Wyoming Law Review

Volume 2 | Number 2 Article 8

January 2002

# Family Law - Wyoming's Adoption of Intentional Infliction of Emotional Distress in the Marital Context - McCulloh v. Drake, 24 P.3d 1162 (Wyo. 2001)

Brandi Monger

Follow this and additional works at: https://scholarship.law.uwyo.edu/wlr

Recommended Citation
Monger, Brandi (2002) "Family Law - Wyoming's Adoption of Intentional Infliction of Emotional Distress in the Marital Context - McCulloh v. Drake, 24 P.3d 1162 (Wyo. 2001)," *Wyoming Law Review*: Vol. 2: No. 2, Article 8.
Available at: https://scholarship.law.uwyo.edu/wlr/vol2/iss2/8

This Case Notes is brought to you for free and open access by the UW College of Law Reviews at Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Wyoming Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

# CASE NOTES

## FAMILY LAW—Wyoming's Adoption of Intentional Infliction of Emotional Distress in the Marital Context. *McCulloh v. Drake*, 24 P.3d 1162 (Wyo. 2001).

### INTRODUCTION

Gerri McCulloh and John Drake were married in March of 1994.[1] Shortly after the wedding Gerri alleged that her husband "commenced a pattern of domestic abuse and violence."[2] Gerri claimed that physical abuse started before the birth of their son in October of 1994.[3] During a visit by John's mother, an argument erupted between John and Gerri.[4] During the argument John allegedly kicked her out of the house and when she returned, he allegedly pushed her down and kicked her in her right leg repeatedly.[5] Gerri was approximately eight months pregnant at the time.[6] Gerri also claimed that John forced her to have anal intercourse even though he knew that she had been molested as a child and was uncomfortable with the practice.[7] Gerri claimed John abused her in other ways such as kicking and jumping on her.[8] Gerri alleged that John also emotionally abused her by yelling at her, threatening to kill her, and on one occasion pulling a gun on her.[9] This pattern of alleged abuse culminated in an incident on September 4, 1997.[10] The couple's son, Ben, woke up in the middle of the night. Gerri went in to take care of him, then came back to bed.[11] Gerri claimed that when she got back into bed there was an argument over how she had handled the situation; she said she did not want to talk about it and rolled over to go to sleep.[12]

---

1. McCulloh v. Drake, 24 P.3d 1162, 1165 (Wyo. 2001).
2. Reply Brief for the Appellant at 2, McCulloh v. Drake, 24 P.3d 1162 (Wyo. 2001) (No. 99-316) [hereinafter Appellant's Reply Brief].
3. Appellant's Opening Brief at 8, McCulloh v. Drake, 24 P.3d 1162 (Wyo. 2001)(No. 99-316) [hereinafter Appellant's Opening Brief].
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 6-7.
8. *Id.* at 9.
9. *Id.* at 9.
10. *Id.* at 14.
11. *Id.*
12. *Id.* at 14.

Gerri claimed that her husband then jumped on top of her, choked her around the neck, and took the pillow and shoved it over her head for around twenty-five seconds.[13]

John claimed that Gerri was being "very cross and sharp" with their son Ben, and he told her to "cut it out."[14] When Gerri came back to bed, they had an argument and he snapped. John stated, "I grabbed the pillow and . . . turned around and back-handed her, pop right in the face."[15]

After the pillow incident Gerri sought a divorce from her husband on December 31, 1997.[16] On October 29, 1998 Gerri filed a complaint asserting various tort claims, including intentional infliction of emotional distress and tortious sexual assault.[17] Gerri requested a jury trial for her tort claims.[18] Her request was denied and the trial court heard evidence on the action for damages along with the divorce proceeding.[19] In its decision the trial court addressed most of the tort claims, finding "that the wife failed 'to state a claim for which relief can be granted; to prove the claim by a preponderance of the evidence; to present sufficient evidence on damages; and/or timely file some allegations.'"[20] However, the trial court found "that the wife did prove a tort occurred in September of 1997 when the husband briefly held a pillow over her face."[21] The trial court awarded the wife damages of $4,250 and punitive damages of $750.[22]

Both parties appealed to the Wyoming Supreme Court. Gerri argued that the trial court's refusal of a jury trial for the tort actions was an error.[23] John questioned whether Wyoming recognized the tort of intentional infliction of emotional distress in a marital context, and if so, whether the elements of that tort were satisfied with regard to the pillow

13. *Id.*

14. Brief of John W. Drake acting as Appellant at 11, McCulloh v. Drake, 24 P.3d 1162 (Wyo. 2001)(No. 99-316)[hereinafter Appellant's Brief].

15. *Id.* at 12.

16. McCulloh v. Drake, 24 P.3d 1162, 1165 (Wyo. 2001).

17. *Id.*

18. *Id.*

19. *Id.* at 1166.

20. *Id.*

21. *Id.*

22. *Id.* at 1168. The amount for punitive damages was based on Wyoming's maximum fine for criminal battery. *Id.*

23. *Id.* at 1169. The wife also appealed the issues of child support, custody and the property settlement, but these issues will not be addressed in this note.

incident.[24] The Wyoming Supreme Court combined the appeals and found that Wyoming recognized the tort of intentional infliction of emotional distress in the marital context and that the tort claims should be separated from the divorce proceeding.[25] The Wyoming Supreme Court also found that the tort claims were improperly joined with the divorce proceeding and should be remanded for a jury trial.[26]

This case note examines the history of the doctrine of spousal immunity in Wyoming and other jurisdictions, as well as how the doctrine has been abrogated in almost all states in the last few years and how other jurisdictions have dealt with the tort of intentional infliction of emotional distress in the marital setting. This note demonstrates that the Wyoming Supreme Court failed to provide a meaningful standard to determine when such conduct will be actionable. It also argues that mandatory separation of tort claims from divorce proceedings conflicts with the Wyoming Rules of Civil Procedure.

## BACKGROUND

### *The History of Spousal Immunity*

The history of spousal immunity is important to the discussion of the issues involved when spouses bring litigation against one another. Spousal immunity was the doctrine that prohibited a husband and wife from suing one another in a court of law.[27] At early common law this immunity was based on the idea that once a woman married, her legal identity merged into that of her husband and therefore she was incapable of entering into contracts or acquiring or disposing of property without her husband's consent.[28] When a woman was married she also gave up her right to sue, unless her husband was joined in the suit.[29] Thus, spouses could not sue one another at common law because the husband would be both plaintiff and defendant.[30]

Some justification for spousal immunity was eroded at the beginning of the 1900s, when most states adopted some form of the mar-

---

24. *Id.* at 1169.
25. *Id.*
26. *Id.* at 1171.
27. Kristin Krohse, *No Longer Following the Rule of Thumb—What To Do With Domestic Torts and Divorce Claims*, 1997 U. ILL. L. REV. 923, 924 (1997).
28. Thompson v. Thompson, 218 U.S. 611, 614-615 (1910).
29. Kroshe, *supra* note 27, at 925.
30. *Id.*

ried women's property acts.[31] These acts allowed a married woman to sue and be sued in law or equity, with or without her husband joined as a party. However, even with these acts, courts were reluctant to change the long-standing doctrine of spousal immunity.[32] Instead they chose to narrowly construe the acts to preserve spousal immunity.[33]

Because family law has typically been solely a matter for state courts, there was only one United States Supreme Court ruling on spousal immunity. The Court ruled on the construction of the District of Columbia's Married Women's Property Act in *Thompson v. Thompson*.[34] The Court construed the Act narrowly, finding that the Act did not allow a wife to bring suit against her husband.[35] The Court also considered the policy implications of creating a liberal interpretation of the Act.[36] The Court feared such interpretation would "open the doors of the courts to accusations of all sorts of one spouse against the other, and bring into public notice complaints for assault, slander, and libel . . . ."[37] After examining these concerns the Court found that if Congress had intended to change the common law so radically it would have expressed such intent clearly.[38]

Justice Harlan joined by Justice Holmes and Hughes dissented from the majority opinion in *Thompson*.[39] In his dissent Harlan argued that the language of Congress was explicit.[40] The plain language allowed a wife to "sue separately, in tort, as if she was unmarried; and in respect to herself, that is, of her person, she may sue, separately as fully and

---

31. While the text of the married women's property acts differs from state to state, the main goal of the acts is to give women a separate legal identity.

32. Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG L. REV. 319, at 327 (1993).

33. *Id.*

34. 218 U.S. 611, 614 (1910). The Supreme Court was faced with the issue of whether the construction of the Married Women's Property Act of the District of Columbia allowed a woman to bring a suit against her husband for assault and battery. *Id.* The relevant portion of the statute states "Married women shall have power to engage in any business, and to contract, whether engaged in business or not, and to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried. . ." D. C. CODE, 31 Stat. 1189, 1374 (1901).

35. *Thompson*, 218 U.S. at 617. The Supreme Court found the purpose of the statue was to remove the requirement that a husband be joined in any action that the wife might bring, so that a wife would be allowed to bring a tort suit in her own name, but the statute was not intended to give the wife a cause of action against her husband. *Id.*

36. *Id.*

37. *Id.* at 617-18.

38. *Id.* at 618. (Harlan, J., dissenting.)

39. *Id.* at 619. (Harlan, J., dissenting.)

40. *Id.* at 621. (Harlan, J., dissenting.)

freely, as if she were unmarried."[41] Harlan maintained if such "result be undesirable on grounds of public policy, it is not within the functions of the court to ward off the dangers feared or evils threatened simply by a judicial construction that will defeat the plainly expressed will of the legislative department."[42]

Other courts relied upon public policy favoring the preservation of marital harmony to avoid regulating marital behavior.[43] Two main policy arguments in favor spousal immunity had been the "domestic harmony" and "privacy" arguments.[44] The domestic harmony argument asserted that states should be committed to the institution of marriage and "should encourage the maintenance of marital relationships, and not provide discontented partners with opportunities for blowing their domestic grievances out of all proportion."[45] The privacy argument contended family life "is an essential feature of society, but at the same time fragile, requiring protection from the incursions of the state."[46]

*The Downfall of Spousal Immunity*

Since the 1970s most states have overturned spousal immunity.[47] For example, in *Townsend v. Townsend,* the Missouri Supreme Court abolished spousal immunity, overruling earlier cases upholding spousal immunity in tort claims.[48] Missouri courts had historically read the state's Married Woman's Property Act narrowly and refused to abrogate common law immunity for interspousal torts, citing policy and a lack of express legislative authority.[49] In *Townsend* the wife was injured when her husband shot her in the back with a shotgun while he was trying to enter her home.[50] The Missouri Supreme Court first questioned whether spousal immunity should be abrogated. The court looked at the relevant section of the Act and found that its broad and inclusive language was not limited, and there was no reason that a wife had the ability to sue everyone but her husband.[51] The court also considered policy arguments

41. *Id.* at 620. (Harlan, J., dissenting.)
42. *Id.* at 621. (Harlan, J., dissenting.)
43. Meredith Taylor, Comment, *North Carolina's Recognition of Tort Liability for the Intentional Infliction of Emotional Distress During Marriage*, 32 WAKE FOREST L. REV. 1261, 1267 (1997).
44. Dalton, *supra* note 32, at 328.
45. *Id.*
46. *Id.*
47. M. Mercedes Fort, *A New Tort: Domestic Violence Gets the Status it Deserves in Jewitt v. Jewitt*, 21 S. ILL U. L. J. 355, 367 (1997).
48. 708 S.W.2d 646 (Mo. 1986) (en banc).
49. *Id.* at 648.
50. *Id.* at 646.
51. *Id.* at 650.

and concluded that in cases such as these there was little marital sanctity left to protect.[52] This case is indicative of the general trend around the country.

*Intentional Infliction of Emotional Distress in the Marital Context*

Many jurisdictions have recently recognized the tort of intentional infliction of emotional distress in the marital setting.[53] This trend has been attributed to "continually expanding application of emotional distress claims outside of family law and . . . a widespread abandonment by many states of interspousal tort immunity."[54] Still the question of whether the tort of intentional infliction of emotional distress should be applied in the marital setting is not without dispute.

A case from Texas may be the best example of the conflicts involved in applying the tort in the marital context. The Supreme Court of Texas recognized the tort of intentional infliction of emotional distress for the first time in the case of *Twyman v. Twyman*.[55] Originally the issue in the case was whether a cause of action existed for negligent infliction of emotional distress.[56] However, while *Twyman* was pending, the court had ruled that Texas did not recognize the tort of negligent infliction of emotional distress.[57] When the Supreme Court of Texas considered Shelia Twyman's allegations it determined her claim was broad enough to encompass a claim for intentional infliction of emotional distress.[58] At the time, Texas did not recognize the tort of intentional infliction of emotional distress, thus the first issue addressed was whether or not Texas recognized this tort.[59] The Texas court decided to join the vast majority of other states and accept the tort as defined in section 46, Re-

52. *Id.*

53. Taylor, *supra* note 43, at 1267.

54. *Id.* at note 48.

55. 855 S.W.2d 619, 621 (Tex. 1993).

56. *Id.* Negligent infliction of emotional distress does not require intentional or recklessly outrageous conduct.

57. *Id.* at 621. The Supreme Court of Texas had declined to recognize the tort or negligent infliction of emotional distress in *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993). *Id.*

58. *Id.* "While this case has been pending, we have refused to adopt the tort of negligent infliction of emotional distress. . . .Thus, the judgment of the court of appeals cannot be affirmed. We consider therefore, whether the court of appeals' judgment may be affirmed on alternate grounds. Because Sheila's pleadings alleging a general claim for emotional harm are broad enough to encompass a claim for intentional infliction of emotional distress, we consider whether the trial court's judgment may be sustained on that legal theory." *Id.* at 621.

59. *Id.* at 621.

statement (Second) Of Torts, including the Restatement definition of outrageous conduct.[60]

The second issue was whether Texas recognized intentional infliction of emotional distress in a divorce proceeding.[61] In deciding this question Texas looked to its past case law and found that Texas had completely abolished the doctrine of spousal immunity as to any cause of action.[62] Thus, the court found no legal impediment for a plaintiff to bring a tort claim in a divorce action based on an intentional act such as assault or battery.[63] After the court found a cause of action for intentional infliction of emotional distress, it remanded the case to determine whether the wife's claim that her husband "intentionally and cruelly attempted to have her engage in deviant sexual acts with him" constituted intentional infliction of emotional distress.[64]

This case is helpful to the spousal immunity analysis not as much for the majority opinion as for the points brought out in the concurring and dissenting opinions.[65] A dissenting opinion by Justices Spector and Doggett[66] and a concurring opinion by Justice Gonzalez[67] suggested that the court should have determined that the conduct in this case

60. *Id.* The Restatement elements of intentional infliction of emotional distress are: 1) the defendant acted intentionally or recklessly, 2) the conduct was extreme and outrageous, 3) the actions of the defendant caused the plaintiff emotional distress, and 4) the emotional distress suffered by the plaintiff was severe. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

61. *Twyman*, 855 S.W.2d at 624.

