

ORIGINAL

No. 34891-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PERLA SALDIVAR and ALBERT SALDIVAR,

Appellants,

vs.

DENNIS MOMAH, JANE DOE MOMAH, and the marital community
composed thereof; U.S. HEALTHWORKS MEDICAL GROUP OF
WASHINGTON, P.S., CHARLES MOMAH, JANE DOE MOMAH,
and the marital community composed thereof,

Respondents,

HARISH BHARTI,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE KATHERINE M. STOLZ

BRIEF OF APPELLANTS PERLA AND ALBERT SALDIVAR

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I. INTRODUCTION

Perla Saldivar was treated for an employment related back injury by Dr. Dennis Momah at a Puyallup clinic run by U.S. Healthworks. She complained to the Department of Health, and then to the Federal Way Police Department, that Dennis Momah sexually abused her. Several months later, she saw an image of Dennis Momah's twin brother Charles Momah on television, recognizing Charles Momah as the physician who had abused her during her first examination, and amended her complaint to add claims against him.

After striking the Saldivars' jury demand which had been filed with the complaint, as "untimely" and rejecting much of their corroborating evidence as hearsay, the trial court found that Perla Saldivar and her husband fabricated their allegations against Dennis Momah for the "improper purpose" of preventing him from practicing medicine. The trial court dismissed the Saldivars' claims at the conclusion of their case in chief and entered judgment against them and in favor of Dennis Momah for over \$2.8 million on his counterclaims for abuse of process and outrage, and awarded defendants attorney fees of \$293,708.49 for advancing a frivolous lawsuit under RCW 4.84.185. The Saldivars appeal.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the underlined portions of the Findings of Fact and Conclusions of Law attached as Appendix A. (CP 1517-31)

2. The trial court erred in finding that the plaintiffs waived their right to a jury trial and in entering its Order Striking Jury Demand. (CP 547-49)

3. The trial court erred in excluding as hearsay testimony that would have rebutted the defendants' contentions that Perla Saldivar fabricated her allegations of sexual abuse by defendants Charles and Dennis Momah. (See, e.g., CP 410, 504, 550; RP 88, 91, 97, 105, 107, 156, 223, 291, 300, 434)

4. The trial court erred in admitting a hearsay summary of an interview prepared by a Department of Health investigator, and in refusing to allow either the full record, or the investigator to testify in person. (Ex. 37; RP 421, 657-61)

5. The trial court erred in entering its Order Striking Testimony of Karil Klingbeil, and in denying reconsideration of that order. (CP 408, 504, 550)

6. The trial court erred in excluding as irrelevant testimony of other women who claimed that defendant Dennis Momah

impersonated his brother Charles Momah at Charles Momah's medical clinic. (CP 410, 504, 550; RP 23-26, 630-36)

7. The trial court erred in excluding from evidence the videotape of a television broadcast from which Ms. Saldivar identified Charles Momah, and other photographic evidence. (RP 30-32; Ex. 5)

8. The trial court erred in excluding evidence of Dennis Momah's counterclaims against other former patients alleging that they had caused the damages he claimed in his lawsuit. (Ex. 41-44; RP 23-26, 612-22)

9. The trial court erred in granting a directed verdict dismissing the Saldivars' claims. (RP 696-707)

10. The trial court erred in entering its judgment against the Saldivars. (CP 1913-15) (App. B)

11. The trial court erred in entering its Order Denying Plaintiff's Motion for Reconsideration/New Trial.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. Is a claim that a physician lost his job and suffered emotional distress after a patient filed a complaint with the Department of Health barred by the absolute immunity provided by RCW 4.24.510? (Assignments of Error ("AE") 1, 10, 11)

B. For purposes of a physician's counterclaim for abuse of process, is a patient's expressed desire to ensure that the physician is not allowed to continue practicing medicine an improper ulterior motive in filing a lawsuit for sexual abuse? (AE 1, 10, 11)

C. Did the trial court err in striking plaintiffs' jury demand, which was filed but not served with the initial complaint, when the defendants had actual notice of the jury demand over seventeen months before trial and shortly after plaintiffs added new claims? (AE 1, 2, 10, 11)

D. Did the trial court err in holding that the plaintiffs fabricated their claims of sexual abuse and in awarding almost \$300,000 in attorney fees against plaintiffs for pursuing a frivolous action while refusing to consider evidence that substantiated plaintiffs' claims and rebutted defendants' charge of fabrication? (AE 1, 3-7, 9, 10, 11)

