

NO. SC-2025-0022

IN THE SUPREME COURT OF ALABAMA

ENVOY AIR, INC.,

Appellant,

v.

JADA CREAGH,

Appellee.

**APPEAL FROM THE CIRCUIT COURT
OF MOBILE COUNTY, ALABAMA
CASE NO. CV-2019-902572**

**REPLY BRIEF OF APPELLANT
ENVOY AIR, INC.**

Cecily L. Kaffer
THE KULLMAN FIRM, PLC
11 N. Water St., Suite 11220
Mobile, Alabama 36602
Telephone: (251) 432-1811
clk@kullmanlaw.com

Forrest S. Latta
Taylor B. Johnson
BURR & FORMAN LLP
Post Office Box 2287
Mobile, Alabama 36652-2287
Telephone: (251) 344-5151
Forrest.Latta@burr.com
Taylor.Barr@burr.com

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES..... 2

SUMMARY OF THE ARGUMENT 4

REPLY ARGUMENT 6

 I. Creagh failed to prove that her termination was solely
 due to her workers compensation claim, and not for
 falsification of a medical document. 6

 II. The Court’s evidentiary admission of a pretrial discovery
 dispute was highly prejudicial and against the rules of
 evidence. 13

 III. The compensatory damages award was excessive given
 the limited nature and duration of plaintiff’s mental
 anguish. 19

 IV. The evidence did not support a punitive damages award.... 24

CONCLUSION 27

CERTIFICATE OF COMPLIANCE..... 29

CERTIFICATE OF SERVICE..... 30

TABLE OF AUTHORITIES

Cases

<i>Ala. Power Co. v. Aldridge</i> , 854 So.2d 554 (Ala. 2002).....	6
<i>Cariglia v. Hertz Equip. Rental Corp.</i> , 363 F.3d 77 (1st Cir. 2004).....	10
<i>Coca-Cola Bottling Co. Consol. v. Hollander</i> , 885 So.2d 125 (Ala. 2003).....	passim
<i>Cooper Industries, Inc. v. Leatherman Tool Group, Inc.</i> , 532 U.S. 424 (2001)	26
<i>Daniels v. East Alabama Paving Inc.</i> , 740 So.2d 1033 (Ala. 1999).....	21
<i>Delchamps, Inc. v. Bryant</i> , 736 So. 2d 824 (Ala. 1999).....	20
<i>EEOC v. Total Sys. Servs., Inc.</i> , 221 F.3d 1171 (11th Cir. 2000)	11
<i>Goldberg v. Nw. Lake Forest Hosp.</i> , 2024 IL App (1st) 220532-U, (Oct. 17, 2024)	15
<i>Hammond v. City of Gadsden</i> , 493 So.2d 1374 (Ala. 1986).....	22
<i>Hill v. Lockhead Martin Logistics Mgmt.</i> , 354 F.3d 277 (4th Cir. 2004)	10
<i>Horton Homes, Inc. v. Brooks</i> , 832 So. 2d 44 (Ala. 2001).....	26
<i>K-Mart Corp. v. Kyles</i> , 723 So.2d 572 (Ala. 1998).....	20, 22

<i>Mobile Invs., LLC v. Corp. Pharmacy Servs., Inc.,</i> 415 So. 3d 1018 (Ala. 2024).....	15
<i>Prudential Ballard Realty Co. v. Weatherly,</i> 792 So.2d 1045 (Ala. 2000).....	27
<i>Rice v. Merchants Food Service,</i> 286 So.3d 681 (Ala. 2019).....	21
<i>Southern Pine Elec. Co-op v. Burch,</i> 878 So.2d 1120 (2003)	19
<i>Van v. Language Line Servs., Inc.,</i> No. 14-CV-03791-LHK, 2016 WL 3566980 (N.D. Cal. June 30, 2016)	14
<i>Wilson v Dukona Corp.,</i> 547 So.2d 70 (Ala. 1989).....	25
Rules	
Ala. R. App. P. 32(c)	29
Ala. R. App. P. 32(d)	29

