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United States Bankruptcy Court  
Eastern District Of Washington

In Re: )  
)  
DAVID WALLACE BAYS, ) Main Case 01-05127  
) Number:  
)  
)  
)

Debtor(s) )  
LINDA BAYS; KELLY CASE , ) Adversary A03-00237  
) Number:  
)  
)  
)

Plaintiff(s) )

vs. )  
DAVID BAYS; DOUG LAMBARTH )  
and JANE DOE LAMBARTH; )  
JOE ESPOSITO and JANE DOE )  
ESPOSITO; GARY STENZEL )  
and JANE DOE STENZEL; )  
PAUL BASTINE and JANE DOE )  
BASTINE; JOE WITTSTOCK )  
and JANE DOE WITTSTOCK; )  
DAVID HARDY and JANE DOE )  
HARDY; SPOKANE COUNTY )  
COURT, )

Defendant(s) )

DECISION RE: LINDA BAYS' AND KELLY  
CASE'S CAUSES OF ACTION FOR OUTRAGE  
(INTENTIONAL INFLICTION OF  
EMOTIONAL DISTRESS) AGAINST GARY  
STENZEL, INDIVIDUALLY AND HIS  
MARITAL COMMUNITY

**FILED**

AUG 28 2008

U.S. BANKRUPTCY COURT  
EASTERN DISTRICT OF WASHINGTON

The plaintiffs Linda Bays and Kelly Case are suing the defendant Stenzels for the tort of outrage. This matter comes before the court upon motions for summary judgment relating to the tort of outrage filed by Linda Bays [AP #557], Kelly Case [AP #570] and Gary Stenzel [AP #553].

1  
2 PROCEDURAL HISTORY

3 Gary Stenzel, individually and his marital community, were  
4 among the original defendants named in Linda Bays' "Complaint for  
5 Damages and for Injunctive Relief" filed in Stevens County Superior  
6 Court. [AP #1, pg 7-20]. Ms. Bays complained about Mr. Stenzel's  
7 his representation of her in her dissolution case with David Bays  
8 and in David Bays' bankruptcy case. The acts complained of involve  
9 his conduct as her attorney. This state court lawsuit was removed  
10 to bankruptcy court and became this adversary proceeding. [AP #1].

11 Linda Bays and Kelly Case filed an amended complaint in this  
12 adversary proceeding. [AP #104]. The Stenzels were named among the  
13 defendants in the amended complaint. Count IX of this amended  
14 complaint is specifically directed against Gary Stenzel and seeks  
15 recovery for attorney malpractice in both the dissolution case and  
16 the bankruptcy. [AP #104 pg 32].

17 The amended complaint included numerous other causes of action  
18 against the Stenzels and the other defendants. Defendants Stenzel  
19 filed a motion to dismiss the various causes of action against  
20 them. [AP #149]. This court dismissed with prejudice a number of  
21 causes actions against the Stenzels. [AP #199 ¶s 3 and 5]. The  
22 court remanded the plaintiffs' claims for malpractice to the  
23 Superior Court. [AP #199 ¶ 9]. The court retained jurisdiction  
24 over the plaintiffs' causes of action against the Stenzels for  
25 Slander of Title and Quiet Title, [AP #199 ¶ 4], Substantial Abuse  
26 of the Bankruptcy Laws [AP #199 ¶ 6], Offset [AP #199 ¶ 7] and  
27 Outrage [AP #199 ¶ 8]. On oral motion of Linda Bays and Kelly Case  
28 the court subsequently ordered the dismissal of the plaintiffs'

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1 substantial abuse of bankruptcy and set off claims against the  
2 Stenzels. [AP # 580, 630, and 633].

3 The summary judgment motions currently before the court by the  
4 Stenzels [AP #533], Linda Bays [AP #557, and Kelly Case [AP #570]  
5 relate to the outrage cause of action.

