

**No. 304710-III**

**STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION NO. III**

**DEBBIE ROTHWELL,**

**Appellant**

**-vs-**

**NINE MILE FALLS SCHOOL DISTRICT; MICHAEL GREEN,**

**Respondents**

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**BRIEF OF APPELLANT**

---

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**I.**

**INTRODUCTION**

The issue in this appeal is whether Debbie Rothwell's claims for negligent and intentional infliction of emotional distress are barred by the Industrial Insurance Act.

This is the second time this issue has come before this court.

On January 15, 2008 the Superior Court granted a CR 12(b)(6) motion and dismissed the action, finding that plaintiff's claims were barred by the exclusive remedy provisions of the Industrial Insurance Act.

This court reversed and remanded for further proceedings. *Rothwell v. Nine Mile Falls School District*, 149 Wn. App. 771, 206 P.3d 347 (2009). (CP 10-28).

The Supreme Court subsequently denied review. *Rothwell v. Nine Mile Falls School District*, 169 Wn.2d 1017, 238 P.3d 502 (2010).

After issuance of mandate on October 7, 2010 (CP 9), discovery ensued and on September 9, 2011, defendant School District filed a motion for summary judgment. After

initially denying the motion (CP 152), the trial court later reversed itself (CP 163) and on November 15, 2011 entered an order granting summary judgment and dismissing the action. (CP 196-198). The second dismissal was for the same reason as the first, that the action was barred by the exclusive remedy provisions of the Industrial Insurance Act. This second appeal follows.

## **II.**

### **ASSIGNMENTS OF ERROR**

1. The Trial Court erred in granting summary judgment dismissing Plaintiff's claims against Defendants Nine Mile Falls School District and Michael Green.

2. The Trial Court erred in holding that RCW 51.04.010 is controlling in this case and that its exclusive remedy provision bars this action.

3. The Trial Court erred in holding that plaintiff sustained exposure to a "single traumatic event" under WAC 296-14-300(2).

4. The Trial Court erred in finding that plaintiff sustained an "injury" as defined in RCW 51.08.100.

### **III.**

#### **STATEMENT OF THE CASE**

In December 2004, appellant Debbie Rothwell had been employed for approximately eight years as a housekeeper/custodian by Nine Mile Falls School District. (Complaint ¶1, CP 3; admitted in Answer ¶ 1, CP 48).

On December 10, 2004, Ms. Rothwell was scheduled to report to work at Lakeside High School at 4:00 p.m. to work until 8:00 p.m. She had split her shift that day with a co-worker, Maryann Brittain, who worked the first four hours of the shift. (Rothwell Depo., pp. 148-149; CP 63).

#### **Called in Early**

Around 1:15 p.m., Ms. Rothwell received a phone call from Kirk Kramer, the chief building custodian. He stated that he had to send Maryann Brittain home and that Ms. Rothwell needed to come in. (Rothwell Depo., pp. 148-150; CP 63).

#### **What She Found at School**

When Ms. Rothwell arrived, she found that the school was locked down and news cameras were present. She

asked Mr. Kramer what was going on and he responded that there “had been an incident.” On further questioning, she was told that a student had tried to kill himself, but that “he would be okay”; and that he [Mr. Kramer] would have cleaned it up but his shift was over and he was leaving. He said: “it’s just a little mess”; and that she would have to use her training in disposing of blood-borne pathogens at the scene; that there was a “little bit of blood and a lot of needles that needed to be packed up”; “. . . Eric will tell you what you need to do.” (Rothwell Depo., pp. 154-159; CP 64, 66).

#### **Standing Guard**

One of the teachers who was standing at the gate gave her a walkie talkie and asked her to watch the gate and not let anyone in unless it was a parent coming to pick up their child, and not to talk to reporters. (Rothwell Depo., p. 160; CP 66).

#### **Called In By Superintendent**

After a while a person came out to relieve her of the walkie talkie at the gate and told her she was needed inside; that she was supposed to go to the office. (Rothwell Depo.,

p. 165; CP 67). In the office she met Superintendent Michael Green. From here on, Ms. Rothwell's deposition testimony describes what happened:

- A. Came in, and Michael<sup>1</sup> was talking with that woman. And I showed up. I said, "Heard I was supposed to come into the office. They told me that someone wanted me in here." And Michael goes, "Yes I did." I go, "Okay." And he goes, "Gonna need to get that cleaned up," you know. "Tomorrow there's gonna be a lot of counselors here. So I want you to make it look like it never happened." And "do I have a problem with it." And I go, "With what?" And he goes, "With cleaning it up." And I go, "Well I haven't been in there yet so I don't—you know, just like a bloody nose. You know, so, No, no, don't have a problem with it."

#### **What She Found**

- A. So I go, you know, I told him, "I don't think I'll have a problem with it, but hang on a sec." So I walked out. And he was talking with that lady again. And walked out of the main office out into the foyer and went out into the entryway and opened the far left door, you know. And that's when I saw it, you know. When I went to the other side, I opened, you know, the right-side door, you know, and told Reed and Nolander<sup>2</sup> "hi." And then went back, you know, to the office.

And then went in—when I—after I talked to Michael, I went into the entryway and I opened

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<sup>1</sup> Michael Green, Superintendent.

<sup>2</sup> Reed and Nolander were sheriff's deputies.

the left side and walked in. And it's just like, Oh wow. Wow. This is more than a nose bleed. This is way more than a nose bleed, you know. You know, the way Kirk made it sound, it was just like a little spot like this (Indicating ). You know, no big deal. Just like a nosebleed. But it was huge. You know, needles, blankets. You know, papers all over everything.

Q. And so what did you do?

A. I went around, you know. I walked around it looking at, you know, I could do this. Yeah, I can do this, you know. And then that's when Reed came over and was talking with me, you know. And I'm going, he goes, "Well, you heard about the suicide?" I go. "Oh, the kid that tried to kill himself?" He goes, "He'll be okay. He's in the hospital," you know.

