
Gary P. Graphia
NONPECUNIARY DAMAGES: A GUIDE TO DAMAGE AWARDS
UNDER LOUISIANA CIVIL CODE ARTICLE 1998

Since the late 1970s, the availability of nonpecuniary damages has been the subject of numerous discussions in the courts and among scholars. Much of the debate has focused on three topics: the Louisiana Supreme Court's interpretation of former Louisiana Civil Code article 1934(3) in *Meador v. Toyota of Jefferson, Inc.*;\(^1\) the effect of new Article 1998 upon *Meador*; and, most recently, *Lafleur v. John Deere Co.*,\(^2\) in which the supreme court read Article 1998 as a reaffirmation of *Meador*.

This comment will review the Louisiana cases handed down since *Lafleur* in an attempt to discover common characteristics among those cases in which nonpecuniary damages were awarded and among those cases where they were disallowed. The results provide practical guidelines for evaluating the chances of recovering nonpecuniary damages in breach of contract cases.

This comment begins by presenting the historical development of Louisiana's current law, including a review of the text of former Louisiana Civil Code article 1934 and the interpretation given that article in *Meador*. Discussion of Louisiana Civil Code article 1998 and events leading up to the revision follows, and the interpretation of Article 1998 by the Louisiana Supreme Court in *Lafleur* will be detailed. The comment will list cases, by circuit, since the *Lafleur* decision, that involve Article 1998 and analyze the consistency of the decisions among, as well as within, the circuit courts. A suggested approach to the problem will be outlined, and finally, the conclusion will set forth elements required to reasonably assure an award of nonpecuniary damages in cases involving breach of contract.

Background

Nonpecuniary damages are those injuries that cannot be measured in pecuniary terms. Common examples include mental anguish, incon-
venience, humiliation, and embarrassment. Formerly, nonpecuniary damages were grounded in Louisiana Civil Code article 1934(3). However, the application of this article proved difficult, and so cases with similar factual situations had conflicting outcomes. For example, while the first circuit awarded nonpecuniary damages for a breach of contract for the sale of a home and again in a case where the breach involved a contract to build a home, the third circuit denied recovery of such damages for the breach of a contract to repair a house. One decision by the supreme court was to have resolved the conflict, but as demonstrated below, the law has remained unsettled.

In Meador, the supreme court addressed former Article 1934(3). In that case, the owner of an automobile sought nonpecuniary damages from a repair shop after a seven month delay in repairing the vehicle. The court stated,

We conclude that plaintiff is not entitled to recover damages for aggravation, distress, and inconvenience caused by the five month loss of use of her automobile, because the procuring of intellectual enjoyment, while perhaps an incidental or inferred contemplation of the contracting parties, was not a principal object of the contract to have the car repaired. (emphasis added)

Meador prompted much discussion and led one writer to conclude that "even after the Louisiana Supreme Court announced a controlling interpretation, inconsistencies and uncertainty persisted." In two cases decided within a year of each other involving similar factual situations, the fourth circuit and the second circuit reached different results on the issue of nonpecuniary damages. The fourth circuit denied damages for breach of a building contract in Catalanotto v. Hebert, stating that a building contract without more does not fit the

4. La. Civ. Code art. 1934(3) (1870) states:
Where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach; a contract for religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule.
8. The court of appeal felt the undue delay consisted of five of the seven months.
9. 332 So. 2d at 437.
11. 347 So. 2d 301 (La. App. 4th Cir. 1977).
category of objects the deprivation of which supports recovery for mental distress. However, in *Whitener v. Clark*\(^\text{12}\) the second circuit awarded nonpecuniary damages caused when the plaintiff’s dream of owning a beautiful home was not realized. The court found that the contractor breached the implied obligation of good workmanlike performance and, when confronted with the decision in *Catalanotto*, stated that “[w]e [the second circuit] differ with the 4th Circuit.”\(^\text{13}\) Finally, in 1979 the supreme court decided, in the case of *Ostrowe v. Daresbourg*,\(^\text{14}\) that a contract to build a house of distinctive design (like those in *Catalanotto* and *Whitener*) did not make the object one of intellectual gratification. The court found that even if intellectual enjoyment was a purpose it was not the principal object; the court viewed “shelter” as occupying that role.

The conflict among the circuit courts may have occurred because some of the circuits agreed with the dissent by Justice Dixon in *Meador*.\(^\text{15}\) When the opportunity was presented to characterize a contract’s object as one of “intellectual gratification” as opposed to some other physical gratification, such as shelter in the case of a house, it seems that some circuit courts based that characterization upon the amount of nonpecuniary damages proved. Damages were awarded when the plaintiff could show real suffering. The justification was likely to be comparable to Justice Dixon’s: there is no reason to delineate between contract and tort when the plaintiff is able to prove damage.