6  
7 FACTS

8 Linda Bays [AP #562] and Kelly Case [AP #574] have filed  
9 declarations in support to their claims of outrage against Gary  
10 Stenzel. The gravamen of their claim is that Gary Stenzel failed  
11 to adequately represent Linda Bays as her attorney in the  
12 dissolution and in David Bays' bankruptcy case. Mostly, the  
13 allegations concern a number of omissions or failures on Mr.  
14 Stenzel's part, when acting as Ms. Bays' attorney. Specifically,  
15 the plaintiffs allege Mr. Stenzel failed to follow instructions, to  
16 sufficiently inform his client about her rights, to do adequate  
17 discovery, to object to an appraiser, to seek the removal of the  
18 trial judge assigned to the dissolution case, and to object on her  
19 behalf to Mr. Bays' bankruptcy discharge. To a lesser extent, the  
20 allegations concern what Mr. Stenzel actually did for his client.  
21 These allegations include complaint about filing incorrect  
22 documents, withdrawing as her attorney on the eve of her trial and  
23 misinforming the bankruptcy judge about her wishes regarding the  
24 dismissal of the bankruptcy.

25 Finally, the plaintiffs allege Mr. Stenzel conspired with the  
26 other defendants against them. Again, all of the allegations  
27 relate to Mr. Stenzel's conduct as Ms. Bays' attorney, which is the

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1 subject of the pending malpractice lawsuit in Stevens County  
2 Superior Court.

3  
4 DISCUSSION

5 The plaintiffs have alleged a conspiracy against them in  
6 support of their claim of outrage.

7 A recent statement of what is required to prove civil  
8 conspiracy is found in All Star Gas, Inc., Of Washington v.  
9 Bechard, 100 Wash.App. 732, 998 P.2d 367 (2000). The court ruled:

10 To establish a civil conspiracy, All Star must prove  
11 by clear, cogent, and convincing evidence that (1) two or  
12 more people combined to accomplish an unlawful purpose,  
13 or combined to accomplish a lawful purpose by unlawful  
14 means; and (2) the conspirators entered into an agreement  
15 to accomplish the conspiracy. *Wilson v. State*, 84  
16 Wash.App. 332, 350-51, 929 P.2d 448 (1996), cert. denied,  
17 522 U.S. 949, 118 S.Ct. 368, 139 L.Ed.2d 286 (1997).  
18 "Mere suspicion or commonality of interests is  
19 insufficient to prove a conspiracy." *Id.* "[When] the  
20 facts and circumstances relied upon to establish a  
21 conspiracy are as consistent with a lawful or honest  
22 purpose as with an unlawful undertaking, they are  
23 insufficient." *Lewis Pacific Dairymen's Ass'n v. Turner*,  
24 50 Wash.2d 762, 772, 314 P.2d 625 (1957).

25 Ibid., 100 Wash.App. 740, 998 P.2d 372.

26 The plaintiffs claim that Mr. Stenzel conspired against them.  
27 The acts about which they complain, took place during the course of  
28 hotly contested dissolution and bankruptcy cases when Mr. Stenzel  
was serving as Linda Bays' lawyer.

The plaintiffs' allegations of conspiracy are conclusory and  
are not supported by evidence. The Plaintiffs have not presented  
evidence of any agreement between Stenzel and any of the other  
alleged co-conspirators. Discussions over lunch or in the course  
of preparing and conducting litigation "are as consistent with a

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1 lawful or honest purpose as with an unlawful undertaking..." Ibid.  
2 The evidence presented is insufficient to support a claim of  
3 conspiracy against Mr. Stenzel under even the preponderance  
4 standard much less the clear, cogent and convincing standard  
5 applicable in Washington.

6 In Washington, civil conspiracy is a separate tort.  
7 "[O]utrage should allow recovery only in the absence of other tort  
8 remedies." Rice v. Janovich, 109 Wash.2d 48 at 62, 742 P.2d 1230  
9 at 1239 (1987). Since Washington views civil conspiracy as a  
10 separate tort it would not allow recovery for both torts. Since  
11 civil conspiracy requires a higher burden of proof, it is easier to  
12 prove outrage.

