

REVISIONISM AND INCONSISTENCY IN THE ALABAMA  
SUPREME COURT: THE LAW SURROUNDING RECOVERY FOR  
NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

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INTRODUCTION

Emotional distress is defined as “[a] highly unpleasant mental reaction (such as anguish, grief, fright, humiliation, or fury) that results from another person’s conduct . . . .”<sup>1</sup> In the past, many courts were not willing

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1. BLACK’S LAW DICTIONARY 563 (8th ed. 2004).

to allow recovery for negligent infliction of emotional distress (NIED).<sup>2</sup> Today, however, almost every state has allowed recovery for NIED as an independent tort.<sup>3</sup> Alabama is one of those states.<sup>4</sup> However, this tort has experienced a troubled history in Alabama. Because the state is imagined to be friendly to plaintiffs, it is surprising that Alabama has not been more willing to recognize an independent tort for NIED. In the past, the Supreme Court of Alabama has allowed recovery for emotional distress when pleaded as “part and parcel of the traditional tort of negligence.”<sup>5</sup> Furthermore, Alabama has refused to entertain any claim for recovery for NIED brought by a bystander.<sup>6</sup> There is seemingly no reason why the Alabama Supreme Court would allow recovery for emotional distress in some cases and not in others.<sup>7</sup> It is also hard to understand why the Alabama Supreme Court will not even consider allowing recovery for emotional distress negligently inflicted on third persons.

This Comment will argue that Alabama should recognize that it has allowed NIED as an independent tort and should allow bystander recovery for NIED. Part II will examine NIED as an independent tort and the commonly used tests for allowing recovery under the theory of NIED. Part III will look at the Alabama case law regarding NIED. Finally, Part IV will examine the problems with Alabama’s NIED jurisprudence and compare the tests for recovery for NIED from the *Restatement (Third) of Torts: Liability for Physical Harm*<sup>8</sup> and the tests used in Alabama.

## I. NIED AS AN INDEPENDENT TORT

Most states have allowed recovery for NIED even though there are significant policy reasons weighing against unlimited recovery.<sup>9</sup> There is “concern[] that some appropriate boundaries exist for [NIED] to minimize spurious claims and to limit the potential liability of defendants.”<sup>10</sup> Due to these concerns, all courts “have placed substantial limitations on

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2. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54, at 359–60 (5th ed. 1984).

3. *Consol. Rail. Corp. v. Gottshall*, 512 U.S. 532, 544–45 (1994).

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

5. *Id.* at 1144.

6. *Gideon v. Norfolk S. Corp.*, 633 So. 2d 453, 454 (Ala. 1994).

7. *See* discussion *infra* Part III. The Alabama Supreme Court seems to allow this to happen because it wants to allow recovery for NIED without moving away from its traditional stance on the tort. By allowing recovery for NIED as part of a traditional negligence suit while denying recovery when NIED is pleaded on its own, the court can easily take both of the paths it wishes to follow.

8. §§ 46–47 (Tentative Draft No. 5, 2007).

9. *See* *Consol. Rail. Corp. v. Gottshall*, 512 U.S. 532, 545–46 (1994).

10. Jeffrey Hoskins, Comment, *Negligent Infliction of Emotional Distress: Recovery is Foreseeable*, 39 J. MARSHALL L. REV. 1019, 1027–28 (2006) (quoting James Podgers, *Witnesses to Tragedy: Courts Open Door to More Suits for Negligent Infliction of Emotional Distress*, 81 A.B.A. J. 44, 44 (Jan. 1995)).

the class of plaintiffs that may recover for emotional injuries and on the injuries that may be compensable.”<sup>11</sup>

#### *A. Policy Reasons for Restricting Recovery*

There are many reasons why courts have limited recovery for NIED.<sup>12</sup> This paper will focus on two primary reasons for restricting recovery for NIED: fear of limitless liability and fear over a floodgate of fraudulent litigation.<sup>13</sup> The fear of opening a floodgate of fraudulent litigation is complicated by the difficulty of verifying and proving an emotional injury.<sup>14</sup> Furthermore, there is also a secondary policy consideration which deals with inherent biases in the common law.<sup>15</sup>

The first policy reason for limiting recovery for NIED regards the lack of “finite limits on the number of persons who might suffer emotional injury as a result of a given negligent act.”<sup>16</sup> Foreseeability limits the recovery for physical injuries well, but “it provides virtually no limit on liability for mental injuries.”<sup>17</sup> If negligent conduct causes the death of a celebrity, people all over the world may attempt to recover for the emotional distress that accompanies the loss of the celebrity.<sup>18</sup> Alternatively, the number of people who might suffer physical injury would be limited to the area where the negligent conduct took place.<sup>19</sup> Limitless liability would also have major ramifications for defendants.<sup>20</sup> For example, if nonrelative bystanders can recover for emotional distress, a defendant could be subjected to unknown liability to an unknown group for an unknown amount of time.<sup>21</sup> If recovery for NIED is limited to relative bystanders, then at least the group of people to whom the defendant could be liable is known. Courts have dealt with these problems by “rejecting the notion that all foreseeable plaintiffs are owed a duty and by reducing the scope of expo-

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11. *Consol. Rail Corp.*, 512 U.S. at 546.

12. *See* KEETON ET AL., *supra* note 2, § 54, at 360. Courts have limited recovery for NIED because “mental disturbance cannot be measured in terms of money, and so cannot serve in itself as a basis for the action; . . . its physical consequences are too remote, and so not ‘proximately caused’; . . . there is a lack of precedent, and that a vast increase in litigation [will] follow.” *Id.* (citations omitted).

13. *See id.*, § 54, at 360–61; Hoskins, *supra* note 10, at 1032–35; Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. ST. L.J. 805, 831–42 (2004).

14. *Consol. Rail Corp.*, 512 U.S. at 546.

15. *See* Rhee, *supra* note 13, at 842–45.

16. *Consol. Rail Corp.*, 512 U.S. at 545.

17. Rhee, *supra* note 13, at 840.

18. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 47 cmt. f (Tentative Draft No. 5, 2007).

19. *See* Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm — A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 507 (1982).

20. *See* Hoskins, *supra* note 10, at 1033.

21. *See id.* at 1033–34.

sure to only a small, finite subset of foreseeable plaintiffs as a matter of law.”<sup>22</sup>

Courts have also limited recovery for NIED due to fears of “open[ing] a floodgate of litigation.”<sup>23</sup> Many courts fear that plaintiffs would bring claims for every type of emotional distress possible.<sup>24</sup> People who were just a little scared or a little worried by an event could bring claims alleging NIED when there is no serious emotional disturbance. Some courts believe that “allowing such claims [for NIED] would promote both ‘normal’ and ‘nervous’ people to believe they suffered emotional shock from any unexpected event.”<sup>25</sup> Others have gone so far as to state that “if litigants are allowed compensation for emotional distress, the floodgates will open for litigation ‘in the field of trivialities and mere bad manners.’”<sup>26</sup>

The fear of fraudulent claims can be broken down into two parts. The first problem regarding fraudulent claims under NIED is that emotional distress is not as apparent as a physical injury.<sup>27</sup> Because it is not easy to verify that a person has suffered emotional distress, allowing recovery could leave the tort system open to abuse through fraudulent claims. It is not difficult to substantiate a claim for a physical injury because normally a doctor can view or analyze that type of injury. The ease in validating a claim for physical injury makes it much less likely that a plaintiff will fraudulently claim damages for a physical injury.

Another problem regarding fraudulent claims under NIED is that the severity of emotional injuries can be very difficult to prove.<sup>28</sup> Courts have been reluctant to recognize claims for NIED because they “are more difficult to prove, disprove, or measure than physical injuries.”<sup>29</sup> These damages are more difficult to prove because they are “‘evanescent, intangible, and peculiar, and vary to such an extent with the individual concerned, that they cannot be anticipated, and so lie outside the boundaries of any reasonable ‘proximate’ connection with the act of the defendant.’”<sup>30</sup> If a defendant does not have the ability to disprove a plaintiff’s claim for NIED, there is a risk that the plaintiff will recover for a fraudulent claim.

Even though the fear of fraudulent litigation is one of the most commonly cited problems with allowing recovery for NIED, courts have the

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22. Rhee, *supra* note 13, at 841–42.

