

No.: 67479-0

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JOSEPH KING, M.D. and HOLLY KING, husband and wife and the marital community comprised thereof, and WJK, LJK, and CJMK, minor children by and through their guardians, JOSEPH KING and HOLLY KING, Appellants/Plaintiffs

v.

MICHAEL EMERIC MOCKOVAK, Respondent/Defendant.

APPELLANTS' REPLY BRIEF

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DIVISION I
2012 MAR 22 PM 4:31

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I. INTRODUCTION

Defendant, here, as below, relies upon a series of technical road blocks to continue a campaign of injury directed against his former business partner. The appeal is untimely, he says, but the Civil Rules and the case law are against him. The appeal from the trial court's July 13, 2011, order was unquestionably timely, and Plaintiffs' notice of appeal properly brings up the trial court's June 8, 2011, order for review as well.

The trial court correctly dismissed Plaintiffs' complaint under CR 12(b)(6) he says, but again, he relies on the finest technicalities that ignore the fact that he raised these issues below on a CR 12(b)(6) motion, which is only proper if he establishes beyond a doubt that Plaintiffs can prove no set of facts, consistent with the complaint, that would entitle them to relief. The case law shows that Plaintiffs can prove facts that would entitle them to relief. Defendant's attempt to avoid the tort consequences of his murder plot can, and should, be rejected.

II. ARGUMENT

A. Plaintiffs' Appeal Is Timely and the Scope of Review Includes Both Orders.

In his effort to support the most technical of interpretations of the civil rules, Defendant glosses over the fact that Plaintiffs filed their motion for leave to amend within the time period required for post-judgment motions, and the effect of the trial court's July 13 order was a ruling on

one of those post-judgment motions.¹ Under the rationale of *Structurals N.W., Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 658 P.2d 679 (1983), Plaintiffs’ motion for leave to amend should be treated as one of these motions, and should result in the appeal being timely as to both appealed orders.

Defendant claims that Plaintiffs are precluded from making this “equivalency” argument because they are raising it for the first time on appeal. This argument is nonsensical, and another appeal to the hypertechnical: of course Plaintiffs raise this argument for the first time on appeal. The argument is raised in the context of whether or not the appeal is timely. The issue of whether the appeal is timely was not before the trial court, and Defendant cites no authority for the proposition that an appellant must anticipate, at the trial court level, the arguments that it might make at the appellate level if the appellate court’s jurisdiction is questioned, then make those arguments to the trial court in a different context in order to preserve their use when appellate jurisdiction is challenged. RAP 2.5(a) states that this Court “may refuse to review any

¹ This is only the first of Defendant’s technicalities: Plaintiffs’ motion was the functional equivalent of a motion for reconsideration, filed within the time provided by the rule. Defendant’s objection is based upon the fact that the pleading does not say “motion for reconsideration.” Opp. at 14-15. The court, however, clearly understood it as such as his order – the order appealed from here – clarifies his earlier order to make clear his view, erroneous as it turns out, that his original order did not contemplate leave to amend, something, again, that he understood Plaintiffs had requested. *See* CP 298-99.

claim of error which was not raised in the trial court.” Since an argument regarding timeliness of appeal could not, by definition, be raised in the trial court, Defendant’s attempt to discount Plaintiffs’ timeliness argument on this basis fails.

Defendant also argues that Plaintiffs’ non-appeal of the August 9 order precludes their arguments here. The August 9 order simply denied Plaintiffs’ motion to amend. Since the trial court had already found that the entire case had been dismissed and that he had not granted leave to amend, the August 9 order contained no new rulings or findings that Plaintiffs desired or needed to appeal in order to make the assignments of error they have made here. Rather, it was the trial court’s July 13 order, which indicated that the trial court did not grant Plaintiffs’ earlier request for leave to amend and clarified that its June 8 order was intended to be a dismissal of the entire case without leave that contained the rulings and findings that Plaintiffs now appeal. Since the trial court had ruled that the entire case was dismissed, the August 9 order contained nothing that the Plaintiffs could appeal to raise the assignments of error that they assert here.

