



Nos. 1001854 and 1002002

IN THE SUPREME COURT OF ALABAMA

ALFA LIFE INSURANCE CORPORATION,

Appellant,

v.

MAGNOLIA JACKSON and HENRY JACKSON,

Appellees.

ON APPLICATION FOR REHEARING

ON APPEAL FROM THE CIRCUIT COURT OF BARBOUR COUNTY
CIVIL ACTION NO. CV-98-015

AMICUS CURIAE BRIEF
OF BUSINESS COUNCIL OF ALABAMA
IN SUPPORT OF APPELLANT ALFA LIFE INSURANCE CORPORATION'S
APPLICATION FOR REHEARING

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ARGUMENT

This Court's opinion in Alfa Life Insurance Corp. v. Jackson, Nos. 1001854 and 1002002, 2004 WL 1009367 (Ala. May 7, 2004) (the "May 7 Opinion"), awarded \$400,000 to a plaintiff who "kind of . . . worried" about an alleged oral statement that differed from the express terms of her contract. In so doing, the May 7 Opinion abandoned this Court's traditional restraints on mental anguish damages and thwarted due process review. Surely, this result was not intended. If not corrected, the May 7 Opinion jeopardizes every business in Alabama.

I. The Award of Unbridled Mental Anguish Damages Undermines State Common Law.

A. This Court Has Previously Adopted Traditional Restraints on Mental Anguish Damages.

Courts have long expressed a healthy skepticism toward mental anguish damages because of the inherent difficulty and uncertainty in determining the existence and extent of such damages.¹ This Court has restrained mental anguish

¹ Indeed, Alabama does not recognize an independent tort for negligent infliction of emotional distress, see AALAR, Ltd., Inc. v. Francis, 716 So. 2d 1141, 1144 (Ala. 1998), and recognizes an independent tort for intentional infliction of emotional distress only where the conduct is "so outrageous in character and extreme in degree as to go beyond all possible bounds of decency, and to be regarded

damages for intentional torts by assessing the evidence of traditional indicia of the existence and degree of mental anguish and by assessing whether such evidence was direct or indirect. Traditional indicia of mental anguish can arise either from the nature of the tort itself, see Liberty Nat'l Life Ins. Co. v. Daugherty, 840 So. 2d 152 (Ala. 2002) (defamation), or from the conduct surrounding the tort, Wal-Mart Stores, Inc. v. Goodman, 789 So. 2d 166 (Ala. 2000) (malicious prosecution involving handcuffing a pregnant woman in a store in front of her children, jailing her, etc.). The traditional indicia of mental anguish include loss of family member, see Taylor v. Baptist Medical Center, Inc., 400 So. 2d 369 (Ala. 1981), public humiliation, see Goodman, 789 So. 2d 166, loss of physical liberty, see id., threatened loss or damage to home or employment, see Southern Pine Elec. Coop. v. Burch, No. 1020066, 2003 Ala. Lexis 326 (Ala. Oct. 24, 2003), professional psychological treatment, see Florence By and Through Florence v. Kinder-Care Learning Centers, Inc., 577 So. 2d 1267, 1268 (Ala. 1991), physical injury or symptoms, as atrocious and utterly intolerable in a civilized society, see American Road Service Co. v. Inmon, 394 So. 2d 361, 365 (Ala. 1980).

see Orkin Exterminating Co., Inc. v. Jeter, 832 So. 2d 25, 35 (Ala. 2001), and harsh and insulting language, Reinhardt Motors, Inc. v. Boston, 516 So. 2d 599, 511-12 (Ala. 1987).

Prior to the May 7 Opinion, this Court overruled outdated precedent and held that indirect evidence of mental anguish, by itself, requires stricter scrutiny and will support only a minimal amount of damages even where such indirect evidence is substantial. In Kmart Corp. v. Kyles, 723 So. 2d 572, 578 (Ala. 1998), Justice Lyons, writing for the Court, cogently explained:

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"

(Citations omitted.)

McMorris stated the law in an era during which it was not permissible for a witness to give testimony as to his or her own mental anguish. This principle was based on the general rule prohibiting testimony by a witness as to his uncommunicated mental intent or state of mind. The rule that allowed an inference of suffering from simply a description of the circumstances is

understandable, because there was no direct method of proof by testimony of the victim.

. . . .

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

(Emphases added.)

In Kyles, 723 So. 2d at 574-77, personnel at a department store mistakenly identified Joyce Kyles as a shoplifter. In addition to the indirect evidence of an officer's "cursing at Kyles" at her home, id. at 574, Justice Lyons recounted the following indirect evidence of mental anguish:

... an unannounced and potentially violent confrontation by two armed constables who, in front of her family and friends, accused her of theft; that she was forced to undergo a search of her residence by two sheriff's deputies; that during a routine traffic stop two years later she was arrested and then jailed on a false charge; and that she had to go through a grand jury hearing before the charge was dismissed.

