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Intentional Infliction of Emotional Distress between Spouses: New Mexico's Excessively High Threshold for Outrageous Conduct

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INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BETWEEN SPOUSES: NEW MEXICO'S EXCESSIVELY HIGH THRESHOLD FOR OUTRAGEOUS CONDUCT

TIFFANY OLIVER*

I. INTRODUCTION

Courts in New Mexico have made it prohibitively difficult for a spouse to recover damages for intentional infliction of emotional distress.1 Pursuant to the Restatement (Second) of Torts, "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."2 Although New Mexico recognizes the tort of intentional infliction of emotional distress, there has never been a reported case in which a mentally or emotionally abused spouse received compensatory damages for this tort claim.3 Over ten years ago, in Hakkila v. Hakkila,4 the New Mexico Court of Appeals overturned a district court's judgment awarding damages for a spouse's intentional infliction of emotional distress, and since that time this claim has not been recognized in the spousal context. As a result of the Hakkila case, New Mexico has fallen out of step with developing law in the rest of the nation and fails to protect spouses who are mentally or emotionally abused by their significant others.5

This comment will argue that New Mexico's excessively high threshold for outrageous conduct creates a difficult, if not impossible, standard of proof for intentional infliction of emotional distress claims in the context of marriage. The initial problem this comment addresses is that of interspousal immunity, which once barred all tort actions between spouses.6 This comment will go on to examine the development of the tort of intentional infliction of emotional distress both in the United States and in the State of New Mexico. It then analyzes New Mexico's rationale for its failure to recognize this claim in the marital context. Next, this comment details how other jurisdictions deal with this issue of law by exploring the types of conduct these jurisdictions consider sufficiently outrageous to recover for intentional infliction of emotional distress. This comment will conclude with a critique of New Mexico's legal inconsistencies with both the case law of other states and its own judicially created body of law.

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3. See infra section II.C.
5. See infra section III.
6. See infra section II.
II. BACKGROUND

A. History of Interspousal Immunity in America

At common law, under the "unity of person" doctrine, a woman was slightly more than a piece of property whose legal existence was merged into that of her husband, thus making it impossible for her to bring a claim against him.\textsuperscript{7} In order for a wife to sue or be sued in a court of law, the husband had to be joined with the wife in the suit, because she had no legal identity of her own.\textsuperscript{8} Because of this joinder, the husband became liable for the torts that his wife committed.\textsuperscript{9} This theory made it impossible to maintain a tort action between husband and wife.\textsuperscript{10}

Whether it was the husband or the wife who brought a tort claim against the other, the mandatory joinder made the husband the benefactor of the award.\textsuperscript{11} For example, if a husband committed a tort against his wife, in order for the wife to bring a suit against him, she would have to join her husband as a plaintiff in the suit.\textsuperscript{12} If she won the suit against him, the damages would have to be paid by the husband to himself.\textsuperscript{13} Likewise, if the wife was the tortfeasor, the husband would have to be joined as a defendant and would ultimately be liable to himself for his wife's tort.\textsuperscript{14} As a result, under the "unity of person" doctrine, interspousal suits proved to be an ineffective means of tort remedy.\textsuperscript{15}

Beginning in 1844, the rights of married women were substantially improved with the widespread adoption of the Married Women's Property Acts.\textsuperscript{16} These statutes gave married women a separate legal identity, the right to sue and be sued, and property rights of their own.\textsuperscript{17} Although the Married Women's Property Acts abolished the "unity of person" doctrine for purposes of property torts, they did not eliminate spousal immunity for personal torts.\textsuperscript{18}

With the elimination of the legal fiction of "unity" of spouses, courts developed other rationales in order to continue to uphold interspousal immunity.\textsuperscript{19} Chief among these rationales was the theory that personal tort actions between husband and wife would disrupt and destroy the peace and harmony of the home.\textsuperscript{20} Second, courts

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\item \textsuperscript{7} John De Witt Gregory, Peter N. Swisher & Sheryl L. Wolf, Understanding Family Law \textsuperscript{194} (2d ed. 2001).
\item \textsuperscript{8} Restatement (Second) of Torts $895F(b) (1977)$.
\item \textsuperscript{9} Id.
\item \textsuperscript{10} Id.
\item \textsuperscript{11} Id.
\item \textsuperscript{12} Id.
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Id.
\item \textsuperscript{15} At common law a husband was liable for the torts of his wife, for the law supposed that a wife acts under her husband's direction. "If the law supposes that, said Mr. Bumble, squeezing his hat emphatically in both hands, the law is an ass—an idiot. If that's the eye of the law, the law is a bachelor; and the worst I wish the law is, that his eye may be opened by experience...." Charles Dickens, Oliver Twist \textsuperscript{394} (Everyman Lib. ed., 1940) (cited in Jesse Dukeminier & James E. Krier, Property 362 (4th ed. 1998)).
\item \textsuperscript{16} Domick Vetri, Tort Law and Practice \textsuperscript{575} (1998).
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Gregory, Swisher & Wolf, supra note 7, at 194.
\item \textsuperscript{19} Vetri, supra note 16, at 575.
\item \textsuperscript{20} Restatement (Second) of Torts § 895F(d) (1977).
\end{enumerate}
expressed concern that spouses might conspire to commit fraud against liability insurance companies that covered tort injury. The last attempted justification for failure to recognize these interspousal claims was that recognition of such claims might encourage spouses to bring frivolous actions against one another. Courts, however, have gradually refuted these rationales for upholding interspousal immunity.

Today, "[t]he common law doctrine of interspousal tort immunity has been fully or partially abrogated in almost every jurisdiction." The Restatement (Second) of Torts announces, "the indications are clear that the complete abolition of immunity between husband and wife is the future state of the law in all states." The abolition of interspousal tort immunity is largely attributable to the widespread adoption of the principles set forth by Justice Harlan in his dissent in Thompson v. Thompson.

