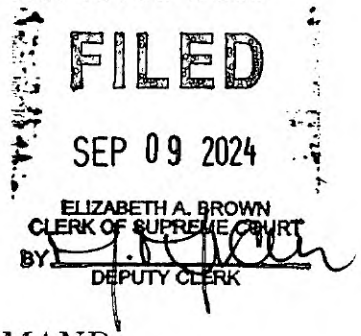
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FELIX MIKHALSKY,
Appellant,
vs.
MAI TRAN,
Respondent.

No. 86591-COA



ORDER OF REVERSAL AND REMAND

Felix Mikhalsky appeals from a district court order granting summary judgment in a tort action. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Felix and respondent Mai Tran were in a relationship which ended in 2018 and share a daughter born in 2017. In 2021, Felix filed a complaint for intentional infliction of emotional distress (IIED) based on Mai creating a harassing environment with respect to their daughter, including an incident in May 2020 where he alleged Mai called the police and falsely accused him of child abuse and being sexually inappropriate with their daughter. Mai's call resulted in a police investigation which was closed shortly thereafter with no action taken against Felix. As a result of the accusations, Felix alleged that he suffered various impairments, including headaches, cognitive impairments, extreme lethargy, vomiting, worrying, depression, sleep deprivation, replaying the events, stress, crying, confused emotions, insomnia, and body pains. Mai denied Felix's

allegations and alleged that his symptoms were attributable to his preexisting anxiety.

The parties engaged in extensive motion practice related to discovery disputes. Felix filed several discovery motions, arguing that Mai was not complying with discovery requirements. The discovery commissioner ultimately vacated several hearings on Felix's motions. In particular, in December 2022, Felix filed a motion to compel certain discovery and attached a declaration of meet and confer attempts, which outlined his efforts to obtain discovery and to confer with defense counsel, and which stated that counsel was unresponsive and failed to provide requested discovery. Despite Felix having attached these materials, the discovery commissioner vacated the corresponding hearing based on Felix's failure to adequately comply with EDCR 2.34(d) (providing that "[d]iscovery motions may not be filed unless" the parties have made a good faith effort to confer and resolve the dispute).[1]

While the parties' discovery disputes continued, Mai filed a motion for summary judgment, which Felix opposed, asserting it was premature because he had moved to extend the discovery deadlines. The district court denied Mai's motion for summary judgment without prejudice and extended the discovery deadlines. Despite the extension of the discovery deadlines, however, Felix attempted to file an untimely expert witness disclosure. In his disclosure, Felix named a forensic clinical

[1]EDCR 2.34 was amended effective June 25, 2024. In this order, we refer to the prior version of this rule.

psychologist as his expert witness and stated that the psychologist would review the evidence obtained during discovery, conduct interviews and assessments and testify as to his opinion regarding whether Felix suffered emotional distress as a result of Mai's conduct.

Thereafter, Mai filed a renewed motion for summary judgment, asserting that Felix, even with additional time, had failed to produce any admissible evidence related to causation or severe emotional distress and arguing that his expert disclosure was untimely and insufficient. Felix opposed the motion and updated his expert disclosure with his expert psychologist's written forensic evaluation. The written evaluation stated, in relevant part, that (1) Felix's existing anxiety problems had "likely been magnified and made worse by the stress and worry that he experienced following the abuse allegations," (2) he began experiencing new symptoms after the allegations and those symptoms were found to be psychosomatic and the consequence of stress from the pending criminal investigation, and (3) in the doctor's opinion, within a reasonable degree of professional certainty, Felix's anxiety disorder worsened because of the allegations. Felix subsequently filed a motion for leave to file and admit a late expert witness disclosure report, which Mai opposed.

