

The Source of Alabama's Abundance of Arbitration Cases: Alabama's Bizarre Law of Damages for Mental Anguish

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Abstract

This Article gives an overview of arbitration litigation in Alabama, including the evolution of mental anguish jurisprudence in contract cases, especially with regard to the automobile and home industries; a proposal to bring Alabama law in line with controlling authorities through substantive and procedural reforms; and an appendix listing a decade of arbitration cases decided by Alabama appellate courts.

I. Introduction

The Alabama Supreme Court decides more cases on the enforceability of arbitration agreements than any other court in the country.¹ Although

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¹See Thomas J. Methvin, *Alabama the Arbitration State*, 62 ALA. LAW. 48, 51 (2001) (noting that Alabama courts are reviewing consumer arbitration cases much more than courts in neighboring states).

one of the authors has examined the unusually high number of Alabama arbitration cases as part of the political battle between trial lawyers and business for control of the Alabama Supreme Court,² politics provides only a partial explanation for the strange abundance of Alabama arbitration cases. A more complete explanation involves legal doctrine as well as politics. The doctrinal explanation for the unusually high number of Alabama arbitration cases, this Article asserts, lies in the seemingly unrelated law of damages for mental anguish. The strange abundance of Alabama arbitration cases is primarily caused by an even stranger aspect of Alabama law: its willingness to award mental anguish damages in contract and warranty actions when there is no evidence of physical injury, but—bizarrely—only when the claim arises out of an allegedly defective new auto or home. No other state has mental anguish law that looks anything like Alabama's.

Alabama is one of only three states that prohibits the enforcement of pre-dispute binding arbitration agreements as a matter of law or public policy.³ Arbitration agreements did not become generally enforceable in Alabama until 1995, when the United States Supreme Court decided *Allied-Bruce Terminix Co. v. Dobson*.⁴ *Dobson* held that the Federal Arbitration Act's (FAA) mandate to enforce arbitration agreements applies to all such agreements involving interstate commerce. That is, the FAA is an example of Congress legislating as far as its permitted reach under the Commerce Clause of the United States Constitution.⁵ *Dobson* overruled Alabama Supreme Court cases that had confined the FAA more narrowly.⁶ After *Dobson*, more arbitration agreements in Alabama became subject to the FAA, leading more Alabama businesses to utilize arbitration agreements.

From the date *Dobson* was decided until June 4, 2004, when research for this Article ended, there have been more than 359 reported cases in which the Alabama appellate courts ruled on the enforceability of arbitra-

²Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 646 (1999).

³STEPHEN WARE, ALTERNATIVE DISPUTE RESOLUTION § 2.5 n.46 (West 2001); see ALA. CODE § 8-1-41(3) (1975).

⁴4513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995).

⁵U.S. CONST. art. I, § 8.

⁶See generally IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 9.5.4 (Supp. 1999).

tion agreements. About one-half of these cases are unremarkable since they involve matters that are frequently the subject of arbitration cases in courts in other states, such as securities transactions, commercial disputes, and employment relationships, among others. However, the remaining cases are remarkable both in their frequency and subject matter. They involve matters that are rarely the subject of arbitration cases in other states: transactions arising out of the purchase of new manufactured homes and new autos. No other jurisdiction, or combination of jurisdictions, reports a similar number of appellate decisions involving the enforceability of arbitration agreements in these industries. This begs the question of why Alabama appellate courts are faced with so many arbitration cases centered on these two industries. This question, the authors argue, is best answered through an understanding of Alabama's bizarre law on damages for mental anguish.

Although Alabama once had a well-deserved reputation as a jurisdiction with unusually high punitive damages, constitutional and statutory reforms have now brought the state within the national mainstream on punitive damage awards.⁷ By contrast, Alabama remains far outside the national mainstream with respect to another type of damage, mental anguish. Alabama law permits the purchaser of a new auto or home to sue for breach of warranty or contract and obtain mental anguish damages without a showing of actual physical injury.⁸ Stated differently, a plaintiff may recover damages for mental pain and suffering in connection with a defective or damaged auto or home, even though the product does not injure the plaintiff physically in any way. This Alabama rule is unique among the fifty states and, curiously, applies only to actions against the

⁷*BMW of N. Am. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) (holding that a grossly excessive award of punitive damages violates substantive due process); ALA. CODE § 6-11-21 (1993) (establishing monetary caps for punitive damage awards). *But see* Harris Interactive, *2003 U.S. Chamber of Commerce State Liability Systems Ranking Study*, Study No. 17942 (Apr. 4, 2003) (ranking Alabama the third worst state in the United States in its treatment of punitive damages).

⁸*S. Energy Homes. v. Washington*, 774 So. 2d 505 (Ala. 2000) (holding mental anguish is recoverable in a warranty action involving a mobile home); *Volkswagen of Am., Inc. v. Dillard*, 579 So. 2d 1301 (Ala. 1991) (holding mental anguish recoverable in a breach of warranty action involving a new auto); *Ala. Power Co. v. Harmon*, 483 So. 2d 386, 389 (Ala. 1986) (holding that "mental anguish need not be predicated upon the presence of physical symptoms"); *B&M Homes v. Hogan*, 376 So. 2d 667 (Ala. 1979) (holding that mental anguish is recoverable in a breach of contract action involving a new home).

new auto and home industries. Furthermore, unlike punitive damages, there is no cap or limit to the amount of mental anguish damages that may be awarded in Alabama, as long as the award is supported by “some” direct evidence.⁹

To date, legislative efforts directed at reforming Alabama’s mental anguish rule have not been successful.¹⁰ The absence of meaningful legislative reform in this area, the authors believe, prompted the auto and home industries to adopt the use of arbitration clauses as a tort-reform substitute. The use of arbitration agreements by these two industries in Alabama has grown exponentially in recent years. It is virtually impossible now for Alabama consumers to purchase new automobiles or homes¹¹ without first signing pre-dispute binding arbitration agreements.¹²

⁹*Liberty Nat’l Life Ins. Co. v. Daugherty*, 840 So. 2d 152, 162-63 (Ala. 2002); *Kmart v. Kyles*, 723 So. 2d 572, 578 (Ala. 1998).

¹⁰*See, e.g.*, Alabama H.R. 408 (2004) (House Bill 408, which is stalled in the House Judiciary Committee, would limit the recovery of mental anguish damages that do not arise from actual physical injury to circumstances where the plaintiff proves that he was treated for such anguish by a mental health provider). This is not the first time this legislation has stalled. *See* Michael C. Quillen, *Damages for Mental Anguish: The Next Battleground*, ALA. DEF. LAW. ASS’N J., Apr. 1998, at 14.

¹¹Prior to 2003, arbitration agreements were used only in transactions involving manufactured homes, as opposed to site built homes, because the Alabama Supreme Court generally held the construction and sale of site-built homes to be intrastate in nature, and thus not subject to the Federal Arbitration Act. In *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 123 S. Ct. 2037, 156 L. Ed. 46 (2003), the Supreme Court overruled Alabama decisional law that interpreted the commerce clause powers of Congress too narrowly. Recent Alabama decisions have enforced arbitration agreements in disputes involving site-built homes because the court has now accepted the notion that the construction and sale of a site-built home may involve interstate commerce. *Elizabeth Homes, L.L.C. v. Gantt*, 882 So. 2d 313, 316-17 (Ala. 2003); *Steele v. Walser*, 880 So. 2d 1123, 1128 (Ala. 2003); *Jim Walter Homes, Inc. v. Saxton*, 880 So. 2d 428, 431 (Ala. 2003).

¹²The inability to purchase a product or service without first signing a pre-dispute binding arbitration agreement is one factor Alabama courts consider when determining whether to void an arbitration agreement on grounds of unconscionability. *Am. Gen. Fin. Inc. v. Branch*, 793 So. 2d 738, 751 (Ala. 2000). Although arbitration agreements are ubiquitous in manufactured home and auto purchase transactions, to date, no one has successfully challenged arbitration agreements in such transactions on the basis that the product could not be purchased anywhere in the state without first signing an arbitration agreement. *See, e.g.*, *Conseco Fin. Corp.-Ala. v. Boone*, 838 So. 2d 370, 372 (Ala. 2002) (holding that mobile home purchaser failed to prove absence of meaningful choice when purchasing mobile home subject to arbitration agreement); *Jim Burke Auto. v. Murphy*, 739 So. 2d 1084, 1087-88 (Ala. 1999) (holding that purchaser failed to present evidence of his inability to buy a car from another source without first signing an arbitration agreement).

The widespread use of arbitration agreements has changed not only the way these industries do business with their customers, but also the way Alabama lawyers handle cases in these industries. Consumer cases arising out of auto and home transactions, which were formerly litigated, are now subject to arbitration. The perception among many practicing lawyers in Alabama is that, whereas juries often will award significant mental anguish damages in these cases, arbitrators do so only rarely. Thus, the value of these cases turns on whether the arbitration agreement in the transaction at issue is enforceable. This is precisely why so many auto and home cases find their way to the Alabama Supreme Court on the issue of arbitration: the appellate court's decision can have a six-figure impact on the value of a case.

Because enforceability of an arbitration agreement is an issue that must be raised early in a case, before the parties initiate fact discovery, it is common for lawyers to spend substantial time and money litigating the arbitration issue before the trial court and on appeal without ever obtaining meaningful information from the opposing party on the merits of the case. In short, these cases are less about the defects in the product at issue, and more about the question of whether a jury will get to decide the value of the plaintiff's subjective mental state. Arbitration has become the proverbial "tail that wags the dog."¹³

The authors contend that the adoption of arbitration agreements by the auto and home industries was a direct and rational response to Alabama's peculiar mental anguish damages law. Because legislative reform failed to address mental anguish damages, the auto and home industries contractually changed the rules of the game. Arbitrators, not juries, now decide the lion's share of Alabama's auto and home warranty and contract cases. This Article demonstrates the connection between the unprecedented trait of Alabama's arbitration caseload—its abundance of cases from the auto and home industries—and Alabama's unique mental anguish rule that applies only to the auto and home industries.

This Article begins by discussing the history of mental anguish doctrine, explaining why Alabama is out of step with the rest of the country.

¹³Not surprisingly, other consumer industries have begun using arbitration agreements, as well. They can now be found routinely in transactions involving credit cards, consumer credit, and insurance. The growth of arbitration in these consumer industries seems to be a national phenomenon that is occurring in Alabama no faster or slower than in other states.

It then explores the shortcomings of the rule by demonstrating how mental anguish claims in contract and warranty cases are virtually indefensible under current Alabama law. The Article then examines the correlation between reported arbitration decisions and mental anguish damages law in Alabama. It demonstrates how Alabama's unique mental anguish damages law has precipitated the wide-spread use of arbitration agreements, and ultimately led to the otherwise inexplicable proliferation of reported decision in this area. Finally, the Article makes the case for reforming Alabama's mental anguish rule and suggests methods for doing so.

II. The History of Mental Anguish Damages

At English and American common law, mental anguish damages were not recoverable in tort absent proof of physical injury.¹⁴ Prior to the 1850s, there were almost no widely-recognized rules of contract damages law.¹⁵ In 1854, the landmark decision of *Hadley v. Baxendale*¹⁶ articulated two general rules for contract damages that gained general acceptance nearly everywhere: (1) a plaintiff may recover damages "as may fairly and reasonably be considered . . . arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself;" and

¹⁴*Lynch v. Knight*, 9 H. L. Cas. 577, 598 (1861) ("mental pain and anxiety the law cannot value, and does not pretend to redress, when the lawful act complained of causes that alone"); *Victorian Railways Commrs. v. Coultas*, 13 A.C. 222, 226 (1888); *Lehman v. Brooklyn City R.R.*, 47 Hun. 355, 356 (N.Y. 1888); Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260 (1921); Kathleen M. Turezyn, *When Circumstances Provide a Guarantee of Genuineness: Permitting Recovery for Pre-Impact Emotional Distress*, 28 B.C. L. REV. 881, 884-906 (1987).

A rule that is more consistent with recognized principles, and is supported by better authority, is that mental suffering, alone and unaccompanied by other injury, cannot sustain an action for damages, or be considered an element of damages. Anxiety of mind and mental torture are too refined and too vague in their nature to be the subject of pecuniary compensation in damages, except where, as in the case of personal injury, they are so inseparably connected with physical pain that they cannot be distinguished from it, and are therefore considered a part of it.

27 AMERICAN & ENGLISH ENCYCLOPEDIA OF LAW 862 (1905).

¹⁵JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS § 14-5 (3d ed. 1987).

¹⁶156 Eng. Rep. 145 (1854).

(2) a plaintiff also may recover damages “such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”¹⁷ The first *Hadley* rule (*Hadley I*) describes what courts refer to as general damages, and the second *Hadley* rule (*Hadley II*) describes what courts refer to as special or consequential damages.¹⁸ Mental anguish damages are sometimes (but rarely) considered *Hadley I* damages;¹⁹ mental anguish damages are more frequently recognized as special or consequential damages under *Hadley II*.²⁰ For the most part, courts refused to award mental anguish damages under *Hadley II*.²¹ The principle rationale offered was that parties did not contemplate mental anguish damages in connection with a contract's breach.²²

A. Early Contract Doctrine

In the late nineteenth century, as the industrial revolution began to transform the legal landscape, different kinds of cases presented themselves to American courts. At issue were claims arising out of then modern inventions. Telegraph cases were among the earliest. In numerous decisions across the country, plaintiffs filed suits against telegraph companies alleging breach of contract and negligence, claiming that the telegraph companies failed to deliver important telegram messages involving the serious illnesses or deaths of loved ones.²³ Applying existing law, recoveries were very slim. Plaintiffs could recover only nominal

¹⁷CALAMARI & PERILLO, *supra* note 15, § 14-5 (quoting 156 Eng. Rep. at 151). The Alabama Supreme Court adopted the *Hadley* rules in 1883 and has applied them ever since. *Daughtery v. Am. Union Tel. Co.*, 75 Ala. 168 (1883); *Cato v. Williamson*, 209 Ala. 477, 96 So. 321 (1923).

¹⁸CALAMARI & PERILLO, *supra* note 15, § 14-5.

¹⁹8 R.C.L. § 83 *Breach of Contract Generally* (1915).

²⁰*See* 15 AM. JUR. *Damages* § 182 (1938) (discussing mental anguish damages as both *Hadley I* (general) and *Hadley II* (consequential) damages); *Lamm v. Shingleton*, 231 N.C. 10, 55 S.E.2d 810 (1949) (applying *Hadley II* damages rule to a mental anguish claim).

²¹*Stanback v. Stanback*, 297 N.C. 181, 187-88, 254 S.E.2d 611, 616-17 (1979); 8 R.C.L. § 83 *Breach of Contract Generally* (1915).

²²*Stanback*, 254 S.E.2d at 617.

²³*See* *W. Union Tel. v. Choteau*, 28 Okla. 664, 115 P. 879 (1911) (citing cases).

damages (*i.e.*, the price of a telegram).²⁴ Beginning in Texas in *So Relle v. Western Union Telegraph Co.*,²⁵ nine states—including Alabama—modified the law to permit mental anguish recoveries in telegraph cases.²⁶ This change has been referred to as the Texas doctrine.²⁷

Early courts were concerned that by expanding the law to permit the award of mental anguish damages, the “floodgates” would open and lead to intolerable and vexatious litigation.²⁸ To address this concern, courts permitted mental anguish awards only in very narrow settings, where the telegram message set forth information concerning the death or serious illness of a close relative.²⁹ Telegram messages communicating any other information would not support a mental anguish award.³⁰ Doctrinally speaking, courts generally permitted mental anguish damages under *Hadley II*, finding that the parties “contemplated” mental anguish damages in cases where the telegraph sender placed the telegraph company on notice of the potential for serious mental harm through the subject matter of the message (death or serious injury of a relative).³¹ Even with this limitation, the remaining states and nearly every federal court to consider this issue rejected the Texas doctrine.³²

²⁴*Id.*; *W. Union Tel. Co. v. Stewart*, 79 So. 200, 201, 16 Ala. App. 502, 503 (1918).

²⁵55 Tex. 308 (1881).

²⁶In addition to Texas and Alabama, Louisiana, Washington, Nevada, Tennessee, North Carolina, Iowa, and Kentucky adopted the Texas doctrine. *Choteau*, 115 P. at 880.

²⁷*Choteau*, 115 P. at 882.

²⁸*Francis v. W. Union Tel. Co.*, 58 Minn. 252, 263, 59 N.W. 1078, 1080 (1894); *W. Union Tel. Co. v. Rogers*, 68 Miss. 748, 9 So. 823, 826 (1891).

²⁹*W. Union Tel. Co. v. Westmoreland*, 151 Ala. 319, 324, 44 So. 382, 383 (Ala. 1907); CALAMARI & PERILLO, *supra* note 15, § 14-6.

³⁰*See, e.g., W. Union Tel. Co. v. Peagler*, 163 Ala. 38, 50 So. 913, 913-14 (1909) (holding a message that said “please let me hear from you at once by wire” did not support a mental anguish award since the telegraph company was not placed on notice of special circumstances).

³¹*See, e.g., W. Union Tel. Co. v. Crumpton*, 138 Ala. 632, 36 So. 517, 520 (1903) (holding that the consequence of the breach was within the contemplation of the parties since the content of telegraph message placed telegraph company on notice of the importance and urgency of the message); 15 AM. JUR. *Damages* § 182 (1938) (“To authorize a recovery in any case the damage must have been within the contemplation of the parties and the defendant must have had notice when the contract was made that mental anguish might result from a default or negligence in its performance.”).

³²*S. Express Co. v. Byers*, 240 U.S. 612, 615-16, 36 S. Ct. 410, 411, 60 L. Ed. 825, 827-28 (1916).

Cases involving a second modern industry produced similar results. In the late 1800s, railroads were the principal means of traveling long distances. From time to time, passengers were wrongfully ejected from trains, and left in precarious situations.³³ Some courts, including Alabama courts, expanded the law to permit the award of mental anguish damages in actions involving wrongful ejections from trains.³⁴

Eventually this expansion in the law found a footing in two other types of cases. Courts held that guests who were wrongfully ejected from inns could recover mental anguish damages in contract.³⁵ Courts also permitted mental anguish damages in cases involving the mishandling of bodies in the context of funerals.³⁶ Alabama courts recognized both expansions.³⁷

B. The Shift to Negligence Doctrine

The trend of expanding contract damages to address modern cases lost favor in American courts beginning in the late nineteenth century and early twentieth century. At that time, courts began to reconsider their approaches and focus instead on negligence law as a method of expanding

³³See, e.g., *Kansas City, Memphis & Birmingham R.R. v. Foster*, 134 Ala. 244, 32 So. 773 (1902) (where a man was wrongfully ejected from a train into a town quarantined under a yellow fever epidemic, court permitted consequential damages (mental anguish) award).

³⁴See *id.* at 778; see also CALAMARI & PERILLO, *supra* note 15, § 14-5 (discussing the application of *Hadley v. Baxendale* in common carrier cases). State courts were later limited in their ability to apply mental anguish damages against common carriers and telegraph companies through the enactment of national legislation—the Interstate Commerce Act—that regulated rates and damages in these industries through tariff laws. *S. Express Co. v. Byers*, 240 U.S. 612, 36 S. Ct. 410, 60 L. Ed. 825 (1916); CALAMARI & PERILLO, *supra* note 15, § 14-6. In a recent case, the Alabama Supreme Court precluded the recovery of mental anguish in a lost luggage case involving an airline based on tariff laws. *Ex parte Delta Air Lines*, 785 So. 2d 327 (Ala. 2000).

³⁵RICHARD A. LORD, WILLISTON ON CONTRACTS § 53:78 (2004) (Obligation as to Guest's Comfort and Safety).

³⁶Gregory G. Sarno, Annotation, *Recoverability of Compensatory Damages for Mental Anguish or Emotional Distress for Breach of Service Contract*, 54 A.L.R.4th 901 (1987 & Supp. 2004).

³⁷*Carter v. Innisfree Hotel*, 661 So. 2d 1174, 1179 (Ala. 1995) (innkeeper case); *Florence Hotel Co. v. Bumpus*, 194 Ala. 69, 73, 69 So. 566, 568 (1915) (innkeeper case); *Birmingham Transfer & Traffic Co. v. Still*, 7 Ala. App. 556, 565-66, 61 So. 611, 614 (1913) (funeral case).

remedies for mental harm.³⁸ Even so, three concerns continued to foster judicial caution and doctrinal limitations on the recovery of mental anguish damages in cases where the plaintiff suffered no actual physical harm: “(1) the problem of permitting legal redress for harm that is often temporary and relatively trivial; (2) the danger that mental anguish may be falsified or imagined; and (3) the perceived unfairness of imposing heavy and disproportionate financial burdens on a defendant,” for remote consequences based on negligent conduct alone.³⁹ Mindful of these concerns, courts adopted three different approaches to expand mental injury claims in negligence actions.

