

A PRACTITIONER'S GUIDE TO RECOVERY OF MENTAL ANGUISH/EMOTIONAL DISTRESS DAMAGES IN ALABAMA

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INTRODUCTION

While Alabama's early common law prohibited compensation for mental anguish/emotional distress,² the appellate courts of this state began to recognize exceptions to the general rule in certain tort³ and breach of contract actions⁴ as early as the late 1800s. The early precedent accompanying these exceptions was less than clear, and often inconsistent, causing one commentator to describe the developing common law as a "jerry-built structure, devoid of coherent characterization or accurate definition."⁵ Notwithstanding these criticisms and fear of awards for exaggerated injuries and inconsequential wrongs,⁶ the common law prohibition against mental anguish awards continued to erode during the next century.

Despite years of evolution, Alabama case law regarding recovery of mental anguish damages remains an enigma. As legislative efforts to define and limit the recovery of these damages have proven unsuccessful,⁷ Alabama juries have returned mental anguish damage awards reach-

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² This article uses the terms "mental anguish" and "emotional distress" interchangeably as a single type of damage. See BLACK'S LAW DICTIONARY 1007 (8th ed. 2004) (referencing the definition of the phrase "emotional distress" for the definition of the phrase "mental anguish").

³ See, e.g., *Montgomery & E. Ry. Co. v. Mallette*, 9 So. 363 (Ala. 1891).

⁴ See, e.g., *W. Union Tel. Co. v. Wilson*, 9 So. 414 (Ala. 1891); *W. Union Tel. Co. v. Henderson*, 7 So. 419 (Ala. 1890).

⁵ John C. Payne, *Recovery of Damages for Unpleasant Mental Stimuli*, 3 ALA L. REV. 30, 117 (1950).

⁶ See *id.* at 121.

⁷ In 2006, House Bill 257 was proposed in the Alabama legislature to establish a standard for the recovery of emotional distress damages in non-physical injury cases, requiring proof of treatment as a condition precedent to recovery, and limiting the amount of recoverable damages. H.R. 257, 2006 Reg. Sess. (Ala. 2006). The Bill did not make it out of committee. See *id.* The Bill was re-proposed in 2007 as House Bill 614, and suffered a similar fate. H.R. 614, 2007 Reg. Sess. (Ala. 2007).

ing into the hundreds of thousands of dollars.⁸ Moreover, since these awards are “compensatory,” they affect post-trial review of punitive damages⁹ and have supported multi-million dollar verdicts on appeal.¹⁰ It is against this backdrop that today’s practitioner faces this confusing, and often misunderstood area of the law of damages.

This article attempts to eliminate some of the confusion and provide direction regarding the recovery of mental anguish damages. Part I of the article examines the unsettled nature of what constitutes compensable mental anguish under Alabama law. Parts II, III and IV discuss when emotional distress damages are recoverable in breach of contract, negligence, and intentional tort actions. Part V addresses the standard of review applied when mental anguish verdicts are examined on appeal, and Part VI discusses significant factors for consideration by practitioners regarding the recovery of these damages.

I. COMPENSABLE MENTAL ANGUISH UNDER ALABAMA LAW

Alabama appellate courts have recognized that emotional distress may manifest itself in various forms, including nightmares, being miserable,¹¹ mad, aggravated,¹² angry and depressed,¹³ and loss of sleep,¹⁴

⁸ *Foster v. Life Ins. Co. of Ga.*, 656 So. 2d 333, 337 (Ala. 1994) (testimony that a defendant’s conduct affected the plaintiff “a lot” resulted in a jury award of approximately \$250,000 in mental anguish damages for two months of emotional distress); *Delchamps, Inc. v. Bryant*, 738 So. 2d 824, 836-37 (Ala. 1999) (awarding approximately \$400,000 in mental anguish damages); *Ala. Power Co. v. Murray*, 751 So. 2d 494, 500-01 (Ala. 1999) (testimony that a plaintiff was “all shook up,” and “[i]t was just hard,” resulted in an award of approximately \$132,000 in mental anguish damages); *Nat’l Ins. Ass’n v. Sockwell*, 829 So. 2d 111, 132 (Ala. 2002) (awarding \$201,000 in compensatory damages, which the defendant claimed was solely attributable to mental anguish damages); *Cochran v. Ward*, 935 So. 2d 1169, 1176 (Ala. 2006) (noting it is not unusual for Alabama juries to award mental anguish damages of \$275,000 or more); *Keller v. NCAA, et al.*, CV-2004-28 (Jackson County, Alabama, 2007) (awarding \$1,000,000 in mental anguish damages).

⁹ *Cochran*, 935 So. 2d at 1175; *see also id.* at 1176 (“Based on the undisputed evidence regarding economic damage of \$75,000 and the evidence of mental anguish, and in light of the language on the verdict form, we reject Cochran’s contention that the \$350,000 award ‘of necessity’ included punitive damages. We further note that it is not unusual for juries to award compensatory damages for mental anguish at or above the level awarded here.”) (citations omitted).

¹⁰ *Gray Brown-Service Mortuary, Inc. v. Lloyd*, 729 So. 2d 280, 285 (Ala. 1990) (affirming \$2 million jury verdict, stating “[i]n this present case, we do not need to determine a possible ratio of compensatory damages to punitive damages, because the particular facts of this case would support an award of compensatory damages for mental anguish and would support an award high enough that, taking the remainder of the jury’s award as punitive damages, the ratio of punitive to compensatory damages would not be unreasonable.”); *Orkin Exterminating Co., v. Jeter*, 832 So. 2d 25, 39, 43 (Ala. 2001) (awarding \$300,000 in compensatory damages, including an award of \$200,000 for mental anguish as well as \$2 million for punitive damages).

¹¹ *Lloyd*, 729 So. 2d at 286.

physical discomfort requiring medication,¹⁵ difficulties in one's marriage, crying,¹⁶ "staying stressed out," and being edgy.¹⁷ Given the numerous ways in which emotional distress manifests itself, one called upon to define compensable mental anguish may be tempted to simply state "I know it when I see it."¹⁸ It should be noted, however, that the Alabama Supreme Court adopted the *Black's Law Dictionary* definition of mental anguish in the 1991 case of *Volkswagen of America, Inc. v. Dillard* stating:

'Mental anguish' is defined as follows:

'When connected with a physical injury, this term includes both the resultant mental sensation of pain and also the accompanying feelings of distress, fright, and anxiety. As an element of damages [it] implies a relatively high degree of mental pain and distress; it is more than mere disappointment, anger, worry, resentment, or embarrassment, although it may include all of these, and it includes mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair and/or public humiliation. In other connections, and as a ground for divorce or for compensable damages or an element of damages, it includes the mental suffering resulting from the excitation of the more poignant and painful emotions, such as grief, severe disappointment, indignation, wounded pride, shame, public humiliation, despair, etc.'¹⁹

¹² *Liberty Nat'l Life Ins. Co. v. Caddell*, 701 So. 2d 1132, 1135-36 (Ala. Civ. App. 1997).

¹³ *George H. Lanier Mem. Hosp. v. Andrews*, 901 So. 2d 714, 726 (Ala. 2004).

¹⁴ *Cochran*, 935 So. 2d at 1176 ("Mrs. Ward testified that she suffered inconvenience, disappointment, and loss of sleep as a result of the improperly installed roof. She testified that she had consulted with a physician, who prescribed an antianxiety medication for her.").

¹⁵ *City of Mobile v. Lester*, 804 So. 2d 220, 230 (Ala. Civ. App. 2001).

¹⁶ *Slack v. Stream*, No. 1060004, 2008 WL 162618, at *15 (Ala. Jan. 18, 2008).

¹⁷ *Horton Homes, Inc. v. Brooks*, 832 So. 2d 44, 54 (Ala. 2001).

¹⁸ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

¹⁹ 579 So. 2d 1301, 1305-06 (Ala. 1991) (quoting BLACK'S LAW DICTIONARY 985-86 (6th ed. 1990) (emphasis omitted)); see *Caddell*, 701 So. 2d at 1138 (Thompson, J., dissenting) ("I believe that in order to recover for mental anguish the plaintiff should have to show more than mere disappointment, anger, worry, aggravation, resentment, or embarrassment."); see also *Daniels v. E. Ala. Paving, Inc.*, 740 So. 2d 1033, 1049 (Ala. 1999) (citing *Volkswagen*, 579 So. 2d at 1305-06; *Thompson*, 726 So. 2d at 655); *Wal-Mart Stores, Inc. v. Thompson*, 726 So. 2d 651, 655 (Ala. 1998) (noting that "[t]his Court has accepted this definition of 'mental anguish' from Black's Law Dictionary (6th ed. 1990)" and quoting in turn the definition set forth in *Volkswagen*); *Duck Head Apparel Co., Inc. v. Hoots*, 659 So. 2d 897, 907 (Ala. 1995) ("In its well-written order on the post-judgment motion, the circuit stated in regard to mental anguish damages: '*Black's Law Dictionary* defines 'mental anguish' as follows: 'an element of damages, it includes the mental suffering resulting from the excitation of the more poignant and painful emotions, such as grief, severe disappointment, indignation, wounded pride, shame, public humiliation, despair, etc.'").

“As the Black’s Law Dictionary definition makes clear, mental anguish is more than mere worry or embarrassment.”²⁰ One seeking to recover emotional distress damages must demonstrate a profound effect on his or her psyche. Notwithstanding the exacting showing mandated by this definition, the appellate courts of this state appear to apply a less demanding burden of proof when reviewing claims for mental anguish damages. For example, in the very case that adopted the *Black’s* definition of mental anguish as being “more than mere *disappointment, anger, worry, resentment, or embarrassment,*”²¹ the Alabama Supreme Court held that a mental anguish jury charge was appropriate because the plaintiff experienced “anxiety, *embarrassment, anger, fear, frustration, disappointment, and worry.*”²² Stated similarly, the Court permitted a jury charge regarding recovery of mental anguish damages because the plaintiff experienced seven emotional states, four of which do not constitute compensable mental anguish under the *Black’s* definition.

In the 2001 case of *Horton Homes, Inc. v. Brooks*, the Alabama Supreme Court cited *Volkswagen* as supporting the proposition that “[m]ental anguish includes anxiety, embarrassment, anger, fear, frustration, disappointment, worry, annoyance, and inconvenience.”²³ Notably, *Horton* cited the portion of *Volkswagen* concluding that the jury charge was proper, not the portion quoting the exacting *Black’s* definition.²⁴ The Court reiterated that “[m]ental anguish includes anxiety, embarrassment, anger, fear, frustration, disappointment, worry, annoyance, and inconvenience” in the 2002 case of *Liberty National Life Insurance Co. v. Daugherty*, quoting *Horton* as authority,²⁵ and again in the 2008 case of *Slack v. Stream*.²⁶

Though it is true that the *Black’s* definition includes the emotional states described in *Horton*, *Daugherty*, and *Slack*, the clear import of

²⁰ *Thompson*, 726 So. 2d at 655 (citing *Volkswagen*, 579 So. 2d at 1306).

²¹ *Volkswagen*, 579 So. 2d at 1306 (emphasis added).

²² *Id.* at 1307 (emphasis added). The plaintiff testified that the “automobile’s stalling, cutting off and losing power in the face of oncoming traffic caused him anxiety, embarrassment, and anger;” that he experienced “near misses” as a result of its loss of power; and that this frightened him. *Id.* at 1303. The Plaintiff also testified that the “automobile’s performance caused him frustration and disappointment,” and that the car was neither “reliable or dependable, had put his life in jeopardy, and had not provided him with safe transportation, and had caused him to worry.” *Id.* In fact, according to the plaintiff, his experience with the car was the worst of his life. *Id.*

²³ *Horton Homes, Inc.*, 832 So. 2d at 53 (citing *Volkswagen*, 579 So. 2d at 1307; *B & M Homes, Inc. v. Hogan*, 376 So. 2d 667, 673 (Ala. 1979)).

²⁴ *Id.* The Court also cited *B & M Homes, Inc. v. Hogan*, which states that “the cases have allowed recovery of mental anguish for annoyance and inconvenience.” *Id.*; *Hogan*, 376 So. 2d at 673. Reliance on *Hogan* is easily distinguishable because it was decided 15 years before the Court adopted the *Black’s* definition of mental anguish in *Volkswagen*.

²⁵ *Liberty Nat’l Life Ins. Co. v. Daugherty*, 840 So. 2d 152, 163 (Ala. 2002) (quoting *Horton Homes, Inc.*, 832 So. 2d at 53).

²⁶ *Slack*, No. 1060007, 2008 WL 162618, at *15.

these cases is that each emotion, in and of itself, supports an award of mental anguish damages. Thus, under the current state of Alabama law, it may be argued that one need simply demonstrate anxiety, embarrassment, anger, fear, frustration, disappointment, worry, annoyance, or inconvenience to recover mental anguish damages, citing *Horton, Daugherty*, and *Slack* as authority. On the other hand, equally compelling argument can be advanced relying upon the Alabama Supreme Court's express adoption of the *Black's* definition of compensable emotional distress, contending that a more profound psychological effect is required. At present, both arguments find support in the precedent of this state. Notwithstanding this fact, it would seem that the most intellectually sound argument follows the definition of compensable mental anguish found in *Black's*, since the Alabama Supreme Court unambiguously adopted the definition when defining compensable emotional distress.

II. RECOVERY OF MENTAL ANGUISH DAMAGES IN BREACH OF CONTRACT ACTIONS

The general rule in Alabama is that mental anguish damages cannot be recovered in breach of contract actions.²⁷ As the Alabama Court of Civil Appeals recognized in *Morris Concrete, Inc. v. Warrick*, “[t]he ground on which the right to recover such damages [for mental anguish] is denied, is that they are too remote, were not within the contemplation of the parties, and that the breach of the contract is not such as will naturally cause mental anguish.”²⁸ As with any general rule, however, Alabama recognizes an exception, allowing emotional distress damages to be recovered:

Where the contractual duty or obligation is so related with matters of mental concern or apprehensiveness or with the feelings of the party to whom the duty is owed, that a breach of that duty will necessitate or reasonably result in mental anguish or suffering and such matters were reasonably within the contemplation of the parties when the contract was made.²⁹

²⁷ See, e.g., *Wellcraft Marine, a Div. of Genmar Indus., Inc. v. Zarzour*, 577 So. 2d 414, 418-19 (Ala. 1990) (“In Alabama, the general rule is that mental anguish is not a recoverable element of damages arising from a breach of contract.”); *Jordan v. Cont'l Airlines, Inc.*, 893 So. 2d 446, 452 (Ala. Civ. App. 2004) (quoting *Sanford v. W. Life Ins. Co.*, 368 So. 2d 260, 264 (Ala. 1979)) (“As a general rule, mental anguish is not a recoverable element of actual damages growing out of a breach of contract.”); *Morris Concrete, Inc. v. Warrick*, 868 So. 2d 429, 438 (Ala. Civ. App. 2003) (quoting *Bowers v. Wal-Mart Stores, Inc.*, 827 So. 2d 63, 68 (Ala. 2001)) (“An award of damages for mental anguish generally is not allowed in breach-of-contract actions in Alabama.”).

²⁸ *Morris Concrete, Inc.*, 868 So. 2d at 438 (quoting *Bowers*, 827 So. 2d at 68-69) (alteration in the original).

²⁹ 1 ALABAMA PATTERN JURY INSTRUCTIONS CIVIL § 10.28 (2d ed. 1993); see also *Sexton v. St. Clair Fed. Sav. Bank*, 653 So. 2d 959, 960 (Ala. 1995); *Zarzour*, 577 So. 2d at 419

Though the language of this exception supports application of a case-by-case analysis, and “[t]he breach of any contract which the parties consider important will always lead to some emotional distress,”³⁰ the appellate courts of this state have applied the exception in four well recognized situations: (1) when the contract deals with a home; (2) when the contract is one of carriage; (3) when the contract is to deliver a baby; and (4) when the contract is a warranty for a new car that frequently breaks down.³¹ The exception has also been found to support recovery of mental anguish damages in other less known situations, such as where the contract at issue is an insurance contract.³²

(citations omitted) (“[T]here are two exceptions to this rule: (1) where the contractual duty is so coupled with matters of mental concern or solicitude, or with the feelings of the party to whom the duty is owed, that a breach of that duty will necessarily, or can reasonably be expected to, result in mental anguish or suffering, and (2) where the breach of the contract is tortious or is attended with personal injury.”). The recoverability of mental anguish damages in tort actions is discussed in more detail in Section IV *infra*.

³⁰ *Molina v. Merritt & Furman Ins. Agency, Inc.*, 207 F.3d 1351, 1361 (11th Cir. 2000) (citing Douglas J. Whaley, *Paying for Agony: The Recovery of Emotional Damages in Contract Actions*, 26 SUFFOLK U.L. REV. 935, 951 (1992)).

³¹ See, e.g., *Morris Concrete, Inc.*, 868 So. 2d at 438 (citations omitted); *Carraway Methodist Health Sys. v. Wise*, Nos. 1041483 & 1041545, 2007 WL 4216543, at *11 (Nov. 30, 2007) (stating “[t]hey also rely on *Bowers*, 827 So. 2d at 69, in which this Court enumerated the only four exceptional types of breach-of-contract cases in which we have allowed mental-anguish damages: (1) the breach of a contract ‘to construct or repair, or to provide utilities to, a house where the breach impacted the habitability of the house’; (2) the breach of ‘contracts of carriage’; (3) the ‘breach of a contract to deliver a baby when the baby was stillborn’; and (4) the ‘breach of warranty in the sale of a ‘lemon,’ a newly manufactured vehicle’ that frequently malfunctioned despite numerous attempts at repair.”).

³² A compelling argument can also be advanced that the subjective/nebulous nature of the exception supports an award of mental anguish damages in other situations, and can lead to inconsistent/inequitable results. Chief Justice Cobb reached such a conclusion in her dissent to the Court’s opinion in *Carraway Methodist Health Systems v. Wise*, referring to this state’s established case law regarding the recovery of mental anguish damages in breach of contract actions as fundamentally flawed. Nos. 1041483 & 1041545, 2007 WL 4216543, at *16 (Cobb, J., dissenting). Specifically, considering the facts in *Wise* (in which the majority reversed an award of \$500,000 in mental anguish damages, holding that such damages were not recoverable in the plaintiff’s breach of employment contract action), Chief Justice Cobb conceded that “[b]ut for the exception this Court has allowed for the recovery of mental anguish on a breach-of-contract claim involving a stillborn infant, I cannot honestly say that the facts surrounding [the plaintiff’s claim] were less egregious and would cause less mental anguish than those limited instances where this Court has permitted the recovery of damages for mental anguish.” *Id.* at *17. Chief Justice Cobb then proposed adopting Mississippi’s example of requiring that a plaintiff seeking to recover mental anguish damages show: “(1) that mental anguish was a foreseeable consequence of the particular breach of contract, and (2) that he or she actually suffered mental anguish. Such generalizations as it made me feel bad, or it upset me are not sufficient.” *Id.* at *18. A plaintiff must show specific suffering during a specific time frame. *Id.* For the time being, however, the appellate courts of this state follow the exception to the general rule in its current form.