DeTray v. City of Olympia, 121 Wn. App. 777, 90 P.3d 1116 (2004), does not require a contrary result. *DeTray* involved two successive land use petitions. Applying the doctrine of res judicata, the

DeTray court found that the appellant's failure to appeal the first permit decision barred his later attempt to appeal a second permit decision that had been made on his amended application. 121 Wn. App. at 792. Here, by contrast, there are not two cases or applications, the latter of which seeks to appeal decisions made in the former. Here we have one matter, and Plaintiffs have appealed from the trial court orders in that matter with which they take issue. *DeTray* is inapplicable.

Defendant's claims to the contrary notwithstanding, it is the *Structurals* case that controls here. There the court held that "[w]hile the stipulation allowing entry of the amended judgment was technically not a motion for amended judgment brought under CR 59, we note that in all practical effect the result is the same as if such a motion had been made and granted." 33 Wn. App. at 714. The Court noted that the stipulation was entered within the time period for a post-judgment motion, and that the rules "are designed to 'allow some flexibility in order to avoid harsh results'; substance is preferred over form." *Id.* (quoting *Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 639 P.2d 732 (1982)). In other words, the Court avoided hypertechnicality and treated the amended judgment as having been entered pursuant to a motion to amend, holding that the appeal was timely. *Structurals* dictates that Plaintiffs' notice of appeal was timely.

Defendant also claims that the undisputedly timely appeal of the July 13 order is meaningless because the July 13 order did not decide anything by itself. He's wrong. The July 13 order specifically and explicitly denied Plaintiffs' request for leave to amend that had been contained in their opposition to Defendant's 12(b)(6) motion and the language of the court's order shows that this is exactly what he understood it to do. CP 298. The July 13 order stated that the court had not granted Plaintiffs' request for leave because "the proposed amendment would not have cured the defect on which the dismissal was granted." *Id.* The July 13 order, in essence, told and clarified to Plaintiffs that the trial court's dismissal was of all of their claims and was final. It is this order (and the underlying June 8 order) that Plaintiffs appeal.

Defendant attempts to distinguish the case law cited by Plaintiffs in support of their alternative argument that the Court should extend the deadline for filing the notice of appeal to prevent a gross miscarriage of justice and because extraordinary circumstances exist. He does not deny that the Rules of Appellate Procedure "were designed to allow some flexibility to avoid harsh results." *Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982) (citing the Comment to RAP 18.8). Nor does he dispute that the "trend of the law in this state is to interpret rules and statutes to reach the substance of matters so that it

prevails over form.” *Weeks*, 96 Wn.2d at 896 (quoting *First Fed. Sav. & Loan Ass’n v. Ekanger*, 22 Wn. App. 938, 944, 593 P.2d 170 (1979)).

Because Defendant had notice and because “applying strict form would defeat the purpose of the rules to ‘promote justice and facilitate the decision of cases on the merits,’” *Weeks*, 96 Wn.2d at 896 (quoting RAP 1.2(a)), the Court should, if it finds the notice of appeal untimely, avoid the hypertechnical and extend the time for Plaintiffs to file their notice of appeal.

B. Under Their Complaint, Plaintiffs Can Prove Facts that Would Entitle Them to Relief.

A trial court’s ruling on a motion to dismiss under CR 12(b)(6) is a question of law that this Court reviews de novo. *Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wn.2d 384, 389, 258 P.3d 36 (2011). Dismissal under CR 12(b)(6) for failure to state a claim is only proper if the defendant establishes beyond a doubt that the “plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.” *Fondren v. Klickitat County*, 79 Wn. App. 850, 854, 905 P.2d 928 (1995) (quoting *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961, 577 P.2d 580 (1978)). The court must presume that “plaintiff’s allegations are true and may consider hypothetical facts that are not included in the record.” *Parmelee v. O’Neel*, 145 Wn. App. 223, 232, 186 P.3d 1094 (2008), *rev’d on other*

grounds, 168 Wn.2d 515 (2010). Motions to dismiss are only “sparingly granted” to ensure that “plaintiff is not improperly denied a right to have his claim adjudicated on the merits.” *Fondren*, 79 Wn. App. at 854 (quoting 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1349 (2d ed. 1990)).

1. Defendant’s Hypertechnical “Presence” Requirement Is Wrong and Should Be Rejected.

Defendant continues to claim that Plaintiffs had to be present at the time that he plotted Dr. King’s murder to assert their claims of emotional distress. His efforts are, again, exercises in the hypertechnical. So much so that, if accepted, they will mark a return to the forms of action abolished by adoption of the Civil Rules. *See* CR 2.

