

RECOVERY FOR INFLICTION OF EMOTIONAL DISTRESS: A COMMENT ON THE MENTAL ANGUISH ACCOMPANYING SUCH A CLAIM IN ALABAMA

I. INTRODUCTION

Black's Law Dictionary defines "mental anguish" or "emotional distress"¹ as an element of damages including "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."² The United States Supreme Court has stated that emotional distress specifically describes a mental or emotional injury that is separate and distinct from the tort law concepts of pain and suffering.³ Pain and suffering, though indicative of mental harms, contemplate an injury that is derived from a physical injury or condition.⁴ The injury dealt with in this Comment—emotional distress—"is mental or emotional harm (such as fright or anxiety) that is . . . not directly brought about by a physical injury, but that *may* manifest itself in physical symptoms."⁵

The courts have been reluctant to acknowledge that an individual's interest in peace of mind is worthy of independent legal protection.⁶ The nature of emotional distress damages, the courts reasoned, "are so evanescent, intangible, and peculiar, and vary to such an extent with the individual concerned, that they cannot be anticipated, and so lie outside the boundaries of any reasonable 'proximate' connection with the act of the defendant."⁷ Yet, it is widely accepted that damages for emotional distress can form a substantial part of a compensatory damages award for torts involving physical injury.⁸ Some independent torts, such as assault, battery, or false imprisonment was traditionally necessary to

1. Both terms are used interchangeably to represent the same harm.

2. BLACK'S LAW DICTIONARY 986 (6th ed. 1990).

3. Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 544 (1994).

4. *Gottshall*, 512 U.S. at 544.

5. *Id.* (emphasis added).

6. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 54-55 (5th ed. 1984).

7. *Id.* at 55.

8. *Id.*

serve "as a peg upon which to hang the mental damages."⁹ Many jurisdictions, however, have recently abandoned this view that emotional distress damages are strictly parasitic in nature, thereby recognizing that the infliction of emotional distress can serve as the sole basis of an action, or is itself an independent tort.¹⁰

Another area of debate, derived from the courts' concern over feigned claims of emotional injury, is whether the emotional distress must be accompanied by some type of immediate physical injury.¹¹ Such a requirement, of course, precludes recovery for those who suffer emotional distress as a result of a "near miss," or as a result of witnessing some peril or injury to another person—often a loved one.¹² Resultantly, most jurisdictions have abandoned this impact requirement, recognizing that the presence of a physical impact is not determinative of whether a claim of emotional distress is genuine.¹³

Alabama law has slowly evolved to become more in line with the United States Supreme Court's non-physical-dependent characterization of emotional distress damages, beginning largely with the Alabama Supreme Court's recognition of an independent tort for intentional infliction of emotional distress.¹⁴ Although the court's current jurisprudence indicates its willingness to recognize emotional distress damages in the absence of a physical injury, the court's evolution is still incomplete in the area of tort law. As this Comment will demonstrate, the current status and theory behind recoverable emotional distress damages in Alabama is in disarray, as recovery and the policy behind it largely depend upon whether the claim is one that is founded in tort law, as explained in Part II of this Comment, or in contract law, as explained in Part III. In addition, where it is founded in tort law, a plaintiff's ability to recover often hinges not upon the merits of the emotional suffering, but upon the form and procedure of the pleadings. Part II.C of this Comment will briefly outline the court's special treatment of claims regarding a defendant's fraudulent misrepresentation, while Part IV will explore the proper method by which to prove a plaintiff's emotional distress.

9. *Id.* at 57 (citations omitted).

10. *See id.* at 55.

11. *See* KEETON ET AL., *supra* note 6, § 54, at 362-63. The physical impact, the courts have opined, provides the desired guarantees that the alleged emotional injury is genuine. *Id.*

12. *See id.* at 365.

13. *See id.*

14. *See* American Road Serv. v. Inmon, 394 So. 2d 361 (Ala. 1980).

II. RECOVERY FOR EMOTIONAL DISTRESS IN TORT CLAIMS

A. *Intentional Infliction of Emotional Distress*1. *Emotional Distress as an Independent Tort*

Historically in Alabama, damages for infliction of emotional distress have been described as "parasitic" in that the right to recover such damages has been dependent upon an accompanying independent tort recognized at common law resulting in a physical injury to the plaintiff.¹⁵ The Alabama Supreme Court has since abandoned this requirement of physical injury or impact, recognizing that the presence of a physical injury or touching is not determinative of whether a plaintiff suffers emotional distress as a result of a defendant's act or omission.¹⁶ The court's first step in the complete abdication of the physical impact rule was in *American Road Service v. Inmon*,¹⁷ where the court held that intentional infliction of emotional distress, also known as the "tort of outrage,"¹⁸ is a separate cause of action in Alabama.¹⁹ To recover under the tort of outrage, a plaintiff must show that the defendant's conduct: (1) was intentional or reckless;²⁰ (2) was extreme and outrageous; (3) was the cause of the plaintiff's emotional distress; and (4) resulted in emotional distress or accompanying bodily harm so severe that no reasonable person could be expected to endure it.²¹ The court narrowly limited "extreme conduct" to that which is so outrageous in character and extreme in degree "as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society."²² Furthermore, in the absence of intent, where the conduct is considered reckless, the conduct must be even more extreme.²³ This limitation of actionable conduct to only that which is extreme serves to insulate a defendant from liability for "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities"²⁴ and results in an action

15. *Inmon*, 394 So. 2d at 363.

16. *Id.* at 365; *Taylor v. Baptist Med. Ctr., Inc.*, 400 So. 2d 369, 374 (Ala. 1981); *Flagstar, Enter., Inc. v. Davis*, 709 So. 2d 1132, 1141 n.5 (Ala. 1998).

17. 394 So. 2d 361 (Ala. 1980).

18. *Thomas v. BSE Indus. Contractors, Inc.*, 624 So. 2d 1041, 1043 (Ala. 1993).

19. *Inmon*, 394 So. 2d at 365.

20. In *Womack v. Eldridge*, 210 S.E.2d 145 (Va. 1974), the Virginia Supreme Court specifically stated that a plaintiff may prove that the defendant "had the specific purpose of inflicting emotional distress," or that the defendant acted recklessly by disregarding the likelihood that his conduct would cause emotional distress. *Womack*, 210 S.E.2d at 148.

21. *Inmon*, 394 So. 2d at 365; see RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

22. *Inmon*, 394 So. 2d at 365.

23. *Barton v. American Red Cross*, 829 F. Supp. 1290, 1310 (M.D. Ala. 1993).

24. *Inmon*, 394 So. 2d at 364-65 (quoting RESTATEMENT (SECOND) OF TORTS § 73 (1948)).

that is rarely a plaintiff's route to recovery.²⁵

Alabama courts have been reluctant to find a cause of action for the tort of outrage, as most cases are not extreme enough in degree to be considered outrageous.²⁶ Demonstrating that the tort of outrage is a very limited cause of action, the Alabama Supreme Court has since recognized it in only three areas: (1) malfeasance within the context of family burials; (2) coercion of an insured by an insurance agent into settling a claim; and (3) egregious sexual harassment.²⁷ In addition, the Alabama appellate courts have typically ruled that actions which arise in the ordinary course of commercial business transactions are insufficient to give rise to the tort of outrage, particularly where steps have been taken to remedy the circumstances in issue.²⁸ Actions which arise in the ordinary course of commercial business include acts of omission, where the harmful event arises out of the defendant's failure to perform some act.²⁹

2. *Emotional Distress as an Element of Damages*

Frequently, the circumstances surrounding an alleged tort of intentional infliction of emotional distress give rise to other independent tort claims as well.³⁰ Parallel claims often include invasion of privacy, false imprisonment, defamation, malicious prosecution, assault, and battery.³¹

25. See sources cited *supra* note 16.

26. See, e.g., *Mohacsy v. Holiday Inns, Inc.*, 603 So. 2d 956 (Ala. 1992); *Moore v. Spiller Associated Furniture, Inc.*, 598 So. 2d 835 (Ala. 1992); *Bloodsworth v. Morgan*, 593 So. 2d 55 (Ala. 1991); *Butler v. Aetna Fin. Co.*, 587 So. 2d 308 (Ala. 1991).

