Nebraska's (More or Less) Stable Approach to "Extreme and Outrageous Conduct" and Intentional Infliction of Emotional Distress: Brandon ex rel. Estate of Brandon v. County of Richardson, 261 Neb. 636, 624 N.W.2d 604 (2001)

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Note*

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I. INTRODUCTION

When Teena Brandon ("Brandon") left Lincoln, Nebraska, for Richardson County, Nebraska, in November 1993, little did she know of the events that would unfold during the 1993 holiday season. First, Brandon would be beaten and raped by two male acquaintances, John L. Lotter ("Lotter") and Thomas M. Nissen ("Nissen"), on early Christmas Day. Then, after reporting the rapes to the authorities, Brandon would endure a long and grueling investigative interview conducted by Richardson County Sheriff Charles B. Laux ("Laux"), during which Laux would use insensitive, if not utterly vulgar, language and would ask Brandon questions which he would later admit were entirely irrelevant to whether Brandon had been raped. Finally, on December 31, 1993, Brandon and two of her friends would be found murdered in a rural Humboldt, Nebraska, farmhouse in Richardson County. Lotter and Nissen would later be charged with and convicted of murdering Brandon and her two friends.

After Brandon's murder, JoAnn Brandon, Brandon's mother and personal representative of Brandon's estate, brought suit against Richardson County and Laux, alleging wrongful death, negligence in failing to protect Brandon, and intentional infliction of emotional distress ("IIED") inflicted on Brandon prior to her murder. This Note

1. Nissen was also known as Marvin T. Nissen. On December 31, 1993, Lotter and Nissen were arrested for the December 25, 1993 sexual assaults on Brandon. Brandon ex rel. Estate of Brandon v. County of Richardson, 261 Neb. 636, 646, 624 N.W.2d 604, 614 (2001).
2. Afraid that Lotter and Nissen would find and kill her because she reported the rapes to law enforcement authorities, Brandon decided to stay with a friend whose house was located in rural Richardson County. Apparently, Brandon believed that Lotter and Nissen did not know the location of the house. Id.
4. The procedure leading up to Brandon ex rel. Estate of Brandon v. County of Richardson came to be quite lengthy. Originally, JoAnn Brandon made a claim pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 to 13-926 (Reissue 1997, Cum. Supp. 2002). The six-month period for Richardson County and Laux to respond to the claim expired without a response. Under the Political Subdivisions Tort Claims Act a civil suit is permitted after the six-month period has elapsed. Id. § 13-906 (Reissue 1997). As such, JoAnn Brandon withdrew her claim and filed a petition seeking damages for the wrongful death of Brandon and for Brandon's pre-death injuries and damages. In response, Richardson County and Laux filed a demurrer, which the district court sustained. JoAnn Brandon then filed an amended petition, adding the IIED claim, which was based on how Laux conducted himself toward Brandon prior to her death. At this point, the only allegation regarding the emotional distress claim was that
discusses only the IIED claim, which was based on Laux's conduct toward Brandon on December 25, 1993 when he interviewed her about the reported rapes. In short, JoAnn Brandon alleged that Laux's conduct toward her daughter throughout the course of the investigative interview was "extreme and outrageous." In *Brandon ex rel. Estate of Brandon v. County of Richardson*, the Supreme Court of Nebraska agreed and held that Laux's conduct toward Brandon was "extreme and outrageous" as a matter of law.  

But how did the court come to reach the conclusion that Laux's conduct was "extreme and outrageous," given that his conduct consisted of nothing more than interviewing, at that point, an alleged rape victim? What standard did the court use? And was that standard liberal, consistent, or restrictive in light of the legal framework that the court had utilized in past IIED claims? By holding that Laux's language-based conduct was "extreme and outrageous" as a matter of law, does the court in *Brandon* evidence a judicial trend in Nebraska toward a more permissive approach to IIED claims, in gen-

"Laux stated that [the victim's] absence from a scheduled second [investigative] interview reflected poorly on her credibility as to the truthfulness of the reported sexual and physical assaults upon her by Lotter and Nissen." *Brandon v. County of Richardson* (Brandon I), 252 Neb. 839, 845, 566 N.W.2d 776, 781 (1997) (quoting JoAnn Brandon's amended petition). Richardson County and Laux filed a demurrer to the amended petition, which was sustained. The district court then gave JoAnn Brandon leave to again amend her petition with regard to all her causes of action except that for IIED, which the district court simply dismissed.

Next, JoAnn Brandon filed a second amended petition, but she again alleged a cause of action for Brandon's pre-death IIED. The district court again sustained a demurrer filed by Richardson County and Laux in response to JoAnn Brandon's second amended petition. Also, the district court denied JoAnn Brandon further leave to amend. The district court, Richardson County, William B. Rist, J., dismissed the entire case. JoAnn Brandon then appealed to the Nebraska Supreme Court.

In *Brandon I*, the Nebraska Supreme Court reversed the district court's granting of the demurrer and held that: (1) JoAnn Brandon's petition did state facts sufficient to constitute a cause of action against Richardson County and Laux since a special relationship between Richardson County and Brandon was created that gave rise to a duty of the investigating officers to protect Brandon after she reported the rapes to the officers and after she agreed to aid in the prosecution of Lotter and Nissen; (2) a claim for IIED survives the death of the victim; but (3) the alleged remarks made by Laux that Brandon's absence from the scheduled interview reflected poorly on her credibility did not give rise to a claim for IIED. *Id.* at 842-45, 566 N.W.2d at 779-81. The court, however, gave JoAnn Brandon leave to amend her petition with regard to the IIED claim. *Id.* at 845, 566 N.W.2d at 781. The facts regarding the IIED claim set forth in the amended petition then eventually gave rise to *Brandon ex rel. Estate of Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001), the subject of this Note.

6. *Id.* at 657, 624 N.W.2d at 621.
eral, and to "extreme and outrageous" conduct, in particular? The answer to this last question is, simply put, both yes and no.

On the one hand, certain portions of Brandon might give rise to some concerns that the Nebraska Supreme Court is becoming more, perhaps too, liberal in its approach to "extreme and outrageous conduct" and IIED claims. Admittedly, Brandon does appear to illustrate a more liberal approach to IIED when compared with past Nebraska IIED cases. On the other hand, Brandon is still largely in keeping with the overall standard and reasoning set forth in section 46 of the Restatement (Second) of Torts, which the Nebraska Supreme Court has rigorously employed in past IIED claims brought before it. Further, Brandon gives no serious indication that the court has any intention of developing any standard of recovery for IIED claims significantly different from that set forth in section 46 of the Restatement. Similarly, there is no indication that the court has fallen prey to a slippery slope whereby all sorts of conduct could be deemed "extreme and outrageous." Consequently, Brandon illustrates Nebraska's (more or less) consistent approach to "extreme and outrageous conduct" and IIED.

Part II of this Note discusses the factual background of Brandon and sets forth Laux's conduct in greater detail. Part III presents the legal framework, including a survey of past Nebraska IIED cases, upon which Brandon can be analyzed. Part IV analyzes the Nebraska Supreme Court's decision in Brandon, beginning with a brief discussion of what standard of recovery the court used. Part IV then continues with an analysis of whether more specific portions of the court's reasoning in Brandon are in keeping with the court's past standard of recovery for IIED and whether Brandon will lead to a slippery slope regarding what kinds of conduct are "extreme and outrageous" for the purposes of IIED claims in Nebraska. This Note concludes by suggesting that Brandon is largely in keeping with the standards and recommendations of section 46 of the Restatement (Second) of Torts and further explains how Brandon sheds light on the Nebraska Supreme Court's (more or less) stable approach to IIED claims and "extreme and outrageous conduct."