First, Plaintiffs have not mischaracterized *Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 333 (1998). The *Reid* Court did not directly address or analyze the issue of whether the plaintiffs there were the direct objects of the defendants’ conduct. While the Court agreed with the County, and held that because the plaintiffs were not present when the conduct occurred, they could not maintain an outrage action, *Reid*, 136 Wn.2d at 202-03, the Court engaged in no specific analysis regarding the plaintiffs’ direct object arguments.²

² Defendant’s argument that the *Reid* plaintiffs were the only possible targets for infliction of emotional distress is not supported by any analysis engaged in by the *Reid* Court. Moreover, even if Defendant is correct that the

Second, Defendant takes issue with Plaintiffs' assessment that the *Reid* Court's analysis of the issue turned on an examination of two cases that involved conduct directed at third parties. He does not contest that the plaintiff in *Schurk v. Christensen*, 80 Wn.2d 652, 497 P.2d 937 (1972), was not the direct object of the defendant's conduct, but he argues that the cuckolded husband in *Lund v. Caple*, 100 Wn.2d 739, 675 P.2d 226 (1984), was the direct object of the minister's affair. Defendant overlooks this critical passage from *Lund*: "Since appellant was not present, he has not established the tort of outrage. Such presence is a crucial element of a claim for outrage when the conduct is directed at a third person. *Restatement § 46(2)(a).*" 100 Wn.2d at 742 (emphasis supplied). The *Lund* Court, in fact, did not view the minister's conduct as directed at the plaintiff.³ Neither *Lund* nor *Schurk* are applicable to this case, where Defendant's conduct was explicitly and undeniably intended to bring about Dr. King's violent death.⁴

deceased *Reid* relatives could not be the direct object of the defendants' conduct because they were not alive (and Plaintiffs do not so concede), that does not automatically mean that the *Reid* plaintiffs were the direct objects of the defendants' conduct.

³ Indeed, the logical "object" of the minister's affair with the woman was the woman herself.

⁴ Defendant's citations to *Bakay v. Yarnes*, 431 F. Supp. 2d 1103 (W.D. Wash. 2006) and *Cunningham v. City of Wenatchee*, 214 F. Supp. 2d 1103 (E.D. Wash. 2002) are also misplaced. In neither case was the court called upon to address the argument that the plaintiffs were the direct object of the defendants' conduct.

Third, Defendant's discussion of *Chambers-Castanes v. King County*, 100 Wn.2d 275, 288, 669 P.2d 451 (1983), is misleading. While *Reid* does post-date *Chambers-Castanes* by 15 years, the *Reid* Court did not discuss it,⁵ much less disapprove or otherwise distinguish it. (Nor, for that matter, did *Reid* cite any case law mentioning the direct object issue.) In addition, Defendant's contention that the plaintiffs in *Chambers-Castanes* were present during the outrageous conduct is misplaced. The claims in *Chambers-Castanes* were based on "the failure of the police to respond in a timely manner." 100 Wn.2d at 281. The Court did not discuss whether the plaintiffs were or were not present during this alleged outrageous conduct (or exactly how one can be "present" for conduct based on the absence of action), but found that there were issues of fact as to whether the police conduct was extreme and outrageous. *Id.* at 289. Defendant has offered no reason to reject the tort elements as set forth in *Chambers-Castanes*.⁶

Fourth, Defendant cannot rely upon the RESTATEMENT (SECOND) OF TORTS § 46 (1965). His argument that the Restatement assumes that

⁵ The *Reid* Court cited *Chambers-Castanes* only in the context of the liberal pleading standard under 12(b)(6). 136 Wn.2d at 201.

⁶ Defendant also claims that all of the cases relied upon by *Chambers-Castanes* involved plaintiffs who were the object of the defendant's conduct and who were present to immediately experience that conduct. Defendant is, again, wrong: in *Grimsby v. Sampson*, 85 Wn.2d 52, 530 P.2d 291 (1975), the object of the hospital's and doctor's alleged outrageous failure to provide medical care was the plaintiff's wife, who was the individual who did not receive the care.

the object of outrageous conduct is present and immediately experiences the defendant's action, is simply wrong. Section 1 of the Rule says:

- (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

RESTATEMENT (SECOND) OF TORTS § 46 (1965). Only in Section 2 is there discussion of presence:

- (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
 - (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
 - (b) to any other person who is present at the time, if such distress results in bodily harm.