27. *Thomas v. BSE Indus. Contractors, Inc.*, 624 So. 2d 1041, 1044 (Ala. 1993). See generally *Whitt v. Hulsey*, 519 So. 2d 901, 906 (Ala. 1987) (finding that defendant's reckless desecration of family burial ground was sufficient to present a jury question as to the tort of outrage); *Levite Undertakers Co. v. Griggs*, 495 So. 2d 63, 64 (Ala. 1986) (holding that defendant undertaker's wrongful retention of remains of plaintiff's husband to force payment of funeral expenses was sufficient to present a jury question as to tort of outrage); *Cates v. Taylor*, 428 So. 2d 637, 640 (Ala. 1983) (describing defendant's revocation of permission to use burial plot thirty minutes before planned funeral as sufficient to present a jury question as to tort of outrage); *National Sec. Fire & Cas. Co. v. Bowen*, 447 So. 2d 133, 141-42 (Ala. 1983) (holding that insurance agent's conduct, including malicious prosecution, bribing of witnesses, and coercion to drop an insurance claim, was so atrocious that jury could find as a matter of law that plaintiff suffered severe emotional stress); *Busby v. Truswal Sys. Corp.*, 551 So. 2d 322, 324-25 (Ala. 1989) (finding that plant supervisor's sexual harassment of female employees was sufficient that a jury could reasonably find it to rise to the level of outrageous conduct).

28. *Roberts v. Public Cemetery of Cullman*, 569 So. 2d 369, 373 (Ala. 1990).

29. *Barton v. American Red Cross*, 829 F. Supp. 1290, 1310 (M.D. Ala. 1993) (holding that American Red Cross' delays in reporting test results to plaintiff was not extreme and outrageous conduct); *Roberts*, 569 So. 2d 369, 373 (holding that a cemetery sexton's failure to pump rain-water out of open grave was not extreme and outrageous conduct).

30. 1 DAMAGES IN TORT ACTIONS, § 6.01[2] (Matthew Bender & Co., Inc. 1999).

31. *Id.* See generally *Kmart Corp. v. Kyles*, 723 So. 2d 572 (Ala. 1998) (malicious prosecution); *Delchamps, Inc. v. Bryant*, 738 So. 2d 824 (Ala. 1999) (malicious prosecution); *United States Fidelity & Guar. Co. v. Miller*, 117 So. 668 (1928) (malicious prosecution); *Blevins v. W.F. Barnes Corp.*, No. 2980165, 1999 WL 685840 (Ala. Civ. App. Sept. 3, 1999) (invasion of privacy and defamation); *Woodley v. City of Jemison*, No. 2980275, 1999 WL 424361 (Ala. Civ. App. June 25, 1999) (false imprisonment); *Machen v. Childersburg Bancorporation, Inc.*, 761 So. 2d

The main distinction between the independent tort of intentional infliction of emotional distress and the other intentional torts is that in the former, the plaintiff can recover only the non-monetary damages accompanying the tort.³² Specifically, “[m]ental anguish is the gravamen of the cause of action for intentional infliction of emotional distress, whereas it functions as a parasitic element of damage under the other theories.”³³ As a result, no other damage must be alleged or proved for a plaintiff to recover under a claim of intentional infliction of emotional distress.³⁴ A plaintiff’s claim of the tort of outrage, however, does not preclude her ability to plead the independent torts as well, including a request for emotional distress damages.³⁵ Given the narrow applicability of the tort of outrage and the fact that the claim is often dismissed at summary judgment, the independent tort often serves as the plaintiff’s only means of recovery.³⁶

In Alabama, the case law is unclear as to when a plaintiff can properly recover damages for emotional distress resulting from other intentional torts. The Alabama Supreme Court has specifically allowed recovery for emotional distress under the tort claims of invasion of privacy, false imprisonment, defamation, malicious prosecution, assault, and battery.³⁷ The court has, however, failed to state its reasoning or theory behind allowing recovery for emotional distress where the gravamen tort is intentional—unlike its relatively well-outlined jurisprudence for torts based on negligent conduct.³⁸

B. *Negligent Infliction of Emotional Distress*

Similar to circumstances where the plaintiff suffers emotional distress from a defendant’s willful act, emotional distress can equally result from a defendant’s negligent breach of a duty owed to the plaintiff. Recovery for emotional distress under a claim of negligence in Alabama, however, requires that the plaintiff draft her pleadings with skilled precision. Generally, in order for a plaintiff to establish a claim for negli-

981 (Ala. 1999) (assault, battery, and invasion of privacy).

32. 1 DAMAGES IN TORT ACTIONS, *supra* note 30, § 6.01[2].

33. *Id.*

34. *Id.*

35. *Id.*

36. *See, e.g., Sanders v. Shoe Show, Inc.*, No. 2981431, 2000 WL 283894, at *3 (Ala. Civ. App. Mar. 17, 2000); *Callens v. Jefferson County Nursing Home*, No. 1980323, 2000 WL 146793, at *7 (Ala. Feb. 11, 2000); *Marcum v. Ausley*, 729 So. 2d 845, 846 (Ala. 1999); *Evans v. Mutual Assurance, Inc.*, 727 So. 2d 66, 66 (Ala. 1999).

37. *See sources cited supra* note 31.

38. *See infra* Part II.B. Where the underlying tort is intentional, the court does not seem to utilize any particular limiting test. Rather, the court seems to freely allow recovery where the underlying tort is coupled with some type of intentional and direct mental injury. *See supra* text accompanying notes 31 & 37.

gence in Alabama, she must demonstrate that: (1) the defendant owed a duty to the foreseeable plaintiff; (2) the defendant breached that duty to the plaintiff; (3) the plaintiff suffered an injury; and (4) the breach of the duty was the proximate cause of the injury.³⁹ Alabama does not, however, recognize an independent "negligent infliction of emotional distress" cause of action that is "based on the existence of a broad, generalized duty to refrain from engaging in conduct that could foreseeably result in some form of emotional distress."⁴⁰ Rather, in a pure negligence case, a plaintiff can recover for emotional distress only where it is a result of a defendant's negligent breach of some other duty recognized by law.⁴¹ Negligently causing another's emotional distress, the court opines, is not an independent tort, but is part and parcel of recovery for a traditional tort of negligence.

1. *Injury to the Person*

Although nearly all states recognize a plaintiff's right to recover for emotional distress in a negligence tort action, no jurisdiction allows recovery for all emotional harms proximately caused by another's negligence.⁴² Unlike readily cognizable physical injuries, claims of emotional injury that are not founded on physical trauma are inherently difficult to substantiate, and the severity difficult to quantify.⁴³ Furthermore, in contrast to cases involving manifest physical injury, "there are no necessary finite limits on the number of persons who might suffer emotional injury as a result of a given negligent act."⁴⁴ In order to address this possibility of nearly infinite claims against unwitting defendants, courts have limited the class of claimants that may recover for emotional injuries⁴⁵ and have further narrowed the types of injuries that are considered compensable.⁴⁶

39. *AALAR, Ltd. v. Francis*, 716 So. 2d 1141, 1144 (Ala. 1998) (citing *Crowne Investments, Inc. v. Bryant*, 638 So. 2d 873 (Ala. 1994)). See *KEETON ET AL.*, *supra* note 6, § 30.

40. *AALAR*, 716 So. 2d at 1144.

41. *Id.* at 1145. Courts justify this holding for policy reasons, worrying that establishing an independent tort would invite fraudulent claims of emotional injury and would "open the floodgates," thereby subjecting the courts to an unreasonable amount of litigation. *KEETON ET AL.*, *supra* note 6, § 54, at 360-61.

42. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 544-45 (1994).

43. See *Gottshall*, 512 U.S. at 545-46.

44. *Id.* at 545.

45. Hereinafter referred to as the "plaintiff class limitation."

46. See *Gottshall*, 512 U.S. at 546. Some foreign jurisdictions utilize a "physical manifestation" test where emotional injuries are compensable only when manifested in the form of physical symptoms. See JOHN G. FLEMING, *THE LAW OF TORTS* 32 (7th ed. 1987). In Alabama, the presence of physical symptoms is not a prerequisite for a plaintiff to recover for emotional distress. *Alabama Power Co. v. Harmon*, 483 So. 2d 386, 389 (Ala. 1986) (citing *B&M Homes, Inc. v. Hogan*, 376 So. 2d 667, 671 (Ala. 1979)).