A. *Recovery is Recognized*

1. When the contract deals with a home

It is well recognized that “[a] homeowner or homebuyer may recover compensatory damages for mental anguish resulting from a breach of contract or warranty in the sale or repair of the home.”³³ Such damages are also recoverable for breach of a contract to provide utilities to a home where the breach impacts habitability,³⁴ or where a lender wrongfully disburses loan proceeds for a home.³⁵ It does not matter whether the dwelling is a mobile home,³⁶ future residence,³⁷ or primary residence.³⁸

In *B & M Homes, Inc. v. Hogan*, the Alabama Supreme Court held that mental anguish damages were recoverable in conjunction with the plaintiffs’ breach of contract claim because

[i]t was reasonably foreseeable by appellants that faulty construction of appellees’ house would cause them severe mental anguish. The largest single investment the average American family will make is the purchase of a home. The purchase of a home by an individual or family places the purchaser in debt for a period ranging from twenty (20) to thirty (30) years. . . . Consequently, any reasonable builder could easily foresee that an individual would undergo extreme mental anguish if their newly constructed house contained defects as severe as those shown to exist in this case. In any event, this court long ago set down the principle that the person who contracts to do work concerning a person’s residence subjects himself to possible liability for mental anguish if that work is improperly performed and causes severe defects in that residence or home.³⁹

Stated similarly,

³³ *Horton Homes, Inc.*, 832 So. 2d at 50 n.7 (citing *S. Energy Homes, Inc. v. Washington*, 774 So. 2d 505, 518-19 (Ala. 2000); *Sexton*, 653 So. 2d at 960-62; *Liberty Homes, Inc. v. Epperson*, 581 So. 2d 449, 453-54 (Ala. 1991); *Lawler Mobile Homes, Inc. v. Tarver*, 492 So. 2d 297, 306 (Ala. 1986)).

³⁴ *Bowers*, 827 So. 2d at 69 (citing *Orkin Exterminating Co. v. Donovan*, 519 So. 2d 1330 (Ala. 1988); *Ala. Power Co. v. Harmon*, 483 So. 2d 386 (Ala. 1986); *Hogan*, 376 So. 2d 667); *Volkswagen*, 579 So. 2d at 1304).

³⁵ *Sexton*, 653 So. 2d at 960-62.

³⁶ *Epperson*, 581 So. 2d at 452 (citing *Hogan*, 376 So. 2d 667) (holding that mental anguish damage award in conjunction with mobile home purchasers’ claim for breach of contract was proper).

³⁷ *Sexton*, 653 So. 2d at 961-62 (citing *Hogan*, 376 So. 2d 667; *Lawler Mobile Homes, Inc. v. Traver*, 492 So. 2d 297 (Ala. 1986)) (rejecting argument that mental anguish damages could not be recovered because the contract allegedly breached contemplated matters regarding an anticipated residence, rather than a residence occupied by the plaintiffs).

³⁸ *Indep. Fire Ins. Co. v. Lunsford*, 621 So. 2d 977, 978 (Ala. 1993) (allowing mental anguish damages to be recovered in a breach of insurance contract action relating to a mobile home that was not the plaintiffs’ primary residence, but occasionally used by their relatives).

³⁹ *Hogan*, 376 So. 2d at 672 (alteration to original).

[b]ecause a person's home is said to be his "castle" and the "largest single individual investment the average American family will make," these contracts are "so coupled with matters of mental concern or solicitude or with the feelings of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering."⁴⁰

2. When the contract is for the delivery of a child

In *Taylor v. Baptist Medical Center, Inc.*, the plaintiff contacted her physician at 3 a.m., complaining of labor pains.⁴¹ She was admitted to the hospital, but the doctor did not arrive until ten minutes after the 11:30 a.m. delivery.⁴² The child was either stillborn or died within moments of delivery,⁴³ and the plaintiff sued her doctor for breach of contract to "provide her with pre-natal, deliver[y], and post-natal care in connection with her pregnancy and impending child birth."⁴⁴ Holding that the plaintiff could recover mental anguish damages, the Alabama Supreme Court recognized that:

Although the general rule in Alabama is that mental anguish is not a recoverable element of damages in an action for breach of contract, an exception to this rule, pertinent to the case at hand, has been recognized by this Court:

"Where the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the feelings of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, it is just that damages therefore be taken into consideration and awarded."⁴⁵

Notably, the court's holding supports compelling argument that mental anguish damages should be sought any time a contract is accompanied by an emotionally freighted duty. Specifically, but for the plaintiff's argument for the first time that the exception applied to contracts for the delivery of a child, this now well recognized situation permitting recovery of mental anguish damages may have never been acknowledged.

⁴⁰ *Molina*, 207 F.3d at 1359 (alteration to original) (quoting *Hogan*, 376 So. 2d at 671-72).

⁴¹ *Taylor v. Baptist Med. Ctr., Inc.*, 400 So. 2d 369, 371 (Ala. 1981).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 374 (alteration in original).

⁴⁵ *Id.* (internal citations omitted) (quoting *Stead v. Blue Cross-Blue Shield*, 346 So. 2d 1140, 1143 (Ala. 1977)).

3. When the contract is for carriage

Alabama law also allows mental anguish damages to be recovered when a common carrier⁴⁶ breaches its contract.⁴⁷ For example, in *Nashville, Chattanooga & St. Louis Railway v. Campbell*, the Alabama Supreme Court held that mental anguish damages could be recovered by a female passenger when a train line breached its contract by carrying her past her stop.⁴⁸ In *Seaboard Air Line Railway Co. v. Mobley*, a train passenger was also allowed to recover for mental suffering resulting from being subject to insulting language due to the carrier's implied promise in fact to provide protection from such abuse.⁴⁹

Notwithstanding this precedent, it should be noted that in the 2004 case of *Jordan v. Continental Airlines, Inc.*, the Alabama Court of Civil Appeals held that mental anguish damages could not be recovered in an action against an airline carrier.⁵⁰ In that case, a passenger, who suffered from hypertension and walked with a cane, exited an airplane looking flush.⁵¹ A wheelchair was requested but never arrived.⁵² The passenger then walked to the car with his family and was driven home, after which time he was taken to the hospital where he died eight days later.⁵³

Suit was filed against the airline and airport, asserting a claim for breach of contract to provide the deceased with a wheelchair.⁵⁴ After summary judgment was granted in the defendants' favor,⁵⁵ the plaintiff appealed, arguing that the ruling was improper because mental anguish damages could be recovered.⁵⁶ Noting the general rule prohibiting recovery of mental anguish damages in breach of contract actions, and the exception thereto, the Alabama Court of Civil Appeals held that there was insufficient evidence to support a conclusion that the plaintiff's claim fell within the exception.⁵⁷

⁴⁶ The Alabama Pattern Jury Charges define a "common carrier" as "one who holds out that he (*it*) will carry by land, water or air for hire, as long as he (*it*) has available space, (*all persons applying*), or (*goods of every one bringing goods to him*), for carriage" 1 ALABAMA PATTERN JURY INSTRUCTIONS CIVIL § 9.00 (2d ed. 1993).

⁴⁷ *Nashville, Chattanooga & St. Louis Ry. v. Campbell*, 101 So. 615, 617 (1924) (citing *W. Union Tel. Co. v. Manker*, 41 So. 850 (Ala. 1906); *W. Union Tel. Co. v. Krichbaum*, 31 So. 607 (Ala. 1902)).

⁴⁸ *Id.* at 616-17.

⁴⁹ *Taylor*, 400 So. 2d at 373 (citing *Seaboard Air Line Ry. Co. v. Mobley*, 69 So. 614 (1915), *rev'd on other grounds*, *Tomme v. Pullman Co.*, 93 So. 462 (Ala. 1922)).

⁵⁰ *Jordan*, 893 So. 2d at 452.

⁵¹ *Id.* at 450.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 448.

⁵⁵ *Id.*

⁵⁶ *Jordan*, 893 So. 2d at 451-52.

⁵⁷ *Id.* at 452.

4. When the contract is a warranty for a new car

Unlike the three previously discussed exceptions to the general rule prohibiting awards of mental anguish damages in breach of contract actions, the fourth exception does not involve contracts with emotionally freighted duties. Specifically, in *Volkswagen of America, Inc. v. Dillard*, the plaintiff purchased a new car that consistently experienced mechanical difficulty.⁵⁸ He sued the car manufacturer, asserting a claim for breach of express warranty and seeking mental anguish damages.⁵⁹ Recognizing that it had never previously applied the general mental anguish recovery exception to contracts for the purchase of a new car, and that doing so would “widen the breach in the general rule beyond its present limits,” the Alabama Supreme Court held that such damages were recoverable.⁶⁰

Notably, the Court’s holding required analysis of the “Uniform Commercial Code, Article 2, Ala. Code 1975, § 7-2-101 et seq., dealing with sales.”⁶¹ Its analysis also focused on what the court perceived to be the legislature’s intent by allowing recovery for “injury to the person” as these words are used in Code of Alabama § 7-2-215 (1975).⁶² As such, any argument that *Volkswagen* allows mental anguish damages to be recovered where no emotionally-freighted duty exists in any context other than the breach of a warranty in the sale of new car is tenuous at best. This is especially true in light of the Court’s statement that:

based on our conclusion that the intent of the legislature, when it provided for an award of damages for injury to the person for breach of warranty, was that those damages include not only damages to compensate for physical injury, but also damages to compensate for mental anguish, we conclude that the trial court properly charged the jury that it could award damages for mental suffering in an action for breach of a warranty given on the sale of a new car.⁶³

5. When the contract at issue is an insurance contract

Alabama law was once clear that mental anguish damages could not be recovered in breach of insurance contract actions.⁶⁴ For example, in

⁵⁸ *Volkswagen*, 579 So. 2d at 1302-03.

⁵⁹ *Id.* at 1302.

⁶⁰ *Id.* at 1304, 1306.

⁶¹ *Id.* at 1304.

⁶² *Id.* at 1305.

⁶³ *Id.* at 1307.

⁶⁴ See, e.g., *Vincent v. Blue Cross-Blue Shield of Ala., Inc.*, 373 So. 2d 1054, 1056 (Ala. 1979); *Sanford*, 368 So. 2d at 264; *Stead v. Blue Cross-Blue Shield of Ala.*, 346 So. 2d 1140, 1143 (Ala. 1977); *Old S. Life Ins. Co. v. Woodall*, 326 So. 2d 726, 732 (Ala. 1976); *Liberty Nat’l Life Ins. Co. v. Stringfellow*, 92 So. 2d 924, 926 (Ala. Ct. App. 1956); see also *Molina*, 207 F.3d at 1359-60 (recognizing that Alabama law does not

the 1977 case of *Stead v. Blue Cross-Blue Shield of Alabama*,⁶⁵ the Alabama Supreme Court affirmed the trial court's refusal to allow mental anguish damages to be recovered in a breach of insurance contract action stating:

The Blue Cross-Blue Shield contract in this case is a simple one calling for the payment of money only: specified rates of payment to others for supplies and services furnished Stead (in this case while an inpatient) by others; the hospital and physician. The breach of it will not permit recovery of damages for personal injury, inconvenience, annoyance or mental anguish and suffering⁶⁶

In the 1979 case of *Sanford v. Western Life Insurance Co.*, the plaintiff alleged that the defendant breached an insurance contract through the non-payment of disability benefits, seeking mental anguish damages as a result of the alleged breach.⁶⁷ Both the trial court and the Alabama Supreme Court held that mental anguish damages were not recoverable because the contract at issue did not involve a "contractual duty or obligation . . . so coupled with matters of mental concern or solicitude, or with the feelings of the party to whom the duty is owed, that a breach of that duty [would] necessarily or reasonably result in mental anguish or suffering"⁶⁸

The bright line rule prohibiting awards of mental anguish damages in breach of insurance contract actions began to fade less than ten years later when the Alabama Court of Civil Appeal decided *Burns v. Motor Insurance Corp.*⁶⁹ In that case, the plaintiffs purchased an insurance policy to insure against default "in the event that they were unable to meet their car payments because of death or disability."⁷⁰ The plaintiff-husband was already totally disabled.⁷¹ The plaintiff-wife then lost her job due to a slow down in work and a disability that affected her ability to work.⁷²

The wife filed a claim for benefits and received approximately six payments during a four-month period. The insurance company then stopped making payments, contending that the wife was no longer disabled.⁷³ Thereafter, the plaintiffs filed suit, asserting claims for breach of

allow one to recover mental anguish damages for the breach of a contract to insure a pleasure boat).

⁶⁵ *Stead*, 346 So. 2d at 1140 (Ala. 1977).

⁶⁶ *Id.* at 1142-43

⁶⁷ *Sanford*, 368 So. 2d at 261-62.

⁶⁸ *Id.* at 264 (quoting *F. Becker Asphaltum Roofing Co. v. Murphy*, 141 So. 630, 631 (Ala. 1932)).

⁶⁹ 530 So. 2d 824 (Ala. Civ. App. 1987).

⁷⁰ *Id.* at 826

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

contract and bad faith,⁷⁴ though only the breach of contract claim was submitted to the jury.⁷⁵ After the jury returned a verdict in the plaintiffs' favor, they appealed, arguing that the trial court erred in refusing to instruct the jury regarding recovery for mental anguish damages.⁷⁶ The Alabama Court of Civil Appeals affirmed the trial court's refusal to give the requested instruction, stating:

The plaintiffs assert that their damages for mental anguish were reasonably foreseeable . . . because they were a disabled couple who had only one automobile and because they relied upon their use of that automobile to go to and from their doctor and pharmacists. Our review of the testimony at trial, however, reveals no evidence which tends to create an inference that either M.I.C. or its claims personnel knew that both Mr. and Mrs. Burns were disabled. In fact, the entire reason that this case is being litigated is because M.I.C. possessed evidence leading it to believe that Mrs. Burns *was not* fully disabled. Nor does our review of the evidence indicate that M.I.C. either knew or should have known that Mr. and Mrs. Burns possessed only the car which it insured.⁷⁷

Importantly, the Court of Civil Appeals did not hold that the trial court's refusal to give the requested instruction was proper due to the nature of the contract at issue. Rather, the trial court's holding was affirmed because the plaintiffs failed to make the requisite evidentiary showing to support such an award. Thus, with this holding, the court signaled the first crack in the once impenetrable proposition that emotional distress damages cannot be recovered in breach of insurance contract actions.

This crack widened when the Alabama Supreme Court decided the 1993 case of *Independent Fire Insurance Co. v. Lunsford*.⁷⁸ In *Lunsford*, an awning attached to the plaintiffs' mobile home was damaged during a

⁷⁴ *Id.*

⁷⁵ *Burns*, 530 So. 2d at 826.

⁷⁶ *Id.*

⁷⁷ *Id.* at 829 (emphasis in original). *But see* *Employees' Benefit Ass'n v. Grissett*, 732 So. 2d 968, 984 (Ala. 1998) (Maddox, J., concurring) (quoting *Aetna Life Ins. Co. v. Lavoie*, 470 So. 2d 1060, 1080 (Ala. 1984) (Torbert, J., dissenting)) ("Certainly an insurance contract is not an ordinary commercial contract for profit in which mental distress damages are unforeseeable. The insured does not bargain for a profit; instead he bargains for compensation in time of catastrophe and for peace of mind. In this sense, an insurance contract is more akin to contracts of carriers and innkeepers, for which consequential damages have long been recognized due to the personal nature of the service. A particularly likely risk of breaching an insurance contract is resulting impoverishment or bankruptcy. Coupled with the fact that such breaches almost always coincide with emotional vulnerability (death, health problems, or destruction of a business or home), a very strong case can be made for awarding consequential damages for financial loss and even for emotional disturbance.").

⁷⁸ 621 So. 2d 977, 979 (Ala. 1993).

windstorm.⁷⁹ The plaintiffs filed an insurance claim, seeking benefits for the windstorm damage to the awning⁸⁰ that was denied.⁸¹ They then filed suit, asserting a claim for breach of contract⁸² and obtained a jury award of \$25,000 in damages. The Alabama Supreme Court affirmed the award, noting that replacement of the awning was estimated to cost \$1,603.68 with the remainder of the award representing compensation for mental anguish.⁸³

One could argue that the Court's holding is not an expansion of the recognized exceptions set forth above because the insurance at issue was for the plaintiffs' home. Such argument is supported by *Molina v. Merritt & Furman Insurance Agency, Inc.*,⁸⁴ in which the United States Court of Appeals for the Eleventh Circuit stated that:

[t]he Alabama Supreme Court in *Lunsford* did no more than to affirm an award of mental anguish damages for breach of an insurance contract on a mobile home. The court specifically noted that even though the mobile home was not the primary residence of the Lunsfords, it was, nonetheless, used by their relatives. We do not think that the *Lunsford* court intended their decision to broaden the narrow exception permitting mental anguish damages for breach of especially sensitive duties. On the contrary, the Alabama Supreme Court has made clear that it is not eager to "widen the breach in the general rule [prohibiting such damages]."⁸⁵

Importantly, however, Justice Maddox noted while concurring and dissenting in *Lunsford* that "[t]he result reached here basically adopts the rationale that the insureds in *Stead* sought to have this Court adopt, and, because it allows the recovery of damages that this Court said, in *Stead*, were not recoverable, I believe that this case overrules *Stead*."⁸⁶

In the 1993 Alabama Supreme Court case of *Pate v. Rollinson Logging Equipment, Inc.*, the plaintiff sought mental anguish damages for the alleged breach of a contract to pay credit disability benefits.⁸⁷ Notably, the Court recognized that

in *Independent Fire Insurance Co. v. Lunsford*, this Court affirmed a judgment awarding damages for mental anguish based on a breach of a contract of insurance, thus implicitly modifying the rule stated in *Vincent v. Blue Cross-Blue Shield of Alabama, Inc.*, ('the law in this state does not permit recovery for personal injury, inconvenience,

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 978.

⁸² *Id.*

⁸³ *Id.* at 979.

⁸⁴ 207 F.3d 1351 (11th Cir. 2000).

⁸⁵ *Molina*, 207 F.3d at 1360 (emphasis and citations omitted).

⁸⁶ *Lunsford*, 621 So. 2d at 981 (Maddox, J., concurring and dissenting in part).

