In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-20-00111-CV

DAVID VERMILLION, APPELLANT

V.

KATERINA VERMILLION, APPELLEE

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

September 30, 2022

MEMORANDUM OPINION

Before QUINN, C.J., and DOSS and HATCH,[1] JJ.

At the heart of this appeal from an Amended Final Decree of Divorce entered following a bench trial is whether Intentional Infliction of Emotional Distress ("IIED") is available under the facts of this case or whether another tort, a "gap-filler," should have

[1] Honorable Les Hatch, Judge, 237th District Court, sitting by assignment.

been prosecuted by Appellee, Katerina Vermillion, instead. Also in issue is whether Appellant, David Vermillion, caused severe emotional distress to Katerina, and, if so, did it justify an award of $250,000 in damages. Specifically, David requests reversal of the IIED damages through two issues challenging the legal sufficiency of the evidence that: (1) Katerina failed to offer any direct evidence of the nature, duration, and severity of her mental anguish, establishing a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger; and (2) Katerina failed to offer any evidence to establish that the amount awarded was fair and reasonable.[2] David also asserts by his third issue that alternative causes of action (such as assault, false imprisonment, trespass, and intrusion on seclusion) could have provided a remedy for Katerina's claimed severe emotional distress and therefore it was error to find that David intentionally inflicted emotional distress on her.

We overrule David's issues and affirm the trial court's judgment.

BACKGROUND

David and Katerina were high school sweethearts. They married in May 2000. They have two minor children, a son born in 2005 and a daughter born in 2007. He is a doctor with a practice in family medicine and she is an attorney but has not practiced since having had children. According to Katerina, she and David had a great marriage until she noticed changes in his behavior in 2011. David admitted to having an affair and he and Katerina started attending counseling. In 2014, David began working late hours and at times, he would not return home for days at a time. Katerina would become worried and searched for him. He began to sleep more than usual, and it was sometimes difficult

[2] David does not attack the factual sufficiency of these damages.

to wake him, even when doused with water. During these sleeping episodes, he began to miss work, family birthday dinners, holidays, and other gatherings, upsetting Katerina and making it necessary for her to make excuses for him. When Katerina would try to talk to David, he would cuss at her and tell her it was all her fault.

In 2015, Katerina discovered needles in David's shoes, and she confronted him as to whether he was using drugs. Initially, he denied any drug use and claimed the needles were from his patients. Later, she discovered a black bag containing methamphetamine and other drug paraphernalia and David confessed that he was using methamphetamine. Katerina pleaded with him to attend a rehabilitation program. He refused, and they constantly fought about his drug use and his behavior.

David's drug use worsened, and Katerina continued to find more needles and other paraphernalia in and around the home. On one occasion, she woke up and found David lying in bed with a needle in his arm next to their daughter. Katerina, accompanied by their two children, also found David in the living room with his arm tied up about to inject methamphetamine.

In addition to his drug use, David started to become physical with Katerina by restraining her and trying to grab her. He would also constantly send her hostile text messages that stated his desire to cause emotional distress. Katerina also saw inappropriate photos on his phone and noticed texts of a sexual nature from other women.

Katerina and David ceased living together in April 2016, and she and the children began staying nearby with her parents because David would not leave the marital residence and she felt safer with her parents. She filed for divorce on April 28, 2016. She requested a temporary restraining order against David, which the trial court granted. She

then obtained a temporary injunction addressing financial and property issues and restraining David from communicating with her in a vulgar, profane, obscene, or indecent language or in a coarse or offensive manner; making calls at unreasonable hours or in an offensive and repetitious manner or without a legitimate purpose; threatening or causing bodily injury to her or the children; excluding her from the use and enjoyment of her residence; opening or diverting mail; and entering, operating, or exercising control over a vehicle in her possession.

During the time Katerina and the children lived with her parents, David used his in-laws' hidden spare house key to enter their home. He went into Katerina's bedroom and stood over her while she slept. He also stood outside her parent's home and yelled, rang the doorbell, stood in the street yelling, and banged on the doors. Once David lay on the concrete outside of Katerina's parents' house refusing to move after being asked to leave. Katerina recalled that on another occasion, when she returned to the home where she was living and then tried to leave, David jumped on the hood of her car with Katerina and the children inside to prevent her from driving away.

