IN THE SUPREME COURT OF FLORIDA
Case No. SC00-287

LINDA HAGAN, BARBARA PARKER)
and WILLIE PARKER,)
)
Petitioners,)
vs.)
)
FLORIDA COCA-COLA BOTTLING)
COMPANY, ST. AUGUSTINE COCA-)
COLA BOTTLING COMPANY, and)
COCA-COLA ENTERPRISES, INC.,)
)
Respondents.)
______________________________)

ON CERTIFICATION OF A QUESTION OF
GREAT PUBLIC IMPORTANCE BY THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT

AMICUS FLORIDA DEFENSE LAWYERS' ASSOCIATION'S BRIEF IN SUPPORT OF RESPONDENTS' POSITION

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STATEMENT OF THE CASE AND FACTS

Amicus, Florida Defense Lawyers' Association, adopts the Statement of the Case and Facts provided by Respondents.

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SUMMARY OF ARGUMENT

This Court has recently and repeatedly reaffirmed both the impact and physical injury requirements of the impact rule. There is no reason to revisit those issues again in this case, nor to depart from this Court’s recent authority validating the physical injury requirement.

Furthermore, a limitation on the physical injury requirement would not resolve the specific issues in this case. The clear majority view requires both actual exposure to the virus and a medically accepted means of transmission before a fear of AIDS claim can proceed. Florida has applied a similar rule in other fear of disease cases, and should continue to follow the actual exposure approach here.

Under this majority actual exposure theory, the requirement of a physical injury under the impact rule does not affect the viability of the claim as long as the specific requirements of a actual exposure and a means of transmission are established. This Court should certainly not abrogate the impact rule in a case which does not even directly raise the issue.

The actual exposure theory has strong public policy grounds. It provides certainty and predictability in tort liability and insurance risk. It reduces speculative and subjective claims, and eliminates the risk that liability could be based on a medically irrational fear of the disease. Contrary to Plaintiffs’ argument, there is nothing wrong with a rule that potentially eliminates claims for some people’s genuine but medically unfounded fear. The

actual exposure rule places a reasonable and legally sound filter on these claims which allows only fear of AIDS claims with medical viability to proceed.

ARGUMENT

I. THE IMPACT RULE SHOULD NOT BE ABOLISHED OR LIMITED.

The impact rule states that "before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional distress suffered must flow from physical injuries the plaintiff sustained in an impact." R.J. v. Humana of Florida, Inc., 652 So. 2d 360, 362 (Fla. 1995), quoting Reynolds v. State Farm Mut. Auto. Ins. Co., 611 So. 2d 1294, 1296 (Fla. 4th DCA 1992).

Plaintiffs acknowledge that the impact rule has two required components - impact and physical injury - but dismiss the impact requirement, asserting that it was necessarily met in this case by the consumption of the beverage. As Respondent's brief explains in detail, this argument may allow a claim for distress from consuming a flat beverage, but the claim for fear of AIDS requires more.

As for the separate physical injury requirement, Plaintiffs concede that there was no direct physical injury in this case. Instead, they ask this Court to abandon the physical injury requirement. However, this Court has recently affirmed both the impact rule and its physical injury requirement. See Gonzalez v. Metropolitan Dade County Public Health Trust, 651 So.2d 673, 676 (Fla. 1995); R.J. v. Humana of Florida, 652 So.2d 360, 362 (Fla. 1995). There has been no argument raised here which would overcome this Court's recent pronouncements on this issue. This Court should adhere to its recently reaffirmed precedent, and enforce the physical injury requirement.

In fact, even when this Court has relaxed the impact requirement, the physical injury requirement has remained. Even in "bystander" cases, which Plaintiffs and the Academy argue are incongruously given a more liberal recovery standard than direct cases, this Court has always required a discernable physical injury. See Zell v. Meek, 665 So. 2d 1048, 1054 (Fla. 1995); Champion v. Gray, 478 So. 2d 17 (Fla. 1985); Brown v. Cadillac Motor Car Division, 468 So. 2d 903, 904 (Fla. 1985). Plaintiffs cannot meet even the allegedly more liberal standard granted to bystanders.

The physical injury requirement is the rule's most critical component. It is undisputedly absent from this case. This Court has already recognized the inevitably massive amount of litigation which could ensue if the physical injury requirement were lifted.

While Plaintiffs argue that the majority of courts have abolished the impact rule, they also correctly admit that the part of the rule which has been eliminated in those jurisdictions is the impact requirement. *See Petitioner's Brief at p. 23-25.* Most such courts still require a discernable physical injury. *See numerous cases cited in Respondent's Brief at Point I.B.* In fact, many of the states cited by Plaintiffs as allowing a no-impact cause of action have specifically rejected fear of AIDS claims. See Heiner v. Moretuzzo, 652 N.E.2d 664 (Ohio 1995). Thus, even if this Court adopts what Plaintiffs urge is the "majority" view, the physical injury requirement still stands and cannot be met in this case.

