

SUPREME COURT OF COLORADO

Giampapa v. American Family Mutual Insurance Co.

64 P.3d 230 (Colo. 2003) · Decided February 24, 2003

SUMMARY

The Colorado Supreme Court held that the Colorado Auto Accident Reparations Act does not preempt common-law contract remedies when an insurer wrongfully refuses to pay benefits. It further held that a full range of foreseeable non-economic damages is available for an insurer's willful-and-wanton breach of an insurance contract, provided the damages are a natural and probable result of the breach. The court reversed the court of appeals and reinstated the insured's \$900,000 special-damages award.

CASE DETAILS

COURT	Supreme Court of Colorado
WRITING FOR THE COURT	Chief Justice Mullarkey; Justice Bender; Justice Coats; Justice Kourlis
JURISDICTION	Colorado
DECIDED	February 24, 2003
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The Supreme Court of Colorado granted certiorari to review the court of appeals' refusal to reconsider its earlier decision limiting Giampapa's contract damages to mental anguish. The court considered whether the No Fault Act preempted common-law contract remedies, whether Colorado's willful-and-wanton rule remained valid and permitted a full range of non-economic contract damages, whether the law-of-the-case doctrine barred reconsideration, and whether the insurer had waived its statutory damages-cap argument.
STANDARD OF REVIEW	The court reviewed legal questions concerning statutory preemption, the availability and scope of contract damages, and the law-of-the-case doctrine de novo. It deferred to the jury's verdict where the trial court properly instructed the jury and the record supported the findings.
PRECEDENTIAL VALUE	precedential
PARTIES	Gioacchino (Jack) Giampapa v. American Family Mutual Insurance Co.

TOPICS

insurance coverage

insurance bad faith

breach of contract

consequential damages

statutory interpretation

PRACTICE AREAS

insurance law

contract law

insurance bad faith

remedies

statutory interpretation

QUESTIONS PRESENTED

1. Whether the No Fault Act preempts a common-law contract claim and remedies for an insurer's wrongful refusal to pay automobile insurance benefits.
2. Whether Colorado's willful-and-wanton rule for contract breaches remains valid.
3. Whether a complete range of foreseeable non-economic damages, rather than only mental-anguish damages, is recoverable for a willful-and-wanton breach of an insurance contract.
4. Whether the law-of-the-case doctrine barred reconsideration of the court of appeals' prior ruling after the precedent on which it relied had been reversed.
5. Whether the insurer waived its argument that the statutory cap on non-economic damages applied to the \$900,000 contract award.

HOLDINGS

1. The No Fault Act does not expressly or implicitly preempt a common-law contract claim or the recovery of nonduplicative special damages for an insurer's wrongful refusal to pay benefits.
2. Colorado retains its longstanding willful-and-wanton rule permitting non-economic damages for a willful-and-wanton breach of contract when the damages satisfy ordinary contract-damages requirements.
3. A complete range of non-economic damages is recoverable for a willful-and-wanton breach of an insurance contract, not merely damages labeled mental anguish, provided the damages were foreseeable at the time of contracting, proven with reasonable certainty, and were a natural and probable result of the breach.
4. The jury findings and instructions sufficiently established foreseeability, reasonable certainty, causation, and willful-and-wanton conduct, and American Family waived its argument that the statutory non-economic-damages cap applied to the \$900,000 award.

KEY QUOTATIONS

"We hold that a complete range of non-economic damages is available when an insurer has willfully and wantonly breached its contract with an insured, so long as the damages are foreseeable at the time of contracting and the damages are a natural and probable result of the breach." (64 P.3d at 234)

"We find no such express or implied repeal or suspension here." (64 P.3d at 236-237)

"In light of these considerations, we conclude that a full range of non-economic damages, not limited to "mental anguish" damages, is recoverable in the event of a willful-and-wanton breach of contract." (64 P.3d at 242)

FACTUAL BACKGROUND

Giampapa was seriously injured when vehicles collided after one rear-ended his stopped vehicle. His automobile policy included medical benefits and coverage for reasonable and necessary durable medical equipment, but American Family repeatedly refused to pay for prescribed home therapy equipment and failed to timely pay some medical-provider bills. Giampapa consequently continued difficult long-distance travel for therapy, experienced increased pain and medication side effects, suffered deterioration in his personal and professional life, and eventually shut down his business. The jury found that American Family's conduct constituted a willful-and-wanton breach and awarded \$900,000 in contract special damages, separate statutory damages, and separate tort damages.

PROCEDURAL HISTORY

A jury found for Giampapa on common-law contract, No Fault Act, and tortious bad-faith claims. It awarded \$900,000 in special damages on the contract claim, statutory treble damages for unpaid benefits, and separate tort and punitive damages. The court of appeals initially held that the No Fault Act did not displace the contract claim but limited non-economic contract damages to mental anguish and ordered a limited retrial. After a retrial award was reduced under the statutory cap, and after the Colorado Supreme Court reversed the relevant precedent in *Decker v. Browning-Ferris Industries of Colorado, Inc.*, the court of appeals declined to reconsider its prior ruling and remanded the reduced award. The Colorado Supreme Court reversed the second court-of-appeals judgment, disapproved *Giampapa I*, reinstated the \$900,000 award, and remanded for further proceedings.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The court of appeals was directed to return the case to the trial court for proceedings consistent with the opinion, including reinstatement of the original \$900,000 special-damages award.

CASES CITED

- *Giampapa v. American Family Mutual Insurance Co.*, 919 P.2d 838, 840-41 (Colo. App. 1995)
- *Decker v. Browning-Ferris Industries of Colorado, Inc.*, 903 P.2d 1150 (Colo. App. 1995)
- *Decker v. Browning-Ferris Industries of Colorado, Inc.*, 931 P.2d 436, 448 (Colo. 1997)
- *State v. Nieto*, 993 P.2d 493, 500 (Colo. 2000)
- *People v. District Court*, 713 P.2d 918, 921 (Colo. 1986)
- *Kristensen v. Jones*, 195 Colo. 122, 124, 575 P.2d 854, 855 (1978)
- *Collard v. Hohnstein*, 64 Colo. 478, 479, 174 P. 596 (1918)
- *Farmers Group, Inc. v. Williams*, 805 P.2d 419, 424-26 (Colo. 1991)
- *Denver & Rio Grande Railroad Co. v. Henderson*, 10 Colo. 1, 2, 13 P. 910, 911 (1887)
- *Adams v. Farmers Insurance Group*, 983 P.2d 797, 803 (Colo. 1999)