Id. at 577 (emphases added); see also Sears, Roebuck & Co. v. Harris, 630 So. 2d 1018, 1033 (Ala. 1993) (approving \$1

of mental anguish damages where plaintiff did not testify), cert. denied, 511 U.S. 1128 (1994).

Thus, even with substantial indirect evidence of the traditional indicia of mental anguish suffered by Mrs. Kyles, seven members of this Court, including Justice Houston and Justice See, held that a mental anguish award of only \$11,000 was justified because the plaintiff did not offer any direct evidence as to her alleged mental anguish. Kyles, 723 So. 2d at 579.

B. The May 7 Opinion Abandons this Court's Restraints on Mental Anguish Damages.

The May 7 Opinion premises an award of \$97,660 in mental anguish damages on two bases: (1) scant indirect evidence of Henry Jackson's (the husband's) mental anguish; and (2) scant direct and indirect evidence of Magnolia Jackson's mental anguish. The first premise is an error as a matter of law because there was no direct evidence of any mental anguish by Mr. Jackson as he did not testify. There was no indirect evidence of the traditional indicia of mental anguish as existed in Kyles. There was no loss of a family member, see Taylor, 400 So. 2d 369, no public humiliation, see Goodman, 789 So. 2d 166, no loss of physical liberty, see id., no threatened loss or damage to

home or employment, see Burch, No. 1020066, 2003 Ala. Lexis 326, no psychological professional treatment, see Florence, 577 So. 2d at 1268, no physical injury or symptoms, see Jeter, 832 So. 2d at 35, and no harsh and insulting language, see Boston, 516 So. 2d at 511-12. Instead, there was only indirect evidence -- a bare inference from Mr. Jackson being the husband of Mrs. Jackson -- that Mr. Jackson may have been concerned about having to pay the premiums for the time period set forth in the contracts instead of a shorter period allegedly stated orally. See May 7 Opinion, at *11.

To support mental anguish damages for Mr. Jackson, the majority opinion quotes the following passage from Kyles:

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).

May 7 Opinion, at *11, n.10.

The balance of the Kyles opinion **that abandons the rule of McMorris** and that is set forth earlier in this brief is not quoted, mentioned, or cited in the May 7 Opinion. It is respectfully submitted that unless the majority of this Court has decided to abandon stare decisis, and overrule Justice Lyons's opinion in Kyles without discussion, the legal basis for the award of mental anguish damages to Mr. Jackson constitutes an error of law. Accordingly, in the absence of substantial indirect evidence of the traditional indicia of mental anguish, the portion of the mental anguish damages attributable to Mr. Jackson and approved in the May 7 Opinion should be reduced to \$1. See Harris, 630 So. 2d at 1033.

With respect to Mrs. Jackson's mental anguish damages, there was additional direct evidence that when she discovered she would have to comply with the terms of the policies and continue to make premium payments after 15 years, she felt like a "big bomb had just exploded" and thus, "[i]t kind of had me . . . worried." (R. 247 - 249.) The May 7 Opinion also concludes that because of Mrs. Jackson's testimony that she had worried about losing her job and another lawsuit, "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." May 7 Opinion at *11. Further, the majority opinion grafts the expansive "eggshell skull" concept onto mental anguish damages by stating:

[Mrs. Jackson] 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.")

May 7 Opinion, at *11 (emphases added).

We understand, however, that Mrs. Jackson was **not** "already beset" with the additional worry from the possible loss of a job and another lawsuit because these events occurred **after** Mrs. Jackson's discovery about the Alfa policies, not before. (R. at 291, 292-293, 279-280.) Thus, there was no "preexisting condition" to use in expanding the mental anguish award. Instead, there were

subsequent, distinct worries proximately caused by someone other than Alfa.

In addition, unlike the plaintiff in Goodman, id. at 179, Mrs. Jackson did not testify that she was pregnant (uninjured, but susceptible), that she had physical symptoms (no lower abdominal pain), that she was publicly humiliated (not handcuffed in front of the public and her own children), that she was deprived of her physical liberty (no jailing), that she lost her employment (Mrs. Jackson kept her job), or that she worried about separation from her children (no threat of authorities taking her children).

A more supportable comparison is to Oliver v. Towns, 770 So. 2d 1059 (Ala. 2000), in which Justice Houston addressed for the Court an action for misappropriation of a client's funds by a lawyer. The client testified that she suffered "a lot of [mental anguish]." There was also evidence that she sought counseling and suffered anxiety over losing the opportunity to purchase a home. Id. at 1061. This Court approved mental damages of \$67,800. Id.