II. FACTUAL BACKGROUND OF BRANDON

Sometime after Brandon moved to Richardson County, Lotter and Nissen, both acquaintances of Brandon, became suspicious of Brandon's sex.\(^7\) On the evening of December 24, 1993, Nissen had a party

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\(^7\) Brandon suffered from gender identity disorder. Id. at 640, 624 N.W.2d at 611. This is a condition in which one develops an intense dislike for one's own gender and assumes the behavioral and emotional traits of the other gender. Bryan Strong & Christine DeVault, Human Sexuality: Diversity in Contemporary America 152 (2d ed. 1997). While living in Richardson County, Brandon
at his home, during which Nissen and Lotter pulled Brandon’s pants down in an attempt to prove that Brandon was a female. On the morning of December 25, 1993, Lotter and Nissen beat Brandon and then drove her to a remote location where both men proceeded to rape her. After Nissen beat Brandon again, all three returned to Nissen’s home. Once there, Brandon eventually escaped by kicking out a bathroom window. Brandon ran to a friend’s home and was then transported to a local hospital for a rape examination. The examination indicated that Brandon had indeed been sexually penetrated just hours before.8

Later that same day, Brandon provided a written statement to the Falls City Police Department regarding the rapes,9 even though Lotter and Nissen had threatened her life if she reported the rapes to anyone.10 Laux and Tom Olberding (“Olberding”) of the Richardson County Sheriff’s Office then conducted a tape-recorded investigative interview with Brandon regarding the rapes. After Laux and Olberding conducted an initial interview together, Laux, by himself, again asked Brandon to recount the details of the rapes.11 This interview between Laux and Brandon was also tape-recorded. It was this interview that gave rise to the IIED claim in *Brandon*.

During the interview, Laux first questioned Brandon about the incident that occurred at Nissen’s house where Lotter and Nissen pulled down Brandon’s pants. The following exchanges took place between Brandon and Laux.

[Laux:] [After he pulled your pants down and seen you was a girl, what did he do? Did he fondle you any?]
[Brandon:] No.
[Laux:] He didn’t fondle you any, huh. Didn’t that kind of amaze you? . . . Doesn’t that kind of, ah, get your attention somehow that he would’ve put his hands in your pants and play with you a little bit?

[Laux:] [You were all half-ass drunk . . . I can’t believe that if he pulled your pants down and you are a female he didn’t stick his hand in you or his finger in you.]
[Brandon:] Well, he didn’t.
[Laux:] I can’t believe he didn’t.12

Laux then proceeded to question Brandon about the rapes. Included among Laux’s statements and questions were the following: “So they got ready to poke you”; “[T]hey tried sinking it in your vagina”, “So then after he couldn’t stick it in your vagina he stuck it in

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8. *Brandon*, 261 Neb. at 640-41, 624 N.W.2d at 611.
9. *Id.* at 641, 624 N.W.2d at 611.
10. *Id.* at 646, 624 N.W.2d at 614.
11. *Id.* at 641, 624 N.W.2d at 611-12.
12. *Id.* at 642, 624 N.W.2d at 612.
your box or in your buttocks, is that right?”, “Did it feel like he stuck it in very far or not?”, “Did he tell you anything about this is how they do it in the penitentiary?”, “Was he enjoying it?”, “Did he think it was funny?”, “Did he play with your breasts or anything?”, and “Well, was he fingering you?”

Laux then inquired about the position of Brandon's legs when Nissen sexually assaulted her. The following exchange took place:

[Laux:] How did you have your legs when he was trying to do that?
[Brandon:] He had them positioned on each side and he was positioned in between my legs.

[Laux:] You had your legs, ah, your feet up around his back or did you just have them off to the sides or what?
[Brandon:] I had one foot on the floor and the other on the seat.

[Laux:] He had you on the back seat and you had one leg on the seat the one leg up up over the front seat or where?
[Brandon:] One leg on the floor and the other just laying [sic] on the seat not on top of the guy.

[Laux:] You had one leg on the back seat and one leg laying [sic] on the floor.
[Brandon:] I had one leg up around him and one leg over the seat.

[Laux:] No, I didn't.

[Laux:] Yeah, because I can play it back for you.

[Laux:] Then play it back because I don't understand it.

Laux then questioned Brandon about Lotter sexually assaulting her. The following exchange took place:

[Laux:] After he got his pants down he got a spread of you, or had spread you out, and he got a spread of you then, then what happened?
[Brandon:] When he finished he got out of the car and got back in the driver's door.

[Laux:] Well, how did, ah, let's back up here for a second. First of all you didn't say anything about him getting it up. Did he have a hard on when he got back there or what?
[Brandon:] I don't know. I didn't look.

[Laux:] You didn't look. Did he take a little time working it up, or what? Did you work it up for him?
[Brandon:] No, I didn't.

[Laux:] You didn't work it up for him?
[Brandon:] No.

[Laux:] Then you think he had it worked up on his own, or what?
[Brandon:] I guess so, I don't know.

[Laux:] You don't know. . . . Did, when he got in the back seat you were already spread out back there ready for him, waiting on him.
[Brandon:] No, I was sitting up when he got back there.

Laux then proceeded to question Brandon about her past sexual experiences.

[Laux:] And you have never had any sex before?

13. Id.
14. Id. at 642-43, 624 N.W.2d at 612.
15. Id. at 643, 624 N.W.2d at 613.
Finally, Laux questioned Brandon about her gender identity crisis. The following exchanges took place:

[Laux:] Why do you run around with girls instead of, ah, guys being you are a girl yourself?
[Brandon:] Why do I what?
[Laux:] Why do you run around with girls instead of guys beings you're a girl yourself? Why do you make girls think you're a guy?
[Brandon:] I haven't the slightest idea.
[Laux:] You haven't the slightest idea? You go around kissing other girls? ... The girls that don't know about you, thinks [sic] you are a guy. Do you kiss them?
[Brandon:] What does this have to do with what happened last night?
[Laux:] Because I'm trying to get some answers so I know exactly what's going on. Now, do you want to answer that question for me or not?
[Brandon:] I don't see why I have to.
[Laux:] Huh?
[Brandon:] I don't see why I have to.

[Brandon:] 'Cause I have a sexual identity crisis.
[Laux:] Your what?
[Brandon:] I have a sexual identity crisis.
[Laux:] You want to explain that?
[Brandon:] I don't know if I can even talk about it.17

In addition to the foregoing language Laux used throughout this tape-recorded interview, Laux openly referred to Brandon as an “it,” once while in Brandon’s presence.18 Also, subsequent to Brandon’s death, Laux asked Brandon’s sister, “what kind of sister did [you] have?”19

At trial, Laux testified that his conduct while interviewing Brandon on December 25, 1993 was due to concerns he had as to whether Brandon was being completely truthful.20 Laux stated that he questioned Brandon’s credibility since she had a history of forgery21 and had been deceiving people in the local community as to her gender.

16. Id. at 643-44, 624 N.W.2d at 613.
17. Id. at 644, 624 N.W.2d at 613.
18. Id. at 640, 624 N.W.2d at 611.
19. Id. at 658, 624 N.W.2d at 621.
20. Id. at 647, 624 N.W.2d at 615.
21. Brandon had been convicted of forgery in Lancaster County, Nebraska, and had violated the terms of her probation. Id. at 640, 624 N.W.2d at 611. In addition, on December 15, 1993, only ten days before Laux interviewed Brandon about the rapes, Brandon was booked into the Richardson County jail on forgery charges for forging checks in Richardson County. Id.
Laux also stated that his conduct was attributable to Brandon's taking an unusually long time to answer questions during the interview. Laux admitted, however, that Brandon's gender identity disorder was entirely irrelevant to her claims that she had been raped.22

Several law enforcement officers' testimony at trial lent support to the IIED claim. For example, Olberding testified that he left the room when Laux was interviewing Brandon because he "didn't think it was right to do that,"23 that is, use the language that Laux used and ask certain questions that Laux asked. Similarly, assistant police chief for the Falls City Police Department, John Caverzagie, testified that he believed that "just about everything" Laux said during the interview was "very unprofessional."24 Caverzagie agreed that Laux's conduct was outrageous. Jack Wyant, a retired Nebraska State Patrol criminal investigator, testified that he saw no reason for Laux to be rude or abrasive while questioning Brandon.25

A prosecutor experienced with sexual assault cases testified on behalf of both the County and Laux. When asked about Laux's conduct during the interview, the prosecutor testified that Laux "was seeking [Brandon's] story, he was trying to get an idea of her version of events. He was trying to get detailed information from her about the chronology of events as well as what the events were."26 The prosecutor further testified that Laux perhaps used "locker room talk" and some inappropriate language when conducting the interview, but that Laux was not unnecessarily confrontational with Brandon. Finally, the prosecutor testified that prior to trial, hearings, or depositions, prosecutors are customarily tougher and more confrontational with victims of sexual assault than Laux was in conducting the interview.27

After considering the foregoing tape-recorded interview and witness testimony, the trial court, Richardson County, Judge Orville L. Coady, denied recovery on the IIED claim, holding that Laux's conduct toward Brandon was not "extreme and outrageous" and that Laux's conduct was "reasonable and necessary to prepare [Brandon] to testify at public trial."28 Further, the trial court held that there was insufficient proof that Brandon suffered emotional distress as a result of Laux's conduct.29 JoAnn Brandon timely appealed the trial court's decision.

