

# IN THE SUPREME COURT OF TEXAS

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No. 02-0120  
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HOFFMAN-LA ROCHE, INC., A/K/A “ROCHE”, PETITIONER,

v.

JOAN ZELTWANGER, A/K/A JOAN GONZALES, RESPONDENT

=====  
ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS  
=====

JUSTICE HECHT, concurring.

I join the Court’s opinion because I agree that the tort of intentional infliction of emotional distress does not lie in circumstances where liability is determined by other torts or by statute since “the tort’s clear purpose is to supplement existing forms of recovery by providing a cause of action for egregious conduct ‘that its more established neighbors in tort doctrine would technically fence out.’”<sup>1</sup> This is consistent with, and not a departure from, my more fundamental position that the tort of intentional infliction of emotional distress should not exist at all for the reasons I explained eleven years ago in *Twyman v. Twyman*.<sup>2</sup> Experience since then has done much to prove those reasons correct, but since the Court is not yet ready to throw in the towel, I accept a restriction that seems to have been latent in the thinking that created the tort, as best I have been able to understand it.

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<sup>1</sup> *Standard Fruit and Vegetable Co. v. Johnson*, 985 S.W.2d 62, 68 (Tex. 1998) (citation omitted).

<sup>2</sup> 855 S.W.2d 619, 629-634 (Tex. 1993) (Hecht, J., concurring and dissenting).

I also agree with JUSTICE O'NEILL that the facts of this case do not rise to the level set by this Court in defining the tort. Jim Webber's conduct as Joan Zeltwanger's supervisor was certainly objectionable, reprehensible, at times even disgusting, but regrettably not that unusual (hence the enactment of a statutory remedy for sexual harassment in the workplace), and not "utterly intolerable in a civilized community".<sup>3</sup> The fact that the trial judge and at least three justices on the court of appeals disagreed with this view, which is supposed to be a matter of law,<sup>4</sup> and that their position is in no way flawed but is simply different from mine and at least two other JUSTICES on this Court, makes me as uncomfortable as I was in *Twyman* that the core standard of liability for the tort is very subjective. But given the way the Court has defined the tort, the discomfort is unavoidable.

Today's rule is not based on the exclusive or preemptive nature of another remedy but on the nature of the IIED tort itself. I think JUSTICE O'NEILL is right that applying the rule will almost certainly prove highly problematic, but that prospect strikes me as one more reason to abandon the tort altogether. Until the Court reaches the same conclusion, the problems of the tort, including those created today, are a necessary evil.

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Nathan L. Hecht  
Justice

Opinion delivered: August 27, 2004

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<sup>3</sup> *Twyman*, 855 S.W.2d at 621 (Tex. 1993) (quoting RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (1965)).

<sup>4</sup> *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 616 (Tex. 1999).