Id. (emphasis added). Defendant's allegation that this Restatement section confirms his interpretation of the presence and direct object issues is incorrect.⁷ Plaintiffs' contention, that the Restatement mandates presence

⁷ Defendant contends that comment i to the RESTATEMENT (SECOND) OF TORTS § 46 supports his argument because the plaintiff in that example had an immediate apprehension of the tortfeasor's suicide attempt. But in that example, the tortious conduct was the suicide attempt, which the plaintiff did not witness. Moreover, Defendant's attempt to finely parse whether the apprehension of a tortfeasor's conduct was immediate enough to fulfill the alleged presence requirement serves to underscore how inappropriate it was to dismiss this matter under CR 12(b)(6). Factual disputes regarding whether Plaintiffs' apprehension of Defendant's murder plot was "immediate" enough to satisfy the purported presence requirement should have been resolved in Plaintiffs' favor and should not have resulted in CR 12(b)(6) dismissal. See *Fondren v. Klickitat County*, 79 Wn. App. 850, 854, 905 P.2d 928 (1995) (a dismissal under CR 12(b)(6) for

only for § 46(2) indirect claims, is supported by numerous case reports. See, e.g., *Dammarell v. The Islamic Republic of Iran*, 2006 U.S. Dist. LEXIS 99679 at *473 (D.D.C. Aug. 17, 2006) (under RESTATEMENT (SECOND) OF TORTS § 46 (1965), presence requirement applies when the conduct is directed at a third party, not at the plaintiff); *Fanean v. Rite Aid Corp. of Delaware*, 984 A.2d 812, 819 (Del. Super. Ct. 2009) (Restatement’s presence requirement “mandates the plaintiff to be physically present during the extreme and outrageous conduct if it directed at a third party and not the plaintiff”); *Leo v. Hillman*, 665 A.2d 572, 577-78 (Vt. 1995) (physical presence is not required when the tortious conduct is directed at the plaintiff, but it is required when the conduct is directed at a third person).

Defendant would also rely upon the RESTATEMENT (SECOND) OF TORTS § 47 (1965) in support of his “thwarted criminal plan” theory. He apparently believes that so long as his criminal scheme was “thwarted” by the authorities, the hallowed legal rule of “no harm no foul” applies, and he should have no civil responsibility for what, under Rule 12(b)(6), are the admitted consequences of his conduct. This section of the Restatement has never been adopted, much less discussed, by Washington courts, but

failure to state a claim is only proper if the defendant establishes beyond a doubt that the “plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.”) (quoting *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961, 577 P.2d 580 (1978)).

emotional distress was not the only legal consequence of Defendant's conduct – Plaintiffs also alleged financial harm. CP 4-5, ¶¶ 3.13, 3.19; CP 8, ¶ 4.2. Since § 47, by its terms, applies only to circumstances in which emotional distress is the only legal consequence of a defendant's actions, it is inapplicable here. Finally, to the extent the application of this section turns on what legally-protected interest Defendant intended his conduct to invade, particularly with respect to Mrs. King and the King children, this issue of intent is inappropriate for disposition on the pleadings.

Fifth, Defendant simply cannot distinguish the case law. For instance, he claims that *Dammarell v. The Islamic Republic of Iran*, 2006 U.S. Dist. LEXIS 99679 (D.D.C. Aug. 17, 2006) is distinguishable because the tortious conduct in that case was a completed bombing that killed and injured people, whereas the tortious conduct here is a failed murder plot. The *Dammarell* court draws no such distinction; the principles cited in *Dammarell* are wholly applicable here; and the public policy implications of a contrary rule are troubling, at best. Should we, as a society, turn a blind eye to the consequences of attempted murder, merely because the actor failed in his attempt?