In July 2016, David broke into Katerina's parents' garage and banged on the door. Katerina's father responded and David grabbed him by the throat and said, "This is what you need to do to your daughter." On August 9, 2016, David confronted Katerina, their son, and her mother in the driveway of the home. David grabbed their son. Katerina sent their son inside and got her phone out. David rushed her and jumped on top of her trying to get the phone. Their son was at the door. David then rushed at the door and pushed himself inside the residence, hurting the son. After Katerina yelled at her mother to call the police, David fell to the floor and then fled the home.

In August 2016, a magistrate signed a protective order prohibiting David from having any contact with Katerina, the children, and Katerina's parents. The order notwithstanding, David continued his erratic behavior. On one occasion, he activated the location service on Katerina's vehicle and confronted her and the children at a movie theater. On another occasion, when Katerina and her brother and his family were attending a Texas Tech football game, her brother observed that David sat near them in violation of the protective order. Katerina asked an officer to escort them from their seats and David became outraged that she had sought help from law enforcement. She described him as acting "crazy" and "throwing a fit." The confrontation resulted in David being handcuffed. A few days later, David sent Katerina a Facebook message that "[o]ne felony count is nothing. Consider yourself warned." She testified that the message scared her, and she felt threatened about his potential future activity.

On another occasion, David pretended to be another doctor and sent Katerina emails which "upset [her] very much." She recognized the content of the emails to be the type that David would have sent—to "put [her] down" and make her feel guilty. During the proceedings, David sent Katerina hundreds of text messages in which he would make statements such as "I was [f . . . ing] with you to see how long it would take you to explode," "it is going to be hell I really do not want to do it but you are forcing me," and "if you don't decide correctly I will become the most cruel and heartbroken and bitter man you have ever imagined." David also logged into his deceased mother's Facebook account to message Katerina. Katerina felt threatened and concerned for her safety because of those messages. David even warned her to stop the divorce proceedings, or he would

kill himself. He also took the dog away from the family, upsetting Katerina and the children.

David agreed to enter a rehabilitation program so that Katerina would give him another chance. He failed to report initially and instead threatened Katerina to dismiss the divorce and calling her stupid. Later, he completed the program but was not successful in refraining from methamphetamine use. Shortly after completing the program, he told Katerina that he knew he would test positive because he had accidentally ingested water containing methamphetamine.

Over the course of the next year, the parties entered into some agreed orders including supervised visitation by David of his children as Katerina was hopeful the rehabilitation had worked. During that period, David was arrested several times for trespass and stalking, conduct that violated the trial court's orders. The trial court also entered another restraining order and several protective orders after Katerina sought protection due to family violence. Katerina described a particular event that occurred on Father's Day on June 18, 2017. Her father had taken the children for a supervised visit with David. When the grandfather attempted to discontinue the visit after three hours and leave with the children, David grabbed his daughter by the neck and held his son against a wall. The grandfather intervened and he and David struggled. The grandfather fell and sought medical attention the following day. Katerina testified that the children were traumatized and scared of their father. David's drug tests later revealed he was positive for methamphetamine before and after this event. Katerina suffered guilt about the trauma the children and her parents had experienced.

Shortly after the Father's Day incident, David and Katerina agreed to a protective order which was signed by the trial court, prohibiting David from, among other acts, being within 1,000 feet of any location where Katerina and her children were known to be, being near the residences or places of employment or business, or daycare or school, and being near Katerina's residence or her parents' residence where she and her children stayed regularly. Despite this order, David continued to follow and harass the family, including a voicemail for Katerina: "I'm going to have to—forced to do something crazy . . . something is going to happen." David used rolling spoof numbers so Katerina could not block his texts.

Katerina testified that in January 2018, she became romantically involved with an individual. In May 2018, with her family and boyfriend, she traveled to Corpus Christi. She further testified that she and her children felt safe in her boyfriend's presence. When they returned home from the trip, she discovered cash and other valuables missing from the home and called the sheriff. The sheriff determined that the home had been broken into with a crowbar. Another item that was missing was an itinerary showing a trip to Jamaica that Katerina and her boyfriend had been planning. Katerina believed David was responsible.