23. Hoskins, *supra* note 10, at 1034.

24. *Id.*

25. *Id.* at 1034–35 (citing Knaub v. Gotwalt, 220 A.2d 646, 647 (Pa. 1966)).

26. Randy J. Cox & Cynthia H. Shott, *Boldly into the Fog: Limiting Rights of Recovery for Infliction of Emotional Distress*, 53 MONT. L. REV. 197, 199 (1992) (quoting STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 16.1, at 937 (1987)).

27. *Consol. Rail. Corp. v. Gottshall*, 512 U.S. 532, 546 (1994).

28. *See* Hoskins, *supra* note 10, at 1035.

29. Douglas A. Terry, *Don’t Forget About Reciprocal Altruism: Critical Review of the Evolutionary Jurisprudence Movement*, 34 CONN. L. REV. 477, 495 (2002).

30. Cox & Shott, *supra* note 26, at 198 (quoting SPEISER, *supra* note 26, § 16.1, at 937 (1987)).

ability to adequately deal with this problem. Some kinds of emotional distress “are marked by definite physical symptoms, which are capable of medical or other objective proof.”<sup>31</sup> One commentator has even stated that “[i]t should be the odd trial, if conducted properly by the deliberative bodies, that a plaintiff’s bald testimony—‘I suffered severe mental injury,’ supported by a self-serving tear or two—suffices to carry the day.”<sup>32</sup> This type of an objection is not unique to claims of emotional distress; many other claims can be just as, if not more, susceptible to fraud.<sup>33</sup> Although the fear of opening a floodgate of fraudulent litigation is a real one, courts should be able to deal with the risk of fraud without rejecting recovery altogether.<sup>34</sup>

The final reason why courts have been reluctant to allow recovery for NIED is the inherent bias in the common law.<sup>35</sup> There was a belief that courts should not allow recovery for NIED because it “is often temporary and relatively trivial.”<sup>36</sup> Mental injuries were often considered to only be injuries of the “weak and fragile.”<sup>37</sup> Finally, courts practiced gender discrimination when evaluating these claims and thought that only women could suffer these injuries.<sup>38</sup> Because emotional distress was not thought of as a serious injury that strong men could suffer, courts were not willing to allow recovery for NIED. These biases caused courts to restrict recovery for NIED without a compelling justification.

### *B. Standards for Recovery*

#### *1. Direct Victims*

Courts have limited recovery for NIED by employing different tests to determine whether a plaintiff can recover.<sup>39</sup> The first test that courts have used to limit recovery for NIED by direct victims is the “physical impact” test.<sup>40</sup> The physical impact test requires that the plaintiff suffer some type of physical impact in order to be able to recover for emotional distress.<sup>41</sup> It did not matter how slight the impact; as long as a physical injury existed,

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31. KEETON ET AL., *supra* note 2, § 54, at 361.

32. Rhee, *supra* note 13, at 831.

33. *Id.* at 831–32.

34. *Id.* at 835.

35. *Id.* at 842.

36. KEETON ET AL., *supra* note 2, § 54, at 360–61.

37. Rhee, *supra* note 13, at 842.

38. *Id.* at 842–43.

39. *Consol. Rail. Corp. v. Gottshall*, 512 U.S. 532, 546 (1994).

40. *Id.* at 546–47.

41. *Id.* at 547.

the plaintiff could recover damages for emotional distress.<sup>42</sup> Almost all states have abandoned this test as a limitation on recovery for NIED.<sup>43</sup>

The second test used by courts to determine liability is the “physical manifestations” test. Using this rule, a plaintiff may recover for NIED when “the mental injury manifested into discernable physical symptoms.”<sup>44</sup> Under the physical manifestations test, the plaintiff does not have to suffer a physical impact at the hands of the defendant.<sup>45</sup> For example, if a driver negligently drives toward a pregnant woman but narrowly misses her, and her fright causes her to have a miscarriage, she can recover for her emotional injury under this rule.<sup>46</sup> This test is slightly different from the physical impact test. Under the physical impact rule, the woman may not have been able to recover for her emotional injury because she did not suffer a physical impact when the driver narrowly missed her.

The third test is the “zone of danger” test. The zone of danger test allows recovery for emotional distress when the plaintiff suffers a physical impact as a result of negligent conduct or when the plaintiff “is placed in immediate risk of physical harm by [the negligent] conduct.”<sup>47</sup> This test places limits on recovery for emotional distress similar to those that are inherent in recovery for physical harm; “those within the zone of danger of physical impact can recover for fright, and those outside of it cannot.”<sup>48</sup> Many jurisdictions have adopted this test as the preferred method of limiting recovery for NIED.<sup>49</sup>

## 2. Bystanders

The main test used to limit recovery for NIED is the “relative bystander” test.<sup>50</sup> This test was first articulated by *Dillon v. Legg*,<sup>51</sup> a California case, and was used to permit recovery for foreseeable emotional distress negligently inflicted on a third person.<sup>52</sup> The court announced three factors that would be used to determine whether the injury to the plaintiff was foreseeable:

- (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it.
- (2) Whether

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42. *Id.*

43. *Id.*

44. Rhee, *supra* note 13, at 815.

45. *See* RESTATEMENT (SECOND) OF TORTS § 436A cmt. a (1965).

46. *See id.*

47. *Consol. Rail Corp.*, 512 U.S. at 547–48.

48. Pearson, *supra* note 19, at 489.

49. *See Consol. Rail Corp.*, 512 U.S. at 548 n.9.

50. *Id.* at 548–49.

51. 441 P.2d 912 (Cal. 1968).

52. *Id.* at 920.

the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.<sup>53</sup>

This formulation not only allows direct victims to recover for emotional distress; it also allows certain bystanders to recover for NIED.<sup>54</sup> About half the states have adopted this rule in some form to allow bystanders to recover for NIED.<sup>55</sup>

Some states have adopted the zone of danger test to deal with the problem of limiting recovery for NIED by bystanders.<sup>56</sup> In these states, a court will allow a plaintiff to recover for witnessing an injury to a close family member when both the injured family member and the plaintiff are in the zone of danger.<sup>57</sup> Under this test, the bystander does not have to suffer any physical injury, but the bystander will not be able to recover in some of the situations that the *Dillon* test would allow.

One court decided to limit recovery to bystanders using the impact test that other courts have applied to direct victims.<sup>58</sup> The Georgia Supreme Court addressed a case where a mother was trying to recover for witnessing the death of her daughter when both were involved in a car accident. The court stated that when a parent suffers a physical impact, "the parent may attempt to recover for serious emotional distress from witnessing the child's suffering and death without regard to whether the emotional trauma arises out of the physical injury to the parent."<sup>59</sup> Although Georgia is the only state that has adopted this method of limiting recovery to bystanders, it is one of the many ways that courts have attempted to deal with this problem.

Finally, one court has decided to allow recovery for both direct victims and bystanders under general negligence principles.<sup>60</sup> In order to recover for NIED in Tennessee, the plaintiff must prove the general elements of negligence.<sup>61</sup> The Tennessee Supreme Court said that it looks at

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53. *Id.*

54. *See Consol. Rail Corp.*, 512 U.S. at 549.

55. *Id.*

56. *See, e.g.*, *Erony v. Alza Corp.*, 913 F. Supp. 195, 201 (S.D.N.Y. 1995) (applying New York law); *Keck v. Jackson*, 593 P.2d 668, 670 (Ariz. 1979) (allowing recovery when a plaintiff is in the zone of danger and suffers physical injury); *Stadler v. Cross*, 295 N.W.2d 552, 553 (Minn. 1980); *Vaillancourt v. Med. Ctr. Hosp. of Vt., Inc.*, 425 A.2d 92, 95 (Vt. 1980).

57. *See, e.g.*, *Keck*, 593 P.2d at 670.

58. *Lee v. State Farm Mut. Ins. Co.*, 533 S.E.2d 82 (Ga. 2000).

59. *Id.* at 86-87.

60. *Ramsey v. Beavers*, 931 S.W.2d 527 (Tenn. 1996).

