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September 30, 2003

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LEWIS COUNTY  
RISK MANAGEMENT

David Ponzoha, Clerk  
Court of Appeals  
State of Washington, Div. II  
950 Broadway, Suite 300, M/S TB-06  
Tacoma, WA 98402-4454

**Re: *Bardsley, et al. v. Pierce County Fire Dist., et al.***  
**Lewis County Superior Court No. 02-2-00494-4**  
**Court of Appeals No. 30882-7-II**

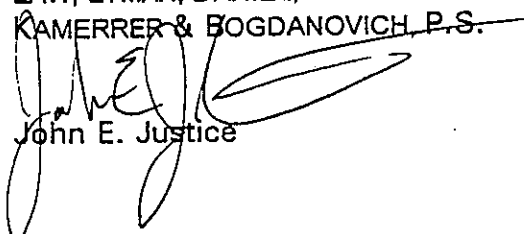
Dear Clerk:

Enclosed is the original and one copy of appellant's Motion for Discretionary Review, and a Declaration of Filing & Service.

Thank you.

Very truly yours,

LAW, LYMAN, DANIEL,  
KAMERRER & BOGDANOVICH, P.S.

  
John E. Justice

JEJ:ta  
Enclosures  
cc/encs:

Adam Berger  
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L. Michael Golden  
Harry Green  
Sheriff John McCroskey  
Susan Looker

**NO. 30882-7-II**

**COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II**

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**DENNIS BARDSLEY, JUDY MACIAS, and LINDA POLLICK,**

**Respondents,**

**v.**

**PIERCE COUNTY FIRE DISTRICT 23, a POLITICAL  
SUBDIVISION OF THE State of Washington, CENTRAL PIERCE  
FIRE AND RESCUE DISTRICT 6, a political subdivision of the  
State of Washington, and LEWIS COUNTY, a political  
subdivision of the State of Washington,**

**Appellants.**

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**On Appeal from Lewis County Superior Court  
Honorable Richard L. Brosey  
Cause No. 02-2-00494-4**

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**MOTION FOR DISCRETIONARY REVIEW**

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## **I. IDENTITY OF PETITIONER**

Lewis County, a defendant in the trial court, is the petitioner herein.

## **II. DECISION BELOW**

Lewis County seeks review of the portion of the Order Granting in Part and Denying in Part Defendant Lewis County's Motion for Summary Judgment, which denied the motion with respect to the plaintiff Dennis Bardsley's cause of action for intentional infliction of emotional distress. The Order was entered on September 5, 2003 by the Honorable Richard L. Brosey of the Lewis County Superior Court. *Appendix*, pp. 1-4.

## **III. ISSUE PRESENTED FOR REVIEW**

Did the trial court commit obvious error which would render further proceedings useless in denying Lewis County's motion for summary judgment regarding the plaintiff Dennis Bardsley's cause of action for intentional infliction of emotional distress?

## **IV. STATEMENT OF THE CASE**

On the evening of October 2, 2000, Charles Bardsley phoned 911 requesting immediate medical assistance. *Appendix*

7, ¶ 4.2. Mr. Bardsley lived in a remote and rural area of Lewis County, with his wife who suffered from advanced Alzheimer's. *Appendix 6-7, ¶ 4.1.* The Bardsleys' home is located within a remote area served by Pierce County Fire District 23 (PCFD 23), and a basic life support (BLS) unit from PCFD 23 was dispatched in response to Mr. Bardsley's 911 call. *Appendix 7, ¶¶ 4.2 & 4.3; Appendix 52, ¶14.*

When the BLS unit arrived, they immediately placed Mr. Bardsley in the back of the unit so that he could be transported to rendezvous with an Advanced Life Support (ALS) unit from Central Pierce Fire and Rescue Department 6 (CPFRD 6). *Appendix 7, ¶ 4.3.* An ALS unit can provide a higher level of medical attention than a BLS unit, which is staffed only with EMT's. *Appendix 16, pg. 75, lines 11-18.*

By arrangement, the BLS unit met the ALS unit at the Nisqually Lodge parking lot, located a short distance from the Bardsleys' residence. *Appendix 7, ¶ 4.3.* The Nisqually Lodge is located in Pierce County. *Appendix 50-51, ¶ 5.* While Mr. Bardsley was being transferred from the BLS unit into the ALS

unit, he went into cardiopulmonary arrest. Attempts to resuscitate him failed and he was pronounced dead in the back of the ALS unit at approximately 12:24 a.m.. *Appendix 7, ¶ 4.3.*