13 "'[O]utrage' and 'intentional infliction of emotional  
14 distress' are synonyms for the same tort. Kloepfel v. Bokor, 149  
15 Wash.2d 192 at 194 FN1, 66 P.3d 630 at 631 FN1 (2003). As outlined  
16 by the Washington State Supreme Court:

17 The tort of outrage requires the proof of three elements:  
18 (1) extreme and outrageous conduct, (2) intentional or  
19 reckless infliction of emotional distress, and (3) actual  
20 result to plaintiff of severe emotional distress.  
(Citations omitted).

20 Ibid, 149 Wash.2d at 196, 66 P.3d at 633.

21 The plaintiffs present evidence that Mr. Stenzel had knowledge  
22 of Ms. Bays' mental and physical state. The plaintiffs' evidence  
23 on the second and third of these elements of the tort of outrage is  
24 at least arguable under the facts presently before the court.  
25 Accordingly, the court will focus on whether the conduct complained  
26 of here was "extreme and outrageous."

27 It is clear in Washington that the actions triggering a

1 finding of outrage must be very unusual.

2 ...It is the law of this state that liability can be  
3 found only where the conduct had been so outrageous in  
4 character and so extreme in degree, as to go beyond all  
5 possible bounds of decency, and to be regarded as  
6 atrocious and utterly intolerable in a civilized  
7 community...

8 Woodward v. Steele, 32 Wash. App. 152, at 155-156, 646 P.2d 167, at  
9 169-170 (1982).

10 Even if the conduct complained of is truly extreme and  
11 outrageous it still might be privileged.

12 ...[T]he conduct although it would otherwise be extreme  
13 and outrageous, may be privileged under the  
14 circumstances. The actor is never liable, for example,  
15 where he's done no more than insist upon his legal rights  
16 in a permissible way, even though he is well aware that  
17 such insistence is certain to cause emotional distress.

18 Ibid, 32 Wash. App. at 155-156, 646 P.2d at 170 (1982).

19 It is for the court to determine, in the first instance,  
20 whether the defendant's conduct may reasonably be  
21 regarded as so extreme and outrageous as to permit  
22 recovery.

23 Restatement (Second) of Torts, Section 46, Comment h.

24 The actions and failures to act complained of by Linda Bays  
25 are common complaints of clients seeking to prove malpractice by  
26 their attorneys. There is nothing in the facts of this case which  
27 raise it to the higher level of outrageous conduct.

28 Legal malpractice is a separate tort. If proved the  
29 plaintiffs could recover the same damages available if they proved  
30 outrage. In light of the availability of another tort remedy, the  
31 exceptional remedy outrage is not available to the plaintiffs.

32 Rice v. Janovich, 109 Wash.2d 48 at 62, 742 P.2d 1230 at 1239  
33 (1987).

1 Kelly Case's course of action is based entirely on Mr.  
2 Stenzel's conduct towards Linda Bays, his mother. The facts don't  
3 support her claim of outrage. His claim is no better than hers.  
4 Both plaintiffs fail to make a prima facie case of outrage against  
5 the Stenzels.

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CONCLUSION

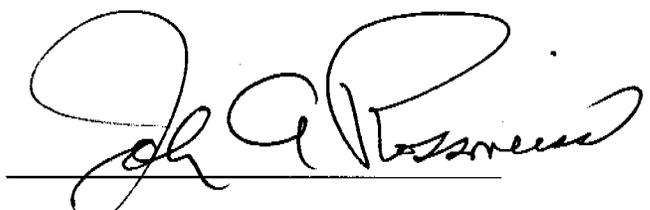
8 The plaintiffs Linda Bays and Kelly Case have failed to make a  
9 prima facie case of outrage against Gary Stenzel individually or  
10 his martial community. The actions complained of were not  
11 outrageous. Whether these complaints constitute legal malpractice  
12 shall be tried in the Superior Court.

13 An order shall be entered granting the Stenzels' motion for  
14 summary judgment against the plaintiffs on their claims of outrage.  
15 The plaintiffs' motions for summary judgment in their favor on the  
16 tort of outrage should be denied and their claims for outrage  
17 dismissed.

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Done this 28th day of August, 2008

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JOHN A. ROSSMEISSL  
BANKRUPTCY JUDGE

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