E. Did the trial court err in admitting the hearsay memorandum of a Department of Health investigator, which was used to impeach the plaintiffs while prohibiting the plaintiffs from calling the investigator as witness? (AE 1, 4, 10)

F. Is a social worker qualified to testify to post traumatic stress disorder? (AE 1, 5, 10)

G. Did the trial court err in excluding testimony that defendants engaged in a scheme of impersonation? (AE 1, 6, 9, 10)

H. Is a videotape admissible for purposes of identifying a defendant only if "authenticated" by the person who created it? (AE 1, 7, 9, 10)

I. Did the trial court in excluding evidence of a defendant's claims that other individuals caused the economic and personal damages defendant claimed from the plaintiffs in this case? (AE 1, 8, 10, 11)

J. In light of the trial court's expressed hostility to plaintiffs and their counsel, should this case be remanded to a new superior court judge?

IV. STATEMENT OF THE CASE.

A. Statement Of Facts.

1. **Perla Saldivar Sought Treatment At U.S. Healthworks In Puyallup For Injuries Suffered From A Fall At Work.**

Perla Saldivar, the daughter of a physician and a nurse, emigrated to the United States from Mexico in approximately 1993. (RP 194-95, 305) She has a degree in business administration from a Mexican university. (RP 195) She and her husband Albert Saldivar have two children born in 1996 and 2000. (RP 79-80, 197)

Although she waived the services of an interpreter at trial, Perla is not fluent in English. (RP 193-95)

Perla began working for World Vision, a Christian-based relief and child advocacy organization, in January 1999, where she worked on behalf of critically ill or dying children. (RP 196-97) She hired a nanny to care for their two small children while Albert worked as a supervisor for Southwest Airlines. (RP 80, 198)

On May 12, 2003, Perla suffered the accident that led to the claims in the instant case. While at work, she slipped on wet concrete stairs, falling a distance of five to seven stairs. (RP 198, Ex. 1, DM 0077) A co-worker who was accompanying her down the stairs also slipped, reached out to stabilize her, but could not prevent her fall. Perla lay prone on the stairs until two co-workers helped her up. She could not move her legs. (RP 199)

Perla was placed on a backboard and taken by ambulance to St. Francis Hospital in Federal Way, where she was given X-rays and treated in the emergency room. (Ex. 1, DM 0074-78, RP 200) Upon her release, her treating physician at St. Francis ordered her to stay home from work for three days. (Ex. 1, DM 0090)

Although she had health insurance through Albert's employer, because she was injured at work, Perla submitted a claim to the

Department of Labor and Industries ("L&I"). (Ex. 31 (5/15/03), RP 203-04, 211) L&I authorized medical care and wage loss benefits, as well as authorizing interpreter services because Perla's English was deficient. (Ex. 31 (5/20/03, 5/22/03))

Perla tried to receive follow up care from the physicians recommended to her at St. Francis, but could not get an appointment for several weeks. She found U.S. Healthworks in the Yellow Pages and was able to get an immediate appointment at its Puyallup clinic. (RP 205-06)

Perla was first seen by Dr. Abdullah at U.S. Healthworks in Puyallup shortly after her injury. A nurse was present during that examination. Dr. Abdullah did not have her remove her clothes. (RP 206-08) Dr. Abdullah diagnosed multiple contusions between her left thigh and shoulder and referred Perla to physical therapy two to three times per week for two weeks. (Ex 1, DM 0011)

2. Perla Alleged That She Was Sexually Abused At The U.S. Healthworks Clinic In Puyallup In May And June 2003.

When she returned for a follow up visit on May 27, 2003, Perla was seen by a physician identified to her as Dr. Dennis Momah. (RP 213, Ex. 1, DM 0025) Dennis Momah completed his residency in 1992 (Ex. 24) and became licensed in 1993. (RP 514)

Prior to obtaining a job with U.S. Healthworks in March 2003, Dennis Momah had worked as an itinerant *locum tenens*, or temporary physician, in several states across the United States. (RP 518-19, 521)

The trial court found that Perla Saldivar's testimony lacked credibility. (FF 3-4, CP 1518-19) Perla gave inconsistent and halting answers, especially when cross-examined by defense counsel. Her recollection of dates and what she had previously stated was especially poor. (See, e.g., RP 381-385)

