

Rel: 5/7/04 Alfa Life Ins. Corp. v. Jackson

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# SUPREME COURT OF ALABAMA

OCTOBER TERM, 2003-2004

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1001854 and 1002002

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**Alfa Life Insurance Corporation**

**v.**

**Magnolia Jackson and Henry Jackson**

**Magnolia Jackson and Henry Jackson**

**v.**

**Alfa Life Insurance Corporation**

**Appeals from Barbour Circuit Court**

**(CV-98-015)**

JOHNSTONE, Justice.

Upon the trial of the claims of the plaintiffs Magnolia Jackson and Henry Jackson ("the plaintiffs") against the defendant Alfa Life Insurance Corporation ("Alfa") for fraud, breach of contract, and negligent or wanton failure to procure life insurance, the jury returned a general verdict awarding the plaintiffs \$500,000 in compensatory damages and \$5,000,000 in punitive damages. Alfa renewed its motion for a judgment as a matter of law, which the trial court had denied at the close of all the evidence, and moved, in the alternative, for a new trial or a remittitur. After conducting a BMW/Hammond/Green Oil<sup>(1)</sup> hearing, the trial court denied Alfa a judgment as a matter of law, a new trial, or a remittitur of the compensatory-damages award. However, the trial court remitted the punitive-damages award from \$5,000,000 to \$1,500,000 to achieve a ratio of punitive damages to compensatory damages of three to one and allocated a portion of this reduced punitive-damages award to the Alabama Civil Justice Foundation, Consumer Protection Division.

Alfa appeals the denial of a judgment as a matter of law and the denial of a remittitur of the compensatory-damages award. Claiming that the trial court

should have reduced the punitive-damages award to an amount less than \$1,500,000, Alfa also appeals the remittitur of the punitive-damages award.

Claiming that the trial court should not have reduced the punitive-damages award, the plaintiffs cross-appeal the remittitur of the punitive-damages award. The plaintiffs also cross-appeal the allocation of a portion of the reduced punitive-damages award to the Alabama Civil Justice Foundation, Consumer Protection Division.

We conclude that the trial court correctly denied Alfa a judgment as a matter of law. However, we conclude that the trial court erred in denying Alfa a remittitur of the compensatory-damages award, erred in not reducing the punitive-damages award enough to satisfy constitutional limits, and erred in allocating a portion of the punitive-damages award to the Alabama Civil Justice Foundation, Consumer Protection Division. Accordingly, we reverse the judgment insofar as it allocates a portion of the punitive-damages award to the Alabama Civil Justice Foundation, Consumer Protection Division, and, in all other respects, affirm the judgment on the condition that the plaintiffs accept a reduction of the compensatory-damages award to \$100,000 and a reduction of the punitive-damages award to \$300,000.

### Facts

#### A. Substantive Facts

"In reviewing a jury verdict, an appellate court must consider the evidence in the light most favorable to the prevailing party...." Liberty Nat'l Life Ins. Co. v. Sanders, 792 So. 2d 1069, 1072 (Ala. 2000) (quoting Delchamps, Inc. v. Bryant, 738 So. 2d 824, 831 (Ala. 1999)). Considered in that manner, the evidence established the following facts.

Between 1981 and 1992, the plaintiffs, a married couple, relied exclusively on Rickey English ("English"), an Alfa agent, to advise them about insurance and to sell them the insurance they needed. Between 1981 and 1992, English sold the plaintiffs insurance on their lives, their automobiles, and their mobile home. Despite having a 10th-grade education, Henry Jackson cannot read. Although Magnolia Jackson has a high school education and an ability to read, she does not understand insurance policies.

Following the birth of the plaintiffs' younger daughter, Hillary, Magnolia Jackson went to English's office in October 1992 to inquire about life insurance on Hillary. Magnolia Jackson testified:

"A. ... When I went to see Rickey about getting some insurance on Hillary, I told him that I wanted insurance where when Hillary and Shantell[, the plaintiffs' older

daughter,] get grown that they wouldn't have to worry about paying no more insurance. So Rickey told me that he would sell me an insurance policy that would be paid up in fifteen years. So we talked some more about how much the pay was, and then I asked him to explain to me more about the fifteen year pay-up. And Rickey told me I would get a letter in the mail explaining to me about the fifteen year pay-up, and that's what he told me.

"....

"Q. And was this statement that y'all would only have to pay premiums for fifteen years something you relied on before deciding to buy it?

"A. Yes.

"....

"Q. Would you have bought these policies had he told you that you might have to make premiums in the future after fifteen years?

"A. No.

"Q. Would y'all have bought this policy had he told you that you could be paying on these policies for fifteen years and they could still go out of force because they were underfunded?

"A. No, I would not have.

"Q. Now, at this meeting that y'all attended, did Mr. English mention anything at all about interest rates?

"A. No.

"Q. Would you tell me what you know about interest rates, please?

"A. Nothing at all.

"....

"Q. ... He didn't use any words like vanishing premium, did he?

"A. No.

"Q. And he didn't use any words like sustain or self-sustain. He didn't use any words like that, did he?"

"A. No."

(Emphasis added.)

In fact, in October 1992, Alfa did not have any policies that would pay up in 15 years. Relying on English's representation that the new Alfa policies would pay up in 15 years, the plaintiffs took out new Alfa life insurance policies on their own lives and on their daughters' lives.

The plaintiffs subsequently received written Alfa life insurance policies. The written policies stated:

"FLEXIBLE PREMIUM ADJUSTABLE LIFE INSURANCE POLICY<sup>(2)</sup>

"Death Proceeds Paid on Insured's Death  
"Flexible Premium Payable During Lifetime  
of Insured Until Maturity Date

"Adjustable Death Benefit  
"This is a Non-Participating Policy"

(Plaintiffs' Trial Exhibits 2, 3, 4, and 5; capitalization in original.) The schedule of benefits on page three of each policy listed the maturity date of each policy. The listed maturity dates were September 22, 2046, for the policy insuring the life of Henry Jackson; October 19, 2050, for the policy insuring the life of Magnolia Jackson; October 19, 2073, for the policy insuring the life of Shantell Jackson; and October 19, 2087, for the policy insuring the life of Hillary Jackson. Magnolia Jackson did not know what "flexible premium adjustable life insurance" was. Each policy notified the plaintiffs of their right to cancel the policy within 10 days and to receive a refund of the initial premium they had paid on the policy. Each policy also contained this provision:

"Entire Contract. This policy and the copy of the application attached to it is the entire contract. ..."

The plaintiffs paid premiums on all four of these policies. None of the new policies provided that payment of the specified premium for 15 years would pay up the policies. When Magnolia Jackson did not receive the expected letter from Alfa confirming that the policies would pay up in 15 years, she wrote a letter to Alfa. In pertinent part, the letter stated that English had told Magnolia Jackson when she took out the policies that "these policies would be paid up in 15 years." (Plaintiffs' Trial Exhibit 18; emphasis added.) The letter requested "verification that these policies will be paid up in 15 years." (*Id.*) In response, Alfa district manager Hardy Bryan met with the plaintiffs on August 10, 1995. Bryan told the plaintiffs that the four policies Alfa issued in 1992 would not pay up in 15 years. Further, Bryan told the plaintiffs that each of the four policies would lapse before the end of the estimated life span of the person whose life was insured by it unless the plaintiffs increased the amount of the premiums they were paying on each policy.

Magnolia Jackson testified that these disclosures made her feel "like a big bomb had just exploded" and made her "worry." Magnolia Jackson testified that she "just [didn't] have the words to explain it, but it's hard thinking that you have insurance and to find out that you don't." On cross-examination, Alfa asked Magnolia Jackson whether, during the same time period when she was worried by her dealings with Alfa, she was also worried by the closing of the Van Heusen shirt factory where she had worked for 19 years, by her being unemployed for several months because of the factory closing, and by her dealings with another insurance company. Magnolia Jackson testified that all of these events caused her to worry. The plaintiffs had paid approximately \$2,340 in premiums on the four policies before they learned from Bryan that the policies would not be paid up in 15 years.

Alfa customer Willie Freeman testified that English had misrepresented to him in the late 1980s that his Alfa interest-sensitive whole life policy "would be a paid-up policy" after a specified number of years. Alfa customer Elnora Sewell testified that English had misrepresented to her in 1989 that her Alfa interest-sensitive whole life policy on the life of her daughter "would be paid up" in 10 years. Alfa customer Pearline Glover testified that Alfa agent Keith Bryan, the son of Hardy Bryan, had misrepresented to her in 1992 that her Alfa whole life policies on her and her daughter's lives "were to be paid up in ten years." Alfa customer Luvercia Simmons testified that Alfa agent Kathy Motley had misrepresented to her that her four Alfa universal life insurance policies on her grandchildren's lives would "be paid up in ten years."

## B. Procedural Facts

The plaintiffs sued Alfa and English in January 1996 for fraud, breach of contract, and negligent or wanton failure to procure life insurance.<sup>(3)</sup> Immediately before jury selection,<sup>(4)</sup> the plaintiffs moved to dismiss voluntarily the claims against English with prejudice. However, the record reveals that the trial court did not order the dismissal of the claims against English:

"THE COURT: Plaintiffs have made an oral motion to dismiss Mr. English with prejudice. Any argument by either side?

"[English's

attorney]: On behalf of Rickey English, we accept the offer.

"THE COURT: That streamlines things.

"[English's

attorney]: With your permission.

"THE COURT: Let's go."

