IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

LINDA HAGAN, BARBARA PARKER and WILLIE PARKER,

Petitioners,

-vs- CASE NO. SC00-287

COCA-COLA BOTTLING COMPANY, et al.,

Respondents.

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PETITIONERS' BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

Petitioners hereby certify that the type size and style used in this brief is 14 point Times New Roman.

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PREFACE

Petitioners were the Plaintiffs and Respondents were the Defendants in a civil action in the Circuit Court of the Seventh Judicial Circuit, St. Johns County, Florida. In this brief the parties will be referred to as they appeared in the trial court and/or by their proper names; Defendants will be referred to in the singular. All emphasis in this brief is supplied by Petitioners, unless otherwise indicated. The following symbols will be used:

(R) - Record-on-Appeal;

(T1) - Volume I of trial transcript;

(T2) - Volume II of trial transcript;

(T3) - Transcript of post-trial motions hearing;

(PX) - Plaintiffs' Exhibits;

(DX) - Defendant's Exhibits.

STATEMENT OF THE CASE

Plaintiffs Linda and Dobie Hagan[1] and Barbara and Willie Parker filed a Complaint (R1-7) alleging damages, both physical and mental, arising out of the consumption by Linda Hagan and Barbara Parker of soda from a Coca-Cola bottle

[1]/Dobie Hagan was no longer a party to the case by the time of trial.

which they later discovered "contained a used condom with 'white, stringy stuff' coming out of it." (R3). The case eventually proceeded to a two-day trial wherein Plaintiffs sought damages for the negligent infliction of emotional distress. At the close of Plaintiffs' evidence, Defendant moved for a directed verdict, arguing that Plaintiffs had failed to prove any impact under Florida law and that even if they had, they had failed to prove actual exposure to the HIV virus (T2 32-6). The motion was denied (T2 52), but renewed at the close of all the evidence (T2 94-6), and again denied (T2 96). However, the trial court did rule that Plaintiffs' claim for damages due to the fear of contracting AIDS would be limited only to the time which elapsed between the incident and their second AIDS test which proved negative (T2 130-1).

At the end of trial, the jury awarded Linda Hagan and Barbara Parker each $75,000 "+ medical bills," and Willie Parker $20,000 on his consortium claim (R232-4). The trial court later denied Defendant's post-trial renewed motion for directed verdict and for new trial, but granted a remittitur, reducing the verdicts to $25,000 each to Linda Hagan and Barbara Parker and $8,000 for Willie Parker (R293-6).

Defendant appealed to the Fifth District Court of Appeal, its main arguments being that Plaintiffs cannot recover damages for emotional distress resulting from a fear of contracting AIDS without a discernable physical injury because of Florida's

impact rule, and that based on case law in other states, Plaintiffs should not be able to claim emotional distress for fear of developing AIDS without proof of actual injury or, at least, actual exposure to the HIV virus. On appeal, the judgment was reversed, COCA-COLA BOTTLING CO. v. HAGAN, 24 Fla.L.Weekly D2688 (Fla. 5th DCA December 3, 1999), but two members of the panel joined in certifying the following question to this Court as one of great public importance:

> SHOULD THE IMPACT RULE BE ABOLISHED OR AMENDED IN FLORIDA?

This proceeding follows.

STATEMENT OF THE FACTS

On September 18, 1992, Linda Hagan was working at the Hastings Academy Day Care in Hastings, Florida, which was operated by her sister, Barbara Parker (T1 65, 113). Hagan had a BS in Political Science and History, and also had 30 hours of child training and HRS training (T1 65). On her lunch break she went to a convenient store and bought a Sprite and two Cokes. Upon her return to the school, she gave one of the Cokes to her sister (T1 66). When Hagan bought the Coke, the seal on the

bottle had been intact (T1 108-109).[2] Parker opened it in her office and poured some of the soda into a cup (T1 88-89, 115). Parker said that it tasted flat, and Hagan responded that it was probably just warm. Parker insisted that there was something wrong with the soda, that something was in it, and insisted that Hagan taste it (T1 66-67, 115). When Hagan tasted it, it tasted flat, like water with no carbonation (T1 67, 90).

Hagan took the bottle into the bathroom next to Parker's office and put it up to the light, where she saw something floating in it that looked like an open balloon, and said "that's a condom." (T1 67-8, 92). Hagan said that the "condom was white-looking, beige, from the color of the Coke, so maybe that had distorted the color a little bit. And the solution or whatever coming out of the condom was a snotty, oozy-like, stringy-like something coming out the condom." (T1 90). She became "nauseated, really sick and scared, because I didn't know what that meant for me, my health-wise and stuff," and panicked (T1 68). The women decided they needed to call the health department (T1 68-69, 117). The school usually closed between 5:00 p.m. and 5:30 p.m., and although Plaintiffs called the health department right after lunch,

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[2]/The parties stipulated that the Coke (Joint Exhibit 1) was bottled by Florida Coca-Cola Bottling Company in May 1992 in Hollywood, Florida, and that at the time it was bottled and sealed, it was under the sole possession of Florida Coca-Cola Bottling Company (T1 63).

by 6:00 p.m. no one had come, so they left the bottle on Parker's desk, and went home (T1 69).

The incident occurred on a Friday, and Hagan testified that during the weekend she and her sister went to the emergency room, where they met a police officer, a doctor and two nurses (T1 70-71). They gave the officer a statement regarding what happened the day before (T1 71). They were given a shot in the emergency room, and the doctor advised them to go to the health department and to take an HIV test (T1 71). At the health department, the women were asked personal questions about how many sex partners they had had, how often they engaged in sex, if they had ever had venereal disease, etc. For approximately two hours they were given information about AIDS, and were told that they would have to wait for the results of the HIV test (T1 71-72, 123-4, 127). They were also told that they would have to take another test in six months, which they did (T172). Both HIV tests were negative (T1 86, 96).

On the following Monday, Plaintiffs took the bottle and cup to Parker's home. Barbara Parker's neighbor, who worked for the county medical examiner's office, sealed the bottle and cup in an evidence bag, and Parker's husband put it in a locked file cabinet (T121-2, 174-75). They never poured any more of the soda out of the Coke bottle (T1 91), nor did they ever remove the condom (T1 107). They had left the bottle on the desk at the school because it was not something that they wanted to

touch, and consequently did not take it with them to the hospital or to the health department (T1 95, 107).

Hagan explained that she did not visit her personal doctor after the incident because she had already been examined by the doctor at the emergency room, and then had had the HIV test at the health department (T1 96-98). In fact, she did not tell anyone else about the incident except her sister in Miami and her gynecologist, whom she saw some months later, because she was embarrassed, and was trying to "keep it private." (T1 70, 74, 77). She did not even tell her husband, from whom she was separated at the time, about it. Hagan explained that they were talking about reconciling at the time, and she found it humiliating to talk about the incident (T1 82). Regarding why Hagan told no one else, she explained that when she and her sister went to the hospital, the police officer, the doctor and the nurses were snickering, which offended her. "It made me feel small and hurt and shamed." (T1 78). She said that the others were grinning because the soda had a condom in it, taking it as being something funny and comical, while "it was humiliating to me." (T1 79). She told them that the matter was serious to her, and that their conduct was rude (T1 78).