62. *Id.*

63. *Id.*

64. *Id.* at 620.

65. *Id.* at 622. In this opinion Chief Justice Phillips, Justices Gonzalez, Hightower, and Cornyn, agreed that the Court of Appeals Decision should be reversed. *Id.* Justices Gonzalez, Hightower, and Cornyn formed a plurality recognizing the tort of intentional infliction of emotional distress in the marital context and remanded the case to the trial court for a new trial. *Id.* Chief Justice Phillips recognized the tort of intentional infliction of emotional distress, but refused to apply the tort to married couples. *Id.* at 625. While Justices Hecht and Enoch would not recognize the tort under any circumstance and would reverse. *Id.* at 622. Justices Doggett and Spector recognized the tort in the marital setting and would affirm the decision of the court of appeals. *Id.*

66. *Id.* at 640. The dissenting justices agreed with the majority that there should be a cause of action for intentional infliction of emotional distress, but they would have affirmed the trial court's decision on the theory of intentional infliction of emotional distress and they would also have adopted a cause of action for negligent infliction of emotional distress. *Id.* at 642.

67. *Id.* at 626. "What happened to Shelia Twyman in the case involves grossly offensive conduct which warrants judicial relief. . . . None of William Twyman's actions could be described as negligent, or careless, or accidental. *Id.*

would rise to the standard of extreme and outrageous conduct.[68] A separate concurring and dissenting opinion by Chief Justice Phillips agreed with the majority opinion to recognize the tort of intentional infliction of emotional distress,[69] but disagreed that it should be applied to conduct within the marital relationship.[70] Justice Phillips reasoned that the relationship between married couples is such an intense and personal relationship that it is inevitable parties will suffer emotional distress in times of discord.[71] In another concurring and dissenting opinion, Justice Hecht joined by Justice Enoch disagreed with the majority opinion adopting the tort of intentional infliction of emotional distress.[72] Justices Hecht and Enoch argued that the tort of intentional infliction of emotional distress does not have "sufficiently objective and particular" standards.[73] They found the deficiency in the tort was the term "outrageous," a term they found to be "a very subjective, value-laden concept . . . ."[74] Another problem was the court's failure to apply the new tort to the facts in the case; they argued that the opinion provided little guidance to parties and trial courts in future proceedings, which would increase the likelihood of more appeals arising from the same issue.[75]

The Texas court is not the first to struggle to determine what

---

68. *Id.* at 626.

69. *Id.* at 626. Justice Phillips agreed with the adoption of the tort of intentional infliction of emotional distress, finding that while the tort was not free from conceptual difficulties, it provides a just result in cases where an actor's conduct is not only outrageous, but inflicted intentionally or recklessly with the probability of inflicting emotional distress. *Id* at 627.

70. *Id.* (Phillips, J., dissenting). "In recognizing this tort, however, I would not extend it to actions between spouses or former spouses for conduct occurring during their marriage. *Id.* (Phillips, J., dissenting). Although this Court has abolished interspousal immunity, . . . it does not necessarily follow that all conduct actionable between strangers is automatically actionable between spouses." *Id.* (Phillips, J., dissenting).

71. *Id.* (Phillips, J., dissenting).

72. *Id.* at 629. (Hecht, J., dissenting.)

73. *Id.* (Hecht, J., dissenting). "[C]onduct for which the common law offers redress by an award of damages should be defined by standards sufficiently objective and particular to allow a reasonable assessment of the likelihood that certain behavior may be found to be culpable, and to adjudicate liability with some consistency." *Id.* (Hecht, J., dissenting).

74. *Id.* (Hecht, J., dissenting). "To award damages on an I-know-it-when-I-see-it basis is neither principled nor practical." *Id.* (Hecht, J., dissenting). Justices Hecht and Enoch were troubled by the fact that the court found a new cause of action, even though neither of the parties requested the adoption of intentional infliction of emotional distress. *Id.* at 637. (Hecht, J., dissenting). "Today's decision might as well issue in a law review article based upon hypothetical situations or decisions in other jurisdictions as in an opinion in this case; its holding is more an abstract statement of the law than a determination of the case before it." *Id.* (Hecht, J., dissenting).

75. *Id.* at 637-38.

constituted "extreme and outrageous" behavior that would create a cause of action for intentional infliction of emotional distress.[76] This struggle has led to differing views in determining what conduct is sufficient for a claim of intentional infliction of emotional distress in the marital setting.[77]

*What is Outrageous Behavior in the Marital Context?*

In *Hakkila v. Hakkila*, the Court of Appeals for New Mexico was faced with the issue of whether one spouse should have a cause of action against the other for intentional infliction of emotional distress.[78] The husband in this case argued, as Chief Justice Phillips did in his dissent in *Twyman*, "that as a matter of public policy one spouse should have no cause of action against the other spouse for intentional infliction of emotional distress."[79] The court rejected the husband's argument, but went on to state "the policy grounds opposing recognition of the tort in this context counsel caution in permitting lawsuits of this nature."[80] The court found that New Mexico had adopted the tort of intentional infliction of emotional distress as set out in the Restatement (Second) of Torts.[81] In addition to adopting the tort, New Mexico had also abrogated immunity for interspousal torts in prior cases.[82] However, the court found that the abolition of spousal immunity did not mean the marital relationship must be ignored when considering the scope of liability.[83] The court considered the policy for restricting the scope of intentional

76. *See also*, Hakkila v. Hakkila, 812 P.2d 1320 (N.M. Ct. App. 1991) (overturning a jury award that husband's conduct was extreme and outrageous, the conduct included battery, yelling at her in front of guests and locking her out of her house in a bathrobe); Henriksen v. Cameron, 622 A.2d 1135 (Me. 1993) (Affirming a jury award that a husband's conduct was extreme and outrageous, the conduct included physical violence, smashing cabinets, and rape.).

77. Taylor, *supra* note 43, at 1269-72. This article examined how different courts have dealt with the issue. *Id.* First, looking at *Hakkila* at 812 P.2d at 1320, where the court refused to find that husband's conduct was extreme and outrageous enough to provide a cause of action for intentional infliction of emotional distress. *Id.* at 1269-70. Then comparing that result to the result in *Bhama v. Bhama*, 425 N.W.2d 733 (Mich. Ct. App. 1988), where the wife's allegations that her husband had brainwashed their children into rejecting her were enough to allow the jury to consider recovery on remand. *Id.* at 1271.

78. *Hakkila*, 812 P.2d at 1323.

79. *Id.* at 1322-23.

80. *Id.* at 1323.

81. *Id.* The New Mexico Supreme Court adopted the tort in *Ramirez v. Armstrong*, 673 P.2d 822, 824 (1983). *Id.*

82. *Id.* New Mexico had abandoned immunity for interspousal torts. *See* Maestas v. Overton, 531 P.2d 947 (1975) (wrongful death in an airplane crash). Flores v. Flores, 506 P.2d 345 (Ct. App. 1973) (intentional stabbing).

