

IN THE SUPREME COURT OF FLORIDA

CHERIE WILSON-WATSON,

Plaintiff/Petitioner,

vs.

Case No. SC00-1989

DCA No. 2D99-3521

Lower Case No. 96-0674-CA-01

DAX ARTHRITIS CLINIC, INC.,
a Florida Corporation, and RICHARD A.
SAITTA, M.D.,

Defendants/Respondents.

_____ /

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Review from the District Court of Appeal, Second District
State of Florida

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TABLE OF CONTENTS

	<u>PAGE NO.</u>
Table of Citations	iii
Statement of the Case and of the Facts	1
Summary of Argument	3
Argument	5
<p>IN THE EVENT OF AN ACCIDENTAL PUNCTURE BY A USED HYPODERMIC NEEDLE, THE QUESTION OF REASONABLENESS OF THE PLAINTIFF’S CLAIM FOR FEAR OF CONTRACTING AIDS IS ONE TO BE RESOLVED BY THE JURY UNDER ALL THE FACTS AND CIRCUMSTANCES.</p>	
Conclusion	17
Certificate of Font Size and Service	18
Appendix	
Conformed copy of the decision of the Court of Appeal	TAB A

TABLE OF CITATIONS

Cases

	Page
<i>Coca-Cola Bottling Co. v. Hagan</i> , 750 So. 2d 83 (Fla. 5 th DCA 1999)	5,6
<i>Doyle v. Pillsbury</i> , 476 So. 2d 1271 (Fla. 1985)	6,7
<i>Faya v. Almaraz</i> , 329 Md. 435; 620 A. 2d. 327 (Md.1993)	11
<i>Hamilton v. Walker Chemical & Exterminating Co.</i> , 233 So 2d 440 (Fla 4 th DCA 1970)	8,9
<i>Madrid v. Lincoln County Med. Ctr.</i> , 923 P.2d 1154 (N.M. 1996)	13
<i>Mansfield v. Brigham</i> , 91 Fla 109, 107 So 336 (1926)	8
<i>R.J. v. Humana of Florida, Inc.</i> , 652 So. 2d 360 (Fla 1995)	5,6,7,8,9,16
<i>Williamson v. Waldman</i> , 677 A.2d 1179 (N.J. Super. Ct. App. Div. 1996)	12,14
 <i>Other Authority</i>	
Florida Standard Jury Instructions in Civil Cases, 6.1b and 6.2a	8

STATEMENT OF THE CASE AND FACTS

Petitioner appealed the judgment of the Circuit Court for Collier County, Florida, granting partial final summary judgment against her in her negligence action seeking to recover damages for fear of contracting AIDS. The Second District Court of Appeals affirmed.

Petitioner was working as an emergency medical technician when she responded to a medical emergency at Respondents' clinic. When she arrived, a clinic employee handed her a red contamination bag used to dispose of medical debris accumulated during the emergency.

Contrary to accepted medical standards, the contamination bag had been employed by the clinic to store used hypodermic needles. Such needles are required to be stored in a "sharp's" container, a hard case designed to prevent accidental punctures because of the high degree of hazard associated with such incidents.

Some time later, Petitioner's leg was punctured by a used, discarded hypodermic needle concealed inside the bag. The multiple punctures broke the skin and caused bleeding. The needle was not, and could not, be tested for HIV contamination, but Petitioner underwent multiple HIV tests over a two-year period.

To date, the tests have produced negative results. The clinic where the needle had been discarded had been engaged in the treatment of AIDS patients.

Petitioner filed an action against Respondents' clinic for negligence, seeking to recover damages for bodily injury and all other damages reasonably flowing from the negligence, including fear of contracting AIDS. Petitioner settled with Respondents as to all elements of her damages except the fear of contracting AIDS.

Petitioner did prove that her contact with the needle was a medically and scientifically accepted channel for the transmission of AIDS, but because the needle could not be tested before it was discarded, she was unable to prove that the virus was present in the needle.

On appeal from the trial court's order, the Court of Appeal held that Petitioner's fear of contracting AIDS was unreasonable as a matter of law and not a legally compensable injury, because she did not prove that the virus was present in the needle, affirming the order of the trial court.