1. The Physical Impact Doctrine

The first extension of the law was to permit mental anguish awards in negligence cases where there was actual physical contact (even if no actual physical harm occurred).⁴⁰ The existence of the contact or impact between the plaintiff and the object of his suffering was deemed to be a reliable indicator that mental anguish actually occurred.⁴¹ This became

³⁸See *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994).

³⁹W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 54 (5th ed. 1984). In many situations, mental anguish claims are easily simulated and often exaggerated. *W. Union Tel. Co. v. Choteau*, 28 Okla. 664, 115 P. 879 (1911) (citing cases denying recovery for mental anguish). Anxiety, despair and humiliation—the indicia of mental harm—often defy empirical confirmation, and require strong corroborating evidence. *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 764 F.2d 1084, 1087-88 (5th Cir. 1985) (holding that a strong showing of causation is required because mental anguish is subjective and susceptible to fabrication or exaggeration).

⁴⁰*Taylor v. Baptist Med. Ctr.*, 400 So. 2d 369 (Ala. 1981); *Clark v. Choctawhatchee Elec. Coop.*, 107 So. 2d 609 (Fla. 1959); *Christy Bros. Circus v. Turnage*, 38 Ga. App. 581, 144 S.E. 680 (App. Ct. 1928); *W. Chicago St. Ry. Co. v. V. Liebig West*, 79 Ill. App. 567 (App. Ct. 1898); *Boston v. Chesapeake & Ohio Ry. Co.*, 223 Ind. 425, 61 N.E.2d 326 (1945); *Kentucky Traction & Terminal Co. v. Roman’s Guardian*, 232 Ky. 285, 23 S.W.2d 272 (1919); *Chappetta v. Bowman Transp.*, 415 So. 2d 1019 (La. Ct. App. 1982); *Spade v. Lynn P. Boston R.R.*, 168 Mass. 285, 47 N.E. 88 (1897); *Bass v. Nooney Co.*, 646 S.W.2d 765 (Mo. 1983); *Brisbase v. Kansas City Pub. Servs. Co.*, 303 S.W.2d 619 (Mo. 1957); *Bass Shultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983); *Miller v. Baltimore & Ohio S.W. R.R.*, 78 Ohio St. 309, 85 N.E. 499 (1908); *Bosley v. Andrews*, 393 Pa. 161, 142 A.2d 263 (1958); *Johnson Freight Lines v. Tallent*, 53 Tenn. App. 464, 384 S.W.2d 46 (App. Ct. 1964).

⁴¹See KEETON ET AL., *supra* note 39, § 54.

known as the physical impact doctrine. Having originated a century ago, most of the major industrial states followed this rule by 1908.⁴²

2. The Zone of Danger Doctrine

Some courts expanded the physical impact doctrine further to address circumstances where the plaintiff suffered a near miss, in which death or serious injury could have resulted had an actual impact occurred.⁴³ This became known as the zone of danger doctrine. A near miss in a life and death situation is deemed to be a reliable guaranty of real mental harm.⁴⁴ The zone of danger doctrine came into use around a hundred years ago; fourteen jurisdictions continue to utilize it.⁴⁵

3. The Relative Bystander Doctrine

Many jurisdictions expanded this approach even further into what became known as the relative bystander doctrine. Under this rule, a plaintiff can recover mental anguish damages if he witnesses the death or serious injury of a loved one.⁴⁶ This rule is somewhat reminiscent of

⁴²*Gottshall*, 512 U.S. at 547. At least five states continue to adhere to it. See *Lee v. State Farm Mut. Ins. Co.*, 272 Ga. 583, 533 S.E.2d 82 (2000); *Shuamber v. Henderson*, 579 N.E.2d 452 (Ind. 1991); *Anderson v. Schaffler*, 242 Kan. 857, 752 P.2d 667 (1988); *Deutch v. Shein*, 597 S.W.2d 141 (Ky. 1980); *Hammond v. Central Lane Communications Ctr.*, 312 Or. 17, 816 P.2d 593 (1991).

⁴³*Keck v. Jackson*, 122 Ariz. 114, 593 P.2d 668 (1979); *Stadler v. Cross*, 295 N.W.2d 552 (Minn. 1980); *Valliancourt v. Med. Ctr. Hosp. of Vt.*, 139 Vt. 138, 425 A.2d 92 (1980); *Hanbrook v. Stokes Bros.*, 1 K.B. 141 (1925); P.G. Guthrie, Annotation, *Right to Recover Damages in Negligence for Fear of Injury to Another, and Shock or Mental Anguish at Witnessing Such Injury*, 29 A.L.R.3d 1337 (1970 & Supp. 2004).

⁴⁴*Gottshall*, 512 U.S. at 557.

⁴⁵*Id.* at 547; *AALAR Ltd. v. Francis*, 716 So. 2d 1141 (Ala. 1998); *Keck v. Jackson*, 122 Ariz. 114, 593 P.2d 668 (1979); *Towns v. Anderson*, 195 Colo. 517, 579 P.2d 1163 (1978); *Robb v. Pa. R.R.*, 58 Del. 454, 210 A.2d 709 (1965); *Williams v. Baker*, 572 A.2d 1062 (D.C. App. 1990); *Rickey v. Chicago Transit Auth.*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983); *Resavage v. Davies*, 199 Md. 479, 86 A.2d 879 (1952); *Stadler v. Cross*, 295 N.W.2d 552 (Minn. 1980); *Asaro v. Cardinal Glennon Mem'l. Hosp.*, 799 S.W.2d 595 (Mo. 1990); *Bosum v. Sanperi*, 61 N.Y.2d 219, 461 N.E.2d 843 (1984); *Wetham v. Bismarck Hosp.* 197 N.W.2d 678 (N.D. 1972); *Boucher v. Dixie Med. Ctr., a Div. of IHC Hosps.*, 850 P.2d 1179 (Utah 1992); *Jobin v. McQuillen*, 158 Vt. 322, 609 A.2d 990 (1992); *Garrett v. New Berlin*, 122 Wis. 2d 223, 362 N.W.2d 137 (1985).

⁴⁶*Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912 (1968).

the old telegraph rule in contract actions, since a recovery cannot be had unless the victim is personally affected by the death or serious injury of a relative. Courts adopting this rule have reasoned that the requirement of the plaintiff witnessing the death or serious injury of a relative is a reliable indicator of actual mental injury.⁴⁷ Approximately one-half of the states utilize this rule.⁴⁸

C. Contract Doctrine in Alabama

Unlike the rest of the country, Alabama continued to use contract instead of negligence doctrine to address mental anguish claims during the twentieth century. Alabama did not adopt a modern standard for mental anguish claims in negligence actions until 1998, when it adopted the zone of danger doctrine.⁴⁹

⁴⁷See, e.g., *Culbert v. Sampson's Supermarkets*, 444 A.2d 433, 436-37 (Me. 1982).

⁴⁸*Croft v. Wicker*, 737 P.2d 789 (Alaska 1987); *Thing v. La Chusa*, 48 Cal. 3d 644, 257 Cal. Rptr. 865, 771 P.2d 814 (1989); *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985); *Fineran v. Pickett*, 465 N.W.2d 662 (Iowa 1991); *Lejeune v. Rayne Branch Hosp.*, 556 So. 2d 559 (La. 1990); *Cameron v. Pepin*, 610 A.2d 279 (Me. 1992); *Stockdale v. Bird & Son, Inc.*, 399 Mass. 249, 503 N.E.2d 951 (1987); *Nugent v. Bauermeister*, 195 Mich. App. 158, 489 N.W.2d 148 (Ct. App. 1992); *Entex, Inc. v. McGuiirie*, 414 So. 2d 437 (Miss. 1982); *Maguire v. State*, 254 Mont. 178, 835 P.2d 755 (1992); *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985); *Buck v. Greyhound Lines*, 105 Nev. 756, 783 P.2d 437 (1989); *Wilder v. Keene*, 131 N.H. 599, 557 A.2d 636 (1989); *Frame v. Kothair*, 115 N.J. 638, 560 A.2d 675 (1989); *Folz v. State*, 110 N.M. 457, 797 P.2d 246 (1990); *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, 327 N.C. 283, 395 S.E.2d 85 (1990); *Paugh v. Hanks*, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983); *Sinn v. Burd*, 485 Pa. 146, 404 A.2d 672 (1979); *Reilly v. United States*, 547 A.2d 894 (R.I. 1988); *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985); *Ramsey v. Beavers*, 931 S.W.2d 527 (Tenn. 1996); *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993); *Gain v. Carroll Mill Co.*, 114 Wash. 2d 254, 787 P.2d 553 (1990); *Heldreth v. Marrs*, 188 W. Va. 481, 425 S.E.2d 157 (1992); *Contreras v. Carbon County Sch. Dist. No. 1*, 843 P.2d 589 (Wyo. 1992). Alabama rejected the bystander doctrine in *Gideon v. Norfolk S. Corp.*, 633 So. 2d 453, 454 (Ala. 1994).

⁴⁹*AALAR Ltd. v. Francis*, 716 So. 2d 1141 (Ala. 1998). Prior to this decision, confusion existed over the state of Alabama law on this issue. Alabama had long adhered to the common law rule that a recovery for mental anguish was not permitted under a negligence theory unless the injury accompanied actual physical harm. See, e.g., *Holcombe v. Whitaker*, 292 Ala. 430, 318 So. 2d 289 (Ala. 1975). However, in 1981, the Alabama Supreme Court decided *Taylor v. Baptist Medical Center*, 400 So. 2d 369 (Ala. 1981), which arguably adopted the tort of negligent infliction of emotional distress. See *Boyles v. Kerr*, 855 S.W.2d 593, 599 n.4 (Tex. 1993) (listing Alabama in the minority of jurisdictions that have adopted a right to recover for negligently

1. The *Murphy* Rule

Alabama's modern approach to mental anguish claims in contract originated in a 1932 decision involving the breach of a home warranty. In *F. Becker Asphaltum Roofing Co. v. Murphy*,⁵⁰ a contractor's poor construction of a new home led to numerous roof leaks, which eventually caused the home purchaser to become ill.⁵¹ The Alabama Supreme Court upheld a mental anguish award on these facts.⁵² *Murphy* is important because it marks the first time that Alabama applied a new legal test to determine whether mental anguish damages were recoverable in an action of assumpsit (breach of contract in modern parlance). This test has no name, but this Article refers to it as the *Murphy* rule. Under this rule, Alabama courts will award mental anguish damages if the contract meets the following standard:

Yet where the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the feelings of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, it is just that damages therefor be taken into consideration and awarded.⁵³

Murphy held that this rule was an exception to the general rules of damages.⁵⁴ The court recognized that the breach of contract damages will not, to use *Hadley* I words, "naturally cause" mental harm.⁵⁵ The court also recognized that mental harm is "too remote" and not within the

inflicted emotional distress). *But see* *Allen v. Walker*, 569 So. 2d 350, 352 (Ala. 1990) (rejecting tort of negligent infliction of emotional distress in Alabama). *Francis* later harmonized *Taylor* with other Alabama decisions, and held that the *Taylor* decision is consistent with the zone of danger doctrine. *Francis*, 716 So. 2d at 1147.

⁵⁰224 Ala. 655, 141 So. 630 (1932).

⁵¹*Murphy*, 141 So. at 631.

⁵²*Id.* at 632.

⁵³*Id.* at 631 (quoting 8 R.C.L. § 83 *Breach of Contract Generally* (1915)).

⁵⁴*Id.* (citing *Birmingham Water Works Co. v. Vintner*, 164 Ala. 490, 51 So. 356 (1910)). The court also cites a second exception to the general rule precluding mental anguish damages in contract: "where the breach of contract is tortious, or attended with personal injury, damages for mental anguish may be awarded." *Id.* (citing *Vinson v. S. Bell Tel. & Tel. Co.*, 188 Ala. 292, 66 So. 100 (1914)).

⁵⁵*Id.* (citing *Western v. Olathe State Bank*, 78 Colo. 217, 240 P. 689 (1925)).

“contemplation of the parties.”⁵⁶ Thus, the court acknowledged that mental anguish is not normally a recoverable element of damage under either *Hadley* I or II. Beginning in *Murphy*, Alabama then moved in its own unique direction by continuing to treat mental anguish damages as a matter for contract law and by creating its own novel contract doctrine.⁵⁷

However, the novel doctrine at the core of Alabama’s unique direction rests on a mistake. The *Murphy* court misunderstood the passage quoted above. The passage quoted in *Murphy* originated in a 1915 legal encyclopedia entitled *Ruling Case Law*.⁵⁸ There, the unnamed author discussed mental anguish damages that “naturally result” from breach of contract (*i.e.*, *Hadley* I damages), and those that are otherwise “contemplated by the parties” (*i.e.*, *Hadley* II damages).⁵⁹ The passage quoted by *Murphy* represents only a portion the encyclopedia text. The *Murphy* court overlooked the fact that the author was discussing circumstances that could bring certain types of contract claims, which are *personal* in nature, within the *Hadley* II “contemplation of the parties” test.⁶⁰ The full text of the encyclopedia article, set forth below, emphasizes in italics the excerpt cited by *Murphy*:

Breach of Contract Generally.—It is a general rule that damages for mental anguish cannot be recovered in an action for breach of contract, except in those cases where the breach amounts, in substance, to an independent, willful tort, although in some states mental anguish or suffering is a proper element of damage in actions for breach of contract, at least where it may be said that such anguish is the natural result of the breach. While, as a general rule, mental anguish is not a proper element of damage in actions for breach of a contract, a distinction is drawn between contracts having, on the one hand, a direct relation to property or pecuniary matters, and those having, on the other, relation to the feelings and sensibilities of the parties

⁵⁶*Id.*

⁵⁷By contrast, other states were moving from contract to negligence law to handle mental anguish damages. See *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 541, 114 S. Ct. 2396, 2403, 129 L. Ed. 427, 439 (1994) (stating that, because jurisprudence of the Federal Employers Liability Act “gleans guidance from common-law developments,” the statute encompasses the common law recovery for mental anguish damages).

⁵⁸8 R.C.L. § 83 *Breach of Contract Generally* (1915).

⁵⁹*Id.*

⁶⁰*Id.*

entering into them, and from the nature of which it is known when the contract is made that great mental suffering will result from its breach. And so, while under the general rule stated, damages are not recoverable for mental anguish growing out of the violation of an ordinary contract, as, for example, for the payment of money, *yet where the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the feelings of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, it is just that damages therefor be taken into consideration and awarded.* The reason why such damages are not generally recoverable is that they are too remote, and could not have been in the contemplation of the parties when the contract was made. But if a person contracts upon a sufficient consideration, to do a particular thing, the failure to do which may result in anguish and distress of mind on the part of the other contracting party, he is presumed to have contracted with reference to the payment of damages of that character, in the event such damages accrue by reason of a breach of the contract on his part.⁶¹

Thus, the passage quoted by *Murphy* as an exception to the *Hadley* rules was, instead, a discussion of circumstances under which mental anguish damages could be recovered under *Hadley II*—where the personal nature of the contract is “known” by the contracting parties, and thus “presumed” to be within the “contemplation of the parties.”⁶² To put it bluntly, *Murphy* misread a legal encyclopedia article and developed an exception to contract doctrine based on this mistaken reading.

The Alabama Supreme Court’s exception in *Murphy* lay forgotten in the law for more than forty years.⁶³ Then, in 1978, the Alabama Court of Civil Appeals resurrected this mistaken rule in a breach of warranty case involving a home.⁶⁴ The following year, the Alabama Supreme

⁶¹*Id.* (emphasis added).

⁶²Alabama cases pre-dating *Murphy* correctly understood how mental anguish damages fall within the *Hadley II* “contemplation of the parties” test. *See, e.g.*, *W. Union Tel. Co. v. Swindle*, 208 Ala. 303, 94 So. 283 (1922) (“In order to justify the recovery of damages for mental distress it is essential that such distress should have been within contemplation when the contract was made. The company must have either knowledge or notice that from dereliction of duty in the premises it is reasonable to anticipate that mental distress may result.”).

⁶³A handful of cases in the 1930s relied on the *Murphy* rule. *See* *Becker Roofing Co. v. Pike*, 230 Ala. 289, 292, 160 So. 692, 695 (1935); *Ala. Water Serv. Co. v. Wakefield*, 231 Ala. 112, 115, 163 So. 626, 628 (1935); *Holley v. Vaughan*, 226 Ala. 249, 251, 146 So. 396, 397 (1933).

⁶⁴*Hill v. Sereneck*, 355 So. 2d 1129 (Ala. Civ. App. 1978).

Court recognized the *Murphy* rule in another home case.⁶⁵ Both courts repeated the mistake of the *Murphy* court by citing the *Murphy* rule as an exception to the *Hadley* rules, as opposed to an expression of the *Hadley* II rule.⁶⁶ Modern decisions continue to allow mental anguish damages for breach of contract.⁶⁷ In addition to new home cases, the Alabama Supreme Court has extended the *Murphy* rule to contract and warranty claims involving new mobile homes, termite bonds on homes, and autos.⁶⁸ Alabama appellate courts have rejected it in other settings.⁶⁹

The primary difference between the *Murphy* rule and the *Hadley* II rule is the way a court analyzes the limits of liability. Under *Murphy*, a court decides the limits of a defendant's contract liability through the tort law standard of foreseeability. According to *Murphy*, if the contract is personal in nature,⁷⁰ then the court presumes that mental anguish

⁶⁵*B&M Homes, Inc. v. Hogan*, 376 So. 2d 667 (Ala. 1979).

⁶⁶*Hill*, 355 So. 2d at 1132 (applying the *Murphy* rule); *B&M Homes, Inc.*, 376 So. 2d at 670-71 (using an application of the *Murphy* rule).

⁶⁷*See, e.g., Liberty Homes, Inc. v. Epperson*, 581 So. 2d 449, 454 (Ala. 1991) (applying the *Murphy* rule).

⁶⁸*S. Energy Homes v. Washington*, 774 So. 2d 505 (Ala. 2000) (mobile home case); *Volkswagen of Am., Inc. v. Dillard*, 579 So. 2d 1301 (Ala. 1991) (auto case); *Orkin Exterminating Co. v. Donovan*, 519 So. 2d 1330 (Ala. 1988) (allowing mental anguish damages in a case where the home is damaged from the breach of a termite bond); *see also Sexton v. St. Clair Fed. Sav. Bank*, 653 So. 2d 959 (Ala. 1995) (involving a breach of construction contract claim where a bank wrongfully disbursed plaintiff's loan proceeds to a builder; the court upheld a mental anguish award). Like the home and auto industries, the pest control industry has reacted to this extension in the law by requiring customers to agree to arbitration in connection with the issuance of termite bonds.

⁶⁹*See, e.g., Boros v. Baxley*, 621 So. 2d 240, 244 (Ala. 1993) (rejecting mental anguish damages in a claim for breach of legal services contract); *Wellcraft Marine v. Zarzour*, 577 So. 2d 414, 418-19 (Ala. 1991) (rejecting mental anguish damages in warranty action involving a pleasure craft); *United Am. Ins. Co. v. Brumley*, 542 So. 2d 1231, 1238 n.4 (Ala. 1989) (noting that mental anguish damages are not recoverable in a breach of contract action involving an insurance policy); *Faith, Hope & Love, Inc. v. Ala. Bank of Talladega County, N.A.*, 496 So. 2d 708, 711 (Ala. 1986) (rejecting mental anguish damages in contract action to establish credit for T-shirt business); *Morris Concrete, Inc. v. Warrick*, 868 So. 2d 429, 438-39 (Ala. Civ. App. 2003) (rejecting mental anguish damages in contract action involving commercial construction).

⁷⁰The distinction of whether mental anguish damages should be awarded for personal contracts as opposed to commercial contracts has been the subject of some criticism. *See, e.g., Giampapa v. Am. Family Mut. Ins. Co.*, 64 P.3d 230 (Colo. 2003) ("We do not adopt the personal/commercial test because it is often difficult to label contracts as

damages are foreseeable and, thus, recoverable.⁷¹ Importantly, events that occur after contract formation are considered in determining whether mental harm was foreseeable.⁷² This is consistent with tort law, because the foreseeability analysis in tort requires a court to consider all events leading up to and including the injury.⁷³ By contrast, under *Hadley II*, the court decides the limits of a defendant's contract liability through the contract law "contemplation of the parties" test. To make this determination, a court must consider whether the promisor knew or had reason to know of special circumstances that would give rise to mental anguish damages at the time the parties entered into the contract.⁷⁴ Conduct of the parties that occurs after the contract is formed is irrelevant.

