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Where's the Outrage? "Outrageous" Conduct in Analyzing the Tort of Intentional Infliction of Emotional Distress in the Wake of *Snyder v. Phelps*

Constance A. Anastopoulo

Daniel J. Crooks III

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ARTICLES

WHERE'S THE OUTRAGE? "OUTRAGEOUS" CONDUCT IN ANALYZING THE TORT OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IN THE WAKE OF *SNYDER V. PHELPS*

By: Constance A. Anastopoulo¹ & Daniel J. Crooks III²

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I. INTRODUCTION

The American civil law system is built on the common law. As a result of numerous factors, the common law is and has always been a fluid concept. Common law torts and claims associated therewith

1. Constance A. Anastopoulo, Assistant Professor of Law, Charleston School of Law, J.D., University of North Carolina at Chapel Hill.

2. Daniel J. Crooks III, LL.M. in Law and Government, American University Washington College of Law, 2012. J.D., *cum laude*, Charleston School of Law, 2011.

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grow more complicated and far reaching as the common law itself evolves. Evolution and recognition of various torts have been ever-contracting and expanding propositions since courts first recognized common civil claims for compensation to plaintiffs. Expansion has come through judicial proclamation as well as legislative action. Contraction has also come through these same means as courts continue to refine and redefine torts. One needs only a brief review of history to recognize these trends in Tort Law.³ Questions about appropriateness of these expansions and contractions abound, whether undertaken by the judicial branch or through legislative action. As these movements emerge, this area is littered with pejorative phrases such as “tort reform” and concerns about “judges legislating from the bench.”⁴ Additionally, these trends may coincide with the politics of the day. Should Tort Law fluctuate in unison with the political pendulum, or should Tort Law be driven by other factors? Once established, should a tort always remain a tort? In other words, is Outrage an appropriate and applicable tort any more in light of its treatment by both state and federal courts? These questions are at issue with regard to the tort of Outrage, otherwise known as the tort of Intentional Infliction of Emotional Distress (“IIED”).

This Article analyzes the highly publicized case of *Snyder v. Phelps*⁵ to illustrate the current status of the tort of Outrage and asks whether courts should continue to recognize this tort or whether, in the name of refinement, the courts have eviscerated the protections and necessity of the tort. It is important to understand the tort’s origin in order to determine if it is still a viable claim or whether this tort has morphed into simply a variation of other torts, such as assault or negligent infliction of emotional distress.

Part II of this Article focuses on a discussion of recovery for mental distress prior to the tort’s status as an independent cause of action, discussing five categories of cases from which the tort derived. Part III delves into the evolution of the tort of Outrage, including the history leading up to and culminating in the *Restatement (Second)* section 46. Part III argues that the key inquiry of the tort of Outrage is the nature of the defendant’s conduct rather than the severity of the plaintiff’s alleged injury. This focus makes Outrage a punitive-based tort. Part IV addresses state courts’ treatment of the tort using a recent South Carolina Supreme Court decision, *Hansson v. Scalise Builders of S.C.*,⁶ as evidence that state courts have already begun to redefine

3. See generally M. Stuart Madden, *The Cultural Evolution of Tort Law*, 37 ARIZ. ST. L.J. 831 (2005).

4. See, e.g., Jeffrey Rosen, *What’s Wrong with Judges Legislating from the Bench?*, TIME (July 16, 2009), <http://www.time.com/time/magazine/article/0,9171,1910989,00.html>.

5. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

6. *Hansson v. Scalise Builders of S.C.*, 650 S.E.2d 68 (S.C. 2007).

the tort. The South Carolina Supreme Court diverged from its own precedents by focusing the inquiry on the extent of the plaintiff's injury and whether the emotional distress was "severe" rather than on the outrageousness of the defendant's conduct. Part V considers the status of the tort in the wake of *Snyder v. Phelps*.⁷ In addition to analyzing *Snyder v. Phelps*, Part V discusses whether the tort remains a viable claim for claimants injured by the extreme and outrageous conduct of tortfeasors in light of the treatment of the element of "outrageousness" and concludes that when Prosser gave birth to the tort, it was necessary given the legal environment at the time. The tort filled a gap that existed at the time of its recognition because actions for assault were not sufficient to address claims that did not meet the elements of assault, but nonetheless resulted in injury to the plaintiff. Therefore, IIED claims provided an avenue of recovery, especially for those deemed "weaker" in society, such as women, children, and the infirmed. However, today, other torts have expanded to fill these gaps, and IIED has become so narrowly defined that in practice, it no longer remains a viable claim. Prosser announced the tort's birth. This Article proclaims its impending death.

II. RECOVERY FOR EMOTIONAL HARM BEFORE THE TORT OF OUTRAGE

Outrage⁸ is the red-headed stepchild of the law of torts.⁹ More accepted in theory than in practice,¹⁰ Outrage, at most, "provide[s] the basis for achieving situational justice"¹¹ for the "noninstitutional, non-professional party to a variety of significant economic and commercial relations."¹² That, instead of the general protection of emotional tranquility, is the primary justification for this tort.¹³

7. *Snyder*, 131 S. Ct. 1207 (2011).

8. The tort of "Outrage" is also known as the tort of Intentional Infliction of Emotional Distress, or just "IIED". See, e.g., Russell Fraker, Note, *Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED*, 61 VAND. L. REV. 983, 988 (2008) ("The inclusion of outrage as a defining term has remained inextricably linked with IIED ever since—even to the point of usurping the name.").

9. *Id.* at 993 ("[U]nlike other intentional torts, [IIED] is predicated on the causation of objective harm to the plaintiff. In this feature, IIED resembles negligence On the other hand, most of the cases emphasize outrage at the defendant's conduct above the severity of the injury—even where the severity of the injury is primarily what makes the conduct seem outrageous To this end, the *Restatement* definition places high bars on both the injury and conduct elements, consciously limiting the tort to doubly exceptional cases. These restrictions have resulted in the schizophrenic interpretation of IIED as being primarily injury-based or conduct-based.").

10. See Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 62 (1982) ("[W]e find widespread acceptance of the tort in principle and a narrower, but still significant, recognition of the tort in practice.").

11. *Id.* at 75.

12. *Id.*

13. *Id.*

However, the doctrinal confusion and controversy surrounding Outrage have resulted in its emergence as a chimerical cause of action—half intentional and half negligence-based.¹⁴ This schizophrenic interpretation can be remedied either by recognizing that the defendant's "outrageous" conduct is the tort's only concern¹⁵ or by eliminating the severe injury requirement in its entirety.¹⁶ This Article offers guidance based on the tort's history and its current status in its treatment by the courts, both generally and in South Carolina as an example of state court treatment.

The tort of Outrage has only recently been added to lawyers' arsenals as an independent cause of action.¹⁷ For most of the Anglo-American common law's life, Lord Wensleydale's famous dictum provided the textbook answer as to whether the law compensates for purely emotional harms: "[m]ental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone."¹⁸ Nonetheless, legal theory must—and often did—yield to both practical and policy-related concerns when the available causes of action proved insufficient to provide adequate relief to the plaintiff.¹⁹ Thus, courts often engaged in "writ stretching"²⁰ in order to justify the award of damages for mental anguish²¹ where the true cause of action merely served "as a peg to hang the parasitic element."²²

14. Fraker, *supra* note 8, at 1026.

15. See Givelber, *supra* note 10, at 51 ("The issues of conduct and resulting injury, [which are] distinct in an action for unintentional injuries, here merge into [the] single issue [of the defendant's outrageousness].").

16. Fraker, *supra* note 8, at 1026 ("[E]liminating the severe injury requirement[] would align [Outrage] with other intentional torts.").

17. *Id.* at 983.

18. *Lynch v. Knight*, 11 Eng. Rep. 854 (1694–1865); see also Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1048 (1936) ("According to the familiar formula, this interest [in the peace and comfort of one's own thoughts and emotions] is not given independent protection . . .").

19. See William L. Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 43 (1956) (commenting that, in such cases, the nominal tort merely "served as a peg upon which to hang the mental damages").

20. See Magruder, *supra* note 18, at 1050 ("[C]ourts have created for themselves unnecessary difficulties by presupposing a general proposition which does not fit all the known data, and then shoving into a miscellaneous and ill-assorted category of 'exceptions' the decided cases which cannot be squared with the general principle.").

21. See RESTATEMENT OF TORTS, § 47(b) (1934) ("If the actor has by his tortious conduct become liable for an invasion of any legally protected interest of another, emotional distress caused by the invasion or by the tortious conduct which is the cause thereof is taken into account in assessing the damages recoverable by the other.").

22. Herbert F. Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497, 510 (1922) ("It is sufficient if the cause of action exists as a peg to hang the parasitic element upon. Thus the mental injury is assessed in cases of assault, in malicious prosecution, in defamation, in wrongful arrest, in seduction, in unlawful search and seizure, and . . . [with] trespass q. c. f.").

The majority of these cases fit within five identifiable categories:²³ (1) actions for assault; (2) actions against common carriers and public establishments for insults directed by an employee to a passenger or patron; (3) actions for negligence based on the plaintiff's "fright"; (4) intentional torts committed by the more powerful party in an established legal relationship, such as creditor/debtor, insurance company/insured, and landlord/tenant; and (5) the well-known "practical joke" cases. Collectively, the cases within these categories represent the progenitor of Outrage,²⁴ for it was with these cases in mind that William L. Prosser, the ALI *Restatement (Second)* reporter, fashioned the boundaries of the "new tort."²⁵

A. Assault

The first category includes actions for assault, a tort nearly as old as the common law itself.²⁶ Since the seminal case of *I. de S. et ux. v. W. de S.*,²⁷ juries have enjoyed wide latitude in determining damages in assault cases. These cases demonstrate that "[j]udicial control over the size of verdicts has been deemed a sufficient safeguard against

23. See generally William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939) [hereinafter *New Tort*]. Prosser's Michigan Law Review article, published in 1939, synthesized no fewer than twelve law review articles and one comprehensive Report of the New York State Law Revision Commission on Liability for Injuries Resulting From Fright or Shock. See also discussion *infra* Part II.C. In his article, Prosser relied on these sources, in addition to more than one hundred court decisions released primarily within the two decades preceding the article's publication (approximately the late 1910s into the late 1930s). In addition to Prosser's 1939 article, Magruder's 1936 article, published in the Harvard Law Review and entitled "Mental and Emotional Disturbance in the Law of Torts," provided Prosser with a solid foundation upon which Prosser could build. Prosser himself, on the first page of his 1939 article, acknowledged "a great indebtedness to the very excellent article by Professor Calvert Magruder." *New Tort*, *supra* note 23, at 874.

24. All of the cases pre-date 1948, which is when the ALI published a supplement to the Restatement. See RESTATEMENT OF TORTS § 46 (Supp. 1948). The supplement effectively reversed the portion of section 46: "Except as stated in §§ 21-34 [assault] and § 48 [special liability of carriers for insult], conduct which is intended or which though not so intended is likely to cause only a mental or emotional disturbance to another does not subject the actor to liability (a) for emotional distress resulting therefrom, or (b) for bodily harm unexpectedly resulting from such disturbance." RESTATEMENT OF TORTS § 46 (1934). The revised version of section 46 reads as follows: "One who, without privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it." RESTATEMENT OF TORTS § 46 (Supp. 1948).

25. *New Tort*, *supra* note 23, at 874.

26. See, e.g., *I. de S. et ux v. W. de S.*, Book Lib. Assis. f. 99, pl. 60 (Assizes 1348) (Eng.), reprinted in VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS 37 (11th ed. 2005).

27. *Id.* In *I. de S.*, a drunken patron rapped his hatchet on the door of the closed tavern, hoping to get some more wine. *Id.* at 37. The tavern keeper's wife opened the door to shout at him, and the man hit his hatchet near her, causing her to become emotionally distraught and suffer mental distress. *Id.* The legal interest violated was one's legal right to be free from imminent apprehension of offensive contact or bodily harm. *Id.*

abuse in cases where the plaintiff's essential grievance is of an intangible sentimental sort."²⁸ To prevail on an assault claim, a plaintiff must show that the defendant acted intentionally either (a) to cause a harmful or offensive contact or (b) to cause the imminent apprehension of such contact; moreover, the plaintiff must actually fear imminent harm as a direct result of the defendant's actions.²⁹ Although assault evolved out of a broader interest in bodily security,³⁰ this legally-protected interest did not contemplate situations in which the plaintiff lacked apprehension of imminent bodily harm.³¹

However, courts sometimes made exceptions by allowing recovery of mental distress damages in assault cases that lacked apparent fear of bodily harm.³² For example, in *Leach v. Leach*,³³ the Texas court of civil appeals affirmed a trial court's judgment in favor of a female plaintiff who claimed the defendant (who, incidentally, was the plaintiff's husband's uncle) assaulted her by propositioning her "with intent to have carnal knowledge of her."³⁴ In an opinion that covers barely half of one column of the reporter page, the court simply held that "[i]t is too plain for argument . . . that a willful violat[ion] of [a] woman's most sacred right of personal security [warrants] damages for an outrage to her feelings"³⁵

To the court then, an unwelcomed sexual proposition sufficed to sustain the cause of action for an assault, notwithstanding the court's failure to explain whether the proposition itself caused the plaintiff to apprehend imminent bodily harm.³⁶ Prosser's observation that the

28. Magruder, *supra* note 18, at 1033.

29. RESTATEMENT (SECOND) OF TORTS § 21(1) (1965) ("An actor is subject to liability to another for assault if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) the other is thereby put in such imminent apprehension.").

30. *E.g.*, *Kline v. Kline*, 64 N.E. 9 (Ind. 1902); *Trogon v. Terry*, 90 S.E. 583, 584-85 (N.C. 1916); *see also Fowler V. Harper & Mary Coate McNeely, A Re-examination of the Basis for Liability for Emotional Distress*, 1938 WIS. L. REV. 426, 427 (1938) ("[A]pprehension or fear of bodily harm is as much an invasion of [the] interest [in bodily security] as is illness or other actual harm to the physical being").

31. *Harper & McNeely, supra* note 30, at 428 ("As a result of the hardening into rigid form of the rules governing assault, the law did not readily give redress where the harm apprehended was not immediate.").

32. *See New Tort, supra* note 23, at 874 ("[Outrage] . . . is something very like assault 'Mental anguish' has been an orphan child. Notwithstanding its early recognition in the assault cases, the law has been reluctant, and very slow indeed, to accept the interest in peace of mind as entitled to independent legal protection.").

33. *Leach v. Leach*, 33 S.W. 703 (Tex. Civ. App.—Fort Worth 1895, writ ref'd).

34. *Id.* at 703.