B. The U.S. Supreme Court's Response to Interspousal Immunity

In 1910, the U.S. Supreme Court made its one and only ruling on interspousal immunity in Thompson v. Thompson, and while the Court upheld interspousal immunity, the case is most notable for its riveting dissent by Justice Harlan. Justice Harlan argued that since the District of Columbia's Married Women's Property Acts allowed for a wife to independently bring tort actions and did not exclude her husband from those she could bring suit against, the wife was allowed to "sue separately as fully and freely as if she were unmarried, for torts committed against her." Harlan further argued that if interspousal tort claims were "undesirable on grounds of public policy, it is not within the functions of the court to ward off the dangers feared or the evils threatened simply by a judicial construction that will defeat the plainly expressed will of the legislative department." The dissent in Thompson is said to be "the first substantive break with immunity, marking the commencement of its erosion, a process that continued throughout the twentieth century."

After Thompson, courts and legislatures across the country began to modify the doctrine of interspousal immunity, and by 1977, the Restatement (Second) of Torts recognized the legal demise of the doctrine. The Restatement explicitly declares, "A husband or wife is not immune from tort liability to the other solely by reason of that relationship." "Most states have finally adopted Justice Harlan’s dissent in

22. Id.
27. 218 U.S. 611.
28. Id. at 622 (Harlan, J., dissenting).
29. Id. at 621 (Harlan, J., dissenting).
Thompson, which suggested that Congress could not have intended a wife be able to sue her husband for an injury to her property but not to her person.33

C. The Abolition of Interspousal Immunity and the Development of Intentional Infliction of Emotional Distress4 in New Mexico

Historically, New Mexico followed the common law rule that damages for emotional distress, absent physical injury, are not recoverable.35 In 1972, however, New Mexico, in Mantz v. Follingstad,36 began its incremental abolition of interspousal immunity and development of the tort of intentional infliction of emotional distress.37 In Mantz, although the plaintiff failed to provide sufficient proof of the claim, the court acknowledged that intentional infliction of emotional distress constituted a new tort theory in New Mexico.38 The following year, in Flores v. Flores,39 New Mexico went further and abolished interspousal immunity for intentional torts.40 Just two years later, in Maestas v. Overton,41 the New Mexico Supreme Court abolished interspousal immunity for negligently inflicted torts.42 In 1981, Dominguez v. Stone43 became the first case in which the New Mexico Court of Appeals recognized that an issue of fact existed as to intentional infliction of emotional distress thus requiring review by a jury.44 In Trujillo v. Puro,45 New Mexico expanded its law even further when it made it clear that there is no requirement of bodily harm in order to recover damages for intentional infliction of emotional distress.46 In the final decision in this line of cases, Hakkila v. Hakkila,47 the court turned all of these decisions on their heads when it determined that a husband who slammed a camper shell on his wife’s head, verbally abused her in private and in public, and battered her failed to meet the legal standard of outrageousness necessary to prove a claim for intentional infliction of emotional distress.48 Following is a detailed description of this legal progression of intentional infliction of emotional distress in New Mexico.

34. Also known as the tort of "outrage." Stock v. Grantham, 1998-NMCA-081, ¶ 33, 964 P.2d 135.
37. Acosta, supra note 35, at 446.
38. Mantz, 84 N.M. at 479, 505 P.2d at 74.
40. Id. at 602, 506 P.2d at 346.
41. 87 N.M. 213, 531 P.2d 947 (N.M. 1975).
42. Id. at 214, 531 P.2d at 948.
44. Id. at 215, 638 P.2d at 427.
46. Id. at 414, 683 P.2d at 969.
48. Id. at 179, 812 P.2d at 1327.
1. Mantz v. Follingstad—New Mexico Adopts the Restatement’s Version of Intentional Infliction of Emotional Distress

In 1972, the New Mexico Court of Appeals acknowledged the tort of intentional infliction of emotional distress for the very first time in Mantz v. Follingstad. In Mantz, the plaintiff alleged that the defendant doctor caused her severe emotional distress when he performed a mastectomy without properly informing her of her medical options. The Mantz court discussed the leading decision on intentional infliction of emotional distress in the country at that time, Rockhill v. Pollard, an Oregon decision that already had adopted the definition expressed by the Restatement of Torts. Following Oregon’s lead, the court in Mantz chose to adopt the Restatement’s version of the tort; however, it found no facts to prove that the defendant intentionally engaged in extreme and outrageous conduct that caused severe emotional distress. Despite the court’s denial of Mantz’ claim, the court of appeals acknowledged that intentional infliction of emotional distress constituted a new tort theory in New Mexico.

2. Flores v. Flores—Interspousal Immunity Crumbles for Intentional Torts

One year after Mantz, the court in Flores v. Flores held that a spouse may sue the other for intentional torts. In the instant case, Mrs. Flores brought a tort action against her husband to recover for the injuries she sustained as a result of his intentional stabbing of her with a knife. The court asserted that “[t]he common law rule is not to be applied to bar suits between spouses because liability free intentional injury to one’s spouse does not reflect the circumstances in New Mexico.” This decision thus abolished interspousal immunity for intentional torts.

The Flores court further recognized the invalidity of the argument that permitting suits between spouses would flood the courts with trivial matrimonial disputes. The court offered proof of this by pointing out that jurisdictions that permit spouses to sue for intentional torts had not been inundated with groundless claims. With this holding, the court acknowledged that interspousal immunity was no longer applicable; however, it did not address whether a tort action may be brought against a spouse absent physical injury.