Alfa then moved to dismiss the claims against Alfa on the ground that the plaintiffs' putative dismissal of the claims against English with prejudice had foreclosed the plaintiffs from further prosecuting their claims against Alfa. However, the trial court denied the Alfa motion to dismiss, and the claims against Alfa proceeded to trial. At the close of all the evidence, Alfa moved for a judgment as a matter of law. The trial court denied the motion and submitted the case to the jury.

Apparently realizing after trial that no order had been entered dismissing the claims against English, the trial court entered an order on the case action summary dismissing the claims against English without prejudice the day after the trial:

"1/11/2001 Case assigned status of: Disposed

Disposed on: 01/10/2001 by (jury verdict)

Court action judge: Hon. Burt Smithart

\$500,000.00 compensatory & \$5,000,000.00 punitive

[English] disposed by (dism w/o prej) on 01/11/2001."

(Emphasis added.)

### Issues

On appeal, Alfa raises these issues: (1) whether the trial court erred in denying Alfa a judgment as a matter of law on the ground that the plaintiffs' claims were not ripe, (2) whether the trial court erred in denying Alfa a judgment as a matter of law on the ground that the plaintiffs' putative dismissal of the claims against English with prejudice foreclosed the plaintiffs from further prosecuting their claims against Alfa, (3) whether the trial court erred in denying Alfa a judgment as a matter of law on the plaintiffs' fraud claim on the ground that the plaintiffs failed to prove the justifiable-reliance<sup>(5)</sup> element of their fraud claim, (4) whether the trial court erred in denying Alfa a judgment as a matter of law on the plaintiffs' breach-of-contract claim on the ground that this claim was based on oral statements that merged into the written policies of insurance that Alfa subsequently issued, (5) whether the trial court erred in denying a remittitur of the compensatory-damages award on the ground that the plaintiffs failed to present sufficient direct evidence of mental anguish to support the amount awarded by the jury for mental anguish, (6) whether the trial court erred in failing to remit the punitive-damages award to an amount not exceeding \$250,000 on the ground that § 6-11-21, Ala. Code 1975, as written before the Alabama Legislature rewrote it in Act No. 99-358, Ala. Acts 1999, limited punitive damages to \$250,000,<sup>(6)</sup> and (7) whether the trial court erred in failing to remit the punitive-damages award to an amount less than \$1,500,000 on the ground that \$1,500,000 in punitive damages is still excessive under the three guideposts established by the United States Supreme Court in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), and the factors established in Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986), and Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989).

On cross-appeal, the plaintiffs raise these issues: (1) whether the trial court erred in remitting the punitive-damages award from \$5,000,000 to \$1,500,000 on the ground that BMW, Hammond, and Green Oil do not authorize a reduction of punitive damages solely to achieve a ratio of punitive damages to compensatory damages of three to one when the other guideposts and factors support the jury award,<sup>(7)</sup> and (2) whether the trial court erred in allocating a portion of the punitive-damages award to the Alabama Civil Justice Foundation, Consumer Protection Division, on the ground that the trial court lacked authority to make such an allocation.

### Standards of Review

In Ex parte Helms, [Ms. 1001475, June 13, 2003] So. 2d , (Ala. 2003), we detailed the standard for appellate review of a ruling on a motion for judgment as a matter of law:

"The appellate standard for reviewing a ruling on a motion for judgment as a matter of law, a 'JML,' is the same as the standard for the original decision by the trial court.

"The first prerequisite for JML in favor of a movant who asserts a claim or an affirmative defense is that the claim or affirmative defense be valid in legal theory, if its validity be challenged. The second prerequisite for JML in favor of such a movant, who necessarily bears the burden of proof, is that each contested element of the claim or affirmative defense be supported by substantial evidence. The third prerequisite for JML in favor of such a movant is that the record be devoid of substantial evidence rebutting the movant's evidence on any essential element of the claim or affirmative defense. Substantial rebutting evidence would create an issue of fact to be tried by the finder of fact and therefore would preclude JML. JML in favor of the party who asserts the claim or affirmative defense is not appropriate unless all three of these prerequisites coexist.

"JML in favor of a movant who does not assert the claim or affirmative defense but who only opposes it, and who therefore does not bear the burden of proof, is appropriate in either of two alternative cases. One is that the claim or affirmative defense is invalid in legal theory. The other is that one or more contested essential elements of the claim or affirmative defenses is unsupported by substantial

evidence. If either alternative be true, JML is appropriate. If, however, the nonmovant's claim or affirmative defense is valid in legal theory and is supported by substantial evidence on every contested element, JML is inappropriate irrespective of the presence or weight of countervailing evidence.

"The statutory definition of substantial evidence is: 'evidence of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions as to the existence of the fact sought to be proven.' West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989), explains, 'substantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' A trial court deciding a motion for JML and an appellate court reviewing such a ruling must accept the tendencies of the evidence most favorable to the nonmovant and must resolve all reasonable factual doubts in favor of the nonmovant."

(Citations omitted.)

In reviewing whether a jury award of compensatory damages for mental anguish is excessive, we accord a presumption of correctness to the jury award if the plaintiff presented "some" direct evidence of mental anguish:

"A plaintiff is required only to present some evidence of mental anguish, and once the plaintiff has done so the question whether the plaintiff has suffered mental anguish and, if so, the question of how much compensation the plaintiff is entitled to for the mental anguish are questions for the jury. [Kmart Corp. v. Kyles, 723 So. 2d [572,] 578 [(Ala. 1998)]. The amount of the jury's award is left to the jury's sound discretion, and it will not be set aside absent a clear abuse of discretion. Id. A jury's verdict is presumed correct, and that presumption is strengthened by the trial court's denial of a motion for a new trial. Id."

Wal-Mart Stores, Inc. v. Goodman, 789 So. 2d 166, 178 (Ala. 2000). However, this Court has held that it may substitute its judgment for that of the jury if the plaintiff has suffered no physical injury and has introduced little or no direct

evidence of mental anguish to avoid cross-examination that would reveal adverse information about the plaintiff. E.g., Kmart Corp. v. Kyles, 723 So. 2d 572, 578 (Ala. 1998), and Delchamps v. Bryant, 738 So. 2d 824 (Ala. 1999). On the other hand, this Court has refrained from substituting its judgment where the plaintiff has presented a relatively modest amount of direct evidence of mental anguish if that relatively modest amount of direct evidence afforded the defendant an opportunity to cross-examine the plaintiff and if the amount of the award by the jury did not constitute a clear abuse of discretion. See Wal-Mart Stores, Inc. v. Goodman, 789 So. 2d at 179 n.8:

"This is not a case where the plaintiff presented only a minimum of evidence regarding mental anguish, so as possibly to avoid being cross-examined by questions calling for information about the plaintiff's prior experiences. Compare [Delchamps v. Bryant, 738 So. 2d [824,] 835 [(Ala. 1999)] (testimony from plaintiff could have led to cross-examination about previous felony convictions); [Kmart Corp. v. Kyles, 723 So. 2d [572,] 579 [(Ala. 1998)] (testimony from the plaintiff concerning mental anguish could have led to cross-examination about previous arrests)."

In reviewing the refusal of the trial court to give effect to the \$250,000 cap on punitive damages contained in § 6-11-21 as originally written, we review de novo whether the trial court properly applied the law to the facts. See Gaston v. Ames, 514 So. 2d 877, 878 (Ala. 1987) ("[W]hen the trial court improperly applies the law to the facts, no presumption of correctness exists."). Finally, we review de novo a determination by the trial court of the constitutionality of a punitive-damages award. Acceptance Ins. Co. v. Brown, 832 So. 2d 1, 24 (Ala. 2001).

## Law and Analysis

### A. Ripeness

A "vanishing premium" policy is a self-sustaining policy: "The underlying theory of ['vanishing premium'] policies is that the cash value of the policies will generate enough income through dividends and interest to pay the premiums on the policies and the policies will thereby sustain themselves. The ability of such policies to sustain themselves depends on mortality rates, expenses, dividends, and interest rates."

Williamson v. Indianapolis Life Ins. Co., 741 So. 2d 1057, 1060 (Ala. 1999). Because premiums continue to be paid on such policies after the so-called "vanish date," albeit from the cash values of the policies rather than from the pockets of the insureds, "[t]echnically ... the premiums on such policies never vanish." Id.

Policies that "pay up" in a specified number of years, on the other hand, require no premium payments from any source beyond the specified premium-payment period:

"Although potentially identical in effect, a paid-up policy differs from a vanish pay policy. A paid-up policy is contractually guaranteed never to require premium payments beyond the stated premium payment period. No such guarantee exists with a vanish pay policy."

Kenneth Black, Jr. & Harold D. Skipper, Jr., Life Insurance 106 (Prentice Hall, Inc. 12th ed. 1994) (emphasis added).

In Williamson, supra; Stringfellow v. State Farm Life Insurance Co., 743 So. 2d 439 (Ala. 1999); and DeArman v. Liberty National Life Insurance Co., 786 So. 2d 1090 (Ala. 2000), the plaintiffs-insureds alleged that the defendants-insurers had misrepresented the date when their "vanishing premium" policies would become self-sustaining. However, the plaintiffs-insureds had sued the defendants-insurers before the policies were to become self-sustaining according to the alleged representations of the defendants-insurers. Because, when the plaintiffs-insureds sued the defendants-insurers, the capacity of the cash values to sustain the policies depended on interest rates that could change in the future, the prospects of the policies to perform as represented or to fail so to perform in the future were likewise uncertain on the date suit had been filed. Therefore, in Williamson, Stringfellow, and DeArman, this Court held that the plaintiffs-insureds' claims were not yet ripe for adjudication when they had sued the defendants-insurers.