SUMMARY OF ARGUMENT

In this case, the District Court of Appeal held that a plaintiff who has been negligently stuck with a hypodermic needle, while able to recover damages for pain and suffering and economic damages, may not recover damages for emotional distress resulting from fear of contracting aids absent proof of actual exposure to the virus.

The decision of the District Court cannot be reconciled with the decision of the Supreme Court of Florida in the case of *R.J. v. Humana of Florida Inc.*, 652 So.2d 360 (Fla 1995) which holds that a plaintiff may recover damages for emotional distress caused by the negligence of another, when the emotional distress flows from physical injuries sustained by the plaintiff in an impact. Indeed the decision of the District Court of Appeals conflicts with the very essence of the laws of Florida regarding recovery of emotional distress in tort cases as embodied in the Common Law and in the Standard Jury Instructions adopted by this Court.

The District Court of Appeal⁰ has carved out an exception to the Common Law rule allowing recovery of mental suffering as a result of physical traumatic injury, by holding, in effect, that mental distress is compensable in all cases of physical impact, except when such mental distress consists of fear of contracting aids. The District Court has created this exception to the rule in the absence of any

compelling necessity for it, in spite of the fact that public awareness of aids and its ability to be transmitted by used needles is so great as to have been a catalyst for aids prevention to permeate the safety standards of American life, and in spite of the fact that the first thought that would cross the mind of any reasonably intelligent person when accidentally stuck by a needle of unknown origin, would be the specter of HIV infection leading to AIDS.

In so holding, the district court has overridden the well-established criteria for jury evaluation of reasonableness in tort cases. The decision fails to take into account the fact that the context of a needle stick will give rise to jury questions of foreseeability and reasonableness that preclude the application of a bright line rule barring a claim for fear of contracting aids. The trial court and the district court have thus preempted the role of the trier of fact in these cases.

ARGUMENT

IN THE EVENT OF AN ACCIDENTAL PUNCTURE
BY A USED HYPODERMIC NEEDLE, THE
QUESTION OF REASONABLENESS OF THE
PLAINTIFF'S CLAIM FOR FEAR OF
CONTRACTING AIDS IS ONE TO BE RESOLVED
BY THE JURY UNDER ALL THE FACTS AND
CIRCUMSTANCES

The district court decision is in direct conflict with the decision of this Court in *R.J. v. Humana of Florida Inc.*, 652 So.2d 360 (Fla 1995) which holds that a plaintiff may recover damages for emotional distress caused by the negligence of another, when the emotional distress flows from physical injuries sustained by the plaintiff in an impact. (*Humana* at 362)

The Second District Court of Appeal incorrectly relied on the decision in *Coca-Cola Bottling Company v. Hagen*, 750 So.2d 83 (Fla 5th DCA 1999) that applied the impact rule to the facts of that case because, in that case, there was no impact. The plaintiffs had simply observed what they thought may have been a contaminated condom in a soft drink. The Fifth District applied *Humana* and held there could be no recovery because there was no impact.

However in the instant case, the emotional distress suffered by Petitioner flows from the physical injuries sustained when the needles penetrated Petitioner's skin and flesh. That is an impact. There would have been no distress if there had

been no such impact. There would have been no fear of contracting AIDS if there had not been a penetration of the body by a used hypodermic needle. Thus recovery of the damages meets the requirements of *Humana* because the “emotional distress suffered flows from injuries the plaintiff sustained in an impact.” (*Humana* at 362)

In applying *Coca-Cola* to the facts of this case, the Second District inverted the meaning of that case by applying it to a situation where impact did occur. The *Coca-Cola* decision is now pending review by this Court, wherein plaintiff seeks a decision eliminating the impact rule in Florida.

The instant case is simply not a case for the application of the impact rule because that rule applies to define the limits of an award of mental anguish *absent* an impact. This is a case of physical impact creating a foreseeable emotional injury just as though there was an automobile accident that caused among other things, emotional stress as an element of the damages. The impact rule only operates to bar recovery when there is no impact. If there is an impact then the rule does not come in to play and damages are simply a matter of foreseeability.

