IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

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| CHERIE WILSON-WATSON,<br><br>Petitioner,<br><br>v.<br><br>DAX ARTHRITIS CLINIC, INC., a Florida Corporation, and RICHARD A. SAITTA, M.D.,<br><br>Respondents. | ) | Case No.: SC00-1989 |

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ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT, STATE OF FLORIDA

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# ANSWER BRIEF OF RESPONDENTS
# DAX ARTHRITIS CLINIC, INC. and RICHARD A. SAITTA, M.D.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

**CASES**

**OTHER AUTHORITY**

## STATEMENT OF THE CASE AND FACTS

The Plaintiff/Petitioner's brief fails to include record cites to support her statement of the case and facts. Some of these statements are not supported by the record and are also misleading. Consequently, the Defendants/Respondents, Dax Arthritis Clinic, Inc. and Richard A. Saitta, M.D.,[1/] respectfully submit the following Statement of the Case and Facts to include matters either omitted or underemphasized by the Plaintiff/Petitioner, Cherie Wilson-Watson, as follows:

Watson sued an arthritis clinic ("Dax") and its owner/doctor ("Saitta"), for an incident that occurred on March 1, 1995. The amended complaint alleges that Watson was a paramedic responding to an emergency medical call (heart attack) at the clinic that day. (R. 2:14-16; 165)[2/] According to Watson's complaint, a clinic employee handed her a red contamination bag for the purpose of disposing of medical debris that had accumulated during the emergency. Watson claimed that Respondents had negligently placed a used syringe needle in the bag instead of in a proper container. The needle allegedly pricked Watson in the leg, puncturing the skin. According to Watson, she suffered pain and incurred medical

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[1/] For ease in reference, the Defendants/Respondents will be referred to as "Dax" or "Saitta" individually, or collectively as "the Defendants." The Plaintiff/Petitioner will be referred to as "Watson" or "the Plaintiff."

[2/] All citations to the record on appeal are indicated by the letter "R" followed by the volume and page number in the record.

expenses as a result of the needle stick and suffered mental anguish from fear of acquiring AIDS. (Id.)

Watson filed her original complaint on February 14, 1996, nearly one year after the incident. (R. 2:11-13) According to the affidavit of Michael Bach, M.D., filed on September 6, 1997, Watson's fear of acquiring AIDS was groundless because she had continued to test negative for HIV more than two years after any infection could have presumptively occurred. (R. 2:69-70) Watson's response to the Defendants' renewed motion for summary judgment (R. 3:303-08), claims that because the needle prick satisfied the impact rule, it was unnecessary for her to prove anything more in order to state a cause of action for fear of acquiring AIDS. Watson's response admits that "the needle itself was never tested" and it was unknown whether it had been used on a person infected with HIV. (R. 3:316) Watson also makes this admission in her response to Defendants' motion for summary judgment:

> Statistically, Plaintiff is not likely to become HIV positive, however, it is within the realm of medical possibility that she will become positive at some unknown time in the future. There are further, more definite tests available which Plaintiff may undergo in the future.

(R. 2:316-17) (emphasis added).

On March 16, 1998, more than three years after the incident, the trial court entered an order granting the Defendants' renewed motion for summary judgment on her fear of AIDS claim. (R. 3:321-22) The Defendants subsequently moved for a partial summary

judgment solely on that claim. (R. 3:359) However, both parties wished to bring finality to the case. Consequently, Watson and Defendants entered into a stipulation later incorporated into the judgment. In it, Defendants settled with Watson in the amount of $2,501.00 for all pending claims, other than "fear of contracting AIDS." (R. 3:363-66) Consequently, through that settlement, Plaintiff recovered her damages for any pain, distress, or medical expenses associated solely with the puncture wound and for undergoing blood tests for HIV. Id.

On August 27, 1999, the trial court entered a final judgment finding for the Defendants on the "fear of acquiring AIDS" claim and acknowledging the parties' stipulated settlement of the remaining claims. (R. 1:1-4) In the judgment, the trial court stated that it was aligning itself with the majority of courts throughout the United States that dismissed such claims absent either actual injury, (infection with HIV) or, at minimum, a showing of actual exposure to the HIV virus. The trial court concluded that although there had been impact to the Plaintiff, as she had been stuck with a needle, there was no evidence of the contested injury she claimed as a result -- exposure to HIV. Consequently, her "fear of acquiring AIDS" claim could not stand. (Id.) (emphasis added). The Plaintiff then appealed to the Second District Court of Appeal. (R. 1:5-6)