Defendant also would distinguish the cases cited by Plaintiffs as involving “a plaintiff's first-hand experience of a defendant's harmful conduct.” Opp. at 40. First, to the extent that Defendant is now

characterizing the alleged “presence” requirement as a “first-hand experience” requirement, he strengthens Plaintiffs’ argument that these claims should never have been dismissed under CR 12(b)(6). Whether Plaintiffs had a “first-hand experience” of Defendant’s murder plot when they were told of it shortly after its discovery is most certainly an issue that cannot be decided on the pleadings.⁸ Second, Defendant mischaracterizes the cases. For example, in *Fanean v. Rite Aid Corp. of Delaware*, 984 A.2d 812, 815 (Del. Super. Ct. 2009), the pharmacist disclosed plaintiff’s sensitive medical information to third parties, including plaintiff’s family members, and the information “eventually made its way back to [plaintiff’s] fiancé and allegedly caused [plaintiff] humiliation and embarrassment.” Plaintiff was not present during the disclosure and did not experience “first hand” the disclosure. In *Shemenski v. Chapieski*, 2005 U.S. Dist. LEXIS 7975 *35 (N.D. Ill. Apr. 13, 2005), the policeman’s arrest of the husband and prevention of his presence occurred after the plaintiff wife had gone to the hospital, and not in her presence. Finally, in *Cahalin v. Rebert*, 10 Pa. D. & C.3d 142, 150 (Pa. Dist. Ct. 1979), the court specifically said that, while the complaint

⁸ Moreover, the record creates, at the very least, an issue of fact as to whether Dr. King was present during part of Defendant’s conspiracy to commit murder. *See* CP 200 (certification for determination of probable cause indicates that, prior to Plaintiffs’ vacation, Defendant spoke with Dr. King and tried to “pin him down” as to where he was going and when, and Dr. King provided the date of his departure).

did not allege that the father was present during the taking of his children, the conduct was directed at him, his emotional distress was foreseeable, and the presence requirement was not absolute. These cases demonstrate that a plaintiff who is not physically present during the defendant's tortious conduct, as may be the case with Plaintiffs here,⁹ can still recover for infliction of emotional distress.¹⁰

2. Defendant's Arguments Regarding the Claims Based on the Criminal Statute Are Unavailing.

Defendant claims that because no Washington court has held that a violation of the solicitation of murder statute constitutes a civil tort, Plaintiffs' claim based on that statute should be dismissed. Defendant is wrong for two reasons.

First, this case comes before the Court on an appeal of the grant of a CR 12(b)(6) motion to dismiss. A dismissal under CR 12(b)(6) for failure to state a claim is only proper if the defendant establishes beyond a

⁹ Again, presence in this conduct may actually be an issue of fact, which should not be resolved on the pleadings.

¹⁰ Defendant does not appear to explicitly contest Plaintiffs' argument that the following caveat from the RESTATEMENT (SECOND) OF TORTS § 46 (1965) should apply in the event that the Court is inclined to interpret the alleged presence requirement as barring Plaintiffs' claims: "The Institute expresses no opinion as to whether there may not be other circumstances under which the actor may be subject to liability for the intentional or reckless infliction of emotional distress." See Opening Brief at 28-30. The Restatement states that this Caveat is intended "to leave open the possibility of situations in which presence at the time may not be required." RESTATEMENT (SECOND) OF TORTS § 46 (1965), cmt. 1. Plaintiffs continue to contend that this caveat should be applied in this case.

doubt that the “plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.” *Fondren v. Klickitat County*, 79 Wn. App. 850, 854, 905 P.2d 928 (1995) (quoting *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961, 577 P.2d 580 (1978)). The fact that no Washington court has been confronted with this particular statute as a basis for civil liability does not mean that Plaintiffs can prove no set of facts which would entitle them to relief.

Second, there is no basis for Defendant’s argument that Plaintiffs’ claims based on violation of the criminal statute cannot stand apart from Plaintiffs’ claims for infliction of emotional distress. A claim for intentional or negligent infliction of emotional distress has specific elements: for example, intentional infliction of emotional distress requires that the defendant’s behavior be outrageous and extreme, *Chambers-Castanes v. King County*, 100 Wn.2d 275, 288, 669 P.2d 451 (1983), and negligent infliction of emotional distress requires objective symptomatology. *Hegel v. McMahon*, 136 Wn.2d 122, 132, 960 P.2d 424 (1998). However, Plaintiffs’ claim based on the criminal statute merely alleges that Defendant owed Plaintiffs a duty not to violate the statute, and that his breach of that duty caused various damages to them, including loss of consortium, loss of enjoyment of life, and financial harm. *See* CP 7-8, ¶ 4.2. In essence, Plaintiffs’ first claim for relief is a negligence claim,

with the criminal statute providing the basis for the duty. Such claims can exist independently from claims for infliction of emotional distress. *See, e.g., Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 141 Wn. App. 407, 167 P.3d 1193 (2007) (affirming jury verdict on outrage claim but reversing verdict of negligence based on violation of the statute). As Plaintiffs demonstrated in their opening brief, they have met the three considerations for determining whether a cause of action may be implied from a statute. Plaintiffs' claim should not have been dismissed.