83. *Hakkila*, 812 P.2d at 1323.

infliction of emotional distress when it is applied in the marital setting.[84] First, the court examined the elements for intentional infliction of emotional distress, observing that conduct must be "extreme and outrageous."[85] The court found these considerations suggest "a very limited scope for the tort in the marital context."[86] The court stated, "not only should intramarital activity ordinarily not be the basis for tort liability, it should also be protected against disclosure in tort litigation."[87] The court concluded that "when the tort of outrage should be recognized in the marital setting, the threshold of outrageousness should be set high enough . . . that the social good from recognizing the tort will not be outweighed by unseemly and invasive litigation of meritless claims."[88]

After setting this foundation for establishing the scope of liability, the court considered the claims in the case.[89] The findings established that the husband had insulted his wife in the presence of guests, assaulted and battered her on numerous occasions, refused to have sexual relations, used excessive force when they did have sexual relations, and blamed his sexual inadequacies on her.[90] In considering the merits of the wife's claims, the court found that they did not meet the legal standard of outrageous conduct.[91] In making this decision the court found that the conduct of the husband was not "beyond the bounds of decency."[92] This case illustrates the high bar New Mexico has set for recovery under a claim for intentional infliction of emotional distress in the marital context.

In *Henriksen v. Cameron*, Maine adopted the tort of intentional infliction of emotional distress in the marital context.[93] The wife sued her ex-husband for intentional infliction of emotional distress resulting

84. *Id.*

85. *Id.* at 1324. In considering why there is a requirement for the "extreme and outrageous" conduct the court finds several reasons compelling. *Id.* First is the "freedom to vent emotions in order to maintain our mental health." *Id.* Second, is "that there may be a protected liberty interest in conduct that would otherwise be tortuous." *Id.* Finally, the requirement "provides reliable confirmation of two other elements of the tort – injury and causation – thereby reducing the possibility of unfounded, or even fraudulent, lawsuits." *Id.*

86. *Id.*

87. *Id.* at 1325.

88. *Id.* at 1326. In this case the court uses the tort of outrage interchangeably with intentional infliction of emotional distress.

89. *Id.*

90. *Id.* at 1321.

91. *Id.* at 1327.

92. *Id.* Finding that the husband was free to refrain from intercourse and there was no evidence to show that his other conduct caused severe emotional pain. *Id.*

93. 622 A.2d 1135, 1138 (Me. 1993).

from physical and psychological abuse during their marriage.[94] The wife claimed that during their marriage her husband called her names, came after her while breaking glass in the kitchen cabinets, accused her of sleeping with his brother, threatened to burn their home down, and raped her.[95] The jury found in her favor, awarding $75,000 in compensatory damages and $40,000 in punitive damages.[96] The case came to the Supreme Judicial Court of Maine on appeal.[97] The court considered the issue of "whether physical violence accompanied by verbal abuse that was intended to inflict emotional distress is, by virtue of the mutual concessions implicit in marriage, privileged or not tortious because the parties were married to one another when the violence occurred."[98] Its answer was that such behavior is not privileged by marriage.[99] Recognizing the policy concerns of frivolous litigation, the court set a high threshold for outrageousness.[100] Quoting the New Mexico Court of Appeals in *Hakkila*, the Maine court found that "the threshold of outrageousness should be set high enough . . . that the social good from recognizing the tort will not be outweighed by unseemly and invasive litigation of meritless claims."[101] After setting out the framework for determining when there is a cause of action for intentional infliction of emotional abuse, the court ruled on the merits of the case. The court found the husband's conduct was extreme and outrageous and affirmed the jury's verdict.[102]

The appellate courts in *Hakkila* and *Henriksen* both used the Restatement (Second) of Torts definition of outrageous, yet came to different decisions about whether the conduct complained of was outrageous.[103]

Another example of how the tort of intentional infliction of emotional distress in the marital setting has been decided is the Texas decision in *Massey v. Massey*.[104] Gayle Massey complained that her husband belittled her in front of others, had outbursts that resulted in property destruction, withheld marital funds, and threatened to tell their children

94. *Id.*
95. *Id.* at 1137.
96. *Id.* at 1138.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 1138-39.
101. *Id.* at 1139 (*quoting* Hakkila v. Hakkila, 812 P.2d 1320, 1326, (N.M. Ct. App. (1991)).
102. *Id.*
103. *See* Kroshe, *supra* note 27, at 932 n. 80 (comparing the similar conduct that was actionable in *Henriksen* to the conduct in *Hakkila* that was found to be unactionable).
104. 807 S.W.2d 391 (Tex. Ct. App. 1991).

and friends that she was having an affair.[105] However, she made no claims of physical violence by her husband.[106] The jury agreed with Gayle that her husband's conduct was extreme and outrageous and awarded her $362,00 in damages.[107] The case came to the Texas Supreme Court shortly after the decision in *Twyman v. Twyman.* However, this time, instead of remanding to the trial court, the Texas Supreme Court found the evidence supported the jury's findings.[108] This case illustrates that intentional infliction of emotional distress can be used in situations where there is no physical abuse. In a dissenting opinion Judge Hecht reiterated his objections to the intentional infliction of emotional distress standard, "the standard by which outrageousness is to be measured is the personal opinion of the person asked to decide. That is not a workable legal standard."[109] He argued that "[w]ithout standards for guidance, the jury may be incited to act out of simple dislike for the defendant."[110]

These cases illustrate the problem of subjectivity when determining whether the conduct of a spouse will be considered actionable as a claim for intentional infliction of emotional distress. Because there are no objective guidelines to determine if conduct is "extreme and outrageous" the determination is left to the subjective determination of a judge or jury. In conjunction with the issue of determining the standard for outrageous conduct, courts are also faced with the problem of whether tort claims should be joined with a divorce proceeding.[111]

*Joinder*

The Texas Supreme Court stated in its opinion in *Twyman,* "the more difficult issue is when the tort claim must be brought and how the tort award should be considered when making a 'just and right' division of the marital estate."[112] The Texas court looked to states that already dealt with the issue of joinder. It found that several states required the tort claim to be litigated separately from the divorce proceeding.[113]

---

105. *Id.* at 399.
106. *Id.*
107. Massey v. Massey, 867 S.W.2d 766, (Tex. 1993).
108. *Id.*
109. *Id.* (Hecht, J., dissenting).
110. *Id.* at 767. (Hecht, J., dissenting).
111. Bradley A. Case, *Turning Marital Misery into Financial Fortune: Assertion of Infliction of Emotional Distress Claims by Divorcing Spouses*, 33 U. LOUISVILLE J. FAM. L. 101, 115 (1994).
112. Twyman v. Twyman, 855 S.W.2d, 619, 624 (Tex. 1993).
113. *Id.* The Texas Court lists the following decisions prohibiting joinder; *Walther v. Walther*, 709 P.2d 387, 388 (Utah 1985), *Windauer v. O'Conner*, 107 Ariz. 267, 485

While, other states required joinder of the two claims.[114] The Supreme Court of Texas decided the best approach was somewhere between the two extremes. The court ruled that joinder of the tort claim "should be permitted, but subject to principles of *res judicata*."[115] This approach leaves the ultimate decision of how claims are tried with the trial judge.[116] While the Texas court left the decision of whether to try the claims together up to the trial judge, other jurisdictions require joinder of the tort claims with the divorce proceedings.[117]

The arguments for requiring joinder of the two actions are judicial economy, reducing litigation costs, and reducing the emotional toll on the parties.[118] Proponents of mandatory joinder argue that usually the same underlying facts are involved in both the tort claim and in certain aspects of the divorce action. Thus, trying these two actions together encourages judicial economy and decreases cost by avoiding two trials.[119] Also, one proceeding is better because it settles the matter more quickly, allows the parties to get on with their lives, and does not require them to revisit issues they would rather forget.[120]

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.[121] Justice Donnelly came to this decision after considering the problems associated with having a tort claim joined with a divorce proceeding.[122]

Jurisdictions have mandated that tort claims should be tried sepa-

---

P.2d 1157 (Ariz. 1971), *Simmons v. Simmons*, 773 P.2d 602, 605 (Colo. Ct. App. 1988). *Id.*

114. *Id.* The Texas Court lists the following decisions requiring the two claims be joined; *Tevis v. Tevis*, 79 N.J. 422, 400 A.2d 1189, 1196 (N.J. 1979), *Weil v. Lammon*, 503 So.2d 830, 832 (Ala.1987). *Id.*

115. *Id.* at 624.

