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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 INFLECTION OF  
EMOTIONAL DISTRESS) AGAINST DOUGLAS  
LAMBARTH, INDIVIDUALLY AND HIS  
MARITAL COMMUNITY

FILED

SEP 03 2008

U.S. BANKRUPTCY COURT  
EASTERN DISTRICT OF WASHINGTON

The plaintiffs Linda Bays and Kelly Case are suing the defendant Lambarths 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 Doug Lambarth [AP #539].

## 1 PROCEDURAL HISTORY

2 Doug Lambarth, 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. Lambarth's  
6 conduct during his representation of David Bays in their  
7 dissolution case and in David Bays' bankruptcy case. The acts  
8 complained of involve his conduct as David Bays' attorney. The  
9 state court lawsuit was removed to bankruptcy court and became this  
10 adversary proceeding. [AP #1].

11 Linda Bays and Kelly Case filed an amended complaint in this  
12 adversary proceeding. [AP #104]. The Lambarths were named among  
13 the defendants in the amended complaint.

14 The amended complaint included numerous other causes of action  
15 against the Lambarths and the other defendants. Defendants  
16 Lambarth filed a motion to dismiss the various causes of action  
17 against them. [AP #187]. Upon that motion, this court dismissed  
18 with prejudice a number of causes actions against the Lambarths.  
19 [AP #198 ¶s 3, 5 and 9]. One of those claims dismissed was the  
20 plaintiffs' claims for malpractice. [AP #198 ¶ 9]. The court  
21 retained jurisdiction over the plaintiffs' causes of action against  
22 the Lambarths for Slander of Title and Quiet Title, [AP #198 ¶ 4],  
23 Substantial Abuse of the Bankruptcy Laws [AP #198 ¶ 6], Offset [AP  
24 #198 ¶ 7] and Outrage [AP #198 ¶ 8].

25 The plaintiffs' causes of action against the Lambarths for  
26 substantial abuse of the bankruptcy laws and slander of title were  
27 dismissed on summary judgment. [AP #s 506 and 518].

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1 On Linda Bays oral motion the court ordered the dismissal of  
2 Linda Bays' setoff claim against the Lambarths. [AP #633].

3 The summary judgment motions currently before the court  
4 brought by the Lambarths [AP #539], Linda Bays [AP #557], and Kelly  
5 Case [AP #570] relate to the outrage cause of action.

6  
7 FACTS

8 Many of the matters Linda Bays complains about in support of  
9 her outrage claim against the Lambarths occurred in the course of  
10 Mr. Lambarth's representation of David Bays in the dissolution  
11 case. For example, Linda Bays contends that David Bays paid off  
12 the real estate contract on the Kettle Falls residence in  
13 satisfaction of a contract obligation David had to her for cleaning  
14 up his Ione residence. David Bays took the position that he had  
15 loaned the money to Linda and that he had been assigned the vendors  
16 interest in the real estate contract to secure Linda's obligation  
17 to him. Mr. Lambarth, as David's attorney, championed David's  
18 version of the facts in the dissolution and prevailed at trial.  
19 Linda Bays appealed the trial court's judgment but lost that appeal  
20 in the Court of Appeals and further review was denied by the  
21 Washington Supreme Court.

22 Ms. Bays is extremely dissatisfied with the results of the  
23 dissolution and subsequent appeal. Her outrage claim is based on  
24 the argument that the dissolution judgment was wrongfully decided  
25 and that her version of the facts are the true facts. Essentially,  
26 her complaint regarding Mr. Lambarth is that he successfully  
27 represented his client and convinced the trial court that David

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1 Bays' position was correct, a result upheld upon appellate review.

2 Ms. Bays also complains about Mr. Lambarth's conduct as David  
3 Bays' attorney in his bankruptcy case. These complaints have been  
4 analyzed in depth in this court's decision on the Substantial Abuse  
5 of the Bankruptcy Laws cause of action. [AP #503]. That decision  
6 should be considered as part of the rationale and analysis  
7 supporting this decision on the outrage cause of action.

8 Ms. Bays' position is that Mr. Lambarth's representation of  
9 Mr. Bays in the bankruptcy constituted intentional acts on his part  
10 to inflict emotional distress upon her amounting to the tort of  
11 outrage. She also complains that Mr. Lambarth throughout both the  
12 dissolution and the bankruptcy conspired with others including the  
13 defendants in this adversary proceeding to deprive her of her  
14 property and rights.

