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

RESPONDENTS' BRIEF ON THE MERITS

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INTRODUCTION

This case is before the Court on review of a decision of the Fifth District Court of Appeal certifying a question of great public importance. This Court has discretionary jurisdiction. *See* Art. V, § 3(b)(4), Fla. Const. (1999). The appeal to the district court was from a final judgment after a jury verdict in Plaintiffs' favor. After drinking from a Coca-Cola bottle they assumed contained a used condom, Plaintiffs sought damages for negligent infliction of emotional distress, alleging they feared contracting AIDS. The jury awarded them $170,000, which the trial judge remitted. The Fifth District Court of Appeal reversed the verdict, holding that (a) the impact rule precluded recovery for negligent infliction of emotional distress without both impact and physical injury; and (b) even disregarding the impact rule, every court that has considered a fear-of-AIDS claim has required either actual exposure to the HIV virus or a scientifically-proven channel of transmission, neither of which was present in this case.

Review in this Court presents two possible issues. In view of the certified question, this Court may first consider whether to abolish the impact rule in Florida, so that plaintiffs may recover for negligent infliction of emotional distress without demonstrating any physical injury or illness. Thirty states continue to require physical injury for recovery of emotional distress damages. If this Court follows the 14 states that have abolished that requirement, it must then fashion the standard under which plaintiffs may recover for fear of contracting AIDS. As explained below, the

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overwhelming majority of courts that have considered the issue require two factors: actual exposure to the HIV virus and a scientifically-accepted channel of transmission. A very small minority of courts require a likelihood that HIV was present and a scientifically-proven channel of transmission. As the district court of appeal recognized, neither was present in this case. Therefore, regardless of the impact rule, the district court's decision should be affirmed.

CERTIFICATE OF FONT TYPE

The undersigned certifies that this brief was drafted using the Times New Roman 14 point font type on WordPerfect.

STATEMENT OF THE CASE AND FACTS

The facts are explained in detail in the decision under review. *See Coca-Cola Bottling Co. v. Hagan*, 750 So. 2d 83, 84 (Fla. 5th DCA 1999). Rather than repeat them here, Respondents summarize only the most important facts and some that Plaintiffs' statement may have omitted. Most of the facts are taken from the opinion.

A. Relevant Facts

Plaintiff Linda Hagan worked as a teacher at a day care center near St. Augustine, Florida. *See Coca-Cola Bottling Co. v. Hagan*, 750 So. 2d 83, 84 (Fla. 5th DCA 1999). Her sister, Plaintiff Barbara Parker, owned and operated the center. *Id.* In September 1992, Hagan went to a nearby store and bought two Cokes and a Sprite.

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750 So. 2d at 84. She drank one Coke on the way back to the center. *Id.* When she arrived, she gave the other Coke to Parker. *Id.* Parker broke the seal, poured part of the contents into a cup, and drank some. *Id.* She remarked that there was something wrong with it, and asked Hagan to taste it. *Id.* Hagan took a sip and agreed. *Id.* It tasted flat. *Id.* Hagan took the bottle into the bathroom and held it up to the light. *Id.* She saw something floating in the bottle that looked like a used condom, with "oozy stringy stuff" coming out of the top. *Id.* Hagan became nauseated. *Id.* Both became frightened for their health, but neither developed any physical symptoms.

Because they were concerned that they might have been exposed to HIV, Hagan and Parker took HIV tests, which proved negative. *Id.* Six months later they took another test, which again proved negative. *Id.* Neither has taken an HIV test since. Nor has either suffered any physical illness resulting from drinking the Coke, or from the emotional upset it caused them.

The offending Coke bottle was taken to Parker's house, sealed in an evidence bag, and locked in a filing cabinet. *Id.* About a week later it was delivered to an attorney Plaintiffs had hired. *Id.* at 84-85. Neither the Plaintiffs nor their attorney ever opened the sealed bags, or had the contents tested. *Id.* at 85. Coca-Cola later obtained the bottle and did test it. A chemist inspected the contents of the bottle and determined it was a mold. *Id.* He concluded that, to a "scientific certainty," the item floating in

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the Coke bottle was not a condom. *Id.* He admitted, however, that he did not see the lab technician pour the Coke and item into the beaker just before it was tested. *Id.*

Plaintiffs presented no medical or scientific evidence that HIV was present in the Coke. *Id.* They also presented no evidence that HIV can be transmitted from a contaminated source in this manner, or that if it could be, how long a person who tasted the Coke would be at risk for contracting AIDS. *Id.*

B. Proceedings in the circuit court

Four years after the incident, Plaintiffs sued Coca-Cola for negligent infliction of emotional distress (R. 1:1). After Plaintiffs presented their evidence at trial, Coca-Cola moved for a directed verdict, arguing that Plaintiffs failed to prove any impact under Florida law and that, even assuming impact, Plaintiffs had failed to prove actual exposure to HIV (T. 2:32-36). The judge denied the motion (T. 2:52). Coca-Cola renewed its motion after all the evidence, but again the court denied it (T. 2:94-96). The court did rule, however, that the Plaintiffs' fear of contracting AIDS was no longer reasonable after the second AIDS test (T. 2:130-31). The jury awarded Linda Hagan and Barbara Parker each $75,000 "plus medical bills;" and awarded Willie Parker $20,000 for loss of consortium (T. 2:189-90).

After trial, Coca-Cola filed a motion for entry of judgment in accordance with the prior motion for directed verdict, or in the alternative, for a new trial (R. 2:235,

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243), as well as a motion for remittitur (R. 2:238, 241). After a hearing (SR. 1-41),[1] the court denied the motion for directed verdict or for new trial, but granted a remittitur (R. 2:270-71). The judge ruled that the Plaintiffs' damages should be limited to the period between the plaintiffs' possible exposure to the disease and their negative HIV test results six months later. *See Hagan,* 750 So. 2d at 85-86. The court reduced the verdicts to $25,000 each as to Linda Hagan and Barbara Parker and to $8,000 for Willie Parker, for a total verdict reduction from $170,000 to $58,000 (R. 2:272).

C. <u>The district court's decision</u>

Coca-Cola appealed the judgment to the Fifth District Court of Appeal. Plaintiffs cross-appealed the remittitur. The Fifth District reversed the judgment. *See Hagan*, 750 So. 2d at 84. The court analyzed the case on two levels. It first determined that the impact rule required both impact and injury for recovery of damages for negligent infliction of emotional distress. *Hagan*, 750 So. 2d at 86-89. The court cited cases from this Court as recent as 1997 -- as well as other cases from around the state -- reaffirming the impact rule. *Id.* at 88 (citing *Tanner v. Hartog*, 696 So. 2d 705 (Fla. 1997); *Zell v. Meek*, 665 So. 2d 1048 (Fla. 1995); *R.J. v. Humana of Fla., Inc.*, 652 So. 2d 360, 362 (Fla. 1995)). The Plaintiffs failed to show any physical injury from drinking the contaminated Coke. *Id.* at 87.

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[1] Coca-Cola supplemented the record with the transcript of the hearing and the transcript of trial, which was inadvertently omitted from the record.