Perla described Dr. Momah as fairly brusque; he did not introduce himself, and asked her only to explain her injuries and to pronounce her name. (RP 213) During the examination, when Dr. Momah asked her to bend forward and backward while holding her from behind, he slid his hand inside the band of her elastic sweat pants and placed his hand inside her vagina. (RP 214-15) Perla told Dr. Momah that she was uncomfortable and asked him to get a nurse. Dr. Momah handed her a pill and told her to take it for her pain, before leaving the room. (RP 215)

Perla described her confusion after Momah left the room:

[H]e said, I'll be right back. So I continue sitting in the same chair and I was shocked. I didn't know if I could run away or stay there, but at the same time it was – I had to wait for him to come back and finish – to finish the papers because I had to report back to where I work. So, I said, if I leave the room maybe they'll think

that I didn't show up to my appointment. If they think I didn't want to show up they'll think that I'm not interested or getting better or whatever. So, I was thinking, what can I do? And, it came to my mind that this is strange, I felt really bad. I was not – it was not professional to the way he touched me and I'm not saying like I'm a chicken, but it was so different for me.

(RP 216)

Perla estimated that she waited approximately 40 minutes before she was seen again. (RP 216-18) Finally Dr. Momah reentered the room, only this time he looked and acted differently. He was wearing a large velcro orthopedic shoe. His hairline and accent were slightly different. Although he had just examined her, he did not remember her name or why she was there. (RP 218-19)

Perla was confused. Dr. Momah saw the pill and asked her why she had not taken it. Perla said she had allergies to pain medication. (RP 219-20) A nurse knocked on the door, Dr. Momah signed her order for an MRI, and Perla left. (RP 220-21)

Perla testified that she felt confused and humiliated:

I was very embarrassed. I didn't know what to do. For me maybe I had a good look at somebody that knocked at the door, I don't know. It was -- I felt very confused. It was very -- I felt very humiliated. And, just to have that for L&I, maybe there are more things I should do. I didn't know what to do especially because I knew it was wrong. And, inside me I said, if I come with this to my husband's family, I don't know if they're going to be there and what they thought about me as very distracted or stupid. If that happened to me especially

where I grew up and the involvement of the parents, my mom and dad, you know, are doctors and nurses. I felt really bad.

(RP 221)

Perla was initially afraid to report to her husband what had happened at the clinic. (RP 222) Upon her return home, she telephoned her father, a physician in Mexico, to discuss what she believed was improper conduct by Dr. Momah. (RP 221, 223, 226) She also called her closest friend, who lived in Arizona. (RP 83-84, 228) In tears, Perla then told Albert what had happened, including her sense that the second doctor who saw her was not quite the same as the first. (RP 80, 82-83, 224) Albert was shocked. (RP 227) Perla described at trial her emotions of shame, embarrassment, and confusion. (RP 221, 230)

Albert testified that he called the U.S. Healthworks clinic the next day and told the office manager that he did not want Perla to be seen by Dr. Momah again. He did not give specific details or reasons, because Perla was so embarrassed over the incident. (RP 88) The office manager told Albert that they would try to schedule another physician on Perla's next visit. (RP 89)

Perla continued attending U.S. Healthworks in Puyallup for physical therapy and for follow up appointments, where she saw a

different physician, Dr. Sorsby, and a nurse practitioner, Laurie Gwerder. (RP 288, Ex. 1, DM 0040, 0054, 0059-60) Dr. Sorsby recommended that Perla return to work half-days by June 16, 2003, a little over a month after her fall, with some restrictions. (Ex. 1, DM 0054) Perla returned to work part time on June 16, but complained to L&I that she had to use her sick and vacation time to keep her health care appointments. (Ex. 31 (6/18/03))

3. Perla Alleged She Was Again Sexually Abused By Dennis Momah During A Follow-Up Appointment.

Perla testified that when she returned to U.S. Healthworks for a follow-up appointment in mid-June, to her surprise, Dennis Momah entered the examination room. (RP 288-89) Dr. Momah asked her name and to explain her injuries. He asked her to change into a gown. Perla asked for a nurse to be present. Dr. Momah said he would get a nurse and left the examination room. (RP 289)

Dr. Momah returned without a nurse. (RP 289) Dr. Momah told Perla that a nurse was coming and asked Perla to lay on her side. Dr. Momah stood behind her, asked her to bring her knees to her chest. (RP 290) Dr. Momah touched her vagina. Perla tried to sit up, and Dr. Momah told her that she needed to cooperate. (RP 291) Perla told him that she did not want to be examined when there was no one else present. Dr. Momah left the room, and Perla

dressed. After she had dressed, an interpreter, Ed Fuentes, scheduled to assist in the examination, knocked on the door. He was late. (RP 291)