15 Kelly Cases's claim of outrage against Mr. Lambarth is based  
16 in part on Lambarth's attempt to adjudicate his interest in  
17 property in the Bays' dissolution. This court has concluded that  
18 attempt failed. [AP #515]. The balance of Mr. Case's outrage claim  
19 against Lambarth is dependent and derivative upon his mother Linda  
20 Bays' claim.

## 21 DISCUSSION

### 22 A. Claim Preclusion/Issue Preclusion

23 Linda Bays' bases her outrage claim against Mr. Lambarth on  
24 the premise that he successfully convinced the trial and appellate  
25 courts that David Bays' version of the facts was true, when in fact  
26 her version was true. It is based on the premise that the  
27 decisions in the Bays v. Bays dissolution at trial and the

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1 appellate levels were wrong. The fatal flaw with her argument is  
2 that Ms. Bays is bound by the dissolution judgment, as is this  
3 court. State v. Mullin-Coston, 152 Wash.2d 107 at 113 95 p.3d 321  
4 at 324 (2004); In re Harman, 250 F.3d 1240 at 1246 (9th Cir. 2001).  
5 [See also AP #515 at pg 3]. She is precluded from making that  
6 claim and this court is precluded from accepting it.

7 The issue presently before this court is not one of claim  
8 preclusion (res adjudicata). Rather it is one of issue preclusion  
9 (collateral estoppel). Linda Bays is suing Douglas Lambarth for  
10 outrage because he successfully represented David Bays in obtaining  
11 a judgment which she views as wrong. The fundamental premise of  
12 her outrage claim against Mr. Lambarth is that the judgment is  
13 unjust, resulting in emotional distress, for which he is partly  
14 responsible.

15 Ms. Bays' collateral attack upon the dissolution decree  
16 necessarily implicates the doctrine of issue preclusion.

17 This court has discretion in regard to the application of  
18 issue preclusion. In re Lopez, 367 B.R. 99 at 107 (9th Cir. BAP  
19 2007). The Full Faith and Credit Act (28 U.S. C. § 1738) requires  
20 that this court give state court judgments the same preclusion  
21 effect such judgment would enjoy under state law. In re Lopez, 367  
22 B.R. at 106.

23 The elements of issue preclusion under Washington law were  
24 stated in the case of State v. Mullin-Coston, where the court said:

25 The party seeking to enforce the rule must show that:  
26 "(1) the issue decided in the prior adjudication must be  
27 identical with the one presented in the second; (2) the  
prior adjudication must have ended in a final judgment on  
the merits; (3) the party against whom the plea of

1 collateral estoppel is asserted must have been a party or  
2 in privity with a party to the prior litigation; and (4)  
3 application of [the] doctrine must not work an  
4 injustice."

5 152 Wash.2d 107, 114 95 P.3d 321, 324 (2004) (citing State v.  
6 Bryant, 146 Wash 2d 90, 98-99, 42 P.3d 1278 (2002)).

7 The court will analyze how these elements apply to Linda Bays'  
8 claim of outrage against Douglas Lambarth.

9 1. Identical Issue

10 Linda Bays seeks to challenge the correctness of the final  
11 judgment entered in the dissolution. The issues are identical.

12 2. Final Judgment as the Merits

13 The decision in the dissolution court was appealed and  
14 affirmed. It is final.

15 3. Against a Party or Person in Privity

16 Although Douglas Lambarth was not a party to the dissolution  
17 case, as David Bays' attorney throughout that case Douglas Lambarth  
18 was in privity with his client.

19 4. Work as Injustice

20 Linda Bays contends that the dissolution trial should have  
21 been continued because her medical condition precluded her from  
22 attending and representing herself. She sought a continuance but  
23 that was denied and the trial proceeded in her absence. Post  
24 trial, she challenged the findings and conclusions of the trial  
25 court but these motions were denied as well. She appealed the  
26 trial court's judgment to the Court of Appeals which affirmed the  
27 decision. The Supreme Court denied review. During that process  
28 Ms. Bays either raised or had the opportunity to raise the same

1 issues she complains of here.

2 Accordingly, it does not work an injustice to preclude Ms.  
3 Bays' challenge to the dissolution court's findings conclusions and  
4 decree as it relates to her claim of outrage against Lambarth.

5 B. Legal Malpractice

6 In her outrage claim, Ms. Bays questions the quality of the  
7 legal work performed by Mr. Lambarth for his client David Bays.  
8 Ms. Bays' outrage complaints against Mr. Lambarth is a legal  
9 malpractice suit. All of the allegations against Mr. Lambarth are  
10 directed against his actions as Mr. Bays' attorney during both the  
11 dissolution and bankruptcy proceeding.