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After determining that the impact rule required reversal, the court analyzed the possible result without the rule, and held that reversal would be required anyway:

> we have found no case in researching all of the states, that would permit recovery for fear of contracting AIDS -- emotional distress damages, based on a record like this one. The fear of AIDS cases in which recovery has been allowed for negligent infliction of emotional distress and upset alone, require as a threshold, a showing by the plaintiff that the fear is reasonable. The great majority of cases say this means the plaintiff must show that the virus was present, and that the contact between the material containing the virus and the plaintiff was a medically and scientifically accepted channel for the transmission of the disease. A minority of courts hold that actual presence of HIV or AIDS need not be shown, if it is likely and probable to believe the virus was present, and there was a medically and scientifically accepted channel shown by which the plaintiff could have become infected.
>
> Neither standard was met in this case. The appellees failed to establish that the condom and material in the Coke were contaminated with HIV. Nor did they show that it was likely and probable that the virus was present. Only a very small percentage of the general population is HIV positive or has AIDS, and the mere presence of semen would not be enough. The appellees also failed to show a medically and scientifically accepted channel for transmitting the disease. Without such showings or proofs, a plaintiff's fear of contracting AIDS is unreasonable as a matter of law and not a legally compensable injury. As a matter of public policy, the allowance of such lawsuits without the threshold proofs discussed above could lead to an explosion of frivolous litigation, opening as some courts say a "Pandora's box" of AIDS phobia claims.

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Hagan, 750 So. 2d at 90-91 (footnotes omitted). Thus, the district court determined that regardless of the impact rule, Plaintiffs had failed as a matter of law to prove a claim for their fear of contracting AIDS.

Judge Dauksch concurred, reiterating his long-held position that the impact rule should be abolished. Two judges, including Dauksch, concurred in certifying to this Court the following question: should the impact rule be abolished or amended in Florida? This petition follows.

STATEMENT REGARDING JURISDICTION

Although this Court has the discretion to review this case, it need not exercise it here. The sole basis for jurisdiction is the certified question asking whether the impact rule should be abolished. This Court has repeatedly answered that question and has decided that the impact rule serves a useful purpose. It is unnecessary to address the issue again so soon after the Court re-affirmed the rule.

As the district court recognized, *see Hagan*, 750 So. 2d at 88, this Court reaffirmed the impact rule just three years ago. In *Tanner*, 696 So. 2d at 707, which involved an action for negligent stillbirth, this Court allowed recovery of damages for emotional distress, holding that the impact rule was not intended to apply to such situations. *Id.* at 708. This Court emphasized, however, that "[a]t the same time, we do not intend to depreciate the value of the impact rule." *Id.* This Court then quoted its opinion two years earlier: "We reaffirm today our conclusion that the impact rule

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continues to serve its purpose of assuring the validity of claims for emotional or psychic damages, and find that the impact rule should remain part of the law of this state." *Tanner*, 696 So. 2d at 709 (quoting *Humana*, 652 So. 2d at 360). In *Humana*, this Court specifically rejected a request to abolish the rule. 652 So. 2d at 363. *See also Zell*, 665 So. 2d at 1054 (reaffirming that a cause of action for negligent infliction of emotional distress requires proof of a physical injury); *Gonzalez v. Metro. Dade County Public Health Trust*, 651 So. 2d 673, 674 & n.1 (Fla. 1995) (noting that Florida retains the rule).

Just two years ago, this Court again could have abolished the rule. Instead, it re-affirmed the physical injury requirement but created a narrow statutory exception to the rule in the insurance context. *See Time Ins. Co. v. Burger*, 712 So. 2d 389, 393 (Fla. 1998) (noting that the impact rule "holds that in the absence of a physical injury a person cannot recover compensatory damages for mental distress or psychiatric injury"). Having reaffirmed the impact rule five years ago, three years ago, and again two years ago, this Court need not address the issue a fourth time.

This is also the wrong case to abrogate the rule because it will not affect the ultimate outcome. As the district court recognized, and as explained in greater detail below, of the many states that have considered a fear-of-AIDS claim, *no* case has held such a claim viable under these circumstances. Even the most liberal courts have required a likelihood that the HIV virus was present *and* a scientifically-accepted

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channel of transmission. *See Hagan*, 750 So. 2d at 90. The district court noted that "[n]either standard was met in this case." *Id.* This Court should wait for a more compelling case.

SUMMARY OF THE ARGUMENT

If this Court decides to hear this case, it should affirm the impact rule. The rule requires that before a plaintiff can recover for negligent infliction of emotional distress, the emotional distress suffered must flow from physical injuries the plaintiff suffered as a result of an impact. *R.J. v. Humana of Fla., Inc.*, 652 So. 2d 360, 362 (Fla. 1995). The rule establishes a bright-line test ensuring that only genuine claims can be litigated. It assures the authenticity of claims and recognizes that not every injury should be compensated. Although Florida courts have been willing to liberalize the "impact" aspect of the rule, they have continued to require physical injury in almost all cases. Florida courts applying the impact rule in cases based on the fear of contracting a disease have required a disease or illness accompanying the emotional distress. Florida courts considering food ingestion cases also require a physical injury. Although most states have abolished the "impact" requirement of the rule, 30 states still require some physical injury associated with a claim for emotional distress, whether producing the emotional distress or caused by it. Plaintiffs concede that they suffered no physical injury.

If this Court abolishes the impact rule altogether, it must determine the standard for recovering emotional distress damages from a fear of contracting AIDS. Until this case, no Florida court had considered this issue. Many other states, however, have considered the requirements for a fear-of-AIDS claim. Overwhelmingly, they require proof of some physical ailment resulting from the exposure, or at least actual exposure to HIV. As those courts emphasized, public policy considerations dictate that fear-of-AIDS claims be limited to cases of actual exposure to the disease and a scientifically-accepted channel of transmission. Allowing recovery for injuries resulting from purely emotional distress, and without any requirement of actual exposure to the AIDS virus, would invite fictitious and speculative claims. Requiring actual exposure to the AIDS virus strikes a balance between compensating plaintiffs for emotional injuries and encouraging potential defendants to take reasonable steps to avoid such injuries, with the need to protect courts from frivolous suits.

If this Court does abrogate the impact rule but follows the overwhelming majority of courts requiring proof of actual exposure to recover for fear of contracting AIDS, nothing would remain of Plaintiffs' case. Despite Plaintiffs' assertions on appeal, they asserted no other elements of damages besides their fear of AIDS. As the district court recognized, Plaintiffs presented no evidence of the emotional distress caused by simply ingesting the offensive Coke. Their entire theory of damages was based on their fear of contracting AIDS. If this Court finds that Plaintiffs sought

damages other than for their fear of contracting a disease, however, a new trial would be required because Plaintiffs' fear-of-AIDS claim permeated the trial. The only recoverable damages would be for Plaintiffs' "disgust" at drinking a soda they assumed contained a condom. Of course, such a *de minimis* claim underscores one important reason for the impact rule: that not every injury should be compensated.

ARGUMENT

Coca-Cola presents the following argument in support of the district court's decision.

I. FLORIDA'S IMPACT RULE, WHICH REQUIRES PHYSICAL INJURY FOR RECOVERY OF DAMAGES FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS, SHOULD BE RE-AFFIRMED BECAUSE IT ESTABLISHES A BRIGHT-LINE RULE ENSURING THAT ONLY GENUINE CLAIMS ARE PERMITTED

If this Court decides to hear this case, the first issue it may consider is the certified question: whether the impact rule should be abolished. Below, Coca-Cola first discusses current Florida law on this issue, and then addresses the law of other jurisdictions and demonstrates why the impact rule should remain intact.

