THE SUPREME COURT IN AND FOR THE
STATE OF FLORIDA

CASE NUMBER 65,249

GERALD DOYLE and MARIE DOYLE,

Petitioners/Appellants,

vs.

THE PILLSBURY COMPANY,
GREEN GIANT COMPANY, and
PUBLIX SUPER MARKET, INC.,

Respondents/Appellees.

BRIEF OF PETITIONERS/APPELLANTS IN CONNECTION WITH PETITIONERS/APPELLANTS' MOTION FOR REHEARING

ON APPEAL FROM THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT

CASE NO. 83-1199

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STATEMENT OF THE CASE AND OF THE FACTS

The Statement of the Case and of the Facts incorporated within the initial brief to this Court filed by Petitioners/Appellants, DOYLE, is hereby referenced and adopted as though fully set forth herein. The following constitutes a supplement to such statement:

The Order appealed from issued by Judge H. Mark Purdy on May 10, 1983 was predicated upon a conclusion that the impact rule barred Plaintiffs' cause of action as a matter of law (R112,113). This decision issued on May 10, 1983 continued for a period in excess of two (2) years (until this case was decided by the Supreme Court on August 29, 1985) to be the controlling basis for denying Plaintiffs the opportunity to bring their case before a jury.

In the opinion rendered on August 29, 1985, this Court took a position that had been advanced by Appellants for more than two years, to wit: that the impact rule was inapplicable to the facts in this case. Nevertheless, the Court ruled that Plaintiffs continued to remain unable to bring their case before a jury based upon the Court's conclusion that:

(a) as with respect to the cause of action pleaded in breach of warranty, same was barred since this case did not contain the element of ingestion - an element which, according to the August 29 opinion, was always an essential element of breach of warranty cases involving food products;

(b) as with respect to the cause of action sounding in negligence, foreseeability was lacking as a matter of law.

(c) as with respect to the cause of action set forth in strict liability, same was not the subject of any judicial comment other than to fall within the sphere of the Court's general conclusion that "no merit" existed in any of the other issues raised by Appellants.

PRELIMINARY STATEMENT

Respondents/Appellants DOYLE respectfully submit that the decision to bar them from bringing their case before a jury has been predicated upon incorrect postulations. More specifically, it is respectfully submitted that, contrary to the statements set forth in this Court's August 29 opinion, the law of Florida did not, prior to this case, require ingestion as an element for successfully proceeding in a food product case on a breach of warranty theory; further, it is also submitted that the conclusions predicated upon a professed lack of foreseeability are unsupportable and contrary to previous pronouncements of this Court on the subject. In addition, it is respectfully submitted that a cause of action lies in strict liability - a position which was not addressed by this Court.

ARGUMENT

POINT I

CONTRARY TO THE PRESUPPOSITION OF THIS COURT IN ITS AUGUST 29, 1985 RULING, INGESTION HAS NEVER BEEN AN ESSENTIAL ELEMENT IN A BREACH OF WARRANTY CLAIM INVOLVING A FOODSTUFFS CASE.

At Oral Argument, Justice McDonald posed the following question to counsel for Appellees:

> "So you want us to lay down a broad statement that insofar as a defect in a food product is concerned, there must be some ingestion of the food before there can be any liability?"

It is submitted that the question was phrased in such a manner as to suggest that such a holding would constitute new law.

In fact, Appellees had never argued that such novel position constituted the pre-existing law of Florida, nor had the Circuit Court or Fourth District Court of Appeals so ruled.

In the Court's decision of August 29, there is a statement that "the foreign object cases all involve some ingestion of a portion of the food or drink products." The Court goes on to state "We continue to require ingestion of a portion of the food before liability arises." (Emphasis added.)

It is submitted (as counsel for Appellants posited at oral argument) that the ingestion factor has never been a requirement but only a common element in some, though not all, of the cases based upon breach of warranty and involving food products. This phenomena is not surprising in view of the fact that it is readily conceded that most persons who would experience an adverse reaction to a foreign substance contained in a food product would only suffer damages once injury was manifested as the result of ingestion; however, such was simply not the case with

Mrs. DOYLE; nor, to the best of Appellants' research, has any prior case decided in a ingestion to be a requirement.
Florida appellate court ever held/ In fact, Appellants have been unable to locate a case decided in this jurisdiction which even discusses the concept of ingestion as a requisite criterion for establishing a prima facie breach of warranty claim.