116. *Id.* at 624-625.

117. *See*, Tevis v. Tevis, 79 N.J. 422, 400 A.2d 1189, 1196 (N.J. 1979); Weil v. Lammon, 503 So.2d 830, 832 (Ala.1987).

118. Case, *supra* note 111, at 118-19.

119. *Id.* at 118.

120. *Id.* at 119.

121. Hakkila v. Hakkila, 812 P.2d 1320, 1331 (N.M. Ct. App. 1991) (Donnelly, J., concurring).

122. *Id.* (Donnelly, J., concurring). Judge Donnelly argued that combining tort claims with divorce proceedings would require courts to deal with extraneous issues, including trial by jury. *Id.* (Donnelly, J., concurring). He was also concerned about the tension between fees for divorce proceedings and contingent fees for tort claims. *Id.* (Donnelly, J., concurring).

rately from the divorce proceeding because of the distinct nature of the claims.[123] For example, the Maine court found that divorce proceedings should be separate from tort actions because the purpose of a tort claim is to redress a legal wrong in damages, while the divorce proceeding is to sever the marital relationship between the parties.[124] The Maine court also found that "resolution of tort claims may necessarily involve numerous witnesses and other parties . . . [c]onsequently, requiring joinder of tort claims could unduly lengthen the period of time before a spouse could obtain a divorce . . . ."[125]

Utah has also followed this principle.[126] In *Lord v. Shaw*, the Utah Supreme Court found that a wife was not precluded from suing her husband on various tort claims because the claims were not barred by the divorce proceedings.[127] The Utah court found:

> [A]ctionable torts between married people should not be litigated in a divorce proceeding. We believe that divorce actions will become unduly complicated in their trial and disposition if torts can be or must be litigated in the same actions. A divorce proceeding is highly equitable in nature, whereas the trial of a tort claim is at law and may well involve, as in this case, a request for trial by jury. The administration of justice will be better served by keeping the two trials separate.[128]

While most jurisdictions have adopted the approach of requiring tort claims to be kept separate from divorce proceedings, criticism arises because this approach ignores most rules of civil procedure which allow the joinder of all claims a party has against an opponent.[129]

---

123. *See* Henrikson v. Cameron, 622 A.2d 1135, (Me. 1993); Lord v. Shaw, 665 P.2d 1288 (Utah 1983); and Simmons v. Simmons, 773 P.2d 602 (Colo. Ct. App. 1998).

124. *Henrikson*, 622 A.2d at 1141.

125. *Id.*

126. *Lord*, 665 P.2d 1288. This was also the position taken by the Colorado Court of Appeals in *Simmons v. Simmons*, 773 P.2d 602 (Colo. Ct. App. 1998). *Id.*

127. *Id.* However the wife was barred from recovery based on the statute of limitations. *Id.*

128. *Id.*

129. Case, *supra* note 111, at 118. For example the Wyoming Rules of Civil Procedure provide "[a] party assering a claim to relief as an original claim . . . may join . . . as many claims, legal, or equitable, as the party has against an opposing party." WYO. R. CIV. P. 18(a).

*History of Spousal Immunity in Wyoming*

One of the earliest cases in Wyoming that addressed the issue of spousal immunity for tort claims was *McKinney v. McKinney*.[130] In *McKinney*, a wife brought a negligence suit against her husband for injuries she sustained in an automobile accident.[131] The issue on appeal was whether a wife could maintain an action against her husband for gross negligence.[132] At the time, Wyoming had adopted the Married Women's Act, which provided that "any woman may, while married, sue and be sued in all matters having relation to her property, person or reputation, in the same manner as if she were sole."[133] After considering the language of the Act, the Wyoming Supreme Court found the language was intended to protect women's separate property, not overturn the common law rule of spousal immunity.[134] The Wyoming Supreme Court concluded that the Legislature did not intend the Act to create a tort cause of action between husband and wife and upheld the common law doctrine of spousal immunity.[135]

*McKinney* was decided in 1943 and was controlling law until 1987 when Wyoming abrogated interspousal tort immunity in the case of *Tader v. Tader*.[136] *Tader*, like *McKinney* involved a negligence suit for injuries received in an automobile accident.[137] The accident occurred when a rental car driven by the husband went into a skid and struck another vehicle head-on, injuring the wife. In its decision, the Wyoming Supreme Court found two persuasive reasons for abrogating spousal immunity.[138] First, the Wyoming Supreme Court reasoned that "a direction of the Wyoming jurisprudence that affords liability for negligence without 'only ifs' or 'but not nows' gives cogently justified and ration-

130. 59 Wyo. 204, 135 P.2d 940 (1943).

131. *Id.* at 940. The husband had been driving about 75 miles per hour on a slippery highway when he took a curve and the car went out of control, rolling six or eight times. *Id.*

132. *Id.* at 941.

133. WYO. REV. STAT § 69-103 (1931).

134. *McKinney*. 135 P.2d at 942.

135. *Id.* at 950-951. The Wyoming Supreme Court looked at the history of the Married Women's Act and found that it had been a territorial act that was carried forward when the territory became a state. *Id.* at 942. The court found no conclusive language within the Act to suggest that it was intended to repeal the common law doctrine of spousal immunity. *Id.* at 942.

136. 737 P.2d 1065 (Wyo. 1987). This case involved a wife that was suing her husband for injuries she sustained in a car accident that was caused by her husband. *Id.* at 1065-66.

137. *Id.* at 1065.

138. *Id* at 1068.

ally understood justice to our citizens."[139] The court suggested that a comprehensive standard that applied evenly to everyone was more desirable.[140] Second, the court considered the rights provided in the Wyoming Constitution and found "it is hard to find a philosophic basis in constitutional guarantees to justify an exception when one spouse through negligence or intentional conduct injures another."[141] In coming to this conclusion it considered rights granted for due process and uniform operation of law and decided all citizens deserved equal protection of the law.[142]

The Wyoming Supreme Court considered the traditional argument of domestic harmony and concluded that it could not "foresee that personal injury suits between spouses will be any more damaging to marital harmony than the multiplicity of property and contract actions currently permitted."[143] The Wyoming Supreme Court concluded that *McKinney* was no longer good law and that interspousal tort immunity should be abrogated in Wyoming.[144]

*History of Intentional Infliction of Emotional Distress in Wyoming*

Originally there was no common law tort for emotional distress.[145] Courts feared that adopting a cause of action for intentional infliction of emotional distress would flood the court system with frivolous claims.[146] Despite this fear, most jurisdictions began recognizing the idea that emotional distress warrants some sort of recovery and most states have adopted the tort of intentional infliction of emotional distress.[147] Wyoming formally adopted the tort of intentional infliction of

---

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* "No person shall be deprived of life liberty, or property without due process of law." WYO. CONST. Art. 1 § 6; "All laws of general nature shall have uniform operation." WYO. CONST. Art. 1 § 34.