The day before the scheduled hearing on Mai's renewed motion for summary judgment, the district court vacated the hearing and decided the case on the pleadings pursuant to EDCR 2.23(c) (providing that the court may consider and rule on a motion on its merits at any time with or without oral arguments) and (d) (requiring the court to remove a motion and hearing from the calendar when deciding a motion prior to the hearing

date). The court granted Mai's renewed motion for summary judgment, finding that Felix had not sufficiently alleged that Mai's conduct was severe and outrageous because Mai's reporting allegedly serious issues concerning her daughter's safety to the police did not constitute utterly intolerable conduct and because Felix failed to provide any medical evidence verifying the existence of extreme emotional distress. The court further determined that Felix's opposition contained "no medical evidence or testimony" speaking to causation and that an expert was required to establish causation. In making this determination, the district court did not acknowledge Felix's untimely attempt to disclose an expert and expert witness report and did not resolve Felix's motion for leave to admit his late expert disclosure. This appeal followed.

On appeal, Felix argues that the district court's grant of summary judgment was improper and that the court failed to rule on his motion to admit his untimely disclosed expert, whose written evaluation established causation. In her answering brief, Mai asserts that Felix's expert witness disclosure was untimely, deficient, and did not address causation. With respect to summary judgment, Mai asserts that the grant of summary judgment was proper because Felix never provided medical evidence to support his claim that her allegations of child abuse to the police caused Felix injuries. In his reply brief, Felix argues that the discovery issues, the failure to hold hearings on his motions, and the district court's failure to review the evidence and rule on his motion to admit his expert witness impeded his ability to adequately present his case.

We review a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a). "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Wood*, 121 Nev. at 729, 121 P.3d at 1029.

To recover for IIED, a plaintiff must establish the following elements: (1) that the defendant's conduct was extreme and outrageous; (2) that the defendant either intended or recklessly disregarded the causing of emotional distress; (3) that the plaintiff actually suffered severe or extreme emotional distress; and (4) that the defendant's conduct actually or proximately caused the distress. *Star v. Rabello*, 97 Nev. 124, 125, 625 P.2d 90, 91-92 (1981). "[E]xtreme and outrageous conduct is that which is outside all possible bounds of decency and is regarded as utterly intolerable in a civilized community." *Maduike v. Agency Rent-A-Car*, 114 Nev. 1, 4, 953 P.2d 24, 26 (1998) (internal quotation marks omitted). For the reasons set forth below, we conclude that the district court erred by granting summary judgment on Felix's IIED claim.

In granting summary judgment to Mai, the district court concluded that Felix failed to show that Mai's actions were extreme and outrageous, noting that, even if accepted as true, the fact that Mai reported alleged concerns "about serious issues concerning her daughter's safety" to the police was not sufficient to deem her conduct utterly intolerable. In

addressing this point on appeal, Felix contends that he provided evidence demonstrating that Mai's conduct was extreme and outrageous, but the court failed to review his evidence and vacated the hearing where he would have argued this point. Mai does not address this issue in her answering brief on appeal.

It is well established that whether specific conduct is extreme and outrageous is a factual determination for the jury. *See, e.g., Posadas v. City of Reno*, 109 Nev. 448, 456, 851 P.2d 438, 444 (1993) ("Whether the issuance of a press release which could be interpreted as stating that a police officer committed perjury is extreme and outrageous conduct is a question for the jury."); *Branda v. Sanford*, 97 Nev. 643, 645, 649, 637 P.2d 1223, 1224, 1227 (1981) (holding that a jury was entitled to determine, considering "prevailing circumstances, contemporary attitudes and [the plaintiff's] own susceptibility," whether verbally accosting a 15-year-old busgirl with sexual innuendos and abusive language constituted extreme outrage). Here, despite Felix's contention that Mai made a false report to police, the district court determined that Mai was reporting concerns for her daughter's safety, which was effectively a factual determination that the report was not false or intentional. Thus, under these circumstances, to the extent the district court considered Mai's aforementioned actions and determined, on its own, that they were not utterly intolerable and thus did not qualify as extreme and outrageous conduct, the court failed to construe the evidence in the light most favorable to Felix, the nonmoving party, and made a factual finding on disputed facts. *See Posadas*, 109 Nev. at 456, 851 P.2d at 444; *Branda*, 97 Nev. at 645, 649, 637 P.2d at 1224, 1227. Thus, we

conclude that the district court erred in granting summary judgment on this basis.