61. *Id.* at 531.

three factors to determine whether the plaintiff's emotional injury was a "proximate and foreseeable result[] of [the] defendant's negligence."<sup>62</sup> Those three factors are the plaintiff's physical location at the time of the accident, the degree of injury to the third person, and the plaintiff's relationship to the third person.<sup>63</sup>

### *C. Restatement (Third) Test for Recovery Under NIED*

The *Restatement (Third)* addresses liability for inflicting NIED on both direct victims and bystanders. Section 46, which addresses recovery for NIED by direct victims, states:

An actor whose negligent conduct causes serious emotional disturbance to another is subject to liability to the other if the conduct . . . places the other in immediate danger of bodily harm and the emotional disturbance results from the danger . . . or . . . occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional disturbance.<sup>64</sup>

Thus, the drafters of the *Restatement (Third)* have chosen to adopt the zone of danger test unless the emotional disturbance occurs in the course of a specified activity. Because the drafters do not take a position on which activities should give rise to liability for NIED,<sup>65</sup> it is up to the courts to make this determination. In adopting this section, the drafters of the *Restatement (Third)* decided that recovery for NIED should not be dependent on physical impact or manifestations.<sup>66</sup> They also decided that recovery should not be based on general negligence principles. However, recovery for NIED should not be dependent on foreseeability because "[it] cannot appropriately be employed as the standard to limit liability for emotional harm."<sup>67</sup>

Section 47, which addresses recovery for NIED by bystanders, states that "[a]n actor who negligently causes serious bodily injury to a third person is subject to liability for serious emotional disturbance thereby caused to a person who . . . perceives the event contemporaneously, and . . . is a close family member of the person suffering the bodily injury."<sup>68</sup>

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62. *Id.*

63. *Id.*

64. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 46 (Tentative Draft No. 5, 2007).

65. *Id.* at cmt. d.

66. *See id.* at cmt. c.

67. *Id.* at cmt. f.

68. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 47 (Tentative Draft No. 5, 2007).



The drafters of the *Restatement (Third)* decided to use a test which is very similar to the test from *Dillon*.<sup>69</sup> Again, the drafters of the *Restatement (Third)* disregarded the requirement for physical impact or manifestations.<sup>70</sup> In contrast to *Dillon*, foreseeability should not be taken into account because “genuine emotional disturbance can occur and is foreseeable in many situations in which courts clearly would not permit recovery.”<sup>71</sup>

## II. NEGLIGENCE INFLICTION OF EMOTIONAL DISTRESS IN ALABAMA

The traditional rule in Alabama prevented recovery for emotional distress when there was no physical impact.<sup>72</sup> Alabama, however, abandoned the physical impact test without moving to the zone of danger test to allow recovery in certain situations.<sup>73</sup> Then, the Alabama Supreme Court abruptly moved to use the zone of danger test to allow recovery for NIED when it was pleaded as part of the traditional tort of negligence.<sup>74</sup> Even though Alabama will allow recovery for emotional distress as part of the tort of negligence, it will not formally recognize an independent tort for NIED.<sup>75</sup> Further, the Alabama Supreme Court has also stated that it will not consider allowing bystanders to recover for negligently inflicted emotional distress.<sup>76</sup>

### A. The Physical Impact Test in Alabama

As early as 1909, the Alabama Supreme Court established the physical impact test to allow recovery for NIED.<sup>77</sup> In *Birmingham Waterworks Co. v. Martini*,<sup>78</sup> the court announced that the traditional physical impact rule would determine recovery for emotional distress in Alabama.<sup>79</sup> The court went so far as to state that no recovery would be allowed without physical

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69. Compare *id.* and *Dillon v. Legg*, 441 P.2d 912, 920 (Cal. 1968). The first difference between the two tests is that the *Dillon* test takes the plaintiff's proximity to the event into account while the Restatement test does not consider the plaintiff's proximity to the event. The second difference is that the *Dillon* court thought of the factors as determining foreseeability while the Restatement does not consider foreseeability to be the actual test.

70. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 47 cmt. b (Tentative Draft No. 5, 2007).

71. *Id.* at cmt. f.

72. JENELLE MIMS MARSH & CHARLES W. GAMBLE, ALABAMA LAW OF DAMAGES § 36:6 (5th ed. 2005).

73. See discussion *infra* Part III.B.

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

75. See *Allen v. Walker*, 569 So. 2d 350, 352 (Ala. 1990).

76. *Gideon v. Norfolk S. Corp.*, 633 So. 2d 453, 454 (Ala. 1994).

77. See *W. Union Tel. Co. v. Jackson*, 50 So. 316, 318 (Ala. 1909) (stating that plaintiff cannot recover damages for mental injury when there are “no recoverable damages for injury to the person, reputation, or estate of the plaintiff”).

78. 56 So. 830, 832 (Ala. Ct. App. 1911).

79. *Id.*

impact even if there was great emotional distress.<sup>80</sup> There would be, however, recovery for emotional distress “in all cases where there is the slightest physical injury accompanied by circumstances showing mental distress.”<sup>81</sup> Alabama allowed recovery for fear<sup>82</sup> and worrying<sup>83</sup> if those emotions accompanied physical injury. The physical impact test was followed in Alabama as late as 1978,<sup>84</sup> which is only three years before the Alabama Supreme Court rejected the physical impact test.

### *B. Moving Away from the Physical Impact Test*

The Alabama Supreme Court realized that the physical impact test was not the best test to limit recovery for NIED.<sup>85</sup> After abandoning the physical impact test in certain situations, the court struggled with its jurisprudence in the area of allowing recovery for NIED. Finally, the court decided to adopt the zone of danger test through a revisionist reading of its precedent.<sup>86</sup>

#### *1. Taylor v. Baptist Medical Center*

In *Taylor*, the plaintiff underwent an emergency appendectomy when she was twenty-three weeks pregnant. There was a chance that the procedure could interfere with the pregnancy. Three weeks after the appendectomy, the plaintiff started to go into labor and notified her obstetrician. The obstetrician told the plaintiff to go to the hospital, but he did not arrive until ten minutes after the plaintiff had given birth. The plaintiff’s baby was either stillborn or died shortly after birth. Because the obstetrician did not make it to the hospital in time for the birth, there was no doctor present during the plaintiff’s delivery. The plaintiff alleged negligence and breach of the contract of care against the obstetrician. She alleged damages for emotional distress, as well as physical suffering. The trial court granted summary judgment for the doctor.

On appeal, the Alabama Supreme Court looked at the history of allowing recovery for emotional distress.<sup>87</sup> The court noted that “[t]raditionally, damages for mental anguish alone have not been recoverable in [Ala-

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80. *Id.*

81. *Id.*

82. *See Macke v. Sutterer*, 141 So. 651, 653 (Ala. 1932) (“If . . . fear was the natural consequence of her personal injury resulting proximately from defendants’ negligence, it was mental anguish, and therefore an element of actual damages.”).

83. *See E. Ala. Express Co. v. Dupes*, 124 So. 2d 809, 812 (Ala. 1960) (allowing recovery for a plaintiff who worried about her injuries suffered in a car accident).

84. *See Gregath v. Bates*, 359 So. 2d 404, 409 (Ala. Civ. App. 1978) (denying recovery of damages for mental suffering because there was no proof of a physical injury suffered by the plaintiffs).

85. *See Taylor v. Baptist Med. Ctr., Inc.*, 400 So. 2d 369, 374 (Ala. 1981).

86. *See AALAR, Ltd. v. Francis*, 716 So. 2d 1141, 1147 (Ala. 1998).

