanner*, so their emotional distress damages stood alone. *See Tanner*, 696 So. 2d at 708.

127. *See Tanner*, 696 So. 2d at 708. The father is the only party present in the appeal because the impact portion of the impact rule was overcome by the impact on the mother through the delivery process. *Id.* at 706.

128. *See Kush*, 616 So. 2d at 422.

129. *See Tanner*, 696 So. 2d at 707.

130. *Id.*

131. *Id.*

132. *Id.*

133. *See id.*

The court rejected this escape route and adopted the reasoning in *Kush.*[134] In doing so, the court created another new cause of action just as it did in *Kush*: negligent stillbirth.[135] Now, instead of resorting to distorted constructions of an impact or creating an exception, the court places this tort outside the realm of general negligence actions with freestanding torts such as trespass and defamation.[136] Since the foreseeability of emotional harm flows from the nature of the tort, a plaintiff need not overcome the impact rule in order to prevail.[137]

However, it must be noted that even the *Kush* reasoning has its harsh limitations. In *Thomas*, a doctor negligently misdiagnosed and terminated a pregnancy.[138] Thus, the parents could not point to a wrongful birth or a stillbirth.[139] The father and husband brought an NIED claim.[140] However, rather than analyze the claim for the presence of conduct which created foreseeability, which is the essence of the *Kush* analysis, the question turned on whether termination of the pregnancy was a stillbirth within the *Tanner* cause of action.[141] Recognizing that *Tanner* created a new cause of action, the court could not fit the facts of this case into the definition of a stillbirth as it existed in *Tanner*.[142] Therefore, the father could not proceed on his NIED claim despite a set of facts just as meritorious as those presented in *Tanner*.[143]

Gracey v. Eaker moved *Kush* out of the realm of hospitals and applied it to a therapy setting.[144] In *Gracey*, a licensed therapist treating a husband and wife as separate patients revealed the confidences of those sessions to all parties, contrary to a statutorily imposed duty.[145] The court held that the impact rule did not apply, in part because of the *Kush* reasoning.[146] Just as in *Kush*, emotional damages are foreseeable because a therapist should realize his patients are en-

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134. *See id.*
135. *See Tanner*, 696 So. 2d at 707.
136. *See id.*
137. *See id.*
138. *Thomas*, 889 So. 2d at 971. The facts of this case are particularly unsettling. The doctor negligently removed an arm from the fetus in utero while he was still alive thinking the pregnancy symptoms were caused by a molar pregnancy. *Id.* at 971.
139. *Id.*
140. *Id.*
141. *Id.* at 972.
142. *See id.*
143. *See id.*
144. Gracey v. Eaker, 837 So. 2d 348, 351 (Fla. 2002).
145. *Id.*
146. *Id.*

trusting him with their innermost secrets.[147] The statutory duty owed to the patients buttressed this argument, leaving the therapist without the impact rule as a defense.[148] This was an important step in the Florida impact rule, as the statutory duty could have been enough to invoke *Kush* without placing emphasis on the special relationship.[149] However, the court went on to emphasize the special relationship between the parties and its role in foreseeability.[150] This left the door open for other special relationships that could limit the impact rule's application.

The plaintiff in *Rowell v. Holt* sought to take advantage of this open door, asserting the attorney-client relationship.[151] *Rowell* involved a public defender who received a document from his or her client that completely exonerated the client and would have secured his release from pretrial detention.[152] The public defender either lost this document or forgot about it, and the mistake was only realized when another public defender happened to interview the still incarcerated client.[153] The wrongfully detained client brought an NIED claim for his unnecessarily long incarceration, to which the Office of the Public Defender answered with the impact rule.[154] Following the reasoning of *Kush*, the court found the impact rule did not apply here because of the attorney-client relationship and the clearly foreseeable emotional harm that resulted because of the public defender's failure to act.[155] *Kush* clearly implicated a doctor-patient relationship, but the relationship itself did not play a central role in the analysis.[156] However, *Rowell* put another special relationship on the NIED map.[157] First, doctor-patient relationships are implicated. Next, therapist-patient relationships are explicitly mentioned, and now attorney-client relationships are, too.[158]

This special relationship argument is where *Willis* leaves its mark on the freestanding tort cases. Recall in *Willis*, a robber held a

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147. *Id.*
148. *Id.* at 357.
149. *See id.* at 356.
150. *See Gracey*, 837 So. 2d at 356.
151. *Rowell*, 850 So. 2d at 476-77.
152. *Id.* at 476-77. The opinion in *Rowell* is careful to not reveal the identity of the attorneys that met with Rowell. *Id.*
153. *Id.* at 477.
154. *Id.*
155. *Id.* at 479-80.
156. *See Kush*, 616 So. 2d at 417.
157. *See id.*; *Rowell*, 850 So. 2d at 480; *Gracey*, 937 So. 2d at 357.
158. *See Rowell*, 850 So. 2d at 480; *Gracey*, 937 So. 2d at 357; *Kush*, 616 So. 2d at 417.

hotel guest at gunpoint and the impact of the gun to her head satisfied the impact rule.[159] If the hotel guest had sued the robber, the intentional torts of assault and battery would overwhelm the negligence action and more clearly implicate the *Kush* line of cases.[160] If the relationship between doctor and patient is enough to foresee emotional harm, surely that between robber and victim will suffice to support parasitic emotional damages.[161] However, the hotel had not committed any freestanding torts, so those causes of action were unavailable.[162] Therefore, it is unknown how the court would apply the freestanding tort exception in cases where the defendant is not the party who committed the freestanding tort.[163] However, requiring the hotel to act in such a way to preserve the hotel guest's emotional tranquility *only after* the gunman touched her does indicate the court may not be troubled by this degree of separation.[164]

Perhaps most relevant to the freestanding tort line is that the court is able to avoid cementing the special relationship exception, leaving *Kush* as an ad hoc limitation to the impact rule's construction.[165] *Rowell*, *Gracey*, and *Kush* began the making of this exception, and if the courts were to extend it to the innkeeper-guest relationship, Florida would be hard-pressed to avoid calling this something other than a special relationship exception. Certainly, an innkeeper is substantially less charged with the emotional tranquility of his or her guests than a therapist of his or her patients.[166] However, the easy resolution of *Willis* through the impact rule left this issue untouched.[167]

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159. *Willis*, 967 So. 2d at 850.

160. *See id.*

161. *See id.*

162. *See id.*

163. *See id.*

164. *See id.*

165. *See Willis*, 967 So. 2d at 848. This issue was actually the third certified question in *Willis*. *Id.*

166. *See Rowell*, 850 So. 2d at 480; *Gracey*, 937 So. 2d at 357; *Kush*, 616 So. 2d at 417; *see also* Woodard v. Jupiter Christian Sch., Inc., 913 So. 2d 1188, 1191 (Fla. Dist. Ct. App. 2005) (dismissing the case due to the lack of a special relationship exception despite the statutory duty of the clergy to keep communications confidential). *Woodard* is a fascinating case. There, a high school student confessed to his teacher/minister under the assurance of confidentiality that he was homosexual. The teacher revealed these confidences to administrators and other students, and the student brought an NIED claim. Therefore, this case presents the special relationship exception question and facts that give rise to a freestanding tort analysis. *See id.* However, the appeal to the Florida Supreme Court was dismissed, albeit with a dissent along the freestanding tort lines. *Id.* (Pariente, J., dissenting). *But see Willis*, 967 So. 2d at 848.

167. *See Willis*, 967 So. 2d at 850.

Lastly, *Willis* marks another instance in which the appellate courts in Florida certified questions to the Florida Supreme Court on the how the impact rule should operate.[168] One of the supposed benefits of the impact rule is its creation of a bright line for the existence of foreseeability in an NIED claim.[169] However, the number of certified questions regarding how to apply it would suggest that the line drawn is anything but bright.[170]

D. Justifications for Florida's Impact Rule

Throughout these lines of cases, Florida has maintained the traditional policy justifications for the impact rule: foreseeability, evidentiary concerns, and judicial efficiency.[171] However, these cases have shown numerous situations in which foreseeability is more clearly proven despite the lack of an impact.[172] The impact rule is a per se rule of foreseeability.[173] To acknowledge that foreseeability is present in these cases absent an impact is to acknowledge that Florida is not deriving this benefit from the impact rule. Evidence concerns are not what they used to be one hundred years ago. Experts capable of proving purely emotional damages are available in situations in which they are needed.[174] Lastly, the flood of litigation has not occurred anywhere.[175] These justifications are seen in the approaches of other states, as discussed below.

168. *Id.* at 848.

169. *See* Lee v. State Farm Mut. Ins. Co., 533 S.E.2d 82, 86 (Ga. 2000).

170. *E.g.*, *Willis*, 967 So. 2d at 848 (certifying four questions); *Rowell*, 850 So. 2d at 475-76 (certifying one question); *Gracey*, 837 So. 2d at 350 (certifying one question); *Hagan*, 804 So. 2d at 1235 (certifying one question); *Tanner*, 696 So. 2d at 706 (certifying one question); R.J. v. Humana of Florida, Inc., 652 So. 2d 360, 362 (Fla. 1995) (asking how the impact rule operates in a case of negligent HIV diagnosis); *Zell*, 665 So. 2d at 1054 (certifying a two-part question); *Kush*, 616 So. 2d at 417 (certifying one question and conflict with another DCA); *Champion*, 478 So. 2d at 18 (certifying one question).