A handful of courts did altogether abandon the requirement of physical harm and recognize an independent cause of action for negligent infliction of emotional distress. See Molien v. Kaiser Found. Hosps., 616 P.2d 813, 814 (Cal. 1980); Rodriques v. State, 472 P.2d 509, 520 (Haw. 1970); Bass v. Nooney, 646 S.W.2d 765, 772 (Mo. 1983); St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 650 (Tex. 1987) (all cited by Plaintiffs). However, Plaintiffs overlook the fact that these courts did recognize the need for some limiting device. See Rodriques, 472 P.2d at 520 (requiring objective proof of serious mental distress, and stating "serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress . . . .").

Furthermore, these same courts subsequently retreated from this liberal position, limiting negligent infliction of emotional distress as an independent cause of action and narrowing the circumstances under which the absence of physical harm would still permit recovery. See Julie A. Davies, *"Direct Actions for Emotional Harm: Is Compromise Possible?"*, 67 Wash. L. Rev. 1, 13 (1992). Many have required proof that the defendant breached a preexisting and independent legal duty to protect the plaintiff from emotional harm. See Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc., 770 P.2d 278, 281-82 (Cal. 1989) (limiting Molien v. Kaiser Found. Hosps., 616 P.2d 813 (Cal. 1980)) (allowing the claim where an independent duty arose out of a physician-patient relationship); Flores v. Baca, 117 N.M. 306, 311, 871 P.2d 962, 966 (1994) (breach

of a funeral contract creates independent duty). There is no such allegation or proof in this case.

Thus, the few courts which initially eliminated the physical injury requirement have come to regret it and have reinstated limitations on emotional distress claims. This Court should not make the same mistake.

Even where this Court has carved exceptions to the impact part of the rule, Florida has consistently reaffirmed the physical injury requirement. Of the courts which have eliminated the impact rule, most still require a physical injury. Thus, contrary to Plaintiff's argument, the "majority rule" does not help their claim here. At a minimum, the physical injury requirement should be retained.

II. FLORIDA LAW SHOULD CONTINUE TO LIMIT RECOVERY FOR FEAR OF AIDS TO CASES IN WHICH BOTH AN ACTUAL EXPOSURE TO THE VIRUS AND A MEDICALLY ACCEPTED CHANNEL OF TRANSMISSION HAVE BEEN DEMONSTRATED.

A. FLORIDA SHOULD FOLLOW THE MAJORITY "ACTUAL EXPOSURE" RULE.

Significantly, even if this Court decided to remove or reduce the physical injury requirement, such a change would be irrelevant to the case at hand. Under the fear of AIDS standard which the majority of jurisdictions use, a claim will inevitably satisfy both elements of the impact rule anyway.

It is important to note that the defense argument in this case is not that a fear of AIDS claim can never exist. A majority of jurisdictions have allowed claims for fear of contracting AIDS. This majority has simply required that the plaintiff must "prove

actual exposure to HIV as a result of a defendant's negligence." Steven S. Wasserman & G. Keith Phoenix, *"Fear May Not Be Enough in HIV-Exposure Claims, Med. Malpractice L. & Strategy*," (May 1998) at 4; Debra Baker, "*Positively Truthful: Appeal Asks Whether Doctors Have Duty to Disclose HIV Status to Patients*," A.B.A. J (Aug. 1998) at 38.

Generally, actual exposure is said to include two factors; "(f)irst, there must be an exposure to tissue, blood, or body fluid infected with HIV, and second, the exposure to the infected tissue, blood, or body fluid must be by way of a channel of . . . transmission deemed medically or scientifically sufficient to cause an HIV infection." Hartwig v. Oregon Trail Eye Clinic, 580 N.W.2d 86, 91 (Neb. 1998). See also Pendergist v. Pendergrass, 961 S.W.2d 919, 926 (Mo. App. 1998).

Courts have either analyzed the actual exposure requirement as a required element of a fear of contracting AIDS claim, or by holding that the absence of actual exposure demonstrated that the fear of contracting AIDS was per se unreasonable. Pendergist, 961 S.W.2d at 924; Brown v. New York City Health and Hosp. Corp., 648 N.Y.S. 2d 880 (N.Y. App. 1996); Russaw v. Martin, 472 S.E.2d 508, 512 (Ga. App. 1996). Under either analysis, the claim fails as a matter of law if there is no proof of infection in the source, or no proof that the contact provided a medically accepted channel of transmission.

As the court explained in Pendergist v. Pendergrass, 961 S.W.2d 919, 926 (Mo. App. 1998):

> Absent proof of actual exposure to the HIV virus as a result of a defendant's negligent conduct, that is, proof of both a scientifically accepted method, or channel, of transmission and the presence of the HIV virus, the fear of contracting AIDS is unreasonable as a matter of law and, therefore, not a legally compensable injury. . .