- Mid-Century Insurance Co. v. Travelers Indemnity Co., 982 P.2d 310, 314-15 (Colo. 1999)
- Westesen v. Olathe State Bank, 78 Colo. 217, 219-20, 240 P. 689, 690-91 (1925)
- Hall v. Jackson, 24 Colo. App. 225, 227-28, 134 P. 151, 151-52 (1913)
- McCreery v. Miller's Groceteria Co., 99 Colo. 499, 503, 64 P.2d 803, 805 (1936)
- Trimble v. City of Denver, 697 P.2d 716, 730-32 (Colo. 1985)
- People v. Blehm, 983 P.2d 779, 788 (Colo. 1999)
- Town of Alma v. AZCO Construction, Inc., 10 P.3d 1256, 1262 (Colo. 2000)
- People ex rel. Gallagher v. District Court, 666 P.2d 550, 553 (Colo. 1983)
- People v. Dunlap, 975 P.2d 723, 758 (Colo. 1999)
- People v. Roybal, 672 P.2d 1003, 1005 n.5 (Colo. 1983)
- Pearson v. District Court, 924 P.2d 512, 515 (Colo. 1996)
- City of Aurora v. Allen, 885 P.2d 207, 212 (Colo. 1994)
- Allison v. Industrial Claim Appeals Office, 884 P.2d 1113, 1118 (Colo. 1994)
- Stewart v. Rice, 47 P.3d 316, 322 (Colo. 2002)
- Peterson v. Colorado Potato Flake & Manufacturing Co., 164 Colo. 304, 310, 435 P.2d 237, 240 (1967)

OPINION

MULLARKEY, J.

Chief Justice MULLARKEY delivered the Opinion of the Court. I. INTRODUCTION This case clarifies the availability of non-economic damages when an insurer has willfully and wantonly breached its insurance contract. When an insurer has wrongfully refused to pay benefits to an insured, the insured may, under certain circumstances, seek remedies under contract law, tort law, and the Colorado Auto Accident Reparations Act (“No Fault Act” or “Act”). §§ 10-4-701 et seq., 3 C.R.S.

(2002). In this case, Gioacchino (Jack) Giampapa filed all three types of actions against the American Family Mutual Insurance Company and a jury awarded Giampapa damages under all claims. Under the contract claim specifically, the jury awarded Giampapa \$900,000 in economic and non-economic “special damages” for American Family’s willful-and-wanton breach of contract.

This award did not duplicate any of Giampapa’s tort or statutory damages. On appeal today is the issue of whether Giampapa may recover complete non-economic damages under his common law contract claim. We hold that a complete range of non-economic damages is available when an insurer has willfully and wantonly breached its contract with an insured, so long as the damages are foreseeable at the time of contracting and the damages are a natural and probable result of the breach.

We begin our discussion with a summary of the underlying facts of this case and an explanation of its complex procedural history. Next, we address the threshold issue of whether a common law contract claim can coexist with a statutory claim under the No Fault Act, and conclude that the No Fault Act does not preempt a contract claim.

We then address contract claims specifically, explaining (1) the background of Colorado's existing "willful- and-wanton" rule; (2) why we retain the rule today; and (3) why the scope of the rule allows an insured to recover complete non-economic damages not limited to "mental anguish." Finally, we apply Colorado's willful-and-wanton rule to Giampapa and find that (1) the "law of the case doctrine" is inapplicable here; (2) his case satisfies the elements of the willful-and-wanton rule; and (3) the full \$900,000 award stands because American Family has waived its section 13-21-102.5(3)(a), 5 C.R.S.

(2001), statutory cap argument. Accordingly, we reverse the judgment of the court of appeals and reinstate Giampapa's original special damages award in its entirety. II. FACTS AND PROCEDURAL HISTORY In 1992, a vehicle traveling at 35-45 miles per hour rear-ended Giampapa while he was stopped at a stop sign.

After the initial impact, a second vehicle crashed into the first vehicle, causing another collision. Giampapa suffered numerous serious injuries, including spinal fractures, head and neck injuries, torn knee cartilage, and severe numbness in his arms and legs. At the time of the accident, the defendant American Family Mutual Insurance Company ("American Family") was Giampapa's automobile insurance carrier.

Giampapa was covered under a "deluxe" insurance plan, for which he paid a higher premium and which provided additional benefits beyond the basic personal injury protection ("PIP") coverage required by the No Fault Act. Namely, American Family agreed to pay for medical care provider bills and for reasonable and necessary durable medical equipment. Following the accident, Giampapa began a physical therapy regimen that included hydrotherapy, treadmill walking, and strengthening exercises.

Giampapa's physicians believe that he probably will need to continue this physical therapy for the rest of his life. On his physicians' advice, Giampapa attended these physical therapy sessions three to five times a week and had to drive approximately sixty miles, round trip, to attend each of these sessions. Soon, the strain of this frequent and time-consuming drive began to substantially aggravate his condition and to negate the positive effects of the therapy.

In light of these circumstances, Giampapa's physicians concluded that he would be better off with a treadmill and weight machine for home use. Such home equipment would allow Giampapa to continue physical therapy without having to make the strenuous drive, thus his therapy would be more effective. His physicians also prescribed a special therapeutic chair that *235would allow

him to sit without great pain, and a hot tub that had been effective in both improving his condition and alleviating his constant pain.

American Family was advised of the medical opinion that this home medical equipment was necessary to help Giampapa recover from his injuries, but American Family repeatedly refused to pay for such items. Furthermore, in addition to refusing to pay for the medical equipment, American Family failed to pay some of Giampapa's medical care provider bills and paid other bills months late.

As a result, Giampapa received numerous collection notices from his medical providers about his failure to pay for their services. All of these events had a devastating impact on Giampapa's life. Because of American Family's failure to pay the above benefits, Giampapa was required to continue his sixty-mile drives to his physical therapy sessions, three to five times a week.

He consumed large amounts of pain medications to offset the diminished effectiveness of his physical therapy, and he endured substantial side effects from these medications. His personal relationships with his family degenerated as he became increasingly irritable and withdrawn, and his condition eventually forced him to shut down his business. Giampapa ultimately filed suit against American Family for failing to make timely medical provider payments and for failing to pay for reasonable and necessary medical equipment.

Giampapa argued that American Family's actions constituted a common law breach of contract, a statutory violation of the No Fault Act, and a tortious bad faith breach of contract. A jury trial found for Giampapa on all claims.

Under the contract action, the jury found that American Family had willfully and wantonly breached its contract with Giampapa by failing to pay for \$10,574.59 worth of reasonable and necessary durable medical equipment, causing him to suffer an additional \$900,000 in special damages. Furthermore, the jury found that American Family had willfully and wantonly failed to pay \$9,336.74 in medical care provider bills in a timely fashion.

