

No. 67354-8-1

(King County Superior Court No.: 10-2-13709-2-SEA)

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

ANGELA M. OPPE,

Appellant,

vs.

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.

REPLY BRIEF OF APPELLANT

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12

TABLE OF CONTENTS

REPLY TO RESPONDENTS’ STATEMENT OF THE CASE 1

REPLY ARGUMENT.....3

 A. Ms. Oppe has a legal malpractice claim against Atwood. 3

 1. Atwood breached her duty of care to Ms. Oppe3

 2. Ms. Oppe’s damages were proximately caused by
 Atwood’s negligence 6

 a. The Oppe Brothers were not immune from
 Liability under RCW 4.24.5107

 b. A claim for intentional infliction of emotional
 Distress can be a “stand alone” claim. 10

 3. The Oppe Brothers did not act in good faith under
 the VAPA statute.11

 4. The Oppe Brothers’ conduct was extreme and
 outrageous and the cases cited by Ms. Oppe in support
 of her argument are persuasive. 14

 B. Atwood’s request for attorney fees and costs is
 baseless.....21

CONCLUSION24

DECLARATION OF SERVICE..... 25

TABLE OF AUTHORITIES

Cases

Ang v. Martin,
154 Wn.2d 477, 114 P.3d 637 (2005)3

Chapman v. Perera,
41 Wn.App. 444, 704 P.2d 1224 (1985)..... 23

Contreras v. Crown Zellerbach Corp.,
88 Wn.2d 735, 565 P.2d 1173 (1977)18

Corey v. Pierce County,
154 Wn.App. 752, 225 P.3d 367 (2010)*Passim*

Dang v. Ehredt,
95 Wn.App. 670, 977 P.2d 29 (1999)9, 10

Daugert v. Pappas,
104 Wn.2d 254, 704 P.2d 600 (1985)6, 7

Doe v. Corp. of the Pres. of Church of Jesus Christ of Latter-Day Saints,
141 Wn.App. 407, 167 P.3d 1193 (2007) 18

Hansen v. Wightman,
14 Wn.App. 78, 538 P.2d 1238 (1975)3

Hizey v. Carpenter,
119 Wn.2d 251, 830 P.2d 646 (1992)3

Jackson v. Peoples Fed. Credit Union,
25 Wn.App. 81, 604 P/2d 1025 (1979)14

Kommavongsa v. Haskell,
149 Wn.2d 288, 67 P.3d 1068 (2003)7

Kloepfel v. Bokor,
149 Wn.2d 192, 66 P.3d 630 (2003)10

<i>Matheson v. Gregoire,</i> 139 Wn.App. 624, 161 P.3d 486 (2007)	23
<i>Lawson v. Boeing Co.,</i> 58, Wn.App. 261, 792 P.2d 545 (1990)	20
<i>Nielson v. Eisenhower & Carlson,</i> 100 Wn.App. 584, 999 P.2d 42 (2000)	6
<i>Phillips v. Hardwick,</i> 29 Wn.App. 382, 628 P.2d 506 (1981)	15, 18
<i>Rice v. Janovich,</i> 109 Wn.2d 48, 742 P.2d 1230 (1987)	14
<i>Saldivar v. Momah,</i> 145 Wn.App. 365, 186 P.3d 1117 (2008)	8
<i>Sattler v. Northwest Tissue Center,</i> 110 Wn.App. 689, 42 P.3d 440 (2002)	11
<i>Seaman v. Karr,</i> 114 Wn.App. 665, 59 P.3d 701 (2002)	14, 18
<i>Streater v. White,</i> 26 Wn.App. 430, 613 P.2d 187 (1980)	22, 23
<i>Strong v. Terrell,</i> 147 Wn.App. 376, 195 P.2d 977 (2008)	15
<i>Whaley v. State,</i> 90 Wn.App. 658, 956 P.2d 1100 (1998)	11
<i>Woodcraft Const., Inc. v. Hamilton,</i> 56 Wn.App. 885, 786 P.2d 307 (1990)	21

Statutes

RCW 4.24.510 *Passim*

RCW 4.84.185 21

RCW 74.34.050 11, 22

REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Respondents' Brief asserts several statements of fact which are either misstatements or are unsupported by the record. Specifically, Respondents assert that although the restraining order issued against Ms. Oppe was inapplicable to Swedish Hospital where Agnes was admitted, "there is no indication that she [Ms. Oppe] attempted to visit Agnes at the hospital." Res. Br. at 11. This is incorrect. Ms. Oppe *did* attempt to see her mother at the hospital but was informed by hospital personnel that she could not due to the entry of the Temporary Restraining Order issued on April 15, 2004 by Commissioner Prochnau of the King County Superior Court. CP 103; 268-269. As a result, Ms. Oppe was denied the opportunity to be with her mother in the hours leading up to her death.