Additionally, in granting Mai's motion for summary judgment, the district court concluded that Felix failed to provide any medical evidence to verify the existence of his alleged extreme emotional distress and demonstrate that Mai caused his injuries. The court further emphasized that an expert was required to establish causation. Felix contests these determinations on appeal and asserts that the court failed to rule on his motion to admit his later disclosed expert evaluation, which supported his allegations. In response, Mai summarily concludes that Felix's expert disclosure was untimely and insufficient but does not address the court's failure to rule on Felix's motion to admit the late expert disclosure.

The district court did not acknowledge Felix's untimely expert disclosure, and likewise did not rule on his motion for leave to admit the same. We conclude that the court's grant of summary judgment under these circumstances, without first resolving Felix's motion to have his untimely expert disclosure admitted, was premature.[2]

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[2]While Mai asserts, as she did below, that Felix's untimely expert disclosure was insufficient, because the district court failed to address whether the untimely disclosure should be admitted, much less evaluate the sufficiency of the expert's evaluation to support Felix's claims, we decline to address this issue in the first instance. *See 9352 Cranesbill Tr. v. Wells Fargo Bank, N.A.*, 136 Nev. 76, 82, 459 P.3d 227, 232 (2020) (declining to address an issue that the district court did not resolve in the underlying proceeding). Nonetheless, we note that, if admitted, the evaluation could potentially provide support for Felix's IIED claim to the extent the expert stated, in part, that Felix's anxiety was likely magnified

Moreover, the district court's conclusion that medical evidence is required for proving IIED claims is not accurate. *See Franchise Tax Bd. of State of Cal. v. Hyatt*, 133 Nev. 826, 855, 407 P.3d 717, 742 (2017) (adopting a sliding scale approach and concluding that "while medical evidence is one acceptable manner in establishing that severe emotional distress was suffered for purposes of an IIED claim, other objectively verifiable evidence may suffice to establish a claim when the defendant's conduct is more extreme, and thus, requires less evidence of the physical injury suffered"), *rev'd and remanded, on other grounds sub nom. Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230 (2019). Indeed, in some cases, testimony may be sufficient evidence on its own to prove emotional distress. *See id.* at 855-56, 407 P.3d at 742 (allowing testimony from the plaintiff and his sons, without medical evidence, to demonstrate plaintiff's emotional distress based on the severity of the conduct); *Farmers Home Mut. Ins. Co. v. Fiscus*, 102 Nev. 371, 374-75, 725 P.2d 234, 236 (1986) (allowing the plaintiff's testimony alone as proof of emotional distress). The district court improperly ruled that Felix was required to have medical evidence without addressing the sliding scale approach here. Thus, the district court improperly granted summary judgment without addressing the motion to file the untimely expert disclosure or whether expert testimony was necessary here under the sliding scale approach.

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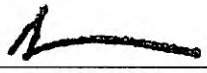
and worsened as a result of Mai's allegations and the subsequent criminal investigation.

Finally, we turn to Felix's challenge to the district court and discovery commissioners' decisions to vacate various discovery-related hearings. While the record is largely silent regarding why these hearings were vacated, to the extent that the January 31, 2023, hearing on Felix's motion to compel certain discovery was vacated on the basis that Felix had failed to comply with the EDCR 2.34(d) meet-and-confer requirement, that conclusion is belied by the record, as Felix's December 23, 2022, motion to compel included the required declaration outlining his efforts to meet and confer with Mai's counsel. While we make no comment on the merits of the discovery requested in that motion, on remand, to the extent Felix's case ultimately moves forward, the district court should take steps to ensure that Felix's discovery requests and concerns are properly addressed.

Accordingly, for the reasons set forth above, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[3]

_____, C.J.
Gibbons



_____, J.
Bulla

_____, J.
Westbrook

[3]Insofar as Felix raises arguments that are not specifically addressed in this order, including arguments concerning alleged violations of his constitutional rights, we have considered the same and conclude that they do not present a basis for relief.

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Department XIV
Felix Mikhalsky
Michael T. Hua Law
Eighth District Court Clerk