Hagan and Parker decided not to discuss the incident with the other workers at the school because of their embarrassment (T178-79). Hagan found it humiliating when people grinned about her having drunk a soda with a condom in it, because she

did not think it was funny (T1 79). On the Monday after the incident, there was a report in the local paper which did not name names, but stated that two women had drunk a soda believed to contain a condom that they had bought at DeFord's Service Station. There was also a report about it on the radio. One of Hagan's co-workers mentioned that she had read the news article, and three or four times pointed at Hagan and said she wondered who the women were. Hagan felt that "she knew it was me. She just wanted me to admit it, but I didn't admit it" (T1 77-79). Hagan asked a friend about the radio report, and the friend thought the report was funny because it involved a condom. Hagan stated that her friend "didn't take it like I was taking it to mean, because it was affecting me." (T1 77-78). Due to the "smallness of Hastings," everybody knew about the incident and were talking about the article in the paper and the radio report that Hagan said "was really embarrassing to me." (T1 77, 81). She felt like everyone was grinning at the fact that she had drunk a soda with a condom in it (T1 79).

Hagan testified that the results of the second HIV test did not put her fears about her health to rest because the pamphlets that she had received from the health department indicated that a person with HIV can have it and not know it within a 7-year incubation period (T1 83-86). At the time of trial, Hagan had no illness or injury that she could attribute to the Coke bottle incident (T106).

Plaintiff Barbara Parker testified that she has a master's degree in education, and had been operating the Hastings Academy Day Care for about 16 years at the time of trial (T1 112-13). She recounted the details of the September 1992 incident (T1 115-16), and was absolutely certain that she broke the seal on the Coke bottle, observing that when the seals are loosened, they snap, and a ring loosens up between the cap and the bottle itself. She specifically remembered that the ring was attached to the cap when she received the bottle (T1 146). Parker was also absolutely sure that what she saw in the bottle was a condom (T1 128). She never poured the contents out of the bottle to check it out because there was no question in her mind about what was in the bottle (T1 128, 146). She stated that a large clunk of mucus and "stringy white stuff" extended from the base of the condom (T1 128, 132). It looked disgusting (T1 132). She hesitated telling her husband because "I was really apprehensive about sharing it, because I was really thinking about what he was -- how he was going to feel about it ----" (T1 117).

Immediately after the incident, Parker was concerned about her health, and about her relationship with her husband, and how he was going to feel after she told him (T1 118-119). Over the weekend after the incident, she spoke only with her husband and her mother and one of her sisters about it (T1 130). Her husband was

"really apprehensive" when they talked about it, and they continued to talk about the children and their future (T1 126).

Parker also did not tell her neighbors about the incident, and explained:

> Well, again, one of my main concerns was that I just did not want it to get out into the community and be misunderstood or -- somehow sometimes when things get into the community, it's told one way and it's altogether different, so I didn't want to share it for that reason. And I don't want anybody to feel that I was sick or had some type of disease. You know, people tend to back away from you.

(T1 128). Parker was also upset because "the fact is that I run a day care and it's in Hastings and Hastings is very small. So, if the wrong information gets out in Hastings, I wouldn't have any children. It gets out very, very fast. I mean, you don't even have to have a telephone in Hastings; the information just gets out that fast." Parker figured that if the wrong information was circulated, she "could possibly lose children at my day care," because people were becoming more aware and frightened of different diseases, including AIDS (T1 118). She did not talk about the incident with her doctors because after the health department said that she did not have AIDS, she felt that if her physicians found or did not find something without the information about the condom in the Coke bottle, that information would be more accurate (T1 125-6).

Parker testified that she took AIDS tests in 1992 and 1993, and that at the time of trial she had no physical problems that related to the Coke incident in September 1992 (T1 142). However, at trial she stated that she still did not have peace of mind about the incident and about concerns regarding her health "because nobody really knows." (T1 147).

Barbara Parker's husband Willie F. Parker identified Joint Exhibit 1 as the empty Coke bottle and the white cup (T2 14-15), as well as the photographs of the bottle in the evidence bag before it was given to Katz (PX2, 3, 4; T2 19-20). He testified that on the day of the incident his wife came home very upset (T2 8). She was very upset as well after visiting the health department where the workers thought that her ordeal was funny (T2 10). She had been an even-keeled type of person, but after the incident she began to get up at various times during the night, which she had seldom done before (T2 11-13). Between the time of the first and second HIV tests, she wanted to make sure that things were in order regarding their children because she "could be gone tomorrow." Since then, Mr. Parker's wife has still expressed concerns regarding her health (T2 24). At the time of the incident, the Parkers had been married 13 or 14 years (T2 11), and Mr. Parker testified that they should have gotten some counseling after the incident because it upset their house "for a good while." They were not talking about the situation as they should have (T2 11). It put a hard

strain on him that was made harder because of things that were not said (T2 25). Previously, Barbara had been the type of person who would point out the things that they needed to do, but all of a sudden after the incident it was not like that anymore, although it had become better by the time of trial (T2 12). Mr. Parker also testified that he felt that Linda Hagan had been even more affected by the incident than his wife because she developed a nervous condition which she had to have taken care of (T2 26).

Photographs of the Coke bottle in the plastic evidence bag were identified at trial (PX2, 3; T1 144-145). The bottle, still inside the evidence bag, was later turned over to Plaintiffs' attorney (T1 134). On October 6, 1992 Barry Katz, at the time a sales representative for Coca-Cola Enterprises in Ft. Pierce (T1 25-26), went to the office of Plaintiff's attorney to pick up the bottle. He testified that he saw a bottle of Coke with something floating in it (T1 32), and identified one of Plaintiff's photographs (PX3) as an accurate photo of what he picked up that day (T1 42). After looking at the bottle for a minute or two (T1 54), Katz signed a receipt which stated "received of Donald N. Watson, Esquire, of Gary, Williams, Parenti, Finney & Lewis, the following evidence: "One (1) 10-ounce Coca-Cola bottle containing the unpoured portion of Coca-Cola and a white condom and a white plastic cup, and containing the poured portion of Coca-Cola. The above evidence is sealed individually in plastic."

(T1 36). Although Katz did not type the receipt, he was sure that he had read it, and did not question anything that was on it or tell the attorney that the receipt needed to be changed because it was not accurate (T1 37, 41). Katz never opened the bottle, or changed its packaging, and delivered it to people at Coca-Cola for testing (T1 38). He never saw the bottle again (T1 47).

Dr. Forrest Bayer, director of packaging in the Scientific and Regulatory Affairs Department of the Coca-Cola Company (T2 57), testified that in October 1992 he received the bottle and cup in the evidence bag, and visually inspected the bottle (T2 62-63). He saw a tannish-brown material floating near the neck of the bottle, which he at first thought was a condom (T2 63-64). After visually inspecting it, he instructed the laboratory analysis personnel to remove the sample from the bag, to take the foreign material out of the bottle, thoroughly inspect it, and then notify him of the results (T2 64-65). He went back to his office, and approximately 10 to 15 minutes later was called back to the laboratory by the analyst. Bayer stated that the foreign object turned out not to be a condom, but mold (T2 65). He determined that by visual inspection after the contents of the bottle had been poured into a beaker by the analyst. When Bayer re-entered the lab, the foreign material was floating on the top inside the beaker, and the analyst removed it with a pair of metal forceps (T2 66-67). It appeared to be a gelatinous-type mass, semi-solid and brown or tannish-brown,

with "sort of a rubbery texture to it." (T2 67). Bayer had the analyst take a piece of the sample and place it in a microscope, where it was identified as a mold (T2 67-68).