References:

50. Id.
51. Id. at 476, 505 P.2d at 71.
52. 485 P.2d 28 (Or. 1971) (holding that when a doctor failed to examine the plaintiff and her ten-month-old child after an automobile accident in which they sustained visible injuries and the mother thought her child was dead, plaintiff provided sufficient evidence for the case to be submitted to the jury for determination of whether intentionally inflicted emotional distress upon the plaintiff existed).
53. Mantz, 84 N.M. at 479-80, 505 P.2d at 75.
54. Id. at 480, 505 P.2d at 74.
55. Id. at 479, 505 P.2d at 74.
57. Id. at 602, 506 P.2d at 346.
58. Id.
59. Id. at 603, 506 P.2d at 347.
60. Id.
61. Id.
3. *Maestas v. Overton*<sup>63</sup>—Interspousal Immunity Abolished for Negligent Torts

In 1975, New Mexico abolished interspousal immunity for negligently inflicted torts in *Maestas v. Overton*.<sup>64</sup> This wrongful death action, brought between the respective personal representatives of a married couple that died in a plane crash, alleged that the wife’s death was due to the husband’s negligence in piloting.<sup>65</sup> The New Mexico Supreme Court, following the *Restatement*, found that there was no immunity from tort liability between spouses by reason of their marital relationship.<sup>66</sup> The Court reasoned that because *Flores* held that interspousal immunity no longer exists for intentional torts, there was “no logical or legal reason for drawing a distinction between interspousal personal torts intentionally inflicted and those negligently inflicted.”<sup>67</sup>


While *Mantz* was the first New Mexico case to acknowledge the existence of intentional infliction of emotional distress, *Dominguez v. Stone* was the first case in which an issue of fact was found to exist as to this cause of action.<sup>69</sup> In *Dominguez*, the defendant, a member of the governing body of the village, made derogatory statements to the effect that the plaintiff, a twenty-two-year-old Mexican National who had been residing in the United States since she was three years of age, was not qualified for her position as director of the village’s senior citizens program because she was a “Mexican.”<sup>70</sup> The court, in applying Section 46 of the *Restatement (Second) of Torts*, held that an issue of fact did exist as to intentional infliction of emotional distress and further held that the trial court erred in granting summary judgment and dismissing the claim.<sup>71</sup>

*Dominguez* was the first reported case in which a New Mexico court was presented with facts sufficient to warrant a jury determination on whether intentional infliction of emotional distress had occurred.<sup>72</sup> The plaintiff’s emotional distress centered around a meeting in which the defendant made multiple derogatory comments about her alienage and ethnicity.<sup>73</sup> Specifically, the defendant stated that the person performing the duties of program director should not be a “Mexican” because the program was funded by American tax dollars.<sup>74</sup> The defendant additionally interrogated the plaintiff concerning payment of income and property

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<sup>63</sup> 87 N.M. 213, 531 P.2d 947 (N.M. 1975).

<sup>64</sup> Id.

<sup>65</sup> Id. at 213, 531 P.2d at 947.

<sup>66</sup> Id. at 214, 531 P.2d at 948.

<sup>67</sup> Id.


<sup>69</sup> Id. at 215, 638 P.2d at 427.

<sup>70</sup> Id. at 212, 638 P.2d at 424.

<sup>71</sup> Id. at 215, 638 P.2d at 427.

<sup>72</sup> Id.

<sup>73</sup> Id.

<sup>74</sup> Id.
taxes, whether she possessed a green card, whether she had applied for U.S. citizenship, and whether she had registered to vote in the United States. The court determined that these actions were extreme and outrageous enough to have inflicted emotional distress upon the plaintiff.

5. *Trujillo v. Puro*—New Mexico Acknowledges There Is No Requirement of Bodily Harm in Order to Recover for Intentionally Inflicted Emotional Distress

In *Trujillo*, the court held that there is no requirement that the plaintiff suffer bodily harm in order to recover for intentionally inflicted emotional distress. In this case, the defendant doctor’s delay in responding to complications resulting from a cataract removal surgery he performed resulted in the plaintiff’s loss of vision in his right eye. The plaintiff alleged that, upon informing the doctor that he was experiencing a sharp pain in his eye, the doctor failed to schedule an appointment or make arrangements for him to see another physician and the doctor intentionally included false statements in his hospital records, failed to note in his records a telephone call received from the plaintiff, and falsely testified that he never received a telephone call from the plaintiff. The court held that these allegations were enough to sufficiently state a claim of intentional infliction of emotional distress and thus preclude a motion to dismiss. Further, the court rejected the defendant’s argument that the patient’s complaint should be dismissed because he failed to allege the existence of any physical injury attendant to his claim of intentional infliction of emotional distress. In its holding, the court announced that “[t]here is no requirement that plaintiff suffer bodily harm in order to recover for intentional infliction of emotional distress, although he may recover for such harm if it results from such conduct.”

6. *Hakkila v. Hakkila*—New Mexico’s Refusal to Take the Next Step

In *Hakkila*, the New Mexico Court of Appeals determined that a husband’s insults and outbursts over the course of a ten-year marriage were not sufficiently outrageous to establish liability for intentional infliction of emotional distress. Mr. Hakkila perpetually called his wife crazy and incompetent, accused her of preferring women to men, and went into screaming rages. Once, when Mrs. Hakkila approached her husband at a Christmas party to suggest they go home, Mr. Hakkila began screaming, “You f___ bitch, leave me alone,” causing Mrs. Hakkila to have to

75. *Id.*
76. *Id.*
78. *Id.* at 414, 683 P.2d at 969.
79. *Id.* at 410, 683 P.2d at 965.
80. *Id.* at 414, 683 P.2d at 969.
81. *Id.*
82. *Id.*
83. *Id.* at 414-15, 683 P.2d at 969-70.
85. *Id.* at 179, 812 P.2d at 1327.
86. *Id.* at 173-74, 812 P.2d at 1321-22.
excuse herself and walk home alone. During another argument, Mr. Hakkila went as far as locking his wife out of the house overnight. These actions, however, were not found to be extreme and outrageous enough to state a claim for intentional infliction of emotional distress.

