Suppose an employer receives an informal complaint from an employee, fully investigates and validates the complaint, and takes reasonable action to make sure it never happens again. Unfortunately an employee is not satisfied with this action and files a lawsuit asserting several claims in both contract and tort. After lengthy discovery, it becomes obvious that much of the damage allegedly suffered by the plaintiff is emotional distress. The case goes to trial and the plaintiff testifies about an ongoing emotional roller coaster he must now endure, which includes nightmares, anxiety, and uncontrollable anger about the employer's action. This testimony is the only mental anguish evidence received by the court. Fortunately for the employer, the plaintiff cannot recover for any emotional injuries because he failed to use an expert to prove these damages. Or can he? In the hypothetical, does it matter if the damages sought are only for a strictly emotional injury, versus a claim where emotional injury merely comprises a portion of the overall damages? Does it change anything if the employer's action was alleged as mere negligence, but not as an intentional tort? This article will answer these questions and provide the framework courts use to determine when emotional distress damages are recoverable.

Historically, claiming emotional injury has been the topic of spirited debate by courts. On one hand, courts want to provide a mechanism to help the wrongfully injured, but at the same time don't want courtrooms to become a gathering point for the fraudulent and trivial. This is especially true considering emotional harm is by its nature intangible and unquantifiable. The difficulty in striking an effective balance between these objectives has been a longstanding challenge of the court. Fortunately, it began to turn the corner and provide clarity on the topic twelve years ago with its decision in Camper v. Minor, 915 S.W.2d 437 (Tenn. 1996).

1. Emotional injuries as "stand-alone" damages. In Camper, the plaintiff, Mr. Camper, was involved in an automobile accident caused by a 16-year old who turned in front of his cement truck. Id. at 439. He got out of his truck and saw the minor in grave condition, which had quite an emotional impact on him. Id. Although he only scraped his knee in the accident, the emotion distress he suffered was purportedly extensive and served as the only basis for recovery in his lawsuit against the minor's estate. Id. Upon hearing the case, the Tennessee Supreme Court decided that negligent infliction of emotional distress claims should be analyzed under a general negligence cause of action. Id. at 446. More importantly for the purposes of this article, the Court required two prerequisites to recover damages for purely emotional injuries: (1) the emotional injury must be "serious or severe," and (2) the serious or severe emotional injury must be supported by expert medical or scientific proof. Id. Without both, there could be no recovery. Id. 4

2. Emotional injuries as "parasitic" damages. Camper remains good law, but not without some clarification along the way. In Amos v. Vanderbilt, a patient, Ms. Story, received four units of blood during jaw surgery in 1984 at the Vanderbilt Medical Center. 62 S.W.3d 133, 135 (Tenn. 2001). One of the units was contaminated with HIV, and infected Ms. Story without her knowledge. Id. In 1989, she married Ron Amos and thereafter gave birth to a daughter, who had became infected with HIV in utero and died less than three months after being born. Id. Ms. Story and Mr. Amos sued Vanderbilt for wrongful birth, negligence, and
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negligent infliction of emotional distress. *Id.* Ms. Story died during the early stages of litigation, so Mr. Amos continued the claim. *Id.* The trial court found in favor of Ms. Amos' estate on the emotional distress claim, but the Court of Appeals reversed the award because, citing *Camper*, there was no presentation of expert or scientific testimony of serious or severe emotional injury. *Id.* at 136. The Supreme Court reversed. In doing so, it clarified *Camper* - "[w]hen emotional damages are a 'parasitic' consequence of negligent conduct that results in multiple types of damages, there is no need to impose special pleading or proof requirements that apply to 'stand-alone' emotional distress claims." *Id.* at 137. In other words, the requirement to present expert medical or scientific proof to show serious or severe emotional injuries can be obviated by proving other types of damages. *Id.* at 137-38. Here, the Amoses tried to do just that by pleading other damages in connection with wrongful birth and negligence, which allowed them to at least try to recover for emotional damages without an expert witness.