171. *Zell*, 665 So. 2d at 1050-51. *Zell* dwells more on causation, because the specific issue there is whether the time interval between the physical manifestations and the bombing bar the claim. However, when causation is not so questionable, this justification distills to whether the defendant could have foreseen the emotional harm. *See Hagan*, 804 So. 2d at 1239.

172. *See Zell*, 665 So. 2d at 1050 (finding bystander liability); *Kush*, 616 So. 2d at 422 (finding liability based on foreseeability).

173. *See Lee*, 533 S.E.2d at 86.

174. Kircher, *supra* note 14, at 808.

175. *See* Osborne v. Keeney, 399 S.W.3d 1, 18 n.39 (Ky. 2012); *infra* Part III.C.

II. The Impact Rule in Other States

A. Indiana

Indiana follows the impact rule, but physical manifestations of the injury are not required in a direct victim claim.[176] However, if the impact or manifestation is minimal, the direct victim-plaintiff must show that the injury is serious and not speculative.[177] For example, a restaurant customer successfully asserted an NIED claim against a restaurant when he ate a portion of a meal that had been cooked with a worm.[178] Eating the contaminated food served as the impact.[179] Even though this impact does not have the force of a negligently driven car, the evidence showed genuine emotional distress that was foreseeable by the restaurant.[180]

The court defined the outer limits of this test in *Atlantic Coast Airlines v. Cook*.[181] In the months after September 11th, airline passengers watched an unsettled passenger harass flight attendants, smoke cigarettes on the plane, and attempt to obtain a seat near the cockpit door.[182] The passenger's actions were alarming enough for the plaintiff to secure the assistance of other passengers in case an imminent threat of attack arose.[183] The flight ended uneventfully, but the plaintiff brought an NIED claim against the airline for failing to control a flight security risk.[184] Faced with the impact rule, the passenger asserted the cigarette smoke from the security risk passenger and the vibrations in the floor of the airplane as the impacts sustained.[185] This invoked the *de minimis* impact/serious injury test, and the court found

176. Conder v. Wood, 716 N.E.2d 432, 435 (Ind. 1999). *Conder* is more appropriately categorized as a bystander case, but since the victim sustained an impact from banging on the truck that was crushing her friend, the direct victim/bystander distinction was not made until later. Thus, language from *Conder* pops up in direct victim and bystander cases. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. D'Angelo, 875 N.E.2d 789, 796 n.2 (Ind. Ct. App. 2007) (asserting a direct impact from trying to lift a car off of the accident victim despite the presence of bystander facts); Atl. Coast Airlines v. Cook, 857 N.E.2d 989, 996 (Ind. 2006) (citing *Conder* for requirement of an impact, even though impact has not been required since 2000 for bystander cases).

177. *Atl. Coast Airlines*, 857 N.E.2d at 996.

178. Holloway v. Bob Evans Farms, Inc., 695 N.E.2d 991, 996 (Ind. Ct. App. 1998).

179. *See id.*

180. *See id.* at 996-97.

181. *Cook*, 857 N.E.2d at 991-92.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 999.

the injury not one within the ambit of relief.[186] The lack of medical treatment and symptoms to describe the emotional distress, other than anxiety during the event, led the court to describe the injury as transitory and similar to emotions many passengers feel on airplanes daily.[187] Thus, the impact rule in Indiana does keep out apparently frivolous claims,[188] but the impact rule is applied in name only. The Indiana courts are actually applying a serious injury test, only allowing plaintiffs to proceed on significant emotional injuries foreseeable to the defendant.[189]

The bystander line of cases started in *Shaumber v. Henderson*.[190] There, a mother and her daughter watched helplessly as their son and brother, respectively, died from his injuries following a car crash.[191] The survivors successfully asserted a negligence action against the drunk driver for their physical injuries, but they were more severely injured emotionally from the lost family member.[192] Instead of getting rid of the impact rule, Indiana chose to create the "direct involvement" rule.[193] It allows claims for emotional distress to go forward if the impact is not causative of the emotional distress, so long as the plaintiff is directly involved in the injury to the third party.[194] In asserting the direct involvement rule, a plaintiff must show the emotional damages are serious in nature and would normally be suffered by a reasonable person.[195]

Even though the mother and daughter were both impacted in *Shaumber*, the impact requirement did not last long.[196] *Groves v. Taylor* held no impact upon the bystander is needed.[197] There, an eight-year-old girl heard her six-year-old brother struck by a car.[198] She then turned to see his body rolling off the road.[199] By allowing for recovery because of the daughter's direct involvement in the incident, absent

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186. *Id.* at 1000.
187. *Cook*, 857 N.E.2d at 999-1000.
188. Ross v. Cheema, 716 N.E.2d 435, 437 (Ind. 1999) (denying an NIED claim where the impact derives from a courier knocking on the front door).
189. *See Cook*, 857 N.E.2d at 999; *Holloway*, 695 N.E.2d at 996.
190. Shuamber v. Henderson, 579 N.E.2d 452, 453 (Ind. 1991).
191. *Id.*
192. *Id.*
193. *Id.* at 456.
194. *See id.*
195. *Id.*
196. Groves v. Taylor, 729 N.E.2d 569, 573 (Ind. 2000).
197. *Id.*
198. *Id.*
199. *Id.*

any impact upon her, Indiana's bystander rule was formed.[200] The rule in *Groves* is more akin to the *Dillon* rule: a fatal or serious injury sustained by a person with a close relationship to the bystander, which would cause emotional distress to a reasonable person, only needs to be perceived by the bystander.[201]

Finally, Indiana also has an intentional tort exception, which applies when the defendant's conduct is akin to a crime or intentional tort, like arson,[202] defamation,[203] or fraud.[204] Such intentional conduct is outside the scope of the impact rule because the foreseeability function of the impact rule is unnecessary when the defendant acts with intent.[205] The intentional tort exception is exactly that and does not necessarily run to freestanding torts, like negligent stillbirth. In *Spangler v. Betchel*, a baby was stillborn after alleged negligent treatment while the baby was still in utero.[206] Instead of recognizing the foreseeability that would flow from the malpractice action, the court allowed the NIED claim to go forward because of the impact of the treatment to the mother.[207] Therefore, an impact is required in the negligent stillbirth context.[208]

Taken together, the Indiana impact rule is perhaps nearly nonexistent, but still stricter than the Florida impact rule. Indiana's highly technical application of the *de minimis* impact, in conjunction with the serious injury test, functions similarly to the direct-victim line of cases in Florida.[209] Both bystander rules are versions of the *Dillon* rule and no longer require any type of impact on the bystander.[210] The freestanding tort exception in Florida is broader than the Indiana intentional tort exception since it encompasses torts that are negligence-based.[211] While Florida has created the negligent stillbirth action, In-

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200. *See id.*; *Shaumber*, 579 N.E.2d at 453.

201. *Groves*, 729 N.E.2d at 573-74.

202. Kline v. Kline, 64 N.E. 9, 10 (Ind. 1902). The facts of *Kline* would also support an assault claim. *Id.* at 9.

203. Lazarus Dep't Store v. Sutherlin, 544 N.E.2d 513, 526 (Ind. Ct. App. 1989).

204. Groves v. First Nat'l Bank of Valparaiso, 518 N.E.2d 819, 829 (Ind. Ct. App. 1988).

205. *Shaumber*, 579 N.E.2d at 454.

206. Spangler v. Bechtel, 958 N.E.2d 458, 460 (Ind. 2011).

207. *See id.* at 468 n.6.

208. *See id.* at 467.

209. *Compare Holloway*, 695 N.E.2d at 996-97, *Conder*, 716 N.E.2d at 435, *Atl. Coast Airlines*, 857 N.E.2d at 999, *and Shaumber*, 579 N.E.2d at 454, *with Willis*, 967 So. 2d at 850, *Hagan*, 804 So. 2d at 1236, *Zell*, 665 So. 2d at 1053, *and Elliott*, 58 So. 3d at 882.

210. *Compare Conder*, 716 N.E.2d at 435, *and Shaumber*, 579 N.E.2d at 454, *with Zell*, 665 So. 2d at 1053.