The majority of jurisdictions have settled upon essentially three different methods of plaintiff class limitation for recovery of emotional distress in negligence actions. The first of these is the "physical impact" test, where the plaintiff must prove that her emotional distress is accompanied by a physical impact or injury sustained due to the defendant's negligent conduct.⁴⁷ With a skeptical eye towards a plaintiff's claim of emotional injury, many courts embraced the physical impact test, theorizing that the presence of a physical injury or touching mitigates the inherent possibility that an emotional distress claim is unfounded or fraudulent.⁴⁸ Although this test was widely used in the early 1900s, few states continue to adhere to it today.⁴⁹

A majority of jurisdictions abandoned the physical impact test, recognizing that emotional injuries could occur absent a physical impact, and often do not manifest themselves in the form of physical symptoms. The second test, referred to as the "zone of danger" test, is premised upon the recognition that "a near miss may be as frightening as a direct hit."⁵⁰ This limitation narrows the availability of recovery to those who either sustain a physical impact, or who are "placed in immediate risk of physical harm" by the defendant's negligent conduct.⁵¹ The zone of danger test, therefore, allows plaintiffs to recover for mere fright, unaccompanied by any physical touching.⁵² Fourteen jurisdictions currently utilize the zone of danger test.⁵³

The third plaintiff class limitation test is one first recognized by the California Supreme Court in *Dillon v. Legg*.⁵⁴ The California court relaxed its plaintiff class limitation by specifically rejecting the zone of danger test and opting for a new "relative bystander" test where the availability of recovery depends upon whether the defendant could have reasonably foreseen that his negligent act would result in a plaintiff's emotional injury.⁵⁵ The *Dillon* court outlined three factors to consider

47. *AALAR*, 716 So. 2d at 1146.

48. See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55, at 350-51 (3d ed. 1964).

49. *Gottshall*, 512 U.S. at 547 (citing Archibald H. Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 263-64, 264 n.5 (1921) (explaining that at the time Congress enacted the Federal Employers' Liability Act ("FELA"), 42 U.S.C. §§ 51-60, most industrial states espoused this test)). Approximately five states continue to utilize the physical impact test today. *Gottshall*, 512 U.S. at 547.

50. *Gottshall*, 512 U.S. at 547. (quoting Richard Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm: A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 488 (1982)). The zone of danger test first came into use at approximately the same time as the physical impact test, and was utilized by several jurisdictions at the time FELA was adopted. *Id.*

51. *Id.* at 547-48.

52. Pearson, *supra* note 50, at 489.

53. *AALAR, Ltd. v. Francis*, 716 So. 2d 1141, 1146 (Ala. 1998).

54. 441 P.2d 912 (Cal. 1968).

55. *Dillon*, 441 P.2d at 919-21. The court based its abandonment of the physical impact test on a criticism of the foundation upon which it rests. *Id.* at 918. Specifically, the court stated that

when determining reasonable foreseeability:

(1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.⁵⁶

Nearly half of the states have adopted the *Dillon* test and now allow bystanders outside the zone of danger to recover for emotional distress brought about by the plaintiff's witnessing of an injury or death of a close relative that is caused by the negligence of the defendant.⁵⁷

The Alabama Supreme Court utilized the physical impact test until its decision in *Taylor v. Baptist Medical Center, Inc.*⁵⁸ There, the court specifically rejected this longstanding test, stating 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."⁵⁹ In *Taylor*, the court reversed a summary judgment in favor of the defendant physician, on the plaintiff's claim that she suffered emotional distress as a result of experiencing complications during labor without the personal assistance of her physician.⁶⁰ Relying upon the court's prior rationale in *Inmon* when it abandoned the physical impact rule for intentional torts, the court in *Taylor* similarly opined that an individual's mental solicitude can equally be adversely affected in the absence of a physical injury in negligence actions.⁶¹ The court did not, however, go to the extent that it did in *Inmon* with respect to intentional torts and hold that negligent infliction of emotional distress was an independent tort. Rather, *Taylor* only extended plaintiffs' right to recover damages for emotional distress to victims who did not suffer

the possibility of fraudulent claims, which the physical impact test purports to vitiate does not justify an abdication of the judicial responsibility to award damages for sound claims: if it is "to be conceded that our procedural system for the ascertainment of truth is inadequate to defeat fraudulent claims [. . .], the result is a virtual acknowledgment that the courts are unable to render justice in respect to them."

Id. at 918 (citation omitted). The standard for awarding emotional distress damages, therefore, was whether the distress was "reasonably foreseeable"—a determination which was to be left to the discretion of the jury. *See id.* at 919.

56. *Id.* at 920.

57. *Gottshall*, 512 U.S. at 549.

58. 400 So. 2d 369 (Ala. 1981).

59. *Taylor*, 400 So. 2d at 374.

60. *Id.* at 371, 375.

61. *See id.* at 372-74.

cognizable physical injury; damages for negligent infliction of emotional distress remained parasitic in nature.⁶²

The court contemplated, however, a limited right to recovery for those plaintiffs who suffered emotional distress which was reasonably foreseeable—the plaintiff must be a foreseeable plaintiff.⁶³ In *Taylor*, the court held that a scintilla of evidence existed regarding whether it was reasonably foreseeable that the plaintiff would suffer emotional distress from the physician's failure to attend her delivery.⁶⁴ Therefore, the granting of summary judgment by the trial court was improper.⁶⁵ Similarly, in *Flagstar Enterprises, Inc. v. Davis*,⁶⁶ the court, citing *Taylor*, permitted the plaintiff to recover for emotional distress, based on allegations that a Hardee's restaurant had negligently served food that had been tainted with human blood.⁶⁷ The court reached this decision reasoning that physical injury was not necessary in order to recover for emotional distress, specifically noting that it was reasonably foreseeable that the plaintiff would be placed at risk of physical injury as a result of Hardee's serving food that had been tainted with human blood.⁶⁸ As *Taylor* and *Flagstar* demonstrate, the current state of Alabama law is analogous to the "zone of danger" limitation test, where plaintiffs without physical injury can recover for emotional distress only if they were "placed in immediate risk of physical harm by that conduct."⁶⁹

The zone of danger test has proven, however, to be a rather harsh doctrine, and, arguably, is ill-suited at providing courts with a consistent

62. See *id.*

63. See *AALAR*, 716 So. 2d at 1147. This purported additional consideration, however, is not a further limitation upon the class of plaintiffs who can recover for emotional distress, as implied in *AALAR*. Rather, the "reasonably foreseeable" requirement is an element which all plaintiffs must prove in negligence actions. See, e.g., *id.* at 1144 (citing *Crowne Investments, Inc. v. Bryant*, 638 So. 2d 873 (Ala. 1994)).

64. *Id.* at 1147; *Taylor*, 400 So. 2d at 374. It is noteworthy that *Taylor* was decided on both a contractual and a tortious basis. See *Taylor*, 400 So. 2d at 373-75. While *Taylor* relied on *Inmon*, an intentional tort case, when reaching its holding, the court also expressly relied upon the "coupled with matters of mental concern or solicitude," see *infra* Part III, exception for recovery of emotional distress in contract claims. See *Taylor*, 400 So. 2d at 374. Cases since *Taylor* have referred to *Taylor* as being in the negligent tort classification. See *AALAR*, 716 So. 2d at 1147; *Flagstar Enters., Inc. v. Davis*, 709 So. 2d 1132, 1141 n.5 (Ala. 1997).

65. *Taylor*, 400 So. 2d at 374.

66. 709 So. 2d 1132 (Ala. 1997).

67. *Flagstar*, 709 So. 2d at 1133-34, 1140.

68. *Id.* at 1140.

69. *AALAR*, 716 So. 2d at 1147. *AALAR* cited to both *Taylor* and *Flagstar* in reaching its holding that Alabama utilized the "zone of danger" test for negligence actions. See *id.* at 1147. As noted previously, this reasoning is somewhat flawed, as *Taylor* was based partially upon a contract claim and not merely negligence. See *supra* note 64 and accompanying text. The language in *Taylor* where the court justified its deviation from precedent, however, is well suited for application to claims based in both contract and tort law. See *Taylor*, 400 So. 2d at 374-75. More simply, a holding that physical injury is not required for a plaintiff to recover emotional distress damages only where the breach is based in contract and not in negligence would be illogical. Therefore, it is understandable that the court in *AALAR* characterized *Taylor* as a tort case for the purposes of tracing the evolution of the zone of danger test in Alabama.

and comfortable means of permitting recovery for emotional distress where facts justify doing so. For instance, in *Wal-Mart Stores, Inc. v. Bowers*,⁷⁰ the court stated that where a negligent tort results in mere damage to property, a plaintiff cannot recover for emotional distress.⁷¹ In *Bowers*, the plaintiffs claimed that Wal-Mart had negligently serviced their car, and that the negligent servicing caused their car and home to be destroyed by fire.⁷² For the plaintiff-husband who, unlike his wife, was not at home at the time of the fire, the only claim was based on damage to property.⁷³ The court utilized the zone of danger test and held that because the husband was not home at the time of the fire and was, thus, outside the zone of danger, he was not entitled to recover damages for emotional distress.⁷⁴ Resultantly, the husband was not able to recover for his emotional distress due to the complete destruction of his home, whereas his wife was.