87. *See Taylor*, 400 So. 2d at 372.

bama].”<sup>88</sup> The court also recognized that it allowed recovery for emotional distress in a negligence action when there is physical impact accompanying the emotional distress.<sup>89</sup> However, the court realized that there was a problem with allowing the physical impact test to be the primary limiting test in Alabama.<sup>90</sup> Emotional distress was recoverable even with the slightest of injuries and was thought of as being “parasitic.”<sup>91</sup> The court abandoned the physical impact test in this type of situation when it stated “to continue to require physical injury caused by culpable tortious conduct, when mental suffering may be equally recognizable standing alone, would be an adherence to procrustean principles which have little or no resemblance to medical realities.”<sup>92</sup> The plaintiff could recover in this case because the court allowed recovery for negligently inflicted emotional distress in certain breach of contract actions.<sup>93</sup> Therefore, the court created an exception to the physical impact rule when there is a “breach of implied contracts arising from the rendition of medical services.”<sup>94</sup>

## 2. Wrongful Termination of Electric Services

The court slightly expanded the exception that it created in *Taylor* when it allowed recovery for NIED due to breach of contract in *Alabama Power Co. v. Harmon*.<sup>95</sup> The plaintiff attempted to have electrical service connected to his trailer and the defendant told him it would take one week after he moved the trailer onto the property. Electrical service was not set up because defendant wanted to construct the power line across property over which the plaintiff did not have a right-of-way. Plaintiff made his request in April 1980, and he did not get service connected until February 1981. As a result, plaintiff brought an action for breach of contract and misrepresentation and attempted to recover damages for emotional distress.

The court first stated that “claims for damages for mental anguish need not be predicated upon the presence of physical symptoms.”<sup>96</sup> The plaintiff had to sleep on other people’s floors with his family and “testified that he was upset by relying upon others to provide shelter for his family,

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88. *Id.*

89. *Id.*

90. *Id.* at 373 (“These decisions feign to insist upon the presence of a tort of long standing when it is perfectly obvious that any injury from the traditional tort is slight and the damages sought for the mental disturbance constitute the primary (if not the sole) reason for having initiated the action.”).

91. *Id.*

92. *Id.* at 374.

93. *See id.* (stating that when a contractual duty is intertwined with matters of emotional concern or with the feelings of a party, recovery for emotional distress will be allowed).

94. *Id.*

95. 483 So. 2d 386 (Ala. 1986).

96. *Id.* at 389.

felt inadequate in his family obligations, and felt as if everything was ‘falling in on him.’”<sup>97</sup> The court found sufficient evidence of emotional distress and allowed the plaintiff to recover.<sup>98</sup> Again, the Alabama Supreme Court established an exception to the physical impact test when there is a breach of contract. Unlike the situation in *Taylor*, the contract did not have to be connected to the receipt of medical services to recover for NIED; in this case, the breach of contract involved electric services.

The Alabama Supreme Court expanded this exception to allow recovery for NIED in all wrongful termination of electric service actions. In *Southern Pine Electric Cooperative v. Burch*,<sup>99</sup> the court stated that “in actions alleging the wrongful termination of utility services, damages for mental distress are recoverable . . . .”<sup>100</sup> In this case, the plaintiff alleged wrongful termination of electric services because Southern Pine Electric shut off his service. Southern Pine believed that the plaintiff submitted an application for electric service to avoid past due charges at the same property accrued by the wife of plaintiff’s cousin. The court allowed plaintiff to recover for mental distress even though plaintiff was never placed in a zone of danger by having his electric service turned off.<sup>101</sup> Instead of focusing on whether the plaintiff was in a zone of danger, the court focused on whether the plaintiff suffered severe mental distress.<sup>102</sup> Therefore, through *Harman* and *Southern Pine Electric Cooperative*, the Alabama Supreme Court created an exception to the zone of danger test in this particular type of breach of contract action. In these cases, the only requirement for recovery is that the plaintiff suffers severe emotional distress.

### 3. *Fraud in Procuring an Insurance Contract*

In *Reserve National Insurance Co. v. Crowell*,<sup>103</sup> the plaintiffs purchased a Medicare supplement policy from an agent who misrepresented the policy dates and preexisting conditions coverage. The plaintiffs paid an extra month’s premium to ensure that they would have immediate coverage and a preexisting benefits rider, for which they were in fact not eligible.<sup>104</sup> The defendant’s agent issued the policy two months after the date that they were told the coverage would begin and without the preexisting benefits rider. One of the plaintiffs had a heart attack during the lapse in

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97. *Id.*

98. *Id.*

99. 878 So. 2d 1120 (Ala. 2003).

100. *Id.* at 1127.

101. *Id.* at 1128.

102. *Id.* at 1127.

103. 614 So. 2d 1005 (Ala. 1993).

104. A preexisting benefits rider is “a policy addendum providing coverage for pre-existing [sic] conditions.” *Id.* at 1006.

coverage and had to pay for medical treatment without any money from the defendant due to the misrepresentations.

The court held that the plaintiff could recover for emotional distress because “the case before us involves a claim of fraud . . . . Damages for mental distress may be awarded in a case of willful fraud.”<sup>105</sup> The only reason given for allowing recovery for mental distress in a fraud case is that “willful fraud[] could result in emotional distress to the victims [of the fraud].”<sup>106</sup> In this case, there is no mention of the physical impact or the zone of danger test. Like *Taylor*, the Alabama Supreme Court began to create an exception to the physical impact test and allowed recovery for emotional distress when brought on by willful fraud.<sup>107</sup>

In *Life Insurance Co. of Georgia v. Johnson*,<sup>108</sup> the Alabama Supreme Court again addressed recovery for mental distress in a case of fraud by an insurance company. The plaintiff alleged that the defendant insurance company sold her a Medicare supplement policy that was worthless. The defendant’s agent suggested that the plaintiff purchase the supplement policy even though it was illegal and against company policy because the plaintiff was on Medicare. The plaintiff attempted to recover for emotional distress.

The court stated that the plaintiff could recover for emotional distress because when she learned that the policy was worthless, she became angry and worried.<sup>109</sup> The plaintiff testified that “she could not sleep and her meal schedule was disrupted.”<sup>110</sup> She even became so angry that she chased two insurance agents off of her property.<sup>111</sup> The court only examined whether the plaintiff suffered emotional distress as a result of defendant’s actions and did not apply any limiting test.<sup>112</sup> Instead of relying on any limiting test for NIED, the court created an exception allowing a plaintiff to recover for infliction of emotional distress when there is fraud in procuring an insurance contract.

#### 4. NIED in Cases Involving Housing

In 1979, the Alabama Supreme Court first created an exception to the physical impact test in cases involving the construction of a plaintiff’s

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105. *Id.* at 1011.

106. *Id.* at 1012.

107. *Id.*

108. 684 So. 2d 685 (Ala. 1996), *overruled on other grounds by* Life Ins. Co. of Ga. v. Johnson, 701 So. 2d 524 (Ala. 1997).

109. *Id.* at 690.

110. *Id.*

111. *Id.*

112. This case was decided before *Francis*, and therefore, the court would not have explicitly used the zone of danger test to evaluate an emotional distress claim. The primary limiting test would have been the impact test, and there is no discussion of that test, or any other, in the *Johnson* decision.

house.<sup>113</sup> In *B & M Homes, Inc.*, the plaintiffs purchased a lot and entered into an agreement to have a house built on that lot. While the house was being built, one of the plaintiffs discovered a long, hairline crack in the concrete slab. The defendant told the plaintiff that these types of cracks were common. As time went on, the crack widened and caused severe damage to the house. The damage caused by the crack could not be permanently repaired.

The court noted that “the general rule [in Alabama] is that mental anguish is not a recoverable element of damages arising from breach of contract.”<sup>114</sup> In beginning its analysis, the court recognized that when a contract is tied to matters of mental concern, it will allow recovery for mental distress.<sup>115</sup> The court created an exception in this case because it believed that “any reasonable builder could easily foresee that an individual would undergo extreme mental anguish if their newly constructed house contained defects as severe as those shown to exist in this case.”<sup>116</sup> The chance of emotional distress was so obvious in this case that the court was not willing to deny recovery because of the general rule.<sup>117</sup> The Alabama Supreme Court has continued to recognize this exception and allow recovery for NIED in an action involving the building of a personal residence.<sup>118</sup>

##### 5. NIED in Municipal Flooding Cases

In *City of Mobile v. Jackson*,<sup>119</sup> the Alabama Supreme Court allowed the plaintiffs to recover for NIED when a drainage system overflowed and flooded their property. Prior to construction on an adjacent piece of property, water from a service road flowed along the plaintiffs’ rear property line. After construction on an adjacent piece of property began, water began to settle in plaintiffs’ backyard. Finally, water from the service road and a ditch entered the plaintiffs’ home and caused substantial damage. The court affirmed an award for NIED without consideration of physical impact or any limiting test.<sup>120</sup> The court continued to allow an exception for recovery for NIED in cases involving negligent construction and main-

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

114. *Id.* at 671.