On August 23, 2000, the appellate court affirmed the trial court's decision, reported as Wilson-Watson v. Dax Arthritis Clinic, Inc., 766 So. 2d 1135 (Fla. 2d DCA 2000). In doing so, the Second District aligned itself with the Fifth District's decision in Coca-Cola Bottling Co. v. Hagan, 750 So. 2d 83 (Fla. 5th DCA 2000) and the "majority view" across the nation. This view holds that a plaintiff's fear of contracting AIDS is unreasonable as a matter of law when there is no showing that plaintiff has been exposed to HIV. Id. at 90.[3/]

SPECIFIC POINTS OF DISAGREEMENT WITH PETITIONER'S STATEMENT OF THE CASE AND FACTS:

1. Watson states that the needle "could not be tested for HIV contamination" and "could not be tested before it was discarded." There is no cite to the record and, in fact, no record support for Watson's claim. In her response to Defendants' motion for summary judgment, Watson states only that "the needle itself was never tested," giving no reason for that being the case. (R. 3:316) During oral argument, the Second District panel asked Plaintiff's counsel why it was not tested and he had no response. The record does not disclose any reason, and Petitioner's statement to this court that it "could not" be tested is misleading. One thing, however, is certain: Plaintiff has never alleged, nor has she ever argued, that Defendants took back possession of the needle

[3/] The "minority" view requires, at the very least, that it is "likely and probable" that the virus is present in the contact. Coca-Cola at 90.

after giving it to Plaintiff or that it was the Defendant clinic, doctor, or any of Defendant's employees who discarded it.

2. Watson also states that "the clinic where the needle had been discarded had been engaged in the treatment of AIDS patients." What this statement implies --- that the clinic treated patients for AIDS -- is dangerously misleading. The record reflects that although the clinic treated two AIDS patients for arthritis during the time of the incident, it did not provide treatment for AIDS. Under oath, Dr. Saitta testified that he never drew blood from those two patients, who went to the AIDS center for that purpose, and that he never conducted invasive procedures in examining these patients. (R. 2:176-80)

## ISSUE ON APPEAL

The Defendants/Respondents respectfully restate the issue on appeal as follows:

> WHETHER THE SECOND DISTRICT CORRECTLY AFFIRMED THE TRIAL COURT'S CONCLUSION THAT PLAINTIFF HAD NO CAUSE OF ACTION FOR "FEAR OF ACQUIRING AIDS" WHEN SHE COULD NOT SHOW THAT THE DEFENDANTS HAD EXPOSED HER TO HIV, OR THAT IT WAS EVEN LIKELY AND PROBABLE THAT THE VIRUS WAS PRESENT IN THE NEEDLE THAT PRICKED HER.

## SUMMARY OF ARGUMENT

In affirming the trial court's ruling that Watson could not prevail on her claim for "fear of acquiring AIDS," the Second District aligned itself with the vast majority of jurisdictions across the nation that require either the actual presence of the HIV virus in the contact with the Plaintiff (both "impact and injury" rule), or at minimum, a showing that the plaintiff has been actually exposed to an HIV contaminant ("exposure" rule). (R. 1:1-4) The trial court had correctly found neither rule satisfied in Watson's case, finding impact only, and no compensable injury. Thus, it held that her fear was "neither supported by the facts nor the applicable law." (Id.)

Four months after entry of judgment in this case, the Fifth District decided Coca-Cola Bottling Co. v. Hagan, 750 So. 2d 83 (Fla. 5th DCA 1999). In a case of first impression in the State of Florida, the court held that in order for a plaintiff to recover for fear of contacting AIDS, there must be not only physical impact, but also a showing of either actual contact with HIV infected materials (majority view), or that it was "likely and probable" to believe that HIV was present (minority view). Id. at 90. The Fifth District noted that only a very small percentage of our nation's populace is HIV positive. Thus, without showing, at the very least, that it is "likely and probable that the virus was present," a plaintiff's fear is "unreasonable as a matter of law and not a legally compensable injury." Id. at 90-91.

With the Coca-Cola decision, Florida joined the majority of the jurisdictions throughout the United States that have held plaintiffs to these standards. A survey of the "needle stick" cases throughout the United States demonstrates that, without more, a mere showing that a plaintiff was stuck by a used hypodermic needle is not enough to substantiate a claim based on fear of acquiring AIDS. Even California, which liberally recognizes innovative tort causes of action, requires actual exposure to the virus or, at least, a "medical probability" that the disease will develop in the future before allowing damages for fear of AIDS.

According to the California courts, allowing a cause of action based on mere "possibility" would result in a proliferation of a fear of AIDS claims. An absence of meaningful restrictions on such claims would compromise the availability and affordability of medical, dental, and malpractice insurance, prescription drugs and blood products. It would result in inconsistent jury verdicts, and the risk that the coffers of defendants and their insurers would be emptied to pay for emotional suffering of plaintiffs unaffected by exposure to the virus, possibly leaving inadequate compensation for plaintiffs to whom the fatal AIDS virus was actually transmitted.