In June 2018, the divorce trial commenced and over a span of nine months, the trial court heard evidence on issues related to the divorce and Katerina's IIED claim. The trial concluded in February 2019. On July 5, 2019, the trial court signed a judgment in favor of Katerina on the IIED claim and awarded her $250,000 in damages. That judgment was merged into the Amended Final Decree of Divorce entered on January 15, 2020, from which David appeals.

Standard of Review for Legal Sufficiency

In conducting a legal sufficiency review, we must consider the evidence in the light most favorable to the verdict and indulge every reasonable inference that supports the verdict. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). Evidence will be found to be legally sufficient if it would enable reasonable and fair-minded people to reach the verdict under review. *Id*. at 827. In conducting a legal sufficiency analysis, this court must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not. *Id*. The trier of fact is the sole judge of the credibility of the witnesses and of the weight to be given to their testimony. *Id*. at 819. But if the evidence allows only one inference, neither the trier of fact nor the reviewing court may disregard it. *Id*.

A legal sufficiency challenge may only be sustained when the record discloses (1) a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla of evidence, or (4) the evidence conclusively establishes the opposite of the vital fact in question. *Id.* at 810. More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004). Evidence does not exceed a scintilla if it is so weak as to do no more than to create a mere surmise or suspicion that the fact exists. *Id*.

When reviewing the evidence for legal sufficiency, we assume that the fact finder decided questions of credibility or conflicting evidence in favor of the finding if it

reasonably could do so. *City of Keller*, 168 S.W.3d at 819. We do not substitute our judgment for that of the fact finder if the evidence falls within this zone of reasonable disagreement. *Id*. at 822. When no findings of fact or conclusions of law are filed following a bench trial, the trial court's judgment implies all findings necessary to support it. *Mo. Pac. R. Co. v. Limmer*, 299 S.W.3d 78, 84 n.29 (Tex. 2009) (citing *Pharo v. Chambers Cnty.*, 922 S.W.2d 945, 948 (Tex. 1996)). When a reporter's record is filed, implied findings are not conclusive and may be challenged for legal sufficiency. *Roberson v. Robinson*, 768 S.W.2d 280, 281 (Tex. 1989).

APPLICABLE LAW—INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

IIED can be an independent cause of action if the actor intended to cause severe emotional distress or severe emotional distress is the primary risk created by the actor's reckless conduct. *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 63 (Tex. 1998). "Courts should consider the entire set of circumstances surrounding the conduct, such as the defendant's course of conduct, the context of the parties' relationship, whether the defendant knew the plaintiff was particularly susceptible to emotional distress, and the defendant's motive or intent." *MVS Int'l Corp. v. Int'l Adver. Sols., LLC*, 545 S.W.3d 180, 203 (Tex. App.—El Paso 2017, no pet.) (*citing GTE SW., Inc. v. Bruce*, 998 S.W.2d 605, 615 (Tex. 1999). IIED as a cause of action depends less on a particular set of facts and more on the overall essence of the plaintiff's complaint. *Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004).

To recover damages for IIED, a plaintiff must show (1) the conduct was intentional or reckless; (2) the conduct was extreme and outrageous; (3) the conduct caused the claimant emotional distress; and (4) the emotional distress was severe. *Hersh v. Tatum*,

526 S.W.3d 462, 468 (Tex. 2017); *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993). The second element of an IIED claim is satisfied if the conduct is "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Twyman*, 855 S.W.2d at 621 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (AM. L. INST. 1965)). Conduct that is merely insensitive or rude is not extreme and outrageous, nor are "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *GTE SW.*, 998 S.W.2d at 612. The elements of IIED ensure that mental anguish is both foreseeable and genuine. *Hardin v. Obstetrical & Gynecological Assocs., P.A.*, 527 S.W.3d 424, 436 (Tex. App.—Houston [1st Dist.] 2017, pet. denied).