12 State law determines whether an attorney owes a duty to a  
13 party. In Hizey v. Carpenter, 119 Wash.2d 251, 261 (1992),  
14 Washington State has clearly established the elements necessary to  
15 a legal malpractice claim:

16 To establish a claim for legal malpractice, a plaintiff  
17 must prove the following elements; (1) the existence of  
18 an attorney-client relationship which gives rise to a  
19 duty of care on the part of the attorney to the client;  
20 (2) an act or omission by the attorney in breach of the  
21 duty of care; (3) damage to the client; and (4) proximate  
22 causation between the attorney's breach of the duty and  
23 the damage incurred.

24 If a plaintiff is not the attorney's client or in privity with the  
25 attorney's client, in order to have a cause of action for  
26 malpractice the plaintiff must show some other basis upon which the  
27 attorney owed the plaintiff a duty. Stangland v. Brock, 109  
28 Wash.2d 675, 681 (1987).

29 An attorney owes no duty to a third party in an adversarial

1 relationship. The Washington Supreme Court has clearly stated that  
2 Existence of a duty to an adversary party beyond the  
3 courtesy and respect owed all participants in the legal  
4 process...would interfere with the undivided loyalty an  
5 attorney owes a client and would diminish an attorney's  
6 ability to achieve the most advantageous position for a  
7 client.

8 Bowman v. Two, 104 Wash.2d 181, 188-189 (1985).

9 Ms. Bays has failed to make a prima facie malpractice claim  
10 against Mr. Lambarth. She persists in relying on these malpractice  
11 type allegations in support of her outrage claim.

12 Likewise she relies on Mr. Lambarth's alleged poor performance  
13 in meeting requirements under bankruptcy law and procedures in  
14 David Bays' bankruptcy case. This court has examined in detail the  
15 actions complained of in its decision on Ms. Bays's cause of action  
16 for substantial abuse of the bankruptcy law and found she had no  
17 claim. [AP #503]. She persists in relying on those actions in  
18 support of her outrage claim.

19 C. Civil Conspiracy

20 Linda Bays has also alleged a conspiracy against her in  
21 support of their claim of outrage.

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

25 To establish a civil conspiracy, All Star must prove  
26 by clear, cogent, and convincing evidence that (1) two or  
27 more people combined to accomplish an unlawful purpose,  
28 or combined to accomplish a lawful purpose by unlawful  
29 means; and (2) the conspirators entered into an agreement  
30 to accomplish the conspiracy. *Wilson v. State*, 84  
31 Wash.App. 332, 350-51, 929 P.2d 448 (1996), *cert. denied*,  
32 522 U.S. 949, 118 S.Ct. 368, 139 L.Ed.2d 286 (1997).  
33 "Mere suspicion or commonality of interests is  
34 insufficient to prove a conspiracy." *Id.* "[When] the



1 facts and circumstances relied upon to establish a  
2 conspiracy are as consistent with a lawful or honest  
3 purpose as with an unlawful undertaking, they are  
4 insufficient." *Lewis Pacific Dairymen's Ass'n v. Turner*,  
5 50 Wash.2d 762, 772, 314 P.2d 625 (1957).

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

7 Ms. Bays claims that Mr. Lambarth conspired against her. The  
8 acts about which she complains, took place during the course of  
9 hotly contested dissolution and bankruptcy cases when Mr. Lambarth  
10 was serving as David Bays' lawyer.

11 Her allegations of conspiracy are conclusory and are not  
12 supported by evidence. She has not presented evidence of any  
13 agreement between Lambarth and any of the other alleged co-  
14 conspirators except the agreement to act as David Bays' attorney in  
15 these cases. Discussions over lunch or in the course of preparing  
16 and conducting litigation "are as consistent with a lawful or  
17 honest purpose as with an unlawful undertaking..." Ibid. The  
18 evidence presented is insufficient to support a claim of conspiracy  
19 against Mr. Lambarth under even the preponderance standard much  
20 less the clear, cogent and convincing standard applicable in  
21 Washington.

22 D. Outrage

23 Washington only allows recovery for outrage in the absence of  
24 other tort remedies. Rice v. Janovich, 109 Wash.2d 48 at 62, 742  
25 P.2d 1230 at 1239 (1987). The court has found that the evidence  
26 presented by Ms. Bays against Mr. Lambarth is insufficient to  
27 support claims of malpractice, abuse of the bankruptcy laws, and  
28 civil conspiracy. It remains to be seen whether the actions of Mr.  
Lambarth complained of by Ms. Bays support a viable claim of

1 outrage.