However, this Court held in Boswell v. Liberty National Life Insurance Co., 643 So. 2d 580 (Ala. 1994), and Donoghue v. American National Insurance Co., 838 So. 2d 1032 (Ala. 2002), that a claim that the plaintiff-insured was misled to pay premiums for a policy by representations that the policy would contain a coverage or feature that the subsequently issued policy did not in fact contain is ripe as soon as the plaintiff-insured pays a premium. In Boswell and Donoghue, this Court held that the plaintiffs had suffered an actual injury as soon as they had paid a premium for their policy because the plaintiffs were persuaded, through the fraudulent acts of the defendants, to pay for something they did not receive.

Alfa argues that the present case is a "vanishing premium" case and that under the holdings in Williamson, Stringfellow, and DeArman the plaintiffs' claims will not be ripe until the expiration of 15 years from October 1992. We disagree. English represented that the policies "would be paid up in fifteen years." (Emphasis added.) He did not represent that the policies would contain a "vanishing premium" provision, that the premiums would "vanish," that the policies would become "self-sustaining," or that interest earned on the cash values of the policies would enable the cash values to pay the premiums after 15 years.<sup>(8)</sup> Because English represented that the policies would be "paid up" in 15 years rather than be self-sustaining in 15 years, the performance of the policies in accordance with English's representation did not depend on future interest rates. Rather, the falsity of English's representation depends only on whether the policies themselves provided that they would be paid up by the plaintiffs' payment of the premiums for 15 years. Because the policies did not so provide, the policies, immediately upon issuance, belied English's representation. Like the plaintiffs in Boswell and Donoghue, the plaintiffs in the present case "were persuaded, through the fraudulent acts of the defendants, to pay for something they did not receive," i.e., policies that would be paid up in 15 years. Boswell, 643 So. 2d at 582. Thus, their claims were ripe as soon as they paid a premium. Id.

#### B. Putative Dismissal of the Claims Against English with Prejudice

Although the plaintiffs orally moved to dismiss the claims against English, the Alfa agent, with prejudice, the ruling of the trial court on the plaintiffs' oral motion, rendered by an entry on the case action summary, dismissed the claims against English without prejudice. Because neither Alfa nor English challenged this order before the trial court, we cannot reverse or ignore this order. Ex parte Ryals, 773 So. 2d 1011, 1013 (Ala. 2000) ("[T]he trial court cannot be reversed on any ground or argument not presented [to the trial court]."), and Smith v. Equifax Servs., Inc., 537 So. 2d 463, 465 (Ala. 1988) ("[T]his Court will not reverse the trial court's judgment on a ground raised for the first time on appeal ...."). Indeed, any error in entering the order of dismissal without prejudice is not even before us because Alfa has neither identified the order as an issue on appeal nor presented and argued such an issue on appeal. Tucker v. Cullman-Jefferson Counties Gas Dist., 864 So. 2d 317, 319 (Ala. 2003) ("An appeals court will consider only those issues properly delineated as such, and no matter will be considered on appeal unless presented and argued in brief." (emphasis original)(quoting Braxton v. Stewart, 539 So. 2d 284, 286 (Ala. Civ. App. 1988))). While the brief to us by Alfa indicates that it was unaware that the trial court ordered the dismissal of the claims against English without prejudice, Alfa was under a "duty to stay abreast of

any action taken in this case." Merrill Lynch, Pierce, Fenner & Smith v. Cobb, 717 So. 2d 355, 356 (Ala. 1998) (holding that the defendants' ignorance, until after expiration of the 42-day appeal period, of an order denying, by an entry on the case action summary, the defendants' motion to compel arbitration did not excuse the defendants' failure to appeal within the 42-day period).

Thus, we must recognize the order dismissing the claims against English without prejudice rather than with prejudice.

The absence of a dismissal with prejudice of the claims against English deprives Alfa of the main premise of its argument that it is entitled to judgment as a matter of law on the ground that the plaintiffs' putative dismissal with prejudice of the claims against English foreclosed the plaintiffs' claims against Alfa.

### C. Justifiable Reliance

This Court articulated the justifiable-reliance standard applicable to this case in Foremost Insurance Co. v. Parham, 693 So. 2d 409 (Ala. 1997):

""A plaintiff, given the particular facts of his knowledge, understanding, and present ability to fully understand the nature of the subject transaction and its ramifications, has not justifiably relied on the defendant's representation if that representation is 'one so patently and obviously false that he must have closed his eyes to avoid the discovery of the truth.'""

693 So. 2d at 420 (quoting Johnson v. State Farm Ins. Co., 587 So. 2d 974, 979 (Ala. 1991), quoting in turn Southern States Ford, Inc. v. Proctor, 541 So. 2d 1081, 1091-92 (Ala. 1989) (Hornsby, C.J., concurring specially)).

Alfa argues that this Court's holdings in Arthur Rutenberg Homes, Inc. v. Norris, 804 So. 2d 180 (Ala. 2001), and Osborne v. Weil, 628 So. 2d 436 (Ala. 1993), require this Court to hold that the plaintiffs in the present case could not, as a matter of law, have justifiably relied on English's misrepresentations. However, neither of those cases is apt.

In Arthur Rutenberg Homes, this Court held that a physician with experience in real-estate matters and his college-educated wife could not have justifiably relied on promises made by Arthur Rutenberg Homes ("ARH") about the construction methods used by ARH franchisees in constructing houses after the physician and his wife initialed provisions in their construction contract with an ARH franchisee

that explicitly stated that ARH was not participating in the construction of the plaintiffs' house either as a constructor or as a guarantor of proper construction by the franchisee. That holding turned on two factors: (1) the intelligence, education, and experience of the plaintiffs in that case and (2) the explicitness of the contract provisions, which the plaintiffs initialed, disclaiming the participation of ARH as constructor or guarantor in the construction of the plaintiffs' house.

In Osborne, this Court held that the plaintiffs, who purchased a business from the defendants, could not have justifiably relied on oral representations the defendants made before the parties executed the sales contract. That holding turned on two factors: (1) the plaintiffs' lawyer drafted the sales contract, and (2) the sales contract explicitly stated that "[e]ach party hereby acknowledges that in executing this contract he has not been induced, persuaded or motivated by any promise or representation made by the other party, unless expressly set forth herein." 628 So. 2d at 438 (emphasis omitted; emphasis added).

The factors crucial to the holdings in Arthur Rutenberg Homes and Osborne are absent from the case now before us. In the case now before us, the plaintiffs lacked the education, experience, and sophistication of the plaintiffs in Arthur Rutenberg Homes. In the case now before us, the language of the insurance policies belied English's misrepresentations without the explicitness of the documents in Arthur Rutenberg Homes and Osborne. In the case now before us, the policies were not drafted by a representative of the plaintiffs as was the document in Osborne.

Furthermore, a crucial factor is present in the case now before us that was absent from Arthur Rutenberg Homes and Osborne. English had established a relationship of trust with the plaintiffs through his dealings with them over the 11 years preceding the October 1992 meeting. No such relationship of trust existed between the plaintiffs and the defendants in Arthur Rutenberg Homes and Osborne. Accordingly, given the plaintiffs' particular education, knowledge, and ability to read and to understand life insurance policies and given the plaintiffs' relationship of trust with English, this Court cannot hold, as a matter of law, that the plaintiffs "closed [their] eyes to avoid the discovery of the truth." Foremost, 693 So. 2d at 420. Thus, Alfa was not entitled to judgment as a matter of law on the fraud claim on the ground that the plaintiffs could not, as a matter of law, have justifiably relied on English's misrepresentations.

#### D. Merger

In Alfa Mutual Insurance Co. v. Northington, 561 So. 2d 1041 (Ala. 1990), as in the case now before us, Alfa contended that the trial court erred in denying Alfa a judgment as a matter of law on the plaintiff's claim for breach of an oral contract.

The ground of the motion by Alfa was that the plaintiff based this claim on oral statements of the Alfa agent that had merged into the subsequently issued policy. This Court held:

"The parol evidence rule is based upon the idea that a completely integrated writing, executed by the parties, contains all of the stipulations, engagements, and promises that the parties intended to make, and that all of the previous negotiations, conversations, and parol agreements are merged into the terms of the instrument. In Alabama, however, it has been generally recognized that parties to a lawsuit may try their case on evidence that would otherwise be inadmissible upon proper objection and that where evidence violative of the parol evidence rule is admitted without objection, it may be considered and allowed such force and effect as its weight entitles it in construing the agreement of the parties. Because the testimony concerning oral negotiations between [the Alfa agent] and [the plaintiff-insured] was admitted into evidence without objection, the trial court did not err in denying Alfa's motion for a directed verdict and its motion for a judgment notwithstanding the verdict.[-(9)]"

561 So. 2d at 1044 (citations omitted).

In the case now before us, Alfa contends that the oral representation by English that the policies would pay up in 15 years was merged into the written policies that were subsequently issued and that, therefore, Alfa was entitled to a judgment as a matter of law on the plaintiffs' claim for breach of an oral contract. However, Alfa failed to object on the ground of the parol evidence rule to Magnolia Jackson's testimony that English orally represented that the policies would pay up in 15 years. Therefore, Alfa was not entitled to a judgment as a matter of law on the ground of merger on the plaintiffs' claim for breach of an oral contract. Northington, supra.

#### E. Excessiveness (Vel Non) of Compensatory Damages for Mental Anguish

While the amount of direct evidence of mental anguish presented by Magnolia Jackson was modest, it did afford Alfa the opportunity to cross-examine her about other events that were causing her worry during the same time period when Alfa was causing her mental anguish. For that reason, her direct evidence of mental anguish is more analogous to the direct evidence of mental anguish presented by

the plaintiff in Wal-Mart Stores, Inc. v. Goodman, *supra*, than it is to the failure of the plaintiffs to present any direct evidence of mental anguish in an effort to avoid cross-examination in Kmart Corp. v. Kyles, *supra*, and Delchamps, Inc. v. Bryant, *supra*.