211. *Compare Spangler*, 958 N.E.2d at 467-68, *with Tanner*, 696 So. 2d at 706.

diana still resolves these cases through the impact rule.[212] Indiana's approach has limitations, such as failing to recognize the emotional well-being of the father or situations where there is no impact, even under the Indiana impact rule.[213] Indiana's impact rule has been somewhat modernized, but Florida's impact rule exceptions are broader, particularly due to the freestanding tort line of cases.[214]

B. Georgia

The Georgia impact rule follows a similar exception-riddled history, with *Chambley v. Apple Restaurants, Inc.* towing the direct victim line of cases.[215] In *Chambley*, a restaurant customer noticed an unwrapped condom in the salad she was eating.[216] The restaurant customer grew nauseous and required medical treatment.[217] However, the evidence in the case tended to show the physical symptoms stemmed from her knowledge of eating the contaminated food as opposed to any harm the contaminants themselves caused.[218] Thus, the impact required is minimal and the emotional distress must stem from the impact, but the physical injury need not relate to it.[219]

Lee v. State Farm Mutual Ins. Co. created the bystander exception.[220] *Lee* involved a mother who watched her daughter succumb to her injuries after they were both involved in a car crash.[221] Prior to *Lee*, there was no bystander rule, however, the *Lee* court took a very small step forward.[222] Georgia's impact rule required a plaintiff to sustain a physical impact, which would cause a physical injury, and then cause the mental injury.[223] Instead of creating a wholly new bystander

212. *See Spangler*, 958 N.E.2d at 467-68.
213. *See id. But see Tanner*, 696 So. 2d at 706.
214. *Compare Spangler*, 958 N.E.2d at 467-68, *with Tanner*, 696 So. 2d at 706.
215. Chambley v. Apple Rest., Inc., 504 S.E.2d 551, 552 (Ga. Ct. App. 1998).
216. *Id.*
217. *Id.*
218. *Id.* at 552.
219. *Id.* at 500. While the majority is content to resolve this case through the impact rule with the nausea and vomiting evincing the physical injury, the concurrence would infer malicious intent from the presence of an unwrapped condom in food. *Id.* at 554 (Eldridge, J., concurring); *see also* OB-GYN Assocs. of Albany v. Littleton, 410 S.E.2d 121, 121 (Ga. 1991). *Littleton* formed much of the current Georgia impact rule, where allegedly negligent medical treatment led to the death of a two-day-old infant. In the ensuing NIED claim, recovery was not permitted for the mother's emotional distress if it stemmed from the death of the baby and not any impact on the mother. *See id.*
220. *Lee*, 533 S.E.2d at 83.
221. *Id.*
222. *Id.*
223. *Id.*

rule, the court simply eliminated the third requirement of the impact rule.[224] Therefore, bystanders could bring an action if they suffered an impact and were physically injured, but the mental injury need not come from the physical injury.[225] The Georgia Supreme Court has not addressed the holding of *Lee* to date. This leaves two main questions open. First, whether *Lee* is solely a bystander rule or whether it extends to direct victim cases.[226] Second, whether the impact will be required in a bystander type-case.[227]

Georgia also applies what, at first glance, is a special relationship-type limitation on the rule's applicability.[228] For example, in *Bruscato v. O'Brien*, the impact rule did not apply to a medical malpractice claim against a psychiatrist who negligently discontinued medicating a patient.[229] The patient then killed his mother due to his un-medicated mental state.[230] The doctor-patient relationship created the foreseeability that the impact rule seeks to impose.[231] Thus, the impact rule was unnecessary.[232] *Bruscato* is unclear on whether a special relationship exception actually exists, though, or if the foreseeability derived more from the cause of action sounding in medical malpractice.[233] While this distinction may be irrelevant in *Bruscato*, moving forward, such a distinction might determine if this exception could grow beyond medical malpractice facts.[234] The *Bruscato* analysis touched upon the statutory pleading requirements and rules governing medical standards of conduct, discussing how these rules establish foreseeability.[235] These rules also served the policy jus-

224. *Id.* at 87.

225. *Id.*

226. *Compare* Wilson v. Allen, 612 S.E.2d 39, 41 n.4 (Ga. Ct. App. 2005) (denying relief because the injury did not cause mental suffering in a direct victim-type case, but noting the potential applicability of *Lee*), *with* Grizzle v. Norsworthy, 664 S.E.2d 296, 298 (Ga. Ct. App. 2008) (applying the impact rule in a direct victim case with causation of the emotional distress flowing from the physical injury, notwithstanding citation to *Lee*).

227. *See* Oliver v. McDade, A14A0147, 2014 WL 3510716, at *2 (Ga. Ct. App. July 16, 2014). In *Oliver*, the victim/plaintiff was also the truck driver that collided with the third party victim, killing him. The driver sustained an impact both in the force of the crash and from the decedent's blood. However, instead of muddling through *Lee*, the court applied the pecuniary loss exception to the impact rule. *Id.* at *1-2.

228. Bruscato v. O'Brien, 705 S.E.2d 275, 278 (Ga. Ct. App. 2010), *aff'd*, 715 S.E.2d 120 (Ga. 2011).

229. *Id.*

230. *Id.*

231. *Id.*

232. *See id.* at 280.

233. *See id.* at 279.

234. *Bruscato*, 705 S.E.2d at 279.

235. *See id.* at 280-81.

tifications for the impact rule.[236] Frivolous claims were screened out by the heightened pleading requirements.[237] The flood of litigation concern is addressed because a doctor-patient relationship needs to exist. The court found it unlikely that malpractice claims would become more numerous with the availability of emotional damages.[238] Lastly, the element of causation is not something completely determined by the court, but governed by the applicable standards of conduct in the medical community.[239] Based on the *Bruscato* analysis, it would appear that special relationships do not control when the impact rule applies, but an analysis of the impact rule justifications and their presence in the case at bar.[240]

Two years after *Bruscato*, a federal court sitting in diversity was unwilling to work with Georgia's impact rule exceptions, despite the presence of a contractual relationship, as well as fraud and slander claims.[241] The family in *Hang v. Wages & Sons Funeral Home, Inc.* could not proceed on their NIED claim when the funeral home cremated the decedent's body prior to the viewing, even though the funeral home could likely foresee emotional harm by virtue of the contractual relationship with the family.[242] *Nationwide Mutual Fire Ins. Co. v. Lam* adds more confusion to the mix where a car crash aggravated an existing mental illness.[243] There was no physical injury to the accident victim, which would normally bar the emotional damages.[244] However, the impact rule did not bar the damages because the court could clearly relate the accident to causation and none of the policy justifications were served by applying the impact rule.[245] Again, considerations of policy tend to control when an otherwise mechanical application of the impact rule would result.[246]

Lam also states the pecuniary loss rule.[247] This rule allows for an NIED claim to proceed when the emotional distress complained of is

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236. *See id.*
237. *See id.*
238. *See id.* at 280-81.
239. *See id.* at 281.
240. *See Bruscato*, 705 S.E.2d at 279-81.
241. Mitchell v. Deutsche Bank Nat'l Trust Co., 1:13-CV-00304-WSD, 2013 WL 6510783, at *11 (N.D. Ga. Dec. 12, 2013).
242. Hang v. Wages & Sons Funeral Home, Inc., 585 S.E.2d 118, 120-21 (Ga. Ct. App. 2003).
243. Nationwide Mut. Fire Ins. Co. v. Lam, 546 S.E.2d 283, 285 (Ga. Ct. App. 2001).
244. *Id.*
245. *See id.*
246. *See Hang*, 585 S.E.2d at 121; *Lam*, 546 S.E.2d at 285; *Mitchell*, 2013 WL 6510783 at *11.
247. *Lam*, 546 S.E.2d at 284.

coupled with a pecuniary loss.[248] The idea being that the pecuniary loss establishes a legitimate NIED claim when there is no impact.[249] However, this line of reasoning is dubious. If the driver in *Lam* had borrowed her friend's car, then that car owner could potentially claim emotional damage if she was emotionally injured by viewing her wrecked car. Such an absurd result would derive solely from the car owner's claimed emotional distress coupled with a pecuniary loss.[250]

McCunney v. Clary presents an even more confusing picture.[251] There, a father driving his family car was struck by the defendant's car.[252] He was unharmed, but his wife and two children were injured.[253] The father sued for emotional distress but found his NIED claim barred because he was not impacted by the defendant's negligence.[254] These facts would seem to implicate the *Lam* analysis, but upon closer inspection, the personal injury claims had already been settled before the NIED claim was brought, so there were no pecuniary losses still present.[255] However, the court does not explicitly dispose of the case along these lines, instead finding the impact rule's application justified.[256] Then, without describing why the court thought the claim might be fraudulent or the causal connection difficult to draw, it held there can be no NIED recovery.[257]

In short, Georgia's impact rule is in a state of flux. There is no true bystander rule,[258] the ad hoc exceptions are difficult to predict,[259] and the definition of an impact is stretched to avoid harsh results.[260] Even with this level of unpredictability, the Georgia impact rule is still harsher than the Florida rule. The direct victim line of cases bear similarities, as both states allow contaminated food cases to proceed and the impact required is minimal.[261] Unlike the *Lee* case in Georgia,

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248. *Id.*
249. *See id.* at 285.
250. *See Oliver*, 2014 WL 3510716, at *5 (Andrews, J., dissenting).
251. McCunney v. Clary, 576 S.E.2d 635, 635-36 (Ga. Ct. App. 2003).
252. *Id.*
253. *Id.*
254. *Id.*
255. *See id.* at 636.
256. *See id.*
257. *See McCunney*, 576 S.E.2d at 637.
258. *See id. Lee* is the closest to a bystander rule, but the apparent requirement of an impact fails to distinguish the rule announced in *Lee* from a modern impact rule. *See Lee*, 533 S.E.2d at 83.
259. *See Bruscato*, 705 S.E.2d at 281; *McCunney*, 576 S.E.2d at 637.
260. *See Chambley*, 504 S.E.2d at 552.
261. *Compare Willis*, 967 So. 2d at 850, *and Hagan*, 804 So. 2d at 1236, *with Lee*, 533 S.E.2d at 86-87, *and Chambley*, 504 S.E.2d at 552.

