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United States Bankruptcy Court  
Eastern District Of Washington

In Re: )  
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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 INFLECTION OF  
EMOTIONAL DISTRESS) AGAINST JOE  
ESPOSITO AND JANE DOE ESPOSITO AND  
THE BANKRUPTCY ESTATE OF DAVID BAYS

**FILED**  
AUG 22 2008

U.S. BANKRUPTCY COURT  
EASTERN DISTRICT OF WASHINGTON

This matter comes before the court upon Motions for Summary judgment. The Plaintiffs Linda Bays and Kelly Case, have filed an adversary proceeding containing multiple counts. Parties to this adversary proceeding have filed multiple motions for summary judgment. The court has heard and disposed of a number of these motions.

The issue before the court in this decision is Linda Bays' and

1 Kelly Case's causes of action for outrage (intentional infliction of  
2 emotional distress) against Joe Esposito, personally, his marital  
3 community, and in his capacity as trustee in the bankruptcy of David  
4 Bays. Linda Bays, Kelly Case, the Espositos and the Bankruptcy estate  
5 have all moved for summary judgment. [AP # 557, #570, #544].<sup>1</sup>

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PROCEDURAL DEVELOPMENTS

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Since the argument of these summary judgment motions Mr. Esposito has died.

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The Plaintiffs in this action were suing Mr. Esposito in his representative capacity as trustee of the David Bays bankruptcy estate, personally and his martial community. A probate has been commenced and appropriate steps will be taken to substitute Mr. Esposito's probate estate as a party in this adversary proceeding pursuant to F.R. Bkrtcy. P. Rule 7025.

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The United States Trustee's Office has appointed Tony Grabicki as Successor Trustee in the David Bays bankruptcy case. Mr. Grabicki is now acting as trustee of the David Bays bankruptcy estate and party to this adversary proceeding. [DB CT #106]. 11 U.S.C. § 325; F.R. Bkrtcy. P. Rule 2012(b); F.R. Bkrtcy. P. Rule 7025(d). Mr. Grabicki continues to be represented in the adversary proceeding by the bankruptcy estate's special counsel Keefe, King and Bowman P.S. [DB CT #95].

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<sup>1</sup>The record in the case is extensive. The court has made numerous references to documents filed with the court in the parties various cases. AP # \_\_\_ refers to the document docketed under the number in this adversary proceeding. DB CT # \_\_\_ refers to the document docketed under the number in David Bays' main case.

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FACTS AND PLEADINGS1. The Republic House

The plaintiffs base their claims of outrage, in part, upon Mr. Esposito's activities as they relate to a house located in Republic, Washington. Mary King, Linda Bays' mother, had acquired an interest of record in this real property. [See generally AP #383 Ex. 16]. Linda Bays was involved in the transfer of this property to her mother. During Mr. Esposito's short term as trustee in Linda Bays' bankruptcy case (October 8 to October 23, 2002) Mr. Esposito drafted a complaint in his capacity as Linda Bays' trustee to set aside a number of fraudulent conveyances. [AP 480, XB pgs 14-18]. One of the transfers to be targeted was Mary King's interest in the Republic property. Mr. Esposito never completed a final draft of this complaint. [AP 480, XB pg. 13]. He resigned as trustee in Linda Bays' chapter 7 case shortly after working on this draft. The action to set aside the transfer to Mary King was never taken. The evidence before the court does not show that Mary King or Linda Bays even knew about this contemplated suit before commencing this adversary lawsuit.

Instead of suing Ms. King to set aside her interest in the Republic house, the trustee contacted her for a different purpose. Mr. George, Mr. Esposito's attorney, by letter dated August 6, 2003, inquired whether Ms. King was interested in either purchasing David Bays' half interest in the Republic property or cooperating in sale of the property and dividing the proceeds with the Bays estate. [AP #383 Ex 16 pg 31]. The correspondence between Ms.

1 King and Mr. George concerning the Republic real estate evidences  
2 cooperation by Ms. King enabling the trustee to obtain access to  
3 the property for an inspection. [AP #383, Ex. 16 pgs 31-47].