And I go, "Do you know who it was?" And Reed, you know, he goes, "Yeah, Skyler." No, no, no, it wasn't Skyler. He goes, "Yeah it was Skyler." He goes, "Did you know Skyler?" I go, "Yeah, Skyler wouldn't do that," you know. And I go, "What a hard lesson to learn. Why did he do it," you know?

And it's just like, you know, I just started losing it. You know, I started crying. And I told Reed I'll be back. And instead of going back to the office, I went down the south hall, went out, got in my car, went off school grounds across the road, started crying. I think I stayed there for 15, 20 minutes. Got myself back together, went back in the office, you know.

(Rothwell Depo. pp. 168-170; CP 67).

Q. Tell me why it upset you so much when you learned the identity of the student who shot

- himself, or that you found out it was Skyler.
- A. Why it upsetted [sic] me? Because I thought, when they told me it was Skyler, I, I didn't think that he had talked, you know, he had coped with the breaking up of his girlfriend. You know, and more or less, lost his best friend.

I didn't really get to know many of the kids. I mean, there's a lot of kids there. We'd say hi to each other, you know. And they'd called me janitor lady, you know. One of the kids, "Hey janitor lady," and then, "Hey student dudes," you know. You know, so Skyler started doing that with me, too. You know, "Hey janitor lady," and "Hey student dude," you know.

But he was so, just so joyful, you know. And I knew he was bummed out, you know, about that incident. But I thought he got over it. You know, I thought—because I'd see him in passing, you know, and smiles. You could tell he was still a little down, you know. But I thought he was coming out of it. He was, you know, getting on with it, you know.

(Rothwell Depo., pp. 184; CP 72).

- ...
- Q. Okay. And just so I'm clear, you did not start crying until you learned it was Skyler, correct?
- A. Yes.
- Q. All right. And then you said you drove off campus to collect yourself?
- A. (Witness nods head).
- Q. Yes?
- A. Yes. No one needed to see me cry, you know. Uh huh.

(Rothwell Depo., p. 185; CP 72).

**Another Conversation With The  
Superintendent**

- Q. Okay. So when you saw Michael again—
- A. He goes, “Well if you’ve got a problem with it, I’ll find someone else to do it.” You know, and I didn’t want to lose my job, so I said, you know, “I take the class so I can do it. Don’t want to do it, but can do it.”
- Q. Okay, so when you went up to Michael the second time he said, “So do you have a problem with cleaning it up,” yes?
- A. Yes.
- Q. And what was your response?
- A. First response, “yes.”
- Q. Okay. So you said yes?
- A. Yes.
- Q. And what did he say?
- A. I told him I didn’t want to.
- Q. And what did he say?
- A. He says, well, he goes, “Part of the job.” He goes, “If you don’t want to do it, I’ll find someone else to do it.”
- Q. Okay.
- A. And it’s, well, you know—and I felt like my job was threatened there by not doing it.
- Q. So his words were, “If you don’t want to do it I’ll find someone else to do it?”
- A. Yes.
- Q. And what did you say in response to that?
- A. I told him “I’ll clean it up.” I didn’t want to lose my job.

(Rothwell Depo., pp. 168-172; CP 68-69).

- Q. You said something earlier that Michael said something to you to the effect of if you didn’t want to clean it up, he’d find somebody else that could. Do you remember saying that?

- A. Uh-huh.
- Q. Yes?
- A. Yes.
- Q. And you said that you kind of interpreted that as a threat to your job--
- A. Yes.
- Q. --do you remember that?
- A. Yes.
- Q. Tell me why you considered that or interpreted that as being a threat to your job.
- A. The tone. The way he said it.
- Q. And anything else other than the tone and the way he said it?
- A. No. A couple days prior, I had had a problem. And I talked to a, oh, who was it, I think it was Kirk [her supervisor]. Him and I were butting heads. You know, I told him I didn't have a problem like doing the work. But I have a problem of doing your work. And he said, "Well, it says on the contract. It's the very last one," you know. "The principal, school board, whoever," you know, "above you," you know. At the very bottom it says, "and as need be by the principals," you know, "superintendent , board members, teachers," you know, "they ask you to do something, you do it. You can't argue about it," you know. And he went like this, in parentheses (indicating), and "as need be." "So if they tell you to do something, you do it. Even if it's not in your contract, you do it."
- Q. That was a conversation you had with Kirk a few days before December 10<sup>th</sup>, 2004?
- A. Yeah, a couple days before. You know, I told him I was gonna go to Bob [Anaker]<sup>3</sup>, you know. And I told Bob what Kirk had said. And he goes, "Well, it does say, 'as need be'."
- ...
- So, you know, when, you know, a couple days later the suicide, and then Michael, you know,

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<sup>3</sup> High School Principal.

problem cleaning it up? No. No, don't have a problem. Because I'm thinking that last paragraph of the contract, and "as need be." You know, it would be considered insubordination. They could fire you, terminate you right there on the spot.

Q. What was Michael's tone in the way he said it?

A. He said he wanted me to clean it up. And he goes, "You don't have a problem with that, do you?" You know, the tone and his manner, just like, you know, you're a janitor. Do your job, you know. And if you can't do it, you know, I got the impression he'd fire me, find somebody else. You know, I –

Q. I appreciate what your impression is. I'm trying to get what that's based upon. And you said that his tone was such that he implied, or you inferred that he was indicating you're the janitor, clean it up. But what else about the way he said it led you to believe you could lose your job if you didn't say yes?

A. He goes, "Well, if you won't do it, I'll just find somebody else who will."

Q. Okay.

A. You know, it's just like just the manner it was said in, well, I don't want to lose my job.

Q. Well, what manner was it said in? Or let me— strike that. What was his manner when he said that?

A. I felt like he was being a bully.

Q. And what led you to think that?

A. Well, back then it seemed that, you know, it was his way or the highway. Plain and simple.

Q. Okay. And I appreciate that might be his leadership style. But I specifically what [sic] to know his mannerism –

A. No, that's the impression, you know, that I got when he said it. Just like, you know, it's either my way or the highway. And if you don't want to

clean it up, then there's the road, and I'll find someone else.