Plaintiffs do not dispute that the actual exposure rule is the majority view, so a thorough list of jurisdictions applying the actual exposure rule is probably unnecessary. Although not a complete list, the following cases provide examples of application of the majority view, requiring the plaintiff to show actual exposure to HIV. See Brzoska v. Olson, 668 A.2d 1355, 1363 (Del. 1995) ("without actual exposure to HIV, the risk of its transmission is so minute that any fear of contracting AIDS is per se unreasonable"); Russaw v. Martin, 472 S.E.2d 508, 512 (Ga. App. 1996); Russaw v. Martin, 472 S.E. 2d 508 (Ga. App. 1998) (needle stick case; refusing to allow recovery "based on imagined possibilities" without proof of actual exposure); Neal v. Neal, 873 P.2d 871, 876 (Idaho 1994) (wife claiming fear of AIDS from husband's affair must show that she was actually exposed to the disease); Reynolds v. Highland Manor, Inc., 954 P.2d 11, 15-16 (Kan. App. 1998) (plaintiff accidentally picked up a used condom left in her hotel room; required to show actual exposure); Falcon v. Our Lady of the Lake Hospital, 729 So.2d 1169 (La. App. 1999); Marriott v. Sedco Forex Int'l Resources, Ltd., 827 F. Supp. 59, 74-75 (D. Mass. 1993) (plaintiff who was inoculated with a vaccine testing positive for HIV must show direct exposure as well as a direct channel of exposure); K.A.C. v. Benson, 527 N.W.2d 553, 559

(Minn. 1995) ("plaintiff who fails to allege actual exposure to HIV is not, as a matter of law, in personal physical danger of contracting HIV"); Pendergist v. Pendergrass, 961 S.W.2d 919, 925-926 (Mo. App. 1998); De Milio v. Schrager, 666 A.2d 627, 629 (N.J.App. 1995) (plaintiff may only recover emotional distress damages in a fear of AIDS case if he proves both actual exposure and a scientifically accepted channel of transmission; however, "where there exists proof that a defendant's wrongful conduct was either intentional or recklessly indifferent, a rebuttable presumption of exposure will arise, enabling plaintiff to survive a motion for summary judgment"); Ordway v. County of Suffolk, 583 N.Y.S.2d 1014, 1016-17 (N.Y.App.1992) (requiring actual exposure and holding that a doctor who operated on an HIV positive patient did not reach that level of proof absent a precipitating incident such as a broken glove, pierced skin, or a patient bite); Hare v. State, 539 N.Y.S.2d 1018, 1021-22 (N.Y.App.1989) (holding that the plaintiff's claim was too speculative where the plaintiff was bitten by an unrestrained prisoner, and whether the inmate was HIV positive "was a rumor at best"); Montalbano v. Tri-Mac Enterprises of Port Jefferson, Inc., 652 N.Y.S. 2d 780 (N.Y. App. 1997) (ingesting french fries covered in blood; plaintiff could not recover, absent proof of "actual exposure" to HIV); Burk v. Sage Products, Inc., 747 F. Supp. 285, 288 (E.D. Pa. 1990) (absent proof that the plaintiff was in fact exposed to HIV, the plaintiff cannot recover damages for his fear of contracting AIDS); Lubowitz v. Albert Einstein Med. Center, N. Division, 623 A.2d 3, 5 (Pa. App.

1993); Bain v. Wells, 936 S.W.2d 618, 620 (Tenn. 1997); Carroll v. Sisters of St. Francis Health Servs., Inc., 868 S.W.2d 585, 591 (Tenn. 1993); Drury v. Baptist Memorial Hospital System, 933 S.W.2d 668 (Tex.App. 1996); Sanders v. State, No. 14433-0-III, 1997 WL 43664, at *1 (Wash. App. 1997); Johnson v. West Virginia Univ. Hosp., Inc., 413 S.E.2d 889, 892-94 (W.Va. 1991) (holding that a security officer who was bitten by an AIDS patient was actually exposed to the disease and therefore the plaintiff could recover emotional distress damages based on his fear of contracting the disease); Babich v. Waukesha Mem'l Hosp., Inc., 556 N.W.2d 144, 147 (Wis. App. 1996) (requiring a plaintiff in a needle stick case to prove that the needle came from a contaminated source).

Florida should follow the majority view. In this case, Plaintiffs would not be able to recover under the majority "actual exposure" standard, because, even assuming that the substance was a condom, Plaintiffs have not proven that it was contaminated with HIV. Furthermore, Plaintiffs have not proven a medically accepted channel of transmission. The Fifth District correctly analyzed and applied the actual exposure rule.

B. THE "ACTUAL EXPOSURE" STANDARD HAS BEEN USED IN FEAR OF DISEASE CASES IN FLORIDA AND IN A MAJORITY OF STATES FOR A NUMBER OF YEARS.

Although AIDS and AIDS claims are relatively new, the actual exposure standard has longstanding support in the well-established historical body of law based on claims for fear of future disease. See Edward M. Slaughter, "*AIDS Phobia: The Infliction of Emotional Distress and the Fear of AIDS*," 16 U. Haw. L. Rev. 143, 154 (1995);

Brian R. Garves, *"Fear of AIDS,"* 3 J. Pharmacy & L. 29, 30 (1994)(noting that the similarity between AIDS and cancer has resulted in courts analyzing such cases with similar standards); John Patrick Darby, *"Tort Liability for the Transmission of the AIDS Virus: Damages for Fear of AIDS and Prospective AIDS,"* 45 Wash. & Lee L. Rev. 185, 188 (1988) ("Because of similarities between HIV and carcinogens, courts analyzing liability for transmitting HIV should examine a defendant's liability under established law for exposing a plaintiff to a carcinogen."). See also Neal v. Neal, 873 P.2d 881, 887 (Idaho App. 1993) ("The similarities between terminal cancer and AIDS - their latent manifestation and their deadly, incurable nature - have led courts and commentators to analyze actions for fear of contracting AIDS under the same standards as actions for fear of developing cancer.").[1/]