Moreover, Alfa itself, in cross-examining Magnolia Jackson, adduced evidence that she was already beset with worry about her loss of employment and her troubled dealings with another insurer. This evidence allows an inference that she was more emotionally fragile and therefore more susceptible to mental anguish resulting from wrongdoing by Alfa. See Dempsey v. Phelps, 700 So. 2d 1340, 1348 (Ala. 1997) ("[A] defendant is responsible for the probable consequences of his actions, regardless of the preexisting condition of the plaintiff."); 2 Stuart M. Speiser, Charles F. Krause & Alfred W. Gans, The American Law of Torts § 8:14 (Lawyers Co-operative Publishing Co. 1985) ("[A] tortfeasor 'takes his victim as he finds him,' and is responsible in damages for the consequences of his tort although the damages so caused are greater because of a prior condition that may be aggravated.").

However, Henry Jackson did not testify, and Magnolia Jackson did not supply any direct evidence of the mental anguish suffered by Henry Jackson. Since the plaintiffs presented evidence that they had paid approximately \$2,340 in premiums for the policies before they learned of the fraud, the jury award of approximately \$497,660 in compensatory damages for mental anguish is based on indirect<sup>(10)</sup> evidence of both Magnolia's and Henry's mental anguish, a modest amount of direct evidence of Magnolia's mental anguish, and no direct evidence of Henry's mental anguish. Given this state of the record, we conclude that the award of \$497,660 for mental anguish was substantially greater than a properly functioning jury, applying sound discretion, could award. We further conclude that the greatest amount of compensatory damages for both plaintiffs' mental anguish a properly functioning jury, applying sound discretion, could have awarded on the basis of the evidence in this case is \$97,660. Accordingly, we hold that the trial court erred in denying a remittitur of the compensatory-damages award. If the plaintiffs do not accept a remittitur of the compensatory-damages award from \$500,000 to \$100,000 (\$97,660 + \$2,340), Alfa will be due a new trial.

## F. Excessiveness (Vel Non) of Punitive Damages

### 1. Section 6-11-21, Ala. Code 1975

Section 6-11-21, Ala. Code 1975, before it was rewritten by Act No. 99-358, Ala. Acts 1999, provided that "[a]n award of punitive damages shall not exceed \$250,000, unless it is based upon ... [a] pattern or practice of intentional wrongful conduct, even though the damage or injury was inflicted only on the plaintiff." In

Henderson v. Alabama Power Co., 627 So. 2d 878 (Ala. 1993), this Court held that the \$250,000 cap on punitive damages in § 6-11-21 was unconstitutional.

Alfa argues that the Henderson <sup>(11)</sup> Court erred in holding that the cap on punitive damages contained in § 6-11-21, Ala. Code 1975, was unconstitutional. Thus Alfa argues that it was entitled to a remittitur of the punitive-damages award to \$250,000 under § 6-11-21. However, Willie Freeman, Elnora Sewell, Pearline Glover, and Luvercia Simmons supplied evidence that Alfa engaged in a pattern or practice of intentionally misrepresenting that Alfa life insurance policies would pay up in a specified number of years. <sup>(12)</sup>

Such a pattern or practice is an exception to the \$250,000 cap on punitive damages contained in § 6-11-21. Therefore, the \$250,000 cap contained in § 6-11-21 would not apply to this case even if we were to overrule Henderson and were to hold § 6-11-21 constitutional. Accordingly, without reaching the issue whether Henderson was correctly decided, we hold that the trial court did not err in denying Alfa a reduction of the punitive-damages award to \$250,000.

## 2. Due Process

In reviewing whether a punitive-damages award is so excessive as to violate the defendant's due-process rights, we consider the three "guideposts" established by the United States Supreme Court in BMW as well as the factors established by this Court in Hammond and Green Oil. AutoZone, Inc. v. Leonard, 812 So. 2d 1179, 1187 (Ala. 2001).

### a. The BMW Guideposts

#### i. Reprehensibility of the Defendant's Conduct

"Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." BMW, 517 U.S. at 575 (footnote omitted). "[T]rickery and deceit are more reprehensible than negligence, and ... acts of affirmative misconduct, such as making deliberate false statements, are more reprehensible than making innocent misrepresentations." Orkin Exterminating Co. v. Jeter, 832 So. 2d 25, 39 (Ala. 2001), citing BMW, 517 U.S. at 575-76.

The deliberate fraud by Alfa in this case was highly reprehensible. Even so, while it justified an award of punitive damages in the range of \$300,000, the jury award of \$5,000,000 and the remitted award of \$1,500,000 were both excessive.

ii. Ratio of Punitive Damages  
to the Actual or Likely Harm

The ratio of the punitive damages to the actual or likely harm is the second BMW guidepost. 517 U.S. at 580. In State Farm Insurance Co. v. Campbell, 538 U.S. 408, , 123 S.Ct. 1513, 1524-26 (2003), the United States Supreme Court said:

"Turning to the second [BMW] guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. [BMW], supra, at 582 ('[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award'); TXO [Prod. Corp. v. Alliance Res. Corp.], 509 U.S. 443] at 458 [(1993)]. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In [Pacific Mutual Life Insurance Co. v.] Haslip, [499 U.S. 1 (1991),] in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. 499 U.S. at 23-24. We cited that 4-to-1

ratio again in [BMW], 517 U.S. at 581. The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. Id., at 581, and n.33. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range of 500 to 1, id., at 582, or, in this case, of 145 to 1.

"Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' Ibid.; see also ibid. (positing that a higher ratio might be necessary where 'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine'). The converse is also true, however. When compensatory damages are substantial, then a lesser

ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

"In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. In the context of this case, we have no doubt that there is a presumption against an award that has a 145-to-1 ratio. The compensatory award in this case was substantial; the Campbells were awarded \$1 million for a year and a half of emotional distress. This was complete compensation. The harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them. The compensatory damages for the injury suffered here, moreover, likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element. See Restatement (Second) of Torts § 908, Comment c, p. 466 (1977) ('In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both').

"....

"An application of the [BMW] guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element) likely would justify a punitive damages award at or near the amount of compensatory damages. The punitive award of \$145 million, therefore, was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant. The

proper calculation of punitive damages under the principles we have discussed should be resolved, in the first instance, by the Utah courts.

"The judgment of the Utah Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion."

In this case now before us, the plaintiffs' actual economic damage was \$2,340. While the jury found that the actual damage to the plaintiffs' mental well-being was \$497,660, this Court is remitting that amount to \$97,660. The testimony of the plaintiffs' pattern-or-practice witnesses tended to prove the likelihood of similar damage to other victims. The ratio of the \$5,000,000 in punitive damages awarded by the jury to the plaintiffs' actual damage of \$100,000 would be 50 to 1, and the ratio of the remitted punitive-damages award of \$1,500,000 to the plaintiffs' actual damage would be 15 to 1. In the context of the case now before us, these ratios are excessive. In the context of the case now before us, a ratio of 3 to 1 would comport with due process.

### iii. Sanctions for Comparable Conduct

"Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness." BMW, 517 U.S. at 583. The Alabama Deceptive Trade Practices Act, § 8-19-1 et seq., Ala. Code 1975, does not apply to "[a]ny person or activity which is subject to the Alabama Insurance Code ...." § 8-19-7(3). Section 27-12-17 of the Alabama Insurance Code prohibits the willful collection of a premium for insurance that is not provided. Section 27-12-23 of the Alabama Insurance Code prohibits an agent from "knowingly [making] a false or fraudulent statement or representation ... relative to[] an application for insurance." A willful violation of the Alabama Insurance Code is "punishable as a misdemeanor, ... by a fine of not more than \$1,000.00 or by imprisonment in the county jail, or by sentence to hard labor for the county, for a period not to exceed one year or by both such fine and imprisonment or hard labor ...." § 27-1-12, Ala. Code 1975. The Alabama Criminal Code provides that theft by deception of more than \$1,000 of another's funds is a Class B felony, punishable by imprisonment for 2 to 20 years and by a fine of not more than \$10,000. §§ 13A-8-3, 13A-5-6(a)(2), and 13A-5-11(a)(2), Ala. Code 1975.

In terms of the monetary value of the loss of freedom and earning capacity during the imprisonment appropriate for a repeat offender, imprisonment in the upper part of the 2-to-20-year range would equate with a substantial punitive-damages award. While it might not equate with a punitive-damages award of \$5,000,000 or \$1,500,000, it at least equates with a punitive-damages award of \$300,000.

iv. Summary of the BMW Analysis

While the jury's punitive-damages award of \$5,000,000 and the remitted punitive-damages award of \$1,500,000 were excessive, a punitive-damages award of \$300,000 is reasonable.

b. The Hammond/Green Oil Factors

i. Relationship Between the Punitive-Damages Award and the Actual or Likely Harm

""Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that has actually occurred."" Orkin, 832 So. 2d at 41 (quoting Green Oil, 539 So. 2d at 223, quoting in turn Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050, 1062 (Ala. 1987)). As noted above, the plaintiffs suffered an actual monetary loss of approximately \$2,340, and the jury found actual damage to the plaintiffs' mental well-being in the sum of \$497,660, which this Court is remitting to \$97,660. Further, as noted above, the plaintiffs' pattern-or- practice evidence tends to prove a likelihood of similar harm to other victims. The relationship between the punitive-damages jury award of \$5,000,000 and those actual and likely damages is unreasonable. Likewise, the relationship between the remitted punitive-damages award of \$1,500,000 and those actual and likely damages is unreasonable. However, the relationship between a punitive-damages award of \$300,000 and those actual and likely damages is reasonable.

ii. The Reprehensibility of the Defendant's Conduct

"[I]n a Hammond/Green Oil review, we assess the reprehensibility of a defendant's conduct by considering "[t]he duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or 'cover-up' of that hazard, and the existence and

frequency of similar past conduct." Green Oil, 539 So. 2d at 223 (quoting Lavoie, 505 So. 2d at 1062)."

