IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-287

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LINDA HAGAN, BARBARA PARKER and WILLIE PARKER,
*Petitioners*,

vs.

COCA-COLA BOTTLING COMPANY,
*Respondents.*

. . . . . .

. . . . . .

# *AMICUS CURIAE* BRIEF
# OF
# THE ACADEMY OF FLORIDA TRIAL LAWYERS

. . . . . .

ON A QUESTION CERTIFIED BY THE FIFTH DISTRICT COURT OF APPEAL
as One of Great Public Importance

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## STATEMENT REGARDING THE *AMICUS CURIAE* AND THIS BRIEF

The Academy of Florida Trial Lawyers participates in this proceeding as an *amicus curiae* with the written consent of all the parties. The Academy urges the Court to hold that direct plaintiffs who suffer a legal impact are not required to prove an additional physical injury in order to recover for emotional distress foreseeably flowing from the impact. Having coordinated its efforts with the petitioners, the Academy presents no statement of case and facts and has focused primarily on the concept of foreseeability and its recurring role in impact rule jurisprudence.

## SUMMARY OF ARGUMENT

The traditional impact rule required both physical impact and physical injury to enable recovery for emotional distress injuries caused by negligence. Conceived during the infancy of modern psychology, this formulation is an anachronism. Its time has come to go.

A legal "impact" under the rule is more than a mere contact or touching. It requires a degree of intimacy that foreseeably leads to the emotional distress for which damages are sought. Where an impact or its equivalent upon a direct plaintiff is legally adequate, *e.g.*, ingestion of revolting adulterated food, there should be no additional requirement of a *physical* injury. While "[t]here must be some level of harm which one should absorb without recompense as the price he pays for living in an organized society," the case before the Court—presenting consumption of a Coca-Cola spiked with a semen-oozing condom—seems safely beyond the pale. Assurances

of adequate gravity for other emotional distress claims can be can be achieved by summary judgment standards and jury instructions that require plaintiffs to show an objective basis for significant emotional distress.

The Court should modify the impact rule so that direct plaintiffs may recover if they suffer a physical impact (or its equivalent) foreseeably leading to significant emotional distress, regardless of physical injury.

## ARGUMENT

### 1. THE COURT SHOULD MODIFY THE IMPACT RULE FOR DIRECT VICTIMS OF NEGLIGENCE.

#### A. Introduction

"Generally stated, the impact rule requires that before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional stress suffered must flow from physical injuries the plaintiff sustained in an impact."[1] The purpose of the requirement is to address problems of proof, fraudulent claims, and excessive litigation that could otherwise arise from claims for pure emotional distress. It also "'gives practical recognition to the thought that not every injury which one person may by his negligence inflict upon another should be compensated in money damages,'" since "'[t]here must be some level of harm which one should absorb without recompense as the price he pays for living in an organized society.'"[2]

The rule was first announced in England in 1888.[3] It was quickly accepted in the United States, where Florida adopted it in 1893.[4] Almost every jurisdiction that adopted it (including England)[5] has now abandoned it, however. They have done so because issues of proof and fraudulent claims are not what they were a century ago,[6]

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1 *Tanner v. Hartog*, 696 So. 2d 705, 707 (1997) (citing *R.J. v. Humana of Florida, Inc.*, 652 So. 2d 360, 362 (Fla. 1995)).

2 *Champion v. Gray*, 478 So. 2d 17, 18 (Fla. 1985) (acknowledging implicit approval of, and quoting, dissent in *Stewart v. Gilliam*, 271 So. 2d 466, 477 (Fla. 4th DCA 1972) (Reed, J. dissenting), *quashed*, 291 So. 2d 593 (Fla. 1974)).

3 *Victorian Railways Commissioners v. Coultas*, 13 App.Cas. 222 (1888); *Stewart v. Gilliam*, 271 So. 2d 466 at 472.

4 *International Ocean Telegraph Co. v. Saunders*, 32 Fla. 434, 14 So. 148 (1893).

5 *Dulieu v. White & Sons*, 2 K.B. 669 (1901).