Courts have long held that one who negligently exposes another to an infectious or contagious disease, which another contracts, is liable in damages, provided the feared disease actually develops. See Terry Morehead Dworkin, *"Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?,"* 53 Fordham L. Rev. 527, 542 & n.121 (1984). In most of the early cases, the nature of the disease meant that the fear was necessarily short-

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[1/] For an overview of American tort law regarding emotional distress as an element of recovery in future disease, see generally David Carl Minneman, Annotation, Future Disease or Condition, or Anxiety Relating Thereto, as Element of Recovery, 50 A.L.R. 4th 13 (1986).

lived, and proof that the Plaintiff actually contracted the disease was easily used as the benchmark. See Duke v. Housen, 589 P.2d 334, 340 (Wyo. 1979) (and cases cited therein); 39 Am. Jur. 2d Health § 48 (1968). See also Jones v. United R.Rs., 202 P. 919, 922-23 (Cal. Ct. App. 1921) (fear of future disability); Figlar v. Gordon, 53 A.2d 645, 648 (Conn. 1947) (fear of developing epilepsy); Watson v. Augusta Brewing Co., 52 S.E. 152, 153 (Ga. 1905) (fear of dying from glass in the stomach); Butts v. National Exch. Bank, 72 S.W. 1083, 1084 (Mo. Ct. App. 1903) (fear of blood poisoning); Walker v. Boston & Maine R.R., 51 A. 918, 919 (N.H. 1902) (fear of going insane); Alley v. Charlotte Pipe & Foundry Co., 74 S.E. 885, 886 (N.C. 1912) (fear of developing cancer from severe burns); Ward Baking Co. v. Trizzino, 161 N.E. 557 (Ohio Ct. App. 1928) (fear from swallowing needles); Southern Kan. Ry. v. McSwain, 118 S.W. 874, 875 (Tex. Civ. App. 1909) (fear of blood poisoning); Elliott v. Arrowsmith, 272 P. 32, 32-33 (Wash. 1928) (fear of having a miscarriage).

Later, actions for latent conditions such as "fear of cancer" became more commonplace. While modern courts have varied in whether symptomology of the feared disease is required, courts have uniformly held that there must be objective evidence of actual exposure to the disease-causing agent. See, e.g., Harper v. Illinois Cent. Gulf R.R., 808 F.2d 1139, 1140 (5th Cir. 1987) (no recovery for emotional distress absent evidence of exposure to disease-causing agent); Plummer v. United States, 580 F.2d 72 (3rd Cir. 1978) (infectious bacteria entering the body); Mink v. Univ.

of Chicago, 460 F. Supp. 713 (N.D. 111, 1978) (ingestion of DES); In re Hawaii Fed. Asbestos Cases, 734 F. Supp. 1563, 1567-70 (D. Haw. 1990) (noting that exposure provides objective evidence of connection between physical harm and emotional distress); Laxton v. Orkin Exterminating Co., 639 S.W.2d 431 (Tenn. 1982) (ingestion of contaminated drinking water); Gideon v. Johns-Mansville Sales Corp., 761 F.2d 1129 (5th Cir, 1985) (inhalation of asbestos fibers). But see Potter v. Firestone Tire and Rubber Co., 863 P.2d 795 (Cal. 1993) (holding that a toxic ingestion or exposure, without more, does not provide an actionable claim for fear of developing a future illness). See generally Scott D. Marrs, "*Mind Over Body: Trends Regarding the Physical Injury Requirement in Negligent Infliction of Emotional Distress and 'Fear of Disease'* Cases," 28 Tort & Ins. L.J. 1 (1992).

Florida has likewise applied this majority rule in other fear of disease cases. See Swain v. Kury, 595 So.2d 168, 172 (Fla. 1st DCA 1992) (emotional distress damages for fear of cancer allowed where Plaintiff actually contracted the disease); Eagle-Picher Indus., Inc. v. Cox, 481 So. 2d 517, 529 (Fla. 3d DCA 1985) (actual exposure to asbestos required to state a claim for fear of cancer from asbestosis).

As one of these Florida courts explained, without the filter of the actual exposure standard, the "task of discerning fraudulent 'fear of' [disease] claims from meritorious ones would be 'prodigious.'" Eagle-Picher Indus., Inc. v. Cox, 481 So. 2d 517,

529 (Fla. 3d DCA 1985) (quoting Ayers v. Jackson, 461 A.2d 184, 189 (N.J. Super. Ct. Law Div. 1983)).

Like courts around the country, Florida should apply the same analysis to fear of AIDS cases as to other fear of disease cases: the actual exposure standard.