4 Ms. Bays bases her claim of outrage, as it relates to the  
5 Republic property, on the premise that Mr. Esposito at one time  
6 considered suing Ms. King to void her interest in that property and  
7 that such conduct would have been outrageous. [AP #561, pg 4, pgs  
8 6-8].<sup>2</sup> The court could find no evidence in the record that Mr.  
9 Esposito ever took any action to set aside the transfer to Ms. King  
10 or that he ever threatened either Ms. Bays or Ms. King to do so.  
11 This aspect of Ms. Bays' claim rests on the ground that he at one  
12 time considered doing it.

13 2. Mr. Esposito's Other Conduct as Trustee

14 In addition to the matters relating to the Republic property,  
15 Linda Bays has a litany of complaints about Mr. Esposito's actions  
16 as the trustee handling David Bays' bankruptcy estate. These  
17 complaints were discussed at substantial length in this court's  
18 decision dealing with substantial abuse of the bankruptcy laws. [AP  
19 #503]. The Plaintiffs rely on those actions and failures to act in  
20 support of their allegations of outrage. The court incorporates  
21 that decision in this decision on the plaintiffs' complaint of  
22 outrage against Espositos and the David Bays estate.

23  
24 DISCUSSION

25 The plaintiffs' claims against the Espositos and the Bays'

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27 <sup>2</sup> "I have suffered much emotional trauma since learning of that  
28 evil plot." [AP # 561, pg 7].

1 bankruptcy estate require a two step analysis. First do the  
2 actions complained of constitute a prima facie case of outrage? If  
3 they do, what liability, if any, do the Espositos and the Bays  
4 estate have to the plaintiffs? The second question involves  
5 analysis of immunity for bankruptcy trustees.

6 1. Outrage

7 The plaintiffs have alleged a conspiracy against them in  
8 support of their claim of outrage.

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

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

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

21 The plaintiffs allege that Mr. Esposito has conspired to  
22 deprive them of their property. The acts about which they  
23 complain, took place during the course of hotly contested  
24 dissolution and bankruptcy cases. Linda Bays and David Bays had  
25 dramatically different versions of the facts in dispute. The  
26 plaintiffs' complaints against Mr. Esposito are in essence that he  
27 sided with David Bays in these disputes.

28 DECISION  
08/22/08

1           The bankruptcy court had lifted the stay so that the property  
2 dispute between the Bays could be resolved in the dissolution and  
3 then returned to the bankruptcy court for administration by the  
4 bankruptcy court. [DB CT #51]. The trial of the dissolution  
5 resulted in the state court finding in favor of David Bays on the  
6 property issues. Mr. Esposito made some suggestions in regard to  
7 the findings of fact, conclusions of law and decree which would  
8 facilitate his administration of the bankruptcy estate. This was  
9 consistent with his legal duties as trustee to reduce the estate  
10 property to money and distribute pursuant to the bankruptcy law .  
11 11 U.S.C. § 704(a). This put him in conflict with Linda Bays who  
12 disputed the decision of the trial judge. That decision was upheld  
13 on appeal.

14           The actions of Mr. Esposito in regard to the dissolution case  
15 and the handling of this bankruptcy case have all been within the  
16 scope of his authority as trustee and within his reasonable  
17 discretion as a trustee.

18           These facts are insufficient to support a prima facie case of  
19 civil conspiracy. They do not show a combination with anyone to  
20 accomplish an unlawful purpose. Nor were unlawful means used to  
21 accomplish a lawful purpose. There is no evidence of an agreement  
22 to accomplish a conspiracy. The natural overlap of common  
23 interests between David Bays and his bankruptcy estate is  
24 insufficient to prove a conspiracy. The plaintiffs' suspicions are  
25 not enough. All of the actions complained of by the plaintiffs are  
26 consistent with a lawful, honest purpose by Mr. Esposito in  
27 performance of his trustee's duties. The evidence relied upon by

1 the plaintiffs in support of this summary judgment motion is  
2 insufficient to meet a preponderance of the evidence standard, much  
3 less than the clear, cogent, and convincing standard required to  
4 prove civil conspiracy in Washington.