22. Id. at 647, 624 N.W.2d at 615.
23. Id. at 648, 624 N.W.2d at 615.
24. Id. at 648, 624 N.W.2d at 616.
25. Id.
26. Id. at 649, 624 N.W.2d at 616 (quoting the prosecutor's testimony on direct examination).
27. Id. at 649-50, 624 N.W.2d at 616-17.
28. Id. at 657, 624 N.W.2d at 621 (quoting the trial court's opinion).
29. Id. at 652-53, 624 N.W.2d at 618. Having already determined that Laux's conduct towards Brandon was not "extreme and outrageous," it is unclear why the
The Supreme Court of Nebraska reversed the trial court's decision and held that Laux's conduct was "extreme and outrageous" as a matter of law. The court found none of the County's attempts to justify Laux's conduct persuasive. In reviewing the tape-recorded interview, the court stated that it found no places where Laux was attempting to clarify inconsistencies, that irrelevant questions asked during the interview hardly contributed to "fact finding," that it was inappropriate for Laux to attempt to prepare Brandon for trial just hours after the sexual assaults had occurred, and that Laux's language indicated that he was simply expressing a prurient interest in the sexual assaults. Finding Laux's conduct "extreme and outrageous," the court then remanded to the trial court the issue of whether Laux's conduct throughout the interview caused Brandon to suffer emotional distress so severe that no reasonable person should be expected to endure it.

On remand, the trial court judge found that Laux's conduct did cause Brandon severe emotional distress. In a June 2001 hearing, JoAnn Brandon's attorney asked the trial court judge to award $240,000 in damages for emotional distress. The judge, Orville L. Coady, instead awarded only $7,000. David Hendee, Brandon Case Returns to State's High Court, OMAHA WORLD-HERALD, Oct. 24, 2001, at 1B, available at 2001 WL 9589068; David Hendee, Suit Award Angers Mom of Brandon, OMAHA WORLD-HERALD, Oct. 5, 2001, at 1B, available at 2001 WL 9587478. JoAnn Brandon appealed that damage award to the Nebraska Supreme Court, marking the third, and final, time that the Brandon matter would be taken to Nebraska's highest court. On November 5, 2002, JoAnn Brandon's attorney "took the unprecedented step... of asking the Nebraska Supreme Court to intervene and personally award more damages... ." Paul Hammel, More Money Sought in Brandon Case, OMAHA WORLD-HERALD, Nov. 6, 2002, at 1A, available at 2002 WL 5348249. JoAnn Brandon's attorney argued that the Nebraska Supreme Court or a judge other than District Judge Orville Coady should decide the amount of damages. Id. The Nebraska Supreme Court disagreed and upheld the $7,000 damage award on the IIED claim. In its opinion, the court stated that the district court found that Brandon was upset by Laux's conduct but that "Brandon's emotions were affected primarily by Nissen and Lotter and the mental anguish resulting from the rape and threat to her life." Brandon v. County of Richardson, 264 Neb. 1020, 1028, 653 N.W.2d 829, 837 (2002). The Nebraska Supreme Court simply refused to "interfere with the judgment of the fact finder in awarding damages for mental anguish... ." Id. at 1029, 653 N.W.2d at 837; see also Robynn Tysver, Teena Brandon Award to Stand, High Court Says, OMAHA WORLD-HERALD, Dec. 6, 2002, at 1A, available at 2002 WL 5350708 (reporting on the damage award).
III. RELEVANT LAW: THE LEGAL FRAMEWORK OF IIED IN NEBRASKA

Two separate, yet equally relevant, types of legal authority govern IIED claims in Nebraska. First, section 46 of the Restatement (Second) of Torts sets forth the basic legal framework of an IIED claim. Second, Nebraska case law interprets and applies the language of section 46.

A. Section 46 of the Restatement (Second) of Torts

In pertinent part, section 46 of the Restatement (Second) of Torts provides: “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.”33 In other words, a plaintiff must prove each of three elements in order to make a prima facie case for IIED: (1) that the defendant acted intentionally or recklessly, (2) that the defendant’s conduct was “extreme and outrageous,” and (3) that the defendant’s conduct caused the plaintiff severe emotional distress.34

Among these prima facie elements, determining what rises to the level of “extreme and outrageous conduct” has often created the most difficulty.35 This only stands to reason. There is no hard-and-fast rule as to what conduct is “extreme and outrageous.” “There is no litmus test for outrageousness; whether conduct was outrageous and extreme must be analyzed on a case-by-case basis.”36

Nonetheless, the official comments to section 46 attempt to define what might generally constitute “extreme and outrageous conduct.” These comments explain that liability for IIED is imposed only when the defendant’s conduct was “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”37 Generally, a defendant’s conduct is “extreme and outrageous” only if it would cause an “average member of the community” to exclaim, “Outrageous!”38

33. Restatement (Second) of Torts § 46(1) (1965).
34. Id.
36. Skidmore v. Precision Printing and Packaging, Inc., 188 F.3d 606, 613 (5th Cir. 1999).
37. Restatement (Second) of Torts § 46 cmt. d.
38. Id.
Liability is not, however, to be imposed for "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities."\textsuperscript{39} The Restatement recognizes that plaintiffs "must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind."\textsuperscript{40} Liability cannot be imposed each and every time "some one's feelings are hurt."\textsuperscript{41}

In addition, the comments to section 46 indicate general circumstances under which recovery for IIED might be had. For instance, the outrageousness of a defendant's conduct may arise from a defendant's abuse "of a position, or a relation with the [plaintiff], which gives [the defendant] actual or apparent authority over the [plaintiff]."\textsuperscript{42} In particular, police officers are among those who have been held liable for abuse of their position, although liability has not been imposed for petty insults and annoyances.\textsuperscript{43}

Moreover, a defendant's "extreme and outrageous conduct" "may arise from the [defendant's] knowledge that the [plaintiff] is peculiarly susceptible to emotional distress."\textsuperscript{44} Conduct otherwise not "extreme and outrageous" may become so when the defendant "proceeds in the face of such knowledge."\textsuperscript{45} Again, however, the defendant's conduct must still be "extreme and outrageous," and it is not sufficient that the defendant simply knows that the plaintiff's feelings might be hurt.\textsuperscript{46}

Finally, it is left to the court to first decide whether the defendant's conduct "may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so."\textsuperscript{47} The jury shall decide whether the defendant's conduct was "extreme and outrageous" when reasonable persons may differ. Otherwise, the court may find that the defendant's conduct was "extreme and outrageous" as a matter of law.\textsuperscript{48}

With just three prima facie elements, a claim for IIED may seem deceptively simple. Section 46 no doubt provides some guidance, although its suggestions as to what conduct is "extreme and outrageous" are arguably vague to the point of being unhelpful. Fortunately, the Nebraska Supreme Court's past interpretation and applications of section 46 provide, to some degree, a useful sampling of what kinds of

\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id. cmt. e.
\textsuperscript{43} Id.
\textsuperscript{44} Id. cmt. f.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id. cmt. h.
\textsuperscript{48} Id.
conduct are "extreme and outrageous" for the purposes of IIED claims brought in Nebraska courts.