6 Sigmund Freud began private practice in Vienna two years prior to the creation of the impact rule. WORLD BOOK ENCYCLOPEDIA, Vol. 7 at 530 (2000 ed.).

and because the jurisdictions that went before them did not experience the opening of the proverbial litigation floodgates or Pandora's Jar[7] that defendants had assured would occur. As for the necessary recognition that not every wrong is a subject for redress in an organized society, the courts have been able to limit claims to serious distress by use of reasonable person, foreseeability and zone of danger formulations.

The Academy has located only six other states that use the traditional impact rule today: Arkansas, Georgia, Idaho, Kentucky, Oklahoma, and Oregon.[8] Courts and commentators have run their own tallies, listing Indiana, Kansas, Mississippi, Nevada, and North Carolina as impact rule states.[9] Those states are no longer properly listed.

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[7] T. Dworkin, Article: *Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?* *, 53 FORDHAM L. REV. 527, * (Dec. 1984) ("Common usage ascribes the container of the world's evils given by Zeus to Pandora to be a box. Apparently, however, Zeus gave them to her in a jar. When Pandora opened the jar, she unleashed the torments on humanity.") (citing *Plummer v. Abbott Laboratories,* 568 F. Supp. 920, 925 n.4 (D.R.I. 1983); R. Warner, ENCYCLOPEDIA OF WORLD MYTHOLOGY 29-31 (1975)).

[8] *M.B.M. Co. v. Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980); *Chambley v. Apple Restaurants, Inc.*, 504 S.E.2d 551, 552 (Ga. Ct. App. 1998); *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank*, 804 P.2d 900, 906 (Idaho 1991); *Deutsch v. Shein*, 597 S.W.2d 141 (Ky. 1980); *Van Hoy v. Oklahoma Coca-Cola Bottling Co.*, 205 Okla. 135, 235 P.2d 948 (1951); *Saechao v. Matsakoun*, 78 Or. App. 340, 717 P.2d 165 (1986). *But see* NOTE: *Out With the Old: Georgia Struggles With Its Dated Approach to the Tort of Negligent Infliction of Emotional Distress*, 34 GA. L. REV. 349 (1999) (discussing implicit changes in Georgia's impact rule—"the most conservative in the United States," *id.* at 351 n.19); *Deutsch v. Shein*, 597 S.W.2d 141, 146 (Ky. 1980) ("Contact, however slight, trifling, or trivial, will support a cause of action.").

[9] *See*, *e.g.*, *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 547 n.7 (1994) (identifying Georgia, Indiana, Kansas, Kentucky, and Oregon as adhering to impact rule); William Winter, A Tort in Transition: Negligent Infliction of Mental Distress, ABA J 62, 64 (Mar. 1984) ("At last count, only eight states still adhere to the impact rule: Arkansas, Florida, Georgia, Idaho, Indiana, Kentucky, Mississippi and North Carolina."); M. Donovan, Comment, *Is the Injury Requirement Obsolete in a Claim for Fear of Future Consequences?*, 41 U.C.L.A. L. REV. 1337, 1352 n. 56 (1994) (identifying Arkansas, Georgia, Indiana, Kentucky, Nevada, and Oregon as adhering to impact rule).

They have each abrogated or substantially modified their rules.[10] For example, Indiana permits recovery for emotional distress injuries regardless of physical injuries, provided that the plaintiff suffered a physical impact,[11] and North Carolina permits recovery for emotional distress damages "in ordinary negligence cases," provided there is "some actual physical impact *or* genuine physical injury."[12]

This Court has modified the rule for bystanders of negligence, but not yet modified the rule for direct victims of negligence. The time has come to do so.

### B. Two Categories of Impact Rule Cases

There are two principal categories of impact rule cases: direct victim and

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[10] *Shuamber v. Henderson*, 579 N.E. 2d 452, 456 (Ind. 1991); *Anderson v. Sheffler*, 752 P.2d 667, 669 (Kan. 1988) ("There may be no recovery in Kansas for emotional distress unless that distress *results in* 'physical impact': an actual physical injury to the plaintiff." (emphasis added)); *First National Bank v. Langley*, 314 So. 2d 324 (Miss. 1975) (abandoning rule and providing extensive historical analysis of rule's rise and abrogation in United States.); *Barmettler v. Reno Air, Inc.*, 956 P.2d 1382, 1387 (Nev. 1998) ("We . . . hold that, in cases where emotional distress damages . . . precipitate physical symptoms, *either* a physical impact must have occurred *or*, in the absence of physical impact, proof of 'serious emotional distress' causing physical injury or illness must be presented." (emphasis added)). *Wilson Ford v. NCNB*, 104 N.C. App. 172, 177-178, 408 S.E.2d 738, 741 (N.C. Ct. App 1991) (emphasis added).