Even though the tort of intentional infliction of emotional distress does not require that physical injury accompany the emotional distress, the court found that the physical abuse Mr. Hakkila inflicted upon his wife also failed to rise to the necessary standard of outrageousness. Mrs. Hakkila was the victim of numerous physical abuses. Once, while Mrs. Hakkila was putting groceries into their camper, Mr. Hakkila “slammed part of the camper shell on her head and the trunk lid on her hands.” During another argument, Mr. Hakkila “grabbed his wife and threw her facedown across the room into a pot full of dirt.” There was also evidence presented that Mr. Hakkila grabbed his wife’s wrist during an argument and twisted it severely. All these physical and emotional abuses, which ultimately led to Mrs. Hakkila’s disability and impairment, were not found to be legally actionable behavior by the court.

D. Intentional Infliction of Emotional Distress as Applied to Hakkila

The Restatement (Second) of Torts, which New Mexico adopted in Manz, states, “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.” The tort of intentional infliction of emotional distress is limited to conduct that is “extreme and outrageous.” The Hakkila court offered several reasons for imposing this limitation: (1) to prevent burdensome litigation of the commonplace, (2) to protect privileged conduct, and (3) to avoid groundless allegations of causation. The concerns that “necessitate limiting the tort of intentional infliction of emotional distress” are discussed below.

1. Preventing Burdensome Litigation of the Commonplace

The Hakkila court worried that recognition of interspousal claims of intentional infliction of emotional distress might lead to courts being burdened by the litigation of commonplace marital occurrences. The court commented that “[c]onduct intentionally or recklessly causing emotional distress to one’s spouse is prevalent

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87. Id. at 174, 812 P.2d at 1322.
88. Id.
89. Id. at 179, 812 P.2d at 1327.
90. Id.
91. Id. at 174, 812 P.2d at 1322.
92. Id.
93. Id.
94. Id. at 179, 812 P.2d at 1327.
96. RESTATEMENT (SECOND) OF TORTS § 46 (1) (1965).
97. Hakkila, 112 N.M. at 176, 812 P.2d at 1324.
98. Id. at 177, 812 P.2d at 1325.
99. Id.
100. Id.
in our society.” The court went on to say that “[t]his is unfortunate but perhaps not surprising given the length and intensity of the marital relationship.” Here the court seems to indicate that abusive behavior happens so much that it should be excusable and further suggests that the court must be surprised by a spouse’s conduct in order to establish a cause of action. The fundamental purpose of the judicial system is to afford individuals a day in court in order to redress injury: potentially legitimate claims surely should not be excluded because they may be burdensome or commonplace.

2. Protecting Privileged Conduct

The *Hakkila* court seems to be solely concerned with the privileges and privacy of the accused. In quoting the *Restatement’s* section 895F(h), the *Hakkila* court stated that “[p]artners who are pledged to live together for a lifetime have a right to criticize each other’s behavior.” Here, the court seems to be saying that husbands have the privilege of inflicting emotional distress upon their wives. The court commented that “[c]ourts must recognize that we are not yet as civilized as we might wish. Many, if not all, of us need some freedom to vent emotions in order to maintain our mental health. The law should not require a degree of civility beyond our capacity.” This seems to indicate that the court finds it permissible for a husband to maintain his mental health at the expense of his wife’s.

According to the court, there may be a protected liberty interest in conduct that might tend to impose emotional distress. The court stated, “Intentionally making another person unhappy or upset may also serve useful purposes besides simply preserving the mental health of the perpetrator” and suggests that such behavior may be justified to serve the greater social good or the recipient’s own good. In concluding that conduct causing emotional distress may have social utility, the court focused on the rights of the aggressor and ignored the rights of the victim altogether.

3. Avoiding Groundless Allegations of Causation

The *Hakkila* court expressed concern that extending the tort of intentional infliction of emotional distress may lead to spouses attempting to seek redress for groundless claims. To bolster this argument, the court cited the *Restatement*, which remarks,

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101. Id. at 176, 812 P.2d at 1324.
102. Id.
103. Tobias, supra note 30, at 461.
106. Kohler, supra note 104, at 1059.
109. Id.
110. *Hakkila*, 112 N.M. at 176, 812 P.2d at 1324.
111. Kohler, supra note 104, at 1059.
112. *Hakkila*, 112 N.M. at 177, 812 P.2d at 1325.
The intimacy of the family relationship may involve some relaxation in the application of the concept of reasonable care, particularly in the confines of the home. Thus, if one spouse, in undressing leaves shoes out where the other stumbles over them in the dark, or if one spouse spills coffee on the other while they are both still sleepy, this may well be treated as not negligence.113 Certainly there is a distinguishable difference between the benign action of a spouse leaving a shoe out and the calculated, intentional action of a spouse locking the other out of the house overnight in the dead of winter, as was the case in Hakkila.114 While it is understandable that the standard of reasonable care should be more flexible in the home, courts must not allow serious injuries to be swallowed up by this less stringent standard of reasonable care.

Fraudulent claims might also fall under the umbrella of groundless allegations that the court so feared. The possibility of fraud exists in every negligence action involving an insured tortfeasor.115 Further, it is suggested that domestic violence is lied about at the same rate as other crimes—about two percent of the time.116 As a result, it is no more necessary for the court to worry about fraudulent intentional infliction of emotional distress claims than it does any other tort action.117

From the critic’s vantage, judicial recognition of intentional infliction of emotional distress between spouses poses the threat of opening up the floodgates to a host of frivolous litigation.118 Assuming arguendo that a rash of lawsuits could result, such fear is hardly a justification for refusal to recognize the cause of action.119 William Prosser commented, “It is the business of the law to remedy wrongs that deserve it, even at the expense of a ‘flood of litigation,’ and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds.”120

There are several levels of legal safeguards in place to guard against the possibility of opening up the floodgates to nonmeritorious claims.121 First, Rule 11 of the Federal Rules of Civil Procedure places an obligation on lawyers to certify, under the threat of sanctions, that the claim they are bringing is not frivolous or “presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”122 This rule also applies to unrepresented parties.123 Additionally, per the Restatement, judges are required to review the facts and make a determination as to whether the conduct in question “may reasonably be regarded as so extreme and outrageous as to permit