⁸⁷ *Pate v. Rollinson Logging Equip., Inc.*, 628 So. 2d 337, 345 (Ala. 1993).

annoyance, or mental anguish and suffering in an action for breach of a contract of insurance') and similar cases.⁸⁸

After also noting the general rule that damages in breach of contract actions should return the injured party to the position he or she would have held had the contract been fully performed and that such damages are those that generally flow naturally from the breach, the Court held that:

Considering these rules of contract, along with this Court's recent decision in *Lunsford*, and given the special nature of credit disability insurance and the reasonable expectations of the parties to such a contract of insurance, we hold that the summary judgments for Roosevelt and Independent on Pate's contract claims were improper. As discussed more *infra*, there is substantial evidence supporting Pate's argument that the insurers breached their contracts and substantial evidence that Pate suffered consequential damages as a result.⁸⁹

Under the *Lunsford* line of cases, credible argument can be advanced that mental anguish damages are recoverable in breach of insurance contract actions. This said, the appellate courts of this state have not acknowledged these contracts as creating one of the well recognized situations in which such damages are recoverable.⁹⁰

B. Recovery May Be Allowed in Other Circumstances

As demonstrated through examination of the *Lunsford* line of cases, recovery of mental anguish damages is not limited to the four recognized exceptions to the general rule. In *Molina v. Merritt & Furman Insurance Agency, Inc.*, the United States Court of Appeals for the Eleventh Circuit stated that a number of Alabama cases have also allowed mental anguish damages to be recovered in actions involving the burial of loved ones.⁹¹ It recognized that such awards are allowed "because it is highly foreseeable that egregious breaches of certain contracts -- involving one's home or deceased loved one, for example -- will result in significant emotional distress."⁹² It should be noted, however, that the Alabama Supreme Court has prohibited a beneficiary from recovering mental anguish dam-

⁸⁸ *Id.* at 345 (citations omitted). The Court also specifically noted in a footnote Justice Maddox's recognition in *Lunsford* that *Lunsford* changed the law regarding the recovery of damages for mental anguish in an action for breach of an insurance contract. *Id.* at n.3.

⁸⁹ *Id.* at 345.

⁹⁰ *But see Bowers*, 827 So. 2d at 70 (citing with approval *Molina*, 207 F.3d at 1359-60) ("We have, for example, rejected as an inappropriate basis for a mental-anguish claim the breach of a contract to sell a boat. The Eleventh Circuit, relying on Alabama law, rejected a mental-anguish claim stemming from the breach of an insurance contract.") (internal citation omitted).

⁹¹ *Molina*, 207 F.3d at 1359.

⁹² *Id.* at 1359-60 (citing *Sexton*, 653 So. 2d at 962).

ages for breach of a burial insurance policy.⁹³ Additionally, though the Court has recognized that mental anguish damages can be recovered for the breach of a contract by an innkeeper,⁹⁴ this proposition has not been universally adopted.⁹⁵

The Alabama Supreme Court has also recognized that mental anguish damages may be recoverable in breach of employment contract actions, depending on the accompanying circumstances. For example, in *Carraway Methodist Health Systems v. Wise*, the Alabama Supreme Court stated that “[b]ased upon all the facts and circumstances presented here, we do not consider this to be ‘the case’ in which we should recognize the availability of mental-anguish damages arising out the breach of an employment contract.”⁹⁶ Though the Court refused to allow emotional distress damages to be recovered on the facts presented in *Carraway*, it signaled that there may be circumstances in which such damages are recoverable in breach of employment contract actions. It should also be noted that Chief Justice Cobb’s dissent to the Court’s refusal to allow mental anguish damages, stated that “precedent exists in Alabama for awarding damages for mental anguish in a breach-of-employment-contract claim.”⁹⁷

⁹³ See *Liberty Nat’l Life Ins. Co. v. Stringfellow*, 92 So. 2d 924, 926-27 (Ala. Ct. App. 1956) (citing *Jordan’s Mut. Aid Ass’n v. Edwards*, 232 Ala. 80, 166 So. 780 (Ala. 1936)). But see *Morris*, 868 So. 2d at 438 (quoting with approval *Molina’s* statement that mental anguish damages can be recovered in conjunction with claims relating to the burial of a loved one).

⁹⁴ See, e.g., *Carter v. Innisfree Hotel, Inc.*, 661 So. 2d 1174, 1179 (Ala. 1995) (quoting *Dixon v. Hotel Tutwiler Operating Co.*, 214 Ala. 396, 108 So. 26 (1926)) (citing *James v. Governor’s House, Inc.*, 225 So. 2d 815 (1969); *Florence Hotel Co. v. Bumpus*, 69 So. 566 (1915)) (“This Court has stated the following principles: ‘One of the things which a guest for hire at a public inn has the right to insist upon is respectful and decent treatment at the hands of the innkeeper and his servants. That is an essential part of the contract whether it is express or implied. This right of the guest necessarily implies an obligation on the part of the innkeeper that neither he nor his servants will abuse or insult the guest, or indulge in any conduct or speech that may unnecessarily bring upon him physical discomfort or distress of mind.’”); *American Road Service Co. v. Inmon*, 394 So. 2d 361, 363 (Ala. 1980) (citing *Dixon v. Hotel Tutwiler Operating Co.*, 214 Ala. 396, 108 So. 26 (1926)); see also MARSH & GAMBLE, ALABAMA LAW OF DAMAGES, § 36:6 (5th ed. 2005) (“Likewise it was an easy step to apply the theory of a contractual duty implied by law to make an innkeeper similarly liable” for failure to provide protection from insulting language.).

⁹⁵ See *Hardesty v. CPRM Corp.*, 391 F. Supp. 2d 1067, 1074 (M.D. Ala. 2005) (quoting *Epperson*, 581 So. 2d at 454) (“In this case, contracts for the rental of hotel rooms do not fall within the exception because they are simply not ‘so coupled with matters of mental concern or solicitude, or with the feelings of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering.’”).

⁹⁶ *Wise*, Nos. 1041483 & 1041545, 2007 WL 4216543, at * 13.

⁹⁷ *Id.* at *16 (Cobb, C.J., dissenting) (citing *Birmingham-Jefferson County Transit Auth. v. Arvan*, 669 So. 2d 825 (Ala. 1995)).

III. RECOVERY OF MENTAL ANGUISH DAMAGES IN NEGLIGENCE ACTIONS

A. *When the Plaintiff is within the "Zone of Danger"*

Historically, mental anguish damages could only be recovered in negligence actions when accompanied by physical injury.⁹⁸ This changed in the 1981 case of *Taylor v. Baptist Medical Center*, wherein the Alabama Supreme Court reasoned that "to continue to require physical injury caused by culpable tortious conduct, when mental suffering may be equally recognizable standing alone, would be an adherence to procrustean principles which have little or no resemblance to medical realities."⁹⁹

In the 1997 case of *Flagstar Enterprises, Inc. v. Davis*,¹⁰⁰ the Alabama Supreme Court, citing *Taylor*, reaffirmed that mental anguish damages may be recovered in negligence actions absent physical injury.¹⁰¹ The next year, in *AALAR, Ltd., Inc. v. Francis*, the Court noted that:

[i]n *Taylor*, it was reasonably foreseeable that the plaintiff would be placed at risk of physical injury by the physician's failure to attend her delivery; thus, there was clearly a legal duty owed by the defendant physician to his patient. Likewise, in *Flagstar*, it was reasonably foreseeable that the plaintiff would be placed at risk of physical injury as the result of the restaurant's serving her food that had been tainted with human blood--blood that put the plaintiff at risk of contracting HIV, the virus that causes the disease AIDS; thus, there was clearly a duty owed by the restaurant to its customer. As these cases demonstrate, the current state of Alabama law is consistent with the "zone of danger" test . . . which limits recovery for emotional injury to those plaintiffs who sustain a physical injury as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct.¹⁰²

Pursuant to the "zone of danger" test, mental anguish damages can be recovered when a defendant's conduct causes either physical injury,

⁹⁸ *AALAR, Ltd. v. Francis*, 716 So. 2d 1141, 1144 (Ala. 1998) (citing *Taylor v. Baptist Med. Ctr., Inc.*, 400 So. 2d 369 (Ala. 1981)).

⁹⁹ *Taylor*, 400 So. 2d at 374.

¹⁰⁰ *Flagstar Enterprises, Inc. v. Davis*, 709 So. 2d 1132 (Ala. 1997).

¹⁰¹ *Id.* at 1141 n.5 (citing *Reserve National Ins. Co. v. Crowell*, 614 So. 2d 1005, 1011 (Ala. 1993); *Taylor*, 400 So. 2d 369) ("[T]his Court has recognized that only the intentional infliction of severe emotional distress is actionable as a separate tort. However, the present action is based on allegations that a Hardee's employee negligently packaged Davis's food and that that negligence resulted in Davis's suffering emotional distress. Damages for emotional distress may be awarded in a negligence case, even in the absence of physical injury."); *see also AALAR*, 716 So. 2d at 1144 (citing *Flagstar*, 709 So. 2d 1132).

¹⁰² *AALAR*, 716 So. 2d at 1147.

or an immediate risk of physical injury.¹⁰³ As such, a bystander cannot recover mental anguish damages for simply watching the death of a loved one while outside the “zone of danger.”¹⁰⁴ As the Alabama Supreme Court appropriately recognized, this rule limits

possible plaintiffs who c[an] sue for negligent tortious harm to those who ha[ve] actually been at risk of physical injury. If not for this legal limitation, anyone who witnessed a tort arising out of negligence could bring a mental-anguish claim, even if he witnessed the tort only remotely, as for example, on television.¹⁰⁵

B. Application of the “Zone Of Danger” Test

1. Alleged negligence resulting in tainted food

In *Flagstar Enterprises, Inc. v. Davis*, the plaintiff asserted claims for negligence, wantonness, and under the Alabama Extended Manufacturer’s Liability Doctrine (AEMLD) after finding human blood in the package containing her breakfast biscuit.¹⁰⁶ Affirming denial of the defendant’s motion for judgment as a matter of law on the plaintiff’s claim for mental anguish damages, the Alabama Supreme Court noted that a jury could reasonably infer that the plaintiff experienced emotional distress as a result of eating the blood-tainted food.¹⁰⁷ Specifically, “it was reasonably foreseeable that the plaintiff would be placed at risk of physical injury as the result of the restaurant’s serving her food that had been tainted with human blood--blood that put the plaintiff at risk of contracting HIV, the virus that causes the disease AIDS”¹⁰⁸

2. Alleged negligence resulting in possible arrest/fear for physical safety

In *AALAR, Ltd. v. Francis*, the defendant’s rental car was listed with the National Crime Information Center (NCIC) after it was stolen.¹⁰⁹ Though the vehicle was retrieved and rented, it was never removed from

¹⁰³ *City of Mobile v. Taylor*, 938 So. 2d 407, 412 n.2 (Ala. Civ. App. 2005).

¹⁰⁴ *See, e.g., Gideon v. Norfolk S. Corp.*, 633 So. 2d 453, 454 (Ala. 1994) (“Even if we did recognize such a cause of action [for negligent infliction of emotional distress,] we would not extend it to bystanders.”); *Murray*, 751 So. 2d at 498 (quoting *AALAR*, 716 So. 2d at 1144-47 (Ala. 1998)) (“As noted, this Court in *Taylor* abandoned the ‘physical impact’ test. This Court has, however, refused to extend liability so far as to recognize a right of recovery in bystanders.”).

¹⁰⁵ *Bowers*, 827 So. 2d at 69 (citing *Consolidated Rail Corp. v. Gotshall*, 512 U.S. 532, 534 (1994)).

¹⁰⁶ *Flagstar*, 709 So. 2d at 1133-34.

¹⁰⁷ *Id.* at 1140.

¹⁰⁸ *AALAR*, 716 So. 2d at 1147.

¹⁰⁹ *Id.* at 1142.

the NCIC database.¹¹⁰ As a result, the plaintiff son who rented the car was questioned by police at his mother's home.¹¹¹ Though neither the son nor his mother, who was also a plaintiff and signed the rental papers, experienced physical injury, an officer drew his pistol momentarily when the son went to the car to retrieve the rental papers.¹¹²

Holding that the mother could not recover mental anguish damages, the Alabama Supreme Court stated that "the undisputed evidence indicated that [the mother] was never at risk of suffering physical injury as a result of renting the automobile."¹¹³ Specifically, "[t]here [was] no evidence that the police physically threatened her by, say, pulling a gun in her presence or by verbally threatening her with physical violence."¹¹⁴ The Court reached a different conclusion with respect to the son. Specifically, the Court held that there was a question of fact as to whether it was reasonably foreseeable that the son would be placed at risk of physical injury and whether he was emotionally distressed by having the police officer draw his weapon.¹¹⁵

In the 2002 Alabama Court of Civil Appeals case *Terrell v. R & A Manufacturing Partners, Ltd.*, the plaintiff purchased a dump trailer.¹¹⁶ The paperwork reflected that the vehicle was a 2000 model; however, the VIN and serial plate reflected that it was a 1999 model.¹¹⁷ A new certificate of origin was issued, which contained the same VIN and indicated that the trailer was a 1999 model, while the new serial plate contained a different VIN.¹¹⁸ The trial court granted summary judgment in the defendant's favor on the plaintiff's negligence claim, concluding that the plaintiff could not recover mental anguish damages.¹¹⁹

On appeal, the plaintiff argued that he was entitled to recover mental anguish damages for alleged emotional distress under the authority of *AALAR* by attempting to compare himself to the son in that case.¹²⁰ Specifically, he argued that, like the son, he could have been subject to arrest at gunpoint because of the discrepancies in the VINs on the undercarriage of the trailer and the serial plate.¹²¹ The Court of Civil Appeals rejected this argument, recognizing that the plaintiff was neither arrested nor testified that he feared for his physical safety when questioned about

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1143.

¹¹² *Id.*

¹¹³ *Id.* at 1147.

¹¹⁴ *AALAR*, 716 So. 2d at 1147-48.

¹¹⁵ *Id.* at 1147; *see also* *Terrell v. R & A Mfg. Partners, Ltd.*, 835 So. 2d 216, 229 (Ala. Civ. App. 2002) (citing *AALAR*, 716 So. 2d at 1147).

¹¹⁶ *Terrell*, 835 So. 2d at 220.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 229-30.

¹²⁰ *Id.* at 229.

¹²¹ *Id.*

his alleged emotional distress.¹²² As such, the court concluded that the plaintiff's situation was more like that of the mother than the son in *AALAR*, and the fact that he may have been a foreseeable plaintiff did not entitle him to recover mental anguish damages.¹²³

As *AALAR* makes clear, and *Terrell* re-affirms, an important consideration in application of the "zone of danger" test is the distinction between whether the risk of injury is foreseeable or immediate. Where the injury is simply foreseeable, mental anguish damages cannot be recovered. However, where there is an immediate risk of injury, such damages are recoverable.¹²⁴ Thus, practitioners addressing claims for mental anguish damages in the negligence context should be aware of this distinction and present evidence accordingly. For example, inquiry should be made as to a plaintiff's proximity to an event, or the lack of possibility that a plaintiff could have been injured.

3. Alleged negligence resulting in damage to a home

a. Defects in home air conditioner resulting in destruction of a home

In *White Consolidated Industries, Inc. v. Wilkerson*, the plaintiffs filed suit under the AEMLD after their home was destroyed when their air conditioner caught fire.¹²⁵ Holding that the plaintiffs could not recover mental anguish damages, the Alabama Supreme Court stated:

The evidence indicates that the defect in the air conditioner caused harm only to the Wilkersons' property. Additionally, at the time of the fire the Wilkersons were away from home and at their places of employment. Therefore, they were not in the "zone of danger" created by the defect – a zone in which they would have been at immediate risk of physical harm. Thus, the Wilkersons are not entitled to recover damages for mental anguish.¹²⁶

¹²² *Terrell*, 835 So. 2d at 229.

¹²³ *Id.* at 229-30.

¹²⁴ *City of Mobile*, 938 So. 2d at 412 n.2 ("AALAR makes a clear distinction between foreseeable risk of injury and immediate risk of injury. The mother in *AALAR* was foreseeably at risk, but she did not actually face an immediate risk. Therefore, she could not recover for mental anguish, but her son could recover because the gun was actually pulled on him."); see also *Terrell*, 835 So.2d at 229-30 (noting that plaintiff was foreseeably at risk but never actually at risk); 38 AM. JUR. 2d *Fright, Shock, & Mental Disturbance* § 25 (1999) ("Where a plaintiff does not suffer a contemporaneous physical injury, in some jurisdictions, he or she may still prevail on a negligent infliction of emotional distress claim if the plaintiff can prove that he or she [1] was placed in a zone of danger of imminent physical impact, [2] reasonably feared for his or her safety, and [3] as a consequence, suffered severe emotional distress."); see also *Ex parte Grand Manor, Inc.*, 778 So. 2d 173, 179 (Ala. 2000) (quoting *Bowers*, 752 So. 2d at 1203).

¹²⁵ *Wilkerson*, 737 So. 2d at 448.

¹²⁶ *Id.* at 449.

Pursuant to *Wilkerson*, the “zone of danger” test applies equally to claims brought under the AEMLD.¹²⁷

b. Negligent servicing of an automobile resulting in destruction of a home

Similarly, in *Wal-Mart Stores, Inc. v. Bowers*, the plaintiff-wife took her car to Wal-Mart to be serviced.¹²⁸ When she arrived home, the car began to smoke, then burst into flames, and ultimately destroyed both the car and the plaintiffs’ home.¹²⁹ The plaintiff-husband’s only theory of liability submitted to the jury was that Wal-Mart negligently serviced the car and that this negligence caused both the car and house to be destroyed.¹³⁰

The Alabama Supreme Court refused to allow the husband to recover mental anguish damages stating:

Mr. Bowers suffered no physical injury as a result of the fire. It is undisputed that he was away from home when the fire started. Because he was outside the zone of danger and was not placed in any immediate risk of physical harm, Mr. Bowers was not entitled to recover damages for mental anguish.¹³¹

Notably, the plaintiffs argued that even if they were outside the “zone of danger,” they should be allowed to recover mental anguish damages because such damages are recoverable when a wrong is committed under circumstances of insult or contumely.¹³² The Court rejected this argument, noting that “in negligence actions involving damage only to property, the ‘insult or contumely’ exception does not apply. Instead, in negligence actions, the applicable test is the zone-of-danger test.”¹³³

¹²⁷ *Bowers*, 752 So. 2d at 1203 (“In *White Consolidated Industries*, the plaintiffs’ house burned as the result of a defect in an air conditioner they had recently purchased and installed. They suffered property damage but no physical injury. They sought mental-anguish damages based on a claim made under the Alabama Extended Manufacturer’s Liability Doctrine (“AEMLD”). This Court, even though the case was an AEMLD case and not a traditional negligence case, applied the zone-of-danger test, holding that, because ‘at the time of the fire [the plaintiff homeowners] were away from home and at their places of employment,’ they were not within the zone of danger.”).

¹²⁸ *Id.* at 1202.

¹²⁹ *Id.*

¹³⁰ *Id.* at 1204.

