

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.

BRIEF OF APPELLANT

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INTRODUCTION

Appellant, Angela Oppe (hereinafter “Ms. Oppe”) seeks reversal of the trial court’s June 24, 2011 Order granting Summary Judgment in favor of Appellees and dismissing her Complaint. CP 813-814.

Ms. Oppe’s Complaint against her former attorney Sarah Atwood (hereinafter “Atwood”) ¹ alleges legal malpractice, based on Atwood’s failure to file an intentional infliction of emotional distress/outrage² claim against Ms. Oppe’s brothers, Michael Oppe and Paul Oppe (hereinafter collectively “Oppe Brothers”) prior to the expiration of the statute of limitations, in accordance with the terms of their Professional Services Agreement.³ CP 1-9. Ms. Oppe’s claim arose from years of mental and emotional abuse perpetrated against her by the Oppe Brothers regarding her care of their elderly mother, Agnes Oppe (hereinafter “Agnes”). CP 1-9.

In its ruling, the lower court held that Atwood was negligent for the purposes of legal malpractice in that she breached the applicable

¹ In addition to Atwood and the Law Office of Sarah L. Atwood, PLLC, Ms. Oppe sued Atwood’s husband, Ed Atwood and the marital property comprised thereof. CP 1-9.

² “Outrage” and “intentional infliction of emotional distress” are synonyms for the same tort. *Kloepfel v. Bokor*, 149 Wn.2d 192, 194, n. 1, 66 P.3d 630 (2003).

³ Ms. Oppe’s counsel conceded during the oral arguments on December 17, 2010, that her claims for abuse of process and malicious prosecution against the Oppe Brothers (as was alleged in her Complaint) were “de-emphasized.” RP 25. Accordingly, Ms. Oppe argued that her sole claim against the Oppe Brothers was for intentional infliction of emotional distress/outrage. RP 25.

standard of care⁴ in failing to file a counterclaim or complaint against the Oppe Brothers as detailed in the parties' Professional Services Agreement. RP 23, 40. However, the lower court went on to hold that the Oppe Brothers' conduct against Ms. Oppe did not rise to extreme and outrageous, and thus, Ms. Oppe could not satisfy the proximate cause element of her legal malpractice claim against Atwood, and dismissed Ms. Oppe's complaint. RP 39, 41-43. Although Appellee raised arguments for dismissal of Appellant's complaint pursuant to Washington's anti-SLAPP statute,⁵ the litigation privilege under the applicable vulnerable adult statute,⁶ and that the outrage claim could not be maintained as a

⁴ John Strait, Appellant's expert witness, stated the following as the standard of care for attorneys:

Washington lawyers owe a general duty of care to define the scope of their representation if they intend it to be limited and to obtain consent from a client as to the limited scope of representation. Washington lawyers as a general matter also owe due diligence obligations to adequately and promptly represent the scope of representation they have undertaken. Washington lawyers also owe a duty to make factual investigation necessary to the scope of investigation they have undertaken and advise their client with regard to that scope of representation and how best to accomplish the goal of that scope of representation. Washington lawyers are obligated to maintain adequate communication and to keep their client sufficiently informed so that the client can make reasonable decisions about the goals of representation. CP 144.

⁵ RCW 4.24.510 states in part:

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 of concern to that agency or organization.

⁶ RCW 74.34.050 (1) states in part:

A person participating in good faith in making a report under this chapter or testifying about alleged abuse, neglect, abandonment, financial exploitation, or

separate, stand-alone tort, the lower court did not issue its ruling based on these specific issues. CP 538-546; RP 42.

Ms. Oppe asks the Court to reverse the June 24, 2011 Summary Judgment Order and remand the cause of action to the trial court for further proceedings.

ASSIGNMENT OF ERROR

The trial court erred when it granted Summary Judgment dismissing Plaintiff's Complaint.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Do genuine issues of material fact remain concerning whether the Oppe Brothers' conduct rose to the level of being extreme and outrageous sufficient to support a claim for intentional infliction of emotional distress/outrage?

The Appellate Court's review of the trial court's ruling on a motion for summary judgment is *de novo*. *Snyder v. Med. Serv. Corp. of Eastern Wash.*, 98 Wn.App. 315, 320-321, 988 P.2d 1023 (1999); *Keates v. City of Vancouver*, 73 Wn.App. 257, 263, 869 P.2d 88 (1994).

However, the Court reviews and considers the evidence in a light most favorable to the non-moving party, drawing all reasonable inferences in

self-neglect of a vulnerable adult in a judicial or administrative proceeding under this chapter is immune from liability from the report or testimony. . . .

favor of Ms. Oppe. *Morinaga v. Vue*, 85 Wn.App. 822, 828, 935 P.2d 637 (1997).

STATEMENT OF THE CASE

I. Procedural History

On or about April 13, 2010, Appellant, Angela Oppe, filed this legal malpractice action against her former attorney, Appellee, Sarah Atwood. CP 1-9. Following a hearing, the Honorable Carol Schapira granted Defendant's/Appellee's Amended Motion for Summary Judgment and dismissed Ms. Oppe's Complaint on June 24, 2011. CP 813-814. On or about July 5, 2011, Ms. Oppe timely filed her Appeal with the Court of Appeals. CP 815-818.

II. Facts

A. The Oppe Brothers' Relationship with Ms. Oppe and Agnes Oppe

Ms. Oppe's relationship with her older brothers has been estranged and abusive. CP 262, 765-768. Michael Oppe (hereinafter, "Michael") was often verbally abusive with Ms. Oppe and would threaten her with statements that "he would do 'things' to her and get away with it," and that she (Ms. Oppe) would do all of the 'work' in caring for Agnes and "not get anything for it." CP 204, 262. Throughout their adulthood, Michael and his family "shunned" Ms. Oppe, refusing to have any contact

with her, and treated her like she was not a member of the family and didn't exist. CP 205, 262. Michael was also condescending and insulting towards Ms. Oppe and had been physically abusive towards her. CP 213, 262-263. Like Michael, Paul Oppe (hereinafter, "Paul") was similarly condescending and insulting, and had been physical abusive towards Ms. Oppe. CP 213, 262-263. Ms. Oppe has not spoken with Michael since 2004 and Paul since 2005. CP 262.