35. *Id.*

36. *Id.* Notably, the *Leach* case, decided forty-five years prior to Prosser's 1939 article, was not cited by Prosser when he stated that "it has been held that no action will lie for the insult and humiliation involved in inviting a woman to illicit intercourse." *New Tort, supra* note 23, at 889. Without explanation, however, Prosser's 1956 article cites to *Leach* as an example of a case where the court awarded mental distress damages for outrageous conduct by relying on the nominal cause of action for assault. Prosser, *supra* note 19, at 42 n.14. Of course, only speculation can be had as to

new tort could be described as “something very like assault”³⁷ applies to *Leach* to the extent that the court essentially allowed recovery based on the defendant’s intentional conduct that caused “outrage to the plaintiff’s feelings.”³⁸

B. *Common Carriers and Public Businesses*

The second category of cases involves actions by customers against common carriers (e.g., railroad or steamship companies)³⁹ and public business (e.g., hotels, theaters, circuses, amusement parks, and telegraph companies)⁴⁰ for the insulting or otherwise offensive conduct of the companies’ employees.⁴¹ Notably, the overwhelming majority of cases in this category sounded in contract law, for the courts viewed a public business’s failure to provide courteous and respectful treatment to its patrons as a breach of contract.⁴²

The vast majority of the common carrier cases involved actions against railroad or steamship companies for mental distress caused by an employee’s insults during a fare payment dispute with a passenger.⁴³ For example, in *Austro-American S.S. Co. v. Thomas*,⁴⁴ the defendant–steamship company appealed a decision of the United States District Court for the Eastern District of New York permitting a plaintiff to recover damages for mental distress she endured when defendant’s employee accused her of tendering a worthless check and ordered her to leave the boat if she lacked alternative payment.⁴⁵ On appeal, the United States Court of Appeals for the Second Circuit declined to address “the long-vexed question as to whether mere mental suffering, resulting from the non-malicious act of one owing no special duty to the sufferer, can either furnish basis for suit or justify an award of damages” and, instead, upheld the trial court’s judgment for plaintiff based solely on “an infraction of contractual obligation,

why the case was not included in the first article, although the fact that male propositions to women—even married ones—were not considered by the courts Prosser cites as outrageous enough to justify an award of damages likely tells us more about the male-dominated, chauvinistic tone of parts of society more than it informs us of any aspect of the common law other than to reinforce its whimsical application in such cases.

37. *New Tort*, *supra* note 23, at 874.

38. *Leach*, 33 S.W. at 703.

39. *New Tort*, *supra* note 23, at 881.

40. *Id.* at 882.

41. For a comprehensive list of cases involving insults to passengers by common carriers, see Joseph R. Parker, *Torts—Intentional Infliction of Mental Suffering—A New Tort*, 22 MINN. L. REV. 1030, 1031 n.10 (1938); see also Magruder, *supra* note 18, at 1034 n.5; *New Tort*, *supra* note 23, at 881 n.38; Harper & McNeely, *supra* note 30, at 436 n.37.

42. Parker, *supra* note 41, at 1032.

43. *New Tort*, *supra* note 23, at 881.

44. *Austro-Am. S.S. Co. v. Thomas*, 248 F. 231 (2d Cir. 1917).

45. *Id.* at 233–34.

which was also a tort"⁴⁶ The court continued by stating "mental suffering proximately result[ing] from a legal wrong . . . is an element of damage."⁴⁷

Some courts, however, seemed to focus more on public policy concerns⁴⁸ and the relationship of the parties than on the sometimes tenuous breach-of-contract claim.⁴⁹ For example, in *Gillespie v. Brooklyn Heights R.R.*,⁵⁰ the plaintiff-passenger sued the defendant-railway company for the "mental suffering, humiliation, wounded pride, and disgrace"⁵¹ that the plaintiff suffered at the hands of the company's employee, who treated her "disrespectfully and indecorously."⁵² In a 4-3 decision,⁵³ the New York Court of Appeals reversed the trial court's judgment for the defendant-railroad company and held that "[t]he relation between a carrier and its passenger is more than a mere contract relation," so any recovery based on a breach of the duty of a common carrier to its passengers "may be had in an action of tort as well as for a breach of the contract."⁵⁴ By 1934, the interest in being free from mental distress caused by the insulting conduct of the carriers' servants was the only recognized exception to the general rule against compensating purely mental distress.⁵⁵ The American Law Institute added a caveat to section 48 and expressed no opinion as to whether other public businesses are liable for similar insulting conduct of their employees.⁵⁶ Well before the publication of the First Restatement, however, some courts began to extend legal liability to hotels whose employees subjected the plaintiff to mental distress in a variety of ways.⁵⁷ For example, in *DeWolf v. Ford*,⁵⁸ the defendant-innkeeper forced himself into a female plaintiff's room, then

46. *Id.* at 234.

47. *Id.*

48. *See, e.g., Gulf, C. & S. F. Ry. v. Luther*, 90 S.W. 44, 48 (Tex. Civ. App. 1905, writ ref'd) ("What could be more humiliating to a frail, delicate, sensitive woman, with a babe at her breast and her other little ones around her, than to be pounced upon, vilified, and traduced by a negro servant in a railway depot . . . ?").

49. *See Parker, supra* note 41, at 1033 ("a contract explanation has been advanced").

50. *Gillespie v. Brooklyn Heights R.R.*, 70 N.E. 857 (N.Y. 1904) (4-3 decision).

51. *Id.* at 859.

52. *Id.*

53. *Id.* at 863 (Gray, J., dissenting) ("I dissent, because I think it is extending unduly the doctrine of a common carrier's liability in making it answerable in damages for the slanderous words spoken by one of its agents."). Chief Judge Parker and Judge O'Brien also dissented. *Id.*

54. *Id.* at 859.

55. RESTATEMENT OF TORTS § 46 (1934) ("Except as stated in §§ 21 to 34 and § 48, conduct which is intended or which though not so intended is likely to cause only a mental or emotional disturbance to another does not subject the actor to liability"); *see also id.* cmt. a ("Section 48 deals with the special liability of a carrier for insults by its servants.")

56. RESTATEMENT OF TORTS § 48 (1934) (caveat).

57. Magruder, *supra* note 18, at 1051-52.

58. *DeWolf v. Ford*, 86 N.E. 527 (N.Y. 1908).

“addressed to her . . . ‘vile and insulting language,’ charged her with being a disreputable person, accused her of conduct imputing guilt of impropriety and immorality, and insulted her in other ways.”⁵⁹ The trial court dismissed the plaintiff’s action, but the New York Court of Appeals reversed.⁶⁰ Although admitting that the relationship between innkeeper and guest “cannot be defined with exactitude,”⁶¹ the Court held that “the innkeeper retains a right of access [to a guest’s room] only at such proper times and for such reasonable purposes as may be necessary.”⁶² Deciding that the inn’s purported interest in the “good repute of the hotel”⁶³ did not justify the late-night intrusion, the Court characterized the intrusion as one “which would have caused any woman, except the most shameless harlot, a degree of humiliation and suffering that only a pure and modest woman can properly describe.”⁶⁴

In a similar vein, poorly chosen words spoken by employees of movie theaters, circuses, and amusement parks subjected these places of public amusement to liability.⁶⁵ When a movie theater employee refused to sell a ticket to a fourteen-year-old girl and accused her of obnoxious conduct during the showing of prior films, the girl experienced “such shame and humiliation that she went to bed and had to receive home treatment of sedatives to relieve the shock and mental suffering.”⁶⁶ On appeal, Mississippi’s highest court affirmed the trial court’s judgment against the movie theater⁶⁷ and held that although “it is true[] damages for mental pain and suffering not accompanied by a distinct physical injury are not allowable,” the rule does not encompass cases of “wanton or shamefully gross wrong, such as the case now before us.”⁶⁸ Two decades earlier, the Tennessee Supreme Court upheld a \$1,500 judgment against Barnum & Bailey for the actions of one of its employees, who “addressed profane language to the ladies of [a] party” and otherwise conducted himself in an “outrageous” manner.⁶⁹ And just five years prior to the Tennessee decision, the New York Court of Appeals, relying on its pseudo-contractual rationale articulated in *Gillespie*⁷⁰ and *DeWolf*,⁷¹ affirmed a lower court’s award of mental distress damages to a female plaintiff who brought

59. *Id.* at 529.

60. *Id.* at 528.

61. *Id.* at 530.

62. *Id.*

63. *Id.* at 529.

64. *Id.* at 531.

65. *New Tort*, *supra* note 23, at 882.

66. *Saenger Theatres Corp. v. Herndon*, 178 So. 86, 87 (Miss. 1938).

67. *Id.* (compensatory and punitive damages totaled \$1,000).

68. *Id.*

69. *Boswell v. Barnum & Bailey*, 185 S.W. 692, 692 (Tenn. 1916) (three cases brought by three of the plaintiffs, two of whom were women).

70. *Gillespie v. Brooklyn Heights R.R.*, 70 N.E. 857 (N.Y. 1904).

71. *DeWolf v. Ford*, 86 N.E. 527 (N.Y. 1908).

suit against a Coney Island amusement park after an employee turned her away from a ticket line in front of numerous onlookers.⁷² In a somewhat dubious attempt at justifying the award, the Court emphasized that the “indignity and humiliation caused by an expulsion” from a public place is especially acute because “it is the publicity of the thing that causes the humiliation.”⁷³

Although seemingly distinct from the above-mentioned venues, telegraph companies likewise failed to escape liability for the insulting conduct of their employees.⁷⁴ In *Dunn v. Western Union Telephone Co.*,⁷⁵ a male plaintiff⁷⁶ visited his local Western Union office for the sole purpose of sending a message to the uncle of two boys in order to inform the uncle of the boys’ mother’s recent death—a fact that made the two boys orphans.⁷⁷ In response to the plaintiff’s attempt to send the urgent message, a Western Union employee “willfully and wantonly”⁷⁸ told the plaintiff to “[g]o to hell,”⁷⁹ refused to allow the plaintiff to send a telegraph, and forced him to leave the office.⁸⁰ A Georgia appellate court held that “[e]very public service company owes to . . . the general public . . . the duty of affording them safe and decent access to the office,” and a duty to “accord respectful treatment.”⁸¹ After prescribing the duty owed to the plaintiff, the court continued by holding that Western Union breached this duty through its employee and, because of the breach, was liable to the plaintiff for compensatory mental damages.⁸² Rejecting Western Union’s argument that the plaintiff’s mental suffering alone is non-compensable, the court re-emphasized Georgia’s established rule that “[w]ounding a man’s feelings is as much actual damage as breaking his limbs”—the only difference being one is mental, the other physical.⁸³

C. *The Fright Cases*

The third category consists of traditional negligence actions brought by a plaintiff who suffered mental distress—fright and shock being the

72. *Aaron v. Ward*, 96 N.E. 736, 737 (N.Y. 1911).

73. *Id.* at 738.

74. *New Tort*, *supra* note 23, at 882.

75. *Dunn v. W. Union Tel. Co.*, 59 S.E. 189 (Ga. Ct. App. 1907).

76. That the plaintiff was male is notable only to the extent that a vast majority of plaintiffs in cases against common carriers or public businesses were female. *Cf. New Tort*, *supra* note 23, at 888 (“Nearly all of the plaintiffs have been women . . .”).

77. *Dunn*, 59 S.E. at 189.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 191.

83. *Id.* (quoting *Head v. Ga. Pac. Ry. Co.*, 7 S.E. 217, 218 (Ga. 1887)).

most prominent⁸⁴—because of the defendant's negligent conduct.⁸⁵ Nearly all of the plaintiffs in fright cases were women who suffered some sort of physical symptoms, such as nervous shock or miscarriage.⁸⁶ Of those plaintiffs who were not women, a majority were children,⁸⁷ while men were the least likely plaintiffs.⁸⁸ Critically analyzing the history of these fright cases, Professors Martha Chamallas and Linda K. Kerber observed that “the law of torts values physical security and property more highly than emotional security and human relationships.”⁸⁹ Chamallas and Kerber concluded that “[t]his apparently gender-neutral hierarchy of values has privileged men, as the traditional owners and managers of property, and has burdened women, to whom the emotional work of maintaining human relationships has commonly been assigned.”⁹⁰ Chamallas and Kerber further surmised that women began to seek compensation for fright beginning in the late nineteenth century because of the findings of pioneering neurologists such as George Beard and S. Weir Mitchell, who established a connection between mind and body and concluded that mental distress could manifest itself physically.⁹¹ Notwithstanding these nuanced views of science, most physicians and other male experts continued to view women as “the pests of many households, who constitute the despair of physicians, and who furnish those annoying examples of despotic selfishness”⁹² Therefore, hysteria, fright, and childbirth-related injuries served only to underscore society's

84. See John E. Hallen, *Damages for Physical Injuries Resulting from Fright or Shock*, 19 VA. L. REV. 253 (1933); see also *New Tort*, *supra* note 23, at 876 n.10 (fright and shock are the prominent emotions, but also anxiety, grief, rage, and shame).

85. See generally Hallen, *supra* note 84, at 253–55.

86. *Id.* at 253; *New Tort*, *supra* note 23, at 876 (“It is not difficult to discover in the earlier opinions a distinctly masculine astonishment that any woman should ever be so silly as to allow herself to be frightened or shocked into miscarriage.”); see also Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990).

87. Magruder, *supra* note 18, at 1037 n.19.

88. *Id.*; see Chamallas & Kerber, *supra* note 86, at 825–26 n.34 (“A man's claim for fright-based injury during this period would have been much harder to fit into this medico-social framework. The critical tie to reproductive injury would be broken in the man's claim, not only because there would be no resulting miscarriage or stillbirth but also because hysterical injury would not be a likely diagnosis for a male patient. While the availability of neurasthenia as a diagnosis made men, as well as women, more free to confess to anxieties, insomnia, palpitations, impotence, and other nervous disorders, men still lived in a culture that severely inhibited them from publicly confessing weakness.”); see also Barbara Sicherman, *The Uses of a Diagnosis: Doctors, Patients, and Neurasthenia*, in *SICKNESS AND HEALTH IN AMERICA* 23–24, 26–28 (J. Leavitt & R. Numbers 2d ed. 1985).

89. Chamallas & Kerber, *supra* note 86, at 814.

90. *Id.*

91. *Id.* at 824.