SUMMARY OF THE ARGUMENT

Creagh did not present substantial evidence proving that her filing of a workers' compensation claim was the "sole" reason for her termination. Instead the evidence showed that Creagh was fired due to a falsified medical record, which this Court has held is an "independently sufficient basis" for discharge. *Coca-Cola Bottling Co. Consol. v. Hollander*, 885 So.2d 125 (Ala. 2003). Creagh does not cite the nearly on-point *Hollander* case, much less distinguish it. Nor does she dispute that the medical note was the only basis for Jonathan Wilson's decision that she be terminated. Now on appeal Creagh claims it was Atkinson (her supervisor) who was the actual decision-maker, but the trial record is indisputable that the termination decision came from Wilson in the Dallas-based HR office, and Atkinson was the local messenger.

At a minimum, a new trial is necessary because of the erroneous admission into evidence of a forged discovery response that Envoy's former counsel mistakenly served. A Special Master, after a two-day evidentiary hearing, found that the discovery answer did not come from Envoy. Nor was it relevant to a material element of Creagh's claim since both she and Envoy agreed she was terminated (she did not resign). In

fact the termination was a material element of Creagh's claim for retaliation, so the discovery dispute had no bearing on the merits. Nonetheless, the trial court let her attorneys introduce that discovery answer as if it came from Envoy, without Envoy being afforded a chance to explain and give context – which the trial court prohibited. This case is a prime example of why discovery disputes are generally inadmissible in a jury trial.

The compensatory damages verdict also was excessive and warrants a remittitur, as Creagh acknowledges she only offered her own limited testimony that she was upset and did not eat for a couple of days. Under Alabama law such testimony, without more, cannot support an award of \$250,000 in compensatory damages. Nor should the punitive damages verdict of \$475,000 be upheld inasmuch as it was tainted from the chaos and drama surrounding the false interrogatory answer that the trial court found was not attributable to Envoy (the judge adopted the Special Master's recommendation on that). The forged discovery response was not competent evidence in the first place, much less relevant to any disputed material fact or the claim for punitive damages.

REPLY ARGUMENT

I. Creagh failed to prove that her termination was solely due to her workers compensation claim, and not for falsification of a medical document.

Creagh failed to demonstrate that her discharge from employment was solely due to her workers compensation claim as a matter of law. *Ala. Power Co. v. Aldridge*, 854 So.2d 554, 563 (Ala. 2002). “[I]f there is uncontradicted evidence of an independently sufficient basis for the discharge then the defendant is entitled to a judgment as a matter of law. *Id.* at 568. This Court in *Coca-Cola Bottling Co. Consol. v. Hollander*, 885 So.2d 125 (Ala. 2003), recognized that a falsified medical record is an “independently sufficient basis” for discharge, and absent evidence that the medical record was mere pretext, judgment as a matter of law is due to be granted. *Id.* at 132-133.

Creagh in her response fails to address or even cite the *Hollander* case. She also fails to point the Court to any evidence that Wilson directed Atkinson to terminate Creagh for any reason other than the falsified medical record. As with the *Hollander* case, Envoy was entitled to judgment as a matter of law where the record confirms she was discharged due to the falsified medical record.

Rather than attempt to distinguish *Hollander*, Creagh asks the Court to simply disregard Wilson as the decision-maker, and find that Atkinson made the decision. (Resp. Br., 24-27). But Wilson’s directive to Atkinson was clear and unmistakable:

Brigitte,

Per our conversation, the employee has now been provided the opportunity to speak to the discrepancy between the document that she provided and the document that was provided by the Doctors office. The employee has not provided sufficient reason as to why the two documents are different. The resulting conclusion is that the document was altered after leaving the Doctor’s office, and prior to being turned in to Envoy. The altering of official documentation is considered a violation of Envoy Guiding Principles and Business Ethics. Specifically the Guiding Principles says, “We conduct ourselves with the highest standards of honesty, integrity and fairness – obeying all the laws of the communities in which we work or do business. We must all understand and comply with our business ethics policies.”

Please suspend the employee immediately, and proceed with off-boarding based upon the above determination.