Because the jury found that American Family's conduct was willful and wanton, the trial court, pursuant to section 10-4-708(1.8) of the No Fault Act, 3 C.R.S. (2001), trebled "the amount of unpaid benefits recovered in the proceeding." Specifically, the trial court awarded Giampapa three times the amount of the actual value of the medical equipment and three times the amount of the actual value of unpaid medical care provider bills.

Finally, under the tort action, the jury found that American Family had breached the insurance contract in tortious bad faith, entitling Giampapa to \$100,000 in economic damages and \$200,000 in non-economic damages. Neither amount duplicated the special damages under the contract claim.

The jury also determined that American Family's breach was willful and wanton beyond a reasonable doubt, thus warranting punitive damages in the amount of \$300,000. After the trial court issued its order, this case began a long and convoluted journey through an appeal, a limited retrial, and a second appeal.

We now summarize this complex procedural history. First, American Family appealed the \$900,000 special damages award on the basis that the No Fault Act is the exclusive remedy for an insurer's willful-and-wanton breach of an automobile insurance contract.

The court of appeals rejected this argument, allowing Giampapa to recover special damages under common law contract principles. *Giampapa v. American Family Mut. Ins. Co.*, 919 P.2d 838, 840-41 (Colo.App.1995) ["Giampapa I"].

However, the court of appeals also held, sua sponte, that its holding in *Decker v. Browning-Ferris Indus. of Colo., Inc.*, 903 P.2d 1150 (Colo.App.1995) ["Thomas Decker I"], limited the recovery of non-economic special damages to "mental anguish" caused by the willful-and-wanton breach of contract. *Giampapa I*, 919 P.2d at 841. Giampapa's \$900,000 special damages award had included not only lost earnings and mental anguish, but also physical pain, impairment of earning capacity, and impairment of quality of life.

Therefore, based on *Thomas Decker I*, the court vacated the \$900,000 award and remanded the case for a *236limited new trial to determine damages on the segregated issue of lost earnings and mental anguish.¹ This court denied cross-petitions for certiorari review of *Giampapa I*. *American Family Mut Ins. Co. v. Giampapa*, No. 96SC43, 1996 Colo. LEXIS 203 (Colo.

June 17, 1996). At retrial, the jury awarded Giampapa \$125,000 on the sole issue of mental anguish. The trial court reduced this award to \$50,000 pursuant to section 13-21-102.5(3)(a), 5 C.R.S. (2001), which generally limits total non-economic damages in civil suits to \$250,000.² Under this provision, only "justification by clear and convincing evidence" warrants a greater award of non-economic damages, up to a maximum of \$500,000.

Id. The trial court agreed that Giampapa had indeed suffered the damages determined by the jury, but still chose not to pierce the \$250,000 cap because Giampapa's damages were aggravated by his unusual physical and psychological condition. Meanwhile, we reversed *Thomas Decker I* in the case of *Decker v. Browning-Ferris Indus. of Colo., Inc.*, 931 P.2d 436 (Colo.1997) ["Thomas Decker II"].

In *Thomas Decker II*, we agreed that "mental suffering" was recoverable for a willful-and-wanton breach of contract, but held that the jury's non-economic award for "inconvenience and emotional stress" was also proper under Colorado law. 931 P.2d at 448. Our decision in *Thomas Decker II* set the stage for the second appeal of the Giampapa case.

In the second appeal, Giampapa was the party seeking relief from the court of appeals. Giampapa argued for reinstatement of his original \$900,000 special damages award in light of our *Thomas Decker II* decision. At this stage, the court of appeals declined to reconsider *Giampapa I*, believing the law had not changed because the court considered “inconvenience and emotional distress” to be mere subsets of “mental suffering.” *Giampapa v. Am.*

Family Mut. Ins. Co., 12 P.3d 839, 841 (Colo.App.2000) [“*Giampapa II* ”]. The court then remanded the narrower issue of Giampapa’s reduced \$50,000 mental anguish award back to the trial court, stating that the trial court had erroneously considered Giampapa’s unusual physical and psychological condition when deciding whether or not to award damages exceeding the \$250,000 non-economic damages cap.

Id. We granted certiorari to determine whether the court of appeals properly refused to reconsider *Giampapa I* in light of our *Thomas Decker II* decision regarding non-economic damages for a willful-and-wanton breach of contract.

We also, sua sponte, requested briefing from the parties on the issues of whether the longstanding willful-and-wanton rule should stand and, if so, whether complete non-economic damages — not limited to “mental anguish” — are available for a willful- and-wanton breach.

We answer the above questions in the following order of analysis: First, we address the threshold issue of whether a common law contract claim can coexist with a No Fault Act claim when an insurer has wrongfully refused to pay insurance benefits.

Second, we address the availability of non-economic damages in contract cases under Colorado’s willful-and-wanton rule. Third, we apply Colorado’s willful-and-wanton rule to *Giam-papa* and find it proper to reinstate his original special damages award in its entirety. III. ANALYSIS A. The No Fault Act Does Not Preempt Common Law Contract Remedies At the outset, we affirm the *Giampa-pa I* holding that the No Fault Act does not abrogate a common law contract claim when an insurer wrongfully refuses to pay insurance benefits.

Because the No Fault Act is *237not an exclusive remedy, Giampapa’s contract claim against American Family is viable. American Family argues that the “willful-and-wanton” provision of the No Fault Act signifies the legislature’s intent to statutorily abrogate common law contract remedies for an insurer’s willful-and-wanton breach of an automobile contract. American Family thus proposes that Giampapa cannot recover any special damages under common law contract principles because his damages are limited to the statutory formula trebling his general damages.³ We reject American Family’s contention.

The No Fault Act contains no express legislative intent to preempt common law contract remedies, and to imply such intent would frustrate the primary purpose of the Act. When construing a

statute, our task is to give effect to the intent of the General Assembly. *State v. Nieto*, 993 P.2d 493, 500 (Colo.2000); *People v. Dist. Court*, 713 P.2d 918, 921 (Colo.1986).

Although the Colorado legislature has the power to expressly abrogate common law remedies via statute, we will not infer such an intent unless it is clearly expressed in the law, either directly or by necessary implication. See *Kristensen v. Jones*, 195 Colo. 122, 124, 575 P.2d 854, 855 (1978); *Collard v. Hohnstein*, 64 Colo. 478, 479, 174 P. 596 (1918).