Murphy's application of the tort law doctrine of foreseeability is incomplete. In tort, although the doctrine of foreseeability is often the starting point for analyzing a defendant's legal liability, the law imposes limits to liability. The flip-side to foreseeability is proximate causation. Under generally recognized tort standards, the doctrine of proximate causation defines the outer limits of a defendant's legal liability as a matter of law and public policy.⁷⁵ In *AALAR, Ltd. v. Francis*,⁷⁶ the Alabama Supreme Court articulated Alabama's modern proximate causation standard applicable to claims for mental anguish damages in negligence cases. That standard limits a plaintiff's recovery for mental anguish damages to two situations: (1) where the plaintiff sustained an actual physical injury, or (2) where the plaintiff was placed in immediate risk of physical harm by the defendant's conduct (*i.e.*, a "near miss" within

purely one or the other."); *see also* Lloyd W. Gathings, *Damages for Mental Anguish: When, How and How Much?*, 1999 ATLA WINTER J. (discussing difficulty in reconciling differing results in cases where the *Murphy* rule and its exceptions are applied by Alabama courts).

⁷¹*B&M Homes, Inc. v. Hogan*, 376 So. 2d 667, 671-73 (Ala. 1979).

⁷²*See, e.g., id.* (considering a defendant's post contract conduct in a foreseeability analysis); *Orkin Exterminating Co. v. Donovan*, 519 So. 2d 1330, 1333-34 (Ala. 1988) (same); *Lawler Mobile Homes. v. Tarver*, 492 So. 2d 297, 306 (Ala. 1986) (same); *Ruiz de Molina v. Merritt & Furman Ins. Agency*, 207 F.3d 1351, 1359 (11th Cir. 2000) (citing cases involving "egregious" breaches of contract that will support a recovery).

⁷³*KEETON ET AL.*, *supra* note 39, § 43.

⁷⁴*CALAMARI & PERILLO*, *supra* note 15, § 14-5.

⁷⁵*Shades Ridge Holding Co. v. Cobbs, Allen & Hall Mortgage Co.*, 390 So. 2d 601, 611 (Ala. 1980).

⁷⁶716 So. 2d 1141 (Ala. 1998).

the zone of danger).⁷⁷ If a plaintiff cannot prove either prong, then a defendant cannot be held liable. In contract cases under *Murphy*, by contrast, even though a court begins its analysis with foreseeability, the doctrine of proximate cause is not applied, leading to potentially limitless liability.⁷⁸ The problem with this doctrine is obvious. As the Supreme Court of California aptly noted in *Thing v. La Chusa*, “there are clear judicial days on which a court can foresee forever, and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury.”⁷⁹

2. The *Hadley II* Rule in Alabama

Even though modern decisions in Alabama apply the *Murphy* rule in contract and warranty actions, there are a number of older Alabama decisions that address mental anguish damages utilizing the *Hadley II* rule. In these decisions, Alabama appellate courts recognized that mental anguish damages should be considered a consequential damage under *Hadley II* if the plaintiff can prove that such damages were contemplated by the parties at the time the contract was formed. These decisions have never been overruled and are clearly at odds with *Murphy*. For example, in *Western Union Telegraph Co. v. Westmoreland*, a 1907 case that predates *Murphy*, the Alabama Supreme Court laid down the following rule in telegram cases:

[Mental anguish] damages, notwithstanding their elusive character, are actual; but they are ordinarily not the natural result of a breach, and thus not within the contemplation of the parties. In cases where they are not clearly contemplated, it would be dangerous and unfair in the extreme to allow them. When the message is between persons of a close degree of relationship and relates to exceptional events, such as sickness or death, of such relations in which a failure to deliver obviously comprehends mental distress and anguish, we have allowed such anguish as an element of damages. But to extend as a natural result the allowance on other occasions “would, in our judgment, tend to promote and encourage a species of litigation more or less speculative in its nature, and unjust and oppressive in its results.”⁸⁰

⁷⁷*Francis*, 716 So. 2d at 1147.

⁷⁸*Horton Homes v. Brooks*, 832 So. 2d 44, 50 n.7 (Ala. 2001).

⁷⁹48 Cal. 3d 644, 668, 257 Cal. Rptr. 865, 881, 771 P.2d 814, 830 (1989).

⁸⁰151 Ala. 319, 324, 44 So. 382, 383 (1907) (citations omitted).

Other pre-*Murphy* cases also correctly apply the *Hadley* II rule. In *Browning v. Fies*,⁸¹ the Alabama Supreme Court reversed and remanded a case for a new trial where the trial court failed to submit the plaintiff's mental anguish claim to the jury. The defendant breached a contract to transport the plaintiff and his friends and family from his home to a church where he was to be married.⁸² The court held that the question of mental anguish damages should have been submitted to the jury since such damages were within the contemplation of the parties.⁸³

In *Birmingham Water Works Co. v. Ferguson*,⁸⁴ the Alabama Supreme Court held that it was not error to instruct the jury that a plaintiff could recover for inconvenience and annoyance in a breach of contract action where the defendant failed to provide water to the plaintiff's residence.⁸⁵ Such damages were recoverable because they were within the contemplation of the parties.⁸⁶

In *Pullman v. Meyer*,⁸⁷ the Alabama Supreme Court affirmed a judgment against a defendant who failed to provide sleeping car accommodations on a train.⁸⁸ The plaintiff relapsed into mental illness as a result of the breach of contract.⁸⁹ The court found that the plaintiff's special circumstances were brought to the attention of the defendant, and that the plaintiff's damages were, therefore, recoverable.⁹⁰ In other words, her damages were contemplated.

In summary, Alabama's mental anguish law is muddled. Two distinct and divergent lines of cases exist in Alabama on the issue of mental anguish damages in contract and warranty: cases applying the *Murphy* rule, and cases applying the *Hadley* II rule. Although the *Murphy* rule is dominant in modern decisions, it suffers from three flaws. First, it was predicated on the misreading of a legal encyclopedia. Second, it applies

⁸¹4 Ala. App. 580, 587-88, 58 So. 931, 933-34 (Ala. 1912).

⁸²*Browning*, 58 So. at 932.

⁸³*Id.* at 933-34.

⁸⁴168 Ala. 494, 501-02, 51 So. 150, 153 (1909).

⁸⁵*Ferguson*, 51 So. at 153.

⁸⁶*Id.*

⁸⁷195 Ala. 379, 70 So. 763 (1915).

⁸⁸*Pullman*, 70 So. at 768.

⁸⁹*Id.* at 765-66.

⁹⁰*Id.* at 767-68.

tort law standards instead of contract law doctrine. Third, its application of tort law is flawed in a way that is quite harsh to defendants: *Murphy* defines a defendant's legal liability under the doctrine of foreseeability, but without applying the necessary corollary to that rule, proximate cause.

III. The Shortcomings of Alabama's Mental Anguish Rule in Practice

This Section discusses the shortcomings of Alabama's mental anguish damages rule in practice. This is done by exploring the practical facets of a litigated case, showing that at each stage of a case, from beginning to end, a mental anguish claim is virtually indefensible under current law.

Modern Alabama decisional law does not require a plaintiff to plead a request for mental anguish damages in the complaint.⁹¹ A plaintiff can file suit against a defendant and, without ever mentioning mental anguish as an element of damage, receive a jury charge at trial.⁹² This relaxed pleading rule makes it difficult to defend a mental anguish claim. A defendant may not learn about mental anguish damages until trial, where a jury has the authority to award any amount within its sound discretion.⁹³

The defense of a mental anguish case becomes more difficult after the pleading stage. In an action involving a claim for breach of contract or warranty where mental anguish damages are sought, it is appropriate to discover and present evidence on the cause and amount (*i.e.*, severity)

⁹¹Walker Builders, Inc. v. Lykens, 628 So. 2d 923, 924 (Ala. Civ. App. 1993). Alabama's relaxed mental anguish pleading rule conflicts with other settled Alabama authority. The relaxed rule originated in *Lykens*, where the Alabama Court of Civil Appeals held that mental anguish damages are general in nature and do not have to be specially pleaded. *Id.* *Lykens* conflicts with Alabama Rule of Civil Procedure 9(g), which requires "special damages" to be specifically stated in the complaint. Supreme court decisions from a century ago hold that mental anguish is a special or consequential damage under the law. *See, e.g.*, Lay v. Postal Tel. Cable Co., 171 Ala. 172, 54 So. 529 (1911) (mental anguish is a special damage); W. Union Tel. Co. v. Crumpton, 138 Ala. 632, 36 So. 517 (1903) (same). Alabama law supports this position as well. Section 7-2-715, which discusses some of the types of damages available for breach of warranty under the Uniform Commercial Code, declares that personal injury damages are consequential in nature. ALA. CODE § 7-2-715(1) (1975). *Volkswagen of Am., Inc. v. Dillard* held that mental anguish in a breach of warranty action may result in personal injury damages under this code section. 579 So. 2d 1301, 1305-08 (Ala. 1991).

⁹²ALABAMA PATTERN JURY INSTRUCTIONS 10.28 (2d ed. 1993).

⁹³*See* Kmart Corp. v. Kyles, 723 So. 2d 572, 578 (Ala. 1998).

of the damage. Unfortunately, Alabama law does not permit discovery of mental records at any level. Alabama's version of the psychotherapist-patient privilege forecloses the discovery of a plaintiff's psychological and psychiatric records.⁹⁴ Alabama Rule of Evidence 503 precludes the introduction of a plaintiff's mental health records at trial.⁹⁵ Thus, even though a plaintiff places his mental state at issue in a case, a defendant is not permitted to obtain or use a plaintiff's medical records to challenge evidence of causation.⁹⁶

The harshness of these rules might be mitigated if a defendant could obtain independent expert evidence of a plaintiff's psychological condition under Alabama Rules of Civil Procedure, which states in part:

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination⁹⁷

Alabama trial courts, however, routinely deny these motions in cases involving new homes and autos.⁹⁸ Thus, a defendant can neither obtain existing evidence concerning a plaintiff's mental state, nor have the plaintiff independently evaluated by an expert.

At trial, a plaintiff in Alabama proves mental anguish damages by offering testimony about how the problems with the house or auto made him feel from a subjective standpoint. Typical testimony includes statements that the problems made the plaintiff feel mad, embarrassed, angry,⁹⁹ nervous, stressed-out, edgy, anxious, afraid,¹⁰⁰ frustrated, disap-

⁹⁴ALA. CODE § 34-26-2 (1975).

⁹⁵ALA. R. EVID. 503.

⁹⁶*Ex parte Pepper*, 794 So. 2d 340, 344 (Ala. 2001) (declining to create an exception to the statutory privilege where a party seeks information relevant to the issue of proximate cause); *Ex parte United States Serv. Stations*, 628 So. 2d 501, 504 (Ala. 1993) (finding no exception to privilege where the issue of a party's mental condition is raised in a civil proceeding).

⁹⁷ALA. R. CIV. P. 35.

⁹⁸The denial of a motion to take a mental examination in a mental anguish case involving the breach of a warranty or contract has never been the subject of a reported opinion in Alabama.

⁹⁹*S. Energy Homes v. Washington*, 774 So. 2d 505, 519 (Ala. 2000).

¹⁰⁰Even though fear will support a mental anguish award under the *Murphy* rule, fear will not support such an award in a negligence case. *S. Bakeries, Inc. v. Knipp*, 852

pointed, worried, annoyed, or inconvenienced.¹⁰¹ Although Alabama once prevented a plaintiff from testifying about his own mental anguish, that rule was officially abrogated in 1998.¹⁰² Thus, the plaintiff's own self-serving and subjective testimony is the basis for mental anguish awards in new home and auto cases. No corroborating evidence is necessary.¹⁰³

Cross examination of the plaintiff can be a real problem. Without the ability to obtain and offer opposing evidence, a defendant has no realistic chance of discrediting the plaintiff by showing that the alleged harm is exaggerated or imagined.¹⁰⁴ In short, the plaintiff gets a "free pass" on issues of causation and damages. Furthermore, unlike punitive damages, there is no cap to the amount a jury can award, since the damages are compensatory in nature.¹⁰⁵ Emotional testimony such as this is very effective a trial. Juries are sometimes led to award significant mental anguish recoveries based on the plaintiff's subjective testimony.¹⁰⁶

So. 2d 712, 718 (Ala. 2002) (holding that a fear of contracting an asbestos-related disease in the future does not support a mental anguish award, because such an allegation does not state a claim under Alabama law).

¹⁰¹Horton Homes, Inc. v. Brooks, 832 So. 2d 44, 53 (Ala. 2001) (citations omitted).

¹⁰²Kmart v. Kyles, 723 So. 2d 572, 578 (Ala. 1998).

¹⁰³The better practice is to require strong corroborating evidence of mental anguish in a property damage case. *In re Air Crash Disaster Near New Orleans on July 9, 1982*, 764 F.2d 1084, 1087-88 (5th Cir. 1985) (holding that a strong showing of causation is required since mental anguish susceptible to fabrication or exaggeration).

¹⁰⁴The Alabama Court of Civil Appeals recognized the problem of proof of mental harm in a worker's compensation case. *See, e.g., Fruehauf Corp. v. Prater*, 360 So. 2d 999, 1001 (Ala. Civ. App. 1978) ("We recognize the possible difficulty of establishing the existence of or the precipitating cause of any neurosis or psychic disorder. We recognize that there is a distinct possibility of attempted malingering in the absence of objective symptoms. We believe, however, that the difficulty of proof may be overcome by the use of expert medical testimony and/or objective evidence.").

¹⁰⁵"[A] buyer should be able to recover the full amount of consequential damages that are foreseeable or, in the case of injury to person or property, that proximately resulted from a breach of warranty regardless of the disproportionate relationship between such damages and the price paid [for the product]." JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 10-4, at 454 n.60 (3d ed. 1988).

¹⁰⁶*See, e.g., S. Energy Homes v. Washington*, 774 So. 2d 505, 509 (Ala. 2000) (awarding, by a jury, more than \$350,000 in mental anguish damages in a case involving a single-wide mobile home that cost less than \$20,000); *see also Lay v. Postal Tel. Cable Co.*, 171 Ala. 172, 53 So. 529, 532 (1911) (discussing the fact that wealthy corporations open themselves up to unreasonable prejudice based on the sympathy aroused by a mental anguish case; such a situation, in the court's view, is to be "closely watched and controlled by an even-handed bench").

Appealing a mental anguish award is very difficult. Because mental anguish damages are compensatory in nature, an appellate court must focus on the evidence presented by the plaintiff at trial to determine whether the verdict was supported by the evidence.¹⁰⁷ A plaintiff is required to present “only *some* evidence of mental anguish, and once the plaintiff has done so, the question of damages for mental anguish is for the jury.”¹⁰⁸ Appellate courts apply a stricter level of scrutiny to mental anguish awards where the victim has offered little or no direct evidence concerning the degree of suffering that he or she has experienced.¹⁰⁹ The plaintiff’s own testimony, however, may be considered direct evidence.¹¹⁰

A trial court may not substitute its own judgment for that of the jury when the jury has returned a verdict that is clearly supported by the evidence.¹¹¹ A trial court may not conditionally reduce a verdict merely because it believes that the verdict over-compensates the plaintiff.¹¹² Jury verdicts carry a strong presumption of correctness; that presumption is strengthened once the trial court denies a motion for a new trial.¹¹³ When there is no evidence before the appellate court of any “misconduct, bias, passion, prejudice, corruption, improper motive” or cause inconsistent with the truth and the facts, there is no statutory authority to invade the province of the jury in awarding compensatory damages.¹¹⁴ The jury’s award will not be set aside absent clear abuse of discretion.¹¹⁵

In practice, as long as the plaintiff takes the stand and testifies to *some* evidence of his alleged mental harm, the appellate court will presume the correctness of the jury’s award.¹¹⁶ The plaintiff’s own self-serving,

¹⁰⁷Pitt v. Century II, Inc., 631 So. 2d 235, 239 (Ala. 1993).

¹⁰⁸Ala. Power Co. v. Harmon, 483 So. 2d 386, 389 (Ala. 1986).

¹⁰⁹Kyles, 723 So. 2d at 578.

¹¹⁰S. Pine Elec. Coop. v. Burch, 878 So. 2d 1120, 1127 (Ala. 2003) (citing *Kyles*, 723 So. 2d at 578).

¹¹¹State v. McCurdy Concrete, Inc., 507 So. 2d 403, 404 (Ala. 1987).

¹¹²B&M Homes v. Hogan, 376 So. 2d 667, 676 (Ala. 1979).

¹¹³Alfa Mutual Ins. Co. v. Northington, 561 So. 2d 1041, 1048 (Ala. 1990).

¹¹⁴N.E. Ala. Reg’l Med. Ctr. v. Owens, 584 So. 2d 1360, 1366 (Ala. 1991).

¹¹⁵*Kyles*, 723 So. 2d at 578.

¹¹⁶The “some evidence standard” conflicts with other Alabama laws. For example, to survive a motion for summary judgment or a motion for judgment as a matter of law, a plaintiff must offer substantial opposing evidence. *Day v. Williams*, 670 So. 2d 914

subjective, and anecdotal testimony, which the appellate court deems to be the best direct evidence available, can be used to justify a six-figure recovery. As long as the plaintiff offers the “standard” litany of testimony at trial—“the home [or car] made me sad, mad, or anxious, etc.”—then the appellate court will likely affirm the jury’s verdict.

The confluence of pleading, discovery, evidentiary, and appellate rule applicable to mental anguish claims makes such claims extremely difficult to defend in jury trials. A plaintiff who never mentions his alleged mental anguish in a complaint can breeze through a jury trial virtually unchallenged with a realistic expectation of having his award affirmed on appeal. As long as the plaintiff can show a singular breach of warranty or contract, and then testify to his alleged mental anguish, he has satisfied Alabama law for purposes of securing a recovery. With substantial money at stake, a plaintiff is too easily led to exaggerate the nature and intensity of the alleged mental harm. The fact that Alabama courts do not require corroborating evidence of mental anguish virtually guarantees that the plaintiff’s testimony will be believed by the jury and given substantial weight—particularly since the pleading and discovery rules preclude a defendant from gathering or introducing evidence to the contrary. From a defendant’s perspective, this system represents the wholesale denial of procedural and substantive due process.¹¹⁷

The system just described applies only in contract and warranty actions involving homes and automobiles. Only these industries are singled out by Alabama law on mental anguish damages.¹¹⁸ The perception among Alabama lawyers is that arbitrators are much more conservative

(Ala. 1995) (summary judgment standard); *Callaway v. Whittenton*, No. 1020660, 2003 WL 22977433, **2-3 (Ala. Dec. 19, 2003) (judgment as a matter of law standard). *Substantial* evidence is more than *some* evidence.

¹¹⁷For a general discussion of the due process concerns associated with emotional distress damages, see Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 VA. L. REV. 1401, 1416-17 (2004) (“If juries are authorized to award ‘damages’ for pain and suffering in any amount without a well-defined purpose, how does a defendant have notice of the scope of a potential verdict? Obviously, when damages are meant to compensate for ‘concrete loss,’ those damages can be predicated with some degree of accuracy. But without rational criteria or defined limits, the pain and suffering award becomes the same arbitrary deprivation of property as were punitive damages before cases like *BMW of North America* and *Campbell*.”).

¹¹⁸In other types of cases, the general rule applies that precludes mental anguish damages in a breach of contract action. See *supra* note 69 for cases disallowing recovery of mental anguish damages for breach of contract.

than juries when it comes to the award of “soft” damages such as mental anguish. This, the authors argue, is precisely why consumer arbitration agreements are more common in Alabama than in other states.¹¹⁹ The new home and auto industries, which do not often use arbitration agreements in other states, use them regularly in Alabama as contractual “tort reform.” Arbitration, rather than being a symptom of an overly aggressive business community, is simply a rational response to a bizarre rule of damages and a skewed set of procedural laws that make mental anguish cases virtually indefensible, both at trial and on appeal.

As addressed in the next Section, nearly half the Alabama appellate decisions that have decided the enforceability of an arbitration agreement since *Allied-Bruce Terminix Co. v. Dobson*¹²⁰ involve homes and autos, the industries singled out by Alabama’s bizarre *Murphy* rule on mental anguish damages for breach of contract and warranty.

IV. The Strong Correlation Between Arbitration Cases in Alabama and the *Murphy* Rule

The authors reviewed all of the reported cases in Alabama over the last nine years in which Alabama appellate courts decided the enforceability of arbitration agreements. The *Dobson* decision was used as a starting point. Prior to that time, Alabama courts applied Alabama statutory law to strike down binding arbitration agreements.¹²¹ *Dobson*, which held that arbitration agreements are enforceable under the FAA whenever interstate commerce is involved or affected, cleared the way for the use of arbitration agreements in Alabama.¹²²

From the *Dobson* decision in 1995 until research for this Article ended in 2004, Alabama appellate courts decided 359 cases in which the enforceability of an arbitration agreement was at issue. The authors organized these cases into seventeen categories based on the facts presented: automobiles, banking, commercial construction, commercial contracts, commercial vehicles, credit cards, employment agreements, funerals, in-

¹¹⁹See Terry Carter, *Arbitration Pendulum: Mandatory Arbitration Agreements, Once an Easy Pass, Come Under More Scrutiny*, 89 A.B.A. J. 14 (May 2003).