Q. He didn't say that, though?

A. No. No.

Q. All right. Is there anything else you can tell me about the way he said it as opposed to how you interpreted it?

A. He was a lot different than he was before. I mean, I mean, we've talked, you know. And like I said, I had a lot of respect for him.

Q. And how was he different that night?

A. But that time it was just, I felt like, you know, he was, he was like towering over me, you know, really close, you know. And I felt like he was just trying to bully me into doing what he wanted me to do. And it's just like, you know, I've dealt with guys like that before. You know, I've dealt with it with Parker, you know, when he was principal.

And, you know, yeah, I'd set up the library for board meetings. Michael would come in, "Hi, how you doing?" "Oh, good. How you doing?" "Oh, not bad." You know, casual conversations, you know. But that day it was just like the tone, you know.

Q. Okay. It was the tone and mannerism you hadn't before seen in –

A. Yes.

Q. -- Mr. Green?

A. Yes.

(Rothwell Depo., pp. 240-244; CP 86-87).

### **Looking for Bombs**

A. Later on Bob came in, Bob Anaker<sup>4</sup> came in and

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<sup>4</sup> High School Principal.

found me. And said “Michael wants us—they’re sending up a bomb sniffing dog from Yakima or Tacoma” or something like that. “And it’s gonna be awhile before it gets here. But there’s a possible bomb in the bag, or bomb.” He didn’t say “in the bag.” He said “there’s a possible bomb.”

And Bob wanted—Michael told Bob about the dog coming. And get Skyler’s schedule, and open the classrooms he was in, prop the doors open. And Bob says, Bob said, “Since you clean this up where most of his, Skyler’s classes were, you want to go with me and then go in and see if there’s anything out of the ordinary.” Because, he goes, “You would know,” you know, “since you clean it every day.” I said, “Okay, so what, we’re looking for a bomb?” And I go, “Where did this come from?” And he goes, “Well, there was a possible device, bomb device. So they just, they want to check the school building. So we need to open the doors, especially the classrooms, you know, that Skyler had.”

(Rothwell Depo., pp. 172-173; CP 69).

. . . But I kind of looked at Bob and started laughing. I go, you know, “Come to think of it, Bob,” I go, “Now I know I’m on the lowest part of the totem pole.” And he goes, “What do you mean by that?” And I’m going, “Oh, to save a bomb sniffing dog’s life, they’re willing to put my life to go in and look at the classrooms to see if there’s anything out of the ordinary, so the bomb dog doesn’t get exploded, but I’m okay,” you know. “Go in there and check that out,” you know, like I go, “That’s wrong. That’s just wrong. I’ll open the doors, you know, prop them open, but--you know, no, the bomb squad’s on its way,

too. All right. Then how come they don't-- you know, I'll give them the key. They can go open the doors."

(Rothwell Depo. 174; CP 69).

Q. -- you've described feeling like you were the low person on the totem pole. But were there any other emotions you were feeling as you were walking through the south wing propping open and looking in the classrooms?

A. I was scared.

Q. Okay.

A. And for a little while there, I was mad at Michael. You know, I was thinking to myself, why didn't he have--you know, he can have the key. He can go open them. You know, that's what the cops were wanting him to do, then he should do it. Don't pass it down to someone else.

Q. Okay. What were you scared of?

A. I was scared of finding a bomb.

Q. Okay. Were you afraid as you were walking through the south wing that your life was in danger?

A. Somewhat, yes. I just wanted to leave.

Q. Okay. Did you tell Bob that?

A. I told him this sucks.

Q. Did you tell him that you felt your life was in danger?

A. No. Well, kind of. When I get scared, I kind of joke. And I looked him, and I go, "If I'm gonna go, you're going with me," you know. And he's sitting there, well, he goes, "Let's just prop them open, take a quick peek and get out of here." I go, "okay."

(Rothwell Depo., pp. 197-198; CP 75).

### **Bomb in the Backpack**

- Q. When were you given that okay? [to clean up]
- A. Oh, it was dark, I know that. I want to say 8:00, 9:00 o'clock at night.
- Q. Okay. And who gave you that okay?
- A. I'm trying to remember who. Maybe it was later than that. Cuz I remember coming in the south side. But I'm trying to remember if there's -I think it was after the bomb squad left that we were given the okay to clean it up. No, it's not. Because when I walked in there, I think one of the sheriffs or detectives, the cops were in there, I asked them, you know, "is it okay if I start cleaning up?" And they said "yeah." One of the guys, he had a black suit on. It wasn't a, you know, it didn't have any emblems on it. Just a suit.

So I started removing the garbage cans. And then I went over and grabbed the backpack, picked it up. Started walking into the cafeteria, where we keep the lost and found. And took, got one step into the cafeteria before the cops go, "Whoa, whoa, wait wait. That stays." And I go, "What, backpack?" "Yeah, that stays there." And I was like, "Oh, so that was Skyler's?" "Yeah." "Well, I can just put it in lost and found. And he can pick it up when, you know, when he gets out of the hospital." "No, that, that needs to stay there." "All right." So I took it back to where it was and just kind of dropped it. And they all went like this. (Indicating). And I go, "Oh you guys are weird." So I—

- Q. You're demonstrating that they all kind of jumped or flinched?
- A. Yeah. They all went like this (Indicating). And I go "what is wrong with you guys," you know.

(Rothwell Depo., pp. 163-165; CP 67).

### **Starts Cleaning Up**

She and coworker Jeff cleaned up the debris and she ran the floor machine to clean up the blood which had been spilled on the floor. (Rothwell Depo., p. 175; CP 70).

A. Well, we went in, I remember I went with Jeff into the entryway. And we're, we're looking at it. And Jeff is going, "What's that? What's that? What's that?" And I'm going, "What?" I thought he was meaning the IV, the needle, you know. And he goes, "No, that white stuff." You know, and I'm looking. And I'm going, "I don't know."