C. THE ACTUAL EXPOSURE THEORY MAKES GOOD PUBLIC POLICY SENSE.

There is no question that AIDS has become one of America's most severe medical crises. As of December 31, 1999, the CDC reported that over 400,000 people in the United States were living with HIV or AIDS. 47,218 of these people resided in Florida, and Florida ranked third among US States and Territories in the number of AIDS cases reported to the CDC. Centers for Disease Control and Prevention (CDC), Division of HIV and AIDS Prevention, HIV/AIDS Surveillance Report, December 1999.

The incidence of HIV and AIDS is an important public policy concern for this state. Controlling irrational fear and preventing public misunderstanding about the disease is an important part of that public policy. In this case, the Plaintiffs had an irrational and medically unfounded fear of contracting HIV from a Coke bottle that had been bottled four months earlier. To cloak that medically unfounded fear with legal validation would risk excessive litigation, and sacrifice genuineness of claims. See Pendergist, 961 S.W.2d at 926; K.A.C. v. Benson, 527 N.W. 2d 553, 559 (Minn. 1995); Brown v. New York City Health & Hosp. Corp., 648 N.Y.S. 2d 880 (N.Y. App. 1996).

Perhaps more importantly, allowing the claim without actual exposure and a medically recognized channel of transmission "unnecessarily contributes to the gratuitous phobia that continues to surround AIDS, and promotes irrational beliefs concerning the manner and facility of HIV transmission." Note, Eric J. Knapp *"Tort Law-turning Blood into Whine: "Fear of Aids" as a Cognizable Cause of Action in New Mexico,"* 28 N.M. L. Rev. 165 (1998). The requirement of actual exposure ensures that the fear of contracting AIDS is not based on misconceptions about the disease. Pendergist, 961 S.W.2d at 926 (citing Brown v. New York Health & Hosp. Corp., 225 A.D.2d 36, 44, 648 N.Y.S.2d 880, 886 (1996)).

According to the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention (CDC), HIV is only transmittable through passage of blood products, bodily secretions, and other bodily fluids from an infected host individual to another individual. *CDC HIV/AIDS Surveillance Report (December 1999).* CDC studies have shown that the virus cannot survive in the environment. The CDC states that it is "biologically necessary for these viruses to infect specific human or primate cells to complete their life cycles and thereby reproduce themselves." Thus, without a transmission to a new host, the virus dies, at a rate of 90 to 99% within hours. *United States Department of Health and Human Services, Centers for Disease Control and Prevention (CDC),*

CDC/NCHSTP - Divisions of HIV/AIDS Prevention,"Survival of HIV in the Environment." See also *www.cdc.gov/hiv/hivinfo*. [2]

While Plaintiffs have likened ingesting the contents of a used condom to oral sex, there does not appear to be any medical basis for that analogy. Unlike oral sex, in which there is a direct transmission to a new potential host, ingesting soda which contained an item which may or may not have been a condom, and which may or may not have contained semen, but which undisputedly remained in a Coke bottle for a period of four months before ingestion of the Coke, does not involve direct transmission. According to the CDC's most recent information, even if the Plaintiffs could prove that the bottle contained HIV positive material, the virus would be dead by the time of ingestion.

In fact, the CDC has reported that because of the low environmental survivability of the virus, there is "no known risk" of HIV infection to coworkers or consumers when a food service employee is HIV positive. *CDC, Division of HIV/AIDS Prevention, "Human Immunodeficiency Virus and Its Transmission."* That CDC report states that food service workers who are HIV positive need

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[2] In fact, in studies of families living with an HIV-positive member, no incidences of nonsexual, nonblood, or nonperinatal transmission were found, regardless of the fact that they shared bathrooms, eating utensils, and toothbrushes. See Matthew Warren Grill, "*Recovery for Emotional Distress Due to Fear of Aids: Exposing Aidsphobia in Alabama*," 49 Ala. L. Rev. 1009, at note 6 (Spring 1998) (citing Joycelyn L. Cole, Comment, "AIDS-phobia: Are Emotional Distress Damages For a Fear of AIDS a Legally Compensable Injury?," 19 T. Marshall L. Rev. 333 (1994), and Centers for Disease Control, AIDS Information: HIV Transmission, No. 320020, January 1, 1993)).

not be restricted from work. If the CDC has determined that even an actual HIV infection in a person preparing and handling food poses no threat to the consumer, this case in which it is admitted that there was no actual infection is clearly too speculative to proceed under any legally recognized test. The Plaintiffs' emphasis on the duties owed by food providers to ensure that food is free of contaminants is relevant only to the extent that a plaintiff seeks to recover for any injuries caused by the specific object in the food, not for a medically irrational fear that the object contains and can transmit a horrible disease.

In addition to the lack of proof in the Plaintiffs' claims in this case, the fact that HIV positive food service workers are medically permitted to continue work raises a serious public policy concern should this Court allow the cause of action that Plaintiffs urge. Persons infected with HIV or AIDS are protected as "disabled" under the Americans with Disabilities Act. See Bragdon v. Abbott, 118 S. Ct. 2196, 2213 (1998). Thus, as a matter of federal law, employers will in many cases be required to keep HIV positive employees in positions where they are in contact with coworkers, the general public, or products used or consumed by the general public. The ADA protections even apply to protect the jobs of HIV positive health care workers, some of them performing invasive procedures. In 1998, the CDC reported that 21,267 health care workers were HIV positive. *CDC, Division of HIV/AIDS Prevention, "Surveillance of Health Care Workers with HIV/AIDS,"* (December 31, 1998). See also Mary Anne Bobinski, "*Risk and*

Rationality: The Centers for Disease Control and Regulation of HIV-Infected Health Care Workers," 36 St. Louis U. L.J. 213, 226-29 (1991) (discussing guidelines for HIV-positive health care workers in performing invasive procedures).

