In The
Supreme Court of Virginia

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RECORD NO: 151944

NANCY MAE GILLIAM,

Appellant,

v.

JACOB THOMAS IMMEL,

Appellee.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR 1

STATEMENT OF THE CASE 1

STANDARD OF REVIEW 7

ARGUMENT.....8

I. THE TRIAL COURT ERRED IN NOT GRANTING A NEW TRIAL WHEN THE JURY RETURNED A ZERO VERDICT DESPITE UNDISPUTED EVIDENCE OF DAMAGES (Assignment of Error I) 8

II. THE TRIAL COURT ERRED IN NOT ADMITTING INTO EVIDENCE THE DEFENDANT'S STATEMENT CALLING THE PLAINTIFF A "BLACK BITCH" (Assignment of Error II) 17

A. Mental anguish caused by a defendant's intentional conduct during a negligent accident should be a recoverable element of damages 19

1. Mental anguish caused by a defendant's conduct during an accident is a proximate result of the negligent act..... 19

2. Including in damages a defendant's intentionally distressing conduct is a logical outworking of the *Hughes* line of cases, is beneficial to judicial economy, and is consistent with the approach of other jurisdictions 24

B. Including in damages a defendant's intentionally distressing conduct is consistent with the approach of other jurisdictions 27

CONCLUSION..... 31

RULE 5:26(h) CERTIFICATE 32

TABLE OF AUTHORITIES

Page(s):

Cases:

Barnette v. Dickens,
205 Va. 12, 135 S.E.2d 109 (1964) 19-20, 23

Bradner v. Mitchell,
234 Va. 483, 362 S.E.2d 718 (1987).....9, 10, 15

Cheatham v. Gregory,
227 Va. 1, 313 S.E.2d 368 (1984) 15

Childers v. Geile,
367 S.W.3d 576 (Ky. 2012) 28, 29

Downer v. CSX Transp.,
256 Va. 590, 507 S.E.2d 612 (1998)..... 9, 16

Filak v. George,
267 Va. 612, 594 S.E.2d 610 (2004).....17

Herring v. Johnson,
2014 Va. Unpub. LEXIS 5 (Dec. 12, 2014) 15

Hughes v. Moore,
214 Va. 27, 197 S.E.2d 214 (1973) ..... *passim*

Johnson v. Smith,
241 Va. 396, 403 S.E.2d 285 (1991).....8

Kaltman v. All Am. Pest Control, Inc.,
281 Va. 483, 706 S.E.2d 864 (2011).....17

Keiffer v. Queen,
155 W. Va. 868, 189 S.E2d 842 (1972).....16

Kondaurov v. Kerdasha,
271 Va. 646, 629 S.E.2d 181 (2006).....*passim*

Landrum v. Chippenham & Johnston-Willis Hosps., Inc.,
282 Va. 346, 717 S.E.2d 134 (2011).....7

Mastin v. Theirjung,
238 Va. 434, 384 S.E.2d 86 (1989) 10, 11, 12, 13

Mitchell v. Rochester Ry. Co.,
151 N.Y. 107, 45 N.E. 354 (1896) 24

Naccash v. Burger,
223 Va. 406, 290 S.E.2d 825 (1982).....*passim*

Norfolk & W. Ry. Co. v. Whitehurst,
125 Va. 260, 99 S.E. 568 (1919).....20

Peek v. Stevens,
395 So.2d 617 (Fla. 1981).....16

Riverside Hosp., Inc. v. Johnson,
272 Va. 518, 636 S.E.2d 416 (2006).....7

Rogers v. Louisville Land Co.,
367 S.W.3d 196 (Tenn. 2012) 28, 29

Russo v. White,
241 Va. 23, 400 S.E.2d 160 (1991) 18

Smithey v. Refining Co.,
203 Va. 142, 122 S.E.2d, 872 (1961).....8

Vilseck v. Campbell,
242 Va. 10, 405 S.E.2d 614 (1991) 10, 12, 13

Wakole v. Barber,
283 Va. 488, 722 S.E.2d 238 (2012).....17

Wjla-Tv v. Levin,
264 Va. 140, 564 S.E.2d 383 (2002).....7

Womack v. Eldridge,
215 Va. 338, 210 S.E.2d 145 (1974) ..... *passim*

ASSIGNMENTS OF ERROR

I. The trial court erred in not setting aside the jury verdict and awarding a new trial when the jury returned a zero verdict despite undisputed evidence of damages.[1]

II. The trial court erred in not allowing to be admitted the defendant's statement calling the plaintiff a "black bitch."[2]

STATEMENT OF THE CASE

On October 27, 2011, Ms. Gilliam was stopped at a red light when Jacob Thomas Immel crashed his car into the rear of her vehicle. (J.A. 88-89.) The shock of the crash caused Ms. Gilliam's foot to come off her brake, and the force of the crashed pushed her forward, nearly causing her to enter oncoming traffic. (J.A. 88-89.) After he crashed into Ms. Gilliam, but before either party left the scene, Immel called Ms. Gilliam a "black bitch," and told her that because he "[didn't] have insurance" she would not "get anything out of" him. (J.A. 20.)