Florida has a bystander rule where impact is not required.[262] While Florida's freestanding tort exceptions probably allow more cases to be heard, the exceptions are at least based on the common sense application of foreseeability and not the bizarre, more limited pecuniary loss rule.[263]

C. Kansas

Kansas applies a rule that allows for liability if the plaintiff is impacted or if there is a physical injury that results.[264] In *Hoard v. Shawnee Mission Medical Center*, a hospital mistakenly notified parents that their daughter had died in a single car accident.[265] The daughter had in fact survived the crash but was disabled and confined to a wheelchair.[266] After the hospital realized its mistake and corrected it, the parents were able to tend to their daughter.[267] This tragic situation left the parents in dual roles as full time caretakers and parents.[268] They had medical bills to pay, both for their injuries and their daughter's.[269] However, the parents only had a direct victim claim on facts somewhat similar to the classic cases involving negligent transmission of death notices.[270] The physical injuries that can support an NIED claim for the parents were those caused by, and that followed, the misinformation of their daughter's death: fainting, nausea, and nightmares.[271] While some damages may be successfully claimed for these injuries, the emotional distress for which the family needed compensation resulted from their daughter's newly inflicted disabilities.[272] But these emotional injuries were simply not caused by the hospital.[273] Thus, direct victim cases in Kansas do not require an impact if there is

262. *Compare Champion*, 478 So. 2d at 18-19, *and Zell*, 665 So. 2d at 1054, *with Lee*, 533 S.E.2d at 86-87.

263. *Compare Tanner*, 696 So. 2d at 708, *with Lam*, 546 S.E.2d at 285.

264. Hoard v. Shawnee Mission Med. Ctr., 662 P.2d 1214, 1219-20 (Kan. 1983). Another interesting aspect of the Kansas impact rule is that courts rarely call it the impact rule. Instead, Kansas courts refer to the necessity of an impact or physical injury. *See id.*

265. *Id.* at 1216.

266. *Id.* at 1217-18.

267. *Id.* at 1217.

268. *See id.* at 1217-18.

269. *Id.* at 1219.

270. *Hoard*, 662 P.2d at 1220 (citing Kaufman v. W. Union Tel. Co., 224 F.2d 723 (5th Cir. 1955)).

271. *Id.* at 1220.

272. *See id.* at 1221.

273. *See id.*

a physical injury, but the physical manifestation of the injuries must be caused by the defendant's negligence.[274]

Schmeck v. City of Shawnee is the closest thing Kansas has to a bystander case.[275] In this case, a woman was thrown from a motorcycle after being struck by a car.[276] She was totally disabled by the accident.[277] Her mother, who was not present at the scene and learned of her daughter's injuries an hour later, brought an NIED claim.[278] The mother was denied relief because she was not impacted.[279] However, the court seemed willing to recognize a bystander cause of action similar to the *Dillon* rule should the facts change accordingly.[280] Unfortunately, this question has never been directly presented to the Kansas Supreme Court since the *Schmeck* case.[281]

There is also no special relationship exception in Kansas, as shown in *Humes v. Clinton*.[282] In *Humes*, a doctor failed to warn his patient of the need to replace a contraceptive device within a year.[283] As a result of this failure, the patient became pregnant.[284] Pregnancy with the presence of the contraceptive device presented life-threatening risks to the mother, so she ultimately decided to have a medically necessary abortion.[285] Although the mother did contract an infectious disease from the doctor's negligence, that injury did not appear to be causative of the emotional injury.[286] Consequently, the impact rule applied and barred the action, regardless of the doctor-patient relationship that existed.[287]

Nor does the presence of intentional or otherwise independent torts limit the application of the impact rule. For example, in *Fusaro v.*

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274. *See id.* at 1219-20; *see also* Ware *ex rel.* Ware v. ANW Special Educ. Co-op. No. 603, 180 P.3d 610, 613 (Kan. Ct. App. 2008).

275. *See* Schmeck v. City of Shawnee, 647 P.2d 1263, 1264 (Kan. 1982).

276. *Id.*

277. *Id.*

278. *Id.*

279. *See id.* at 1266.

280. *See id.*

281. *See Tucker*, 2007 WL 2155658, at *3-4; *see also* Smelko v. Brinton, 740 P.2d 591, 598 (Kan. 1987) (denying relief because parents were not present to witness surgical injury to child, and did not recognize a bystander cause of action because they were in the next room).

282. *See Humes*, 792 P.2d at 1034-35. While this negligence gave rise to the malpractice action, technically, the mother argued the doctor's negligence stemmed from his failure to warn her of the psychological effects of having an abortion. *Id.* at 1038.

283. *Id.* at 1034-35.

284. *Id.*

285. *Id.*

286. *See id.* at 1038.

287. *Id.*

First Family Mortgage Corp., the homeowner brought trespass, intentional infliction of emotional distress (IIED), and NIED claims when a contractor entered the plaintiff's house and disposed of his belongings.[288] This underlying conduct did not limit the application of the impact rule.[289] While emotional damages could be claimed under intentional tort theories, the intent must be to cause emotional harm, not invasion of some other legal interest.[290] Therefore, in Kansas, the foreseeability derived from the intentional tort does not carry over into the NIED claim.[291]

Of the remaining states that retain the impact rule, Kansas applies the harshest version and makes the Florida impact rule look like a general negligence approach. The high threshold for a physical injury or impact, lack of exceptions for freestanding torts, and the lack of a bystander rule all stand in stark comparison to Florida law.[292] Kansas still resolves many of its impact rule cases by determining whether or not there was an impact, rather than the foreseeability analysis that often emerges in Florida.[293] While the results of the cases are no doubt harsh, Kansas' unflinching adherence to the impact rule has at least created an unrivaled clarity in the state's NIED law.[294]

D. Nevada

Nevada's direct victim cases require either an impact or physical manifestations of the injuries.[295] In *Chowdhry v. NLVH, Inc.*, for example, the court would not allow a doctor to pursue an NIED claim against the hospital when the hospital placed a reprimand on his record.[296] Clearly there was no impact here, so the court then examined the record for physical manifestations of the injury.[297] In this analysis, the symptoms of insomnia and general discomfort were insufficient to qualify as physical manifestations, so the court denied the NIED

288. Fusaro v. First Family Mortg. Corp., 897 P.2d 123, 127 (Kan. 1995).

289. *See id.* at 131.

290. *See id.* at 132.

291. *See id.*

292. *Compare Schmeck*, 647 P.2d at 1264, *Hoard*, 662 P.2d at 1219-20, *Smelko*, 740 P.2d at 598, *Fusaro*, 897 P.2d at 131, *and Humes*, 792 P.2d at 1038, *with Willis*, 967 So. 2d at 850, *Hagan*, 804 So. 2d at 1241, *Zell*, 665 So. 2d at 1054, *and Tanner*, 696 So. 2d at 708.

293. *See Hagan*, 804 So. 2d at 1241; *Zell*, 665 So. 2d at 1054.

294. *See Schmeck*, 647 P.2d at 1264; *Hoard*, 662 P.2d at 1219-20; *Smelko*, 740 P.2d at 598.

295. Olivero v. Lowe, 995 P.2d 1023, 1026 (Nev. 2000).

296. Chowdhry v. NLVH, Inc., 851 P.2d 459, 461-62 (Nev. 1993).

297. *Id.* at 462.

claim.[298] Notice two things in this analysis: first, no direct victim claim absent an impact had actually been brought in Nevada prior to *Chowdry*, so the court's willingness to entertain this claim signals its eagerness to relax the impact rule.[299] Second, even though the court stated that these injuries were "insufficient to satisfy the physical impact requirement," the court still commented on the significance of the injuries.[300] Under the guise of the impact rule, the court's analysis of the gravity of the plaintiff's symptoms depict this test for what it really is—a serious injury test in disguise.[301]

Two years later, the court in *Shoen v. Amerco* established the physical manifestations test.[302] In this case, the court permitted a tortiously discharged employee to pursue an NIED claim.[303] Here, the plaintiff/father built what is known today as the U-Haul company and turned control of the company over to his sons.[304] He stayed on as an advisor and continued to draw a salary.[305] In this capacity, he developed bi-polar disorder, and the U-Haul company paid disability payments to him since he could no longer work.[306] Meanwhile, the father gave damaging testimony against his sons in an IRS hearing.[307] Shortly thereafter, he was fired and the disability payments stopped.[308] After these events unfolded, the father was diagnosed with situational depression.[309] The court accepted this diagnosis as evidence of an emotional injury without an impact.[310] This sliding scale required a higher showing of physical injury when the degree of outrageous conduct was less, and vice versa.[311] This blurs the line between freestanding tort cases and direct victim cases, but underscores the theme common to a modern impact rule: foreseeability.[312]

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298. *See id.*
299. *See id.*
300. *Id.*
301. *See id.*
302. Shoen v. Amerco, Inc., 896 P.2d 469, 477 (Nev. 1995).
303. *Id.*
304. *Id.* at 471.
305. *Id.*
306. *Id.*
307. *Id.* at 471-72.
308. *Shoen*, 896 P.2d at 471-72.
309. *Id.* at 477. Reading *Shoen* in isolation, one might conclude that the impact rule was abolished, as there are not necessarily physical symptoms for depression. However, the court seems to indicate in *Olivero* that it is unwilling to completely move away from the impact rule. *See Olivero*, 995 P.2d at 1026.
310. *See id.*
311. *See id.*
312. *See id.*

