IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ANGELA M. OPPE, Appellant, v. THE LAW OFFICES OF SARAH L. ATWOOD, PLLC, a Washington Professional Limited Liability Company; and SARAH L. ATWOOD and ED ATWOOD, and the marital community comprised thereof, Respondents.	)	DIVISION ONE No. 67354-8-I UNPUBLISHED OPINION FILED: October 8, 2012

Dwyer, J. — In order to succeed on a legal malpractice claim, the plaintiff must demonstrate that, but for the attorney's negligence, he or she would have achieved a better result in the underlying litigation. Here, Angela Oppe filed a legal malpractice claim against the Law Offices of Sarah Atwood (Atwood), contending that Atwood had negligently failed to bring an action against Oppe's brothers for intentional infliction of emotional distress. Because Oppe did not demonstrate that, but for Atwood's alleged negligence, she would have prevailed in such an action, the trial court properly dismissed Oppe's legal malpractice claim.

From May 1996 until April 2004, Angela Oppe was the primary caretaker of her elderly mother, Agnes Oppe. During that time, Oppe had an estranged relationship with her two brothers, Michael and Paul Oppe.[1] Oppe would later describe her relationship with her brothers as "abusive." Specifically, Oppe alleged that Michael and his family refused to speak with her and "shunned" her. Her brothers, she asserted, "were condescending, insulting, and never said anything kind or nice to [her]." Oppe also alleged that Michael would verbally threaten her, stating that he was "going to do 'this'"—without indicating what "this" was—and telling Oppe that she would be forced to "do all the work" in caring for Agnes and would "get nothing for it." Oppe believed that her brothers were involved in "a conspiracy and a scheme to take [her] inheritances."

In April 2004, Michael and Paul filed a petition for appointment of guardians and entry of an order of protection of a vulnerable adult (the VAPA petition), alleging that Oppe had mentally abused, exploited, and neglected Agnes and seeking appointment as Agnes's guardians. The petition alleged that Oppe had "allowed Agnes Oppe's medical, physical and mental condition to deteriorate" and had "isolated Agnes Oppe from her sons and other members of her family." It further alleged that Oppe had engaged in "coercion" and "harassment" of their mother and "likely" had "engaged in verbal assaults that may [have] include[d] ridiculing or intimidating Agnes Oppe or yelling at her." In

[1] In order to avoid confusion, Agnes Oppe is referred to herein by her first name. Michael and Paul Oppe are referred to individually by their first names or, collectively, as "the Oppe brothers." Angela Oppe is referred to as "Oppe."

addition, the petition alleged that Oppe had failed to provide the necessary care for their mother, allowing Agnes to suffer from malnutrition and dehydration and refusing to provide Agnes with her eyeglasses and clothing while she resided in a nursing facility. Through the petition, the Oppe brothers also sought an order precluding Oppe from removing Agnes from the nursing facility where she then resided. Michael and Paul had learned of Oppe's plans to move Agnes to the east coast, and they believed that such an action was unwise given their mother's poor health.

Michael's declaration, filed in support of the petition, set forth numerous instances of Oppe's alleged abuse, neglect, exploitation, and isolation of Agnes. In addition, the declaration provided a timeline describing numerous instances in which Michael had been unable to contact his mother and, concerned for her well-being, had contacted authorities requesting welfare checks. Michael described an instance in April 2000 when his mother sounded "very weak and frail" during their telephone call. Three days later, he visited her house, finding her alone and "totally bedridden with no means of getting out of bed and no food or drink available to her." Michael took his mother to the emergency room, and she was admitted to the hospital for three weeks. Hospital records show that Agnes weighed less than 80 pounds when she was admitted to the hospital and that she was treated for malnutrition and dehydration.

Michael's declaration also described two instances in which he contacted

the King County Sheriff's Department requesting that a welfare check on his mother be performed. Following many days during which Michael was unable to reach his mother by telephone, he contacted the sheriff's department on May 7, 2003. Similarly, Michael contacted the sheriff's department to request a welfare check on July 1, 2003. Prior to this second call, Michael had been unable to reach his mother by telephone for many weeks, and Paul had reported to Michael that, when he had attempted to call their mother, Oppe had refused to let Paul speak with Agnes and would not tell Paul whether Agnes was home.