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[1] **Rulings:** J.A. 276-77 (Final Order, Sept. 21, 2015)
Objection preserved: J.A. 197-98, 6-30-15 Mem. Supp. Mot. Set Aside at J.A. 263-66
[2] **Rulings:** J.A. 23.
Objections preserved: J.A. 19-23.

At the crash scene, Ms. Gilliam's low back and the right side of her neck began to hurt. (J.A. 89.) She told emergency responders about her pain, and they transported her to Southside Regional hospital by ambulance. (J.A. 90.) At the hospital, Ms. Gilliam's neck was X-rayed, and she was given medicine. (J.A. 91.)

Approximately two weeks later, Ms. Gilliam followed-up with her primary care physician, Dr. Boodram, as the ER physician advised. (J.A. 91.) After an examination, Dr. Boodram prescribed Ms. Gilliam medications and advised her to see an orthopedic doctor. (J.A. 92.) Ms. Gilliam was treated by Dr. Boodram one additional time in November 2011. (J.A. 92.)

Approximately one month after the crash, Ms. Gilliam treated with Dr. Fiore, an orthopedic doctor at Advanced Orthopaedics. (J.A. 92.) At her initial visit with Dr. Fiore, Ms. Gilliam told him that she had been experiencing low back and neck pain since the crash. (J.A. 92-93.) Dr. Fiore prescribed Ms. Gilliam medicine and had her participate in physical therapy for "[a] long time." (J.A. 93.)

On May 27, 2015, Gilliam appeared before a jury empaneled by the Circuit Court of the City of Colonial Heights. Prior to jury selection, counsel for both parties agreed to ask the judge to determine whether Ms. Gilliam could testify to the racially charged language Immel made to her following the crash. (J.A. 19.) Ms. Gilliam's counsel argued that the testimony would be relevant to the mental anguish she suffered in the crash. (J.A. 20.) The trial court stated that only mental anguish *caused by the crash* were relevant to the issue of damages Ms. Gilliam suffered, and even if relevant, such relevance would be outweighed by the prejudicial affect. (J.A. 20-22, 23.) As a result, the trial court ruled that the testimony regarding Immel's racist comments could not be elicited without permission. (J.A. 23.)

At trial, Ms. Gilliam testified regarding the injuries she suffered as a result of the crash (as outlined above), but did not testify that Immel called her a "black bitch" after he crashed into her because of the trial court's earlier ruling. During Ms. Gilliam's testimony, she identified bills she incurred for medical expenses

she believed were related to the car crash. (J.A. 97-99.) Those bills, along with a summary of those bills, were introduced into evidence as Plaintiff's Exhibit 1 with the understanding that the bills were "an accurate reflection of medical expenses she incurred without necessarily conceding that these medical expenses incurred [*sic.*] as a result of the car wreck." (J.A. 97-98.)

When cross-examining Ms. Gilliam, Immel's counsel did not attempt to impeach Ms. Gilliam regarding her neck and back injuries. The only testimony defense counsel elicited on cross-examination regarding injuries Ms. Gilliam suffered at the scene of the crash were questions asking her to admit that she did not suffer any *visible* signs of injury, such as cuts, scrapes, bruises, or swelling. (J.A. 113.) Ms. Gilliam acknowledged that Defendant's Exhibits 1 and 2 were accurate photographs of her vehicle following the crash, and that circle marks on the photographs were marks she made "trying to pick out the damage on the vehicle." (J.A. 114.) Ms. Gilliam also testified that she worked the day after the crash. (J.A. 107.)

Dr. Whipple, Immel's expert medical witness and the only witness he called in this case, testified that, as a result of the crash, Ms. Gilliam suffered "a muscular strain injury to her neck and a muscular strain injury to her low back." (J.A. 215.) Further, Dr. Whipple testified that he had no opinion regarding how long Ms. Gilliam's crash-related, neck and back injuries would be symptomatic, but stated that medical intervention would be advantageous within the first six weeks, and that such injuries could take longer than six weeks to heal. (J.A. 215-16.) In fact, the only medical treatment Dr. Whipple testified was *not* caused by the crash, was medical treatment Ms. Gilliam received for a shoulder/biceps injury. (J.A. 217.)