¹³¹ *Id.*

¹³² *Id.* at 1203-04 (citing *Jeffries v. Bush*, 608 So. 2d 361, 364 (Ala. 1992)). Black’s Law Dictionary defines the term “contumely” as “[i]nsulting language or treatment; scornful rudeness.” BLACK’S LAW DICTIONARY 268 (7th ed. 2000).

¹³³ *Bowers*, 752 So. 2d at 1204 (citing *AALAR*, 716 So. 2d at 1147; *Wilkerson*, 737 So. 2d at 449).

c. Negligent manufacture of a mobile home

In *Ex parte Grand Manor, Inc.*, the plaintiffs purchased a mobile home, and during the closing presented the seller with a list of problems that they wanted corrected.¹³⁴ The list was incorporated into the parties' written agreement, and the defendant agreed to complete all repairs by January 17, 1996.¹³⁵ This date came and went without the repairs being completed.¹³⁶ The plaintiffs then filed suit, asserting claims for negligent manufacture, negligent delivery, and promissory fraud.¹³⁷ After the trial court entered a jury verdict for the plaintiffs, the seller appealed to the Alabama Supreme Court.¹³⁸

The Court began its analysis of the jury award, reiterating that “[i]n negligence actions, Alabama follows the ‘zone-of-danger’ test, which limits recovery of mental anguish damages to those plaintiffs who sustain a physical injury as a result of a defendant’s negligent conduct, or who are placed in immediate risk of physical harm by that conduct.”¹³⁹ It then reviewed the evidence submitted during trial concluding that, though when viewed most favorably to the plaintiffs, the evidence tended to show that the plaintiffs were potentially at risk of suffering physical injury, the record did not support a conclusion that there was fear for one’s physical safety.¹⁴⁰ As such, the Court held that, though mental anguish damages may be recovered in negligence actions relating to manufactured homes, the plaintiffs did not make the requisite showing to recover such damages.¹⁴¹

It should be noted, however, that in *Keck v. Dryvit Systems, Inc.*, the plaintiffs sought damages as a result of alleged defects that arose after an exterior insulation finishing system was applied to their home.¹⁴² The trial court dismissed their negligence claim, holding that the defendants did not owe the plaintiffs a duty due to a lack of contractual privity.¹⁴³ The plaintiffs appealed this decision, citing *Ex parte Grand Manor, Inc.* for the proposition that a plaintiff may recover on a negligence claim absent contractual privity when he is a foreseeable victim of a defect in the product.¹⁴⁴ The Alabama Supreme Court distinguished its holding in *Ex parte Grand Manor, Inc.* from the facts at hand, noting that the plaintiffs in *Keck* were subsequent purchasers of the house and had no rela-

¹³⁴ *Ex parte Grand Manor, Inc.*, 778 So. 2d 173, 175-76 (Ala. 2000).

¹³⁵ *Id.* at 176.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 177.

¹³⁹ *Grand Manor*, 778 So. 2d at 179 (quoting *Bowers*, 752 So. 2d at 1203).

¹⁴⁰ *Id.* at 179-81.

¹⁴¹ *See id.* at 180-81.

¹⁴² *Keck v. Dryvit Sys., Inc.*, 830 So. 2d 1, 3 (Ala. 2002).

¹⁴³ *Id.* at 4, 9.

¹⁴⁴ *Id.* at 4, 10.

tionship or contract with the builder or any of the defendants. In *Ex parte Grand Manor, Inc.*, however, the mobile home dealer contracted with the retailer to manufacture a mobile home for the plaintiffs according to their specifications.¹⁴⁵ Since the facts in *Ex parte Grand Manor, Inc.* indicated that the defendant was manufacturing the mobile home for a specific client, as opposed to mass producing a generic home to sell to a retailer, the plaintiffs in that case were within the foreseeable area of risk, but the plaintiffs in *Keck*, secondary purchasers of the home who had no relationship with the defendants, were not.¹⁴⁶

d. Negligence resulting in damage to a home by the elements

In *City of Mobile v. Lester*, the trial court awarded four plaintiffs emotional distress damages ranging from \$10,000 to \$15,000 as a result of alleged negligence causing the land around their homes to subside.¹⁴⁷ The City appealed the awards, contending that they were improper.¹⁴⁸ Applying the “zone of danger” test to the facts at hand, the Alabama Court of Civil Appeals noted that

[i]n the present case, it appears that the only plaintiff who presented evidence of potentially being at risk of physical injury was Mrs. Patterson. She testified that her sewer pipes had separated, causing various plumbing problems; that the pipes to her gas water heater had separated, causing a leak; and that a rat had entered her home through a crack.¹⁴⁹

In light of this testimony, the Court of Appeals affirmed the mental anguish damage award in Mrs. Patterson’s favor but reversed the awards rendered in favor of the other plaintiffs because they did not offer similar evidence that they were within the “zone of danger.”¹⁵⁰

In *City of Mobile v. Taylor*, the plaintiffs alleged that negligent maintenance of the City’s storm water drainage system resulted in repeated flooding of their homes.¹⁵¹ Affirming the trial court’s decision to submit the plaintiffs’ claims for mental anguish damages to the jury, the Alabama Court of Civil Appeals noted that both plaintiffs were older and during all of the floods either left home or stayed indoors due to fear of the rising water.¹⁵² Additionally, though neither plaintiff experienced physical injury as a result of the floods, they each gave testimony from which the jury could infer that

¹⁴⁵ *Id.* at 10.

¹⁴⁶ *Id.*

¹⁴⁷ *Lester*, 804 So. 2d at 222.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 229-30.

¹⁵⁰ *Id.* at 230.

¹⁵¹ *City of Mobile v. Taylor*, 938 So. 2d at 408-09.

¹⁵² *Id.* at 409, 411.

the flooding problem at issue resulted in the plaintiffs' losing sleep whenever rain was threatened, the plaintiffs' needing to remain vigilant during rains, a possibility that snakes or other animals might be in the water and enter the plaintiffs' houses, and a risk that the plaintiffs might fall in the water and be injured or drown if it became necessary for any reason to leave their houses. Each plaintiff also testified as to a fear of electrocution caused by the flood water; each plaintiff testified that she would normally cut the main electrical circuits to her house or turn off all lights in her house during heavy rains to avoid risks of electrical shock.¹⁵³

Given this testimony, the plaintiffs presented a question of fact for the jury as to whether they experienced mental anguish damages, and the trial court did not commit reversible error on this issue.¹⁵⁴

e. Alleged negligence resulting in damage to a business

In *Morris Concrete, Inc. v. Warrick*, an individual used his employee discount to buy concrete for the plaintiff from his employer in exchange for waiver of a down payment for the vehicle he was purchasing.¹⁵⁵ The concrete was supposed to withstand 3,000 pounds per square inch of pressure, but did not, which resulted in alleged damage to the plaintiff.¹⁵⁶ The plaintiff filed suit against the employer, asserting claims for breach of contract and negligence, among other claims.¹⁵⁷ The Alabama Court of Civil Appeals refused to allow mental anguish damages to be recovered on the plaintiff's breach of contract claim because the contract was not within one of the recognized exceptions to the general rule discussed above.¹⁵⁸ The court also reversed the award of mental anguish damages on the plaintiff's negligence claim, stating "[o]ur review of the record fails to show that Warrick produced any evidence that would support a finding that he was in a zone of danger as a result of Morris Concrete's negligence. Thus, an award of mental-anguish damages as to this claim would also be erroneous."¹⁵⁹

¹⁵³ *Id.* at 409-10.

¹⁵⁴ *Id.* at 410. However, the appellate court did find that the trial court erred in not submitting the defendant's "zone of danger" instruction to the jury. *Id.* at 412. While the trial judge determined that the question of whether the plaintiffs were in the "zone of danger" was a question of law for the court to decide, the Court of Civil Appeals held that the decision "that it was foreseeable that the plaintiffs would be at risk of physical injury" was a question of fact for the jury to decide. *City of Mobile v. Taylor*, 938 So. 2d at 412-13. Thus, the court reversed and remanded for a new trial on damages. *Id.* at 413.

¹⁵⁵ *Warrick*, 868 So. 2d at 432.

¹⁵⁶ *Id.* at 432.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 438-39.

¹⁵⁹ *Id.* at 440.

C. *Recovery Despite Absence of “Zone of Danger” Test Analysis*

Notwithstanding what appears to be a clear requirement to recover mental anguish damages in negligence actions, Alabama appellate courts have allowed such damages to be recovered absent discussion of one’s presence within a “zone of danger.”

1. Negligence/wantonness in organ transplant

In *George H. Lanier Memorial Hospital v. Andrews*, a 12-year-old boy suffering from a severe asthma attack was brought to the hospital emergency room where he died due to cardiac arrest.¹⁶⁰ His eyes were later removed by an organ donor bank due to an alleged belief that the boy’s parents had provided their consent.¹⁶¹ The jury awarded each parent \$100,000 on their claims for negligence/wantonness.¹⁶² The defendants challenged the awards on appeal, arguing that they were entirely attributable to alleged mental anguish and excessive.¹⁶³ Notably, the Alabama Supreme Court affirmed the awards absent any indication that the plaintiffs were within the “zone of danger.”¹⁶⁴

A possible explanation for the Court’s holding is that a plaintiff need not be within the “zone of danger” to recover mental anguish damages in a wantonness action. Notably, however, in *Terrell v. R & A Manufacturing Partners, Ltd.*, the plaintiff challenged the trial court’s summary judgment order on his claim for negligent/wanton manufacture, contending that it was improper because he experienced emotional distress as a result of the defendant’s actions.¹⁶⁵ The Alabama Court of Civil Appeals, rejected this argument, and affirmed summary judgment in the defendant’s favor because the plaintiff did not demonstrate that he was within the “zone of danger.”¹⁶⁶

Additionally, a close look at the decision in *George H. Lanier* supports the possibility that the defendants may not have challenged whether

¹⁶⁰ *George H. Lanier*, 901 So. 2d at 717.

¹⁶¹ *Id.* at 718-19.

¹⁶² *Id.* at 719.

¹⁶³ *Id.* at 725.

¹⁶⁴ *Id.* at 726.

¹⁶⁵ *Terrell*, 835 So. 2d at 229.

¹⁶⁶ *Id.* at 229. In *Horton Homes, Inc. v. Brooks*, the defendants argued that the plaintiff’s wanton repair claim should not have been submitted to the jury because he could not recover mental anguish damages since he was not within the “zone of danger.” The Court made a point to note that it “express[ed] no opinion” regarding the defendant’s argument. Concluding that there was no basis to believe that mental anguish damages were awarded under the wanton repair claim as opposed to the breach of warranty claims, the Court noted that a homeowner could recover compensatory damages for mental anguish resulting from a breach of warranty claim. Thus, whether mental anguish damages can be recovered in conjunction with wantonness claims absent presence within the “zone of danger” appears to be an open question in this state.

emotional distress damages were recoverable. Specifically, it does not appear that the defendants challenged the plaintiffs' ability to obtain such damages but simply argued that the award was excessive.¹⁶⁷ Given the Court of Civil Appeals' holding in *Terrell*, and this possible explanation for the holding in *George H. Lanier*, a compelling argument can be made that the "zone of danger" test also governs claims for mental anguish damages in wantonness actions.¹⁶⁸ Importantly, however, claims for negligence and wantonness are clearly different, which may support a difference in recovery of mental anguish damages under each tort claim.¹⁶⁹

¹⁶⁷ *George H. Lanier*, 901 So. 2d at 725 ("The defendants' final argument is that the jury verdict of \$200,000 was excessive. They argue that the award was entirely attributable to damages for mental anguish, and they contend that insufficient evidence was presented at trial to support such a verdict.").

¹⁶⁸ See *Hardesty*, 391 F. Supp. 2d at 1072 n.1 ("The Court does acknowledge that, to the extent that the case of *George H. Lanier*, 901 So. 2d 714, is valid precedent, a contradiction exists in Alabama law. In [*George H. Lanier*], the Alabama Supreme Court held that the emotional damages that the plaintiffs had been permitted to recover in a negligence/wantonness action where the hospital mistakenly harvested the corneas of their deceased child were not excessive. *Id.* at 725-26. The Court did not apply the zone of danger test, instead stating that '[i]t is well settled that a plaintiff may recover compensatory damages for mental anguish, even when mental anguish is the only injury visited upon the plaintiff.' *Id.* For this proposition, the Court cited only *Kmart v. Kyles*, 723 So. 2d 572, 578 (Ala. 1998) and *Alabama Power Co. v. Harmon*, 483 So. 2d 386, 389 (Ala. 1986). *Id.* A close reading of *Alabama Power* illustrates that the court there reaches two conclusions: first, that according to long-established contract law, mental anguish damages are recoverable in *breach of contract actions* where the contractual duty is bound up with matters of mental concern, and second, that 'claims for damages for mental anguish need not be predicated upon the presence of physical *symptoms*.' *Harmon*, 483 So. 2d at 389 (emphasis added). It is unclear how these accurate statements of contract and damages law (even in conjunction with the statements of law in *Kmart v. Kyles*, which itself only cites to *Harmon*) support the proposition that "'it is well settled' that plaintiffs in negligence actions may recover for mental anguish damages regardless of their physical injury or immediate risk or harm. At most, this holding can be viewed only as a minority position in light of the repeated strong statements by the same court, after lengthy analysis, that the zone of danger test is the proper law in negligence cases in Alabama.").

¹⁶⁹ See, e.g., *Ex parte Jackson*, 737 So. 2d 452, 455 (Ala. 1999) (quoting *Lynn Strickland Sales & Serv., Inc. v. Aero-Lane Fabricators, Inc.*, 510 So. 2d 142, 145-46 (Ala. 1987) ("To the extent that the negligence cause of action and the wantonness cause of action are both creatures of tort law, of course, they are similar. However, they are nonetheless distinct causes of action. This Court, in *Lynn Strickland Sales & Service, Inc. v. Aero-Lane Fabricators, Inc.*, addressed the distinction between negligence and wantonness [stating] . . . '[w]antonness is not merely a higher degree of culpability than negligence. Negligence and wantonness, plainly and simply, are qualitatively different tort concepts of actionable culpability . . . Willful and wanton conduct should not be confused with negligence. It has been correctly stated that the two concepts are as 'unmixable as oil and water.'").

2. Negligence resulting in flooding of a home

In *Carson v. City of Prichard*, multiple plaintiffs filed suit, claiming damages as a result of defects in the city's sanitary sewer system.¹⁷⁰ The Alabama Supreme Court allowed mental anguish damages to be recovered absent any discussion of whether the plaintiffs were within the "zone of danger."¹⁷¹ The Court also allowed such damages to be recovered absent examination of the plaintiffs' presence within the "zone of danger" in *City of Mobile v. Jackson*.¹⁷²

Justice Johnstone issued virtually verbatim dissenting opinions in *Wal-Mart Stores, Inc. v. Bowers* and *White Consolidated Industries, Inc. v. Wilkerson*, citing *Carson* and *Jackson* for the proposition that mental anguish damages have been awarded when plaintiffs were outside the "zone of danger."¹⁷³ Justice Lyons attempted to distinguish Justice Johnstone's interpretation of *Carson* through his concurrence in *White*, stating that:

In *Carson*, the evidence showed that the homeowners experienced continuing suffering caused by the presence of raw sewage in their yards and homes; that suffering included the difficulty of dealing with an unpleasant odor, a loss of appetite, and, in one instance, snakes in the house. Under *AALAR, Ltd., Inc. v. Francis*, the Wilkersons were outside the "zone of danger," while the plaintiffs in *Carson* clearly were within it.¹⁷⁴

Justice Lyons, reiterated this position while dissenting in *Ex parte Grand Manor, Inc.*, stating that he was

unable to join Justice Johnstone's dissenting opinion [in that case], because it relie[d] on *Carson v. City of Prichard*, and *City of Mobile v. Jackson*, for the proposition that this Court has previously accepted the proposition that a plaintiff can recover mental-anguish damages based on negligent interference with the enjoyment of the plaintiff's home, without the plaintiff's having to show either a physical injury or that the plaintiff was within the "zone of danger." While I recognize that such an exception exists with regard to contract law, I can find no such exception under general negligence law.¹⁷⁵

¹⁷⁰ *Carson v. City of Prichard*, 709 So. 2d 1199, 1201-02 (Ala. 1998).

¹⁷¹ *Id.* at 1208. The plaintiffs alleged various types of injuries, including mental anguish, emotional distress, annoyance and inconvenience. *Id.* at 1202. All of them complained that the overflow caused debris and waste from the sewer system to enter their yards. *Id.* at 1202-03. One plaintiff testified that he had snakes in his house as a result of the sewage overflow. *Id.* at 1203. According to the residents, the odor from the sewage overflow was so great that they could not eat in their homes and were embarrassed to have visitors. *Id.*

¹⁷² *City of Mobile v. Jackson*, 474 So. 2d 644, 645-46 (Ala. 1985).

¹⁷³ *Bowers*, 752 So. 2d at 1205-06; *Wilkerson*, 737 So. 2d at 450-52.

¹⁷⁴ *Wilkerson*, 737 So. 2d at 450.

¹⁷⁵ *Ex parte Grand Manor, Inc.*, 778 So. 2d at 185 (citations omitted).

Furthermore, according to Justice Lyons,

no exception to the “zone-of-danger” rule was necessary in *Carson* to support an award of damages for mental anguish because in *Carson* “the homeowners experienced continuing suffering caused by the presence of raw sewage in their yards and homes; that suffering included the difficulty of dealing with an unpleasant odor, a loss of appetite, and, in one instance, snakes in the house.”¹⁷⁶

Additionally,

a review of the [*Jackson*] opinion . . . , and the briefs filed in that case, reflects that the only issue argued regarding the validity of the award of damages concerned whether the plaintiffs could recover damages in excess of the amount indicated in their notice, and it reflects that the sufficiency of the evidence to support an award of mental-anguish damages was not in issue.¹⁷⁷

The majority in *Ex parte Grande Manor, Inc.* also rejected Justice Johnstone’s interpretation of *Carson* and *Jackson* stating:

[i]n *Carson*, the homeowners presented substantial evidence indicating that, as a result of the defendant's negligent operation and maintenance of the sewer system, they suffered, and continued to suffer, from the overflow of raw sewage into their yards and homes after periods of heavy rain. . . . In *Jackson* (a case governed by the “scintilla rule” of evidence), the homeowners presented evidence indicating that the defendant's design and maintenance of a drainage system caused water to flood their home, caus[ing] substantial damage to the structure and to the personal property located in the house. As a result of the flooding, the homeowners left their home and lived in a camper parked in their backyard. Thus, in both *Carson* and *Jackson*, the plaintiffs presented sufficient evidence to meet the applicable standard of proof, evidence from which a jury could reasonably find that they had suffered mental anguish.¹⁷⁸

Notwithstanding the potential for argument that *Carson* and *Jackson* allow mental anguish damages to be recovered absent presence within the “zone of danger,” the Alabama Supreme Court’s subsequent precedent interpreting these opinions undermines any contention to this effect.