143. *Tader,* 737 P.2d at 1069 (*quoting* Townsend v. Townsend, 708 S.W.2d 646, 650 (Mo. 1986)).

144. *Id.* at 1069. The Wyoming Supreme Court also found that this decision should be applied both prospectively and retroactively to any cause of action not yet matured or awaiting judgment. *Id.*

145. Taylor, *supra* note 43, at 1262.

146. Leithead v. American Colloid Company, 721 P.2d 1059, 1065 (Wyo. 1986).

147. Taylor, *supra* note 43, at 1262. Forty-seven states have adopted the Restatement (second) version of intentional infliction of emotional distress; American Road Serv. Co. v. Inmon, 394 So. 2d. 361, 365 (Ala. 1980); Richardson v. Fairbanks N. Star Borough, 705 P.2d 454, 456 (Alaska 1985); Savage v. Boies, 77 Ariz. 355, 272 P.2d 349, 351 (Ariz. 1954); M.B.M Co. v. Counce, 268 Ark. 269, 596 S.W.2d 681, 687 (Ark. 1980); State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282, 285

emotional distress in *Leithead v. American Colloid Company*.[148] *Leithead* involved an employment contract in which the plaintiff argued that his employer had intentionally inflicted emotional distress by firing him without cause.[149] Before the court could decide whether the conduct of the employer constituted intentional infliction of emotional distress the court had to determine whether to recognize the tort in Wyoming.[150] At the time *Leithead* was decided the court had recently recognized a cause of action for emotional distress in *Waters v. Brand* by allowing recovery for false imprisonment.[151] In *Waters,* the defendant had placed the plaintiff under an unauthorized arrest and held him by threat of force.[152] The plaintiff sought and was given compensatory and exemplary damages

---

(Cal. 1952); Rugg v. McCarty, 173 Colo. 170, 476 P.2d 753, 756 (Colo. 1970); Petyan v. Ellis, 200 Conn. 243, 510 A.2d 1337, 1342 (Conn. 1986); Cummings v. Pinder, 574 A.2d 843, 845 (Del. 1990); Metropolitan Life Ins. Co. v. McCarson, 467 So. 2d 277, 278 (Fla. 1985); Yarbray v. Southern Bell Tel. & Tel. Co., 261 Ga. 703, 409 S.E.2d 835, 837 (Ga. 1991); Hatfield v. Max Rouse & Sons N.W., 100 Idaho 840, 606 P.2d 944, 953 (Idaho 1980); Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E. 157, 165 (Ill. 1961); Cullinson v. Medley, 570 N.E.2d 27, 31 (Ind. 1991); Amsden v. Grinnell Mut. Reinsurance Co., 203 N.W.2d 252, 253 (Iowa 1972); Dawson v. Assocs. Fin. Servs. Co. of Kan., 529 P.2d 104, 113 (Kan. 1974); Craft v. Rice, 671 S.W.2d 247, 249 (Ky. 1984); White v. Monsanto Co., 585 So. 2d 1205, 1209 (La. 1991); Vicnire v. Ford Motor Credit Co., 401 A.2d 148, 154 (Me. 1979); Harris v. Jones, 281 Md. 560, 380 A.2d 611, 613 (Md. 1977); George v. Jordan Marsh Co., 359 Mass. 244, 268 N.E.2d 915, 921 (Mass. 1971); Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 438 (Minn. 1983); Pretsky v. Southwestern Bell Tel. Co., 396 S.W.2d 566, 568 (Mo. 1965); Paasch v. Brown, 193 Neb. 368, 227 N.W.2d 402, 404 (Neb. 1975); Star v. Rabello, 97 Nev. 124, 625 P.2d 90, 92 (Nev. 1981); Morancy v. Morancy, 134 N.H. 493, 593 A.2d 1158, 1159 (N.H. 1991); Buckley v. Trenton Savings Fund Soc., 111 N.J. 335, 544 A.2d 857, 864 (N.J. 1988); Newberry v. Allied Stores, Inc., 108 N.M. 424, 773 P.2d 1231, 1239 (N.M. 1989); Fischer v. Maloney, 43 N.Y.2d 553, 373 N.E.2d 1215, 1217, 402 N.Y.S.2d 991 (N.Y. 1978); Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325, 335 (N.C. 1981); Muchow v. Lindblad, 435 N.W.2d 918, 923-24 (N.D. 1989); Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of Am., 453 N.E.2d 666, 671 (Ohio 1983); Breeden v. League Servs. Corp., 575 P.2d 1374, 1376 (Okla. 1978); Champlin v. Washington Trust Co., of Westerly, 478 A.2d 985, 988 (R.I. 1984); Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776, 778 (S.C. 1981); Groseth Intern., Inc. v. Tenneco, Inc., 410 N.W.2d 159, 169 (S.D. 1987); Medlin v. Allied Inv. Co., 217 Tenn. 469, 398 S.W.2d 270, 272 (Tenn. 1966); Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344, 346-47 (Utah 1961); Shelta v. Smith, 136 Vt. 472, 392 A.2d 431, 432 (Vt. 1978); Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145, 148 (Va. 1974); Grimsby v. Samson, 85 Wash. 2d 52, 530 P.2d 291, 295 (Wash. 1975); Harless v. First Nat'l Bank, 169 W.Va. 673, 289 S.E.2d 692, 703-05 (W.Va. 1982); Alsteen v. Gehl, 21 Wis. 2d 349, 124 N.W.2d 312, 316 (Wis. 1963); Leithead v. American Colloid Co., 721 P.2d 1059, 1065 (Wyo. 1986). *Twyman*, 855 S.W.2d at 622-623 n.7.

148. 721 P.2d 1059 (Wyo. 1986).

149. *Id.* at 1061.

150. *Id.* at 1065.

151. Waters v. Brand, 497 P.2d 875 (Wyo. 1972).

152. *Id.* at 876.

during a jury trial.[153] On appeal the defendant claimed that the plaintiff failed to prove damages because there was no physical harm.[154] The court disagreed, finding that a "plaintiff may recover such sum as will fairly and reasonably compensate him for . . . mental anguish the evidence shows that he suffered by virtue of the false imprisonment."[155] Based in part on the *Waters* decision, the Wyoming Supreme Court reasoned that if "a person can recover for negligently inflicted harm, then without question they should have a cause of action for intentional harm."[156] Joining a vast majority of other states, Wyoming adopted the tort of intentional infliction of emotional distress as defined by the Restatement (Second) of Torts.[157] The Restatement definition required the conduct to be "extreme and outrageous" and cause "severe emotional distress to another."[158] Outrageous conduct is defined by the Restatement (Second) as "conduct which goes beyond all possible bounds of decency, is regarded as atrocious, and is utterly intolerable in civilized society."[159] After the court recognized a cause of action it found that it was for "the court to determine, in the first instance, whether the conduct may reasonably be regarded as so extreme and outrageous as to permit recovery."[160] The court reasoned that these limits "together with the jury's common sense" would protect courts from being flooded with "fraudulent or frivolous claims."[161]

## PRINCIPAL CASE

The Wyoming Supreme Court in *McCulloh* affirmed the trial court's decision that intentional infliction of emotional distress should be recognized in the marital setting.[162] However, the court found the cause of action for intentional infliction of emotional distress should be separated from the divorce proceedings. It then remanded the tort action for a jury trial.[163]

---

153. *Id.*
154. *Id.* at 877-78.
155. *Id.*
156. Leithead v. American Colloid Company, 721 P.2d 1059, 1066 (Wyo. 1986).
157. *Id.* At the time thirty-seven jurisdictions had adopted the tort and only Kentucky, Indiana, and Texas had explicitly rejected the claim. *Id.* Currently, forty-seven states have adopted the tort including Texas in *Twyman*. Twyman v. Twyman, 855 S.W.2d 619, 622.
158. *Leithead*, 721 P.2d at 1066.
159. *Id.* at 1066 (*citing* RESTATEMENT (SECOND) TORTS § 46 (1965)).
160. *Id.*
161. *Id.*
162. McCulloh v. Drake, 24 P.3d 1162, 1170 (Wyo. 2001).
163. *Id.* at 1171.