3. Defendant's Request for Bail has Nothing to do with Plaintiffs' Claims – They Were Injured by his Effort to have Dr. King Killed.

Defendant has Constitutional rights to bail and a jury trial. He has taken full advantage of all of them. His extreme and outrageous behavior was not in his exercise of these rights, but rather in his plot to murder Dr. King. In fact, the trial court specifically found, as a matter of law, that Defendant's convictions for solicitation to commit the first degree murder of Dr. King and attempted murder in the first degree of Dr. King had preclusive effect and constituted "outrageous conduct." CP 213-15. It is this conduct that forms the basis for Plaintiffs' claims.

The cases cited by Defendant are all distinguishable because the outrageous conduct was also the conduct that was legally protected. In

Keates v. City of Vancouver, 73 Wn. App. 257, 264-65, 869 P.2d 88 (1994), the court upheld dismissal of an outrage claim that was based upon the police's alleged premature and aggressive interrogation of the plaintiff for his wife's murder. Based on the facts surrounding the interrogation, as well as the lawfulness of the investigation, no outrage claim could exist. *Id.* Similarly, in *Springer v. Rosauer*, 31 Wn. App. 418, 426, 641 P.2d 1216 (1982), the employer's rejection of the purchase offer and his firing of the plaintiff was privileged and not a basis for an outrage claim. The other cases cited by Defendant are also based on underlying conduct that was legal. *See also Jackson v. Peoples Fed. Credit Union*, 25 Wn. App. 81, 88, 604 P.2d 1025 (1979) (credit union had a right to repossess the car and its employees' involvement in that did not rise to the level of outrage); *Thompson v. Sikov*, 490 A.2d 472, 474 (Pa. Super. 1985) (attorney's in-court threat to file an appeal was privileged and could not form the basis for outrage); *Kemps v. Beshwate*, 103 Cal. Rptr. 3d 480, 484-85, 180 Cal. App. 4th 1012 (Cal. Ct. App. 2009) (tort claims based on bench warrant obtained by defendants after plaintiff resisted testifying were barred by anti-SLAPP statute); *Swerdlick v. Koch*, 729 A.2d 849, 863 (R.I. 1998) (defendant's surveillance of plaintiff's zoning violations was not unfounded). Here, by contrast, Defendant's conduct was not only not legally protected, it was criminal. Dismissal of Plaintiffs' claims

impermissibly ignores the true source of Plaintiffs' emotional distress:

Defendant's murder plot.

4. Defendant's Criminal Conduct was the Proximate Cause of Plaintiffs' Injuries.

Defendant contends that the emotional distress that Plaintiffs suffered after learning of the murder plot is too remote to meet the requirements of proximate cause. Defendant, again, is incorrect.

First, Defendant erroneously claims that Plaintiffs "complain only of secondary injuries stemming from Defendant's exercise of his constitutional rights to bail and a jury trial." Opp. at 45. This is untrue. Plaintiffs alleged that they suffered fear after learning of Defendant's arrest, exacerbated by the fact that Defendant knew details about their home. CP 4-5, ¶ 3.14. This fear caused Plaintiffs to move into a hotel. CP 5, ¶ 3.15. Plaintiffs have suffered numerous damages, including severe emotional distress and loss of enjoyment of life. CP 5-6, ¶ 3.21. Plaintiffs further allege that Defendant's violation of the criminal statutes proximately caused Plaintiffs emotional harm, CP 7-8, ¶ 4.2, and that Defendant's murder-for-hire plot inflicted emotional distress on Plaintiffs. CP 8, ¶¶ 5.1-5.3. Under CR 12(b)(6)'s liberal standard, these allegations are more than sufficient to demonstrate that the bail and criminal trial were not the sole bases for the emotional distress.