PCFD 23 Captain James Gregory and CPFRD 6 Captain Robert Hudspeth jointly decided at that point to return to the Bardsleys' residence because of the fact that Mrs. Bardsley was believed to be home alone, and suffering from advanced Alzheimers. *Appendix 52, ¶ 16.* Dispatch was advised of this decision and a Lewis County Deputy Sheriff was sent to the Bardsleys' residence to meet the returning medical personnel. *Appendix 21, pg. 19, line 2 - pg. 21, line 5.*

Deputy Sheriff Eric Weinreich was dispatched to the scene and when he arrived at approximately 1:30 a.m., the ALS and BLS units were already there. *Appendix 22, pg. 25, lines 23-25.* Mr. Bardsley's remains were still in the back of the medic unit at that point. *Appendix 23, pg. 29, lines 23-25.* Deputy Weinreich had a question over the jurisdiction of Lewis County Sheriff's Department investigating a death that occurred in Pierce County. *Appendix 24, pg. 33, lines 9-24.* After consulting with his

sergeant, however, Deputy Weinreich was instructed to investigate the circumstances leading to Mr. Bardsley's death. *Appendix 25*, pg. 34, lines 3-8.

Approximately forty-five minutes after arriving, Deputy Weinreich was informed by the BLS and ALS personnel that they wished to return to service. *Appendix 26*, pg. 39, line 13 - pg. 41, line 20. At that time, Deputy Weinreich did not believe he had the authority to order medical personnel from another jurisdiction to remain at the scene. *Appendix 22*, pg. 23, line 17-21.

A discussion occurred regarding what to do with Mr. Bardsley's remains. While there is a dispute about who participated in this discussion, the end result was that the medical personnel removed Mr. Bardsley's remains from the back of the ALS unit and placed it on the ground, on a backboard, fully covered with a blanket and straps. *Appendix 54*, ¶ 23. As the Captain/Paramedic from Central Pierce Fire and Rescue District 6 (the ALS Unit) described it:

Because of Mrs. Bardsley's [Alzheimer's] condition, we wanted to eliminate any chance that Mr. Bardsley would see her husband in that state. The Bardsley residence was approximately 650 square feet and

had only one entrance that was visible that evening. There was no garage or other structure on the property that could be used. We then covered Mr. Bardsley, and with the help of at least four emergency personnel, removed Mr. Bardsley from the Medic Unit, on a backboard, and placed him on the property next to the large gazebo in the front yard of the home. At the time of his death, Mr. Bardsley weighed 215 pounds. The Deputy Sheriff then repositioned his vehicle in such a way as to block the view of that area from the rest of the cul-de-sac and roadway. We left the scene in the Medic Unit at 2:08 a.m. *Id.*

Dispatch had earlier notified the Lewis County Coroner to have someone respond to the Bardsley residence at the request of the Deputy Sheriff. *Appendix 29*, pg. 54, lines 8-16. Deputy Weinreich watched over Mr. Bardsley's remains while awaiting the arrival of the Deputy Coroner. *Appendix 27*, pg. 48, line 11 - pg. 49, line 14.

A Lewis County Deputy Coroner arrived at the residence in his private passenger vehicle at approximately 3:30 a.m.. *Appendix 28*, pg. 50, lines 9-12. The Deputy Coroner told Deputy Weinreich it was o.k. for him to leave and that he would watch over the body until the arrival of a transport vehicle from Brown's Mortuary to remove Mr. Bardsley's remains. *Appendix*

28, pg. 52, lines 7-23. Deputy Weinreich left the Bardsleys' residence at approximately 4 a.m. *Appendix 30*, pg. 84, lines 18-22. As he was leaving the scene he encountered Dennis Bardsley, and his wife Cindy. *Appendix 29*, pg. 55, lines 15-31. Deputy Weinreich expressed his condolences for the death of Mr. Bardsley and told them that the deputy coroner was at the house. *Id.*

When Dennis Bardsley arrived at this parents' residence he spoke with the Deputy Coroner, Ricki Gray, who told him that a Mortuary Service was en route to transport Mr. Bardsley's remains. *Appendix 8*, ¶ 4.8. Mr. Bardsley's remains were removed by Brown's Mortuary Service at approximately 7:30 a.m.. *Appendix 48*, ¶¶ 4&5.