Orkin, 832 So. 2d at 41.

From the testimony of the four pattern-and-practice witnesses about their respective experiences with Alfa from 1989 to 1992, the jury could reasonably have inferred that, during this period, some Alfa agents engaged in a practice of intentionally misrepresenting to customers that Alfa life insurance policies would be paid up in a specified number of years when the agents knew that the policies did not, in fact, so provide. While this intentional misconduct during this three-year period would not justify the jury award of \$5,000,000 in punitive damages or the remitted award of \$1,500,000 in punitive damages, it justifies an award of \$300,000 in punitive damages.

### iii. Defendant's Profit from the Misconduct

We consider whether the punitive-damages award removes any profit the defendant derived from the wrongful conduct and causes the defendant to suffer a loss. Orkin, 832 So. 2d at 42. The record does not establish how much profit Alfa derived from the plaintiffs or from the pattern or practice of misrepresenting to customers that Alfa life insurance policies would pay up in a specified number of years. In the absence of such evidence, this factor does not apply.

### iv. The Defendant's Financial Position

Alfa has "stipulated that this factor does not weigh in favor of a remittitur of the punitive award. (R. 941-45; C. 2336)." Appellant's Brief at p. 41.

### v. Costs of Litigation

"In a Hammond/Green Oil review, we must consider whether the punitive-damages award was sufficient to reward the plaintiff's counsel for assuming the risk of bringing the lawsuit and to encourage other victims of wrongdoing to come forward. Green Oil, 539 So. 2d at 223. See also Life of Georgia v. Parker, 726 So. 2d 619, 624 (Ala. 1998)."

Orkin, 832 So. 2d at 42.

This case had to be tried twice because of a mistrial resulting from the disqualification of a juror after the close of all the evidence in the first trial. The plaintiffs incurred over \$46,000 in litigation expenses, and the plaintiffs' attorneys expended over 2,000 hours in litigating the case. While the jury award of \$5,000,000 in punitive damages would exceed, and the remitted award of \$1,500,000 in punitive damages might exceed, the amount necessary to accomplish the goal of this factor, an award of \$300,000 would not. Indeed, this particular factor might militate in favor of somewhat more than \$300,000 in punitive damages.

vi. Criminal Sanctions

"If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages." Green Oil, 539 So. 2d at 223-24. Since no evidence was offered that criminal sanctions have been or will be imposed on Alfa, this factor does not apply.

vii. Other Civil Actions

"If there have been other civil actions against the same defendant based on the same conduct, this should be taken into account in mitigation of the punitive damages award." Green Oil, 539 So. 2d at 224.

Alfa has paid a total of \$450,000 to settle two lawsuits brought by other plaintiffs who claimed that Alfa agents misrepresented to them that their Alfa life insurance policies would be paid up in a specified number of years. However, the record does not reflect whether the sums paid in settlement of those two lawsuits included any punitive damages. Thus, this factor does not weigh in favor of a reduction of the punitive-damages award.

viii. Summary of the  
Hammond/Green Oil Analysis

Weighing these factors establishes that, although the jury award of \$5,000,000 and the remitted award of \$1,500,000 were excessive, an award of \$300,000 is reasonable.

c. Final Analysis of the  
Punitive-Damages Award

Weighing the guideposts and factors together, we conclude that, although the jury award of \$5,000,000 and the remitted award of \$1,500,000 were excessive, an award of \$300,000 is sufficient to punish the highly reprehensible conduct of Alfa and to deter it from engaging in similar conduct in the future yet is sufficiently limited not to violate the due-process rights of Alfa.

G. Allocation of a Portion of  
the Punitive Damages to the Alabama  
Civil Justice Foundation,  
Consumer Protection Division

In Life Insurance Co. of Georgia v. Johnson, 701 So. 2d 524, 531-32 (Ala. 1997), we held that the judicial review of punitive-damages awards required by the United States Supreme Court coupled with the procedure already established by this Court in Hammond and Green Oil were sufficient to prevent windfalls to those who pursue claims against tortfeasors. Accordingly, we specifically overruled the portion of our earlier April 26, 1996, opinion in Life Insurance Co. of Georgia v. Johnson, 684 So. 2d 685 (1996), that had required an allocation of punitive damages to benefit a nonparty in all cases except wrongful-death cases. 701 So. 2d at 532 and 534. Therefore, in the present case, we hold that the trial court erred in allocating a portion of the punitive-damages award to the Alabama Civil Justice Foundation, Consumer Protection Division.

Conclusion

We reverse the judgment of the trial court insofar as it allocates a portion of the punitive-damages award to the Alabama Civil Justice Foundation, Consumer Protection Division. In all other respects, we affirm the judgment on the condition that the plaintiffs, within 30 days of the date of this opinion, file in this Court a remittitur of the compensatory-damages award to \$100,000 and the punitive-damages award to \$300,000. If the plaintiffs do not file such a remittitur within that time, the judgment will be reversed and the case remanded for a new trial.

AFFIRMED CONDITIONALLY IN PART AND REVERSED IN PART.

Houston, Lyons, Harwood, and Woodall, JJ., concur.

See, Brown, and Stuart, JJ., concur in part and dissent in part.



SEE, Justice (concurring in part and dissenting in part).

Between 1981 and 1992, the plaintiffs, Henry Jackson and Magnolia Jackson, purchased numerous insurance policies from Rickey English, an insurance agent for Alfa Life Insurance Corporation. English sold the Jacksons life insurance, automobile insurance, and mobile-home insurance. Magnolia testified that Henry has a tenth-grade education but cannot read. Magnolia has a high school education and is able to read. She testified, however, that she does not understand insurance policies.

In October 1992, the Jacksons asked English about purchasing life insurance policies on their daughters, Hillary and Shantell. Magnolia testified that she explained to English that she "wanted insurance where when Hillary and Shantell get grown that they wouldn't have to worry about paying no more insurance." She testified that English told her that he would sell her a life insurance policy that would be paid up in 15 years and that when she asked English to explain more about the 15-year paid-up aspect of the premium, English told her that she would receive a letter in the mail explaining it. When Magnolia's attorney asked her if she relied on English's statements when deciding to buy the life insurance policy, she replied, "yes." The Jacksons purchased universal life insurance policies on their own lives and on the lives of their daughters.

The Jacksons received their life insurance policies in the mail from Alfa. The policies stated:

"FLEXIBLE PREMIUM ADJUSTABLE LIFE INSURANCE POLICY

"Death Proceeds Paid on Insured's Death

"Flexible Premium Payable During Lifetime

## Of Insured Until Maturity Date

### "Adjustable Death Benefit

#### "This is a Non-participating Policy"

(Capitalization in original.) The schedule of benefits on page three of each policy listed the following maturity dates for each policy: 2046 for Henry's policy; 2050 for Magnolia's policy; 2073 for Shantell's policy; and 2087 for Hillary's policy. Each policy stated that the policyholders, the Jacksons, had the right to cancel the policy within 10 days and to receive a refund of the initial premium paid on the policy. Magnolia testified that she did not know what "flexible premium adjustable life insurance" is.

The Jacksons continued to pay the premiums on all four of the insurance policies for approximately three years. In early 1995, the Jacksons decided to inquire about the status of their insurance. Magnolia sent Alfa a letter requesting verification from Alfa that the life insurance policies would be paid up in 15 years from the date they were purchased. On August 10, 1995, Hardy Bryan, a district manager with Alfa, met with the Jacksons and told them that the insurance policies issued three years earlier in 1992 would not be paid up in 15 years from the date they were purchased. Bryan told the Jacksons that each of the policies would lapse before the end of the estimated life span of the person the policy insured. The Jacksons had paid approximately \$2,340 in premiums when Bryan told them that the policies would not be paid up in 15 years from the date of purchase.

Magnolia testified that these disclosures made her feel "like a big bomb had just exploded" and made her "worry." She further testified that she "just [didn't] have the words to explain it, but it's hard thinking that you have insurance and to find out that you don't."

The Jacksons' actual out-of-pocket expenses amounted to \$2,340. In addition to the out-of-pocket expenses, the jury awarded the Jacksons \$497,660 in damages for mental anguish and \$5,000,000 in punitive damages. The trial court remitted the punitive-damages award to \$1,500,000. The main opinion remits the actual damages award for mental anguish to \$97,660, and the punitive-damages award to \$300,000.

Alfa argues that the trial court erred in denying it a judgment as a matter of law on the Jacksons' fraud claim because, it says, the Jacksons failed to prove that they

justifiably relied<sup>(13)</sup> on English's representation that the policies would be paid up in 15 years. Specifically, Alfa argues that the Jacksons could not have justifiably relied on English's oral representation when they later signed written contracts -- the policies -- that included terms that contradicted that prior oral representation. See Arthur Rutenberg Homes, Inc. v. Norris, 804 So. 2d 180, 186 (Ala. 2001); Osborne v. Weil, 628 So. 2d 436 (Ala. 1993). Alfa notes that Magnolia is 37 years old, that she can read, that she has a high school education, and that she had 10 days within which to review her policy and, if she so chose, to reject it; it argues that, therefore, she may not now claim fraud based on an oral statement allegedly made before she received the contract.<sup>(14)</sup> Alfa also argues that even if the trial court's ruling as to the justifiable-reliance issue is proper, the evidence does not support the award for mental anguish and the punitive-damages award.