¹²⁰513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995).

¹²¹ALA. CODE § 8-1-41(3) (1975).

¹²²*Dobson*, 513 U.S. at 265.

surance, leases, loans and mortgages, manufactured homes, nursing homes, retail contracts, securities and investments, site-built homes, and residential termite bonds.¹²³

Cases involving autos, manufactured homes, site-built homes, and residential termite bonds share a common trait: a plaintiff can recover mental anguish damages in a contract or warranty action under Alabama's bizarre *Murphy* rule without a showing of actual physical harm. In the other types of cases listed, mental anguish damages are not available under *Murphy*. If, as the authors contend, the *Murphy* rule has led the home and auto industries to adopt the use of arbitration agreements across-the-board, then one would expect to see a large number of reported decisions in which Alabama appellate courts decided the enforceability of such agreements. The authors' survey of post-*Dobson* decisions confirmed this very fact. Out of the 359 cases reported, 171 cases involved the home and auto industries, in which the *Murphy* rule applies.¹²⁴

Figure 1
Arbitration Cases Decided by Appellate Courts in Alabama¹²⁵
(September 1995-June 4, 2004)

	Reported Decisions	Mental Anguish Claims ¹²⁶
Automobiles	56	Yes ¹²⁷
Banking	7	No ¹²⁸

¹²³See Appendix, *infra*, for a listing of cases and division of categories.

¹²⁴Alabama appellate courts decided 79 manufactured homes cases, 56 automobile cases, 16 termite bond cases, and 20 site-built homes cases. The number of Alabama arbitration decisions involving homes and automobiles is also extremely high relative to the number of similar cases in other jurisdictions. Although the authors have not researched the exact number of such cases in all jurisdictions, most state appellate courts have reported only a handful (fewer than five in most instances). See Thomas J. Methvin, *Alabama the Arbitration State*, 62 ALA. LAW. 48, 51 (2001).

¹²⁵See Appendix, *infra*. Footnotes within Figure 1 refer to cases discussing mental anguish damages within the categorical area of the law.

¹²⁶From the categories analyzed, this column illustrates the types of cases in which a plaintiff can recover mental anguish damages in contract or warranty claims under the *Murphy* rule. When this Article refers to the home industry as being subject to mental anguish damages in contract or warranty actions, manufactured home cases, site-built home cases, and cases involving residential termite bonds are included.

¹²⁷See, e.g., *Volkswagen of Am. v. Dillard*, 579 So. 2d 1301 (Ala. 1991) (holding that mental anguish damages are available in a breach of warranty of a new vehicle).

¹²⁸See, e.g., *First Nat'l. Bank of Mobile v. Ducros*, 27 Ala. App. 193, 195, 168 So. 704, 705 (1936) (awarding no mental anguish damages in an action against a bank for

Commercial Construction	22	No
Commercial Contracts	20	No
Commercial Vehicles	8	No
Credit Cards	4	No
Employment Agreements	25	No ¹²⁹
Funerals	2	No ¹³⁰
Insurance	40	No ¹³¹
Leases	6	No ¹³²
Loans and Mortgages	18	No
Manufactured Homes	79	Yes ¹³³
Nursing Homes	3	No

wrongful dishonor of a check). *But see* Sexton v. St. Clair Fed. Sav. Bank, 653 So. 2d 959, 960 (Ala. 1995) (upholding an award of mental anguish damages where a residential construction lender could have foreseen that the property owners would undergo extreme mental anguish if the loan disbursements were not properly monitored).

¹²⁹*See, e.g.*, Wyatt v. BellSouth, Inc., 757 So. 2d 403, 408 (Ala. 2000) (holding that the plaintiff must prove an independent tort in order to recover damages for mental anguish in an employment case).

¹³⁰Mental anguish damages are available in a contract action involving the mishandling of a loved one's remains. *See* Gray Brown Serv.-Mortuary, Inc. v. Lloyd, 729 So. 2d 280 (Ala. 1999); CALAMARI & PERILLO, *supra* note 15, § 14-5. Mental anguish damages are equally available in burial or funeral cases pleaded in tort. Bessemer Land & Improvement Co. v. Jenkins, 111 Ala. 135, 18 So. 565 (Ala. 1895) (trespass); Cates v. Taylor, 428 So. 2d 637 (Ala. 1983) (intentional infliction of emotional distress); KEETON ET AL., *supra* note 39, §§ 12 & 54 (intentional infliction of emotional distress and negligence). The right to recover mental anguish damages in contract for the mishandling of a loved one's remains pre-dated the *Murphy* rule by several decades. *Browning v. Fies*, 4 Ala. App. 580, 58 So. 931 (1912); *Birmingham Transfer & Traffic Co. v. Still*, 7 Ala. App. 556, 61 So. 611 (1913); *Deavors v. S. Express Co.*, 200 Ala. 372, 76 So. 288 (1917). Modern funeral cases in which mental anguish damages are sought appear to apply pre-*Murphy* decisions as a basis for recovery as opposed to the *Murphy* rule. *See* Gray Brown Serv.-Mortuary, Inc., 729 So. 2d at 285. Thus, even though the funeral industry appears to use arbitration agreements in Alabama, the *Murphy* rule does not seem to be the cause of this trend. *See* SCI Ala. Funeral Serv. v. Lanyon, No. 1030337, 2004 WL1909350, **3-4 (Ala. Aug. 27, 2004); *Kupfer v. SCI-Ala. Funeral Serv.*, No. 1022002, 2004 WL 1418695, *1 (Ala. June 25, 2004).

¹³¹*See* United Am. Ins. Co. v. Brumley, 542 So. 2d 1231, 1238 n.4 (Ala. 1989) (recognizing that a bad faith tort claim may allow mental anguish damages, whereas breach of contract action would not).

¹³²Although mental anguish damages are not available in modern breach of lease cases, such damages were available in early eviction cases that involved claims of forced racial desegregation (at a time when state public policy required segregation). *See* Wyatt v. Adair, 215 Ala. 363, 110 So. 801 (1926).

¹³³*S. Energy Homes v. Washington*, 774 So. 2d 505 (Ala. 2000) (mobile home case).

Retail Contracts	1	No
Securities and Investments	22	No
Site-Built Homes	20	Yes ¹³⁴
Termite Bonds	16	Yes ¹³⁵

During that same time period, Alabama appellate courts decided 188 cases involving the enforcement of arbitration agreements in all other contexts: banking, commercial construction, commercial contracts, commercial vehicles, credit cards, employment agreements, funerals, insurance, leases, loans and mortgages, nursing homes, retail contracts, and securities and investments. Thus, almost forty-eight percent of the cases decided during this nine-year period involved the enforceability of arbitration agreements in the two industries where the *Murphy* rule applies—the home and auto industries.

The authors submit that the abundance of cases in these two industries is not a coincidence. Rather, these industries reacted rationally and intentionally to avoid jury trials in Alabama. The perception among practitioners who prosecute and defend warranty and contract actions in the auto and home industries is that arbitrators generally award less money to plaintiffs for mental anguish than do Alabama juries.¹³⁶ For this reason,

¹³⁴*B&M Homes v. Hogan*, 376 So. 2d 667 (Ala. 1979) (holding that mental anguish is recoverable in a breach of contract involving a new home).

¹³⁵*Orkin Exterminating Co. v. Donovan*, 519 So. 2d 1330 (Ala. 1988) (holding that a breach of termite bond will support a mental anguish recovery).

¹³⁶There is no practical way to gather statistics of arbitration awards involving home and automobile transactions in Alabama, because arbitration awards are not published. However, at least three arbitration cases in these industries have been discussed in reported decisions in Alabama. The mental anguish awards in these cases appear to confirm the anecdotal belief of practitioners that arbitrators award less money than Alabama juries. *McKee v. Hendrix*, 816 So. 2d 30 (Ala. Civ. App. 2001) (arbitrator awarded \$7,500 in mental anguish damages in a home case); *Sanderson Group, Inc. v. Smith*, 809 So. 2d 823 (Ala. Civ. App. 2001) (arbitrator awarded \$20,000 in mental anguish damages in a mobile home case). *But see* *Waverlee Homes, Inc. v. McMichael*, 855 So. 2d 493 (Ala. 2003) (discussing four mobile home arbitrations in which the same arbitrator awarded nearly \$2 million collectively in total damages). The defendant in *McMichael* argued that the awards were the product of arbitrator bias. *McMichael*, 855 So. 2d at 500. The Alabama Supreme Court remanded the case back to the trial court for further findings relative to this allegation. *Id.* at 507. For this reason, *McMichael* should probably not be relied upon as an example of what arbitrators typically award. By contrast, during the same general time period, Alabama juries have been very generous in doling out mental anguish damages. *See, e.g.*, *Horton Homes v. Brooks*, 832 So. 2d 44, 50 n.7 (Ala. 2001) (mobile home case in which jury awarded \$150,000 in mental anguish damages); *S. Energy Homes v. Washington*, 774 So. 2d 505, 508 (Ala.

the Alabama home and auto industries have generally required customers to agree to binding arbitration agreements. The home and auto industries' widespread use of arbitration agreements in Alabama appears to be a symptom of a flawed damages law doctrine. In the authors' view, this decision is a function of these industries seeking to avoid the harsh application of the *Murphy* rule before Alabama juries.

The next Section suggests methods for reforming Alabama's substantive mental anguish doctrine and procedural rules governing mental anguish claims.

V. Proposed Reforms

Our proposals for reforms are simple and straightforward. With respect to the substantive law of mental anguish, the authors urge Alabama courts to apply already existing law. The *Murphy* rule should be rejected; in its place, Alabama courts should apply the *Hadley II* "contemplation of the parties" test in contract actions and the standards set forth in Alabama Code section 7-2-715(2)(b) in warranty actions.¹³⁷ This correction will bring Alabama in line with the law of other states. Alabama courts should limit mental anguish recoveries through the mitigation of damages doctrine. This doctrine is expressed in both contract law and warranty law under the Uniform Commercial Code (UCC). Alabama courts should also apply existing law that governs the quantum and quality of evidence necessary to prove mental anguish damages. The aberrant "some direct evidence" standard should be abandoned in favor of the rule of reasonable certainty, which is an evidence rule that applies to all consequential damages claims, including mental anguish.

Correcting Alabama's substantive mental anguish law will necessarily require a retooling of Alabama procedural law as well. The authors'

2000) (awarding approximately \$355,000 in mental anguish damages in a mobile home case); *Liberty Homes v. Epperson*, 581 So. 2d 449, 454 (Ala. 1991) (awarding approximately \$168,000 in mental anguish damages in a mobile home case). Of course, one need only count the high number of reported decisions involving arbitration appeals in the home and automobile industries to conclude that lawyers regularly choose to fight over arbitration in these cases. There is no doubt that the decision to take or defend an expensive appeal is motivated by the likelihood that juries will award higher mental anguish awards than arbitrators.

¹³⁷ALA. CODE § 7-2-715(2)(b) (1975).

proposals in this regard are guided by due process concerns, which require fairness in all aspects of civil litigation. Pleading rules and, in certain limited settings, the rules of evidence should be advanced in accordance with substantive law. Finally, the standard for appellate review of mental anguish claims should be adjusted in keeping with substantive law requirements. The authors' proposals are set forth hereafter.

A. The "Contemplation of the Parties" Test in Contract Actions

The authors urge Alabama courts to apply the *Hadley II* "contemplation of the parties" test when determining whether a contract claim will support a recovery for mental anguish damages. The Alabama Supreme Court discussed this test in the pre-*Murphy* case of *Western Union Telegraph Co. v. Swindle*.

In order to justify the recovery of damages for mental distress it is essential that such distress should have been within contemplation when the contract was made. The [defendant] must have either knowledge or notice that from dereliction of duty in the premises it is reasonable to anticipate that mental distress may result.¹³⁸

This standard has never been explicitly overruled in Alabama. It remains good law and should be revived.

Knowledge should be read broadly to include not only direct evidence of what the defendant knew but also facts that the defendant *had reason to know* at the time of contracting and not after.¹³⁹ This is a test of "reasonable foreseeability of probable consequences."¹⁴⁰ This doctrine is consistent with the *Restatement Second of Contracts*, which provides that a loss may be foreseeable at the time of contracting based on "the ordinary course of events," or "as a result of special circumstances, be-

¹³⁸208 Ala. 303, 304 94, So. 283, 283 (1922).

¹³⁹5 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1008, at 73-76 (1964); E. Allen Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145 (1970).

¹⁴⁰*Gerwin v. Southeastern Cal. Ass'n of Seventh Day Adventists*, 14 Cal. App. 3d 209, 92 Cal. Rptr. 111 (Ct. App. 1971) (citations omitted).

yond the ordinary course of events, that the party in breach had reason to know.”¹⁴¹

The two circumstances that will justify a finding of foreseeability include evidence that the breach caused bodily harm, or that the contract or its breach “is of such a kind that serious emotional disturbance was a particularly likely result.”¹⁴² The second circumstance is “exceptional.” According to the Restatement, this should include contracts of carriers with passengers and innkeepers with guests, contracts for the carriage or proper disposition of dead bodies, and contracts for the delivery of messages concerning death (telegram cases).¹⁴³ Contract and warranty actions involving homes and automobiles do not fall within this narrow exception.¹⁴⁴

B. The Doctrine of Proximate Causation in Warranty Actions

Although the drafters of the UCC apply the *Hadley* II test in lost profits cases, adopted in Alabama under section 7-2-715(2)(a), the code rejects the test in warranty actions involving personal injuries under section 7-2-715(2)(b). Instead, the code applies the doctrine of proximate causation to limit the reach of personal injury recoveries.¹⁴⁵ Section 7-2-715(2)(b) specifies that “[c]onsequential damages resulting from the seller’s breach include: . . . [i]njury to person or property *proximately resulting* from any breach of warranty.”¹⁴⁶ Note the code drafter’s choice of words—“proximately resulting”—in this section. The Alabama Supreme Court interpreted the phrase “injury to person” to include mental anguish

¹⁴¹RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981).

¹⁴²*Id.* § 353.

¹⁴³*Id.*

¹⁴⁴*Id.* at Illustration 1. The following cases apply the *Restatement* approach. *See Hancock v. H&M Constr.*, 808 P.2d 251, 258-59 (Alaska 1991) (holding a breach of house construction contract will not support mental anguish damages, and citing cases); *Wise v. Gen. Motors Corp.*, 588 F. Supp. 1207, 1209-13 (W.D. Va. 1984) (holding a breach of warranty claim involving an auto did not support mental anguish damages); *Kwan v. Mercedes-Benz of N. Am.*, 23 Cal. App. 4th 174, 187-89, 28 Cal. Rptr. 2d 371, 379-81 (Ct. App. 1994) (holding breach of warranty claim involving an auto will not support mental anguish damages).

¹⁴⁵WHITE & SUMMERS, *supra* note 105, § 10-4 at 453, & §11-8, at 470-71.

¹⁴⁶ALA. CODE § 7-2-715(2)(b) (1975) (emphasis added).

damages.¹⁴⁷ Alabama courts, however, have never been asked to interpret the phrase “proximately resulting” in this context. Although two Alabama appellate court decisions have held that the Alabama’s proximate causation standard does not apply in mobile home cases decided under the *Murphy* rule, those courts failed to mention section 2-715(2)(b).¹⁴⁸ There are no reported decisions in Alabama deciding what “proximately resulting” means under 2-715(2)(b). Its meaning is an open question in Alabama. The authors submit that the code drafters included the phrase “proximately resulting” in section 2-715(2)(b) to limit the scope of a defendant’s liability through the doctrine of proximate causation.

According to the leading treatise on the UCC, the drafters intended to import the tort standard of proximate causation into section 2-715(2)(b) through the inclusion of the phrase “proximately resulting.”¹⁴⁹ Decisional law from other jurisdictions uniformly holds that the phrase “proximately resulting” in section 2-715(2)(b) means proximate causation.¹⁵⁰ Even pre-code courts required proof of proximate causation to support a breach of express warranty claim.¹⁵¹ Alabama’s UCC supports this conclusion, as well. For example, the phrase “proximately resulting” is used synonymously with “proximate causation.”¹⁵² Furthermore, Official Comment

¹⁴⁷*Volkswagen of Am. v. Dillard*, 579 So. 2d 1301, 1305-08 (Ala. 1991).

¹⁴⁸*Horton Homes, Inc. v. Brooks*, 832 So. 2d 44, 50 n.7 (Ala. 2001) (holding that a consumer could recover mental anguish damages for breach of express warranty without satisfying the proximate cause zone of danger test); *Sanderson Group, Inc. v. Smith*, 809 So. 2d 823, 828-29 (Ala. Civ. App. 2001) (same).

¹⁴⁹WHITE & SUMMERS, *supra* note 105, § 11-8, at 470.

¹⁵⁰*Lindemann v. Eli Lilly & Co.*, 816 F.2d 199, 201-02 (5th Cir. 1987); *Emguschowa v. N.Y. Steak & Seafood*, No. CIV.A. 96-6252, 1997 WL 535867, *2-5 (E.D. Pa. Aug. 5, 1997); *Reed v. Sears, Roebuck & Co.*, 934 F. Supp. 713, 718-20 (D. Md. 1996); *Blockhead, Inc. v. Plastic Forming Co.*, 402 F. Supp. 1017, 1027-29 (D. Conn. 1975); *Torres v. N.W. Eng’g Co.*, 86 Haw. App. 383, 396-97, 949 P.2d 1004, 1017-18 (Ct. App. 1997); *Erdman v. Johnson Bros. Radio & Tel. Co.*, 271 A.2d 744, 750-51 (Md. 1970); *Divis v. Clarklift of Neb., Inc.*, 256 Neb. 384, 393, 590 N.W.2d 696, 702 (1999); *Klages v. Gen. Ordnance Equip. Corp.*, 240 Pa. Super. 356, 373, 367 A.2d 304, 313 (Super. Ct. 1976); *Morris v. Adolph Coors Co.*, 735 S.W.2d 578, 587 (Tex. Ct. App. 1987).

¹⁵¹*Hanrahan v. Walgreen Co.*, 243 N.C. 268, 270, 90 S.E.2d 392, 394 (1955); *Yormack v. Farmer’s Co-op Ass’n*, 11 N.J. Super 416, 78 A.2d 421 (1951).

¹⁵²Compare section 7-2-715 (2)(b), which employs the phrase “proximately resulting,” with the Official Comment 13 to section 7-2-314, which states “[i]n an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the *proximate cause* of the loss sustained.” ALA. CODE § 7-2-314 cmt. 13 (emphasis added).

5 to section 7-2-715(2)(b) states that causation may be an issue where a purchaser fails to inspect a defective product, which means that defenses such as assumption of the risk or contributory negligence may bar a recovery.¹⁵³ These defenses would have no application in section 2-715(2)(b) unless this section required proof of causation under tort standards.¹⁵⁴ In short, the overwhelming weight of authority supports the proposition that Alabama courts should be applying the doctrine of proximate causation to mental anguish claims brought under section 7-2-715(2)(b).

In *AALAR Ltd. v. Francis*, the Alabama Supreme Court announced Alabama's modern proximate causation rule for mental anguish damages in negligence cases, which limits a plaintiff's recovery for mental anguish damages to two situations: (1) where the plaintiff sustained an actual injury, or (2) where the plaintiff was placed in immediate risk of physical harm by the defendant's conduct (*i.e.*, a "near miss" within the zone of danger).¹⁵⁵ A plaintiff should have to prove one of the two *Francis* prongs to recover mental anguish damages in warranty cases, as well.¹⁵⁶

C. The Mitigation Doctrine in Contract and Warranty Actions

In both contract and warranty actions, mental anguish damages are also limited by the application of the mitigation of damages doctrine.¹⁵⁷

¹⁵³ALA. CODE § 7-2-715 cmt. 5; *see also* WHITE & SUMMERS, *supra* note 105, § 11-8, at 468-74 (discussing the assumption of the risk and comparative fault as defenses to a warranty claim based on the plaintiff's contributory behavior).

¹⁵⁴The application of the doctrine of proximate causation in mental claims brought under section 7-2-715(2)(b) is also consistent with the leading Alabama decision interpreting this code section. *Volkswagen of Am., Inc. v. Dillard*, 579 So. 2d 1301, 1305-08 (Ala. 1991). In *Dillard*, the Alabama Supreme Court upheld a mental anguish award in favor of a car purchaser who suffered a breach of warranty. The facts in that case showed that the plaintiff purchased a defective car that stalled in traffic and had several "near misses" with oncoming traffic that placed the plaintiff's life in jeopardy. *Id.* at 1302-03. The plaintiff established proximate causation when he proved that he was placed in "immediate risk of physical harm" as a result of the breach of warranty.