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

6        The tort of outrage requires the proof of three elements:  
7        (1) extreme and outrageous conduct, (2) intentional or  
8        reckless infliction of emotional distress, and (3) actual  
9        result to plaintiff of severe emotional distress.  
10       (Citations omitted).

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

12        Ms. Bays presented evidence that Mr. Lambarth had knowledge of  
13 Ms. Bays' mental and physical state. The plaintiffs' evidence on  
14 the second and third of these elements of the tort of outrage is at  
15 least arguable under the facts presently before the court.  
16 Accordingly, the court will focus on whether the conduct complained  
17 of here was "extreme and outrageous."

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

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

26 Woodward v. Steele, 32 Wash. App. 152, at 155-156, 646 P.2d 167, at  
27 169-170 (1982).

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

...[T]he conduct although it would otherwise be extreme  
and outrageous, may be privileged under the  
circumstances. The actor is never liable, for example,  
where he's done no more than insist upon his legal rights

1 in a permissible way, even though he is well aware that  
2 such insistence is certain to cause emotional distress.

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

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

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

9 This court has already ruled that David Bays' activities in  
10 the dissolution and bankruptcy cases did not support a viable claim  
11 of outrage by Linda Bays. [AP #647]. All of the actions taken in  
12 those cases were done on behalf of David Bays by his attorney  
13 Douglas Lambarth. It follows that since David's actions don't  
14 support Linda's outrage claim, neither do his attorney's.

15 All the complained-of activities took place in the context of  
16 court cases. The actions in the dissolution case have been  
17 reviewed by the state courts. It is possible that outrageous  
18 behavior could be found in the prosecution of litigation. This  
19 court's review of the actions complained of here in the prosecution  
20 of the Bays' litigation do not as a matter of law reach the  
21 threshold of outrageous behavior, "atrocious and intolerable in a  
22 civilized society." Litigants and their attorneys have a certain  
23 freedom in their attempts to enforce perceived legal rights in  
24 litigation. It is to the benefit of society that parties be given  
25 greater license in the assertion of their rights when pursuing  
26 litigation in the courts than they would have in pursuit of self-  
27 help extra judicial remedies. The conduct complained of by Linda  
28 Bays here does not amount to the extra ordinary conduct necessary  
to prove the tort of outrage.

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1 Kelly Case's outrage claim is based in part on Lambarth's  
2 attempt to litigate Mr. Case's rights in property in the Bays'  
3 dissolution. The court has concluded that Kelly Case is not bound  
4 by the dissolution decree as it relates to his interests in  
5 property. [AP #515 pg. 7]. The extent of these interests will be  
6 decided at another time. That attempt although ill conceived does  
7 not amount to outrageous conduct.

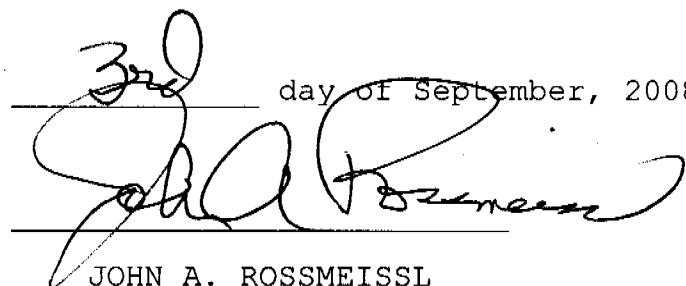
8 The remainder of Kelly Case's cause of action is based on Mr.  
9 Lambarth's conduct towards Linda Bays, his mother. The facts don't  
10 support her claim of outrage. His claim is no better than hers.  
11 Both plaintiffs fail to make a prima facie case of outrage against  
12 the Lambarths.

13 CONCLUSION

14 The plaintiffs Linda Bays and Kelly Case have failed to make a  
15 prima facie case of outrage against Douglas Lambarth individually  
16 or his martial community. The actions complained of were not  
17 outrageous.

18 An order shall be entered granting the Lambarth's motion for  
19 summary judgment against the plaintiffs on their claims of outrage.  
20 The plaintiffs' motions for summary judgment in their favor on the  
21 tort of outrage should be denied and their claims for outrage  
22 dismissed.

23 Done this 3rd day of September, 2008



24  
25  
26 JOHN A. ROSSMEISSL  
BANKRUPTCY JUDGE