Watson argues that merely being pricked by a used needle of unknown origin "reasonably" warrants recovery for fear of AIDS. Her "fear" is simply not compensable, however, as it is based -- by her own admission -- on a remote "possibility" of exposure. Her

cause of action cannot stand, as it is based solely on a speculative fear without any showing of even a "likelihood" or a "probability" that it was contaminated with HIV. Thus, Watson's claim satisfies neither the "majority" nor "minority" standard in the United States to state a cause of action. In addition, Watson obtained damages for her compensable injuries -- pain, distress, and medical expenses caused solely from the needle prick as well as any blood testing -- when she settled all other claims except for fear of acquiring AIDS. Thus, in view of the facts of this case, the Second District correctly affirmed the trial court whether this court adopts the majority or the minority standard.

## ARGUMENT

THE SECOND DISTRICT CORRECTLY AFFIRMED THE TRIAL COURT'S DECISION THAT PLAINTIFF HAD NO CAUSE OF ACTION FOR "FEAR OF ACQUIRING AIDS" WHEN SHE COULD NOT SHOW THAT THE DEFENDANTS HAD EXPOSED HER TO HIV, OR THAT IT WAS EVEN LIKELY AND PROBABLE THAT THE VIRUS WAS PRESENT IN THE NEEDLE THAT PRICKED HER.

In ruling that Watson could not prevail on her claim for "fear of acquiring AIDS," the Second District aligned itself with the vast majority of jurisdictions across the nation that require either the actual presence of the HIV virus in the Plaintiff (both "impact and injury" rule), or at minimum, a showing that the plaintiff has been actually exposed to an HIV contaminant (the "exposure" rule). The trial court found neither rule satisfied in Watson's case, finding impact only. Thus her fear was "neither supported by the facts nor the applicable law." (R. 1:1-4)

Plaintiff argues that impact alone, without more, automatically gives rise to a claim for fear of acquiring AIDS. Her argument finds no support under Florida law. Coca-Cola Bottling Co. v. Hagan, 750 So. 2d 83 (Fla. 5th DCA 1999) is a case of first impression in the State of Florida. The Fifth District held in Coca-Cola that for a plaintiff to recover for fear of contacting AIDS, there must be not only physical impact, but also a showing of either actual contact with HIV-infected materials or at least a likelihood and probability that HIV was present. Id. at 90.[4/]

[4/] The Coca-Cola v. Hagan case is now before this court on the certified question of whether to abolish the impact doctrine. The

In explaining its holding, the Fifth District noted that only a very small percentage of our nation's populace is HIV positive. Thus, in order to recover, a plaintiff must show that his or her fear is reasonable. According to the court, the great majority of cases throughout the United States hold that "reasonableness" entails a showing that: (1) the virus was present and (2) the contact was through a medically recognized means of transmitting the disease. Alternatively, the court noted, a minority of courts in the United States hold that the actual presence of HIV or AIDS need not be shown, as long as (1) it was "likely and probable to believe the virus was present," along with (2) a medically accepted channel of transmission. The court found that neither of these standards was met in the Coca-Cola case. Id. at 90-91.[5/]

As the Coca-Cola decision makes clear, both prongs of whichever standard is chosen must be present in order for the plaintiff to recover. Specifically, the Fifth District noted:

> without such showing**s** or proof**s**, a plaintiff's fear of contracting AIDS is unreasonable as a matter of law and not a legally compensable injury. As a matter of public policy, the allowance of such lawsuits without the

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instant case, however, involves impact, but no injury, in the sense of actual exposure or even likelihood of HIV contact, a substantially different issue.

[5/] Coca-Cola does not address a far stricter standard adopted by several courts, which requires a plaintiff to prove that he or she not only had actual exposure, but that he or she has tested positive for HIV, in order to recover. Transamerica Ins. Co. v. Doe, 840 P. 2d 288 (Ariz. App. 1992); Poole v. Alpha Therapeutic Corp., 698 F. Supp. 1367 (N.D. Ill. 1988).

> threshold proof**s** discussed above could lead to an explosion of frivolous litigation, opening as some courts say a "Pandora's box" of AIDS phobia claims.

Id. at 91 (emphasis added). Watson's case meets neither of these "reasonableness" standards.

Consequently, similar to the plaintiff in Coca-Cola, the Plaintiff in the instant case satisfies neither the majority nor the minority standard of recovery. Watson was able to show only one prong of the requirement -- impact. She was allegedly pricked with a used needle, a medically accepted channel for the transmission of the disease. However, she failed totally in satisfying the requirement that (1) either the HIV virus was present on the needle, or (2) it was "likely and probable to believe that the virus was present."