Nevertheless, one can see the need for revision in the area of nonpecuniary damages that existed at that time. In 1984, the Louisiana Legislature replaced Article 1934(3) with Civil Code article 1998 as part of the revision of the articles on obligations. The new article, which became effective January 1, 1985, reads as follows:

> Damages for nonpecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss.

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13. 356 So. 2d at 1098.
15. 332 So. 2d at 439 (Dixon, J., dissenting). Justice Dixon wrote:

> There is no logical reason to allow recovery of such damages when property is involved in cases delineated as “tort,” and yet deny recovery of similar damages when property involved (as in this case), simply because the cause of action is delineated as “contract.” Both involve a duty and a breach... In the instant case, plaintiff has proved, to the satisfaction of the trier of fact, that she suffered inconvenience, distress and aggravation because of defendant’s breach of duty. She should recover therefor.
Regardless of the nature of the contract, these damages may be recovered also when the obligor intended, through his failure, to aggrieve the feelings of the obligee.

Expectations were that the ambiguities inherent in old Article 1934 would be eliminated. However, one may see similarities in these articles, as the supreme court did in *Lafleur v. John Deere Co.*

*Lafleur* involved consolidated cases in which two plaintiffs, the purchaser and the user of an allegedly defective grain drill, brought an action to recover damages from the drill manufacturer, John Deere, and the seller, F. Hollier and Sons. The lower court awarded compensatory damages for crop loss plus expenses. In addition, the court awarded damages for mental anguish based on the buyer's worrying caused by financial difficulties brought on by the poor crop. The supreme court reversed this portion of the judgment stating, "such worry is not within the scope of the risk to which is extended Deere's duty to deliver a useful grain drill."

The court distinguished *Lafleur* from *Meador*, which it viewed as a simple service contract, stating that *Lafleur* contained both delictual as well as contractual elements. The court made this distinction as part of its discussion of whether, when nonpecuniary damages are not recoverable in cases of simple breach of contract, such damages may be recovered in tort or in redhibition. This issue was ultimately avoided.

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16. Comment (a) to La. Civ. Code art. 1998 states:
   This Article is new. It changes the law in part. As interpreted in *Meador v. Toyota of Jefferson, Inc.*, (cite omitted) C.C. Art. 1934(3) (1870) allows recovery of damages for nonpecuniary losses only for breach of a contract which has "intellectual enjoyment" as its principal or exclusive purpose. Under this Article, such damages are recoverable when a contract has been made for the gratification of a nonpecuniary interest and, because of circumstances surrounding its formation or breach, the obligor knew or should have known that his failure to perform would cause nonpecuniary loss. Such damages are also recoverable when regardless of the nature of the contract or the purpose for which it has been made, the obligor, through his breach, intends to aggrieve or hurt the feelings of the obligee.

17. 491 So. 2d at 629.
18. Id. at 631.
19. Id. at 630.
20. The court stated:
   A normal breach of contract not involving delictual conduct is governed, as respects damages, by La. Civ. Code art. 1934(3) (at present CC 1998). There are however, contract situations where there occur damages by reason of fault which are distinct from and/or in addition to breach of a conventional obligation. Such is the case where a product is sold which is not reasonably safe for its intended use, and the purchaser or consumer suffers damages as a consequence.
21. Id.
because the court found that the evidence did not support an award for mental pain and anguish damages under any theory.

What is so interesting about Lafleur, however, is that section of the opinion devoted to reaffirming Meador. The court stated that Meador did not apply because Lafleur was not a simple breach of contract.22 But before reaching that conclusion, Justice Calogero, author of the majority opinion in Meador, responded to the statement by the court of appeal that “the Meador rule is no longer inflexibly applied to preclude awards of nonpecuniary damages”:23

This position is not well taken. In fact no opinion of this court after Meador has repudiated its holding, despite criticism by some Law Review commentators.24

Justice Calogero continued:


... The only changes to La.Civ.Code art. 1934(3) were to substitute a contract “to gratify a nonpecuniary interest” for a contract having “for its object the gratification of some intellectual enjoyment.” . . . [T]he substitution of gratification of nonpecuniary interest for gratification of some intellectual enjoyment, serve to clarify and make more certain under the law the Meador resolution. . . .

The last statement by Justice Calogero cited above is the focus of the remainder of this paper. Has Article 1998 “served to clarify and make more certain under the law the Meador resolution?”

The discussion of Meador in Lafleur is subject to criticism: textually-based arguments support the theory that Meador is no longer the rule. Comparison of the language of old Article 1934(3) and new Article 1998 demonstrates that an award of nonpecuniary damages should no longer be restricted to cases involving the breach of a contract where the principal or exclusive object is the gratification of a nonpecuniary interest.