More recently, in *Grand Manor, Inc. v. Dykes*,⁷⁵ the court denied the plaintiffs recovery for emotional distress damages due to the alleged negligent manufacture, delivery, and installation of a mobile home.⁷⁶ In that case, the plaintiffs alleged that shortly after they moved into their new mobile home they experienced numerous problems including plumbing, electrical, and various other cosmetic defects.⁷⁷ The court restated its long-held utilization of the "zone of danger" test for negligence actions and specifically held that the plaintiffs presented no evidence that they were placed in immediate risk of physical harm.⁷⁸ In addition, the court ruled that the plaintiffs presented no evidence of injury to anything other than the mobile home itself—"Alabama law does not permit recovery of mental-anguish damages based on a claim of simple negligence where the negligent act or omission results in mere

70. 752 So. 2d 1201 (Ala. 1999).

71. *Bowers*, 752 So. 2d at 1204 (holding that the insult and contumely exception, *see infra* Part II.B.2, does not apply to negligence actions, as the appropriate test in such a circumstance is the "zone of danger" test).

72. *Id.* at 1202.

73. *Id.* at 1204.

74. *Id.* Since the jury returned a general verdict in favor of the plaintiffs, the court remanded the case for a new trial to determine the proper award for the wife's emotional distress. *Id.* at 1204-05.

75. No. 1980348, 2000 WL 337528 (Ala. Mar. 31, 2000).

76. *Grand Manor*, 2000 WL 337528, at *2.

77. *Id.* at *1.

78. *Id.* at *4-*5. More specifically, the plaintiffs presented no evidence that they feared for their own physical safety; fear for the safety of their child, who was not a represented plaintiff, was insufficient. In other words, for negligent torts, the court seems to require a personalized fear on behalf of the plaintiff; the "near miss" must result in the plaintiff's fear for her own physical safety. Though this result seems harsh, any holding otherwise would have effectively resulted in the adoption of the relative bystander test. In addition, this holding corresponds to the long-held rule that an individual cannot, absent court appointment of a legal guardian, assign her rights to litigate a personal injury claim.

injury to property."⁷⁹

Yet, other cases indicate that the court is willing to permit emotional distress damages where the plaintiff's harm is similar to that described in *Bowers* and *Grand Manor*. Whereas the court usually requires that a plaintiff fear for her own physical safety in a negligent tort claim (thereby necessitating that the plaintiff be in the zone of danger), the court does not require such a personalized fear under other areas of the law, and as will be demonstrated, even under negligent torts on occasion. In *Carson v. City of Prichard*,⁸⁰ the Alabama Supreme Court allowed substantial damages for emotional distress absent a zone of danger analysis.⁸¹ In *Carson*, the plaintiffs suffered from the continuous overflow of raw sewage into their yards and homes after periods of heavy rain, due to the negligence of the Water Works and Sewer Board of the City of Prichard.⁸² Although none of the plaintiffs suffered any physical injury, and were not in the immediate risk of physical harm, the court affirmed emotional distress damages in the amount of \$282,500.⁸³

Similarly, in *City of Mobile v. Jackson*,⁸⁴ the Alabama Supreme Court expressly approved damages for emotional distress absent a zone of danger analysis.⁸⁵ In *Jackson*, the plaintiffs alleged that the City of Mobile negligently allowed water to flow from a service road drainage ditch into their home.⁸⁶ The drainage caused substantial damage to their home and personal property, thereby forcing them to vacate the premises and live in a camper parked in their backyard.⁸⁷ In affirming the trial court's verdict, the Alabama Supreme Court held that the plaintiffs were entitled to the \$39,144 jury award for emotional distress and inconven-

79. *Id.* at *5; see *infra* Part II(B)(2). The court suggested that in *Grand Manor*, the proper means of recovery would have sounded in contract, and not tort law. See *infra* Part III.

80. 709 So. 2d 1199 (Ala. 1998).

81. See *Carson*, 709 So. 2d at 1208.

82. *Id.* at 1201-02.

83. *Id.* at 1208. Because the tort was based on negligence, the "insult or contumely" exception, see *infra* Part II.B.2, to property damage-only cases was not applicable and not utilized by the court in its holding. In *Carson* the court failed to explain its reasoning for affirming the emotional distress damages. Had this been a contract claim, it likely would have fallen under the "coupled with matters of mental concern or solicitude" exception, which usually applies where a breach of contract causes damage to a residence. See *infra* note 115.

In his dissent in *Grand Manor*, Justice Lyons attempted to reconcile *Carson* by arguing that the plaintiffs were in the "zone of danger," and as such, "no exception to the 'zone-of-danger' rule was necessary . . . to support an award of damages for mental anguish . . ." *Grand Manor*, 2000 WL 337528, at *10 (Lyons, J., dissenting). This rationale may be misplaced as the court did not expressly apply the zone of danger test in *Carson*. Furthermore, the overflow of raw sewage into a home after periods of heavy rain does not place an individual in the *immediate* risk of physical harm. Rather, a more likely explanation of the holding in *Carson* indicates either the court's oversight in specifically addressing the zone of danger concepts or its implicit application of its contract jurisprudence to the tort claim. See *infra* Part III.

84. 474 So. 2d 644 (Ala. 1985).

85. *Jackson*, 474 So. 2d at 651.

86. *Id.* at 645-46.

87. *Id.*

ience.⁸⁸

Several other cases indicate the court's willingness, or perhaps oversight, to award emotional distress damages absent a "zone of danger" analysis, and where the plaintiff's emotional distress is wholly unrelated to any fear for her own physical safety.⁸⁹ Specifically, the court has unsystematically allowed damages for emotional distress in intentional or reckless tort actions without stating any justification for doing so.⁹⁰ In addition, as will be explained in Part III of this Comment, the Alabama Supreme Court allows recovery for emotional distress in contract actions, where the plaintiffs are not in the zone of danger, are not subject to extreme and outrageous conduct, and only suffer from a breach of contract.⁹¹ As a result, plaintiffs who sue under contract often receive compensation for emotional distress resulting from pecuniary damage that pales in comparison to that demonstrated in *Bowers* and *Grand Manor*.

In summary, the court has simply not stated the kind of emotional distress that must be suffered by the plaintiff. Where a plaintiff may recover for sleeplessness and embarrassment due to a malicious prosecution, she cannot recover for those same injuries where her home is completely destroyed by fire due to a negligent tort by the defendant. As a result, the court's case law pertaining to plaintiff class limitation on recovery of emotional distress damages for negligent torts: (1) does not always reflect the court's express intended jurisprudence; (2) is often inconsistent with its intentional tort jurisprudence; and (3) as will be explained in Part III, is occasionally inconsistent with its contract jurisprudence. A defendant confronted with a claim of negligent infliction of emotional distress, although provided with a series of bright-line rules specifying when a plaintiff is part of the compensable class, is conse-

88. *Id.* at 651. The court again failed to explain its basis for awarding emotional distress damages to plaintiffs who were not in the zone of danger.

In his dissent in *Grand Manor*, Justice Lyons distinguished *Jackson* by correctly noting that although the court upheld the jury's verdict, "a review of the opinion . . . reflects that the only issue argued . . . [was] whether the plaintiffs could recover damages in excess of the amount indicated in their notice . . ." *Grand Manor*, 2000 WL 337528, at *10 (Lyons, J., dissenting). The validity of the emotional distress award, therefore, was not at issue.

89. See *supra* Part II.A.2.

90. See *supra* Part II.A.2. In *Kmart v. Kyles*, 723 So. 2d 572 (Ala. 1998), the court allowed a plaintiff to recover for emotional distress resulting from malicious prosecution, although the plaintiff was not in immediate risk of physical harm and the defendant's conduct was not extreme and outrageous. *Kyles*, 723 So. 2d at 578-79. Affirmance of the award of damages in *Kyles* was not a unique, aberrant decision, as the court has specifically stated on numerous occasions that a plaintiff may properly recover emotional distress damages in malicious prosecution actions. *Delchamps, Inc. v. Bryant*, 738 So. 2d 824, 837 (Ala. 1999); *United States Fidelity & Guar. Co. v. Miller*, 117 So. 668, 670 (Ala. 1928); *Thompson v. Kinney*, 486 So. 2d 442, 445-46 (Ala. Civ. App. 1986), *overruled on other grounds by Barrett Mobile Home Transp., Inc. v. McGugin*, 530 So. 2d 730 (Ala. 1988).