Bayer testified that assuming the product had been bottled in May 1992 and purchased on September 18, 1992, and for whatever reason had lost its carbonation, there would have been enough time for the mold to have formed in the product (T2 70). Bayer stated that over a period of time the mold would form almost a solid coverage across the top of the neck of the bottle, and upon being disturbed it could break loose from the edges of the bottle and become free-floating so that it would orient itself in the "up" direction if the bottle was turned upside down, and vice versa (T2 71). Bayer stated that the sample was placed in a petri dish, which was placed in a refrigerator, locked and secured. He identified a petri dish with a brown material in it in evidence at trial as being a sample of the mold that was found in the Coke bottle (T2 72). Bayer opined that to a scientific certainty, the contents of the bottle was mold, not a condom (T2 74). Bayer's written report (DX1) stated that he received the sample in the laboratory on October 12, 1992 (T2 75-76).

On cross-examination, Bayer acknowledged that he was not personally present when the contents of the bottle were poured out into the beaker, but that the contents had already been poured into the beaker at the time he returned to the laboratory (T2

80). He also acknowledged that one of Plaintiffs' photographs (PX4) showed the foreign object adhering to the bottom of the bottle, rather than floating on the surface (T2 82, 86). Further, no chemical tests were performed on the product (T2 83).[3] The only test performed was visual observation and microscopic examination (T2 83). He never saw the receipt which Katz had signed (T2 79), and acknowledged that there was no identifying mark on the petri dish displayed at trial to indicate that it held the same object which had been taken out of the bottle (T2 84). While he affirmed that the sample had been placed in the refrigerator and locked, he could not state how long it had been kept there because he had been out of the department for several years and "I don't know what has transpired in the last few years with regards to sample retention." (T2 85). His report did not reflect the date on which the analysis had been conducted, and the fact that someone other than he had conducted the inspection (T2 85).

SUMMARY OF ARGUMENT

[3]/Plaintiffs had no time to conduct their own chemical analysis. The incident occurred on September 18, 1992 (T2 70), the bottle was given to Coca-Cola (via Katz) for analysis by Defendant on October 6, 1992 (T1 35), then totally emptied and retained by Defendant (T2 85).

Plaintiffs urge that the physical injury requirement of the impact rule be abolished pursuant to the issue certified to this Court by the Fifth District Court of Appeal. The impact aspect of the impact rule is not really at issue here, because it is clearly satisfied by the fact of ingesting a foreign substance in food. While most jurisdictions have abolished the impact aspect of the impact rule, most jurisdictions still require proof of physical injury. However, there is a growing trend, including at least 14 jurisdictions, against the retention of that requirement, and writings by legal scholars are unanimous that it should be abolished. Maintaining the physical injury requirement ignores advances in medical and psychological science. The task of a court or jury in a case of negligent infliction of emotional distress in assessing the verity of damages does not differ at all from the task which they already have faced in determining mental distress damages in cases alleging negligent defamation or invasion of privacy, or in independent tort cases where the physical injury is slight.

The Fifth District was incorrect in deciding that Plaintiffs had failed to demonstrate proof sufficient to entitle them to damages for the fear of developing AIDS. Drinking from a Coke bottle containing a used condom with apparent semen oozing from it is the equivalent of oral sex, which is a well-recognized channel of transmission of the HIV virus.

ARGUMENT

THE PHYSICAL INJURY REQUIREMENT OF THE IMPACT RULE SHOULD BE ABOLISHED

Introduction

In its opinion in this case, COCA-COLA BOTTLING CO. v. HAGAN, 24 Fla.L.Weekly D2688 (Fla. 5th DCA December 3, 1999), the court reversed the judgment (R272-3), holding that in cases where a plaintiff alleges emotional distress resulting from the ingestion of a foreign substance in food, Florida law still requires a physical injury in order to recover damages. The court determined that because only Linda Hagan became nauseated, and neither she nor Barbara Parker vomited or suffered other physical reactions, no physical injury was proven in the case. Id. at D2690. The court further conjectured that this Court might some day determine that negligent exposure to the AIDS virus is sufficient to allow mental distress damages for fear of contracting AIDS in the future even without physical injury, due to the deadly nature of the virus. However, the court held that no such recovery would be possible based on the record in this case, because the Plaintiffs failed to establish that the condom and material in the soft drink were contaminated with HIV, or that it was likely and probable that the virus was present. Id. at D2691. Nonetheless, the author of the opinion, Judge Sharp, joined Judge Dauksch in certifying to this Court the

following question as one of great public importance: "SHOULD THE IMPACT RULE BE ABOLISHED OR AMENDED IN FLORIDA?" As will be explained in this brief, Plaintiffs maintain that, pursuant to this Court's opinion in DOYLE v. PILLSBURY CO., 476 So.2d 1271 (Fla. 1985), cases based on ingestion of food either do not involve the impact rule at all, or the impact rule is satisfied by the fact of ingestion. Therefore, the point raised by the certified question which is at issue under the facts of this case is whether the physical injury component of the impact rule should be altered or abolished. Plaintiffs maintain that it should be abolished.

Florida Cases On The Impact Rule

This Court has recently restated its long-held position on the impact rule in TANNER v. HARTOG, 696 So.2d 705, 707 (Fla. 1997), as follows:

> 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.

Id. at 707, citing R.J. v. HUMANA OF FLORIDA, INC., 652 So.2d 360, 362 (Fla. 1995). The Court has also recognized that the overwhelming majority of jurisdictions have abolished the impact rule in negligent infliction of emotional distress cases. See ZELL v. MEEK, 665 So.2d 1048, 1050 (Fla. 1995); GONZALEZ v.

METROPOLITAN DADE COUNTY PUBLIC HEALTH TRUST, 651 So.2d 673, 674 n. 1 (Fla. 1995) ("The physical impact rule has been abrogated in more than 30 jurisdictions.")

However, the Court has carved out exceptions to the impact rule. CHAMPION v. GRAY, 478 So.2d 17, 20 (Fla. 1985), held that impact is not required in cases where a person suffers significant, discernible physical injury due to psychological trauma resulting from observing the death or physical injury of a close family member. In GONZALEZ, supra, the Court held that an action for mental anguish based on negligent handling of a dead body does not require impact. 651 So.2d at 675. In KUSH v. LLOYD, 616 So.2d 415 (Fla. 1992), the Court held "that public policy requires that the impact doctrine not be applied within the context of wrongful birth claims." Id. at 423. Similarly, in TANNER v. HARTOG, supra, the Court held "that public policy dictates that an action by the parents for negligent stillbirth should be recognized in Florida" to which the impact rule does not apply. Id. at 708. The Court's discussion in TANNER and KUSH indicates that, strictly speaking, wrongful birth and stillbirth causes of action are not exceptions to the impact rule, but are rather "free standing" torts separate from any emotional injury to which the impact rule was never intended to be applied. KUSH, supra at 422; TANNER, supra at 708.