For instance, former Article 1934(3) used the language “where the contract has for its object the gratification of some intellectual enjoyment.” New Article 1998 states that damages may be recovered “when the contract, because of its nature, is intended to gratify a nonpecuniary

22. Id.
25. 491 So. 2d at 629 (emphasis added).
interest." The use of the article "a" indicates that a nonpecuniary interest need no longer be the principal or exclusive object of the contract. Rather, it is enough that a nonpecuniary interest be an object of the contract.

Further support for this proposition appears in the change of language from "gratification of some intellectual enjoyment" to "intended to gratify a nonpecuniary interest." Elimination of the word "intellectual" acknowledges that, although the contract may have physical characteristics, we look to the interest that the party intended to satisfy. The examples given in Article 1934(3) were narrowly drawn. The fact that Article 1998 no longer provides examples also indicates an intent to broaden the protected interests. The new article also uses the phrase "because of its nature," which calls upon the court to investigate a party's motive for a contract, regardless of the physical nature of the contract's object, because almost all contracts can be viewed as involving some physical interest.

While the legislature intended to provide certainty in the law because of the inconsistencies among the decisions of the courts, it is doubtful that the legislature intended to "make more certain the law under Meador." If that were the intent of the legislature, Article 1998 might have read, "Damages for nonpecuniary loss may be recovered when the exclusive object of the contract is the gratification of nonpecuniary interests." The absence of such language, given the state of the law at the time of the revision, is an indication that the legislature intended to overrule Meador and make nonpecuniary damages more readily available in a breach of contract action.

Analysis

As will be shown in the discussion that follows, Justice Calogero's prediction that Article 1998 has made the Meador resolution more certain has not been realized. This section will concentrate on the consistency of opinions within the circuit courts. It will also recognize any divergence among circuits in cases with similar factual situations.

First Circuit

Unfortunately, the first circuit has had little to say about nonpecuniary damages since the enactment of Article 1998. In Nippert v. Baton Rouge Railcar Services, an owner of railcars sued the repairer alleging damages for failure to repair the railcars properly. The trial court awarded damages including lost profits, but denied plaintiff's

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26. See supra note 4.
27. 526 So. 2d 824 (La. App. 1st Cir.), writ denied, 530 So. 2d 84, 87, 91 (1988).
request of damages for aggravation and mental anguish. In that part of the opinion dealing with this denial, the court stated that although "damages for nonpecuniary loss may be recovered in contract cases, . . . we agree with the trial court that the record does not support such awards." 28

Although the plaintiff failed to prove nonpecuniary damages, it is disappointing that the court did not take the opportunity to expand on the meaning of Article 1998. While what constitutes a "nonpecuniary interest" remains subject to debate, the repair of a railcar would seem to be outside the category of a contract "intended to gratify a non-pecuniary interest." Unlike the contract in Meador, involving the repair of an automobile, the contract in Nippert is of a commercial nature. The two cases are distinguishable in that a contract to repair an automobile is of a "personal nature." The dealership must have known that a delay in repairing something as personal as one's automobile would cause frustration and aggravation.

In another case, a homeowner brought an action against a contractor for damages after a brick patio and two brick walkways constructed at the owner's residence "buckled and came apart." In that case, Miller v. Thompson, 29 the factual situation arose before enactment of Article 1998, and therefore the case was decided under former Article 1934. However, the court recognized the new article in stating that "nonpecuniary loss is recoverable when the object of the contract is the gratification of intellectual enjoyment. This has been incorporated in the present Article 1998." 30 The court of appeal affirmed the trial court's finding that "the object of the contract between Miller and Thompson was to fulfill a utilitarian purpose rather than to gratify a nonpecuniary interest." 31 The trial court reached this conclusion because the "weight of the evidence indicat[ed] that the work was for utility rather than aesthetic purposes." 32 One conclusion, suggested by this language, is that had the plaintiff proved that he simply built the patio and walkways to beautify his home rather than as a necessary addition, he may have recovered nonpecuniary damages.

Second Circuit

The second circuit first addressed Article 1998 in Gaither v. Arkansas Louisiana Gas Company. 33 In this case Mr. and Mrs. Gaither, customers

28. Id. at 828.
30. Id. at 98.
31. Id.
32. Id.
33. 475 So. 2d 71 (La. App. 2d Cir. 1985).
of the gas company, brought an action for damages arising out of the company's termination of gas service to a house owned by the Gaithers but occupied by relatives. The couple had not been delinquent in their payment and were not notified of termination. The relatives, who had been delinquent at their previous residence, gave this new address to the gas company as a forwarding address. The gas company considered the relatives, rather than the Gaithers, as its "customer" even though the gas account was in the Gaithers' name. As a result of nonpayment of the delinquency by the relatives, the gas company turned off the gas to the Gaithers' house at which the relatives resided. The trial court awarded $750 for embarrassment and humiliation.