Absolutely no evidence was introduced at trial to suggest that Ms. Gilliam was not injured in the subject crash. Nor was there any evidence that the medical bills Ms. Gilliam incurred for the uncontroverted medical treatment described above was not related to injuries she suffered in the crash. In fact, defense counsel essentially admitted, in opening statements, that at least $10,976.23 of the medical bills Ms. Gilliam incurred were due to

the medical care she received right after the crash. (J.A. 83.) And again in closing argument, defense counsel acknowledged that certain medical treatment was causally related to the crash. (J.A. 187.)

Following the close of evidence, the judge instructed the jury on the law by reading certain model jury instructions. (J.A. 159-64.) During deliberations, the jury asked the following question: "Have the first four expenses listed in the summary of medical bills been or will be covered by the defendant or defendant's insurance?" (J.A. 192.) The court instructed the jury that "[i]nsurance of any kind or the lack of insurance of any kind has no role in this lawsuit. You cannot consider that issue as part of your deliberations." (J.A. 194.) After deliberation, the jury rendered a verdict in which it found "for the plaintiff and assess[ed] her damages at zero." (J.A. 195.)

Following the jury's verdict, plaintiff's counsel made an oral motion to set aside the jury verdict as contrary to the evidence and a motion for a new trial. (J.A. 197-98.) The trial judge ordered briefing on the issues presented in the motion, (J.A. 199-

200.), and the parties filed Memoranda in accordance with the court's order, (J.A. 263-75.) In its final order, the trial court denied the plaintiff's motion to set aside the jury verdict and its motion for a new trial without explanation. (J.A. 276-77.)

STANDARD OF REVIEW

A trial court's decision regarding the admission or exclusion of evidence is reviewed for abuse of discretion. *Riverside Hosp., Inc. v. Johnson*, 272 Va. 518, 529, 636 S.E.2d 416, 421 (2006). An abuse of discretion occurs when "a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment." *Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011).

A trial court's denial of a motion to set aside a verdict as inadequate is also reviewed for abuse of discretion. *Wjla-Tv v. Levin*, 264 Va. 140, 163, 564 S.E.2d 383, 396 (2002). If a jury's

verdict is so inadequate that it "shock[s] the conscience of the court," thereby creating the "impression that the jury has been influenced by passion, corruption or prejudice, or has misconceived or misunderstood the facts of the law," or on the other hand "if the award is so out of proportion to the injuries suffered to suggest that it is not the product of a fair and impartial decision, then it becomes the plain duty of the judge, acting within his legal authority, to correct the injustice." *Smithey v. Refining Co.*, 203 Va. 142, 146, 122 S.E.2d, 872, 875-76 (1961). If, on denying a motion to set aside a verdict as inadequate, the trial court does not state a rational basis for its denial, or this Court cannot "conceive of a rational basis for the denial," the trial court abused its discretion. *See Johnson v. Smith*, 241 Va. 396, 400-01, 403 S.E.2d 285, 687 (1991).

ARGUMENT

I. THE TRIAL COURT ERRED IN NOT GRANTING A NEW TRIAL WHEN THE JURY RETURNED A ZERO VERDICT DESPITE UNDISPUTED EVIDENCE OF DAMAGES (Assignment of Error I).

In a personal injury action where liability is admitted, a jury may not award a plaintiff zero damages where the uncontroverted

evidence is that a plaintiff was injured. If the jury returns such a verdict, it must be set aside as inadequate and a new trial ordered because that verdict "create[s] the impression that the jury has been influenced by passion or prejudice or has in some way misconceived or misinterpreted the facts or the law which should guide them to a just conclusion." *Downer v. CSX Transp.*, 256 Va. 590, 594, 507 S.E.2d 612, 614-15 (1998) (citations omitted). While this Court has never explicitly stated this rule, existing case law suggests that this is indeed already the law in Virginia.

In *Bradner v. Mitchell*, 234 Va. 483, 362 S.E.2d 718 (1987), this Court stated that "[w]here the evidence [regarding damages] is uncontroverted and so complete that no rational fact-finder could disregard it . . . it must be considered as a fixed constituent part of the verdict." *Id*. at 487, 362 S.E.2d at 720. When the special damages have become a "fixed constituent part of the verdict" in this manner, the trial court must set aside a verdict that is returned for an amount nominally greater than the uncontroverted special damages. *Id*. at 490, 362 S.E.2d at 722.