91. *Lawyers Title Ins. Corp. v. Vella*, 570 So. 2d 578, 585 (Ala. 1990), *overruled on other grounds by State Farm Fire and Cas. Co. v. Owen*, 729 So. 2d 834 (Ala. 1998).

quently left with an ill-defined body of case law that creates uncertainty as to a defendant's scope of liability for emotional distress damages.

2. *Injury to Property Only*

The Alabama Supreme Court is somewhat more stringent with its approval of an award for emotional distress where the tort results in mere injury to property. For torts involving negligence concepts in which only property damage has been sustained, the court utilizes the zone of danger test as outlined *supra*, requiring that the plaintiff be in immediate risk of physical harm.⁹² For intentional torts, the court already has recognized the "tort of outrage" test as previously outlined,⁹³ which can potentially apply to cases involving mere injury to property.⁹⁴

Even before Alabama recognized the tort of outrage, however, the court carved out an exception to its general preclusion of claims for emotional distress where the tort results in mere damage to property. In *Reinhardt Motors, Inc. v. Boston*,⁹⁵ the court reiterated the well-established rule that recovery for emotional distress is not permitted where the intentional tort results in mere injury to property, unless the injury is "committed under circumstances of insult or contumely . . ."⁹⁶ The Alabama Supreme Court has found insult or contumely in "rude and insulting language and treatment"⁹⁷ and has largely confined the insult and contumely exception to cases involving intentional trespass concomitant with words or acts of insult.⁹⁸

92. See *supra* note 69 and accompanying text; *Grand Manor*, 2000 WL 337528, at *5. See also *supra* Part II.B.1; *AALAR*, 716 So. 2d at 1147. This practice follows with the court's determination that a near miss can be as frightening as a direct hit. See *supra* note 50 and accompanying text.

93. See *supra* Part II.A.

94. None of the elements to the tort of outrage preclude recovery where the tort results merely in property damage. See text accompanying *supra* note 21.

95. 516 So. 2d 509 (Ala. 1986).

96. *Reinhardt Motors*, 516 So. 2d at 511. See also *Smith & Gaston Funeral Dirs. v. Wilson*, 79 So. 2d 48, 50 (Ala. 1955) ("That mental anguish is recoverable in an action of trespass to property committed 'under circumstances of insult or contumely' is well recognized."); *Dawsey v. Newton*, 15 So. 2d 271, 273 (Ala. 1943) ("When a trespass to property is committed under circumstances of insult or contumely, mental suffering may be compensated for, when it is a proximate consequence.").

97. See *Reinhardt Motors*, 516 So. 2d at 512.

98. See, e.g., *Jeffries v. Bush*, 608 So. 2d 361, 364 (Ala. 1992) (refusing to apply the exception where the alleged trespass was not attended by words or acts of insult); *Smith*, 79 So. 2d at 50 (applying the exception where a defendant intentionally trespassed into a grave); *Dockins v. Drummond Co.*, 706 So. 2d 1235, 1237 (Ala. Civ. App. 1997) (applying the exception in an action alleging trespass and nuisance where the defendant acted knowingly); *Johnson v. Martin*, 423 So. 2d 868, 871 (Ala. Civ. App. 1982) (refusing to apply the exception where there was no evidence of trespass concomitant with words or acts of insult).

C. Fraud

For claims alleging fraud, the Alabama Supreme Court differentiates between compensable and non-compensable claims of emotional injury by returning⁹⁹ to its classification of whether the misrepresentation was negligent or intentional.¹⁰⁰ In *Holcombe v. Whitaker*,¹⁰¹ the court held that in the context of claims alleging fraud, a showing of willful misrepresentation is necessary in order for a plaintiff to recover "for the ordinary, natural, and proximate consequences though they consist of shame, humiliation, and mental anguish."¹⁰² Where willful misrepresentation is determined by the jury to be present, it may award damages for emotional distress, regardless of the defendant's state of mind with respect to infliction of emotional distress.¹⁰³

In Alabama, therefore, emotional distress damages resulting from a defendant's misrepresentation may only be awarded in cases where the misrepresentation is willful.¹⁰⁴ Again, the court's utilization of the negligent/willful differentiation in order to determine whether an emotional distress award was proper, conflicts with its "reasonable foreseeability" standard as utilized in pure breach of contract claims, to be described below in Part III.A.¹⁰⁵ Certainly, emotional distress damages are equally within or outside the contemplation of a defendant guilty of negligent misrepresentation during the sale of a car, as they are by a defendant guilty of breach of contract for the construction of a new residence, as will be discussed below in Part III.A.

III. RECOVERY FOR EMOTIONAL DISTRESS IN A NON-TORT CONTEXT

A. Contract Claims

The Alabama Supreme Court has taken a different route in allowing recovery of damages for emotional distress in the context of contract claims, opting not to focus upon whether the plaintiff suffered from an

99. The court makes this differentiation in tort cases.

100. This practice should be contrasted with the court's policy against this differentiation for breach of contract claims, see *infra* Part III.A, and for this differentiation in tort claims, see *supra* Part II.A & B.

101. 318 So. 2d 289 (1975).

102. *Holcombe*, 318 So. 2d at 293.

103. *Reserve Nat'l Ins. Co. v. Cromwell*, 614 So. 2d 1005, 1012 (Ala. 1993).

104. See *Pacific Mut. Life Ins. Co. v. Haslip*, 553 So. 2d 537, 540 (Ala. 1989); see also *Foster v. Life Ins. Co. of Ga.*, 656 So. 2d 333, 337 (Ala. 1994) (noting that the trial court properly held that the "jury was authorized under Alabama law to award compensatory damages for mental anguish and emotional distress if it found that [the defendant] had intentionally perpetrated a fraud on [the plaintiff]"); *Holcombe v. Whitaker*, 318 So. 2d 289, 293 (Ala. 1975) (holding that "where the wrong is willful rather than negligent, recovery may be had for . . . mental anguish").

105. See text accompanying *supra* notes 114-124.

intentional or negligent act,¹⁰⁶ or whether the plaintiff was in immediate risk of physical harm. Early on, the Alabama Supreme Court recognized that when one party breaches a contract, the other party is entitled to damages "such as may fairly and reasonably be considered as arising naturally from such breach, or as may reasonably be supposed to have been in the contemplation of the parties at the inception of the contract as the possible result of a breach of it."¹⁰⁷ This recovery included, therefore, damages for emotional distress where such emotional distress arose naturally and proximately from the breach of contract.¹⁰⁸

The court has, however, limited such recovery by restricting the class of claimants that may recover for emotional injuries. In several cases involving contract claims, the Alabama Supreme Court has disallowed emotional distress damages, finding 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."¹⁰⁹ The general rule in Alabama, therefore, is that damages for emotional distress are not recoverable in an action for breach of contract.¹¹⁰ The court has, however, carved out several exceptions to this general rule:

[W]here 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 therefor be taken into consideration and awarded. Another exception is where the breach of the contract is tortious, or attended with personal injury, damages for mental anguish may be awarded.¹¹¹

The second exception is really no exception at all, as it is triggered only when a separate actionable tort is committed. In this situation, the plaintiff's claim for emotional distress is subject to the "zone of danger" test, as described above.¹¹² The other exception—"coupled with matters of mental concern or solicitude"—typically finds application where a breach of contract causes damage to a residence, thereby affecting habitability.¹¹³

106. The court has, however, made this differentiation with respect to claims of misrepresentation. See *infra* Part III.C.

107. *Western Union Tel. Co. v. McMorris*, 48 So. 349, 353 (Ala. 1908).

108. *McMorris*, 48 So. at 353.

109. *B&M Homes, Inc. v. Hogan*, 376 So. 2d 667, 671 (Ala. 1979) (quoting *Stead v. Blue Cross-Blue Shield of Ala.*, 346 So. 2d 1140 (Ala. 1977)).

110. *Sexton v. St. Clair Fed. Sav. Bank*, 653 So. 2d 959, 960 (Ala. 1995); *B&M Homes*, 376 So. 2d at 671; *Stead v. Blue Cross-Blue Shield of Alabama*, 346 So. 2d 1140 (Ala. 1977).

111. *B&M Homes*, 376 So. 2d at 671.