Prior to Agnes' decline in health, and while Ms. Oppe was serving in the Navy, the Oppe Brothers made little to no contribution of their time or finances to help their widowed mother. CP 263, 271. The Oppe Brothers sporadically visited Agnes at her home. CP 263, 271. After Agnes' health declined, the Oppe Brothers did not contribute any care for their mother. CP 263. As a result, Ms. Oppe, after retiring from the Navy, returned home to become Agnes' full-time caregiver. CP 263-264. Her duties and responsibilities included, but were not limited to, cooking, cleaning, and monitoring prescriptions, transportation to doctor's appointments, and assisting Agnes with transfer and mobility. CP 263-264. Ms. Oppe was Agnes' caregiver from 1996 until Agnes' death in April 2004. CP 2, 263-264. Throughout the eight (8) years that Ms. Oppe acted as Agnes' caregiver, Agnes was mentally competent and made all of her own medical decisions. CP 272-273, 275-276, 281-282. Agnes often

did not want the Oppe Brothers to be aware of the status of her health, or the nature of her medical treatment. CP 272-273, 277-278, 280-281, 283-284, 286-287.

In May 2000, Agnes appointed Ms. Oppe to act as her general power of attorney. CP 263-264, 289-291, 293-294. The Oppe Brothers both declined this responsibility and did not object to Ms. Oppe's appointment until filing the Petition for Protection of a Vulnerable Adult in April 2004, only a few weeks prior to Agnes' death. CP 263-264, 595-605, 728, 740-741. In fact, it was Paul's opinion that Ms. Oppe was capable to act as a power of attorney, because he "didn't want the responsibility," and he "didn't want to be involved." CP 728. Paul also testified that he felt that Ms. Oppe was "capable" of acting as a power of attorney and that this belief never changed. CP 728. Paul made it clear that he was not interested in Agnes' medical condition, so that he could "stay out of those things." CP 728, 733. Finally, Paul believed that Ms. Oppe was not doing anything to cause Agnes' health to deteriorate. CP 732.

The Oppe Brothers only sporadically visited and contacted Agnes while she was under Ms. Oppe's care until Agnes' death in 2004. CP 263.

B. The Oppe Brothers' Complaints to Adult Protective Services and the King County Sheriff's Department.

Throughout the time Ms. Oppe served as Agnes' caregiver, the Oppe Brothers made several baseless and malicious allegations of neglect and mental abuse to local agencies. CP 3, 264, 701. Specifically, Michael contacted the local Adult Protective Services (hereinafter "APS") in Seattle on two (2) separate occasions for health and welfare checks on Agnes. CP 3, 264, 273, 275, 701-702, 753-754. Michael's complaints were made specifically when Agnes was not under the direct care of Ms. Oppe, but after she had been admitted to a nursing home. CP 273, 275, 752-755. The first APS check occurred in May 2000 while Agnes was being admitted to The Kenney Nursing Home (hereinafter "The Kenney"). CP 753-754. The APS caseworker interrupted the check-in process at The Kenney and met with Agnes in her room. CP 754. After speaking with Agnes for approximately 15-20 minutes, the caseworker left without finding any basis to support a neglect or abuse allegation. CP 754. The case worker did not speak with Ms. Oppe. CP 754.

Despite his alleged concerns, Michael did nothing to have Ms. Oppe removed as Agnes' power of attorney. CP 556-558. A few days before the second health and welfare check, Michael called and spoke with Agnes at The Kenney. CP 558. By this time, Agnes had been under the

continuous care of The Kenney for seventeen (17) months. CP 274, 754. Towards the end of her stay at The Kenney, Agnes' physicians allowed her to travel back to her home for the day, to determine if she was physically ready and able to move back home on a permanent basis. CP 274-275, 754. Despite Agnes' progress, Michael contacted APS and requested another health and welfare check at Agnes' home. CP 558. On November 2, 2001, APS arrived at Agnes' home and met with Ms. Oppe. CP 275, 754. Ms. Oppe informed the caseworker that Agnes was not at home, but was at The Kenney nursing home. CP 275. The caseworker did not ask to come into the home and left. CP 275. No basis of abuse or neglect was found. CP 275, 755. Agnes was not discharged from The Kenney until December 2001. CP 275, 755. This second visit by APS was also unfounded and APS did not issue a report. CP 272-273, 275, 753-754. Paul thought that the complaints made to APS were a "waste of time." CP 729.

In addition to the complaints made to APS, Michael also made a total of three (3) complaints to the King County Sheriff's Department (hereinafter "Sheriff's Department) for health and welfare checks. CP 3, 264, 282-283, 756. All of these complaints were made over the course of a short two (2) month time frame (May-July 2003). CP 282-283.

Regarding the disclosure of her health and medical treatment to the Oppe

Brothers, Agnes, not Ms. Oppe, was the decision maker. CP 272-273, 275-276, 281-282. Both Oppe Brothers rarely visited Agnes or called her by phone. CP 271, 273, 276, 279, 281, 283, 284, 286, 756, 760.

In the spring of 2003, Michael contacted the Sheriff's Department and made the first complaint against Ms. Oppe regarding her caregiving of Agnes. CP 755. Ms. Oppe and her mother were not at home when the Sheriff's Department arrived to investigate; but, Ms. Oppe was later informed of this fact by a neighbor. CP 206.