Lewis County does not have a vehicle for transporting bodies. *Appendix 45*, ¶ 3. Human remains can only be transported in vehicles licensed and approved for that purpose. *Id.* Because it does not have such a vehicle, Lewis County has a verbal agreement with area mortuaries, which rotates on a monthly basis, to transport the remains of persons who die within the County. *Id.* When a mortuary is called upon to do a transport,

it charges Lewis County a fee for that service. *Id.*

On the night in question, the mortuary on call was Brown's Mortuary Service in Chehalis. *Appendix 47, ¶¶ 2-5.* Tim Berg, the funeral director for Brown's at the time, was contacted by phone at 4:10 a.m., to retrieve the remains of Charles Bardsley from his residence for the Lewis County Coroner's Office. *Id.* He left his residence at approximately 4:30 a.m. to retrieve the transport vehicle from Brown's headquarters in Chehalis. *Id.* He picked up the transport vehicle and then drove to pick up an assistant, Jim Wheeler, so that he could accompany him. It is customary to bring two people on a home transport because the body may need to be carried up stairs. *Id.*

Mr. Berg and Mr. Wheeler departed to the Bardsleys' residence at approximately 5:30 to 5:45 a.m. They encountered foggy conditions, which delayed their travel. They eventually arrived at the Bardsleys at approximately 7:15 a.m. They loaded Mr. Bardsley's remains into the Mortuary vehicle and departed at approximately 7:30 a.m. *Id.*

Lewis County moved for summary judgment on all of the

plaintiffs' claims. *Appendix 1*. The Court granted the motion regarding the plaintiffs' claims of Negligent Infliction of Emotional Distress/Mistreatment of a Dead Body on behalf of the plaintiff's Dennis Bardsley, Linda Pollick and Judy Macias. *Appendix 3*. The Court denied summary judgment on the sole remaining claim, for intentional infliction of emotional distress on behalf of Dennis Bardsley. *Id.*

At the hearing on the oral argument on the summary judgment motion, the following colloquy occurred:

THE COURT: You're not answering my question. Exactly what did the coroner do on which you're predicating negligence on the part of the coroner? Exactly what was the coroner supposed to do that he or she didn't do?

[Plaintiff's Attorney]: I think the coroner was left with no options, so I don't think there was any negligence on the part of the coroner given the circumstance that the deputy coroner was confronted with.

*Appendix 73*, lines 16-25.

The only Lewis County employee that was allegedly at the

scene, other than the coroner, was Deputy Sheriff Eric Weinreich. *Appendix 5-10*. Thus, his conduct is the sole basis upon which Dennis Bardsley can predicate his claim for intentional infliction of emotional distress against Lewis County. Hence, the focus of this motion for discretionary review is whether Deputy Weinreich's conduct can support claim for intentional infliction of emotional distress.

## V. ARGUMENT

### A. Standards for Accepting Review Pursuant to RAP 2.3.

A denial of summary judgment is subject to discretionary review pursuant to RAP 2.3(b)(1), "[i]f the superior court has committed an obvious error which would render further proceedings useless." *Douchette v. Bethel School District*, 117 Wn.2d 805, 808, 818 P.2d 1362 (1991) ("Review may also be granted to avoid a useless trial."), *citing*, *Sea-Pac Co. v. United Food & Comm'l Workers Local Union 44*, 103 Wn.2d 800, 802, 699 P.2d 217 (1985). *See also*, *Shannon v. Dep't of Corrections*, 110 Wn. App. 366, 368, 40 P.3d 1200 (2002).

Summary judgment "is proper if the pleadings and affidavits

show there is no genuine issue as to any material fact and the nonmoving party is entitled to judgment as a matter of law.” *Douchette*, 117 Wn.2d at 809. In reviewing a motion for summary judgment, the Court of Appeals “takes the position of the trial court, assuming facts most favorable to the nonmoving party.” *Id.* at 809.

In this case, the trial court committed an obvious error which would render further proceedings useless, when it denied Lewis County’s motion for summary judgment in part, regarding Dennis Bardsley’s claim for intentional infliction of emotional distress. Review of this decision would avoid a useless trial.

**B. As a matter of law, Dennis Bardsley cannot establish a claim for intentional infliction of emotional distress based on the alleged conduct of the Lewis County Sheriff’s Deputy.**

The elements of a claim of intentional infliction of emotional distress, otherwise known as a claim for 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. *Dicomes v. State*, 113 Wn.2d 612, 782 P.2d 1002. The conduct in question must be “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 society." *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975).