The trial court prohibited Perla from testifying to what she told Ed Fuentes (RP 291), and prohibited Mr. Fuentes from testifying to what Perla told him. (RP 156) Perla testified that she walked to the reception area with Mr. Fuentes feeling afraid, disoriented and upset with herself. (RP 293) Mr. Fuentes advised Perla not to be in the examination room without a nurse present. (RP 166) Mr. Fuentes identified Dennis Momah in the courtroom as the physician whom he saw at U.S. Healthworks. (RP 167) The trial court found Mr. Fuentes' testimony not credible because he had previously told defense counsel that he had not been present during any of Perla Saldivar's medical appointments with Dennis Momah. (FF 5, CP 1519-20)

Perla had Nurse Practitioner Lori Gwerder sign a referral to physical therapy at the reception desk. (Ex. 1, DM 0062; RP 294) Nurse Gwerder again authorized Perla to return to working four hour shifts with restrictions. (Ex. 1, DM 0060) Nurse Gwerder filled out and signed the notification to L&I that Perla was cleared to resume

half time work. Dennis Momah later signed the form as well. (Ex. 1, DM 0063)

Perla returned home and discussed what had happened to her with her husband and called her friend Nancy in Arizona. She also called her parents in Mexico. (RP 296) Determined to avoid Dr. Momah, she scheduled her next visit with the U.S. Healthworks clinic in Tacoma, where she was seen by Dr. Jena Schliiter on June 23. (RP 296, Ex. 31 (6/23/03)) Perla was advised by her L&I claim manager that she needed to have a form signed in order to change doctors. (RP 296-98)

Perla returned to the Puyallup U.S. Healthworks clinic to have Dr. Momah sign the form at the end of June. (RP 296-97) She testified that she waited for Dr. Momah in an examination room. (RP 299-300) When he arrived she told him that she did not want to see him because he was not professional and asked him to fill out the referral form to Dr. Schliiter. (RP 300, 301-02) Although Perla testified that she was not examined (RP 300), the chart reflects that a nurse took her blood pressure and pulse and that Dr. Momah diagnosed "back pain." Perla's chart states that "PT needs referral for PT and to see another Dr. (Schliiter)" (Ex. 1, DM 0064)

Perla saw Dr. Schliiter in Tacoma on a monthly basis for the next four months, through November 17, 2003, while also participating in physical therapy at Olympic Sport and Spine Rehab. Dr. Schliiter continued to recommend that Perla work on a reduced schedule of four hours per day. (See Ex. 1, DM 0068, 0071; Ex. 31(8/18/03, 9/15/03, 9/25/03, 10/20/03, 11/17/03)

4. The Saldivars Complained To The Department Of Health, Alleging Inappropriate Sexual Contact By Dennis Momah On Two Separate Occasions.

Neither Perla nor Albert Saldivar raised Dennis Momah's sexual abuse with U.S. Healthworks management in Puyallup because Perla was "afraid and embarrassed." (RP 410) However, Albert Saldivar testified that he complained to the Puyallup office manager that Dr. Momah had again been assigned to examine Perla in June 2003 after Albert had been promised that Perla would not see him again. (RP 94-95) The office manager told Albert that "we don't hire bad doctors." (RP 94)

Albert also lodged a complaint with the Washington State Department of Health in June 2003, and was referred to Virginia Renz, a department investigator. (RP 96, 98) At Ms. Renz's request, Perla provided a written statement, alleging that Dr. Dennis Momah "touched me improperly on two occasions without my

consent and with the excuse that he needed to check my injuries.” (RP 319-20, Ex. 19) Perla also complained that Dr. Momah “gave me a medicine that I didn’t know what it was because he never answered me when I asked what he was giving me.” (Ex. 19) Perla asked Ms. Renz to use “all the possible discretion regarding this matter.” (Ex. 19) The Saldivars also complained to the Federal Way Police Department after being advised by Ms. Renz that Dr. Momah’s alleged sexual abuse constituted a crime. (RP 189, 312-13, 418)

B. Procedural History.

1. After Complaining To The Department Of Health, The Saldivars Sought Counsel And Filed This Action Against Dennis Momah And U.S. Healthworks In April 2004.