Therefore, a mere overlap of statutory and common law claims does not preempt the common law claim. Section 10-4-708(1.8) of the No Fault Act explicitly states that when an insurer's failure to pay benefits is willful and wanton,⁴ the insured will receive "an amount which is three times the amount of unpaid benefits recovered." Aside from this trebled general damage award arising from unpaid benefits, the Act includes no other remedy for the breach; the Act is silent regarding the availability of economic or non-economic special damages.

In interpreting the Act's silence, we are reminded that "we do not look to whether the legislature specifically authorizes the continuance of preexisting common-law remedies... but rather to whether, 'in express terms or by clear implication, [the statute] repeals or suspends the common-law right of action.'" *Farmers Group, Inc. v. Williams*, 805 P.2d 419, 426 (Colo.1991) (citing *Denver & Rio Grande R.R.*

Co. v. Henderson, 10 Colo. 1, 2, 13 P. 910, 911 (1887)). We find no such express or implied repeal or suspension here. First, this court has previously examined the language and the legislative history of the No Fault Act in detail, finding absolutely no evidence that the General Assembly abrogated common law remedies. *Williams*, 805 P.2d at 424.

In *Williams*, these findings led us to conclude that the No Fault Act does not abrogate a common law bad faith tort claim. *Id.* at 424-25. In our *Williams* analysis, we explained the context of the legislature's silence, finding that "[c]ase law existed in 1973 to guide the General Assembly in limiting common-law remedies against insurance companies if that result was intended." *Id.* at 425 (citing *Fitzsimmons v. Olinger Mortuary Ass'n*, 91 Colo.

544, 17 P.2d 535 (1932) (a common law contract case allowing non-economic mental suffering damages for a willful-and-wanton breach)). The General Assembly placed no limits on common law remedies when it first enacted the No Fault Act in 1973, and it has placed no limits on common law contract remedies in the No Fault Act in the eleven years since we decided *Williams*.

Surely, almost thirty *238years of legislative silence evidences agreement with our interpretation of the law. Second, we also find no implicit legislative intent to preempt common law contract claims; to the contrary, extinguishing such remedies would frustrate the essential purpose of the No Fault Act.

The primary purpose of the Act is “to avoid inadequate compensation to victims of automobile accidents.” § 10-4-702, 3 C.R.S. (2002); see also *Adams v. Farmers Ins. Group*, 983 P.2d 797, 803 (Colo.1999) (when interpreting the Act, courts should use a “liberal construction of its provisions in favor of insureds”). Not all damages are covered by the statute. Furthermore, regarding section 10-4-708(1.8) specifically, we have stated that the purpose of the treble damages remedy is that it “functions as a PIP coverage enforcement mechanism... for the benefit of those wrongfully denied the mandatory statutory coverage.” *Mid-Century Ins.*

Co. v. Travelers Indem. Co., 982 P.2d 310, 314-315 (Colo.1999).⁵ Thus, the treble damages provision functions primarily as a statutory penalty or an enforcement mechanism, not as a complete remedial measure. It gives the insured a modest incentive to seek a legal remedy for lost benefits.

The trial court in *Giampapa I* aptly described the inadequacy of trebled “unpaid benefits” as a remedy by using an example where the “unpaid benefit” is a basic wheelchair. The court first observed that special damages would be “obvious and predictable” if an insurer refused to pay for an insured’s necessary wheelchair.

The court then concluded that it “[did] not believe that the legislature intended to limit breach of contract recovery to three times the value of a wheelchair when an insurance company’s unreasonable failure to pay for a wheelchair renders a capable worker unable to maintain employment or to be reasonably self-sufficient.” We agree that three times the price of an “unpaid benefit” does not ensure adequate compensation for a willful-and-wanton breach resulting in lost wages, impairment of earning capacity, physical pain, mental anguish, impairment of quality of life, and other foreseeable special damages.

Therefore, we conclude that the legislature did not intend to limit an insured’s remedies to the statutory remedy alone. Unlike the No Fault Act, which speaks only of general damages and is silent on special damages, common law contract principles have long provided both general and special damages for a breach of contract. See, e.g., *Westesen v. Olathe State Bank*, 78 Colo.

217, 219, 240 P. 689, 690 (1925); John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 14-5(a), at 595 (3d ed.1987); 3 *Dobbs*, supra note 3, § 12.2(3), at 38. Therefore, we adhere to our long-established position that the legislature intended the No Fault Act to coexist with common law provisions, allowing insureds to recover special damages under a common law contract claim so long as no damages are duplicative.

B. Non-economic Damages in Contract Cases: Colorado’s Willful-and-Wanton Rule Having concluded that a common law contract claim is viable when an insurer fails to pay benefits, we now turn to the more specific question of when and to what extent non-economic damages are available in a contract claim in the insurance context.

We hold today that in Colorado, a complete range of non-economic damages is available when an insurer has willfully and wantonly breached its contract with an insured, so long as the damages are foreseeable at the time of contracting and the damages are a natural and probable result of the breach. See also *Thomas Decker II*, 931 P.2d at 448; *Trimble v. City of Denver*, 697 P.2d 716, 731 (Colo.1985).

To better understand the elements and scope of Colorado's "willful-and-wanton" rule, we begin our analysis with a brief summary of the rule's background. Next, we *239 explain why we retain the longstanding rule. Finally, we explicitly define the scope of available non-economic damages in contract actions.

1. Background of the Willful- and-Wanton Rule Colorado's willful-and-wanton rule dates back to the early twentieth century, when the court of appeals first held that mental distress damages alone, meaning mental distress damages unaccompanied by physical or pecuniary loss, are available when a promisor's breach is accompanied by "willful, insulting or wanton conduct." *Hall v. Jackson*, 24 Colo.App.

225, 228, 134 P. 151, 152 (1913). This court later approved the willful-and-wanton rule in *Fitzsimmons*, 91 Colo, at 550, 17 P.2d at 537, and defined a willful-and-wanton breach as being "intentional, and without legal justification or excuse."⁶ *McCreery v. Miller's Groceteria Co.*, 99 Colo. 499, 503, 64 P.2d 803, 805 (1936).

After *McCreery*, no Colorado court discussed non-economic damages in contract cases for almost fifty years. Then, in the 1980s, we reaffirmed the rule that mental suffering damages are available if they result from a willful-and-wanton breach. *Trimble*, 697 P.2d at 731.⁷ *Trimble* was an employment contract case in which a hospital supervisor sought to "get rid" of Dr. Trimble, a "very respected" physician, after a conflict developed between the two men.

Id. at 720-21. The trial court found that the supervisor maliciously demoted Dr. Trimble through unauthorized and improper methods: the supervisor intentionally reorganized the hospital's departments to abolish Dr. Trimble's position, assigned Dr. Trimble to an office in a maintenance building known as the "boiler house," and later breached a settlement agreement intended to restore Dr. Trimble's reputation.