And one of the cops came up. And Jeff goes, "Well, you're a cop, you should know. What is this, what is this?" And the cop goes, "Well, that's brain matter. And that's a skull piece. The bone." You know, and I just looked at Jeff  
...

(Rothwell Depo., pp. 204-205, CP 77).

Q. I got the impression from what you said that there were really two stages to this. First you guys cleaned up the pillows and debris that was around and then went back later and cleaned up the blood.

A. Yeah.

Q. How long did that first part take, where you were cleaning up the debris?

A. I want to say about an hour.

...

Q. So during that first, I'll just call it the first section or first time when you were cleaning up,

what in addition did you clean up other than the pillow, the blanket and the caution tape?

- A. We were getting everything together to run the floor machine. Got the mops, mop heads. I had to think of what we could use that had to be thrown away but wasn't expensive that could be easily replaced for the school. It was mainly getting all the supplies together.

(Rothwell Depo., p. 211-213; CP 79).

- Q. During the second portion of the cleanup, in addition to cleaning up the blood, you picked up needles?

A. Yes.

- Q. Was there anything else that was, that you had to pick up to dispose of during the second portion of the cleanup?

A. There was IV tubing, those, I want to say vials, but I don't know if that's what they were or not.

- Q. Little glass containers?

A. Yeah, a couple of them were broke.

...

- Q. Okay. We'll call that a vial. Anything else?

A. Well, the syringes and then they had those, like, tiny, tiny needles that had wings.

- Q. Okay. Anything else?

A. Just the body stuff.

- Q. Okay. And I'll get to that in a minute. But I just want nonhuman body stuff at this point. Anything else that you can think of that you cleaned up during that second portion of the cleanup?

A. I cleaned up some blood prints.

- Q. I'll go to those in a minute.

A. No, I think that was about it.

(Rothwell Depo., pp. 215-216; CP 80).

- ...
- Q. How long did the whole process of cleaning up during the second portion take?
- A. I'd say oh, about an hour and a half, two hours.
- Q. Okay. And I heard you tell me that one of the things you did was pour water on the, on the blood, yes?
- A. Yes.
- Q. And then after you poured water on the blood, you used a mop on it?
- A. Yeah. I used the broom. You know, well, what it is, I used the broom, swept all the brain matter and pieces of bone. Got it all together, because I didn't want it to go into the machine, you know.
- ...
- Q. Okay. And what, what all was it that you were sweeping up.
- A. Clots, brain matter, skull pieces. That's about it.
- Q. What was the last thing that you just said?
- A. About a soccer ball size.
- Q. Can you—
- A. Brain matter, bone, skull pieces.
- Q. Okay. And the skull pieces, you know there were skull pieces because that officer had identified that as skull pieces?
- A. Yeah. I know what bones look like.
- Q. Okay. How many pieces were there?
- A. I don't know. I didn't count.
- Q. Are we talking a lot though or
- A. No, maybe twenty small pieces.
- Q. And how big was the biggest piece?
- A. Well, I'd say the biggest piece was, I don't know, maybe inch, inch by inch (Indicating), half inch.

(Rothwell Depo., pp. 220-223; CP 81-82).

- Q. Okay. So how were you feelings about having to clean that up as you were cleaning it up?
- A. I wanted to leave. I seriously wanted to leave. I didn't want to do it.
- Q. Okay.
- A. You know, but it was so late, I couldn't call somebody and say, hey, come and take of this for me, you know. Just something that had to get done.
- Q. Tell me why you wanted to leave.
- A. I felt like this job just wasn't' worth it.
- Q. And why not? I mean, tell me—I, I appreciate and recognize you wanting to leave. But tell me what emotionally you were feeling that lead you to want to leave.
- A. You know, I was scared. I was pissed.
- Q. Anything else?
- A. Just thinking this job isn't worth that.
- Q. Okay. What were you pissed at?
- A. I was pissed at Michael.
- Q. Okay. Any why were you pissed at Michael?
- A. Well, through the evening I asked him how Skyler was doing. And he kept on saying, "oh, he's in surgery, he's in surgery." Okay. "I hope he makes it," you know. And not even five minutes later, you know, I saw Bob. And went over to Bob, I go, "How's Skyler doing?" "He died." "Well, Michael just said he was in surgery." "No, he died a couple of hours ago." I go, "Oh, really." I go, and I asked Michael, "oh, he's still in surgery."

You know, I want to say what, "you didn't have the balls to tell me he died. You, am I that, you know, I don't need to know basis. You don't lie to me, you know. Didn't lie to you, don't lie to me.

(Rothwell Depo., pp. 237-238; CP 85).

There was blood spattered on the wall and on the windows. This required a window cleaner, sponge and squeegee. (Rothwell Depo., p. 232; CP 84).

After the blood was cleaned up, she and Jeff were approached in the student parking lot by Superintendent Green and told to leave the school property for an hour. (Rothwell Depo., p. 177, 202; CP 70, 76). During that period of time she went home.

- Q. . . . Were you home for approximately an hour?
- A. Yes.
- Q. While you were home for that approximate hour, did you talk with anyone other than your husband?
- A. No.
- Q. What did you do for that hour or approximate hour?
- A. My husband made me dinner. And I told him I wasn't hungry. Didn't feel like eating. Then we just went outside. He had the TV on, you know. And I, I don't like watching news, you know. So I grabbed a Pepsi and went out on the deck, you know. And he, he, Chris, came out and sat next to me and just sat there looking westward, you know. And I go, "So what time is it now?" And he goes, "It's only two minutes since you asked last time." He goes, "You want to go back?" I go, "No." He goes, "You gonna go back?" "I have to," you know, so--
- Q. Did you eat anything while you were home?
- A. No.
- Q. So then—

- A. Well, I tried, I should say. I tried. I mean he cooked the dinner, so I tried to eat it. And I had a few bites and just, I couldn't keep it down. And he goes, "Oh, my cooking that bad?" I go, "No. I don't know what it is. I just, I'm just not hungry."
- Q. Did you throw up?
- A. Yeah. And I go, "It's not your cooking," you know.