ISSUE ONE—LEGAL SUFFICIENCY OF THE EVIDENCE TO SUPPORT MENTAL ANGUISH

In his brief, David concedes that he "struggled with methamphetamine addiction and engaged in erratic, unacceptable behavior on several occasions." He does not challenge whether his conduct was extreme and outrageous. Thus, that element of an intentional infliction of emotional distress claim is not in dispute. Rather, his legal sufficiency challenge is directed at whether Katerina presented sufficient evidence of the nature, duration, and severity of her mental anguish as more than worry, anxiety, vexation, embarrassment, or anger.

Emotional distress includes all highly unpleasant mental reactions, such as fright, humiliation, embarrassment, anger, and worry. *Behringer v. Behringer,* 884 S.W.2d 839, 844 (Tex. App.—Fort Worth 1994, writ denied). For a plaintiff to recover, the distress must be so severe that no reasonable person should be expected to endure it. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 46, cmt. j (AM. L. INST. 1965)). The plaintiff must

prove that she suffered more than "mere worry, anxiety, vexation, embarrassment, or anger." *Regan v. Lee*, 879 S.W.2d 133, 136 (Tex. App—Houston [14th Dist.] 1994, no writ). Feelings of anger, depression, and humiliation are insufficient evidence of severe distress. *Id.* at 136–37. Emotional distress has been found to be sufficiently severe in these cases: *Behringer,* 884 S.W.2d at 844–45 (plaintiff feared for his life, slept with a pistol, cried in public, and lost his appetite); *Motsenbocker v. Potts*, 863 S.W.2d 126, 135 (Tex. App.—Dallas 1993, no writ) (plaintiff so disturbed, uncomfortable, worried, and frightened that he considered suicide); and *Tidelands Auto. Club v. Walters*, 699 S.W.2d 939, 945 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.) (plaintiff refused to speak or see anyone, became ill and disoriented, and experienced extreme anger). When the Texas Supreme Court decided *GTE Southwest*, it was noted that emotional problems such as crying spells, emotional outbursts, nausea, stomach disorders, headaches, difficulty in sleeping and eating, stress, anxiety, and depression which required medical treatment and medication were legally sufficient evidence to support a finding of severe emotional distress. *GTE SW.*, 998 S.W.2d at 618–19. It has also been held that the outrageousness of the conduct may help prove the severity of the distress. *See Zaremba v. Cliburn*, 949 S.W.2d 822, 828 (Tex. App.—Fort Worth 1997, pet. denied).

In the record, more than a scintilla of evidence for a fact finder to find Katerina suffered severe emotional distress is present. David's acts directed at her include constant text messages stating, for example, "I was [f…king] with you to see how long it would take you to explode," "it is going to be hell I really do not want to do it, but you are forcing me," "if you don't decide correctly, I will become the most cruel and heartbroken and bitter man you have ever imagined," and "If I have to, I'll do something stupid and go

to jail for it. Make it happen." David lay in bed next to their daughter with a needle in his arm, stood over Katerina while she slept, and jumped on the hood of her car while she and their children were in it. During a visitation, David grabbed their daughter by the neck and held their son against a wall. Another time, David jumped on top of Katerina trying to grab her phone. In a Facebook message, he stated, "One felony count is nothing. Consider yourself warned." At one point, David activated the location service on Katerina's vehicle and confronted her and their children at a movie theater. He also turned off her phone causing her to feel vulnerable, terrorized, and tormented. Katerina hid in a closet rocking back and forth on the cusp of a breakdown, fearing for her and her children's safety to the extent of changing locks and adding security to her house, and frequently switching houses where she and the children slept due to her safety concerns. She was unable to sleep without David's charging and wearing his ankle monitor. David would sometimes allow the ankle monitor battery to become depleted and not work, causing Katerina to fear where he may be.

Katerina hired a therapist for herself and the children due to David's acts. This therapist testified that Katerina absolutely experienced the effects of trauma from David's actions. She was frightened and stressed while she watched the children change emotional states. Katerina and one child have talked about changing their last name due to the conduct David conceded was outrageous. She also suffered from the children being physically harmed. Testimony describes her as broken down, feeling like she had gone crazy, and being unable to handle David's actions. Due to her and the children's fear of David, she developed a safety plan for every location they regularly attended. This plan included keeping a sheriff's number in each of her children's phones. She also

testified that she changed phones because she was unable to complete daily activities with David's constant messaging. Considered in sum, this evidence supports that Katerina suffered more than mere worry, anxiety, vexation, embarrassment, or anger. *See Regan v. Lee*, 879 S.W.2d 133, 136 (Tex. App.—Houston [14th Dist.] 1994, no writ) (finding no IIED when primary purpose in bringing suit was to punish defendant). Thus, we overrule the first issue.