Mrs. Jackson, however, had no money stolen from her, was not wronged by a trusted attorney hired to protect her

interests, did not lose the opportunity to buy a home, and instead of suffering "a lot of mental anguish," said she "kind of . . . worried."²

Indeed, had Mrs. Jackson's husband and two children all died, she would have received \$90,000 (\$30,000 face value per policy times three policies) and suffered very real grief. Without such grief or traditional indicia of mental anguish and with an effect of only "kind of had me . . . worried," plaintiffs received \$97,660. The patent excessiveness of this award is further demonstrated by the following chart:

² Further, unlike Foster v. Life Ins. Co. of Georgia, 656 So. 2d 333, 334 (Ala. 1994), Mrs. Jackson's evidence did not include that she was elderly, lived alone, had only a fixed Social Security income, or that the life insurance policies that she had purchased were worthless.

MENTAL ANGUISH AWARDS BY THE ALABAMA SUPREME COURT			
	<u>Kyles</u> (Lyons, J.)	<u>Oliver</u> (Houston, J.)	<u>Jackson</u> (Johnstone, J.)
Cause of Action	Malicious Prosecution	Misappropriation of Funds	Insurance Fraud
Loss of Liberty	Arrested and jailed.	None.	None.
Public Humiliation	Home searched by officers in front of family, cursed at by officer.	None.	None.
Physical Symptoms/ Professional Treatment	Cried.	Sought counseling.	None.
Fear/Worry	No evidence.	About losing opportunity to buy home.	About paying unexpected future premiums for policies that were valuable and in effect.
Economic Damages	\$4,000	\$7,200	\$2,340
Mental Anguish Damages	\$11,000	\$67,800	\$97,660
Ratio of Economic to Mental Anguish Damages	1:3	1:9	1:42

A comparison of the economic damages in this case, \$2,340, to the total non-economic damages, \$397,660, produces a more revealing ratio of **1:170**.

Where mental anguish damages are no longer restrained by the traditional indicia of reliability and evidentiary restraints, they tend to serve the purpose of punishment (i.e., retribution and deterrence) more than compensation.

As the Restatement explains:

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.

Restatement (Second) of Torts § 908, Comment c, (1977).

Since the drafting of the Restatement in 1977, however, the separation of damages into compensatory and punitive categories has become a significant constitutional issue because due process review, to date, only applies to punitive damages. See, e.g., BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) (imposing three-pronged due process review of punitive damages award). Thus, under the current constitutional regime, an unrestrained mental anguish award is simply a relabeled component of punitive damages freed from the inconvenience of mandatory due process review. The Supreme Court of the United States,

however, has warned against just such an emphasis on form (i.e., labels), stating:

[T]he 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).

State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003) (emphases added).

To avoid the shift of punitive damages under the label of mental anguish and the consequent inaccurate application of due process review, this Court should reaffirm the traditional restraints on damages for mental anguish. First, this Court should confirm its holding in Kyles that indirect evidence of mental anguish alone is insufficient to support any award other than a de minimis award for mental anguish. Second, this Court should assess remittitur of mental damages awards in light of the traditional indicia of reliability: loss of family member, public humiliation, loss of physical liberty, threatened

loss or damage to home or employment, professional psychological treatment, physical injury or symptoms, and harsh and insulting language.

II. The May 7 Opinion is Inconsistent with Due Process Precedent.

A. Campbell Requires a Ratio of No More than 1:1.

As demonstrated above, an award of \$97,660 of mental anguish damages in this case is more than substantial. As the Supreme Court has stated:

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.

Campbell, 538 U.S. at 426.

The punitive award should be reduced to a 1:1 ratio.

B. The May 7 Opinion's Comparison to a Criminal Sanction is Erroneous as a Matter of Law.

Finally, the May 7 Opinion compared the punitive award to a criminal sanction of imprisonment as follows:

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.

May 7 Opinion, at *14 (emphases added).

Aside from the fact that Alfa, as a corporation, cannot be vicariously placed in prison, the Supreme Court has clearly rejected the criminal sanction comparison, stating:

The third guidepost in Gore is the disparity between the punitive damages award and the "civil penalties authorized or imposed in comparable cases." Id., at 575. We note that, in the past, we have also looked to criminal penalties that could be imposed. Id., at 583; [Pacific Mutual Life Ins. Co. v.] Haslip, 499 U.S. [1,] at 23 [(1991)]. The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

Campbell, 538 U.S. at 428 (emphases added).

Accordingly, the May 7 Opinion's analysis of the third Gore guidepost is an error as a matter of law.

CONCLUSION

If this Court does not render judgment for Alfa, it should nonetheless grant the application for rehearing and conform the opinion to traditional Alabama mental anguish law and current Supreme Court due process precedent.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by United States mail, properly addressed and postage prepaid, on this the 21st day of May, 2004.

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