115. *See id.*

116. *Id.* at 672.

117. *Id.*

118. *S. Energy Homes, Inc. v. Washington*, 774 So. 2d 505 (Ala. 2000) (allowing recovery for emotional distress when the plaintiff received his mobile home with many severe defects); *Sexton v. St. Clair Fed. Sav. Bank*, 653 So. 2d 959 (Ala. 1995) (allowing recovery for emotional distress from a lender who did not properly manage loan disbursements to home builder).

119. 474 So. 2d 644 (Ala. 1985).

120. *Id.* at 650-51.

tenance of a sewer system in *Carson v. City of Pritchard*.<sup>121</sup> In *Carson*, there was a defect in the City of Pritchard's sewer system which caused sewage to backup into plaintiffs' yards and homes after long periods of rain. The court affirmed an award for NIED totaling \$282,500.<sup>122</sup> The court did not specifically reference the zone of danger test because Alabama had not officially adopted the zone of danger test until the *Francis* decision later in 1998.<sup>123</sup> The Alabama Court of Civil Appeals refused to recognize an exception for recovery for NIED in municipal flooding cases while attempting to apply the zone of danger test to these types of cases.<sup>124</sup>

#### 6. *Flagstar Enterprises, Inc. v. Davis*

After creating exceptions to the physical impact test for certain actions, the Alabama Supreme Court, without explanation, allowed recovery for NIED without using the physical impact test or creating a definite exception. In *Flagstar Enterprises, Inc. v. Davis*,<sup>125</sup> a gas station employee bought breakfast from a Hardee's restaurant. She began to eat her breakfast until she realized that her biscuit was covered in blood. The blood was inside the biscuit carton and dripped down while the plaintiff continuously opened and closed the lid. The blood came from a cut on the arm of an employee at the Hardee's restaurant. The plaintiff brought a negligence claim against Hardee's for breach of a duty to exercise reasonable care in the preparation and packaging of her food. She included emotional distress as a part of the damages sought.

The court recognized that the action could proceed because it was brought as part of a negligence case,<sup>126</sup> rather than as an independent action. Here, the restaurant "had a duty to sell [the plaintiff] merchantable food or food that was not unreasonably dangerous."<sup>127</sup> In this case, the court simply stated that due to a failure to exercise reasonable care in packaging the food, blood got into the package, "and that [the plaintiff] suffered emotional distress as a result of eating blood-tainted food."<sup>128</sup> The court made no mention of a limiting test and only stated that "[d]amages for emotional distress may be awarded in a negligence case, even in the absence of physical injury."<sup>129</sup> Here, the court seemed to completely disregard any type of limiting test and allows recovery for NIED without

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121. 709 So. 2d 1199 (Ala. 1998).

122. *Id.* at 1208.

123. *See id.*

124. *See discussion infra* Part III.D.

125. 709 So. 2d 1132 (Ala. 1997).

126. *Id.* at 1141 n.5.

127. *Id.* at 1139.

128. *Id.* at 1140.

129. *Id.* at 1141 n.5.

explaining its decision in terms of the physical impact test or the zone of danger test.

*C. Movement to the Zone of Danger Test Through Revisionism*

The Alabama Supreme Court finally enunciated a standard for the zone of danger test in *Francis* when it stated that recovery was limited to a plaintiff “who sustain[s] a physical impact as a result of a defendant’s negligent conduct, or who [is] placed in immediate risk of physical harm by that conduct.”<sup>130</sup> In *Francis*, a rental car was stolen from Atlanta Rent-a-Car. When the car was stolen, it was listed on the National Crime Information Center (NCIC). The vehicle was recovered in Huntsville, Alabama, and an employee from the Birmingham Rent-a-Car office went to pick it up. The car remained in Birmingham, Alabama and several attempts were made to remove the car from the NCIC list. The car was never removed and was rented to the plaintiffs in this case. After the plaintiffs rented the car, a police officer saw one of the plaintiffs in the car and checked the vehicle’s tag number. Once the officer realized that the car was reported stolen, he went to the plaintiffs’ house and demanded entry. When one of the plaintiffs went to get the rental papers out of the car’s glove compartment, a police officer who was assigned to watch the car briefly drew his gun on that plaintiff. Neither plaintiff suffered physical injury or was charged with a crime.

The plaintiff who had the gun pulled on him was allowed to recover while the plaintiff who did not have the gun pulled on her was not.<sup>131</sup> The first plaintiff, who was allowed to recover, was in the zone of danger because he was placed in immediate risk of danger by the defendant’s conduct. The first plaintiff would not have had a gun pulled on him if the defendant would have properly taken the car off of the NCIC list.<sup>132</sup> The second plaintiff, who was not allowed to recover, was not in the zone of danger because there was no immediate risk of danger. She never had a gun pulled on her, and the court determined that the risk of going to jail was insufficient.<sup>133</sup>

The court discussed the “establishment” of the zone of danger test in Alabama.<sup>134</sup> In moving to the zone of danger test, the court put the plaintiff in *Taylor* in the zone of danger because she could have suffered physical injury due to the physician’s failure to come to her delivery.<sup>135</sup> The

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130. AALAR, Ltd. v. Francis, 716 So. 2d 1141, 1146 (Ala. 1998) (quoting Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 547–58 (1994)).

131. *Id.* at 1147–48.

132. *Id.* at 1147.

133. *Id.* at 1147–48.

134. *Id.* at 1144–45.

135. *Id.* at 1147.



court looked at *Taylor* and found that “[i]mplicit in [its] holding is a recognition that damages for emotional distress alone may be awarded in negligence cases where the evidence suggests that emotional distress may have resulted from culpable tortious conduct.”<sup>136</sup> Instead of recognizing the holding in *Taylor* as an exception to the physical impact test, the court states in *Francis* that it implicitly abandoned the physical impact test when there was a breach of duty by a doctor.

Furthermore, the court placed the plaintiff in *Flagstar Enterprises* in the zone of danger by stating that there was a risk of physical injury due to contracting HIV from consuming the blood.<sup>137</sup> The same court in *Taylor* and *Flagstar Enterprises* never states that it is using the zone of danger test or that either plaintiff was at risk of suffering physical injury. Without any explanation, the court in *Francis* moves to the zone of danger test by using a revisionist reading of its prior cases.<sup>138</sup> The creation of exceptions to the physical impact test in *Taylor* and *Crowell* and the refusal to apply the physical impact test in *Flagstar Enterprises* provided the court with the opportunity to move to the zone of danger test in *Francis*.

Additionally, the court recognized that there is no broad duty to refrain from conduct that could result in emotional distress.<sup>139</sup> The defendant did have “a duty to have the NCIC computer listing removed before it allowed them to drive the automobile.”<sup>140</sup> In this case, the court stated that “[a] reasonable person could conclude that [the defendant] could have foreseen that either [plaintiff] might be stopped and questioned by police officers as a result of the NCIC listing and that those police officers would approach them under an assumption that they had committed a felony.”<sup>141</sup> Therefore, a plaintiff cannot recover for emotional distress unless the defendant breaches some other duty. By recognizing that there is no independent duty to avoid inflicting emotional distress on another, the court maintained the parasitic nature of NIED.

Finally, the court applied the traditional elements of negligence to NIED. In *Francis*, the court stated that it must be reasonably foreseeable that the plaintiff will be placed at risk of physical injury and that there must be actual emotional injury.<sup>142</sup> The zone of danger test is essentially a threshold test to determine whether a plaintiff can recover for emotional distress in a negligence action. After meeting the threshold test, the plaintiff must prove the normal elements of negligence.

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136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 1144.

140. *Id.* at 1147.

141. *Id.*

142. *Id.* (stating that it must be reasonably foreseeable to the defendant that the plaintiff would suffer a risk of physical harm and that there must actually be emotional distress to recover).