Respondents also state that Professional Service Agreement II (hereinafter, "Agreement II") was entered into by the parties to provide "additional details" for the scope of representation for Professional Service Agreement I (hereinafter "Agreement I"). Res. Br. at 13. However, there is nothing in the record to support this assertion, other than Atwood's own self-serving statements. Agreement II is clear on its face: Atwood agreed to file either a counterclaim in the Partition matter or a new cause of action on behalf of Ms. Oppe against the Oppe Brothers, to end the "harassment, frivolous suits, discovery of a harassing nature. . . ."

CP 193. The two (2) Professional Service Agreements (Agreement I for representation in the Partition matter and Agreement II for the separate litigation against the Oppe Brothers) were entered into by the parties on the same day. CP 189-195. Atwood's conclusion is unsupported by the record and is illogical given the facts and circumstances in the record.

Finally, Respondents assert that the trial court granted the Motion for Summary Judgment

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.

Res. Br. at 3. (Emphasis added).

This assertion is only partially correct, as the trial court stated that it dismissed Appellant's Complaint because Ms. Oppe failed to prove that the Oppe Brothers' conduct rose to the level of being extreme and outrageous. RP 41. It was this proximate cause issue the lower court said was "the crucial failure" of Ms. Oppe's intentional infliction of emotional distress claim against the Oppe Brothers. RP 42. The record is void of any conclusions that the use of "lawful and normal processes [was not a] basis for a claim for intentional infliction of emotional distress," when it dismissed Ms. Oppe's Complaint. RP 43.

REPLY ARGUMENT

A. Ms. Oppe has a legal malpractice claim against Atwood.

To prevail on a claim for legal malpractice, Ms. Oppe must prove:

(1) the existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of duty and damages. *Hizey v. Carpenter*, 119 Wn.2d 251, 260, 830 P.2d 646 (1992); *Ang v. Martin*, 154 Wn.2d 477, 481-482, 114 P.3d 637 (2005). Genuine issues of material fact exist for each element of Ms. Oppe's legal malpractice claim against Atwood. Reversal and remand are therefore appropriate.

1. Atwood breached her duty of care to Ms. Oppe.

To comply with the duty of care, Atwood must have "exercise[d] the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in this jurisdiction." *Hizey, supra*, 119 Wn.2d at 261; *Hansen v. Wightman*, 14 Wn.App. 78, 90, 538 P.2d 1238 (1975). An attorney's duty of care also includes a duty to define the full scope of the representation to the client, and to obtain the client's consent if that representation is to be limited in any way. CP 144.

Ms. Oppe and Atwood entered into two (2) Professional Services Agreements, which were clear in their scope and specificity of representation. CP 189-191; 193-195. Agreement I provided that Atwood would defend Ms. Oppe in the Partition matter that was already pending with/against the Oppe Brothers in the King County Superior Court. CP 189-191. Agreement II stated that Atwood would “(1) Bring a counterclaim against . . . [the Oppe] brothers 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” CP 193-195. (Emphasis added). Atwood’s argument that Agreement II’s language (which she drafted) did not contemplate a counterclaim or new claim for intentional infliction of emotional distress is meritless. In order to end the Oppe Brothers’ continuous pattern of harassment and malicious behavior, Atwood agreed to represent Ms. Oppe to: (1) file a counterclaim in the Partition matter; or (2) file a new, separate case. Atwood assured Ms. Oppe that she had a claim against the Oppe Brothers and further stated that she (Atwood) would file that claim upon the conclusion of the Partition matter. CP 245; 208-209. To assert otherwise ignores the specific language of Agreement II and the record.

Finally, Atwood’s assertion that she performed and completed her duties as Ms. Oppe’s attorney pursuant to the Agreements by obtaining

“favorable results” for Ms. Oppe is also irrelevant.¹ This result was expected in Agreement I, and part and parcel to the Partition litigation. Thus, there was no need for a second Agreement to address the discovery disputes in the Partition litigation, as those issues were already covered by Agreement I. Agreement II, however, was clear: Atwood was to file either a counterclaim in the Partition action or a new cause of action against the Oppe Brothers. She failed to do either. The trial court thus concluded (RP 23; 40):

For purposes of summary judgment, I don’t think there’s any question - - I don’t mean to insult anybody in the room - - that *Ms. Atwood was negligent, that she failed to meet the standard of care*. Her client asked for X and she didn’t get X. . . .

