

NO. 67354-8-I

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

ANGELA M. OPPE,

Appellant.

v.

THE LAW OFFICES OF SARAH L. ATWOOD, PLLC, a Washington
Professional Limited Liability Company; and SARAH L. ATWOOD and
ED ATWOOD, and the marital community comprised thereof,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This is a legal-malpractice action arising out of the representation of plaintiff-appellant, Angela Oppe, by defendants-respondents Sarah L. Atwood and Law Offices of Sarah L. Atwood, PLLC (hereinafter collectively Ms. Atwood). Ms. Oppe retained Ms. Atwood in 2005 to represent her in a partition action regarding the sale of the house owned by Angela's late mother, Agnes Oppe, and the division of proceeds between Angela and her brothers, Mike and Paul Oppe.¹

On April 13, 2010, more than three years after conclusion of the partition action, Angela filed this action, alleging legal-malpractice against Ms. Atwood. Angela's theory of liability against Ms. Atwood shifted dramatically throughout the underlying litigation. In her deposition, Angela alleged that Ms. Atwood's duty was to investigate and set aside a Quit Claim Deed, executed by her mother in 1996, and her uncle's 2003 probate. Angela claimed that doing this would have uncovered a decades-old conspiracy by Mike and Paul to rob Angela of her inheritances.

After this theory was abandoned, Angela claimed that Ms. Atwood should have pursued tort claims against Mike and Paul for abuse of process, malicious prosecution and intentional infliction of emotional distress. Angela eventually conceded that there was no merit to her claims

for malicious prosecution of abuse of process and that her sole theory of liability was that Ms. Atwood should have brought a claim of intentional infliction of emotional distress against Mike and Paul for an alleged “history” of abusive conduct that predated both Agnes’s death and the partition action.

Angela claims that Mike and Paul unrelentingly harassed her for several years causing her to suffer extreme emotional distress. Angela describes this “abuse” and “harassment” by Mike and Paul as “shunning” her, not contacting her, and essentially making her a “non-member” of the Oppe family. Angela criticizes her brothers for not actively participating in Agnes’s healthcare and not visiting Agnes.

Angela further alleges that Mike and Paul caused her severe emotional distress when they called the authorities four or five times over a period of several years for help locating their elderly mother after not hearing from her for extended periods of time. This perceived abuse culminated in 2004, when Angela’s brothers learned that she was planning on moving Agnes, who was then 87 years old and in poor health, against Agnes’s wishes and her doctor’s advice, and petitioned the court for an order of protection preventing Angela from removing Agnes from her nursing home.

¹ This brief refers to Angela, Agnes, Mike, and Paul Oppe by their first names to avoid

Ms. Atwood moved for summary judgment of dismissal of this action on June 24, 2011, on the basis that she never agreed to bring a tort claim against Mike and Paul and any such claim would have failed. At the hearing, the superior court granted Ms. Atwood's motion on the grounds that the use of lawful and normal processes is no basis for a claim of intentional infliction of emotional distress and that Angela failed to show the necessary proximate cause to sustain a claim of attorney negligence. This court should affirm the superior court's dismissal of this action on summary judgment.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Ms. Atwood assigns no error to the superior court's decision.

Issues Pertaining to Assignments of Error

Ms. Atwood disagrees with Angela's statement of Issues Pertaining to Assignment of Error. Ms. Atwood believes that this appeal presents a single issue, which is more properly stated as follows:

Whether the superior court properly dismissed a legal-malpractice action as a matter of law on summary judgment, where:

1. The scope of Ms. Atwood's representation did not include asserting a claim for intentional infliction of emotional distress against

confusion.

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Ms. Oppe's brothers and any such claim would have failed as a matter of law.

III. STATEMENT OF THE CASE

A. This case arises from Angela Oppe's alleged mishandling of her mother's care and finances.

Agnes Oppe was a widow and mother of plaintiff-appellant, Angela Oppe, and her brothers, Mike Oppe and Paul Oppe. In 1996, Angela moved back into Agnes's home. CP 264. Before Angela moved back into the family home, Mike enjoyed a close relationship with Agnes, talking to her on the phone almost every day. CP 737. After Angela's return, Agnes's health began deteriorating, and Mike began to hear from his mother less frequently. CP 737, 739.

On April 20, 2000, Mike came to Agnes's home at approximately 8 a.m. and found her alone, unable to get out of bed, in need of proper hygiene, and without food and water. CP 555, 789-90. Mike took Agnes to Providence Medical Center, where she was diagnosed with malnutrition, dehydration, a urinary tract infection, possible early pneumonia, and rib fractures. CP 798-99. No one heard from Angela until almost 12 hours after Mike had found Agnes. CP 790. Agnes's doctor determined that she required 24-hour care and aggressive physical therapy and transferred Agnes to the Skilled Nursing Unit, where Agnes remained for several days. CP 798-99. The treating doctor recommended

that Agnes be placed in a convalescent nursing home and requested social-work consultation. *Id.*

After being discharged from the hospital, Agnes was moved into The Kenney Nursing Home in West Seattle. CP 556. Upon arrival to The Kenney, an Adult Protective Services (“APS”) caseworker interviewed Agnes and Angela. CP 556. The record does not state who called APS. Agnes remained at The Kenney for 17 months. CP 363.

In late October through early November 2001, Angela removed Agnes from The Kenney on several occasions and took Agnes to her home. CP 274. Apparently Mike had concerns over whether Agnes was physically and mentally able to return to her home. CP 557-58. On November 2, 2001, APS attempted to interview Agnes and Angela at the home. CP 558, 754. APS determined that Agnes was not at the house, but back at The Kenney, and left. CP 275, 558. Contrary to Angela’s assertions in her brief, there is nothing in the record, other than Angela’s own self-serving statements, indicating that “no basis of abuse or neglect were found” or that the calls to APS were “unfounded.” App. Br. at 8.

Agnes was discharged from The Kenney on December 7, 2001. From then forward, Mike and Paul had increasing difficulty reaching their mother and noticed significant withdrawals of funds from their mother’s bank account. CP 561-67, 598. By Angela’s own admission, she refused

to give her brothers her contact information. CP 274. Angela admits that on at least one occasion she did not notify them when Agnes suffered an allergic reaction to her medication, was hospitalized, and then was admitted to a rehabilitation center. CP 755.