Another category of cases which includes the instant case, those involving the ingestion of food by the plaintiff, was included by this Court in its recitation in HUMANA of instances in which the impact rule has been upheld. Discussing the leading case in this category, DOYLE v. PILLSBURY CO., supra, the Court in HUMANA wrote that in that case "we held that impact in the form of ingestion of food must occur before one can recover for emotional damages as the result of finding an insect in food." 652 So.2d at 363. However, Plaintiffs maintain that DOYLE was technically not an impact rule case. In DOYLE, the plaintiff had jumped back in alarm, fell over a chair, and suffered physical injuries after she looked into an opened can of peas and observed a large insect floating on the surface. The trial court had granted summary judgment, finding that the impact rule barred the claim, and the Fourth District affirmed on the basis of GILLIAM v. STEWART, 291 So.2d 593 (Fla. 1974), one of the seminal impact rule cases in Florida jurisprudence. This Court held that the impact rule did not apply to the case at all. While it approved the affirmance of the summary judgment, it quashed the portion of the district court opinion which applied "the impact rule to the circumstances of this case." 476 So.2d at 1272. The Court explained by citing breach of warranty cases brought against manufacturers or packers of food, as well as restaurants and retailers of food products, referring to those cases as embodying "liberalized rules to promote recovery for physical and psychic

injury" in cases involving foreign objects found in food products where there had been "some ingestion of a portion of the food or drink product." Id.

This Court pointed out in DOYLE that "the ingestion requirement is grounded upon foreseeability rather than the impact rule," id., and explained the public policy underlying its holding as follows:

> 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 foods 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. The Court then stated that the same foreseeability is lacking "where a person simply observes the foreign object and suffers injury after the observation." Thus, Mrs. Doyle, who never ingested any portion of the canned peas, could not recover because "[w]hen a claim is based on an inert foreign object in a food product, we continue to require ingestion of a portion of the food before liability arises." Id.

Two observations about DOYLE are pivotal to the disposition of the instant case. First, the Fourth District's opinion in DOYLE was quashed explicitly because the impact rule did not apply at all. This Court concluded its opinion by stating: "We approve that portion of *Doyle* affirming the summary judgment and quash that portion

applying the impact rule to the circumstances of this case." Id. Rather, DOYLE turned on "the breach of implied warranty theory [which applies] to food manufacturers or packers...." Id.[4] Second, DOYLE does not fit this Court's articulation of the impact rule. As stated in TANNER and HUMANA, the impact rule requires that before a plaintiff can recover for emotional distress, "the emotional distress suffered must flow from physical injuries the plaintiff sustained in an impact." 696 So.2d at 705. While in those cases the Court stated that the emotional distress must arise from a physical injury sustained in an impact, in DOYLE, liability arises on ingestion, and the plaintiff suffers injury by becoming either "physically or mentally ill after consuming part of [the] food product...." 476 So.2d at 1272. Even if ingestion is equated with impact, it is sufficient if mental or physical illness follows; the mental illness need not be preceded by physical injury. In the ordinary impact case, the emotional distress "must flow from physical injuries...." TANNER, supra at 707.

[4]/The result in DOYLE is consistent with long-standing case law which has held canners of food and bottlers of cold drinks to be bound by a rule of absolute liability by implied warranty. See, e.g., MIAMI COCA-COLA BOTTLING CO. v. TODD, 101 So.2d 34, 35 (Fla. 1958).

If Plaintiffs' reading of DOYLE is correct, then liability in ingestion cases such as this can arise when emotional distress results from ingestion of a foreign object, with no intervening requirement of a physical injury.

In its opinion, the Fifth District noted Justice Overton's statement in HUMANA that in DOYLE, this Court required "impact in the form of ingestion of food" before liability could attach, 24 Fla.L.Weekly at D2690, citing HUMANA at 363, and rejected Plaintiffs' argument that antecedent physical injury is not required, even if DOYLE is interpreted to mean that ingestion equals impact. The appellate court observed that this issue "is not entirely clear," id., and after a discussion of various cases concluded that with few exceptions physical injury is required under Florida case law, and would be required "in cases involving slight impact, such as ingestion...." Id. at D2691. Plaintiffs submit that the Fifth District's analysis of this issue in the context of the impact doctrine is based on dicta in HUMANA, and not the holding of DOYLE. Clearly, DOYLE held that the impact rule does not apply; that case turned on foreseeability and the well-established implied warranty of fitness. 476 So.2d at 1272. Even if DOYLE, contrary to its own language, is considered to be an impact rule case and the emotional distress must flow from a physical injury, the impact aspect of the rule is clearly satisfied by the fact of ingestion. Thus, within the parameters of the facts of this case, it is the physical injury aspect of the impact rule

which is at issue pursuant to the question certified by the Fifth District. Further, that issue is most germane to the reason for certification because in his special concurrence, Judge Dauksch suggested that emotional injury itself should satisfy the injury requirement, given the recognition of illnesses such as Post-Traumatic Stress Syndrome by "[a] respected body of medical experts...." 24 Fla.L.Weekly at D2692.[5]

The Injury Requirement In Florida And Elsewhere

As this Court observed in GONZALEZ, although the majority of jurisdictions no longer require physical impact, the majority of jurisdictions still require a physical injury for recovery for negligent infliction of emotional distress. 651 So.2d at 674. If TANNER and KUSH, the stillbirth and wrongful birth cases respectively, are viewed not as exceptions to the impact rule but cases to which it was never intended to apply, and if DOYLE is viewed as a breach of warranty case, then to this date this Court has never made an exception to the physical injury requirement in an impact rule case. While CHAMPION dispensed with the impact requirement, it still required

[5]/Judge Dauksch previously proffered a cogent challenge to the impact rule in CHAMPION v. GRAY, 420 So.2d 348 (Fla. 5th DCA 1982), as did Judge Mager in STEWART v. GILLIAM, 271 So.2d 466 (Fla. 4th DCA 1972). See also NATIONAL CAR RENTAL SYSTEM, INC. v. BOSTIC, 423 So.2d 915, 918 (Fla. 3d DCA 1982) (Pearson, J., concurring specially).

"a significant discernable physical injury when such injury is caused by psychic trauma resulting from negligent injury imposed on another" to whom the plaintiff is related. 478 So.2d at 20.[6] The Court's position on physical injury was reaffirmed most recently in GONZALEZ, where it pointed out that the requirement of physical impact and physical injury are not to be used interchangeably. 651 So.2d at 674. The Court specifically rejected the argument based on Section 868 of the Restatement (Second) of Torts that a physical injury requirement should be eliminated from a cause of action for the negligent handling of a dead body, even though that cause of action does not require physical impact. Id. at 675-6.

While the physical injury element is still required in a majority of jurisdictions, including those which have dispensed with physical impact analysis, nonetheless abolishing the physical injury requirement has been termed "the modern judicial trend...." Scott D. Marrs, *Mind Over Body: Trends Regarding the Physical Injury Requirement in Negligent Infliction of Emotional Distress and "Fear of Disease"*

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[6]/Adding to the confusion in an already confusing area of law, CHAMPION, and its later elaboration in ZELL v. MEEK, supra, 665 So.2d at 1054, stated that physical injury must be caused by the psychological trauma, while all the other cases state that "the emotional stress suffered must flow from physical injuries...." TANNER, supra at 707. BROWN v. CADILLAC MOTOR CAR DIVISION, 468 So.2d 903, 904 (Fla. 1985), adds to the confusion because there, as in CHAMPION, the court held that the "psychological trauma must cause a demonstrable physical injury...."