R/S,

JW

Johnathan Wilson
Consultant, People Services
Phone: 1 (972) 374-9540 | Mobile: 1 (469) 493-9059
Email: johnathan.wilson@aa.com

envoy

Envoy Air Inc., An American Airlines Group Company

(Def. Ex., 120).

Creagh takes substantial liberties with the record in order to attempt to paint Atkinson as the decision-maker. Creagh cites to multiple places in the record confirming only that Atkinson was the person who signed the termination letter and delivered it to Creagh. (Resp. Br. p. 13, citing Def. Ex. 14; R. Vol. 16, Atkinson Tr., p.29; Pltf. Ex. 178, RFP

Response No. 14). But Envoy has never disputed that Atkinson signed the letter and facilitated the termination after receiving Wilson’s directive. Those actions do not elevate her to decision-maker. The record is clear – Atkinson never suggested any particular disciplinary actions to Wilson; she followed HR’s directions to interview Creagh; she reported back as requested; and carried out the termination as instructed. (Def. Exs. 12E, 12N, 12J, 12O).

Creagh incorrectly claims that Atkinson testified that she made the decision and merely sought approval from Wilson and the HR Department. (Resp. Br., p.25). To the contrary, Atkinson testified that HR handled the investigation and provided her with the termination letter to sign. (Supp. R., Vol. 16, Atk. Depo, p. 28-29, 55:03-55:505; 55:21-55:22). She testified specifically that: “the decision to fire Jada was made by HR.” (Supp. R., V 16, Atk. Dep., p. 36, 68:12-68:14).¹ This was

¹ Creagh also makes misleading statements about Atkinson’s testimony regarding the altered medical note (though the inquiry is not material to the question of whether Envoy had an independent basis for termination). *See Hollander*, 885 S.2d at 131, n.5. For example, Creagh states multiple times in her brief that “Atkinson did not testify at trial to dispute Creagh’s testimony [that Atkinson had altered the note]” insinuating this was undisputed. (Resp. Br., p. 10). But Atkinson testified at trial through her deposition, and specifically stated that the note she

consistent with Envoy's practices and policies, and the separate lanes between the workers compensation analysts, station managers, and the HR business partners who handle investigations and related termination decisions. (R. 419-22; 448; 455-56; 492-93; 507-508; 757; 763).²

Envoy employees testified that while station managers may have the ability to terminate in some situations, the best practice consistent with Envoy's expectations was for a station manager to follow the directives of the HR business partners. (R. 492-93; 565; 572). In any event, Atkinson's hypothetical ability to terminate an employee is irrelevant where the evidence is clear that in this case Wilson made the decision.

Creagh also incorrectly represents that "Envoy offered no plausible explanation why Atkinson would still be conducting an investigation concerning the allegedly altered doctor's note if Wilson had already made

received from Creagh on November 30th was altered, with handwritten X's. (Supp. R. Vol. 16, p. 31, 59:05- 60:02).

² Creagh claims that Josh Hernandez, an Envoy Business Partner, testified that "HR did not make hiring and firing decisions for Atkinson. (Resp. Br., p. 15, citing R. 592). To the contrary, Hernandez testified that Jonathan Wilson made the decision to fire [Creagh] on December 28th 2018." (R. 592).

the decision to fire Creagh.” (Resp. Br., p. 14). But Wilson specifically directed Atkinson in the email to suspend Creagh first and then proceed with off-boarding “based on the above determination.” (Def. Ex., 120). The reason for this procedure is to allow time for internal administrative tasks, such as drafting a termination letter, to be completed prior to the official termination date. (R. 589).

Creagh cites to three federal employment discrimination cases for the proposition that animus of a non-decisionmaker can be imputed to a decision-maker. (Resp. Br., pp. 26-27). Such case law has not been adopted in Alabama retaliatory discharge cases, and significantly federal employment discrimination cases involve a different “determinative cause” standard rather than the “sole causation” standard involved here. *See Cariglia v. Hertz Equip. Rental Corp.*, 363 F.3d 77, 84 (1st Cir. 2004) (discriminatory animus need only be “determinative factor” not sole cause of termination). Even so the cases are distinguishable on the facts as Wilson did not “rubberstamp” a decision that Atkinson had previously made. Atkinson never made any recommendation to Wilson on what action to take. *Cf. Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 290 (4th Cir. 2004).