92. CARROLL SMITH-ROSENBERG, *DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA* 207 (1985); see also S.W. MITCHELL, *LECTURES ON THE DISEASES OF THE NERVOUS SYSTEM, ESPECIALLY IN WOMEN* 266 (2d ed. 1885).

view of middle- and upper-class women as frail and dependent beings.⁹³

To succeed on an action for negligence, the plaintiff must show that the defendant had a duty to the plaintiff, breached that duty, and proximately caused the plaintiff's harm.⁹⁴ Relying primarily on the lack of precedent and the difficulty of proving causation, early New York and English cases denied recovery for purely emotional damages resulting from the defendant's negligent conduct,⁹⁵ and many states followed suit.⁹⁶

Although the common law was "reluctant to recognize the interest in one's peace of mind as deserving of general and independent legal protection,"⁹⁷ a few courts did just that.⁹⁸ For example, in *Hill v. Kimball*,⁹⁹ the defendant-landlord verbally assaulted and violently attacked two "negroes" in front of the plaintiff-tenant, who was pregnant at the time.¹⁰⁰ The plaintiff subsequently brought suit, alleging that the "defendant's conduct frightened [her], and eventually produced a miscarriage, and otherwise seriously impaired her health."¹⁰¹ On appeal, the Supreme Court of Texas reversed the trial court's judgment for the defendant¹⁰² and, after acknowledging the novel question raised by the facts of the case, held that the plaintiff had stated a valid cause of action.¹⁰³ Despite the acknowledged lack of precedent for the action, the court concluded that "a physical personal injury may be produced through a strong emotion of the mind,"¹⁰⁴ and the fact that proving causation may be more difficult in such cases does not mean "that a recovery should not be had."¹⁰⁵

Likewise, in the South Carolina case of *Mack v. South-Bound R. Co.*,¹⁰⁶ the fourteen-year-old male plaintiff witnessed the defendant's

93. Chamallas & Kerber, *supra* note 86, at 825.

94. RICHARD EPSTEIN, *CASES AND MATERIALS ON TORTS* 170 (9th ed. 2008).

95. *Lehman v. Brooklyn City R. R.*, 54 N.Y. Sup. Ct. 355 (N.Y. App. Div. 1888) (stressing lack of precedent on which to base award of damages for purely emotional damages for action based on negligence); *see also* *Victorian Rys. v. Coultas*, [1888] 13 App. Cas. 222 (holding same).

96. *See* Archibald H. Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 264 n.25 (1921) (listing cases where recovery was denied).

97. Magruder, *supra* note 18, at 1035 ("Misleading though Lord Wensleydale's dictum may be as a sweeping generalization, it is nevertheless true that the common law has been reluctant to recognize the interest in one's peace of mind as deserving of general and independent legal protection, even as against intentional invasions.").

98. *See* Throckmorton, *supra* note 96, at 265 n.28 (listing cases where recovery was allowed).

99. *Hill v. Kimball*, 13 S.W. 59 (Tex. 1890).

100. *Id.* at 59.

101. *Id.*

102. *Id.* at 60.

103. *Id.* at 50.

104. *Id.*

105. *Id.*

106. *Mack v. S.-Bound R.R.*, 29 S.E. 905 (S.C. 1898).

train strike his mule, which was travelling at a high rate of speed.¹⁰⁷ In order to save himself, the boy threw himself down “between and along the cross-ties just outside of the rail” and “just barely escaped being struck by the locomotive”¹⁰⁸ As a result of the ordeal, the boy “was terribly frightened, his nervous system was shocked, his mind was affected and partially destroyed, his reason unbalanced, and he for a long time was made ill and sick, and suffered great mental anguish and physical pain.”¹⁰⁹ The South Carolina Supreme Court affirmed the award of mental distress damages for the boy after citing the reasoning of a California case,¹¹⁰ which had held that “a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism.”¹¹¹

The opinions make clear that “mental anguish” damages were awarded for the physical effects of such mental distress—not for the mental distress itself.¹¹² Hence, this category of cases actually fails to do much at all to buttress the claims of Prosser and others that the courts were already awarding mental distress damages with respect to fright cases. These cases represent facts completely distinct from those for which the new tort purportedly would provide a remedy. After all, these were negligence actions—not intentional torts. Moreover, the injuries suffered by the plaintiffs—nervous shock, fright, or miscarriage—were all medically recognized physical injuries reasonably attributed to the preceding mental distress. Thus, to the extent the courts allowed recovery in these cases, courts allowed recovery for the physical injuries caused by mental distress—not for purely emotional harm unaccompanied by physical symptoms. It is strange that Prosser sought to include these cases to support a proposition that the law should—or, rather, already did—recognize “the interest in peace of mind,” for the fright cases justify the award of damages based on the nuanced scientific discoveries that mental distress could cause cognizable physical injuries.

D. “Special Relationship” Cases

The fourth category consists of the “special relationship”¹¹³ cases, which typically involved actions brought by a debtor, insured, tenant, or other strategically weaker party in a financial or fiduciary relationship.¹¹⁴ Because of the compelling policy reasons that provided the

107. *Id.* at 906, 911.

108. *Id.* at 906.

109. *Id.*

110. *Sloane v. S. Cal. Ry. Co.*, 44 P. 320 (Cal. 1896).

111. *Id.* at 322.

112. *See Mack*, 29 S.E. at 905; *Sloane*, 44 P. at 322; *see also Chamallas & Kerber*, *supra* note 86, at 824–25.

113. *See Fraker*, *supra* note 8, at 991.

114. *Id.* at 990; *Parker*, *supra* note 41, at 1034; *New Tort*, *supra* note 23, at 883.

impetus for the majority of courts' decisions, these cases are important to a modern understanding of Outrage.¹¹⁵ Concerned with protecting debtors from the high-pressure and harassing collection techniques of creditors, some courts began to allow recovery for purely emotional injuries suffered at the hands of a more powerful, overzealous party.¹¹⁶ Courts were "especially willing to compensate plaintiffs for purely emotional injuries when the abusive treatment was a deliberate and premeditated element of a commercial strategy."¹¹⁷ The courts in these instances were far less concerned with identifying a specific cause of action than with ensuring that the physically, emotionally, or financially weaker party had a means of legal redress against the more powerful party in the relationship.¹¹⁸ The more frequently cited torts within this category of cases include assault,¹¹⁹ battery, false imprisonment, and trespass.¹²⁰

Assault, as defined above, is the intentional causing of either (a) a harmful or offensive contact or (b) the imminent apprehension of such contact, where the plaintiff must actually fear imminent harm as a direct result of the defendant's actions.¹²¹ In *Whitsel v. Watts*,¹²² for example, the defendant went to the plaintiff's home to retake possession of some hogs that the plaintiff had mortgaged to the defendant's husband.¹²³ When the plaintiff refused to turn over the hogs, the de-

115. Cf. Fraker, *supra* note 8, at 991 ("In recent years, the existence of a special relationship, particularly one of authority or economic dependence, between the plaintiff and defendant often has been an important factor in rendering liability for [Outrage]."); see also *Johnson v. Sampson*, 208 N.W. 814, 815-16 (Minn. 1926) (high school principal threatens to tarnish a girl's otherwise unblemished reputation).

116. See, e.g., *Clark v. Associated Retail Credit Men of Wash. D.C.*, 105 F.2d 62 (D.C. Cir. 1939); *Barnett v. Collection Serv. Co.*, 242 N.W. 25, 28 (Iowa 1932) (granting recovery for mental anguish resulting from intentional conduct absent physical harm); *La Salle Extension Univ. v. Fogarty*, 253 N.W. 424, 426 (Neb. 1934); see also Fraker, *supra* note 8, at 991; Magruder, *supra* note 18, at 1063 n.125.

117. Fraker, *supra* note 8, at 991 (citing John W. Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63, 72 (1950)).

118. See, e.g., *Continental Cas. Co. v. Garrett*, 161 So. 753, 754-55 (Miss. 1935); see also Fraker, *supra* note 8, at 991.

119. Assault is discussed independently above in a different context to illustrate the longevity of the rule that mental distress damages have long been allowed by juries in cases of assault. See discussion *supra* Part II.A.

120. See, e.g., Fraker, *supra* note 8, at 987 n.12.

121. RESTATEMENT (SECOND) OF TORTS § 21(1) (1965) ("An actor is subject to liability to another for assault if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) the other is thereby put in such imminent apprehension.").

122. *Whitsel v. Watts*, 159 P. 401 (Kan. 1916). It should not go unnoticed that there was a pre-existing legal relationship between the defendant and the plaintiff's husband, for courts were especially likely to "bend" the law to reach the correct result if the emotional harm occurred when one party in the legal relationship exploited his position to, for example, collect a debt. See Givelber, *supra* note 10, at 63-64 ("In one group of cases the defendant has engaged in excessive self-help in an effort to force the plaintiff to comply with contractual terms (most typically, to pay a debt).").

123. *Whitsel*, 159 P. at 401.

defendant jumped from his carriage, ran toward her, shook his fists at her, and told her that she was “fooling with the wrong person this time.”¹²⁴ Frightened by the defendant’s gestures, the plaintiff ran back into her house, collapsed on the floor, lost consciousness, and subsequently suffered a miscarriage.¹²⁵ The plaintiff then sued the defendant for damages “for the personal injuries directly resulting from fright caused by the willful tort of the defendant,” and the jury returned a verdict of \$225 for the plaintiff.¹²⁶ On appeal, the defendant argued that his actions did not constitute an assault because “proof of a mere fright furnishes no basis for a recovery.”¹²⁷ The Supreme Court of Kansas unanimously affirmed, holding that “the defendant’s liability does not depend upon whether his wrongful onset constitutes an assault,” but rather upon whether “[he] is liable in damages for injuries which are the natural and reasonable consequences of his wrongful act, whatever name may be fittingly applied to the wrong.”¹²⁸ The Court further opined that “there is general agreement . . . that a recovery may be had where the injury results from fright caused by a willful wrong . . .”¹²⁹ Nonetheless, as close to assault as the defendant’s actions in *Whitsell* may have seemed, the fact remains that it was not assault—only “something very like assault.”¹³⁰

Battery is the intentional and offensive direct or indirect contact with another person.¹³¹ However, a few courts went to great lengths to award mental distress damages in cases where the offensive contact itself was negligible.¹³² For example, in *Interstate Life & Accident Co. v. Brewer*,¹³³ the defendant, who was an agent of the plaintiff’s insurance company, visited the sick¹³⁴ and bed-ridden plaintiff at her home; angrily questioned her about the legitimacy of her sickness; threatened to stop her insurance payments; and upon leaving her room, threw a silver dollar coin at her, hitting her directly.¹³⁵ As a result of the trauma, the plaintiff suffered a nervous shock and heart attack, both of which her doctor claimed were caused by the agent’s visit.¹³⁶ The plaintiff prevailed at trial and recovered both compensa-

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 402.

130. *New Tort*, *supra* note 23, at 874 (“[T]he courts have created a new tort . . . [that] is something very like assault.”).

131. RESTATEMENT (SECOND) OF TORTS § 18(1) (1965).

132. *See New Tort*, *supra* note 23, at 884.

133. *Interstate Life & Accident Co. v. Brewer*, 193 S.E. 458 (Ga. Ct. App. 1937).

134. *Id.* The plaintiff suffered from hypertension and heart disease. *Id.* at 462.

135. *Id.* at 459–62.

136. *Id.* at 460.

tory and exemplary damages.¹³⁷ On appeal, the Georgia court of appeals affirmed the trial court's judgment and held that "[h]owever slight the injury occasioned by the impact of the coin, it was nevertheless . . . a "physical injury" that, as in similar cases, was "merely the necessary concomitant of mental pain and suffering, [which is] the main element of damage."¹³⁸

False imprisonment is the intentional confinement of another within established boundaries, where the person confined is either conscious of the confinement or harmed by it.¹³⁹ In *Salisbury v. Poulson*,¹⁴⁰ for example, the defendant confined the plaintiff in his dental office for approximately thirty to fifty minutes when the plaintiff failed to pay the sum of money she allegedly owed for completed dental work.¹⁴¹ In addition to using profane language toward the plaintiff, the defendant shook his fists at her, locked the exit doors, and demanded she remain seated until a constable arrived.¹⁴² Although the constable allowed the plaintiff to leave in order to retrieve the balance of the money owed, the plaintiff "became very nervous and sick" a few days after the ordeal and "as a result of her experience suffered a miscarriage"¹⁴³ At trial, the jury awarded the plaintiff compensatory and punitive damages, and the Supreme Court of Utah affirmed.¹⁴⁴

E. *Practical Joke Cases*

The fifth and final category consists of the practical joke cases, of which there are notably few.¹⁴⁵ The seminal English case of *Wilkinson v. Downton*¹⁴⁶ was the first of its kind to hold a defendant liable for the plaintiff's mental distress that resulted in physical illness without stating an independent cause of action.¹⁴⁷ In *Wilkinson*, a joker persuaded a woman that her husband was hospitalized with two bro-

137. *Id.* at 464. The applicable Georgia statute referred to "punitive damages" as "exemplary damages," which the jury were permitted to award if they found the existence of aggravating circumstances and decided that such damages would either (1) deter the defendant from acting similarly again or (2) compensate the plaintiff for "wounded feelings." See GA. CODE ANN. § 105-2002 (1933) (currently GA. CODE ANN. § 51-12-5 (West 2012)).

138. *Interstate Life & Accident Co.*, 193 S.E. at 463.

139. RESTATEMENT (SECOND) OF TORTS § 35(1) (1965).

140. *Salisbury v. Poulson*, 172 P. 315 (Utah 1918).

141. *Id.* at 316.

142. *Id.*

143. *Id.*

144. *Id.* at 316-17.

145. Fraker, *supra* note 8, at 991-92.

146. *Wilkinson v. Downton*, [1897] 2 Q.B. 57, reprinted in FRANCIS H. BOHLEN, CASES ON THE LAW OF TORTS 221 (1915).

147. *Wilkinson*, 2 Q.B. at 57 ("The defendant has . . . wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action"); see also Magruder, *supra* note 18, at 1045.

ken legs.¹⁴⁸ When she heard the news, the wife immediately suffered nervous shock that produced vomiting and other permanent physical ailments.¹⁴⁹ Holding that the plaintiff should recover because the defendant violated “her legal right to personal safety,” the court stated that such a violation, without more, stated a cause of action.¹⁵⁰ Following *Wilkinson*, the Saskatchewan court of appeals affirmed a judgment against the defendant who circulated a rumor that the plaintiff’s son had hanged himself from a telephone pole.¹⁵¹ The court focused on the fact that the defendant knew it was substantially likely the rumor would circulate and ultimately reach the plaintiff.¹⁵²

In 1920, the *Wilkinson* rule spread to the United States and was adopted by the Supreme Court of Louisiana in the famous “pot of gold”¹⁵³ case, *Nickerson v. Hodges*.¹⁵⁴ The *Nickerson* case involved an eccentric, mentally unstable¹⁵⁵ woman who came to believe that her dead relatives buried treasure on her neighbor’s property.¹⁵⁶ Mrs. Nickerson solicited the aid of about four or five other individuals, who all assisted her in digging for the buried treasure.¹⁵⁷ Being so excited, due to her mentally deficient state, the woman called upon all of her friends and family to join her at the unearthing of the treasure, which turned out to consist of only earth and rocks that the defendants had jokingly placed within a wooden box and buried in the ground.¹⁵⁸ The woman was so emotionally distraught and embarrassed in front of her family and friends that she suffered a nervous breakdown from which she never recovered, dying two years later.¹⁵⁹ The Louisiana Supreme Court awarded damages to the woman’s estate without naming a specific cause of action upon which its opinion rested,¹⁶⁰ although the woman’s known vulnerability likely played a pivotal role in the Court’s decision.¹⁶¹ To the extent these three “practical joke” cases

148. *Wilkinson*, 2 Q.B. at 57.