On the other hand, if the plaintiff's special damages evidence is "controverted, doubtful as to nature and extent, or subject to substantial question whether attributable to the defendant's wrong or to some other cause," then plaintiff's special damages claim is not a fixed part of the jury's verdict, and a Virginia court cannot set aside a verdict as inadequate because "a rational fact-finder might properly find the plaintiff entitled to considerably less than the amount claimed as special damages, rendering it impossible for the court to determine what amount might have been awarded in pain, suffering, and other non-monetary factors." *Id*. at 487-88, 362 S.E.2d at 721-22. This was precisely the reason this Court affirmed zero dollar jury awards in *Mastin v. Theirjung*, 238 Va. 434, 384 S.E.2d 86 (1989) and *Vilseck v. Campbell*, 242 Va. 10, 405 S.E.2d 614 (1991).

In *Mastin*, the defendant rear ended the plaintiff's vehicle, causing minimal damage. *Mastin*, 238 Va. at 435-36, 384 S.E.2d at 87. The investigating police officer did not make a report because "there were no personal injuries involved." *Id*. at 436, 384 S.E.2d at 87. From the scene of the crash, the plaintiff and

her husband went to the concert they were originally planning on attending and, despite leaving the concert early because she was not feeling well, she went to work the next morning even though she was still hurting. *Id*. The afternoon following the crash the plaintiff sought medical attention for the first time from a doctor who found no objective data to support the injuries she was claiming. *Id*.

Two days later she sought medical attention from another provider, who diagnosed her condition as "muscle spasms in the neck, or a neck strain," and who proscribed strict bed rest with heat for three to ten days. *Id*. Finally, approximately two weeks following the crash, the plaintiff sought medical attention from a neurologist and psychiatrist specializing in chronic pain problems who, among other things, testified that the plaintiff's personality was such that "there is a definite potential for motives of secondary gain, arising out of the possibility of recovery of money damages in a lawsuit." *Id*. at 437, 384 S.E.2d at 87. The opinion of this Court does not indicate that any expert testimony was offered by any defense medical experts.

At trial, the jury returned a verdict "In favor of the plaintiff sum of damages $0.00." *Id*. at 436, 384 S.E.2d at 87. On appeal, this Court held that the jury's verdict was not insufficient as a matter of law because "the jury could have found that Mastin's alleged injuries were feigned," or that the post-traumatic stress disorder she related to the crash could have been the result of some other traumatic experience. *Id*. at 437-38, 384 S.E.2d at 88. In short, this Court held that the jury were the sole judges of the weight and credibility of the evidence, and the evidence was sufficient for the jury to reasonably have concluded either that the plaintiff was injured in the crash, or was not. *Id*. at 438-39, 384 S.E.2d at 88-89.

Similarly, in *Vilseck*, this Court held that a zero dollar jury verdict was not insufficient as a matter of law where the plaintiff contradicted himself in trial testimony, and where the defendant's Rule 4:10 doctor reported merely that "it was his 'impression' that the plaintiff had suffered a soft tissue injury" and "that he 'felt' the plaintiff 'may' have been developing a tardy ulnar nerve plasy." *Vilseck*, 242 Va. at 14, 405 S.E.2d at 616.

The Court stated that *Vilseck* was a case in which the plaintiff "told a jury he was injured in an accident but . . . also contradicted himself by saying he was not injured." *Id*. Based on this testimony, the "jury was free to accept the version indicating actual injury and to award damages. The jury was equally free, however, to accept the version indicating the absence of injury and to deny damages." *Id*.

The Court also held that the jury was free to disregard the Rule 4:10 doctor's report because it spoke "in terms of impression, feeling, supposition, and suggestion" which are "expression of possibility, not probability." *Id*. Such terms, the Court said, made it impossible for the doctor's opinion to "have been based upon reasonable medical certainty but, rather, upon mere possibility." *Id*. at 14-15, 405 S.E.2d at 616.

The case before this Court is easily distinguished from both *Mastin* and *Vilseck*. Ms. Gilliam unequivocally testified that she immediately felt pain in her low back and neck. She also testified that she informed emergency responders that she was experiencing pain and, as a result, was transported from the scene

of the crash to the hospital, where she was treated for low back and neck injuries. She testified that she was advised to follow-up with her PCP, which she did within two weeks. When she met with her PCP, Ms. Gilliam complained of the same injuries. Ms. Gilliam was not impeached on this testimony during cross-examination. Additionally, the defendant's own expert medical witness stated in no uncertain terms that Ms. Gilliam was injured in the crash, and that her injuries were muscle strains to her neck and low back, and that her injuries would have taken more than six weeks to heal.