ISSUE TWO—LEGAL SUFFICIENCY OF THE EVIDENCE TO SUPPORT AWARD OF $250,000

David further maintains that the evidence is legally insufficient to support the award of $250,000 in damages for mental anguish. We overrule this issue, as well.

Recovering damages for mental anguish requires both proof of compensable mental anguish and proof justifying the amount awarded. *Bentley v. Bunton*, 94 S.W.3d 561, 606 (Tex. 2002); *Saenz v. Fid. & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996). Mental anguish is only compensable if it causes a "substantial disruption in . . . daily routine" or "a high degree of mental pain and distress." *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995) (quoted in *Bentley*, 94 S.W.3d at 606). "Even when an occurrence is of the type for which mental anguish damages are recoverable, evidence of the nature, duration, and severity of the mental anguish is required." *Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 231 (Tex. 2011). "[G]eneralized, conclusory descriptions of how an event affected a person are insufficient evidence on which to base mental anguish damages." *Id*. at 232. In reviewing a mental anguish award, we must be tolerant of the limits of proof in this realm; indeed, "[t]he process of awarding damages for amorphous, discretionary injuries such as mental anguish or pain and suffering is inherently difficult because the alleged injury is a subjective,

unliquidated, nonpecuniary loss." *Figueroa v. Davis*, 318 S.W.3d 53, 62 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (quoting *HCRA of Tex., Inc. v. Johnston*, 178 S.W.3d 861, 871 (Tex. App.—Fort Worth 2005, no pet.)). Given this lack of objective measures, so long as some compensable mental anguish has been established, the task of fixing the exact amount of damages is "generally left to the discretion of the fact finder." *Id*. (quoting *Pentes Design, Inc. v. Perez*, 840 S.W.2d 75, 80 (Tex. App.—Corpus Christi 1992, writ denied)). A review of other similar cases in determining the reasonableness of the mental anguish damages awarded to Katerina is helpful.

In *Toles v. Toles*, 45 S.W.3d 252, 260 (Tex. App.—Dallas 2001, pet. denied), the Dallas Court reinstated a jury verdict awarding the wife $325,000 for her IIED claim where the evidence showed that her husband mentally and physically abused her, causing her to suffer an ulcer, severe depression, and post-traumatic stress disorder. In *Garza v. Hernandez*, No. 13-97-853-CV, 1999 Tex. App. LEXIS 2832 (Tex. App.—Corpus Christi Apr. 15, 1999, no pet.) (mem. op.), a jury award of $375,000 to the wife for IIED was affirmed based on evidence that the husband stated he would be better-off if the wife would die and the husband's refusal to provide financial support to his wife while supporting a paramour, causing the wife to suffer severe distress and depression. In *Massey v. Massey*, 807 S.W.2d 391, 400 (Tex. App.—Houston [1st Dist.] 1991, writ denied), an award of $362,000 to the wife for intentional and negligent infliction of emotional distress was affirmed where the evidence showed that the wife's psychologist diagnosed the husband as having explosive personality disorder and characterized the wife as emotionally battered. In *Lambert v. Lambert*, No. 05-08-00397-CV, 2009 Tex. App. LEXIS 4007, at *1 (Tex. App.—Dallas May 29, 2009, no pet.), the court affirmed

$131,132.57 in actual damages and $100,000 in exemplary damages to the wife on an IIED claim based on the allegation that the husband broke into her house, stole some items, and left notes for her to discover, causing severe emotional distress, weight gain, hair loss, TMJ caused by grinding her teeth, damage to her gums, loss of sleep, increased nightmares, fatigue, and depression.