In April and May 2003, Mike made several phone calls to Agnes that went unanswered and unreturned. CP 567-68. Mike became increasingly worried. *Id.* Mike lived approximately 100 miles from his mother's home. He was advised by the local sheriff's department to call the King County Sheriff's Department to check on Agnes's welfare. CP 568, 786. According to Angela, the Sheriff's Department came to the house for a health and welfare check, found Agnes in the bathroom, and left. CP 282.

In July 2003, Mike again became worried when he could not reach Agnes and called the King County Sheriff's Department to help locate her. CP 785-86. Unbeknownst to Mike or Paul, Agnes had been hospitalized and then moved to Arden Rehab and Health Center. CP 283. Angela described the final "horrendous visit" from the Sheriff's Department:

A: ... Then the 3rd of July, I opened the windows in the kitchen and looked out. It was about 8 o'clock in the morning. And there were two sheriffs, one in a big Jeep and one in a car, and wearing boots, getting out of their cars and coming up to the front door. ... I was rather angry, and I came out on the front porch and confronted them. And they were looking

for a body, smelling for a body.

Q: For a body?

A: (Witness nodding.)

Q: Whose body were they looking for?

A: My mother.

Q: And what was –

A: That's what they told me. And they had the handcuffs out. And one of them kept me on the front stoop, and the other one went through the house, ransacking, looking for a body, smelling for a body – came out, said, "oh, there's correspondence here for Agnes Oppe."

And I said, "Well, what do you want me to do? Change her address every time she moves to a – a nursing facility?"

"Well, no. Oh, by the way, who's the power of attorney?" I said, "I am."

Well, they took off. Anyway, it was a horrendous experience.

...

A: ... So that – as I had done in previous times, I called my mother's attorney and told her, you know, "We've had another visit." I also called [Irving Sonkin] who was my attorney at the time. And neither one of them gave me productive advice on how to stop what was occurring.

CP 576.

B. In 2004, concerned that Angela was going to move Agnes to the East Coast, Mike and Paul petitioned for appointment of a guardian and for protection of a

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vulnerable adult.

In December 2003, Agnes, then 87 years old, fell, broke her pelvis, and later was moved into Providence Mount St. Vincent nursing home. CP 592, 579. During Agnes's stay at Providence, her caregivers noted erratic behavior by Angela. CP 580-84. Angela accused the nursing assistant of being a "mole" in the employ of her brothers to transmit information regarding Agnes's care to Mike and Paul and would cause a scene when Mike and Paul would try to visit. CP 581. Angela refused the caregiver's request to bring in "even minimal clothing to keep Agnes warm and appropriately dressed." *Id.* When Mike and Paul brought clothing for Agnes, Angela removed it, stating that Agnes did not need it. CP 585. In spring 2004, Mike and Paul discovered that Angela intended to remove Agnes from the nursing home to Washington, D.C. CP 572. Agnes informed her nurse that she did not want to move to the East Coast with Angela and wanted to stay at Providence because it was "nice" there. CP 586.

Concerned for their ailing mother's health and wellbeing, on April 15, 2004, Mike and Paul filed a Petition for Appointment of Guardians and For Entry of Protection of a Vulnerable Adult under the Vulnerable Adult Protection Act ("VAPA"). CP 595-605. They requested, among other things, that the court suspend any power of attorney held by Angela,

order that Angela (1) not remove or cause the removal of Agnes from Providence Mount St. Vincent, and (2) provide an accounting of the disposition of the income or other resources of Agnes. CP 604. In support of their petition, Mike submitted a declaration detailing his concerns about Agnes's wellbeing and Angela's intent to move Agnes thousands of miles away from her home of 50 years. CP 554-73. The court found that good cause existed for the issuance of a temporary restraining order and granted the brothers' petitions. CP 607-610. Commissioner Prochnau entered the following findings of facts:

- Agnes Oppe is a vulnerable adult within the meaning of RCW 74.34.020(13);
- Agnes Oppe has allegedly suffered abuse, exploitation, and/or neglect by Angela Oppe within the meaning of RCW 74.34.020. Further, Michael Oppe and Paul Oppe believes [sic] that their mother is in threat of further harm if a protection order is not immediately entered;
- The relief requested in the Petition for Order of Protection is necessary for the safety, protection and well-being of Agnes Oppe. Because of the threat of further harm, there is good cause for this order to be entered without notice to the respondent.

Id. Based on these findings, Commissioner Prochnau issued a Temporary Vulnerable Adult Protection Order that restrained Angela from:

- Committing any further acts of abuse, neglect, or exploitation against Agnes Oppe;
- Entering or coming within 50 feet of Agnes Oppe's

residence at Providence Mount St. Vincent;

- Acting on behalf of Agnes Oppe pursuant to any previous power of attorney, or any other authority.
- Transferring any real or personal property belonging to Agnes Oppe without further order of the court; and
- Removing or causing the removal of Agnes Oppe from her current placement at Providence Mount St. Vincent in Seattle, Washington.

Id.

The Order did allow Angela telephonic communication with her mother. *Id.* The Order was duly served upon Angela on April 16, 2004, at 2:40 p.m. CP 610, 612. Angela, who was represented by attorney Irving A. Sonkin, never filed a response to the petition and never sought to quash the restraining order. CP 613. Instead, Angela returned to the East Coast on April 18, 2004 and requested that Mr. Sonkin move the show cause hearing, originally set for April 29, 2004, to May 16, 2004, to accommodate her schedule. CP 101.

On April 22, 2004, Agnes was admitted to Swedish Hospital with pneumonia. CP 587. Angela and Mike were notified of their mother's condition. CP 588. Agnes was able to return to Mount St. Vincent Nursing Home on April 27, 2004, but was re-admitted to Swedish Hospital the following day after suffering a stroke. CP 589. Agnes's caregivers alerted the appointed guardian, Angela, Mike, and Paul that

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Agnes was admitted to the hospital. *Id.* The following day, Mike and Paul, through their attorney, presented a modified order of protection that allowed Angela to “visit Agnes Oppe at any hospital, nursing home or health care facility in which Agnes Oppe may reside.” CP 617-620. Angela’s attorney, Mr. Sonkin, accepted service of the order on behalf of Angela and approved it for entry. CP 620.