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114. Hakkila, 112 N.M at 174, 812 P.2d at 1322.
116. Information and Resources for Survivors and Their Supporters 21 (Haven House, Rio Rancho, New Mexico) (date unavailable) (on file with the NEW MEXICO LAW REVIEW).
117. See infra section II.D.3.
119. Id.
120. Id. (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12, at 51 (4th ed. 1971)).
121. Taylor, supra note 118, at 1279.
122. FED. R. CIV. P. 11(b).
123. Id.
recovery.”124 In this way, judges act as gatekeepers ensuring that only valid claims reach the jury.125 Once the claim reaches the jury, it must survive yet another screening by the jurors, many of whom are themselves married and in the best possible position to determine what behavior between spouses is atrocious and utterly intolerable in a civilized community.126 As a result of these multiple reviews, groundless claims for intentional infliction of emotional distress are screened out and courts need not worry about burdensome litigation.127

E. Procedural Concerns in Recognizing Intentional Infliction of Emotional Distress

In addition to the three concerns specifically expressed by the majority opinion in Hakkila, courts are faced with the problem of whether to try tort claims together with or apart from divorce proceedings.128 “While the New Mexico Court of Appeals did not have to address the issue of joinder in its opinion in Hakkila, Justice Donnelly wrote a concurring opinion, which suggested precluding either permissive or compulsory joinder of interspousal tort claims.”129 Additionally, Justice Donnelly suggested that “where a tort claim for [intentional infliction of emotional distress] is joined with an action for dissolution of marriage, [the better procedure for the trial judge to follow] is to bifurcate the tort claim from the trial of the divorce proceedings so that the tort claim may be tried separately.”130 While Justice Donnelly discusses the problems with joining tort claims with divorce proceedings, he fails to address the benefits.

1. Joinder versus Separation of Divorce and Tort Actions

It is left to the courts to determine whether the claim of intentional infliction of emotional distress should be brought with or separate from divorce proceedings.131 Because the same set of facts are often involved in both actions, trying them together allows attorneys and parties to discuss the facts only once, which makes the litigation process shorter and thus less costly.132 This model additionally promotes judicial economy and allows for the emotional toll on the parties to be lessened.133 For these reasons, joinder of intentional infliction of emotional distress tort claims with divorce is a more favorable approach than requiring each case to be tried individually.

Opponents of joining the two claims argue that tort claims and divorce proceedings should be tried separately because of their distinct purposes.134 It is
pointed out that the purpose of a tort claim is to redress a legal wrong with damages, while the purpose of a divorce proceeding is to dissolve the marital relationship between the parties.\textsuperscript{135} To further this argument, opponents assert that while divorce is equitable in nature, and therefore not subject to a jury trial, a tort claim is a question of law and may involve a jury trial.\textsuperscript{136} This argument ultimately fails because the overarching rules of civil procedure allow the joinder of all claims a party has against the opposition.\textsuperscript{137} While divorce and tort claims have distinct purposes, the benefits of joining the two claims substantially outweigh critics’ expressed concerns.\textsuperscript{138}

2. Res Judicata

Courts that try divorce actions separate from tort actions may encounter complications regarding res judicata of claims.\textsuperscript{139} When a final decree of divorce is granted without express adjudication of the claim for intentional infliction of emotional distress, the legal doctrine of res judicata could potentially bar a spouse from bringing such a claim in the future.\textsuperscript{140} This is the case in jurisdictions such as Texas, where the transitional approach to res judicata is followed.\textsuperscript{141} Under the transitional approach, parties are not only precluded from bringing a second action on issues that have already been litigated, they are precluded from bringing causes of action or defenses that arise out of the same subject matter and might have been litigated in the previous suit.\textsuperscript{142} This is, however, not the practice in all courts. Several states allow a claim for intentional infliction of emotional distress to be adjudicated after divorce, so long as the final decree of divorce did not adjudicate that tort claim.\textsuperscript{143} This seems to be the fairest way in which to deal with the issue of res judicata, although it does not promote the ever-present goal of judicial economy.

F. Purpose for Recognizing the Tort of Intentional Infliction of Emotional Distress

Recognizing the tort of intentional infliction of emotional distress in the context of marriage furthers numerous goals of tort jurisprudence.\textsuperscript{144} Court awarded damages serve the goal of corrective justice by helping to restore the moral balance between the aggressor and the victim.\textsuperscript{145} This provides a sense of vindication for

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\item \textsuperscript{135} Id.
\item \textsuperscript{136} Id. at 586.
\item \textsuperscript{137} Id. at 576.
\item \textsuperscript{138} See supra section II.E.
\item \textsuperscript{139} Richard R. Orsinger, Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress in Connection with Divorce, 25 St. Mary’s L.J. 1253, 1296 (1994).
\item \textsuperscript{140} Id.
\item \textsuperscript{141} Id. at 1295.
\item \textsuperscript{142} Id. at 1295-96.
\item \textsuperscript{143} Id. at 1296.
\item \textsuperscript{144} Kenneth S. Abraham, The Forms and Functions of Tort Law 14-19 (1997) (stating that the functions of tort law are corrective justice, optimal deterrence, loss distribution, compensation, and redress of social grievances).
\item \textsuperscript{145} Id. at 14.
\end{enumerate}
\end{footnotesize}
victims who have endured abuse.\textsuperscript{146} Likewise, allowing victims to pursue civil tort claims, such as intentional infliction of emotional distress, sends a message to the community that domestic abuse will not be tolerated. Thus, abuse is likely to be deterred.\textsuperscript{147} Though a poor substitute for prior mental well-being, monetary damages do achieve tort goals.\textsuperscript{148}