Cases, 28 Tort & Ins. L.J. 1 (1992). As of the date of the Tort and Insurance Law Journal survey, 14 jurisdictions had abolished the physical injury requirement. See JOHNSON v. RUARK OBSTETRICS, 395 S.E.2d 85, 97 (N.C. 1990); ADVISORY COMMISSION v. DIAMOND SHAMROCK, 578 A.2d 1248, 1249 (N.J. Super. A.D. 1990); ST. ELIZABETH HOSPITAL v. GARRARD, 730 S.W.2d 649, 654 (Tex. 1987); HARRIS v. KISSLING, 721 P.2d 838, 840 (Or. App. 1986); JAMES v. LIEB, 375 N.W.2d 109, 116 (Neb. 1985); WILSON v. KEY TRONIC CORP., 701 P.2d 518 (Wash. App. 1985); JOHNSON v. SUPERSAVE MARKETS, INC., 686 P.2d 209 (Mont. 1984); BASS v. NOONEY CO., 646 S.W.2d 765, 772 (Mo. 1983); SCHULTZ v. BARBERTON GLASS CO., 447 N.E.2d 109, 113 (Ohio 1983); CULBERT v. SAMPSON'S SUPERMARKETS, INC., 444 A.2d 433, 438 (Me. 1982); TAYLOR v. BAPTIST MEDICAL CENTER, INC., 400 So.2d 369, 374 (Ala. 1981); MOLIEN v. KAISER FOUNDATION HOSPITALS, 27 Cal.3d 916, 616 P.2d 813 (Cal. 1980); MONTINIERI v. SOUTHERN NEW ENGLAND TELEPHONE CO., 398 A.2d 1180, 1184 (Conn. 1978); RODRIGUES v. STATE, 472 P.2d 509, 519 (Haw. 1970).

The first court to abandon the physical injury requirement was the Supreme Court of Hawaii in RODRIGUES v. STATE, supra. In RODRIGUES, the plaintiffs charged that the state highway department had been negligent in failing to protect their

home from flood damage caused by the failure of a highway culvert to drain surface waters after it had become blocked, which in turn resulted in plaintiffs' emotional distress. Id. at 513. The Hawaii Supreme Court abandoned the physical injury requirement in negligent infliction of mental distress cases, and addressed two considerations behind the rule requiring physical injury: first, the likelihood that courts will be flooded by fraudulent claims; second, the defendant's potentially unlimited liability for every type of mental disturbance. The court reasoned as follows:

> We place little weight on the first consideration. Courts which have administered claims of mental distress incident to an independent cause of action are just as competent to administer such claims when they are raised as an independent ground for damages. In judging the genuineness of a claim of mental distress, courts and juries may look to the quality and genuineness of proof and rely to an extent on the contemporary sophistication of the medical profession and the ability of the court and jury to weed out dishonest claims....

472 P.2d at 519-20 (citation and internal quotation marks omitted). The court responded to the concern about potentially unlimited liability by acknowledging compelling reasons for limiting liability to claims of serious mental distress, but stated that those reasons should be "considered by the jury and the court with the particular facts of each case in applying the 'reasonable man' standard we adopt below and are

not legal limitations on the right to recover." Id. at 520. The standard which the court adopted was the following:

> We hold that serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.

Id.

RODRIGUES was followed later by the California Supreme Court in MOLIEN, supra. In that case, the plaintiff sought damages for emotional distress arising from the negligent misdiagnosis of his wife as having syphilis. The erroneous diagnosis caused the plaintiff's wife to become upset and suspicious that he had engaged in extramarital sexual activities, and the resulting hostility between them caused the breakup of their marriage. 616 P.2d at 814-5. The court in MOLIEN relied heavily on the analysis in RODRIGUES, and stated:

> We agree that the unqualified requirement of physical injury is no longer justifiable. It supposedly serves to satisfy the cynic that the claim of emotional distress is genuine. Yet we perceive two significant difficulties with the scheme. First, the classification is both overinclusive and underinclusive when viewed in the light of its purported purpose of screening false claims. It is overinclusive in permitting recovery for emotional distress when suffering accompanies or results in any physical injury whatever, no matter how trivial. If physical injury, however slight, provides the ticket for admission to the courthouse, it is difficult for advocates of the "floodgates" premonition to deny that the doors are already wide open:

> as we observed in Capelouto v. Kaiser Foundation Hospitals, supra, 7 Cal.3d at p. 893, 103 Cal.Rptr. at p. 859, 500 P.2d at p. 883, "mental suffering frequently constitutes the principal element of tort damages...." More significantly, the classification is underinclusive because it mechanically denies court access to claims that may well be valid and could be proved if the plaintiffs were permitted to go to trial.

616 P.2d at 820. See also CULBERT, supra, 444 A.2d at 437. The California court stated that the second defect in the requirement of physical injury is that it encourages extravagant pleading and exaggerated testimony in order to establish the requirement of a physical manifestation. Id. The court quoted approvingly the "reasonable man" standard from RODRIGUES in cases of serious mental distress. Id. at 819-20. In cases where the mental distress is not of a medically significant nature, the Court again agreed with RODRIGUES that the standard of proof required is "some guarantee of genuineness in the circumstances of the case." Id. at 821. The court explained:

> This standard is not as difficult to apply as it may seem in the abstract.... [J]urors are best situated to determine whether and to what extent the defendant's conduct caused emotional distress, by referring to their own experience. In addition, there will doubtless be circumstances in which the alleged emotional injury is susceptible of objective ascertainment by expert medical testimony.... To repeat: this is a matter of proof to be presented to the trier of fact. The screening of claims on this basis at the pleading stage is a usurpation of the jury's function.

Id. at 821.[7] The Ohio Supreme Court in SCHULTZ v. BARBERTON GLASS CO., supra, 447 N.E.2d at 112, also dispensed with the physical injury requirement, relying on the basic principles of the trial process as did RODRIGUES, as follows:

> Judges and juries will consider the credibility of witnesses and the genuineness of the proof as they do in other cases. In most instances, expert medical testimony will help establish the validity of the claim of serious mental distress.

A number of the courts which have abrogated the physical injury requirement have cited the contemporary sophistication of medical science in discerning the genuineness of emotional distress. See RODRIGUES, supra at 519-20; SCHULTZ, supra at 112. In LEONG v. TAKASKI, 55 Haw. 398, 520 P.2d 758 (Hawaii 1974), the Hawaii Supreme Court explained how negligently-inflicted mental distress can be characterized from a medical perspective, relying on a widely-cited journal article,[8] as follows:

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[7]/Similarly, in ST. ELIZABETH HOSPITAL, supra, the Texas Supreme Court stated that the distinction between physical injury and emotional distress is no longer defensible. "The problem is one of proof, and to deny a remedy in all cases because some claims may be false leads to arbitrary results which do not serve the best interest of the public. Jurors are best suited to determine whether and to what extent the defendant's conduct caused compensable mental anguish by referring to their own experience." 730 S.W.2d at 654.

[8]/Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 Geo.L.J. 1237, 1248-63 (1971).

From a medical perspective, negligently-inflicted mental distress may be characterized as a reaction to a traumatic stimulus, which may be physical or purely psychic. Traumatic stimulus may cause two types of mental reaction, primary and secondary. The primary response, and immediate, automatic an instinctive response designed to protect an individual from harm, unpleasantness and stress aroused by witnessing the painful death of a loved one, is exemplified by emotional responses such as fear, anger, grief, and shock. This initial response, which is short in duration and subjective in nature, will vary in seriousness according to the individual and the particular traumatic stimulus.