On or about May 7, 2003, the Sheriff's Department arrived at Agnes' home for the second health and welfare check. CP 282. After observing that Agnes was in the restroom, the Sheriff's Department left without incident. CP 282. A report was not prepared. CP 282. Later that month, Agnes was admitted to Arden Rehabilitation. CP 755. Ms. Oppe informed family members of Agnes' status, including her Aunt Marie Clark-Bassett. CP 755. On or about June 11, 2003, Ms. Clark-Bassett wrote Paul a detailed letter informing him of Agnes' status and the fact that she was in a rehabilitation center. CP 760-761. In fact, Paul was admonished by "Aunt Marie" when she told him, "Are you too busy with [your] self to give her [Agnes] a visit at least once a month? . . . I was surprised too that your sister, Ms. Oppe, has the whole burden of caring for your mother." CP 760. Towards the end of June 2003, Paul contacted

Ms. Oppe directly and she told him that Agnes was at Arden Rehabilitation. CP 763.

On or about July 1, 2003, at approximately 8:00 a.m., the Sheriff's Department arrived at Agnes' home for the third and final health and welfare check. CP 283, 756. Ms. Oppe met the officers at the front door. CP 283. Seeing that the officers had handcuffs and because she was detained on the front porch during the search of the home, Ms. Oppe was scared and intimidated. CP 206, 283. The officers also threatened her that she could be incarcerated. CP 283. After the officers conducted a thorough search of the home for Agnes and were informed that Agnes had been admitted to Arden Rehabilitation, they left the home without further incident. CP 283. No findings of abuse or neglect were concluded by the Sheriff's Department for any of the three visits. CP 282-283.

Less than a week after the third health and welfare check by the Sheriff's Department, Paul wrote Agnes a letter stating that he first learned the she was in a rehabilitation center after he received a letter from his aunt in late June 2003. CP 763-764. Paul went on to admit to Agnes that Michael called the Sheriff's Department allegedly to "locate" Agnes. CP 763. In fact, Paul did not perceive any reason to contact the Sheriff's Department regarding Agnes. CP 741. Michael admitted that he probably did not inform the Sheriff's Department about any concerns he may have

had regarding Ms. Oppe's care of Agnes. CP 743. Michael also admitted to not feeling remorse after learning that the third Sheriff's Department visit almost led to Ms. Oppe's arrest. CP 750.

C. The filing of the Petition for Protection of Vulnerable Adult against Ms. Oppe.

In December 2003, Agnes suffered a fall in her home, which caused her to break her pelvis. CP 265. She was treated at Swedish Hospital and then Providence Mount St. Vincent Hospital (hereinafter, "PMSV") for rehabilitation. CP 265. The total rehabilitation and in-patient treatment lasted for four (4) months. CP 265. As Agnes' caregiver and power of attorney, Ms. Oppe forwarded all information regarding their mother to the Oppe Brothers through PMSV staff. CP 265. During the time that Agnes was in and out of medical facilities, the Oppe Brothers contributed nothing to Agnes' care and had minimal contact with her. CP 286. Ms. Oppe also informed PMSV staff of the Oppe Brothers' history of harassing and menacing conduct towards Ms. Oppe and Agnes. CP 298.

A short time after Agnes' admission to PMSV, Ms. Oppe made inquiries with Agnes' physicians to move Agnes to the East Coast. about moving her mother to the East Coast. CP 267, 302. It was Ms. Oppe's intention to only move Agnes when she was physically able to do so. CP

267, 271, 302. Ms. Oppe asked one of Agnes' physicians for information about nursing homes in the Washington, DC area. CP 302. Ms. Oppe never received any notification from Agnes' physicians that the move was contrary to her mother's best interest. CP 267. Ms. Oppe also informed PMSV staff of her intentions, but instructed them not to inform the Oppe Brothers until plans were finalized. CP 267, 286. In direct disobedience of Agnes' power of attorney's instructions, PMSV staff contacted and informed Michael of Ms. Oppe's and Agnes' intentions to move to the East Coast. CP 286. On April 14, 2004, the Oppe Brothers filed the Petition for Protection of Vulnerable Adult (hereinafter, "Petition") against Ms. Oppe. CP 595-605. Despite being a co-petitioner to the Petition (which alleged among other things that Ms. Oppe was not a fit and proper person to care for Agnes, and that she engaged in mental abuse, exploitation, and neglect), Paul stated that he was not aware of any risk of harm towards Agnes by Ms. Oppe. CP 732. He also testified that Agnes never complained about the care she was receiving from Ms. Oppe. CP 733. Specifically, the Oppe Brothers were seeking:

an order protecting my mother from my sister Ms. Oppe. Entry of such an order will prevent the removal of my mother from the State of Washington and will permit her to receive the care and attention which she so desperately needs.

CP 573.

In support of the Petition, the Oppe Brothers attached Michael's Declaration. CP 554-573. The Declaration did not contain any documentation in support of the eighty (80) paragraphs of baseless allegations. CP 554-573. Moreover, the Petition did not attach any Declarations from Paul, Agnes' medical providers, or other alleged witnesses. CP 554-573, 595-605. At the time of filing, Ms. Oppe did not have any finalized plans to relocate with her mother to the East coast. CP 267.

Michael's Declaration was baseless, false, and misleading. CP 271-287, 554-573. For example, Michael insinuated several times that Ms. Oppe caused a "blocker" to be installed on Agnes' phone with the purpose of preventing the Oppe Brothers from contacting their mother, despite the fact that he had a rotary phone. CP 559, 560, 562, 564, 565, 566. However, a "blocker" was never on Agnes' phone and other individuals, namely Agnes' sister, were able to get through to the residence without any issues. CP 276, 278. In fact, Ms. Oppe never answered a telephone call from Michael that was directed through the operator and there were no interferences with the phone line. CP 278, 279. Also, if Michael called, he often did not leave a message for Agnes to call him back. CP 278, 282, 284. Michael also alleged that Ms. Oppe

refused to bring Agnes any clean clothes from home during her rehabilitation period at PMSV in 2004. CP 570-571. However, due to Agnes becoming incontinent during her rehabilitation, she did not wish to use her personal clothing and instead used clothing supplied by PMSV. CP 285. Further, because warm temperatures were maintained in Agnes' room, Agnes did not need sweat pants and other warm clothing. CP 285. Michael also alleged that Agnes often sounded "weak and frail" when she would speak with her on the phone. CP 555, 559, 560, 562, 563. However, many of these telephone conversations with Michael occurred in the evening when Agnes was tired, or if she was suffering from a cold or flu. CP 271-272, 276. Agnes retained her mental capabilities until her death. CP 273, 275, 277, 278, 281.