B. Past IIED Claims Brought Before the Nebraska Supreme Court

Throughout the past several decades, a number of IIED claims have been brought before the Nebraska Supreme Court.49 In these cases, the court overwhelmingly applied section 46 of the Restatement (Second) of Torts.50 A brief discussion of these past IIED claims provides substance to the section 46 framework as applied in Nebraska and provides a sense of the kinds of conduct that the court has found to be "extreme and outrageous."

Of these past IIED claims, the court usually declined to award the plaintiff legal recovery for IIED, due in large part to an unwillingness to find the defendant's conduct "extreme and outrageous." Still, there are several cases in which the court did find there to be "extreme and outrageous conduct."

For instance, in La Salle Extension University v. Fogarty,51 the court held that a creditor's attempt to collect a debt by mailing almost forty "damaging, threatening, harassing and malicious letters, notices and warnings"52 to the alleged debtor constituted conduct sufficient to warrant the alleged debtor's recovery for mental suffering.53 Some of these letters contained accusations of dishonesty and moral turpitude and threats of legal action; others were mailed to the alleged debtor's employer and neighbors, thereby causing the alleged debtor to be humiliated and to nearly lose his job.

In addition, there are more recent cases in which the court found the defendant's conduct to be "extreme and outrageous." In Mindt v. Shavers,54 the defendant sexually assaulted the plaintiff and ejacu-

49. This Note narrows its focus to IIED claims brought before the Nebraska Supreme Court. To be sure, IIED claims have been brought before the Nebraska Court of Appeals, as well. See, e.g., Vergara v. Lopez-Vasquez, 1 Neb. Ct. App. 1141, 510 N.W.2d 550 (1993); Wadman v. State, 1 Neb. Ct. App. 839, 510 N.W.2d 426 (1993).
51. 126 Neb. 457, 253 N.W. 424 (1934). Note should be taken that Fogarty pre-dates section 46 of the Restatement (Second) of Torts. In making its decision, however, the court, for all practical purposes, applied the very standard that would become what is now section 46. Thus, Fogarty is as relevant to this discussion as any case that the court heard after the development, and the court's adoption, of section 46.
52. Id. at 458, 253 N.W. at 424.
53. Id. at 463, 253 N.W. at 426.
lated on the plaintiff’s body and clothing. Without discussion, the court held this to be “extreme and outrageous conduct.”

In *Nichols v. Busse*, the defendant was in a car accident with the plaintiff’s daughter, who died shortly after the accident occurred. Immediately after the accident, the defendant dragged the plaintiff’s daughter’s body from the vehicle and placed it in a ditch. The defendant then returned home, eventually telephoned the plaintiff, and told her that her daughter had stolen his vehicle and that “something horrible ha[d] happened.” Not until the discovery of his vehicle did the defendant finally come forward about the accident, and the plaintiff was then informed of her daughter’s death. The court found that the defendant’s conduct toward the plaintiff mother was “extreme and outrageous.”

Finally, in *Dale v. Thomas Funeral Home, Inc.*, a widow sued a funeral home for IIED because it refused to release her husband’s corpse until an embalming bill was paid. Ambiguously, the court was willing to note only that the funeral home’s conduct “may” have been “extreme and outrageous.”

In contrast to these relatively few cases in which the court found that there was, or that there may have been, “extreme and outrageous conduct,” there are many more cases in which the court declined to find “extreme and outrageous conduct.” These cases set forth a variety of (sometimes bizarre) fact patterns.

55. *Id.* at 792, 337 N.W.2d at 101. In *Mindt*, the court noted that a sexual assault is “uniquely appropriate” for a claim for IIED. *Id.* However, a sexual assault does not *ipso facto* give rise to recovery for IIED. In *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996), the plaintiff attempted to make such an argument and proposed that the jury instructions state: “Should you find from a preponderance of the evidence presented that the actions of the Defendant . . . constituted a non-consensual sexual assault, you may find that the assault constitutes an intentional infliction of emotional distress . . . .” *Id.* at 730, 551 N.W.2d at 543. The court held that the trial court properly refused to submit that instruction since it only addressed that element of an IIED claim requiring that a defendant’s conduct be intentional or reckless. Even in cases of sexual assault, the court stated, a plaintiff must still prove, and a jury must still find, that the defendant’s conduct was outrageous and that the conduct caused the plaintiff severe emotional distress. *Id.* at 730-31, 551 N.W.2d at 543.


57. *Id.* at 814, 503 N.W.2d at 178.

58. It is unclear exactly where the defendant’s vehicle was located before it was finally discovered. The defendant had contacted the police and reported the vehicle stolen, and the defendant repeatedly denied any knowledge of the whereabouts of the vehicle. *Id.*

59. *Id.* at 817, 503 N.W.2d at 179.

60. 237 Neb. 528, 466 N.W.2d 805 (1991).

61. *Id.* at 531-32, 466 N.W.2d at 808. Such a characterization of the defendant’s conduct was nonetheless irrelevant because the court held that the plaintiff failed to prove that her distress was severe enough to warrant recovery. *Id.* at 532, 566 N.W.2d at 808.
In *Davis v. Texaco, Inc.*, for instance, the plaintiff visited a service station where she was splashed and burned with scalding radiator fluid when the attendant removed the plaintiff's radiator cap. As Justice White, in his concurring opinion, explained:

The evidence shows that [the plaintiff] was burned by the negligent acts of a Texaco station employee. She was compelled to remove her outer garments which were saturated with hot radiator fluid. She requested something to cover herself and was given a filthy fender skirt to cover her partial nakedness. While attempting to leave the premises to secure medical treatment while naturally upset, hysterical, and in pain, the woman found that the station attendant had removed the ignition coil from her automobile and he would not restore it unless she surrendered the fender cover, thus leaving her partially clad on a major thoroughfare in Omaha, Nebraska. Finally, she suffered the indignity of being forced to bargain for a used shirt.

The majority of the court did not find the attendant's conduct "extreme and outrageous." In *Hassing v. Wortman*, the defendant, the plaintiff's ex-husband, persisted in harassing the plaintiff. He constantly drove by the plaintiff's house, crawled in her bushes, attempted to force her car off of the road, entered her house through an unlocked door, attempted to initiate a scheme whereby she would learn that her teaching contract would not be renewed, and indicated to relatives that she was pregnant when she and the defendant married but that the defendant was not the father. The court held that while the defendant acted in a "childish, irresponsible, and inconsiderate fashion," it was "doubtful" that the defendant's conduct was "extreme and outrageous."

In *Foreman v. AS Mid-America, Inc.*, the court similarly declined to find "extreme and outrageous conduct." In that case, the plaintiffs, who were non-union employees, endured a campaign of harassment and intimidation conducted by the defendant's union employees. The union employees repeatedly followed the plaintiffs home after work, physically threatened the plaintiffs and called them names, placed threatening phone calls to the plaintiffs' homes, damaged the plaintiffs' property, and spread dog feces on one of the plaintiff's clothes.

In *Gall v. Great Western Sugar Co.*, one of the defendant's claims agents telephoned the plaintiff and told her that her husband, who had only one arm, would be required to accept a particular job availa-

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63. *Id.* at 71-72, 313 N.W.2d at 224.
64. *Id.* at 71, 313 N.W.2d at 223. Justice White, in his concurrence, in which Chief Justice Krivosha joined, disagreed.
66. *Id.* at 157-58, 333 N.W.2d at 767.
68. *Id.* at 346, 586 N.W.2d at 306.
ble with his employer. The plaintiff was told that if her husband did not accept the job, all of his insurance would be cancelled and he would be fired. The court held that this was not "extreme and outrageous conduct." 70

Additionally, failing to comply with a court injunction or decree, 71 participating in a consensual sexual relationship that later goes awry, 72 moving one's possessions from one building to another in a manner that was perceived by the plaintiff as threatening, 73 and exclaiming that one's absence from a scheduled interview with the police reflected poorly on one's credibility 74 have all been held to not constitute "extreme and outrageous conduct" for the purposes of IIED in Nebraska.