I think [Agreement] *No. 2 does contemplate either counterclaims or a new action to deal with the perceived abuse and harassment*, which were very important to Ms. Oppe. *The attorney would not have written it down if there wasn’t some contemplation that this was a problem for the client.*

The fact that an attorney might think there’s a cause of action, that she might plan to work on that cause of action, that the client hopes that there’s a cause of action, . . . it has a little to do with what we’re doing today in the sense of: Was there a duty to check this out? Was there a duty to communicate that to the client and to do the best that one

¹ Atwood’s assertion that she defeated “a motion for summary judgment that sought appointment of a referee . . .” in the Partition action is incorrect. Res. Br. at 20. The March 3, 2006 Order for Summary Judgment provided that, “Patricia Erickson is *designated as the referee* for the limited purpose of listing, marketing, and selling the subject real property in an open market transaction.” CP 655. (Emphasis added). The Order then lists Ms. Erickson’s duties as the referee. CP 655-656.

can? Well, yes there is such a duty. So, again, for today's purposes, *that absolutely was Ms. Atwood's responsibility.*

(Emphasis added).

Atwood admitted that she and Ms. Oppe did not understand each other at the start of their attorney-client relationship. CP 245; 217-218. Despite the misunderstandings, Atwood agreed to enter into Professional Service Agreements with Ms. Oppe. There is no dispute that Atwood failed to investigate any evidence received by her regarding the Oppe Brothers' harassment and treatment of Ms. Oppe. CP 245; 186-187; 222. Atwood breached her duty of care to Ms. Oppe by failing to fulfill her obligations as stated in Agreement II.

2. Ms. Oppe's damages were proximately caused by Atwood's negligence.

The proximate causation element in negligence cases has two parts: cause in fact and legal causation. *Daugert v. Pappas*, 104 Wn.2d 254, 257, 704 P.2d 600 (1985). "Cause in fact" is traditionally referred to as the "but for" test, requiring "a plaintiff to establish that the act complained of probably caused the subsequent disability." *Id., supra*, 104 Wn.2d at 260. Therefore, a plaintiff must prove that they would have prevailed or achieved a better result in the underlying case, "but for" the attorney's negligence. *Nielson v. Eisenhower & Carlson*, 100 Wn.App. 584, 594, 999 P.2d 42 (2000). This element of proximate causation is

generally a matter for the jury. *Kommavongsa v. Haskell*, 149 Wn.2d 288, 300, 67 P.3d 1068 (2003). The court may determine the issue of proximate cause only if reasonable minds could not differ on the facts or the inferences from the facts. *Daugert, supra*, 104 Wn.2d at 260.

Atwood raises several arguments in the Respondent's Brief that *were not relied upon* by the trial court in issuing its decision for summary judgment. Res. Br. at 39-43. First, Atwood argues that the Oppe Brothers were immune from liability. Res. Br. at 23-27². Second, Atwood argues that a claim for intentional infliction of emotional distress cannot be brought as a "stand alone" claim. Res. Br. at 27-28. Finally, Atwood asserts that the Oppe Brothers were privileged under the VAPA statute and litigation immunity. Res. Br. at 28-32. Despite these arguments, and in viewing all facts and reasonable inferences from the facts in Ms. Oppe's favor, Ms. Oppe would have been successful in her intentional infliction of emotional distress claim against the Oppe Brothers.

- a. The Oppe Brothers were not immune from liability under RCW 4.24.510.

Washington's anti-SLAPP statute, RCW 4.24.510, provides in pertinent part:

² Atwood raises, *for the first time* in the Respondent's Brief, that the complaints to the Sheriff's Department were not actionable due to the statute of limitations. Res. Br. at 23. This argument was never presented by Atwood to the trial court in any of its Motions for Summary Judgment or Reply pleadings. CP 307-312; 313-336; 527-550; 769-773.

[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.

However, the immunity offered through the anti-SLAPP statute is inapplicable “to private lawsuits for private relief. . . .” *Saldivar v. Momah*, 145 Wn.App. 365, 386-387, 186 P.3d 1117 (2008). Therefore, a party seeking immunity under the RCW 4.24.510, *and* who seeks redress from the court in a private lawsuit, “cease[s] to be among the class of persons who can claim protection from liability” under the statute. *Id.*, *supra*, 145 Wn.App. at 384; RCW 4.24.510.