On or about April 15, 2004, an *ex parte* Temporary Restraining Order (hereinafter, "TRO") was issued against Ms. Oppe. CP 607-610. The TRO prevented Ms. Oppe from having any contact with her mother other than by telephone. CP 608-609. After she was served with the Petition the following day, Ms. Oppe contacted her counsel, Irving Sonkin, but was unable to reach him. CP 267-268, 612. In fact, it was not until April 19, 2004, that Mr. Sonkin returned Ms. Oppe's numerous phone calls. CP 268. Ms. Oppe was advised that she could leave for her

pre-planned trip to the East Coast on April 18, 2004 and return for the scheduled hearing. CP 268.

On April 22, 2004, Agnes suffered a stroke which led to her admission to Swedish Hospital. CP 268. Soon thereafter, Agnes recovered and was released to PMSV for rehabilitation. CP 268. However, Agnes's health again declined and she was readmitted to the hospital on April 28, 2004. CP 268. After receiving the news of Agnes' decline, Ms. Oppe flew back to Seattle, arriving in the early afternoon of April 29, 2004. CP 268. During the scheduled Show Cause hearing on April 29, 2004, the TRO was reissued and extended (upon Ms. Oppe's counsel's request) to May 14, 2004, but permitted Ms. Oppe to visit with her mother at any hospital, nursing home, or other health care facility. CP 617-620. Ms. Oppe was not notified of the reissued TRO and was prevented from seeing Agnes prior to Agnes' death later that day. CP 268-269.

D. Representation by Sarah Atwood

A year after Agnes' death, the Oppe Brothers filed a Partition of Real Property by Sale (hereinafter "Partition") against Ms. Oppe, in connection with the Oppe family home, in the Superior Court for King County. CP 269, 622-634. The three siblings owned the home as tenants in common following the death of their mother. CP 622-623. At the time

Ms. Oppe was represented by Michael Longyear. CP 269. Ms. Oppe instructed Mr. Longyear to file the Partition action with her as the moving party and to move forward with the case, as the Oppe Brothers were delaying the sale of the home. CP 270, 707. Contrary to Ms. Oppe's explicit instructions and without her consent, Mr. Longyear agreed with the Oppe Brothers' counsel to allow the Oppe Brothers file the Partition action as the moving party. CP 270, 707. Unhappy with Mr. Longyear's representation, in August 2005, Ms. Oppe contacted Atwood for representation in the Partition matter, as well as addressing the Oppe Brothers' abuse and harassment. CP 270. Ms. Oppe informed Atwood that addressing the abuse and harassment was central because it was adversely affecting her emotional wellbeing as well as employment opportunities. CP 707. Ms. Oppe asked Atwood to obtain copies of Michael's complaints to both APS and the Sheriff's Department. CP 186. Despite this request, Atwood made no effort to retrieve these documents. CP 222.

On September 15, 2005, Ms. Oppe and Atwood entered into two (2) Professional Services Agreements (hereinafter "Agreement I" and "Agreement II"). CP 5-6, 189-191, 193-195. Agreement I provided that Atwood would defend Ms. Oppe in the Partition case against the Oppe Brothers while Agreement II provided that Atwood would "(1) Bring a

counterclaim against your brothers . . . , 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” CP 189-191, 193-195.

Throughout the representation, Ms. Oppe followed up with Atwood about her claims against the Oppe Brothers. CP 197-199, 213, 270. At the conclusion of the Partition case, Atwood told Ms. Oppe that she would seek a restraining order against the Oppe Brothers to prevent the abuse and harassment. CP 209, 709. Ms. Oppe believed that, after the conclusion of the Partition case, Atwood would then handle the claims against the Oppe Brothers pursuant to the terms of Agreement II. CP 213. The Oppe family’s aunt, Sr. Annette Marie also informed Atwood of the Oppe Brothers’ “persistent harassment” inflicted upon Oppe. CP 766-768. Atwood never filed a counterclaim or a new cause of action against the Oppe Brothers. RP 40.

ARGUMENT

A. The Court reviews the lower court’s summary judgment order *de novo* and draws all reasonable inferences in favor of Ms. Oppe.

The Court reviews the record *de novo*. *Keates v. City of Vancouver*, 73 Wn.App. 257, 263, 869 P.2d 88 (1994); *Snyder v. Med. Serv. Corp. of Eastern Wash.*, 98 Wn.App. 315, 320-321, 988 P.2d 1023

(1999). The Court, thus, reviews the record to determine if a genuine issue of material fact exists, and considers the evidence and the reasonable inferences from the evidence in the light most favorable to the non-moving party. *Snyder, supra*, 98 Wn.App. at 321. The lower court's order granting the Motion for Summary Judgment will only be upheld if "the pleadings, affidavits, depositions and admissions on file demonstrate that there is no genuine issue as to any material fact and the party bringing the motion is entitled to a judgment as a matter of law." *Keates, supra*, 73 Wn.App. at 263. A "material fact" is one on which all or part of the outcome of the case depends. *Hill v. Cox*, 110 Wn.App. 394, 402, 41 P.3d 495 (2002).

B. Ms. Oppe established genuine issues of material fact concerning whether the Oppe Brothers' conduct constituted intentional infliction of emotional distress.