Id. at 720-21. Faced with these facts, the *Trimble* court reaffirmed the rule that a plaintiff can recover non-pecuniary damages for a willful-and-wanton breach of contract. *Id.* at 731. Ten years after *Trimble*, in 1995, the court of appeals in *Thomas Decker I* interpreted the willful-and-wanton rule with a new twist. Perhaps focusing on prior cases off-handedly stating that mental damages "alone" may be recovered for a willful-and-wanton breach, the court held that a promisee could not recover other non-economic damages in addition to mental damages, such as damages for inconvenience or emotional stress.

Thomas Decker I, 903 P.2d at 1158. We later reversed Thomas Decker I in Thomas Decker II, holding that other non-economic damages such as inconvenience and emotional stress are in fact available for a willful-and-wanton breach. Thomas Decker II, 931 P.2d at 448.

As mentioned above in the procedural history portion of this opinion, the court of appeals relied on its Thomas Decker I holding when it reversed Giampapa's original \$900,000 special damages award. 2. Continuing Validity of the Willful-and-Wanton Rule In this appeal, we requested briefing from the parties on the issue of whether Colorado's longstanding willful-and-wanton rule should stand.

Stare decisis binds us to the pre-existing rule unless we are clearly convinced that (1) the rule was originally erroneous or is no longer sound due to changing conditions and (2) more good than harm will come from departing from precedent. *People v. Blehm*, 983 P.2d 779, 788 (Colo.1999).

Because we are not clearly convinced that the above tests are met, we reaffirm the willful-and-wanton rule. First, the willful-and-wanton rule was not erroneous when it was adopted. From the beginning, the rule has adhered to basic contract law principles. All contract damages, whether general or special, economic or non-economic, are recoverable only if the damages were the foreseeable result of a breach at the time the contract was made.

See, e.g., Restatement (Second) of Contracts, §§ 351 & 352 (1981). A foreseeability requirement is inherent in every contract case because contractual liability is determined by whether such liability was within the contemplation of the parties at the time of contracting. See *id.*; *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854).

In Colorado, the standard jury instruction on special damages in contract cases properly reflects this emphasis on foreseeability, instructing the jury that it must find, "at the time the parties entered into the contract, the defendant reasonably could have anticipated from the facts or circumstances that the defendant knew or should have known that these damages would probably be incurred by the plaintiff if (he)(she), the defendant, breached the contract." C.J.I.

30:35 (emphasis added).⁸ Under the willful-and-wanton rule, the allowance of non-economic damages in contract claims does not dispose of expectation interests. To the contrary, the rule properly limits the availability of non-economic damages to extraordinary contractual circumstances where such damages are in fact foreseeable at the time of contracting.

In typical commercial contracts where goods are exchanged for money, non-economic damages are not foreseeable because only pecuniary loss is at stake. See *Adams*, 691 P.2d at 355 (mental anguish resulting solely from pecuniary loss following a breach of contract is not recoverable); see also 3 Dobbs, *supra* note 3, § 12.4, at 819.

Because the parties in an ordinary sales situation do not contemplate non-economic harm at the time of contracting, a willfully breaching party is not responsible for non-economic damages. In contrast, serious non-economic harm may be foreseeable when the contract is of a more personal nature.⁹ In particular, when an insured pays an automobile insurance carrier for medical coverage in the event of an injury accident, the insured is also paying for the peace of mind and security that inherently accompanies that insurance coverage.¹⁰ For such cases, it is plainly foreseeable at the time of contracting that if the insurer later decides to intentionally and wrongfully abandon its agreement after the insured is seriously injured in a debilitating automobile accident, physical pain and mental anguish will be probable results of the breach.

Under these circumstances, it is within the clear contemplation of both parties that a breach will cause damages beyond those caused by mere economic loss. If these foreseeable non-economic damages are proven with reasonable certainty and the insurer's conduct is in fact willful and wanton, the breaching insurer will be held liable for those damages. This conclusion honors the parties' expectation interests and is therefore consistent with fundamental contract principles. *241 Several other states also allow the recovery of non-economic damages so long as the non-economic damages were foreseeable at the time of contracting.

In Hawai'i, emotional distress damages are recoverable only if specifically provided for in the contract or if "the nature of the contract clearly indicates that such damages were within the contemplation or expectation of the parties." *Francis v. Lee Enters., Inc.*, 89 Hawai'i 234, 971 P.2d 707, 713 (1999).

In New Mexico, emotional distress damages are recoverable only after a showing that "the parties contemplated damages for emotional distress at the time the contract was made." *Bourgeois v. Horizon Healthcare Corp.*, 117 N.M. 434, 872 P.2d 852, 858 (1994). And, in New Hampshire, mental suffering damages are allowable if such damages were within the contemplation of the parties or if pain and suffering were foreseeable results of the contract violation.

Guerin v. N.H. Catholic Charities, Inc., 120 N.H. 501, 418 A.2d 224, 227-28 (1980). Like Colorado, the above states recognize that the availability of non-economic damages is consistent with basic contract law principles so long as the foreseeability requirement is met.

Thus, Colorado's willful- and-wanton rule was not erroneous when it was adopted. Moreover, changing conditions have not rendered the willful-and-wanton rule unsound. We disagree with American Family's argument that the expansion of tort remedies over the past few decades has completely obviated the need for contractual remedies under the willful-and-wanton rule.

The separate tort and contract remedies serve entirely different purposes. See *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1262 (Colo.2000) (distinguishing the separate sources and purposes of tort and contract obligations).

Under tort law, a willful-and-wanton requirement seeks to punish the wrongdoer, encourage socially responsible behavior, and compensate the aggrieved. Under contract law, however, the willful-and-wanton requirement seeks to provide the parties with the benefit of their bargain.

Thus, the contractual version of the willful- and-wanton rule serves the separate and distinct purpose of providing non-economic damages where they are necessary to return the parties to the position they would have been in had the contract been performed according to the parties' expectations. Given this unique function of the willful-and-wanton rule under contract law principles, the rule has not been rendered unsound by the growing availability of tort law remedies.

Second, we decline to depart from Colorado's longstanding willful-and-wanton rule because we are not clearly convinced that such a departure would create more good than harm. The willful-and-wanton rule has existed in Colorado for ninety years, and we recently relied on the rule in *Thomas Decker II*, 931 P.2d 436. Replacing the willful-and-wanton requirement with some new rule would undoubtedly spur increased litigation and raise a number of new uncertainties.