This brief survey of past IIED claims brought before the Nebraska Supreme Court gives a sampling of the kinds of claims that the court has heard and the kinds of conduct that are and are not "extreme and outrageous" in Nebraska. With both these past IIED claims and section 46 of the Restatement (Second) of Torts in mind, Brandon can be properly analyzed.

IV. ANALYSIS OF BRANDON EX REL. ESTATE OF BRANDON V. COUNTY OF RICHARDSON

Brandon ex rel. Estate of Brandon v. County of Richardson serves to further develop the Nebraska Supreme Court's approach to IIED claims, generally, and to "extreme and outrageous conduct," more specifically. The development, largely, continues to be consistent, or stable. As in past cases, the court generally adhered to the standards and recommendations of section 46 of the Restatement (Second) of Torts in its analysis of the IIED claim in Brandon.

At the same time, portions of Brandon might give rise to concerns that the court is becoming more relaxed in its application of section 46 and in its approach to "extreme and outrageous conduct." Such con-

70. Id. at 360, 363 N.W.2d at 378.
73. Pick v. Fordyce Co-op Credit Ass'n, 225 Neb. 714, 408 N.W.2d 248 (1987). Here, more specifically, one of the plaintiffs' tenants was moving out of a leased commercial space into another space. The defendant's move apparently caught one of the plaintiffs, Mrs. Pick, by surprise. She testified that, during the defendant's move, she heard a "tremendous amount of racket on the side of my house which is towards the bank building." Id. at 719, 408 N.W.2d at 252. She further stated that her little girls were frightened, that she did not know what was going on, and that "[i]t looked like Gun Smoke, walking towards the house." Id. at 719, 408 N.W.2d at 253.
74. Brandon v. County of Richardson (Brandon I), 252 Neb. 839, 845, 566 N.W.2d 776, 781 (1997).
cerns might stem from the court's focus on the nature of Laux's tone of voice for the purposes of finding his conduct "extreme and outrageous," as well as from the fact that Laux's conduct was completely language-based rather than act-based. Further, some may question the wisdom of the court in finding Laux's language-based conduct "extreme and outrageous as a matter of law."\(^7\)

Even so, any real serious concerns of the court's taking a more relaxed approach to "extreme and outrageous conduct" and IIED are unfounded. The court, for example, did not put as much emphasis on Laux's tone of voice as it could have. Section 46 does clearly permit legal recovery for a defendant's language-based conduct alone. Section 46 also expressly permits a court to find conduct "extreme and outrageous" as a matter of law. Moreover, \textit{Brandon} gives no indication that the court has any intention of developing any standard of recovery in lieu of section 46, or that the court has fallen prey to a slippery slope whereby all sorts of conduct—and all sorts of language—may be deemed "extreme and outrageous."

Simply put, \textit{Brandon}, in certain respects, may well take a relatively more liberal approach to "extreme and outrageous conduct" and IIED than past Nebraska IIED cases. At the same time, \textit{Brandon} still overwhelmingly applies and adheres to the fundamental framework of section 46 of the \textit{Restatement}. Consequently, \textit{Brandon} evidences Nebraska's (more or less) stable approach to "extreme and outrageous conduct" and IIED.

\section*{A. \textit{Brandon} is Generally Within the Parameters of Section 46}

Generally, \textit{Brandon} is in keeping with the Nebraska Supreme Court's long-standing application of section 46 of the \textit{Restatement (Second) of Torts}. The court continued to require that the plaintiff prove three prima facie elements—(1) intentional or reckless conduct, (2) "extreme and outrageous conduct," and (3) causation of severe emotional distress—in order to recover for IIED.\(^7\) In addition, when analyzing and deciding whether Laux's conduct was "extreme and outrageous," the court by and large applied and adhered to the guidelines set forth in the comments of section 46. In particular, the court used comments e\(^7\) and f\(^7\) of section 46 in reasoning that Laux's con-

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\(^7\) \textit{Brandon}, 261 Neb. at 657, 624 N.W.2d at 621 ("we determine . . . that Laux's conduct was extreme and outrageous as a matter of law").

\(^7\) \textit{Id.} at 656, 624 N.W.2d at 620-21.

\(^7\) Recall that this comment suggests that "extreme and outrageous conduct" may arise from the defendant's abuse of a position of power in relation to the plaintiff. \textit{Restatement (Second) of Torts} § 46 cmt. e (1965).

\(^7\) Recall that this comment suggests that "extreme and outrageous conduct" may arise if the defendant has knowledge that the plaintiff is particularly vulnerable
duct was "extreme and outrageous." Namely, the court found that Laux, a law enforcement officer conducting a rape investigation, was in a position of power or authority in relation to Brandon, the alleged victim of the rapes who went to Laux for assistance. The court also reasoned that Laux proceeded to use "crude and dehumanizing language" even though he knew that Brandon was in a particularly vulnerable emotional state.

Rather surprisingly, however, the court made only one reference to comment d of section 46, which suggests that liability may not be imposed for mere "insults," "indignities," or "rough language." Since Laux's conduct consisted wholly of language use, it is curious that the court did not make more of an effort to balance "rough language," for which legal recovery may not be had, against "extreme and outrageous" language, for which legal recovery is available. Presumably, the court found Laux's language to be so "extreme and outrageous" that it did not believe a lengthy discussion balancing "rough language" against "extreme and outrageous" language was necessary; the court did, after all, find Laux's conduct "extreme and outrageous" as a matter of law. At any rate, the court's sole reference to comment d of section 46 indicates that it at least remained mindful of the Restatement's warning against imposing tort liability for "rough language." Moreover, the court's use of Laux's position of authority and Laux's knowledge of Brandon's emotional state as factors in reasoning that Laux's conduct was "extreme and outrageous" is well within the recommendations and boundaries of section 46.

Generally, then, the court's reasoning in Brandon is within the parameters of section 46 of the Restatement. Nonetheless, the court was not as strict in its adherence to section 46 as it could have been, possibly giving rise to concerns that the court has begun to take a more liberal approach to "extreme and outrageous conduct" and IIED claims.

B. The Court's Emphasis on Laux's Tone of Voice is Questionable

As seen above, the court largely applied the section 46 standard in its analysis of JoAnn Brandon's IIED claim and in its finding Laux's...
conduct "extreme and outrageous." Nonetheless, certain portions of
the court's reasoning seem to stray from, and fall outside of, the stan-
dards and recommendations of section 46. Namely, the court's empha-
thesis on Laux's tone of voice for the purposes of finding Laux's conduct
"extreme and outrageous" is questionable under section 46 and its offi-
cial comments.

The court's focus on the tone of voice that Laux used throughout
the course of the interview with Brandon is set forth in two places in
the court's decision. First, the court stated that the "tone used during
the interview is also something to be considered in determining the
outrageousness of Laux's conduct."83 Later, the court again empha-
sized that Laux's tone of voice was "very significant" for the purposes
of determining outrageousness.84 Precisely how much Laux's tone of
voice influenced the court in finding his conduct "extreme and outra-
geous" remains unclear. These quotations, though, suggest that it
played more than a marginal role.

Section 46 does not explicitly indicate whether the nature of a de-
fendant's tone of voice may be an appropriate factor for a court to so
heavily consider when determining if a defendant's conduct was "ex-
treme and outrageous."85 In this respect, the court did not directly
disregard the language of section 46 and its comments by placing em-
phasis on Laux's tone of voice. However, comment d to section 46 at
least implicitly suggests that a significant emphasis on a defendant's
tone of voice might not be appropriate. According to comment d, tort
liability for IIED is not to extend to "mere insults," "annoyances,"
"petty oppressions," and "rough language."86 Thus, under a close,
scrutinized reading of section 46 and its comments, a finding that the
defendant's tone of voice was "demeaning, accusatory, and intimidat-
ing"87 might well be insufficient for a finding of "extreme and outra-
geous conduct."