Seeking a monetary judgment, such as damages for intentional infliction of emotional distress, is important for victims who have endured financial abuse as part of an abusive marriage.\textsuperscript{149} "One of the tactics that abusers use to control their victims is to secure access to the couple’s finances and to make all budgeting decisions."\textsuperscript{150} When an abused spouse who has no means to support herself finally leaves her abuser, she may be forced to return to him simply because she does not have the financial resources to support herself.\textsuperscript{151} It is said that "[t]he most likely predictor of whether an abused woman will permanently separate from her abuser is whether she has the economic resources to survive without him."\textsuperscript{152} The ability to recover for intentional infliction of emotional distress is thus extremely important for victims who lose their financial stability as a consequence of leaving their abusers.\textsuperscript{153}

Allowing claims for intentional infliction of emotional distress in the marital context is seemingly the most effective means of allowing mentally abused spouses to recover. While a divorce action may provide escape from tortious abuse, divorce provides no compensatory relief.\textsuperscript{154} In the event that alimony is awarded after the divorce, it is merely intended to fill the needs of the future, not to compensate for the wrongs of the past.\textsuperscript{155} Civil suits, namely the tort of intentional infliction of emotional distress, may provide victims with financial remedies for the wrongful acts of their abusers, potentially covering lost wages, pain and suffering, medical and psychological treatment costs, and expenses for relocation and protection.\textsuperscript{156}

There is no substitute for allowing compensation for tortious injury.\textsuperscript{157} Although the criminal law may vindicate society’s interest in punishing a wrongdoer, it cannot compensate an injured spouse for her or his suffering or injury.\textsuperscript{158} Only a tort suit can provide the appropriate compensation for a wrongful injury.\textsuperscript{159} Additionally, "[u]nlike a criminal charge which requires proof beyond a reasonable doubt, a civil

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\item\textsuperscript{146} Melissa J. Pena, The Role of Appellate Courts in Domestic Violence Cases and the Prospect of a New Partner Abuse Cause of Action, 20 REV. LITIG. 503, 507 (2001).
\item\textsuperscript{147} Id.
\item\textsuperscript{148} ABRAHAM, supra note 144, at 14.
\item\textsuperscript{149} Pena, supra note 146, at 506.
\item\textsuperscript{150} Id.
\item\textsuperscript{151} Id.
\item\textsuperscript{152} Id. (citing Barbara Hart, Assessing Whether Batterers Will Kill, in CONFRONTING DOMESTIC VIOLENCE: EFFECTIVE POLICE RESPONSE 1, 2 (Pa. Coalition Against Domestic Violence ed., 1990)).
\item\textsuperscript{153} Pena, supra note 146, at 506.
\item\textsuperscript{154} Henricksen v. Cameron, 622 A.2d 1135, 1140 (Me. 1993).
\item\textsuperscript{155} Skelton v. Skelton, 490 A.2d 1204, 1207 (Me. 1985).
\item\textsuperscript{156} DEBORAH GOELMAN ET AL., WHEN WILL THEY EVER LEARN? EDUCATING TO END DOMESTIC VIOLENCE: A LAW SCHOOL REPORT 41 (1997).
\item\textsuperscript{157} Krohse, supra note 23, at 927.
\item\textsuperscript{158} Merenoff v. Merenoff, 388 A.2d 951, 962 (N.J. 1978).
\item\textsuperscript{159} Krohse, supra note 23, at 927.
\end{itemize}
claim requires proof that it is ‘more probable than not’ that the tort occurred.”

When a spouse stops just short of physical abuse, awarding damages for intentional infliction of emotional distress may be the only means available to redress the wrongs committed.

G. Defining Extreme and Outrageous Conduct

In order for conduct to be actionable under New Mexico law, the conduct must be “extreme and outrageous.” In defining extreme and outrageous conduct, the Restatement (Second) of Torts comments, “Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’” Emotional distress includes “all highly unpleasant mental reactions such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.” Liability only arises where the emotional distress is extreme.

Most states recognize a cause of action for intentional infliction of emotional distress; however, as Hakkila proves, states differ widely with regard to what conduct between spouses they consider to be “outrageous.” Difficulties in defining what constitutes outrageous behavior in the marital context plague courts.

In attempting to define outrageousness, commentators and courts have concluded that the conduct must be “beyond the normal ebb and flow of married life.” When there has been no evidence of physical abuse, it is harder for the courts to draw the line between emotional distress that qualifies as outrageous behavior, and behavior that, though not ‘normal’ or desired in a marriage, is closer to the ‘ebbs and flows of married life.’

The Restatement, in an effort to resolve some of the ambiguity surrounding what constitutes “extreme and outrageous conduct,” describes several factors to consider. First, it directs that “[t]he law intervene[s] only where the distress inflicted is so severe that no reasonable man could be expected to endure it.” Second, the Restatement adds that “intensity and the duration of the distress are factors to be considered in determining its severity.” Finally, it states that “if the enormity of the outrage carries conviction that there has in fact been severe emotional distress, bodily harm is not required.” Despite these guidelines, the

161. Taylor, supra note 118, at 1276.
163. Id.
164. RESTATEMENT (SECOND) OF TORTS § 46(j) (1965).
165. Id.
166. Krohse, supra note 23, at 931.
167. Id.
169. Krohse, supra note 23, at 933-34.
170. RESTATEMENT (SECOND) OF TORTS § 46(j) (1965).
171. Id.
172. Id.
173. Id. § 46(k).
court found that Mr. Hakkila’s ten years of mental and physical abuse were not actionable.\footnote{Hakkila v. Hakkila, 112 N.M. 172, 179, 812 P.2d 1320, 1327.}

The Restatement comments that while “[s]evere distress must be proved. . . in many cases the extreme and outrageous character of the defendant’s conduct is in itself important evidence that the distress has existed.”\footnote{Id. § 46(j).} It adds, “Normally severe emotional distress is accompanied or followed by shock, illness, or other bodily harm which itself affords evidence that the distress is genuine and severe.”\footnote{Id. § 46(k).} While New Mexico adopted these guidelines, the court of appeals has ultimately ignored them in the spousal context.\footnote{See Hakkila, 112 N.M. 172, 812 P.2d 1320.}