Secondary responses, which may be termed traumatic neuroses, are longer-lasting reactions caused by an individual's continued inability to cope adequately with a traumatic event. Medical science has identified three frequently occurring forms of neuroses resulting from trauma. In the first, the anxiety reaction, the trauma produces severe tension, which results in nervousness, weight loss, stomach pains, emotional fatigue, weakness, headaches, backaches, a sense of impending doom, irritability, or indecision as long as the tension remains. The second, the conversion reaction is a reaction to trauma in which the individual converts consciously disowned impulses into paralysis, loss of hearing, or sight, pain, muscle spasms, or other physiological symptoms which cannot be explained by actual physical impairment. The third, the hypochondriasis reaction, is characterized by an over-concern with health, a fear of illness, or other unpleasant sensations. Thus only secondary responses result in physical injury.

The severity of mental distress may be approached in terms of the amount of pain and disability caused by defendant's act. Traumatic neuroses are more susceptible to medical proof than primary reactions because they are of

longer duration and usually are manifested by physical symptoms which may be objectively determined. While a psychiatrist may not be able to establish a negligent act as the sole cause of plaintiff's neurosis, he can give a fairly accurate estimate of the probable effects the act will have upon the plaintiff and whether the trauma induced was a precipitating cause of neurosis, and whether the resulting neurosis is beyond a level of pain with which a reasonable man may be expected to cope.

In a situation where only the primary response to trauma occurs, the defendant's negligence may produce transient but very painful mental suffering and anguish. Because this reaction is subjective in nature and may not result in any apparent physical injury, precise levels of suffering and disability cannot be objectively determined. The physician or psychiatrist must rely on the plaintiff's testimony, the context in which the trauma occurred, medical testing of any physical ramifications, the psychiatrist's knowledge of pain and disability likely to result from such trauma, and even the framework of human experience and common sense to determine the amount of pain resulting naturally as a response to defendant's act, and whether it is beyond the level of stress with which a reasonable man may be expected to cope.

Thus calculation of damages becomes a simpler matter when the primary response is coupled with a secondary one, because damages may be assessed by more objective standards. Nevertheless, the absence of a secondary response and its resulting physical injury should not foreclose relief. In either event plaintiff should be permitted to prove medically the damages occasioned by his mental responses to defendant's negligent act, and the trial court should instruct the jury accordingly.

520 P.2d at 766-767.

Another commentator[9] has suggested that the reasonable man standard proposed by the court in RODRIGUES and adopted by others is less desirable than a standard based on secondary reaction to emotional distress, suggesting that recovery should be granted only in cases where secondary reactions of pure emotional distress are proven. Id. at 251-3.

Plaintiffs submit that the bottom line on this issue is that the time has come to recognize, as other courts have, that "[e]motional injury can be as severe and debilitating as physical harm and is deserving of redress." SCHULTZ, supra, 447 N.E.2d at 113. A damage remedy for purely mental distress has long been available in cases such as invasion of privacy or negligent defamation, where the impact rule has never applied. GONZALEZ, supra at 675, TANNER, supra at 708. As this Court stated in KUSH: "If emotional damages are ascertainable in these contexts, then they are also ascertainable here." 616 So.2d at 422. Plaintiffs maintain that the same conclusion should apply across-the-board in negligent infliction of emotional distress cases. Indeed, it is questionable whether there is any real difference between the task facing a court and jury in defamation or invasion of privacy cases and their task in

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[9]/David R. Lenox, *Negligent Infliction of Emotional Distress--Should the Florida Supreme Court Replace the Impact Rule with a Foreseeability Analysis?* Champion v. Gray, 420 So.2d 348 (Fla. 5th DCA 1982), 11 Fla.St.U.L.Rev. 229 (1983).

cases such as this. The same is true regarding emotional distress damages available in independent tort cases (so-called "parasitic" damages[10]) and claims for negligent infliction of emotional distress, particularly since in the independent tort cases, damages for emotional distress are available no matter how slight the physical injury.

As the courts have discussed in other jurisdictions, imposing a physical injury requirement in this context ignores the contemporary competence of medical science to separate real from fanciful claims. Further, it totally ignores the widespread recognition of psychological conditions such as Judge Dauksch's example, Post-Traumatic Stress Syndrome, whose onset can occur without any physical impact whatsoever. Thus, to a large extent, the physical injury requirement exists in a "never-never land," oblivious to the evolving psychological realities of life, which is perhaps why, as the Court in SCHULTZ, supra, observed that legal scholars who have considered the issue are unanimous in condemning the physical injury requirement "as unjust and contrary to experience." 447 N.E.2d at 113.

As the survey of cases presented here establishes, all jurisdictions which have done away with the physical injury requirement have nonetheless limited recovery to cases of serious emotional distress. In most of such cases, added protection against

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[10]/William L. Prosser, LAW OF TORTS §55 at 350 (1964).

unlimited liability will likely be provided by the testimony of psychological experts. If that is so, then the statement by the Supreme Court of Hawaii in RODRIGUES rings true:

> Courts which have administered claims of mental distress incident to an independent cause of action are just as competent to administer such claims when they are raised as an independent ground for damages. In judging the genuineness of a claim of mental distress, courts and juries may look to the quality and genuineness of proof and rely to an extent on the contemporary sophistication of the medical profession and the ability of the court and jury to weed out dishonest claims.

472 P.2d at 519-20 (citation and internal quotation marks omitted). That conclusion is particularly true in a case such as this, where there is no question that the impact aspect of the impact rule has been satisfied.[11]

HIV Exposure

There is no question that the Coke bottle at issue in this case contained something foreign and offensive. Indeed, Defendant admitted so both in testimony

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[11]/Plaintiffs further submit that, unlike the choice among the proposed alternatives to the requirement of the impact rule, see Lester E. Segal, *Recovery for Direct Negligent Infliction of Emotional Distress: The Impact Rule, or a Better Idea?*, 69 Fla.Bar J. 10 (April 1995), deciding whether the physical injury requirement should be retained does not involve public policy line-drawing, but simply issues of proof and the trial process itself.

(T2 65, 67) and in argument before the jury (T2 153, 156). The only issue was whether the foreign object was a condom, the central factual issue which the jury obviously decided in favor of Plaintiffs, with ample support in the evidence. Plaintiffs testified that from their observation, the item was a condom with some sort of stringy substance oozing from it (T1 67-8, 90-2, 128, 132, 146). Coca-Cola sales representative Barry Katz signed a receipt for the coke bottles which recited that it contained a white condom (T136). Even Dr. Forrest Bayer, Defendant's director of packaging (T257), testified that when he visually inspected the bottle he thought it had a condom in it (T262-4). Even though he testified that the foreign item was actually a gelatinous mold, not a condom (T274), on cross-examination he admitted that one of Plaintiffs' photographs of the bottle before it was given to Defendant (PX4) showed the foreign object adhering to the bottom of the bottle, rather than floating on the surface as would be the case if the object were a mold, which he had testified would be free-floating and would orient itself in the "up" direction if the bottle was turned upside down, and vice versa (T2 71, 82, 86). In addition, the jury had the benefit of photographs of the bottle before it was turned over to Defendant (PX2, 3, 4, T1 144-5). Coca-Cola sales representative Barry Katz identified one of those photographs (PX3) as an accurate depiction of the bottle as it looked on the day he picked it up from the office of Plaintiffs' attorney (T142). Obviously, the jury rejected the

testimony of Dr. Bayer that supported Defendant's position, and had reasons to do so based on factors developed in cross-examination (T2 79-85).