Simply put, might not tone of voice, by its nature, more readily be
one of life's "petty oppressions," rather than "atrocious"?88 Is tone of
voice not more akin to the "rough language" to which plaintiffs living
in a complex society must necessarily become accustomed than it is
akin to conduct that is "utterly intolerable in a civilized commu-
nity"?89 Other courts believe so.90 One such court, for example, noted

83. Brandon, 261 Neb. at 659, 624 N.W.2d at 622.
84. Id. at 662, 624 N.W.2d at 624.
85. See Restatement (Second) of Torts § 46.
86. Id. cmt. d.
87. In Brandon, the court described Laux's tone of voice as "demeaning, accusatory,
and intimidating." Brandon, 261 Neb. at 659, 624 N.W.2d at 622.
88. See Restatement (Second) of Torts § 46 cmt. d (explaining that liability for
IIED extends to "atrocious" conduct but not to "petty oppressions").
89. See id. (noting that plaintiffs are required to be "hardened to a certain amount of
rough language").
that if a defendant's tone of voice constitutes "outrageous conduct," a
court would be "hard-pressed" to find conduct that is not "extreme and
outrageous." Thus, the Nebraska Supreme Court's more-than-mar-
ginal emphasis on Laux's tone of voice seems to constitute a somewhat
more relaxed approach to "extreme and outrageous conduct" in com-
parison to the implicit suggestions of section 46, to other courts' appli-
cations of the language and official comments of section 46, and to the
prior IIED claims decided by the Nebraska Supreme Court.

C. "Extreme and Outrageous Conduct" in Nebraska: Just
How Slippery Does Brandon Make the Slope?

Particular aspects of Brandon might not convince scholars and
practitioners that the Nebraska Supreme Court is simply taking a sta-
ble, consistent approach to IIED claims and to "extreme and outra-
geous conduct." In placing significant emphasis on Laux's tone of
voice for the purposes of finding his conduct "extreme and outrageous"
and by holding that Laux's language-based conduct was "extreme and
outrageous" as a matter of law, the court might instead draw criticism
that it is taking too liberal of an approach to "extreme and outrageous
conduct" and IIED. One might wonder, in fact, if Brandon signals the
beginning of Nebraska's slide down the proverbial slippery slope
where the Nebraska Supreme Court will eventually make the rela-
tively strict standards of section 46 all but meaningless.

Although these fears of an increasingly liberal approach to "ex-
treme and outrageous conduct" may well exist, they are largely un-
founded. Brandon suggests that section 46 still stands strong. There

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90. See, e.g., Lee v. Wojnaroski, 751 F. Supp. 58, 61 (W.D. Pa. 1990) (holding that the
plaintiff's claim for IIED could not withstand the defendant's motion for sum-
mary judgment when the plaintiff's allegations consisted only of the defendant's
use of a particular tone of voice); see also Purdy v. City of Nashua, No. 98-627-JD,
of the Restatement (Second) of Torts and holding, in part, that the defendant's
tone of voice did not constitute "extreme and outrageous conduct" since liability
does not extend to "mere insults, indignities, threats, annoyances, or other trivi-
Sept. 16, 1997) (holding that the plaintiff failed to allege "extreme and outra-
geous conduct" when she alleged that the defendant told her that she was over-
paid, used a very "nasty" tone of voice, and asked her "who the hell" she was
talking to on the telephone). But see Drejza v. Vaccaro, 650 A.2d 1308, 1315 n.19
(D.C. 1994) (indicating that the tone of the defendant's remarks could make a
"considerable difference" in determining whether the defendant's conduct was
"extreme and outrageous").


92. See supra section III.B. Prior to Brandon, it appears the court had never explicit-
ly focused on the nature of a defendant's tone of voice for the purposes of finding
"extreme and outrageous conduct." Id.
currently is no real serious threat of a slippery slope regarding “extreme and outrageous conduct” and future IIED claims in Nebraska.

1. Concerns of a Slippery Slope Quieted: Section 46 Stands Strong

First, in comparison to past IIED claims brought before the Nebraska Supreme Court, the Brandon decision represents the first such claim in which the court placed explicit emphasis on the defendant’s tone of voice for the purposes of finding “extreme and outrageous conduct.” Although this approach is questionable under section 46, the court’s consideration of a defendant’s tone of voice, as demonstrated in Brandon, is not as permissive, or relaxed, as it could potentially be. Thus, the Brandon court did not too significantly stray from the standards and recommendations of section 46.

To be accurate, Brandon does not hold that a defendant’s use of a particular tone of voice by itself is necessarily sufficient to constitute “extreme and outrageous conduct.” It was not Laux’s tone of voice in and of itself that was “extreme and outrageous.” Rather, the court found Laux’s conduct “extreme and outrageous” based on the totality of the circumstances—Laux’s tone of voice coupled with his choice of language, his position of authority, Brandon’s emotional vulnerability, and so on.

In other words, Brandon indicates that a defendant’s tone of voice may be considered as one of many factors when doing the outrageousness calculus. The court, however, has not indicated that it would entertain, much less sustain, a claim for IIED when the plaintiff alleges only that the defendant used a particular tone of voice, whether accusatory, demeaning, crude, or the like.

In focusing on Laux’s tone of voice, then, the court may well have focused on a single factor that might by itself fall outside the stan-

93. See supra section IV.B.
94. See Brandon, 261 Neb. at 656-62, 624 N.W.2d at 620-24.
95. Admittedly, it seems difficult to imagine a case where a plaintiff would base her IIED claim solely on the defendant’s tone of voice and would not concern herself with the actual words that the defendant said. On the other hand, what happens if someone mutters innocuous words but in a menacing way? Consider, for instance, what happens when one’s boss or superior says, “Good morning, I sure hope you have a good day today.” In this kind of case, tone of voice could be quite significant. On the one hand, the boss or superior could cheerfully say the words to the subordinate. On the other hand, the boss or superior could say the words menacingly or threateningly, perhaps implying, through tone of voice, that the subordinate will find herself fired by day’s end or that the boss or superior wishes harm or misfortune on the subordinate. In either case, the words themselves could not be the basis for an IIED claim, but are there grounds for an IIED claim in the latter case due to tone of voice alone? Would the Nebraska Supreme Court, in light of its emphasis on Laux’s tone of voice in Brandon, entertain such a claim?
standards and language of section 46 and its comments. But, most importantly, the court in Brandon indicated that a number of factors falling within the standards of section 46—a defendant’s position of authority, for instance—must be present, as well. Thus, the importance of section 46 continues, and Nebraska’s approach to “extreme and outrageous conduct” remains (more or less) stable.

Second, Brandon represents an IIED claim where the defendant’s “extreme and outrageous conduct” was primarily language-based; that is, Laux’s conduct was more or less comprised of what he said to Brandon and how he said it. Until Brandon, most IIED claims appealed to the court were precipitated largely by act-based, rather than by language-based, conduct. In sum, most prior defendants did, rather than said.96 Laux, on the other hand, simply opened his mouth; he interviewed Brandon but made no threats, took no action, and made no physical contact with Brandon.

To some, this distinction between act- and language-based conduct for the purposes of IIED claims may be negligible.97 To others, however, a readiness to permit language-based IIED claims may conjure up fears of a slippery slope where all kinds of language may become grounds for legal recovery.98 In contrast to acts, words might tend to

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96. See supra section III.B. In those cases in which the court found that there was or that there may have been “extreme and outrageous conduct,” the defendants’ conduct was not primarily language-based. Instead, the conduct ranged anywhere from incessantly sending malicious and threatening letters in Fogarty to deceptively dragging a body across a remote county road in Nichols, and from holding a loved one’s corpse hostage for the sake of debt collection in Dale to perpetrating a sexual assault in Mindt. These kinds of behavior constitute something other than the use of crude language, and, in some cases, might even rise to the level of some other more traditional torts, such as assault, battery, and defamation. Moreover, even most of those defendants party to IIED claims in which the court declined to find “extreme and outrageous conduct” engaged in primarily act-based, rather than language-based, conduct.