The gas company contended that the action was in contract and that Article 1998 prevented recovery of nonpecuniary damages because of the factual situation. After citing Article 1998 and discussing comments (a) and (b), the court stated, "We need not determine whether the plaintiffs have a remedy under contract and shall assess damages under CC Art. 2315." Thus, the court was able to avoid the question of whether this situation called for the application of Article 1998. As was the case with Nippert in the first circuit, it is apparent the article would not apply to this action because a contract to supply gas to a home has a principally utilitarian purpose.

The subject arose again in Thomas v. Bienville Parish School Board, and this time the court made its position clear. In Thomas, employees of the school board brought an action against the board for medical and hospital expenses allegedly due because of the school board's negligence in failing to properly process their applications for insurance coverage. The plaintiffs also sought damages for mental anguish and embarrassment, which were denied by the trial court. The court of appeal affirmed and concluded:

Recovery for damages of this nature cannot be had for a breach of a contract which has as its object anything other than intellectual gratification. La. Civil Code Art. 1998 (1984). The purpose of this contract between the employees and the school board was to secure insurance, not intellectual gratification.

The court, however, did not explain why it reached the conclusion that securing insurance was not intellectually gratifying. A contrary view is that securing insurance provides comfort and peace of mind which is not measurable in dollars and is, therefore, intended to gratify a

34. Id. at 75.
35. 475 So. 2d 125 (La. App. 2d Cir. 1985).
36. Id. at 128.
37. Id.
nonpecuniary interest. Consider, for instance, the slogans of three well-known insurance companies: “Like a good neighbor,” “You’re in good hands,” and “Get a piece of the rock.” Their advertising campaigns are obviously intended to appeal to a person’s desire for security in times of need.

In \textit{Gaither}, the court determined that termination of gas service without cause under a contract gave rise to nonpecuniary damages in tort. In \textit{Thomas}, the court found that negligent processing of insurance applications was a \textit{breach of contract} not subject to such damages. Only the court can explain the logic of these conclusions.

\textit{Fussell v. Louisiana Business College of Monroe}\textsuperscript{38} involved a student, Fussell, who was dismissed from the college for allegedly disruptive conduct. Fussell brought suit for breach of contract. The court eventually held the school had no basis for dismissing Fussell and imposed liability for monetary loss caused by the delay she had experienced in beginning her career. Fussell also claimed nonpecuniary damages for mental anguish. The court found that she had not proved mental anguish, but stated: “these damages can be awarded only in limited circumstances. Defendant’s obligation to provide \textit{vocational} training was not intended to ‘gratify a nonpecuniary interest.’”\textsuperscript{39} Again the court failed to state its reason for such a conclusion. One can only speculate that the court felt vocational training would result in employment for Fussell and, thus, enable her to provide for physical necessities. But the court may have just as easily concluded that Fussell sought this training in order to better herself and increase self-esteem, thereby intending to gratify a nonpecuniary interest. This case is at least debatable and deserved more discussion by the court.

The most recent case involving Article 1998 is \textit{Creger v. Robertson}\textsuperscript{40}, which involved the purchase of a home with redhibitory defects. After discussing general damages,\textsuperscript{41} the court turned to the claim of nonpecuniary damages, stating: “There has long been uncertainty in the jurisprudence as to whether purchasers bringing a redhibition suit are permitted to recover nonpecuniary damages. Formerly, LSA-C.C. Art. 1934(3) was the controlling article.”\textsuperscript{42} The court then explained how Article 1934(3) had been replaced by Article 1998. It seems strange that the court did not apply the articles on redhibition,\textsuperscript{43} which limit damages

\textsuperscript{38} 519 So. 2d 384 (La. App. 2d Cir. 1988).
\textsuperscript{39} Id. at 388.
\textsuperscript{40} 542 So. 2d 1090 (La. App. 2d Cir. 1989).
\textsuperscript{41} Id. at 1094-97.
\textsuperscript{42} Id. at 1098.
\textsuperscript{43} The first paragraph of La. Civ. Code art. 2531 states:

\begin{quote}
The seller who knew not the vices of the thing is only bound to repair, remedy
unless the seller knows of the vice. In any case, the court chose to apply Article 1998 and held that "[i]n the instant case, the contract for the sale of the house, although for the sale of a fine home in a fine neighborhood, was not a contract '... intended to gratify nonpecuniary interests.'"