A unanimous Wyoming Supreme Court first determined whether Wyoming should adopt the tort of intentional infliction of emotional distress in the marital setting. The court started by considering historic arguments of regulating conduct within the marital setting.[164] Here the court found three major concerns associated with allowing civil relief among married people: (1) The fear of opening the courts to frivolous litigation; (2) the intensely intimate relationship between husband and wife, making emotional distress likely in the event of discord; and (3) whether the inquiry into the conduct is too great an intrusion into the marriage.[165] After acknowledging these concerns, the court questioned whether "legal intrusion into behavior which occurs within a marriage is appropriate and whether legal relief in addition to a divorce is justified for an intentional infliction of emotional distress claim . . . ."[166] The court answered these questions in the affirmative, finding that while "the preservation of marital harmony is a respectable goal, behavior which is truly outrageous and results in severe emotional distress should not be protected in some sort of misguided attempt to promote marital peace."[167] "In coming to this decision, we also identified the responsibility to guard against frivolous litigation. Only situations involving atrocious and outrageous behavior should be compensated."[168] The court directed trial courts to be especially cautious when handling these claims, suggesting that summary judgment should be used to protect defendants from frivolous claims.[169]

*Joinder*

The Wyoming Supreme Court agreed with Gerri McCulloh that her tort claim should have been separated from the divorce proceeding and that the tort issue should have been submitted to a jury. The court reasoned that "[a] civil action in a tort is fundamentally different from a divorce proceeding . . . and the procedure involved in divorce actions . . . makes joining tort claims impracticable."[170] In making its decision the

---

164. *Id.* at 1169.

165. *Id.*

166. *Id.*

167. *Id* Emotional distress is as real and tormenting as physical pain, and psychological well-being deserves as much legal protection as physical well being." *Id.* (*quoting* Henriksen v. Cameron, 622 A.2d 1135, 1139 (Me. 1993)).

168. *Id.* at 1169.

169. *Id.* The court stated "[a]ccordingly, we intend for motions for summary judgment to be carefully considered in an effort to protect defendants from the possibility of long and intrusive trials on frivolous claims." *Id.*

170. *Id.* at 1170. The Wyoming Supreme Court also states "[t]he goal to promote judicial economy should not be sought at the expense of fair and proper consideration of the parties' issues." *Id.*

court also considered the effect of a tort claim prolonging the resolution of the divorce proceedings.[171] The court feared that complicated tort issues could "unduly lengthen the period of time before a spouse could obtain a divorce and result in such adverse consequences as delayed child custody and support decisions."[172] Accordingly, the court remanded the tortious sexual assault claims that the trial court had dismissed for a jury trial.[173]

Because the court's opinion precluded tort actions from being joined with the divorce proceedings it was "compelled to address how the doctrine of *res judicata* affects this situation."[174] Four criteria determine the applicability of *res judicata*, including a requirement that the issues in the claims have identical subject matter.[175] The court found that the issues in a tort case were fundamentally different, because a divorce deals with the dissolution of marriage and a tort is for monetary damages.[176] Therefore, the two issues do not meet the requirement for identical subject matter and the doctrine of *res judicata* did not apply and did not serve as a bar for the subsequent action.[177] The court concluded that "the efficient administration of divorce actions requires their separation from actions at law and such separation of the claims will not trigger the *res judicata* doctrine."[178]

## ANALYSIS

The decision of the Wyoming Supreme Court in *McCulloh v. Drake* correctly allowed an action for intentional infliction of emotional distress in the marital setting. However, by offering little guidance as to what standard applied in determining whether conduct is actionable, the court left the determination in the hands of trial judges. In addition, by

171. *Id.*
172. *Id.*
173. *Id.* at 1172. In her original complaint Gerri requested a jury trial for other complaints of sexual assault. However, the trial court refused to grant the jury trial and decided that there was not a sufficient showing of fact to prove her claims of tortious sexual assault. *Id.* However, the Wyoming Supreme Court ruled that it was an error not providing a jury trial for all the tort claims, so the claims for tortious sexual assault were remanded for a jury trial. *Id.*
174. *Id.* at 1171. The court described *res judicata* as the doctrine precluding the presentation of claims that have been resolved in an earlier judgment. *Id.*
175. *Id.* The first requirement is that parties are identical, second, is that the subject matter is identical, third, is that the issues were the same and related to the subject matter, and finally that the capacities of the persons were identical in reference to both the subject matter and the issues between them. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*

mandating that tort claims be separate from divorce proceedings, the court ignored the contradictory effect this decision had on the Wyoming Rules of Civil Procedure allowing joinder of claims against the same defendant.

*Claim for Intentional Infliction of Emotional Distress in the Marital Setting*

Adopting a claim of intentional infliction of emotional distress in the marital setting was the correct legal conclusion. The decision conformed to precedent. Wyoming has abrogated spousal immunity and adopted the tort of intentional infliction of emotional distress, so there is no legal obstacle to a spouse bringing a claim for intentional infliction of emotional distress. In its decision in *McCulloh*, the Wyoming Supreme Court recognized that "emotional distress is as real and tormenting as physical pain, and psychological well-being deserves just as much legal protection as physical well-being."[179] The opinion also stated "[w]e are convinced 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."[180] The recognition of intentional infliction of emotional distress in the marital setting was an important statement that certain kinds of extremely abusive behavior are socially unacceptable and are not protected by spousal immunity.[181]

*No Meaningful Standard for Actionable Conduct*

Although the Wyoming Supreme Court made the right decision in *McCulloh* by adopting the tort of intentional infliction of emotional distress in the marital setting, it provided little guidance on what conduct would be actionable. The Restatement (Second) of Torts definition of extreme and outrageous conduct provided no meaningful standard to guide trial courts, plaintiff and practitioners in determining what conduct would be actionable. Instead the court emphasized, "that a high standard for recovery exists and direct[s] trial courts to be especially cautious when handling such claims."[182] The court also set forth the requirement that a plaintiff must show a defendant's conduct was so "extreme and outrageous" that it exceeded "all possible bounds of decency."[183] The problem with the Restatement definition of outrageous conduct is that it is a subjective standard. Judge Hecht of the Texas Supreme Court argued

179. *Id.* at 1169.
180. *Id.* at 1170.
181. Taylor, *supra* note 43, at 1276.
182. *McCulloh*, 24 P.3d at 1169.
183. *Id.* at 1170. (*quoting* RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

in his dissenting opinion in *Massey*, "the standard by which outrageousness is to be measured is the personal opinion of the person asked to decide. That is not a workable legal standard."[184] He argued that "[w]ithout standards for guidance, the jury may be incited to act out of simple dislike for the defendant."[185] Asking judges and juries to substitute their judgment for a clear legal standard leaves them with too much control and the potential for inconsistent results.