149. *Id.* at 58.

150. *Id.* at 57–59; see also Parker, *supra* note 41, at 1039.

151. See Parker, *supra* note 41, at 1039 (citing *Bielitski v. Obadiak*, [1922] 65 D.L.R. 627).

152. See *id.*

153. Fraker, *supra* note 8, at 991.

154. See *Nickerson v. Hodges*, 84 So. 37, 39 (La. 1920).

155. See *id.* at 38 (“Mrs. Nickerson was a maiden, nearing the age of 45 years, and some 20 years before had been an inmate of an insane asylum . . .”).

156. *Id.* at 37.

157. *Id.*

158. *Id.* at 38.

159. *Id.* at 39.

160. *Id.*

161. See Fraker, *supra* note 8, at 992 (noting that Mrs. Nickerson’s known vulnerability, or peculiar susceptibility, factored in the finding of liability).

were more legal aberrations than precedent-worthy decisions, they exerted a disproportionately strong influence on Prosser and others.¹⁶²

All five of these categories serve to illustrate how, prior to 1939, courts already recognized and protected a right in being free from mental distress in certain circumstances. And, as Professor Magruder reported, courts seemed perfectly capable of and comfortable with compensating purely emotional injuries through clever escape from the straightjacket, in “Houdini-like” fashion.¹⁶³ Ultimately, Professor Thomas A. Street’s portending statement about the common law proved true: “A factor which is today recognized as parasitic will, forsooth, tomorrow be recognized as an independent basis of liability.”¹⁶⁴ Prosser and his colleagues resolved to do just that.¹⁶⁵

III. AN ATHENIAN BIRTH OR THE CROWN OF LEGAL REALISM?¹⁶⁶

In 1934, the ALI published the Restatement of Torts, which took the position that no recovery for emotional injury—even when intentionally inflicted—was allowed if the defendant’s conduct did not oth-

162. Cf. Givelber, *supra* note 10, at 72 (“*Wilkson v. Downton*, the practical joke case, has spawned few progeny despite its importance in the development of the tort.”).

163. Magruder, *supra* note 18, at 1050. Referring to the two alleged “exceptional cases where conduct causing only mental or emotional distress is actionable,” Magruder criticized the deceptively simple classification of only two exceptions to the general rule of no liability for purely emotional harm on the grounds that it “seems to encase the courts in a straightjacket, from which, however, Houdini-like, they have managed to escape upon appropriate occasion.” *Id.*; see also Parker, *supra* note 41, at 1031 (“In many instances, it is evident that the courts have over-exploited the possibilities of recognized causes of action, or have advanced dubious rationalizations to support their actual desire to compensate the real injury sustained—outrageous invasions of mental and emotional security.”).

164. THOMAS ATKINS STREET, FOUNDATIONS OF LEGAL LIABILITY 470 (9th ed. 1912).

165. Cf. *New Tort*, *supra* 23, at 892 (“All of these problems could be dealt with in far more intelligent fashion if we were to jettison the entire cargo of technical torts with which the real cause of action has been burdened, and recognize it as standing on its own feet. There is every indication that this will henceforth be done, and that the intentional infliction of extreme mental suffering by outrageous conduct will be treated as a separate and independent tort.”).

166. This is an allusion to the Greek mythological story of Athena’s birth from Zeus’s head. Here, Prosser represents Zeus and the “new” tort of Outrage represents Athena, who emerged from Zeus’s head full grown, fully clothed, and ready for battle. The analogy derives from some scholars’ views that Prosser essentially created a new cause of action based not on the actual reality of any substantive change in the common law, but rather on myriad academic articles that circulated beginning in the early twentieth century and, arguably, culminating in Prosser’s own article published in early 1939 and entitled *Intentional Infliction of Mental Suffering: A New Tort*. Cf. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 102 (2003) (“A major contribution to the ‘creation’ of the ‘new tort’ had been made by Prosser himself.”).

erwise amount to a tort.¹⁶⁷ But, as Professor Magruder has observed, “the courts have already given extensive protection to feelings and emotions.”¹⁶⁸ Thus, the main criticism of the Restatement’s position was that it actually failed to accomplish its purpose to restate the law.¹⁶⁹ If, as Magruder, Prosser, and others insisted, courts from the late 1800s and 1900s allowed recovery for purely emotional distress, then the Restatement section 46 did indeed erroneously portray the current state of the law at that time.¹⁷⁰ Ultimately, as both Magruder and Prosser revealed in their respective articles, the courts were becoming quite adept at meting out justice for “the intentional, outrageous infliction of mental suffering in an extreme form”¹⁷¹—no matter how cleverly the courts tried to disguise their actions.

Now that Magruder and, more notably, Prosser had articulated a problem with the Restatement’s position, the onus fell upon them and other legal scholars to convince the ALI to reconsider its position.¹⁷² Of course, a legitimate question at this point might be why Prosser and his colleagues felt the need to champion a cause of action so conclusively rejected in the Restatement. An answer to this question requires a brief explanation of the intellectual context in which these individuals thought, and legal realism provides such a context.¹⁷³

A. *The Influence of Legal Realism*

Initially, the legal realists¹⁷⁴ themselves represented an intellectually disjointed group, which likely can be attributed to the fact that most lacked the philosophical training to adequately express a cogent, commonly held set of beliefs.¹⁷⁵ Nonetheless, three basic tenets of the American Legal Realism movement can be identified: (1) a height-

167. RESTATEMENT OF TORTS § 46 (1934). As previously stated, *see supra* Part II.B, the Restatement did allow for recovery of mental distress resulting from the insults of common carrier employees.

168. Magruder, *supra* note 18, at 1067.

169. According to the ALI, restatements “reflect the law as it presently stands or might plausibly be stated by a court, [and] black-letter formulations assume the stance of describing the law as it is.” *Projects – Overview*, THE AM. LAW INST., <http://www.ali.org/index.cfm?fuseaction=projects.main> (last visited Sept. 7, 2012).

170. Givelber, *supra* note 10, at 44.

171. *New Tort*, *supra* note 23, at 874.

172. *See* Fraker, *supra* note 8, at 988 (“In response to the *Restatement* position, a series of influential articles published over the next five years argued for recognition of [Outrage].”).

173. WHITE, *supra* note 166, at 104–05.

174. For more sources that name prominent figures of the American legal realism movement, *see* Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1919 & n.13 (2005).

175. *Id.* at 1919. Professor Green adds the caveat that a lack of formal philosophical training does not necessarily result in inherent fallacious logic; rather, he views the works of the realists he names as simply requiring some “philosophical reconstruction.” Although well beyond the scope of this Article, Professor Green’s article provides an excellent defense of legal realism in the wake of its former disrepute throughout the field of philosophy. *See generally id.* at 1915–20.

ened interest in the insights of the behavioral sciences; (2) an impatience with judicial “fictions”; and (3) a nuanced conception of tort law as an exercise in social policymaking.¹⁷⁶ Most importantly, an essential component of Realism was an understanding that doctrinal uniformity was impossible in light of an ever-changing world and an increasingly complex society whose values and interests remain in a constant state of fluctuation.¹⁷⁷ This skeptical view of the legal principle is more understandable in light of technological advances in publication that took place in the first third of the twentieth century.¹⁷⁸ Inundated with opinions from state appellate and supreme court decisions, scholars quickly realized that “actual decisions reflected idiosyncrasy and contradiction quite as much as they did legal principle.”¹⁷⁹

Realism’s focus on the psychological dimensions of human behavior and fascination with the nascent behavioral sciences directly affected how the common law began to view the idea of quantifiable emotional damages in tort law.¹⁸⁰ Prosser and his colleagues sought to expand the locus of compensation for emotional distress from the isolated and aberrational cases to an independent cause of action.¹⁸¹ Prosser may have expedited the “creation” of the new tort, but Outrage more surely sprang out of the collective mind of the legal realists, who sought merely to give form to what courts had already created.

B. *Prosser’s Contribution to the Tort’s Creation*

Professor G. Edward White¹⁸² graciously credits Prosser with being the leading contributor to the “creation” of the tort of Outrage through Prosser’s organization of the diverse cases where mental distress damages were granted.¹⁸³ Relying on twelve leading law review articles from 1902 to 1938,¹⁸⁴ the comprehensive “Report of the New

176. WHITE, *supra* note 166, at 104. For a more detailed account of the history of American legal realism, see Brian Leiter, *American Legal Realism* in THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY 50, 51 (W. Edmundson & M. Golding eds., 2005) (detailing the contribution of Justice Oliver Wendall Holmes, Jr., Karl Llewellyn, Underhill Moore, Leon Green, and other notable figures of the American legal realism movement).

177. WHITE, *supra* note 166, at 106.

178. Chamallas & Kerber, *supra* note 86, at 842; see generally Edward A. Purcell, Jr., *American Jurisprudence between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIST. REV. 424 (1969).

179. Chamallas & Kerber, *supra* note 86, at 842.

180. WHITE, *supra* note 166, at 103.

181. *Id.* at 104; see generally *New Tort*, *supra* note 23; Magruder, *supra* note 18.

182. WHITE, *supra* note 166, at 102 (“Prosser’s statement [that the courts had created a new tort] was also unnecessarily modest. A major contribution to the ‘creation’ of the ‘new tort’ had been made by Prosser himself.”).

183. Prosser, with the help of his research assistant Joseph R. Parker (referenced throughout this article), organized the diverse cases where recovery for emotional distress had been granted. See *New Tort*, *supra* note 23, at 874, asterisked note.

184. *New Tort*, *supra* note 23, at 874–75 n.3.

York State Law Revision Commission on Liability for Injuries Resulting From Fright or Shock,"¹⁸⁵ and Parker's student Note, Prosser synthesized all of the materials into one article that signified the birth of a new tort: *Intentional Infliction of Mental Suffering: A New Tort*.¹⁸⁶

On December 31, 1938, Prosser delivered this article during the meeting of the Association of American Law Schools, and prodigiously declared that "the courts have created a new tort."¹⁸⁷ Recognizing the efforts of his colleague Professor Calvert Magruder and other academics who traced the progress of the "new tort" in a series of law review articles beginning in 1902,¹⁸⁸ Prosser characterized the tort as "the intentional, outrageous infliction of mental suffering in an extreme form."¹⁸⁹ Claiming that the tort appeared "in one disguise or another"¹⁹⁰ in more than one hundred decisions primarily from the 1910s into the 1930s, Prosser wanted to show that, contrary to the Restatement,¹⁹¹ courts recognized the interest in peace of mind as entitled to independent legal protection.¹⁹²

C. Addressing the Critics' Concerns

However, the key to formal recognition of the new tort lay in persuasive counterarguments to critics' major concerns.¹⁹³ Essentially, four main criticisms had been leveled against the proposed cause of action: (1) the potential for fraudulent claims; (2) the lack of binding legal precedents; (3) the perceived difficulty in proving and measuring damages; and (4) the possibility of increased litigation.¹⁹⁴ Magruder's 1936 article and Prosser's 1939 article proved that the second and third concerns were baseless.¹⁹⁵ Regarding the first and fourth claims, both Magruder and Prosser conceded their validity¹⁹⁶ and recognized

185. N.Y. Leg. Doc. No. 65 (E) (1936); see *New Tort*, *supra* note 23, at 875 n.3.

186. *New Tort*, *supra* note 23.

187. *Id.* at 874.

188. The earliest article was written by Francis H. Bohlen, a professor at the University of Pennsylvania's School of Law and the reporter for the Restatement of Torts. Francis H. Bohlen, *Right to Recover for Injury Resulting from Negligence without Impact*, 50 AM. L. REG. (N.S.) 141 (1902).

189. *New Tort*, *supra* note 23, at 874.

190. *Id.*

191. RESTATEMENT OF TORTS (1934), § 46 cmt. c ("The interest in mental and emotional tranquility and, therefore, in freedom from mental and emotional disturbances is not, as a thing in itself, regarded as of sufficient importance to require others to refrain from conduct intended or recognizably likely to cause such a disturbance.").

192. See generally *New Tort*, *supra* note 23.

193. See Givelber, *supra* note 10, at 44–45.

194. WHITE, *supra* note 166, at 105; see also Throckmorton, *supra* note 96, at 273–74 (discussing four policy reasons for not allowing emotional damages in fright cases).

195. See generally *New Tort*, *supra* note 23, at 874–75; Magruder, *supra* note 18, at 1048–49.

196. See Magruder, *supra* note 18, at 1035 ("Adoption of the suggested principle would open up a wide vista of litigation in the field of bad manners, where relatively minor annoyances had better be dealt with by instruments of social control other than

the need for limitations on the tort.¹⁹⁷ Prosser's solution, which the ALI subsequently adopted in its 1948 supplement to the Restatement's section 46,¹⁹⁸ limited the application of the tort to instances where an actor inflicted severe emotional distress "without a privilege to do so."¹⁹⁹ However, this definition proved to be too broad, as the inquiry into the plaintiff's "severe emotional distress" allowed the plaintiff to more easily survive a directed verdict motion simply by proving severe injury regardless of how the defendant acted to cause the injury.²⁰⁰ Even Prosser, who originally proposed the "privilege" test, conceded the need for a more limited statement, which will set some boundaries for the liability.²⁰¹

The solution was found in the nature of the defendant's conduct. As early as 1955, with the circulation of the first draft of the *Restatement (Second)*, the tort was named "Outrageous Conduct Causing Emotional Distress."²⁰² By the time the second draft was circulated in 1956, the title had changed to what would become its final iteration: "Outrageous Conduct Causing Severe Emotional Distress."²⁰³

D. *The Elements of Outrage*

The tort requires four elements: (1) intentional or reckless conduct that is (2) outrageous in nature, beyond the bounds of human decency, and intolerable in a civilized community, and that (3) causes emotional distress that is (4) severe such that no one should be expected to endure it.²⁰⁴ Prosser emphasized the centrality of the defendant's outrageous behavior by noting that a proper case to which the tort should apply "is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim 'Outrageous!'"²⁰⁵ As Professor Givelber observed, "[t]his is a strange description of a rule of law," for it is precisely in such situations where the community is "up

the law."); *New Tort*, *supra* note 23, at 877 ("The most valid objection to the protection of 'mental' interests lies in the 'wide door' which might be opened, not only to fictitious and fraudulent claims, but to litigation in the field of trivialities and mere bad manners.").

197. See Givelber, *supra* note 10, at 44-45 ("The challenge was to define the rule permitting recovery while at the same time meeting the major objections to the recognition of the tort . . .").

198. The 1948 supplement to section 46 reversed the ALI's position as promulgated in the 1934 publication of the Restatement.

199. "One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it." RESTATEMENT OF TORTS § 46 (Supp. 1948).