112. See *supra* Part II.B.1.

113. *Grand Manor*, 2000 WL 337528, at *13 n.7. See *Southern Energy Homes, Inc. v. Wash-*

In *B&M Homes, Inc. v. Hogan*¹¹⁴ the court held that “contracts dealing with residences are in a special category and are exceptions to the general damages rule applied in contract cases which prohibits recovery for mental anguish.”¹¹⁵ In *B&M Homes*, the plaintiffs sued their home builder for failing to construct their future residence in a workmanlike manner, claiming that the finished structure had “major defects.”¹¹⁶ The plaintiffs alleged breach of contract and express warranty and sought damages for emotional distress.¹¹⁷ The Alabama Supreme Court applied the “coupled with matters of mental concern or solicitude” exception, stating:

It was *reasonably foreseeable* . . . that faulty construction of [the plaintiffs'] 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 [a] 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 [severe] defects.¹¹⁸

More simply, the court utilized a “reasonable foreseeability” test with respect to whether these plaintiffs could recover for emotional distress resulting from the damage to their home.¹¹⁹ Absent a physical injury and outside any potential zone of danger, the plaintiffs were awarded damages in the amount of \$75,000 for a home appraised at \$42,500 in a non-defective condition.¹²⁰

The utilization of this “reasonable foreseeability” standard with respect to contract claims is at odds with the “zone of danger” test applied

ington, No. 1971628, 2000 WL 127184, at *2, *12 (Ala. Feb. 4, 2000) (applying exception where breach related to express and implied warranties in connection with the purchase of a custom-built mobile home); *Sexton*, 653 So. 2d at 961 (applying the exception where construction lender made wrongful disbursement of loan proceeds to builder); *Orkin v. Donovan*, 519 So. 2d 1330, 1333 (Ala. 1988) (applying the exception where the breach caused damage to plaintiff's current residence); *Lawler Mobile Homes, Inc. v. Tarver*, 492 So. 2d 297, 306 (Ala. 1986) (applying the exception where the breach related to the sale and delivery of a mobile home); *B&M Homes*, 376 So. 2d at 671-72 (applying the exception where faulty construction caused damage to plaintiff's future residence). See also *Volkswagen of Am., Inc. v. Dillard*, 579 So. 2d 1301, 1304-07 (Ala. 1991) (applying exception to a breach of an automobile warranty which caused plaintiff to suffer anxiety, embarrassment, anger, fear, frustration, disappointment, and worry); *Taylor v. Baptist Medical Center, Inc.*, 400 So. 2d 369, 374-75 (Ala. 1981) (applying exception to a physician's breach of contract to deliver a baby).

114. 376 So. 2d 667 (Ala. 1979).

115. *B&M Homes*, 376 So. 2d at 672.

116. *Id.* at 670.

117. *Id.*

118. *Id.* at 672 (emphasis added).

119. See *id.*

120. *Id.* at 671, 676.

with respect to tort claims.¹²¹ While the court is willing to make exception for homeowners¹²² in a contract situation because "the largest single investment the average American family will make is the purchase of a home,"¹²³ it is unwilling to make an exception for homeowners who suffer from negligent acts while they reside in their homes, unless they are in the zone of danger.¹²⁴

By requiring a "zone of danger," "tort of outrage," or an "insult and contumely" determination before a plaintiff can recover under tort allegations, while utilizing a "reasonable foreseeability" standard for contract claims, the court unknowingly endorses a policy that is counterintuitive to the circumstances surrounding the two types of claims (contract and tort). Under a contract arrangement, the plaintiff knowingly and voluntarily elects to deal with the defendant; as a result, the plaintiff should be charged with some amount of awareness of the likelihood of future conflicts with the specific defendant given the circumstances surrounding the contract. In tort cases, on the other hand, there is ordinarily no element of voluntary dealing between the plaintiff and defendant. The plaintiff may have no foreseeable advance dealings with the specific defendant and have no advanced awareness of potential conflicts, as she would have in a contract situation. Therefore, by allowing a plaintiff in a contract case to recover for "reasonably foreseeable" emotional distress damages while disallowing it under the same circumstances in a tort case, the court fails to account for the parties' respective positions and relationship at the time of the breach or tort.

In order to alleviate this apparent disparity, the court could join with the majority of its sister states and adopt the "relative bystander" test¹²⁵ for application to tort cases. As stated previously, the relative bystander test turns for the most part on whether the defendant could have reasonably foreseen the emotional injury to the plaintiff.¹²⁶ By adopting this theory, the court would not only bring its tort law more in line with the majority of the states, but it would also establish congruity between a defendant's duty to a plaintiff in both a contract and tort context. On the

121. In *Grand Manor*, the court denied the plaintiffs' recovery for emotional distress due to the form of their pleadings—the plaintiffs alleged negligent manufacture, delivery, and installation of a mobile home when they should have alleged breach of contract or warranty to successfully recover for emotional distress. See *Grand Manor*, 2000 WL 337528, at *5, *13 n.1, *13 n.7.

122. The court goes as far as to apply the exception to the construction of future residences, where the plaintiff is not forced to live in a defective home. See *supra* text accompanying note 115.

123. *B&M Homes*, 376 So. 2d at 672.

124. See *Wal-Mart Stores, Inc. v. Bowers*, 752 So. 2d 1201 (Ala. 1999); *supra* Part II.B. But see *Carson v. City of Prichard*, 709 So. 2d 1199 (Ala. 1998); *City of Mobile v. Jackson*, 474 So. 2d 644 (Ala. 1985).

125. As of 1994, over half of the states utilized the "relative bystander" test for negligent torts. *AALAR*, 716 So. 2d at 1147; *Gottshall*, 512 U.S. at 549.

126. See text accompanying *supra* notes 54-57.

other hand, the court could remedy this disparity by wholeheartedly adopting its zone of danger test for all contract and tort claims—the plaintiff should be required to demonstrate that she feared for her own personal safety. A requirement of this sort would, however, amount to a substantial departure from its common practice to allow emotional distress damages for intentional torts such as the tort of outrage, malicious prosecution, and invasion of privacy, where the emotional distress suffered does not entail any personalized fear.

IV. PROVING EMOTIONAL DISTRESS

Assuming that a plaintiff has followed the procedure required in Alabama by alleging: (1) a tort of outrage; (2) an intentional tort which the court has referred to as congruent with a mental harm; (3) a negligent tort independent from infliction of emotional distress, where the plaintiff was inside the zone of danger; (4) an emotional injury that was a “reasonably foreseeable” result to a breach of contract; or (5) intentional misrepresentation, the plaintiff cannot merely present evidence of the occurrence of the act in order to recover for any accompanying emotional distress. Rather, the plaintiff is required to present evidence that she actually suffered emotional distress as a result of the defendant’s act or omission.¹²⁷ Once the plaintiff has done so, the award of damages for emotional distress is left to the jury’s sound discretion, subject to review for abuse.¹²⁸

Initially in Alabama, evidence of emotional distress was limited to that which was indirect and objective; evidence of emotional distress was to be “inferred by the jury from circumstances attending the particular breach of duty or contract.”¹²⁹ Premised upon the general evidentiary rule prohibiting witness testimony as to her own uncommunicated subjective intent, purpose, or motive, the court early on in *Western Telegraph v. McMorris*,¹³⁰ held that “if the facts showing liability are proved, we believe it is the settled law that the jury may infer the fact of mental suffering, because it is recognized as a common result under such circumstances, and the direct proof is not indispensable to show that mental suffering did ensue.”¹³¹

127. *Grand Manor*, 2000 WL 337528, at *4; *Kmart Corp. v. Kyles*, 723 So. 2d 572, 578 (Ala. 1998). In addition, the plaintiff need not demonstrate that her emotional distress manifested itself in physical symptoms. *Alabama Power Co. v. Harmon*, 483 So. 2d 386, 389 (Ala. 1986). Compensable emotional distress can merely take the form of purely mental harms, including but not limited to: grief, severe disappointment, indignation, wounded pride, shame, public humiliation, or despair. See BLACK’S LAW DICTIONARY 986 (6th ed. 1990).

128. *Harmon*, 483 So. 2d at 389.

129. *Western Telegraph Co. v. McMorris*, 48 So. 349, 353 (Ala. 1908).

130. 48 So. 349 (Ala. 1908).

131. *McMorris*, 48 So. at 353.