This tort "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Grimsby*, 85 Wn.2d at 59. "[I]t is not enough that a 'defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.'" *Id.*

The question of whether conduct is sufficiently outrageous is ordinarily for the jury, but it is initially for the court to determine if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability. *Phillips v. Hardwick*, 29 Wn. App. 382, 387, 628 P.2d 506 (1981). Dismissal of a claim of outrage is appropriate if the court determines that reasonable minds could not differ as to whether the conduct was extreme and

outrageous. *Dicomes*, 113 Wn.2d at 630. *See also, Jackson v. Peoples Fed. Credit Union*, 25 Wn. App. 81, 84, 604 P.2d 1025 (1979) (trial court must make an initial determination as to whether the conduct may reasonably be regarded as extreme and outrageous, thus warranting a factual determination by the jury.)

In *Phillips v. Hardwick*, *supra*, 29 Wn. App. at 388, the Court set forth the following factors to use in determining whether a claim for outrage should go to a jury: (a) the position the defendants occupied; (b) whether the plaintiff was peculiarly susceptible to emotional distress, and if the defendants knew this fact; (c) whether the defendants' conduct may have been privileged under the circumstances; (d) 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 (e) whether the defendants were aware that there was a high probability that their conduct would cause severe emotional distress, and they consciously disregarded it.

A review of Washington cases involving failed claims for

outrage illustrates the extreme degree of conduct necessary to proceed to trial on a claim for outrage:

In *Spurrell v. Block*, 40 Wn. App. 854, 701 P.2d 529 (1985), the Court held allegations that the defendants erroneously removed the plaintiff's children from their home and placed them in temporary protective custody for thirty hours did not "come anywhere near" the elements of outrage.

In *Robel V. Roundup Corporation, d/b/a Fred Meyer, Inc.*, 103 Wn. App. 75, 84, 10 P.3d 1104 (2000), the plaintiff alleged that her co-workers, "and perhaps even her supervisors, subjected her to rough, insulting language and other indignities" including calling her a "f-ing b---" a "liar" and much worse. The Court held, that this conduct "was not so extreme and outrageous as to be regarded as atrocious or intolerable. As a matter of law, reasonable minds could not differ on whether the conduct was so extreme as to result in liability." *Id.* at 90.

In *Sedlacek V. Hillis*, 104 Wn. App. 1, 25, 3 P.3d 767 (2000), the Court held that the defendants' acts of terminating the plaintiff and her husband's employment as apartment managers

and ordering them to vacate their apartment of seven years, within three days, with the knowledge that the plaintiff's husband was suffering a debilitating illness may have been "unnecessarily harsh" but did not rise to the level of outrage.

In *Keates v. Vancouver*, 73 Wn. App. 257, 264-65, 869 P.2d 88 (1994), the Court upheld summary judgment in a claim for outrage where the plaintiff alleged that he was subjected to a seven-hour interrogation by police following his wife's murder, during which one of the interrogator's screamed in his face that he believed the plaintiff had "murdered" his wife. Police later arrested a neighbor for the crime and he was convicted.

These cases establish that negligent or patently unreasonable conduct will not come anywhere near supporting a claim for outrage as a matter of law. *See, also Dicomes*, 113 Wn.2d at 630 (intentional preparation of a false report for the purpose of humiliating and terminating plaintiff did not constitute outrage); *Hurst v. Farmer*, 40 Wn. App. 116, 118, 697 P.2d 280, review denied, 103 Wn.2d 1038 (1985) (informing plaintiff he was being terminated for sexual harassment did not constitute the

tort of outrage); *Guffey v. State*, 103 Wn.2d 144, 146, 690 P.2d 1163 (1984) (Trooper pointing gun at person erroneously believed to be a wanted felon did not “come anywhere near” a claim of outrage.); *Banks v. Nordstrom, Inc.*, 57 Wn. App. 251, 263, 787 P.2d 263 (1990) (Failure to inform police that person arrested for shoplifting was wrong person, despite knowledge of this fact, until after person was booked, fingerprinted and arraigned, was not outrageous.)

On the contrary, the conduct in question must not only be extreme, but must be done **intentionally or recklessly to inflict emotional distress upon the plaintiff**. See, e.g. *Brower v. Ackerley*, 88 Wn. App. 87, 943 P.2d 1141 (1997) (Threats of severe physical harm over the phone.); *Kloepfel V. Bokor*, 149 Wn.2d 192, 66 P.3d 630 (2003) (Harassing phone calls and felony stalking.); *Seaman v. Karr*, 114 Wn. App. 665, 59 P.3d 701 (2002) (Brutal physical and mental mistreatment of plaintiffs by police investigating a murder *after* substantial evidence that plaintiff’s were not involved in crime.)

In sum, in evaluating an outrage claim, a trial court must

make an initial determination: Is the alleged conduct extreme and outrageous and was emotional distress intentionally or recklessly inflicted upon the plaintiff? If no reasonable juror could find in the affirmative, based on the alleged conduct involved, then summary judgment should be granted.