In *Ross v. Ross*, No. 03-02-00771-CV, 2004 Tex. App. LEXIS 3395, (Tex. App.—Austin Apr. 15, 2004, no pet.) (mem. op.), the court affirmed an award of $150,000 for mental anguish damages for IIED in a divorce case with facts similar to those at bar where the husband chased the wife in his vehicle, sometimes while she had the children in her car, repeatedly called the wife on the phone and referred to her with vulgar and obscene language, threatened to break her neck, and told her that she would "find out what happens to people that f--- him over." After the wife moved to a gated community, the husband went to her home uninvited by going over the fence, under the fence, and by boat across the lake. He demanded control of the wife's financial, emotional, and social environment and her ability to move around freely in the neighborhood, to see friends, and to go places. Although the frequency and severity of the bodily injury that the wife suffered as a result of the husband's conduct was unclear, the court held that this evidence, when viewed in the light most favorable to the wife, amounts to more than a scintilla of evidence that she experienced emotional distress so severe that no person should be expected to endure it. *Id.* at *30.

Katerina testified that when she worked as an attorney, she made approximately $40,000 per year but she had not practiced law since she had children. Regarding her jewelry business which she tried to operate from her home, she testified that in 2018 and

2019, she lost "about $24,000." She had been distracted by the divorce proceedings and had not been able to go to the market to purchase inventory. Katerina provided evidence of substantial disruption in daily routine by having to periodically switch houses, adding security devices, purchasing new phones, creating safety plans, feeling compelled to change locations of flights, and approaching emotional breakdown exemplified by hiding, crying, and rocking herself in closets. *See Parkway Co.*, 901 S.W.2d at 444 ("[A]n award of mental anguish damages will survive a legal sufficiency challenge when the plaintiffs have introduced direct evidence of the nature, duration, and severity of their mental anguish, thus establishing a substantial disruption in the plaintiffs' daily routine."). The record also includes evidence of Katerina's loss of sleep, embarrassment in the community, and financial strain from David's various acts, all of which support emotional distress. *Bentley*, 94 S.W.3d at 576, 606–07.

The trial court observed Katerina as she testified at length concerning the emotional distress suffered as a result of David's numerous acts and how they affected her daily life. Also, the trial court observed the demeanor and body language exhibited by the witnesses and the raw emotions as events were re-lived, none of which are evident from a review of the trial transcript. Not that we are so inclined in this case, but we do not substitute our judgment for that of the trial court even when the evidence is subject to reasonable disagreement. *See City of Keller*, 168 S.W.3d at 819. Based on the evidence, we find that the amount of the damages awarded by the trial court is supported.

ISSUE THREE—GAP-FILLER

By his third issue, David asserts that alternative causes of action (such as assault, false imprisonment, trespass, and intrusion on seclusion) could have provided a remedy

for Katerina's claimed severe emotional distress, and therefore, IIED was not available to her as a cause of action. "Where the gravamen of a plaintiff's complaint is really another tort, [IIED] should not be available." *Hoffmann-La Roche*, 144 S.W.3d at 447. This is the case even if the evidence would be sufficient to support a claim for IIED in the absence of another remedy. *Id.* at 441. However, if conduct is intended or primarily likely to produce severe emotional distress, intentional infliction of emotional distress is an applicable theory of recovery even if the actor's conduct also produces some other harm, such as physical injury. *See Standard Fruit & Vegetable Co.*, 985 S.W.2d at 67. Courts should consider the entire set of circumstances surrounding the conduct, such as the defendant's course of conduct, the context of the parties' relationship, whether the defendant knew the plaintiff was particularly susceptible to emotional distress, and the defendant's motive or intent. *See, e.g., GTE SW.*, 998 S.W.2d at 615. In *Hoffmann-La Roche*, the Texas Supreme Court suggests that a plaintiff is not barred from bringing an IIED claim if there is an "independent" set of facts that would support the claim. *Hoffmann-La Roche*, 144 S.W.3d at 450 (reversing trial court's award of damages under IIED because "we do not believe that [P's] intentional infliction claim is independent of her sexual harassment claim").