[11] *Shuamber v. Henderson*, 579 N.E. 2d at 456 (plaintiff may recover damages for negligent infliction of emotional distress when he "sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person . . . *without regard to whether emotional trauma arises out of or accompanies any physical injury to the plaintiff*." (emphasis added).

[12] *Wilson Ford v. NCNB*, 104 N.C. App. at 177-178, 408 S.E.2d at 741 (emphasis added). North Carolina also treats a wide range of cases as "extraordinary" in which it does not require either impact or injury—provided that "the emotional and mental stress suffered was an obvious and natural consequence of the particular negligence involved." (*Id.*). Thus, a person whose deposit on behalf of his employer had been lost by a bank was permitted to recover emotional distress damages: "The same rule applies in this extraordinary case where defendant bank's negligence in handling money duly and properly delivered to it naturally, if not inevitably, caused plaintiff to be suspected of dishonesty and suffer mental and emotional distress, though no physical contact either occurred or was threatened." 104 N.C. App. at 148, 408 S.E.2d at 742.

bystander. In a direct victim case the plaintiff is the primary recipient of the defendant's negligence. In a bystander case, the plaintiff suffers no physical contact but seeks to recover for the emotional trauma of exposure to another's injury—or the plaintiff's near injury—due to another's negligence.

In the landmark decision of *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985), the Court established a reasonable foreseeability test as a substitute for the physical impact requirement in bystander cases, where physical injury exists and foreseeably results from emotional trauma.[13] It should now apply a variation of that test as a substitute for the physical injury requirement in direct victim cases, where physical impact exists and foreseeably leads to emotional trauma.

The *Champion* version of the reasonable foreseeability test—limiting bystander recovery to cases involving physical injury—was largely driven by the Court's concern that it was dealing with "an unusual and nontraditional," *bystander* cause of action for negligence:

> Foreseeability is the guidepost of any tort claim. Because we are dealing with an unusual and nontraditional cause of action in allowing damages caused by psychic injury following an injury *to another*, however, public policy comes into play and some outward limitations need to be placed on the pure foreseeability rule. *We have already referred to the requirement of a significant discernible physical injury.* In addition the psychically injured party should be directly involved in the event causing the original injury.

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[13] "We hold that a claim exists for damages flowing from a significant discernible physical injury when such injury is caused by psychic trauma resulting from negligent injury imposed on another who, because of his relationship to the injured party and his involvement in the event causing that injury, is foreseeably injured." *Champion v. Gray*, 478 So. 2d at 20 (footnote omitted).

(*Id.* at 20, emphasis added). The Court recognized that any limitation was "somewhat arbitrary," but also determined that the limitations imposed were "necessary to curb the potential of fraudulent claims, and to place some boundaries on the indefinable and unmeasurable psychic claims." (*Id.*).

Given the universe of potential bystander plaintiffs, the justification for restricting bystander claims to only those in which a "significant discernible physical injury" exists is considerable:

> If recovery is to be permitted, however, it is also clear that there must be some limitation. It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one person were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as all his friends. And probably the danger of fictitious claims, and the necessity of some guarantee of genuineness, are even greater than before. It is no doubt such considerations that have made the law extremely cautious in extending its protection to the bystander.

W. Prosser and W. Keeton, THE LAW OF TORTS § 55 at 366 (5th Ed. 1984). These concerns do not exist in direct action cases involving physical impact. Hence, the Court's note in *Champion* "that a claim for psychic trauma unaccompanied by discernible bodily injury, *when caused by injuries to another* and not otherwise specifically provided for by statute, remains nonexistent." (478 So. 2d at 20 n.4, emphasis added).