The tort of intentional infliction of emotional distress or outrage requires a plaintiff to prove: (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result of severe emotional distress. *Seaman v. Karr*, 114 Wn.App. 665, 684, 59 P.3d 701 (2002). For conduct to be found "extreme and outrageous," it must be '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 in a civilized community.’” *Id.*, 114 Wn.App. at 684, quoting, *Rice v. Janovich*, 109 Wn. 2d 48, 61, 742 P.2d 1230 (1987).

Whether certain conduct is deemed sufficiently “outrageous” ordinarily presents a question for the jury. *Jackson v. Peoples Fed. Credit Union*, 25 Wn.App. 81, 84, 604 P.2d 1025 (1979). Accordingly, the Court must determine whether reasonable minds could differ on whether the conduct was sufficiently extreme and outrageous to result in liability. *Phillips v. Hardwick*, 29 Wn.App. 382, 387-388, 628 P.2d 506 (1981). In making this determination, the Court considers: (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. *Id.*, *supra*, 29 Wn.App. at 388, citing, *Jackson*, *supra*, 25 Wn.App. at 86-87.

In this case the record reveals that reasonable minds could conclude that the Oppe Brothers engaged in extreme and outrageous

conduct that resulted in the intentional infliction of emotional distress of their sister.

1. The Oppe Brothers' pattern of false and unsubstantiated reports of abuse to APS and the King County Sheriff's Department constituted extreme and outrageous conduct.

Michael Oppe's complaints for health and welfare checks to APS and the Sheriff's Department were not isolated incidents designed simply to annoy, insult, or embarrass Ms. Oppe for the caregiving she was providing Agnes. Michael's conduct was specifically planned, calculated, and manipulated to continue his, and through his complicity, Paul Oppe's, mental and emotional abuse and harassment of their sister. Considering and applying the factors from *Phillips, supra*, a jury could have reasonably concluded that the Oppe Brothers' complaints to APS and the Sheriff's Department constituted extreme and outrageous conduct.

Throughout the Oppe siblings' adulthood, the Oppe Brothers occupied a dominating and controlling position over Ms. Oppe. The Oppe Brothers did not participate in Agnes' medical care, nor did they wish to do so. CP 263-264. Thus, the Oppe Brothers could readily complain of abuse and neglect against Ms. Oppe, as outside third parties of Agnes' daily routine and medical treatment, knowing that all such complaints are taken seriously and investigated by both APS and the Sheriff's Department. Moreover, Michael's relationship with Ms. Oppe was such

that he and his family did not even consider Ms. Oppe as a member of the family, and “shunned” her. CP 205, 262. These facts, in conjunction with the Oppe Brothers’ past mental and physical abuse against Ms. Oppe, put the Oppe Brothers in a dominating and controlling position over Ms. Oppe.

Furthermore, Michael Oppe knew that there was a high probability that his conduct would cause Ms. Oppe severe emotional distress, and he consciously disregarded it. Both of the complaints to APS were made when Agnes was under the care of The Kenney, not Ms. Oppe. CP 273, 275, 752-755. Thus, jurors could reasonably conclude that Michael’s complaints were designed to hurt Ms. Oppe mentally and emotionally, given that Agnes was not even under Ms. Oppe’s care during that time-frame. It is also reasonable to infer that after Michael found out that Agnes was allowed day trips back to her home, he initiated the second complaint to APS to continue his harassment and abuse of Ms. Oppe, knowing full well that Agnes was under the care and custody of The Kenney. Michael also admitted in his deposition that he did not inform the Sheriff’s Department of his alleged concerns about Agnes prior to their health and welfare checks. CP 743. Moreover, Michael admitted that he didn’t “feel bad” when the third visit by the Sheriff’s Department almost resulted in Ms. Oppe’s arrest. CP 750. It is clear that Michael knew that

the complaints to APS and the Sheriff's Department would cause Ms. Oppe severe emotional distress – and he consciously disregarded that fact.

Finally, there is no dispute that Ms. Oppe's emotional distress in response to Michael's conduct (along with the filing of the Petition for Protection of Vulnerable Adult) was severe to a degree which would not normally occur between siblings over the care of their mother. Ms. Oppe was Agnes' primary caregiver for a total of eight (8) years. CP 263-264. This entailed, among other things, taking Agnes to her doctor appointments, monitoring her medications, and caring for her daily needs. CP 263-264. Agnes was the center of Ms. Oppe's life. Accusations of abuse and neglect by one's siblings, when those siblings had little to no contact or interest in the care of their mother, goes beyond insults, annoyances, and disagreements. Ms. Oppe suffered and continues to suffer from an adjustment disorder and other emotional problems, all as a direct result from the Oppe Brothers' conduct. CP 229, 262-263.

The complaints to APS and the Sheriff's Department are beyond an annoyance or an insult – they are extreme and outrageous. Michael's unfounded allegations of abuse and neglect to APS and the Sheriff's Department were designed to fuel the Oppe siblings' tense and unstable relationship with his continued harassing behavior against Ms. Oppe. Michael chose to absent himself from his mother's life and refused to help

with her care. Instead, he contacted third parties with false and hurtful allegations of abuse and neglect against his own sister. Michael's complaints were extreme and outrageous as they were calculated and designed to harass Ms. Oppe for her caregiving.

2. The Oppe Brothers' malicious filing of a Petition for Protection of a Vulnerable Adult constituted extreme and outrageous conduct.

Similar to the complaints to APS and the Sheriff's Department, the filing of the Petition for Protection of a Vulnerable Adult against Ms. Oppe was filed for the specific purpose of perpetuating the Oppe Brothers' abusive and harassing conduct against their sister. Applying the factors identified in *Phillips, supra*, and drawing all reasonable inferences in Ms. Oppe's favor, the events and circumstances surrounding the Oppe Brothers' Petition, and its outcome in preventing Ms. Oppe from seeing Agnes prior to her death, provide ample basis from which a jury could reasonably conclude that the Oppe Brothers engaged in extreme and outrageous conduct.