A contrary result is shown in *Bartmettler v. Reno Air*, where an employer violated a confidentiality agreement with the employee regarding his alcohol abuse problems.[313] This claim was not allowed to proceed because the "serious emotional distress" alleged by the employee was insufficient to meet the physical manifestation rule.[314] There is no sliding scale analysis in *Barmettler* despite the possibility of intentional conduct, so the court apparently resolved this case under the serious injury rule.[315] It would appear that the serious injury rule is the controlling factor, with the sliding scale test being invoked in close cases; otherwise, the victim in *Bartmettler* would have been deprived of the full protection of Nevada's impact rule.[316]

In a malpractice action, the operation of the impact rule is absent.[317] In *Kahn v. Morse & Mowbray*, emotional damages based on acts potentially constituting malpractice were inappropriate because the gist of a legal malpractice action is economic damages.[318] Thus, emotional harm that is premised upon the loss of money is unforeseeable.[319] This is a difficult holding to square with *Shoen*, as the gist of a tortious discharge claim is primarily economic, but the NIED claim can still go forward.[320] Here the malpractice-type conduct alongside the NIED claim has no effect, possibly implying that the sliding scale test is only invoked when the quasi-intentional conduct is intended to emotionally harm the victim.[321]

Nevada's bystander rule is similar to the *Dillon* rule.[322] A bystander must be emotionally distressed by witnessing injury to a close relative, and must be near the scene of the incident.[323] The most recent refinement of the rule is in *Grotts v. Zahner*.[324] There, a fiancé could not recover on her NIED claim, despite witnessing the death of her fiancé in an accident, because she was not a member of the decedent's family.[325]

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313. Barmettler v. Reno Air, Inc., 956 P.2d 1382, 1384 (Nev. 1998).

314. *See id.* at 1387.

315. *See id.*

316. *See Shoen*, 896 P.2d at 477. *But see Barmettler*, 956 P.2d at 1387 (applying the serious injury rule, not the sliding scale analysis).

317. Kahn v. Morse & Mowbray, 117 P.3d 227, 237 (Nev. 2005).

318. *See id.*

319. *Id.*

320. *See Shoen*, 896 P.2d at 477. *But see Kahn*, 117 P.3d at 237 (considering emotional damages when the claim is premised on an unlawful discharge).

321. *See Shoen*, 896 P.2d at 477. *But see Kahn*, 117 P.3d at 237.

322. Grotts v. Zahner, 989 P.2d 415, 416 (Nev. 1999).

323. *Id.*

324. *Id.*

325. *See id.*

Nevada's impact rule is similar to Florida's but stricter, mainly due to the impact rule's application when freestanding torts are present.[326] Otherwise, the direct victim line allows an NIED claim with only physical manifestations,[327] the bystander rule is based on a close relative witnessing an injury to another,[328] and the serious injury test is applied to borderline claims; all these cases look like Florida tort law.[329] Florida does not explicitly subscribe to a serious injury rule, but the case law bears out the functional equivalent of that test.[330] The freestanding tort exception distinguishes Florida from Nevada. Nevada's sliding scale test, which surfaces when intentional torts are present, is similar, but the Nevada impact rule still has application in these types of cases when the intentional conduct is not targeted at emotional harm, as opposed to a broader foreseeability analysis.[331]

In summary, of all five states retaining the impact rule, the construction of the rule in Florida is the least like an actual impact rule. This reading of the Florida impact rule is created either through exceptions, limits to its application, or *de minimis* satisfaction of the impact requirement.[332] This exception-riddled construction has the effect of making the law more complex than it needs to be. If Florida NIED law already looks like a general negligence approach in comparison to other states, why not simply switch to one?

III. THE EVOLUTION OF AD HOC EXCEPTIONS TO CLARITY

A. *Tennessee and the Physical Symptoms Rule*

Tennessee does not use the impact rule, but does require physical manifestations of emotional distress to find a viable NIED claim.[333] Thus, a discussion of *Camper v. Minor* is relevant because Tennessee's rejection of a physical manifestation would be equivalent to abrogation of Florida's impact rule.[334] In *Camper*, a driver disobeyed a stop sign

326. *Compare Kahn*, 117 P.3d at 237, *with Rowell*, 850 So. 2d at 476-77.

327. *Compare Olivero*, 995 P.2d at 1026, *and Chowdhry*, 851 P.2d at 462, *with Willis*, 967 So. 2d at 850, *and Zell*, 665 So. 2d at 1054.

328. *Compare Grotts*, 989 P.2d at 416, *with Zell*, 665 So. 2d at 1054.

329. *Compare Barmettler*, 956 P.2d at 1387, *with Elliott*, 58 So. 3d at 882 (denying NIED claim because headaches, loss of appetite, and hair loss are insufficient injuries).

330. *See Elliott*, 58 So. 3d at 882.

331. *Compare Bartmettler*, 956 P.2d at 1387, *with Tanner*, 696 So. 2d at 708.

332. *See Willis*, 967 So. 2d at 850; *Zell*, 665 So. 2d at 1054; *Tanner*, 696 So. 2d at 708.

333. Camper v. Minor, 915 S.W.2d 437, 443 (Tenn. 1996). This case contains an excellent discussion of the history of the impact rule as well. *See id.* at 440-43.

334. *Id.* at 439.

and pulled out in front of a cement truck at a highway intersection.[335] The driver of the car was killed instantly.[336] The cement truck driver walked around to the crushed car and saw the driver's dead body at close range.[337] While undiagnosed at the time of trial, the truck driver claimed to be reliving the accident over and over.[338]

Prior to *Camper*, even with the more relaxed physical manifestation rule, Tennessee still had the same history of ad hoc exceptions.[339] Unsurprisingly, these cases follow a similar pattern.[340] Situations in which emotional damages could foreseeably result trumped the physical manifestations rule: mutilation of a husband's corpse;[341] fear of injury after consuming contaminated water;[342] experiencing mental, but no physical injuries from a car crash;[343] and finding a cigar stub in a bottle of Coke.[344] Faced with inequitable and illogical results of a strictly construed barrier to NIED claims, Tennessee chose to create exceptions, expand to absurdity the construction of a physical manifestation, limit the rule's applicability, and use public policy arguments to come to conclusions contrary to established law.[345]

Camper provided Tennessee with a rule to obtain emotional damages where the plaintiff can, through expert testimony, show emotional damages with which a reasonable person would be unable to cope.[346] Post-*Camper*, Tennessee law functions similar to pre-*Camper* cases, with the exception of a focus on predictability.[347] Take, for example, *Flax v. DaimlerChrysler Corp.*[348] There, a truck driver rear-ended a minivan, resulting in the collapse of a passenger seat which ultimately killed the bystander's son.[349] The mother then brought an NIED claim against the manufacturer of the minivan.[350] Prior to *Camper*, the mother in *Flax* likely would not have had difficulty bringing this claim, as the facts in *Flax* fall squarely within the ad hoc

335. *Id.*
336. *Id.*
337. *Id.*
338. *Id.*
339. *Camper*, 915 S.W.2d at 444.
340. *See id.*
341. Hill v. Travelers' Ins. Co., 294 S.W. 1097, 1099 (Tenn. 1927).
342. Laxton v. Orkin Exterminating Co., 639 S.W.2d 431, 434 (Tenn. 1982).
343. Johnson Freight Lines, Inc. v. Tallent, 384 S.W.2d 46, 50 (Tenn. Ct. App. 1964).
344. Boyd v. Coca Cola Bottling Works, 177 S.W. 80, 81 (Tenn. 1915).
345. *See Camper*, 915 S.W.2d at 446.
346. *Id.* at 531.
347. Flax v. DaimlerChrysler Corp., 272 S.W.3d 521, 531 (Tenn. 2008).
348. *See id.*
349. *Id.* at 525-26.
350. *Id.*

exceptions to the physical manifestation rule.[351] However, after *Camper*, emotional damages can be won if the plaintiff can show the injury is one with which a reasonable person would be unable to cope.[352] Such emotional damage must be proven through expert testimony.[353]

The functional difference after *Camper* is predictability.[354] Ironically, the plaintiff in *Flax* argued that expert testimony should not be required because a mother witnessing the death of her child is such an obvious source of emotional harm.[355] This reasoning worked well pre-*Camper*;[356] however, in *Flax*, the court sought to avoid the type of ad hoc case law that NIED claims produced prior to *Camper*.[357] The court's denial of the NIED claim comports with this goal, for here it is not necessarily the causation in question, but the amount of damages. Recall the evidence justification for the impact rule-that emotional damages are difficult to prove.[358] In this case, the problem is not causation, but how to value the damages the mother seeks for her NIED claim.[359] *Camper*'s requirement of expert testimony for such injuries takes some subjectivity out of that equation.[360] In other words, abrogation of the physical manifestation rule in Tennessee resulted in more predictable case law, all the while still allowing meritorious claims.[361]