On April 15, 2004, the trial court entered a temporary protection order in the guardianship action, finding that Agnes was a vulnerable adult pursuant to the Vulnerable Adult Protection Act (VAPA), chapter 74.34 RCW. The order precluded Oppe from visiting her mother, who was then residing in a nursing care facility, and suspended Oppe's authorization to act as Agnes's power of attorney. The order also precluded Oppe from removing Agnes from the nursing care facility. The trial court's order did, however, allow Oppe to have telephone contact with her mother. A show cause hearing was originally scheduled for April 29. However, the parties later agreed to a continuance of the hearing to May 14, and the trial court reissued the temporary protection order.

Agnes was admitted to the hospital with pneumonia on April 22, 2004, and Michael and Oppe were notified of their mother's condition. Agnes was released from the hospital a few days later; however, she was readmitted shortly

thereafter when she suffered a stroke. Through their attorney, Michael and Paul presented a modified order for protection that allowed Oppe to visit their mother "at any hospital, nursing home or health care facility in which Agnes Oppe may reside." Oppe's attorney approved the order for entry. After learning of her mother's condition, Oppe, who had been out of town, returned to Seattle on April 29, 2004. Agnes died that afternoon. The guardianship action was thereafter dismissed.

On May 23, 2005, Michael and Paul filed a complaint for the partition of real property, seeking an order directing the sale of real property owned by Oppe, Michael, and Paul as tenants in common following the death of their mother. Attorney Michael Longyear initially represented Oppe in the partition action. Longyear answered the Oppe brothers' complaint without asserting a counterclaim or mentioning the dismissed guardianship action. Unhappy with Longyear's representation of her in the partition action, Oppe contacted Atwood.

On September 15, 2005, Oppe and Atwood entered into two "Professional Services Agreements" (Agreement I and Agreement II). Agreement I stated that Atwood would "[d]efend against" the action for partition of real property filed against Oppe by her brothers. Agreement II, which is at issue in this lawsuit, provided that Atwood would

> (1) Bring a counterclaim against your brothers Michael J. Oppe and Paul J. Oppe either under [the cause number of the partition action] or a new cause number to end harassment, frivolous suits, discovery of a harassing nature, and (2) to address the personal property transferred by your mother during her lifetime

and end your brothers' claims and probate her estate if necessary.

On March 3, 2006, the trial court entered an order directing the sale of the real property. The partition action was dismissed on November 9, 2006, and an order directing the disbursement of funds from the court registry was entered on December 7, 2006. Oppe discharged Atwood as her attorney in mid-2007.

On April 13, 2010, Oppe filed an action for legal malpractice against Atwood, alleging that Atwood had negligently failed to bring an action against Michael and Paul for damages resulting from the brothers' alleged conduct of making false reports of neglect and abuse of Agnes by Oppe to Adult Protective Services (APS) and the King County Sheriff's Department and of filing a "frivolous and materially false" VAPA petition. Oppe's complaint alleged that she had "valid and enforceable" causes of action against Michael and Paul, including claims for "abuse of process, malicious prosecution, and intentional infliction of emotional distress," based upon her brothers' alleged conduct. The complaint further alleged that Atwood had breached her duty of care to Oppe by "failing to file any and all appropriate claims against the Oppe brothers" within the statutory limitation period.

Atwood filed a motion for summary judgment dismissal of Oppe's claim. At the subsequent hearing on the motion, Oppe conceded that she had not had viable causes of action against her brothers for abuse of process or malicious prosecution. Accordingly, Atwood filed an amended motion for summary

judgment, addressing Oppe's sole remaining contention that Atwood was negligent in failing to file an action against the Oppe brothers alleging intentional infliction of emotional distress.