200. See Givelber, *supra* note 10, at 60 n.91.

201. Prosser, *supra* note 19, at 41.

202. RESTATEMENT (SECOND) OF TORTS § 46 (Preliminary Draft No. 1, 1955).

203. RESTATEMENT (SECOND) OF TORTS § 46 (Council Draft No. 1, 1956).

204. RESTATEMENT (THIRD) OF TORTS § 45 (Tentative Draft No. 5, 2007).

205. Prosser, *supra* note 19, at 44 (quoting RESTATEMENT OF TORTS § 46 cmt. g (Supp. 1948)).

in arms over the outrageous conduct of individuals” that “evenhanded application of law is threatened.”²⁰⁶

As many courts have no doubt come to realize, the root of the entire problem surrounding the real-world application of outrage is that the element of “outrageousness” is a standard without a context—“it is the hermit crab of the law of torts.”²⁰⁷ Professor Givelber further contends that all of the tort’s elements collapse into one: outrageous conduct by the defendant.²⁰⁸ Even though the formal definition of the tort “attempts to straddle the fence” between unintentional and intentional torts by requiring “severe injury, the attempt fails”:

[T]he reality is that the proof of the injury element in outrageousness does not, in practice, differ significantly from that of other intentional torts While there is a theoretical distinction between the injury element of false imprisonment, for instance, and outrageousness, there may be very little practical difference—in both instances evidence that the defendant behaved in the prohibited manner combined with plaintiff’s assertion that he or she in the one case felt restrained or in the other suffered severe distress permits the finding that the plaintiff was injured.²⁰⁹

Thus, in practice, the focus of the court’s initial inquiry should be squarely on whether, as a matter of law, the defendant’s conduct is “outrageous.”

The fourth element requiring “severe” emotional distress is nothing more than a tautology, for “in many cases the extreme and outrageous character of the defendant’s conduct is itself important evidence bearing on whether the requisite degree of disturbance resulted.”²¹⁰ As a practical matter, the “plaintiff’s ability to articulate the extent of his or her suffering is usually important only for the influence it may have on the factfinder with respect to the issue of attributing a dollar value to the pain-and-suffering element of damages.”²¹¹ Furthermore, the use of an objective “reasonable person” standard to measure the severity of the emotional harm directs the court’s inquiry back to the nature of the defendant’s behavior, once again emphasizing that “in practice, the heart of the tort is the quality of defendant’s conduct.”²¹²

Apart from two cases dating from the late 1970s,²¹³ nearly all jurisdictions begin—and often end—the inquiry with the defendant’s be-

206. Givelber, *supra* note 10, at 52.

207. *Id.* at 69.

208. *Id.* at 49.

209. *Id.* at 50.

210. RESTATEMENT (THIRD) OF TORTS § 45 cmt. i (Tentative Draft No. 5, 2007).

211. Givelber, *supra* note 10, at 48.

212. *Id.*

213. See *Harris v. Jones*, 380 A.2d 611 (Md. 1977) (Notwithstanding that the defendant-supervisor (1) verbally and (2) physically mimicked plaintiff’s stuttering disability (3) more than 30 times over a six-month period, the Maryland court of appeals held that the plaintiff failed to allege severe emotional distress.); *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148 (Me. 1979) (“feeling down” as a result of defendant

havior.²¹⁴ When all of the elements collapse into “outrageousness,”²¹⁵ the semantic dust finally settles, and it becomes clear that outrage “most unambiguously furthers the punishment and control functions of tort law.”²¹⁶ To the courts, then, is left the unenviable task of applying a tort that “defies consistent definition, and presents all the problems inherent in that lack of definition compounded by a prominent punitive component.”²¹⁷ The more daunting challenge for courts, however, is determining what conduct constitutes the type of outrageous behavior contemplated by the tort. This challenge always will leave the courts to decide where to draw the line between truly outrageous conduct and all other offensive conduct for which “a certain toughening of the mental hide is a better protection than the law could ever be.”²¹⁸

IV. SOUTH CAROLINA AS AN EXAMPLE

South Carolina has adopted the *Restatement (Second)*, and thus it requires the same four elements.²¹⁹ As noted above, outrageousness is key, and South Carolina’s application of outrage over the years illustrates how all of the elements ultimately reduce to outrageousness.²²⁰ The majority of opinions from the South Carolina Supreme Court and the Court of Appeals that address Outrage demonstrate that the courts are well aware of the tort’s exacting standards of proof and limited application in every-day litigation.²²¹ Most of these opinions demonstrate that South Carolina courts share the same policy-related concerns that prompted courts to allow recovery for mental distress in “special relationship” and “practical joke” cases prior to the tort’s formal recognition.²²²

With few exceptions, South Carolina seemed quite adept at managing this troublesome tort. However, the recent South Carolina Supreme Court case of *Hansson v. Scalise Builders of S.C.*, marks a

repossessing plaintiff’s vehicle not so severe such that no one would be reasonably able to endure it).

214. See Givelber, *supra* note 10, at 48 (“The courts have found, however, that a relatively ‘objective’ measure of extreme suffering, such as that which would make a reasonable person suffer, may solve [the] difficulty” resulting from “variations in emotional responsiveness among individuals, and variations in their ability and willingness to articulate their hurt . . .”).

215. *Id.* at 49 (“collapse of four elements into one”).

216. *Id.* at 54; see also *id.* at n.63 (explaining how Outrage furthers the goals associated with the doctrine of punitive damages).

217. *Id.* at 75.

218. Magruder, *supra* note 18, at 1035.

219. See *infra* notes 246–53; see also *Ford v. Hutson*, 276 S.E.2d 776 (S.C. 1981).

220. Givelber, *supra* note 10, at 49.

221. See, e.g., *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 321 S.E.2d 602, 610 (S.C. Ct. App. 1984) (acknowledging the tort’s acceptance in theory more so than in practice), *quashed on other grounds*, 336 S.E.2d 472 (S.C. 1985).

222. See *supra* Parts II.D, II.E.

sharp departure from a conduct-based inquiry to one focused on the severity of the plaintiff's alleged injury.²²³ *Hansson* ignores years of precedent and threatens to fundamentally change the nature of the tort itself by directing lower courts' attention to the degree of the plaintiff's emotional suffering rather than on the defendant's conduct. The South Carolina Supreme Court strayed from the original nature of the tort of outrage as a punitive-based cause of action reserved for those few cases where the defendant's conduct rises to the standard of outrageousness that the Supreme Court itself has created over the past thirty-three years.²²⁴

A. South Carolina's Formal Recognition of Outrage

From 1977 to 1981, the South Carolina Supreme Court handed down three opinions addressing "outrageous" behavior.²²⁵ But in 1981, South Carolina formally recognized the tort of Outrage²²⁶ as an independent cause of action in the landmark case of *Ford v. Hutson*.²²⁷

In *Ford*, the defendant had purchased a home with which he was unhappy from the plaintiff—real estate agent.²²⁸ On one occasion, the defendant barged into the plaintiff's home unannounced and verbally accosted her in front of her friend.²²⁹ On another occasion, the defendant approached the plaintiff in the middle of a restaurant and, again, verbally accosted her in front of others.²³⁰ Between 1972 and 1974,

223. *Hansson v. Scalise Builders of S.C.*, 650 S.E.2d 68 (S.C. 2007).

224. For purposes of this Article, *Rhodes v. Sec. Corp. of Landrum*, 233 S.E.2d 105, 106 (S.C. 1977) marks the origin of the Supreme Court's Outrage jurisprudence because it is the first non-"fright" case where the cause of action was solely for emotional distress unaccompanied by any physical injury.

225. *See id.*; *Bellamy v. Gen. Motors Acceptance Corp.*, 239 S.E.2d 73, 73 (S.C. 1977); *Hudson v. Zenith Engraving Co.*, 259 S.E.2d 812, 813 (S.C. 1979). Prior to 1977, the South Carolina Supreme Court decided three cases that often are cited as historical support for South Carolina's willingness to award damages for mental distress: *Mack v. S.-Bound R.R.*, 29 S.E. 905, 906 (S.C. 1898); *Padgett v. Colonial Wholesale Distrib. Co.*, 103 S.E.2d 265, 265 (S.C. 1958); and *Turner v. ABC Jalouse Co. of N.C.*, 160 S.E.2d 528, 528 (S.C. 1968). For purposes of better understanding the tort of Outrage, however, these cases are unhelpful because they all are "fright" cases based on a negligence theory. In these cases, recovery was allowed not because the plaintiffs suffered true mental anguish or the type of mental distress commonly associated with the tort of Outrage, but rather because the court viewed nervous shock as a physical, rather than a mental injury. Thus, if a similar fact pattern were to arise today, the proper cause of action in South Carolina would be negligent infliction of emotional distress. For more on "fright" cases, see *supra* Part II.C.

226. In South Carolina, the tort is commonly known by one of two interchangeable names: "intentional infliction of emotional distress" or "outrage." Because the former name fails to emphasize the key element of "outrageousness," the latter name more accurately describes the cause of action as South Carolina courts have applied it.

227. *Ford v. Hutson*, 276 S.E.2d 776 (S.C. 1981).

228. *Id.* at 779.

229. *Id.*

230. *Id.*

the defendant confronted and verbally accosted the plaintiff on approximately five separate occasions.²³¹ Allegedly as a result of all of these encounters, the plaintiff suffered various physical symptoms including “an attack of shaking, nausea, cramps, and hysteria,” as well as “knotting of the intestinal tract, severe bouts of nausea, stiffness and numbness.”²³²

After rejecting the defendant’s argument that “physical illness or some other non-mental damage is essential to recovery,” the Court formally adopted the *Restatement (Second)* section 46²³³ and held that “where physical harm is lacking, the courts should look initially for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious.”²³⁴ Applying this rule, the Court held that the trial court correctly denied the defendant’s motion for summary judgment for Outrage because the defendant’s conduct was outrageous as a matter of law.²³⁵

In the twenty-five years following *Ford*, the South Carolina Supreme Court has addressed the tort of Outrage on seven occasions,²³⁶

231. *Id.*

232. *Id.* at 780.

233. *Id.*; *Restatement (Second) of Torts*, section 46 provides as follows: “(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress (a) to a member of such person’s immediate family who is present at the time, whether or not such distress results in bodily harm, or (b) to any other person who is present at the time, if such distress results in bodily harm.” *RESTATEMENT (SECOND) OF TORTS* § 46 (1965).

234. *Ford*, 276 S.E.2d at 780.

235. *Id.* (“We cannot say, as a matter of law, that the trial judge erred in submitting the issues to the jury. The evidence is legally sufficient to support the verdict.”).

236. *Bell v. Dixie Furniture Co.*, 329 S.E.2d 431, 433 (S.C. 1985) (3–2 decision) (defendant–seller’s conduct was outrageous as a matter of law where he argued with plaintiff–buyer, refused to accept plaintiff’s court-ordered payment of her debt owed to defendant, and exclaimed “damn the judge” in response to plaintiff’s attempt to explain why the payment did not include court costs); *Nash v. AT&T Nassau Metals*, 381 S.E.2d 206, 210 (S.C. 1989) (when defendant–employer’s outrageous conduct occurs while executing a collective bargaining agreement with plaintiff–employee, section 301 of the federal Labor Management Relations Act preempts plaintiff’s state law claim for Outrage); *McSwain v. Shei*, 402 S.E.2d 890, 891–92 (S.C. 1991), *overruled on other grounds by Sabb v. S.C. State Univ.*, 567 S.E.2d 231 (S.C. 2002) (denial of defendant–employer’s motion for summary judgment in plaintiff–employee’s action for outrage was appropriate, and defendant’s conduct could be considered outrageous as a matter of law, where defendant knew of plaintiff’s serious bladder condition, denied her request for leave to have needed surgery, and forced her to participate in physical exercises that caused her to lose control of her bladder in front of other employees); *Hainer v. Am. Med. Int’l, Inc.*, 492 S.E.2d 103, 106 (S.C. 1997) (defendant–hospital’s act of referring plaintiff–nurse to state disciplinary board for “patient abandonment” was not outrageous as a matter of law); *Bergstrom v. Palmetto Health Alliance*, 596 S.E.2d 42, 49 (S.C. 2004) (a hospital’s negligence in separating a mother from her newborn child does not rise to the level of outrageous behavior because it was neither intentional nor reckless); *Hansson v. Scalise Builders of S.C.*, 650 S.E.2d 68, 72 (S.C. 2007) (a defendant’s outrageous conduct is just one of

but it only found outrageous conduct in one and remanded the other, *Bell*, for the trial court to evaluate it beyond summary judgment.²³⁷

According to the South Carolina Supreme Court, the following conduct is not outrageous as a matter of law: (1) a creditor's good-faith and non-abusive attempts to collect a debt to which the defendant reasonably believes he is legally entitled;²³⁸ (2) an employer's non-abusive and lawful termination of an at-will employee;²³⁹ (3) a hospital's act of referring one of its nurses to the state disciplinary board for alleged "patient abandonment";²⁴⁰ and (4) a hospital's negligent separation of a mother from her newborn child.²⁴¹

However, the Court has found the following conduct to be outrageous as a matter of law: (1) a creditor's excessive attempts to collect a debt from a debtor whom the creditor knows to be peculiarly susceptible to stress but from whom the creditor nonetheless continues to demand payment;²⁴² (2) a co-equal party in an established business relationship who resorts to excessive self-help remedies and verbally accosts the other party both in private and in public approximately five times over a span of two years;²⁴³ (3) an employer who knows of an employee's medically documented illness and forces the employee to engage in physical activity known to the employer to exacerbate the employee's illness and known to the employer to result in the employee's embarrassment and humiliation in front of co-workers and bystanders;²⁴⁴ and (4) a creditor who curses at and refuses to accept a debtor's payment as sanctioned by a state judge who presided over a hearing that the creditor requested but failed to attend.²⁴⁵

four elements of a claim for outrage, and where the defendant's conduct is considered outrageous as a matter of law, the court must still determine whether the plaintiff's physical symptoms are sufficiently severe as a matter of law to withstand defendant's motion for summary judgment); *see also* *Hensley v. Heavrin*, 282 S.E.2d 854, 855 (S.C. 1981) (plaintiff-patient stated cause of action for mental distress against defendant-doctor, where defendant negligently informed plaintiff that she had syphilis).

237. *Bell*, 329 S.E.2d at 433; *McSwain*, 402 S.E.2d at 892-93.

238. *Rhodes v. Sec. Fin. Corp. of Landrum*, 233 S.E.2d 105, 106 (S.C. 1977).

239. *Hudson v. Zenith Engraving Co.*, 259 S.E.2d 812, 814 (S.C. 1979).

240. *Hainer*, 492 S.E.2d at 108.

241. *Bergstrom*, 596 S.E.2d at 48-49.

242. *Bellamy v. Gen. Motors Acceptance Corp.*, 239 S.E.2d 73 (S.C. 1977).