AIDS is not "treated" in an arthritis clinic. Furthermore, even though discovery revealed that the clinic treated the arthritis of two AIDS patients, the Defendant doctor testified that he never drew blood from these patients or performed invasive examinations on them. Watson argues that the "reasonableness" of her belief that HIV was present on the needle is a jury question -- that it must always be a jury question. This argument belies the fact that judges are empowered to determine whether a claim meets a minimal legal threshold before allowing it to proceed to trial. Watson's case failed to satisfy even the bare minimum threshold. Consequently, her claim failed as a matter of law.

The cites contained in the footnotes to the Coca-Cola opinion are also instructive to the issue here. They contain a representative sample illustrating the large number of cases that require at least one of the two threshold standards -- both absent in the case at hand -- in order for a party to proceed on a claim for fear of acquiring AIDS. Footnote 11 of the opinion, in fact, sets out only a few of the many cases holding that a needle-stick, without more, is insufficient support for such a claim.

Watson argues that Coca-Cola is not applicable to her case because there was no impact in that case. She ignores the requirement that her fear of AIDS claim requires both impact and injury. The injury must be in the form of exposure to AIDS, or the likelihood of same, not just injury from a needle prick. Indeed, Watson belatedly argues in her brief that her "emotional distress" flows from the "physical injury" of the needle penetrating her flesh. (Initial brief, p. 5-6) However, she fails to acknowledge that she settled all claims relating to the needle-prick itself, appealing only her claim for "fear of acquiring AIDS." Under this claim, the emotional distress is the fear itself - which Watson alleges to be reasonable.

Most important, the decision below does not conflict with this court's decision in R.J. v. Humana of Florida, Inc., 652 So. 2d 360 (Fla. 1995). In R.J., this court disallowed the plaintiff's cause of action for emotional distress based on an erroneous misdiagnosis

that he had been infected by HIV. The opinion generally focused on the "impact rule," and the plaintiff's failure to satisfy the impact rule in that case. This court found that the impact rule would have been satisfied if, aside from the taking of blood for testing, the plaintiff had been subjected to invasive medical treatment or the endurance of drugs with toxic or adverse side effects so that she would have suffered bodily injury from that treatment. In such case, this court ruled that the plaintiff "would have met the requirements of the impact rule and would be able to recover for the emotional trauma suffered as a result of **that** treatment." Id. at 364 (emphasis added). Consequently, it is even doubtful that Watson's needle-prick would even satisfy this court's definition of "impact."

It is clear from the R.J. decision, however, that this court never held that the plaintiff in R.J. was entitled to recover for "fear" of acquiring AIDS. This court held only that he could have recovered for "emotional distress" as a result of "that" treatment -- i.e., invasive treatment or caustic medication causing concurrent bodily injury. In Watson's case, neither the needle prick nor the blood tests she experienced rise to that level. However, even if they could be so characterized, Watson has already waived any claims to those damages. As already noted, she settled any claim for "emotional distress" caused by the physical impact of the needle puncturing her skin. Instead, she elected to contest

only the denial of her claim for "fear of acquiring AIDS." Furthermore, the lower court never invoked the "impact rule" to deny Watson her recovery. She satisfied "impact" for a limited purpose -- pain and medical expenses. She completely failed, however, to show any proof that she could recover for the injury of "fear," as it was based on a remote possibility only.

Watson's brief to the Second District also relied on the First District Court of Appeal's decision in City of Hollywood v. Karl, 643 So. 2d 34 (Fla. 1st DCA 1994). In that decision, the claimant was awarded workers' compensation for fear of AIDS, although he never contracted the virus.[6/] Watson failed to include the information, however, that the plaintiff in Karl was exposed to the virus. This occurred as a result of back-to-back occasions when he was called to the scene of accidents in the course of his employment as a firefighter and paramedic. In the first, he was attempting to assist an individual involved in an vehicular collision, when the victim became combative, biting and scratching the claimant's hands, producing open wounds. The very next day, in attempting to assist a gunshot victim, the claimant got a significant amount of that victim's blood on his bare hands which still had the open wounds.

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[6/] Watson's initial brief to this court omits mention of this case, and the two that follow. However, Respondents will address it here as a precaution in the event that Watson intends to include them in her reply brief.

Upon learning that the second victim had AIDS, the claimant in Karl developed psychological problems and sought workers' compensation benefits. The court ruled that the combined effect of the two incidents resulted in a combination of physical and mental injury compensable under the workers' compensation statute. Id. at 35. Because there had been an actual exposure to AIDS in that case, no question arose as to whether the complaint involving fear of AIDS was too remote or speculative to allow recovery.