Adopting the Plaintiffs' theory in this case would mean that any person who comes in contact with these people or the products or services supplied by them could sue for fear of AIDS without proof of a medically sound basis for that fear. The employer would be in the legal Catch-22 of having both a duty to keep the infected employee employed and a duty to prevent the infected employee from direct or indirect contact with the public.

In addition to potential cross-liabilities of employers, the risk of exponentially increased health care costs has been significant in most courts' rejection of a speculative AIDSphobia claim. Courts have recognized that one potential societal cost of imposing ambiguous guidelines upon future defendants is that the health care industry will have to purchase additional liability insurance to hedge against the uncertain liability standard. See Jeffrey B. Greenstein, *New Jersey's Continuing Expansion of Tort Liability: Williamson V. Waldman and the Fear of Aids Cause of Action*, 30 Rutgers L. J. 489, 507 (Winter 1999). Eliminating the actual exposure requirement "forces health care providers to assume an overly burdensome level of risk prevention and could adversely affect the already exorbitant price of health care." Pendergist, 961 S.W.2d at 926 (citing Julie Anne Davies, "*Direct Actions for*

Emotional Harm: Is Compromise Possible?," 67 Wash. L. Rev. 1, 16 (1992)).

Even Wisconsin, which attempted to come up with a compromise position between actual exposure and reasonableness, observed that at least a "proof of contaminated source" standard is necessary. See Babich, 556 N.W. 2d at 147; Eric S. Fisher, "*AIDSphobia: A National Survey of Emotional Distress Claims for the Fear of Contracting AIDS*," 33 Tort and Ins. L. J. 169, 178 (Fall 1997). The court recognized that without such a standard, not only would the health care industry inefficiently use its resources in efforts to protect itself from liability, but health professionals might become so overly cautious as to segregate or even to refuse to treat AIDS patients. See Babich, 556 N.W.2d at 147-148. In fact, requiring actual exposure actually helps to ensure tort recovery for plaintiffs that are exposed to the virus or actually contract the disease as a result of negligent conduct by a defendant: "[a] rule providing an unrestricted right of recovery for all persons fearing AIDS could exhaust (the) resources of defendants and insurers." Pendergist, 961 S.W.2d at 926. See also Kerns v. Hartley, 33 Cal. Rptr. 22 172, 179 (Cal. App. 1994) (failure to curtail AIDSphobia cases may compromise the availability and affordability of medical, dental and malpractice insurance, medical and dental care, and blood products).

This case provides a compelling illustration of the significance of these policy concerns. In this case, plaintiffs are not only trying to recover based on their personal belief that

they could have contracted AIDS from a random condom in a Coke, but also on their perception that the substance in the bottle was in fact a condom in the first place, and on their perception that the "window of fear" could be up to seven years.[3/] If plaintiffs are permitted to recover on such claims, the needed predictability in the torts system will vanish. Defendants, including the food service industry and the health care industry, cannot respond effectively to ambiguous liability exposures based on people's incorrect perceptions of their risk of contracting AIDS. If future defendants are forced to guard against claims based upon plaintiffs' medically unsound perceptions of the risk of contracting AIDS as well as plaintiffs' perceptions regarding whether the substance at issue can transmit the virus at all, the court system will be reinforcing these unfounded fears and prejudices, and potential defendants will be forced to make enormous expenditures for insurance. Surely, common sense and tort law principles could not intend such a result.

Plaintiffs' argument erroneously assumes that it is bad policy to preclude claims involving actual, though medically unfounded, fear. They urge this Court to adopt a subjective standard that would allow compensation for any genuine fear, regardless of the

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[3/] As the Fifth District noted below, a "negative test result after six months from the potential exposure to HIV indicates that the person has a 95% probability of not being infected with the virus." Pendergist v. Pendergrass, 961 S.W.2d 919, 926 (Mo. Ct. App. 1998). Compensation beyond that point has been held per se unreasonable even where actual exposure is proved. Pendergist, 961 S.W.2d at 926.

medical viability of the claim. However, Florida courts have repeatedly recognized that the impact rule will necessarily eliminate recovery for some harms, and that this result is acceptable in light of the alternative. In Eagle-Picher Industries, Inc. v. Cox, 481 So. 2d 517 (Fla. 3d DCA 1985), the court, in affirming the physical injury requirement for fear of disease cases, stated that:

> While this requirement might preclude some plaintiffs with actual fear from bringing suit, it seems to us justified by the fact that the judicial system could not handle the potential mere exposure "fear of" claims, and the task of discerning fraudulent "fear of" claims from meritorious ones would be "prodigious."