After learning of her mother’s stroke, Angela flew back to Seattle. CP 268-69. Upon arrival the afternoon of April 29, 2004, Angela attempted to contact attorney Sonkin regarding the restraining order. CP 268-69. Despite Angela’s belief that the restraining order did not apply to Swedish, there is no indication that she attempted to visit Agnes at the hospital. CP 103. Agnes died on April 29, 2004, at 1:25 p.m. CP 633.

Although attorney Sonkin continued to represent Angela until the VAPA action was dismissed on June 15, 2004, Angela never moved to dismiss the action, never denied the allegations, and never asserted a counterclaim against her brothers. CP 677.

After Agnes’s death, Angela, Mike, and Paul disagreed on how to proceed with the sale of the mother’s home, which the siblings now co-owned. CP 624. On May 23, 2005, Mike and Paul filed a Complaint for Partition of Real Property by Sale in King County Superior Court. CP 622-25. Attorney Michael Longyear appeared for Angela in that action

and answered the Complaint on August 17, 2005, without any counterclaim or reference to the events in 2001 through 2004. CP 426-29.

C. Angela became dissatisfied with attorney Longyear and retained Ms. Atwood to represent her.

In August 2005, upset that Longyear had allowed Mike and Paul to be the moving party in the partition matter, Angela contacted Ms. Atwood to represent her in the partition action and “three lawsuits that [Mike and Paul] had just brought against her.” CP 506, 642-43. Angela inaccurately informed Ms. Atwood that Mike and Paul were suing her in multiple lawsuits, a real estate partition action, and three other lawsuits involving Seattle City Light, the City of Seattle, the Department of Finance, and Homeguard Security. CP 270, 680, 687. Angela requested representation in the partition action and help in “interrupting” the three other pending legal actions. CP 687. Angela explained that she did not want to provide an accounting of funds, hers or her mother’s, and did not want to respond to discovery propounded on her in the partition action. CP 681, 690.

On September 15, 2005, Ms. Atwood and Angela entered into two Professional Services Agreements. CP 520-26. The first agreement, “Professional Services Agreement I,” provided that Ms Atwood would render professional services to “[d]efend against a lawsuit filed by your brothers Michael J. Oppe and Paul J. Oppe under King County Superior

Cause No. 05-2-17128-6KNT,” the pending partition action. CP 520-522.

The second agreement, “Professional Services Agreement II,” covered the rendering of profession services to:

- (1) Bring a counterclaim against your brothers Michael J. Oppe and Paul J. Oppe either under King County Superior Cause No. 05-2-17128-6KNT or a new cause number to end harassment, frivolous suits, discovery of a harassing nature, and (2) to address the personal property transferred by your mother during her lifetime and end your brothers’ claims and probate her estate if necessary.

CP 524-26. Agreement II was executed to provide additional details regarding the scope of representation and reflect Angela’s desire to prevent her brothers from discovery of their mother’s bank accounts, the mother’s property in Angela’s possession, and Angela’s personal information. CP 435, 683-84.

Ms. Atwood substituted for Mr. Longyear as Angela’s counsel in the partition action on September 16, 2005. CP 649-650. Shortly thereafter, Ms. Atwood determined that there was only one pending lawsuit, the partition action, and that the other “lawsuits” were actually records subpoenas to third parties. CP 681. Pursuant to Angela’s instruction, and the parties’ arrangements, Ms. Atwood successfully prevented Mike and Paul from obtaining the “harassing” discovery, shielded Angela from paying Mike and Paul’s attorney fees incurred prior to the partition action, and ended the litigation with Mike and Paul. CP

683-84. The partition action was dismissed on November 9, 2006, and an order directing disbursement of funds from the court registry was entered on December 7, 2006. CP 660-67.

D. More than three years after dismissal of the partition action, Angela sued Ms. Atwood for legal malpractice for alleged failure to assert a claim against Mike and Paul.

On April 30, 2010, Angela filed a Complaint for Negligence/Legal Malpractice against Ms. Atwood, claiming that Ms. Atwood was negligent for failing to allege counterclaims against Mike and Paul for allegedly filing a “frivolous and materially false Petition for an Order of Protection of a Vulnerable Adult” in 2004. CP 460-68. Although difficult to discern, the gravamen of Angela’s complaint appeared to be that Ms. Atwood failed to sue Mike and Paul for abuse of process, malicious prosecution, and intentional infliction of emotional distress for calling the authorities to help locate Agnes and for seeking an order of protection under the Vulnerable Adult Protection Act. *Id.*

During the course of the underlying litigation, Angela clarified that she based her claim against Ms. Atwood on an apparent failure to properly investigate the “documents and the history of the situation” which would have revealed a decades-old conspiracy by Mike and Paul to rob Angela of her inheritances. CP 470-72. She never testified that she expected

Ms. Attwood to claim intentional infliction of emotional distress against Mike and Paul. Angela complains that she has been estranged from Mike and Paul for most of their adult lives, that Mike and his family have “shunned” her, and that Paul does not have contact with her. CP 262. She criticizes her brothers for never contacting her, being condescending, and never saying anything nice to her and equates this behavior to “abusive conduct.” *Id.*

On November 19, 2010, Ms. Atwood filed a Motion for Summary Judgment of Dismissal of Angela’s Complaint. CP 313-526. At the December 17, 2010 summary judgment hearing before Judge Beth Andrus, Angela conceded that she did not have viable causes of action for malicious prosecution or abuse of process and clarified that the sole claim was for intentional infliction of emotional distress. RP 11, 25, CP 529. Consistent with the concessions at the December 17, 2010 hearing, Ms. Atwood filed an Amended Motion for Summary Judgment on the remaining issue of whether Angela could pursue a claim of legal-malpractice for Ms. Atwood’s alleged failure to bring a claim of intentional infliction of emotional distress against Mike and Paul. CP 527-50.

At the June 24, 2001 hearing, Judge Schapira found the proximate cause issue to be the crucial failure in Angela’s case. RP 42. The superior

court ruled that her claim for intentional infliction of emotional distress could not have prevailed based on the facts presented: a few calls to the sheriff to check on where the mother was and how the mother was, and the filing of the VAPA action when it appeared that Agnes might be moved. *Id.* The superior court found that the brothers had good reason to be concerned about moving their mother – the health of the mother. *Id.* The superior court held that use of lawful and normal processes could not be the basis of an outrage claim and granted Ms. Atwood’s Motion for Summary Judgment. RP 39, 43.