(Rothwell Depo., pp. 207-208; CP 78).

- Q. Right when you got back from that being home for about an hour?
- A. Yeah. And the bomb squad, everybody was starting to leave. Cuz we weren't there when they exploded it.
- Q. Okay.
- A. But we were asked to leave again before they exploded it. Because I remember the, you know, the robot grabbing the bag and bringing it out, you know, and going through it. And we were asked to leave again. "Come back in 15 minutes half hour."
- Q. Who asked you to leave again?
- A. I think Michael did.
- Q. Did he tell you why you had to leave again?
- A. There was something about the bomb squad.
- Q. And did you—
- A. and—
- Q. Go ahead.
- A. Yeah, yeah, I left. And Jeff and I went over to the, went over to the gas station and got a pop and sat in the parking lot there.  
. . . and then we had a cigarette and heard a boom. And I'm going, "well I think we can go back now," you know. So we both went back.

(Rothwell Depo. p. 210-211; CP 78-79).

### Late Night Cleanup

. . . Went back down. And when I got there, they had already exploded the, whatever it was in the bag. They said they took it out, put it in a water container, you know.

And I remember at that point, I just looked, and I go, "Idiots." You know, cuz they did it right next to the building. You know, and it's black soot all the way up the white paint. You know, to the overhang. And tracks, black tracks from the robot, you know, going through the ash and everything, you know.

And it's when Michael goes, "don't care if you have to paint it or paint the sidewalks, paint the building, do whatever you have to do. Doesn't matter how long it takes, do it. I don't want to—I want to come back here tomorrow and look like nothing ever happened. Don't want no tracks, no black, no nothing," you know. So Jeff had to leave at midnight. I remember him telling me that he had to leave at midnight. So when I came back, Jeff was there like five minutes, then he had to leave. And when the bomb squad left, that's when Bob and Michael Green left.

And Michael Green wanted me to come back tomorrow morning and help the people that, the kids that come in for counseling, help them, you know, escort them to a counselor, you know. And set up to some coffee, juice, cookies, you know, for the people in the foyer. And counselors were using the library a lot. A lot of counselors were in there but there was a lot in the foyer too.

(Rothwell Depo. p. 178-179, CP 70-71).

- Q. So what time did you go home the night of December 10<sup>th</sup>, morning of December 11<sup>th</sup>?
- A. I want to say about 3:30, 4:00 o'clock in the morning.
- Q. When you left was there anyone else at the school?
- A. No.
- Q. Who was the last person to leave before you, if you know?
- A. Man, I don't recall. I think the last ones to leave were—cuz Jeff had left. But Michael and Bob were in their car, and they were leaving. So I think it was Bob and Michael.
- Q. How much before you did those two leave?
- A. I don't know. A few hours.

(Rothwell Depo., p. 252; CP 88).

### **Next Morning**

- Q. Okay. And then you said something about coming back the next morning to set up coffee and donuts?
- A. Yeah. Before Michael left that night he asked me to come back in the morning.
- Q. On Saturday morning?
- A. Yes.
- Q. All right.
- A. At 7:30.
- Q. And did you?
- A. Yeah.
- Q. And what did you do? What did you do that day at the school?
- A. I ran the gate for awhile, like an hour, hour and a half. And then I went inside and escorted some of the families, kids and their parents, to the counselors. And set up coffee, made sure

the coffee, cookies, juice, napkins and necessities were all set up in the foyer.

- Q. How long were you there that day?  
A. I think I stayed there until 10:00, 11:00 o'clock.  
Q. In the morning?  
A. Yeah.  
Q. All right.  
A. And that's, I went in, told Bob I've got to go home. I was tired. I think I slept for maybe an hour. Seemed like only minutes. . .

(Rothwell Depo., pp. 251-252; CP 88-89).

- Q. And why was listening to those kids the next day emotionally traumatic to you?  
A. Cuz of all the crying.  
Q. Okay. And was it emotionally traumatic because you felt similar emotion of losing Skyler?  
A. Somewhat. I mean, I didn't know Skyler like those kids did, you know. And the things that were going through my head as soon as I found out, you know, that Skyler had died is just, you know, I thought, well, I know where he's at. He's in a safe place now. You know, but the people he left behind, his parents, you know, any loss of a child, you know, it's tough.  
Q. And is that why hearing those kids crying and talking about Skyler was emotionally traumatic for you?  
A. Yes.

(Rothwell Depo., pp. 253-254; CP 89).

### **Following Weeks**

- Q. Okay. Did you come to the school at all on Sunday?

- A. No.
- Q. You returned to work then on --
- A. Monday.
- Q. --Monday the 13<sup>th</sup>?
- A. Yes.
- Q. All right. What shift did you work that day?
- A. The second.
- Q. Okay. And you made a comment earlier about picking up candles and cards and the like. When did that start?
- A. Monday.
- Q. Okay. And who told you to pick up the candles and cards and the like?
- A. There was a note in my mailbox.
- Q. From whom?
- A. It didn't state from whom. It was just, you know, it was on a Lakeside tablet, you know, head letter saying that the flowers, pictures, candles are all to be put in a box and put in the counseling room in Barb Roma's office.
- Q. As you sit here today--
- A. And I was supposed to wait until the kids were gone, you know, to do it. So I usually waited until about 9:00 o'clock.
- ...
- Q. How many days was it that you collected either flowers, cards or candles?
- A. It had to be a good two weeks.
- Q. Okay. Every day for two weeks?
- A. Till Christmas break.
- ...
- Q. Was there like an area that the students would leave the cards, candles and flowers?
- A. Yeah. At first it was right in front of the entryway where the student—it was in the staff parking lot. But the busses would pull up there. And students would get out and go into the entryway. It was right there, just like from door to door.