In contrast to these many IIED claims precipitated by and large by a defendant’s act-based conduct, recall that Brandon I and Gall do represent language-based IIED claims. In Gall, the alleged “extreme and outrageous conduct” essentially consisted of statements made to the plaintiff during a telephone conversation. In Brandon I, the only allegation of “extreme and outrageous conduct” was that Laux stated that Brandon’s absence from a scheduled interview reflected poorly on her credibility as to the truth of the rapes committed by Lotter and Nissen. The court declined to find “extreme and outrageous conduct” in both Brandon I and in Gall. See Brandon I, 252 Neb. at 845, 566 N.W.2d at 781; Gall, 219 Neb. at 360-61, 363 N.W.2d at 378.

97. Section 46 of the Restatement (Second) of Torts, for instance, does not require that the defendant engage in act-based conduct or make any kind of physical contact with the plaintiff before liability may be imposed. The defendant need engage only in “extreme and outrageous conduct,” which can include language-based conduct. See Restatement (Second) of Torts § 46 (1965).

98. See, e.g., Drejza v. Vaccaro, 650 A.2d 1308, 1309 (D.C. 1994). The facts of Drejza were much like that of Brandon. The plaintiff, a victim of a sexual assault, reported the assault to a police detective, who, according to the plaintiff, was belit-
play much more on one's individual values and sensitivities or sentiments,\textsuperscript{99} precluding a court from drawing any meaningful line between legally recoverable language and language for which legal recovery may not be had. Hence, holding one's use of language "extreme and outrageous" may be more readily vulnerable to a slippery slope than would a court holding one's doing of acts or one's making physical contact with the plaintiff "extreme and outrageous."

Ultimately, however, it seems difficult to ascertain whether, or to what extent, language-based conduct is more susceptible to a slippery slope. Most important, though, a plaintiff's legal recovery for a defendant's language-based conduct alone is completely within the bounds of section 46 of the Restatement (Second) of Torts. In fact, permitting legal recovery for a defendant's language-based conduct, and that language-based conduct alone, appears to be one of the fundamental purposes of section 46. So-called parasitic damages are no longer needed; section 46 recognizes IIED as a tort in and of itself. Thus, act-based conduct is not necessarily needed in order for conduct to be "extreme and outrageous."\textsuperscript{100} As such, the Nebraska Supreme Court's having

\textsuperscript{99} See Bartow v. Smith, 78 N.E.2d 735 (Ohio 1948), overruled by Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of Am., 453 N.E.2d 666 (Ohio 1983). In Bartow, the court refused to extend tort liability for IIED to those instances in which the defendant only used defamatory, insulting and profane words absent making some threat, engaging in a menacing action, or making physical impact with the plaintiff, since the plaintiff's injuries would be "more sentimental than substantial." \textit{Id.} at 740.

\textsuperscript{100} See \textsc{Restatement (Second) of Torts} § 46 cmt. b (indicating that IIED is a "separate and distinct basis of tort liability, without the presence of the elements necessary to any other tort, such as assault, battery, false imprisonment, trespass to land, or the like"). However, some courts, claiming to have adopted the section 46 standard, nonetheless do seem to require that a defendant engage in something other than, or something beyond, language-based conduct before tort liability for IIED may be imposed. See Vernon v. Med. Mgnt. Ass'n of Margate, Inc., 912 F. Supp. 1549, 1559 (S.D. Fla. 1996) (explaining that "[i]t is the element of offensive, non-negligible physical contact that, when coupled with persistent verbal abuse and threats of retaliation, can under some facts and circumstances constitute conduct of sufficient outrageousness to support a claim for intentional infliction of emotional distress"); Johnson v. Thigpen, 788 So. 2d 410 (Fla. Dist. Ct. App. 2001) (holding that the lower court correctly denied the defendant's motion for a directed verdict on the plaintiff's IIED claim, since the plaintiff endured both verbal abuse and repeated offensive, unwelcomed physical contact) (emphasis added); \textit{see also} Howard v. United States, No. 99-3865, 2000 WL1272590, at *4-5 (E.D. Pa. Aug. 28, 2000) (holding that there was no extreme and outrageous conduct for the purposes of IIED when the defendants, DEA agents, conducted a search of the plaintiffs' home without raising their voices, using foul language,
no qualms about awarding legal recovery for IIED when the defendant engaged in language-based conduct alone is hardly outside the parameters of, or liberal in relation to, section 46, although it does indeed seem liberal in relation to past Nebraska IIED claims in the sense that entirely language-based conduct has never before been held to be "extreme and outrageous." In this respect, Brandon exhibits Nebraska's (more or less) stable approach to "extreme and outrageous conduct" and IIED.

Third, the Brandon court went beyond finding Laux's conduct "extreme and outrageous." The court, in fact, found Laux's conduct to be "extreme and outrageous as a matter of law." What is more, Brandon appears to mark the first time in which the Nebraska Supreme Court has found any type of conduct, let alone language-based conduct, "extreme and outrageous" as a matter of law for the purposes of IIED. As such, concerns might again arise that this finding evidences the court's willingness to take too permissive of an approach to IIED claims. After Brandon, one might wonder what other kinds of conduct might be "extreme and outrageous" as a matter of law. What are the limitations?

Admittedly, Brandon, in this respect, seems to provide evidence that the court might be taking more of a permissive approach to IIED claims. By finding Laux's language-based conduct "extreme and outrageous" as a matter of law, the court essentially held that Laux's conduct was necessarily "extreme and outrageous" and that reasonable men could not find that Laux's conduct was not "extreme and outrageous." The court essentially held that Laux's conduct was so "ext-

and making physical contact with the plaintiffs); Adams v. Gen. Motors Corp., No. 93AP-173, 1993 WL 310420, at *2 (Ohio Ct. App. Aug. 12, 1993) (sustaining the lower court's grant of summary judgment to the defendant on the plaintiff's claim for IIED when the plaintiff failed to allege that the defendant physically touched her or threatened to discharge her from employment).

It is difficult to reconcile these courts' apparent requirements for an IIED claim with the language of section 46, especially considering that these courts purport to have adopted the section 46 standard. Clearly, a requirement of offensive physical contact, for instance, rises to the level of battery, see Restatement (Second) of Torts §§ 13, 18, which, again, is explicitly not required under section 46. See id. § 46 cmt. b (recognizing IIED as a separate basis for tort liability); id. cmt. k (explaining that recovery for IIED is not limited to "cases where there has been bodily harm").

101. Brandon, 261 Neb. at 657, 624 N.W.2d at 621.
102. See Restatement (Second) of Torts § 46 cmt. h. More precisely, comment h provides:

It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.
treme and outrageous" that reasonable men could not differ on the issue. This author is aware of no other instances in which the court has found conduct for the purposes of IIED to be "extreme and outrageous" as a matter of law.

At the same time, despite its arguably liberal relationship to past Nebraska IIED claims, Brandon's holding that Laux's conduct was "extreme and outrageous" as a matter of law is still perfectly in keeping with section 46—the court's overall, general IIED standard. Again, comment h of section 46 explicitly permits a court to find conduct "extreme and outrageous" as a matter of law. As such, the Nebraska Supreme Court is not in the midst of adopting any new, more liberal standard in finding Laux's conduct "extreme and outrageous" as a matter of law. The court instead has simply exhibited a greater willingness to employ what seem to be the more liberal portions of the guidelines and requirements already set forth in section 46—the standard that the court has faithfully used all along. Consequently, Brandon again sheds light on Nebraska's (more or less) stable approach to "extreme and outrageous conduct" and IIED.

2. Uncertain but Predictable: Language-Based Conduct and the Future of IIED in Nebraska

This, of course, is not to say that language-based IIED claims could not lead to a slippery slope. For better or for worse, Brandon is only a starting point. Eventually, a delicate balance between "rough language" and "extreme and outrageous" language must be struck, and it is hard telling where that line will be drawn. Given Brandon, one wonders just how far the court is willing to entertain future IIED claims based on a defendant's use of language alone. For the purposes of future IIED claims, under what circumstances will these language-based claims likely succeed? What other language, used under what other circumstances, might cause the court to exclaim, "Outrageous!"?