IV. SUMMARY OF ARGUMENT

The superior court’s June 24, 2011 Order Granting Defendants’ Motion for Summary Judgment should be affirmed because: (1) Ms. Atwood never undertook a duty to assert a claim for intentional infliction of emotional distress against Mike and Paul; (2) the three-year statute of limitations and the statutory immunity of RCW 4.24.510 would have barred any claim based on the calls to Adult Protective Services and the Sheriff’s Department; (3) there is no legal authority that would support a stand-alone claim for intentional infliction of emotional distress for conduct arising out of litigation; (4) the litigation privilege is an absolute bar to any tort claims arising out of the VAPA proceedings; and (5) Mike and Paul’s conduct was not “so outrageous in character, and so extreme in

degree, as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable.”

V. ARGUMENT

A. **The standard of review is de novo, but this court may affirm on any ground the record supports.**

This court engages in the same inquiry as the superior court when reviewing a summary judgment order. *See Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions of file demonstrate the absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. *See* CR 56(c). However, “[a] superior court’s decision will be affirmed on appeal if it is sustainable on any theory within the pleadings and the proof.” Tegland, 2A Wash. Prac., Rules Practice RAP 2.5 (6th ed. 2010); *see also Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 493, 933 P.2d 1036 (2007). Although Angela devotes her entire brief to the argument that the superior court erred because the conduct complained about was extreme and outrageous, this court may affirm the superior court’s order on any basis supported by the record. *Burnet*, 131 Wn.2d at 493.

B. **The superior court correctly dismissed Angela’s claim because Angela failed to prove the necessary requirements of a legal malpractice claim.**

To prove a claim of legal malpractice, a plaintiff must show: (a)

the existence of an attorney-client relationship; (b) the existence of a duty on the part of the lawyer; (c) failure to perform the duty; and (d) the negligence of the lawyer must have been a proximate cause of the damage to the client. *Sherry v. Diercks*, 29 Wn. App. 433, 437, 628 P.2d 1336, *rev. denied*, 96 Wn.2d 1003 (1981). To defeat summary judgment of dismissal, Angela was required to show an issue of material fact as to **each** element. *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992); *Craig v. Wash. Trust Bank*, 94 Wn. App. 820, 824, 976 P.2d 126 (1999) (emphasis added).

1. **This court should affirm summary judgment on the alternative ground that Angela failed to show that Atwood had a duty owing to assert a claim for damages against the Oppe brothers.**

To meet the applicable standard of care, an attorney must exercise the degree of care, skill, diligence and knowledge commonly possessed by a reasonable, careful and prudent lawyer. *See, e.g., Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992). As elaborated by a relevant treatise, the standard of care for an attorney is what is reasonable under the circumstances of the particular case:

The duty of competence, like that for diligence, does not make the lawyer a guarantor of a successful outcome in the representation. **It does not expose the lawyer to liability to a client for acting only within the scope of the representation** or following the client's instructions. It does not require a lawyer, in a situation involving the

exercise of professional judgment, to employ the same means or select the same options as would other competent lawyers in the many situations in which competent lawyers reasonably exercise professional judgment in different ways. The duty also does not require “average” performance, which would imply that the less skillful part of the profession would automatically be committing malpractice. **The duty is one of reasonableness in the circumstances.**

Restatement of the Law (Third), The Law Governing Lawyers, § 52, comment b. Competence. (emphasis added). *See also Hansen*, 14 Wn. App. at 88 (attorney is not negligent when exercising judgment in a matter of doubtful construction).

Ms. Atwood’s duty to Angela was one of reasonableness given the circumstances. That duty did not include setting forth counterclaims that: (1) were beyond the scope of representation, and (2) were meritless and would have failed as a matter of law. The Professional Services Agreement II states that Atwood would render professional services to:

(1) Bring a counterclaim against your brothers Michael J. Oppe and Paul J. Oppe either under King County Superior Cause No. 05-2-17128-6KNT or a new cause number to **end harassment, frivolous suits, discovery of a harassing nature**, and (2) to address the personal property transferred by your mother during her lifetime and end your brothers’ claims and probate her estate if necessary.

CP 524-26.

No reasonable interpretation of the above language obligated Ms. Atwood to bring a counterclaim to recover damages for intentional

infliction of emotional distress arising from the VAPA proceedings or from the calls to Adult Protective Services or the Sheriff's Department. When Angela first contacted Ms. Atwood, she claimed that Mike and Paul had filed multiple lawsuits against her. Angela does not, and cannot, dispute this. Professional Services Agreement II encompassed **ending** what Angela perceived as harassment by her brothers – frivolous suits and discovery of a harassing nature. There is no indication that the parties ever agreed that Ms. Atwood would assert a separate tort claim against Mike and Paul brothers for conduct that (1) was immune from civil liability, as explained below, and (2) should have been addressed within the context of the VAPA proceedings.

Ms. Atwood performed the professional services that the parties' agreement contemplated, and she obtained favorable results for Angela by: (1) ending discovery requests for bank records for Agnes and Angela; (2) preventing Mike and Paul from obtaining Angela's personal information; (3) defeating a motion for summary judgment that sought appointment of a referee and an award of attorneys' fees for Mike and Paul's expenses prior to the filing of the partition action; and (4) ending the litigation with Angela's brothers. CP 683-84. Atwood acted within the scope of the agreed representation and did so in a competent, reasonable manner. There is no evidence that after conclusion of the partition action that

Angela continued to experience “harassment” by Mike and Paul. Angela has no malpractice claim because she cannot establish the existence of any legal duty. As such, the superior court properly granted summary judgment dismissal in this matter.

2. The superior court correctly dismissed Angela’s claim because she had no claim for intentional infliction of emotional distress.

Even if this court finds that factual issues remain as to whether Ms. Atwood had a duty to assert a claim of intentional infliction of emotional distress against Mike and Paul, Angela cannot prove the requisite proximate-cause element of a legal-malpractice claim. Negligence is not presumed, and a plaintiff must prove both negligence and that it was the proximate cause of the injury. *Carley v. Allen*, 31 Wn.2d 730, 737, 198 P.2d 827 (1948); *Sherry v. Diercks*, 29 Wn. App. 433, 437, 628 P.2d 1336 (1981).