Given the jury's finding that the coke bottle included a condom as an unwelcomed bonus, if this Court does not require a finding of physical injury, then Plaintiffs maintain that emotional distress from a fear of developing AIDS is the kind of serious mental distress for which the above-discussed cases would provide redress, and that the judgment in this case should have been affirmed on that basis.

Admittedly, there was no testimony establishing that the contents of the coke bottle contained the HIV virus, and therefore no testimony that Plaintiffs were actually exposed to the virus. Among cases in other jurisdictions which have considered claims for damages for emotional distress arising out of alleged exposure to the HIV virus, the courts in BABICH v. WAUKESHA MEMORIAL HOSPITAL, INC., 556 N.W.2d 144, 147 (Wis. App. 1996); DRURY v. BAPTIST MEMORIAL HOSPITAL SYSTEM, 933 S.W.2d 668, 674 (Tex. App. 1996); and CARROLL v. SISTERS OF ST. FRANCIS HEALTH SERVICES, INC., 868 S.W.2d 585, 590 (Tenn. 1993), explained that the cases decided thus far present basically two analytical approaches to the issue. One standard, referred to as the "overall reasonableness" standard, permits consideration of all the circumstances surrounding the incident at issue, regardless of whether actual exposure to HIV has been shown, and the question of

whether the plaintiff's fear is reasonable under the circumstances is left to the jury to determine as a question of fact. The other standard, referred to as the "proof of contaminated source" standard, requires the plaintiff to prove actual exposure to the HIV virus. The latter approach is followed in a large majority of cases which have considered the issue to date.

On the issue of actual exposure, two factors have been considered relevant in the case law: (1) whether there was exposure to the HIV virus, and (2) whether the exposure was via a scientifically-accepted method of transmission of the virus. See BROWN v. NEW YORK CITY HEALTH AND HOSPITALS CORP., 225 A.D.2d 36, 648 N.Y.S.2d 880, 886 (N.Y. App. Div. 1996); DeMILIO v. SCHRAGER, 285 N.J. Super. 183, 666 A.2d 627, 631 (N.J. Super. 1995). The court in BROWN explained that the existence of a channel for infection makes the threat of infection much more of a real possibility to be feared and far more than a speculative worry. Id. Various cases have taken judicial notice of facts regarding HIV, including that the fluids which transmit it are blood, semen, vaginal fluids, and breast milk, and that the primary modes of transmission include sexual contact, exposure to contaminated blood or blood components, sharing of contaminated intravenous needles, and perinatally from mother to infant. See PENDERGIST v. PENDERGRASS, 961

S.W.2d 919, 922 (Mo. Ct. App. 1998); BRZOSKA v. OLSON, 668 A.2d 1355, 1357 n. 1 (Del. 1995).

While the majority of cases require proof of exposure, others have not. For example, in CASTRO v. NEW YORK LIFE INS. CO., 153 Misc.2d 1, 588 N.Y.S.2d 695 (Sup. Ct. 1991), a cleaning worker was stuck in the thumb by a used hypodermic needle as she was attempting to empty a waste container at the offices of New York Life. Although the plaintiff offered no evidence of HIV infection or that the needle was contaminated by the HIV virus, dismissal and summary judgment were denied based on the Court's conclusion that a reasonable person exposed to information about AIDS could develop a fear of contracting it under the circumstances of that case. In support of its ruling, the court explained:

> The overwhelming consensus of medical opinion is clear: the HIV virus is not spread casually. Rather, it has specific and well-known modes of transmission through sexual contact, exposure to infected blood, or blood components, and perinatally from mother to infant....
>
> Moreover, even though the AIDS disease is still not completely understood by the medical profession, it is known to have a dormant quality which may not manifest itself in its victims for many years after a person is exposed to the HIV virus....
>
> Here, Castro's claim for mental anguish and "AIDS Phobia" is directly tied to the date on which she allegedly received the hypodermic puncture to her right thumb. Given the massive informational campaign waged by

> federal, state and local health officials over the last few years in an effort to educate the public about this dreadful disease, any reasonable person exposed to this information who is stuck by a used and discarded hypodermic needle and syringe from which blood was apparently drawn could develop a fear of contracting AIDS....
>
> The medical community has been unwavering in its view that the HIV virus can be transmitted through the blood. Castro testified at her deposition that she had seen commercials about the disease on television. She was therefore aware of the possibility of contracting the disease through HIV contaminated blood. Clearly, then, there exists here a basis to guarantee the genuineness of her claim....

558 N.Y.S.2d at 697-8.

Similarly, in MARCHICA v. LONG ISLAND RR. CO., 31 F.3d 1197, 1205-6 (2d Cir. 1994), cert. denied, 513 U.S. 1079, 115 S.Ct. 727, 130 L.Ed.2d 631 (1995), an employee was stuck in the hand by a hypodermic needle which was hidden among a pile of refuse. The Second Circuit Court of Appeals affirmed the denial of summary judgment, even though there was no proof of actual exposure. The court reasoned that a plaintiff who has suffered a physical impact may recover for a fear of developing AIDS if the impact caused by the defendant's negligence occurred under circumstances that would cause a reasonable person to develop a fear of AIDS.

In FAYA v. ALMARAZ, 329 Md. 435, 620 A.2d 327, 336-7 (Md. 1993), two patients were operated on by a surgeon infected with AIDS, but could not prove that

they were exposed to the virus. The Maryland Court of Appeals reversed the dismissal of their claims based on lack of proof of actual exposure. Even though the complaints did not identify any actual channel of transmission, the court stated that the plaintiffs' fear of acquiring AIDS was not unreasonable as a matter of law.

Both MARCHICA and FAYA allowed recovery only for the period of time between possible exposure and the time when the plaintiffs knew, or had reason to know, that they had not in fact become infected with the disease. 31 F.3d at 1207; 620 A.2d at 337. A number of courts, including those dealing with cases of actual exposure, have limited recovery for emotional distress damages to a "window of anxiety," usually identified by the plaintiff having received negative results from a second HIV test. See PENDERGIST, supra at 922; MAJCA v. BEEKIL, 289 Ill.App.3d 760, 682 N.E.2d 253, 256 (Ill.App. 1997); RUSSAW v. MARTIN, 221 Ga.App. 683, 472 S.E.2d 508, 512 n. 2 (Ga.Ct.App. 1996); FUNERAL SERVICES BY GREGORY, INC. v. BLUEFIELD COMMUNITY HOSPITAL, 413 S.E. 79, 82 (W.Va. 1991).

Given these authorities, Plaintiffs maintain that the judgment in this case should have been affirmed. Both Plaintiffs were well-educated women who had received approximately two hours of informational instruction by the health department (in addition to what they already knew) when they appeared to take their first HIV test

(T1 71-72, 123, 127). As Plaintiffs argued during the directed verdict arguments, they had a reasonable basis for fear based on that instruction and the general knowledge common in society about the AIDS virus (T2 47).