- Q. So the same entryway that Skyler shot himself in?
- A. Yes.
- Q. But outside?
- A. Yes, outside.
- Q. All right.
- A. And then, then they started—when they came back after winter break, that spring I should say, because I don't remember any snow on the ground then, there was a tree planted in Skyler's name. And they started leaving things there at the tree.
- Q. And, you continued to pick up the mementoes left at the tree?
- A. Yeah.
- Q. And how long did that continue?
- A. For about a month, I'd say.
- Q. Okay.
- A. They were putting angels on the branches.
- Q. And tell me why, Ms. Rothwell, you cry when you talk about the kids leaving stuff at the tree that was planted in Skyler's name?
- A. I don't know. I don't know why I cry. Like I don't know why I'm crying. I shouldn't be crying.
- Q. Was picking up the cards, candles and flowers and other mementoes left by the students emotionally traumatic to you?
- A. Yeah. There was a few things that were pretty mean. But those I threw away. I didn't even put them in the box. Because I found out Barb was taking them, you know, the next day over to Skyler's mom, and she didn't need to see stuff like that.
- Q. There was some student's stuff left that was mean?
- A. Mean, yeah.
- Q. Setting aside students leaving mean or cruel things, was the act of picking up the candles

and the cards and the flowers something that was emotionally traumatic to you?

A. Yeah, it was.

(Rothwell Depo., pp. 254-258; CP 89-90).

### **Aftermath – Depression**

Q. And that's what I'm in-artfully trying to get at is after cleaning up this suicide scene you started having symptoms that you believe were caused by cleaning up the suicide scene. Correct?

A. Yes.

Q. When did you start having those symptoms?

A. The next day.

Q. Okay. And what was it about what was going on in April of 2006 that made you decide to, at that time, share your experience at having cleaned up the suicide scene with one of the healthcare providers?

A. I talked to Barb Roma, and she told me that I needed to see a counselor, you know, they might be able to help me and to talk to my care provider about it. And I'm going, well, you know—I asked Barb, I go, "well, what can a family doctor do? Yeah, I'm nauseous, you know, I cry on the drop of a dime, but I will get over it, you know."

But it just kept getting worse, and you know, I would go to work and you know, see a kid and you know, and I will just, "hi, hi how are you doing" and then I would just start crying, what's wrong. I'm going, "this isn't good for kids." So I would dart away from people, but then I would be crying and Barb would come in and because her—you know, she could hear me crying in the closet, you know, and I'm trying to be as quiet as possible. And the bathroom is right next to the

closet, you know, where I was crying and she would hear me and want me to come in there and talk to her. And said, “well, have you ever thought about talking to a counselor about it,” you know, and I’m going, “you know I’m strong. I can get through this. It’s no big deal, I can do this.”

But then it just kept getting worse, so I decided to go and tell my physician about it and that’s when she wanted to do the blood work and come back and said “you’re not even in premenopause.” So they put me on Fluoxetine and started with 20 milligrams, and then I was still, I mean, I was kind of calm, but you know, still—so she upped the dose to 40. And that’s what I’ve been on ever since.

(Rothwell Depo., pp. 86-88, CP 58).

In the aftermath of the suicide episode, Ms. Rothwell made several applications for other positions within the school district, including other shifts at Lakeside High School, building custodian at Nine Mile Elementary School, housekeeper at the middle school and as housekeeper at Lake Spokane Elementary School. She was not successful with any of these applications, which would have removed her from the environment which brought back her disturbing memories. (Rothwell Depo. pp. 88-95; CP 58-59).

### Health Care Providers

Q. Do you know, as you sit here, Ms. Rothwell, whether April 24, 2006, was the first time you made mention to either Ms. Carter or Dr. Moran that you had involvement in cleaning up the suicide scene?

A. No.

Q. No you don't.

A. No, I never told them about the suicide. I went in there because I would wake up, and I would be drenched in sweat. I felt tired, you know, I would feel like I couldn't function like I used to. So I went and saw Julie and they thought I was going into post-menopause because of my age, and I—they were giving me shots, I don't know if they were estrogen shots or something like that, and I thought, okay, well that explains what's going on with me, you know.

And then after this, I went in and they drew blood. And then they called me back and said "you're not even in premenopause, so something else is going on." And then that's when I, you know, told them about the suicide and everything, and they said, "well that explains it all." "It's from the"—she said "it's from the depression," you know, "and it's not premenopause."

...

Q. Okay. Why had you not talked to any healthcare provider prior to that time regarding any issues you were having with respect to Skyler's suicide.

A. Because I didn't want to admit that it affected me as it did.

(Rothwell Depo. 84-85; CP 57).

The chart notes of Randi Carter, RN, PA-C at Deer Park Family Care Clinic show that Ms. Rothwell first related to her that she had been stressed by cleaning up after the suicide and after the bomb squad on April 24, 2006. (CP 125). The same notes indicate that Ms. Rothwell had previously been diagnosed with depression, and was taking medication for the depression. (CP 125-126).

On March 5, 2007 Ms. Rothwell first visited John Baumann, licensed Mental Health Counselor, at Group Health. Mr. Baumann's notes relate:

Debbie says she has come to therapy because she suffers intense fears and depression. She calls them mood swings. She says she has had trouble "freaking out" over seemingly innocuous experiences, and that she suffers frequent nightmares, so bad sometimes that she has come into the habit of drinking three or four shots of hard liquor to put herself to sleep. She reports these experiences began shortly exposure to a traumatic experience. She had been assigned two years ago to clean up the human remains of a boy who had shot himself in the head at the school where she works as a custodian. She states she was called into work early to do this work and then, throughout the long ordeal of the cleanup and safety screening of the school building, she was given very little direction as to what had actually happened to the boy and how she could take opportunities to put herself back together emotionally after going through the jarring experience.

Debbie reports that she knew the boy who had killed himself quite well and had taken an active role in trying to encourage him. . . . She felt she could have done something to prevent this boy's suicide and did not. As a result of her feelings of guilt, anxiety, and terror, she suffers insomnia on a regular basis. She suffers nightmares in which she feels someone is compelling her to clean up gory human remains.

(CP 101-102).