Proximate causation has two elements: cause in fact and legal causation. *City of Seattle v. Blume*, 134 Wn.2d 243, 251, 947 P.2d 223 (1997). “Cause in fact refers to the ‘but for’ consequences of an act, that is, the immediate connection between an act and an injury.” *Id.* at 251-52. Legal causation is based on policy considerations determining how far the consequences of an act should extend. *Id.* In a legal-malpractice claim, plaintiff must demonstrate that “but for” the attorney’s negligence **she**

would have obtained a better result. *Sherry*, 29 Wn. App. at 438 (emphasis added). Proximate cause is usually the province of the jury. *Brust v. Newton*, 70 Wn. App. 286, 291-93, 852 P.2d 1092 (1993). However, the court can determine proximate cause as a matter of law if “reasonable minds could not differ.” *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999); *Smith v. Preston Gates Ellis*, 135 Wn. App. 859, 864, 147 P.3d 600 (2006), *rev. denied* 161 Wn.2d 1011 (2007).

There are two causation issues for legal-malpractice claims: (1) whether the attorney’s negligence caused a loss of the claim, and (2) whether the loss of the cause of action caused damage to the client. *Kommavongsa v. Haskell*, 149 Wn.2d 288, 300, 67 P.3d 1068 (2003); Mallen & Smith, *Legal Malpractice* § 33.11 at 95 (5th ed. 2000). It is the second of these issues that requires a court to engage in a “trial-within-a-trial.” *Kommavongsa*, 149 Wn.2d at 300. Thus, for Angela to prevail, she had to show, in a trial-within-a-trial, that, **“but for” Ms. Atwood’s alleged failures, she would have been successful in the prosecution of any purported claims in the underlying litigation.** *Id.*; *Aubin v. Barton*, 123 Wn. App. 592, 608, 98 P.3d 126 (2004) (emphasis added).

As the superior court correctly determined, even when viewing the facts in the light most favorable to Angela, she cannot show that “but for” Atwood’s alleged failures, she would have succeeded on a claim of

intentional infliction of emotional distress against her brothers. RP 42-43.

- a. **Both the three-year statute of limitations and the statutory immunity of RCW 4.24.510 would have barred any claim based on the calls to the Sheriff's Department.**

Angela claims that Mike and Paul intentionally inflicted emotional distress by calling Adult Protective Services in May 2000 and November 2001 and the Sheriff's Department on May 7 and July 1, 2003, for help in locating their mother.² As a threshold matter, claims of intentional infliction of emotional distress are subject to a three-year statute of limitations. RCW 4.16.080(2); *Cox v. Oasis Physical Therapy, PLLC*, 153 Wn. App. 176, 222 P.3d 119 (2009); *St. Michelle v. Robinson*, 52 Wn. App. 309, 759 P.2d 467 (1988). Accordingly, by the time Ms. Atwood was retained in 2005, the only "actionable" conduct not barred by the statute of limitations was two phone calls in 2003 to the King County Sheriff's Department.

Moreover, Washington law broadly prohibits civil litigation that attempts to punish those who petition the government for action, including calls to the police. *Saldivar v. Momah*, 145 Wn. App. 365, 387, 186 P.3d 1117 (2008).

² Appellant's brief refers to three calls to the Sheriff's Department; however, the record documents personal knowledge of only two calls, on May 7 and July 1, 2003. CP 282-83, 568.

In 1989, The Washington Legislature passed the first modern anti-SLAPP (Strategic Lawsuit Against Public Participation in government) statute. Like other states with similar statutes, Washington's anti-SLAPP law, RCW 4.24.500 *et seq.*, was enacted to counter the trend of lawsuits filed to chill or punish individuals and citizen groups who openly express their views to government agencies:

Information provided by citizens concerning potential wrongdoing is vital to **effective law enforcement** and the efficient operation of government. The legislature finds that the threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies.

RCW 4.24.500 (emphasis added).

As originally enacted, the statute granted immunity from civil liability to all persons who communicated complaints to government agencies, but did not afford a SLAPP target a particularly efficient remedy. *See* RCW 4.24.510. While the target could ordinarily expect to prevail, he or she had to endure considerable litigation before prevailing, contrary to the Legislature's clear intent. To deal with the problem, the Legislature in 2002 amended section 5.24.510 in several significant ways. First, the amendment included a new first section containing a strong public policy statement recognizing the constitutional threat of SLAPP litigation. RCW 4.24.510 (2002). Second, the Legislature removed the

former good faith requirement as an element of the SLAPP defense. In other words, SLAPP defendants, such as the Oppe brothers, would not have to prove that they acted in good faith. Third, the statute now authorizes statutory damages of \$10,000, as well as expenses and attorneys' fees to a prevailing SLAPP target. The superior court can deny the SLAPP target statutory damages only if the SLAPP plaintiff can prove the target had communicated to the government agency in bad faith. The practical effect of the latter provision is to impose on the plaintiff the burden of proving the target acted in bad faith.

RCW 4.24.510 now provides:

A person who communicates a complaint or information to any branch or agency of federal, state, or local government ... is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

RCW 4.24.510 (emphasis added). The statutory immunity applies when a person (1) “communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization” that is (2) based on any matter “reasonably of concern to

that agency.” *Bailey v. State*, 147 Wn. App. 251, 261, 191 P.3d 1285 (2008) (quoting RCW 4.24.510).

In *Dang v. Ehredt*, 95 Wn. App. 670, 977 P.2d 29 (1999), the Court of Appeals confirmed that RCW 4.24.510 provides immunity from civil liability to persons who communicate information to law enforcement agencies. In *Dang*, a bank teller called the police when the plaintiff presented a suspicious check for negotiation. *Id.* at 673. The police arrested Dang but later released her. *Id.* She sued the bank teller. The superior court dismissed the civil suit on summary judgment based on RCW 4.24.510, and the Court of Appeals affirmed. *Id.* The court found that the statutory immunity is not limited to claims based on the communication itself but also applies to claims based on events surrounding the communication, as well as claims based upon subsequent police conduct. *Id.* at 685. Here, by Angela’s own testimony, the “horrendous” conduct was that of the Sheriff’s Department, not Mike and Paul. However, Angela does not have a claim even if the initial phone call set the events in motion. Under *Dang*, not only does statutory immunity bar claims based on the communication itself, but it also bars claims based on later police conduct.