This conclusion is puzzling given the decision in Hostetler v. W. Gray & Company, Inc. one year earlier. Although the cause of action arose in 1984 making Article 1934(3) applicable, the second circuit noted that the Lafleur decision affirmed the viability of Meador. Therefore, it is apparent that the court was aware that the recognized criteria for an award under either article have been held to be basically the same; yet in Hostetler, the court allowed nonpecuniary damages. This case involved the purchase of a lakefront lot where the flowage easement was misrepresented on the subdivision plat. Consequently, the plaintiff's house was built below the flowage easement. In awarding nonpecuniary damages the court found that

in the instant case the contract clearly had as its principal object the gratification of an intellectual interest. . . . Having lived in a trailer prior to building this house, the plaintiffs were looking forward to fulfilling their dream of having a special house as a home.

The inconsistency created by the decisions in Creger and Hostetler is a clear indication that there is a need for guidance in this area of the law.

Third Circuit

In Robert v. Bayou Bernard Marine, Inc., the third circuit court of appeal had little difficulty concluding that a fishing boat "was purchased exclusively for recreational purposes which had as its principal object . . . intellectual enjoyment." Plaintiff had purchased a boat that

or correct the vices as provided in Article 2521, or if he be unable or fails to repair, remedy or correct the vice, then he must restore the purchase price, and reimburse the reasonable expenses occasioned by the sale, as well as those incurred for the preservation of the thing, subject to credit for the value of any fruits or use which the purchaser has drawn from it.

44. La. Civ. Code art. 2545 states: "The seller, who knows the vice of the thing he sells and omits to declare it, besides the restitution of price and repayment of the expenses, including reasonable attorneys' fees, is answerable to the buyer in damages."
45. 542 So. 2d at 1099.
47. Id. at 1366.
48. Id.
50. Id. at 549.
was found to be defective. Delays in repairs lasted two years, and the requested damages included mental anguish and inconvenience. Because this case arose in 1982, the court applied old Article 1934(3). But the decision, handed down in 1987, cited *Lafleur* and stated that "the rule today is that nonpecuniary loss may not be recovered in a simple breach of contract case unless the contract is intended to gratify a nonpecuniary interest." The court did not discuss the language of *Lafleur* that reaffirmed *Meador*, treating the language "intended to gratify a non-pecuniary interest" and "the gratification of some intellectual enjoyment" as if they required the application of different standards. Nine months later, however, in the case of *Leleux v. Morrow's Sports Center, Inc.*, the court recognized that those standards were synonymous.

In *Leleux*, a boat owner sued a boat repairer seeking damages when the boat he left for repair was stolen. Plaintiff later recovered the boat, but not its contents or its engine. Morrow's finally supplied a replacement engine two years later. In discussing plaintiff's claim for mental anguish, the court wrote:

> LSA-C.C. art. 1998 allows for recovery of damages for non-pecuniary losses under a contract intended to gratify a non-pecuniary interest. A contract intended to gratify a non-pecuniary interest is one that has "intellectual enjoyment" as its principal or exclusive purpose.\(^{53}\)

This statement raises the textual argument previously discussed. A contract to gratify a nonpecuniary interest is not necessarily one that has intellectual enjoyment as its *principal* object. The court denied damages for mental anguish.

The court in *Leleux* considered a factual situation almost identical to that present in *Robert*, yet reached a different result. The court attempted to distinguish the two cases by stating:

> In that case [*Robert*] the plaintiff testified that fishing was his only hobby and that he often fished 3-4 times a week. He testified that he had fantasized about owning a fishing boat and that he became so anxious and frustrated by defendant's failure to repair the boat, that he had to consult a psychologist. In the present matter the only testimony regarding plaintiff's alleged mental anguish was . . . "it's really been tough," and when his friends went out fishing or brought their families out for boat rides, he and his family were forced to stay home . . . .\(^{54}\)

\(^{51}\) Id.

\(^{52}\) 527 So. 2d 519 (La. App. 3d Cir. 1988).

\(^{53}\) Id.

\(^{54}\) Id. at 520.
It becomes obvious that the plaintiff in *Leleux* simply failed in his burden of proof. Had he testified to extreme anger or some other emotional reaction to his situation, the outcome would likely have been different.

The third circuit dealt with Article 1998 most recently in *Hageman v. Foreman*, in which the purchaser of a townhouse brought suit for defective construction. The court cited *Ostrowe v. Daresbourg* and stated simply, “Damages for mental anguish are not recoverable for the breach of a contract to build a home.”