Neither Ms. Gilliam's nor Dr. Whipple's testimony is inherently incredible. Nor is their testimony inconsistent with any other facts in the record. As a result, the jury was required to find, at a minimum, that Ms. Gilliam suffered low-back and neck muscle injuries that were symptomatic for at least six weeks: "although a trier of fact must determine the weight of the testimony and the credibility of witnesses, it may not arbitrarily disregard uncontradicted evidence of unimpeached witnesses which is not inherently incredible and not inconsistent with the facts in the

record . . . ." *Bradner v. Mitchell*, 234 Va. 483, 487, 362 S.E.2d 718, 720 n.2 (citing *Cheatham v. Gregory*, 227 Va. 1, 4, 313 S.E.2d 368, 370 (1984)).

The combination of Ms. Gilliam's and Dr. Whipple's testimony creates uncontroverted evidence of damages, as was the case in the Court's recent unpublished decision, *Herring v. Johnson*, 2014 Va. Unpub. LEXIS 5 (Dec. 12, 2014). In *Herring*, this Court held that a jury verdict that was almost the exact amount of the uncontroverted special damages was inadequate as a matter of law. *Id*. at *1. At trial, the defendant's "medical expert witness . . . conceded that the medical treatment Herring received on the day of the accident along with the treatment provided by her primary care physician and Herring's physical therapy . . . was medically necessary and appropriate for the injuries she sustained in the accident." *Id*. at *4. This Court found that the medical expert's testimony was, thus, uncontroverted and "'a fixed constituent part of the verdict.'" *Id*. (citing *Bradner*, 234 Va. at 490, 362 S.E.2d at 722).

Here, too, Dr. Whipple's testimony is uncontroverted and must be a fixed part of the verdict. At a minimum, the jury was required to award Ms. Gilliam damages for her low back and neck muscle injuries, and the treatment she sought for those injuries for at least six weeks. The jury's verdict for Ms. Gilliam with an award of zero damages was plainly inadequate and gives "the impression that the jury [was] influenced by passion or prejudice or [was] in some way misconceived or misinterpreted the facts or the law which should [have guided] them to a just conclusion." *Downer*, 256 Va. at 594, 507 S.E.2d at 614-15 (citations omitted).[3] This is further supported by the jury's question

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[3] This conclusion is consistent with other court's that have addressed this issue. *See, e.g., Keiffer v. Queen*, 155 W. Va. 868, 874, 189 S.E2d 842, 845 (1972) ("In the present case there is uncontradicted evidence that the parties suffered more than mere superficial injuries. A jury verdict awarding no damages cannot stand where the preponderance of the evidence, or, as in this case, the uncontradicted evidence, shows injury of a substantial nature."); *Peek v. Stevens*, 395 So.2d 617 (Fla. 1981) (holding that where the jury returned a zero verdict and there was no question that at least the plaintiff's diagnostic medical bills were directly related to the crash, "the jury was obviously misled or failed to understand that at least a portion of the expenses suffered by the plaintiff should have been paid by the defendant, [and the court] must assume [the jury] was not fully cognizant of its duty as a jury.").

regarding whether certain incurred medical expenses were paid for by the defendant or the defendant's insurance.

As a result, it was error for the trial court to deny plaintiff's motion to set aside the jury verdict and motion for a new trial. For this reason, the plaintiff, Nancy Mae Gilliam respectfully requests that this Court set aside the jury's verdict as inadequate as a matter of law, reverse the judgment of the trial court, and award her a new trial.

II. THE TRIAL COURT ERRED IN NOT ADMITTING INTO EVIDENCE THE DEFENDANT'S STATEMENT CALLING THE PLAINTIFF A "BLACK BITCH" (Assignment of Error II).

In Virginia, "[t]he primary consideration underlying tort law is the protection of persons and property from injury. . ." *Kaltman v. All Am. Pest Control, Inc.*, 281 Va. 483, 492, 706 S.E.2d 864, 870 (2011) (quoting *Filak v. George*, 267 Va. 612, 618, 594 S.E.2d 610, 613 (2004)). This protection takes its form in monetary compensation—payment for "bodily injury, physical pain, mental anguish (past and future), and inconvenience (past and future)." *Wakole v. Barber*, 283 Va. 488, 494, 722 S.E.2d 238, 241 (2012). This Court has also explained that the term

"emotional distress" travels under many labels, such as, "mental suffering, mental anguish, mental or nervous shock . . . . It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea." *Russo v. White*, 241 Va. 23, 27, 400 S.E.2d 160, 163 (1991).