III. RECENT DEVELOPMENTS

Since the Hakkila decision, states across the country have been confronted with interspousal intentional infliction of emotional distress claims and have allowed recovery.\footnote{See infra section III.} The same year that Hakkila was decided, a Texas appellate court, in Massey v. Massey, held that there was intentional infliction of emotional distress when presented with facts strikingly similar to those in Hakkila. In Massey,\footnote{807 S.W.2d 391 (Tex. App. 1991).} the wife testified that her husband was abusive, explosive, and rageful.\footnote{Id. at 399.} She further testified that her husband “constantly engaged in verbal abuse such as criticism and blaming and belittled her in front of her children.”\footnote{Id.} Additionally, “[h]e had temper tantrums and physical outbursts which sometimes involved the destruction of property.”\footnote{Id. at 400.}

Although her husband stopped short of physical assault, Ms. Massey testified that his outbursts “caused her to experience intense anxiety and fear.”\footnote{Id.} In addition to these outbursts, her husband had “tight control over money” and made threats that she would be “penniless if she divorced him.”\footnote{Id.} The record reflects that

[\textbf{h}e doled out small sums of cash—$20 at a time—to [\textbf{h}er] for groceries; he would not let her write checks on their supposedly joint account; and when once she wrote a check in an emergency, he exploded and told her to never again come into the bank (where he was president); he bought her clothes and became enraged when once, on her own, she bought two $75.00 dresses. [\textbf{S}he] was allowed no voice in decisions, financial or otherwise, which affected her.\footnote{Id.}}

The court held that this conduct was sufficiently outrageous to uphold the finding of intentional infliction of emotional distress.\footnote{Id. at 400.}
Similarly, in *Christians v. Christians*, the Supreme Court of South Dakota held that where a husband treated his wife “less than respectful” by controlling her behavior regarding use of the vehicles, her job, social life and spending of money, his conduct was “extreme and outrageous,” causing his wife emotional distress for which she was able to recover damages. In South Dakota, the elements for intentional infliction of emotional distress include (1) extreme and outrageous conduct by defendant, (2) intent to cause severe emotional distress, (3) a causal connection between the wrongful conduct and the emotional distress, and (4) severe emotional distress must result. While New Mexico imposes a similar standard of proof, the factual threshold of outrageousness set forth by *Hakkila* is substantially higher, making it much more difficult to prove a claim of intentional infliction of emotional distress in New Mexico.

Likewise, in 2001, the Supreme Court of Wyoming held that “extreme and outrageous conduct by one spouse which results in severe emotional distress to the other spouse should not be ignored by virtue of the marriage of the victim to the aggressor.” In *McCulloh v. Drake*, the husband began a pattern of abuse shortly after the couple married. After various incidents of abuse, the husband held a pillow over the wife’s face, which was the final act that caused her to leave the relationship. The trial court reasoned, and the supreme court affirmed, that court decisions must reflect society’s disdain for domestic abuse of any type and that punitive damages were accordingly appropriate. The court went on to say,

> The focus of such claims must be on the element of outrageousness, and the scrutiny must be stringent enough so that the social good which comes from recognizing the tort in a marital setting will not be undermined by an invasive flood of meritless litigation. The plaintiff must demonstrate that the defendant’s conduct was so “extreme and outrageous” that it “exceeded all possible bounds of decency.”

The court determined that the defendant’s act of holding a pillow over his wife’s face could be reasonably regarded as so extreme and outrageous as to permit recovery.

In a like manner, the Supreme Judicial Court of Maine, in *Henriksen v. Cameron*, found that the wife established a claim for intentional infliction of emotional distress where a husband’s actions included shattering the doors of kitchen cabinets while he “came after” her meanwhile calling her a “lying, whoring bitch” who was “stealing money from him”; calling

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188. Id. at 381.
189. Id. at 382.
191. Id.
192. Id. at 1165.
193. Id. at 1166.
194. Id.
195. Id. at 1169-70.
196. Id. at 1166.
197. 622 A.2d 1135 (Me. 1993).
[her] at a friend's house where she was staying because she was afraid to come home and threatening to burn down the inn; tearing down a wall in the dining room before she returned; swaying over her bed and threatening to "get" her; threatening that [she] would get what his mother got (referring to his father's beating his mother); and pulling the telephone out of the wall and telling [her] he did so to prevent her from calling for help. Most of this conduct occurred while [he] was intoxicated. 198

In finding that the wife had proven a claim for intentional infliction of emotional distress, the court stated that although it did recognize the desire to preserve marital harmony, there was clearly no marital harmony remaining to be preserved because the suit was brought after the parties were divorced. 199 The jury ultimately awarded Mrs. Henriksen $75,000 in compensatory damages and $40,000 in punitive damages. 200

Illinois, too, has awarded damages for intentional infliction of emotional distress between spouses. In Feltmeier v. Feltmeier, 201 the Appellate Court of Illinois held that where physical abuse and verbal attacks were present over an eleven-year marriage, the conduct was extreme and outrageous enough to recover damages. 202 Mrs. Feltmeier repeatedly found herself on the receiving end of verbal attacks and often had objects hurled in her direction. 203 Additionally, her husband systematically isolated her from friends and family, and when she took action to rid herself of the abuse, he stalked her. 204

During trial, Mr. Feltmeier unsuccessfully argued that since his abuse occurred only three or four times per year over the course of eleven years of marriage, his behavior constituted "marital conduct that any reasonable wife should be able to endure without suffering emotional distress." 205 Mrs. Feltmeier suffered severe emotional distress and was diagnosed as suffering from post-traumatic stress disorder, manifested by depression, fear of other men, and inability to form relationships with them. 206 The court commented that

[the] mate who is responsible for creating the condition suffered by the battered victim must be made to account for his actions—all his actions. Failure to allow affirmative recovery under these circumstances would be tantamount to the courts condoning the continued abusive treatment of women in the domestic sphere. 207