On June 24, 2011, the trial court granted Atwood's motion for summary judgment, determining that Atwood's conduct was not the proximate cause of Oppe's alleged damages because, regardless of Atwood's conduct, Oppe would not have had a viable cause of action against her brothers for intentional infliction of emotional distress. The trial court ruled that the Oppe brothers' alleged conduct was not "extreme and outrageous," as required in order to state a viable claim for intentional infliction of emotional distress.

Oppe appeals.

II

Oppe contends that the trial court erred by dismissing on summary judgment her claim against Atwood for legal malpractice. She asserts that Atwood negligently failed to bring a claim against the Oppe brothers, alleging intentional infliction of emotional distress, within the statutory limitation period. According to Oppe, bringing such an action was within the scope of Atwood's representation as contemplated by Agreement II. However, because Oppe did not demonstrate that, but for Atwood's allegedly negligent conduct, Oppe would have prevailed on such a claim, the trial court properly dismissed the legal malpractice action.

We review de novo a trial court's order granting summary judgment and, in so doing, engage in the same analysis as did the trial court. Boguch v. Landover Corp., 153 Wn. App. 595, 608, 224 P.3d 795 (2009). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). "A material fact is one upon which the outcome of the litigation depends." Barrie v. Hosts of Am., Inc., 94 Wn.2d 640, 642, 618 P.2d 96 (1980). In determining whether a genuine issue of material fact exists, this court considers all facts and inferences in the light most favorable to the nonmoving party. Ashcraft v. Wallingford, 17 Wn. App. 853, 854, 565 P.2d 1224 (1977). "In opposing summary judgment, a party may not rely merely upon allegations or self-serving statements, but must set forth specific facts showing that genuine issues of material fact exist." Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc., 114 Wn. App. 151, 157, 52 P.3d 30 (2002).

To establish a claim for legal malpractice, a plaintiff must demonstrate (1) the existence of an attorney-client relationship giving rise to a duty of care to the client, (2) an act or omission by the attorney in breach of the duty, (3) damages to the client, and (4) proximate causation between the attorney's breach and the damages incurred. Hizey v. Carpenter, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). Thus, "[p]roof only of an attorney's negligence is insufficient for malpractice liability to attach." Boguch, 153 Wn. App. at 611. Rather, in

addition, the "client must show that, if the client's attorney had not committed the alleged malpractice, the client 'would have prevailed or at least would have achieved a better result.'" Boguch, 153 Wn. App. at 611 (quoting Sherry v. Diercks, 29 Wn. App. 433, 438, 628 P.2d 1336 (1981)). In other words, to establish proximate cause in a legal malpractice action, the client must demonstrate that, "but for" the attorney's negligence, the outcome of the underlying litigation would have been more favorable. Daugert v. Pappas, 104 Wn.2d 254, 263, 704 P.2d 600 (1985).

Here, Oppe must demonstrate that, but for Atwood's allegedly negligent failure to bring such an action, she would have prevailed in an action for intentional infliction of emotional distress. Oppe does not do so for two reasons. First, Oppe conceded that she could not have stated a viable claim against her brothers for either malicious prosecution or abuse of process; instead, she attempts to devise a claim for intentional infliction of emotional distress arising primarily from conduct occurring during litigation. However, both the litigation privilege and the statutory immunity provided by RCW 4.24.510 and RCW 74.34.050 would have precluded Oppe from succeeding in such an action. Second, because the Oppe brothers' conduct was not "extreme and outrageous," Oppe could not have stated a viable claim for intentional infliction of emotional distress.

Our Supreme Court has explained the litigation privilege in the context of

a defamation action: "Allegedly libelous statements, spoken or written by a party or counsel in the course of a judicial proceeding, are absolutely privileged if they are pertinent or material to the redress or relief sought, whether or not the statements are legally sufficient to obtain that relief." McNeal v. Allen, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980). This privilege, as it pertains to parties to judicial proceedings, "is based upon the public interest in according to all men [and women] the utmost freedom of access to the courts of justice for the settlement of their private disputes." McNeal, 95 Wn.2d at 267. The privilege is not limited to defamation actions. Rather, we have applied the privilege to bar tort claims of interference with a business relationship, outrage, infliction of emotional distress, and civil conspiracy. See Jeckle v. Crotty, 120 Wn. App. 374, 386, 85 P.3d 931 (2004).