*Francis* was not the only case in which the court used a revisionist reading of prior cases to apply the zone of danger test. In *White Consolidated Industries, Inc. v. Wilkerson*,<sup>143</sup> a products liability action, the court applied the zone of danger test to deny recovery for NIED when an air conditioner caused a fire that destroyed the plaintiffs' house while they were not home. Looking back at *Carson*, Justice Lyons attempted to place those plaintiffs in the zone of danger.<sup>144</sup> According to Justice Lyons, the plaintiff in *Carson* was in the zone of danger because of "the presence of raw sewage in their yards and homes; . . . the difficulty in dealing with an unpleasant odor, a loss of appetite, and, in one instance, snakes in the house."<sup>145</sup> Justice Lyons applied the zone of danger test to justify the ruling in *Carson* without acknowledging that the court had created an exception for recovery of NIED in cases of negligent construction and maintenance of a municipal sewer system. There is no way that the court could have been applying the zone of danger test in *Carson* because Alabama had not officially adopted the test yet.<sup>146</sup>

#### D. NIED After Francis

The traditional negligence analysis has been used to prevent a plaintiff from recovering for emotional distress even when the zone of danger test is met.<sup>147</sup> In *Grand Manor*, the zone of danger test was met because of problems with a mobile home's water pressure and wiring systems.<sup>148</sup> The court then looked at whether there was substantial evidence that the plaintiffs had suffered mental anguish.<sup>149</sup> Because the plaintiffs could not provide any support that they suffered emotional distress, the court denied recovery.<sup>150</sup> The only injury that the plaintiffs suffered in this case was damage to their property.<sup>151</sup>

In *Alabama Power Co. v. Murray*,<sup>152</sup> the plaintiffs attempted to recover for NIED when a power surge caused a fire in their house. The plaintiffs were in their house when the fire occurred and could recover because

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143. 737 So. 2d 447 (Ala. 1999).

144. *See id.* at 450 (Lyons, J., concurring specially).

145. *Id.*

146. Alabama officially adopted the zone of danger test in *Francis*, which was decided on Apr. 17, 1998. The court had decided *Carson* on Jan. 30, 1998. There was no mention of the zone of danger test or its application in *Carson*. *See Carson v. City of Pritchard*, 709 So. 2d 1199 (Ala. 1998).

147. *See Ex parte Grand Manor, Inc.*, 778 So. 2d 173 (Ala. 2000).

148. *Id.* at 179.

149. *Id.*

150. *Id.* at n.5 ("[T]here is no evidence whatever in the record to support this statement suggesting that the [plaintiffs] feared being scalded.").

151. *See id.* at 180 (the court denied recovery because the only injury to the plaintiffs was the damage to their mobile home).

152. 751 So. 2d 494 (Ala. 1999).

they were in the zone of danger.<sup>153</sup> Although the defendant argued that a new standard should apply to further limit recovery for NIED, the court refused to limit the use of the zone of danger test.<sup>154</sup> A similar situation occurred in *Wal-Mart Stores, Inc. v. Bowers*,<sup>155</sup> when the plaintiffs attempted to recover for emotional distress when their car, which had been serviced by the defendant, burst into flames and caused their house to burn down. The husband was not at home when the fire broke out and the court denied him recovery for NIED.<sup>156</sup> He could not recover because “his only claim was based on damage to property.”<sup>157</sup> The court determined that “[b]ecause he was outside the zone of danger and was not placed in any immediate risk of physical harm, Mr. Bowers was not entitled to recover damages for mental anguish.”<sup>158</sup> Thus, the court correctly applied the zone of danger test to limit recovery for NIED.

Alabama courts have refused to allow recovery for NIED under the zone of danger test when a plaintiff is not threatened with immediate physical harm in other cases as well.<sup>159</sup> Finally, they have determined that once a plaintiff “present[s] some evidence of mental anguish,”<sup>160</sup> the issue of whether the plaintiff suffered emotional distress is a question of fact for the jury to decide.<sup>161</sup>

In *George H. Lanier Memorial Hospital v. Andrews*,<sup>162</sup> the court allowed recovery for emotional distress without consideration of the zone of danger test. The plaintiffs’ son died of an asthma attack in defendant’s hospital. The plaintiffs never gave express consent to organ donation and the defendant allowed the harvest of the plaintiffs’ son’s corneas. The jury awarded \$100,000 to each plaintiff for emotional distress and the Alabama Supreme Court upheld the verdict.<sup>163</sup> The only requirement for recovery that the court stated was that the plaintiffs provide evidence that they actually sustained emotional distress.<sup>164</sup> The court never made reference to

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153. *Id.* at 499.

154. *See id.* (Defendant wanted a plaintiff to “be required to submit ‘direct evidence of the nature, duration, and severity of the claimed mental anguish of a sufficient magnitude to constitute a substantial disruption in the plaintiff’s daily routine.’”).

155. 752 So. 2d 1201 (Ala. 1999).

156. *Id.* at 1204.

157. *Id.*

158. *Id.*

159. *See Hardesty v. CPRM Corp.*, 391 F. Supp. 2d 1067 (M.D. Ala. 2005) (denying recovery for emotional distress under a civil rights claim because there was no chance of physical harm to plaintiff); *Terrell v. R & A Mfg. Partners, Ltd.*, 835 So. 2d 216 (Ala. Civ. App. 2002) (denying recovery for emotional distress to a person who could have been arrested due to negligent manufacture of a truck).

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

161. *See City of Mobile v. Taylor*, 938 So. 2d 407, 412–13 (Ala. Civ. App. 2005).

162. 901 So. 2d 714 (Ala. 2004).

163. *Id.* at 726.

164. *Id.* at 725–26.

the zone of danger test because it continued to maintain the exceptions to the zone of danger test in certain situations.<sup>165</sup>

Finally, in *City of Mobile v. Lester*,<sup>166</sup> the Alabama Court of Civil Appeals attempted to apply the zone of danger test to limit recovery in a case of negligent maintenance of a municipal drain system. All of the plaintiffs involved in the case suffered property damage when the City of Mobile made repairs to a street and caused settling of the land. Instead of recognizing the exception to the limiting rules created in *Jackson* and *Carson*, the court applied zone of danger principles to limit recovery for NIED.<sup>167</sup> The court stated that only one plaintiff was at risk of physical injury because of plumbing problems, a gas leak, and a rat entering the home.<sup>168</sup> The court used the zone of danger test to allow recovery for NIED in a situation where the perceived zone of danger was very questionable and to limit recovery for NIED in a situation where plaintiffs have been able to recover in the past.<sup>169</sup> More recently, the Alabama Court of Civil Appeals again attempted to utilize the zone of danger test in a negligent maintenance of a drainage system case instead of utilizing the exception created by the Alabama Supreme Court.<sup>170</sup>

#### *E. No Independent Cause of Action for NIED*

Although the Alabama Supreme Court has allowed recovery for emotional distress in a negligence action, it claims that it refuses to allow the establishment of an independent tort for NIED.<sup>171</sup> Emotional distress remains part of the tort of negligence and can only be recovered when the defendant breaches some other duty imposed by law.<sup>172</sup> The court stated that there is no “cause of action based on the existence of a broad, generalized duty to refrain from engaging in conduct that could foreseeably result in some form of emotional distress.”<sup>173</sup> The United States Supreme Court

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165. See *Andrews*, 901 So. 2d 714. This case is similar to the situation in *Taylor*, where there was a “breach of implied contracts arising from the rendition of medical services.” *Taylor v. Baptist Med. Ctr., Inc.*, 400 So. 2d 369, 374 (Ala. 1981).

166. 804 So. 2d 220 (Ala. Civ. App. 2001).

167. See *id.* at 229–30.

168. *Id.*

169. It is difficult to believe that plumbing problems or a rat could cause serious physical injury to a plaintiff. On the other hand, plaintiffs who experienced flooding due to negligent maintenance of a drain system found themselves having to prove that they were in a zone of danger even though the plaintiffs in *Jackson* and *Carson* did not have to make the same showing of proof for a similar claim.

170. See *City of Mobile v. Taylor*, 938 So. 2d 407 (Ala. Civ. App. 2005) (stating that the plaintiffs could be in the zone of danger because of the possibility of snakes or other animals entering into the house, the possibility of drowning in the standing water, and the possibility of electrocution caused by the flood water).

171. See *Gideon v. Norfolk S. Corp.*, 633 So. 2d 453, 453–54 (Ala. 1994); *Allen v. Walker* (569 So. 2d 350, 352 (Ala. 1990).