B. Kentucky and the Impact Rule

Kentucky recently abolished the impact rule in *Osborne v. Keeney*.[362] In *Osborne*, a negligent airplane pilot struck the plaintiff's home, destroying her chimney and setting her house on fire.[363] The homeowner suffered from depression, hypertension, insomnia, anxiety, and diabetes prior to the plane crash, but the medical expert at trial testified the crash exacerbated these conditions.[364] However, the

351. *See id.* at 531.
352. *Id.* at 528.
353. *Flax*, 272 S.W.3d at 528.
354. *See id.* at 531.
355. *See id.*
356. *See id.*
357. *See id.*
358. Kircher, *supra* note 14, at 808.
359. *See Flax*, 272 S.W.3d at 531.
360. *See id.*
361. *See id.*
362. *Osborne*, 399 S.W.3d at 6.
363. *Id.*
364. *Id.*

homeowner was not physically struck by any plane debris or pieces of her house.[365] After the crash, she retained an attorney to represent her against the pilot and work with her insurance company.[366] Her attorney took twenty percent of payments as his fee from the homeowner's insurance company and told the homeowner more payments would be coming as her claims against the pilot progressed.[367] Two years later, she still wanted to proceed against the pilot.[368] Unbeknownst to the homeowner, the statute of limitations had run, so her attorney attempted to discourage her from filing suit against the pilot.[369] The homeowner insisted, and her attorney filed the complaint with the court.[370] The court, in turn, granted summary judgment against the homeowner because of the time bar.[371] The attorney never disclosed that the statute of limitations expired to his client, so she filed a malpractice suit against him.[372] At trial, the homeowner first needed to show she would have prevailed on the negligence claim against the airplane pilot, and then she could show that she was robbed of this result by her lawyer's incompetence.[373] Thus, two separate instances of conduct provided the basis for her emotional distress: the airplane crash itself and her lawyer's representation. Her attorney asserted the impact rule as a defense to the NIED claims, and the lower court agreed.[374] Their decision was in turn affirmed by the court of appeals in Kentucky.[375]

The Supreme Court of Kentucky took this opportunity to abrogate the impact rule and handle NIED claims as general negligence actions, but required that the plaintiff demonstrate the injury was serious.[376] Their opinion began with an overview of impact rule jurisprudence in Kentucky and it followed a familiar pattern.[377] The court had previously adopted the impact rule because it provided a

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365. *Id.*
366. *Id.* at 6-7.
367. *Id.* at 7.
368. *Osborne*, 399 S.W.3d at 7.
369. *Id.*
370. *Id.*
371. *Id.*
372. *Id.*
373. *See id.* at 8.
374. *Osborne*, 399 S.W.3d at 8.
375. *Id.* Under Kentucky law, a malpractice suit is tried as a suit within a suit. Essentially, this means the court would hear the underlying case where the pilot hit the house to determine the result without the lawyer's incompetence. Then, the malpractice action is heard to determine if the lawyer is actually at fault. *Id.* at 10.
376. *See id.* at 17.
377. *Id.* at 15.

bright line test as to when a person's emotional state could be foreseeably injured.[378] The court feared it would be difficult to screen out fraudulent claims and that a flood of litigants would clog the dockets.[379] However, over time, this bright line excluded clearly meritorious claims, so the courts resorted to exceptions and varying constructions of an impact in order to avoid harsh results.[380] For example, in *Deutsch v. Shein*, the court held bombarding a person's body with X-rays constituted an impact.[381] In this case, a doctor repeatedly X-rayed a pregnant woman without first determining if pregnancy was the cause of her symptoms.[382] Certainly, there was no apparent physical impact.[383] Thus, with no exception, the impact rule would have prevented the mother's NIED claim despite the obvious and well-known consequences of exposing a fetus to X-rays.[384] In *Wilhoite v. Cobb*, a mother watched a truck strike her infant daughter, who ultimately died from her injuries.[385] The court denied relief because there was no physical impact upon the mother.[386] Therefore, until *Osborne*, the Commonwealth of Kentucky still applied the impact rule rather harshly[387] and had no bystander rule.[388] The *Osborne* court reasoned that, although the justifications for the impact rule are no less valid today than they were 200 years ago, these goals could be achieved more effectively through the serious injury rule ensconced within a negligence action.[389]

Post-*Osborne* cases show the same features as post-*Camper* cases: functionally similar case law with clearer guidelines as to why an NIED claim may or may not fail.[390] *Keaton v. G.C. Williams Funeral Home, Inc.* involved an NIED claim where a funeral home buried

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378. *Id.*

379. *Id.*

380. *Osborne*, 399 S.W.3d at 15.

381. *Id.* (citing Deutsch v. Shein, 597 S.W.2d 141, 146 (Ky. 1980)).

382. *Deutsch*, 597 S.W.2d at 142.

383. *See id.* at 146.

384. *Id.*

385. Wilhoite v. Cobb, 761 S.W.2d 625, 626 (Ky. Ct. App. 1988).

386. *Id.* The trial court did note the absurdity in the distinction between the X-rays that caused the mother's harm in *Deutsch* and the light rays, which caused the mother's pain here. *Id.*

387. *See* Steel Techs., Inc. v. Congleton, 234 S.W.3d 920, 930 (Ky. 2007) (barring a claim for emotional damages prior to the ultimately fatal impact in a car crash).

388. *See Wilhoite*, 761 S.W.2d at 626.

389. *See id.* at 17-18.

390. Keaton v. G.C. Williams Funeral Home, Inc., 436 S.W.3d 538, 541 (Ky. Ct. App. 2013); *see Osborne*, 399 S.W.3d at 18. *Keaton* actually began before *Osborne* was decided, but *Osborne* was retroactive, so its holding applied. *Keaton*, 436 S.W.3d at 543-44.

the remains of the family's mother in the wrong plot.[391] The family discovered the mistake and was present when the casket was moved to the correct plot.[392] The court denied the NIED claim because the only evidence presented regarding the emotional harm was the family's statement of their own distress, with no expert testimony, as required under *Osborne*.[393] Just like Tennessee after *Camper*, Kentucky is able to screen out speculative injuries and remove subjectivity from damages, ensuring the law regarding NIED claims is predictable without the ad hoc exceptions.[394]

C. The Flood of Litigation

Tennessee and Kentucky have apparently managed to control the ensuing flood of litigation. In the 2012-13 fiscal year, there were 9,868 tort cases and 385 medical malpractice claims filed in Tennessee.[395] Combined, there were 10,253 cases that could potentially have facts that support an NIED claim.[396] The number is probably less than this, as it is unlikely every tort case filed in Tennessee has an NIED component. But, assuming the worst-case scenario, there is roughly one potential NIED claim filed for every 630 persons in Tennessee, with a small decrease from the previous year.[397] Kentucky does not specifically track tort cases; however, in using total civil cases in general, in 2013 there was approximately one civil case filed in Kentucky for every 100 people living there, again with a small decrease from 2012.[398] Recall in Kentucky that the impact rule was abolished in

391. *Keaton*, 436 S.W.3d at 541.

392. *Id.*

393. *Id.* at 544.

394. *See Osborne*, 399 S.W.3d at 18; *Keaton*, 436 S.W.3d at 544; Powell v. Tosh, 942 F. Supp. 2d 678, 696 (W.D. Ky. 2013) (denying emotional damages based on the noxious odors from a pig farm due to lack of expert testimony on damages); Taylor v. JPMorgan Chase Bank, N.A., CIV. 13-24-GFVT, 2014 WL 66513, at *7 (E.D. Ky. Jan. 8, 2014) (denying an NIED claim when plaintiff had to wait seven days for a check to clear).

395. ANNUAL REPORT OF THE TENNESSEE JUDICIARY FISCAL YEAR 2012-2013 330 (2013), *available at* http://www.tsc.state.tn.us/sites/default/files/docs/annual_report_tn_judiciary_fy_2012-13_2-4-14.pdf [hereinafter TENNESSEE CASELOAD].

396. *See id.*

397. *See id.*; *State & County QuickFacts: Tennessee*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/47000.html (last updated Apr. 22, 2015).

398. KENTUCKY COURTS CASE MANAGEMENT SYSTEM, STATEWIDE CASELOAD REPORT (2014), *available at* http://courts.ky.gov/aoc/statisticalreports/Documents/StatewideCaseloadReport_Circuit.pdf [hereinafter KENTUCKY CASELOAD]; *State & County QuickFacts: Kentucky*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/21000.html (last updated Apr. 22, 2015).

2012.[399] If the feared proverbial flood of litigation had ensued, Kentucky would in fact have seen an increased caseload in 2013. Yet, it appears as if the levees held.[400]

Florida, on the other hand, tracks cases much more specifically. In 2013, 34,790 tort cases were filed at the circuit level.[401] In 2012, that number was 35,595.[402] This means that there are about 550 people in Florida for every tort case filed, a figure that went down from 2012.[403] What these numbers depict is that total caseload is more dependent on other economic factors, not the availability of emotional damages.[404] If the impact rule is abolished in Florida, litigation rates will not likely increase significantly, or necessarily at all.[405] The simplicity that could result from eliminating the impact rule could just as easily help judicial efficiency by creating more predictable, and therefore more manageable, judicial standards.[406]

Formal abrogation of the Florida impact rule should follow an approach similar to the *Osborne* case in Kentucky, whereby the court would implement a serious injury rule to screen out frivolous claims and apply a general negligence approach. Again, this is nearly the functional equivalent of what is already happening in Florida tort law, as Florida already screens NIED claims for serious injuries when they are filed.[407] In granting the freestanding tort exceptions and allowing for a *de minimis* impact, Florida is not applying the impact rule.[408] Instead, the courts are analyzing the alleged tortious conduct to see if the tortfeasor could have foreseen the emotional injury.[409]

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399. *See Osborne*, 399 S.W.2d at 24.