3. Emotional injury as damages – bystander cases. *Camper* deferred discussion on the "zone of danger" rule previously adopted in negligence cases when a plaintiff suffered only emotional distress by virtue of being placed in immediate danger of physical harm. Since *Camper*, the Court in *Ramsey v. Beavers*, 931 S.W.2d 527 (Tenn. 1996) and more recently in *Eskin v. Bartee*, ___S.W.3d ___, 2008 WL 3504934 (Tenn. Aug. 14, 2008), the Court has abandoned such a "hypertechnical" approach. Now, the standard of proof depends on whether the plaintiff witnessed the negligent conduct. In either case, recovering for purely emotional damages as a bystander requires a "serious or severe emotional injury" as supported by expert medical or scientific evidence. *Ramsey*, 931 S.W.2d at 533.

a. Plaintiff witnessed negligent conduct. In this situation, the elements are the same as those for a general negligence claim: (1) duty, (2) breach of duty, (3) injury or loss, (4) causation in fact, and (5) proximate causation. *Laurrey v. Estate of Scarlett*, 146 S.W.3d 48, 52-53 (Tenn. 2004). However, to prove proximate causation, four factors must be balanced: the plaintiff's location at the time of the event, the plaintiff's awareness of the event, the degree of injury to the third party, and the plaintiff's relationship to the injured third party. *Ramsey*, 931 S.W.2d at 531; *Eskin*, slip. op. at 6.

b. Plaintiff did not witness negligent conduct. If a plaintiff does not witness an injury-producing event and wants to recover purely for emotional distress, proving negligence and showing the following are required: "(1) the actual or apparent death or serious physical injury of another caused by the defendant's negligence, (2) the existence of a close and intimate personal relationship between the plaintiff and the deceased or injured person, (3) the plaintiff's observation of the actual or apparent death or serious physical injury at the scene of the accident before the scene has been materially altered, and (4) the resulting serious or severe emotional injury to the plaintiff caused by the observation of the death or injury." *Eskin*, slip. op. at 9.

4. Emotional injuries as damages – intentional infliction of emotional distress. The goal in *Camper* was to provide an avenue for relief to those emotionally injured, but at the same time create a mechanism to prevent fraudulent claims. In cases of intentional infliction of emotional distress, the plaintiff has a tough burden to prove the defendant's conduct was "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
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civilized community." Miller v. Willbanks, 8 S.W.3d 607, 614 (Tenn. 1999) (quoting Restatement (Second) of Torts § 46 cmt. d (1965)). This standard adds reliability to and insures against frivolous claims, so the "outrageous nature of the conduct…vitiates the need for expert testimony." Id. Although expert medical or scientific evidence is not required to support the claim, a plaintiff must still prove the existence of a serious or severe emotional injury. Id.

Conclusion. Although the hypothetical employer mentioned in the introduction certainly did not welcome the line of cases following Camper, the effect of permitting lawsuits claiming purely emotional damages has seemingly had little impact on litigation. At first glance, the "emotional distress" line of cases are relatively confusing and appear to be fraught with exceptions that attempt to swallow the rules. However, a careful study of cases during the last twelve years reveal that the Court is ultimately focused on removing technical rigidities and instead figuring out how to compensate the injured without opening the door to fraud. Nobody knows what the future holds in this area, but it will almost assuredly contemplate this balancing approach.

1 Emotional distress is synonymous with mental anguish, mental suffering, and mental or nervous shock. Nairon v. Holland, No. M2006-00321 (Tenn. Ct. App. Oct. 26, 2006); see Sallee v. Barrett, 171 S.W.3d 822, 824 (Tenn. 2005) (noting the terms "infliction of mental anguish" and "inflicting of emotional distress" can be used interchangeably); see also Smith v. Gore, 728 S.W.2d 738, 744 (Tenn. 1987).

2 Causes of action arising from a statute and contract are outside the scope of this article since both can affirmatively exclude recovery for emotional injuries.

3 "A 'serious' or 'severe' emotional injury occurs 'where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.'" Id. (quoting Rodrigues v. State, 472 P.2d 509, 520 (Haw. 1970)).

4 Camper was remanded for further proceedings.

5 The Court made it a point to note that Camper "did not alter the longstanding rule that emotional injuries are compensable if accompanied by additional claims of damages." Id. at 137.

6 The Camper decision wanted the requirement of expert medical or scientific evidence to serve as a safeguard to help ensure the reliability of "stand-alone" claims and prevent fraudulent claims. Id. at 137.