¹⁵⁵716 So. 2d 1141, 1148 (Ala. 1998).

¹⁵⁶Prior to *Francis*, Alabama permitted mental anguish recoveries in negligence actions only in cases where the plaintiff suffered an actual physical injury. *Hayes v. Newton Bros. Lumber Co.*, 481 So. 2d 1123, 1124 (Ala. 1985) (citing *B.F. Goodrich Co. v. Hughes*, 239 Ala. 373, 194 So. 842, 847 (1940)).

¹⁵⁷*See* WHITE & SUMMERS, *supra* note 105, § 10-4, at 453.

In contract actions, Alabama Pattern Jury Instruction 11.29 sets forth the correct jury charge in this regard.

It is the duty of one (injured) (damaged) to exercise ordinary care to reduce (his) (her) damages: (he) (she) is bound to exercise such care as a reasonably prudent person would exercise under like circumstances to reduce or mitigate the damages. (He) (She) can recover only such damages as would have been sustained had such care been exercised.¹⁵⁸

In warranty actions, the mitigation doctrine is embraced within the proximate cause rule.¹⁵⁹ Official comment 5 of Alabama Code section 7-2-715 sets forth the analysis the court should employ:

Subsection (2)(b) states the usual rule as to breach of warranty, allowing recovery for injuries “proximately” resulting from the breach. Where the injury involved follows the use of goods without discovery of the defect causing the damage, the question of “proximate” cause turns on whether it was reasonable for the buyer to use the goods without such inspection as would have revealed the defects. If it was not reasonable for him to do so, or if he did in fact discover the defect prior to his use, the injury would not proximately result from the breach of warranty.¹⁶⁰

This standard incorporates the tort defenses of contributory negligence and assumption of the risk when determining whether a plaintiff’s failure to act reasonably should bar or limit a recovery.¹⁶¹

D. Standard of Evidence: The Rule of Reasonable Certainty

Under modern decisions, Alabama courts apply the “some direct evidence” standard when determining whether a plaintiff’s evidence is sufficient to prove mental harm.¹⁶² The authors propose that Alabama

¹⁵⁸ALA. PATTERN JURY INSTRUCTIONS 11.29 (2d ed. 1993).

¹⁵⁹See WHITE & SUMMERS, *supra* note 105, § 10-4, at 453.

¹⁶⁰ALA. CODE § 7-2-715 cmt. 5 (1975). For an excellent discussion of how the doctrine of proximate cause under U.C.C. § 2-715(b)(2) limits recovery when a plaintiff acts unreasonably, see *Erdman*, 271 A.2d 744.

¹⁶¹See WHITE & SUMMERS, *supra* note 105, § 11-8, at 468-74.

¹⁶²See *Ala. Power Co. v. Harmon*, 483 So. 2d 386, 389 (Ala. 1986); *S. Pine Elec. Coop. v. Burch*, 878 So. 2d 1120, 1127 (Ala. 2003).

abandon this standard. This standard has no grounding whatsoever in the common law outside of Alabama, and was invented to reconcile ancient Alabama common law evidentiary rules. In place of the “some direct evidence” rule, Alabama courts should apply the rule of reasonable certainty, which is a special rule of evidence applicable to all consequential damages claims.¹⁶³ The rule of reasonable certainty already applies both to warranty claims under section 7-2-715(2)(b) and common law contract claims in Alabama.¹⁶⁴

The rule of reasonable certainty is a rule of evidence that requires a higher degree of proof than the preponderance of the evidence standard in cases where consequential damages are sought.

[The requirement of certainty] thus imposed on the injured party a distinctly more onerous burden than that imposed by the ordinary requirements that he make out his case by a “preponderance of the evidence” and manifested a judicial reluctance to recognize interests that are difficult or impossible to measure in money.¹⁶⁵

In a contract or warranty action in Alabama, the rule of reasonable certainty can be met if the plaintiff can prove one of three things: (1) actual physical injury (like a broken bone, for example); (2) corroborating medical evidence of a mental injury (lay testimony concerning the plaintiff's emotional state is insufficient); or (3) tortious breach of contract, which requires the plaintiff to prove that the defendant is guilty of an independent tort that permits a mental anguish recovery.

There is a substantial difference between *feeling* concerned, depressed, and apprehensive and being diagnosed and treated for clinical depression

¹⁶³See generally *Kmart Corp. v. Kyles*, 723 So. 2d 572 (Ala. 1998).

¹⁶⁴E. ALLEN FARNSWORTH, *CONTRACTS* § 12.15, at 921-22 (2d ed. 1990); *Mannington Wood Floors, Inc. v. Port Epes Transport, Inc.*, 669 So. 2d 817, 823 (Ala. 1995) (recognizing that the rule of reasonable certainty applies in contract claims where consequential damages are sought); ALA. CODE § 7-2-715(2)(b) cmt. 4 (1975) (rule of certainty applies in warranty claims); WHITE & SUMMERS, *supra* note 105, § 10-4, at 449-51 (same); see also *RESTATEMENT (SECOND) OF CONTRACTS* § 352 (1981) (“Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.”).

¹⁶⁵FARNSWORTH, *supra* note 164, § 12.15, at 921-22; see also *Mannington Wood Floors*, 669 So. at 823 (holding that the rule of reasonable certainty requires a special proof of consequential damages claims).

or some other real mental injury. “Feelings” are a state of mind—not an injury.¹⁶⁶ The task of the law, therefore, is to provide meaningful standards to make the distinction between hurt feelings and actionable damage. This task is particularly difficult in contract and warranty actions in which the basis of the injury is mere property damage.

When mental anguish is predicated on a physical injury, such a claim will always satisfy the rule of certainty since the physical injury serves to authenticate the accompanying mental suffering:

Where there has been a physical injury to a person, under circumstances warranting the recovery of compensatory damages therefor, mental suffering, which is a natural incident thereto, furnishes one of the elements of recoverable damages, and in such case the jury may always consider the element of mental suffering and award compensation therefor. The body and mind are so closely connected that the mind is, of necessity, affected by an injury to the body.¹⁶⁷

Absent proof of physical harm, additional proof is necessary to meet the reasonable certainty standard. For example, in tort actions in Alabama, mere property damage—standing alone—will never support a mental anguish award.¹⁶⁸ Even those jurisdictions that permit mental anguish recoveries in cases alleging negligent infliction of emotional distress require evidence of physical injury, mental illness, or at least physical symptoms to support a recovery.¹⁶⁹ This is the case because the existence

¹⁶⁶See *Mitchell v. Winn-Dixie Stores, Inc.*, 536 So. 2d 934 (Ala. 1988) (distinguishing between a mental disturbance that qualifies as an injury under Article I, Section 13 of the Alabama Constitution, as opposed to mental disturbance that is not a recognized injury under the Alabama Constitution).

¹⁶⁷*Birmingham Waterworks Co. v. Martini*, 2 Ala. App. 652, 56 So. 830 (1911) (citation omitted). The RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981) agrees with the view that physical injury will support a mental anguish claim in a breach of contract action. *Murphy* also mentions that a plaintiff may recover mental anguish damages if he is personally injured. *Murphy*, 141 So. at 657.

¹⁶⁸*Wal-Mart Store, Inc. v. Bowers*, 752 So. 2d 1201 (Ala. 1999) (holding that the insult and contumely standard does not apply to negligence actions in Alabama involving only property damage; instead, the zone of danger doctrine applies); *Reinhardt Motors, Inc. v. Boston*, 516 So. 2d 509, 511 (Ala. 1986) (holding that property damage must be occasioned by insult or contumely to support a mental anguish award).

¹⁶⁹*Roes v. FHP, Inc.*, 91 Haw. 470, 474 n.6, 985 P.2d 661, 665, n.6 (1999) (holding emotional distress arising out of property damage is precluded by statute unless the plaintiff proves actual physical injury or mental illness); *Barnhill v. Davis*, 300 N.W.2d

of mere property damages cannot corroborate mental injury. No self-respecting psychologist ever would diagnose mental injury by asking the patient, "Does your roof leak?" Yet this is precisely how Alabama juries are asked to decide whether to award mental anguish damages when the rule of reasonable certainty is not applied: the existence of property damage is the determining factor for awarding damages for mental harm.

When actual physical harm is not present, the rule of reasonable certainty will still support a mental anguish recovery if the plaintiff can offer either corroborating medical evidence of mental injury, or evidence that the defendant committed a tort that would permit the recovery of damages for mental harm. Examples applying both of these principles in Alabama law are discussed in the next paragraphs.

When a plaintiff seeks future mental anguish in a tort case, the law requires proof by a reasonable certainty, which requires corroborating medical testimony. This standard applies because the issue of whether someone will suffer future mental anguish—even where the claim is based on actual physical harm—is highly subjective.¹⁷⁰ The same concerns apply to past and present mental anguish in a case where the plaintiff suffers no physical injury, when the only fact that anchors the claim for mental harm is mere property damage. Past or present mental anguish predicated on mere property damage is just as subjective as future mental anguish based on a physical injury, if not more so. The rule of reasonable certainty should be applied for this reason.¹⁷¹

104, 107 (Iowa 1981) (stating that "compensable mental distress should ordinarily be accompanied with physical manifestations of the distress"); *Vienire v. Ford Motor Credit Co.*, 401 A.2d 148, 154-55 (Me. 1979) (holding recovery for the negligent infliction of emotional distress is permitted only where the plaintiff proves physical injury or substantial distress manifested by objective symptomatology); *Corso v. Merrill*, 119 N.H. 647, 659, 406 A.2d 300, 308 (1979) (holding that mental harm is not actionable in a claim for negligent infliction of emotional distress unless it is accompanied by objective physical symptoms).

¹⁷⁰*Jones v. Fortner*, 507 So. 2d 908, 910 (Ala. 1987); *Collins v. Wingham*, 277 Ala. 129, 132-33, 167 So. 2d 690, 693-94 (1964); 22 AM. JUR. 2D *Damages* § 765 (1964); Danny R. Veilleux, Annotation, *Necessity of Expert Testimony on Issue of Permanence of Injury and Future Pain and Suffering*, 20 A.L.R.5th 1 (1994).

¹⁷¹The rule of reasonable certainty differs somewhat in contract as opposed to tort claims. In contract, "[d]amages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty." RESTATEMENT (SECOND) OF CONTRACTS § 352 (1981). In tort, "[o]ne to whom another has tortiously caused harm is entitled to compensatory damages for the harm if, but only if, he establishes by proof

Similarly, under bankruptcy law, a debtor may sue a creditor for the violation of the automatic stay under Bankruptcy Code section 362(h)¹⁷² for abusive debt collection practices, and obtain mental anguish damages if such damages are proven with reasonable certainty.¹⁷³ Illinois bankruptcy courts fashioned this rule.¹⁷⁴ This standard has been accepted elsewhere, including Alabama.¹⁷⁵ A majority rule has emerged that defines how a plaintiff proves mental anguish to a reasonable certainty. Mental distress “must be more than ‘fleeting, inconsequential, and medically insignificant’ to be compensable.”¹⁷⁶ “[T]here must be some medical or other corroborating evidence to support the debtor’s claim which shows that the debtor suffered something more than just fleeting and inconsequential distress, embarrassment, humiliation and annoyance.”¹⁷⁷

Thus, similar to tort law, bankruptcy law requires mental anguish to be proven with corroborating medical evidence in order to meet the reasonable certainty standard. There is no reason that the rule of reasonable certainty in contract or warranty actions in Alabama should demand anything less.

The third and final item of proof that will satisfy the reasonable certainty standard is proof of an independent tort that qualifies the plaintiff for a recovery separate and apart from contract doctrine. In *F. Becker Asphaltum Roofing Co. v. Murphy*, the Alabama Supreme Court held that evidence of “tortious” breach of contract will support a mental anguish award.¹⁷⁸ The *Murphy* court described this standard as requiring the plaintiff to prove that the defendant’s conduct violated a tort duty in

the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.” RESTATEMENT (SECOND) OF TORTS § 912 (1979).

¹⁷²11 U.S.C. § 362(h) (2000).

¹⁷³See *Aiello v. Providian Fin. Corp.*, 257 B.R. 245, 249 (N.D. Ill. 2000); *In re Sumpter*, 171 B.R. 835, 844 (Bankr. N.D. Ill. 1994).

¹⁷⁴*Aiello*, 257 B.R. 245; *In re Sumpter*, 171 B.R. 835.

¹⁷⁵*In re Bryant*, 294 B.R. 791, 800 (Bankr. S.D. Ala. 2002).

¹⁷⁶*Aiello*, 257 B.R. at 250 (quoting *In re Crispell*, 73 B.R. 375, 380 (Bankr. E.D. Mo. 1987)).

¹⁷⁷*Id.* at 251 (citing *In re Aiello*, 231 B.R. 684, 691 (Bankr. N.D. Ill. 1999)).

¹⁷⁸224 Ala. 655, 141 So. 630, 657 (1932) (citing *Vinson v. S. Bell Tel. & Tel. Co.*, 188 Ala. 292, 66 So. 100 (1914)).

addition to a contract duty.¹⁷⁹ This holding was separate from the court's pronouncement of the *Murphy* rule, which this Article has shown was based on a misreading of a legal encyclopedia article. The reasonable certainty standard is met when there is an independent tort, since a jury can infer that a plaintiff would suffer mental harm when the defendant's conduct is sufficiently egregious. This rule is consistent with Bankruptcy Code section 362(h)¹⁸⁰ claims as well, which permit a mental anguish recovery where the creditor's conduct is so egregious and extreme that mental harm can be presumed objectively.¹⁸¹

Alabama law has several well-developed doctrines for determining whether to award mental anguish damages in tort actions. These standards share a common aim: they are designed to authenticate mental harm by requiring proof of certain kinds of conduct from which a jury can infer that mental harm reasonably resulted. Stated differently, the defendant's conduct has to be sufficiently bad that a reasonable plaintiff would likely experience mental injury as a result. The following is a summary of Alabama's mental anguish standards in this regard.

(1) In a negligence case, a plaintiff must show actual physical injury or immediate risk of physical harm within the "zone of danger."¹⁸²

(2) In an outrage case (intentional infliction of emotional distress), a plaintiff must show distress "so severe that no reasonable person could be expected to endure it" and conduct "so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society."¹⁸³

¹⁷⁹*Murphy*, 141 So. at 632 (involving facts establishing that the defendant was also "negligent" in the performance of the duty). The tortious breach of contract standard also was discussed in *Thagard v. Vafes* in the context of the breach of a physician's contractual duty that resulted in the death of a patient. 218 Ala. 609, 119 So. 647 (1928).

¹⁸⁰11 U.S.C. § 362(h) (2000).

¹⁸¹*Bryant*, 294 B.R. at 800; *In re Taylor*, 263 B.R. 139, 152-53 (Bankr. N.D. Ala. 2001); *Aiello*, 231 B.R. at 691 (citations omitted).

¹⁸²*AALAR Ltd. v. Francis*, 716 So. 2d 1141, 1148 (Ala. 1998); see also *Ex parte Grand Manor, Inc.*, 778 So. 2d 173, 179 (Ala. 2000) (involving plaintiffs who could not recover mental anguish damages in a mobile home case under a negligence theory because they did not prove physical injury or immediate risk of physical harm).

¹⁸³*Am. Rd. Serv. Co. v. Inmon*, 394 So. 2d 361, 365 (Ala. 1980).

(3) In a trespass or conversion case, the plaintiff must show that the defendant acted under circumstances of insult or contumely to recover mental anguish damages.¹⁸⁴

(4) In an assault and battery case, mental anguish damages are recoverable generally; however, these cases involve battery (*i.e.*, facts involving violence).¹⁸⁵

(5) In a nuisance case, the plaintiff must show that the defendant acted under circumstances of “malice, insult, inhumanity or contumely” to recover mental anguish damages.¹⁸⁶

(6) In a malicious prosecution case, a plaintiff may recover mental anguish, provided all the elements of the cause of action are proven, including substantial evidence that the defendant acted without probable cause and with malice.¹⁸⁷

(7) In an insurance bad faith case, mental anguish damages are recoverable provided the plaintiff proves that the defendant intentionally refused to pay the claim and, in a “normal” case, that the plaintiff is entitled to a directed verdict on the contract claim.¹⁸⁸

(8) In a fraud case, a plaintiff may recover mental anguish damages on proof that the defendant committed “willful” fraud.¹⁸⁹

In each setting, there must be something *more* than the breach of an ordinary legal duty to substantiate the authenticity of a mental anguish claim. If “hurt feelings” alone were actionable, then the courts would be overrun with litigation.¹⁹⁰

The preceding discussion illustrates that mental anguish damages claims must be proven with reasonable certainty. Mere property damage, coupled with the plaintiff’s self-serving testimony, should never be sufficient evidence to prove the existence of mental anguish.¹⁹¹

¹⁸⁴New Plan Realty Trust v. Morgan, 792 So. 2d 351, 364 (Ala. 2000).

¹⁸⁵Powell v. Bingham, 29 Ala. App. 248, 196 So. 154 (1940).

¹⁸⁶Seale v. Pearson, 736 So. 2d 1108, 1113 (Ala. Civ. App. 1999).

¹⁸⁷Delchamps, Inc. v. Bryant, 738 So. 2d 824, 831, 836 (Ala. 1999).

¹⁸⁸Alfa Mut. Fire Ins. Co. v. Thomas, 738 So. 2d 815, 822 (Ala. 1999).

¹⁸⁹Reserve Nat’l Ins. Co. v. Crowell, 614 So. 2d 1005, 1011-12 (Ala. 1993).

¹⁹⁰Mitchell v. Winn-Dixie, 536 So. 2d 934, 936 (Ala. 1988) (“The law cannot entertain such claims as this if our legal system is to avoid collapse from the burdens placed upon it by an increasingly litigious society.”).

¹⁹¹See *In re* Air Crash Disaster Near New Orleans, La. on July 9, 1982, 764 F.2d 1084, 1087-88 (5th Cir. 1985) (holding that a strong showing of causation is required because mental anguish is subjective and susceptible to fabrication or exaggeration).

E. Procedural Reforms

Bringing Alabama substantive law in line with controlling authorities will require an adjustment to procedural law as well. *Hadley v. Baxendale* and its progeny correctly teach that mental anguish damages in contract are considered special or consequential damages¹⁹²—not general damages, as the Alabama Court of Civil Appeals incorrectly concluded in *Walker Builders, Inc. v. Lykens*.¹⁹³ As such, mental anguish damages should be governed by Alabama Rule of Civil Procedure 9(g), which requires special damages to be specifically pleaded in the complaint.¹⁹⁴ The pleading rules associated with special damages should be applied to mental anguish claims in contract and warranty actions.

Rules governing the discovery and admissibility of evidence should be modified to address due process concerns. The rule of reasonable certainty permits a plaintiff to prove mental injury through evidence of (1) actual physical injury; (2) corroborating medical evidence of a mental injury; or (3) tortious breach of contract or warranty, which requires the plaintiff to prove that the defendant is guilty of an independent tort that permits a mental anguish recovery. When a plaintiff's case can be made through evidence of actual physical injury or tortious breach of contract or warranty, both plaintiff and defendant have equal access to relevant discoverable evidence. In the case of a physical injury, the plaintiff's medical records can be subpoenaed. In the case of an independent tort, both sides can gather and introduce opposing evidence on the facts giving rise to the tort. Thus, no procedural reforms are necessary.

However, whenever the plaintiff proves mental harm with corroborating evidence of mental harm, through psychological or psychiatric expert testimony, for example, the defendant should have equal access to similar proof. The plaintiff should be held to have waived his psychotherapist-patient privilege by placing his mental state at issue.¹⁹⁵ Furthermore, the

¹⁹²156 Eng. Rep. 145 (1854).

¹⁹³628 So. 2d 923, 924 (Ala. Civ. App. 1993).

¹⁹⁴ALA. R. CIV. P. 9(g); *see also* June Rodd T/A the Studio of Havelock v. W.H. King Drug Co., 30 N.C. App. 564, 228 S.E.2d 35 (1976) (holding special damages under section 2-715(2) of the Uniform Commercial Code must be specially pleaded under Rule 9(g)).

¹⁹⁵*Williams v. The Gillette Co.*, No. 3:02 CV 2213, 2004 WL 717173 (D. Conn. Mar. 24, 2004) (finding the privilege waived when plaintiff commences an action for recovery

defendant should be permitted to have the plaintiff evaluated by an independent mental health professional so that an opposing point of view can be offered at trial.¹⁹⁶ This would give both sides adequate due process.