The answers, while admittedly uncertain, are at least somewhat predictable, which again, should alleviate serious concerns about the feared slippery slope approach to "extreme and outrageous conduct" and IIED.

Language-based IIED claims are in need of much further development in Nebraska before their limits can truly be known. Brandon, read narrowly, might nonetheless work to indicate that legal recovery for language-based IIED may not be had under just any circumstances. For instance, the court's emphasis both on a special relationship of sorts between Laux and Brandon and on the fact that Laux proceeded to use "crude and dehumanizing language" knowing that Brandon was emotionally vulnerable may quiet some concerns among those fearful of too lenient a standard. In its reasoning, the court implies that it might be much less apt to find a defendant's language
“extreme and outrageous” absent some kind of relationship between the plaintiff and the defendant and/or absent the defendant’s knowledge of the plaintiff’s emotional vulnerabilities. For example, a defendant who simply talks about taking “a little time working it up,” having “a hard on when he got back there,” and inquiring whether one had “trouble getting it in,” may not be “extreme and outrageous” for the purposes of IIED in cases in which the defendant is not in a position of authority, has no other special relationship with the plaintiff, or is unaware of the plaintiff’s peculiar emotional susceptibilities.

Still, Nebraska practitioners might be wise to remain cautious of such generalizations and narrow readings of Brandon. The court has not explicitly bound itself to finding language-based conduct “extreme and outrageous” only when there is a plaintiff/defendant relationship and/or when the defendant is aware of the plaintiff’s emotional state. Brandon only suggests that these principles are relevant to the discussion. One might imagine, for instance, an unknown passerby crossing a street in downtown Omaha and directing such obscene and abusive language at another that this language might fairly be held “extreme and outrageous.” Brandon certainly does not preclude such a result.

While the court’s reasoning in Brandon gives at least some suggestion that “crude and dehumanizing” language might not so readily be “extreme and outrageous” in all circumstances, Brandon is not as helpful in indicating precisely what kind of language, aside from Laux’s, might cause the court to exclaim, “Outrageous!” That is, even if there were both a relationship between the parties analogous to that in Brandon and the defendant was aware of the plaintiff’s emotional vulnerabilities when engaging in language-based conduct, as in Brandon, the limits as to just what kind of language might be “extreme and outrageous” for the purposes of future IIED claims remain elusive.

It remains unclear, for example, how the Nebraska Supreme Court would treat one’s calling another a “damned fat fag” or how the court would deal with one’s speaking of and telling jokes about the size of a man’s penis. Other courts have found such language not to be “extreme and outrageous.” In other words, the balance between “rough language” and “extreme and outrageous” language is hardly certain. From a Nebraska practitioner’s standpoint, one must simply work from and with the language-based conduct in Brandon, making

103. Brandon, 261 Neb. at 643, 624 N.W.2d at 613.
104. Id.
105. Id. at 644, 624 N.W.2d at 613.
analogies accordingly. Striking a meaningful balance between “rough language” and “extreme and outrageous” language cannot be done until future language-based IIED claims are fully litigated.

One might, at any rate, predict that the court will not stray too far from section 46 of the Restatement (Second) of Torts when future language-based IIED claims are brought before it. With the arguable exception of its likely disproportionate focus on a defendant’s tone of voice, the court has largely adhered to the Restatement and has given no serious indication that it seeks to devise or apply any fundamentally different standard for recovery. The court continues to remain mindful of the Restatement’s suggestion against permitting recovery for mere “rough language.”108 The court, therefore, is most unlikely to be too quick to deem just any language “extreme and outrageous.” And thus, the Nebraska defense lawyer’s delight is the Nebraska plaintiffs’ lawyer’s disappointment: Nebraska’s path down any slippery slope is probably a short one.

V. CONCLUSION

Brandon ex rel. Estate of Brandon v. County of Richardson may well be comparatively liberal with respect to past Nebraska IIED cases. Nonetheless, Brandon is still overwhelmingly in keeping with the standards and recommendations of section 46 of the Restatement, the IIED standard long used by the Nebraska Supreme Court. Accordingly, Brandon sheds light on the Nebraska Supreme Court’s (more or less) consistent, or stable, approach to IIED claims and to the “extreme and outrageous conduct” necessary for a plaintiff’s legal recovery for IIED.

The Brandon court continued to utilize section 46 of the Restatement (Second) of Torts, emphasizing Laux’s position of authority and Laux’s knowledge of Brandon’s emotional disposition. While apparently never before done by the Nebraska Supreme Court, recovery for a defendant’s language-based conduct is completely permissible under section 46, which recognizes IIED as an independent tort; thus, the court’s finding that Laux’s conduct was “extreme and outrageous” is no anomaly. Further, the court’s finding that Laux’s conduct was “extreme and outrageous” as a matter of law is also permitted under the standards of section 46. So long as the court continues to remain aware of the Restatement’s warning against allowing recovery for mere “rough language”—which, thus far, it has—the court is not too likely to quickly slide down a slippery slope whereby legal recovery in tort suddenly becomes available for all sorts of language-based conduct. In short, the application of section 46 remains strong in Nebraska.

108. See Brandon, 261 Neb. at 657, 624 N.W.2d at 621.
To assure that section 46 continues to serve as Nebraska’s standard of legal recovery for IIED, the court must take care to avoid placing undue emphasis on factors that arguably fall outside of the section 46 framework for the purposes of finding conduct “extreme and outrageous” in future IIED claims brought before it. Among these factors is the nature of a defendant’s tone of voice. Insofar as Brandon does not indicate that the nature of a defendant’s tone of voice alone would be a sufficient basis for a claim for IIED, the court’s focus on these kinds of factors thus far has been minimal. If the court wishes to maintain any reasonable and meaningful standard of recovery for IIED, it must not stray further.

Yet, one might argue that an emphasis of any kind—no matter how minimal—on factors such as the defendant’s tone of voice for the purposes of finding conduct “extreme and outrageous” is misplaced and inappropriate. After all, the court’s more-than-nominal emphasis on Laux’s tone of voice may have already set an unwise precedent from a practical, or systemic, standpoint. Given the court’s obvious willingness to now consider a defendant’s tone of voice as a prominent factor in the calculus of “extreme and outrageous conduct,” even if the court has not fallen prey to a slippery slope of “extreme and outrageous conduct,” it is not difficult to imagine plaintiffs at least attempting to more readily litigate IIED claims. By placing such emphasis on a defendant’s tone of voice, the court, in effect, may have opened the doors of Nebraska’s courts to plaintiffs seeking legal redress because they did not appreciate the manner in which they were spoken to. It is ultimately uncertain just how far beyond filing a petition these plaintiffs might get, but Brandon at least suggests that they might well go further than any pre-Brandon plaintiffs ever dreamt.109

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109. Of course, even if a plaintiff’s IIED claim based solely on a defendant’s use of a particular tone of voice should survive a demurrer for failure to state facts sufficient to constitute a cause of action and/or a later motion for summary judgment, the plaintiff must eventually bear the burden of proving, or at least substantiating, the defendant’s “extreme and outrageous conduct.” This would be no easy task. From a practical standpoint, one might imagine that the precise nature of a defendant’s tone of voice is very difficult to prove, or substantiate, absent a tape-recording like that available in Brandon.

On the one hand, this heavy, if not nearly impossible, burden of proof might work to alleviate the systemic concerns that seem to arise from the court’s focus on a defendant’s tone of voice for the purposes of finding “extreme and outrageous conduct.” This burden of proof might discourage more litigious plaintiffs from bringing IIED claims whose merits are somewhat questionable.

On the other hand, there may be plaintiffs (or would-be plaintiffs) who were in fact subjected to a truly “extreme and outrageous” tone of voice, whatever that may be. For a suggestion, see supra note 95. With the exception of those who were fortunate enough to have tape-recorded such a tone of voice, they too will find it nearly impossible to bear the burden of proving or substantiating with any
meaningful degree of credibility the "extreme and outrageous conduct," in which case the court's focus on a defendant's tone of voice seems to give but a virtually meaningless tool to those few plaintiffs who might in good faith be able to use it.