The Oppe Brothers’ complaints to government agencies are similar to the complaints made to government agencies in *Saldivar*. In *Saldivar*, the plaintiff instituted a complaint against the defendant doctors to the Medical Quality Assurance Commission (MQAC). *Saldivar, supra*, 145 Wn.App. at 373. The complaint alleged that the defendant doctors engaged in sexual abuse of the plaintiff during her treatment and physical therapy. *Id.* After conducting an investigation into the allegations, MQAC determined that “no cause of action” was warranted. *Id.* The plaintiff then filed a complaint with the local police department. *Id.* at 373-374. However, the police took no further action. *Id.* at 374. Shortly thereafter, the plaintiff filed a complaint for negligence and other causes of

action against the defendant doctors. *Id.* The defendant doctors filed a counterclaim, alleging intentional infliction of emotional distress, negligent infliction of emotional distress, and abuse of process. *Id.* at 375. In holding that the plaintiff did *not* have statutory immunity under RCW 4.24.510, the trial court stated that while the plaintiffs would be protected from actions taken by the MQAC and the police department, the immunity is inapplicable to “private lawsuits for private relief.” *Id.* at 386. Thus, because the plaintiff went further with her complaints and filed a lawsuit for damages against the defendant doctors, she did not have immunity protection. Like the plaintiff in *Saldivar*, the Oppe Brothers’ communications to the King County Sheriff’s Department and to Adult Protective Services are not protected under the anti-SLAPP immunity statute. The Oppe Brothers lost immunity protection when they filed the Petition for Protection of Vulnerable Adult (which included their complaints to the Sheriff’s Department and Adult Protective Services) and sought judicial relief to remove Ms. Oppe as Agnes’ caregiver. CP 595-605. Therefore, because the Oppe Brothers were not immune from liability under RCW 4.24.510, genuine issues of material fact remain relative to Ms. Oppe’s intentional infliction of emotional distress claim.

Atwood’s reliance on *Dang v. Ehredt*, 95 Wn.App. 670, 977 P.2d 29 (1999) in support of her argument that the Oppe Brothers were immune

from liability under RCW 4.24.510 also fails. Res. Br. at 26. This matter differs from *Dang* because the *Dang* defendants did not file a subsequent private cause of action against the plaintiff for the communications to the law enforcement agencies. *Dang, supra*, 95 Wn.App. at 676. The Oppe Brothers used the legal system when they filed the Petition for Protection of Vulnerable Adult against Ms. Oppe, based in part on their complaints to Adult Protective Services and the Sheriff's Department. RCW 4.24.510, therefore, does not immunize them from civil liability.

Ms. Oppe's claim for intentional infliction of emotional distress would not have been barred based upon RCW 4.24.510.

- b. A claim for intentional infliction of emotional distress can be a "stand alone" claim.

Atwood argues that a party may not bring a claim for intentional infliction of emotional distress as a "stand-alone" cause of action. Res. Br. at 28. Atwood attempts to create new law, as her assertion is unsupported by any State or Federal precedent. *Id.* For example, *Kloepfel v. Bokor*, 149 Wn.2d 192, 195, 66 P.3d 630 (2003) involved a bench trial on the sole cause of action of intentional infliction of emotional distress. Given Atwood's lack of authority and the fact that *Kloepfel* proceeded to trial on the sole claim for intentional infliction of emotional distress, Atwood's assertion is meritless.

3. The Oppe Brothers did not act in good faith under the VAPA statute.

To trigger immunity based upon the filing of the Petition for Protection of Vulnerable Adult, the Oppe Brothers must have acted “in good faith.”³ RCW 74.34.050 (1). “Good faith” is defined as “a state of mind indicating honesty and lawfulness of purpose.” *Sattler v. Northwest Tissue Center*, 110 Wn.App. 689, 695, 42 P.3d 440 (2002) (citing, *Whaley v. State*, 90 Wn.App. 658, 669, 956 P.2d 1100 (1998)). It also means an “honesty of purpose, *freedom from intention to defraud* and being faithful to one’s obligation.” *Sattler, supra*, 110 Wn.App. at 695. (Emphasis added). Thus, whether a party has acted in “good faith” under the VAPA statute is a question for the jury.