### Fourth Circuit

One may get the impression that application of Article 1998 arises most often in cases involving the residence of a plaintiff; the fourth circuit also has its share of these cases. In *Leflore v. Anderson*, the plaintiff sought rescission of the sale of a home after discovering that the foundation of the house was sinking and that repairs would cost $57,000. The house had been purchased for $55,000. The trial court awarded nonpecuniary damages to which the defendant objected. The court of appeal affirmed, citing Article 1998 and finding that “the sinking problem of the house in question was intentionally concealed from the plaintiff by the defendants.” However, no discussion was given to whether the purchase was “intended to gratify a nonpecuniary interest.”

Perhaps the court was trying to apply the second paragraph of Article 1998, which is reserved for those instances in which one breaches a contract out of spite. It is submitted that if the purpose of the court was to apply the second paragraph of the article, the court misapplied it. In *Leflore*, there can be no question of the intentional concealment. However, this fact only proves that portion of the first part of Article 1998 that states: “because of the circumstances surrounding the for-

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55. 539 So. 2d 678 (La. App. 3d Cir. 1989).
56. 377 So. 2d 1201 (La. 1979).
57. 539 So. 2d at 681.
58. 537 So. 2d 215 (La. App. 4th Cir. 1988).
59. Id. at 219.
60. Paragraph two of *La. Civ. Code* art. 1998 states: “Regardless of the nature of the contract, these damages may be recovered also when the obligor intended, through his failure, to aggrieve the feelings of the obligee.”
61. Comment (d) to *La. Civ. Code* art. 1998 states:

Under this Article, an obligee may recover damages for the nonpecuniary loss he sustains when the obligor fails to perform in circumstances that give rise to the presumption that the obligee’s embarrassment or humiliation was intended by the obligor.

mation or nonperformance of the contract, the obligor knew, or should have known that his failure to perform would cause that kind of loss." Thus, only one of the two requirements set forth in the first part would be met. The court apparently presumed the initial requirement that the contract be "intended to gratify a nonpecuniary interest." If so, then the fourth circuit, like the second circuit, chose to disregard the supreme court's decision in Ostrowe.62 Perhaps this choice can be explained by the fact that Ostrowe involved a contract to build, while Leflore involved a contract for the sale of an existing home. But certainly, under the canon of interpretation, "the greater includes the lesser," if a contract to build a distinctively designed home is not intended to gratify a nonpecuniary interest, then neither is a contract to purchase an existing home.

One possible reason the court did not detail how it concluded that the contract in Leflore was one "intended to gratify a nonpecuniary interest" is that the court did not feel bound by this threshold requirement. Support for this theory is found through creative reading of Scott v. Thomas.63 The victim of a rape that occurred in a "project" owned by the Housing Authority of New Orleans retained Thomas as her attorney in a civil action against the Authority. The attorney allowed the tort action to prescribe, and the client brought a malpractice suit that was dismissed by the trial court on motion for summary judgment. On appeal, the defendant attorney claimed that the plaintiff suffered no loss because, although the tort action had prescribed, the victim still had an action for breach of contract under her lease agreement.64 The defendant stated that "a contract claim is as valuable as a tort claim because LSA-C.C. art. 1998 states that nonpecuniary damages are generally recoverable in contract claims."65 The court, rather than refuting this statement, agreed that while "it is possible for recovery in a contract claim to be as valuable as in a tort claim, that result is not a certainty."66 The court reversed the summary judgment. It is this writer's opinion that the language of the court was an understatement. It is apparent that recovery is by no means a certainty and language to that effect by the court would have been welcomed. The court might have gone further and discussed the requirements of Article 1998 as well as the unpredictability of interpretations demonstrated by past decisions. In not doing so, the court leaves one with the impression that the fourth circuit feels recovery under Article 1998 is not as limited as in other circuits.

62. See supra note 56.
63. 543 So. 2d 494 (La. App. 4th Cir. 1989).
64. Id. at 495.
65. Id. (emphasis added).
66. Id. at 495-96.
This conclusion is substantiated further in *Bishop v. Callais.* The parents of a boy who was allegedly sexually assaulted while confined for treatment in a psychiatric hospital brought an action for mental anguish and suffering they sustained as a result of physical and psychological injuries suffered by their son. The trial court, characterizing the action as one in tort, maintained an exception of no cause of action on the grounds that tort law provided no remedy. The court of appeal reversed, adopting the fact pleading approach suggested by Justice Dixon in his *Meador* dissent. Noting that damages in such a claim were formerly governed by *Meador,* the court concluded that

"the reasoning of *Meador* is questionable today because of the passage of Civil Code Article 1998 in 1984. . . . Thus, recovery for nonpecuniary loss in breach of contract cases is clearly expanded beyond the "intellectual gratification" of *Meador.*"

Such a statement shows total disregard for the supreme court’s decision in *Lafleur,* which indicates that Article 1998 makes "more certain under the law the *Meador* resolution." But at least the court’s attitude towards recovery of nonpecuniary damages is consistent.