400. *See* KENTUCKY CASELOAD, *supra* note 398.

401. FLORIDA OFFICE OF THE STATE COURTS ADMINISTRATOR, FY 2012-13 STATISTICAL REFERENCE GUIDE 4-2 (2014), *available at* http://www.flcourts.org/core/fileparse.php/250/urlt/reference-guide-1213-circuit-civ.pdf.

402. *Id.* The malpractice cases in Florida were left out of this calculation since the impact rule does not apply in that context. *See Tanner*, 696 So. 2d at 706.

403. FLORIDA OFFICE OF THE STATE COURTS ADMINISTRATOR, FY 2011-12 STATISTICAL REFERENCE GUIDE 4-2 (2012), *available at* http://www.flcourts.org/core/fileparse.php/250/urlt/ReferenceGuide11-12-Chp4.pdf.

404. Lance Bachmeier et al., *The Volume of Federal Litigation and the Macroeconomy*, 24 INT'L REV. L. & ECON. 191, 206 (2004). Macroeconomic factors such as output and inflation are discussed, not the availability of emotional damages. *See id.*

405. *See id.*; Frank B. Cross, *Tort Law and the American Economy*, 96 MINN. L. REV. 28, 81 (2011). Cross argues that pro-plaintiff tort law is not harmful to the economy and may actually be beneficial. One of the reasons for this counter intuitive conclusion is the higher degree of predictability of tort law in pro-plaintiff forums. *See id.*

406. *Id.*

407. *Compare Elliott*, 58 So. 3d at 882, *with Osborne*, 399 S.W.3d at 17.

408. *See Elliott*, 58 So. 3d at 882.

409. *Hagan*, 804 So. 2d at 1241; *Tanner*, 696 So. 2d at 708.

With the adoption of an approach based on foreseeability, the outcome of NIED claims would become more predictable. Judicial efficiency would then be served by fewer appeals, or at least appeals in which the applicable law is clearer. Furthermore, a judgment would have more finality to it if it were not contingent upon the impact rule. Litigants would no longer have to think up creative complaints in order to satisfy the impact rule and plaintiffs would know which injuries would get past the motion to dismiss stage.[410] Most importantly, parties would know which injuries are actually frivolous through a body of case law that delineates which injuries are serious.[411] If Florida adopts, in form, what it already does in substance, the real gain for all parties involved would be case predictability.

IV. Florida Impact Rule Cases Under a General Negligence Approach

To show that Florida case law would change little after abrogation of the impact rule, two types of cases discussed above will be analyzed under a general negligence approach, utilizing a serious injury rule: direct victim cases and freestanding tort cases.[412]

A. *Direct Victim Cases*

The facts of *Hardy v. Pier 99 Motor Inn* are helpful for analyzing direct victim cases because it presents facts similar to *Willis*.[413] In *Hardy*, a motel guest saw his friend fatally stabbed in the motel parking lot and got into an altercation with the attacker.[414] In this fight, the attacker stabbed the motel guest.[415] He brought suit, arguing that the motel should have foreseen this attack due to the numerous criminal incidents that had occurred on the motel's property.[416] However, most importantly, the motel guest sued for physical injuries he sustained in the attack.[417] Consequently, there is no analysis of whether

410. *See Elliott*, 58 So. 3d at 882; *Osborne*, 399 S.W.3d at 18.

411. *Osborne* requires the plaintiff to use expert testimony to express the damages more objectively. Such a change would be unnecessary in Florida, as the courts have been able to value emotional distress damages and use experts when necessary. *See, e.g.*, *Hagan*, 804 So. 2d at 1241 (no expert for damages); *Zell*, 665 So. 2d at 1049-50 (using expert testimony).

412. Bystander cases would be no different absent the impact rule because Florida already uses a version of the *Dillon* rule in those cases. *See Zell*, 665 So. 2d at 1049-50.

413. Hardy v. Pier 99 Motor Inn, 664 So. 2d 1095, 1096-97 (Fla. Dist. Ct. App. 1995).

414. *Id.*

415. *Id.*

416. *Id.*

417. *See id.* (emphasis added).

the injury was compensable since a stab wound is an impact.[418] This left the hotel's foreseeability of the attack the remaining issue.[419] For this type of showing, the court looked at past incidents and 911 calls to the hotel premises.[420]

Compare this to the facts of *de Saric v. Miami Caribe Investments, Inc.*[421] In *de Saric*, two hotel guests, mother and daughter, were escorted to their room by hotel personnel.[422] After settling in for about an hour, they opened the door to leave and were confronted by two masked robbers, one of whom had a gun.[423] One robber forced the daughter into the bathroom where she fainted.[424] After regaining consciousness, the robber searched her for hidden jewelry.[425] Meanwhile, the other robber ordered the mother to lie on the floor while he stole money and jewelry from her purse.[426] The hotel guests were not physically injured in any serious way but suffered from emotional distress for which they could point to physical symptoms.[427] They brought suit against the hotel for this emotional distress and were barred by the impact rule.[428]

The impact rule today would not bar this claim because the *de minimis* impact endured by the hotel guests would now be sufficient to bring an NIED claim.[429] More importantly though, under a general negligence approach, the touchstone of the analysis would be the foreseeability of the attack based upon the hotel's awareness of similar incidents.[430] Such a rule is more logical because foreseeability is the guidepost of the analysis. Under the impact rule, the hotel would only be under a duty to prevent robbers who physically touch their victims in the slightest way, but not those who hold a victim at gunpoint.[431] The Florida Supreme Court has already noted the harsh results of "sacrific[ing] the first victim's right to safety upon the altar of foreseeability . . .," but that is what the impact rule would have the courts

418. *See id.*
419. *See id.* at 1098.
420. *Id.*
421. de Saric v. Miami Caribe Invs., Inc., 512 F.2d 1013, 1014 (5th Cir. 1975).
422. *Id.*
423. *Id.*
424. *Id.*
425. *Id.*
426. *Id.*
427. *de Saric*, 512 F.2d at 1014.
428. *Id.*
429. *See Willis*, 967 So. 2d at 850; *Hardy*, 664 So. 2d at 1098.
430. *See Hardy*, 664 So. 2d at 1098.
431. *See id. But see de Saric*, 512 F.2d at 1014.

do.[432] Again, there is no functional change to the law. The NIED claim can still go forward after *Willis*. The only difference would be in evidence of previous incidents and hotel security being relevant concerns, as opposed to whether or not the gun held by the robber touched the victim.[433]

Applying this same reasoning to the facts of *Willis*, the opinion would be several pages shorter and still come to the same natural conclusion. Of course a hotel guest victimized by negligent hotel staff and then an armed robber will sustain a serious emotional injury. The merit of that claim should not turn on whether the hotel guest was physically touched by the gun. Rather, the prior incidents at the hotel and actions of hotel personnel should be considered.[434]

B. Serious Injury Test

The serious injury test contemplates the magnitude of the injury, not foreseeability. In other words, courts recognize there are genuine cases of emotional distress, but fear the subjectivity inherent in such an injury would have no stopping point.[435] The serious injury test addresses that fear by setting a threshold for what types of injuries may support an NIED claim, usually requiring expert testimony.[436] To view how the serious injury test would work in Florida, the facts of *Elliot v. Elliot* are instructive.[437] There, a family member dismembered his mother's corpse and scattered her ashes over the family farm, contrary to her and her family's wishes.[438] The family members sued for negligent infliction of emotional distress.[439] The family did not witness any of these events, so they argued they fit within the physical manifestation of emotional trauma exception since there was no impact.[440] The injuries alleged included: stress, insomnia, hair loss, anxiety, diarrhea, headaches, diabetes, and sleep apnea.[441]

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432. *See Hardy*, 664 So. 2d at 1098.

433. *See Willis*, 967 So. 2d at 850; *Hardy*, 664 So. 2d at 1098. *But see de Saric*, 512 F.2d at 1014.

434. *See Hardy*, 664 So. 2d at 1098 (totaling 3 pages). *But see Willis*, 967 So. 2d at 850 (totaling 32 pages including concurrences and dissents, 25 pages of which are dedicated to a discussion of the impact rule).

435. Joseph Matye, *Bystander Recovery for Negligent Infliction of Emotional Distress in Missouri*, 60 UMKC L. REV. 169, 188 (1991).

436. *See id.* at 170.

437. *Elliott*, 58 So. 3d at 879.