Furthermore, eliminating the rule would risk under-compensation not only in insurance cases as exemplified here, but also in employment cases, where employees terminated in a willful-and-wanton manner cannot bring a tort claim for a bad faith breach. *Id.* at 446.

In short, because Colorado's longstanding willful-and-wanton rule is sound and because a departure from the rule would produce more potential harm than overriding benefits, we decline to overturn the rule today. 3. The Willful-and-Wanton Rule Allows a Full Scope of Non-Economic Damages Turning now to the scope of non-economic damages available for a willful-and-wanton breach, we clarify our decision in *Thomas Decker II* and hold that non-economic damages are not limited to "mental anguish" damages only.

Instead, a full range of non-economic damages is available in cases involving a willful-and-wanton breach of contract. Colorado case law supports our conclusion that the willful-and-wanton rule has always allowed the recovery of various non-economic damages in addition to "mental anguish." First, it is clear that the Colorado courts have historically used the phrase "mental distress" as an abbreviation encompassing other types of non-economic damages.

As early as *Hall*, the court of appeals used the terms "mental suffering" or "mental anguish" to collectively refer to "mental anguish, humiliation, and distress of mind." *Hall*, 24 Colo.App. at 227-28, 134 P. at 151-52. Similarly, in *McCreery*, the phrases "mental pain" and "mental suffering" served as proxies for other types of non-economic damages such as "humiliation, embarrassment, distress, and damages." 99 Colo, at 500, 64 P.2d at 804.

In more recent Colorado cases, the courts have used the terms "emotional distress" and "mental anguish" interchangeably, and this court has held that the "loss of ability to enjoy life" is

equivalent to “mental suffering.” See *Westfield Dev. Co. v. Rifle Inv. Assoc.*, 786 P.2d 1112, 1121 (Colo.1990); *Trimble*, 697 P.2d at 730; *Denver Publ’g Co. v. Kirk*, 729 P.2d 1004, 1008 (Colo.App.1986).

In *Thomas Decker II*, we specifically upheld an award for inconvenience and emotional stress under the general notion that “the award of... noneconomic damages for [the defendant’s] willful-and-wanton breach of its [contract] is proper under Colorado law.” 931 P.2d at 448.

We now clarify our interpretation of the willful-and-wanton rule to explicitly allow a complete recovery for non-economic damages caused by a willful- and-wanton breach. In affirming a broad interpretation of the willful-and-wanton rule, we note that neither *American Family* nor any of the amici has offered a logical reason for limiting recovery to only some categories of non-economic damage.

Their arguments depend entirely on cases that use, without explanation, the statement in *Hall* that damages are recoverable in cases seeking “mental distress alone” or “mental distress only.” See, e.g., *Mortgage Fin., Inc. v. Podleski*, 742 P.2d 900, 904 (Colo.1987); *Kirk*, 729 P.2d at 1008; *Adams v. Frontier Airlines Fed. Credit Union*, 691 P.2d 352, 355 (Colo.App.1984).

A lack of contextual clarification over the years has allowed courts to wrongly interpret the language “mental distress alone” to mean that other types of non-economic damages are not available. *Thomas Decker I*, 903 P.2d at 1158; *Giampapa I*, 919 P.2d at 841. This interpretation is incorrect.

As explained earlier, “mental distress alone” simply refers to cases involving mental distress damages unaccompanied by physical or pecuniary loss. *Hall*, 24 Colo.App. at 228, 134 P. at 152. The phrase does not refer to a preclusion of non-economic damages outside of mental distress. Even if *American Family* had provided a sound reason for precluding other types of non-economic damages, we find it highly impractical to categorize different non-economic damages into arbitrary compartments where some damages are compensable and others are not.

For purposes of determining a non-economic damage award, we simply find no principled method of separating “mental suffering” and “emotional distress” damages from those damages incurred by “physical pain” or “physical stress,” because “mental anguish” is commonly evidenced by physical manifestations of that same anguish. See, e.g., *Smith v. Hoyer*, 697 P.2d 761, 764-65 (Colo.App.1984) (holding that a plaintiff’s sleeplessness, loss of appetite, and diarrhea were symptomatic of his mental anguish caused by a willful-and-wanton breach of contract).

Therefore, we decline to adopt a new, narrower rule which would not only prevent insureds from seeking a complete remedy for their non-economic injuries, but which would also open an endless debate over overlapping terminology.

In light of these considerations, we conclude that a full range of non-economic damages, not limited to “mental anguish” damages, is recoverable in the event of a willful-and-wanton breach of contract. C. Application In this section, before we apply Colorado’s willful-and-wanton rule to Giampapa’s case, we first determine whether the “law of the case” doctrine prevents either the court of appeals or this court from re-examining Giampapa I. Because we find that the rule is not binding here, we proceed to examine, in detail, the willful-and-wanton rule as applied to the jury findings and jury instructions in this case.

Upon examination, we conclude that the findings and instructions in the trial record adequately support the non-economic portion of the jury’s \$900,000 special damages verdict in favor of Giampapa on his contract claim.

Finally, because American *243Family has waived the argument that the section 13-21-102.5(3)(a) statutory cap on non-economic damages applies to this case, we reinstate Giampapa’s original \$900,000 award in its entirety. 1. Law of the Case Doctrine When a court issues final rulings in a case, the “law of the case” doctrine generally requires the court to follow its prior relevant rulings.

See *People ex rel. Gallagher v. Dist Court*, 666 P.2d 550, 553 (Colo.1983). Here, we reject American Family’s contention that the law of the case doctrine requires the court of appeals to uphold its original decision in Giampapa I and that the doctrine precludes this court from reaching the substantive issues arising from that case.

The law of the case doctrine is merely discretionary when applied to a court’s power to reconsider its own prior rulings. See *id.*; *People v. Dunlap*, 975 P.2d 723, 758 (Colo.1999); *People v. Roybal*, 672 P.2d 1003, 1005 n. 5 (Colo.1983) (“The doctrine of the law of the case is more flexible in its application to reconsideration by the court making the decision, because there the only purpose of the doctrine is efficiency of disposition.”).

Courts considering whether or not to review one of their own cases are reminded that the law of the case doctrine neither requires nor encourages courts to support erroneous judgments. *Pearson v. Dist. Court*, 924 P.2d 512, 515 (Colo.1996).

Therefore, a court may decline to apply the doctrine if a previous decision is no longer sound because of changed conditions of law. See *City of Aurora v. Allen*, 885 P.2d 207, 212 (Colo.1994). In this case, we have already discussed how the court of appeals in Giampapa I erroneously interpreted the scope of Colorado’s willful-and-wanton rule by relying on *Thomas Decker I*. In light of our subsequent reversal of *Thomas Decker I* in *Thomas Decker II*, the court of appeals’ decision regarding special damages was no longer sound when Giampapa II reached the court of appeals.