Finally, because the rule of reasonable certainty governs the quantum and quality of evidence necessary to make a case for mental anguish, Alabama's appellate courts should apply this rule in lieu of the current "some direct evidence" rule when evaluating whether a verdict comprised of mental anguish damages is based on sufficient evidence. Alabama will no longer need the "some direct evidence rule" that it currently employs to weed out spurious claims from the good ones. Although that test was well intentioned, it actually works very poorly. Currently, the Alabama Supreme Court considers the best evidence to be the plaintiff's own self-serving and anecdotal testimony. Such evidence is very unreliable since plaintiffs, through their own testimony, will almost always inflate the duration and severity of mental harm. Furthermore, plaintiffs rarely admit to other causes for mental harm; instead, plaintiffs' testimony almost always emphasizes property damages as the culprit for mental suffering. With the "some direct evidence" standard eradicated, appellate courts can focus a much simpler and more reliable test: whether the plaintiff's evidence meets the rule of reasonable certainty. The remaining appellate standards will still apply. A verdict should be upheld where the plaintiff has established mental harm through substantial evidence of an actual physical injury, corroborating medical evidence of mental harm, or evidence of a tortious breach of contract or warranty. The

based on mental condition); *Lanning v. S.E. Pa. Transp. Auth.*, Nos. Civ. A. 97-593 & Civ. A. 97-1161, 1997 WL 597905 (E.D. Pa. Sept. 17, 1997) (holding that a claim for emotional injury waives the psychotherapist-patient privilege); *Torretto v. I.B. Diffusion L.P.*, No. 92 C 2758, 1996 WL 563540 (N.D. Ill., Sept. 30, 1996) (finding the privilege waived when the plaintiff alleges intentional infliction of emotional distress); *Topol v. Trustees of the Univ. of Pa.*, 160 F.R.D. 476, 477 (E.D. Pa. 1995) (holding the psychotherapist-patient privilege waived when the plaintiff alleges emotional distress in the complaint); *Suggs v. Capital Cities/ABC, Inc.*, No. 86 Civ. 2774, 1991 WL 73972 (S.D.N.Y. 1991) (same); *Sheff v. Mayo*, 645 So. 2d 181 (Fla. Ct. App. 1994) (same). *But see Morrisette v. Kennebec County*, No. Civ. 01-01-B-S, 2001 WL 969014 (D. Me. Aug. 21, 2001) (order denying disclosure of mental health records in an action seeking to recover damages for emotional distress).

¹⁹⁶*Pearson v. Norfolk-Southern Ry.*, 178 F.R.D. 580 (M.D. Ala. 1998) (citing *Schlagenhauf v. Holder*, 379 U.S. 104, 118-19, 85 S. Ct. 234, 243, 13 L. Ed. 2d 152, 162 (1964)).

appellate courts should remit a verdict under existing standards when there is evidence of juror misconduct, bias, passion, prejudice, corruption, improper motive, or cause inconsistent with the truth and the facts.

VI. Conclusion

For a century, courts around the country have understood the danger of permitting recovery of mental anguish damages in a contract action.

The reason why [mental anguish damages in contract should not be allowed] is found in the remoteness of such damages, and in the metaphysical character of such an injury considered a part from physical pain. Such injuries are generally more sentimental than substantial. Depending largely upon physical and nervous condition, the suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which an injury can be justly compensated or even approximately measured. Easily simulated and impossible to disprove, it falls within all the objections to speculative damages, which are universally excluded, because of their uncertain character. That damages so imaginary, so metaphysical, so sentimental, shall be ascertained and assessed by a jury with justness, not by way of punishment to the defendant but as mere compensation to the plaintiff is not to be expected.¹⁹⁷

Despite this fact, Alabama embarked on an ill-conceived judicial experiment, which has had unintended, but nevertheless significant, results. The auto and home industries, fearing catastrophic verdicts before Alabama juries, now require customers, nearly across-the-board, to enter into pre-dispute binding arbitration agreements as a condition of doing business. These industries have effectively divorced themselves from the Alabama civil justice system in hopes of obtaining fairer and more just awards before arbitrators.

Ironically, this unique trend is predicated on a simple mistake that occurred in 1932: The Alabama Supreme Court misread a legal encyclopedia article and invented a contract doctrine that conflicts with state law everywhere. This change should be recognized and addressed. This

¹⁹⁷W. Union Tel. Co. v. Chouteau, 28 Okla. 664, 673, 115 P. 879 (Okla. 1911) (quoting Wadsworth v. Tel. Co., 86 Tenn. 695, 8 S.W. 574, 582 (1888) (Judge Lurton dissenting)).

Article has set forth a number of proposals that the authors believe will bring Alabama in line, not only with the law of other states, but also its own law. The authors are not advocating the invention of new contract doctrine. Instead, the authors urge Alabama courts simply to recognize the mistake made in *Murphy* and apply already existing Alabama law that works very well to achieve its aim: to distinguish between spurious claims, which presently are taxed unfairly against defendants, and legitimate claims where plaintiffs deserve real recoveries.

Appendix
A Decade of Arbitration Cases Decided
by Appellate Courts in Alabama
(September 1995 - June 2004)

Automobiles

Dan Wachtel Ford, Lincoln, Mercury, Inc. v. Modas, No. 1022087, 2004 WL 759261 (Ala. Apr. 9, 2004) (compelling arbitration); Serra Toyota, Inc. v. Johnson, 876 So. 2d 1125 (Ala. 2003) (remanding for arbitration); Capitol Chevrolet & Imports v. Payne, 876 So. 2d 1106 (Ala. 2003) (finding no contract for arbitration); Washington v. Bill Heard Chevrolet, 876 So. 2d 1103 (Ala. 2003) (affirming arbitration); Parkway Dodge v. Hawkins, 854 So. 2d 1129 (Ala. 2003) (remanding for arbitration); McConnell Auto. Corp. v. Jackson, 849 So. 2d 159 (Ala. 2002) (refusing to compel arbitration); Chesser v. AmSouth Bank, 846 So. 2d 1082 (Ala. 2002) (granting arbitration of a contract for a used vehicle); Mostella v. N&N Motors, 840 So. 2d 877 (Ala. 2002) (remanding for a decision on the merits when interstate commerce is not present for the enforcement of Federal Arbitration Act); Vann v. First Cmty Credit Corp., 834 So. 2d 751 (Ala. 2002) (affirming arbitration); Jim Burke Auto. v. McGuire, 826 So. 2d 122 (Ala. 2002) (compelling arbitration for a signatory defendant); Keel Motors Inc. v. Tolbert, 821 So. 2d 963 (Ala. 2001) (denying arbitration when the sale of a used vehicle did not substantially affect interstate commerce); Credit Sales, Inc. v. Crimm, 815 So. 2d 540 (Ala. 2001) (compelling arbitration); Premiere Auto. Group v. Welch, 794 So. 2d 1078 (Ala. 2001) (remanding with instruction for limited discovery before conducting a hearing on the execution of arbitration agreements); Tefco Fin. Co. v. Green, 793 So. 2d 755 (Ala. 2001) (holding an arbitration agreement is not enforceable when interstate commerce is not involved); *Ex parte* Lovejoy, 790 So. 2d 933 (Ala. 2000) (holding an arbitration agreement was not broad enough to include an insurer); Fountain Fin., Inc. v. Hines, 788 So. 2d 155 (Ala. 2000) (affirming the denial of arbitration in an incident stemming from the repossession of a vehicle); Capitol Chevrolet & Imports v. Grantham, 784 So. 2d 285 (Ala. 2000) (holding an arbitration agreement binding for claims against a dealer and a manufacturer because of an agency relationship); Parkway Dodge, Inc. v. Yarbrough, 779 So. 2d 1205 (Ala. 2000) (compelling arbitration with a dealer but denying arbitration with a manufacturer); Williams, Inc. v. Ivey, 777 So. 2d 94 (Ala. 2000) (denying enforcement of an arbitration agreement obtained by fraud); *Ex parte* Jim Burke Auto., 776 So. 2d 118 (Ala. 2000) (granting limited discovery regarding the agreement to arbitrate); Brebaker Motors v. Belser, 776 So. 2d 110 (Ala. 2000) (denying the enforcement of arbitration as an action not within the scope of the agreement); Mitchell Nissan, Inc. v. Foster, 775 So. 2d 138 (Ala. 2000) (holding

an arbitration agreement enforceable); *Crown Pontiac, Inc. v. Davis*, 773 So. 2d 1005 (Ala. 2000) (holding an arbitration agreement in an unsigned contract enforceable when the contract is accepted and acted upon); *Jack Ingram Motors v. Ward*, 768 So. 2d 362 (Ala. 1999) (per curiam) (holding a transaction was not subject immediately to arbitration because of possible fraud in the inducement of the agreement, and remanding for discovery); *Ex parte Foster*, 758 So. 2d 516 (Ala. 1999) (per curiam) (holding that an arbitrator is to determine the issue of arbitration when an arbitration agreement includes disputes over the enforceability of the arbitration provision); *Premiere Chevrolet v. Headrick*, 748 So. 2d 891 (Ala. 1999) (holding that a trial court decides arbitrability of claims when the evidence is not clear that the parties agree to arbitrate disputes); *Ex parte Perry*, 744 So. 2d 859 (Ala. 1999) (compelling arbitration); *Ex parte Payne*, 741 So. 2d 398 (Ala. 1999) (vacating an order to compel arbitration as a retail purchase order is not a binding contract); *Jim Burke Auto. v. Murphy*, 739 So. 2d 1084 (Ala. 1999) (holding an arbitration agreement not unconscionable when a purchaser failed to present evidence of any matters the court has recognized as material to a determination of unconscionability, including the inability to buy a car from another source without first signing an arbitration agreement); *Nissan Motor Acceptance Corp. v. Jackson*, 738 So. 2d 812 (Ala. 1999) (holding an assignee is not entitled to compel arbitration in the purchase of a used vehicle); *Ex parte Waites*, 736 So. 2d 550 (Ala. 1999) (upholding an arbitration agreement); *Quality Truck & Auto Sales v. Yassine*, 730 So. 2d 1164 (Ala. 1999) (holding arbitration enforceable); *Value Auto Credit v. Talley*, 727 So. 2d 61 (Ala. 1999) (reversing the trial court's order denying a motion to compel arbitration); *Infiniti of Mobile, Inc. v. Office*, 727 So. 2d 42 (Ala. 1999) (holding an arbitration agreement binding on a third party beneficiary); *Med Ctr. Cars v. Smith*, 727 So. 2d 9 (Ala. 1998) (not allowing arbitration on a class-wide basis); *Tom Williams Motors v. Thompson*, 726 So. 2d 607 (Ala. 1998) (denying arbitration of claims of a nonsignatory party); *Anniston Lincoln Mercury Dodge v. Conner*, 720 So. 2d 898 (Ala. 1998) (concluding the arbitrator is to decide the question of arbitrability); *Anderson Bros. Chrysler Plymouth Dodge v. Hadley*, 720 So. 2d 895 (Ala. 1998) (reversing the trial court's denial of arbitration where the dealer did not sign the contract); *Ex parte Dan Tucker Auto Sales*, 718 So. 2d 33 (Ala. 1998) (requiring the initiating party to prepay the costs of arbitration); *Ex parte Dickinson*, 711 So. 2d 984 (Ala. 1998) (finding that a nonsignatory party cannot be compelled to arbitrate); *Ford Motor Co. v. Hall*, 709 So. 2d 1198 (Ala. 1998) (per curiam) (denying arbitration); *Ex parte Pointer*, 714 So. 2d 971 (Ala. 1997) (holding an unsigned arbitration agreement not binding); *Nissan Motor Acceptance Corp. v. Ross*, 703 So. 2d 324 (Ala. 1997) (holding an assignee may enforce an arbitration provision to which an assignor agreed); *Carl Gregory Chrysler-Plymouth, Inc. v. Barnes*, 700 So. 2d 1358 (Ala. 1997) (per curiam) (denying arbitration where a party

did not agree to arbitrate disputes); *Hurst v. Tony Moore Imports*, 699 So. 2d 1249 (Ala. 1997) (holding that the Federal Arbitration Act preempts state law); *Crown Pontiac, Inc. v. McCarrell*, 695 So. 2d 615 (Ala. 1997) (holding an arbitration is not enforceable in the purchase of a used car where the merger clause nullified the contract terms); *Coastal Ford, Inc. v. Kidder*, 694 So. 2d 1285 (Ala. 1997) (compelling arbitration); *Ryan Warranty Servs. v. Welch*, 694 So. 2d 1271 (Ala. 1997) (affirming the denial of arbitration of a used car mechanical repair agreement when the arbitration clause is an issue of contractual interpretation, determined by the intent of the parties, and the trial court found a lack of intent); *Ex parte Jones*, 686 So. 2d 1166 (Ala. 1996) (denying arbitration to an insurer where the contract was between a debtor and a creditor); *Med Ctr. Cars v. Smith*, 682 So. 2d 382 (Ala. 1996) (denying a class certification of an arbitration action where the parties were not similarly situated); *Ex parte Gray*, 686 So. 2d 250 (Ala. 1996) (compelling a customer's arbitration in a dispute against a car salesperson even though the salesperson was a nonsignatory party); *Jim Burke Auto. v. Beavers*, 674 So. 2d 1260 (Ala. 1995) (denying arbitration where the dealer did not prove involvement of interstate commerce); *Ex parte Phelps*, 672 So. 2d 790 (Ala. 1995) (compelling arbitration even though the party moving to arbitrate had taken steps to litigate the claim); *Valley Fin., Inc. v. Owens*, 733 So. 2d 439 (Ala. Civ. App. 1999) (holding an arbitration agreement enforceable as between a debtor and a creditor); *Crown Pontiac, Inc. v. Savage*, 723 So. 2d 1274 (Ala. Civ. App. 1998) (holding an arbitration agreement includes disputes involving the condition of the motor vehicle); *Crown Pontiac, Inc. v. Charley*, 710 So. 2d 435 (Ala. Civ. App. 1997) (denying arbitration when the dealer did not comply with the terms of the agreement in filing for arbitration within the time limits of the contract).

Banking

AmSouth Bank v. Looney, 883 So. 2d 1207 (Ala. 2003) (granting a motion to compel arbitration); *SouthTrust Corp. v. James*, 880 So. 2d 1117 (Ala. 2003) (reversing the trial court to compel arbitration); *SouthTrust Bank v. Ford*, 835 So. 2d 990 (Ala. 2002) (holding contract claims subject to arbitration); *Compass Bank, Inc. v. Snow*, 823 So. 2d 667 (Ala. 2001) (vacating a class certification); *SouthTrust Bank v. Williams*, 775 So. 2d 184 (Ala. 2000) (remanding for arbitration); *Am. Bankers Life Assurance Co. v. Rice Acceptance Co.*, 739 So. 2d 1082 (Ala. 1999) (affirming a denial of arbitration); *Ex parte Indus. Techs.*, 707 So. 2d 234 (Ala. 1997) (holding the stipulation regarding arbitration unenforceable).

Commercial Construction

Huntsville Utils. v. Consol. Constr. Co., 876 So. 2d 450 (Ala. 2003) (holding that the trial court erred in denying arbitration); *Clement Constr. Group v.*

Coating Sys., 882 So. 2d 971 (Ala. 2003) (affirming a denial of arbitration to individual capacity); Bd. of Water & Sewer Comm'r v. Bill Harbert Constr. Co., 870 So. 2d 699 (Ala. 2003) (affirming a denial of arbitration); Mountain Heating & Cooling v. Van Tassel-Proctor, Inc., 867 So. 2d 1112 (Ala. 2003) (finding legitimate doubts that the parties intended to arbitrate the disagreements); Lee v. YES of Russellville, Inc., 858 So. 2d 250 (Ala. 2003) (affirming a denial of arbitration); Brown v. Pool Depot, Inc., 853 So. 2d 181 (Ala. 2002) (vacating arbitration); Sadd Constr. Co. v. DPF Architects, 851 So. 2d 507 (Ala. 2003) (holding the tort claims were not subject to arbitration); F.A. Dobbs & Sons v. Northcutt, 819 So. 2d 607 (Ala. 2001) (holding an agreement not subject to arbitration); *Ex parte* Allen, 798 So. 2d 668 (Ala. 2001) (remanding for arbitration); *Ex parte* Messer, 797 So. 2d 1079 (Ala. 2001) (holding the claims subject to arbitration); Massey Bros. Chevrolet-Olds-Geo v. W.E. Davis & Sons Constr., 786 So. 2d 1093 (Ala. 2000) (holding the dispute should have been determined by arbitration); Lee v. YES of Russellville, Inc., 784 So. 2d 1022 (Ala. 2000) (affirming a denial of arbitration); Sisters of the Visitation v. Cochran Plastering Co., 775 So. 2d 759 (Ala. 2000) (denying arbitration), *abrogated by* 539 U.S. 52 (2003); *Ex parte* Inverness Constr. Co., 775 So. 2d 153 (Ala. 2000) (denying a writ to compel arbitration); Rogers Found. Repair v. Powell, 748 So. 2d 869 (Ala. 1999) (denying arbitration); Beaver Constr. Co. v. Lakehouse, L.L.C., 742 So. 2d 159 (Ala. 1999) (remanding for arbitration); Delta Constr. Corp. v. Gooden, 714 So. 2d 975 (Ala. 1998) (remanding for arbitration); E. Dredging & Constr. v. Parliament House, 698 So. 2d 102 (Ala. 1997) (affirming a denial of arbitration); *Ex parte* Stallings & Sons, Inc., 670 So. 2d 861 (Ala. 1995) (finding no agreement to arbitrate); Harbar Constr. Co. v. Willis, 871 So. 2d 97 (Ala. Civ. App. 2003) (remanding for arbitration); Mountain Heating & Cooling, Inc. v. Van Tassel-Proctor, Inc., 867 So. 2d 1121 (Ala. Civ. App. 2003) (complying with a Supreme Court remand to deny arbitration); Mountain Heating & Cooling, Inc. v. Van Tassel-Proctor, Inc., 867 So. 2d 1104 (Ala. Civ. App. 2002) (affirming the compelling of arbitration); Dilsaver v. Roger's Found. Repair Co., 866 So. 2d 551 (Ala. Civ. App. 2002) (reversing an order compelling arbitration as not affecting interstate commerce).

Commercial Contracts

Memberworks, Inc. v. Yance, No. 1021460, 2004 WL 1178751 (Ala. May 28, 2004) (compelling arbitration); Northcom, Ltd. v. James, 848 So. 2d 242 (Ala. 2002) (remanding to compel arbitration); Monsanto Co. v. Benton Farm, 813 So. 2d 867 (Ala. 2001) (compelling arbitration for agents of the signatory parties); Karl Storz Endoscopy-Am., Inc. v. Integrated Med. Sys., 808 So. 2d 999 (Ala. 2001) (concluding that the tort claims were within the scope of the arbitration clause); Birmingham News Co. v. Lynch, 797 So. 2d 440 (Ala. 2001) (holding the claims subject to arbitration with exceptions); Marshall Durbin

Farms, Inc. v. Fuller, 794 So. 2d 320 (Ala. 2001) (denying arbitration); *Ex parte* Disc. Foods, Inc., 789 So. 2d 842 (Ala. 2001) (compelling arbitration); Birmingham News Co. v. Horn, 790 So. 2d 939 (Ala. 2000) (compelling arbitration); *Ex parte* Stewart, 786 So. 2d 464 (Ala. 2000) (holding the trial court properly compelled arbitration); J&J Marine, Inc. v. Bay & Ocean Equip. Co., 758 So. 2d 549 (Ala. 2000) (holding the agreement fell within the scope of the arbitration agreement); Colonial Sales-Lease-Rental v. Target Auction & Land Co., 735 So. 2d 1161 (Ala. 1999) (applying an arbitration agreement to both the purchaser and the agent); Selma Med. Ctr. v. Manayan, 733 So. 2d 382 (Ala. 1999) (remanding for arbitration); *Ex parte* Conference Am., Inc., 713 So. 2d 953 (Ala. 1998) (vacating an order of arbitration); Morrison Rest., Inc. v. Homestead Vill. of Fairhope, 710 So. 2d 905 (Ala. 1998) (holding the right to arbitration was waived by filing a writ of mandamus); *Ex parte* Pope, 706 So. 2d 1156 (Ala. 1997) (holding no agreement to arbitrate dispute); Northcom, Ltd. v. James, 694 So. 2d 1329 (Ala. 1997) (holding a contract requires arbitration); Reynolds & Reynolds Co. v. King Autos., 689 So. 2d 1 (Ala. 1997) (holding an arbitration clause enforceable); *Ex parte* Birmingham Airport Auth., 678 So. 2d 757 (Ala. 1996) (setting aside an order of dismissal to reinstate action for arbitration); Hill v. Nat'l Auction Group, Inc., 873 So. 2d 244 (Ala. Civ. App. 2003) (holding a nonsignatory bidder was not subject to an arbitration agreement between the seller and the auctioneer); Matchmaker Int'l of Mobile v. Francis, 753 So. 2d 520 (Ala. Civ. App. 1999) (holding that a delay waived arbitration).