This limitation to indirect evidence was slowly whittled away,¹³² culminating in its express abandonment in *Ingram v. State*,¹³³ where the Alabama Supreme Court finally classified witnesses as being competent to give direct, subjective evidence as to their subjective emotional state. In *Ingram*, the court approved the admission of a witness' testimony regarding his emotion of fear, reasoning that the emotion of fear is an "involuntary physical effect"¹³⁴ and "for that reason it is different from the mere voluntary mental action of entertaining a motive or intention which was not communicated or otherwise expressed."¹³⁵

The question that remained, however, was whether indirect evidence alone would be sufficient to support a finding of emotional distress. In *Kmart Corp. v. Kyles*,¹³⁶ the Alabama Supreme Court answered this question in the negative when it adopted a significant modification of Alabama law, stating that the court shall "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."¹³⁷ In other words, the plaintiff must give her own testimony regarding her suffering in order to avoid the court's stricter scrutiny of verdicts relying solely upon indirect, objective evidence.¹³⁸ The court based this radical change in law upon the non-pecuniary and imprecise nature of emotional distress damages, asserting that as a result the court "must view the evidence from the plaintiff's perspective and determine what the evidence supports in terms of the plaintiff's suffering."¹³⁹ In *Kyles* the court specifically found that because the plaintiff did not testify about her emotional distress at trial,¹⁴⁰ the jury's award of over \$90,000 for emotional distress was an abuse of discretion.¹⁴¹

The Alabama Supreme Court again applied the *Kyles* test in *Delchamps, Inc. v. Bryant*,¹⁴² but in doing so served to vitiate the definition of what constituted direct evidence. In *Bryant*, a customer sued Delchamps for malicious prosecution resulting from an initial shoplifting

132. See generally *Jones v. Keith*, 134 So. 630, 633 (Ala. 1931) (allowing the witness to testify that he was "excited"); *Alabama Power Co. v. Edwards*, 121 So. 543, 546 (Ala. 1929) (permitting a witness to testify, "I was scared"); *Moss v. State*, 96 So. 451, 452 (Ala. Ct. App. 1922) (allowing the witness to testify that he was "frightened").

133. 42 So. 2d 36 (Ala. 1949).

134. *Ingram*, 42 So. 2d at 38.

135. *Id.*

136. 723 So. 2d 572 (Ala. 1998).

137. *Kyles*, 723 So. 2d at 578.

138. *Id.*

139. *Id.* (quoting *Foster v. Life Ins. Co. of Ga.*, 656 So. 2d 333, 337 (Ala. 1994)).

140. The only evidence of the plaintiff's alleged emotional distress was her husband's indirect testimony that "she cried on one occasion—when she telephoned him to say that she had been arrested." *Id.* at 577-78.

141. *Id.* at 579.

142. 738 So. 2d 824 (Ala. 1999).

arrest and continued prosecution after notice of an unassailable alibi.¹⁴³ Delchamps argued that the jury award of \$400,000 for compensatory damages¹⁴⁴ was unfounded as the plaintiff did not present any direct evidence thereof; the plaintiff, Delchamps argued, did not testify that he experienced sleeplessness or sustained a loss of income or degradation to his reputation.¹⁴⁵

The court agreed with Delchamps and reduced the compensatory damages award to \$100,000, finding that the plaintiff "gave scant direct testimony about [his] mental anguish."¹⁴⁶ Although the plaintiff presented both direct and indirect evidence of his emotional distress,¹⁴⁷ the court, purportedly relying upon the *Kyles* test, found that the jury abused its discretion in awarding him \$400,000 as compensatory damages.¹⁴⁸ The courtroom, the court reasoned, was not a platform where the plaintiff's own testimony as to his suffering should be limited "to a few terse words"¹⁴⁹ with the hopes that any subsequent jury determination as to the appropriate emotional distress award will "pass judicial scrutiny."¹⁵⁰ In *Bryant*, the absence of evidence to confirm the plaintiff's scant and vague descriptions of his suffering—evidence tending to aid the jury in quantifying the emotional distress,¹⁵¹—was insufficient to support a \$400,000 compensatory award.¹⁵²

143. *Bryant*, 738 So. 2d at 828-30.

144. Of the award, only \$700 was to compensate him for monetary damages incurred; the bulk of the compensatory damages award was to compensate him for emotional distress. *See id.* at 837-38.

145. *Id.* at 836-37.

146. *Id.* at 838. In addition, the court seemed to further justify its decision based upon the limited duration of the plaintiff's emotional distress; the emotional distress was not a result of an event that "will continue to inflict great pain through the years, such as the loss of a loved one." *Id.* at 828-30. The court has continued to utilize this "extended period" factor in subsequent cases. *See, e.g.,* *Southern Energy Homes, Inc. v. Washington*, No. 1971628, 2000 WL 127184, at *11 (Ala. Feb. 4, 2000).

147. The plaintiff presented indirect evidence of his emotional distress by describing the events that took place—his arrest and his hours of incarceration. *Bryant*, 738 So. 2d at 838. The direct evidence of his specific suffering, however, consisted only of testimony that (1) the incident was "hard" on him, (2) he worried over whether the incident would amount to a violation of his parole on a previous sodomy conviction, and (3) he was "put through humiliation." *Id.* at 837.

148. *Id.* at 837-38.

149. *Id.*

150. *Id.* The court seems to be implying that when the plaintiff is given a chance to proffer testimony, whether through her own words or through other corroborating methods, she should take full advantage of such a platform. Only through full utilization of this opportunity to explain to the jury the exact emotional impact she has suffered will an award be subject to lowered judicial scrutiny. The plaintiff cannot, therefore, simply present the jury with the occurrence of a defendant's breach of duty or contract with the aspiration that the jury will make its own inference and determination of what they believe she should have emotionally suffered as a result.

151. Corroborating evidence of the plaintiff's own specific emotional distress, the court held, could have come in the form of his own testimony, or that of family members, or professionals. *Bryant*, 738 So. 2d at 838.

152. *Id.* The court recently held in *Grand Manor* that the plaintiff's testimony that she "worried a lot about [her] children being safe when [she was] not home, . . . lost many nights' sleep from wondering why [she] was treated the way [she] was, . . . [and] spent a lot of time . . . worrying if [she and her husband] made the right decision in buying the home," did not constitute sub-

Justice Cook correctly pointed out in his concurrence, however, that the definition of "direct evidence" has proven to be elusive in a *Kyles* analysis, and that concern over the classification has only served to elevate form over substance.¹⁵³ In *Kyles*, the court held direct evidence to refer to testimony from the plaintiff with respect to her specific subjective emotional distress; this direct evidence, the court rationalized, was necessary in order to remove from the jury the burden of having to infer as to how the plaintiff subjectively perceived the incident and how it specifically affected her.¹⁵⁴ In *Bryant*, while purporting to base its decision using a strict scrutiny *Kyles* analysis, the court held that the jury abused its discretion because the plaintiff did not produce evidence corroborating his own description of the intensity of his suffering.¹⁵⁵ Specifically, the court held that because the plaintiff did not produce enough corroborating evidence, from whatever the source, his own testimony was scant.¹⁵⁶ *Bryant* held, therefore, that a plaintiff seeking to recover for emotional distress must not only provide subjective, direct evidence as to his own suffering, but must also provide objective, indirect evidence corroborating such testimony.¹⁵⁷ The *Kyles* emphasis on subjective, direct evidence has been effectively stripped of its meaning. Rather, the court has unknowingly implied a return to the pre-*Kyles* analysis, where the sufficiency of emotional distress evidence was measured regardless of the source or manner offered.¹⁵⁸

In his dissent in *Bryant*, Justice Johnstone criticized the *Kyles* decision largely because of the unreliable nature of subjective, direct evidence.¹⁵⁹ Johnstone argued that the *Kyles* requirement of subjective evidence is counterintuitive to the rules of evidence.¹⁶⁰ As the rules of evidence often require corroborating evidence in order to ameliorate some inherent unreliability of some forms of evidence, the *Kyles* test requires just the opposite: "it requires the least reliable of all forms of evi-

stantial evidence that she feared for her own physical safety. *Grand Manor*, 2000 WL 337528, at *5.

153. *Bryant*, 738 So. 2d at 839-40 (Cook, J., concurring).

154. *Kmart Corp. v. Kyles*, 723 So. 2d 572, 578-79 (Ala. 1998).

155. *See Bryant*, 738 So. 2d at 838. The court stated that such corroborating evidence could come in the form of the plaintiff's own testimony or through that of third parties. *Id.*

156. *See id.*

157. *See id.*

158. *See id.* at 839-40 (Cook, J., concurring); *Foster v. Life Ins. Co. of Ga.*, 656 So. 2d 333 (Ala. 1994). Evidence of the court's continued struggle with applying a *Kyles* analysis is found in the recent case of *Oliver v. Towns*, No. 1982303, 2000 WL 264229 (Ala. Mar. 10, 2000). In *Oliver*, the court held that although the plaintiff proffered evidence that she suffered "a lot of [mental anguish]" and that she had to seek professional counseling, she did not present enough evidence to support an emotional distress award of \$492,800. *Oliver*, 2000 WL 264229, at *2. Specifically, the court noted the plaintiff's failure to present corroborating evidence from her professional counselor as being justification to reduce the emotional distress award to \$75,000. *Id.*

159. *See Bryant*, 738 So. 2d at 841-42 (Johnstone, J., dissenting).