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

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

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

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

20 The plaintiffs' evidence that Mr. Esposito had knowledge of  
21 Ms. Bays' mental and physical state is weaker than their evidence  
22 against David Bays on this point. Even given this, the plaintiffs'  
23 evidence on the second and third of these elements of the tort of  
24 outrage is at least arguable under the facts presently before the  
25 court. Accordingly, the court will focus on whether the conduct  
26 complained of here was "extreme and outrageous."

27 It is clear in Washington that the actions triggering a  
28 finding of outrage must be very unusual.

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

5 Woodward v. Steele, 32 Wash. App. 152, at 155-156, 646 P.2d 167, at  
6 169-170 (1982).

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

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

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

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

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

17 The actions taken by Mr. Esposito as trustee in the David Bays  
18 bankruptcy, and during his short term as trustee in Linda Bays'  
19 bankruptcy, are all within the spectrum of ordinary, common actions  
20 taken by a trustee in the administration of a bankruptcy estate.  
21 There is nothing extreme, atrocious or utterly intolerable about  
22 them. Even if these actions met the criteria of outrageous conduct  
23 they are privileged. These actions all appear to fall within the  
24 duties proscribed for trustees in the Bankruptcy Code. 11 U.S.C.  
25 704; In re Castillo, 297 F.3d 940, at 950-951 (9th Cir., 2002).

26 The essence of the plaintiffs' complaints against Mr. Esposito  
27 is that he didn't believe Linda Bays side of the story. Mr.



1 Esposito's actions were all within his reasonable discretion or  
2 business judgment. Ms. Bays may be personally outraged by this,  
3 but the evidence does not support a viable legal claim of outrage  
4 against Mr. Esposito.

5 2. Trustee Immunity

6 All of Mr. Esposito's actions complained of by the plaintiffs  
7 were taken within the scope of his authority under 11 U.S.C. §704  
8 and within the exercise of his discretionary judgment. Even if  
9 some of these actions were done negligently, Mr. Esposito acting as  
10 trustee has personal immunity from liability for negligent actions  
11 taken within the scope of his authority. In re Castillo, 297 F.3d  
12 940 (9th Cir., 2002); In re Continental Coin Corp., 380 B.R. 1  
13 (Bkrtcy. C.D. Cal., 2007).

14 The plaintiffs contend that Mr. Esposito's actions went beyond  
15 mere negligence. They contend that his actions constitute  
16 intentional torts, outrage and conspiracy. If that was proven Mr.  
17 Esposito would be personally liable for those actions. Walsh v.  
18 Northwestern National Ins. Co. (In re Ferrante), 51 F.3d 1473 (9th  
19 Cir., 1995). But the plaintiffs' evidence does not make a prima  
20 facie case for either of these intentional torts

21 Therefore Mr. Esposito's actions fall within the area in which  
22 he is entitled to quasi judicial immunity as a bankruptcy trustee.

23  
24 CONCLUSION

25 The plaintiffs Linda Bays and Kelly Case have failed to make a  
26 prima facie case of outrage against Joseph Esposito individually,  
27 his martial community, and in his representative capacity as

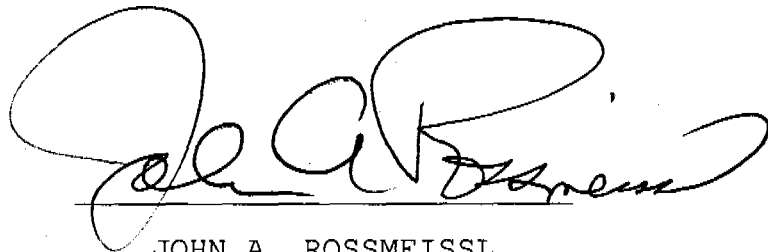
1 trustee of the bankruptcy estate of David Bays. The actions  
2 complained of were not outrageous and were within his reasonable  
3 discretion in performance of his legal duties as a bankruptcy  
4 trustee in both the David Bays and Linda Bays bankruptcy cases.

5 An order shall be entered granting the Espositos' motion for  
6 summary judgment against the plaintiffs on their claims of outrage.  
7 The plaintiffs' motions for summary judgment in their favor on the  
8 tort of outrage should be denied and their claims for outrage  
9 dismissed.

10 This decision will be binding on any successor in interest.

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Done this 22nd day of August, 2008



JOHN A. ROSSMEISSL  
BANKRUPTCY JUDGE