Commercial Vehicles

Gen. Motors Corp. v. Stokes, 885 So. 2d 119 (Ala. 2003) (affirming a denial of arbitration); Wolf Motor Co. v. White, 869 So. 2d 1129 (Ala. 2003) (compelling arbitration); Gen. Motors Corp. v. Stokes, 850 So. 2d 1239 (Ala. 2002) (remanding for arbitration); Bay Lines, Inc. v. Stoughton Trailers, 838 So. 2d 1013 (Ala. 2002) (affirming the trial court's dismissal of the action); Kenworth of Birmingham, Inc. v. Langley, 828 So. 2d 288 (Ala. 2002) (remanding for arbitration regarding the purchase of a tractor-trailer); *Ex parte* Kenworth of Birmingham, Inc., 789 So. 2d 227 (Ala. 2000) (vacating discovery in the arbitration of claim); Kenworth of Dothan, Inc. v. Bruner-Wells Trucking, 745 So. 2d 271 (Ala. 1999) (denying arbitration as to the purchase of reflectors because they were not part of the original purchase); Lipham v. Gen. Motors Corp., 665 So. 2d 190 (Ala. 1995) (preventing an award of mental anguish claims for a commercial vehicle).

Credit Cards

Providian Nat'l Bank v. Screws, No. 1020668, 2003 WL 22272861 (Ala. Oct. 3, 2003) (holding arbitration agreement binding); *Ex parte* Colquitt, 808 So. 2d 1018 (Ala. 2001) (requiring disputes to be resolved through arbitration);

Perry v. Beneficial Nat'l Bank USA, No. CV97-218, 1998 WL 279174 (Ala. Civ. App. May 15, 1998) (holding that class allegations will not defeat an arbitration clause); Williams v. Direct Cable TV, No. CV-97-009, 1997 WL 579156 (Ala. Civ. App. Aug. 13, 1997) (granting a motion to compel arbitration).

Employment Agreements

Alafabco, Inc. v. Citizens Bank, 872 So. 2d 809 (Ala. 2003) (overruling Alabama an decisional law that interpreted the commerce clause of Congress too narrowly); Gayfer Montgomery Fair Co. v. Austin, 870 So. 2d 683 (Ala. 2003) (remanding for arbitration); Baptist Health Sys., v. Mack, 860 So. 2d 1265 (Ala. 2003) (holding a written agreement to arbitrate did exist); *Ex parte* Webb, 855 So. 2d 1031 (Ala. 2003) (vacating arbitration); Potts v. Baptist Health Sys., 853 So. 2d 194 (Ala. 2002) (affirming an arbitration agreement); Ameriquet Mortgage Co. v. Bentley, 851 So. 2d 458 (Ala. 2002) (reversing the trial court's denial of arbitration); Liberty Nat'l Life Ins. Co. v. Douglas, 826 So. 2d 806 (Ala. 2002) (affirming a denial of arbitration due to lack of proof of interstate commerce); Dunigan v. Sports Champions, Inc., 824 So. 2d 720 (Ala. 2001) (dismissing for lack of jurisdiction under the Alabama Arbitration Act); Selma Med. Ctr. v. Fontenot, 824 So. 2d 668 (Ala. 2002) (remanding for arbitration); *Ex parte* Walker Reg'l Med. Ctr., 825 So. 2d 741 (Ala. 2001) (dismissing a petition for writ of mandamus until the discovery was completed on a motion to compel arbitration); Gadsden Budweiser Distrib. Co. v. Holland, 807 So. 2d 528 (Ala. 2001) (remanding for arbitration); *Ex parte* Ephraim, 806 So. 2d 352 (Ala. 2001) (granting a petition to vacate arbitration due to lack of proof regarding a substantial effect on interstate commerce); Ryan's Family Steakhouses v. Brooks-Shades, 781 So. 2d 215 (Ala. 2000) (denying a motion to compel arbitration); U.S. Pipe & Foundry Co. v. Curren, 779 So. 2d 1171 (Ala. 2000) (reversing a denial of arbitration); Jim Walter Res., Inc. v. Argo, 779 So. 2d 1167 (Ala. 2000) (holding an employee's claims subject to arbitration); Allmerica Fin. Life Ins. & Annuity Co. v. Miller, 775 So. 2d 132 (Ala. 2000) (affirming an exemption from arbitration); *Ex parte* Crisona, 743 So. 2d 452 (Ala. 1999) (upholding arbitration); Ryan's Family Steakhouses, Inc. v. Regelin, 735 So. 2d 454 (Ala. 1999) (compelling arbitration); SouthTrust Sec. v. McClellan, 730 So. 2d 620 (Ala. 1999) (remanding for arbitration); Gold Kist, Inc. v. Baker, 730 So. 2d 614 (Ala. 1999) (holding an employee subject to arbitration); *Ex parte* McNaughton, 728 So. 2d 592 (Ala. 1999) (denying a writ of mandamus challenging the trial court's ordering arbitration); Ga. Power Co. v. Partin, 727 So. 2d 2 (Ala. 1998) (remanding for arbitration); *Ex parte* Hagen, 721 So. 2d 167 (Ala. 1998) (denying arbitration because claims are outside the arbitration agreement); *Ex parte* Hood, 712 So. 2d 341 (Ala. 1998) (denying arbitration on the grounds that the employer waived the right to arbitrate); *Ex parte* Beasley, 712 So. 2d 338 (Ala. 1998) (vacating an order to arbitrate because a form the employee signed did not contain an arbitration clause).

Funeral Homes

SCI Ala. Funeral Servs. v. Corley, 883 So. 2d 1206 (Ala. 2003) (compelling arbitration for nonsignatory plaintiffs where their claims were reliant on signatory claims); Servs. Corp. Int'l v. Fulmer, 883 So. 2d 621 (Ala. 2003) (compelling arbitration).

Homes

Elizabeth Homes, L.L.C. v. Gantt, 882 So. 2d 313 (Ala. 2003) (remanding for arbitration); Steele v. Walser, 880 So. 2d 1123 (Ala. 2003) (remanding for arbitration); Jim Walter Homes, Inc. v. Saxton, 880 So. 2d 438 (Ala. 2003) (compelling arbitration); Jim Walter Homes, Inc. v. Spraggins, 853 So. 2d 913 (Ala. 2002) (upholding an arbitration agreement as signed, written contract); Brookfield Constr. Co. v. Van Wezel, 841 So. 2d 220 (Ala. 2002) (holding the claims not subject to arbitration); Aronov Realty Brokerage v. Morris, 838 So. 2d 348 (Ala. 2002) (upholding the trial court's denial of arbitration because the defendants failed to make a prima facie showing that the agreement involved a transaction affecting interstate commerce); *Ex parte* Kampis, 826 So. 2d 819 (Ala. 2002) (vacating an order of arbitration on the grounds that interstate commerce was not affected); *Ex parte* Learakos, 826 So. 2d 782 (Ala. 2002) (holding arbitration not to be compelled because interstate commerce was not affected); Brown v. Dewitt, Inc., 808 So. 2d 11 (Ala. 2001) (holding that a purchase agreement did not affect interstate commerce); Ballard Servs. v. Conner, 807 So. 2d 519 (Ala. 2001) (holding that interstate commerce was substantially affected to compel arbitration); Walter Indus. v. McMillan, 804 So. 2d 1081 (Ala. 2001) (affirming the trial court's denial of arbitration); Benchmark Homes v. Aleman, 786 So. 2d 1101 (Ala. 2000) (enforcing an arbitration agreement); Thermo-Sav, Inc. v. Bozeman, 782 So. 2d 241 (Ala. 2000) (affirming a denial of arbitration); Thompson v. Skipper Real Estate Co., 729 So. 2d 287 (Ala. 1999) (invoking the Federal Arbitration Act); *Ex parte* Bentford, 719 So. 2d 778 (Ala. 1998) (vacating an order compelling arbitration); *Ex parte* Warren, 718 So. 2d 45 (Ala. 1998) (affirming the trial court's compelling of arbitration); *Ex parte* Prendergast, 678 So. 2d 778 (Ala. 1996) (granting a writ to deny arbitration); Lopez v. Home Buyers Warranty Corp., 670 So. 2d 35 (Ala. 1995) (requiring arbitration on remand from the United States Supreme Court); May v. Buchanan, 877 So. 2d 613 (Ala. Civ. App. 2003) (remanding for arbitration in the purchase of a house where termite infestation was undisclosed); McKee v. Hendrix, 816 So. 2d 30 (Ala. Civ. App. 2001) (affirming arbitration).

Insurance

Phila. Am. Life Ins. Co. v. Bender, Nos. 1022141 & 1030029, 2004 WL 1233974 (Ala. June 4, 2004) (remanding for arbitration); Liberty Nat'l Life Ins.

Co. v. Ester, 880 So. 2d 1112 (Ala. 2003) (compelling arbitration where no proof of fraudulent inducement was presented); ECS, Inc. v. Goff Group, Inc., 880 So. 2d 1140 (Ala. 2003) (directing an order for arbitration); Anderson v. Ashby, 873 So. 2d 168 (Ala. 2003) (denial of a motion to compel arbitration as an arbitration clause was unconscionable and unenforceable); Cent. Reserve Life Ins. v. Fox, 869 So. 2d 1124 (Ala. 2003) (holding an arbitration agreement enforceable); Health Ins. Corp. of Ala. v. Smith, 869 So. 2d 1100 (Ala. 2003) (ordering arbitration under the terms of arbitration agreement); Celtic Life Ins. Co. v. Brown, 850 So. 2d 322 (Ala. 2002) (reversing a denial of arbitration); S. Foodservice Mgmt. v. Am. Fidelity Assurance Co., 850 So. 2d 316 (Ala. 2002) (affirming arbitration); Mason v. Acceptance Loan Co., 850 So. 2d 289 (Ala. 2002) (affirming a grant of arbitration); *Ex parte* S. United Fire Ins. Co., 843 So. 2d 151 (Ala. 2002) (issuing a writ of mandamus to compel arbitration); *Ex parte* Celtic Life Ins. Co., 834 So. 2d 766 (Ala. 2002) (holding an arbitration agreement enforceable but a provision providing for punitive damages was invalid); Porter v. Colonial Life & Accident Ins. Co., 828 So. 2d 907 (Ala. 2002) (affirming the judgment of the trial court in compelling arbitration); Voyager Life Ins. Co. v. Hughes, 841 So. 2d 1216 (Ala. 2001) (holding the defendants had waived arbitration rights with regard to one but not all members of the putative classes); Modern Woodmen of Am. v. McElroy, 815 So. 2d 520 (Ala. 2001) (affirming a denial of arbitration by the trial court); Celtic Life Ins. Co. v. McLendon, 814 So. 2d 222 (Ala. 2001) (compelling arbitration); Jericho Mgmt. v. Fid. Nat'l Title Ins. Co., 811 So. 2d 514 (Ala. 2001); Auvil v. Johnson, 806 So. 2d 343 (Ala. 2001) (affirming the trial court's denial of motions to compel arbitration); Blue Cross & Blue Shield of Ala. v. Woodruff, 803 So. 2d 519 (Ala. 2001) (holding a contract was not properly amended to require arbitration); S. United Fire Ins. Co. v. Purma, 792 So. 2d 1092 (Ala. 2001); Liberty Fin., Inc. v. Carson, 793 So. 2d 702 (Ala. 2000) (affirming a denial of arbitration); Old Republic Ins. Co. v. Lanier, 790 So. 2d 922, (Ala. 2000) (holding an arbitration award res judicata); S. United Fire Ins. Co. v. Pierce, 775 So. 2d 194 (Ala. 2000) (remanding for arbitration); United Wis. Life Ins. Co. v. Beaty, 775 So. 2d 191 (Ala. 2000) (holding an arbitration agreement was not retroactive); S. United Fire Ins. Co. v. Howard, 775 So. 2d 156 (Ala. 2000) (compelling arbitration); *Ex parte* Handley, 775 So. 2d 141 (Ala. 2000) (issuing a writ to deny arbitration); Celtic Life Ins. Co. v. Lindsey, 765 So. 2d 640 (Ala. 2000) (reversing a denial of arbitration); Am. Bankers Ins. Co. of Fla. v. Crawford, 757 So. 2d 1125 (Ala. 1999) (remanding for arbitration); *Ex parte* Roberson, 749 So. 2d 441 (Ala. 1999) (issuing a writ to deny arbitration); Commercial Credit Corp. v. Leggett, 744 So. 2d 890 (Ala. 1999) (holding that arbitrability was an issue for the judge not arbitrators); *Ex parte* Caver, 742 So. 2d 168 (Ala. 1999) (denying a writ to overturn arbitration); Woodmen of the World Life Ins. Soc'y v. Harris, 740 So. 2d 362 (Ala. 1999) (remanding for

arbitration); *TranSouth Fin. Corp. v. Bell*, 739 So. 2d 1110 (Ala. 1999) (reversing a denial of arbitration); *Ex parte Shelton*, 738 So. 2d 864 (Ala. 1999) (upholding arbitration); *McDougle v. Silvernell*, 738 So. 2d 806 (Ala. 1999) (holding arbitration binding); *S. United Fire Ins. Co. v. Knight*, 736 So. 2d 582 (Ala. 1999) (affirming the trial court's denial of arbitration because the defendant did not prove a relationship to interstate commerce); *Universal Underwriters Life Ins. Co. v. Dutton*, 736 So. 2d 564 (Ala. 1999) (holding the trial court could not require a dealership to initiate arbitration and to bear all the costs of arbitration); *First Family Fin. Servs. v. Rogers*, 736 So. 2d 553 (Ala. 1999) (compelling arbitration with signatories); *Ex parte Hopper*, 736 So. 2d 529 (Ala.) (vacating an order of arbitration), *vacated by* 740 So. 2d 362 (Ala. 1999); *Am. Gen. Fin., Inc. v. Manley*, 729 So. 2d 260 (Ala. 1998) (per curiam) (reversing the denial of arbitration); *Ex parte Green Tree Fin. Corp.*, 723 So. 2d 6 (Ala. 1998) (vacating a class certification); *Fid. Nat'l Title Ins. Co. of Tenn. v. Jericho Mgmt.*, 722 So. 2d 740 (Ala. 1998) (reversing a denial of arbitration); *Mut. Assurance, Inc. v. Wilson*, 716 So. 2d 1160 (Ala. 1998) (remanding for arbitration); *Ex parte Rager*, 712 So. 2d 333 (Ala. 1998) (finding no error in the trial court compelling arbitration); *Stewart Title of Mobile, Inc. v. Montalvo*, 709 So. 2d 1194 (Ala. 1998) (refusing to compel arbitration); *Am. Bankers Life Assurance Co. v. Rice Acceptance Co.*, 709 So. 2d 1188 (Ala. 1998) (upholding a denial of arbitration); *Ex parte Dyess*, 709 So. 2d 447 (Ala. 1997) (finding no error in compelling arbitration); *Ex parte Smith*, 706 So. 2d 704 (Ala. 1997) (holding a dealer waived arbitration); *Companion Life Ins. Co. v. Whitesell Mfg.*, 670 So. 2d 897 (Ala. 1995) (affirming a denial of arbitration).

Leases

Serra Chevrolet v. Hock, No. 1021446, 2004 WL 870467 (Ala. Apr. 23, 2004) (compelling arbitration); *Hudson v. Outlet Rental Car Sales*, 876 So. 2d 455 (Ala. 2003) (holding the trial court determines the existence of an agreement to arbitrate); *Lanier Worldwide, Inc. v. Clouse*, 875 So. 2d 292 (Ala. 2003) (remanding for arbitration in a photocopier lease); *Ex parte Cobb*, 781 So. 2d 208 (Ala. 2000) (holding the arbitration clause was not enforceable in a void lease agreement); *Mangiafico v. Street*, 767 So. 2d 1103 (Ala. 2000) (dismissing for failure to initiate arbitration); *Thompson Tractor Co. v. Fair Contracting Co.*, 757 So. 2d 396 (Ala. 2000) (holding that the trial court erred in not compelling arbitration).

Loans and Mortgages

Polaris Sales, Inc. v. Heritage Imports, Inc., 879 So. 2d 1129 (Ala. 2003) (remanding for arbitration); *AmSouth Bank v. Dees*, 847 So. 2d 923 (Ala. 2002) (remanding for arbitration); *Conseco Fin. v. Murphy*, 841 So. 2d 1241 (Ala. 2002) (remanding for arbitration); *Vann v. First Cmty. Credit*, 834 So. 2d 751

(Ala. 2002) (affirming a motion to compel arbitration); *Conseco Fin. Corp. v. Sharman*, 828 So. 2d 890 (Ala. 2002) (holding no intertwining exists to compel arbitration); *Ex parte Majors*, 827 So. 2d 85 (Ala. 2002) (issuing a writ denying arbitration as an invalid agreement); *Alternative Fin. Solutions v. Colburn*, 821 So. 2d 981 (Ala. 2001) (affirming a denial of arbitration as interstate commerce not involved in the transaction); *Am. Gen. Fin. v. Morton*, 812 So. 2d 282 (Ala. 2001) (holding the transactions were not interstate commerce, thus denying arbitration); *Huntley v. Regions Bank*, 807 So. 2d 512 (Ala. 2001) (affirming a denial of arbitration); *Ex parte Greenstreet, Inc.*, 806 So. 2d 1212 (Ala. 2001) (limiting discovery in arbitration enforceability); *Ex parte Greenstreet, Inc.*, 806 So. 2d 1203 (Ala. 2001) (ordering a hearing to consider a motion to compel arbitration); *Am. Gen. Fin. v. Branch*, 793 So. 2d 738 (Ala. 2001) (affirming the lower court's denial of the insurer's motion to compel arbitration); *Liberty Fin. v. Johnson*, 787 So. 2d 704 (Ala. 2000) (affirming a denial of arbitration); *First Family Fin. Servs. v. Jackson*, 786 So. 2d 1121 (Ala. 2000) (remanding for arbitration); *Ex parte Williams*, 686 So. 2d 1110, (Ala. 1996) (directing a reconsideration of an order compelling arbitration); *Money Tree, Inc. v. Moore*, 677 So. 2d 1170 (Ala. 1996) (denying a motion to compel arbitration because the contracts involved did not contain arbitration provisions); *Washington Mut. Fin. v. Steele*, 866 So. 2d 556 (Ala. Civ. App. 2003) (affirming a denial of arbitration).