In this matter, Ms. Oppe presented facts demonstrating that the Oppe Brothers acted with malicious intent and conduct when they filed the Petition. The Oppe Brothers did not object to Ms. Oppe acting as Agnes’ attorney-in-fact. CP 718; 728; 740-741. In fact, Paul Oppe testified that he was comfortable with Ms. Oppe acting in this capacity so that he could “stay out of those things” (*i.e.* Agnes’ medical condition and treatment)

³ RCW 74.34.050 (1) states: 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.

and because he did not “want the responsibility for it.” CP 718; 728. Paul Oppe also said that he did not want to be “involved.” CP 728. He felt that Ms. Oppe was capable because she “had a college education, and she, you know, had 20 years as a naval officer. . . .” CP 728. The Oppe Brothers filed the Petition years after Ms. Oppe had been Agnes’ power of attorney. During that time period, the Oppe Brothers did nothing to address the alleged abuse and neglect committed by Ms. Oppe or to have Ms. Oppe removed from the power of attorney. The Oppe Brothers’ admitted disinterest in Agnes’ health and years of inaction for her well-being supports the conclusion that the VAPA filing was done in bad faith and with a lack of “honesty in purpose.”

The complaints to Adult Protective Services and the Sheriff’s Department are additional examples of the Oppe Brothers’ lack of good faith. Although these complaints were made, Paul Oppe testified that he did not perceive any issues which would have necessitated such visits. CP 729. Paul Oppe went so far as to testify that the complaints to the Sheriff’s Department were a “waste of time” because he felt there was absolutely no reason to contact the sheriff regarding Agnes or her care. CP 729. Moreover, Michael Oppe did not inform the Sheriff’s Department of his alleged concerns regarding Ms. Oppe’s care giving. CP 743. Perhaps most revealing of the Oppe Brothers’ bad faith, Michael

Oppe admitted that he did not feel bad when the final visit by the Sheriff's Department almost resulted in Ms. Oppe's arrest. CP 750. Michael Oppe's Declaration, submitted in support of the Petition, contained the very same complaints to Adult Protective Services and Sheriff's Department (which Paul Oppe thought were a "waste of time"). CP 554-573. The fact that the Oppe Brothers acknowledge that there were no issues with Ms. Oppe's caregiving and their subsequent filing of the VAPA Petition that included such acts are examples of their bad faith and a lack of honesty in their attempts to not only have Ms. Oppe removed as Agnes' caregiver, but from *all* interaction with Agnes.

Atwood's claim that the Oppe Brothers did act in good faith due to their "fear that Angela intended to move Agnes to the East Coast against her doctor's advice" is not supported by the record. Res. Br. at 31. Atwood has produced no evidence that this was in fact the case. It was Ms. Oppe's intention to have her mother move with her to the East Coast only when she was physically able to do so and after clearance from her treating physicians. CP 704; 267. After being informed by the hospital staff (without Ms. Oppe's consent) of the future move, the Oppe Brothers filed the Petition. This was after not filing any pleading in the years during the alleged abuse. The fact that the Oppe Brothers did not obtain a

Declaration from any of Agnes' physicians to support their Petition also shows that the Oppe Brothers acted in bad faith. CP 705.

In viewing all of the facts and reasonable inferences from the facts in favor of Ms. Oppe, it is reasonable to conclude that the Oppe Brothers filed the Petition for Protection of a Vulnerable Adult against Ms. Oppe in bad faith. They accordingly were not immune from liability as provided in RCW 74.34.050.

4. The Oppe Brothers' conduct was extreme and outrageous and the cases cited by Ms. Oppe in support of her argument are persuasive.

For the Oppe Brothers' conduct to be characterized as sufficiently extreme and outrageous for purposes of an intentional infliction of emotional distress cause of action, it must be "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." *Seaman v. Karr*, 114 Wn.App. 665, 684, 59 P.3d 701 (2002) (quoting, *Rice v. Janovich*, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987)). Generally, it is a question for the jury to determine whether or not conduct is sufficiently "extreme and outrageous." *Jackson v. Peoples Fed. Credit Union*, 25 Wn.App. 81, 84, 604 P.2d 1025 (1979). However, when presented with a Motion for Summary Judgment, the Court determines if reasonable minds could differ

whether the conduct was extreme and outrageous.⁴ *Strong v. Terrell*, 147 Wn.App. 376, 385, 195 P.2d 977 (2008).

In this case, reasonable minds could in fact conclude that the Oppe Brothers engaged in extreme and outrageous conduct in the days, weeks, months, and even years leading to Agnes' death. Contrary to Atwood's assertion, the several calls for health and welfare checks to Adult Protective Services and the Sheriff's Department, and the subsequent filing of the VAPA petition, were not isolated incidents. Their conduct established pattern of false and unsubstantiated complaints of abuse and neglect against Ms. Oppe, over the course of months and years.