His Clinical Formulation states:

Debbie suffers a very clear cut case of PTSD occasioned by having had to clean up some of the remains of a high school student who had shot himself in the entry to the school. She can vividly describe nightmares, preoccupation with the event, and has not been able to grieve the loss or work through the devastating impact of this experience. In part this is because she has been telling herself, "just get over it, don't be weak" and the like, and in part, she was provided relatively little guidance by her employer about how to cope.

(CP 103).

In a report dated March 14, 2007, Mr. Baumann stated:

Debbie reports significant distress attempting to continue work in the same environment on the same shift at which the trauma occurred two years ago. While it is possible that in the long run she may re-acclimate herself to this work environment, it seems unwise to ask her to continue with normal responsibilities in this situation for the time being. Ms. Rothwell is suffering an intense and prolonged

anxiety disorder that requires some sort of accommodation in order to expedite her healing process.

(CP 106).

#### IV.

#### ARGUMENT

##### A. Summary Judgment Standards:

As the court is well aware, in deciding a summary judgment motion, the court must consider all material evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party.

*Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). If reasonable persons considering the evidence and inferences could reach different conclusions, summary judgment should be denied. *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, at 502.

When reviewing an order for summary judgment, the appellant court engages in the same inquiry as the trial court. *Syrov v. Alpine Resources, Inc.*, 122 Wn.2d 544, 548, note 3, 859 P.2d 51 (1993). This court will affirm summary judgment if no genuine issue of any material fact exists and the moving party is entitled to judgment as a matter of law. CR

56(c). All facts and reasonable inferences are considered in the light most favorable to the non-moving party. *Taggart v. State*, 118 Wn. 2d 195, 199, 822 P.2d 243 (1992) (and all questions of law are reviewed *de novo*. *Syrovoy*, 122 Wn.2d at 548 note 3.

*Mountain Park Homeowners Association v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

In the first appeal, the issue was whether the allegations of the complaint stated a claim. The Court of Appeals found that they did. This time around, the issue is whether the sworn statements which were before the court in support of the summary judgment motion are sufficient, with inferences considered in the light most favorable to the nonmoving party, for the case to go to trial. The evidence is, if anything, more overwhelming this time around.

**B. Elements of Industrial Injury:**

**“Single Traumatic Event”**: (Assignments of Error 1, 2, 3, and 4)

An industrial “injury” is defined in the Act as a  
**“sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring**

**from without**, and such physical conditions as result therefrom.” RCW 51.08.100.

In referring to this statute in its Opinion, the Court of Appeals also observed:

**. . . WAC 296-14-300(2) provides that ‘stress resulting from exposure to a “single traumatic event” is treated as an injury under RCW 51.08.100. (Emphasis added). Accordingly, a mental condition can qualify as an industrial injury under RCW 51.08.100, and therefore fall within the coverage of the act, if the condition resulted from a sudden, tangible, and traumatic event that produced an immediate result. RCW 51.08.100, Boeing, 101 Wn. App. At 633-34.**

*Rothwell v. Nine Mile Falls School District*, 149 Wn. App. 771, at 780.

After reviewing the allegations of the complaint, the Court of Appeals held:

**Under these facts, Ms. Rothwell’s mental condition was not the result of exposure to a single traumatic event, or a sudden and tangible happening of a traumatic nature, nor did the trauma produce an immediate and prompt result.**

*Rothwell, supra*, 149 Wn. App., at 781.

The Opinion concluded:

**. . . Ms. Rothwell's PTSD did not result from a single traumatic event; rather, it resulted from a series of incidents over a period of a few days. Furthermore, the trauma did not immediately result in Ms. Rothwell's PTSD. Therefore, we conclude that Ms. Rothwell's PTSD is not an injury or occupational disease under the act and her claims against the district are not barred by the act's exclusive remedy provision.**

*Rothwell, supra*, 149 Wn. App. 771.

The same conclusions should apply at this stage of the case, based on the evidence before the court on summary judgment.

**C. Definition of Terms:**

Since the Court is interpreting a statute and a regulation of the Department of Labor and Industries, definitions of the terms are important. The following are definitions of the words contained in the statute and WAC:

Single: one only, being an individual unit; alone; one which is abstracted from others. . . unitary; detached; individual; affecting only one person; containing only one part, article, condition or covenant.<sup>5</sup>

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<sup>5</sup> *Black's Law Dictionary, 5<sup>th</sup> Ed.*

Traumatic: caused by or resulting from a wound or any external injury; as, traumatic insanity, produced by an injury to or fracture of the skull with consequent pressure on the brain.<sup>6</sup>

Event: the consequence of anything; the issue or outcome of an action as finally determined; that in which an action, operation, or series of operations terminates. Noteworthy happening or occurrence. Something that happens.<sup>7</sup>

Sudden: 1. Happening without previous notice; coming or appearing unexpectedly; not foreseen or prepared for; as a sudden emergency. 2. Done, coming, or taking place quickly or abruptly; hasty. 3. Violent; rash; precipitate; impetuous. 4. Rapidly effective; prompt in effect. *Synonym*: unanticipated, unexpected, unlooked for.<sup>8</sup>

Tangible: having or possessing physical form. Capable of being touched and seen; perceptible to the touch; tactile; palpable; capable of being possessed or realized; readily apprehensible by the mind; real; substantial.<sup>9</sup>

Happening: something that happens; occurrence; incident, event.<sup>10</sup>

Immediate: present; at once; without delay; not deferred by any interval of time.<sup>11</sup>

Prompt: to act immediately, responding on the instant.<sup>12</sup>

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<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Webster's Dictionary, 2<sup>nd</sup> Ed.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

**D. The Facts of This Case Do Not Establish An Industrial Injury:**

Applying these definitions, the sequence of events that began in the early afternoon of December 10, 2004 were not a single traumatic event causing an immediate or prompt result, nor was it a sudden and tangible happening of a traumatic nature. The cleanup itself consumed several hours, and it was preceded and followed by other events extending into the next day and the weeks after the initial request to cleanup was made by Superintendent Green. There was no “single, traumatic event”. Each of these events caused emotional distress to plaintiff. None of these events were sudden. The second cleanup after the bomb squad took most of the night. The disturbing events continued over a considerable period of time. The events continued to disturb Ms. Rothwell for several years.