3. Negligence resulting in business damages

In the 1993 case of *Pittman v. Mast Advertising Publishing, Inc.*, the Alabama Supreme Court addressed its previous holding in *Morgan v. South Central Bell Telephone Co.* when analyzing whether the plaintiff

¹⁷⁶ *Id.* at 186 (citing *Wilkerson*, 737 So. 2d 450).

¹⁷⁷ *Id.* (citations omitted).

¹⁷⁸ *Id.* at 181 n.7 (quotation marks omitted).

could recover mental anguish damages in conjunction with his negligence claim stating:

In support of his argument that the summary judgment was improper, Mr. Pittman relies primarily on *Morgan v. South Central Bell Telephone Co.*, wherein this Court held that two periodontists who had paid for listings in a telephone directory could recover damages for mental anguish in a negligence action against a telephone company and the agency that had solicited the listing when one of their names was omitted.¹⁷⁹

The Court added that the particular facts of *Morgan* demonstrated that the defendants should have reasonably foreseen that their negligent misperformance of the contract would cause the plaintiffs to suffer mental anguish.¹⁸⁰ Though this precedent appears totally inconsistent with the current state of Alabama law, it does support argument that mental anguish damages can be recovered in a business context absent one's presence within the "zone of danger."¹⁸¹

4. Negligent/innocent misrepresentation/legal fraud

Alabama recognizes claims for negligent/innocent misrepresentation, commonly known as legal fraud.¹⁸² Not surprisingly, the case law of this state supports conflicting arguments as to whether mental anguish damages can be recovered in conjunction with such claims. For example, in *Pacific Mutual Life Insurance Co. v. Haslip*, the Alabama Supreme Court stated, "[a]gain, damages for mental distress may not be awarded unless the fraud [is] willful."¹⁸³ The United States Court of Appeals for the Eleventh Circuit reached a similar conclusion when it accepted the plaintiff's concession that "neither [a] negligenc[t] nor . . . innocent misrepresentation claim is capable of supporting an award of damages for mental anguish," citing *Haslip* as authority.¹⁸⁴

However, in *Ford Motor Co. v. Burkett*, the Alabama Supreme Court allowed mental anguish damages to be recovered where the plaintiff's claim appears to have been based upon simply negligent misrepresentations.¹⁸⁵ Specifically, in that case, the plaintiff paid approximately \$10,000 for an automobile that used an inordinate amount of motor oil.¹⁸⁶

¹⁷⁹ *Pittman v. Mast Adver. Publ'g., Inc.*, 619 So. 2d 1377, 1378 (Ala. 1993) (citing *Morgan v. S. Cent. Bell Tel. Co.*, 466 So. 2d 107, 114 (Ala. 1985)).

¹⁸⁰ *Pittman*, 619 So. 2d at 1379.

¹⁸¹ *Id.* at 1378.

¹⁸² ALA. CODE § 6-5-101 (1975).

¹⁸³ *Pac. Mut. Life Ins. Co. v. Haslip*, 553 So. 2d 537, 540 (Ala. 1989) (citing *Holcombe v. Whitaker*, 318 So. 2d 289 (1975)).

¹⁸⁴ *Molina*, 207 F.3d at 1358 (noting that "mental anguish damages not available for negligent fraud").

¹⁸⁵ *Ford Motor Co. v. Burkett*, 494 So. 2d 416, 418 (Ala. 1986).

¹⁸⁶ *Burkett*, 494 So. 2d at 416.

Initially, the vehicle manufacturer made several statements to the effect that it would fix the problem and make the purchaser happy.¹⁸⁷ When the problems continued, the plaintiff filed suit against the manufacturer and car dealer, after which time his claims for breach of warranty and fraud were submitted to the jury.¹⁸⁸

Reversing the jury's award of punitive damages, the Court recognized that "a misrepresentation of a material fact, not accompanied by either malice, reckless disregard for the truth, or intent to injure (i.e., one made without knowledge of its falsity), while constituting a legal fraud and authorizing compensatory tort damages, will not authorize the imposition of punitive damages."¹⁸⁹ The Court also noted that it was unable to draw reasonable inferences from the evidence that the tort was committed with "malice or with reckless disregard for the truth, or with intent to injure."¹⁹⁰ Tacit in the Court's statement is the conclusion that the misrepresentation at issue was negligent or innocent rather than willful. Of particular significance is the Court's conclusion that though the record did not support an award of punitive damages, it was not "devoid of support for a reasonable inference that Ford committed the tort of legal misrepresentation [, which], in turn, authorize[d] an award of compensatory damages, including loss of time and mental anguish proximately resulting from the wrong."¹⁹¹

In the 2006 case of *Cochran v. Ward*, the Alabama Supreme Court also allowed mental anguish damages to be recovered in conjunction with a claim for legal fraud.¹⁹² In that case, the jury returned a verdict of \$350,000, which the defendant challenged as impermissibly including an award of punitive damages.¹⁹³ The Court rejected this contention, noting that "[b]ecause the verdict form applicable only to legal fraud was used by the jury and because it is inconsistent with an award of punitive damages, we must conclude that the total award of \$350,000 represented compensatory damages."¹⁹⁴ Importantly, the Court went on to state that

[b]ased on the undisputed evidence regarding economic damage of \$75,000 and the evidence of mental anguish, and in light of the language on the verdict form, we reject Cochran's contention that the \$350,000 award 'of necessity' included punitive damages. We fur-

¹⁸⁷ *Id.* at 416.

¹⁸⁸ *Id.* at 416-17.

¹⁸⁹ *Id.* at 417.

¹⁹⁰ *Id.* at 418.

¹⁹¹ *Id.* at 417-18.

¹⁹² *Cochran*, 935 So. 2d at 1176.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

ther note that it is not unusual for juries to award compensatory damages for mental anguish at or above the level awarded here.¹⁹⁵

In light of this precedent, credible argument can be advanced that a plaintiff may recover mental anguish damages for negligent misrepresentation absent presence within the “zone of danger,” though Alabama appellate court precedent also supports argument to the contrary.

IV. RECOVERY OF MENTAL ANGUISH DAMAGES IN INTENTIONAL TORT ACTIONS

As a general rule, mental anguish damages are only recoverable in tort actions resulting in injury to property when the tort is committed under circumstances of insult or contumely.¹⁹⁶ Notwithstanding this general rule, as one commentator has noted, the appellate courts of this state seem to freely allow emotional distress damages to be recovered where the underlying tort is coupled with some type of intentional and direct mental injury.¹⁹⁷ Moreover, as the Alabama Court of Civil Appeals recognized in *Dockins v. Drummond*, “[o]ur supreme court has held that damages for mental anguish are allowed in an action alleging ‘culpable tortious conduct,’ regardless of the absence of a physical injury.”¹⁹⁸ Stated similarly, “intentional torts committed on persons authorizes recovery for mental distress.”¹⁹⁹ Though the list of intentional tort claims for which mental anguish damages are recoverable set forth below is not exhaustive, it does provide a point of reference when analyzing this area of the law.

¹⁹⁵ *Id.* (citing *Orkin Exterminating Co.*, 832 So. 2d 25 (Ala. 2001); *Oliver v. Towns*, 770 So. 2d 1059 (Ala. 2000); *Delchamps v. Bryant*, 738 So. 2d 824 (Ala. 1999); *Sperau v. Ford Motor Co.*, 674 So. 2d 24 (Ala. 1995), *vacated*, 517 U.S. 1217 (1996), *remanded to*, 708 So. 2d 111 (Ala. 1997); *Crown Life Ins. Co. v. Smith*, 657 So. 2d 821 (Ala. 1994); *Sears, Roebuck & Co. v. Harris*, 630 So. 2d 1018 (Ala. 1993)).

¹⁹⁶ *New Plan Realty Trust v. Morgan*, 792 So. 2d 351, 363 (Ala. 2000) (citing *Prudential Ballard Realty Co. v. Weatherly*, 792 So. 2d 1045, 1049 (Ala. 2000)).

¹⁹⁷ M. Lee Huffaker, *Recovery of Infliction of Emotional Distress: A Comment on the Mental Anguish Accompanying Such a Claim in Alabama*, 52 ALA. L. REV. 1003, 1007 (2001) (citing *Delchamps, Inc. v. Bryant*, 738 So. 2d 824 (Ala. 1999) (malicious prosecution); *Machen v. Childersburg Bancorporation, Inc.*, 761 So. 2d 981 (Ala. 1999) (assault and battery); *Kmart Corp. v. Kyles*, 738 So. 2d 824 (Ala. 1998) (malicious prosecution); *Life Ins. Co. of Ga. v. Gipson*, 682 So. 2d 56 (Ala. 1996) (bad faith); *Life Ins. Co. of Ga. v. Johnson*, 684 So. 2d 685, 687 (Ala. 1996) (fraud); *U.S. Fid. & Guar. Co. v. Miller*, 117 So. 668 (Ala. 1928) (malicious prosecution); *Blevins v. W.F. Barnes Corp.*, No. 2980165, 1999 WL 685840 (Ala. Civ. App. Sept. 3, 1999) (invasion of privacy)).

¹⁹⁸ *Dockins v. Drummond Co., Inc.*, 706 So. 2d 1235, 1237 (Ala. Civ. App. 1997) (citing *Taylor*, 400 So. 2d at 374).

¹⁹⁹ 2 ROBERTS & CUSIMANO, ALABAMA TORT LAW § 40.6 (4th ed. 2004).

A. *Bad Faith Insurance Claims*

It appears to be a well-established principle of Alabama law that mental anguish damages are available where an insurer refuses to pay an insurance claim in bad faith.²⁰⁰ For example, in *National Insurance Ass'n v. Sockwell*, the plaintiff filed suit against her insurance company, contending that it acted in bad faith by failing to properly evaluate, investigate and ultimately in denying her claim for under-insured motorist benefits.²⁰¹ The jury awarded \$201,000 in compensatory damages, which the defendant claimed was solely attributable to mental anguish and challenged as excessive.²⁰² After discussing the level of scrutiny that would be applied to the award, the Alabama Supreme Court affirmed the compensatory damages portion of the verdict, which included the plaintiff's claim for mental anguish damages.²⁰³

B. *Intentional Misrepresentation*

Mental anguish damages can also be recovered in most fraud actions brought under Alabama law. In *Holcombe v. Whitaker*, the defendant fraudulently induced the plaintiff to marry him by telling her that he was single.²⁰⁴ The trial court allowed mental anguish damages to be recovered,²⁰⁵ and the defendant appealed, arguing that the plaintiff did not experience a compensable injury.²⁰⁶ The Alabama Supreme Court disagreed, citing the New Jersey Supreme Court case of *Morris v. McNabb*,²⁰⁷ as reflecting the same standard for recovery of mental anguish damages recognized under Alabama law.²⁰⁸ In *Morris*, the court stated, “[h]ere the defendant's conduct was not merely negligent, but was willfully and maliciously wrongful. It was bound to result in shame, humiliation, and mental anguish for the plaintiff, and when such result did ensue the plaintiff became entitled not only to compensatory but also to punitive damages”²⁰⁹

²⁰⁰ See, e.g., *Wal-Mart Stores, Inc. v. Bowers*, 752 So. 2d 1201, 1206 (Ala. 1999) (Johnstone, J., dissenting) (quoting *Wilkerson*, 737 So. 2d 450-51) (noting “in *Gulf Atlantic Life Ins. Co. v. Barnes*, this Court held that damages for mental distress are recoverable in an action for bad faith failure to honor an insurance contract”).

²⁰¹ *Sockwell*, 829 So. 2d at 111, 114 (Ala. 2002).

²⁰² *Id.* at 132.

²⁰³ *Id.* at 133-35; see also *Life Ins. Co. of Ga. v. Gipson*, 682 So. 2d 56, 58 n.1 (Ala. 1996) (Hooper, C.J., dissenting); *Chavers v. National Security Fire & Cas. Co.*, 405 So. 2d 1, 7 (Ala. 1981) (stating “[t]he elements of the tort of bad faith may be proved, as with other intentional torts, by circumstantial as well as direct evidence. Recoverable damages may include mental distress and economic loss”).

²⁰⁴ *Holcombe v. Whitaker*, 318 So. 2d 289, 291 (Ala. 1975).

²⁰⁵ *Id.* at 292.

²⁰⁶ *Id.*

²⁰⁷ *Morris v. MacNab*, 135 A.2d 657 (N.J. 1957).

²⁰⁸ *Holcombe*, 318 So. 2d at 293.

²⁰⁹ *Id.* at 293 (quoting *Morris*, 135 A.2d at 662).

In *Williams v. Williams*, the plaintiff claimed to have been fraudulently induced to leave his current employment and take a job as the interim head basketball coach at Alabama State University.²¹⁰ The jury returned a verdict on his claims for breach of contract and fraud, awarding \$200,000 in compensatory damages.²¹¹ The Alabama Supreme Court affirmed the award, noting that the plaintiff gave substantial testimony regarding the mental anguish he claimed to have experienced.²¹²

In *Life Insurance Co. of Georgia v. Johnson*, the plaintiff filed suit against the defendant insurance company contending that it had engaged in “intentional and reckless fraud and fraudulent suppression by selling her a Medicare supplement insurance policy” that was worthless.²¹³ The jury’s \$250,000 compensatory damage award was affirmed, though the plaintiff’s out-of-pocket expenses amounted to only \$3,132²¹⁴ because “[t]he jury listened to [the plaintiff’s] evidence and concluded that she had suffered emotionally as a result of the company’s conduct. ‘There [is no] yardstick to measure the amount of recompense which should be awarded for ... mental suffering,’” and the trial court did not abuse its discretion in refusing to grant a new trial or remit the verdict.²¹⁵

C. Defamation

Equally well established is the fact that mental anguish damages may be recovered in defamation actions. In *Prudential Insurance Co. of America v. Watts*, an insurance agent left his employer and began work with another company.²¹⁶ When replacement notices were sent to the plaintiff’s former employer (reflecting that its customers were moving their business to the plaintiff’s new employer), representatives of the former employer attempted to convince the customers not to move their business.²¹⁷ The representatives allegedly made false and defamatory statements about the plaintiff, and the jury rendered a verdict in his favor.²¹⁸ Affirming the jury’s verdict, the Alabama Court of Civil Appeals held “that the record is replete with evidence from which the jury could

²¹⁰ *Williams v. Williams*, 786 So. 2d 477, 478-79 (Ala. 2002).

²¹¹ *Williams*, 786 So. 2d at 479.

²¹² *Id.* at 481.

²¹³ *Life Ins. Co. of Ga. v. Johnson*, 684 So. 2d 685, 687 (Ala. 1996), *overruled on other grounds* by *Life Ins. Co. of Ga. v. Johnson*, 701 So. 2d 524 (Ala. 1997).

²¹⁴ *See Johnson*, 684 So. 2d at 690.

²¹⁵ *Id.* (citing *Birmingham Elec. Co. v. Thompson*, 37 So. 2d 633, 634 (1948)); *see also* *Spooner v. State Farm Mut. Auto Ins. Co.*, 709 So. 2d 1157, 1161 (Ala. 1997) (citing *First Commercial Bank v. Spivey*, 694 So. 2d 1316 (Ala. 1997)).

²¹⁶ *Prudential Ins. Co. of Am. v. Watts*, 451 So. 2d 310, 311 (Ala. Civ. App. 1984), *overruled on other grounds* by *Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d 1085, 1092 n.3 (Ala. 1988).

²¹⁷ *Watts*, 451 So. 2d at 311-312.

²¹⁸ *Id.* at 312.

conclude that the statements made by Prudential were embarrassing and humiliating, and caused Mr. Watts mental suffering. Therefore, we hold that the \$3,000 compensatory damages awarded to Mr. Watts was not erroneous.²¹⁹

A more recent, and significant award of mental anguish damages is found in the Alabama Supreme Court case of *Liberty National Life Insurance Co. v. Daugherty*. In that case, another insurance agent sued his former employer, contending that the employer defamed him when trying to keep the plaintiff's customers from moving their business to his new employer.²²⁰ After hearing significant testimony regarding the plaintiff's emotional distress, the jury awarded \$300,000 in compensatory damages.²²¹ The defendants challenged this award, arguing that the only evidence of alleged mental anguish was "non specific" and "indefinite."²²² Holding that it could not presume that the entire award was attributable to mental anguish damages, the Court affirmed the award noting that: "[w]hile the jury's verdict of \$300,000 is higher than a justice of this Court, sitting as a juror, might have awarded, that is not the test to determine whether such an award is excessive."²²³

During the past few years, the tort of defamation has proven particularly fertile ground for large mental anguish damage jury awards. For example, in *Cottrell v. National Collegiate Athletic Association*, an Alabama jury awarded a former University of Alabama football coach \$6 million in compensatory damages against a football recruiting analyst for purported injury to reputation and emotional distress resulting from three allegedly defamatory statements.²²⁴ In 2007, a University of Alabama football booster obtained a \$1,000,000 mental anguish jury verdict in conjunction with claims asserted against the National Collegiate Athletic Association (NCAA), arising out of statements that were made in conjunction with the NCAA's investigation of the University of Alabama football program.²²⁵ Additionally, in 2008, the Alabama Supreme Court affirmed a \$200,000 mental anguish damage verdict in favor of an assistant professor who was defamed through communications characterized as resembling a systematic effort to ruin his career.²²⁶ The clear import of these cases is that those prosecuting and defending defamation claims

²¹⁹ *Id.* at 313; see also *Daugherty*, 840 So. 2d at 162-63; *Cousins v. T.G. & Y. Stores Co.*, 514 So. 2d 904, 907 (Ala. 1987).

²²⁰ *Daugherty*, 840 So. 2d at 154.

²²¹ *Id.* at 162.

²²² *Id.*

²²³ *Id.* at 163.

²²⁴ *Cottrell v. NCAA*, No. 1041858, 2007 WL 1696564, at *1 (Ala. June 1, 2007), *cert. denied*, 128 S. Ct. 1334 (2008). It should be noted, however, that the trial court ordered a new trial, and this decision was affirmed on appeal. *Cottrell*, No. 1041858, 2007 WL 1696564, at *40 (Ala. June 1, 2007).

²²⁵ *Keller v. NCAA*, No. 04-28 (Ala. Cir. Ct. Jackson County Nov. 29, 2007).

²²⁶ *Slack*, No. 1060007, 2008 WL 162618, at *15-16.

should be particularly mindful that mental anguish damages are recoverable in these proceedings, and awards can be significant.