Similarly, Plaintiff's brief to the Second District professed to rely on Eagle-Picher Industries v. Cobb, 481 So. 2d 517 (Fla. 3d DCA 1985). In Cobb, there was both an impact and an injury that allowed for recovery of emotional distress based on risk of contracting cancer under those circumstances. Unlike Watson, Cobb had an injury -- an actual exposure to asbestos, the disease-causing element -- much like HIV is to AIDS. In the instant case, Watson can only allege a mere possibility that she was exposed to a disease-causing element, HIV. Thus, the Cobb case does no more for Watson's argument than does Karl.

Plaintiff's brief to the Second District also relied on Swain v. Kury, 595 So. 2d 168 (Fla. 1st DCA 1992). In Swain, the plaintiff sought emotional damages based on an increased fear of the recurrence of cancer resulting from provable negligence in the diagnosis of her disease, which could have been detected earlier. Once again, a disease (cancer) itself had been present, not a mere

speculation that it existed. According to the court, a recurrence of the disease would prove that the delayed treatment resulted, not in eradication of the disease, but in micrometastases, meaning that due to this delay, the disease was never really cured. Id. at 172. The circumstances in the Swain decision are so different as to have no bearing on the case at hand.

Watson's brief ignores the dozens of cases throughout the United States that echo the reasoning of both the majority and minority opinion throughout the nation. Instead, her brief cites only to the very few opinions that support her view. These cases are aberrations. In addition, one case on which Watson heavily relies presents a far weaker claim than Watson suggests. Specifically, Faya v. Almaraz, 620 A. 2d 327 (Md. App. 1993) involves potential exposure to AIDS, wherein patients brought negligence actions against a surgeon who performed operations on them without informing them he had AIDS.

The Faya court relied heavily on a decision that was later reversed by the state supreme court, Carroll v. Sisters of St. Francis Health Services, Inc., 1992 W.L. 276717 (Tenn. App. 1992), 868 S.W. 2d 584 (Tenn. 1993). In Faya, unlike the instant case, there was at least the presence of the virus. Furthermore, even the Faya court found that continued fear of contracting AIDS becomes unreasonable when a plaintiff does not test positive for HIV within six months after exposure. Id. at 337.

Likewise, Watson argues that Madrid v. Lincoln County Med. Ctr., 923 P. 2d 1154 (N.M. 1996) and Williamson v. Waldman, 677 A. 2d 1179 (N.J. Super. 1996) are applicable here. They are not. These decisions merely rejected the requirement that the plaintiff prove "actual exposure" to AIDS. In Watson's case, however, she fails to even satisfy the minimum, lesser standard (and minority view) that it was "likely" or "probable" to believe the virus was present in the discarded needle at the arthritis clinic.

A survey of the "needle stick" cases throughout the United States demonstrates that, without more, a mere showing that the plaintiff was stuck by a used hypodermic needle is not enough to substantiate a claim based on fear of acquiring AIDS. For example, in a case remarkably similar to the one at hand, a paramedic was stuck by a needle protruding from a container for disposing of used medical syringes. The court held that, absent any proof that the paramedic was in fact exposed to the AIDS virus, he could not recover in a products liability action for his fear of contracting the disease. Burk v. Sage Products, Inc., 747 F. Supp. 285 (E.D. Pa. 1990).

In Burk, the plaintiff admitted that he could not prove that the needle that stuck him was a needle used on an AIDS patient. The Burk court wisely noted that cases allowing recovery for fear of AIDS had done so only when plaintiffs exposed to the disease were faced with the question of whether they would contract the

disease in the future. The plaintiff in the Burk case faced the additional question of whether he had even been exposed to the AIDS virus in the first place. Id. at 287.

Furthermore, the Burk plaintiff also admitted that he had tested negatively for HIV antibodies on five separate occasions in the 20 months that had passed since the incident. Because HIV antibiotics would have been detectable within six months, the court noted it had become substantially unlikely that he would ever develop the disease from the incident. Id. at 288. Similar to the instant case, the Burk trial court found that plaintiff's failure to establish exposure to the AIDS virus, coupled with the fact that he could now be presumed to be free from AIDS infection, led to the result that his claim must fail. Id. at 286.

In 1993, the Supreme Court of Tennessee issued a lengthy opinion discussing the merits of a claim for fear of AIDS brought by a hospital visitor who pricked her finger on used needles after mistaking a medical waste receptacle for a paper towel container. Carroll v. Sisters of Saint Francis Health Services, Inc., 868 S.W. 2d 585 (Tenn. 1993). In Carroll, the plaintiff tested negative for HIV on five occasions over a three year period after the incident. She also admitted that she could not prove that the needles which pricked her were contaminated with HIV. Id. at 586-87. Tennessee's highest court chose to join the majority of jurisdictions holding that it was necessary for the plaintiff to

prove, at minimum, actual exposure to the virus, rather than embrace a standard holding that it is "generally reasonable" for a person pricked by any used needle to recover for fear of the possibility of acquiring AIDS in the future. Id. at 590; 592-93.

