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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 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 PROCEDURAL HISTORY

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

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

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

28 DECISION
08/28/08

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

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

DECISION
08/28/08

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.

6
7 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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19 Done this 28th day of August, 2008

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24 JOHN A. ROSSMEISSL
25 BANKRUPTCY JUDGE