### I. Justifiable Reliance

When reviewing the trial court's judgment on a motion for a judgment as a matter of law, this Court must determine whether the nonmoving party has presented substantial evidence in support of its position. Callaway v. Whittenton, [Ms. 1020660, Dec. 19, 2003] \_\_\_ So. 2d \_\_\_, \_\_\_ (Ala. 2003). Substantial evidence is "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989); § 12-21-12(d), Ala. Code 1975. The evidence must be viewed in the light most favorable to the nonmoving party, and if reasonable inferences in favor of the nonmoving party's claims can be drawn from the evidence, the motion must be denied. Callaway, \_\_\_ So. 2d at \_\_\_.

When determining whether the Jacksons justifiably relied on English's representations, we consider the following:

"A plaintiff, given the particular facts of his knowledge, understanding, and present ability to fully comprehend the nature of the subject transaction and its ramifications, has not justifiably relied on the defendant's representation if that representation is "one so patently and obviously false that he must have closed his eyes to avoid the discovery of the truth.""

Johnson v. State Farm Ins. Co., 587 So. 2d 974, 979 (Ala. 1991), overruled by Foremost Ins. Co. v. Parham, 693 So. 2d 409 (Ala. 1997)(readopting the "reasonable reliance" standard for fraud).

The main opinion distinguishes Arthur Rutenberg Homes and Osborne:

"The factors crucial to the holdings in Arthur Rutenberg Homes and Osborne are absent from the case now before us. In the case now before us, the plaintiffs lacked the education, experience, and sophistication of the plaintiffs in Arthur Rutenberg Homes. In the case now before us, the language of the insurance policies belied English's misrepresentations without the explicitness of the documents in Arthur Rutenberg Homes and Osborne. In the case now before us, the policies were not drafted by a representative of the plaintiffs as was the document in Osborne.

"Furthermore, a crucial factor is present in the case now before us that was absent from Arthur Rutenberg Homes and Osborne. English had established a relationship of trust with the plaintiffs through his dealings with them over the 11 years preceding the October 1992 meeting. No such relationship of trust existed between the plaintiffs and the defendants in Arthur Rutenberg Homes and Osborne."

\_\_\_ So. 2d at \_\_\_.

In Arthur Rutenburg Homes ("ARH"), this Court stated that the plaintiffs, Dr. William B. Norris and his wife, Jennifer L. Norris, could not have justifiably relied<sup>(15)</sup> on Arthur Rutenburg Home's prior oral representations because the language of the building agreement the Norrises later signed stated that Arthur Rutenburg Homes would not be held liable for the construction of the home. 804 So. 2d at 185. The main opinion distinguishes ARH from the Jacksons' case:

"That holding turned on two factors: (1) the intelligence, education, and experience of the plaintiffs in that case and (2) the explicitness of the contract provisions, which the plaintiffs initialed, disclaiming the participation of ARH as constructor or guarantor in the construction of the plaintiffs' house."

\_\_\_ So. 2d at \_\_\_. I must reject the suggestion that it was "the intelligence, education, and experience" of the plaintiffs in ARH that caused them to be bound by the express terms of their contract.

Dr. Norris, an ear, nose, and throat doctor, had 13 years of education after high school and Mrs. Norris, a school teacher, had a college degree. The main opinion emphasizes Dr. Norris's prior real-estate experience. 804 So. 2d at 185 (noting that "[h]e had previously purchased and sold several pieces of property"). The main opinion -- by distinguishing ARH on the ground of the plaintiffs' education and experience -- suggests that someone such as Magnolia, who does not have a college education, but who does have a high school education and can read, and who has purchased numerous insurance policies, including life insurance policies, is not bound by the terms of a contract she has entered into. This is a deeply disturbing departure even from pre-Parham law. Foremost Ins. Co. v. Parham, 693 So. 2d at 420 (noting that the justifiable-reliance standard considers the plaintiff's "knowledge, understanding, and present ability to fully understand the nature of the subject transaction and its ramifications").

In Liberty National Life Insurance Co. v. Sherrill, 551 So. 2d 272 (Ala. 1989), this Court noted that Ms. Sherrill never read her insurance application or policy. We stated that "Ms. Sherrill could read, and her seventh-grade education alone does not create an inference that she could not have understood the policy had she read it." 551 So. 2d at 275.<sup>(16)</sup> In other pre-Parham cases, we held that a plaintiff's reliance on a misrepresentation is unjustifiable as a matter of law when the plaintiff has failed to read the contract and to discover the fraud before entering into the contract. Vance v. Huff, 568 So. 2d 745, 751-52 (Ala. 1990); see, also, Walker v. Transouth Fin. Corp. (No. CV-95- A-672-N)(M.D. Ala., July 10, 1996)(not published in F. Supp.).<sup>(17)</sup>

The main opinion today liberalizes the justifiable- reliance standard in the face of the recognition, when we readopted the reasonable-reliance standard,<sup>(18)</sup> that "the Court's departure from the reasonable reliance rule" "may have encouraged victims of fraud to avoid discovering potential fraud when it could have been discovered by checking oral representations against the documents memorializing the transaction." Parham, 693 So. 2d at 437 (Shores, J., concurring specially). In my special writing in Parham, I noted that

"[s]evering the buyer's right to rely from his duty to act in a reasonable manner has discouraged buyers from reading their contracts. It has reduced the traditional costs associated with such laxity by insulating the buyer from its consequences and by providing an incentive for the buyer to recast his own carelessness as the seller's 'fraud.'"

Parham, 693 So. 2d at 438-39 (See, J., concurring specially)(footnote omitted). The Jacksons had 10 days to review and to sign or reject their insurance policies. Magnolia claims that she did not fully understand the policies, but she did not question the terms of the policies until three years after the Jacksons had received the policies.

In Osborne, we again held that the plaintiffs could not have justifiably relied on oral representations the defendants made before executing the sales contract. 628 So. 2d at 438. The main opinion distinguishes Osborne from the present case because in Osborne the plaintiffs' lawyer had drafted the sales contract and the sales contract included explicit terms stating that the party signing the contract was not induced to do so except as "expressly set forth herein." I cannot agree that a contract is binding only on the party whose representative drafted it, and then only if the contract contains an express assurance that the signing party "has not been induced, persuaded or motivated by any promise or representation made by the other party, unless expressly set forth herein." 628 So. 2d at 438. In this case, the first page of Magnolia's insurance policy stated, "[P]remium payable during lifetime of insured until maturity date." The policy stated that the maturity date was October 19, 2050. In addition, the "Statement of Policy Cost and Benefit Information" contains a list that shows projected premiums continuing for more than 15 years. Thus, I believe that, as in Osborne, the terms of the life insurance policy specifically negate any prior oral representation English may have made that the policy would be paid up in 15 years.

The main opinion today holds that Magnolia's reliance on English's oral representations was justifiable because she did not read her policy. I must dissent because I would not change the law from what this Court stated it to be in ARH, 804 So. 2d at 185 (the plaintiffs could not justifiably rely on oral misrepresentations when the written contract explicitly stated contrary terms); in Osborne, 628 So. 2d at 438 (the plaintiffs could not have justifiably relied on oral representations the defendants made before executing the sales contract); in Burroughs v. Jackson National Life Insurance Co., 618 So. 2d 1329, 1333 (Ala. 1993)(the plaintiff may not justifiably rely on an alleged misrepresentation when documents were available that did not include the oral misrepresentation); and in Vance v. Huff, 568 So. 2d 745, 751-52 (Ala. 1990)(the plaintiff may not justifiably rely on an alleged misrepresentation when she failed to read the contract).

Finally, the main opinion distinguishes this case from ARH and Osborne because here English and the Jacksons had developed "a relationship of trust" through their past dealings. At the risk of sounding like a Pollyanna about the condition of contract relations in the United States, I suspect that this new rule -- that would render enforceable only contracts between strangers or between those who actively distrust one another -- would render unenforceable a majority of contracts. [\(19\)](#)

For these reasons I dissent from the main opinion. I would reverse the trial court's judgment denying Alfa's motion for a judgment as a matter of law.

## II. Compensatory Damages for Mental Anguish

I would reverse for the reasons recited above; however, even had the Jacksons demonstrated reliance and established liability, I would consider the amount of damages approved by the main opinion excessive. When determining if an award of compensatory damages for mental anguish is excessive, this Court will not set aside a judgment based on a jury's award unless the jury clearly abused its discretion. Wal-Mart Stores, Inc. v. Goodman, 789 So. 2d 166, 178 (Ala. 2000). Once the plaintiff has presented some evidence of mental anguish, the question of how much compensation should be awarded for that mental anguish is a question for the jury. Id.

This Court has held that the jury abused its discretion in awarding damages for mental anguish when the plaintiff provided only scant direct testimony about mental anguish and there was no corroborating testimony regarding the plaintiff's suffering. Kmart Corp. v. Kyles, 723 So. 2d 572, 578 (Ala. 1998); Delchamps, Inc. v. Bryant, 738 So. 2d 824 (Ala. 1999). In Kyles, Kmart had Kyles arrested on suspicion of shoplifting. The only evidence that suggested that Kyles suffered mental anguish was her testimony that she cried when she telephoned her husband to pick her up from jail. Kyles, 723 So. 2d at 579. This

Court held that the jury abused its discretion in awarding \$100,000 in compensatory damages for mental anguish; thus it remitted the award to \$15,000. Id. Similarly, in Delchamps, another false-arrest case, this Court noted that the plaintiff, J.S. Bryant, had given scant direct testimony about his mental anguish, and we held that the jury verdict of \$400,000 in damages for mental anguish was excessive. 738 So. 2d at 838. This Court further stated,

"The mental anguish here described is of limited duration. We are not dealing with an event that will continue to inflict great pain through the years, such as the loss of a loved one. While 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."