Here, Oppe alleges that her brothers' conduct in filing the VAPA petition—and, presumably, the declaration of Michael in support of the petition, which Oppe asserts was "baseless, false, and misleading"—caused the emotional distress for which she now seeks to recover damages. But "allegations in pleadings are absolutely privileged and cannot form the basis for a damage action." McNeal, 95 Wn.2d at 267. Both the VAPA petition and Michael's declaration are undoubtedly "pertinent or material to the redress or relief sought." McNeal, 95 Wn.2d at 267. Indeed, they form the basis for the VAPA proceeding itself. Thus, the litigation privilege would have barred any tort

claim arising from such conduct.

In addition, the statutory immunity provided by RCW 4.24.510 and RCW 74.34.050 would have precluded Oppe from prevailing in an action for intentional infliction of emotional distress against her brothers. RCW 4.24.510 grants immunity from civil liability to a person who communicates a complaint or information to any branch or agency of federal, state, or local government. Such immunity extends to "claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization." RCW 4.24.510. In enacting this statute, our legislature recognized that "[i]nformation provided by citizens concerning potential wrongdoing is vital to effective law enforcement" and that "the threat of a civil action for damages can act as a deterrent to citizens who wish to report" such information. RCW 4.24.500. Thus, the legislature sought "to protect individuals who make good-faith reports to appropriate governmental bodies." RCW 4.24.500.

We have determined that RCW 4.24.510 grants immunity from civil liability for tort claims arising from communication with law enforcement agencies. Dang v. Ehredt, 95 Wn. App. 670, 681-85, 977 P.2d 29 (1999). Here, the alleged telephone calls to APS and the sheriff's department regarded a matter "reasonably of concern" to those agencies—specifically, the welfare of an elderly citizen. Accordingly, the Oppe brothers would be immune from tort

liability arising from such communications, and Oppe could not have recovered on a claim premised upon that conduct.

Similarly, the statutory immunity provision set forth in the VAPA would have precluded Oppe from succeeding on an intentional infliction of emotional distress claim based upon her brothers' conduct in filing the VAPA petition. RCW 74.34.050(1) provides: "A person participating in good faith in making a report under this chapter or testifying about alleged abuse, neglect, abandonment, financial exploitation, or self-neglect of a vulnerable adult in a judicial or administrative proceeding under this chapter is immune from liability resulting from the report or testimony." Oppe contends that her brothers are not entitled to immunity because they did not file the VAPA petition in good faith. However, the record contains no evidence supporting this contention. RCW 74.34.050 would have provided the Oppe brothers with immunity from liability arising from the assertions set forth in Michael's declaration in support of the VAPA petition.

In addition, Oppe's legal malpractice claim was properly dismissed because Oppe did not demonstrate that, but for Atwood's allegedly negligent failure to bring an action, Oppe could have proven the elements of intentional infliction of emotional distress. The elements of this tort, also called outrage, "are (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional

distress." Rice v. Janovich, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987). "Liability exists 'only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" Grimsby v. Samson, 85 Wn.2d 52, 59, 530 P.2d 291 (1975) (emphasis omitted) (quoting Restatement (Second) of Torts § 46 cmt. d, at 73 (1965)). "The law intervenes only where the distress inflicted is so severe that no reasonable person could be expected to endure it." Saldivar v. Momah, 145 Wn. App. 365, 390, 186 P.3d 1117 (2008). In other words, the tort "'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.'" Grimsby, 85 Wn.2d at 59 (quoting Restatement (Second) of Torts § 46 cmt. d, at 73). Although the elements of outrage "are generally factual questions for the jury, a trial court faced with a summary judgment motion must first determine whether reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability." Strong v. Terrell, 147 Wn. App. 376, 385, 195 P.3d 977 (2008).