In Blanton v. Cudahy Packing Co., 19 So.2d 313 (Fla. 1944), it happens that ingestion had occurred. There the Plaintiff had eaten a tainted meat product which caused her to become ill, and in this early case (which pre-dated adoption by Florida of the Uniform Commerical Code by some 23 years), the Court did allow the Plaintiff to recover for her injuries on an implied warranty theory of liability. The Court reasoned that:

> "The manufacturer knows the content and quality of the food products canned and offered to the public for consumption. The public generally is vitally concerned in wholesome food, or its health will be jeopardized. If poisonous, unhealthful, and deleterious foods are placed by the manufacturer upon the market and injuries occur by the consumption thereof then the law should supply the injured person an adequate and speedy remedy. It is our conclusion that the implied warranty remedy of enforcement will accomplish the desired end." (emphasis added.)

"Consumption", as opposed to "ingestion" was discussed, but the use of the word "consumption" does not provide rationale for concluding that ingestion is a requisite element. See, for example, Russell v. Community Blood Bank, Inc., 185 So.2d 749 (Fla., 2d DCA 1966) wherein a cause of action was stated against a blood bank for breach of implied warranty and wherein the Court quoted with approval the California case of Gottsdanker v. Cutter Laboratories, 6 Cal. Rptr. 320 (1960) which stated in part:

> "The vaccine is intended for human consumption quite as much as is food. We see no reason to differentiate the policy considerations requiring pure and wholesome food from those requiring pure and wholesome vaccine." (Emphasis added.)

Obviously, vaccines are not generally ingested though they are consumed. Sencer v. Carl's Markets, Inc., 45 So.2d 671 (Fla. 1950), Food Fair Stores, Inc. v. Macurda, 93 So.2d 860 (Fla. 1957) and Cliett v. Lauderdale Biltmore Corp., 39 So.2d 476 (Fla. 1949), all cited by the Court in connection with the supposed ingestion requirement may each have had the presence of ingestion as a matter of mere happenstance, but a statement that the case would have been otherwise decided in the absence of ingestion is overly-broad and without supporting precedent. In fact, an earlier Florida case, Smith v. Burdine's, Inc., 198 So.2d 223 had already extended the implied warranty theory for the benefit of a consumer who was injured by the presence of poisonous substances in a lipstick (which, of course, is not an ingested product), and in speaking of the Blanton and Smith cases, the Cliett court stated that:

> "These cases established the principle that as to items of food or other products in the original package which are offered for sale for human consumption or use generally, a person who purchases such items in reliance upon the express or implied condition or assurance that they are wholesome and fit for the uses or purposes for which they are advertised or sold, and who is injured as the result of unwholesome or deleterious substances therein which are unknown to the buyer, may hold either the manufacturer or the retailer liable in damages for injuries sustained by him, on the theory of an implied warranty of wholesomeness or fitness of such article or product for the purposes for which it was offered to the public." (emphasis added.)

This finding on the part of the Cliett court makes it clear that the determination to apply the breach of warranty doctrine was not intended to be limited to ingestion cases, and Mrs. DOYLE's experience falls within the parameters of Cliett as she was injured as the result of deleterious substances contained in a product sold for human consumption.

Naturally, ingestion cases are embraced within the Blanton and Cliett rulings though, as the language in Cliett makes clear, ingestion is not essential; rather, it is only necessary to sustain injury "as the result of injurious substances within the food package." This concept was again enunciated with approval in Wagner v. Mars, Inc., 166 So.2d 673 (Fla. 2nd DCA 1964).

While the Sencer case involved ingestion, it is interesting to note the following language contained within the majority decision:

> "Posed for adjudication here is the simple question: Is a retailer dealer in food products sold in sealed packages or cans to the consuming public liable in damages for injuries sustained by a purchasing consumer because of deleterious, unwholesome or unfit substances for human consumption appearing in the sealed package or can on the theory of an implied warranty?" (emphasis added.)