172. See *AALAR, Ltd. v. Francis*, 716 So. 2d 1141, 1144–45 (Ala. 1998).

173. *Id.* at 1144.

even believed that Alabama remains as the only jurisdiction refusing to allow an independent tort of NIED.<sup>174</sup>

In *Foster v. Po Folks Restaurant*,<sup>175</sup> the court would not allow recovery for NIED. The plaintiff alleged that the defendant, a restaurant, negligently inflicted emotional distress by serving her food that contained a worm. The court was clear that there is no independent action for NIED.<sup>176</sup> Other cases have also made strong statements denying independent recovery for NIED.<sup>177</sup> There is a problem here because the court has allowed recovery for NIED in some cases and will not allow it in others. The court allows recovery for NIED while stating that it does not, instead of just recognizing that NIED is recoverable.

#### *F. Denial of Bystander Recovery*

In addition to the problems regarding recovery for NIED by direct victims, the Alabama Supreme Court has completely refused to consider recovery for NIED by bystanders.<sup>178</sup> In *Gideon*, the plaintiff was following her friend in a car. The plaintiff's friend was driving the plaintiff's son and a train struck his car. The child was thrown from the car and the plaintiff could see her son lying on the ground. After the train stopped, the plaintiff went to her son, who died shortly thereafter. Plaintiff attempted to recover from the railroad under the theory of NIED and asked the court to allow bystanders to recover under the same theory.<sup>179</sup> In denying recovery, the court stated that "[e]ven if we did recognize [NIED], we would not extend it to bystanders."<sup>180</sup> The court did not even take the cause of action into consideration, claiming that it did not even recognize recovery for NIED.<sup>181</sup>

The Alabama Supreme Court has readily denied bystander recovery dating back to *Tyler v. Brown-Service Funeral Homes Co.*<sup>182</sup> In *Tyler*, defendant's employees took the plaintiff's husband from the hospital to his house. When the employees left the husband at his house, he was seriously ill. The house also lacked sufficient heating capability to keep the man warm. Plaintiff found her husband unattended and very cold. She tried to recover for NIED which was caused when she found her husband in such

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174. See *Consol. Rail Corp. v. Gottshall*, 512 U.S. at 545 n.3.

175. 675 So. 2d 455 (Ala. Civ. App. 1996).

176. *Id.* at 455.

177. See *Roberts v. City of Geneva*, 114 F. Supp. 2d 1199, 1215 (M.D. Ala. 2000); *Diefenderfer v. Ford Motor Co.*, 916 F. Supp. 1155, 1162 (M.D. Ala. 1995); *Gideon v. Norfolk S. Corp.*, 633 So. 2d 453, 453-54 (Ala. 1994).

178. See *Gideon*, 633 So. 2d at 453-54.

179. *Id.* at 453.

180. *Id.* at 454.

181. *Id.*

182. 34 So. 2d 203 (Ala. 1948).

a bad state. The court held that “[a] breach of duty to the husband would not authorize the recovery of the damages here sought.”<sup>183</sup> The plaintiff was barred from recovery because the defendant did not have a duty to the plaintiff.<sup>184</sup> The only duty was to the plaintiff’s husband, and the plaintiff could not recover in the event that duty was breached.<sup>185</sup>

The court did, however, implicitly allow bystander recovery when the plaintiffs were in the zone of danger.<sup>186</sup> In *Daniels*, there was a single-car accident on a portion of highway that was being resurfaced. One of the plaintiffs lost control of the car, causing her three-year-old daughter to die and other family members to suffer injuries. The plaintiffs alleged that the defendant negligently created a dangerous condition on the highway which caused the accident. The plaintiffs attempted to recover damages for emotional distress due to witnessing the death of a family member. The court recognized that the emotional distress of family members cannot be recovered in a wrongful death action.<sup>187</sup> Emotional distress, however, does include grief, and the plaintiffs in this case were in the zone of danger.<sup>188</sup> The only emotional distress claimed by the plaintiffs was the grief and trauma of being present at the scene of the family member’s death.<sup>189</sup> The court allowed the plaintiffs to recover for the negligently inflicted emotional distress because they were in the zone of danger and were each injured themselves.<sup>190</sup> According to the court, the plaintiffs “were more than mere bystanders, who have no right of recovery for the trauma of witnessing the death of a family member.”<sup>191</sup> Finally, the court stated that “[t]he jury was . . . authorized to conclude that [the daughter’s] death was a traumatic experience for the family members and that it had a direct and lasting emotional impact upon their lives.”<sup>192</sup> In *Daniels*, the court implicitly allowed bystander recovery when a person is in the zone of danger.

### III. RECOGNIZING NIED IN ALABAMA’S JURISPRUDENCE

The State of Alabama has many problems in its jurisprudence regarding recovery for NIED. The Alabama Supreme Court will allow recovery for NIED for plaintiffs who are within the zone of danger while saying that there is no cause of action for NIED. Even though the court allows recovery for NIED when the plaintiff is in the zone of danger, it does not

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183. *Id.* at 205.

184. *Id.*

185. *Id.*

186. *See Daniels v. E. Ala. Paving, Inc.*, 740 So. 2d 1033 (Ala. 1999).

187. *Id.* at 1048 (citing *James v. Richmond & Danville R.R.*, 9 So. 335 (Ala. 1890)).

188. *Id.* at 1049.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

want to admit that it allows recovery. Alabama should make changes regarding NIED in order to solve the problems in its jurisprudence.

*A. The Problems with Alabama's Jurisprudence Regarding Direct Victims*

There are two main problems that have plagued Alabama's jurisprudence regarding recovery for NIED by direct victims. The first problem is the fact that Alabama moved from creating exceptions to the physical impact test to establishing the zone of danger test without explanation.<sup>193</sup> The court allowed recovery for NIED without physical impact in cases of breach of implied contract for medical services,<sup>194</sup> wrongful termination of electric services,<sup>195</sup> fraud in procuring an insurance contract,<sup>196</sup> housing,<sup>197</sup> and municipal flooding cases.<sup>198</sup> The strangest step that the court took was in *Flagstar Enterprises* when it allowed recovery for NIED without creating an exception for the particular situation or without explicitly adopting the zone of danger test.<sup>199</sup> Finally, the court moved to the zone of danger test in *Francis*,<sup>200</sup> but it did so in an odd manner. On multiple occasions, the court has read older cases to require the zone of danger when the court originally did not apply the test. The characterizations of *Taylor* and *Flagstar Enterprises* were changed to make it seem that the court had utilized the zone of danger test in the past.<sup>201</sup> One concurring justice also used this method in *White Consolidated Industries* when he read *Carson* to hold that a plaintiff was in the zone of danger.<sup>202</sup> The Alabama Supreme Court took a revisionist position in order to justify moving to the zone of danger test, and although it is the correct position, it was the incorrect way to adopt the test.

The second major problem with Alabama's jurisprudence regarding recovery for NIED by direct victims is the fact that the court allows recovery for NIED while saying that it does not.<sup>203</sup> Although the court will allow recovery for NIED, it needs to move away from its current position and admit that it will allow recovery for NIED when a defendant breaches a duty to the plaintiff and the plaintiff is in the zone of danger. The court already established that there is no general duty to avoid inflicting emo-

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193. See discussion *supra* Part III.B.1-6, III.C.

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

195. See *supra* Part III.B.2.

196. See *supra* Part III.B.3.

197. See *supra* Part III.B.4.

198. See *supra* Part III.B.5.

199. See *Flagstar Enters. v. Davis*, 709 So. 2d 1132 (Ala. 1997).

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

201. See *id.* at 1147.

202. See *White Consol. Indus. v. Wilkerson*, 737 So. 2d 447, 450 (Ala. 1999) (Lyons, J., concurring specially).

203. See *supra* Part III.D-E.

tional distress.<sup>204</sup> Therefore, Alabama's Supreme Court does not have to worry about recovery for frivolous claims of NIED. It has already dealt with these problems since announcing the zone of danger test in *Francis* and there has not been a problem with frivolous lawsuits. These two problems illustrate why there is so much confusion and concern over the NIED jurisprudence in Alabama.