Oppe asserts that her brothers engaged in "extreme and outrageous conduct" (1) by making "false and unsubstantiated reports of abuse" to APS and to the King County Sheriff's Department and (2) by "malicious[ly]" filing the VAPA petition "for the specific purpose of perpetuating [their] abusive and harassing conduct against [Oppe]." However, the record does not support Oppe's

interpretation of her brothers' motivations. The record indicates that Michael twice contacted the sheriff's department in 2003 when he could not reach his mother by telephone and became concerned for her well-being. Moreover, contrary to Oppe's contention that her brothers reported "abuse" to the authorities, Michael stated in his deposition that he did not report any concerns regarding Oppe's care of Agnes when requesting these welfare checks; rather, his concern was locating his mother.

Similarly, the record does not demonstrate that the Oppe brothers filed the VAPA petition in order to "abuse and harass" Oppe. Rather, hospital records indicate that the Oppe brothers' concerns regarding their mother were warranted. One such record, of Agnes's admission to the hospital when Michael found her bedridden in her home, indicates that Agnes was suffering from malnutrition and dehydration. Another record corroborates Michael's declaration, stating that Oppe refused to bring clothing needed by Agnes to the nursing care facility and that Oppe removed clothing from the facility that Michael had brought for his mother. Moreover, hospital records demonstrate that hospital personnel, not just the Oppe brothers, believed that Oppe's plan to move her mother to the east coast was unwise, given Agnes's condition.

In addition, and perhaps most telling, the trial court's order granting the Oppe brothers' VAPA petition suggests that the petition did not consist of baseless allegations intended to harass and abuse Oppe. Indeed, the trial court

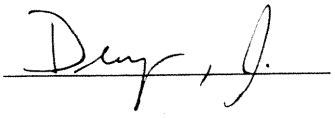
found that the relief requested in the petition was "necessary for the safety, protection and well-being of Agnes Oppe" and that "[b]ecause of the threat of further harm, there [was] good cause for [the court's] order to be entered without notice to [Oppe]."

Moreover, even had Michael and Paul contacted authorities for welfare checks and filed the VAPA petition in order to "harass and abuse" Oppe, such conduct would not constitute "extreme and outrageous conduct" as required in order to state a viable claim for outrage. We have previously rejected a claim that malicious allegations of abuse are sufficient to sustain a claim for intentional infliction of emotional distress. Saldivar, 145 Wn. App. at 389-91. There, Saldivar filed a lawsuit against her physician, alleging that he had sexually abused her while she was receiving medical treatment. Saldivar, 145 Wn. App. at 374-75. Her physician counterclaimed, alleging, among other claims, intentional infliction of emotional distress. Saldivar, 145 Wn. App. at 375. We have reversed the trial court's determination that the Saldivars had committed the tort, holding that, "[f]iling suit alleging sexual abuse by a physician, even with malicious intent," did "not rise to the level of outrageous conduct." Saldivar, 145 Wn. App. at 390. We concluded that the physician could not "support a claim of outrage merely by accusing [his patient] of fabricating her claims to obtain money from him 'under false pretenses.'" Saldivar, 145 Wn. App. at 390. Similarly, here, even if the evidence supported Oppe's contention that her

brothers' conduct in requesting welfare checks of their mother and filing the VAPA petition was malicious, such conduct is not sufficiently extreme to result in liability.

In sum, Oppe did not demonstrate that, but for Atwood's allegedly negligent conduct, she would have prevailed in an action for intentional infliction of emotional distress against her brothers. The litigation privilege and statutory immunity would have precluded Oppe from succeeding in such an action. Moreover, because the Oppe brothers' conduct was not "extreme and outrageous," Oppe could not have stated a viable claim for intentional infliction of emotional distress. Thus, Atwood's allegedly negligent conduct is not the proximate cause of Oppe's purported damages. Accordingly, the trial court properly dismissed Oppe's legal malpractice claim.[2]

Affirmed.



We concur:

[2] Although Oppe's claim against Atwood is unmeritorious, it does not meet the standard set forth in Streater v. White, 26 Wn. App. 430, 435, 613 P.2d 187 (1980), for a frivolous appeal. Accordingly, we deny Atwood's request for an award of attorney fees on appeal premised upon her assertion that Oppe's appeal is frivolous.

Schindler, J. Grosse, J.