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.*

The court held the physical manifestations exception was still not of such a low threshold to allow a lawsuit for these types of injuries, particularly when supported by weak expert testimony or none at all.[442]

Elliot is more forthright in its analysis of the physical manifestations prong of the impact rule.[443] Other cases require reading between the lines a bit more. For example, even though not technically required under Florida law, NIED cases are still resolved solely on the lack of an impact. In *Janie Doe 1 ex rel. Miranda v. Sinrod*, the underlying basis of the NIED claim was the sexual molestation of the plaintiffs' child by a school teacher.[444] The parents filed the original complaint to the school board in 2006, but the NIED claim five years later.[445] Here, the seriousness of the injury is dubious when the victim waited five years to file the claim. However, more to the point, the court resolved the claim by requiring an impact. When the family claimed physical manifestations in the absence of an impact, the court limited that prong to bystander type cases.[446] Cases like this potentially do not receive a full-on impact rule analysis because they appear to be frivolous claims for reasons not so easily articulated in the opinion. However, if a serious injury test were part of Florida tort law, then the opinion could literally read "this injury is not serious enough," just as *Elliot* does.[447]

Again, Florida law would change very little. As *Elliot* demonstrates, the serious injury test is already part of Florida law.[448] It simply is not applied predictably because the law surrounding the impact rule is anything but predictable. Clear abrogation of the impact rule and approval of the test in *Elliot* would solve that problem.

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442. *Id.*; *see also* Langbehn v. Pub. Health Trust of Miami-Dade Cnty., 661 F. Supp. 2d 1326, 1341 (S.D. Fla. 2009) (assessing seriousness of exacerbation of multiple sclerosis, nausea, stomach pain stemming from denial of access to plaintiff's dying life partner at the hospital); Brown v. Cadillac Motor Car Div., 468 So. 2d 903, 904 (Fla. 1985) (requiring death, paralysis, muscular impairment, or some other physical ailment absent an impact); LeGrande v. Emmanuel, 889 So. 2d 991, 995 (Fla. Dist. Ct. App. 2004) (pleading exacerbation of existing diabetes and memory loss).

443. *See Elliott*, 58 So. 3d at 879.

444. Janie Doe 1 *ex rel.* Miranda v. Sinrod, 117 So. 3d 786, 787 (Fla. Dist. Ct. App. 2013).

445. *Id.* at 788.

446. *Id.*; *see also* Arditi v. Grove Isle Ass'n, Inc., 905 So. 2d 151, 153 (Fla. Dist. Ct. App. 2004) (holding that the impact rule barred the claim despite the victim's heart attack); Rivers v. Grimsley Oil Co., 842 So. 2d 975, 977 (Fla. Dist. Ct. App. 2003) (denying an NIED claim on facts similar to *Willis* where post-traumatic stress disorder and anxiety were medically controlled after a robbery); Testa v. S. Escrow & Title, LLC, 36 So. 3d 713, 714 (Fla. Dist. Ct. App. 2010) (dismissing NIED claim because there was no physical injury stemming from an impact despite the post *Willis* state of the impact rule).

447. *See Elliott*, 58 So. 3d at 879.

448. *See id.*

C. Freestanding Tort Cases

Freestanding tort cases would be simpler, as the results would be based on foreseeability, not impacts. To bring a negligence claim with freestanding tort facts, a plaintiff must argue that the underlying tortious conduct created foreseeability. Currently, that reasoning applies to attorney-client malpractice, doctor-patient malpractice, intentional torts, and torts where damages are primarily non-economic.[449] If a general negligence analysis were applied to these types of cases, a court would simply examine whether or not the defendant was under a duty since that is the touchstone of foreseeability in negligence. The detour through the impact rule and its freestanding tort limitation is unnecessary.

The next likely instance in which Florida will have to deal with NIED claims will be veterinary malpractice.[450] In *Kennedy v. Byas*, the First DCA denied an NIED claim stemming from veterinary malpractice.[451] The doctor performed an operation on the owner's dog.[452] After the operation, the doctor left the dog on a heating pad, resulting in severe burns.[453] The court denied relief because of the impact rule, but not before commenting on the merits of a veterinary malpractice exception.[454]

Unsurprisingly, *Kush* is the genesis of the asserted veterinary malpractice exception, where the malpractice conduct is sufficient to trigger foreseeable warning signs for the defendant.[455] Hence, in the veterinary context, the question is whether the veterinarian should foresee the potential for emotional harm. The impact rule would say no because, obviously, the owner is not impacted, and the impact is sustained by the pet, if at all. However, the foreseeability analysis is more telling. Florida law compensates a pet owner for the property value of the animal in a veterinary malpractice claim.[456] Consequently, it

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449. *See Tanner*, 696 So. 2d at 706.

450. Rebecca J. Huss, *Valuation in Veterinary Malpractice*, 35 LOY. U. CHI. L.J. 479, 492 (2004); Mary Margaret McEachern Nunalee & G. Robert Weedon, *Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward Non-Human Animals Will Change Veterinary Medicine*, 10 ANIMAL L. 125, 159 (2004); Jay M. Zitter, *Recovery of Damages for Emotional Distress Due to Treatment of Pets and Animals*, 91 A.L.R. 5th 545, § 2 (2001).

451. Kennedy v. Byas, 867 So. 2d 1195, 1196 (Fla. Dist. Ct. App. 2004).

452. *Id.*

453. *Id.*

454. *Id.*

455. *See id.*

456. *Id.*

would be unfair to sue a veterinarian for an NIED sized judgment when the replacement cost of the pet is less than $400.[457]

The Third DCA reasoned differently in *Knowles Animal Hospital, Inc. v. Wills*, where an award for $13,000 in emotional damages was affirmed on almost identical facts with no impact rule analysis.[458] This case, while notably lacking in foreseeability analysis, is not without merit. The average veterinarian bill runs about $500 a year, with some people spending upwards of $1,000 on more serious injuries.[459] Surely such expenditures show a pet owner is more emotionally invested in a pet than its property value. The opinion does contain hints of the freestanding tort exception when discussing the "gross negligence" of the veterinarian, but both *Johnson* and *Knowles* come before *Kush*.[460]

Whichever way this split goes, it makes more sense for the outcome to be based on the degree of foreseeability the veterinarian possesses, not whether the veterinarian touched the pet owner in the course of treatment.[461] Under a general negligence approach, the degree of foreseeability would be determined by what type of treatment the pet was receiving and how the market value of the pet compared to the cost of the care. Thus, the doctor in *Kennedy* might have been on notice the dog owner was emotionally invested in his dog when he paid for a veterinary operation in the first place.[462] However, the fundamental point here is that there is little difference in the case law after negligence principles apply. Both *Knowles* and *Kennedy* already examine the foreseeability to determine if the impact rule should bar the claim.[463] *Knowles* does not even examine the impact rule, finding the emotional distress an obvious conclusion from the nature of the veterinarian's conduct.[464] If the serious injury test has any application in Florida, it will be in these veterinary malpractice cases. Pets are valued differently by different people. Before awarding an NIED sized

457. *Kennedy*, 867 So. 2d at 1196. The damages in *Kennedy* constituted $350 for replacing the basset hound and $50 for a fraud claim associated with the bill. *Id.* at 1196-97.

458. *See* Knowles Animal Hosp., Inc. v. Wills, 360 So. 2d 37, 38 (Fla. Dist. Ct. App. 1978).

459. Sue Manning, *Poll: Vet Visits a Pricey Trip for Pet Owners*, USA TODAY (Nov. 30, 2011), http://usatoday30.usatoday.com/news/nation/story/2011-11-30/pet-care-costs/51487992/1; Liz Weston, *Should You Buy Pet Insurance?*, MSN MONEY (Nov. 4, 2010), http://money.msn.com/insurance/should-you-buy-pet-insurance-weston.aspx.

460. *Knowles*, 360 So. 2d at 38; *see* Johnson v. Wander, 592 So. 2d 1225, 1226 (Fla. Dist. Ct. App. 1992) (affirming the holding in *Knowles* on nearly identical facts).

461. *See Kennedy*, 867 So. 2d at 1196.

462. *But see id.*

463. *See id.*; *Knowles*, 360 So. 2d at 38.

464. *See Knowles*, 360 So. 2d at 38.

judgment to a plaintiff, a court will want to be sure the emotional distress suffered by the pet owner is genuine.[465]

The takeaway point here is not that *Osborne* resulted in better case law, but that it resulted in clearer case law.[466] Florida *is already doing this analysis*.[467] The foreseeability analysis is the same as a general negligence analysis. There is already a serious injury test. All that is left to do is eliminate the detour through the impact rule.

CONCLUSION

In conclusion, the impact rule in Florida is already functionally abolished and the practical effect of it is indistinguishable from a more modern approach to NIED claims. Moreover, the traditional justifications of judicial efficiency, evidence concerns, and foreseeability are not served by the exception riddled version of the impact rule Florida currently follows. Compared to the remaining states that have yet to abolish the impact rule, Florida's rule is the most complex in either creating exceptions or liberally construing the impact requirement. To truly serve these interests, predictable tort law is desirable, which is where Florida's impact rule has its most profoundly negative impact.

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465. Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 NEB. L. REV. 783, 820 (2004); William C. Root, *"Man's Best Friend": Property or Family Member? An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for Their Wrongful Death or Injury*, 47 VILL. L. REV. 423, 447 (2002).

466. *Flax*, 272 S.W.3d at 531.

467. *See, e.g.*, *Willis*, 967 So. 2d at 850; *Elliott*, 58 So. 3d at 882.