243. *Ford v. Hutson*, 276 S.E.2d 776 (S.C. 1981).

244. *McSwain v. Shei*, 402 S.E.2d 890 (S.C. 1991), *overruled on other grounds by Sabb v. S.C. State Univ.*, 567 S.E.2d 231 (S.C. 2002).

245. *Bell v. Dixie Furniture Co.*, 329 S.E.2d 431 (S.C. 1985).

Since 1984,²⁴⁶ the South Carolina Court of Appeals has addressed outrageous conduct on twenty occasions.²⁴⁷ In all but one case how-

246. Although the South Carolina Legislature created the court of appeals in 1979, the court did not begin its first term until October 17, 1983. Thus, the court's first opinions addressing the tort of Outrage were issued in the latter half of 1984. Jasper M. Cureton, *Coming of Age: The South Carolina Court of Appeals*, S.C. COURT OF APPEALS, <http://www.judicial.state.sc.us/appeals/history.cfm> (last visited Sept. 13, 2012).

247. *Williams v. Lancaster Cnty. Sch. Dist.*, 631 S.E.2d 286, 293 (S.C. Ct. App. 2006) (defendant-school district's actions cannot be considered extreme or outrageous, where plaintiffs-parents alleged only that their son was denied the opportunity to retake a Spanish test and their daughter was unfairly lowered in class rank from first to second, but where defendant satisfactorily remedied each child's respective dilemmas); *Fleming v. Rose*, 526 S.E.2d 732, 739-40 (S.C. Ct. App. 2000) (defendant-employer's conduct was insufficiently extreme and outrageous because plaintiff-employee failed to adduce any evidence of "hostile or abusive encounters" or "coercive or oppressive conduct"), *rev'd on other grounds*, 567 S.E.2d 857 (S.C. 2002); *Dye v. Gainey*, 463 S.E.2d 97, 99 (S.C. Ct. App. 1995) ("Allegations of broken promises made during the course of an adulterous relationship, without more, are not sufficient to state a claim for outrage."); *Doe v. N. Greenville Hosp.*, 458 S.E.2d 439, 442 (S.C. Ct. App. 1995) (because defendant-hospital's actions were neither intentional nor reckless, only harmless error where trial court denied plaintiff-patient's motion to amend his pleadings to allege outrage based on defendant-hospital's release of plaintiff's medical records to insurance company); *Gattison v. S.C. State Coll.*, 456 S.E.2d 414, 418-19 (S.C. Ct. App. 1995) (where defendant's employee gave plaintiff short notice of staff meetings, forced plaintiff to sit in a small chair during the meetings, and forbade plaintiff from taking notes during the meetings, conduct was not sufficiently outrageous as a matter of law to submit issue to jury); *Strickland v. Madden*, 448 S.E.2d 581, 584-85 (S.C. Ct. App. 1994) (defendant-doctor's negligently founded statement to plaintiff-child that her father was dead when he was in fact still alive did not constitute extreme and outrageous behavior); *Shupe v. Settle*, 445 S.E.2d 651, 654, 656 (S.C. Ct. App. 1994) (per curiam) (where defendant-president of homeowner's association told plaintiff-prospective buyer that he "just did not like foreigners running the place," defendant's statement was not extreme and outrageous to sustain a claim for Outrage); *Shipman v. Glenn*, 443 S.E.2d 921, 922 (S.C. Ct. App. 1994) (where supervisor on only one occasion threatened to fire and also ridiculed the speech impediment of plaintiff-employee who had cerebral palsy was not so extreme and outrageous as to be utterly intolerable in a civilized society); *Hawkins v. Greene*, 427 S.E.2d 692, 694 (S.C. Ct. App. 1993) (defendant-doctor's negligently founded statement to plaintiff-mother that her baby was dead when it was still alive cannot be the basis for an action for Outrage because defendant acted neither intentionally nor recklessly to inflict emotional distress on plaintiff); *Wright v. Sparrow*, 381 S.E.2d 503, 505-06 (S.C. Ct. App. 1989) (allegations that a supervisor built a case to justify firing plaintiff-employee by inundating her with work, stripping her of authority, and subsequently accusing her of failing to follow directions are insufficient as a matter of law to sustain a cause of action for Outrage); *Andrews v. Piedmont Air Lines*, 377 S.E.2d 127, 129 (S.C. Ct. App. 1989) (per curiam) (defendant-airline's employee's conduct was not outrageous where employee removed handicapped plaintiff-passenger from the departure gate, placed him in a visible area near the ticket counter, but continued to check on him periodically); *Butts v. AVX Corp.*, 355 S.E.2d 876, 880 (S.C. Ct. App. 1987) (supervisors did not act outrageously by continuing to speak with plaintiff-employee whom they knew was under doctor's orders not to speak but who nonetheless initiated the conversation with the supervisors); *Manley v. Manley*, 353 S.E.2d 312, 314 (S.C. Ct. App. 1987) (defendant-husband and defendants-children who involuntarily committed plaintiff-wife/mother to the state's mental hospital did not act in an outrageous manner); *Folkens v. Hunt*, 348 S.E.2d 839, 845 (S.C. Ct. App. 1986) (defendant-accountant's abusive allegations that plaintiff-business partner owed

ever, the court has held the defendant's conduct legally insufficient to be considered outrageous.²⁴⁸ Of the remaining nineteen cases, *Todd v. S.C. Farm Bureau Mutual Insurance Co.*²⁴⁹ includes the court's most comprehensive discussion of Outrage.²⁵⁰ In *Todd*, the court cautioned that neither it nor a trial court "is at liberty to substitute its subjective and provincial sensibilities regarding what is reprehensible and socially intolerable conduct for the guidelines which [the] Supreme Court has established with its adoption of the Restatement formulation of the tort."²⁵¹ Noting the "Restatement's repeated insistence that the conduct be extreme and outrageous is no mere happenstance,"²⁵² the court underscored the fact that the tort is accepted in theory more than it is applied in practice.²⁵³

In *Todd*, the court of appeals established an exacting standard for the tort in order to prevent the newly recognized cause of action from becoming "a panacea for wounded feelings rather than reprehensible

hundreds of thousands of dollars in taxes and filed fraudulent tax returns did not rise to the level of outrageous behavior); *Gilmore v. Ivey*, 348 S.E.2d 180, 182–84 (S.C. Ct. App. 1986) (defendant–employer's willful failure to warn plaintiff–employee about potential life-threatening effects of working near x-ray machine presented an issue of material fact such that defendant's conduct could be considered outrageous as a matter of law); *Roberts v. Dunbar Funeral Home*, 339 S.E.2d 517, 519 (S.C. Ct. App. 1986) (defendant–funeral home's insistence that plaintiff–widow supply collateral or funds prior to her deceased husband's funeral service was insufficient conduct to sustain claim for Outrage); *Save Charleston Found. v. Murray*, 333 S.E.2d 60, 66 (S.C. Ct. App. 1985) (injury to "reputation and credit" and "great anguish and emotional distress" resulting from unlawful conversion of promissory note are insufficiently extreme and outrageous to sustain a claim for Outrage); *Caddel v. Gates*, 327 S.E.2d 351, 352 (S.C. Ct. App. 1984) ("[A] lawyer's overlooking of an easement or other title encumbrance in searching public title records, though negligent, will not be held by this court to be outrageous conduct."); *Corder v. Champion Rd. Mach. Int'l Corp.*, 324 S.E.2d 79, 81 (S.C. Ct. App. 1984) ("While wrongful discharge for any reason is reprehensible conduct and may cause mental anguish to the discharged employee, it is not in itself the kind of extreme conduct which gives rise to a legal claim for outrage."); *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 321 S.E.2d 602, 613 (S.C. Ct. App. 1984) (holding defendant–employer's acts of lying to plaintiff–employee about the reason for a polygraph test and subsequently firing plaintiff for failure to submit to the test "may not reasonably be considered extreme, outrageous and utterly intolerable in a civilized community."); *quashed on other grounds*, 336 S.E.2d 472 (S.C. 1985); *see also Nash v. AT&T Nassau Metals*, 363 S.E.2d 695, 700 (S.C. Ct. App. 1987) (dicta) ("Conduct may be adjudged outrageous because a defendant acts with knowledge that a plaintiff is peculiarly susceptible to emotional distress . . ."), *rev'd on other grounds*, 381 S.E.2d 206, 209 (S.C. 1989) (notwithstanding defendant's outrageous conduct, plaintiff's claim for outrage is preempted by section 301 of the federal Labor Management Relations Act).

248. *Gilmore*, 348 S.E.2d 180 (S.C. Ct. App. 1986).

249. *Todd*, 321 S.E.2d 602.

250. *See id.* at 608–613. The opinion, exclusive of West's notes, covers approximately thirteen reporter pages, and the court uses approximately five pages to discuss the tort of Outrage.

251. *Id.* at 610.

252. *Id.*

253. *Id.* (citing Givelber, *supra* note 10, at 62).

conduct”²⁵⁴ The court cited favorably to Professor Givelber’s 1982 article, in which Givelber argued that the defendant’s outrageous conduct, although technically one of four elements, is practically the entire tort itself.²⁵⁵ To better illustrate the concept of “outrageousness,” the court simplified its analysis by listing the three factors common to most cases alleging outrage: (1) a pre-existing legal relationship between a debtor–creditor, insured–insurer, landlord–tenant, physician–patient, or employer–employee; (2) a defendant’s excessive self help in asserting a legal right or avoiding a legal obligation, including coercive and oppressive abuse of an employee by an employer; and (3) a defendant’s calculated infliction of suffering or heedless and contemptuous disregard for the plaintiff’s emotional suffering in an attempt either to force the plaintiff to comply or to punish the plaintiff for a past action.²⁵⁶

From both the supreme court’s and court of appeals’ jurisprudence, only four cases included conduct that was so extreme and outrageous as to be utterly intolerable in a civilized society.²⁵⁷ Moreover, until 2007, the analysis in every appeal of a trial court’s grant or denial of summary judgment for Outrage began and ended with the threshold inquiry into whether the defendant’s conduct could be considered outrageous as a matter of law.²⁵⁸ Focusing the summary judgment inquiry on whether the defendant’s behavior is outrageous as a matter of law comports with the *Restatement (Second) of Torts* section 46,²⁵⁹ the ALI’s proposed draft of the *Restatement (Third) of Torts* section

254. *Id.* at 611 (citing *Swallows v. W. Electric Co.*, 543 S.W.2d 581 (Tenn. 1976)).

255. Givelber, *supra* note 10, at 42–43 (“[D]espite its apparent abundance of elements, in practice [Outrage] tends to reduce to a single element—the outrageousness of the defendant’s conduct.”).

256. *Todd*, 321 S.E.2d at 610–611 (citing Givelber, *supra* note 10, at 62–63).

257. *Ford v. Hutson*, 276 S.E.2d 776 (S.C. 1981); *Bell v. Dixie Furniture Co.*, 329 S.E.2d 431 (S.C. 1985); *McSwain v. Shei*, 402 S.E.2d 890 (S.C. 1991), *overruled on other grounds by Sabb v. S.C. State Univ.*, 567 S.E.2d 231 (S.C. 2002); *Gilmore v. Ivey*, 348 S.E.2d 180 (S.C. Ct. App. 1986).

258. *See supra* notes 236 (supreme court cases) and 247 (court of appeals cases) for an extensive list of all outrage cases decided since *Ford*, 276 S.E.2d 776.

259. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965) (“Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”). *Id.* at cmt. j (“Severe 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.”).

45,²⁶⁰ academic articles,²⁶¹ and the supreme court's own outrage jurisprudence.²⁶²

However, in 2007, the South Carolina Supreme Court broke with precedent in *Hansson v. Scalise Builders of S.C.*²⁶³ by focusing its analysis on the severity of the plaintiff's alleged injury instead of the defendant's alleged outrageous conduct.²⁶⁴ In *Hansson*, the plaintiff–construction worker sued the defendant–supervisor for Outrage, alleging that he suffered mental distress as a result of his co-workers' and supervisor's derisive, callous, and vulgar remarks and gestures related to homosexuality.²⁶⁵ The alleged remarks occurred periodically from 1997 until 2000, when the plaintiff quit.²⁶⁶ Two years later, the plaintiff filed suit alleging various causes of action, including outrage.²⁶⁷ The trial court granted summary judgment to the defendant on all of the plaintiff's claims, and the plaintiff appealed.²⁶⁸

In a 2–1 unpublished opinion, the court of appeals reversed the trial court's grant of summary judgment and held that the defendants' con-

260. RESTATEMENT (THIRD) OF TORTS § 45 cmt. d (Tentative Draft No. 5, 2007) (“Under the ‘extreme and outrageous’ requirement, an actor is liable only if the conduct goes beyond the bounds of human decency and would be regarded as intolerable in a civilized community.”). *Id.* at cmt. i (“Severe disturbance must be proved, but in many cases the extreme and outrageous character of the defendant’s conduct is itself important evidence bearing on whether the requisite degree of disturbance resulted.”).

261. See Givelber, *supra* note 10, at 54 (“[T]he outrageousness requirement means that we must first determine whether the defendant is deserving of condemnation; if so, plaintiff must be compensated, if not, plaintiff recovers nothing.”); *id.* at 55 (“Defendants may be punished . . . because of the obnoxious quality of their behavior alone. In this respect, the tort functions like the criminal law.”); David Crump, *Evaluating Independent Torts Based Upon “Intentional” or “Negligent” Infliction of Emotional Distress: How Can We Keep the Baby From Dissolving in the Bath Water?*, 34 ARIZ. L. REV. 439, 449 (1992) (“[I]t is important to recognize that this outrageous element is the principal means we have of delimiting the tort.”); John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 806 (2007) (“[I]t should be noted that recovery is only allowed when the defendant’s conduct can be characterized as ‘extreme and outrageous.’”); see also Fraker, *supra* note 8, at 1022 (proposing, as reformulation of the tort, that Outrage’s “familiar definition should be retained in essence, but modified to focus judicial inquiry on the defendant’s conduct”); Brian L. Church, Note, *Balancing Corrective Justice and Deterrence—Injury Requirement and the Negligent Infliction of Emotional Distress*, 60 ALA. L. REV. 697, 700 (2009) (“Like its counterpart sounding in negligence, recovery for [Outrage] was once generally limited by a physical manifestation requirement. However, the common practice of contemporary courts has been to lift this requirement from [Outrage] actions. Lightening the evidentiary burden on plaintiffs has allowed jurors to more intently focus on the nature of the defendant’s conduct at issue.”).

262. See, e.g., *Hansson v. Scalise Builders of S.C.*, 650 S.E.2d 68, 71 (S.C. 2007) (recognizing “the widespread reluctance of courts to permit the tort of outrage to become a panacea for wounded feelings rather than reprehensible conduct”).

263. *Id.* at 68–73.

264. *Id.* at 72.