In *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992), the Court recognized a new cause

of action based upon a negligent infliction of emotional distress—wrongful birth—where there was no impact and there was no physical injury to the plaintiffs, who were parents of a severely deformed child. The Court drew upon the principle that independent torts like defamation and invasion of privacy did not require impact or physical injury.[14] (*Id.* at 422 (citing RESTATEMENT (SECOND) OF TORTS §§ 569, 570, 652H cmt. b (1977)). It also stated, however, that the "essence of the impact rule remains intact because here the tort [of wrongful birth] was committed directly against the mother and the father." (*Id.* at 423 n.6). The essence of the rule also remains intact whenever negligent physical impact upon a direct victim foreseeably leads to significant emotional trauma.

In *Tanner v. Hartog*, 696 So. 2d 705, 706 (1997), the Court followed *Kush*'s reasoning to allow a new cause of action for the emotional injury to expectant parents resulting from a stillbirth caused by negligence, despite the fact that neither impact nor physical injury was alleged. The Court acknowledged that there were "legitimate legal argument[s] which [could] be directed against any particular theory upon which a recovery . . . might be predicated and that the law does not provide a remedy for every wrong." Nonetheless, it found it "*difficult to justify the outright denial of a claim for the mental pain and anguish which is so likely to be experienced* by parents as a result of the birth of a stillborn child caused by the negligence of another." (*Id.*

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[14] It reasoned that wrongful births were an inherently reliable source of emotional injury: "There can be little doubt that emotional injury is more likely to occur when negligent medical advice leads parents to give birth to a severely impaired child than if someone wrongfully calls them liars, accuses them of unchastity, or subjects them to any other similar defamation." (616 So. 2d at 422-23).

at 708, emphasis added). It is similarly difficult to justify outright denial of a claim for the mental pain and anguish which is so likely to be experienced by a consumer who ingests a beverage adulterated with an inherently loathsome object, like a semen-oozing condom or a rat.

Of course, the mere presence of revolting items in food should not furnish a basis for recovery. Ingestion must be required to ensure that emotional trauma is a reasonably foreseeably consequence of the item's presence. In *Doyle v. Pillsbury Company*, 476 So. 2d 1271 (Fla. 1985), the plaintiff opened a jar of peas, noticed a bug inside, and fell over a chair—experiencing physical injuries but no physical impact with the product. Asked to abrogate the impact rule, the Court refused because the plaintiff had not ingested the peas, and because adulterated food cases fall within a warranty of fitness analysis and outside the rule's technical ambit. (*Id.* at 1271-72). "Even with these liberalized rules to promote recovery for physical and psychic injury, the foreign object cases all involve some ingestion of a portion of the food or drink product. . . . *To this extent*, Florida courts have required an 'impact.'" (*Id.* at 1272, emphasis added).

The Court explained that the ingestion requirement in adulterated food cases "is grounded upon foreseeability rather than the impact rule," but that the "impact rule itself is a convenient means of determining foreseeability." By limiting adulterated food cases to those in which a plaintiff's emotional distress is reasonably foreseeable, *i.e.*, those involving actual ingestion, the Court balanced the interests between injured consumers and negligent manufacturers:

> The public has become accustomed to believing in and relying on the fact that packaged foods are fit for consumption. *A producer or retailer of food should foresee that a person may well become physically **or** mentally ill after consuming part of a food product and then discovering a deleterious foreign object,* such as an insect or rodent, in presumably wholesome food or drink. The manufacturer or retailer must expect to bear the costs of the resulting injuries.

(*Id.*, emphasis added). The Court denied recovery to the plaintiff because the "same foreseeability is lacking where a person simply observes the foreign object and suffers injury after the observation. The mere observance of unwholesome food cannot be equated to consuming a portion of the same. We should not impose virtually unlimited liability in such cases."

### C. The District Court's Opinion

The district court in this case denied recovery, despite plaintiffs'[15] ingestion of a Coca-Cola laced with a semen-oozing condom.[16] *Coca-Cola Bottling Co. v. Hagan*, 750 So. 2d 83 (Fla. 5th DCA 1999). The court relied heavily upon language in *R.J. v. Humana*, 652 So. 2d 360, 362 (Fla. 1995), that "'before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional

[15] The term "plaintiffs" in the argument of this brief refers to Linda Hagan and Barbara Parker, the two women who actually consumed the Coca-Cola. The claim of the third plaintiff, Willie Parker, is for loss of consortium, and derivative to the issues before the Court.