Angela seeks to impose liability for her brothers’ public actions in reporting concern over their mother’s whereabouts. Whether the brothers

acted in bad faith in making the calls is irrelevant. Angela's claim is precisely the sort of intimidation-by-litigation that the statute is intended to curb. Washington's anti-SLAPP statute and its supporting legislative intent would have required dismissal of this claim, with an award of costs, attorney fees, and statutory damages to Mike and Paul pursuant to RCW 4.24.510. Accordingly, Angela cannot show any damage by Ms. Atwood's alleged failure to bring a claim that would have failed.

b. A plaintiff cannot bring a claim for intentional infliction of emotional distress for conduct arising out of litigation.

The crux of Angela's claim for intentional infliction of emotional distress is that Mike and Paul filed "baseless, false and misleading" allegations against her in the VAPA proceedings. She alleges that the Petition was baseless and the allegations contained in the Declaration submitted in support of the Petition were false. However, there is no cognizable cause of action, and no recovery, for the conduct of which Angela complains.

First, Angela essentially attempts to assert a cause of action for perjury. However, it is well settled in Washington that there is no civil claim for perjury. *See Dexter v. Spokane County Health Dist.*, 76 Wn. App. 372, 884 P.2d 1353 (1994).

Second, the primary torts involving misuse of legal process are

malicious prosecution and abuse of process. 16A David K. DeWolf & Keller W. Allen, Wash. Prac. *Tort Law & Practice* § 21.1 (3rd ed. 2011). Angela conceded at the first summary judgment hearing that she did not have viable claims for malicious prosecution or abuse of process and redefined her claim as intentional infliction of emotional distress based on the VAPA proceedings. However, Angela cites no authority for the notion that one may bring a stand-alone claim for intentional infliction of emotional distress for conduct arising out of litigation. Where no authorities are cited, this court may assume that counsel, after diligent search, has found none. *DeHeer v. Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). Ms. Atwood's counsel has found no authority for this novel theory of liability. Angela's failure to cite authority likely is because, as discussed below, the litigation privilege protects parties from civil liability arising out of litigation.

3. The litigation privilege bars tort claims arising from the VAPA proceedings.

Witnesses in a judicial proceeding generally are absolutely immune from suit based on their testimony. *Bruce v. Byrne-Stevens & Assocs. Eng'rs., Inc.*, 113 Wn.2d 123, 125, 776 P.2d 666 (1989). This rule of absolute immunity extends not only to witnesses, but also to the parties. *McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980); *Jeckle v.*

Crotty, 120 Wn. App. 374, 386, 85 P.3d 931, *review denied* 152 Wn.2d 1029, 103 P.3d 201 (2004). The defense of absolute privilege or immunity avoids all liability. Such immunity is “absolute,” meaning that the purpose in publishing the defamatory matter, the belief in its truth, or even knowledge of its falsity, is irrelevant. *McNeal*, 95 Wn.2d at 267.

The doctrine was set forth in *McNeal* as follows:

Allegedly libelous statements, spoken or written by a party or counsel in the course of a judicial proceeding, are absolutely privileged if they are pertinent or material to the redress or relief sought, whether or not the statements are legally sufficient to obtain that relief. **The defense of absolute privilege or immunity avoids all liability.**

Id. (emphasis added; internal citations omitted).

The rule is based on the public interest in according to all men the utmost freedom of access to the courts of justice for the settlement of their private disputes. Restatement (Second) Torts § 587 (1977), *comment a*. Washington has long recognized the policy supporting absolute immunity:

The right of free allegations in a pleading has always been considered privileged. ... If the rule were established that an action could be maintained simply upon the failure of a plaintiff to substantiate the allegations of his complaint in the original action, litigation would become interminable, and the failure of one suit, instead of ending litigation, which is a policy of the law, would be a precursor to another; and, if that suit per chance should fail, it would establish the basis for still another.

Gem Trading Co. v. Cudahy Corp., 92 Wn.2d 956, 964-65, 603 P.2d 828 (1979).

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Although the privilege was founded to protect against defamation claims, Washington courts have repeatedly refused to limit the privilege only to such claims. *Bruce*, 113 Wn.2d at 132. In *Bruce*, the Supreme Court considered the scope of the privilege in the context of witness immunity as follows:

[T]here is nothing in the policy rationale underlying witness immunity which would limit its applicability to defamation cases. Witness immunity is premised on the chilling effect of subsequent litigation. The threat of subsequent litigation is the same regardless of the theory on which that the subsequent litigation is based.

... [A] rule limiting witness immunity to defamation cases would be easy to evade by recasting one's claim under other theories.

Id. at 132.

Similarly, in *Jeckle*, 120 Wn. App. at 386, the Court of Appeals applied the doctrine of litigation privilege to bar claims other than defamation. The *Jeckle* court held that the litigation privilege bars tort claims for intentional interference with a business relationship, outrage, infliction of emotional distress, and civil conspiracy, where the conduct complained about occurred in the course of litigation. *Id.* at 386.

Angela could not have maintained a cause of action against her brothers for intentional infliction of emotional distress because the acts alleged, with the exception to the calls to APS and the Sheriff's Department, fall within the scope of the litigation privilege doctrine. CP

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462-64. Angela's claim has no standing, to the extent it alleges her brothers made allegedly false statements to the court, those statements are absolutely immune from civil action irrespective of how the allegation is packaged.

In addition, claims against Mike and Paul arising out of the VAPA proceedings would have failed as a matter of law under the plain language of the VAPA statute. Undoubtedly to encourage the reporting of elder abuse in our state, our Legislature provided immunity for persons testifying about the abuse or neglect of a vulnerable person:

Immunity from liability

(1) A person participating in good faith in making a report under this chapter or testifying about alleged abuse, neglect, abandonment, financial exploitation, or self-neglect of a vulnerable adult in a judicial or administrative proceeding under this chapter is immune from liability resulting from the report or testimony[.]

RCW 74.34.050.

“The standard definition of good faith is a state of mind indicating honesty and lawfulness of purpose.” *Whaley v. State*, 90 Wn. App. 658, 669, 956 P.2d 1100 (1998).