D. Conversion

Mental anguish damages can also be recovered in conversion actions. For example, in *Liberty National Life Insurance Co. v. Caddell*, the plaintiff filed suit against his insurance company, asserting claims for breach of contract, conversion, and fraud.²²⁷ Only the conversion claim, alleging that the insurance company improperly drafted funds from his checking account, was submitted to the jury.²²⁸ The jury awarded \$50,000 in mental anguish damages to the plaintiff, and the verdict was affirmed on appeal.²²⁹

In *Oliver v. Towns*, the plaintiff filed suit against her attorney who settled the plaintiff's personal injury action for \$12,000, forged her name to the settlement check, and failed to provide the plaintiff with her portion of the settlement funds.²³⁰ A default was entered, and the plaintiff was awarded \$500,000 in compensatory damages.²³¹ Reducing the amount of the compensatory damages award, the Alabama Supreme Court stated, "[t]he actual financial loss claimed in this case was \$7,200. Therefore, we must conclude that the court awarded \$492,800 for Towns's mental anguish. . . . [W]e see no reason why the compensatory damages in this case should exceed \$75,000."²³²

In *Williford v. Emerton*, the plaintiffs entered into a lease-purchase of a mobile home.²³³ They were unable to make a required monthly payment, and the defendant placed a "Notice of Termination of Tenancy/Lease" on the door to the mobile home, warning that "if they did not surrender possession of the home within 10 days they would face legal action."²³⁴ When the plaintiffs, who had been staying with one of their parents, returned to move their personal belongings, they were given ten minutes to get everything out of the home before the police were called.²³⁵ According to the plaintiffs, they gathered what they could in ten minutes, leaving many of their possessions in the mobile home.²³⁶

²²⁷ *Caddell*, 701 So. 2d at 1133.

²²⁸ *Id.*

²²⁹ *Id.* at 1133, 1136.

²³⁰ *Oliver v. Towns*, 770 So. 2d 1059, 1060 (Ala. 2000).

²³¹ *Id.* at 1060.

²³² *Id.* at 1061.

²³³ *Williford v. Emerton*, 935 So. 2d 1150, 1151 (Ala. 2004).

²³⁴ *Id.* at 1152.

²³⁵ *Id.*

²³⁶ *Id.*

After suit was filed, the jury awarded \$8,000 in compensatory damages, which the defendants challenged as improper on appeal.²³⁷ Affirming the verdict, the Alabama Supreme Court stated that:

At trial the Emertons presented evidence of only \$2,180 in actual damages; on appeal, the Emertons claim that the extra \$5,820 can be attributed to the mental anguish associated with the loss of items with sentimental value that were in the mobile home, including wedding gifts and wedding photographs. We agree. Therefore, we affirm the award of \$8,000 in compensatory damages on the conversion claim.²³⁸

Though the \$5,820 portion of the award attributable to mental anguish may seem insignificant to some, it should be noted that the award more than doubled plaintiff's actual damages.

E. Malicious Prosecution

In *Wal-Mart Stores, Inc. v. Goodman*, the plaintiff sued Wal-Mart and its employee, asserting a claim for malicious prosecution.²³⁹ According to the plaintiff, she and her two children went to Wal-Mart to exchange a telephone.²⁴⁰ When she entered the store, an employee greeted her and attached a sticker to the box containing the phone.²⁴¹ Unable to find a suitable replacement, the plaintiff left the store with the phone she originally intended to exchange.²⁴² She was stopped in the parking lot, asked to return inside, and accused of stealing the phone.²⁴³ The plaintiff, who was pregnant at the time, was then arrested, handcuffed, and taken to jail with her two children, where she was charged with theft of property.²⁴⁴ The jury returned a verdict awarding the plaintiff \$200,000 in mental anguish damages,²⁴⁵ which was affirmed on the grounds that it did not "shock the conscience of [the] Court."²⁴⁶

²³⁷ *Id.* at 1152-1155.

²³⁸ *Williford*, 935 So. 2d at 1155 (citing *New Plan Realty Trust v. Morgan*, 792 So. 2d 351 (Ala. 2001)) (affirming an award of \$100,000 in compensatory damages "where a landlord converted his tenant's property worth \$46,679, because the additional amount could be damages attributable to mental anguish").

²³⁹ *Wal-Mart Stores, Inc. v. Goodman*, 789 So. 2d 166, 170 (Ala. 2000).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 171.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Goodman*, 789 So. 2d at 170.

²⁴⁶ *Id.* at 179; *see also* *Delchamps, Inc. v. Bryant*, 738 So. 2d 824, 836-838 (Ala. 1999) (recognizing that mental anguish damages can be recovered in malicious prosecution action); *Kmart Corp. v. Kyles*, 723 So. 2d 572, 578-79 (Ala. 1998) (same).

F. *Trespass*

In *Jefferies v. Bush*, the plaintiffs asserted a claim for trespass, contending that the defendants obstructed flowing surface water.²⁴⁷ Holding that the plaintiffs could not recover mental anguish damages, the Court stated:

Under the specific facts of this case, a finding that the Jefferieses were not entitled to damages for mental anguish necessarily involved a finding that the trespass was not committed with insult and contumely. Unless the trespass is attended with words or acts of insult or contumely, damages for mental anguish are not recoverable Our review of the record reveals that the Bushes made a prima facie showing that the alleged trespass was not attended by words or acts of insult or contumely, and Mrs. Jefferies failed to rebut that showing by presenting substantial evidence [to the contrary]. . . . Therefore, the trial court properly decided she was not entitled to damages for mental anguish either individually or as the personal representative of Mr. Jefferies' . . . estate.²⁴⁸

A different conclusion was reached in the case of *Dockins v. Drummond Co., Inc.* In that case landowners sued the defendant, contending that its blasting activities damaged their property, and caused them to experience mental anguish.²⁴⁹ The trial court granted summary judgment in the defendant's favor on the plaintiffs' claim for mental anguish damages.²⁵⁰ Reversing this order, the Alabama Court of Civil Appeals recognized the plaintiffs' allegation that the defendant "continued its blasting with knowledge that it was causing damage to the Dockinses' property. Therefore, . . . the Dockinses [were] entitled to submit to the jury their claim for mental anguish damages, if they present substantial evidence that they suffered mental anguish caused by the blasting" because there was a question of fact as to whether the defendant acted under circumstance of insult or contumely.²⁵¹

G. *Retaliatory Discharge*

In *Auto Zone, Inc. v. Leonard*, the plaintiff was employed as an auto parts salesman for the defendant.²⁵² While stopped in traffic on his way to pick up an auto part, the plaintiff's vehicle was struck from behind, and his knee was injured.²⁵³ Since he was injured at work, the plaintiff filed a claim for workers' compensation benefits.²⁵⁴ After the claim was

²⁴⁷ *Jefferies v. Bush*, 608 So. 2d 361, 362 (Ala. 1992).

²⁴⁸ *Id.* at 363-64.

²⁴⁹ *Dockins v. Drummond Co., Inc.*, 706 So. 2d 1235, 1236 (Ala. Civ. App. 1997).

²⁵⁰ *Id.*

²⁵¹ *Id.* at 1237.

²⁵² *Auto Zone, Inc. v. Leonard*, 812 So. 2d 1179, 1181 (Ala. 2001).

²⁵³ *Id.*

²⁵⁴ *Id.*

denied, he filed a lawsuit seeking benefits.²⁵⁵ Given his knee condition, the plaintiff was unable to return to work for some time. When the plaintiff did return, his file did not include medical excuses explaining his absence.²⁵⁶ A representative of the defendant's loss prevention department attempted to take the plaintiff's statement regarding his injuries; however, he refused to give a statement without his attorney present.²⁵⁷ Shortly thereafter, the plaintiff was terminated for purportedly failing to cooperate with the loss prevention investigation and unauthorized absenteeism.²⁵⁸

The plaintiff filed suit against his employer, claiming that he had been fired in retaliation for filing a workers' compensation claim.²⁵⁹ The jury awarded \$200,000 in compensatory damages, which the trial court remitted to \$75,000.²⁶⁰ The defendant appealed, contending that the plaintiff incurred only \$3,000 in lost wages; thus, \$72,000 of the remitted award was attributable to mental anguish damages and excessive.²⁶¹ The Court disagreed that the award was excessive and affirmed the verdict.²⁶²

V. STANDARD OF REVIEW FOR MENTAL ANGUISH DAMAGE AWARDS

The appellate court precedent of this state makes clear that a plaintiff need not corroborate his or her mental anguish with physical injury or symptoms.²⁶³ "Once the plaintiff has presented some evidence of emotional distress, the question whether he should recover for such mental anguish, and, if so, how much, are questions reserved for the jury."²⁶⁴ It is also well established that

"[t]here is no fixed standard for ascertainment of compensatory damages recoverable . . . for physical pain and mental suffering' and that 'the amount of such [an] award is left to the sound discretion of the

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Leonard*, 812 So. 2d at 1182.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 1182-84.

²⁶² *Id.* at 1184; *see also* *Montgomery Coca-Cola Bottling Co., Ltd. v. Golson*, 725 So. 2d 996, 1000-01 (Ala. Civ. App. 1998) (affirming award of \$94,000 in compensatory damages, which included \$19,000 for lost wages and \$75,000 for mental anguish in a retaliatory discharge claim).

²⁶³ *See, e.g., Hogan*, 376 So. 2d at 672-73 ("Appellants contend, that before recovery for mental anguish or suffering can be allowed, the mental anguish has to be corroborated by physical symptoms, i.e., becoming physically sick or ill. We reject this contention. The cases have not required mental anguish to be corroborated by the presence of physical symptoms. This is demonstrated by the fact that the cases have allowed recovery for annoyance and inconvenience.").

²⁶⁴ *George H. Lanier*, 901 So. 2d at 725 (citing *Sockwell*, 829 So. 2d at 133; *Kmart*, 723 So. 2d at 578).

jury, subject only to correction by the court for clear abuse and passionate exercise of that discretion.” [The Alabama Supreme] Court has consistently held that a trial court cannot interfere with a jury verdict merely because it believes the jury gave too little or too much.²⁶⁵

Moreover, “[a] jury’s verdict is presumed correct, and that presumption is strengthened upon the trial court’s denial of a motion for new trial.”²⁶⁶ However, “where the plaintiff has suffered no physical injury, [Alabama appellate courts] ‘address the strength of the presumption that a jury’s verdict is correct,’ in the context of the plaintiff’s testimony regarding the ‘nature, severity, and duration of the mental anguish.’”²⁶⁷

The appellate courts of this state also claim to apply “stricter scrutiny to an award of damages for mental anguish where the victim has offered little or no direct evidence concerning the degree of suffering he or she has experienced.”²⁶⁸ Such is also the case “when a plaintiff who claims damages solely for mental anguish fails to offer his own testimony of the mental anguish he has suffered”²⁶⁹ or “suffered no physical injury and offered little or no direct evidence concerning the mental suffering sustained as a result of the defendant’s wrongdoing.”²⁷⁰ Moreover, Alabama Supreme Court precedent provides that the Court will “not hesitat[e] to remit such damages where the plaintiff has produced little or no evidence indicating that he has suffered such mental anguish,” his testimony “amounts to little more than the obvious notion that dealing with the traumatic event was ‘hard’ or ‘humiliating,’” or he simply testifies “that he suffered ‘a lot’ of mental anguish.”²⁷¹

²⁶⁵ *Sockwell*, 829 So. 2d at 135 (quoting *Daniels*, 740 So. 2d at 1044); see also *Caddell*, 701 So. 2d at 1136 (quoting *Duck Head Apparel Co.*, 659 So. 2d at 907).

²⁶⁶ *Slack*, No. 1060007, 2008 WL 162618, at *15 (quoting *George H. Lanier*, 901 So. 2d at 726); *Cochran*, 935 So. 2d at 1176 (citing *Goodman*, 789 So. 2d 166).

²⁶⁷ *Burch*, 878 So. 2d at 1127 (quoting *Delchamps, Inc. v. Bryant*, 738 So. 2d 824, 837 (Ala. 1999)) (citing *Orkin Exterminating Co. v. Jeter*, 832 So. 2d 25 (Ala. 2001) (remitting \$400,000 compensatory-damages award to \$300,000); *Oliver v. Towns*, 770 So. 2d 1059 (Ala. 2000) (\$500,000 compensatory-damages award remitted to \$75,000); *Ala. Power Co. v. Murray*, 751 So. 2d 494 (Ala. 1999) (\$150,000 compensatory-damages award reduced to \$84,000); *Delchamps, Inc. v. Bryant*, 738 So. 2d 824 (reducing \$400,000 compensatory-damages award to \$100,000); *Kmart Corp. v. Kyles*, 723 So. 2d 572 (Ala. 1998) (\$100,000 compensatory-damages award remitted to \$15,000)).

²⁶⁸ *Daugherty*, 840 So. 2d at 163 (citing *Horton Homes, Inc.*, 832 So. 2d at 53); *George H. Lanier*, 901 So. 2d at 725 (citing *Nat’l Ins. Ass’n v. Sockwell*, 829 So. 2d 111 (Ala. 2002); *Kmart Corp. v. Kyles*, 723 So. 2d 572 (Ala. 1998)). A plaintiff’s testimony is direct evidence of mental anguish. See *Burch*, 878 So. 2d at 1127 (Ala. 2003) (citing *Kyles*, 723 So. 2d at 578).

²⁶⁹ *George H. Lanier*, 901 So. 2d at 726 (citing *Sockwell*, 829 So. 2d at 133-34; *Kyles*, 723 So. 2d at 578).

²⁷⁰ *Sockwell*, 829 So. 2d at 133 (citing *Kyles*, 723 So. 2d at 578).

²⁷¹ *George H. Lanier*, 901 So. 2d at 726 (citing *Oliver v. Towns*, 770 So.2d 1059, 1061 (Ala. 2000); *Delchamps, Inc. v. Bryant*, 738 So. 2d 824, 837 (Ala. 1999); *Foster v. Life Ins. Co. of Ga.*, 656 So. 2d 333, 336-37 (Ala. 1994)) (“When a plaintiff’s testimony

In *National Insurance Ass'n v. Sockwell*, the plaintiff filed suit, alleging that the defendant insurance company acted in bad faith failing to properly evaluate, investigate, and ultimately pay her claim for underinsured-motorist benefits.²⁷² When reviewing the jury's award of mental anguish damages, the Court cited its previous holding in *Kmart* that "an award of mental-anguish damages was subject to a strict-scrutiny analysis if the plaintiff suffered no physical injury and offered little or no direct evidence concerning the mental suffering sustained as a result of the defendant's wrongdoing."²⁷³

Importantly, however, the Court held that "the strict-scrutiny rule established in *Kmart* [is] inapplicable in a case where the plaintiff suffers physical injury or pain in conjunction with emotional distress"²⁷⁴ and that the plaintiff had experienced such injury though her claim arose out of the defendant insurance company's alleged bad faith. Importantly, the Court stated:

We acknowledge that Sockwell's physical injuries did not originally arise from tortious conduct on the part of National. However, Sockwell testified that her physical condition worsened as a result of National's wrongdoing. Under basic tort principles, National must take Sockwell in whatever condition it finds her. The simple fact that, at the time National acted wrongfully, Sockwell was already suffering from some degree of physical pain does not insulate National from liability for its wrongful actions that directly worsened her pain.²⁷⁵

In addition to the fact that Alabama law regarding when emotional distress damages can be recovered lacks clarity, the subjective nature of mental anguish damage awards, coupled with the significant deference applied by Alabama appellate courts when reviewing these awards makes it difficult, if not impossible, to accurately analyze potential mental anguish damages recovery. Thus, knowledge of the factors Alabama appellate courts appear to utilize when scrutinizing these awards is of particular importance to practitioners.

VI. FACTORS TO CONSIDER REGARDING MENTAL ANGUISH DAMAGE RECOVERY

Historically, plaintiffs were only permitted to present indirect evidence of their alleged emotional distress and could not testify regarding

amounts to little more than the obvious notion that dealing with the traumatic event was 'hard' or 'humiliating,' we have consistently remitted damages. Additionally, when a plaintiff testifies merely that he suffered 'a lot' of mental anguish, we have similarly remitted damages."); *see also Slack*, No. 1060007, 2008 WL 162618, at *15 (quoting *George H. Lanier*, 901 So. 2d at 726).

²⁷² *Sockwell*, 829 So. 2d at 114.

²⁷³ *Id.* at 133 (citing *Kyles*, 723 So. 2d 578).

²⁷⁴ *Sockwell*, 829 So. 2d at 134 (citing *Daniels*, 740 So. 2d at 1044).

²⁷⁵ *Sockwell*, 829 So. 2d at 134.

their own mental anguish. Rather, the jury would simply draw inferences of suffering from a description of the circumstances.²⁷⁶ In the 1998 case of *Kmart Corp. v. Kyles*, the court recognized that

[w]e now clearly allow the testimony of a witness as to his or her mental anguish. The question thus remains, in the present era, when we permit a witness to offer evidence as to the witnesses' . . . own mental anguish, is indirect evidence of mental anguish alone sufficient to support a substantial verdict? We answer this question in the negative. We give stricter scrutiny to an award of mental anguish where the victim has offered little or no direct evidence concerning the degree of suffering he or she has experienced.²⁷⁷

Thus, though "the testimony of a witness is admissible to prove that he or she suffered mental anguish as a result of the alleged wrongdoing by the defendant," the court "give[s] stricter scrutiny to an award of damages for mental anguish where the victim has offered little or no direct evidence concerning the degree of suffering he or she has experienced."²⁷⁸

Though the Court has rejected a requirement that plaintiffs claiming mental anguish without accompanying physical injury present "direct evidence of the nature, duration, and severity of their mental anguish, thus establishing a substantial disruption in the plaintiffs' daily routine,"²⁷⁹ it has recognized that "[w]hile the virtue of stoically dismissing one's suffering by limiting any description of it to a few terse words has its place, the courtroom is not one of them if the person suffering is a plaintiff who expects a significant award to pass judicial scrutiny."²⁸⁰ Justice Johnstone recognized the practical difficulties accompanying application of this standard, stating:

Suppose, now, that the plaintiff had submitted to the new rule (not then in effect) and had testified as follows:

"Oh, it was the most horrible experience of my life. I cried and cried and wrung my hands until my bones were sore. I had a knot in my

²⁷⁶ *Kyles*, 723 So. 2d at 578.

²⁷⁷ *Id.*

²⁷⁸ *Daugherty*, 840 So. 2d at 163.

²⁷⁹ *Murray*, 751 So. 2d at 497-98 (citations omitted). The defendant also noted that

the "zone of danger test," without the evidentiary limitation . . . propose[d], carries the potential for allowing recovery for emotional distress in cases where the plaintiffs are "seeking to recover for the angst caused by the 'normal' stressors of life -- a shaky airplane landing, witnessing an automobile collision, or a tippy apartment tenant attempting to unlock the wrong door at night."