**Fifth Circuit**

In the 1982 case of *Ditcharo v. Stepanek,* plaintiffs brought an action for rescission of the sale of a home after discovering termite infestation. The trial court granted damages rather than rescission, but denied nonpecuniary damages. The defendants appealed, and plaintiffs answered seeking nonpecuniary damages once again. On rehearing, the court of appeal said that the right of recovery of nonpecuniary damages was governed by Article 1998. Finding that the plaintiffs were entitled to such damages the court stated:

Applying the requirements of Article 1998 to the situation here, we conclude the vendors must have known this house would be the principal residence of the purchasers. With a sale price of $180,000, the vendors must have known the house would be considered a "luxury" home or, as described by the plaintiffs, their "dream home." Under such circumstances, it must have

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67. 533 So. 2d 121 (La. App. 4th Cir. 1988), writ denied, 536 So. 2d 1214 (1989).
68. Id. at 121.
69. 332 So. 2d at 439.
70. 533 So. 2d at 123 (emphasis added).
71. 538 So. 2d 309 (La. App. 5th Cir.), writ denied, 541 So. 2d 858 (1989).
72. Id. at 314.
73. Id. It is odd that the court applied Article 1998 to a contract entered into in 1982, prior to the article’s enactment.
been within the contemplation of the vendors that the plaintiffs bought the house not only as a financial investment but also for the comfort, convenience, and aesthetic enjoyment inherent in living in a fine home.\textsuperscript{74}

Like the fourth circuit in \textit{Leflore} and the second circuit in \textit{Hostetler}, the court in \textit{Ditcharo} fails to mention \textit{Ostrowe}. In that sense, one gets an idea of consistency among the circuits. It appears that the court will view a "dream house" or an extraordinary home as purchased in satisfaction of a nonpecuniary interest despite the supreme court's decision to the contrary. The problem faced by the plaintiff is not in convincing the court that nonpecuniary damages should be available, but that they were, in fact, suffered.

In a case involving the rehabilitation of a home, the court of appeal dismissed without discussion the plaintiff's claim for nonpecuniary damages. In \textit{Castigliola v. Dept. of Community Development},\textsuperscript{75} the contractor failed to properly perform rehabilitation work. The court simply stated that "damages are not recoverable for nonpecuniary losses under a contract, unless a principal object of the contract is the gratification of intellectual enjoyment."\textsuperscript{76} One may question why the court, four years after enactment of Article 1998, continues to use the phrase "intellectual enjoyment," especially in light of the rehearing in \textit{Ditcharo}, which was handed down two days after the court issued its opinion in \textit{Castiglola}. On rehearing, the \textit{Ditcharo} court discussed fully the fact that Article 1998 supersedes Article 1934 and \textit{Meador}.\textsuperscript{77} One may question further why the court cannot envision a situation where rehabilitation of a home is not intended to gratify a nonpecuniary interest. If one already owns a home, his interest in shelter is satisfied. A desire to re-plumb, re-roof, level the foundation, or install aluminum siding and sun screens\textsuperscript{78} could be viewed as intending to improve one's living environment and, thereby, gratify a nonpecuniary interest. Obviously, the fifth circuit does not agree.

\textit{Suggested Approach}

Although the supreme court has rejected the views of previous commentators,\textsuperscript{79} the following discussion is presented with the hope that the court will rethink its position. The policy considerations that support the position advanced in this article are not new. Consider the following

\textsuperscript{74} Id. at 315.
\textsuperscript{75} 538 So. 2d 1139 (La. App. 5th Cir. 1989).
\textsuperscript{76} Id. at 1141.
\textsuperscript{77} 538 So. 2d at 314-15.
\textsuperscript{78} These are the repairs requested by plaintiff. 538 So. 2d at 1140.
\textsuperscript{79} See supra note 24.
excerpt by the Reporter of the Obligations Committee of the Louisiana State Law Institute:

It should be noted . . . that nonpecuniary damages are recoverable in tort. There is no valid reason to preserve the distinction between tort and breach of contract insofar as moral damages are concerned, as was clearly expressed by Justice Dixon in his dissent in *Meador v. Toyota*. . . .

This is the position most commonly taken by those who support recovery of nonpecuniary damages in breach of contract cases.

Given the arguments for expansion of the application of nonpecuniary damages to cases involving breach of contract where nonpecuniary interests are an object of the contract, though not necessarily the object, the question becomes how the court will grant such damages. With respect to the application of nonpecuniary damages, contracts may be broken down into three categories: those in which nonpecuniary damages are a certainty; those in which nonpecuniary damages are clearly not available; and those in which there is the potential for nonpecuniary damages.