Angela provides no evidence that would support a finding of a lack of good faith on the part of Mike or Paul. Agnes's medical records support Mike and Paul's fear that Angela intended to move Agnes to the East Coast against her doctor's advice. Angela's own pleadings show that

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Mike and Paul “filed the Petition after learning through PMSV staff ... that [Angela and Agnes] intended to move to the East coast... .” CP 237.

Angela cannot prove a dishonest or unlawful purpose by Mike and Paul in initiating the VAPA proceedings. Her claim that Mike and Paul prevented her from being with Agnes at the time of her death is false. Angela went back to the East Coast after being served with the restraining order, never filed a response, never sought to quash the order, and in fact agreed to extend the return date on the restraining order. CP 101, 811. The fact that Angela did not know the no-contact provision of the VAPA order had been lifted, while unfortunate, does not show a lack of good faith by Mike and Paul. It merely shows a breakdown in communication between Angela and her counsel, Mr. Sonkin, and does not support a claim of intentional infliction of emotional distress. CP 269.

Angela’s claim for intentional infliction of emotional distress is based upon the same actions by Mike and Paul for which they are immune under both the litigation privilege and the vulnerable adult reporting statute. To allow claims for intentional infliction of emotional distress arising out of litigation-related conduct would violate the principles the immunities seek to protect. The number of suits engendered by a ruling allowing claims such as this to proceed is directly contrary to strong policy in Washington of bringing closure to litigation.

4. The superior court correctly found that Mike and Paul's conduct was not extreme and outrageous.

Even if Mike and Paul were not immune for the conduct at issue, that conduct was not so outrageous as to support a claim of intentional infliction of emotional distress. Whether a course of conduct is sufficiently outrageous to result in liability is generally a question of fact determined by the jury. *Chambers-Castanes v. King County*, 100 Wn.2d 275, 286, 669 P.2d 451 (1983). Nevertheless, summary judgment is proper if reasonable minds could reach only one conclusion. *Birklid v. Boeing Co.*, 127 Wn.2d 853, 867, 904 P.2d 278 (1995) (court initially determines if reasonable minds could differ on whether conduct is sufficiently extreme).

The bar for outrageous conduct is set very high. *Reid v. Pierce County*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998). It is not enough that a defendant's conduct is tortious or criminal, or even that it was intended to cause emotional distress. *Kloepfel v. Bokor*, 149 Wn.2d 192, 195-96, 66 P.3d 630 (2003). Liability exists only where the conduct has been "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." *Dombrosky v. Farmers Ins. Co.*, 84 Wn. App. 245, 261, 928 P.2d 1127 (1996).

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

It is the law of this state that liability can be found only where the conduct had been 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 ...

Woodward v. Steele, 32 Wn. App. 152, 155-56, 646 P.2d 167 (1982).

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

Id., at 155-56 (emphasis added).

Washington courts routinely dismiss intentional infliction of emotional distress claims as a matter of law, and those dismissals are routinely affirmed on appeal. *See, e.g., Womack v. Von Rardon*, 133 Wn. App. 254, 261, 135 P.3d 542 (2006) (claim of outrage for lighting cat on fire dismissed on summary judgment); *Hope v. Larry's Markets*, 108 Wn. App. 185, 196, 29 P.3d 1268 (2001) (allegation that employer deliberately injured employee by exposure to dangerous chemicals was not sufficient to survive summary judgment).

Filing suit, even with malicious intent as alleged here, does not rise to the level of outrageous conduct needed to support an intentional infliction of emotional distress claim. *Saldivar v. Momah*, 145 Wn. App.

365, 390, 186 P.3d 1117 (2008). In *Saldivar*, plaintiff filed suit against her physician alleging that she had been sexually abused while receiving treatment at the clinic. Defendant testified that as a result of the lawsuit he lost his job, suffered a stress related stroke, could not afford to renew his medical license, and was uninsurable and unemployable as a result of the litigation. *Id.* at 385. The court found that fabricating claims, and filing suit alleging sexual assault, with the purpose to obtain money did not rise to conduct so outrageous in character, and so extreme in degree to go beyond all possible bounds of decency. *Id.* at 390.

Cases where the court has found conduct sufficient to support an intentional infliction of emotional distress claim involve conduct beyond the realm of all civilized behavior. For example, the Supreme Court found conduct sufficient to support a claim for intentional infliction of emotional distress where masked, armed assailants approached plaintiff outside the tavern where he worked, grabbed him, held a gun to his head, threatened to “[b]low [his] head off,” bound his hands and ankles, taped his mouth shut, dragged him by the ankles, face down, through the tavern and down a staircase into the kitchen, and then firebombed the tavern. *Rice v. Janovich*, 109 Wn.2d 48, 50, 62, 742 P.2d 1230 (1987). Outrageous conduct was also established where plaintiff was required to helplessly witness “the terrifying agony and explicit pain and suffering of his wife

while she proceed to die right in front of his eyes.” *Grimsby v. Samson*, 85 Wn.2d 52, 60, 530 P.2d 291 (1975).

Several calls to the authorities and the filing of the VAPA petition is not in the realm of outrageous conduct necessary to sustain a claim of intentional infliction of emotional distress.

5. Angela cites cases that are easily distinguished.

Angela’s argument that her brothers “occupied a position of dominance” over her and that they exercised this power to inflict emotional distress upon Angela and prevent her from seeing her mother at her time of death is fallacious. The cases she cites are unpersuasive, were not presented to the superior court, and notably do not involve conduct arising out of litigation or lawful communications to government agencies. Further, those cases involve conduct that would be utterly intolerable in society.

For example, Angela relies on *Seman v. Karr*, 114 Wn. App. 665, 59 P.3d 701 (2002), to support her claim that Mike and Paul’s conduct went beyond all realms of decency. In *Seman*, masked SWAT officers forcibly entered a home, released a “distraction device” that dispersed smoke throughout the home and ignited the carpet, pointed machine guns at the occupants’ heads and told them if they moved they would be shot. The police accused the “suspects” of murder and kept them handcuffed

and detained for several hours, even after the police learned they had the wrong people. *Id.* at 674-75, 686. “Ignoring” and “shunning” someone, and use of lawful processes, does not rise to the level of outrageousness demonstrated in *Seman*.