160. *Id.* at 842 (Johnstone, J., dissenting).

dence—subjective, self-serving emoting—ostensibly to buttress the most reliable form of evidence of mental suffering—the objective facts of the acts committed against, and the tangible losses suffered by, the plaintiff.”¹⁶¹ Requiring such subjective evidence, Johnstone asserts, invites testimony by professionals “with more credentials than integrity”¹⁶² as “an option for direct evidence to corroborate mental suffering” and only serves to repel jurors by antagonizing them with pathetic explanations of their suffering.¹⁶³

In summary, Johnstone argues that the *Kyles* rule serves no legitimate purpose, as it places the court in no better position to gauge excessiveness of an emotional distress award.¹⁶⁴ Johnstone specifically posited whether certain testimony would have given the court greater insight into the validity of the plaintiff’s claim of emotional distress, thereby prompting it to reach a different decision in *Bryant*.¹⁶⁵ He offered an example of such testimony:

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 stomach and a splitting headache and I didn’t sleep a wink for two months, all because of what Delchamps did to me.¹⁶⁶

Johnstone answered this supposition in the negative, stating that the direct testimony would have presented no more additional insight than a like quantity of objective, indirect evidence, and that had the plaintiff given such direct, he would have been perceived as “either a liar or a sissy or both, who deserved little award if any at all.”¹⁶⁷

Though Johnstone’s concern over what appears to be a counterintuitive, judicially created rule of evidence is noteworthy, his arguments misconstrue the logic behind the *Kyles* decision for several reasons. First, the definition of direct evidence is distorted by his argument that it invites testimony by professionals.¹⁶⁸ Rather, such expert testimony falls under the classification of indirect, objective evidence, as direct evidence consists solely of that which comes from the plaintiff’s own mouth—the plaintiff’s recitation of his subjective

161. *Id.* (Johnstone, J., dissenting).

162. *Id.* (Johnstone, J., dissenting).

163. *Id.* (Johnstone, J., dissenting).

164. *See Bryant*, 738 So. 2d at 842-43 (Johnstone, J., dissenting).

165. *Id.* (Johnstone, J., dissenting).

166. *Id.* at 842 (Johnstone, J., dissenting).

167. *Id.* at 843 (Johnstone, J., dissenting).

168. To his credit, Justice Johnstone was not the source of the confusion. Since the court ruled direct evidence as being admissible to demonstrate a plaintiff’s state of mind, the court has blurred its boundaries. *See supra* text accompanying notes 153-58.

mental processes after the injury.¹⁶⁹

Secondly, when presenting the court with a parade of horrors,¹⁷⁰ Johnstone overlooks the fact that the *Kyles* decision does not call for a bright-line requirement of plaintiff-provided direct evidence.¹⁷¹ Rather, the *Kyles* decision only requires the court to utilize strict scrutiny when reviewing emotional distress awards to plaintiffs who provided little or no direct evidence concerning the degree of suffering they have experienced; the court's scrutiny need not always result in an all-or-nothing determination of the soundness to the jury's award.¹⁷² It is entirely possible for the court to uphold a substantial award for emotional distress where the jury was presented with sufficient evidence, be it indirect or direct, demonstrating that the plaintiff suffered serious emotional harm.¹⁷³

More importantly, however, Johnstone overlooks the court's apparent objective in establishing the *Kyles* rule. While Johnstone criticizes *Kyles* for its unorthodox evidentiary function of bolstering objective evidence with subjective evidence, he fails to address the court's legitimate concern of a scenario where the plaintiff merely presents the jury with a description of the events underlying the defendant's breach of duty or contract, with the aspiration that any jury determination as to what she should have suffered will pass judicial scrutiny.¹⁷⁴ The plaintiff's own testimony is crucial, as it is the best means of presenting the jury with evidence surrounding what is, after

169. See *Kyles*, 723 So. 2d at 578; *Bryant*, 738 So. 2d at 839-40 (Cook, J., concurring). This limitation of direct evidence to the plaintiff's own words can be found in the *Kyles* decision itself. Before establishing the new heightened scrutiny standard, the court in *Kyles* carefully traced the evolution of the rules of evidence that resulted in allowing the plaintiff to testify as to her own uncommunicated mental intent. See *Kyles*, 723 So. 2d at 578; see also *supra* text accompanying notes 130-39. This change in law is what prompted the court to require the plaintiff to provide such subjective testimony where a substantial emotional distress award is sought. See *Kyles*, 723 So. 2d at 578. Only through such direct testimony, the court opined, can the jury be provided with an accurate perspective of the plaintiff's suffering. *Id.* Through this perspective, the jury is to determine what the indirect evidence—evidence as to the occurrence of the incident and testimony from friends, family, and experts—supports with regard to the severity of the plaintiff's suffering. See *id.* at 578-79. See also *Bryant*, 738 So. 2d at 838; *Foster v. Life Ins. Co. of Ga.*, 656 So. 2d 333, 337 (Ala. 1994).

170. See *supra* text accompanying notes 164-69.

171. See *Kyles*, 723 So. 2d at 578.

172. See *id.* Arguably, Justice Johnstone's concern over an influx of nauseating plaintiff testimony would never come to fruition. As he admits, too much direct, subjective testimony by the plaintiff would tend to anger the jury and lead to their conclusion that she was not deserving of any award at all. See *Bryant*, 738 So. 2d at 843. (Johnstone, J., dissenting). Be this the case, plaintiff's attorneys would be well advised to limit the amount of direct evidence offered—the amount should be self-regulating.

173. See, e.g., *Bryant*, 738 So. 2d at 838 (allowing emotional distress damages in the amount of \$99,300 after a finding that the plaintiff did not present sufficient direct evidence); *Oliver v. Towns*, No. 1982303, 2000 WL 264229, at *2 (Ala. Mar. 10, 2000) (allowing emotional distress damages in the amount of \$68,800 after a finding that the plaintiff did not present sufficient direct evidence).

174. See *supra* note 152 and accompanying text.

all, a mental harm that does not always manifest itself in physical symptoms, which are readily proven with objective evidence,¹⁷⁵ and does not necessarily require the presence of a physical injury.¹⁷⁶ Without some form of testimony from the plaintiff herself regarding her emotional distress, the court would essentially be establishing a general presumption of emotional distress where any breach of duty or contract occurs. Having to subject the court to what Johnstone refers to as "pathetic" testimony by the plaintiff is but a minor burden on the court that serves the legitimate purpose of guarding against inferred emotional distress damages.

V. CONCLUSION

The state of recovery for infliction of emotional distress in Alabama is in a relative state of disarray, and the case law often conflicts with the court's intended jurisprudence. While the court clearly provides a limiting "zone of danger" standard to narrow the class of potential plaintiffs under the negligent tort context, it fails to provide for a similar limiting standard to those defending against intentional torts falling outside the intentional tort of outrage. As a result, a defendant in a civil action is left with little or no defense to a plaintiff claiming emotional distress as a result of the defendant's intentional or reckless act or omission. In addition, in contrast to the court's differentiation between intentional and negligent acts in the tort context, the court chooses to utilize a reasonableness limitation test for breach of contract claims—regardless of the fact that the parties' relationships in each context may call for an opposite treatment. Yet, where the claim is founded on misrepresentation, the court sees fit to return to the intentional/negligent differentiation.

With the above discussion in mind, a civil plaintiff must choose her means of recovery carefully in order to ensure the possibility of recovery for emotional distress damages. Not only must she choose whether to allege an independent tort of outrage, but she must also decide whether to continue under a legal theory of intentional tort, negligent tort, or contract liability, as each legal concept carries its own nuances for permissible recovery for emotional distress. In a similar fashion, a civil defendant faced with a claim for emotional distress must not only make certain of the court's general policy corresponding to the plaintiff's chosen means of recovery, but he must also sift through the

175. See *supra* Part I for a discussion concerning the distinction between pain and suffering and emotional distress.

176. See *supra* Parts I & II.B.1. The courts have removed the requirement of an accompanying physical injury or impact, regardless of the potential for losing some degree of protection from feigned emotional injuries. See *supra* text accompanying notes 11-13.

court's case law with a fact-specific scrutiny to ensure that it does not tell a different story than the court's intended jurisprudence.

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