A. Florida law, prohibits recovery of damages for negligent infliction of emotional distress without accompanying physical injury

The impact rule requires that a plaintiff seeking damages for negligent infliction of emotional distress prove physical injuries resulting from an impact. *See Humana*, 652 So. 2d at 362. As this Court has explained, the rule was designed to ensure the authenticity of mental distress claims. *See Gonzalez*, 651 So. 2d at 674. Another reason for the rule was that allowing recovery for injuries resulting from purely emotional distress would open the floodgates for fictitious or speculative claims. *Humana*, 652 So. 2d at 363. The impact rule assures the validity of such claims. *Id.* As this Court has emphasized, however, the reasons for the rule extend even further:

> [t]here is more underlying the impact doctrine than simply problems of proof, fraudulent claims, and excessive litigation. The impact doctrine gives practical recognition to the thought that not every injury which one person may by his negligence inflict upon another should be compensated in money damages. There must be some level of harm which one should absorb without recompense as the price he pays for living in an organized society.

Gonzalez, 651 So. 2d at 675 (quoting *Stewart v. Gilliam*, 271 So. 2d 466, 477 (Fla. 4th DCA 1972) (Reed, C.J., dissenting), *quashed*, 291 So. 2d 593 (Fla. 1974)).

As further explained below, (1) although Florida courts have been willing to liberalize the "impact" requirement of the impact rule, they have continued to require physical injury in almost all cases; (2) Florida courts applying the impact rule in cases based on the fear of contracting a disease have required a disease or illness accom-

panying the emotional distress; and (3) Florida courts considering food ingestion cases also have required a physical injury.

1) Although Florida courts have been willing to relax the impact rule as it relates to actual "impact," they have been much more reluctant to relax the requirement of a physical injury associated with any emotional distress

Although the impact rule remains strong, this Court has created exceptions to the rule in certain narrow circumstances. For example, the rule does not apply to *intentional* infliction of emotional distress, *see Metropolitan Life Ins. Co. v. McCarson*, 467 So. 2d 277 (Fla. 1985); to claims for wrongful birth, *see Kush v. Lloyd,* 616 So. 2d 415, 422 (Fla. 1992); or to claims for stillbirth, *see Tanner*, 696 So. 2d at 708.

Florida courts also have relaxed the requirements of an impact, so that the impact requirement is easy to satisfy.[2] *See, e.g., Way v. Tampa Coca-Cola Bottling Co.*, 260 So. 2d 288 (Fla. 2d DCA 1972) (finding impact upon ingestion of food, even though the foreign object was not ingested).

While this Court has relaxed the *impact* aspect of the rule, however, it is much more reluctant to relax the *physical injury* requirement. In *Gonzalez*, for example, decided just five years ago, this Court refused to allow emotional distress damages resulting from the negligent mishandling of a corpse without some physical injury. This

[2] In fact, this requirement may be so easy to meet that for practical purposes it no longer exists. The concurring justice in *Humana* thought the majority opinion may have tacitly eliminated the impact requirement altogether. *See Humana*, 652 So. 2d at 365-66 (Kogan, J., specially concurring).

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Court warned that "[t]he consequences of such an exception are too far reaching in a modern society where it is recognized that not all wrongs can be compensated through litigation or the courts." 651 So. 2d at 676.[3] This Court therefore saw "no justification to recede from the long standing decisions of this Court in this area." *Id.* Also, in *Humana*, decided the same day as *Gonzalez*, the Court held that damages for emotional harm resulting from a misdiagnosis of HIV infection cannot be recovered without some physical injury. 652 So. 2d at 362. The Court warned that creating an exception in such a case would negatively affect many aspects of health care, and would make it difficult to limit speculative claims. *Id.* at 363-64. Finally, in *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985), this Court relaxed the impact requirement to allow recovery for the psychological trauma caused from observing the death of a close family member, but still required a *physical* injury. The Court noted,

> We perceive that the public policy of this state is to compensate for *physical* injuries, with attendant lost wages, and physical and mental suffering *which flow from the consequences of the physical injuries.* For this purpose we are willing to modify the impact rule, but are unwilling to expand it to purely subjective and speculative damages for psychic trauma alone.

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[3] This Court also noted that only rare cases involve mental disturbance not severe enough to cause physical harm but serious enough to deserve redress. *Id.* at 676 (citing *Prosser and Keeton on the Law of Torts*, § 54, at 362 (5th ed. 1984)).

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Id. at 20 (emphases added). *See also Brown v. Cadillac Motor Car Div.*, 468 So. 2d 903 (Fla. 1985) (refusing to recognize a cause of action for psychological trauma resulting from witnessing a parent's death without a demonstrable physical injury); *Zell*, 665 So. 2d at 1054 (reaffirming *Champion*'s physical injury requirement).

The Academy of Florida Trial Lawyers, as *amicus* for Plaintiffs, attempt to distinguish between "direct victim" cases and bystander cases (br. at 6-10). The Trial Lawyers argue that only the bystander cases require a physical injury. This argument overlooks *Humana* and *Gonzalez*, both of which were direct victim cases. One involved a negligent diagnosis of a positive HIV infection; the other, the negligent handling of a corpse. *See* 652 So. 2d at 363; 651 So. 2d at 675. In both cases, this Court re-affirmed the physical injury requirement, and denied recovery because no physical injury occurred.

2) Florida courts that have considered claims based on the fear of contracting a disease also have required some associated physical injury or illness

Until the district court's decision in this case, no Florida court had considered the impact rule in the context of a fear-of-AIDS claim. Cases applying the rule to claims asserting a fear of developing cancer, however, have required a disease or illness attributable to the exposure.[4] In *Eagle-Picher Industries v. Cox*, 481 So. 2d 517

[4] Courts considering fear-of-AIDS cases have cited fear-of-cancer cases as persuasive. *See De Milio v. Schrager*, 666 A.2d 627 (N.J. Super. 1995); *Kerins v. Hartley*, 33 Cal. Rptr. 2d 172, 178-79 (Ct. App. 1994); *Neal v. Neal,* 873 P.2d 881,

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(Fla. 3d DCA 1985), the court concluded that a plaintiff exposed to asbestos must develop asbestosis or some other disease to recover for fear of contracting cancer. *Cox*, 481 So. 2d at 527-28 (citing *Devlin v. Johns-Manville Sales Corp.*, 495 A.2d 495 (N.J. Super. 1985) and *Mink v. University of Chicago*, 460 F.Supp. 713, 716 n.2 (N.D. Ill. 1978)). The court allowed the claim because the plaintiff had developed asbestosis. The court expressed concern, however, that allowing "fear of" claims without a showing of physical injury would open a Pandora's box of emotional distress claims:[5] "Permitting an action for fear of cancer where there has been no physical injury from the asbestos would likely devastate the court system as well as the defendant manufacturers." 481 So. 2d at 528. The court noted that the physical injury requirement ensures that only genuine claims are permitted: "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. In *Landry v. Fla. Power & Light Corp.*, 799 F. Supp. 94, 96 (S.D. Fla. 1992), a federal court, applying Florida law,

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887 (Idaho Ct. App. 1993), *aff'd in part, rev'd in part*, 873 P.2d 871 (Idaho 1994); *Johnson v. West Virginia Univ. Hosp.*, 413 S.E.2d 889 (W. Va. 1991); *Burk v. Sage Products, Inc.*, 747 F.Supp. 285 (E.D. Pa. 1990).