In filing the Petition as co-petitioners, the Oppe Brothers continued to occupy their dominant position over Ms. Oppe. Due to Michael's and his family's treatment of Ms. Oppe as a non-member of the Oppe family, Ms. Oppe was ostracized from her own family and became an outsider. CP 205, 262. Because the Oppe Brothers were not involved in Agnes'

medical care or her health, they were able to effectively intrude into Agnes' care and make unfounded accusations of improper caregiving, while Ms. Oppe continued to care for her mother on her own. Given this family dynamic, the Oppe Brothers were able to bully and dominate Ms. Oppe over areas and issues about which they had no desire to engage, i.e., the care of their mother.

By the time the Oppe Brothers filed the Petition in April 2004, they knew Ms. Oppe would be susceptible to emotional distress. Michael's unfounded complaints of neglect to APS and the Sheriff's Department succeeded in adversely affecting Ms. Oppe for several years. Both visits by APS were conducted when Agnes was under the care of The Kenney and not under Ms. Oppe's direct care. CP 273, 275, 752-755. Furthermore, the third visit by the Sheriff's Department almost led to her arrest. CP 283. Despite their alleged concerns, the Oppe Brothers did nothing from July 2003 through April 2004 to remove Ms. Oppe as Agnes' attorney-in-fact and caregiver. CP 264-265, 748. It was only after finding out about Ms. Oppe's tentative plan to relocate with her mother to the East Coast, when Agnes was physically able to do so, that the Oppe Brothers filed the Petition. CP 286, 595-605. 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.

Ms. Oppe experienced emotional distress, not mere inconvenience or embarrassment due to the Oppe Brothers' Petition and its result. Ms. Oppe has been in therapy and suffers from anxiety, depression, difficulty in maintaining a normal life routine, disturbed sleep, fear of further bullying from her brothers, and isolation. CP 263. These emotional injuries are a direct result from the Oppe Brothers' treatment of Ms. Oppe. CP 230. In filing the Petition, the Oppe Brothers prevented Ms. Oppe from being with her mother, of whom she had been caring for eight (8) years and had grown close with, at the time of her death. After years of continued harassment and abuse, the Oppe Brothers moved forward with their plan and jointly filed the Petition.

Finally, the Oppe Brothers knew that there was a high probability that their joint filing as co-petitioners of the Petition, the accompanying Declaration in support, and the resulting TRO would cause, and did cause, Ms. Oppe severe emotional distress. Although Paul testified that he was unaware of any risk of harm to Agnes by Ms. Oppe, he still agreed to act

as a co-petitioner and claim that Ms. Oppe, among other things, was not a fit and proper person to care for Agnes. CP 595-605, 732. This admission demonstrates that Paul consciously disregarded the lack of factual support in the Petition, but still went forward with the claims. Further, the TRO's effect of cutting off all physical contact with Agnes after Ms. Oppe had been a part of Agnes' daily routine was not a minor inconvenience – it was foreseeable that it would cause Ms. Oppe severe emotional distress.

The filing of the Petition and its effect of preventing Ms. Oppe from being at her mother's side at the time of her death is extreme and outrageous. The Oppe Brothers specifically filed the Petition to remove Ms. Oppe at a time when Ms. Oppe would most likely suffer from emotional distress – at the end of Agnes' life. After years of filing unsubstantiated complaints against Ms. Oppe for her caregiving, the Oppe Brothers' filed and requested that Ms. Oppe be removed from Agnes' care and her life during the most emotional point of Ms. Oppe's and Agnes' relationship. This was extreme and outrageous conduct.

C. The lower court erred when it concluded, as a matter of law that the Oppe Brothers had not engaged in extreme and outrageous conduct.

In granting the Appellee's Motion for Summary Judgment, the trial court ruled (RP 41):

The Court is granting the motion because I do agree with defendants that the claim of intentional infliction of emotional distress does require extreme and outrageous conduct. And that is not something that can arise from reporting once or twice to an authority or once or twice from a sheriff's office. That may have felt continuous to Ms. Oppe, but that's far from continuous. Again, the cases that we have involve serious assaults, felonies and that cannot be compared to what Ms. Oppe felt or experienced.

However, the continuing course of conduct perpetrated against Ms. Oppe in this case is analogous to cases in which the Court has held that a jury should determine whether conduct was sufficiently outrageous to constitute intentional infliction of emotional distress/outrage.

In *Seaman v. Karr*, 114 Wn.App. 665, 686, 59 P.3d 701 (2002), the Court reversed summary judgment dismissing the plaintiff's claim of outrage (among other claims), relating to conduct committed by the police department when executing a warrant. The defendant police department executed a warrant to search for a murder suspect at his last known residence which happened to be the plaintiffs' apartment. *Id.*, *supra*, 114 Wn.App. at 673-674. The plaintiffs, an elderly couple, obviously did not match the description of the suspect and had resided at the suspect address for only a month. *Id.* at 674-675. After realizing that neither plaintiff was the suspect, the defendants nevertheless continued on with the search of the plaintiffs' apartment and kept plaintiffs handcuffed for several additional hours. *Id.* at 675. The plaintiffs filed an intentional infliction of

emotional distress/outrage claim based upon the mistaken identity and execution of the warrant. *Id.* at 677. In reversing the trial court decision granting summary judgment, the Court held that the plaintiffs produced enough evidence “that a trier of fact could find Defendants’ conduct exceeded ‘all possible bounds of decency’, measured against an objective standard of reasonableness [for an outrage claim].” *Id.* at 686. This included, accusing the plaintiffs of murder; telling the plaintiffs that they would not be released because they were murder suspects; telling the plaintiffs that they were going to jail; and continuing to rummage through the plaintiffs’ home and belongings, leaving it in “shambles.” *Id.*

In this case, the Oppe Brothers, like the police department in *Seaman*, occupied a position of dominance over Ms. Oppe - they controlled and manipulated her by refusing to help in the care of Agnes and then made unfounded complaints of neglect and abuse regarding her caregiving to the authorities. Michael and his family also treated Ms. Oppe as a non-member of the family and “shunned” her, further dominating her within the Oppe family. Moreover, the Oppe Brothers knew that, like the police department in *Seaman*, their conduct would cause severe emotional distress to Ms. Oppe because they were publicly accusing their only sister, who had been caring for their mother for years when they refused to do so, of abuse and neglect when those allegations

were patently false. Despite their failed attempts to involve APS and the Sheriff's Department, the Oppe Brothers chose to ignore the fact that Ms. Oppe was an effective caregiver of Agnes and continued their outrageous conduct by filing the Petition. Like *Seaman*, the lower court should have submitted the Oppe Brothers' conduct to the jury for determination of whether it was so extreme and outrageous as to constitute intentional infliction of emotional distress/outrage.