Randi Carter, PA-C, reported on February 5, 2007:

“Freaked out” and had panic attack when seeing red paint at the sight [sic] of the suicide. Still having sleep difficulties and stress at work.

(CP 131).

Psychologist John Baumann also testified:

(by Mr. McFarland)

Q. I'm looking at page 4 of Ex. 3.

(by John Baumann)

A. All right. This looks like, yeah, her third visit.

Q. Okay, and the date's March 19<sup>th</sup>?

A. Yes.

Q. On that date there appears to have been a lot of discussion between you and Ms. Rothwell regarding her feelings of guilt; is that a fair statement?

A. Yes.

Q. And in reviewing your chart note from March 19<sup>th</sup>, 2007 is or can you better differentiate Ms. Rothwell's feelings of guilt versus symptoms of PTSD? If that question makes sense to you.

A. Yeah, please run that by me again.

Q. Yeah.

A. It's—

Q. Before, I was asking you whether, or I attempted to ask you whether Ms. Rothwell's guilt arose from the PTSD or not, and I'm asking now if there's anything about that chart note that allows you to further expand on that.

A. It's—I, I would have trouble separating the two. Clearly she feels a great deal of guilt. And a person who was well acquainted as she was with the suicide victim would likely feel guilt, whether they had the PTSD diagnosis or not. But this was all part and parcel of the same emotional baggage for her.

Q. In addition to the guilt, she experienced or was experiencing a great deal of grief related to the loss of the young man?

A. Yes.

Q. Is that true?

A. Yes.

Q. And is the grief that she is experiencing

related to the PTSD or is that something separate and apart from the PTSD?

A. I think it's not a diagnostic criteria for PTSD but it was part of the experience for her.

Q. And what I'm trying to get at, and maybe you can't answer this, but if we assume for a moment that Ms. Rothwell was not asked to clean up the suicide scene, and everything else remains equal, would you have expected her to have these strong feelings of guilt that she had?

A. That would be likely, guilt and grief, yes.

Q. Okay, so both guilt and the grief?

A. Correct.

Q. And is it your opinion that because she was asked to clean up the suicide scene, that those feelings of guilt and grief were exacerbated?

A. That's a reasonable conjecture, yeah.

Q. Okay, well is it a conjecture or is it your opinion?

A. Well, okay, yeah, I can support that.

(Baumann Depo., p. 22, ll. 12-25, p. 23. P. 24, ll. 1-12; CP

**E. This is an Action for Emotional Distress:**

It should be remembered that this is an action for damages for negligent and intentional infliction of emotional distress. Intentional infliction of emotional distress is also known as the "tort of outrage." *Grimsby v. Samson*, 83 Wn.2d 52, 530 P.2d 291 (1975). *Grimsby*

adopted *Restatement (Second) of Torts*, Sec. 46, which defines the tort as:

A person who intentionally or recklessly causes emotional distress to another by extreme and outrageous conduct is liable for severe emotional distress [and any bodily harm] resulting from such conduct.

“Severe emotional distress” is defined:

Severe emotional distress is emotional distress so extreme that no reasonable person could be expected to endure it. It must be reasonable and justified under the circumstances, not exaggerated or unreasonable, unless it results from a peculiar incapacity of the plaintiff of which the defendant had knowledge. Mere annoyance, inconvenience, or the embarrassment that normally occurs in a confrontation between parties is not enough. A showing of bodily harm or objective symptoms is not necessary to prove severe emotional distress, although bodily harm or objective symptoms may be considered as evidence of severe emotional distress.

WPI 14.03.04, based on *Restatement (Second) of Torts*, Section 46, comment j; *Woodward v. Steele*, 32 Wn. App. 152, 154-55, 646 P.2d 167 (1982).

“Negligent Infliction of Emotional Distress” requires “objective symptomatology,” which is satisfied if the emotional distress can be medically diagnosed and proved by medical evidence. *Hagel v. McMahon*, 136 Wn.2d 122,

960 P.2d 424 (1998). *Hagel* does not require that medical evidence be the sole proof of the causal link of emotional distress, but is one way of proving it. *Hagel* also held that the objective symptomatology requirement for a claim of infliction of emotional distress may be satisfied by evidence of nightmares, sleep disorders, intrusive memories, fear, anger, or other nonphysical manifestations if these symptoms constitute a diagnosable emotional disorder. *Reid v. Pierce County*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998); *Brower v. Ackerley*, 88 Wn. App. 87, 99, 943 P.2d 1141 (1997). In this case, plaintiff's health care providers diagnosed her with nightmares, depression, sleep disorders, intrusive memories, fear, anger, and "freaking out." Psychologist Baumann stated that those symptoms constitute a diagnosable emotional disorder, namely, PTSD. The tort of outrage does not require objective symptomatology.

If the trial court determines that reasonable minds could differ on whether the conduct of defendant is sufficiently extreme and outrageous as to warrant a

factual determination by the jury, then the case should be submitted to the jury and is not subject to summary judgment. *Birklid v. Boeing Co.*, 127 Wn. 2d 853, 867, 904 P.2d 278 (1999); *Phillips v. Hardwick*, 29 Wn. App. 382, 387, 628 P.2d 506 (1981); *Jackson v. Peoples Federal Credit Union*, 25 Wn. App. 81, 84, 604 P.2d 1025 (1979).

The facts of the case have not changed since it was before the Court of Appeals in 2009. The summary judgment record is much more detailed, but it still does not establish that Debbie Rothwell's mental distress was from a single, traumatic event, or a sudden and tangible happening of a traumatic nature; nor did the happenings produce an immediate and prompt result.

As a matter of law, this action is not barred by the exclusive remedy provisions of the Industrial Insurance Act.

V.

**CONCLUSION**

The order of the Trial Court granting summary judgment of dismissal should be reversed.

Dated this 27<sup>th</sup> day of February, 2012.

Respectfully submitted:

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