Those cases in which nonpecuniary damages are clearly available include those cases that were listed as examples in former Article 1934(3): a contract for religious or charitable foundation, a promise of marriage, an engagement for a work of some fine art. There are a few other types that probably fit this category, such as a contract involving funeral arrangements. The cause or motive for these contracts is unquestionably the gratification of nonpecuniary interests.

Likewise, it seems fairly easy to determine what types of contracts that, when breached, are not subject to claims of nonpecuniary damages. These contracts include commercial contracts, including contracts for the payment of money, investment contracts, and those other types of contracts whose object is clearly one of pecuniary gain.

The problem area includes those contracts in which the object is of a physical nature, but in which the circumstances reflect the contemplation of nonpecuniary interests. Contracts that fit within this category include contracts between individuals and also those between merchant and consumer that contemplate both pecuniary and nonpecuniary interests. It is in these cases that one must determine whether the breach...
has resulted in compensable damage to a nonpecuniary interest, because mere worry or vexation is not compensable as a nonpecuniary loss.\textsuperscript{83} To make this determination, the courts must focus on two aspects of the contract as required under Article 1998. They must first look at the nature of the contract. Is it one that contains elements of nonpecuniary interest? If so, the courts must then look to the circumstances surrounding both the formation and the breach to determine if the obligor knew or should have known that his failure to perform would cause nonpecuniary loss. The plaintiff should bear the burden of proving, by a preponderance of the evidence, both a loss and such knowledge by the obligor.

\textit{Conclusion}

Despite the strong textual arguments for overruling \textit{Meador}, the courts continue to apply the standards outlined in that case. One may get the impression that in every circuit except the fourth, the claim must be substantiated by an overwhelming factual showing. The fourth circuit seems to be more willing to accept the proposition that a contract alleged by a plaintiff to be one intended to gratify a nonpecuniary interest is, in fact, just that.

In any case, until the supreme court recognizes that a nonpecuniary interest need not be the \textit{exclusive} object of a contract, the following elements appear to be essential to a successful claim for nonpecuniary damages in any circuit. First, the plaintiff must demonstrate that his intention in entering the contract was the satisfaction of a nonpecuniary interest. This will require the plaintiff to overcome the strong, but rebuttable, presumption that his contract had some physical gratification as its purpose. For example, in the case of a house, the presumption is that a purchaser is satisfying a need for shelter. If the purchaser can prove, however, that he is fulfilling a dream to own a certain home with special qualities, then the courts may find that he intended to gratify a nonpecuniary interest, as did the second circuit in \textit{Hostetler}, the fourth circuit in \textit{Leflore}, and the fifth circuit in \textit{Ditcharo}.\textsuperscript{84}

\begin{itemize}
\item \textsuperscript{83} Elston v. Valley Elec. Membership Corp., 381 So. 2d 554 (La. App. 2d Cir. 1980).
\item \textsuperscript{84} Another example of such a contract is the purchase of an automobile. If a plaintiff is able to overcome the burden of proving his purchase was more than the acquisition of a mode of transportation, he may be allowed to recover in the event of breach. Consider the following statement in a footnote to the opinion in B & B Cut Stone, Co., Inc. v. Resneck, 465 So. 2d 851, 859 n.6 (La. App. 2d Cir. 1985): "It is interesting to consider how the result in \textit{Meador} would have differed, had the plaintiff been driving an antique Bentley or an XJ-7 or anything more elevated than the proletarian Toyota."
\end{itemize}
Satisfaction of this requirement does not mean the contract may not have some physical gratification as an incidental purpose; every contract can satisfy some aspect of physical and intellectual gratification. For the time being, however, a nonpecuniary interest must be stressed as the primary purpose of the contract. In addition, the plaintiff must be able to show that this desire to gratify a nonpecuniary interest was communicated to the other party to the contract.

Finally, the plaintiff must prove that he has truly suffered nonpecuniary damages. The evidence should be substantial because the courts seem to require a "clear and convincing" standard as opposed to "preponderance of evidence." It will not suffice to allege that a plaintiff was merely frustrated or aggravated by a breach, both because that is true in practically all breaches and because Article 1998 is intended to apply in special circumstances.

The cases since Lafleur demonstrate that the law in this area remains unclear. It is this writer's opinion that the supreme court should recognize that fact—Article 1998 has not rendered the Meador resolution "more certain." Further, an outline of the necessary elements to a successful claim of damages under Article 1998 would benefit all practitioners. When given the next opportunity to address the issue of nonpecuniary damages, the court should rethink its position in the Lafleur case and provide such an outline because, as a noted scholar has written, "the fact that damage of an exclusively moral nature occurs only seldom is no justification for a denial of recovery where such damage has been proved." 85

Gary P. Graphia