Such varying results are evident in cases from other jurisdictions. Consider the cases of *Hakkila, Henriksen,* and *Massey*.[186] While the exact conduct in these cases differed, *Hakkila* and *Henriksen* involved emotional abuse along with physical violence, while *Massey* involved only emotional abuse.[187] These cases also involved a situation where a jury had awarded a wife damages based on its finding that the husband's conduct was "extreme and outrageous." While the courts in *Massey* and *Henriksen* upheld the damage awards, the *Hakkila* court overturned the jury award, finding the husband's conduct was not sufficiently extreme and outrageous, although the conduct was very similar to that in *Massey*, and also included physical abuse. These cases illustrate the inconsistencies with the tort of intentional infliction of emotional distress in the marital setting. The decision is often left to individual judges and their sense of morality, with little or no guidance in how the tort should be defined.[188]

In the case of *McCulloh* it may have been helpful for the Wyoming Supreme Court to define and apply standards for outrageous conduct to the facts in the case. However, the Wyoming Supreme Court sent the case back to the trial court to be decided in accordance with its opinion in *McCulloh*.[189] Without well-defined standards, it is hard for parties and practitioners to determine what conduct would be considered extreme and outrageous when determining whether to bring suit. Looking to other jurisdictions is not helpful because, as already noted, there is no uniform rule among the different jurisdictions as to what should be the standard for recovery. For example, Texas has a relatively low threshold for recovery while New Mexico has made recovery in these cases very

184. Massey v. Massey, 867 S.W.2d 766 (Tex. 1993) (Hecht, J., dissenting).
185. *Id.* at 767. (Hecht, J., dissenting.)
186. *See Hakkila,* 812 P.2d 1320; *Henriksen*, 622 A.2d 1135; *Massey*, 807 S.W.2d 391.
187. *See id.*
188. *Id.* (Hecht, J., dissenting). In his opinion Judge Hecht went on to say, "I know of no other cause of action so lacking in standards as intentional infliction of emotional distress. Each case that arises demonstrates the impossibility of deriving any legal principle or rule of law from determinations of outrageousness." *Id.* (Hecht, J., dissenting).
189. *McCulloh*, 24 P.3d at 1173.

difficult.[190] In its opinion in *McCulloh* the Wyoming Supreme Court found that "[w]here reasonable men may differ, it is for the jury . . . to determine whether, in a particular case, the conduct has been sufficiently extreme and outrageous to result in liability."[191] Because the court did not create any meaningful standard, there is an increased chance of future appeals.[192] At some point the court will have another opportunity to address what they consider "extreme and outrageous" conduct, either through an appeal from summary judgment or an appeal from a jury verdict. The court was correct that juries are in the best position to decide if conduct is "beyond all bounds of decency."[193] However, if the court decides to leave the decision in the hands of juries, then the jury decision should be given a great amount of weight on appeal to avoid situations like that in *Hakkila*, where the appellate court substituted its own judgment on the facts rather than relying on the judgment of the jury.

*Issues of Joinder*

In dealing with the issue of joinder the Wyoming Supreme Court mandated tort claims be separated from the divorce proceedings.[194] This decision was based on the court's concerns that a divorce proceeding may be unduly complicated by the tort claim and that a jury trial may be requested for the tort claim.[195] While prohibiting joinder is the path taken by a majority of courts, the better solution is to allow permissive joinder of claims.

By requiring tort claims separated from divorce proceedings, the Wyoming Supreme Court has limited a plaintiff's right to join claims under Rule 18 of the Wyoming Rules of Civil Procedure, which allows a plaintiff to bring any claims they may have against a defendant. The Wyoming Supreme Court has also substituted the discretion of the trial court with its own discretion.[196] Rule 42 of the Wyoming Rules of Civil

190. *See Hakkila*, 812 P.2d 1320; *Henriksen*, 622 A.2d 1135; *Massey*, 807 S.W.2d 391.

191. *McCulloh*, 24 P.3d at 1170.

192. Twyman v. Twyman, 855 S.W.2d 619, 637-38. (Hecht, J., dissenting.) Judge Hecht's dissenting opinion, fearing that by not giving a meaningful standard there would be more appeals on the same issue. *Id.* (Hecht, J., dissenting).

193. *McCulloh*, 24 P.3d at 1173.

194. *Id.*

195. *Id.*

196. The pertinent rule states "Joinder of Claims—A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as the party has against an opposing party." WYO. R. Civ. P. 18(a).

Procedure gives trial courts discretion to order separate trials.[197] This discretion is reviewed under an abuse of discretion standard, so the Wyoming Supreme Court has essentially said that it would always be abuse of discretion for a trial court not to order separate trials for the tort claims and the divorce proceedings. While the court had discretion to interpret the Wyoming Rules of Civil Procedure, the problem here is that the court never addressed the implications of the permissive joinder rule.

To come to its decision the court considered the separate nature of the claims, finding a divorce to be equitable in nature while a tort claim is a question of law and may involve a jury trial.[198] However, in many divorce proceedings the same questions of fact are involved in both trials. For example, facts relating to emotional and physical abuse will be at issue in a tort claim, but the same facts would be considered in determining custody of minor children.[199] By deciding both claims in one proceeding, the matter is resolved more quickly and the parties are not forced to go through the ordeal another time.[200] Allowing permissive joinder gives the plaintiff the opportunity to choose how to proceed and protects the plaintiff's right to join all claims against a defendant. Still, the trial court would be able to order separate trials if it felt the joinder of claims would be too great an inconvenience or if there were a chance the other party would be prejudiced.[201] When there is a request for a jury trial for the tort claims the trial court would have to consider whether the jury trial would unduly lengthen the divorce proceeding and if so, the trial court could then order separate proceedings. While permissive joinder was not an issue for Gerri McCulloch because she did not want her claims joined with the divorce proceeding, allowing permissive joinder would benefit the plaintiff who planned to file a tort claim with the divorce and does not have the financial or emotional resources to go through two separate trials.

The court's opinion is also important because it prevents a tort claim from being precluded by *res judicata*.[202] This opinion prevents a defendant from asserting that a tort claim was barred because it was not brought in the divorce proceeding. There are many reasons plaintiffs

197. "Separate trials—The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial for any claim . . . or any separate issue or any number of claims . . . ." WYO. R. CIV. P. 42(b).

198. *McCulloh*, 24 P3.d at 1170.

199. Case, *supra* note 111, at 118.

200. *Id.* at 118-19.

201. *See supra*, note 198.

202. McCulloh, 24 P3d. at 1171.

may not be prepared to bring a tort action at the time they file for divorce including fear, embarrassment or a lack of knowledge of their rights.[203] By allowing permissive joinder and barring claims of *res judicata*, plaintiffs would have the maximum procedural protection when they bring their claims.

## CONCLUSION

In *McCulloh* the Wyoming Supreme Court correctly found a cause of action for intentional infliction of emotional distress within marriage. Unfortunately, the court did not provide trial courts with a meaningful standard in determining whether conduct is sufficiently "extreme and outrageous" to be considered actionable. Had the court determined and applied such a standard to the facts in the case, it would have provided useful guidance for trial courts. Also, the court's decision requiring tort claims to be separate from divorce proceedings is inconsistent with Wyoming Rules of Civil Procedure. A better alternative is to allow for permissive joinder of claims.

BRANDI MONGER

203. Melissa J. Pena, Note, *The Role of Appellate Courts in Domestic Violence Cases and the Prospect of a New Partner Abuse Cause of Action*, 20 REV. LITIG. 503, 526 (2001).