738 So. 2d at 838. Thus, we remitted the award for mental- anguish damages to \$100,000.

Unlike the plaintiffs in Kyles and Delchamps, Goodman, the plaintiff in Wal-Mart, presented the requisite "some evidence" to support the jury's award of \$200,000 for mental anguish:

"Goodman testified at trial concerning the stress she claimed to have undergone because of worry over the case. She also 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."

789 So. 2d at 179. Viewing Goodman's evidence of mental anguish from her perspective and noting that the damages award was high and bordered on excessive, we reasoned that a properly functioning jury, using sound discretion, could properly have awarded Goodman \$200,000 in damages. 789 So. 2d at 180.

The evidence of mental anguish presented by the Jacksons in the case before us is scant compared with the evidence presented in Wal-Mart; it is more similar to that presented in Kyles and Delchamps. (20) Henry did not present any evidence at all to support his mental-anguish claim. Magnolia merely stated in a conclusory way that Bryan's disclosures that the policies would not be paid up in 15 years caused her to "worry" and made her feel "like a big bomb had just exploded."

The Jacksons paid \$2,340 for insurance coverage that they thought would be paid up in 15 years. There is no question that they actually received insurance coverage during that time. Thus, their only economic loss was the presumably higher cost of purchasing equivalent insurance in 1995, when they discovered that the insurance they had purchased would not be paid up,

over what it would have cost them to purchase such insurance in 1992. Magnolia presented only scant evidence indicating that she suffered mental anguish; therefore, I would remit the jury's award to \$10,000. I note that \$10,000 is more than four times the total amount of the premiums the Jacksons paid on their insurance policies during that period. [\(21\)](#)

### III. Punitive Damages

This Court reviews de novo the constitutionality of a punitive-damages award. Acceptance Ins. Co. v. Brown, 832 So. 2d 1, 24 (Ala. 2001).

#### A. BMW Guideposts

In BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), the Supreme Court of the United States established "guideposts" for determining whether a punitive-damages award violates a defendant's due-process rights: (1) the degree of reprehensibility of the conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive-damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

##### 1. Reprehensibility of the defendant's conduct

In determining "the degree of reprehensibility of the defendant's conduct," this Court must consider "whether: [1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, \_\_\_, 123 S. Ct. 1513, 1521 (2003). The Jacksons do not allege any physical harm; Magnolia testified only that English's representation caused her to worry. As for economic damage, the Jacksons paid \$2,340 for insurance coverage they thought would be paid up in 15 years. They actually received insurance coverage during the 3-year period before they realized the policies would not be paid up in 15 years.

English's statement that the policy would be paid up in 15 years did not evince an indifference to or a reckless disregard for the health or safety of others. Moreover, the record does not indicate that the Jacksons were financially vulnerable and that English preyed on that vulnerability. English sold the Jacksons relatively common universal life policies. On the other hand, four other Alfa customers testified that English had sold them insurance policies that he falsely represented would be paid up in a certain number of years; therefore, there is evidence indicating that English's representation to the Jacksons was not an isolated incident. Finally, there is no evidence in the record indicating that in making the representation to the Jacksons English was being intentionally malicious, tricky, or deceitful. Therefore, on balance, I do not believe the record in this case supports a finding that Alfa's conduct was sufficiently reprehensible to support a \$300,000 punitive-damages award.

##### 2. Ratio of the punitive damages

to the actual or likely harm

The second BMW factor is the disparity between the harm or potential harm suffered by the plaintiff and the punitive-damages award. The Supreme Court of the United States in TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 459 (1993), stated:

"Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages would be relatively small. If the harm is grievous, the damages would be much greater."

(quoting Garnes v. Fleming Landfill, Inc., 186 W. Va. 656, 668, 413 S.E.2d 897, 909 (1991)). In this case, the Jacksons paid \$2,340 in premiums for life insurance they thought would be paid up in 15 years. The Jacksons' life insurance policies did provide them insurance coverage; however, the policies were not of the type that would be paid up in 15 years. Magnolia testified that this caused her to worry. The depth of her testimony in support of her mental-anguish claim suggests no more than slight harm resulting from English's conduct. If this type of harm were to continue, future Alfa customers could be paying premiums for life insurance policies that they believed would be paid up on a date certain, but that would not in fact be paid up until maturity. Presumably, when these customers discovered the true nature of their policies, it would cause them to worry. Thus, the nature of the injury would be the loss of money and worry. This is not the kind of harm we call "grievous" and therefore supports only a small punitive- damages award.3. Other civil and criminal

#### sanctions for comparable conduct

The final BMW guidepost is the civil and criminal sanctions for comparable conduct. The main opinion details these sanctions as provided for in the Alabama Insurance Code. Violations of the Alabama Insurance Code are punishable as a misdemeanor, by a fine of not more than \$1,000 or by imprisonment in the county jail, by a sentence to hard labor for a period not to exceed one year, or by both a fine and imprisonment or hard labor. Under the Alabama Criminal Code, a person convicted of theft by deception of more than \$1,000 of another person's funds, a Class B felony, may be punished by 2 to 20 years imprisonment and/or a fine of not more than \$10,000. §§ 13A-8-3, 13A-5-6(a)(2), and 13A-5-11(a)(2), Ala. Code 1975. Thus, it appears that the maximum amount Alfa could be fined is \$10,000. In order to subject English to imprisonment or hard labor, a trial court would have to find beyond a reasonable doubt that he "knowingly" committed theft by deception. The record in this case is insufficient to support a conclusion that such a punishment would be appropriate. (22) It appears, therefore, that the comparable other sanctions are that Alfa would be fined from \$1,000 to \$10,000.

#### 4. Summary of BMW analysis

Because evidence that Magnolia suffered any mental anguish was virtually nonexistent and the evidence supporting her punitive-damages award was minimal, I conclude that it is appropriate in this case to remit the punitive damages to less than \$300,000. The BMW guideposts, as applied to this case, support a minimal punitive-damages award. Thus, based on the

BMW factors, I would remit the punitive-damages award to no more than \$30,000, which allows for approximately a 3 to 1 ratio of punitive damages to what I believe are the actual damages suffered by the Jacksons.

#### B. Hammond/Green Oil Factors

After this Court determines the constitutional limits of the punitive-damages award, we must determine the reasonableness of the award under Alabama law; this Court considers seven factors when determining whether the punitive-damages award here is reasonable: (1) the reprehensibility of Alfa's conduct; (2) the relationship of the punitive-damages award to the harm that actually occurred; (3) Alfa's profit from its misconduct; (4) Alfa's financial position; (5) the cost of the litigation to the Jacksons; (6) whether Alfa has been subject to criminal sanctions for similar conduct; and (7) other civil actions Alfa has been involved in arising out of similar conduct. See Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986), and Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989).

##### 1. The degree of reprehensibility

"The duration of [the defendant's] conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct" is pertinent to the determination of the degree of Alfa's reprehensibility. Green Oil, 539 So. 2d at 223 (quoting Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050, 1062 (Ala. 1987)(Houston, J., concurring specially)). Four pattern-and-practice witnesses testified that between 1989 and 1992 agents had made similar false representations to Alfa customers that they were purchasing a policy that would be paid up in a specified number of years. Alfa states in its brief that, since 1987, Alfa has sold over 91,000 universal life policies, and only six vanishing-premium lawsuits have been filed regarding these policies. Considering the volume of universal life policies sold and the limited evidence in the record that Alfa had fraudulently induced its customers to purchase these policies, I conclude that Alfa's degree of reprehensibility is minimal.

##### 2. The relationship of the punitive-damages award to the harm that actually occurred or is likely to occur

The Jacksons had paid \$2,340 in premiums when they learned that their insurance policy would not be paid up in 15 years. During that period they received insurance coverage. We do not know how much more equivalent insurance would have cost in 1995 than in 1992. In addition, Magnolia stated that she worried about the status of her insurance. The actual harm caused in this particular instance is slight. Thus, this factor weighs in favor of a substantial remittitur. 3. The defendant's profit from the misconduct

The amount of premiums collected in this case amounts to only \$2,340. The Jacksons' own expert testified that Alfa's total profit on the Jacksons' policies was approximately \$740. A minimal punitive-damages award would remove any profit Alfa derived from the representations made regarding the universal life policies sold to the Jacksons. See Orkin Exterminating Co. v. Jeter, 832 So. 2d 25, 42 (Ala. 2001). This factor also weighs in favor of a substantial further remittitur.

##### 4. The defendant's financial position

Alfa stipulates that this factor does not weigh in favor of a remittitur of the punitive-damages award, although an otherwise excessive punitive-damages award is not proper merely because the defendant can afford to pay it. BMW, 701 So. 2d at 514.

#### 5. Costs of litigation

We must consider whether the punitive-damages award sufficiently rewarded the plaintiffs' counsel for assuming the risk of bringing the lawsuit and encouraged other plaintiffs to bring wrongdoers to trial. Green Oil, 539 So. 2d at 223. Substantial litigation costs, alone, however, will not justify a substantial award. Wal-Mart, 798 So. 2d at 183. The record indicates that the litigation expenses in this case amounted to over \$46,000, and that the plaintiffs' lawyers expended over 2,000 hours in litigating this case. This factor supports a substantial punitive- damages award.