In rejecting the Faya decision, so heavily relied on by Watson, the Tennessee Supreme Court stated:

> The latter [Faya] view has, in our opinion, several major shortcomings. First, it treats the reasonableness question in the context of negligence actions for emotional damages in the same manner as the question of reasonableness in other areas of negligence law. This equation is problematic because . . . . the law has been reticent to allow juries to award damages based only on mental or emotional trauma because of the inherently subjective nature of these claims and the concomitant inability of trial courts to give adequate instructions to channel the jury's discretion in these cases.
>
> A related, but more specific problem with the reasonableness standard is that it removes the objective component that has long been deemed necessary to establish a prima facie case of negligent infliction of emotional distress.

Id. at 593.

Consequently, the Carroll court held that, in order to recover emotional damages based on fear of contracting AIDS, the plaintiff must prove, at minimum, that he or she was actually exposed to HIV. Furthermore, even with actual exposure, the damages recoverable for emotional distress would be confined solely to the time between discovery of the exposure and negative medical diagnosis or other information that puts the fear of injury to rest. Id. at 594. The court concluded that because Carroll had tested negatively for HIV

antibodies and had admitted that she could not prove the needles which pricked her were contaminated with HIV, her claim was insufficient as a matter of law. Id.

In Seimon v. Becton Dickinson & Co., 632 N.E. 2d 603 (Ohio App. 1993), a nurse alleged that she was pricked with a contaminated needle due to the negligent design of a syringe by the manufacturer. However, she failed to produce any evidence that she was, in fact, exposed to the HIV virus. The appellate court affirmed the trial court's summary judgment for the defendant, finding that though a needle puncture caused physical injury, it was not the proximate cause of the emotional distress claimed. Id. at 604-05.

In Kaufman v. Physical Measurements, Inc., 615 N.Y.S. 2d 508 (A.D. 3 Dept. 1994), a postal clerk was pricked by a hypodermic needle protruding from an envelope. He brought action against a registered nurse who mailed the needle and against the owner of the business to whom the envelope was addressed. The needle had been used by the nurse to extract blood as part of a physical examination for an insurance company. The postal clerk was tested five times over a period of eighteen months for the presence of HIV, with all results being negative. The blood sample from the subject needle and individual from whom the blood had been taken both tested negative for HIV. The court ruled that the clerk's

claim for emotional distress was far too remote and speculative to be compensable as a matter of law. Id. at 509.

In Doe v. Surgicare of Joliet, Inc., 643 N.E. 2d 1200 (Ill. App. 1994), a patient was stuck with a non-sterile needle and not informed of the incident until months later. The appellate court held that in the absence of actual exposure to the AIDS virus, a legally compensable claim would not be recognized for fear of contracting AIDS. In so ruling, the Doe court noted that Tennessee (Carroll) and a majority of other jurisdictions currently required actual exposure to the HIV virus in order to state such a claim. Id. at 1203 (and cases cited therein). Once again, an appellate court held that a fear of acquiring AIDS, without any allegation of actual exposure to the virus, was a claim that was simply too speculative to be cognizable as a matter of law. Id. at 1204.

In Rothschild v. Tower Air, Inc., 1995 WL 71053 (E.D. Pa. 1995), the plaintiff alleged that during a flight she reached into the magazine pouch adjacent to her seat and was stabbed in her right index finger by a hypodermic needle that was in the pouch. The court had disallowed her claim for emotional distress when she failed to present evidence that the needle was contaminated with HIV or hepatitis B virus. Following the line of cases holding that a plaintiff must first show exposure to a disease in order to recover for fear of contracting that disease, the trial court held

that, to rule otherwise, would be to allow a claim that was "purely speculative." Id.

Russaw v. Martin, 472 S.E. 2d 508 (Ga. App. 1996) is consistent with the majority view. There, a plaintiff was seated in a hospital waiting room when a syringe fell from the pocket of a nurse and a used, non-sterile needle became stuck in the individual's leg, drawing blood. The court found that the claim was too speculative to allow recovery, as the plaintiff could offer no evidence that the needle was contaminated with HIV or hepatitis or that the plaintiff contracted HIV or AIDS as the result of the needle stick. Id. at 511. The court found that to allow recovery for emotional injuries and mental anguish based on "imagined possibilities" were per se unreasonable. Id. at 512. In reaching its conclusions, the Georgia appellate court noted:

> Because this is a case of first impression, it is instructive to examine how other states have proceeded. Most jurisdictions require actual exposure to disease as a pre-requisite to recovery for damages, in part, because the statistical probability of contracting HIV from a single needle stick exposure of HIV contaminated blood is only approximately 0.3 to 0.5%.