Florida courts have applied breach of warranty claims to food product containers though the injury does not result from ingestion nor is ingestion foreseeable in the case of a defective product container case. In Canada Dry Bottling Co. v. Shaw, 118 So.2d 840 (2nd DCA 1953), the doctrine of implied warranty for fitness was applied to protect a Plaintiff who had purchased several bottles of soda from Food Fair Stores, Inc. and who suffered injury to her hand shortly thereafter when one of the bottles broke as she was attempting to open it at her residence. In ruling that the implied warranty doctrine was applicable not only to the contents of the food container but to the container itself, Judge Shannon, on behalf of a unanimous Court, referred to language originally stated in the case of Tennebaum v. Pendergast, 89 NE 2nd 490 (Ohio 1945) which stated that:

> "While this Court would not go so far as to hold that there is an implied warranty as to containers of all goods sold and would confine such warranty to the goods alone, in some cases, yet where, as here the thing purchased is a bottle of Royal Crown Cola - a soft drink of beverage - the consuming or drinking of which drink is by common knowledge ordinarily from the bottle itself, the Court is of opinion that the Purchaser's use of both bottle and the liquid therein contained are so closely associated and related that he cannot ordinarily consume the one without at the same time handling and using the other. It is common knowledge that the drink is kept in the bottle till the purchaser wishes to consume the liquid. The bottle and the contemplated use thereof is much more closely related to the contents then, for instance, a crate and oranges therein contained."

Judge Shannon rejected defense arguments based upon cases from other jurisdictions which found distinctions between the container and its contents and cited with approval the case of Blanton v. Cudahy, supra. The comparison of food vs. food container cases is not the issue; rather, the reference to food container cases is merely illustrative of the fact that the courts have frequently applied the implied warranty doctrine to food-related cases where no ingestion occurred.

Among the other Florida cases cited in the Canada Dry decision, supra., was Florida Coca-Cola Bottling Co. v. Jordan, 62 So.2d 910 (Fla. 1953) wherein the Plaintiff was injured while swallowing broken glass contained in a Coca-Cola bottle. The Canada Dry court noted:

> "It does not appear from the opinion whether the glass was a portion of the bottle itself, or extraneous to it. If the glass was not an internal portion of the bottle, then the Jordan case must be classified with those warranty cases concerning food substances and prepared food, and its value here is to show Florida authority for implied warranty and to show that the purchaser can sue the bottler. On the other hand however, if the glass that the Plaintiff swallowed came from the bottle itself, then the Jordan case takes on a far stronger meaning in relation to the case at bar."

The Court went on to provide:

> "If, as here, the proof at trial shows that when the purchaser in the process of opening a bottle was injured by a defect therein, she is entitled to an implied warranty of fitness for use as held by the lower Court."

A further thought brings us back to the case of Smith v. Burdine's, supra, wherein the purchaser suffered injury as a result of deleterious substances contained

within the lipstick; is it rational and logical to assume that if the same deleterious substances had been present in a topical cosmetic applied to the skin that the Court would have denied recovery because of the absence of ingestion?

Thus, examination of the food product and container cases leads to a conclusion that the decisions in such cases have never really been predicated upon the ingestion factor (nor is there any legitimate rationale for necessitating such a criterion.) Moreover, the warranty doctrine has been applied to other consumables where ingestion concepts are totally inapplicable. In Matthews v. Lawnlite Company, 88 So.2d 299 (Fla. 1956), the Supreme Court applied the breach of warranty doctrine to a lounge chair, a component part of which injured Plaintiff in the normal course of use of the chair. Obviously, ingestion was not an element of a case of this nature, but the Supreme Court language applies equally to Mrs. DOYLE:

> "An implied warranty does not protect against hazards apparent to the Plaintiff; it protects against a usual or apparent use....A lounge chair is not a dangerous instrumentality ... it looks harmless, every aspect of it suggested ease and comfort. There was no notice of any kind that beneath its restful armrest there were moving metal parts so constructed that they would amputate the occupant's fingers with the ease that one clips a choice flower with pruning shears....the moving parts....were completely concealed from the user and as essential parts of the chair were inherently dangerous. No one would suspect that such a dangerous device would be concealed in such an innocent- looking instrumentality. It is a well-settled principle of law that one is not required to guard against danger in places where it is not expected to be. No one would ever suspect danger under the arm of a lounge chair designed for ease and comfort. In our view, the facts recited bring this case within the rule recited from Restatement of Torts , citing Section 398, Volume 2, page 1084 as follows:
>
> "A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to other whom he should expect to use the chattel lawfully or to be in the vicinity of its probable use, for bodily harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design."

Just as a chair with inherent defect in its component parts converts an otherwise safe product into a dangerous instrument so does a seemingly harmless can of peas containing a bug become converted into a mechanism precipitating injury when a reasonably anticipated user thereof who is about to dine on the contents comes so close to physically eating or touching the contents as to become frightened and recoil in reaction, colliding with and falling over a chair in the process.

It should further be noted that many of the cases cited, inclusive of all those relied upon by the Supreme Court in its August 29 opinion, predate Florida's adoption of the Uniform Commercial Code. In Schuessler v. Coca-Cola Bottling Company of Miami, 279 So.2d 901 (Fla. 4th DCA 1973), Florida Statute 672.2 - 314 was quoted in relevant part:

> "A warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind ... goods to be merchantable must be at least such as ... are adequately contained, packaged and labeled as the agreement may require ..."

The Schuessler Court further noted that:

> "This statute imposes on the retailer a warranty of merchantability which covers not only the product which is the object of the sale, but the adequacy of the container and its packaging - ". (Emphasis added.)

Again, the important point of note is that the Court remanded this case for a new trial on a warranty claim in connection with a food product case in the absence of any ingestion.

Although grounded in issues of privity, another interesting case is Bernstein v. Lily - Tulip Cup Corporation, 177 So.2d 362 (Fla. 3rd DCA 1965) wherein Plaintiff was served a hot drink in a paper cup; the cup broke apart from its handle causing the hot contents to spill upon and scald Plaintiff, and Judge Hendry, citing Blanton v. Cudahy Packing Co., supra., stated that:

> "The law in Florida is well-settled that a manufacturer would be held liable in implied warranty without privity to a consumer injured by a defective product manufactured for human consumption or other intimate bodily use"

again applying the Blanton decision to a non-ingestion state of facts.

The doctrine of breach of warranty has also been held applicable to the sale of blood, (see, for example, Community Blood Bank Inc. v. Russell, 195 So.2d 115 [Fla. 1967]).

These cited cases examined in tandem with the Court's August 29 opinion beg the following question:

If the doctrine has been applied to foods, food containers, defective chairs, defective automobiles (Evancho v. Thiel, 297 So.2d 40 [3 DCA 1974]), and consumer products of virtually every other type, then irrespective of and supplemental to Appellants' position that the food products cases never required ingestion in the first place, what would be the logic of finding an ingestion requirement present in a food case when the same theory of liability has been applied to so many non-food products?

The presence of a dead bug in the neck of a soda bottle which prevented the passage of the product from the bottle was sufficient basis to send the case to a jury on a breach of implied warranty theory in spite of the fact that the bug was not viewed by the Plaintiff (who had alleged psychic injury) until after she had already partaken of contents of the bottle that had been poured and digested without incident. No part of the bug was ingested. (Tarwacki v. Royal Crown Bottling Co. of Tampa, Inc., 330 So.2d 253 (Fla. 2d DCA 1976).

Of further support for the position that ingestion has never been a requirement in a breach of warranty case are the secondary sources of authority which are derived from Florida case law. For example, Bender's Florida Forms offers that

in an action based upon a breach of implied warranty of merchantability, the pleader should allege in addition to the usual general requirements:

1. Facts showing how the Plaintiff acquired or came into contact with the goods or product, describing the same with particularity;

2. Facts concerning the Plaintiff's use of the goods or products in question;

3. Facts showing the Defendant's connection with the goods or products;

4. Facts showing that the Defendant offered the goods for consumption by the public generally;

5. Facts showing that at the time of the sale, a defect existed in the goods or products that was not discoverable by simple observation at the time of use by the Plaintiff;

6. Notice of defect given to seller (if and as required) and;

7. Damages and injuries sustained by Plaintiff.

There is no special requirement for pleading ingestion in any food product-related case!