The Fifth District rejected Plaintiffs' argument, determining that damages for fear of developing AIDS were not available due to lack of proof that the condom was contaminated with HIV, and alternatively, that Plaintiffs had failed to show a medically and scientifically accepted channel for transmitting the disease. 24 Fla.L.Weekly at D2691. That decision was error, because numerous cases decided in this area have taken judicial notice that among the fluids which transmit HIV are semen. See, e.g., PENDERGIST, supra; BRZOSKA, supra. Oral sex is virtually an archetypical channel of transmission of the AIDS virus. Drinking a soda which contains a used condom oozing with semen parallels the exposure encountered in oral sex. Thus, there was a channel of transmission. Although there was no proof of HIV contamination, nonetheless Plaintiffs submit that the nature of the object which the jury found to have been in the coke bottle, coupled with its appearance (oozing) and condition (unpackaged and used) would surely cause alarm in any reasonable person, at least during the "window of anxiety." As the court stated in BROWN v. NEW YORK CITY HEALTH AND HOSPITALS CORP., supra at 886, the existence of a channel for infection makes the threat of infection a much more real possibility to be

feared, and "far more than a speculative worry." Furthermore, consistent with many of the cases reviewed here, the trial court limited Plaintiff's argument for damages for emotional distress in front of the jury only to the period of the "window of anxiety," which in this case the court defined to be the time when the women underwent the second HIV test with negative results, and did not allow them to argue for damages in the future (T2 96, 99-100, 103-104, 130-131). The jury was so instructed (T2 178-180). Accordingly, despite the lack of proof of actual exposure, the judgment should have been affirmed.

Other Damages Elements

Even if the Fifth District was correct in determining that there was no proof of actual exposure to HIV, and that there was not an accepted channel for transmission of the disease, that should not have resulted in reversal. This was not simply a "fear-of-AIDS" case. It was also a case of emotional distress caused by the ingestion of soda from a bottle contaminated by an object at once both comical and loathsome. It was not just a condom, but gave every appearance of being a used condom. From the very moment the Plaintiffs appeared at the emergency room of the hospital, they became objects of laughter, and the embarrassment, humiliation and shame which they encountered thereafter were such that both tried to hide the incident from everyone

except those closest to them, with little success in the small town where they lived. Indeed, the notorious nature of the disgusting contaminant was such that the incident was even reported in the local newspaper and on the radio.

Furthermore, aside from whether there was actual exposure to HIV, condoms bear a singular reputation as vessels for harboring AIDS-infected semen, which is the most publicized reason for using them since the onset of the AIDS epidemic. They bear the same reputation regarding other diseases transmittable by sexual intercourse. As Parker testified, Plaintiffs had reason to be concerned that they might be shunned, due to the concerns of other people that they might be sick with some type of disease (not just AIDS) due to the incident. "You know, people tend to back away from you." (T1 128).

Parker particularly harbored serious concern that if people thought she or her sister had been exposed to AIDS or some other sexually-transmittable disease, it would damage her business severely by causing children to be pulled out of the day care center which she had run for children aged 2 to 12 for 16 years (T1 113-14). As she stated, she was concerned about the fact that "I run a daycare and it's in Hastings and Hastings is very small. So, if the wrong information gets out in Hastings, I wouldn't have any children. It gets out very, very fast." (T1 118). The lack of proof at trial of actual exposure to HIV is irrelevant to the damaging public perception of

the incident, based simply on the fact that it involved a used condom. Of course, Parker's sister would have cause for similar concern, since at the time she was an employee at the day care center. Certainly during the months that ensued after the incident, Plaintiffs' concerns in this regard were reasonable, and displayed a serious level of emotional distress. As Judge Dauksch described it: "It was evident and reasonable to believe that appellees were very concerned, fearful, upset, worried and suffered many other negative emotional impacts," 24 Fla.L.Weekly at D2692, a description which is borne out by their testimony.

The Fifth District rejected this argument, ruling that damages were sought in this case only for fear of contracting AIDS. 24 Fla.L.Weekly at D2690. Not so. Plaintiffs addressed these matters in closing argument, including their effect on Willie Parker and his consortium claim (T2 145-6). Further, the claims in the complaint (R17) were not presented in terms of fear of AIDS, nor did the court's instructions (T2 172-84) limit the jury to consider only fear of AIDS damages. If there is any competent evidence to support a verdict, that verdict must be sustained regardless of the district court's opinion as to its appropriateness. HELMAN v. SEABOARD COAST LINE R.R. CO., 349 So.2d 1187, 1189 (Fla. 1977). If evidence supports an award of damages, the award may not be disturbed. PHILLIPS v. OSTRER, 481 So.2d 1241, 1246 (Fla. 3d DCA 1985). Here, the evidence supported the damages

awarded, particularly in the remitted amount. The pivotal factual finding which the jury had to make with regard to these issues was whether the offensive object was a used condom or not, and that issue was squarely placed before them and clearly decided in Plaintiffs' favor.

Finally, another aspect to this case should be considered. This case occupies a special category of ingestion cases, those involving inherently-loathsome objects found in food or drink, worse by any measure than, for example, an insect. The condom in this Coke bottle was disgusting in the extreme. It was described as looking like an opened balloon with "a snotty, oozy-like, stringy-like something coming out of it" (T190-2), or as a used "rubber," with a "clunk of mucous and stringy white stuff" coming out of its base (T1 128). This case easily occupies the position of cases like WAY v. TAMPA COCA COLA BOTTLING CO., 260 So.2d 288 (Fla. 2d DCA 1972), where after drinking some of the Coke, the plaintiff discovered that it contained "a rat with the hair sucked off." Id. Another similar case is WALLACE v. THE COCA-COLA BOTTLING PLANTS, INC., 269 A.2d 117 (Me. 1970), where after drinking from a Coke bottle, the plaintiff discovered that it contained "an unpackaged prophylactic." Id. at 118. In WAY, the plaintiff became nauseated and vomited, while in WALLACE the plaintiff "became ill after he returned home and began to think

about his experience." Id.[12] In the instant case, Hagan testified that she became "nauseated, really sick and scared," and panicked (T168). Parker apparently did not become nauseated or sick at the scene. Cases like WAY, WALLACE and the instant case involving extremely loathsome foreign objects in food should continue to occupy the position of classic cases where recovery is allowed, even in the absence of physical injury. Plaintiffs submit that this type of case does not fit within Judge Reed's statement in his dissent in STEWART v. GILLIAM, 271 So.2d 466, 477 (Fla. 4th DCA 1972), quoted approvingly by this Court in CHAMPION at 18, that "[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." Cases such as these exceed that level of harm. One would be hard-pressed, if put to the choice, to choose between finding a rat with its hair sucked off, or an oozing, used condom, in a Coke bottle after drinking from it as an acceptable price to be paid for living in our organized society, because either is well beyond the realm of acceptability. The loathsomness aspect of this case alone merits relief, even aside from the fear of AIDS aspect and the other consequences discussed above.

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[12]/The Supreme Court of Maine in a later case receded from its requirement in the WALLACE opinion that the plaintiff must allege or prove physical manifestations of distress. See CULBERT, supra at 437.

CONCLUSION

Based on the foregoing argument, Petitioners respectfully request that the Opinion of the District Court be quashed, and that the judgment be reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to RAOUL G. CANTERO, III, ESQ., 2601 S. Bayshore Dr., Ste. 1600, Miami, FL 33133; and MICHAEL J. OBRINGER, ESQ., 12 E. Bay Street, Jacksonville, FL 32202, by mail, this 8th day of May, 2000.

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Florida Bar No. 269824

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