The *Hoffmann-La Roche* holding was confirmed a year later by the Texas Supreme Court. *See Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 816 (Tex. 2005) ("Even if other remedies do not explicitly preempt the tort, their availability leaves no gap to fill."). The holdings of *Hoffmann-La Roche* and *Creditwatch* prevent a claim for IIED in all but the narrowest of circumstances. If there is any recovery for the same facts under another tort, even if that recovery does not include damages for mental distress, IIED is not

available. In fact, for the tenth time in little more than six years, the Texas Supreme Court reversed an intentional infliction of emotional distress finding for failing to meet the exacting requirements of that tort. *Creditwatch*, 157 S.W.3d at 815. However, of the ten cases mentioned not one was a domestic relations case and eight were employer-employee cases. *See id*.

Cases involving domestic relations, specifically family law and divorce arguably provide the most viability for IIED claims. The foundational case of *Twyman v. Twyman* arises from a divorce proceeding. There the court recognized the wife's claim in a divorce case for IIED based on her husband attempting to engage her in deviant sexual acts. *See Twyman*, 855 S.W.2d at 620. Until and unless the Texas Supreme Court overrules or clarifies its holding in *Twyman*, we are duty bound to follow it. *Mitschke v. Borromeo,* 645 S.W.3d 251, 256 (Tex. 2022). And at least two Texas courts of appeals have recognized IIED in a divorce proceeding after *Hoffmann-La Roche* and *Creditwatch*: *Lambert*, 2009 Tex. App. LEXIS 4007, at *1, and *Castro v. Castro*, No. 13-13-00186-CV, 2014 Tex. App. LEXIS 8261, at *14 (Tex. App.—Corpus Christi July 31, 2014, pet. dism'd).

The gravamen of Katerina's complaint is David's intentional infliction of emotional distress and it is independent of her other possible tort claims. The evidence before the trial court specifically showed a pattern of intentional and severe emotional abuse by David. Katerina's testimony established that David exhibited a pattern of erratic and emotionally abusive behavior from the start of his drug use. He knew she was susceptible to severe emotional distress from certain actions, as they were high school sweethearts and married for sixteen years. *See GTE SW.*, 998 S.W.2d at 615. The record also shows that David knew his conduct would cause her severe emotional distress. *See Standard*

Fruit & Vegetable, 985 S.W.2d at 67. While other torts may provide partial relief, they would not completely address the gravamen of Katerina's complaint. *See Hoffmann-La Roche*, 144 S.W.3d at 441. David's methamphetamine use in front of the children and Katerina, his frantic actions including jumping at her to access her phone, jumping onto her car, grabbing the children when it is time to leave, and breaking into her bank account and possibly their house provide an unpredictable environment where emotional distress thrived. *See GTE SW.*, 998 S.W.2d at 616. David also allowed the battery on his ankle monitoring device to go uncharged knowing it gave Katerina the feeling of safety when it was working properly. While David did stalk the family, invade their privacy, and occasionally commit assault, giving rise to other tort causes of action, the gravamen of Katerina's complaint is that his harassing behavior was intended to distress her into submitting to his control, to stop legal action, and to cause her emotional suffering. *See Hoffmann-La Roche,* 144 S.W.3d at 441. As a whole, the actions of David are not better suited by more established tort doctrines. *See id.* at 450.

The Supreme Court has not clearly identified the appropriate single or multiple causes of action that would apply to this record to the exclusion of IIED. This case could be the set of facts the Texas Supreme Court envisioned for IIED and the reason it continues to recognize it as a viable cause of action. The unique procedural posture and circumstances of this case appear to support recovery under IIED. *See Shearer v. Shearer*, No. 12-14-00302-CV, 2016 Tex. App. LEXIS 5685, at *24-29 (Tex. App.—Tyler May 27, 2016, no pet.) (mem. op.). And IIED in divorce cases was affirmed by the Texas Supreme Court in *Twyman*, the Dallas court in *Lambert*, the Austin court in *Ross,* the

Dallas court in *Toles*, the Corpus Christi court in *Castro* and *Garza,* and the Fort Worth court in *Behringer.* We find it applies to this case as well and overrule the third issue.

CROSS-APPEAL

Katerina also filed a notice of appeal seeking to alter the trial court's Amended Final Decree of Divorce. In her brief, however, she unequivocally asserts that she no longer desires to pursue her cross-appeal. Thus, her cross-appeal is denied for want of prosecution.

CONCLUSION

The judgment of the trial court is affirmed.

Les Hatch
Justice