[5] In Greek mythology, the gods gave Pandora a box in which each god placed something harmful. They instructed her never to open the box, but her curiosity overcame her. When she opened it, plagues, sorrow, and mischief escaped. Edith Hamilton, *Mythology* 88 (1942).

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followed *Cox* in similar circumstances. The court denied the claim, however, because the plaintiff had developed no illness.

3) Florida courts that have considered claims for emotional distress based on the ingestion of a foreign substance in food also have required some associated physical injury

Florida cases imposing liability where consumers ingested a foreign substance in a food product similarly have involved physical injuries.[6] *See Food Fair Stores of Florida v. Macurda*, 93 So. 2d 860 (Fla. 1957) (affirming award to plaintiffs who found worms in their spinach and suffered from vomiting, abdominal pains, and diarrhea over a three-day period, and acknowledging the rule that damages for mental distress will not be awarded absent physical injury); *Miami Coca-Cola Bottling Co. v. Todd*, 101 So. 2d 34, 35 (Fla. 1958) (requiring that a plaintiff become ill from a "foreign substance" in the drink); *Waddell v. Shoney's, Inc.*, 664 So. 2d 1134 (Fla. 5th DCA 1995) (pregnant woman drank water contaminated with chlorine cleaning solution, began vomiting and experienced untimely uterine contractions); *Way*, 260 So. 2d at 288 (allowing recovery to plaintiff who began vomiting when he discovered a rat in his drink, but warning that the court did not "express an opinion in those cases where there is neither physical impact nor any objective physical symptom").

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[6] As explained in Section III below, and as the district court found, 750 So. 2d at 87, Plaintiffs did not seek damages based on the ingestion of the Coke alone; their entire claim was based on the resulting fear that they would contract AIDS.

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Plaintiffs cite *no* ingestion case imposing liability for emotional distress in the absence of physical symptoms. Instead, they argue (br. at 19-22) that in *Doyle v. Pillsbury Co.*, 476 So. 2d 1271 (Fla. 1985), this Court held that the impact rule does not apply to food ingestion cases. Neither *Doyle* nor cases interpreting it support such an interpretation. In *Doyle*, the plaintiff observed a contaminant in a food product, but did not ingest the food. The plaintiff fell over a chair, however, and sustained physical injuries. The issue was whether ingestion of the food product was required to impose liability. This Court ruled that it was. *Id.* at 1272. The Court never addressed the issue here: whether ingestion alone, without physical injury, is sufficient to create liability. Any other statement in *Doyle* was dictum.

Since *Doyle*, no Florida court has held that ingestion alone is sufficient to award emotional distress damages in a food ingestion case. Moreover, although several cases have cited *Doyle*, none has cited it as standing for that proposition. *See e.g., Kush,* 616 So. 2d at 422 (denying recovery where injury occurs by merely observing a traumatic event, citing *Doyle*); *Humana,* 652 So. 2d at 363 (holding that impact must occur before recovery for emotional damages, citing *Doyle*); *Sguros v. Biscayne Rec. Dev. Co.,* 528 So. 2d 376, 378 (Fla. 3d DCA 1987) (holding that an injury induced by mere observance of a traumatic event is insufficient to meet the impact requirement, citing *Doyle*); *King v. Eastern Airlines, Inc.,* 536 So. 2d 1023, 1037 (Fla. 3d DCA 1987) (noting that the impact rule applies in Florida, citing *Doyle*), *quashed in part on other*

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grounds, 557 So. 2d 574 (Fla. 1990); *Ruttger Hotel Corp. v. Wagner*, 691 So. 2d 1177, 1179 (Fla. 3d DCA 1997) (denying recovery absent an impact); *Diaz v. Eastern Airlines,* 698 F. Supp. 18, 21 (D. P.R. 1988) (hold that no cause of action exists for emotional distress absent an impact).

Plaintiffs also argue (br. at 21 n.4) that "*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." The only case Plaintiffs cite, however, is *Todd*, 101 So. 2d at 35. In that case, the plaintiff became ill from a foreign substance contained in the drink. Therefore, that case, too, involved physical injuries.

Allowing recovery of emotional distress damages in food ingestion cases without some accompanying physical illness or injury would open in food ingestion cases the same Pandora's Box that Florida courts have kept closed in fear-of-disease cases. *See Cox*, 481 So. 2d at 528. The rule requiring physical injury in such cases is already liberal enough; it requires only vomiting or some other physical reaction to the food. *See Waddell*, 664 So. 2d at 1134 (Fla. 5th DCA 1995) (allowing recovery where plaintiff displayed vomiting, diarrhea, cramps, and multiple contractions). Some cases involve such *de minimis* reactions, however, that a citizen should expect to "absorb [them] without recompense as the price he pays for living in an organized society." *Gonzalez,* 651 So. 2d at 675. *See, e.g., Landry*, 799 F. Supp. at 97 (denying recovery where the symptoms were loss of sleep, excessive intestinal gas, anxiety and

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depression); *Ledford v. Delta Airlines, Inc.*, 658 F. Supp. 540, 542 (S.D. Fla. 1987) (denying recovery where the symptoms were temporary elevation of blood pressure, crying episodes, panic attacks and a fear of heart attack); *Wagner*, 691 So. 2d at 1179 (psychological stress resulting from robbery, which aggravated diabetes, was insufficient physical injury).

The Trial Lawyers argue (br. at 17 & n.22) that even the requirement of some minimal physical manifestation, such as vomiting, is too burdensome and not probative of a genuine claim because such symptoms can be easily faked. To the contrary, vomiting and abdominal cramps provide an indicia that such claims are genuine; potential plaintiffs finding foreign objects in their food are unlikely to induce vomiting simply to substantiate a claim for damages. At least, physical symptoms are *less* easily faked than emotional distress alone, such as a nebulous "fear" of contracting a disease or "disgust." The minimal physical manifestation requirement provides some filter, however porous, against spurious claims. The argument that the filter for claims is *too* porous, as the Trial Lawyers imply, does not dictate removal of the filter. Rather than strengthen the filter, the Trial Lawyers' proposal would eliminate any remaining protection against speculative claims.

B. Most states require physical injury for recovery of damages for negligent infliction of emotional distress

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Abrogation of the impact requirement will likely not affect the decision in this case. As this Court noted in *Gonzalez*, 651 So. 2d at 674, and as Plaintiffs concede (br. at 23-25), although the majority of jurisdictions no longer require an impact, they still require a physical injury, either upon impact or later. *See, e.g., Hancock v. Northcutt*, 808 P.2d 251, 257-58 (Alaska 1991); *DeStories v. City of Phoenix*, 744 P.2d 705, 709-10 (Ariz. Ct. App. 1897); *M.B.M. Co. v. Counce*, 596 S.W.2d 681, 684-87 (Ark. 1980); *Garrison v. Med. Center of Delaware,* 581 A.2d 288 (Del. 1989); *Lee v. State Farm Mut. Auto. Ins. Co., et al.,* 517 S.E.2d 328 (Ga. Ct. App. 1999); *Black Canyon Racquetball Club, Inc. v. Idaho First Nat. Bank*, 804 P.2d 900 (Idaho 1991); *Shuambert v. Henderson*, 579 N.E.2d 452, 456 (Ind. 1991); *Mills v. Guthrie County Rural Electric Co.*, 454 N.W.2d 846 (Iowa 1990); *Anderson v. Scheffler*, 752 P.2d 667, 669 (Kan. 1988); *Deutsch v. Shein,* 597 S.W.2d 141 (Ky. 1980); *Payton v. Abbott Labs*, 437 N.E.2d 171 (Mass. 1982); *Chowdhry v. NLVH, Inc.*, 851 P.2d 459, 462 (Nev. 1993); *Thorpe v. State Dept. of Corrections,* 575 A.2d 351 (N.H. 1990); *Hammond v. Central Lane Comm. Center*, 816 P.2d 593, 597 (Or. 1991); *Houston v. Texaco, Inc.,* 538 A.2d 502 (Pa. Super. Ct. 1988); *Naccash v. Burger*, 290 S.E.2d 825 (Va. 1982); *Fitzgerald v. Congelton*, 583 A.2d 595 (Vt. 1990); *Meracle v. Children's Serv. Soc. of Wisconsin*, 437 N.W.2d 532 (Wis. 1989). The district court also noted that even courts that no longer require an impact still require physical injury. *See Hagan*, 750 So. 2d at 89 (citing cases). As one justice noted in *Humana*, over thirty

