



**In The  
Court of Appeals  
Seventh District of Texas at Amarillo**

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No. 07-20-00111-CV

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**DAVID VERMILLION, APPELLANT**

**V.**

**KATERINA VERMILLION, APPELLEE**

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**On Appeal from the County Court at Law Number 3  
Lubbock County, Texas  
Trial Court No. 2016-520,580, Honorable David L. Gleason, Presiding by Assignment**

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**September 30, 2022**

**CONCURRING OPINION**

**Before QUINN, C.J., and DOSS and HATCH,<sup>1</sup> JJ.**

After reviewing the evidence, I do not find that the evidence supports an award of \$250,000 for mental anguish. Rather than dissenting, however, I offer a concurrence because I do not believe the trial court was constrained to basing its damages award on Katerina's mental anguish. I therefore believe the judgment should be affirmed, albeit for reasons different from those articulated in the well-reasoned majority opinion.

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<sup>1</sup> Honorable Les Hatch, Judge, 237th District Court, sitting by assignment.

The relevant language of the trial court's judgment was non-specific as to the type of damages being awarded:

After considering the pleadings and the papers on file in this cause, hearing the testimony and arguments of counsel, and considering the evidence, the Court is of the opinion that Judgment should be granted in favor of Petitioner, KATERINA VERMILLION, and against Respondent, DAVID VERMILLION. Specifically awarding damages to Petitioner, KATERINA VERMILLION, in the amount of \$250,000.

The trial court's general reference to "damages" is important because in addition to past mental anguish, recoverable IIED damages may include:

- Future mental anguish. *Finley v. P.G.*, 428 S.W.3d 229, 236 (Tex. App.—Houston [1st Dist.] 2014); *Moyer v. Moyer*, No. 03-03-00751-CV, 2005 Tex. App. LEXIS 6966, at \*33 (Tex. App.—Austin 2005, no pet.) (mem. op.).
- Loss of society. See *George Grubbs Enters v. Bien*, 881 S.W.2d 843, 857 (Tex. App.—Fort Worth 1994), *rev'd on other grounds*, 900 S.W.2d 337 (Tex. 1995) (per curiam);
- Past and future medical expenses. *George Grubbs Enters*, 881 S.W.2d at 857; *Finley*, 428 S.W.3d at 234;
- Past and future loss of earning capacity. *George Grubbs Enters*, 881 S.W.2d at 857; *Moyer*, 2005 Tex. App. LEXIS 6966, at \*45; and
- Bodily injury. See Restatement (Second) of Torts § 46 (1965).

Had this been a jury trial and David desired for the trial court to "granulate" the items of damages, David would have been required to object to the proposed broad form damages questions and request itemized responses. *Harris County v. Smith*, 96 S.W.3d 230, 232 (Tex. 2002); *Thomas v. Oldham*, 895 S.W.2d 352, 359–360 (Tex. App. 1995).

When a defendant does not ask for separate damages findings in the court's charge, it is only permitted to challenge the entire award on appeal. *Id.* Failing to challenge the entire award under these circumstances requires the issue to be overruled. *Id.*

Similarly, the law in Texas has long provided that in a bench trial a trial court does not err in making a damages award in the aggregate, requiring a complaining party to make a request if it desires to see the damages apportioned per injury. See *Tagle v. Galvan*, 155 S.W.3d 510, 517 (Tex. App.—San Antonio 2004, no pet.); *Tex. C.R. & Co. v. Fisher*, 43 S.W. 584, 584–85 (Tex. Civ. App.—Austin 1898, no writ). “The corollary to [the rule announced in *Thomas and Harris County*] in bench trials is a party must ask for additional findings of fact and conclusions of law asking for a detailed apportionment of findings between the permissible and impermissible bases for liability. Failure to request additional specific findings will waive any error, and any sufficiency analysis is limited to the determination as a whole.” *Miranda v. Byles*, 390 S.W. 3d 543, 552 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (affirming judgment when appellant did not obtain findings of fact for trial court's apportionment of damages for mental anguish and injury to reputation).

In this appeal, David only challenges whether Katerina suffered compensable mental anguish, but we cannot determine from the record whether the trial court only intended to award mental anguish damages. We have no findings of fact to apportion damages, so I believe David has waived his complaint that the evidence is sufficient to support \$250,000 in mental anguish damages. See *Tagle*, 155 S.W.3d at 516 (when party fails to call attention to trial court the need for separate damages findings, error is waived as to separate damages elements and award must be assailed as a whole);

*Donaldson v. J.D. Transp. Co.*, No. 04-04-00607-CV, 2005 Tex. App. LEXIS 4812 at \*14 (Tex. App.—San Antonio 2005, no pet.) (mem. op.) (holding that because appellant failed to request findings of fact on any item of damages, “we need not decide if the evidence is sufficient to support each individual damage element presented by the plaintiffs and will consider the evidence in the record as a whole.”).

David does not challenge the award as a whole. I would therefore affirm the judgment.

Lawrence M. Doss  
Justice