In *Corey v. Pierce Co.*, 154 Wn.App. 752, 764, 225 P.3d 367 (2010), the Court affirmed the trial court's denial of the defendant's motion for judgment as to the plaintiff's outrage claim. The plaintiff's claim concerned the defendant's (Pierce County Prosecuting Attorney's Office) internal investigation into missing private donations involving the plaintiff (Assistant Deputy Prosecuting Attorney) and statements it made to a local newspaper regarding the investigation. *Id., supra*, 154 Wn.App. at 763-764. The defendant implied that the missing donations were public funds (which they were not) but later determined through its own investigation that its allegations against plaintiff were unsubstantiated; it nevertheless maintained otherwise to the newspaper. *Id.* at 758. The Court stated that although "mere insults and indignities" which cause embarrassment or humiliation normally will not support liability for outrage, the plaintiff presented evidence that she was publically accused of

criminal behavior, *despite knowledge by the defendant that it was unsubstantiated* and “revealed little of substance.” *Id.* at 764. “As a prosecutor, and longtime public servant, such allegations would be particularly loathsome to Corey and go beyond the ‘mere insults and indignities’ of *Dicomes*.”⁷ *Id.*

Like the evidence and conduct in *Corey*, the Oppe Brothers publically accused Ms. Oppe through their continuous course of conduct of complaints and false statements and allegations, of neglect, abuse, and exploitation of Agnes during her caregiving. This was despite having the knowledge through their prior failed complaints that their claims were unfounded and unsubstantiated. The Oppe Brothers reasonably should have known that their accusations against Ms. Oppe, would strike at Ms. Oppe’s core emotional well-being. This all the more evident considering the Oppe Brothers refusal to act as Agnes’ attorney-in-fact, Michael’s admission that he probably did not inform the Sheriff’s Department of concerns he may have had of Ms. Oppe’s care to Agnes, and Paul’s admission that he did not believe that Ms. Oppe was doing anything to cause Agnes’ health to deteriorate. CP 703-704. This conduct, like the

⁷ *Dicomes v. State*, 113 Wn.2d 612, 630-631, 782 P.2d 1002 (1989), affirmed the summary judgment dismissal of the plaintiff’s outrage claim where the plaintiff alleged that her discharge from her employment showed her to be an incompetent and disloyal employee and an accompanying false management study was prepared to embarrass and humiliate her, because the fact of her discharge (as the plaintiff claimed), rather than the method of her discharge, was not sufficient to support an outrage claim.

false allegations of criminal behavior against a county prosecutor in *Corey*, is beyond insulting – it is extreme and outrageous.

The trial court’s conclusion that this case does not rise to the level of outrageous conduct compared to the “serious assaults [and] felonies” of other cases is simply not supported by applicable case law. The claim for intentional infliction of emotional distress/outrage has been upheld in cases not involving “serious assaults” or acts of physical violence. In *Phillips v. Hardwick*, 29 Wn.App. 382, 387, 389, 628 P.2d 506 (1981), the Court affirmed a judgment for outrage, where the defendant/vendor’s actions in retaining possession of a residence past the date provided in agreement with the plaintiff/purchasers, when they had no intention of continuing to reside in premises, constituted extreme and outrageous conduct. The Court went on to state that the defendant/vendor “compounded the issue when they contacted the Sheriff’s Department (when the plaintiff/vendor arrived to take possession of the home pursuant to the agreement) and insisted that they had a right to possession” *Id., supra*, 29 Wn.App. at 389. These actions, along with the defendant/vendor’s knowledge that the plaintiff/purchaser had already rented out their other residence resulted in damages to the plaintiff and supported a finding of outrage. *Id.* In *Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 141 Wn.App. 407, 432-433,

167 P.3d 1193 (2007), the Court affirmed the denial of a motion for judgment on the claim for outrage and subsequent judgment in favor of the plaintiff where the defendant/church's conduct in connection with a victim's report of sexual abuse by a family member was extreme and outrageous conduct. It was held that the defendant/church's statement to the victim that she might cause family break-up if the abuse was reported, suggestion that the victim put a lock on her bedroom door, and failure to report the abuse to the proper authorities was extreme and outrageous. *Id.*, *supra*, 141 Wn.App. at 431-432. "The jury could readily conclude that [the bishop's] advice caused emotional distress that was more than mere annoyance or embarrassment arising from their face to face confrontation, and, in fact, prevented her from seeking further help in stopping the abuse." *Id.* at 432. In *Birkliid v. Boeing Co.*, 127 Wn.2d 853, 866-867, 904 P.2d 278 (1995), the Court held that the plaintiff employee's intentional infliction of emotional distress/outrage claim should have gone to the jury, where the defendant employer harassed its employees who requested protective equipment or utilized medical services and when it knew its employees were becoming ill from fumes from the production of a new product and altered workplace conditions during safety tests. The Court stated that after considering the factors in determining whether conduct is extreme enough to warrant liability, the plaintiffs stated a claim