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states require some physical injury. *See* 652 So. 2d at 365 (Kogan, J., specially concurring). Courts retain the physical injury requirement because mental anguish without physical consequences is "so temporary, so evanescent, and so relatively harmless that the task of compensating for it would unduly burden defendants and the courts." *Payton*, 437 N.E.2d at 178. Florida is consistent with the majority rule in continuing to require a physical injury, which was concededly *absent* in this case.

Because Plaintiffs concede that only 14 jurisdictions have abolished the physical injury requirement (br. at 25), Coca-Cola refrains from an exhaustive analysis of the law. Rather, it demonstrates that even the few states that have abolished the physical injury requirement have witnessed a smorgasbord of trivial claims, and many have therefore reconsidered their abrogation of the rule.

As Plaintiffs argue (br. at 26), Hawaii is in the minority of jurisdictions that have abolished the physical injury requirement. As a result, Hawaiian courts have allowed recovery for emotional stress resulting from the death of a family dog, *see Campbell v. Animal Quarantine Station*, 632 P.2d 1066 (Haw. 1981), and for emotional distress suffered when a couple was forced to stay elsewhere because their hotel was overbooked. *See Dold v. Outrigger Hotel*, 501 P.2d 368 (Haw. 1972). Because of this trend toward the trivial, the Hawaii Supreme Court recently re-adopted a physical injury requirement in certain cases. *See Francis v. Lee Enterprises, Inc.*, 971 P.2d 707, 713 (Haw. 1999) (overruling *Dold*, holding that in breach of contract claims the

plaintiff cannot recover for emotional distress unless the emotional distress accompanies physical injury and the contract is of such a kind that serious emotional disturbance is a particularly foreseeable result).

Plaintiffs also cite to California (br. at 28) as a jurisdiction that has abolished the rule. While California does not require a physical injury, however, it severely limits recovery for emotional distress in "direct victim" cases. In such cases, damages for negligent infliction of emotional distress can only be recovered "where a duty arising from a preexisting relationship is negligently breached." *See Burgess v. Superior Court*, 831 P.2d 1197, 1201 (Cal. 1992).

Plaintiffs also cite Ohio as having abolished the rule (br. at 29). Again, in recent years that state, too, has begun to revert to a physical injury requirement. The Ohio Supreme Court recently held that a plaintiff must suffer "actual physical peril" to recover for negligent infliction of emotional distress in the absence of a tangible physical injury. *See Heiner v. Moretuzzo*, 652 N.E.2d 664 (Ohio 1995). The court used this new standard to hold that a plaintiff who was misdiagnosed with HIV could not recover for negligent infliction of emotional distress.

As these cases demonstrate, not only do most jurisdictions continue to require physical injury; even those that do not require it are beginning to regret their expansion of the law and have imposed limitations designed to curtail speculative claims. Perhaps most important, the cases Plaintiffs cite to advocate adoption of the minority rule were

decided before this Court's decision in *Humana*, when this Court "reject[ed] [the petitioner's] request that [it] abolish the impact rule." 652 So. 2d at 363. Five years ago, this Court considered this issue --and presumably the law of other states -- and decided to maintain its alignment with the 30 states that impose a physical injury requirement. The Court need not undertake another exhausting review of the law.

Ingestion cases are similar. Other states, like Florida, require a physical injury before awarding damages in food ingestion cases. *See Chambley v. Apple Restaurants,* 504 S.E.2d 551 (Ga. App. 1998) (holding that restaurant customer who found unwrapped condom in her chicken salad had to show some physical injury after ingesting the salad); *Wright v. Coca Cola Bottling Co. Of Central South Dakota, Inc.,* 414 N.W.2d 608 (S.D.1987) (holding that plaintiff had to show he suffered a physical injury from drinking out of a soft drink bottle that contained a decomposed mouse); *Cushing Coca-Cola v. Bottling Co. v. Francis,* 245 P.2d 84 (Okl. 1952) (denying recovery for damages resulting from drinking from a beverage bottle in which there was a body of a mouse absent some physical injury); *Cooke v. Pizza Hut, Inc.,* 1994 WL 680051 (Del.Super. 1994) (denying recovery to plaintiff who found a roach on his pizza absent a physical injury).

II. IF THE IMPACT RULE IS ABOLISHED, THIS COURT SHOULD REQUIRE, FOR RECOVERY OF DAMAGES FOR EMOTIONAL DISTRESS RESULTING FROM THE FEAR OF CONTRACTING AIDS, PROOF OF BOTH ACTUAL EXPOSURE TO HIV AND A SCIENTIFICALLY-PROVEN CHANNEL OF TRANSMISSION, NEITHER OF WHICH WAS PRESENT IN THIS CASE

Abrogation of the impact rule is only a first step to allowing recovery in this case. If Plaintiffs convince this Court to adopt a rule that 30 states have rejected, they must then convince this Court to adopt a rule that *every* court has rejected. As demonstrated below, every court to consider whether to recognize a cause of action for fear of AIDS has required at least proof of actual exposure to the HIV virus or a scientifically-accepted channel of transmission. In this case, Plaintiffs proved neither.

A. Almost unanimously, other states require that a plaintiff claiming emotional distress from a fear of developing AIDS prove actual exposure to HIV and a scientifically-accepted method of transmission

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If this Court abrogates the impact rule, the issue becomes whether Plaintiffs may recover damages for negligent infliction of emotional distress, based on the fear of contracting AIDS, without evidence that they were ever exposed to AIDS or HIV. The proliferation of fear-of-AIDS claims has garnered nationwide attention.[7] The issue of

[7] A veritable library of articles on the subject has developed. *See, e.g.,* Comment, *Adding Fuel to the Fire: Realistic Fears or Unrealistic Damages in AIDS Phobia Suits*, 35 TEX. L. REV. 331 (1994); Garves, *In Fear-of-AIDS Cases, Proof is Key Element -- Can a Plaintiff Recover Without Actual Exposure to the Disease?*, NAT'L L.J., Apr. 26, 1993, at 27-30; Goldberg, *AIDS Phobia: Reason-*

what proof is necessary to establish a fear-of-AIDS claim had not been decided in Florida until now. Many other states, however, have considered the issue. Overwhelmingly, they require proof of some physical ailment resulting from the exposure, or at least actual exposure to HIV.

