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.
_____/

PETITIONERS' REPLY BRIEF ON THE MERITS

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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;

(PB) - Petitioner's Initial Brief on the Merits;

(RB) - Respondent's Brief on the Merits.

ARGUMENT

THE PHYSICAL INJURY REQUIREMENT OF THE IMPACT RULE SHOULD BE ABOLISHED

Respondent includes a Statement regarding Jurisdiction (RB7-8), in which it argues that the Court need not exercise its jurisdiction because of its recent re-affirmations of the impact rule, and because a fear-of-AIDS claim in this case is not viable based on the evidence. However, the precise issue in this case is the requirement of physical injury in ingestion cases, an issue which the Fifth District in its opinion acknowledged "is not entirely clear, from various statements in the Florida cases." COCA-COLA BOTTLING CO. v. HAGAN, 24 Fla.L.Weekly D2688, 2690 (Fla. 5th DCA December 3, 1999). As Plaintiffs maintained in their Initial Brief (PB20-22), DOYLE v. PILLSBURY CO., 476 So.2d 1271 (Fla. 1985), can be interpreted to mean either that in ingestion cases, the ingestion of the foul substance itself is an impact, or that impact is not required because of the fact of ingestion. In DOYLE, the Court pointed out that the "ingestion requirement is grounded upon foreseeability rather than the impact rule," and quashed the portion of the Fourth District's opinion which applied the impact rule in that case. Id. at 1272. In DOYLE, the Court also stated that a producer or retailer of food must expect to bear the costs

of the resulting injuries after a person becomes "physically or mentally ill" after consuming a food product and then discovering a deleterious foreign object in it. Id.

Because DOYLE states that liability arises if a person becomes physically or mentally ill after ingestion of a foul substance, Plaintiffs have maintained that DOYLE does not require a physical injury preceding the emotional distress. The Fifth District disagreed, but did so tentatively, stating that "it is likely that in cases involving slight impact, such as ingestion, the court would require proof of physical injury...." Id. at D2691. Therefore, because DOYLE establishes either that the impact rule does not apply in ingestion cases, or that ingestion itself is an impact, whether or not there was an impact in this case is not at issue, because there clearly was ingestion. The only issue is whether in an ingestion case physical injury must precede emotional distress. Plaintiffs maintain that the logic of ingestion cases, and the DOYLE opinion itself, do not require physical injury. At any rate, Defendant is clearly incorrect in contending that this Court should not exercise jurisdiction because this Court's prior opinions have definitively disposed of the issue in this case.

The briefs submitted in this case, as well as the Fifth District's opinion, id. at D2691 n. 9-11, thoroughly explore the state of the law nationally on the issue of the degree of exposure to HIV required in fear-of-AIDS cases. Even if this Court chooses to follow the majority position on that issue, denying Plaintiffs any recovery

whatsoever in this case, which is the result of the Fifth District's opinion, absolutely defies common sense. As one commentator has suggested,[1] the rationale underlying this Court's holding in KUSH v. LLOYD, 616 So.2d 415 (Fla. 1992), that the impact doctrine does not apply to claims for wrongful birth, is that "no one would seriously contend that the emotional distress of parents under such circumstances was feigned or fraudulent." The Virginia Supreme Court so stated in NACCASH v. BERGER, 223 Va. 406, 290 S.E.2d 825, 831 (1982), one of the cases cited by this Court in KUSH. The same rationale should apply to cases such as this, where ingestion involves an almost unspeakably foul substance or object. No one can seriously contend that emotional distress under such circumstances is feigned or fraudulent; indeed, it is virtually self-proving. There should be no further need to show physical injury to guarantee that the distress is real. To require proof of physical injury accompanying the distress in a case like this would, as the court in BERGER stated, "constitute a perversion of fundamental principles of justice." 290 S.E.2d at 831.