In a case involving an attempt to recover damages for observing an insect in a can of peas and falling over a chair in alarm, *Doyle v. Pillsbury*, 476 So.2d 1271 (Fla 1985), this Court observed that “The ingestion [of the peas] requirement is

grounded upon foreseeability rather than the impact rule. The impact rule itself is a convenient means of determining foreseeability.” (at 1272) Because the insect was only observed and the food was not ingested, there was a lack of foreseeability as to the resulting fall over the chair.

The District Court of Appeal has carved out an exception to the rule allowing recovery of mental suffering as a result of physical traumatic injury by holding, in effect, that mental distress is compensable in all cases of physical impact, except when such mental distress consists of fear of contracting aids. The district court has created this exception to established law in the absence of any compelling necessity for it, in spite of the fact that public awareness of aids and its ability to be transmitted by needles is so great as to have been a catalyst for aids prevention to permeate the safety standards of American life, and in spite of the fact that the first thought that would cross the mind of any reasonably intelligent person when accidentally stuck by a needle of unknown origin, would be the specter of HIV infection leading to AIDS.

The rationale for the application of the “impact rule” does not exist in this case. Justice Overton in writing the *Humana* decision, observes that the impact rule is designed to close the floodgates to recovery for purely emotional damages and to assure that only valid claims are presented. (*Humana* at 363) But the

Petitioner's damages are not "purely emotional stress damages," they are combined with real physical trauma. This is not an "invalid claim" for emotional damages; it is a valid claim for compensation for the foreseeable component of Petitioner's injuries that she is entitled to have determined by a jury applying the standard jury instructions defining foreseeability and reasonableness.

If you find for defendant[s] you will not consider the matter of damages. But, if you find for (claimant) you should award (claimant) an amount of money that the greater weight of the evidence shows will fairly and adequately compensate him for such [loss] [injury] [or] [damage], including any such damage as (claimant) is reasonably certain to [incur] [experience] in the future. You shall consider the following elements:
(Florida Standard Jury Instructions in Civil Cases, 6.1b)

Any bodily injury sustained by (name) and any resulting ...[, mental anguish] [, inconvenience] [loss of capacity for the enjoyment of life] experienced in the past [or to be experienced in the future]. There is no exact standard for measuring such damage. The amount should be fair and just in the light of the evidence.
(Florida Standard Jury Instructions in Civil Cases, 6.2a)

It is well settled in the Common Law and Florida case law that after a tort is established, the liability of the tortfeasor extends to all the consequences that naturally, proximately, and reasonably follow or result from such act. *Mansfield v. Brigham* 91 Fla 109, 107 So 336 (1926); *Hamilton v. Walker Chemical & Exterminating Co.* 233 So 2d 440 (Fla 4th DCA 1970).

The District Court has overridden this well-established criteria for jury evaluation of tort cases. The decision fails to take into account the fact that the variable factual context of a needle stick will give rise to jury questions of foreseeability and reasonableness that preclude the application of a bright line rule barring a claim for fear of contracting aids. The trial court and the district court have thus preempted the role of the trier of fact in these cases and have attempted to change the impact rule set forth in *Humana*.

This is a case of first impression in Florida. Among other jurisdictions, there is a split of authority as to the prerequisites for bringing an action for recovery of the emotional stress connected with the fear of contracting aids. In one set of jurisdictions, actual exposure to HIV is a necessary requirement. In the other, there is no actual exposure rule, but rather the requirement that there be only a reasonable fear under the circumstances. The latter is not a special rule isolated for AIDS cases. Rather, as is demonstrated in this brief, it is the Common Law of tort damages as reflected in the above cited cases and quoted jury instructions. Nonetheless, AIDS is a terminal disease that has brought new challenges into our courtrooms. This is particularly true in “fear of contracting” cases, where damages for emotional distress are sought.

If a contaminated needle is the requisite standard, then such a narrow

restriction will inevitably lead to a denial of relief to the most worthy plaintiff. In the case at bar, the needle could not be tested. A “Catch 22” situation is created where the plaintiff can recover if the needle she is stuck with is contaminated, but she can’t test the needle to make that determination.