The district court in this case noted that it had "found no case in researching all of the states, that would permit recovery for fear of contracting AIDS-emotional distress damages, based on a record like this one." *Hagan*, 750 So. 2d at 90. The court explained, citing a number of cases, that the vast majority of states require proof that the virus was present and that the contact between the material containing the virus and the plaintiff was a scientifically-accepted channel for transmission of the disease. *See Hagan*, 750 So. 2d at 90 & n.9. *See, e.g., Babich v. Waukesha Memorial Hospital, Inc.*, 556 N.W.2d 144, 147 (Wis. Ct. App. 1996) (holding that a plaintiff stuck with a hypodermic needle mistakenly left in bed linens could not recover without

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able Fears or Unreasonable Lawsuits?, 78 A.B.A.J., June 1992, at 88; Lipsig, *AIDS Phobia and Negligent Infliction of Emotional Distress*, N.Y. L.J., Mar. 26, 1992, at 3; Maroulis, *Can HIV-Negative Plaintiffs RecoverEmotional Distress Damages for Their Fear of AIDS?*, 62 FORDHAM L.REV. 225 (1993); Note, *Establishing Uniformity in HIV-Fear Cases: A modification of the distinct event approach*, 29 VALPARAISO L.REV. 1251 (1995); Note, *Recovery of Emotional Distress Damages in AIDS-Phobia Cases: A Suggested Approach for Virginia*, 51 WASH. & LEE L. REV. 717 (1994); Note, *Afraids: Fear of AIDS as a Cause of Action*, 67 Temple L. Rev. 769 (1994); Note, *The Fear of Disease as a Compensable Injury: An Analysis of Claims Based on AIDS Phobia*, 67 ST. JOHN'S L.REV. 77 (1993); Note, *Under What Circumstances Should Courts Allow Recovery for Emotional Distress Based Upon the Fear of Contracting AIDS?*, 43 WASH. U. J. URB. & CONTEMP. L. 481 (1993).

proof that the needle came from a contaminated source); *Kaufman v. Physical Measurements, Inc.*, 615 N.Y.S.2d 508, 509 (App. Div. 1994) (holding that an employee pricked by a needle while sorting mail had no evidence to support claim of exposure to HIV because both the needle and the person whose blood the needle contained tested negative); *Doe v. Surgicare of Joliet, Inc.*, 643 N.E.2d 1200, 1203-04 (Ill. App. Ct. 1994) (holding that a patient had no legally-compensable claim against a hospital when a medical technician stuck himself with a needle and used that needle to administer anesthetic to the plaintiff because without actual exposure to HIV, the claim was too speculative); *Reynolds v. Highland Manor, Inc.*, 954 P.2d 11, 15-16 (Kan. Ct. App. 1998) (denying fear-of-AIDS claim resulting when plaintiff accidentally retrieved a used condom in her hotel room because plaintiff failed to prove actual exposure to the HIV virus); *Majca v. Beekil*, 682 N.E.2d 253, 255 (Ill. App. 1997) (denying fear-of-AIDS claim where plaintiff cut herself with used, bloody scalpel lying in the garbage); *Burk v. Sage Products, Inc.*, 747 F.Supp. 285 (E.D. Pa. 1990) (denying recovery to a paramedic stuck by a needle protruding from a medical disposal container located near several AIDS patients because he could not prove that the needle was used on an AIDS patient); *Montalbano v. Tri-Mac Enterprises of Port Jefferson, Inc.*, 652 N.Y.S.2d 780, 781 (App. Div. 1997) (denying recovery to a plaintiff who ate french fries he later discovered were covered with blood, requiring both the actual or probable presence of HIV and a mode of transmission); *Neal v. Neal*, 873 P.2d 881, 888-89

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(Idaho Ct. App. 1993) (holding that wife's fear of contracting AIDS from husband who was having an affair was not actionable absent a showing that the husband's girlfriend was infected with the disease), *aff'd in part, rev'd in part*, 873 P.2d 871 (Idaho 1994).[8] Other courts go even further and require evidence of physical harm or medically-identifiable effect from exposure to a disease. *See Transamerica Ins. Co. v. Doe*, 840 P.2d 288, 292 (Ariz. Ct. App. 1992); *Poole v. Alpha Therapeutic Corp.*, 698 F.Supp. 1367, 1372 (N.D. Ill. 1988). "The logic set forth in these cases is that without proof of actual exposure to the virus and a likelihood of contracting AIDS, the fear of acquiring AIDS is too speculative as a matter of law." *Surgicare,* 643 N.E.2d at 1203.

Only two recorded cases, on which Plaintiffs rely (br. at 38-40), have allowed recovery on a fear-of-AIDS claim without proof that the object at issue was infected. The first case is *Castro v. New York Life Ins. Co.*, 588 N.Y.S.2d 695 (Sup. Ct. 1991), in which a New York trial court allowed a cleaning worker pricked by a used

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[8] *See also De Milio*, 666 A.2d at 636; *Johnson v. West Virginia Univ. Hosp., Inc.*, 413 S.E.2d 889, 892 (W. Va. 1991); *Russaw v. Martin*, 472 S.E.2d 508, 512 (Ga. Ct. App. 1996); *Drury v. Baptist Memorial Hospital System*, 933 S.W.2d 668, 675 (Tex. Ct. App. 1996); *Pendergist v. Pendergrass*, 961 S.W.2d 919, 924 (Mo. Ct. App. 1998); *Falcon v. Our Lady of the Lakes Hosp., Inc.*, 729 So. 2d 1169, 1173 (La. App. 1999); *Kerins*, 33 Cal.Rptr.2d at 179; *Hare v. State*, 570 N.Y.S.2d 125 (App. Div. 1991); *Seimon v. Becton Dickinson & Co.*, 632 N.E.2d 603 (Ohio Ct. App. 1993); *Carroll v. Sisters of St. Francis Health Services, Inc.*, 868 S.W.2d 585, 594 (Tenn. 1993); *Brown v. New York City Health & Hosp. Corp.*, 648 N.Y.S.2d 880, 887 (App. Div. 1996); *Lubowitz v. Albert Einstein Medical Center*, 623 A.2d 3 (Pa. Super. 1993); *Funeral Services by Gregory, Inc. v. Bloomfield Community Hospital*, 413 S.E.2d 79, 84 (W.Va. 1991), *overruled on other grounds,* 437 S.E.2d 436 (W. Va. 1993); *Brzoska v. Olson*, 668 A.2d 1355, 1363-64 (Del. 1995); *K.A.C. v. Benson*, 527 N.W.2d 553, 555 (Minn. 1995).

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hypodermic needle found in a wastebasket to recover even without proof that the needle was contaminated with HIV-infected blood. *Id.* at 697. There, at least a method of transmission -- a used hypodermic needle -- was present. Even so, the case conflicts with several other New York cases requiring the actual or probable presence of HIV when the alleged transmission occurred. *See Schott v. St. Charles Hosp.*, 672 N.Y.S.2d 393 (App. Div. 1998); *Montalbano*, 652 N.Y.S.2d at 781; *Brown v. New York City Health & Hosp. Corp.*, 648 N.Y.S.2d 880, 887 (App. Div. 1996); *Bishop v. Mt. Sinai Med. Center*, 669 N.Y.S.2d 530 (App. Div. 1998); *Blair v. Elwood Union Free Public Schools,* 656 N.Y.S.2d 52, 53 (App. Div. 1997); *Kaufman*, 615 N.Y.S.2d at 509; *Hare v. State*, 570 N.Y.S.2d 125 (App. Div. 1991); *Doe v. Doe*, 519 N.Y.S.2d 595 (Sup. Ct. 1987). For this reason, one New York court commented that *Castro* should be limited to its facts. *See Tischler v. Dimenna*, 609 N.Y.S.2d 1002 (Super. 1994). Other states have recognized that *Castro* "'may be an aberration in New York law' because the general trend in New York requires actual exposure." *K.A.C. v. Benson*, 527 N.W.2d 553, 560 n.9 (Minn. 1995) (quoting *Carroll v. Sisters of St. Francis Health Services, Inc.*, 868 S.W.2d 585, 592 n.15 (Tenn. 1993)).