While the issue was closely contested in the trial court, the central factual issue which the jury obviously decided in favor of Plaintiffs was that the foreign object in the Coke bottle was a condom, with ample support in the evidence as Plaintiffs have

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[1]/Comment, *Florida Impact Doctrine: No Longer an Obstacle to Recovery for Emotional Damages in Wrongful Birth,* 45 Fla.L.Rev. 349, 354 (1993).

explained in their Initial Brief (PB35-6). As Plaintiffs have also explained in their Initial Brief (PB43-5), this was not simply a "fear-of-AIDS" case. The claims in the complaint were not presented in terms of fear-of-AIDS (R17), and the testimony, closing argument (T2 145-6), and jury instructions (T2 172-84) did not limit the jury to consider only fear-of-AIDS damages. Given the fact that the jury believed Plaintiffs' contention about what the disgusting object was, that fact and its gross condition justified significant damages in this case.

Further, the form of the verdicts in this case were three separate, general verdicts for each of the three Plaintiffs, which simply asked the jury whether there had been negligence on the part of Defendant which was the legal cause of damages to the Plaintiff, and if so, the amount of the damages (R232-234). No objection was raised by Defendant to the form of the verdicts when they were proposed by the judge (based on Defendant's form) during the charge conference (T2 122-124). Therefore, under the two-issue rule, Defendant's challenge to the jury's verdicts on the basis that the damages could have only been awarded for fear of AIDS must fail. Pursuant to the two-issue rule, when two or more theories of liability are submitted for resolution to the jury in a general verdict form, with no objection to the form of the verdict, and one of the matters decided by the jury is without error, then the Court must presume that all issues were decided in favor of the prevailing party, requiring that the judgment be

affirmed. See BARTH v. KHUBANI, 748 So.2d 260, 261-2 (Fla. 1999); ODOM v. CARNEY, 625 So.2d 850, 851 (Fla. 4th DCA 1993). Here, there was ample evidence upon which the jury could have awarded damages, totally aside from the AIDS fear issue, and thus the judgment should be affirmed.

Plaintiffs' contention, ably supported by amicus AFTL (Amicus Brief at 7-8), is that this is a "direct victim" case rather than a "bystander" case. Bystander cases such as CHAMPION v. GRAY, 478 So.2d 17 (Fla. 1985), arise where a plaintiff seeks to recover damages as a percipient witness to the injury of another, while direct victim cases arise from the breach of a duty directly owed to the plaintiff by the defendant. See BURGESS v. SUPERIOR COURT, 831 P.2d 1197, 1199 (Cal. 1992). An ingestion case such as this is the archetype of the direct victim variety. Plaintiffs have maintained (PB32-4) that the physical injury requirement should not apply in negligent infliction of emotional distress cases across-the-board. Amicus AFTL (Amicus Brief at 7-8) agrees regarding direct victim cases, but suggests that a physical injury requirement may be appropriate as a needed limitation in bystander cases. Nonetheless, regarding the category of case presented sub judice, a direct victim ingestion case, a physical injury requirement is unneeded as a limiting factor because the repugnant nature of the experience itself signals the authenticity of the claim.

Plaintiffs' argument is not at all weakened by the cases which Defendant (RB21-3) and amicus FDLA (Amicus Brief at 7) cite to create the impression that there has been a wholesale backpeddling by other courts from prior opinions in which they have done away with the physical injury requirement. For example, in BURGESS v. SUPERIOR COURT, supra, the California Supreme Court did not retreat from the abrogation of the physical injury requirement. However, it did amend the position which it had taken in its prior decision in MOLIEN v. KEYSER FOUNDATION HOSPITALS, 27 Cal.3d 916, 616 P.2d 813 (1980), and clarified that MOLIEN was not intended to introduce a new method for determining the existence of duty based on foreseeability alone. The Court in BURGESS held that in direct victim cases, while physical injury or impact was not required, the traditional requirement of a duty owed the plaintiff still applied. 831 P.2d at 1201.[2] Here, Plaintiffs have never proposed that traditional tort principles be supplanted only by the concept of foreseeability as did the California court in MOLIEN.