Id. at 499 (quoting Rachel Giesber & Richard T. Stilwell, *Standards Governing Recovery of Mental Anguish Damages Under Texas Law*, 39 S. TEX. L. REV. 45, 47 (1997)). "Acknowledging [the defendant's] concerns," the Court nonetheless rejected their argument, stating that the plaintiffs' claims do not require a departure from the current standard. *Id.*

²⁸⁰ *Delchamps, Inc. v. Bryant*, 738 So. 2d 824, 838 (Ala. 1999).

stomach and a splitting headache and I didn't sleep a wink for two months, all because of what Delchamps did to me.”

Would this testimony have deterred the Court from remitting the verdict? If so, would the new rule have promoted justice? If we would have remitted the verdict anyway, would we have been honoring the new rule? Remotely possibly, we might have agreed on less of a remittitur simply because of the additional evidence, but not because the direct evidence would have given us greater insight to the truth than a like quantity of additional indirect objective evidence. Our more likely reaction, however, would have been to conclude under this scenario, that the plaintiff was either a liar or a sissy or both, who deserved little award if any at all.²⁸¹

The line of demarcation for what will support a large award of mental anguish damages certainly favors the plaintiff; however, the appellate precedent of this state delineates certain principles that are consistently applied when mental anguish damages awards are examined on appeal.

1. The mere fact that the plaintiff experienced a traumatic event is not dispositive

As the Alabama Supreme Court noted in *George H. Lanier Memorial Hospital v. Andrews*, “[t]he inquiry is not whether traumatic events have occurred, but whether the plaintiff has actually suffered as a result of those events.”²⁸² A perfect example of this principle is found in the case of *Delchamps, Inc. v. Bryant*, wherein the Court substantially remitted a mental anguish damage award in the plaintiff's favor stating:

Although J.S. Bryant presented substantial evidence indicating that certain events occurred, e.g., his arrest, his hours of incarceration, and his worry about his probation, he presented no testimony or other evidence indicating the gravity of his mental anguish The absence of evidence to corroborate J.S. Bryant's description of the intensity of his suffering, i.e., evidence referring to quantifiable effects . . . leads us to conclude that the jury abused its discretion in awarding \$400,000 in [mental anguish] damages.²⁸³

The Court reaffirmed this proposition in *Orkin Exterminating Co., Inc. v. Jeter*, stating “[e]vidence of the mere occurrence of an event, without evidence indicating mental anguish resulting from that event, does not justify a substantial award of damages for mental anguish.”²⁸⁴

Similarly, in *Kmart Corp. v. Kyles*, a Kmart employee saw two individuals loading lawn chairs that the employee believed were stolen into

²⁸¹ *Delchamps*, 738 So. 2d at 842-43 (Johnstone, J., dissenting).

²⁸² *George H. Lanier*, 901 So. 2d at 726 (citing *Orkin Exterminating Co.*, 832 So. 2d at 36-37).

²⁸³ *Delchamps, Inc. v. Bryant*, 738 So. 2d 824, 837, 838 (Ala. 1999).

²⁸⁴ *Orkin Exterminating Co.*, 832 So. 2d at 38 (citing *Delchamps*, 738 So. 2d at 837).

a pickup truck.²⁸⁵ Based upon belief that the plaintiff was one of the individuals involved in the theft, a warrant was issued for her arrest.²⁸⁶ A little less than three years after the incident, the plaintiff was detained by a police officer as part of a routine traffic stop. When the officer ran a computer check on her license number, he discovered the outstanding warrant. The plaintiff was taken to jail, processed, and fingerprinted – eventually spending nearly three hours in custody.²⁸⁷ After a preliminary hearing in which the district court found probable cause to support the arrest, the grand jury eventually “no-billed” the charge.²⁸⁸ The plaintiff then filed suit, asserting a claim for malicious prosecution, and obtained an award of \$100,000 in compensatory damages.²⁸⁹ Remitting the compensatory damage award, the Court stated:

Although Kyles presented substantial evidence indicating that certain events occurred, i.e., her questioning by Jones and the sheriff’s deputies, her arrest, and her nearly three hours’ incarceration, she presented no testimony or other evidence indicating that those events caused her to suffer great mental anguish. The only evidence of Kyles’s alleged mental suffering was her husband’s testimony that she cried on one occasion – when she telephoned him to say that she had been arrested. . . .The plaintiff here did not testify about her mental anguish at this trial. . . . Thus, in light of the paucity of evidence presented by the plaintiff in this case, we concluded that the jury abused its discretion in awarding her \$100,000 in compensatory damages. Kyles presented evidence that she paid approximately \$4,000 in attorney fees to defend the criminal action. Thus, we concluded the jury awarded more than \$90,000 for mental anguish damages even though Kyles presented no evidence of severe mental anguish. We believe that the greatest amount of compensatory damages a jury, using its sound discretion, could have awarded Kyles is \$15,000.²⁹⁰

2. Sustaining a large mental anguish damage award requires examples of how the emotional distress affected the plaintiff, not simply a description of the plaintiff’s emotional state

Importantly, recovering mental anguish damages requires evidence of how an event affected the individual, not simply a description of the plaintiff’s feelings. In *Foster v. Life Insurance Co. of Georgia*, the plaintiff filed suit contending that her insurance agent and company sold her a worthless Medicare supplement policy.²⁹¹ The jury awarded the plaintiff

²⁸⁵ *Kyles*, 723 So. 2d at 573.

²⁸⁶ *Id.* at 575.

²⁸⁷ *Id.* at 574-75.

²⁸⁸ *Id.* at 575.

²⁸⁹ *Id.* at 573.

²⁹⁰ *Id.* at 577-79.

²⁹¹ *Foster v. Life Ins. Co. of Ga.*, 656 So. 2d 333, 334 (Ala. 1994).

\$250,000 in compensatory damages, \$247,436.40 of which the Alabama Supreme Court concluded must be attributed to alleged mental suffering.²⁹² Importantly, during trial, the plaintiff -- who was an elderly, illiterate woman and lived alone²⁹³ -- provided the following testimony concerning the mental anguish that she experienced:

“How has this affected you, Mattie?”

“It’s affected me a lot. After I found out the insurance was not no good and how much money I put in it when I could have been doing something else with it. And they really put pressure on me.”²⁹⁴

Reducing the compensatory damage award from \$250,000 to \$50,000, the Court stated:

In this case, the only evidence regarding [the plaintiff’s] mental anguish and emotional distress is her bare assertion that the discovery of fraud affected her ‘a lot’ and that she sued two months after the mental anguish and emotional distress began. From this limited evidence, we agree that the jury could infer that [the plaintiff] suffered some measure of mental anguish and emotional distress from the realization that she had been paying over a fifth of her monthly income to an insurance company for a worthless policy; however, we hold that, even when viewed in a light most favorable to her, [the plaintiff’s] scant testimony of mental anguish and emotional distress, without more, does not support an award exceeding \$120,000 for each of the two months before she sued.²⁹⁵

In *Oliver*, the plaintiff’s only testimony regarding her mental anguish was “that she suffered ‘a lot of [mental anguish]’ and that she had to seek counseling because of her worry over losing the opportunity to buy a house.”²⁹⁶ However, “[t]he record contain[ed] no evidence from the counselor relating to [the plaintiff’s] mental anguish.”²⁹⁷ The trial court awarded compensatory damages of \$500,000, \$492,800 of which the Alabama Supreme Court concluded was awarded for the plaintiff’s alleged mental anguish.²⁹⁸ Reducing the compensatory damage award to \$75,000, the Court stated:

It is apparent to us that while Towns did offer more evidence than the plaintiff in *Foster* offered, she did not offer much more. She simply did not present enough evidence to support a compensatory-damages award of \$500,000 when her actual loss was only \$7,200. In light of

²⁹² *Id.* at 336.

²⁹³ *Id.* at 334.

²⁹⁴ *Id.* at 336.

²⁹⁵ *Id.* at 337.

²⁹⁶ *Oliver*, 770 So. 2d at 1061

²⁹⁷ *Id.*

²⁹⁸ *Id.* (noting that the plaintiff suffered a monetary loss of \$7,200).

Kyles and *Foster*, we see no reason why the compensatory damages in this case should exceed \$75,000.²⁹⁹

These cases affirm, as the Alabama Supreme Court aptly noted, that though “the virtue of stoically dismissing one’s suffering by limiting any description of it to a few terse words has its place, the courtroom is not one of them if the person suffering is a plaintiff who expects a significant award to pass judicial scrutiny.”³⁰⁰

An example of a sufficient proffer to support an award of significant mental anguish damages is found in the case of *Williams v. Williams*.³⁰¹ In that case, after undertaking a detailed analysis of the evidence presented, including the plaintiff’s trial testimony regarding his emotional distress,³⁰² the Alabama Supreme Court noted that the record was “replete with testimony and other evidence indicating Coach Williams suffered mental anguish.”³⁰³ Of particular significance is the Court’s recognition that

[u]nlike the plaintiffs in *Kmart* and *Delchamps*, Coach Williams testified extensively about the suffering he endured, and while no specified monetary amount can be proved, the law leaves it to the jury to determine, according to the facts shown in the particular case, the amount appropriate to compensate for such an injury.³⁰⁴

Similarly, in *Southern Energy Homes, Inc. v. Washington*, the plaintiff purchased a custom-built mobile home for \$19,320.³⁰⁵ According to the plaintiff, when the home was delivered, it was missing siding and molding, and had damaged window trim, loose carpet, and loose and/or malfunctioning bathroom fixtures and entry doors.³⁰⁶ The plaintiff also claimed that the roof leaked, which caused damage to the carpets and cracks in the living-room ceiling.³⁰⁷ After several unsuccessful attempts to resolve the matter informally, the plaintiff filed suit, asserting various claims for relief.³⁰⁸ The jury awarded \$375,000 in compensatory damages, a substantial portion of which was attributable to mental anguish.³⁰⁹ The defendant challenged the award, arguing that it was excessive based

²⁹⁹ *Id.* The Court’s holding also supports argument that the appropriateness of a mental anguish damage awards must bear some relationship to the special damages awarded.

³⁰⁰ *Delchamps*, 738 So. 2d at 838.

³⁰¹ *Williams v. Williams*, 786 So. 2d 477, 481 (Ala. 2000).

³⁰² *Id.* at 481-82.

³⁰³ *Id.* at 482.

³⁰⁴ *Id.* at 482.

³⁰⁵ *S. Energy Homes, Inc. v. Washington*, 774 So. 2d 505, 509 (Ala. 2000).

³⁰⁶ *Id.* at 510.

³⁰⁷ *Id.*

³⁰⁸ *Id.* (noting that the claims asserted by the plaintiff were “fraud, fraudulent suppression, breach of implied warranty, and breach of express warranty”).

³⁰⁹ *Id.* at 518.

on the standard set forth in *Kmart Corp. v. Kyles*.³¹⁰ The Alabama Supreme Court disagreed, noting that the plaintiff:

[P]resented evidence indicating that he experienced anger, embarrassment, and disruption of his sleep over a period of nearly five years; he presented this evidence through his own testimony, as well as that of his wife. The amount of direct evidence relating to [the plaintiff's] mental anguish is readily distinguishable from the evidence relating to the mental anguish the plaintiff in *Kmart* . . . claimed to have suffered. . . . [The plaintiff] testified that he felt bad and embarrassed when friends came to see his home. He testified that the night before trial, he had to place garbage cans out to catch water leaking from the roof, and that he had previously done so on many occasions. He testified that he was embarrassed and that the purchase of his home had been a "nightmare" to him. Furthermore, his wife testified that when it rained, [the plaintiff] became angry and that, as a result, they did not get along very well. She said that he would rather stay home than work to earn money to make his mortgage payment each month.³¹¹

Another good example of the way in which Alabama appellate courts scrutinize mental anguish damage awards is found in *Alabama Power Co. v. Murray*.³¹² In *Murray*, the plaintiffs claimed to have been awakened one night by the sound of a loud boom from a power company substation near their home.³¹³ Noticing that the power was out in their house, they went back to sleep, only to awaken again, to discover that their house was on fire.³¹⁴ The plaintiffs filed suit against the power company, claiming that it had negligently caused a surge of electricity from its transmission lines to come into their house.³¹⁵

The jury returned \$150,000 verdicts for both the husband and wife,³¹⁶ which the power company challenged as lacking evidentiary basis on appeal.³¹⁷ After noting that the plaintiffs claimed \$35,989.27 in property damage,³¹⁸ the Alabama Supreme Court analyzed their mental anguish damage testimony stating:

With regard to the mental anguish suffered by Mrs. Murray, both Mr. and Mrs. Murray testified that she experienced hysteria and fainting on the morning of the fire, especially when Mr. Murray delayed coming out of the burning house, and both testified she suffered severe

³¹⁰ *Id.*

³¹¹ *Id.* at 518, 519.

³¹² *Murray*, 751 So. 2d 494.

³¹³ *Id.* at 495.

³¹⁴ *Id.* (the plaintiffs and their children were able to evacuate, but the house was completely destroyed due to the fire).

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.* at 497-98, 500-01.

³¹⁸ *Murray*, 751 So. 2d at 495.

symptoms of emotional distress after the fire. The evidence indicated that Mrs. Murray missed a week of work because her clothes had been destroyed; that she developed high blood pressure and a nervous condition following the fire, both of which require her to see a doctor and to take medicine; that before the fire she had been a student and that, although she had been an 'A' student, after the fire she flunked out of school; that she developed problems with sleeping and at the time of the trial still had headaches and still cried about the fire. According to Mr. Murray's testimony, he thinks his wife will never be able to get over the effects of the fire.³¹⁹

In light of this testimony, the court held that the award of \$132,005.36 in mental anguish damages for the wife (\$150,000 minus \$17,995.64 (half of the personal property loss claimed by the plaintiffs)) was amply supported by the testimony of both Mr. and Mrs. Murray.³²⁰ However, the Court reached a different conclusion with respect to the husband, holding that his testimony did not rise to the same level as that of his wife.³²¹ Specifically, the husband testified that:

he was 'all shook up' the morning of the fire, and he said: '[A] man was living in a house with a family . . . and lost everything in one night. And then he had to start all over again. Where is he going to start, without having money, clothes? It was just hard.'³²²

The only other evidence regarding his alleged emotional distress occurred during the following exchange:

Q. Has this fire caused you emotional problems?

A. Yes . . . Just at the time and how just when I think about it now, that my family could have been killed in that fire. The material things could be replaced, but what if I had been on third shift at work, and then that fire happened at that time of morning and my boys had been in their room? I thank God from this day that I was at home to wake them up. Not because of the material things, because I have some boys to see today.³²³

Emphasizing the wife's testimony that the fire affected her more than her husband, the court held that the husband's alleged mental anguish was not of the same nature, severity, or duration as that of his wife.³²⁴ As such, it reduced the mental anguish damage award returned in his favor to \$84,000.³²⁵

In the recent case of *Slack v. Stream*, the jury awarded the plaintiff \$212,000 in compensatory damages (\$200,000 of which was attributed to

³¹⁹ *Id.* at 500.

³²⁰ *Id.* at 501.

³²¹ *Id.*

³²² *Id.* at 500.

³²³ *Id.*

³²⁴ *Id.* at 501.

³²⁵ *Id.*

mental anguish) based on the defendant's defamatory accusation that he had engaged in plagiarism.³²⁶ The defendant appealed the award, arguing that it was excessive.³²⁷ Rejecting this argument, the Alabama Supreme Court noted that the record was "replete with evidence" supporting the award and recognized that, among other examples of emotional distress, the plaintiff offered evidence that he worried about his future employment as well as his professional career and was embarrassed and ashamed that friends and colleagues would associate him with "rape," "intellectual theft," and a "capital offense," as alluded to in a defamatory letter written by the defendant.³²⁸ The Court also emphasized testimony from the plaintiff's wife that during the two years after the incident, he still obsessed over the matter, continually reliving the situation, and that the events of the defamation strained their marriage, which caused difficulty in communication.³²⁹ The wife also testified that she saw her husband cry as a result of the circumstances created by the defendant's actions.³³⁰

This precedent makes clear that those seeking to sustain mental anguish damage awards totaling in the hundreds of thousands of dollars must do more than simply describe the emotions they experienced. Rather, they should provide specific factual examples of how they were emotionally affected by the defendant's alleged conduct. For example, direct examination regarding alleged mental anguish should consist of more than simply eliciting testimony that the plaintiff was embarrassed; instead, it should provide the trier of fact with the details of how the plaintiff was embarrassed. A plaintiff should do more than simply testify that the defendant's actions made him sad. For example, he should testify that the defendant's action made him cry every time he thought of the event to the extent this is true. If anti-anxiety medicine was prescribed, this fact should be disclosed. Rather than simply state that the defendant's actions caused the plaintiff to be irritable, she should testify that it affected her marriage, she was short with her husband and quick to lose patience with her children. Stated similarly, plaintiffs should provide objective examples of their subjective emotional states. On the other hand, those seeking to mitigate mental anguish damages should attempt to demonstrate that a plaintiff cannot provide objective examples of his or her mental anguish. One should inquire whether a plaintiff has seen a physician as a result of the event, lost sleep, been unable to eat, experienced stomach problems, difficulty sleeping, headaches, vomiting or been prescribed an anti-depressant. Practitioners should also ask plain-

³²⁶ *Slack*, No. 1060007, 2008 WL 162618, at *14-15.

³²⁷ *Id.*

³²⁸ *Id.* at *15.

³²⁹ *Id.*

³³⁰ *Id.*

tiffs to provide specific examples of how the alleged mental anguish affected them. To the extent plaintiffs are unable to do so, credible argument can be advanced that any significant mental anguish damage award should be remitted.³³¹

It also bears noting that though not mandated by the appellate court precedent of this state, it appears that evidence of a plaintiff's mental anguish through the testimony of corroborating witnesses is a significant factor when reviewing the excessiveness of an award.³³²

3. Sustaining a large mental anguish damage award requires sufficient testimony regarding the plaintiff's emotional distress to allow cross examination

In *Wal-Mart Stores, Inc. v. Goodman*, the jury awarded the plaintiff \$200,000 in mental anguish damages on her malicious prosecution claim.³³³ The defendant appealed, arguing that the award lacked support in the record.³³⁴ Rejecting this argument, the Alabama Supreme Court noted that the plaintiff

testified at trial concerning the stress that she claimed to have undergone because of worry over the case. She testified that the arrest caused her to suffer lower abdominal pains during her pregnancy, pains she said lasted for several days and caused her to be very anxious over the health of her unborn child. She discussed the embarrassment and humiliation she said she felt because of the arrest on Christmas Eve, a very busy shopping day, and being led out of the Wal-Mart store in handcuffs, escorted by the police officers and accompanied by her two young children. She stated that she remains embarrassed over what has happened. Goodman also stated that at the time of the arrest, she was worried about whether her children were going to be taken away from her because she says she could not immediately find anyone to pick them up from the police station. Moreover, she testified that she was fired from her job as a consequence of the arrest and that she had a difficult time finding other employment.³³⁵

Notably, the Court also recognized that the plaintiff's "evidence of mental anguish afforded [the defendant] ample opportunity for cross-examination,"³³⁶ adding that "[t]his is not a case where the plaintiff presented only a minimum of evidence regarding mental anguish, so as pos-

³³¹ *Goodman*, 789 So. 2d at 179.