POINT II

THE COURT'S DECISION OF AUGUST 29 FAILS TO SET FORTH SUFFICIENT CONVINCING RATIONALE AS TO WHY THIS CASE SHOULD NOT HAVE GONE BEFORE A JURY ON THE ISSUE OF NEGLIGENCE.

The limited portion of the Court's August 29 opinion which speaks to a negation of a cause of action sounding in negligence does so based upon a purported lack of foreseeability in Mrs. DOYLE's case. The Court notes a distinction between ingestion and observance of foreign objects in food and states that the degree of foreseeability is different and that "The mere observance of unwholesome food cannot be equated to consuming a portion of the same." In reaching such conclusion, Mrs. DOYLE's experience is considered out of context. While the pleading might not so state with particularity (only ultimate pleading is required, of course), one can readily understand, that Mrs. DOYLE was in the process of taking the can from her husband who had removed the lid so that she and her husband might eat the contents. The fact that ingestion had not yet occurred should not be decisive of whether Mrs. DOYLE is entitled to recover for injuries sustained under the circumstances. This

was not a case of "mere observance" but rather unexpected visualization and near touching of an offensive, loathsome object - mixed in with the food that Mrs. DOYLE was just about to prepare for dinner.

The Court states that "A producer or retailer of food should foresee that a person may well become physically or mentally ill after consuming part of food product and then discovering a deleterious foreign object, such as an insect or rodent, in presumably wholesome food or drink" while going on to say that "The same foreseeability is lacking where a person simply observes the foreign object and suffers injury after the observation", but the Court does not set forth any basis to explain why this differentiation of degree should be decisive in determining why Plaintiff cannot have her day in Court. While the reason for foreseeability may be greater in the case of injury following ingestion, a suggestion that there is a need to match the degree of foreseeability in non-ingestion cases is without basis, and a position that foreseeability is totally lacking as a matter of law constitutes a refutation of clear-cut law to the contrary. The Court states that "The mere observance of unwholesome food cannot be equated to consuming a portion of the same." By what standard would equation be necessary? Isn't each case to be judged according to its own circumstances? In the cited case of Way v. Tampa Coca-Cola Bottling Company, 260 So.2d 288 (2nd DCA 1982), and in a number of the cases cited above, whether or not ingestion was present, the case was submitted to the jury not only on the theory of implied warranty but also on the theory of negligence, and as to foreseeability, the Way Court, citing Opelika v. Johnson, 241 So.2d 327 (Alabama 1970) stated:

> "but, whatever the language used, all of the cases hold in effect that when a foreign unwholesome substance is found in a sealed package or bottle of food or beverage, there arises an inference, a prima facie case or presumption of the existence of negligence on the part of the manufacturer or bottler."

While the present Supreme Court may disagree as to whether such a presumption arises, it is a far cry and without any basis to turn the tables diametrically so as to suggest that foreseeability is absent as a matter of law when negligence is presumed to exist.

Black's Law Dictionary (2nd edition) defines "foreseeability" as "The ability to see or know in advance, hence, the reasonable anticipation that harm or injury is a likely result of acts or omissions", citing Emery v. Thompson, 148 So.2d 479.

While GREEN GIANT, INC. might not have foreseen that a Mrs. DOYLE would purchase their product, observe a dead bug floating within the container, recoil in alarm and fall over a chair, the precise manner in which a party suffers injury has never been a necessary element in a negligence-based claim. Crislip v. Holland, 401 So.2d 1115 (Fla. 4th DCA 1981).

> "The proper test in determining foreseeability is not whether the initial tortfeasor is able to foresee the exact nature or extent of the injuries or precise manner in which the injuries occurred. Rather, all that is necessary in order for liability to arise is that the tortfeasor be able to foresee that some injury would likely result in some manner as a consequence of this negligent act". Atwood v. Rowland Truck Equipment, Inc., 408 So.2d 590, 591 (Fla. 3 DCA 1981).