Therefore, the court of appeals should have declined to apply the law of the case doctrine to its own prior decision, and reconsidered Giampapa I in accordance with the above developments. As

for the effect of the law of the case doctrine on this court, the doctrine does not bind us to the substantive decisions made by the court of appeals in Giampapa I. A decision of an intermediate appellate court in a prior appeal remains subject to review by a higher court even after retrial and a second round of appellate proceedings in the same case.

See *Mercer v. Theriot*, 377 U.S. 152, 153-54, 84 S.Ct. 1157, 12 L.Ed.2d 206 (1964); *City of Pueblo v. Shutt Inv. Co.*, 28 Colo. 524, 530, 67 P. 162, 164 (1901). Also, our initial denial of certiorari for Giampapa I does not affect our ability to review the case today.

The rule is clear that a denial of certiorari does not constitute judicial review on the merits. *Allison v. Indus. Claim Appeals Office*, 884 P.2d 1113, 1118 (Colo.1994); see also *Mercer*, 377 U.S. at 153, 84 S.Ct. 1157 (stating that a high court can review the judgment of an intermediate appellate court even if it denied certiorari from a previous intermediate appellate court decision).

Therefore, we may reach the substantive issues arising from Giampapa I and we do so at this point. 2. *Giampapa Satisfies the Willful- and-Wanton Rule* We now determine whether the original jury properly awarded Giampapa non-economic damages under his common law contract claim.

In order for the jury's verdict awarding Giampapa non-economic damages to stand, the jury's findings must substantively satisfy the three elements of Colorado's willful-and-wanton rule, namely: (1) Giampapa's non-economic damages must have been the foreseeable result of a breach at the time the contract with American Family was made; (2) Giampapa's non-economic damages must be proven with reasonable certainty; and (3) the non-economic portion of Giampapa's special damages must be the natural and probable result of a willful-and-wanton breach.

We will defer to the jury's verdict if the trial court properly instructed the jury on the above issues and if the record contains evidence to support its findings. *244See *Stewart v. Rice*, 47 P.3d 316, 322 (Colo.2002).

First, the foreseeability element is sufficiently addressed in the trial court's "special damages" instruction because it states that these damages are available only if, "at the time the parties entered into the contract, the defendant reasonably could have anticipated from the facts or circumstances that the defendant knew or should have known that these damages would probably be incurred by the plaintiff if the defendant breached the contract." (emphasis added).

Therefore, the jury was explicitly instructed to determine whether American Family had either foreseen or should have foreseen, at the time of contracting, the non-economic damages that would result from a breach. American Family is in the business of providing personal automobile insurance coverage.

The jury reasonably concluded that when American Family first sold Giampapa a "deluxe" insurance plan, American Family knew or should have known that if it failed to pay for medical

equipment necessary to help Giampapa recover from an automobile accident, Giampapa would suffer mental anguish, physical pain, and impairment of quality of life.

Second, Giampapa's non-economic damages have been proven -with reasonable certainty. We note as a preliminary matter that the rule precluding the recovery of uncertain damages "applies only to situations where the fact of damages is uncertain, not where the amount is uncertain." *Peterson v. Colo. Potato Flake & Mfg. Co.*, 164 Colo. 304, 310, 435 P.2d 237, 240 (1967) (stating also that damages generally "need not be proved with such preciseness as to permit a Jury to reach a verdict with mathematical certainty").

Any doubts regarding the certainty of non-economic damages are resolved against the party in breach, and the court may consider circumstances such as willfulness in deciding whether to require a lesser degree of certainty, giving greater discretion to the jury's findings. See Restatement (Second) of Contracts, § 352 cmt. a (1981).

In the present case, neither party disputes that Giampapa has in fact suffered measurable non-economic damages for physical pain, mental and emotional suffering, and impairment of quality of life. Ample evidence in the trial record, including numerous medical and psychological reports and bills, supports the jury's findings that Giampapa suffered each of the non-economic damages in question.

Third, in order for the non-economic portion of Giampapa's special damages to stand, American Family's breach must have been willful and wanton and Giampapa's non-economic damages must have been the natural and probable result of that breach.

We first address the latter and more straightforward "natural and probable result" element. In the trial court's instruction explaining "special damages," the court required the jury to "find by a preponderance of the evidence that [such damages] were a natural and probable consequence of the claimed breach of the contract by the defendant." 11 Therefore, the trial court explicitly and properly instructed the jury to decide the "natural and probable result" issue when deciding whether to award Giampapa any non-economic damages.

The jury then reasonably concluded that but for American Family's failure to pay for the home medical equipment, Giampapa would not have had to make the frequent, sixty-mile drive to physical therapy that contributed to his mental anguish, physical pain, and impairment of quality of life. What is less apparent is whether the jury made a necessary finding of willful-and-wanton conduct under Giampapa's common law contract claim.

A review of the instructions as a whole reveals that the court did not specifically tell the jury that it had to find willful-and-wanton conduct before it could award special damages under the contract claim. As discussed earlier, the common law defines a "willful-and-wanton" breach of contract as one that is "intentional, and without legal justification or excuse." *McCreery*, 99 Colo., at 503, 64

P.2d at 805. *245The court did, however, instruct the jury-on the willful-and-wanton element under the No Fault Act claim.

The jury was told to consider whether the defendant's failure to pay benefits was willful-and-wanton because if it was, the court could award additional damages pursuant to the Act. The jury instruction defined "willful-and-wanton conduct" under the Act as "an act or omission purposefully committed by a person who must have realized that the conduct was dangerous, and which conduct was done heedlessly and recklessly, either without regard to the consequences, or without regard to the rights and safety of others, particularly the plaintiff."¹² Although the trial court failed to give a separate instruction regarding willful- and-wanton conduct under the common law contract claim, we find that this oversight is not fatal.

At trial, the American Family claims adjuster admitted that Giampapa's insurance policy provided medical equipment and that such equipment was reasonably defined as equipment used for a medical purpose. Giampapa's physician also testified that he notified American Family of his medical opinion that the home medical equipment in question was necessary to help Giampapa recover from his injuries.

There was no conflicting evidence suggesting that the medical equipment was inappropriate or unnecessary. Nevertheless, American Family refused to pay for the home medical equipment. The above evidence clearly supports the jury's conclusion that American Family's failure to pay Giampapa's benefits was willful-and-wanton under the No Fault Act.

Because the definition of willful-and-wanton conduct is narrower under the Act than under the common law, the jury's findings also satisfy the broader definition of willful-and-wanton conduct under Giampa-pa's common law contract claim.