When a defendant intentionally subjects a plaintiff to mental anguish at the scene of a negligently inflicted injury, such should be a recoverable element of damages in a negligence claim because it is a proximate result of the negligent act. This principle is a logical outworking of this Court's jurisprudence from *Hughes v. Moore*, 214 Va. 27, 34-35, 197 S.E.2d 214, 219-20 (1973) to the present, is consistent with the approach of other jurisdictions, and will increase judicial economy by minimizing otherwise spurious claims for the defendant's intentional conduct.

A. Mental anguish caused by a defendant's intentional conduct during a negligent accident should be a recoverable element of damages.

1. Mental anguish caused by a defendant's conduct during an accident is a proximate result of the negligent act.

This Court has consistently stated the importance of a "clear and unbroken chain of causal connection between the negligent act, the emotional disturbance, and the physical injury" in negligence actions where the plaintiff is alleging emotional distress. *Hughes*, 214 Va. at 34 (1973). However, the Court has had minimal opportunities to address "[w]hat, if any, limitations apply to the sources of emotional distress for which the plaintiff may be compensated in damages?" *Kondaurov v. Kerdasha*, 271 Va. 646, 656, 629 S.E.2d 181, 186 (2006).

Precisely *how* proximate a plaintiff's damages must have been to the defendant's negligent act has always been a balanced determination. "Once the act or omission is determined to be negligent with respect to the injured party, the negligent party becomes liable for all the injurious consequences which result naturally from such act or omission. *Barnette v. Dickens*, 205 Va.

12, 16, 135 S.E.2d 109, 113 (1964) (quoting *Norfolk & W. Ry. Co. v. Whitehurst*, 125 Va. 260, 264, 99 S.E. 568, 569 (1919)). However, the injuries must also be "the reasonable and proximate consequences of the breach of the duty owed them, [] consequences that a reasonable and informed person could have foreseen or anticipated." *Naccash v. Burger*, 223 Va. 406, 414, 290 S.E.2d 825, 830 (1982).

In *Naccash*, the parents of a fatally diseased child were permitted to recover damages for emotional distress where a negligently performed blood test deprived them of the opportunity to make an informed decision regarding abortion. The parents alleged emotional suffering endured in the "tragic course of the disease in [their child] and the nature and extent of the care and treatment she required as her condition degenerated," through "the emotional stress and mental anguish they suffered as a result of the child's worsening condition," and in the "expenses they claimed for [the child's] care and treatment." *Id*. at 411, 290 S.E.2d at 828.

The Court stated that "the circumstances of this case justify another exception to the general rule that damages for emotional distress are not allowable unless they result directly from tortiously caused physical injury." *Id*. at 416, 290 S.E.2d at 831. Further, alluding to Virginia's consistent rejection of a purely emotional cause of action for bystanders in negligence cases, the Court held it to be

> wholly unrealistic to say that the [parents] were mere witnesses to the consequences of the tortious conduct involved in this case. In our view, the parents' emotional distress was no less a direct result of wrongful conduct than the distress endured by the plaintiffs in *Hughes* and *Womack*; the evidence shows an unbroken chain of causal connection directly linking the erroneous [blood test], the deprivation of the parents' opportunity to accept or reject the continuance of Mrs. Burger's pregnancy, and the emotional distress the parents suffered following the birth of their fatally defective child.

Id.

The *Naccash* plaintiffs did not assert a cause of action solely based on emotional distress, but instead introduced evidence of mental anguish as a measure of their damages flowing out of defendant's conduct.

In the present case, Ms. Gilliams would not have endured emotional distress and mental anguish absent the negligent act of Mr. Immel. There is an unbroken chain of causal connection linking the negligent act of Mr. Immel rear-ending Ms. Gilliam, Mr. Immel exiting his vehicle and confronting Ms. Gilliam while she was still in her vehicle, and Mr. Immel verbally assaulting her regarding the situation. (J.A. at 19-23). If compensation is to be truly afforded for "mental anguish (past and future)," a plaintiff should not be required to dissect the mental anguish endured at the accident scene and remove the pain, fear, and humiliation which were *intentionally* caused as if *they were somehow less related to the negligently caused accident because they were purposely committed at the scene*.