Foreseeability issues are reserved for the jury (Crislip v. Holland, supra.) absent a determination that no foreseeability exists as a matter of law. Is it really wholely unforeseeable as a matter of law that a middle-aged woman might be frightened by the unexpected presence of a dead bug in food that she was just about to eat - food which was approximately an inch from her grasp - and that upon suddenly perceiving the situation, such person might back away from the offensive object?

The Court concludes in its August 29 opinion that "We would not impose virtually unlimited liability in such cases." There has been no request that the Court impose liability to such degree or that the Court issue a ruling which has overtones any broader than may be necessary to address the instant facts. Mrs. DOYLE only asks for an opportunity to present the circumstances of her case to a jury - the proper body to consider questions of causation and foreseeability.

POINT III

THE OPINION OF THIS COURT WRONGFULLY DENIES MRS. DOYLE AN OPPORTUNITY TO GO BEFORE THE JURY ON A STRICT LIABILITY IN TORT CLAIM.

One of the three theories on which the DOYLES' complaint is predicated is strict liability in tort.

The doctrine was adopted by the State of Florida in West v. Caterpillar Tractor Company, Inc., 336 So.2d 80 (Fla. 1976) with the following holding:

> "The obligation of the manufacturer must become what in justice it ought to be - an enterprise liability, and one which should not depend upon the intricacies of the law of sales. The cost of injuries or damages, either to persons or property, resulting from defective products, should be borne by the makers of the products, who put them into the channels of trade, rather than by the injured or damaged persons who are ordinarily powerless to protect themselves. We therefore hold that a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. This doctrine of strict liability applies when harm befalls a foreseeable bystander who comes within range of the danger."

The product was placed on the market by the Defendant. The product contained a defect. The product was to be used without inspection for defects. The product had a defect that caused injury to a human being.

MARIE DOYLE should be able to go to the jury on this theory and these facts.

CONCLUSION

Based upon Florida law in effect in 1981 when Mrs. DOYLE was injured, and subsequently through August 29, 1985 when the Supreme Court opinion in this case was handed down, injured Plaintiffs were able to bring claims for breach of implied warranty as to merchantability if certain criteria existed (see page 12 of Brief). The criteria were no different in food cases than in cases involving other products on the market, nor was there any distinction in a food or food container case based upon whether the food had been ingested. Understandably, many of the cases involving food did, in fact, have the element of ingestion present, but this mere happenstance does not lead to a conclusion that such coincidental element invokes an additional requirement as a prerequisite for bringing a claim predicated upon a breach of warranty theory in food cases.

As with respect to the claim sounding in negligence, the opinion of August 29 reaches a conclusion without supporting precedent or deductive reasoning. The negligence aspect of the decision appears to be predicated solely upon philosophical beliefs of the majority, and while this result is certainly not unique, it is suggested, again with the utmost respect, that if philosophical views are to control in a situation of this nature, then they should control prospectively and not as to events which occurred several years earlier when the law in effect was contrary to the Court's newly-stated position.

As with respect to strict liability, it appears that Mrs. DOYLE's circumstance brings her squarely within the ambit of controlling law, and the Court is asked to reconsider whether a cause of action has been stated on this theory based

upon the landmark case of West v. Caterpillar Tractor Company, Inc., 336 So.2d 80 (Fla. 1976) and its progeny.

If the Court elects to make ingestion a requisite element in food product cases on any of the theories above espoused, then this requirement should be prospective only and should not apply to an event which occurred nearly three years earlier when then controlling law did not require such element to be present.

RESPECTFULLY SUBMITTED,

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I HEREBY CERTIFY that a copy hereof has been furnished to EDMUND T. HENRY, III, ESQUIRE, Shutts & Bowen, 1500 Edward Ball Building, Miami Center, 100 Chopin Plaza, Miami, FL 33131, by mail, this 12th day of September, 1985.

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TABLE OF AUTHORITIES

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