[16] The defendant's argument that the item in the Coca-Cola really wasn't a condom oozing semen after all, but *a similarly sized piece of mold*, does not effect the Academy's impact rule analysis. A piece of mold, even when mixed with Coke, is foreseeably revolting to the reasonable consumer.

distress suffered must flow from physical injuries the plaintiff sustained in an impact'" and upon the holding in *Ruttger Hotel Corp. v. Wagner*, 691 So. 2d 1177 (Fla. 3d DCA 1997), which the district court asserted required physical injury in addition to physical impact. 750 So. 2d at 86. The court misread both decisions.

In *R.J. v. Humana*, the plaintiff sought damages for negligent misdiagnosis of AIDS. The Court barred recovery on public policy grounds,[17] and upon its impact rule finding that "touching of a patient by a doctor and the taking of blood for ordinary testing would not qualify for a physical impact."[18] 652 So. 2d at 364. The Court held, however, that "other more invasive medical treatment or the prescribing of drugs with toxic or adverse side effects would so qualify." In his concurrence, Justice Kogan observed that the Court had "tacitly equate[d] impact and injury."[19] (*Id.* at 366 (Kogan, J. concurring)).

In *Ruttger Hotel*, two hotel customers were touched by a robber and sought emotional distress damages from the hotel, based upon negligence. The Third District held that the impact rule barred the customers from recovery because—though they had been touched—they had not suffered a legal "impact." 691 So. 2d at 1178. "No recovery can exist under the impact rule, because the appellees failed to show the requisite physical impact that resulted in the physical *or* psychological injury" (*Id.*,

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[17] "Without question, allowing compensation for emotional distress in the absence of a physical injury *under the circumstances of this case* would have a substantial impact on many aspects of medical care, including the cost of providing that care to the public." 652 So. 2d at 364 (emphasis added).

[18] The purported impact—a blood extraction—was not the basis for the plaintiff's emotional distress. The distress arose because of a subsequent misdiagnosis.

[19] He also noted that the Court had not resolved the meaning of the term "injury" for purposes of the impact rule. 652 So. 2d at 365 n.3.

emphasis added). *See Zell v. Meek*, 665 So. 2d 1048, 1050 ("In numerous cases, however, the courts have found that the impact rule was not satisfied because, although there may have been some 'touching,' it did not rise to the level of impact.").

### D. Modifying the Rule Without Opening the Floodgates

The purpose of the impact rule is to ferret out specious and silly claims that could potentially overrun the court system. Where a consumer is a direct victim of negligence and suffers a legal impact that is inherently loathsome such that emotional distress is reasonably foreseeable, physical injuries should not be required as proxy for proof, or a filter on the floodgates. It makes little sense to impose a requirement of physical injury simply to prove that emotional suffering is real, or to bar victims whose suffering is real from the courthouse based upon arguments that access will open Pandora's Jar.[20]

Language in *Champion*, *Kush*, and *Ruttger Hotel* suggests that modern Florida courts may not have viewed physical injury as a prerequisite for recovery of emotional distress damages where the plaintiff has suffered a physical impact that foreseeably

[20] *See Camper v. Minor*, 915 S.W.2d 437, 441 (Tenn. 1996) ("There are at least two reasons that the fear of a flood of litigation should not be used to completely bar a claim for negligent infliction of emotional distress: (1) courts are charged with the duty of providing a remedy to those who are injured; (2) states which have rules other than the physical impact rule have apparently not suffered any such flood of litigation."); *see also Schultz v. Barberton Glass Co.*, 447 N.E.2d 109, 111-12 (Ohio 1983) ("The opportunity for fraud is just as likely [in a case of physical injuries] as one absent any injury.")

led to emotional trauma.

[21] The Academy requests that the Court expressly modify the impact rule for direct victims of negligence in favor of a reasonable foreseeability standard that permits recovery for significant emotional trauma where that trauma is a foreseeable consequence of a physical impact or its equivalent.