In short, the evidentiary record is devoid of any evidence indicating (1) Atkinson was the true decision-maker or (2) Wilson had knowledge that Atkinson might forge a doctor's note to frame an employee, falsify interview notes with an employee, and in essence build a file to get Creagh fired, necessitating additional investigation. *See Hollander*, 885 So.2d at 132 (noting lack of evidentiary record indicating decision-maker had any knowledge in front of him indicating that the medical record might be incorrect).

Creagh is also critical of Envoy for not doing more to investigate whether the note was falsified by either interviewing Atkinson or Creagh. (Resp. Br., p. 26). However, "in a workaday world, not every personnel decision involving a false statement ... has to be treated as something like a trial for perjury." *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1176 (11th Cir. 2000). As was the case in *Hollander*, there was simply no information put in front of anyone in HR indicating there would have been a need for additional investigation. *Hollander*, 885 So.2d at 132. No complaints about Atkinson had ever been received by management from

employees during the period Creagh was employed. (R. 490-491).³ It would be unreasonable to charge an employer with the duty to do a separate investigation under these circumstances.

Creagh does not dispute that she failed to put anyone on notice at Envoy that she was supposedly being framed, even when (as she points out) the investigation was still formally open for a period between the time of her suspension regarding the medical note and when she was discharged. In fact, Creagh did not even file a retaliatory discharge claim until after Envoy's counsel served an incorrect discovery response in her worker's compensation case. (C. 42-43; 75-77; C. 1465).⁴ If Creagh believed she had been framed by Atkinson, why would she not have added a retaliatory discharge claim to her suit from the beginning?

Because Creagh did not demonstrate that the sole reason for her discharge was the filing of a worker's compensation claim and further did

³ Creagh references the fact that Atkinson was fired due to employee complaints, but all of the complaints were subsequent to Creagh's leaving Envoy. (See Resp. Br., p. 13; Cf. Pltf. Ex. 132; R. 320-336; 697; 807; C. 952-1018).

⁴ Creagh's workers compensation case was filed on September 19, 2019. Envoy's former counsel served the incorrect discovery response on December 30, 2019, and a retaliatory discharge claim was added June 8, 2020. (C. 42-43; 75-77; C. 1465).

not prove the falsification of a medical record was pretext, the trial court erred in failing to grant judgment as a matter of law.

II. The Court's evidentiary admission of a pretrial discovery dispute was highly prejudicial and against the rules of evidence.

On the main evidentiary issue (admission of a discovery dispute), the plaintiff still does not explain how it was relevant to any material element of her claim, and not unduly prejudicial and confusing.

The process for analyzing such an evidentiary issue begins with a question: When should a discovery dispute such as Interrogatory 14 be admissible on the merits at trial? The answer is, when it is relevant to a *material fact in dispute*. But here it was never disputed that Creagh did *not* resign but was terminated. So the initial “resigned” answer, which was found to not be attributable to Envoy in any event, was never even a material element of her claim. The parties agreed she was *terminated*, which is a *prima facie* element of her retaliation claim.

Alternatively, Interrogatory 14 was potentially admissible for impeachment of a witness' credibility. But here, the trial court adopted the special master's finding that it was not attributable to Envoy. So it could not be admissible on Envoy's credibility – and even if it were, the

court would have to allow the opposing party (Envoy) a chance to respond and rehabilitate with evidence in the nature of an explanation, such as the story of how Envoy's counsel made a drafting error. But here, the court ruled that Envoy could not explain. (R. 295-316).