Notably, all of the cases cited by Angela that do not involve serious assaults or felonies, as commonly required to support a claim of outrage, involve a tortfeasor who held a position of power or control over the plaintiff. *See, e.g. Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 565 P.2d 1173 (1977) (employee subjected to continuous racial slurs and comments by employer); *Phillips v. Hardwick*, 29 Wn. App. 382, 628 P.2d 506 (1981) (home seller would not relinquish possession of house to purchasers); *Doe v. Corp. of the Pres. of Church of Jesus Christ of Latter-Day Saints*, 141 Wn. App. 407, 167 P.3d 1193 (2007) (bishop informing minor that if she reported sexual abuse to authorities she, rather than the abuser, would cause her family to break up).

According to Angela, she had minimal contact with her brothers since the time she moved in with her mother in 1996. Angela complains that she has been estranged from her brothers, that Mike and Paul never contacted her voluntarily to “catch up,” and that they “shunned” her. CP 262. Angela further criticizes her brother for not visiting Agnes, not participating in Agnes’s healthcare, and ignoring Angela when they would

visit Agnes. App. Br. at 5-6, 21. By Angela's own version of the facts, no reasonable mind could conclude that her brothers occupied such position over Angela that even the slightest unpleasant conduct would give rise to a claim of intentional infliction of emotional distress, or that this constitutes outrageous conduct.

Corey v. Pierce County, 154 Wn. App. 752, 225 P.3d 367 (2010) is equally unpersuasive. Plaintiff Corey was an assistant deputy prosecutor and the third highest ranking deputy prosecutor in Pierce County. *Id.* at 757. After twenty years of employment with the prosecutor's office, Corey was forced to resign in lieu of termination or be fired. *Id.* at 758. Following Corey's termination, The Tacoma News Tribune reported several stories, apparently leaked by the prosecutor's office, that accused Corey of criminal behavior and implied Corey had mishandled public funds and told several lies, despite knowledge that an internal investigation revealed little of substance. *Id.* at 758-59. The Court of Appeals found that as a prosecutor, and longtime public servant, such allegations would go beyond mere insults and indignities. *Id.* at 764.

Here, Mike made several calls to the authorities when he was unable to locate his mother. Mike testified that he did not inform the Sheriff's Department about any concerns about Angela's caregiving except to notify them of the incident in April 2001 that resulted in Agnes

spending 17 months in a nursing home. CP 743. Therefore, it is unclear how the “Oppe brothers publically accused Ms. Oppe ... of neglect, abuse, and exploitation.” App. Br. at 30.

In addition, in *Corey v. Pierce County*, Corey suffered severe emotional distress in the form of severe depression, at one point becoming suicidal, and experienced an onset of epileptic seizures. *Corey*, 154 Wn. App. at 759. Although objective symptomatology is not required to support a claim of intentional infliction of emotional distress, a plaintiff is still required to show severe emotional distress on the facts. *Lawson*, 58 Wn. App. at 270 (depression, loss of appetite, libido and energy, sleeplessness and increased headaches do not constitute severe emotional distress); *Spurrel*, 40 Wn. App. at 862-63 (insomnia, tears, loss of appetite, and anxiety not sufficient to establish severe emotional distress).

Lawson and *Spurrel* follow the Restatement’s requirement that severe emotional distress must be more than “transient and trivial emotional distress” which is “a part of the price of living among people.” Restatement (Second) of Torts § 46 cmt. j.

The social worker that evaluated Angela found that she suffers from anxiety and depression and believes that her brothers worked to take her inheritance away from her. CP 230. This “emotional distress” is more akin to the transient and trivial distress in *Lawson* and *Spurrel* and not the

extreme emotional distress exhibited in *Corey*.

The record is devoid of evidence of conduct by the Oppe brothers that could in any way be considered “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.” *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975). Accordingly, Angela could not have succeeded on a claim of intentional infliction of emotional distress against her brothers, cannot prove her trial-within-a-trial, and cannot support a claim of legal malpractice.

C. Ms. Atwood requests an award of attorney fees and costs.

Pursuant to RAP 18.1, RCW 4.84.185 and/or CR 11, Ms. Atwood requests an award of attorney fees and costs. An appeal is frivolous (and a recovery of fees warranted) “if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists.” *In re Marriage of Greenlee*, 65 Wn. App. 703, 710, 829 P.2d 1120 (1992) (quoting *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224, *rev. denied*, 104 Wn.2d 1020 (1985)).

Similarly, RCW 4.84.185 provides:

In any civil action, the court ... may, upon written findings ... that the action ... was frivolous and advanced without

reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense... .

As outlined above, well settled authority provides for fees associated with defending frivolous actions, such as the appeal before this court. Accordingly, Ms. Atwood is entitled to recovery of fees and costs pursuant to RAP 18.1 and RCW 4.84.185.

VI. CONCLUSION

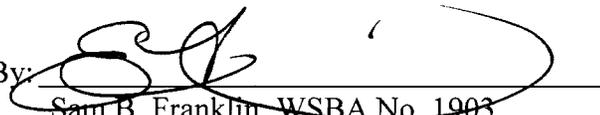
Angela's claims against Ms. Atwood fail as a matter of law because there was never a duty to bring a meritless claim against Mike and Paul for intentional infliction of emotional distress. Even if Angela is able to raise an issue of fact regarding the scope of representation, summary judgment was appropriate because Ms. Atwood has demonstrated that the actions which Angela complains about – welfare check calls to the police and filing for a temporary order of restraint – were legitimate attempts by Mike and Paul to secure their mother's wellbeing and safety.

Notwithstanding the fact that Mike and Paul were immune from civil liability for their actions, Angela cannot create even a weak issue of fact regarding the validity of her brothers' reason for taking action. Commissioner Procnau acknowledged the need for an order of protection. This need is supported by the records from Providence Mount St. Vincent. There is not a shred of evidence to demonstrate an intent to inflict extreme

emotional distress on Angela. Even viewing all of the evidence in the light most favorable to Angela there is still no evidence from which to infer the existence of an intent to inflict emotional distress. Accordingly, the superior court properly dismissed Angela's claim on summary judgment.

Respectfully submitted this 10th day of December, 2011.

LEE SMART, P.S., INC.

By: 

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Of Attorneys for Respondents

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on December 16, 2011, I caused service of the foregoing pleading on each and every attorney of record herein:

**VIA LEGAL MESSENGER
AND/OR FEDERAL EXPRESS**

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