Id. at 511.

In Babich v. Waukesha Memorial Hospital, Inc., 556 N.W. 2d 144 (Wis. App. 1996), a patient stuck with a needle that was mistakenly left in her bed linens failed to establish that the needle came from a source contaminated by HIV. She submitted to HIV testing at six months, twelve months, and eighteen months, after which her

physician assured her that there was little likelihood that she would ever test positive. Id. at 145. The Wisconsin appellate court concluded that a requirement of proof of exposure to the virus strikes a proper balance between insuring that victims are compensated for their emotional injuries and that potential defendants take reasonable steps to avoid such injuries, while at the same time protecting the courts from being burdened with frivolous suits. Id. at 147.

The Babich court found that the real risk that contact with a random used needle would infect a person with the HIV virus is minimal. Id. The court held that it would be a waste of precious health care resources to cause extra dollars to be spent on preventing needle stick injuries, as it would not be efficiently improve overall patient safety. Indeed, the court feared that health care providers, in order to avoid such liability, would perhaps segregate HIV/AIDS patients or possibly refuse them treatment. Id. at 148.

In Murphy v. Abbott Laboratories, 930 F. Supp. 1083 (E.D. Pa. 1996), on the other hand, a nurse who was stuck by a needle used on a patient infected with both HIV and hepatitis B was permitted to recover emotional distress damages. The court found that her alleged emotional injury was a direct result of physical injury from being stuck by a needle that exposed her to AIDS. This case illustrates a case of a reasonable fear of acquiring AIDS.

Similarly, in Brown v. New York City Health & Hospitals Corp., 648 N.Y.S. 2d 880 (A.D. 2 Dept. 1996), a nurse was stuck by a needle in an HIV-positive infant's crib. The court found that because there was sufficient prima facie proof of actual exposure to the AIDS virus, the nurse could recover for emotional distress for the first six months following exposure without having to show proof of actual infection. However, if more than six months passed since exposure, and the plaintiff continued to test negative for the HIV antibodies, her fear became non-compensable. Id. at 886-88. The court concluded that because an "AIDS phobia" cause of action is based on potential future injury, the requirement of proof of actual exposure is necessary in order to ensure that such a cause of action remains within the bounds of what is considered reasonably possible. Id. at 887.

Decisions that do not involve a needle stick are also instructive on this issue: Falcon v. Our Lady of the Lake Hospital, Inc., 729 So. 2d 1169 (La. App. 1999) (requiring a plaintiff to demonstrate the presence of HIV and a proper channel of exposure or infection in order to establish cause of action; otherwise claim purely speculative and not sufficiently reasonable as a matter of law); Bain v. Wells, 936 S.W. 2d 618 (Tenn. 1997) (holding that plaintiff must prove, at a minimum, that he or she was actually exposed to HIV); Drury v. Baptist Memorial Hospital System, 933 S.W. 2d 668 (Tex. App. 1996) (holding that fear of AIDS must be

reasonably based upon circumstances showing actual exposure to the disease-causing agent); Doe v. Doe, 519 N.Y.S. 2d 598 (N.Y. Sup. 1987) (requiring actual exposure to the disease in order to support fraud and tort claim for intentional infliction of "AIDS-phobia"); Marriott v. Sedco Forex International Resources, Ltd., 827 F. Supp. 59 (D. Mass. 1993) (actual exposure to disease required to avoid summary judgment); Brzoska v. Olson, 668 A. 2d 1355 (Del. Sup. 1995) (wherein Supreme Court of Delaware held that, absent any evidence of actual exposure to HIV patients' recovery from HIV infected dentist could not include mental anguish for fear of AIDS); Johnson v. West Virginia University Hospitals, Inc., 413 S.E. 2d 889 (W. Va. 1991) (wherein Supreme Court of West Virginia held that security officer bitten by hospital patient who was suffering from AIDS showed sufficient exposure to disease to permit recovery for emotional distress; without such proof of exposure distress damages would be denied); K.A.C. v. Benson, 527 N.W. 2d 553 (Minn. 1995) (wherein Supreme Court of Minnesota held that damages based on plaintiff's fear of acquiring AIDS without allegations of actual exposure to HIV resulted in no legally cognizable claim); Reynolds v. Highland Manor, Inc., 954 P. 2d 11 (Kan. App. 1998) (recovery for fear of AIDS limited to plaintiff showing direct exposure or substantial probability of exposure); Funeral Services by Gregory, Inc. v. Bluefield Community Hospital, 413 S.E. 2d 79 (W. Va. 1991) (overruled on other grounds) (wherein