265. *Id.* at 69.

266. *Id.*

267. *Id.*

268. *Id.*

duct could be considered outrageous as a matter of law.²⁶⁹ The court of appeals found that the defendants' conduct could be considered sufficiently outrageous as a matter of law where the conduct "included constant commentary about Hansson's sexuality, repeated profanity directed towards Hansson, and even lewd physical contact."²⁷⁰ The supreme court granted review and reversed, holding that the court of appeals should have continued its summary judgment inquiry after finding that the conduct at issue was outrageous as a matter of law.²⁷¹ Specifically, the supreme court held that "on a defendant's motion for summary judgment such as the one at issue here, a court cannot properly deny the motion after only finding that a genuine issue of material fact exists as to one element of the plaintiff's claim"²⁷² Continuing the analysis, the supreme court concluded that the plaintiff's loss of sleep, teeth grinding, and subsequent two trips to the dentist were insufficiently "severe" as a matter of law to survive the defendant's motion for summary judgment.²⁷³ The only discussion by the court regarding "outrageousness" consisted of one sentence in which the court declined to address the court of appeals's analysis of the defendant's conduct.²⁷⁴ Suddenly and without explanation, the court ignored twenty-five years of Outrage jurisprudence by failing to focus its analysis on the nature of the defendant's conduct rather than the extent of the plaintiff's injury.

In *Hansson*, the Court recognized that *Ford* emphasized the heightened burden of proof found in the second and fourth elements of the tort.²⁷⁵ The Court also quoted the portion of *Ford* stating that "where physical harm is lacking, the courts should look initially for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious."²⁷⁶ Finally, the Court quoted the court

269. *Id.* (citing *Hansson v. Scalise Builders of S.C.*, Op. No. 2005-UP-340 (S.C. Ct. App. filed May 18, 2005) (S.C. Jud. Dep't) (unpublished opinion)). Although the court of appeals held that there was conflicting evidence "as to whether the comments were made in a joking manner as opposed to a hostile one," in the very next sentence the court notes "the fact that the behavior of the defendants occurred on construction sites" and the fact that the plaintiff "himself used profanity and made off-color jokes" are evidence that "may serve to make the conduct excusable." The opinion gives short shrift to the plaintiff's own testimony at trial that, in addition to the comments occurring at construction sites, the plaintiff himself acknowledged being "happy at his job," being "left alone 99% of the time," and, most importantly, having even reciprocated with sexually suggestive jokes of his own. Therefore, the defendant's own testimony provided sufficient facts from which the court of appeals could have held the defendant's conduct, although offensive and crude, was not outrageous as a matter of law. *Id.*

270. *Hansson*, Op. No. 2005-UP-340.

271. *Hansson*, 650 S.E.2d at 71-73.

272. *Id.* at 71.

273. *Id.* at 72.

274. *Id.*

275. *Id.* at 71.

276. *Id.* (quoting *Ford v. Hutson*, 276 S.E.2d 776, 780 (S.C. 1981)).

of appeals case of *Todd v. S.C. Farm Bureau Mutual Insurance Co.*²⁷⁷ to emphasize “the widespread reluctance of courts to permit the tort of outrage to become a panacea for wounded feelings rather than reprehensible conduct.”²⁷⁸

B. *The Centrality of “Outrageous” Conduct*

Hansson is problematic for two reasons. First, the opinion is inherently contradictory because the Court engages in precisely the type of analysis that transforms the tort from a punishment for “reprehensible conduct” into the “panacea for wounded feelings” it purports to discourage.²⁷⁹ By shifting the focus from “outrageous” conduct to “severe” injury, the opinion represents a marked and confusing departure from the Court’s own precedents to the extent it speaks of the Court’s “mental anguish jurisprudence,” cites predominantly to pre-*Ford* cases, and fails to either overrule or distinguish *Bellamy*, *Bell*, *Ford*, or *McSwain*. Second, the Court’s decision to eschew discussion of the defendant’s conduct in favor of discussion of the plaintiff’s alleged physical injuries encourages lower courts to focus their analysis on the “severity” element at the risk of denying recovery based solely on that element in cases where the defendant nonetheless acts in an outrageous manner.

Hansson is inherently contradictory because it invites abuse of the tort of Outrage by shifting the summary judgment inquiry from the defendant’s conduct to the severity of the plaintiff’s alleged injuries. The Court’s failure to find that the court of appeals erred in holding the defendant’s conduct could be considered outrageous as a matter of law directly contradicts the admonishment in *Todd* that the element of “outrageousness” was added in response to a perceived need “for a more limited statement which will set some boundaries to the liability” for Outrage.²⁸⁰ Magruder’s “outrageous” test replaced Prosser’s “privilege” test to ensure that the tort was used only in the most egregious of circumstances.²⁸¹ Although the first footnote in *Hansson* traces recovery for emotional harm from *Mack* to *Ford*, the Court fails to mention *Bellamy*, *Bell*, or *McSwain*, all of which focus on the defendant’s conduct. Thus, *Hansson* necessarily calls into question the continuing viability of these and other cases.

If the Court had analyzed the court of appeals’s determination of the defendant’s conduct as legally outrageous, it easily could have re-

277. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 321 S.E.2d 602 (S.C. Ct. App. 1984), *quashed on other grounds*, 336 S.E.2d 472 (S.C. 1985).

278. *Hansson*, 650 S.E.2d at 71 (quoting *Todd*, 321 S.E.2d at 611).

279. *Id.*

280. *Todd*, 321 S.E.2d at 610 (quoting Prosser, *supra* note 19).

281. See RESTATEMENT (THIRD) OF TORTS § 45 (Tentative Draft No. 5, 2007) (“A great deal of conduct may cause emotional disturbance, but the requisite conduct for this claim—extreme and outrageous—is a very small slice of human behavior . . .”).

versed on this ground alone. In *Hansson*, for example, the defendant's jokes may reasonably be characterized as offensive and inappropriate, but under the supreme court's own precedence, they are not so extreme and outrageous as to be utterly intolerable in a civilized society. Male banter, immature antics, and homosexual references among men at a construction site may be frowned upon, but the conduct does not rise to the same level as the defendant's conduct in *Bellamy* or *McSwain*, for example. In fact, the plaintiff in *Hansson* was happy with his job, reciprocated the jokes, and was not peculiarly susceptible.²⁸² It is true that one of the defendants was the plaintiff's supervisor and that an employer–employee relationship existed.²⁸³ However, as the court of appeals has noted, not every case “falls neatly within a simple equation.”²⁸⁴

Hansson also encourages lower courts to engage in the same type of “severe” injury analysis in which the South Carolina Supreme Court engaged. Although often referred to as the tort of “intentional infliction of emotional distress,” that nomenclature is deceptively misleading, for the tort does not in fact provide recovery merely for a defendant's intentional infliction of emotional distress—no matter how severe. The manner in which the distress is inflicted still must be outrageous. But, because *Hansson* discusses only the extent of the plaintiff's injury, lower courts are likely to focus less on the defendant's conduct and more on whether the plaintiff's emotional distress is “severe.” This potential trend threatens to relegate outrage to an injury-based, compensatory tort.

Hansson's contradictory and confusing addition to South Carolina's Outrage jurisprudence is duplicated in other states and often leaves lower courts with inconsistent precedent that creates far more questions than answers. Notwithstanding the possible confusion created in *Hansson*'s wake, all courts presented with an action for Outrage should begin their inquiry with the nature of the defendant's conduct and determine whether the conduct rises to a level similar to the defendants' conduct in successful cases.²⁸⁵ Thus, if the defendant's con-

282. *Hansson v. Scalise Builders of S.C.*, Op. No. 2005-UP-340 (S.C. Ct. App. filed May 18, 2005) (S.C. Jud. Dep't) (unpublished opinion).

283. *Id.*

284. *Todd*, 321 S.E.2d at 612; cf. RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (1965) (Even in cases where an actor is in a position of authority, “insults, indignities, or annoyances that are not extreme and outrageous” do not subject the actor to liability.).

285. In *Bell v. Dixie Furniture Co., Inc.*, 329 S.E.2d 431 (S.C. 1985), the majority's conclusion that the defendant's behavior was outrageous is questionable in light of subsequent cases the Supreme Court has decided. Because *Bell* was a 3–2 decision, its precedential value is further diminished, so it is not included as a case on which a future Supreme Court or court of appeals case should rely.

duct deserves condemnation, the plaintiff must be compensated; if not, the plaintiff recovers nothing.²⁸⁶

C. Other States as Examples

South Carolina is not the only state to redefine the tort of Outrage. In *Creditwatch v. Jackson*, where the plaintiff brought an action for IIED based on her claims of lewd behavior and other negative conduct by her CEO—defendant, the Texas Supreme Court reiterated that IIED is a “‘gap-filler’ tort never intended to supplant or duplicate existing statutory or common-law remedies.”²⁸⁷ “Even if other remedies do not explicitly preempt the tort, their availability leaves no gap to fill.”²⁸⁸ Therefore, under Texas law, the availability of recovery under another tort, even one that does not provide for mental anguish, bars an IIED claim.²⁸⁹ The Supreme Court of Texas has gone even further to minimize or eliminate IIED claims holding that only circumstances bordering on serious criminal acts may rise to the level of an IIED claim, otherwise, IIED is not an appropriate cause of action.²⁹⁰

In *Howell v. N.Y. Post Co.*, the New York appellate court dismissed the plaintiff’s IIED claim against the defendant newspaper for the publication of a photograph of the plaintiff’s mangled face while she was receiving treatment in a psychiatric hospital without first obtaining her permission due to the paper’s privileged conduct exception to a claim for IIED.²⁹¹

Perhaps even more telling is the lack of IIED claims that survive summary judgment. In a review of claims since *Hansson*, there have been only a handful of cases in all fifty states, the United States Territories, and the District of Columbia.²⁹² While not all states have fol-

286. See Givelber, *supra* note 10, at 54 (“[T]he outrageousness requirement means that we must first determine whether the defendant is deserving of condemnation; if so, plaintiff must be compensated, if not, plaintiff recovers nothing.”).

287. *Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 816 (Tex. 2005).

288. *Id.*

289. See *id.* at 818.

290. *Id.*; Sara Rullifson, Note, *R.I.P. I.I.E.D.: The Supreme Court of Texas Severely Limits the Tort of Intentional Infliction of Emotional Distress*, 58 BAYLOR L. REV. 587, 598 (2006).

291. *Howell v. N.Y. Post Co.*, 612 N.E.2d 699, 705 (N.Y. 1993).

292. *State v. Carpenter*, 171 P.3d 41, 62, (Alaska 2007); *Gallegos v. Fores*, No. 1CA-CV10-0178, 2012 WL 208858 at *8 (Ariz. Ct. App. Jan. 24, 2012); *Waterhouse v. Hollingsworth*, No. 06C-07-031, 2010 WL 8250801 at *5 (Del. Super. Ct. May 3, 2010); *Fanean v. Rite Aid Corp., Inc.*, 984 A.2d 812, 819 (Del. 2009); *District of Columbia v. Tulin*, 994 A.2d 788, 803 (D.C. 2010); *Williams v. Dist. of Col.*, 9 A.3d 484, 494 (D.C. 2010); *Young v. Allstate Ins. Co.*, 198 P.3d 666, 693 (Haw. 2008); *Jones v. Dalton*, No. 2008-CA-000500-MR, 2009 WL 1160335 at *4 (Ky Ct. App. May 1, 2009); *McDonald’s Corp. v. Ogborn*, 309 S.W.3d 274, 295 (Ky Ct. App. 2009); *W.T.A. v. M.Y.*, 58 So. 3d 612, 617 (La. Ct. App. 2011); *Castillo v. City of Las Vegas*, 195 P.3d 870, 877 (N.M. Ct. App. 2008); *Schoen v. Freightliner L.L.C.*, 199 P.3d 332, 343 (2008); *Schiele v. Montes*, 218 P.3d 141, 144 (Or. Ct. App. 2009); *Crawford v. J. Avery Bryan Funeral Home*,

lowed the paths of South Carolina and Texas in redefining the tort, analysis of these cases reveals that while outrageous conduct may still be the focus in some states, the conduct necessary to satisfy this element remains extraordinarily high, and often unattainable.

V. THE UNITED STATES SUPREME COURT AND *SNYDER V. PHELPS*²⁹³

The United States Supreme Court also has a long history of contemplating emotional distress claims, dating back as early as 1889. In *Kennon v. Gilmer*, while not directly a case on a claim of intentional infliction of emotional distress, the Court said, “when the injury, whether caused by willfulness or by negligence, produces mental as well as bodily anguish and suffering, independently of any extraneous consideration or cause, it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is to be awarded.”²⁹⁴ Almost one hundred years later, the Court, in *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25*, stated that under the Federal Labor Relations Act, the act did not preempt state court causes of action to recover damages for intentional infliction of emotional distress.²⁹⁵ Later still, in perhaps one of the most publicized decisions on the issues of defamation and IIED, the Court in *Hustler Magazine, Inc. v. Falwell*, held that the First and Fourteenth Amendments prohibited public figures from recovering damages for the tort of intentional infliction of emotional distress without showing that the statement was false and made with actual malice.²⁹⁶

In its more recent opinion considering the tort of Outrage, the Court contemplated the case brought by the family of a Marine killed in combat and the rights of protesters at his military funeral. The impact of the decision in *Snyder v. Phelps*²⁹⁷ is far reaching in both the area of torts as well as on the subject of First Amendment rights and freedom of speech. This Article does not attempt to address the implications for First Amendment applications. Rather, this Article focuses on the effect the opinion has on the tort of Outrage and its viability in the wake of the decision. Nevertheless, it is impossible to discuss the decision in *Snyder* and completely divorce that discussion from the intermingling with the First Amendment protections contemplated by the Court.

Inc., 253 S.W.3d 149, 162 (Tenn. Ct. App. 2007); *Allen v. Anger*, 248 P.3d 1001, 1008 (Utah Ct. App. 2011); *Smith v. Elias*, No. 56-2003, 2007 WL 4209701 at *13 (V.I. Oct. 11 2007).

293. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

294. *Kennon v. Gilmer*, 131 U.S. 22, 26 (1889).

295. *Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290, 302–06 (1977).

296. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

297. *Snyder*, 131 S. Ct. 1207.