"Mindful that this kind of tort deserves circumscription in the marital setting," the court found that Mrs. Feltmeier stated a proper cause of action for the intentional infliction of emotional distress. 208

198. Id. at 1137.
199. Id. at 1139.
200. Id. at 1138.
202. Id. at 1038.
203. Id. at 1035.
204. Id.
205. Id. at 1039.
206. Id. at 1038.
207. Id. at 1044.
208. Id. at 1038.
In Behringer v. Behringer, a case demonstrating that both men and women have the ability to inflict emotional distress, the court held that the wife’s conduct was sufficiently extreme and outrageous so as to cause her husband severe emotional distress. Mrs. Behringer inflicted emotional distress upon her husband in a number of ways. She would often wake him from his sleep to tell him that God was going to give him cancer or a heart attack. She persistently claimed that she knew a hitman that would kill or badly beat Mr. Behringer, hired private investigators to follow her husband, and played a number of other mind games.

On one occasion she woke her husband from his sleep at 1:30 A.M. by bursting into the room accusing him of stealing a book from her purse. After leaving the room to supposedly search the house for the book, she returned, pulling a gun from behind the dresser. She pointed it at her husband, threatening him with “I think I’ll just shoot you” and pulling the trigger several times. Although the gun was later discovered to be a toy, it closely resembled a .38 caliber pistol of Mr. Behringer’s that his wife had recently taken. After threatening to kill her husband, Mrs. Behringer declared, “Since everybody thinks I’m crazy, I can kill you and they won’t do nothing to me.” The court found that Mrs. Behringer’s behavior was sufficiently extreme and outrageous to support a finding of intentional infliction of emotional distress.

IV. ANALYSIS
Throughout its history, New Mexico has been a forerunner in the area of interspousal torts. Four years before the Restatement recognized the legal demise of interspousal immunity, New Mexico had abolished interspousal immunity for intentional torts. Two years prior to this Restatement, New Mexico abolished interspousal immunity for negligently inflicted torts. Unfortunately, in Hakkila, the New Mexico court took a step backward when it effectively made it impossible to prove the substantive elements necessary for a claim of intentional infliction of emotional distress between spouses.

Although New Mexico has adopted the Restatement’s definition of intentional infliction of emotional distress, its application of the law in Hakkila set the factual standard of proof so unreasonably high that it has the effect of precluding all claims.

210. Id. at 844.
211. Id. at 842.
212. Id.
213. Id.
214. Id.
215. Id.
216. Id.
217. Id.
218. Id. at 844.
219. See infra section IV.
220. In 1973, New Mexico abolished interspousal immunity for intentional torts in Flores v. Flores. 84 N.M. 601, 603, 506 P.2d 345, 347 (N.M. 1973). In 1977, the Restatement (Second) of Torts, section 895(f) declared, “A husband or wife is not immune from tort liability solely by reason of that relationship.”
for intentional infliction of emotional distress between spouses. *Hakkila* explicitly acknowledged the possibility of setting the threshold of outrageousness "so high in the marital context as to bar all suits" but failed to realize that in deciding the case as it did, it effectively placed New Mexico in that very category. If a husband's continuous assaulting, battering, demeaning, and insulting of his wife over a ten-year period fails to meet the requisite standard of outrageousness for an intentional infliction of emotional distress claim in New Mexico, the court must ask itself what conduct would rise to the level of outrageousness necessary to prove this claim.

In making the standard of proof so burdensome as to bar all claims, New Mexico has fallen out of step with other states. Facts similar to those in *Hakkila* have consistently been found to meet the requisite standard of outrageousness in other jurisdictions. While other states have recognized the gravity of psychological abuse, New Mexico continues to permit spouses to lawfully inflict mental anguish.

Not only is *Hakkila* inconsistent with other states, it is inconsistent with New Mexico's own body of law. In *Dominguez*, the court established that where an employee proved that the employer made comments about her inability to perform her job based on her ethnicity, the requisite proof of intentional infliction of emotional distress was established. The court in *Dominguez* decided that a material issue of fact existed based on one encounter. Mrs. Hakkila's abuses seem to be at least as emotionally disturbing as the plaintiff's in *Dominguez*. Being verbally abused by a spouse for ten years should certainly be found to cause emotional distress comparable to that experienced by Dominguez.

A decade later, it is time for New Mexico courts to rethink the impossibly high standard set by *Hakkila*. "Emotional distress is as real and tormenting as physical pain." It is imperative that New Mexico begin to provide redress for those individuals who have suffered psychological abuse. While bruises and scrapes may heal, psychological damages linger on long after. Women who are psychologically harmed should not have to show more than Mrs. Hakkila in order to recover damages under the law. Psychological well-being deserves as much legal protection as physical well-being.

V. CONCLUSION

New Mexico's high threshold for what constitutes outrageous conduct makes proving a claim for intentional infliction of emotional distress nearly impossible.

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223. *See supra* section III.
224. *Id.*
225. *Id.*
227. *Id.* at 215, 638 P.2d at 427.
229. *While N.M. STAT. ANN. 1978 § 40-13-5(A)(5) (Supp. 2003) allows the court to order the respondent to reimburse the petitioner or any other household member for expenses reasonably related to the occurrence of domestic abuse...*, this does not provide near the amount of recovery as tort damages.
Until *Hakkila*, intentional infliction of emotional distress was quickly developing into a remedy for spouses who suffered emotional abuse. The rationales used by the New Mexico Court of Appeals no longer apply to the society in which we live. Other jurisdictions have recognized this tort for years without experiencing the adverse effects that the court raised in *Hakkila*. The current majority formulation of intentional infliction of emotional distress has adequate safeguards to dispel arguments that the detrimental aspects of recognition of the tort would outweigh the benefits. New Mexico courts should strictly interpret the law regarding intentional infliction of emotional distress in the context of interspousal relations.

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