## II. THE PLAINTIFFS PRESENTED EVIDENCE OF DAMAGE, *INCLUDING* AN ARTICULATED FEAR OF AIDS

In this case,

> Both women testified [that the item inside the Coca-Cola they drank] looked like a used condom, with oozy stringy stuff coming out of the top. Hagan testified she became nauseated. *Both testified they became frightened for their health.*
> They telephoned the Health Department, but had received no response by the time the center closed. The following morning (a Saturday) they went to the emergency room of the local hospital, gave their statements of what happened (*i.e.,* that there was an oozing condom in a Coke which they had ingested) to a police officer, the nurses and doctors, *and were given shots*.

*Coca-Cola Bottling Co. v. Hagan*, 750 So. 2d at 84 (emphasis added).

> [B]oth Hagan and Parker suffered emotional upset from drinking the Coke. *Part* of their distress was caused by their perception that the nurses and doctors at the emergency room, and other persons who heard of the incident, thought it was funny, and they felt embarrassed and humiliated. Parker was concerned that information about the incident could damage her day care business.
> * * *
> The plaintiffs' *greatest* upset was their fear and concern that they could, in the indefinite future or at least for the

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[21] *But see Food Fair Stores of Florida v. Macurda*, 93 So. 2d 860 (Fla. 1957) (indicating that emotional distress damages were permissible since they flowed from physical injuries that were the result of ingestion of adulterated food).

> next several years, contract AIDS, an admittedly terrible and terminal disease.
> * * *
> Willie Parker observed his wife's and Hagan's emotional upset.

(*Id.* at 86). The district court concluded that the plaintiffs' claims for damages were barred because their "greatest upset was their fear of AIDS," and that existing caselaw in the United States would not permit recovery for fear of AIDS unless there was an actual exposure to the AIDS virus.

Without re-addressing the fear of AIDS cases addressed by the district court and the parties, the Academy believes that the district court erred by weighing and discounting the other factors giving rise to the plaintiffs' emotional anguish. In *Way v. Tampa Coca-Cola Bottling Co*., 260 So. 2d 288 (Fla. 2d DCA 1972), the primary component of damage was emotional distress arising out of the consumption of food that contained a loathsome item—the contents of a Coca-Cola that contained a rat whose hair had been sucked off. (*Id.* at 290). The court permitted recovery based upon the plaintiff's emotional distress. The district court in this case sought to distinguish *Way* because the *Way* plaintiff sought damages based upon the mere loathsomeness of ingestion, while the plaintiffs here sought damages for an *articulated* fear of AIDS.

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[22] The district court also distinguished *Way* on the basis that the plaintiff in *Way* got nauseas and vomited after ingesting a Coke that contained a rat, while Ms. Hagan got nauseas and *didn't* vomit, and Mrs. Parker did not get nauseas at all. The impact rule rests upon the assumption that jurors cannot adequately discern fraud surrounding emotional distress claims, and the goal of limiting the quantity of litigation. The nausea-vomiting requirement serves neither concern. Threshold requirements of nausea and vomiting do nothing to screen fraudulent claims *as a matter*

The term "loathsome" may connote ineffable qualities, but ineffability should not furnish a stronger basis for recovery than articulation. Certainly, the *Way* plaintiff was repulsed by what he found in his soda, but that repulsion just as certainly derived from the well-known fact that rats carry pestilence and other diseases. The fact that maladies carried by rats are not part of an intensive media awareness campaign may explain why the *Way* plaintiff simply described the soda's contents as loathsome, rather than specifically listing the reasons why.

Here, the plaintiffs' emotional trauma was not limited to a fear of AIDS. They were adequately frightened for their general health that they received shots at the health department—suggesting that AIDS was not the only disease they had to fear. They were predictably embarrassed and humiliated by the ridicule they received, and, given the small town in which they worked, they feared for their jobs.

The damages awarded by the trial court following remittitur were not large. The fact that plaintiffs' suffering was *greatest* over a fear of AIDS should not bar their recovery.

## CONCLUSION

The Court should quash the district court's opinion, and reinstate the judgment.

Respectfully submitted,

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*of law*; the conditions can be easily faked or forced adequately to survive summary judgment or a motion for a directed verdict.

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