³³² *See, e.g., id.* at *15; *Daugherty*, 840 So. 2d at 162-63; *Washington*, 774 So. 2d at 518-19; *Murray*, 751 So. 2d at 283.

³³³ *Goodman*, 789 So. 2d at 173.

³³⁴ *Id.* at 177.

³³⁵ *Id.* at 179.

³³⁶ *Id.*

sibly to avoid being cross-examined by questions calling for information about the plaintiff's prior experiences."³³⁷

A similar conclusion was reached in *Liberty National Life Insurance Co. v. Daugherty*,³³⁸ wherein the Court made the following observation regarding the quantum of evidence the plaintiff submitted regarding his mental anguish:

Daugherty testified that from 1994 until he sued the [defendants] in 1996, he received approximately 25 to 30 telephone calls from former [customers of the defendant] regarding visits they had received from Hartley. Daugherty testified that as a result of the telephone calls he began to develop high blood pressure, became very irritable, and felt terrible. Daugherty testified that the stress related to Hartley adversely impacted his relationship with his wife. He testified that during this period he would go home and say things to his wife that he should not have said to her. Daugherty testified that as a result of Hartley's statements he became fearful that he would lose his insurance license, that he would be sued, and that he would not be able to support his family. Daugherty testified that he had worked all his life to build a good name, and he felt his name was being destroyed.

Sybil Daugherty, Daugherty's wife, also testified regarding Daugherty's mental anguish. She testified that since learning of Hartley's statements, Daugherty had been depressed, worried and anguished. She testified that Daugherty could not sleep at night. She testified that Daugherty often woke up in the middle of the night, and, that when he did, she and he would sit and talk. She testified that Daugherty worried a lot about his reputation and that Hartley's statement had caused Daugherty to become irritable with her at times.³³⁹

The Court then noted that "[t]he testimony of Daugherty and his wife described mental anguish over a period of approximately two years in sufficient detail to permit a thorough cross-examination The award is sufficiently grounded in evidence to withstand the strict scrutiny of the jury's verdict mandated by *Kmart*."³⁴⁰

An interesting issue in this context is whether a plaintiff's demand for mental anguish damages waives the psychotherapist-patient privilege, which governs communications between a plaintiff and his mental health provider.³⁴¹ In *Ex parte Western Mental Health Center v. Koikos*, the plaintiffs sought mental anguish damages, after which time the defendants issued Rule 45 subpoenas to the plaintiffs mental health provider.³⁴² The provider objected to the subpoenas and moved to quash them

³³⁷ *Id.* at 180 n.8.

³³⁸ *Liberty Nat'l Life Ins. Co. v. Daugherty*, 840 So. 2d 152 (Ala. 2002).

³³⁹ *Id.* at 163.

³⁴⁰ *Id.* (citing *Kyles*, 723 So. 2d 572).

³⁴¹ ALA. CODE § 32-26-2 (1975).

³⁴² 884 So. 2d 835, 838 (Ala. 2003).

or, in the alternative, for entry of a protective order.³⁴³ The trial court refused to grant the relief sought, and the provider filed petitions for writs of mandamus with the Alabama Supreme Court.³⁴⁴

The Court granted the petitions, recognizing that communications between a patient and his therapist are privileged, adding that “Alabama has not recognized an exception to the psychotherapist-patient privilege when, in civil actions such as this one, the plaintiff merely alleges mental anguish.”³⁴⁵ In reaching this conclusion, the Court did acknowledge the defendant’s argument, and the trial court’s conclusion, that denying the discovery request would make it impossible to defend against the claim, thereby depriving the defendant of its constitutional right to due process;³⁴⁶ however, the Court rejected this contention, concluding that the defendant failed to make the requisite evidentiary showing.³⁴⁷

A constitutional challenge to the psychotherapist-patient privilege was also advanced in *Ex parte Rudder*.³⁴⁸ In that case, the defendant claimed that the privilege should yield to the First Amendment in conjunction with the plaintiff’s defamation claim.³⁴⁹ Rejecting this argument, the Court relied on the defendant’s earlier position that its statements were substantiated by fact, though it had not seen the records at that time.³⁵⁰ Specifically, the Court held that, since the defendant had taken the position that its statements were accurate, independent of what might be found in the privileged records, there was no need to disturb the privilege.³⁵¹

In light of the basis for the Court’s rejection of the constitutional challenges to the psychotherapist-patient privilege in *Koikos* and *Ex parte Rudder*, argument can be advanced that there are situations in which the privilege should yield to a defendant’s constitutional right to due process. The holding in *Koikos* appears to support the conclusion that prevailing on such an argument requires convincing evidence that (1) the plaintiff will seek mental anguish damages at trial; and (2) the claim for mental anguish is central to the plaintiff’s case.³⁵²

It should be noted, however, that even if such an argument is unavailable, either a judge or counsel may comment on invocation of the privilege by a civil party, and the trier of fact is permitted to draw any

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 841 (citing *Ex parte Pepper*, 794 So. 2d 340, 343-44 (Ala. 2001); *Ex parte United Serv. Stations, Inc.*, 628 So. 2d 501, 504 (Ala. 1993)).

³⁴⁶ *Id.* at 841.

³⁴⁷ *Id.* at 843.

³⁴⁸ *Ex parte Rudder*, 507 So. 2d 411 (Ala. 1987).

³⁴⁹ *Id.* at 412.

³⁵⁰ *Rudder*, 507 So. 2d at 417.

³⁵¹ *Id.* at 417.

³⁵² *Koikos*, 884 So. 2d at 843.

appropriate inference from the party's assertion of the privilege.³⁵³ Importantly, however, neither comment nor inference is permissible when the privilege is asserted by a non-party witness, i.e., a psychotherapist; thus, counsel should strategically consider the manner in which he addresses this issue before trial. For example, one may seek information regarding psychological treatment during discovery. A practitioner can issue written discovery requests, or request that a party sign a release, allowing the disclosure of information regarding treatment. Practitioners should also ask the party about treatment during deposition and at trial. To the extent an objection of privilege is lodged, the practitioner gains an opportunity to comment on invocation of the privilege, and request an adverse inference instruction.

4. The duration of the plaintiff's emotional distress can affect the amount of mental anguish damage recovery

Alabama cases also appear to place emphasis on the duration of a plaintiff's mental anguish when scrutinizing whether an award is excessive. For example, in *Orkin Exterminating Co., Inc. v. Jeter*, the jury awarded the plaintiff \$800,000 in compensatory damages, which the trial court remitted to \$400,000.³⁵⁴ The defendants argued that the \$300,000 portion of the award attributable to mental anguish was excessive and not supported by the evidence.³⁵⁵ Reducing the award, the Court stated that

the testimony in this case reveals that Mrs. Jeter endured significant mental anguish during the nine months between her learning of the Maxwell memorandum and her death.

. . . .

If evidence of Mrs. Jeter's mental distress is viewed as based primarily upon the nine-month period from her awareness of the Maxwell memorandum until her death, the trial court's remitted award of \$300,000 for mental anguish would equal approximately \$1,000 per day, significantly more than the \$375,000 compensatory damages award we upheld in *Southern Energy*, a substantial portion of which was allocable to mental anguish over a period of five years.

. . . .

³⁵³ 2 MCELROY'S ALABAMA EVIDENCE § 414.01(9) (5th ed. 1996); see also *United Serv. Stations*, 628 So. 2d at 506 (Houston, J., concurring specially) ("If Loan Nham continues to seek damages for mental pain and anguish and to insist on her psychotherapist-patient privilege of confidentiality (ALA. CODE § 34-26-2), the trial court, in this civil case, should permit the defendant to argue to the jury the inconsistency in the plaintiff's claiming such damages while insisting on the privilege (COLQUITT, ALABAMA LAW OF EVIDENCE § 513, at 193 (1990)); and there is a presumption that the jury will do its job as finder of the facts.").

³⁵⁴ *Orkin Exterminating Co.*, 832 So. 2d at 35.

³⁵⁵ *Id.*

The testimony from Archie Jeter Thompson and Robert Jeter reveals that the Orkin defendants' fraudulent conduct caused Mrs. Jeter to suffer tremendously in the nine months before her death. However, the limited duration of Mrs. Jeter's suffering will not permit the entire remitted award of \$300,000 for mental-anguish damages to survive strict scrutiny.³⁵⁶

After noting that the plaintiff only experienced nine months of mental anguish, the Court further remitted the \$300,000 portion of the award attributable to mental anguish to \$200,000.³⁵⁷

In *Foster v. Life Insurance Co. of Georgia*, the Alabama Supreme Court also remitted a mental anguish damages award, emphasizing the plaintiff's testimony that "her distress did not begin until after she discovered that the policy was worthless and that she sued approximately two months after this discovery." The Court added that her "scant testimony of mental anguish and emotional distress, without more, does not support an award exceeding \$120,000 for each of the two months before she sued."³⁵⁸

These cases stand for the proposition that the duration of a plaintiff's mental anguish is calculated until the date that suit is filed and is an appellate consideration when reviewing mental anguish damage awards on appeal. It should be noted, however, that in *Alabama Power Co. v. Murray*, the Alabama Supreme Court cited with approval testimony that "at the time of trial [the plaintiff] still had headaches and still cried."³⁵⁹ Additionally, in *Akins Funeral Home, Inc. v. Miller*, the court distinguished its holding in *Foster*:

Here, the Millers were not compensated for two months of mental distress over money wasted on worthless insurance, as was the case in *Foster v. Life Insurance Co. of Georgia*; they were compensated for a lifetime of distress and anguish resulting from not being allowed to view the body of a son and husband and the wrongful cremation of that body as a result of that refusal.³⁶⁰

To the extent a plaintiff delays a significant amount of time before filing suit, those seeking to limit damages should consider advancing a tactful mitigation of damages argument. Whether such argument will succeed depends upon any number of factors. For example, to the extent that the plaintiff claims that his mental anguish will end when he obtains judgment from a jury of his peers, but delays until the last day before expiration of the statute of limitations to file

³⁵⁶ *Id.* at 37, 38 (citing *S. Energy Homes, Inc. v. Washington*, 774 So. 2d 505 (Ala. 2000)).

³⁵⁷ *Id.* at 39.

³⁵⁸ *Foster*, 656 So. 2d at 337.

³⁵⁹ *Murray*, 751 So. 2d 494, 500; see also *S. Energy Homes*, 774 So. 2d at 509-18 (noting that plaintiff experienced mental anguish for a period of five years, though he purchased the mobile home in 1993, and filed suit in 1995).

³⁶⁰ *Akins Funeral Home, Inc. v. Miller*, 878 So. 2d 267, 278 (Ala. 2003).

suit, argument may be advanced that the plaintiff could have been “vindicated” if he had filed the action earlier.

5. The plaintiff’s mental anguish must be caused by the defendant’s alleged wrongful conduct toward the plaintiff.

Another important consideration when evaluating mental anguish damage testimony/awards is whether the plaintiff’s emotional distress arose as a result of the defendant’s wrongful conduct directed toward the plaintiff. For example, in *George H. Lanier Memorial Hospital v. Andrews*, the Alabama Supreme Court noted that it “views the evidence of mental anguish claimed by each plaintiff to determine if that particular person should recover; one plaintiff’s mental anguish cannot bootstrap the awarding of damages to the other plaintiff or plaintiffs.”³⁶¹ Stated similarly, a plaintiff’s distress caused as a result of alleged wrongdoing toward another should not support an award of mental anguish damages.

An excellent example of this principle is found in the case of *Ex parte Grand Manor, Inc.* wherein the Court stated: “[w]e must . . . determine whether the Dykeses presented substantial evidence indicating that they, in fact, suffered mental anguish as a result of [the defendant’s] alleged negligent conduct.”³⁶² Furthermore:

Mrs. Dykes testified at trial that their son had been scalded as a result of the water-pressure problem and that the carpeting of the mobile home had become “soaked” as a result of the toilet overflows Mrs. Dykes testified at trial that she had been told by two “certified people” that the interior electrical wiring in her home was “very dangerous” and she testified that because of the possibility of having a fire caused by an electrical problem, she had “worried a lot about [her] children being safe when [she was] not home.” Mrs. Dykes also testified that she had “lost many nights” sleep from wondering why [she] was treated the way [she] was by both the companies . . . and that she “spent a lot of time . . . worrying if [she and her husband] made the right decision in buying the home.”³⁶³

Importantly, while Mrs. Dykes’s testimony, when viewed in a light most favorable to her, tended to “show that she was anxious for her children’s safety and that she worried a great deal, her testimony did not constitute substantial evidence indicating that she ‘fear[ed] for [her] own physical safety’ as a result of the alleged negligent manufacture of the mobile home.”³⁶⁴ At most, the evidence showed “injury to the mobile home itself, and Alabama law does not permit recovery of mental-

³⁶¹ *George H. Lanier*, 901 So. 2d at 725 (citing *Murray*, 751 So. 2d at 500-01).

³⁶² *Ex parte Grand Manor, Inc.*, 778 So. 2d at 179.

³⁶³ *Id.* (alterations in original).

³⁶⁴ *Id.* at 179-80 (alterations in original) (citation omitted).

anguish damages based on a claim of simple negligence where the negligent act or omission results in mere injury to property.”³⁶⁵

Practitioners should also recognize that a plaintiff’s mental anguish must be attributable to the defendant’s wrongdoing, not other circumstances. For example, in *Duck Head Apparel Co. v. Hoots*, the defendant challenged the jury’s mental anguish damage award, contending that some of the plaintiffs’ testimony related to mental anguish regarding the loss of their jobs, which was arguably not at issue.³⁶⁶ Ordering a remittitur of the compensatory damage award, the Alabama Supreme Court stated “because the jury could have been persuaded by their testimony to award a portion of the mental anguish damages based on [the plaintiffs’] testimony of remorse at losing their positions, a remittitur is in order.”³⁶⁷ In light of this precedent, those seeking to reduce/negate mental anguish damage awards should explore whether any alleged emotional distress is attributable to causes other than a defendant’s alleged conduct. For example, if a plaintiff sues a defendant for bad faith denial of an insurance claim arising out of an automobile accident, inquiry should be made as to whether the plaintiff’s alleged mental anguish is attributable to physical pain resulting from the accident, or the denial of benefits. If the plaintiff is alleging that the defendant harassed the plaintiff in connection with collection of a debt, inquiry should be made as to whether the plaintiff is receiving calls from other debt collectors. It should also be noted that to the extent there are potential other causes of a plaintiff’s mental anguish, which a trier of fact would find could reasonably cause mental anguish, a plaintiff’s dogmatic refusal to concede this point could cause him to lose credibility in the eyes of the trier of fact. Thus, some thought should be given to possible other causes for a plaintiff’s alleged mental anguish, and explored through discovery.

6. The egregiousness of the defendant’s alleged conduct should not be a factor in awarding mental anguish damages.

It is also important to recognize that since mental anguish damage awards are compensatory, they should be based on what is necessary to make the plaintiff whole, not the reprehensibility of the defendant’s alleged conduct. Support for this conclusion is found in *Orkin Exterminating Co. v. Jeter*, wherein the Alabama Supreme Court remitted the jury’s mental anguish award stating “[w]e cannot allow strong feelings over the reprehensibility of a defendant’s conduct, however justified, to drive up an award of damages for mental anguish.”³⁶⁸

³⁶⁵ *Id.* at 320 (citations omitted).

³⁶⁶ *Duck Head Apparel Co.*, 659 So. 2d at 908.

³⁶⁷ *Id.*

³⁶⁸ *Orkin Exterminating Co.*, 832 So. 2d at 38.

From a practical standpoint, however, it would seem that the more egregious a defendant's conduct, the greater mental anguish a plaintiff may experience. The Alabama Supreme Court acknowledged this reality when discussing the limited circumstances in which mental anguish damages can be recovered in breach of contract actions stating:

Speaking of exceptional cases in which Alabama law does allow mental-anguish claims resulting from a breach of contract, the United States Court of Appeals for the Eleventh Circuit has said, "[t]hese cases deserve special treatment because it is highly foreseeable that egregious breaches of certain contracts—involving one's home or deceased loved one, for example—will result in significant emotional distress."³⁶⁹

In light of this precedent, argument that a jury's mental anguish award is improperly attributable to the alleged reprehensibility of a defendant's conduct requires that one analyze the quantum of evidence submitted by the plaintiff regarding his or her emotional distress. If the evidence is minimal but the mental anguish award is substantial, a credible argument can be advanced that the award is improper. It should be noted, however, that the Alabama Supreme Court will not remit an award just because it is higher than a justice of the court would return.³⁷⁰

Another practical concern for those who consider challenging a mental anguish damage award as excessive is whether to request that the jury itemize its compensatory damages award by amount. If the damages are itemized, one enjoys the benefit of knowing exactly how much of the verdict is attributable to mental anguish. This is especially true when a plaintiff seeks multiple non-economic damages, such as mental anguish damages and injury to reputation. However, even when a plaintiff seeks a specific sum, i.e., a refund of premiums paid to the defendant in conjunction with a claim for mental anguish damages, there is no way to truly confirm whether the trier of fact awarded the plaintiff the full amount of special damages sought. This said, it should be noted that requesting a jury to itemize any mental anguish damages awarded may, at least implicitly, send the message that not only are such damages properly awarded, but warranted. Thus, thought should be given as to whether the benefit garnered from obtaining an itemized award outweighs the potentially adverse result.³⁷¹

³⁶⁹ *Bowers*, 827 So. 2d at 70 (quoting *Molina*, 207 F.3d at 1359-60).

³⁷⁰ *Daugherty*, 840 So. 2d at 163 ("While the jury's verdict of \$300,000 is higher than a Justice of this Court, sitting as a juror, might have awarded, that is not the test to determine whether such an award is excessive.").

³⁷¹ The Code of Alabama provides that damages assessed by the fact finder shall be itemized as (1) past damages; (2) future damages; and (3) punitive damages. ALA. CODE § 6-11-1 (1975).

CONCLUSION

As noted at the outset of this article, erosion of the early common law prohibitions on the recovery of mental anguish damages has continued as practitioners seek to expand recovery of these damages based on a variety of claims of liability. This trend has continued though uncertainty regarding recovery of these damages has remained.

This uncertainty is only compounded by the lack of any clear standard for assessing when an award of mental anguish damages is excessive, causing these damages to be subject to many of the same criticisms leveled against awards of punitive damages. Nevertheless, the recovery of mental anguish damages is now well entrenched in the common law of Alabama.

It is hoped that this article will, at least, assist practitioners evaluating claims for mental anguish damages under Alabama law by providing some insight into the ever developing decisions of the courts of this state.