The Oppe Brothers' complaints and filing of the VAPA petition were designed and manipulated to inflict mental and emotional abuse, and harassment upon their sister. The Oppe Brothers succeeded in causing their sister severe emotional damage.

In considering the factors enumerated in *Phillips, supra*, the Oppe Brothers occupied a position of dominance and controlling behavior over Ms. Oppe. Because they removed themselves from Agnes' daily routine

⁴ In making this determination, the Court considers the following factors: (1) the position the defendants occupied; (2) whether the plaintiff was peculiarly susceptible to emotional distress, and if the defendants knew this fact; (3) whether the defendants' conduct may have been privileged under the circumstances; (4) whether the degree of emotional distress the defendants caused was severe as opposed to merely annoying, inconvenient, or embarrassing to a degree normally occurring in a confrontation between these parties; and (5) whether the defendants were aware that there was a high probability that their conduct would cause severe emotional distress, and they consciously disregarded it. *Phillips v. Hardwick*, 29 Wn.App. 382, 388, 628 P.2d 506 (1981).

and medical care, as outside third parties they could readily make their complaints of abuse to the authorities, knowing that any such complaint would be taken seriously. CP 263-264. Combined with the fact that Michael Oppe and his family did not even consider Ms. Oppe a part of the family, the Oppe Brothers positioned themselves as a dominating force over Ms. Oppe and the caregiving she provided to their mother – a responsibility with which the brothers both did not want to be bothered. This position of dominance continued the pattern of mental and physical abuse Ms. Oppe suffered at the hands of the Oppe Brothers. CP 213; 262-263.

The Oppe Brothers also knew that their conduct would cause severe emotional distress. The alleged health and welfare checks to Adult Protective Services were all made when Agnes was *not* under the direct care of Ms. Oppe. CP 273; 275; 752-755. Therefore, it is reasonable to infer that the Oppe Brothers knew that such complaints about Ms. Oppe's caregiving would cause her severe emotional distress, simply because Agnes was not even home during the investigation into the complaints. CP 273; 275; 752-755. Michael Oppe, for example, admitted not informing the Sheriff's Department of his alleged concerns for Agnes' care. CP 743. It is thus reasonable to infer that Michael Oppe contacted the Sheriff's Department, not to check on his mother, but to harass and

abuse Ms. Oppe. He also testified that he did not “feel bad” when the final visit almost resulted in Ms. Oppe’s arrest. CP 750. These actions demonstrate the Oppe Brothers’ motive to cause Ms. Oppe severe emotional distress in making the complaints to Adult Protective Services and the Sheriff’s Department.

Similarly, in filing the VAPA petition, the Oppe Brothers continued to occupy their dominating position over Ms. Oppe. The Oppe Brothers knew that there was a high probability that the VAPA Petition, supporting documentation, and the resulting TRO would cause Ms. Oppe severe emotional distress. This is because the Oppe Brothers’ proceeded with their motive to continue their harassment, abuse, and bullying of Ms. Oppe. Paul Oppe’s admission that he was unaware of any risk of harm to Agnes by Ms. Oppe demonstrates his conscious disregard of what the VAPA petition and TRO would do to Ms. Oppe – intentionally cause her severe emotional distress by separating her from her mother during her final illness. CP 595-605, 732.

The filing of the VAPA petition, like the complaints to Adult Protective Services and the Sheriff’s Department, were all part of a specific pattern of abuse designed to cause Ms. Oppe severe emotional distress. Such conduct was extreme and outrageous.

Atwood's allegation that intentional infliction of emotional distress claims commonly require, "serious assault or felonies" is a conclusory statement unsupported by case law or statutory authority. Res. Br. at 37. In fact, Washington courts have upheld claims for intentional infliction of emotional distress in cases that did not involve an assault or felony. See, e.g., *Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 736, 565 P.2d 1173 (1977) (racial jokes and slurs at workplace); *Phillips, supra*, 29 Wn.App. at 384 (seller's refusal to relinquish possession of home to buyer); *Doe v. Corp. of the Pres. of Church of Jesus Christ of Latter-Day Saints*, 141 Wn.App. 407, 432, 167 P.3d 1193 (2007) (church bishop advising minor to not report sexual abuse as it would cause the break-up of the family). Atwood's insistence that Ms. Oppe's claim for intentional infliction of emotional distress would fail because it did not concern a "serious assault or felony" is an incorrect statement of the law.