Second, the cases cited by Defendant in support of his proximate

causation argument are inapposite. The United States Supreme Court cases cited by Defendant all concern the issue of an entity standing between the plaintiff and the defendant, such that the link between the defendant's actions and the plaintiff's injury was too remote. *See Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 273-74, 112 S. Ct. 1311, 1319-21, 117 L. Ed. 2d 532 (1992) (plaintiff's required reimbursement of third parties for injuries defendants caused those third parties was too remote an injury to support plaintiff's RICO claim); *Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 545-46, 103 S. Ct. 897, 912, 74 L. Ed. 2d 723 (1983) (unions' antitrust claims against employers for coercing entities to enter into business relationships with non-union firms was dismissed; injury was too speculative and there were more direct victims); *S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-34, 38 S. Ct. 186, 186, 62 L. Ed. 451 (1918) ("The general tendency of the law, in regard to damages at least, is not to go beyond the first step"; therefore, the fact that plaintiffs passed on to their customers the losses caused by defendants did not prevent the plaintiffs from recovering, and customers had no privity with defendants). Here, there are no parties standing between Defendant and Plaintiffs, and there is no allegation that Plaintiffs' damages are based on injuries suffered by

anyone other than themselves.¹¹

Nor does Washington authority holding that a judicial decision breaks the chain of causation have application, here. In *Bishop v. Miche*, 137 Wn.2d 518, 531-32, 973 P.2d 465 (1999), the Court held that a judge's decision not to revoke probation broke the chain of causation such that the County's allegedly negligent supervision of the parolee up to that point was not a proximate cause of the parolee's post-decision drunk driving that killed the plaintiff. Here, there is no judicial decision breaking the chain of causation between Defendant's murder plot and Plaintiffs' emotional distress. The emotional distress was proximately caused by Defendant's outrageous conduct. It was error to grant Defendant's motion to dismiss on these grounds.¹²

¹¹ The Ninth Circuit cases cited by Defendant are also inapposite for this reason, as they addressed whether an entity that provided health care to smokers had standing under civil RICO and antitrust statutes to sue tobacco companies based on the care that the entity was forced to provide. *See Ass'n of Wash. Public Hosp. Districts v. Philip Morris, Inc.*, 241 F.3d 696 (9th Cir. 2001); *Oregon Laborers Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957 (9th Cir. 1999). Both of these courts found that the claims were too derivative, as the smokers themselves were the direct victims. *See Ass'n of Wash. Public Hosp. Districts*, 241 F.3d at 703; *Oregon Laborers*, 185 F.3d at 963-64. There are no victims more direct than Plaintiffs here – Dr. King was the object of Defendants' plan to use murder as a business dispute resolution technique.

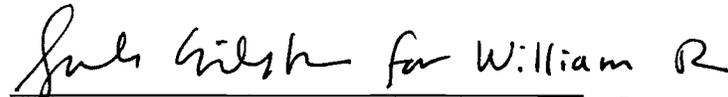
¹² Defendant does not contest the substance of Plaintiffs' argument that the trial court erred if it dismissed the claims for negligent infliction of emotional distress based on a finding that Plaintiffs did not allege objective symptoms of illness. *See* Opening Brief at 37-39. Thus, any opposition to this argument must be deemed abandoned. *See, e.g., Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 981 n.7, 948 P.2d 1264 (1997) (arguments raised before lower court but not addressed in briefing to appellate court had been abandoned).

III. CONCLUSION

In their Complaint, Plaintiffs have alleged that Defendant's plan to murder Dr. King and appropriate his business caused them severe injury and damage. If this is true, and this Court must assume that it is, can there exist a wrong more clearly entitled to a remedy? Instead, Defendant, by hypertechnical arguments that ignore the reality of Plaintiffs' injuries, would have the Court exempt him from responsibility for the harm he has caused. Plaintiffs deserve their day in court. The Court should reverse the dismissal of their claims and remand for further proceedings.

Respectfully submitted this 22nd day of March, 2012.

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The undersigned, being first duly sworn upon oath, deposes and says:

1. I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys for Appellants herein.

2. On March 22, 2012, I caused a true and correct copy of Appellant's Reply Brief to be served on counsel of record for Respondent Michael Emeric Mockovak by hand delivery to the following:

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Donna Patterson
Donna Patterson

SUBSCRIBED AND SWORN TO before me this 22nd day of March, 2012.



Mary Beth Dahl
Print Name: MARYBETH DAHL
NOTARY PUBLIC in and for the
State of Washington,
residing at Milton
My appointment expires 2-25-15

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