The above jury instructions and jury findings sufficiently address and satisfy all elements of Colorado's willful-and-wanton rule; therefore, the jury acted properly by awarding Giampapa non-economic damages. 3. Statutory Cap Argument Waived American Family now argues that even if the jury properly awarded non-economic damages, Colorado's statutory cap on non-economic damages applies to the special damages award in this ease.

Section 13-21-102.5(3)(a) generally limits total non-economic awards in civil suits to \$250,000 with an option to raise the cap in certain circumstances to \$500,000. Giampapa has already received \$200,000 in non-economic damages under his tort claim.

The original jury awarded Giampapa a \$900,000 lump sum for special damages, and this sum covered both his economic and non-economic special damages under his contract claim. The jury did not specify how much of the \$900,000 award compensated his economic injuries of lost earnings and impairment of earning capacity, and how much of the \$900,000 award compensated his non-eeo-nomic injuries of mental anguish, physical pain, and impairment of quality of life.

This uncertainty regarding the actual amount of non-economic damages awarded and whether the damages cap applies are matters that should have been properly raised before the original trial court. At trial, American Family did not claim that the damages cap limited the \$900,000 award. American Family did not object to the special damages instruction either before the instruction was delivered to the jury or after the jury read its verdict.

Nor did American Family ever request separate instructions or ask the jury to allocate economic and non-economic damages more specifically. Furthermore, although the damages cap issue was mentioned briefly in American Family's notice of appeal, American Family did not make any arguments regarding the issue before the court of appeals in *Giampa-pa I*. In fact, American Family specifically conceded in both that appeal and in *Giampa-pa II* that it had not previously raised the non-economic damages cap issue in relation to the original \$900,000 special damages award. *246 We find that American Family's statements and actions constitute a waiver of the argument that the statutory cap applies to the special damages award.

Therefore, we reinstate the \$900,000 special damages award in its entirety. IV. CONCLUSION
For the foregoing reasons, we reverse the judgment of the court of appeals in *Giampa-pa II*, disapprove of *Giampapa I*, and remand this case to the court of appeals to return the case to the trial court for proceedings consistent with this opinion. Justice BENDER specially concurs, and Justice KOURLIS joins in the special concurrence.

Justice COATS dissents.. *Giampapa* did not pursue lost earnings during the retrial. Also, the court of appeals in *Giampa-pa I* erroneously categorized "impairment of earning capacity" as a type of non-economic injury.

As we indicated in *Decker v. Browning-Ferns Indus. of Colo., Inc.*, 931 P.2d 436, 447 (Colo.1997), loss of future pay is an economic injury. See also CJI-Civ. 4th 6:1 (economic loss includes "damage to... ability to earn money in the future")..

The jury at the original trial had already awarded *Giampapa* \$200,000 in non-economic damages under his tort claim.. "General damages" are those that flow naturally from the breach of contract, whereas "special" or "consequential damages" are other foreseeable damages within the reasonable contemplation of the parties at the time the contract was made. See, e.g., 3 Dan B. Dobbs, *Law of Remedies* § 12.2(3), 39-43 (2d ed.1993).

In this case, general damages are the actual value of unpaid medical provider bills and medical equipment, and special damages include economic and non-economic losses such as lost earnings, mental anguish, impairment of quality of life, etc..

The Act itself does not define "willful-and-wanton," but we have previously stated that in the insurance context, a willful-and-wanton breach under the Act is established when "an insurer acts

without justification or in disregard of a plaintiff's rights." *Dale v. Guaranty Nat'l Ins. Co.*, 948 P.2d 545, 551 (Colo. 1997); *Burgess v. Mid-Century Ins. Co.*, 841 P.2d 325, 329 (Colo.App.1992)..

We take note that Giampapa contracted and paid for a "deluxe" PIP plan that provided benefits for medical care provider bills and medical equipment not required by the basic mandatory PIP coverage set forth by section 10-4-706, 3 C.R.S.

(2002). For purposes of this case, we do not distinguish between mandatory and supplemental benefits because we believe a common law contract remedy is available for a willful- and-wanton breach in either case.. We have never considered whether the definition of "willful-and-wanton" under the No Fault Act covers the same "willful-and-wanton" behavior defined under common law contract principles.

We need not reach the issue here because the trial court instructions did not use either definition.. Trimble also suggested that an exception to the willful-and-wanton rule exists where the contract is "of such a personal and special nature that the parties knew, or should have known, that a breach would result in severe mental or emotional distress." Trimble, 697 P.2d at 731-32 (citing Westesen, 78 Colo, at 220, 240 P. at 691).

We do not recognize this as a separate exception to the willful-and-wanton requirement because it departs from the longstanding rule that mental anguish damages are not recoverable in cases where a mere passive breach is unaccompanied by wanton, willful, or insulting acts. *Fitzsimmons*, 91 Colo, at 550, 17 P.2d at 537; *Hall*, 24 Colo.App. at 228, 134 P. at 152..

See also Restatement of Contracts § 341 (1932) (allowing mental suffering compensation only where a wanton or reckless breach is of "such a character that the defendant had reason to know when the contract was made that the breach would cause mental suffering for reasons other than mere pecuniary loss").. Some states directly rely on this distinction between contracts of a "personal" nature and contracts of a "commercial" nature when determining the availability of mental anguish damages.

See, e.g., *Kewin v. Mass. Mut. Life Ins. Co.*, 409 Mich. 401, 295 N.W.2d 50, 53-54 (1980); *Erllich v. Menezes*, 21 Cal.4th 543, 87 Cal.Rptr.2d 886, 981 P.2d 978, 987-88 (1999). We do not adopt the personal/commercial test because it is often difficult to label contracts as purely one or the other.

Therefore, we focus primarily on the foreseeability of the non-economic damage..Professor Whaley agrees that where "peace of mind and freedom from worry are part of the bargain, as the defendant very well knew, and if the defendant breaches these sorts of contracts, the defendant should pay for the agony suffered as an obvious consequence." Douglas J. Whaley, *Paying for the Agony: The Recoveiy of Emotional Distress Damages in Contract Actions*, 26 *Suffolk U.L.Rev.*

935, 953 (1992).. At re-trial, the court further defined the "natural and probable consequence" requirement as a "but-for" inquiry into whether the defendant's breach was "an act or failure to act which in natural and probable sequence produced the claimed injury. It is a cause without which the claimed injury would not have been incurred.". At the time of the original trial, we had not yet decided the Dale case, which defines "willful- and-wanton" under the No Fault Act as being "without justification or in disregard of a plaintiff's rights." 948 P.2d at 551.