A further overriding consideration under the Rules of Evidence is whether the prejudicial effect of the evidence outweighs its probative value. Here it was used to wrongly blame Envoy for giving that answer (which was highly damaging and prejudicial); whereas by contrast, that same evidence had no probative value. In the first place it was incompetent evidence, and secondly it was not germane to any material element that was in dispute. A discovery dispute, especially one involving a forged interrogatory response affecting a material fact issue, should not be admissible because of the risk of substantial prejudice. *See e.g., Van v. Language Line Servs., Inc.*, No. 14-CV-03791-LHK, 2016 WL 3566980, at *4 (N.D. Cal. June 30, 2016) (“the Court concludes that evidence regarding discovery disputes, discovery negotiations, claims of privilege, use of the term “forged” with respect to the documents produced in discovery, and alleged unethical behavior by counsel for Defendants must be excluded under Federal Rule of Evidence 403. The risk of unfair

prejudice, confusing the issues, misleading the jury, and wasting time substantially outweighs any minimal to non-existent probative value of this evidence.”); *Goldberg v. Nw. Lake Forest Hosp.*, 2024 IL App (1st) 220532-U, ¶ 68, as modified on denial of reh’g (Oct. 17, 2024), appeal denied, 251 N.E.3d 392 (Ill. 2025) (finding the trial court abused its discretion in denying a motion in limine on a pretrial discovery dispute, which impacted the jury’s review of a material issue requiring reversal).

The prejudice to Envoy was especially pronounced given that Envoy was also penalized by the Court with a substantial sanction for the same discovery issue, despite a finding that it was not at fault. The plaintiff cites cases saying that a party in certain circumstances can nonetheless be responsible for its attorney’s acts or omissions, which is true. (Resp. Br., p. 38-39). But those cases also demonstrate that the proper remedy is only in the form of something like sanctions; it is not a matter for the jury to decide. *See Mobile Invs., LLC v. Corp. Pharmacy Servs., Inc.*, 415 So. 3d 1018, 1020–21 (Ala. 2024), *reh’g denied* (Nov. 8, 2024) (finding trial court did not abuse discretion in ordering a default judgment as a discovery sanction).

Creagh tries to defend the trial court's order allowing her to introduce Interrogatory No. 14 without also letting Envoy offer any details or context, which cannot be correct. (Resp. Br., pp. 39-42). The prejudice to Envoy was significantly compounded by giving the jury Interrogatory Response No. 14 with no explanation from Envoy and no instruction from the trial court on *what to do with it*, i.e., what it could be considered for. That is particularly troublesome where the discovery response (which was found to be forged), was allowed to be shown to the jury as a properly verified discovery response in violation of Alabama Rules of Evidence 801, 102, 104, 401, and 403. (C. 1462-1486; 2151). Given the finding of the Special Master that the signature was a forgery (adopted by the Trial Court), it was a clear abuse of discretion to allow Interrogatory No. 14 to come in as evidence of Envoy disavowing its prior position that Creagh was terminated. (C. 2151).

Plaintiff also criticizes Envoy's trial counsel for not doing enough to preserve the Interrogatory No. 14 objection, and for trying to work around it at trial. (Resp. Br., pp. 40-42). Such criticism is unwarranted. First, Envoy filed a lengthy motion in limine on the admissibility of Interrogatory No. 14 arguing that it should not come into the trial for any

purpose whatsoever, which was denied. (C. 1044- 1058). Envoy's objection was renewed throughout the trial, as Interrogatory No. 14 continued to be brought up causing substantial issues with the flow of trial, witness testimony, and ultimately causing a near mistrial. (See, e.g., R. 301, "I do want to be heard on my objection to the signed page given that the special master has found, in fact, it was not Valerie Conerly's signature"; R. 295-316; R. 641-644).⁵

Creagh points to the Trial Court's statement at p. 301 of the transcript that it would not adopt the factual finding on the forged signature, but the Court *did* ultimately adopt that finding. (R. 301; C. 2151). This inconsistency is just one of many examples of the obvious chaos and prejudice that was created when the trial court attempted to fashion a ruling allowing in a highly disputed discovery response, while trying to avoid repeating the two day evidentiary trial held by the Special Master on Interrogatory No. 14. However, by disallowing Envoy to at

⁵ The plaintiff's brief freely acknowledges that the trial court made a ruling that Envoy's incorrect discovery response could not be offered as evidence on the issue of Connorly's credibility or veracity (Resp. Br., p. 41) But that is exactly what they argued to the jury, in knowing violation of the trial court's order, which elicited a motion for mistrial (which the court denied). (R. 641-644).

least explain the credible reasons for the incorrect answer, the trial court placed Envoy in an impossible position despite having proven to the Special Master that the signature was a forgery. Envoy ultimately paid for every penny of that two day hearing and all related attorney's costs involving Interrogatory No. 14. (C. 1481-82; 2152). The admission of Interrogatory No. 14 was in essence a double sanction.