In *Snyder v. Phelps*, the Court specifically addressed the question of whether the First Amendment permits the petitioner, Mr. Snyder, a private figure, to seek judicial recourse for the harm intentionally inflicted upon him by the Phelps' tortious conduct.²⁹⁸ Specifically, the Court held that speech on a public sidewalk, about a public issue, cannot be a basis for liability for the tort of emotional distress, even if the speech is found to be "outrageous."²⁹⁹ Further, the Court held that the Free Speech Clause of the First Amendment serves as a defense in state tort suits, including suits for intentional infliction of emotional distress.³⁰⁰

The case began with the death of the petitioner's son, Matthew Snyder, who was a member of the United States Marine Corps when he was killed in action during the Iraq war on March 3, 2006.³⁰¹ The funeral of Matthew Snyder was held at his local parish Catholic Church.³⁰² Seven members of the Westboro Baptist Church picketed Snyder's funeral, standing more than one thousand feet from the church on public property.³⁰³ The Westboro Baptist Church is a non-denominational independent fundamentalist organization begun by Respondent Fred Phelps and his family, who continue to run and populate the church.³⁰⁴ The Phelps family, as members of the Westboro Baptist Church ("WBC"), had a history of picketing funerals that were public and that they believed were used to promote immoral behavior, including the sin of homosexuality, adultery, fornication, murder, and greed prior to the funeral of Matthew Snyder.³⁰⁵ At the funeral of Matthew Snyder, members of the Westboro Baptist Church held signs that said, "Don't Pray for the USA," "God Hates Fags," "God Hates America," "God's View/Not Blessed Just Cursed," "Semper Fi Fags," "Pope in Hell," "God Hates the USA/Thank God for 911," "You're Going to Hell," "Fag Troops," "Thank God for Dead Soldiers," "Thank God for IED's," and "Priests Rape Boys."³⁰⁶ Mr. Snyder testified that he could only see the tops of the signs, but not the content of the signs.³⁰⁷

Over a month after the funeral, the Westboro Baptist Church posted an epic about the picket on its website.³⁰⁸ The epic was a lengthy, epithet-filled posting on the WBC's website titled, "The Burden of Marine Lance Cpl. Matthew A. Snyder," which included state-

298. *See id.* at 1213.

299. *Id.* at 1219.

300. *Id.* at 1215 (citing *Hustler Magazine, Inc.*, 485 U.S. at 50–51).

301. *Snyder v. Phelps*, 580 F.3d 206, 211 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011).

302. *Snyder*, 131 S. Ct. at 1213.

303. *Id.*

304. *Snyder*, 580 F.3d at 211.

305. *See generally Snyder*, 131 S. Ct. at 1213.

306. *Id.*

307. *Id.*

308. *Id.* at 1214 n.1.

ments denouncing petitioners, Mr. Snyder and his ex-wife, for raising their son as a Catholic and claiming that they taught him to “defy his creator and raised Matthew for the devil.”³⁰⁹ The epic was not sent to petitioner; however, Mr. Snyder discovered the epic on the internet and chose to read it.³¹⁰ Mr. Snyder became ill thereafter, including a worsening of his prior health conditions.³¹¹ However, the Court noted that the epic was not properly before it and therefore did not factor the epic into the analysis or its opinion.³¹²

Mr. Snyder brought allegations against Fred Phelps, other members of the Phelps family, and the Westboro Baptist Church for a variety of claims, including contentions for defamation and IIED.³¹³ Specifically, the petitioner’s claim for IIED proceeded on the content of three signs—such as, “God Hates You” and “You’re Going to Hell”—on the basis that they could be interpreted as targeting petitioner.³¹⁴

First, it is helpful to understand the decisions of the lower courts before analyzing the Supreme Court’s ruling. The Westboro Baptist Church appealed the jury award of several million dollars in compensatory and punitive damages.³¹⁵ The United State Court of Appeals for the Fourth Circuit reversed the jury verdict and set aside the judgment on the basis of error by the trial court.³¹⁶ Importantly, it also ruled that the protest signs were “rhetorical hyperbole and figurative expression” and not assertions of fact and were therefore protected speech.³¹⁷ Particularly, the Fourth Circuit held that although there is no categorical constitutional defense for statements of opinion, there are two types of speech for which tort liability may not attach under the Constitution.³¹⁸ “First . . . statements on matters of public concern that fail to contain a ‘provably false factual connotation’” and “[s]econd, rhetorical statements employing ‘loose, figurative, or hyperbolic language.’”³¹⁹ Analyzing the language of the signs, the Fourth Circuit stated that the content involved matters of public concern, “including the issue of homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens.”³²⁰ Additionally, the Fourth Circuit held that “no reasonable reader could interpret the signs as asserting actual and provable facts” and that they contained

309. *Id.* at 1225–26 (Alito, J., dissenting).

310. *Id.* at 1214 n.1.

311. *Id.* at 1214.

312. *Id.* at 1214 n.1.

313. *Id.* at 1214.

314. *Id.* at 1216–17.

315. *Id.* at 1214.

316. *Id.*

317. *Snyder v. Phelps*, 580 F.3d 206, 224 (4th Cir. 2009), *aff’d*, 131 S. Ct. 1207 (2011).

318. *See id.* at 218–20.

319. *Id.* at 224–25.

320. *Id.* at 223.

“strong elements of rhetorical hyperbole and figurative expressions.”³²¹ By focusing on the effect on the receiving party regarding whether a listener could reasonably interpret the language as stating actual facts, the Fourth Circuit adopted analogous reasoning to the South Carolina Supreme Court’s consideration in *Hansson*, which focused on something other than the outrageousness of the speaker’s conduct. The appellate court, as did the South Carolina Supreme Court, diverged from assessing the tort’s key element in reflecting on the defendant’s conduct. As stated above, the focal facet of the tort has been the outrageousness of that conduct.³²² Nonetheless, the import of this point becomes one of semantics because even when the analysis does turn to the outrageousness of defendant’s conduct, the Court’s decision in *Snyder* places the plaintiff in an unwinnable situation, and thus the plaintiff cannot succeed on his IIED claim under either approach.

In distinguishing between false speech and not-proven-false speech, the Fourth Circuit noted the difficulty in addressing falsehoods versus honest utterances even if inaccurate and the balance that must be struck in regulating speech that is tortious versus speech that engages in robust public debate.³²³ Additionally, in a concurring opinion, the Fourth Circuit stated that the protest at issue was not outrageous because it was in a public area and did not disrupt the funeral nor was the epic defamatory and therefore was not sufficient to support a finding of extreme and outrageous.³²⁴

On appeal to the Supreme Court, the petitioner did not appeal the denial of his defamation claim, rather he asked the Court to find that he was a “private figure and therefore his IIED claims should be allowed to stand against not-false speech.”³²⁵ The Court restated that only certain types of speech have been granted First Amendment protection and only after considering the circumstances of the speech—what was said, where it was said, and how it was said—could that speech fall under protection of the First Amendment.³²⁶ The Court noted that only speech that deals with matters of public concern is entitled to First Amendment protection from tort liability.³²⁷ Therefore, the Court in its reasoning reiterated that in order to determine if the speech deals with public or private matters, an independent examination of the “content, form and context” as “revealed by the whole

321. *Id.* at 223–24.

322. RESTATEMENT (SECOND) OF TORTS §46 cmt. j (1965).

323. *Snyder*, 580 F.3d at 222–24.

324. *Id.* at 232 (Shedd, J., concurring).

325. Brief for Respondents at *20, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09-751).

326. *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011).

327. *Id.*

record” must be conducted.³²⁸ Additionally, the Court found that the rule formulated in the Fourth Circuit’s opinion that extreme and outrageous statements are merely “rhetorical hyperbole” was not sufficient.³²⁹

In *Hustler*, as to distinguish it from similar speech within the scope of First Amendment protections, Falwell argued that the *Hustler* speech was so “outrageous” as to take it outside the scope of First Amendment protection.³³⁰ However, the Court noted “outrageous” is an inherently subjective term, susceptible to the personal taste of the jury impaneled to decide a case.³³¹ Such a standard “runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.”³³² In *Snyder*, the respondents argued, relying on *Hustler*, that in contemplating the parameters of determining which speech was protected at the intersection of common-law protections for claims against tortious conduct and First Amendment protections, the first question should be whether the plaintiff is a public official or figure, or a private figure.³³³ The second question that must be determined, they argued, is whether the speech is of a public concern.³³⁴ The respondents stated that when the speech is a public concern and plaintiff is a public figure, the Constitution requires a higher burden before the plaintiff can recover common-law damages in tort.³³⁵ However, when the speech is of a public concern but the plaintiff is a private figure, the constitutional requirements still supplant the common-law, but are “less forbidding.”³³⁶ Additionally, *Hustler* held that a plaintiff cannot recover for speech that cannot be reasonably interpreted as stating actual facts about an individual.³³⁷ Thus they argued, regardless of whether the plaintiff is a public or private figure, speech on matters of public concern is protected by the First Amendment. As Justice Alito noted in his dissent, the Fourth Circuit’s acceptance of the respondents’ argument regarding *Hustler v. Falwell* was misplaced because that case involved a public figure whereas *Snyder* did not involve a public figure, as there was no evidence that Mr. Snyder sought to be a public figure.³³⁸ While the Court was careful to note that its opinion was “narrow” and that First Amendment cases must be carefully re-

328. *Id.* (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985)).

329. *See id.* at 1214–19.

330. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

331. *Id.* at 55.

332. *Id.*

333. Brief for Respondents, *supra* note 325, at *27.

334. *Id.*

335. *Id.*

336. *Id.*

337. *Hustler Magazine, Inc.*, 485 U.S. at 46.

338. *Snyder v. Phelps*, 131 S. Ct. 1207, 1228 (2011) (Alito, J., dissenting).

viewed,³³⁹ the question remains: Is the invocation of a matter of public concern sufficient to protect all speech from tort liability for Outrage?

Justice Alito observed in his dissent that IIED is a very narrow tort with elements that are difficult to satisfy.³⁴⁰ Focusing on those elements, the Court took notice that the jury was instructed that they could hold the church liable for a claim of IIED if they found that the picketing was "outrageous."³⁴¹ The respondents argued and the Court agreed that to allow liability to be imposed for not-proven-false speech on public issues because a claimant subjectively claims to be "outraged" by the speech would undermine all protections the First Amendment provides to speech on matters of public concern.³⁴² Additionally, and interestingly, the respondents argued that their signs had the "tone of a hysterical protester" and thus were indicative of commentary on public matters and purposefully hyperbolic.³⁴³ Relying on *Hustler*, the respondents further argued that even if the utterance is intended to inflict emotional distress, was outrageous, and did in fact inflict serious emotional distress, the First Amendment prohibits tort liability in the area of public debate about public figures.³⁴⁴ The Court agreed, finding that "outrageousness" is highly subjective and juries are unlikely to be neutral about certain types of speech which many might find objectionable, thereby impermissibly suppressing speech on matters of public concern by subjecting the speaker to tort liability.³⁴⁵

The respondents' reliance on *Hustler* here is both paradoxical and interesting. First, it is ironic that the respondents adopt the arguments of a magazine known for depicting pictures of naked women and crude, often pornographic humor, in support of their right to make statements on matters of public concern particularly on the immorality of America related to fornication and sex. Secondly, it is worthy of note that Falwell's pleading was essentially a defamation claim, but he also asserted a claim for intentional infliction of emotional distress. The jury found for *Hustler Magazine* on the defamation claim and for Falwell on the IIED claim. In reversing the jury award to Falwell on the IIED claim, which was affirmed by the Fourth Circuit, the Supreme Court held that an "outrageousness" standard runs afoul of the Court's longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.³⁴⁶ Further, the Court concluded that public figures and

339. *Id.* at 1220 (majority opinion).

340. *Id.* at 1222 (Alito, J., dissenting).

341. *Id.* at 1220 (majority opinion).

342. Brief for Respondents, *supra* note 325, at *36.

343. *Id.*

344. *Id.* at *28.

345. *Snyder*, 131 S. Ct. at 1219 (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)).

346. *Hustler Magazine, Inc.*, 485 U.S. at 55.

public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications without showing in addition that the publication contains a false statement of fact which was made with "actual malice," i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.³⁴⁷ First, in contemplating the torts of defamation and IIED, the Court blurred the lines between the two torts and conflated the analysis. This confusion has continued in the courts since that time focusing on whether the speech contains actual facts about the plaintiff. A defamatory statement is not actionable unless it is false.³⁴⁸ The falsity of the statement, while an element to a defamation claim, is not an element to a claim for IIED.³⁴⁹ Falsity of the statement has never been an element of the tort of Outrage. By ignoring the distinctions, or not clearly analyzing each, the Fourth Circuit and ultimately the Supreme Court have allowed truth and "outrageousness" to be affirmative defenses. In doing so, the courts made the requirement that the speech contain "actual facts about the plaintiff" a requirement and the necessary element of "outrageousness" an unattainable standard. In other words, in order to succeed on a claim for intentional infliction of emotional distress, a plaintiff must demonstrate that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress.³⁵⁰ However, by pleading that the defendant's conduct was outrageous, courts have set the bar so high as to ensure the element cannot be satisfied.

Therefore, a plaintiff who claims IIED, which requires a pleading of outrageousness of conduct, pleads himself out of the claim before it even begins. Coupled with the state courts' treatment and interpretation of the tort, where it rarely if ever survives the summary judgment stage and where the focus has shifted to the severity of the plaintiff's injury and whether the statement is factual and away from the outrageousness of the defendant's conduct as demonstrated in *Hansson* and *Creditwatch*, the tort of Outrage can no longer exist.³⁵¹ While Prosser gave birth to the tort at a time when it was necessary, especially for those who had no other recourse, the Supreme Court in *Snyder* has dealt a fatal blow and perhaps sounded the death knell for the tort in most cases.

347. *Id.* at 56.

348. RESTATEMENT (SECOND) OF TORTS § 581A (1977).

349. RESTATEMENT (THIRD) OF TORTS § 45 (Tentative Draft No. 5, 2007).

350. *Snyder*, 131 S. Ct. at 1215.

351. See *Hansson v. Scalise Builders of S.C.*, 650 S.E.2d 68, 71–72 (S.C. 2007) (saying that *Hansson* failed to establish that his distress was severe enough to survive summary judgment).

VI. CONCLUSION

The law of Outrage is by no means settled. Distinguishing bad manners or worse behavior from truly outrageous conduct is a challenge that courts must face when applying the law of Outrage. Since the tort's inception, courts throughout the country have proven that meeting this challenge remains difficult. If the tort's requirement that the defendant's behavior be so outrageous that precious few plaintiffs prevail in an action for Outrage, then what remains of the tort? We are dealing with a doctrine that already "defies consistent definition, and presents all the problems inherent in the lack of definition compounded by a prominent punitive component."³⁵² In the case of South Carolina, the state supreme court's focus on the severity of the plaintiff's injury rather than on the defendant's conduct takes the "outrageousness" out of Outrage. Other states' courts tempted to follow South Carolina's example also have moved away from the tort's core element of Outrage or have so narrowly defined that tort that by pleading outrageous conduct, the plaintiff pleads himself out of a cause of action. These state court decisions, when coupled with the decision in *Snyder v. Phelps*, which permits a constitutional defense to the tort and cautions that juries simply are not equipped to determine what constitutes outrageous conduct, leave little of the tort to provide punishment for truly reprehensible conduct.

352. Givelber, *supra* note 10, at 74.