Mobile Homes

Harbor Vill. Home Ctr. v. Thomas, 882 So. 2d 811 (Ala. 2003) (ordering arbitration under the terms of the retail contract as free standing arbitration agreement was not fully integrated); *Ex parte Horton Family Hous., Inc.*, 882 So. 2d 838 (Ala. 2003) (ordering hearing for motion to compel arbitration after limited discovery); *Cavalier Mfg. v. Clark*, 862 So. 2d 634 (Ala. 2003) (compelling arbitration with manufacturer but not dealer as ambiguities in dealer agreements construed against dealer); *Johnson Mobile Homes of Ala. v. Hathcock*, 855 So. 2d 1064 (Ala. 2003) (affirming arbitration of claims by signatory party); *Waverlee Homes, Inc. v. McMichael*, 855 So. 2d 493 (Ala. 2003) (remanding for use of "reasonable impression of partiality" standard after impression of bias); *McDonald v. H&S Homes*, 853 So. 2d 920 (Ala. 2003) (remanding for proper selection of arbitrator); *Stevens v. Phillips*, 852 So. 2d 123 (Ala. 2002) (upholding compelling of arbitration); *Lewis v. Conseco Fin. Corp.*, 848 So. 2d 920 (Ala. 2002) (upholding the granting of finance company's motion to compel arbitration and remanding seller's motion as entire transaction satisfied requirement of interstate commerce); *Bama's Best Hous., Inc. v. Hodges*, 847 So. 2d 300 (Ala. 2002) (upholding arbitration agreement under proper procedure of direct appeal when buyer did not prove economic distress when signing the arbitration agreement); *Conseco Fin. Corp.-Ala. v. Salter*, 846

So. 2d 1077 (Ala. 2002) (overruling the trial court's denial of motion to compel arbitration); *Ronnie Smith's Home Ctr., Inc. v. Luster*, 845 So. 2d 764 (Ala. 2002) (affirming denial of arbitration when appellant relied on separate, contemporaneous writing extinguished by a merger clause in the retail installment agreement); *Belmont Homes v. Law*, 841 So. 2d 237 (Ala. 2002) (remanding for consideration of arbitration agreement in "Acknowledgment and Agreement" contract to which both parties were signatories, rather than the installment contract which was dependent on a merger clause); *Conseco Fin. Corp. of Ala. v. Slay*, 839 So. 2d 617 (Ala. 2002) (dismissing appeal as not ripe for adjudication after denial of arbitration as appellant requested relief for a harm it had not yet suffered); *Ex parte Cain*, 838 So. 2d 1020 (Ala. 2002) (issuing writ of mandamus relief to trial court's order compelling arbitration because manufacturer does not have proof of contract); *Conseco Fin. Corp.—Ala. v. Boone*, 838 So. 2d 370 (Ala. 2002) (holding that mobile home purchaser failed to prove absence of meaningful choice when purchasing mobile home subject to arbitration agreement); *BankAmerica Hous. Servs. v. Lee*, 833 So. 2d 609 (Ala. 2002) (compelling arbitration but remanding requirements of allocation of fees and means for selection of arbitrators as not consistent with installment contracts); *Ex parte Homes of Legend, Inc.*, 831 So. 2d 13 (Ala. 2002) (denying a writ of mandamus for arbitration when the trial court had ordered an informal dispute resolution while a direct appeal is the proper procedure to seek a review of the trial court's denial of a motion to compel arbitration); *Ex parte Cox*, 828 So. 2d 295 (Ala. 2002) (granting writ of mandamus for vacating motion granting arbitration to the manufacturer who was not a party to the sales contract that contained the arbitration clause); *Harold Allen's Mobile Home Factory Outlet v. Butler*, 825 So. 2d 779 (Ala. 2002) (authorizing the trial court to appoint the arbitrator when a provision in the arbitration agreement allowing the vendor to appoint the arbitrator is unconscionable); *Ex parte Tony's Towing*, 825 So. 2d 96 (Ala. 2002) (holding a nonsignatory towing company is not bound by an arbitration clause in a sales agreement between the buyer and the seller, thereby granting the towing company's petition for writ of mandamus to proceed to trial); *Green Tree Fin. Corp. v. Channell*, 825 So. 2d 90, (Ala. 2002) (remanding for enforcement of arbitration clause of installment purchase agreement to assignee); *Ex parte Thicklin*, 824 So. 2d 723 (Ala. 2002) (granting a writ of mandamus vacating a motion to compel arbitration of express-warranty claims and Magnuson-Moss Act violations, severing an arbitration clause prohibiting the arbitrator from awarding punitive damages, and granting a motion to compel arbitration of remainder of claims); *Oakwood Mobile Homes v. Godsey*, 824 So. 2d 713 (Ala. 2001) (affirming the trial court's denial of a motion to compel arbitration when the signature of the third party beneficiary bringing suit was forged); *Cavalier Mfg. v. Jackson*, 823 So. 2d 1237 (Ala. 2001) (finding that the Magnuson-Moss Act did not prohibit enforcement of arbitration agreements

other than for warranties and a provision denying the arbitrator power to award punitive damages unenforceable but severed from remainder of agreement), *overruled in part by Ex parte Thicklin*, 824 So. 2d 723 (Ala. 2002) (holding that a manufacturer violated the Magnuson-Moss Act by failing to disclose the arbitration clause in its written warranty or its consumer manual); *H&S Homes v. McDonald*, 823 So. 2d 627 (Ala. 2001) (allowing discovery to continue before further motions regarding arbitration were considered); *Ex parte Cappaert Mfg. Homes*, 822 So. 2d 385 (Ala. 2001) (issuing a writ of mandamus to arbitrate when the rejection of the arbitrator by the buyers did not constitute a “lapse” under the Federal Arbitration Act); *Blue Ribbon Homes Super Ctr. v. Bell*, 821 So. 2d 186 (Ala. 2001) (remanding to the trial court for an order of arbitration when interstate commerce existed and the defendant did not waive its right to arbitration by invoking the litigation process by filing a motion of removal to federal court); *S. Energy Homes Retail Corp. v. McCool*, 814 So. 2d 845 (Ala. 2001) (granting a writ of mandamus to compel arbitration in the manner consistent with the terms of the agreements between the parties); *Green Tree Fin. Corp. v. Lewis*, 813 So. 2d 820 (Ala. 2001) (remanding for an order consistent with the opinion that the transaction involving a manufactured home had a substantial effect on interstate commerce and the defense of unconscionability did not make the arbitration clause unenforceable); *Equifirst Corp. v. Ware*, 808 So. 2d 1 (Ala. 2001) (denying arbitration when the contract contained the forged signature of an appellee); *Ex parte Early*, 806 So. 2d 1198 (Ala. 2001) (ordering the trial court to vacate an order compelling arbitration to allow the parties to conduct limited discovery before ruling on a motion to arbitration); *Ex parte Smith*, 801 So. 2d 837 (Ala. 2001) (denying a writ to compel arbitration); *Ex parte Palm Harbor Homes, Inc.*, 798 So. 2d 656 (Ala. 2001) (holding that the substantive arbitration provisions of free-standing instruments signed at the time of the signing of the installment contracts could not be used to vary the arbitration provision contained in the installment contract, but the defendants were entitled to mandamus relief from an order compelling arbitration under the Alabama Arbitration Act); *Palm Harbor Homes, Inc. v. Turner*, 796 So. 2d 295 (Ala. 2001) (holding that the Magnuson-Moss Act does not preclude enforcement of an arbitration agreement); *Johnnie’s Homes, Inc. v. Holt*, 790 So. 2d 956 (Ala. 2001) (holding that the Federal Arbitration Act preempted Alabama law, that no duty exists to disclose the existence of an arbitration provision when the signatory does not reveal illiteracy and that the arbitrator will determine the validity of an arbitration agreement, and general contract defenses did not prohibit the enforcement of an arbitration provision); *Oakwood Acceptance Corp. v. Hobbs*, 789 So. 2d 847 (Ala. 2001) (holding the enforcement of an arbitration agreement is a question to be decided by the arbitrator and certain ambiguities are resolved in favor of arbitration); *S. Energy Homes v. McCray*, 788 So. 2d 882 (Ala. 2000) (holding that the Magnuson-Moss

Warranty-Federal Trade Commission Improvement Act did not invalidate the arbitration provisions in a written warranty); *Fleetwood Enters. v. Bruno*, 784 So. 2d 277 (Ala. 2000) (holding an arbitration agreement enforceable and not unconscionable); *Ex parte Meadows*, 782 So. 2d 277 (Ala. 2000) (issuing a writ for jury trial to determine the validity of a contract containing an arbitration provision); *Southland Quality Homes v. Williams*, 781 So. 2d 949 (Ala. 2000) (compelling arbitration as called for in the language of the contract between the parties); *Ex parte Brown*, 781 So. 2d 178 (Ala. 2000) (holding an arbitration agreement not an adhesion contract); *S. Energy Homes v. Nalley*, 777 So. 2d 99 (Ala. 2000) (per curium) (granting a motion to compel arbitration); *Carriage Homes v. Channell*, 777 So. 2d 83 (Ala. 2000) (denying a motion to compel arbitration); *S. Energy Homes v. Gregor*, 777 So. 2d 79 (Ala. 2000) (per curium) (holding the purchasers were bound by the arbitration provisions); *Harold Allen's Mobile Home Factory Outlet v. Early*, 776 So. 2d 777 (Ala. 2000) (holding an arbitration agreement enforceable); *S. Energy Homes v. Davis*, 776 So. 2d 770 (Ala. 2000) (per curium) (compelling arbitration); *Homes of Legend, Inc. v. McCollough*, 776 So. 2d 741 (Ala. 2000) (compelling arbitration to the extent of the arbitration agreement); *S. Energy Homes v. Hennis*, 776 So. 2d 105 (Ala. 2000) (holding that a manufacturer's enclosure of an arbitration agreement in a homeowner's manual does not prove the purchaser assented to arbitration when there was no attempt to enforce the warranty contained therein); *Ex parte Stamey*, 776 So. 2d 85 (Ala. 2000) (upholding an arbitration agreement); *Green Tree Fin. Corp. v. Shoemaker*, 775 So. 2d 149 (Ala. 2000) (upholding an arbitration agreement); *Big Valley Home Ctr. v. Mullican*, 774 So. 2d 558 (Ala. 2000) (concluding that the defendant waived its contractual right to arbitration by invoking the litigation process and not invoking a contractual right to arbitration until the eve of trial); *S. Energy Homes v. Kennedy*, 774 So. 2d 540 (Ala. 2000) (affirming the denial of arbitration to the manufacturer as a nonsignatory party to contract between the dealer and the purchaser); *S. Energy Homes v. Gary*, 774 So. 2d 521 (Ala. 2000) (holding that conspiracy claims against the seller and the manufacturer were inextricably intertwined and subject to arbitration), *overruled in part by Jim Burke Auto. v. McGrue*, 826 So. 2d 122 (Ala. 2002) (applying to the extent that intertwining is not sufficient for compelling arbitration); *Oakwood Mobile Homes v. Barger*, 773 So. 2d 454 (Ala. 2000) (remanding for an order of arbitration when the appellant failed to prove fraud in the inducement); *S. Energy Homes v. Ard*, 772 So. 2d 1131 (Ala. 2000) (granting a motion to order arbitration when the purchasers entered into a binding agreement to arbitrate and the Magnuson-Moss Act does not invalidate arbitration provisions in a written warranty); *S. Energy Homes v. Harcus*, 754 So. 2d 622 (Ala. 1999) (requiring the court to apply Alabama contract law to questions of arbitrability); *Green Tree Fin. Corp. of Ala. v. Vintson*, 753 So. 2d 497 (Ala. 1999) (holding an arbitration agreement

broad enough to include intentional tort claims when it was knowingly and voluntarily signed by the purchasers); *Homes of Legend v. Fields*, 751 So. 2d 1228 (Ala. 1999) (per curiam) (finding no contract claim to arbitrate); *Green Tree Fin. Corp. of Ala. v. Wampler*, 749 So. 2d 409 (Ala. 1999) (holding an arbitration agreement not unconscionable and to be presented to the arbitrator to determine enforceability); *S. Energy Homes v. Parmer*, 742 So. 2d 159, 159 (Ala. 1999) (affirming that “[a]rbitration is matter of contract, and a party cannot be required to submit to arbitration any dispute that he has not agreed to submit” (quoting *A.G. Edwards & Sons, Inc. v. Clark*, 558 So. 2d 358, 362 (Ala. 1990))); *Ex parte Smith*, 736 So. 2d 604 (Ala. 1999) (holding that a purchaser not reading the arbitration clause of a contract before signing it does not render the contract unconscionable); *Crimson Indus. v. Kirkland*, 736 So. 2d 597 (Ala. 1999) (enforcing an arbitration agreement for claims arising prior to the execution of the agreement); *S. Energy Homes v. Lee*, 732 So. 2d 994 (Ala. 1999) (holding that written and implied warranty claims are not arbitrable under the Magnuson-Moss Act), *overruled by S. Energy Homes v. Ard*, 772 So. 2d 1131, 1135 (Ala. 2000) (holding that the “Magnuson-Moss Act does not invalidate arbitration provisions in a written warranty”); *Patrick Home Ctr. v. Karr*, 730 So. 2d 1171 (Ala. 1999) (holding that lack of mutuality of remedy, alone, does not make an arbitration agreement unconscionable); *Ex parte Parker*, 730 So. 2d 168 (Ala. 1999) (upholding an arbitration agreement); *Green Tree Fin. Corp. v. Davis*, 729 So. 2d 329 (Ala. 1999) (compelling arbitration); *Ex parte Napier*, 723 So. 2d 49 (Ala. 1998) (upholding an arbitration agreement for claims against nonsignatories because of intertwining); *Ex parte Green Tree Fin. Corp.*, 723 So. 2d 6, 10 n.3 (Ala. 1998) (stating that “arbitration agreements cannot be forced into the mold of class-action treatment without defeating the parties’ contractual rights”); *Brilliant Homes, Ltd. v. Lind*, 722 So. 2d 753 (Ala. 1998) (finding broad arbitration conferred upon the arbitrator the power to decide the preliminary issue of arbitrability); *Green Tree Agency v. White*, 719 So. 2d 1179 (Ala. 1998) (holding claims of fraud in the inducement of the contract subject to arbitration); *Allstar Homes, Inc. v. Waters*, 711 So. 2d 924 (Ala. 1997) (holding that arbitration of an issue of fraud in inducement of a contract may be submitted to arbitration but only after the trial court rules upon disputes regarding the enforcement of the arbitration agreement), *rejected by Ex parte Perry*, 744 So. 2d 859, 863-66 (Ala. 1999) (clarifying that merely alleging fraudulent inducement as to an arbitration clause does not allow a party to avoid arbitration agreement); *Ex parte Grant*, 711 So. 2d 464 (Ala. 1997) (holding an arbitration agreement within a worksheet estimate was not binding as it was not a contract); *Ex parte Isbell*, 708 So. 2d 571, 585 (Ala. 1997) (stating that “[c]ourts should not lightly do away with legitimate arbitration contracts”); *Ex parte Smith*, 706 So. 2d 704 (Ala. 1997) (ruling that a dealer’s delay of ten months in filing for arbitration while continuing discovery waived

arbitration); *Ex parte* Martin, 703 So. 2d 883 (Ala. 1996) (holding that an arbitration agreement between buyers and a seller was not applicable to the manufacturer); *Palm Harbor Homes v. Crawford*, 689 So. 2d 3 (Ala. 1997) (holding that a manufacturer waived the right to arbitration by not filing an interlocutory appeal of a motion to compel arbitration); *Ex parte* Gates, 675 So. 2d 371 (Ala. 1996) (holding the Federal Arbitration Act preempted state law); *Oakwood Mobile Homes v. Carter*, 846 So. 2d 1098 (Ala. Civ. App. 2002) (remanding in favor of arbitration); *Dynasty Housing, Inc. v. McCollum*, 832 So. 2d 73 (Ala. Civ. App. 2001) (affirming judgment on an arbitration award and denying a set-off motion); *Sanderson Group, Inc. v. Smith*, 809 So. 2d 823 (Ala. Civ. App. 2001) (rejecting the argument that a buyer could not be awarded mental anguish damages for breach of contract without a physical injury or zone of danger, as these are tort defenses, and affirming the arbitrator's award of damages for mental anguish).

Nursing Homes

Briarcliff Nursing Home v. Turcotte, Nos. 1012193 & 1012195, 2004 WL 1418698 (Ala. June 25, 2004) (upholding provisions of an arbitration agreement); *Owens v. Coosa Valley Health Care, Inc.*, No. 1021978, 2004 WL 260969 (Ala. Feb. 23, 2004) (compelling arbitration); *McGuffey Health & Rehab. Ctr. v. Gibson*, 864 So. 2d 1061 (Ala. 2003) (compelling arbitration); *Cmty. Care of Am. of Ala. v. Davis*, 850 So. 2d 283 (Ala. 2002) (holding an arbitration agreement was not enforceable).

Retail

Ala. Catalog Sales v. Harris, 794 So. 2d 312 (Ala. 2000) (affirming a denial of arbitration because the trial court is to determine enforceability of an arbitration contract).

Securities and Investments

Edward D. Jones & Co., LP v. Wehby, 882 So. 2d 832 (Ala. 2003) (remanding for arbitration when the appellant met its burden in support of its motion to compel); *UBS PaineWebber, Inc. v. Brown*, 880 So. 2d 411 (Ala. 2003) (remanding for arbitration as the master account agreement contained an arbitration clause); *Hales v. Proequities, Inc.*, 885 So. 2d 100 (Ala. 2003) (holding the right to arbitrate was waived by the failure to object to the trial setting in a timely manner); *Sec. Am., Inc. v. Rogers*, 850 So. 2d 1252 (Ala. 2002) (holding that violations of the Alabama Securities Act rendered the customer agreements unenforceable); *Lewis v. Oakley*, 847 So. 2d 307 (Ala. 2002) (ordering the dispute underlying the litigation to arbitration); *J.C. Bradford & Co. v. Vick*, 837 So. 2d 271 (Ala. 2002) (finding valid contracts regarding arbitration); *Baker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,

821 So. 2d 158 (Ala. 2001) (holding that the preclusive effect of the prior judgment was not arbitrable but was to be decided by the trial court, which prevented the arbitrators from deciding the applicability of collateral estoppel in the arbitration proceeding); *Riscorp, Inc. v. Occupational Safety Ass'n of Ala. Workmen's Comp. Fund*, 796 So. 2d 1062 (Ala. 2000) (dismissing a writ of mandamus for arbitration); *Bear Stearns Sec., Inc. v. Jones*, 789 So. 2d 161 (Ala. 2000) (enforcing arbitration agreements except those not inextricably intertwined); *Norman v. Occupational Safety Ass'n of Ala. Workmen's Comp. Fund*, 776 So. 2d 788 (Ala. 2000) (denying the nonsignatory defendants' motions to compel arbitration); *Dean Witter Reynolds, Inc. v. McDonald*, 758 So. 2d 539 (Ala. 1999) (holding that procedural matters of arbitrability are to be determined by the arbitrator); *AmSouth Inv. Servs. v. Bhuta*, 757 So. 2d 1120 (Ala. 2000) (compelling arbitration); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Kilgore*, 751 So. 2d 8 (Ala. 1999) (compelling arbitration); *Chazen v. Parton*, 739 So. 2d 1104 (Ala. 1999) (finding no agreement to arbitrate); *NationsBanc Inv. v. Paramore*, 736 So. 2d 589 (Ala. 1999) (holding the trial court must make rulings on facts regarding the validity of a contract before granting or denying arbitration); *Inv. Mgmt. & Research v. Hamilton*, 727 So. 2d 71 (Ala. 1999) (holding that, when a claim of fraud in the inducement is directed toward the entire contract, such issue is subject to arbitration); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Kirton*, 719 So. 2d 201 (Ala. 1998) (reversing and remanding to compel arbitration); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cobb*, 717 So. 2d 355 (Ala. 1998) (dismissing the appeal of a decision denying arbitration due to lack of timely appeal); *Ex parte Stripling*, 694 So. 2d 1281 (Ala. 1997) (compelling arbitration except for a nonsignatory party); *Capital Inv. Group v. Woodson*, 694 So. 2d 1268 (Ala. 1997) (holding that an agreement made before signing the arbitration agreement was not subject to arbitration); *Prudential Sec., Inc. v. Micro-Fab, Inc.* 689 So. 2d 829 (Ala. 1997) (denying arbitration); *Koullas v. Ramsey*, 683 So. 2d 415 (Ala. 1996) (holding that claims did not arise under the contract and are not subject to arbitration).

Termite Cases

Cook's Pest Control v. Hastings, 883 So. 2d 1207 (Ala. 2003) (remanding for arbitration); *Bowen v. Sec. Pest Control*, 879 So. 2d 1139 (Ala. 2003) (affirming arbitration); *Sears Termite & Pest Control v. Robinson*, 883 So. 2d 153 (Ala. 2003) (remanding for arbitration); *Orkin Exterminating Co. v. Larkin*, 857 So. 2d 97 (Ala. 2003) (affirming the denial of arbitration due to lack of mutual consent); *Leonard v. Terminix Int'l Co.*, 854 So. 2d 529 (Ala. 2002) (per curiam) (holding the arbitration clause that precludes class-action unconscionable); *Cook's Pest Control v. Rebar*, 852 So. 2d 730 (Ala. 2002) (upholding a denial of motion to compel arbitration when a contract modification was deemed accepted); *All Am. Termite & Pest Control, Inc. v. Walker*, 830 So. 2d 736 (Ala.

2002) (holding a homeowner waived the right to dispute arbitration by participating in an arbitration proceedings); *Allied-Bruce Terminix Co. v. Butler*, 816 So. 2d 9 (Ala. 2001) (reversing the trial court's denial of a motion to compel arbitration); *Watson v. Terminix Int'l Co.*, 810 So. 2d 689 (Ala. 2001) (vacating a judgment of dismissal that should have been stayed during an arbitration proceedings); *Cook's Pest Control v. Boykin*, 807 So. 2d 524 (Ala. 2001) (holding an arbitration is not binding on a nonsignatory when intertwining was nonexistent); *Ex parte Morris*, 782 So. 2d 249 (Ala. 2000) (upholding a motion to compel arbitration); *Am. Termite & Pest Control v. Riley*, 775 So. 2d 179 (Ala. 2000) (affirming the trial court's holding that arbitration cannot be compelled on absent members of a putative class); *Cutler v. Orkin Exterminating Co.*, 770 So. 2d 67 (Ala. 2000) (affirming that only a named plaintiff with an arbitration clause can represent class members with arbitration clauses in their contracts); *Ex parte Rush*, 730 So. 2d 1175 (Ala. 1999) (upholding an arbitration clause); *Terminix Int'l Co. v. Jackson*, 723 So. 2d 555 (Ala. 1998) (holding that the defendants acted inconsistently with arbitration rights); *Allied-Bruce Terminix Co. v. Dobson*, 684 So. 2d 102 (Ala. 1995) (reversing a denial of arbitration for contract claims but denying arbitration tort based claims); *Terminix Int'l Co. v. Jackson*, 669 So. 2d 893 (Ala. 1995) (holding that a termite company did not waive the right to arbitration by conducting discovery).