Having "lost the battle" on the issue, Envoy's counsel had no choice but to protect Envoy's position, as best possible within the confines of the Court's ever-changing ruling on Interrogatory No. 14. (See R. 295, "The next objection has to do with how we are going to handle the Interrogatory #14 issue.... I understand and respectfully disagree and accept what your Honor is doing with Interrogatory No. 14. I want some clarity."). However, at no point did Envoy's counsel waive its objection to the admissibility of Interrogatory No. 14. The assertion that Envoy's objection to the admission of Interrogatory No. 14 was waived is disingenuous.

In the end, the trial court allowed the forged discovery response to be presented to the jury as Envoy's verified response at the time it was served, and Envoy's counsel was only allowed to offer evidence that it

later corrected that position. (R. 295- 316). That allowed Creagh to argue that Envoy had taken a contrary position for a period of time “disavowing” its reason for termination, one of the factors outlined in the jury instruction to prove pretext. (R. 708). Envoy was not allowed to offer any evidence regarding the forged signature and the fact that Envoy did not authorize or sign Interrogatory No. 14. (R. 295-316). The substantial prejudice to Envoy is undeniable, and no limiting instruction could cure it.

III. The compensatory damages award was excessive given the limited nature and duration of plaintiff’s mental anguish.

In making a claim for mental anguish damages, the plaintiff has the burden to prove the “nature, severity, and duration” of her symptoms. *Southern Pine Elec. Co-op v. Burch*, 878 So.2d 1120, 1127 (2003). In this case, however, plaintiff Creagh, as she admits on appeal, introduced almost no evidence except her own limited testimony that she was upset and “did not eat much for a couple of days.” (Resp. Br., p. 48; R. 198-199). That was all.

It is not Envoy’s contention, contrary to the Appellee’s Brief, that a plaintiff cannot give subjective testimony of her own mental anguish. But the law is clear that any significant damages award (e.g. over \$100,000)

requires evidence of such quality and extent to rise to the level of personal injury, i.e., something more than disappointment or inconvenience. *Delchamps, Inc. v. Bryant*, 736 So. 2d 824, 837 (Ala. 1999); *K-Mart Corp. v. Kyles*, 723 So.2d 572, 579 (Ala. 1998). This issue can perhaps be better framed as a question: What should be the standard under American tort law to recover substantial damages for mental anguish, *in the absence of physical injury*? To aid the court in answering that question, Envoy has supplied the Court with several scholarly articles as exhibits to its Appellant's Brief.

The plaintiff offers the Court nothing beyond her own limited testimony that she was upset and did not eat for a couple of days. She presented no other evidence about whether that experience affected her physically or emotionally, or how it was manifested. To shore up that weakness, her attorneys pivot to telling a story about the plaintiff's high character – her upbringing in a respectable family with a college education. (Resp. Br., pp. 48-49) While commendable, such evidence may actually suggest she was more resilient than others in handling disappointment. But assumptions cannot be made, either way; it requires actual evidence and proof.

That is the reason *Rice v. Merchants Food Service*, 286 So.3d 681 (Ala. 2019) is not helpful to the plaintiff as a benchmark to justify the amount of this damages award. While the *Rice* verdict included a mental anguish component, the verdict form was a general verdict that included other elements such as lost wages. This Court, therefore, held that the excessiveness issue was not adequately preserved, meaning it was unreviewable. Hence, *Rice* only stands for the proposition that mental anguish is a recoverable element of damages in a wrongful termination suit – although Envoy still contends they must be proven, not assumed. That is the point on which counsel respectfully submits that *Rice’s* dicta warrants a second look.