for outrage that should have gone to the jury. *Id., supra*, 127 Wn.2d at 867-868. Finally, in *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145, 148 (Va. 1974), the Supreme Court of Virginia reversed the trial court decision to set aside the jury verdict in favor of the plaintiff for emotional distress. The Court stated that the jury could conclude from the evidence presented that the defendant's conduct when she lied to the plaintiff of the purpose in obtaining his photograph for use by a criminal defense team in a child molestation trial was extreme and outrageous. *Id., supra*, 210 S.E. 2d at 148. "There is nothing in the evidence that even suggests that plaintiff may have been involved in the child molesting cases. . . . A reasonable person would or should have recognized the likelihood of the serious mental distress that would be caused in involving an innocent person in child molesting cases." *Id. Compare, Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 742, 565 P.2d 1173 (1977) (reversing lower court dismissal of the plaintiff's complaint for outrage, under CR 12 (b)(6) for failure to state a claim; where the plaintiff stated that he was subjected to acts of intimidation, ridicule, and demotion at defendant/employer when employer knew or should have known that due to the plaintiff's nationality and background, he would be susceptible to emotional distress as a result of the conduct).

Therefore, the trial court erred in granting summary judgment and dismissing Ms. Oppe's Complaint because jurors could reasonably have concluded that the Oppe Brothers' conduct was extreme and outrageous.

The Oppe Brothers' continuing course of conduct in this case is also distinguishable from cases holding that the conduct was not extreme and outrageous for the purposes of intentional infliction of emotional distress/outrage.

In *Keates v. City of Vancouver*, 73 Wn.App. 257, 259-260, 869 P.2d 88 (1994), the plaintiff suspect sued the defendant police department over its aggressive interrogation of him regarding his wife's murder investigation.⁸ Some of the tactics included statements to the plaintiff that he murdered his wife but did not remember doing so, and that a jury could be lenient if he just confessed. *Id.*, *supra*, 73 Wn.App. at 262. In affirming the trial court's summary judgment, the Court stated that although the conduct was "insulting," it did not go "beyond all possible bounds of decency." *Id.* at 265, *quoting, Dicomes v. State, supra*, 113 Wn.2d at 630. The Court went on to state that it was not shown that the defendant consciously disregarded a high probability that their conduct would cause the plaintiff to suffer from emotional distress, and that they

⁸ The plaintiff's neighbor was tried and convicted of the murder. *Id.*, *supra*, 73 Wn.App. at 262.

were unaware of whether or not the plaintiff was susceptible to emotional distress. *Id.* at 264.

In this case, and unlike the police department defendant in *Keates*, the Oppe Brothers knew that their continuous course of harassing and abusive conduct against Ms. Oppe would cause her severe emotional distress, as Ms. Oppe (not they) was Agnes' sole caregiver for eight (8) years; they were now publicly accusing her of elder abuse, despite her unblemished record of caregiving; and they were ultimately successful in preventing her from having any contact with Agnes prior to Agnes' death. The Oppe Brothers consciously disregarded these facts when their attempts to implicate Ms. Oppe through APS and the Sheriff's Department for abuse and neglect and as an ineffective caregiver of Agnes failed and they then proceeded to prepare and file the Petition which prevented Ms. Oppe from having any contact with Agnes until her death. Unlike *Keates*, the Oppe Brothers' conduct should have been submitted to the jury to determine whether the conduct was extreme and outrageous.

In *Snyder v. Med. Serv. Corp. of Eastern Wash.*, 98 Wn.App. 315, 319, 988 P.2d 1023 (1999), the defendant was an intimidating, threatening, and abusive employer. Among other things, the defendant threatened the plaintiff if she discussed a salary raise; after giving the plaintiff a salary raise, told her that if she mentioned this to anyone within

the company, she would “hunt” her down and “kill” her; and poked the plaintiff in the chest when the plaintiff informed the defendant that she was unable to work on a particular Saturday due to family commitments. In affirming the trial court’s grant of summary judgment, the Court stated that the defendant’s “level of incivility demonstrated here does not reach the level to support a claim of outrage.” *Id., supra*, 98 Wn.App. at 322.

Unlike the conduct in *Snyder*, the Oppe Brothers’ conduct goes well beyond general incivilities and mere insults. The Oppe Brothers made unfounded complaints of abuse and neglect to APS and the Sheriff’s Department, and filed the Petition and TRO which prevented Ms. Oppe from seeing and being with Agnes before her death. These actions are not generally uncivil or annoying behavior of one person against another – rather, it is calculated, abusive, and harassing conduct by two (2) brothers against their sister, that was designed to strike at Ms. Oppe’s emotional well-being as Agnes’ only daughter and sole caregiver for eight (8) years. The Oppe Brothers attacked Ms. Oppe for her caregiving of Agnes because they knew that Ms. Oppe would have to defend herself – even when the Oppe Brothers did not want the responsibility of caring for their mother and when Paul admitted that Ms. Oppe was doing nothing to cause Agnes’ health to get worse.

Unlike the conduct in *Keates* and *Snyder*, the Oppe Brothers' conduct was extreme and outrageous for the purposes of intentional infliction of emotional distress.

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 17 day of November 2011.

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Unlike the conduct in *Keates* and *Snyder*, the Oppe Brothers' conduct was extreme and outrageous for the purposes of intentional infliction of emotional distress.

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 16~~th~~ day of November 2011.

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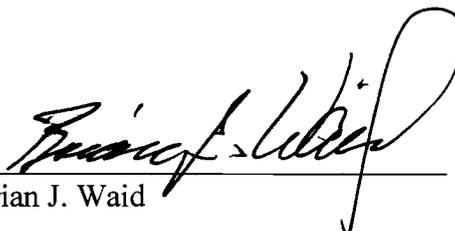
DECLARATION OF SERVICE

I, Brian Waid, declare that on November 17, 2011, I caused to be served the Appellant's Brief upon the following individuals via courier delivery:

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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: November 17, 2011, Seattle, Washington.



Brian J. Waid