Id. at 529 (quoting Ayers v. Jackson Twp., 189 N.J. Super. 561, 580, 461 A. 2d 184, 189 (N.J. Super. Ct. Law Div. 1983), aff'd in part and rev'd in part by Ayers v. Jackson Twp., 106 N.J. 557, 525 A.2d 287 (1987)). It is sound public policy to leave medically unreasonable fears, even if they are genuine, uncompensated. Compensation should be reserved for those claims in which the fear is medically reasonable. The actual exposure rule accomplishes this goal.

D. PLAINTIFFS IN THIS CASE CANNOT RECOVER EVEN UNDER THE MINORITY VIEWS FOR FEAR OF AIDS CASES.

Significantly, Plaintiffs in this case could not recover under even the minority views in fear of AIDS cases. Even in California, which has one of the more liberal standards, this case would be insufficient to allow the claim. California does allow recovery for fear of AIDS absent a physical injury, but only if the plaintiff shows that he was exposed to a substance which threatens

the disease and that he believes, based upon established medical science, that he is more likely than not to contract the virus. Macy's California, Inc. v. Superior Court of Solano County, 41 Cal. App. 4th 744, 48 Cal. Rptr. 2d 496 (Ct. App. 1995) (citing Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 25 Cal. Rptr. 2d 550, 863 P. 2d 795 (1993); Herbert v. Regents of University of California, 26 Cal. App. 4th 782, 31 Cal. Rptr. 2d 709 (Ct. App. 1994); Kerins v. Hartley, 27 Cal. App. 4th 1062, 33 Cal. Rptr. 2d 172 (Ct. App. 1994)).

The Macy's court held that a needle stick would meet the requisite physical injury threshold only if "a hazardous foreign substance, introduced to the body through the needle, causes detrimental change to the body." 48 Cal. Rptr. at 504. Without such proof, the plaintiff would be required to satisfy the "more likely than not" test, which a 1 in 200,000 chance of contracting HIV from a needle-stick would not satisfy. 48 Cal. Rptr. at 505.

Thus, even under one of the most liberal states' view, Plaintiffs would have to prove that they would have been more likely than not to have contracted AIDS from their exposure. The probability of contracting AIDS from a random condom floating in Coke (assuming that is what it was) cannot be higher than the risk of contraction from a random needle prick. See Reynolds v. Highland Manor, Inc., 24 Kan. App. 2d 859, 866-67, 954 P.2d 11, 15-16 (Ct. App. 1998) (plaintiff who accidentally picked up a used condom left in her hotel room was required to show actual exposure

to HIV to recover for fear of AIDS). The Plaintiffs in this case would still not be able to recover.

In fact, the only remedy that could even potentially benefit the Plaintiffs in this case is if Florida unwisely joins the very small minority of jurisdictions that do not require an actual exposure standard for fear of AIDS claims. In order to adopt such a liberal approach, this Court would have to completely remove the impact requirement, the physical injury requirement, and the actual exposure requirement. The Florida Defense Lawyers Association respectfully submits that, even if there are legitimate concerns surrounding the impact rule, this Court should not warp Florida law to allow a recovery in this marginal case.

In fact, even under this minority view, Plaintiffs in this case could not recover because of a lack of medically sound means of transmission. Most of the few cases relaxing the actual exposure requirement have still required a medically sufficient channel of transmission. <u>See</u> <u>Hartwig v. Oregon Trail Eye Clinic</u>, 254 Neb. 777, 785, 580 N.W. 2d 86, 91 (1998) (recovery allowed when the plaintiff was exposed via a "medically sufficient channel of transmission" to the "tissue, blood, or body fluid of another and it is impossible or impracticable to ascertain whether . . . [it] is in fact HIV-positive"); <u>Faya v. Almaraz</u>, 329 Md. 435, 455, 620 A. 2d 327, 336-337 (Ct. App. 1993) (plaintiff operated upon by an HIV-positive physician could have a reasonable fear of AIDS); <u>Madrid v. Lincoln County Med. Ctr.</u> 122 N.M. 269, 278, 923 P. 2d 1154, 1163 (1996) (recognizing "a cause of action for emotional-

distress damages in favor of one who fears that the negligence of another has caused him or her to contract HIV through a medically sound channel of transmission"). Plaintiffs cannot meet that requirement here.

Furthermore, the cases in which no exposure was required have generally been decided on grounds not applicable here. See Marchica v. Long Island Railroad Company, 31 F. 3d 1197 (2d Cir. 1994) (more liberal FELA claim); Hartwig v. Oregon Trail Eye Clinic, 254 Neb. 777, 785, 580 N.W. 2d 86, 91 (1998) (no actual exposure is required if proof would be impossible and a medically sufficient channel of transmission is proved).

Finally, the few cases adopting a more liberal standard for fear of AIDS have been widely criticized as perpetuating the public's misconceptions and unreasonable fears of AIDS:

> Indeed, plaintiffs rely upon the degree of public misconception about AIDS to support their claim that their fear was reasonable. To accept this argument is to contribute to the phobia. Were we to recognize a claim for the fear of contracting AIDS based upon a mere allegation that one may have been exposed to HIV, totally unsupported by any medical evidence or factual proof, we would open a Pandora's Box of "AIDSphobia" claims by individuals whose ignorance, unreasonable suspicion or general paranoia causes them apprehension over the slightest of contact with HIV-infected individuals or objects. Such plaintiffs would recover for their fear of AIDS, no matter how irrational . . . the better approach is to assess the reasonableness of a plaintiff's fear of AIDS according to the plaintiff's actual-not potential-exposure to HIV.