Supreme Court of West Virginia adopts majority view that fear of contracting AIDS, in absence of actual exposure to virus, will not be recognized as legally compensable injury); Lubowitz v. Albert Einstein Medical Center, Northern Div., 623 A. 2d 3 (Pa. Super. 1993) (patient's fear of developing AIDS not legally compensable even where initial test was falsely positive); Hare v. State of New York, 570 N.Y.S. 2d 125 (A.D. 2 Dept. 1991) (holding that x-ray technician bitten by inmate at prison could not recover for fear of AIDS absent proof that the inmate was infected); Montaalbano v. Tri-Mac Enterprises of Port Jefferson, Inc., 652 N.Y.S. 2d 780 (A.D. 2 Dept. 1997) (holding the customer did not demonstrate that he was actually exposed to AIDS virus when he consumed french fries that he later discovered were covered with blood, thus precluding claim for emotional distress); Neal v. Neal, 873 P. 2d 871 (Idaho 1994) (wherein Supreme Court of Idaho concluded that fear of AIDS is not reasonable absent proof of actual exposure); and Pendergist v. Pendergrass, 961 S.W. 2d 919 (Mo. App. 1998) (holding that patient's fear of contracting AIDS or hepatitis from blood clotting factor used during surgery was unreasonable absent proof of actual exposure to HIV or hepatitis B virus).

Even California, which is typically liberal in recognizing innovative causes of action in tort, requires actual exposure to the virus before allowing damages for fear of AIDS. The California Supreme Court (in bank) found that in order to recover emotional

distress damages for fear of contacting a disease, the plaintiff must establish as a "medical probability" that the disease will develop in the future. Potter v. Firestone Tire & Rubber Co., 863 P. 2d 795 (Cal. 1993) (in bank).

Relying on Potter, a California appellate court held that a plaintiff could not recover emotional distress damages for fear of contracting AIDS unless he or she could demonstrate (1) exposure to HIV or AIDS; and (2) fear stemming from knowledge, corroborated by reliable medical or scientific opinion, that it was more likely than not that the plaintiff would develop HIV and AIDS due to the exposure. Kerins v. Hartley, 33 Cal. Rptr.2d 172, 179 (Cal. App. 1994). In Kerins, the court held that the low probability that an infected surgeon transmitted HIV to a patient, and the result of a blood test, which was 95% accurate, precluded a finding that it was more likely than not that patient would become HIV positive so as to recover emotional distress damages for fear of developing AIDS based on negligent exposure. Indeed, the Kerins case cited the following public policy reasons for its decision:

> The magnitude of the potential class of plaintiffs seeking emotional distress damages for negligent exposure to HIV or AIDS cannot be overstated... A proliferation of fear of AIDS claims in the absence of meaningful restrictions would run an equal risk of compromising the availability and affordability of medical, dental and malpractice insurance, prescription drugs, and blood products. Juries deliberating in fear of AIDS lawsuits would be just as likely to reach inconsistent results, discourage early resolution or settlement of such claims. Last but not least, the coffers of defendants and their insurers would risk being emptied to pay for the

> emotional suffering of the many plaintiffs unaffected by exposure to HIV or AIDS, possibly leaving inadequate compensation for plaintiffs to whom the fatal AIDS virus was actually transmitted.

Id. at 178-79.

In sum, Watson's claim that being pricked by a used needle of unknown origin "reasonably" warrants recovery for fear of AIDS is both unreasonable and illogical. Watson confuses (1) emotional distress actually caused by an injury itself with (2) emotional distress caused by the fear of a secondary -- and only remotely possible -- injury, that of acquiring AIDS. Her "fear" of acquiring AIDS is simply not compensable, as it is based solely on a speculative fear of obtaining AIDS from a random used needle without any likelihood shown that it was contaminated with HIV.

The Fifth District's decision in Coca-Cola suggests a proper and practical application of the law and the equities in cases such as this. This court's opinion in R.J. v. Humana supports the Respondents' position and does not conflict with the decision below where the court correctly found impact but no injury in the form of emotional distress based on fear without proof of exposure. Consequently, Walton has not proved up her case even under the minimum standard -- a likelihood or probability that the virus was present on the needle. The decision of the district court below should be affirmed.

## CONCLUSION

For all of the reasons stated in this brief, this Court should affirm the district court's decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Federal Rule of Appellate Procedure 32(a)(7)(B) and (C), the undersigned certifies that this brief is typed with Courier 12-point print, which has 10 characters per inch.

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