Consider *Kondaurov*. Eve Kerdasha was involved in a multi-car collision that left her Jeep flipped over on its roof and Ms. Kerdasha hanging upside-down from her seatbelt. The Court explained that:

> [T]he plaintiff was clearly entitled to be compensated in damages for any emotional distress she suffered as a consequence of the physical impact she sustained in the accident. Such distress might include shock and

> fright at being struck three times, turned over, left hanging upside down in her seatbelt and experiencing physical pain. It might also include anxiety as to the extent of her injuries, worry as to her future well-being, her ability to lead a normal life and to earn a living. It might include fear of disability, deformity, or death. Such factors were proper subjects for the jury's consideration because they might fairly be inferred from the physical impact of the collisions upon her person. They might also be taken into account as factors causing exacerbation of her pre-existing mental and physical conditions.

Kondaurov, 271 Va. at 656, 629 S.E.2d at 186.

If a jury may consider all of the factors just described, then how much more the defendant's exacerbation of such during the plaintiff's very moments of distress. An unduly strict reading of the language "as a consequence of the physical impact" would eliminate *any* mental anguish besides that which is intimately caused by the striking blow of the two automobiles making contact. However, such an interpretation is not consistent with providing compensation for "all the injurious consequences which result naturally from such act or omission" as stated in *Barnette*. Nor, more simply, does such an interpretation acknowledge the fact that our human condition dictates that *future* mental anguish

will invariably include memories—memories of the pain felt, the humiliation endured, and fears realized.

If the mental anguish does indeed include fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea and are proximately related factors for the jury's consideration, then how much more the defendant's intentional creation of them at the scene of the accident.

2. Including in damages a defendant's intentionally distressing conduct is a logical outworking of the *Hughes* line of cases, is beneficial to judicial economy, and is consistent with the approach of other jurisdictions.

The progression of the Court's jurisprudence in this area has been marked by careful exceptions to the "impact rule."[4] In 1973 the Court took in *Hughes* a small step from the rule requiring a physical impact upon the plaintiff as a prerequisite to damages

[4] The leading American authority at the time of *Hughes* court was the New York Court of Appeals, which had held in *Mitchell v. Rochester Ry. Co.* that "[N]o recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury." *Hughes*, 214 Va. at 32, 197 S.E.2d at 218 (quoting *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 109-10, 45 N.E. 354, 354-55 (1896)).

for emotional distress and held that "[w]here the claim is for emotional disturbance *and* physical injury resulting therefrom, recovery for negligent conduct would be permitted, without proof of physical impact. *See Hughes*, 214 Va. at 34-35, 197 S.E.2d at 219-20 (emphasis added) (internal quotations omitted). Ms. Gilliam did not allege physical injury *resulting from* her mental anguish.

Moving to 1974, in *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974), the Court held that "emotional distress resulting directly from a non-tactile tort may be compensable, *provided* . . . that the tort is intentional or reckless, that the tort-feasor's conduct is outrageous and intolerable, that the wrongful conduct and the emotional distress are causally connected, and that the emotional distress is severe." *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974) (*quoted in Naccash*, 223 Va. at 415-16, 290 S.E.2d 830).

In 1982, the *Naccash* Court upheld compensation for emotional distress because the "evidence show[ed] an unbroken chain of causal connection" and the distress "was no less a

direct result of wrongful conduct than the distress endured by the plaintiffs in *Hughes* and *Womack*. . . ." *Naccash*, 223 Va. at 416, 290 S.E.2d at 831.

In 2006, the *Kondaurov* Court refused to allow compensation for the emotional distress caused by a plaintiff's loss of a pet, noting that "permitting such an award would amount to a sweeping change in the law of damages, a subject properly left to legislative consideration. *Kondaurov*, 271 Va. at 657, 629 S.E.2d at 187.

Of paramount consideration is protecting the relief due to plaintiffs who suffer genuine physical and emotional distress, while concomitantly ensuring that the potential deluge of frivolous, solely emotional negligence claims is resisted. Such a safeguard, however, has not dissuaded the Court from carving additional exceptions when doing so will ensure that plaintiffs receive just compensation.

Here, Ms. Gilliam's damages include mental anguish both from her injuries *and* from the defendant's verbal assault of her immediately following those injuries. These distinct occasions of

mental anguish—neither one flowing from the other, but instead occurring one after another, first negligently, then intentionally—do not align with *Hughes*, *Womack*, *Naccash*, or *Kondaurov*. Were the only remedy for such a plaintiff to file a separate action alleging solely the mental anguish flowing from the intentional act, the result would be unnecessarily duplicative litigation.