Seaman v. Karr, 114 Wn.App. 665, 59 P.3d 701 (2002) and *Corey v. Pierce County*, 154 Wn.App. 752, 225 P.3d 367 (2010) are persuasive. The Oppe Brothers and the appellee police department in *Seaman, supra*, both occupied a position of domination and controlling behavior. Like the police officers in *Seaman*, the Oppe Brothers manipulated and controlled Ms. Oppe when they refused to help with Agnes' medical care and then made unfounded complaints of abuse and neglect. Also, because Michael

Oppe treated Ms. Oppe as a non-member of the Oppe family, Ms. Oppe was forced to defend herself without the help and support from her own siblings. Again, drawing all inferences in favor of Ms. Oppe, jurors could reasonably conclude that Ms. Oppe was susceptible to emotional distress based on: (a) Ms. Oppe's eight (8) years of caregiving; (b) the unsubstantiated complaints with APS and the Sheriff's Department; (c) the filing of the Petition for the Protection of a Vulnerable Adult; and (d) the issuance of the TRO preventing Ms. Oppe from having *any* substantive contact with Agnes, prior to Agnes' death. Like the holding in *Seaman*, the lower court should have submitted the Oppe Brothers' conduct to the jury to determine whether or not it was extreme and outrageous.

Similar to the evidence and conduct in *Corey, supra*, the Oppe Brothers publically accused Ms. Oppe through their pattern and continuous course of abuse, complaints, and public filing of the VAPA petition, of neglect and abuse. The Oppe Brothers, like the appellee in *Corey*, should have known that such accusations, made with the knowledge that they are untrue, would cause extreme emotional distress to Ms. Oppe. Again, this is apparent given the fact that the Oppe Brothers refused to have any part of Agnes' care, and Paul Oppe's admission that he did not believe Ms. Oppe was doing anything to cause Agnes' health to decline. CP 703-704.

Both *Seaman* and *Corey* are persuasive examples of defendants exercising positions of dominance to inflict intentional infliction of emotional distress. This position, liked the police officers in *Seaman* and the prosecutor's office in *Corey*, was utilized by the Oppe Brothers to effectuate their abuse upon Ms. Oppe, knowing that their actions would and did cause her severe emotional distress.

Finally, Atwood's assertion that Ms. Oppe did not suffer from actionable, severe emotional distress is disingenuous. Ms. Oppe's treating therapist, Maureen Leventhal, LICSW, stated that Ms. Oppe experienced "ongoing emotional abuse at the hands of her brothers" CP 229. Ms. Leventhal went on to state that Ms. Oppe suffers from anxiety and depression. CP 230. Ms. Oppe states that she not only suffers from anxiety and depression, but also has trouble speaking, suffered from shingles, pulls out her hair, suffers from weight loss, and suffers from stress to the point that her voice cracks. CP 263. She also has difficulty in "maintain[ing] a normal life routine" often "re-experience[ing] . . . the issues and events surrounding [Agnes' death]." CP 263. These objective symptoms are **not** "transient and trivial emotional distresses" which are "a part of the price of living among people." *Lawson v. Boeing Co.*, 58 Wn.App. 261, 270, 792 P.2d 545 (1990); *Restatement (Second) of Torts* § 46 cmt. j. Ms. Oppe's emotional distress goes well beyond what one is

expected to live with on a daily basis when dealing with and living amongst the population. Ms. Oppe's emotional distress is akin to the emotional distress experienced in *Corey, supra*. In *Corey*, the appellant suffered from severe depression, was at one point in time suicidal, and experienced an onset of epileptic seizures. *Corey, supra*, 154 Wn.App. at 759. Both Ms. Oppe and the appellant in *Corey* experienced severe, debilitating, emotional distress.

Ms. Oppe has presented evidence that the Oppe Brothers' conduct was extreme and outrageous for the purposes of intentional infliction of emotional distress. In viewing all of the facts and reasonable inferences from the facts in favor of Ms. Oppe, the Oppe Brothers' conduct was extreme and outrageous. Therefore, Ms. Oppe would have proven that she would have been successful in her claim for intentional infliction of emotional distress against the Oppe Brothers, and ultimately her claim for legal malpractice against Atwood.