### B. Direct Recovery for NIED

Alabama's zone of danger rule is very similar to the *Restatement (Third)*'s rule for imposing liability for NIED.<sup>205</sup> The problem lies with the allowance of recovery for NIED while stating that there is no independent cause of action for NIED. Alabama must recognize that it has established a system that conforms to Section 46 of the *Restatement (Third)*. Through this recognition, much of the confusion regarding recovery by direct victims for NIED will be resolved.

Alabama has established certain exceptions to the zone of danger test that meet the description of "specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional disturbance."<sup>206</sup> For example, the court allowed recovery for NIED in *Taylor* in a "breach of implied contracts arising from the rendition of medical services."<sup>207</sup> The court has also allowed recovery for NIED in a variety of other specific situations.<sup>208</sup> Therefore, there are some situations where the courts will allow recovery for NIED without applying the zone of danger test. This approach is consistent with Section 46(b) of the *Restatement (Third)*. By recognizing these as explicit exceptions, there will be less confusion regarding the development of the jurisprudence surrounding recovery for NIED. There is already a major problem with the exception for municipal negligence in constructing or maintaining a sewer or drain.<sup>209</sup> Alabama should continue to create these

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204. See *Francis*, 716 So. 2d at 1144.

205. Compare RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 46 (Tentative Draft No. 5, 2007) ("An actor whose negligent conduct causes serious emotional disturbance to another is subject to liability to the other if the conduct . . . places the other in immediate danger of bodily harm and the emotional disturbance results from the danger . . .") with *Francis*, 716 So. 2d at 1147 ("[P]laintiffs who sustain a physical injury as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct" may recover.).

206. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 46(b) (Tentative Draft No. 5, 2007).

207. *Taylor v. Baptist Med. Ctr., Inc.*, 400 So. 2d 369, 374 (Ala. 1981); see also *George H. Lanier Mem. Hosp. v. Andrews*, 901 So. 2d 714 (Ala. 2004) (allowing recovery for NIED without using the zone of danger test when a hospital wrongfully harvested Plaintiffs' deceased son's corneas).

208. See discussion *supra* Part III.B.2-5.

209. See discussion *supra* Part III.D. The Alabama Court of Civil Appeals is trying to apply the zone of danger test in this type of case when the Alabama Supreme Court created an exception to the limiting rules in *Jackson* and *Carson*.



exceptions when applicable and honor the created exceptions if any cases are brought under them.

Alabama should also formally recognize that recovery for NIED by direct victims is allowed when the plaintiff is in the zone of danger.<sup>210</sup> Rather than allowing recovery and then saying that recovery is not allowed,<sup>211</sup> the Alabama Supreme Court should state that recovery for NIED is allowable when the plaintiff is in the zone of danger. If the court would take this step, the confusion regarding whether a direct victim can recover for NIED would be lessened because a victim would know the circumstances under which she could recover. Because Alabama's zone of danger test is essentially in line with Section 46(a) of the *Restatement (Third)*,<sup>212</sup> the Alabama Supreme Court only needs to recognize that recovery for NIED is always allowable when a plaintiff is in the zone of danger. By formally recognizing that recovery for NIED by direct victims is allowed, the state will no longer be considered as the only one in which "[n]egligent infliction of emotional distress is not actionable . . . ."<sup>213</sup> Regarding recovery for NIED by direct victims, there are very few changes that the court needs to make to resolve the confusion in its jurisprudence.

### C. Bystander Recovery for NIED

In Alabama, a bystander cannot recover for emotional distress due to witnessing an injury suffered by a family member.<sup>214</sup> It seems unfair that a mother cannot recover when she witnesses the death of her child; the existence of emotional distress is as foreseeable as it is in the other situations where the court has allowed recovery.<sup>215</sup> Because the Alabama Supreme Court states that it has not recognized an independent tort of NIED, it uses that logic to refuse to extend the tort to bystanders. The court should officially recognize that recovery for NIED is allowed in order to consider whether to allow recovery for bystanders under Section 47 of the *Restatement (Third)*.<sup>216</sup> Even if the court recognized an independent tort of NIED, it has explicitly held that it will not consider extending recovery to bystanders.<sup>217</sup> In contrast, the court implicitly allowed bystander recovery in

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210. See *Francis*, 716 So. 2d at 1147.

211. Compare *Francis*, 716 So. 2d 1141 with *Allen v. Walker*, 569 So. 2d 350 (Ala. 1990).

212. See *supra* note 204.

213. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 545 n.3 (1994).

214. See *Gideon v. Norfolk S. Corp.*, 633 So. 2d 453 (Ala. 1994).

215. It is quite foreseeable that a mother who witnesses the death of her child will suffer severe emotional distress. Furthermore, the chance of suffering emotional distress is much greater than the chance of emotional distress due to wrongful termination of electric services or some of the other exceptions.

216. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 47 (Tentative Draft No. 5, 2007).

217. *Gideon*, 633 So. 2d at 454.

situations where the plaintiff is in the zone of danger because grief constitutes part of emotional distress.<sup>218</sup> By doing this, the Alabama Supreme Court has set up a situation where similarly situated people may be able to recover as bystanders in some circumstances and not in others. Because there was no explicit recognition of recovery for bystanders, the court might be inconsistent in dealing with bystander recovery rather than denying it outright. Technically, the court has already established the zone of danger test as the applicable limiting test when dealing with bystanders. In *Daniels*, the court allowed a plaintiff to recover for the grief and trauma of seeing a family member die while in an accident.<sup>219</sup> Because a plaintiff can recover for grief and trauma of seeing a family member die and because a plaintiff can recover for NIED when in the zone of danger, under *Daniels*, a plaintiff will always be able to recover for NIED when she sees a severe injury to a family member caused by an accident that places the plaintiff in the zone of danger. The court could establish the zone of danger test as the limiting test for bystander recovery. The rule would limit recovery for NIED to bystanders “who sustain a physical injury as a result of a defendant’s negligent conduct, or who are placed in immediate risk of physical harm by that conduct.”<sup>220</sup> Under this method, the court would follow *Daniels* and allow a bystander to recover for NIED when the bystander is in the zone of danger.

Another solution would be to follow nearly half of the other states<sup>221</sup> and allow bystander recovery based on *Dillon*. In order to limit who can recover under this theory, Alabama could adopt Section 47 of the *Restatement (Third)*.<sup>222</sup> This test would allow a family member who witnesses an injury to a family member to recover while maintaining substantial limits on recovery for emotional distress. The first limitation is that the bystander’s action is a derivative action that relies on the injured person’s ability to recover.<sup>223</sup> Additionally, recovery is limited because the plaintiff must be a close family member of the injured person.<sup>224</sup> The final limitation is that the plaintiff must contemporaneously perceive the injury.<sup>225</sup> The limitations help to ensure that the plaintiff has actually suffered emotional distress because these two factors provide the best indicators of legitimate emotional distress. In order to avoid a repeat of *Gideon*, the Ala-

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218. See *Daniels v. E. Ala. Paving, Inc.*, 740 So. 2d 1033, 1049 (Ala. 1999).

219. *Id.*

220. *AALAR, Ltd. v. Francis*, 716 So. 2d 1141, 1147 (Ala. 1998).

221. See *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 549 (Ala. 1994).

222. See *supra* note 216.

223. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 47 cmt. c (Tentative Draft No. 5, 2007).

224. See *id.* at cmt. e.

225. See *id.* at cmt. d.

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bama Supreme Court should use the zone of danger test or enact Section 47 to allow bystander recovery in limited circumstances.

## CONCLUSION

Alabama is in line with other jurisdictions that allow recovery for NIED when the plaintiff is in the zone of danger. However, the Supreme Court of Alabama goes out of its way to state that independent recovery for NIED is not allowed. Although Alabama does allow recovery for NIED in most circumstances, it should admit that it has set up a system that is in accordance with Section 46 of the *Restatement (Third)*. Recovery for negligently inflicted emotional distress has not been positively received throughout history. Presently, however, most states have been willing to recognize NIED as an independent tort. Alabama can take significant steps to fix the inconsistencies in its jurisprudence by officially recognizing that recovery for NIED is allowed by direct victims who are in the zone of danger and by extending the ability to recover for NIED to bystanders.

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