The only other case allowing recovery on a fear-of-AIDS claim without proof of actual exposure is *Marchica v. Long Island R.R.*, 31 F.3d 1197 (2d Cir. 1994), which followed *Castro*. In *Marchica*, the plaintiff was stuck by a discarded hypodermic needle with blood in its syringe. *Id.* at 1199. Therefore, as in *Castro*, at

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least a channel of transmission was present. Moreover, *Marchica* was decided under the Federal Employers Liability Act (FELA). FELA allows broader recovery than common law negligence, and its purpose is to remove traditional defenses. *Id*. at 1202. The court noted that a liberal view was "most consistent with FELA's remedial nature," *id.* at 1206, and that "in the FELA context the traditional concept of proximate cause is supplanted by the less stringent standard that there be some causal relation, no matter how slight, between the injury and the railroad's breach of duty." *Id.* at 1207. Therefore, that case is irrelevant to cases decided under common law principles.

The final case on which Plaintiffs rely is *Faya v. Almaraz*, 620 A.2d 327 (Md. 1993) (br. at 40). There, plaintiffs were exposed to HIV through their surgeon, who suffered from AIDS. The plaintiffs therefore proved actual exposure. The court held that under those circumstances plaintiffs did not have to show a channel of transmission. Here, Plaintiffs concede that there was no evidence whatsoever of exposure to HIV. Thus, *Faya* actually supports Coca-Cola's argument.

Thus, the three cases on which Plaintiffs rely involved more compelling facts than this case. In *Faya*, actual exposure occurred; in *Castro* and *Marchica*, at least a method of transmission was present. In this case, Plaintiffs proved neither. They concede that no actual exposure occurred (br. at 37). They argue (br. at 42), however, that a channel of transmission was present because "[d]rinking a soda which contains a used condom oozing with semen parallels the exposure encountered in oral sex."

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This argument is flawed on several grounds. Contrary to Plaintiffs' assertion, there was no evidence whatsoever that semen was present. To the contrary, the evidence showed that the object was simply mold. Even if Plaintiffs impeached Coca-Cola's witness, who testified to a "scientific certainty" that the object was mold, they failed to prove it was a condom.[9] Plaintiffs never removed the object from the bottle and never had it tested. A fear of AIDS is unreasonable if the plaintiff failed even to test the object to determine whether it is infected. *See Montalbano*, 652 N.Y.S.2d at 781 (holding that because plaintiff did not have product tested, he failed to demonstrate actual exposure to HIV); *Bishop*, 669 N.Y.S.2d at 531 (rejecting fear-of-AIDS claim where plaintiff failed to recover and test the object that caused his injuries because it was only pure speculation that it was infected).

Even if the object was a condom, it does not follow that a channel of transmission was present. As Plaintiffs recognize (br. at 42), it is semen, not condoms, that can carries the virus. There was no evidence whatsoever that the object contained semen. The presence of a condom does not itself indicate semen, much less AIDS. *See Highland Manor*, 954 P.2d at 13 (denying claim where plaintiff found a used condom in a hotel room). Therefore, Plaintiffs failed to demonstrate a scientifically-accepted method of transmission.

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[9] The district court had "serious doubts that the plaintiffs established that the object in the Coke was a used condom," but assumed for purposes of its discussion that the jury could have made that finding. 750 So. 2d at 86.

As the cases discussed above demonstrate, every court to consider this issue has required *at least* either actual exposure to HIV or a scientifically-accepted method of transmission. The overwhelming majority of states require both. Plaintiffs proved neither. Therefore, their claim should be denied.

B. Public policy considerations dictate that fear-of-AIDS claims be limited to cases of actual exposure to the disease and a scientifically-accepted channel of transmission

Allowing recovery for injuries resulting from purely emotional distress, without any requirement of actual exposure to the AIDS virus, would invite fictitious and speculative claims. Other states considering such claims have expressed many policy reasons for including such a requirement. The California Supreme Court, for example, cited five separate concerns in limiting fear-of-cancer cases: (1) the absence of meaningful restrictions might compromise the availability and affordability of liability insurance; (2) the detrimental effect on the health care field of allowing such claims without an actual exposure requirement; (3) the possible adverse consequences to those who sustain actual physical injury; (4) the need for a definite and predictable threshhold that can be consistently applied; and (5) the need to limit the class of potential plaintiffs if emotional injury is to continue to be compensable. *See Potter v. Firestone Tire & Rubber Co.,* 863 P.2d 795, 812-14 (Cal. 1993).

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These policy considerations are just as compelling in the fear-of-AIDS context. *See Benson*, 527 N.W.2d at 559 (adopting *Potter*'s policy arguments in fear-of-AIDS case). As the court stated in *Kerins*:

> Proliferation of fear of AIDS claims in the absence of meaningful restrictions would run an equal risk of compromising the availability and affordability of medical, dental and malpractice insurance, medical and dental care, prescription drugs, and blood products. Juries deliberating in fear of AIDS lawsuits would be just as likely to reach inconsistent results, discouraging early resolution or settlement of such claims. Last but not least, the coffers of defendants and their insurers would risk being emptied to pay for the emotional suffering of the many plaintiffs uninfected by exposure to HIV or AIDS, possibly leaving inadequate compensation for plaintiffs to whom the fatal AIDS virus was actually transmitted.

33 Cal. Rptr. at 179. Another court noted that the absence of an actual exposure requirement "would invite claims, and allow recovery, for the fear of AIDS where the plaintiff had undergone a blood transfusion, for the fear of developing tuberculosis based on evidence that a person had coughed in the plaintiff's face, or for fear of cancer where the plaintiff had inhaled or injested an unknown substance, all without any proof that a disease-causing agent was present." *Neal*, 873 P.2d at 888-89. *See also De Milio v. Schrager*, 666 A.2d 627, 634 n.16 (N.J. Super. 1995) ("one could readily envision fear of AIDS claims being raised for every blood transfusion, accidental

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needle puncture, or matrimonial (or other) sexual infidelity, perhaps compromising the availability and affordability of liability insurance for toxic liability risks").

Allowing "fear of" claims without medically-verifiable evidence of a substantially-increased risk of contracting a disease also would reward ignorance about the disease and its causes. *See Brzoska*, 668 A.2d at 1363 (noting that allowing such claims "would open a Pandora's box of AIDS-phobia claims by individuals whose ignorance, unreasonable suspicion, or general paranoia, caused them apprehension over the slightest of contact with HIV infected individuals or objects"); *Majca*, 682 N.E.2d at 255 (noting that allowing plaintiffs to recover for unreasonable fears "rewards ignorance about the disease and its causes"). A restriction on recovery requires plaintiffs to mitigate their fears by educating themselves about the likelihood of contracting the disease. *Majca*, 682 N.E.2d at 255-56.