#### 6. Criminal sanctions

Because no criminal sanctions have been imposed on Alfa, this factor does not apply. Green Oil, 539 So. 2d at 223-24 (stating that any criminal sanctions imposed on the defendant for his conduct should be taken into account when deciding whether to mitigate punitive damages).

#### 7. Other civil actions

Alfa states that six other civil actions have been filed against it based on conduct similar to that alleged in this case. The main opinion states that Alfa has paid a total of \$450,000 to settle two of the lawsuits brought by plaintiffs who claimed that Alfa's agents told them that their policies would be paid up in a specified number of years. This factor weighs in favor of a finding of excessiveness. See Green Oil, 539 So. 2d at 224 ("If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.").

#### 8. Summary of the Hammond/ Green Oil analysis

Alfa's conduct was slightly reprehensible in that English should have explained the universal life policies he sold to the Jacksons in terms that they could better understand. More importantly, the record in this case indicates that the Jacksons were minimally harmed by English's alleged misrepresentation. Moreover, Alfa received only a small profit from its misconduct. In addition, Alfa has already paid approximately \$450,000 in damages in lawsuits similar to this one. Because Alfa has not been subjected to any criminal charges related to this conduct, we need not consider this factor. Thus, Alfa's financial position and the costs of litigating this lawsuit are the only factors that arguably do not support a substantial remittitur. In light of the substantial attorney fees incurred by the Jacksons I would remit the punitive-damages award to what I believe is the outer limit permitted by the BMW analysis, \$30,000.

#### IV. Conclusion

I would reverse the trial court's decision denying the motion for a judgment as a matter of law. However, even if Alfa were not entitled to a judgment as a matter of law, I would further remit the awards for actual damages and punitive damages to \$10,000 and \$30,000, respectively. Therefore, I respectfully dissent from that portion of the majority opinion affirming conditionally the compensatory- damages award and the punitive-damages award. I concur in that part of the majority opinion

that holds that the trial court erred in allocating a portion of the punitive-damages award to the consumer protection division of the Alabama Civil Justice Foundation.

Brown and Stuart, JJ., concur.

1. BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996); Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986); Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989).

2. A flexible-premium adjustable-benefit life insurance policy is a universal life insurance policy. Kenneth L. Black, Jr. & Harold D. Skipper, Jr., Life Insurance 126 (Prentice Hall, Inc. 12th ed. 1994).

3. The plaintiffs also alleged against only Alfa claims for the negligent or wanton hiring and supervision of English. The trial court entered a summary judgment for Alfa on those claims before trial, and the plaintiffs have not cross-appealed the summary judgment on those claims.

4. There were two trials. A mistrial terminated the first trial when a juror was disqualified after jury deliberations had commenced. The plaintiffs moved to dismiss the claims against English immediately before jury selection for the second trial.

5. Because the plaintiffs filed their lawsuit before March 14, 1997, the justifiable-reliance standard applies in this case. Foremost Ins. Co. v. Parham, 693 So. 2d 409, 421 (Ala. 1997).

6. Section 6-11-21, as rewritten by Act No. 99-358 does not apply to the present case because Section 4 of Act No. 99-358, which was not codified in § 6-11-21, provided that "[t]his act shall apply to all actions commenced more than 60 days after the effective date of this act." The act became effective June 7, 1999.

7. As explained in footnote 6, the limitations on punitive damages contained in the current version of § 6-11-21(a) do not apply to this case.

8. Alfa vice president Charles Labriola admitted that Alfa universal life policies like the ones the plaintiffs bought did not have a "vanishing premium" option. Alfa states in brief that "it is undisputed that none of the paperwork issued in connection with this transaction suggests that the plaintiffs' policies had, or were presented as having, a 'vanishing premium' feature." Appellants brief at p. xvi (emphasis omitted). Yet, despite admitting that this case is not based on policies that did contain a "vanishing premium" feature or on representations that the policies either did or would contain a "vanishing premium" feature, Alfa apparently sees no contradiction in arguing that this is a "vanishing premium" case.

9. Rule 50, Ala. R. Civ. P., as amended in 1995, renamed the "motion for a directed verdict" as a "motion for judgment as a matter of law" and renamed the "motion for a judgment notwithstanding the verdict" as a "renewed motion for a judgment as a matter of law."

10. Evidence proving the tort by Alfa was indirect evidence of Magnolia's and Henry's mental anguish:

"At the turn of the century, the form of proof of mental anguish was indirect. For example, in Western Union Telegraph Co. v. McMorris, 158 Ala. 563, 573, 48 So 349, 353 (1908), the Court held:

"[I]n Alabama, ... in cases where wounded feelings or mental pain form an element of recoverable damages, direct proof of such suffering is not necessary, but it may be inferred by the jury from circumstances attending the particular breach of duty or contract ...."

Kmart Corp. v. Kyles, 723 So. 2d at 578 (emphasis added).

11. In Ex parte Apicella, 809 So. 2d 865, 874 (Ala. 2001), the main opinion stated that "[t]o the extent [Henderson] held that § 11[, Constitution of Alabama of 1901,] restricted the Legislature from removing from the jury the unbridled right to punish, Henderson ... [was] wrongly decided." However, of the nine Justices sitting in Ex parte Apicella, only four concurred in this statement.

12. While Alfa objected to the admission of the testimony of these witnesses at trial on the ground that the misrepresentations made to these witnesses were insufficiently similar to the misrepresentations made to the plaintiffs, Alfa has not, on appeal, challenged and briefed the overruling of these objections. Therefore, the admissibility of this testimony is not before us. However, we note that, while the policies purchased by Freeman, Sewell, and Glover, three of the four pattern-or-practice witnesses, were not universal life policies, nevertheless all four pattern-or-practice witnesses testified that Alfa agents misrepresented to them, contrary to fact, that their Alfa life insurance policies "would be paid up" in a specified number of years.

13. 0The justifiable-reliance standard applies in this case because the complaint was filed before this Court decided Foremost v. Parham, 693 So. 2d 409 (Ala. 1997), which re-adopted the reasonable-reliance standard.

14. 0Alfa further argues that this case is distinguishable from Alfa Mutual Fire Insurance Co. v. Thomas, 738 So. 2d 815, 818-20 (Ala. 1999). In Thomas, this Court held that whether Thomas, a 74-year-old widow who could barely read or write, had justifiably relied on Alfa's oral representation when she later signed a contradictory written contract was a jury question. Alfa argues that, unlike the plaintiff in Thomas, Magnolia could read the terms of the policy, and that, if she did not understand the written policy, she could have sought assistance.

15. 0The justifiable-reliance standard also applies in ARH because the case was filed before this Court's decision in Foremost Insurance Co. v. Parham, supra. 804 So. 2d at 185-86.

16. This Court nevertheless concluded that "we cannot hold that there was an unjustifiable reliance on the representations of [the agent] as a matter of law," 551 So. 2d at 275, because the fact that Mr. Sherrill was very ill at the time Ms. Sherrill

purchased the policy and the fact that the agent had told Mr. Sherrill that the \$2,500 death benefit would help Ms. Sherrill if he died, creating a jury question as to whether her reliance was justified. Id.

17. 0In Burroughs v. Jackson National Life Insurance Co., 618 So. 2d 1329, 1333 (Ala. 1993), this Court stated that the plaintiff could not have justifiably relied on an agent's alleged misrepresentation when Burroughs conducted his own investigation of the documents he had received before he invested his money and made his decision based on the documents -- that contained no misrepresentation -- that he received before he purchased his policy.

18. 0In Parham, the plaintiffs claimed that the Bank misrepresented that there was no premium for the first year of insurance coverage on their mobile home. The Court noted that the plaintiffs received documents when they purchased their mobile home that if read or briefly skimmed would have put a reasonable person on notice that, contrary to the Bank's representation, the plaintiffs had actually paid for the coverage. Similarly, in this case, if Magnolia had read or briefly skimmed her insurance policy, she would have noticed that the policy would not be paid up in 15 years.

19. 0Professor Stewart Macaulay observed in his famous article, Non-Contractual Relations in Business: A Preliminary Study: "Businessmen often prefer to rely on 'a man's word' in a brief letter, a handshake, or 'common honesty and decency' -- even when the transaction involves exposure to serious risks." 28 Am. Soc. Rev. 55, 58 (1963). In a subsequent article, he noted that businessmen often "want to leave a vital contingency 'to be equitably agreed.' To force them to work out all allocations of risk at the outset might expose some of the strains in a relationship that the process of negotiation had hidden." Lawrence Friedman & Stewart Macaulay, Contract Law and Contract Teaching: Past, Present, and Future, 1967 Wis. L. Rev. 803, 814 (1967). A businessman interviewed for the article stated, "if something comes up, you get the other man on the telephone and deal with the problem. You don't read legalistic contract clauses at each other if you want to do business again. One doesn't run to lawyers if you want to stay in business because one must behave decently." Id. at 815.

20. 0The main opinion notes that in Kyles and Delchamps the Court was concerned about the plaintiffs' minimal testimony as to their mental anguish because it did not allow the defense the opportunity to cross-examine the plaintiffs about any prior arrests. This case is not a false-arrest case, and Alfa had the opportunity to cross-examine Magnolia regarding other events that had caused her to worry at the time she found out about her insurance. Nonetheless, the amount of evidence supporting Magnolia's mental-anguish claim is similar to the evidence presented in Kyles and Delchamps. The plaintiffs in all of these cases presented only minimal testimony that they suffered mental anguish as a result of the defendant's wrongdoing.

21. 0I note that even an award of 10 times the total amount paid for insurance would produce a compensatory-damages award of only \$23,400.

22. 0English adamantly contends that he did not represent to the Jacksons that the insurance policy would be paid up in 15 years.