In a similar case presently before the Twentieth Judicial Circuit Court, (Husty v. Lee Memorial Health System, Case No. 00-24-AR-IA) the plaintiff, while a patient in the emergency room of the defendant hospital, was stuck with a used needle from another patient that had been left on a gurney. A rule requiring proof of actual contamination before recovery will deny that plaintiff access to the courts for redress of her injury because, it is alleged, the hospital disposed of the needle while the plaintiff was being treated for the needle stick! That plaintiff will have suffered, as alleged, mental anguish, fear, sexual dysfunction, multiple invasive diagnostic testing and embarrassment. But if actual contamination of the needle is required, she will receive no compensation because actual contamination can never be proven.

An overview of the case law in this area reveals disagreement among various state and federal courts over the appropriate standard for allowing recovery. Some states do not recognize a cause of action for the “fear of” contracting AIDS, while other states do. Some jurisdictions provide relief only if there is actual exposure to

the disease causing agent. But others allow recovery without demonstrating actual exposure. The latter jurisdictions generally require only that the plaintiff's fear be reasonable; and the question of reasonableness is, except in the most clear-cut circumstances, one for the trier of fact.

An example of the latter view is the Maryland Court of Appeals' decision in *Faya v. Almaraz*, 329 Md. 435; 620 A. 2d. 327 (Md.1993). *Faya* is important to the present case in that it contemplates the different approaches taken in various jurisdictions, and renders its own sensible result. The issue addressed in *Faya* is whether a patient's fear of contracting AIDS from an infected surgeon constitutes a legally compensable injury where the patient tests negative for HIV.

The court held that one who can demonstrate a genuine fear of AIDS, even though exposure cannot be proven, may recover emotional damages during the "window" of fear created by the uncertainty limits of testing. (*Faya* at 456) The court reasoned that to do otherwise would unfairly penalize one who has received impact and injury, but is prevented from establishing actual contamination.

In reversing the trial court's decision, the Maryland Court of Appeals found that the plaintiffs' emotional distress was not unreasonable as a matter of law. (*Faya* at 336) The potential for exposure was enough to satisfy the Court. The Court reasoned that although the transmission risk was relatively small, it was

nevertheless foreseeable to the defendant.

This reasoning is appropriate to the present case as well. Petitioner was stuck with a dirty, discarded hypodermic needle. Consequently, she was injured. It is common knowledge that hypodermic needles transmit the HIV virus. Because of this, Petitioner has endured multiple invasive testing for HIV, the genuine fear of contracting AIDS and trauma. To make matters worse, she does not know and is unable to establish whether or not she was actually contaminated. She can only hope, wait, and continue testing for the virus. Meanwhile her distress was foreseeable to Respondents and would have been foreseeable to any reasonable person who negligently allows another to be stuck with a used hypodermic needle.

Under the factual circumstances of this case, the reasonableness standard produces a sensible and just result as well as a workable and just rule of law for similar cases. It is common knowledge that hypodermic needles transmit the deadly HIV virus. Therefore, it is foreseeable and *reasonable* that a person who receives a puncture wound from a dirty, discarded hypodermic needle would develop a fear of contracting AIDS. Denying recovery under these circumstances creates unfair and unjust precedent. At the time of its decision, the Maryland court was the only appellate court which had addressed and adopted the general reasonableness standard. Since that time, the New Mexico Supreme Court also

rejected the “actual exposure” standard in *Madrid v. Lincoln County Med. Ctr.*, 923 P.2d 1154 (N.M. 1996) (the requirement of demonstrating actual exposure unfairly harms most plaintiffs because they often lack the information required to do so). Other jurisdictions have followed.