Courts adopting the actual exposure rule note that it ensures that the fear of AIDS is not based on mere public misconceptions about the disease. Such a rule also preserves an objective component to ensure stability, consistency, and predictability. The rule further ensures that victims who are exposed to HIV or actually contract it are compensated for their emotional distress. Finally, the rule protects the justice system from frivolous litigation. *See Pendergist v. Pendergrass*, 961 S.W.2d 919, 926 (Mo. Ct. App. 1998). *See also Bishop*, 669 N.Y.S.2d at 532 (noting that requiring actual exposure ensures that plaintiffs have a genuine basis for their fear, that the fear is not

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based on public misconceptions, and that there is consistent treatment in the courts); *Babich*, 556 N.W.2d at 147-48 (noting that requiring actual exposure strikes a balance between compensating plaintiffs for emotional injuries and encouraging potential defendants to take reasonable steps to avoid such injuries, with protecting the courts from the burden of frivolous suits).

For all these reasons, public policy dictates that plaintiffs asserting fear-of-AIDS claims prove some physical injury or disease resulting from exposure to AIDS. This requirement "will ensure that the claims permitted are only the most genuine." *Cox*, 481 So. 2d at 529. At a minimum, however, a plaintiff should be required to demonstrate actually exposure to HIV. Plaintiffs in this case failed to prove either injury *or* exposure.

III. PLAINTIFFS OFFERED NO EVIDENCE THAT THEY SUFFERED ANY DAMAGES SEPARATE AND APART FROM THEIR FEAR OF CONTRACTING AIDS, AND EVEN IF THEY HAD, THOSE DAMAGES WERE *DE MINIMIS*

Finally, both the Plaintiffs (br. at 43-47) and the Trial Lawyers (br. at 15-17) argue that Plaintiffs asserted other elements of damages besides their fear of AIDS. They claim that if this Court abrogates the impact rule (see Section I) but follows the overwhelming majority of courts in requiring prrof of actual exposure to recover for fear of contracting AIDS (see Section II), they presented evidence of the emotional

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distress caused by simply ingesting the offensive Coke. This argument ignores the entire theory under which the case was tried and submitted to the jury.

Even the recitation of facts in Plaintiffs' brief (at 3-14) demonstrates that the only damages they claimed in this case arose from their fear of AIDS. When Plaintiffs originally drank the Coke, they had almost no reaction. As Plaintiffs admit (br. at 4), "Parker said that it tasted flat, and Hagan responded that it was probably just warm." Parker then insisted that Hagan taste it (br. at 4). When Hagan tasted the Coke, "it tasted flat, like water with no carbonation" (br. at 4). At that point, neither Plaintiff suffered any emotional or physical injury.

It was not until Plaintiffs discovered a foreign object in the bottle, and decided it was a condom, that they experienced any reaction. Their reaction, however, arose from their fear of contracting a disease, specifically AIDS. According to Plaintiffs, Hagan "became nauseated, really sick and scared, because [she] didn't know what that meant for [her], [] healthwise and stuff" (br. at 4). The Plaintiffs then decided to call the health department. Obviously they were not too concerned, because when the health department failed to respond, the Plaintiffs left the bottle behind and simply went home (br. at 5). Plaintiffs also contend that "[i]mmediately 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" (br. at 6). The next day, everything Plaintiffs

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did concerned their fear of disease. They went to the hospital, they took an AIDS test, and they received AIDS counseling (br. at 5).

Parker did not tell her neighbors about the incident because she did not "want anybody to feel that [she] was sick or had some type of disease" (br. at 9). Regarding their business, "Parker was upset because . . . she could possibly lose children at [her] day care because people were becoming more aware and frightened of different diseases, including AIDS" (br. at 9). Parker's husband testified that her concern was regarding her health, and that she "could be gone" at any time (br. at 10).

In their argument about their alternative theory of damages, Plaintiffs state that they "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 due to the incident" (br. at 44) and that "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 . . . ." (br. at 44). These arguments all concern Plaintiffs' fear of contracting AIDS, not any emotional distress stemming from ingesting the contaminated drink itself.[10]

The arguments at trial surrounding Coca-Cola's motion for directed verdict similarly demonstrate that the Plaintiffs' only emotional distress claim concerned their

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[10] To the extent Plaintiffs' fears stemmed from contracting a disease other than AIDS, the reasoning of *Cox* applies. *See* 481 So. 2d at 528 (requiring proof of physical illness resulting from exposure to asbestos before allowing emotional distress damages for fear of contracting cancer).

fear of AIDS. In response to Coca-Cola's motion for directed verdict, counsel for Plaintiffs constantly emphasized their fear (T. 2:37). In response to a question from the judge about the lack of evidence of emotional damages, counsel responded that Plaintiffs suffered "fears" and "superstition" (T. 2:38). At another point, counsel stated: "These Plaintiffs have testified that they have had health concerns, that they have been worried, that they have feared for their future and what will happen to their family once they're gone" (T. 2:41-42). Counsel compared this case to *Waddell*, 664 So. 2d at 1134, in which the plaintiff feared the loss of her unborn child after drinking contaminated water (T. 2:39-40). The entire argument centered around Plaintiffs' fear of contracting AIDS (T. 2:32-52). Counsel never argued that the Plaintiffs sustained any other emotional damage.[11]

Plaintiffs did not argue at trial that after ingesting the Coke they suffered from vomiting, that they became ill, or that they contracted some disease. Unlike *Waddell*, 664 So. 2d at 1134, where the plaintiff began vomiting and experienced untimely uterine contractions, these Plaintiffs experienced no physical, or even emotional, injuries stemming solely from their ingestion of the contaminated beverage. Plaintiffs' only theory of recovery, and the only theory on which the case was tried, was that

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[11] The district court, too, acknowledged that "the damages sought to be proved in this case were for fear of contracting AIDS--not because of the loathsomeness of the object itself." 750 So. 2d at 87.

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Plaintiffs suffered emotional distress from their fear of contracting AIDS. Florida law precludes Plaintiffs from recovering for that fear.

If this Court finds that Plaintiffs sought damages other than for their fear of contracting a disease, Plaintiffs' fear-of-AIDS claim nevertheless permeated the trial below. Therefore, a new trial would be required at which any evidence of Plaintiffs' fear of contracting AIDS (or any other disease) would be excluded. *See Lee v. Dept. of Health and Rehab. Servs.*, 698 So. 2d 1194, 1201 (Fla. 1997) (remanding for new trial to "be conducted as limited by this opinion"); *Linafelt v. Beverly Enterprises-Florida, Inc.*, 745 So. 2d 386, 390 (Fla. 1st DCA 1999) (remanding for new trial where the jury verdict was not rendered under the controlling law and did not address appellant's higher burden of proof). The only recoverable damages would be for Plaintiffs' "disgust" at drinking a soda they assumed contained a condom. Of course, allowing such a claim brings us back to the reasons for the impact rule as it exists in Florida: "not every injury which one person may by his negligence inflict upon another should be compensated in money damages." *Gonzalez*, 651 So. 2d at 675.

CONCLUSION

For the reasons stated, the district court's decision in this case should be affirmed and the case remanded to the trial court for entry of judgment in favor of Coca-Cola.

Respectfully submitted,

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