B. Atwood's request for attorney fees and costs is baseless.

"Attorney fees are generally not awarded in a civil action unless authorized by statute, by agreement of the parties, or upon a recognized equitable ground." *Woodcraft Const., Inc. v. Hamilton*, 56 Wn.App. 885, 887, 786 P.2d 307 (1990). RCW 4.84.185 provides in pertinent part that an award of attorney's fees is warranted only if "upon written findings by

the judge that the action, . . . was frivolous and advanced without reasonable cause” The Court is guided by several factors to determine if an appeal is frivolous:

- (1) a civil appellant has a right to appeal under RAP 2.2;
- (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant;
- (3) the record should be considered as a whole;
- (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous;
- [and] (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.”

Streater v. White, 26 Wn.App. 430, 435, 613 P.2d 187 (1980) (citing, Jordan, *Imposition of Terms and Compensatory Damages in Frivolous Appeals*, Wash. State Bar News, May 1980, at 46).

Ms. Oppe’s appeal is far from frivolous. First, she established that Atwood was negligent. RP 23, 40. Second, Ms. Oppe’s appeal raises debatable issues as to whether or not the Oppe Brothers’ conduct was extreme and outrageous. In support of her argument that the conduct was extreme and outrageous, Ms. Oppe referred the court in her opening Brief to both supporting and distinguishing case law. Third, the record and Ms. Oppe’s current Reply Brief, present detailed arguments and facts why the Oppe Brothers were not immune from liability under RCW 4.24.510 or under RCW 74.34.050. CP 258-259; 717-720. Moreover, the issues related to proximate cause require the determination of whether Ms. Oppe

submitted sufficient evidence from which a jury could reasonably have reached a conclusion in her favor that the Oppe Brothers' conduct was extreme and outrageous. *Compare, Matheson v. Gregoire*, 139 Wn.App. 624, 639, 161 P.3d 486 (2007) (where the Court held that appeal was not frivolous as appellant raised debatable issues upon which reasonable minds could differ on the dismissal of claim regarding allegations that agreement between State and Native American Tribe for cigarette sales taxes was illegal); *Chapman v. Perera*, 41 Wn.App. 444, 456, 704 P.2d 1224 (1985) (where the Court affirmed the award of attorney fees, where the appellant grandparents filed a frivolous appeal of the trial court's custody award of their grandson to the parents in a divorce matter, absent findings of parental unfitness or that award was not in the child's best interest).

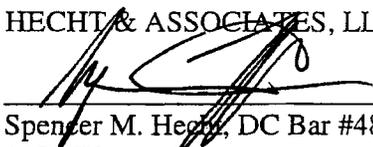
In consideration of the five (5) enumerated factors from *Streater, supra*, holding all doubts in favor of Ms. Oppe, and the corresponding record as a whole, Ms. Oppe's appeal is not frivolous. Ms. Oppe presented debatable issues upon which reasonable minds might differ, which are not totally devoid of merit, and where there would be no possibility of reversal. Accordingly, Atwood's request for attorney fees is meritless and should be denied.

CONCLUSION

For the foregoing reasons, Appellant Angela Oppe respectfully requests that this Court reverse the Order Granting the Defendants' Motion for Summary Judgment Dismissal of Plaintiff's Complaint, dated June 24, 2011, and remand this case back to the trial court for trial.

RESPECTFULLY SUBMITTED, this ~~18th~~ day of January 2012.

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CONCLUSION

For the foregoing reasons, Appellant Angela Oppe respectfully requests that this Court reverse the Order Granting the Defendants' Motion for Summary Judgment Dismissal of Plaintiff's Complaint, dated June 24, 2011, and remand this case back to the trial court for trial.

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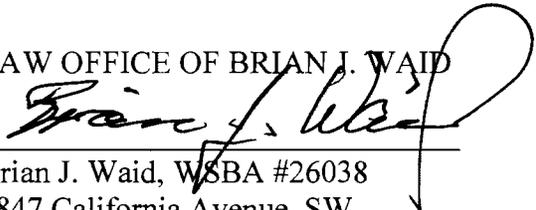
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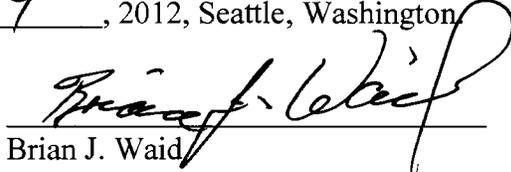
DECLARATION OF SERVICE

I, Brian Waid, declare that on January ~~18~~¹⁹, 2012, I caused to be served the Appellant's Reply Brief upon the following individuals via courier delivery:

Sam Franklin, Esquire
Erin Varriano, Esquire
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct

DATED: January 19, 2012, Seattle, Washington



Brian J. Waid