In this case the only conduct that may be considered by the jury in evaluating Dennis Bardsley's claim for outrage against Lewis County is that of Deputy Sheriff Eric Weinreich. The plaintiffs' attorney admitted at the summary judgment hearing that there was no "negligence on the part of the coroner given the circumstance that the deputy coroner was confronted with." *Appendix 73*, lines 16-25.

With respect to Deputy Weinreich's conduct, the evidence establishes the following:

1. Deputy Weinreich was dispatched to the Bardsley residence after the medical aid personnel independently decided to bring Mr. Bardsley's remains back to his house.
2. When Deputy Weinreich arrived, the aid personnel were already there.

3. After a period of time, the medical aid personnel informed Deputy Weinreich that they wanted to return to service. At the time, Deputy Weinreich did not believe he had the authority to order them to remain at the scene.

4. Lewis County does not have a vehicle to transport bodies, and relies on local mortuary companies for this service. The transport vehicle from the mortuary service had not arrived.

5. The medical aid personnel discussed various options regarding what to do with Mr. Bardsley's remains until the transport vehicle arrived. They decided that it would not be appropriate to bring Mr. Bardsley's remains back inside his residence because his wife was present. She suffered from Alzheimer's and was likely to become upset at the site of her husband's body.

6. After weighing their options, the medical aid personnel decided to remove Mr. Bardsley's remains and place them on the ground, on a backboard, covered with a blanket and straps. Deputy Weinreich did not assist with this process.

7. After the medical aid personnel departed, Deputy Weinreich moved his patrol vehicle beside Mr. Bardsley's remains to block them from view of anyone who might happen upon the scene. The Bardsley's lived in a remote area, on a cul de sac, and it was the middle of the night.

8. Deputy Weinreich watched over Mr. Bardsley's remains until the Lewis County Deputy Coroner arrived to relieve him. Deputy Weinreich left the Bardsley residence and encountered Dennis Bardsley as he was driving out of the neighborhood. He expressed his condolences and told him the Deputy Coroner was at his parent's residence.

The foregoing is the sum total of Deputy Weinreich's involvement in the events of this case. Even when viewed in a light most favorable to the plaintiff, there is no hint that Deputy Weinreich acted outrageously at any time, or that he intended to inflict emotional distress on Dennis Bardsley.

On the contrary, Deputy Weinreich was responding to a situation that was unusual and unprecedented. The medical aid personnel removed Mr. Bardsley's body and placed it on the


ground so that they could return to service. Deputy Weinreich had no way to transport the body himself, or even to move it if he wanted to. He did the only thing he could do, which was watch over Mr. Bardsley's remains until relieved. He then offered words of comfort to Dennis Bardsley during their extremely brief contact. No reasonable juror could find that this conduct was sufficiently extreme and outrageous to warrant a jury trial on this claim. No reasonable juror could find that Deputy Weinreich intended to inflict emotional distress upon Dennis Bardsley.

#### VI. CONCLUSION

Lewis County, the petitioner herein, seeks review and reversal of the trial court's denial of summary judgment on Dennis Bardsley's claim for intentional infliction of emotional distress.

DATED this 30<sup>th</sup> day of September, 2003.

LAW, LYMAN, DANIEL,  
KAMERRER & BOGDANOVICH, P.S.

  
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**Re: *Bardsley, Macias & Pollick v. Lewis County, et al.***

Dear Susan:

Enclosed please find a copy of a letter from the Court of Appeals indicating that the Court has granted my motion to withdraw the notice of discretionary review. That's a long-winded way of saying that this case can now be closed. As always, it was a pleasure working with you and the County in defending this matter.

Sincerely,

LAW, LYMAN, DANIEL,  
KAMERRER & BOGDANOVICH, P.S.

John E. Justice

JEJ:ta  
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cc w/ enc.: L. Michael Golden  
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General Orders, Calendar Dates, Issue Summaries, and General Information at <http://www.courts.wa.gov/courts>

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CASE #: 30882-7-II  
Lewis County, Petitioner v. Dennis Bardsley, et al, Respondents

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LAW, LYMAN, DANIEL  
KAMERRER & BOGDANOVICH

Counsel:

The action indicated below was taken in the above-entitled case.

**A RULING SIGNED BY COMMISSIONER SCHMIDT:**

Petitioner's motion to withdraw notice of discretionary review is granted. The notice of discretionary review is hereby closed.

Very truly yours,

David C. Ponzoha  
Court Clerk