Eric J. Knapp, *Tort Law–Turning Blood Into Whine: "Fear of AIDS" as a Cognizable Cause of Action in New Mexico–Madrid* v. *Lincoln County*

Medical Center, 28 N.M. L. Rev. 165, 189 (1998)(citing Brozoska v. Olson, 668 A. 2d 1355, 1363 (Del. 1995)).

Another writer has similarly observed:

> A reasonableness standard does not and cannot provide future defendants with sufficient predictability because liability for fear of being exposed to AIDS would hinge simply on whether a jury considered the plaintiff's fear to be "reasonable." The actual exposure requirement, on the other hand, offers potential defendants enough guidance as to what steps they must take in order to prevent liability. Most importantly, the actual exposure requirement "strikes a proper balance between ensuring that victims are compensated for their emotional injuries and that potential defendants take reasonable steps to avoid such injuries, but nonetheless protects the courts from becoming burdened with frivolous suits."

Matthew Warren Grill, *Recovery for Emotional Distress Due to Fear of AIDS: Exposing AIDSphobia in Alabama*, 49 Ala. L. Rev. 1009, 1047 (Spring 1998) (quoting Babich, 205 Wis. 2d at 706-707, 556 N.W. 2d at 147)).

Florida should avoid following this much criticized minority path, and adhere to the actual exposure theory.

E. THE PHYSICAL INJURY OR IMPACT RULE REQUIREMENTS ARE NOT DISPOSITIVE OF THIS CASE.

In addition to the fact that this Court has recently and repeatedly reaffirmed the impact rule, even if this Court were suddenly inclined to change its long standing position on that issue, this case is simply not the case in which to accomplish that result. In addition to the specific defects in the claim at issue (neither an actual exposure nor a medically accepted channel of transmission), a correct analysis of AIDSphobia claims reveals that

the impact rule is not what prevents such claims in the vast majority of cases:

> First, there are numerous courts that retain the physician [sic] impact or physical injury requirement for stating a cause of action for emotional distress damages . . . In the Aidsphobia context, this requirement serves little purpose . . . Because Aidsphobia requires that the plaintiff fear contracting AIDS and because AIDS is caused by a virus not normally found in the human body, a plaintiff at minimum must allege that some physical act occurred whereby the virus was tortiously introduced into his or her body. In most cases, then, the physical injury requirement will be satisfied.

Eric S. Fisher, "*AIDSphobia: A National Survey of Emotional Distress Claims for the Fear of Contracting AIDS,*" 33 Tort and Ins. L. J. 169, 223-224 (Fall 1997).

Significantly, even states cited by Plaintiffs as having completely rejected the physical injury prong of the impact rule still require an actual exposure for fear of AIDS claims. See Carroll v. Sisters of Saint Francis Health Services, Inc., 868 S.W. 2d 585, 593-594 (Tenn. 1993) ("[i]n order to recover emotional damages based on the fear of contracting AIDS, the 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) (fear of AIDS must be based on actual exposure to the disease causing agent); Heiner v. Moretuzzo, 652 N.E.2d 664 (Ohio 1995). Thus, Plaintiffs claim cannot succeed even under the minority view which they ask this Court to adopt.

The only true non-impact case in which an AIDSphobia claim could potentially be made is for misdiagnosis of seropositivity. However, Florida has refused to take away the impact rule's

physical injury requirement even for misdiagnosis cases. In R.J. and P.J. v. Humana of Florida, Inc., 652 So. 2d 360 (Fla. 1995), the Court reaffirmed the impact rule as being essential to ensuring claims' validity and refused to "create a limited exception to the impact rule for a negligent HIV diagnosis." Id. at 363. This Court did state that unwanted medical testing and procedures could satisfy the requisite physical impact required under the rule, but nevertheless strongly affirmed the impact rule. Id. at 364.

If Florida has reaffirmed the impact rule's physical injury requirement in the misdiagnosis context, then surely the Court would have no basis for removing the requirement in other scenarios in which a physical injury would have to occur anyway in order to maintain the cause of action.

In sum, this Court has recently and repeatedly held that the physical injury component of the impact rule serves important policy goals in Florida. There is no reason to depart from that established principle in this case. Likewise, there is no reason to depart from the clear majority view in both fear of AIDS and general fear of disease cases, that actual exposure and a medically accepted channel of transmission must be proved in order to permit recovery. Allowing claims to proceed simply because a Plaintiff has a genuine, but medically unsound, fear of AIDS could open the door to litigation over such medically unreasonable fears as homosexual neighbors and hemophiliac food servers. Florida public policy does not benefit from adopting Plaintiff's argument here.

<u>CONCLUSION</u>

The decision of the Fifth District Court of Appeal should be affirmed, and the certified question answered in the negative.

Respectfully submitted,

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