The plaintiff is right in saying that this verdict, like any verdict for money damages, is properly reviewable under the “shock the conscience” standard. (Resp. Br., p. 53) That means, as summarized in many cases, that the verdict must be viewed not in a vacuum, but strictly comparing it to the actual evidence introduced at trial, to determine if the *amount* was arbitrary, i.e., an abuse of discretion. See *Daniels v. East Alabama Paving Inc.*, 740 So.2d 1033, 1049-1050 (Ala. 1999).

Envoy's reference to *Hammond* was not to seek reversal for lack of a post-judgment hearing (contrary to Appellant's Brief), but rather to emphasize the statement by this Court in *Hammond* that Alabama's lack of standards for mental anguish needs to be addressed. *Hammond v. City of Gadsden*, 493 So.2d 1374, 1378 (Ala. 1986). The absence of such standards only leads inexorably to more and more arbitrary verdicts – the exact opposite of due process. And it makes such claims harder and harder to evaluate and settle. This case represents an opportunity to better define those standards, especially in a non-personal injury case – a need this Court first acknowledged thirty years ago.

Because mental anguish is a relatively recent expansion in the common law, it is incumbent upon the court, not the legislature, to chart its latitudes in an ever-changing environment. A modest adjustment is to apply the *Kyles* standard (strict scrutiny) to *any* award of damages for mental anguish when *unaccompanied by physical injury* because of its total subjectivity and risk of exaggeration. See *K-Mart Corp. v. Kyles*, 723 So.2d 572 (Ala. 1998). A trial or appellate court can then review whether the evidence adequately supports such an award and whether it deviates materially from the range of reasonable compensation. This change could

be adopted legislatively, as some states have done; but statutory rules and caps in general are clumsy tools that cannot address the unique facts of each case or to accommodate the constant evolution of common law. Given it was this Court that recognized the common law right to recover damages for mental anguish, it seems appropriate that this Court be the author of its substantive standards and limitations.

As to issue preservation, defense counsel, upon receipt of this arbitrary jury verdict, timely filed a Motion for New Trial or Remittitur raising the question of excessiveness and the lack of sufficient standards for both trial and appeal. (C. 2085-2094). There is no better timing without being faulted for citing hypothetical defenses that are unripe and thus arguably premature and frivolous. Envoy submits that this Court, upon finding that the present compensatory verdict is arbitrarily excessive, should order a remittitur conditioned upon a new trial in which it instructs the trial court (if the plaintiff does not agree to a remittitur) to re-try the case and charge the jury under newly-defined standards for awarding damages for mental anguish.

IV. The evidence did not support a punitive damages award.

It is impossible to ignore the effect on this punitive damages award of the trial court's erroneous decision to allow evidence of the parties' discovery dispute. In common parlance, it "poisoned the well" by impugning Envoy in the eyes of the jury.

The plaintiff's theory of wrongful termination, as already discussed, was a combination of disconnected facts tied together to tell a story (not a true inference) that plaintiff's termination was "solely" motivated by retaliation for her filing a workers comp claim. Under this Court's decision in *Hollander*, however, a false medical note is a separate matter that constitutes a separate cause for termination. But the plaintiff's attorneys, in their jury arguments, equated the two – weaving into their story the false discovery response to impugn Envoy's character.

A review of the record leaves no doubt the plaintiff relied heavily upon that argument, disregarding the special master's finding (which the trial court adopted) that the incorrect, forged discovery response *was not factually attributable to Envoy*. While the conduct of its original defense counsel perhaps was relevant to sanctions (under a theory of imputed liability for counsel's conduct) it had no place being considered by a jury

as part of the plaintiff's claim for punitive damages. Envoy's counsel duly objected in a motion *in limine* and repeatedly objected throughout trial. Yet it was admitted into evidence by the trial court and became a pervasive part of the plaintiff's case, much to the prejudice of Envoy. Without such evidence, and without references to it in connection with Envoy, the jury would have seen and heard a very different trial.