Later that same year, in a case substantially similar to the one before this Court, the New Jersey Superior Court followed this position. *Williamson v. Waldman*, 677 A.2d 1179 (N.J. Super. Ct. App. Div. 1996). In that case, the plaintiff was pricked with a surgical knife while attempting to remove debris from a trash can. Although the plaintiff tested negative for HIV five times over a three-and-one-half year period, she instituted a negligent inflicting of emotional distress claim alleging damages for fear of contracting AIDS as a result of the prick. The court reasoned that where conduct creates a presumption of exposure to HIV, the resulting claim for emotional distress should not be dismissed. The court stated:

It cannot validly be said, as a matter of law, in the light of common knowledge, that a person who receives a puncture wound from medical waste reacts unreasonably in suffering serious psychic injury from contemplating the possibility of developing AIDS, even if only for some period of time, until it is no longer reasonable, following a series of negative testes, to apprehend that result. Indeed, one need not have actually acquired the HIV virus to be so affected by such a fear for a period, especially since some time must pass before an accurate test can be administered. We know of no reason, given existing circumstances and the realities of the times, as well as the policies that underline tort law

doctrine in the state, to require as a prerequisite to recovery for infliction of emotional distress that the plaintiff first establish actual exposure to the feared disease. *Williamson*, 677 A.2d at 1181.

In order to protect the public and prevent the spread of AIDS, state and local regulations have been established regarding the disposal of medical debris. The mere fact that such regulations exist creates a strong presumption in favor of Petitioner. Hence, her claim for emotional distress should not be dismissed. Any reasonable person in her position would develop the same extreme fear of contracting AIDS for which she is now seeking recovery. Further, the requirement that Petitioner demonstrate actual exposure to the HIV virus is unjust and contrary to the policies that underline tort law doctrine.

The rule requiring proven contamination of the needle is rationalized by the notion that such a predicate will prevent the “floodgates of litigation” from opening or will prevent undue financial burden on the medical industry. But such logic is faulty because the rule suggested by Petitioner in this case will allow truly injured plaintiffs reasonable compensation for real injuries under the watchful eye of judge and jury applying the reasonableness test. The rule will instill a sense of duty in the medical profession to prevent accidental needle sticks thereby mitigating against the spread of this insidious disease.

A bright line rule such as that suggested by the court of Appeals fails to

anticipate the many variables that bear upon the issue of reasonableness. Is the needle clean or dirty? Is it used or unused? What is the method of injury and is it capable of AIDS transmission? Is the needle available or testing or even capable of being tested at all? Has the potential defendant destroyed or lost the evidence? Did the injury occur in a location that is more probable of contamination than not such as a hospital that treats AIDS patients? What is the sophistication of the potential plaintiff? Did the injured person undergo diagnostic testing for AIDS? Was it invasive?

These and many others constitute the factors that a jury would consider in determining whether the claim was reasonable or not. That is the jury's function. But to say that as a matter of law one cannot recover for the fear of aids without first contracting the disease or proving that the needle was contaminated ignores the very real fright that any one of us would experience upon being accidentally punctured by such a needle. No reasonable person would fail to be tested for the AIDS virus in such a case, and it is the mere fact that testing would be required and undergone that lends all objective requisite reasonableness to a claim for emotional distress.

This Court is now faced with the task of either vaxidating existing Florida law to resolve the issue, or creating an exception to *Humana* and the common law

by adopting the more restrictive extra-jurisdictional approach.

The trial court found that Petitioner sustained legally sufficient impact. The record indicates that she was consequently injured, *i.e.*, receiving a puncture wound and bleeding. Thus, she satisfied Florida's "impact rule" test. Florida law at present requires nothing further need be established for her to recover for her emotional damages.

There is no reason to create an exception to *Humana*, to the Common Law or to circumvent the jury's traditional role of determining whether a claim is reasonable. The law as it exists provides a workable and just resolution of these claims.

CONCLUSION

In the event of an accidental puncture by a used hypodermic needle, the question of reasonableness of the plaintiff's claim for fear of contracting aids is one to be resolved by the jury under all the facts and circumstances. It cannot be said as a matter of law that all such claims are unreasonable. Accordingly, the decision of the District Court of Appeals should be quashed, and the cause remanded to the trial court for entry of judgment denying defendants' motion for summary judgment.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that the foregoing document has been prepared using font size Times New Roman 14.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular United States Mail this _____ day of April, 2001 to Bonita Kneeland Brown, Esquire, Fowler, White, Gillen, Boggs, Villareal & Banker, P. A., Post Office Box 1438, Tampa, Florida 33601.

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