Instead, a jury should be permitted to consider *all* of the plaintiff's mental anguish flowing from the accident (whether resulting from the negligently caused physical injuries *or* from intentionally distressing conduct accompanying the negligent conduct). Such a rule would better serve the interests of making the injured whole, while still retaining every protection against frivolous and spurious claims.

B. Including in damages a defendant's intentionally distressing conduct is consistent with the approach of other jurisdictions.

Finally, this more permissive approach to the consideration of mental anguish inflicted on plaintiffs has been adopted by several other jurisdictions. The Tennessee Supreme Court has

stated that "[s]evere distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed." *Rogers v. Louisville Land Co.*, 367 S.W.3d 196, 209 (Tenn. 2012).

Even more bluntly, the Kentucky Supreme Court has said:

> We recognize that circumstances may arise in which intentional or reckless acts causing emotional injury might occur close in time with negligent acts causing bodily injury. This opinion would pose no bar to recovery under both theories of liability where each tort is independently supported by its own facts, the physical injury is not merely a collateral consequence of the intentional or reckless conduct that caused the emotional distress, and the emotional injury is not merely a collateral consequence of the negligence that produced the physical injury.

Childers v. Geile, 367 S.W.3d 576, 581 n.1 (Ky. 2012).

Kentucky takes additional measure of noting that "the notion that intentional infliction of emotional distress is a gap-filler tort is correct" though mentioning that "it is a stand-alone tort under the right facts." *Id*. at 582 (Ky. 2012).

These states, similarly, have well-enshrined limitations on *individual torts* based on emotional distress and mental anguish.[5] It is for this reason that Ms. Gilliam does not request this Court create any causes of action or remove any of the current limitations on claims for emotional distress—simply that a defendant's willfully inflicted mental anguish not be exorcised from the jury's consideration of a plaintiff's mental anguish at the scene of a negligent accident.

The measure of a person's injuries flowing from an accident should not be so narrowly construed that a negligent tortfeasor may simultaneously engage in reprehensible, scarring dialogue toward the plaintiff he has only just injured, and yet leave the plaintiff virtually remediless for it.

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[5] *See Rogers*, 367 S.W.3d at 209 (Tenn. 2012) (holding that "[t]he reason for the rule imposing liability only when extreme and outrageous conduct causes serious or severe emotional distress is apparent—to avoid the judicial system being flooded with potentially fraudulent, manufactured, or overstated claims arising from the "transient and trivial" emotional distresses of daily life. . ."); *See generally Childers v. Geile*, 367 S.W.3d 576 (Ky. 2012) (affirming the Virginia Supreme Court's holding of intentional infliction of emotional distress in *Womack*).

Such a paradigm would allow for the willful, egregious, even tortious exacerbation of the mental anguish at the scene of a negligently inflicted injury, and yet—because it is *deliberately* inflicted—the resulting mental anguish is not proximately caused by the negligent act and would not be compensable. Unless the injured party were to also pursue the chimeric intentional infliction of emotional distress, she is left to be "made whole" for only a part of her injury—to carefully extract only specific morsels of mental anguish and to bifurcate her sufferings, even though all proximately flow from the initial negligent act.

Such behavior surely flows proximately from the negligent act which caused the entire event. The Appellant, Nancy Mae Gilliam, respectfully requests that this Court hold that mental anguish caused by a defendant's intentional conduct during an accident, though subservient to the negligent act which gave it occasion, is a proper subject for a jury's consideration.

CONCLUSION

The trial court erred in not setting aside the jury verdict and awarding a new trial when the jury returned a zero verdict despite undisputed evidence of damages. The trial court further erred in in not allowing to be admitted the defendant's verbal assault on the plaintiff calling her a "black bitch" who would get no relief for the injuries she had just sustained. For the above reasons, the plaintiff, Nancy Mae Gilliam respectfully requests that this Court set aside the jury's verdict as inadequate as a matter of law, reverse the judgment of the trial court, and award her a new trial.

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RULE 5:26(h) CERTIFICATE

I hereby certify that, on this, the 18th day of May, 2016:

1) I caused a true and exact electronic copy of the foregoing Brief of Appellant and Appendix to be filed with the Clerk of the Court, via VACES, and served upon opposing counsel, via electronic mail, addressed as follows:

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2) The required paper copies of the foregoing have been dispatched for hand-filing with the Clerk of the Court within the prescribed one business day of said electronic filing.

3) Excluding the portions exempted under Rule 5:26(h), this Brief contains 5,747 words, exclusive of those parts that by rule do not count toward the word limit.

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