Even the slightest taint or influence from the discovery issue warrants a reversal of the punitive damages. It is well settled that an award of punitive damages, unlike compensatory damages, must be viewed from the standpoint of the defendant's right to fair punishment, not the plaintiff's interest in recovering them. See, e.g., *Wilson v Dukona Corp.*, 547 So.2d 70, 73 (Ala. 1989). That is because a plaintiff has no right to them but only serves as an agent of the state in enforcing public policy. Indeed, the proper amount of punitive damages is not even a fact question for the jury but rather a matter of legal judgment for the court. As this Court has recognized, "Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damage is not really a "fact' 'tried' by the jury. Because the jury's award of punitive damages does not constitute a finding of

fact,” appellate review and remittitur “does not implicate” any concerns of due process or right to jury trial.” *Horton Homes, Inc. v. Brooks*, 832 So. 2d 44, 56 (Ala. 2001), quoting *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). Therefore, the *amount* of punitive damages is a purely legal judgment that represents an expression of public policy. There is no public policy rationale that justifies letting a jury decide whether a discovery dispute qualifies as “clear & convincing” evidence of punishable conduct. Yet that is exactly what plaintiff’s counsel argued during trial and even now on appeal.

The entire punitive award, being solely a question of law for this Court, can and should be reversed and rendered as a matter of law. Alternatively, given the need to remit the compensatory award, and given the already-paid \$100,000 sanction, the punitive award should likewise be remitted. Without guessing how much the Court would remit, a reduction of the mental anguish award (compensatory damages) would warrant a commensurate reduction within the 3:1 range to avoid being presumptively excessive under Alabama law. See Ala. Code 6-11-21 (Ala. 1975). See generally, *Prudential Ballard Realty Co. v. Weatherly*, 792

So.2d 1045, 1052-1057 (Ala. 2000), including separate concurrences of Justices Houston, Lyons, and See.

CONCLUSION

Envoy was entitled to a judgment in its favor as a matter of law on the ground that plaintiff Creagh failed to prove each of the statutory elements of a claim for wrongful termination. She instead tried to substitute inadmissible evidence of a discovery dispute (a forged set of responses that both sides knew were incorrect) which cannot be imputed to Envoy for liability purposes. Nor was there sufficient evidence of damages to support the verdict. This court should either reverse and render, reverse for a new trial, or remit the verdict.

Respectfully submitted,

/s/ Forrest S. Latta

Forrest S. Latta (ASB-0526-T62F)
Taylor B. Johnson (ASB-8851-Y78B)
Cecily L. Kaffer (ASB-5953-R66C)
Attorneys for Appellant
Envoy Air, Inc.

OF COUNSEL:

BURR & FORMAN, LLP
P.O. Box 2287
Mobile, AL 36652
Telephone: 251-344-5151
Facsimile: 251-344-9696

THE KULLMAN FIRM, PLC
11 N. Water St., Suite 11220
Mobile, Alabama 36602
Telephone: (251) 432-1811

CERTIFICATE OF COMPLIANCE

In accordance with Alabama Rule of Appellate Procedure 32(d), I hereby certify that the foregoing Brief of Appellant complies with this Court's font requirement and word limitations. The foregoing has been prepared using a 14-point Century Schoolbook font and contains 4,810 words, excluding those parts excluded from the word count under Rule 32(c).

s/ Forrest S. Latta

OF COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellant has been served on the following counsel of record by directing same via first-class, United States mail, postage prepaid and by electronic mail on this the 7th day of October, 2025:

James J. Dailey, Esq.
JAMES J. DAILEY, P.C.
1111 Dauphin Street
Mobile, Alabama 36604
jim@jimdailey.com

Thomas M. O'Hara, Esq.
O'HARA LAW FIRM, LLC
Post Office Box 2466
Daphne, Alabama 36526
Tom.ohara@toharalaw.com

/s/ Forrest S. Latta
Forrest S. Latta
Burr & Forman LLP
P.O. Box 2287
Mobile, AL 36652
Telephone: 251-344-5151