Similarly, Plaintiffs' position here would not comprehend a cause of action such as that entertained in DOLD v. OUTRIGGER HOTEL, 501 P.2d 368 (Haw. 1972),

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[2]/The California court similarly clarified the impact of MOLIEN in bystander cases in THING v. LaCHUSA, 771 P.2d 814 (Cal. 1968), by requiring that the plaintiff must be closely related to the injury victim and present at the scene of the injury producing event, similar to the requirements in the CHAMPION case, but still without the requirement of physical injury. Id. at 829.

where emotional distress damages were permitted along with other damages in a breach of contract for hotel accommodations. However, DOLD and the case which Defendant cites as overuling it, FRANCIS v. LEE ENTERPRISES, INC., 971 P.2d 707, 713 (Haw. 1999), were based on an underlying cause of action recognized in Hawaii but not in Florida, a "tortious breach of contract." Thus, DOLD and FRANCIS are totally inapposite to this case, and Hawaii appears still to follow the rule established in RODRIGUES v. STATE, 472 P.2d 509, 519 (Haw. 1970), as explained in the Initial Brief (RB26-7).

In HEINER v. MORETUZZO, 652 N.E.2d 664 (Ohio 1995), the Ohio Supreme Court did not "revert to a physical injury requirement" (RB22) because of a perceived explosion of litigation due to its abrogation of the physical injury requirement in SCHULTZ v. BARBERTON GLASS CO., 477 N.E.2d 109 (Ohio 1983). Rather, HEINER simply clarified that SCHULTZ and its progeny required that negligent infliction of emotional distress damages were available only where the plaintiff is cognizant of a physical danger to himself or another. Id. at 669. Of the cases cited by Defendant, only the California cases involve a tightening of the rules because of an increase in litigation, because in that state its prior decision had effectively done away with any requirement except foreseeability. Thus, the wholesale retreat which

Defendant and amicus FDLA attempt to portray on the part of the out-of-state courts cited in Plaintiffs' Initial Brief does not in fact exist.

Finally, Defendant cites (RB23) cases from other states which require a physical injury before awarding damages in food ingestion cases. Among those cases are two involving Coke bottles with decomposed mice inside. WRIGHT v. COCA-COLA BOTTLING CO. OF CENTRAL SOUTH DAKOTA, INC., 414 N.W.2d 608 (S.D. 1987); CUSHING COCA-COLA BOTTLING CO. v. FRANCIS, 245 P.2d 84 (Okl. 1952). Those cases prove Plaintiffs' point. A mouthful of decomposing mouse juice ought to be sufficient alone, without proof of physical injury, to get to a jury. Surely no one would seriously contend that emotional distress due to that savory circumstance is feigned or fraudulent. The same is true of an oozing condom. Even one swallow ought to be recognized as too great a price to pay for living in an organized society without recompense. That is what Plaintiffs believe this Court has already established in DOYLE, and at least to the extent that the Fifth District's opinion here disagrees with that, the opinion should be quashed.[3]

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[3]/The WRIGHT case does provide some instructive discussion regarding the role of the jury in such cases. There, the plaintiff's swallow of mouse juice caused him to gag, but he never actually vomited, and the South Dakota Supreme Court held that it should be a jury which decides whether the extent of physical harm or effect is either too inconsequential or trivial to permit recovery. Similarly here, while no physical injury should be required, it would still be up to a jury to determine whether

(continued...)

CONCLUSION

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

[3](...continued)
the extent of loathsomeness of the ingested substance is sufficient to justify recovery.

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; MICHAEL J. OBRINGER, ESQ., 12 E. Bay Street, Jacksonville, FL 32202; JOHN G. CRABTREE, ESQ., 544 Ridgewood Rd., Key Biscayne, FL 33149; and TRACY RAFFLES GUNN, ESQ., P.O. Box 1438, Tampa, FL 33601, by mail, this 1st day of September, 2000.

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