When their Department of Health complaint had not been resolved, the Saldivars sought the advice of counsel in July 2003. (RP 100-04, 321-22, 418-19) Ten months later, in April 2004, the Saldivars filed this action in Pierce County Superior Court against Dennis Momah and U.S. Healthworks for negligence, lack of informed consent, breach of fiduciary duty, violation of the Consumer Protection Act and infliction of emotional distress. (CP 6-21) They alleged that on one of her visits Perla noticed that Dennis Momah’s appearance and speech appeared to have changed and that she

"believes that she was seen by two different physicians who looked mostly alike." (CP 11) The Saldivars filed, but did not serve, a jury demand with their complaint. (CP 5)

Dennis Momah filed a counterclaim alleging that the Saldivars' claims, as well as their "complaint to the police and the Medical Quality Assurance Commission of the Department of Health . . . [were] without good cause and for improper motives." (CP 31-32) Dennis Momah contended that the Saldivars' complaints to government authorities were "made to obtain money from Dr. Momah" and that the Saldivars were liable for negligent and intentional infliction of emotional distress and for the tort of abuse of process. (CP 32)

2. The Saldivars Amended Their Complaint To Add Charles Momah After Perla Saldivar Recognized Him As The Physician Who Had Sexually Abused Her On May 27, 2003.

At her deposition, Perla described differences in appearance and speech between the doctors who treated her on May 27, 2003, at U.S. Healthworks. (CP 66) She also attended the deposition of Dennis Momah. (CP 66) In the fall of 2004, Perla was watching a news broadcast on KOMO-TV depicting Dennis Momah's twin brother Charles Momah subsequent to his arrest and arraignment on charges of sexually abusing his patients. While watching the video it

became apparent to Perla that she was in fact seen by two different physicians on May 27 – both Charles and Dennis Momah – and that it was Charles who had sexually abused her during that first visit. (CP 66)

Ms. Saldivar had no contact with any other plaintiff alleging sexual abuse by Charles or Dennis Momah. (CP 106) As soon as she saw the news broadcast, Perla contacted her attorney, who moved to amend the Saldivars' complaint to assert claims against Charles Momah. (CP 34, 106) Judge Katherine M. Stolz ("the trial court"), granted the motion to amend in December 2004. (CP 230)

3. The Trial Court Struck The Saldivars' Jury Demand And Prohibited The Saldivars' Witnesses Who Alleged That Dennis Impersonated His Brother Charles At Charles' King County Clinic From Testifying.

The trial court entered several orders limiting the Saldivars' evidence at trial. One of the Saldivars' expert witnesses, Professor Karil Klingbeil, MSW, the Director of Social Work and founder of Harborview's Sexual Assault Center, interviewed Perla twice and performed a forensic examination, determining that Perla suffered from post-traumatic stress disorder. (CP 2236-41) The trial court held that "as a social worker Ms. Klingbeil is not qualified to opine on psychiatric conditions" and prohibited her testimony. (CP 408, 550)

Plaintiffs had also disclosed numerous lay witnesses in support of their claim that Dennis Momah allowed his brother Charles to impersonate him. (RP 2226-35) These witnesses, who claimed that Dennis Momah had impersonated his brother Charles at Charles' clinics in King County, included a former medical assistant at Charles Momah's King County clinics who testified that she observed Dennis Momah in his brother Charles' Burien office on a routine basis. (CP 442, 444) The trial court excluded these witnesses because they did not "have experience at the Puyallup clinic of U.S. Healthworks during similar time period." (CP 410, 504, 550-53)

The trial court also held that the Saldivars' failure to serve the jury demand after it was filed at the inception of the case violated CR 38 and waived the right to a jury trial. (CP 5, 547) The trial court also dismissed on summary judgment all claims against U.S. Healthworks, except those related to its failure to honor Perla's request to be treated by a doctor other than Dennis Momah and her request for a chaperone. (CP 555)

In pretrial motions in limine the trial court rejected the Saldivars' argument that evidence of allegations of sexual abuse against Dennis Momah by other women was relevant to Dennis

Momah's claim that his economic damages and emotional distress were caused by Perla Saldivar's allegations against him. (RP 23-26) The trial court also excluded a videotape of the KOMO-TV newscast in which Perla recognized Charles Momah as the doctor who sexually abused her on May 27, as well as any other photographs or videotapes of Charles or Dennis Momah, absent foundation testimony from the person who took the photos. (RP 30-35; Ex. 5)

4. Although The Defendants Alleged That The Saldivars' Claims Were Fabricated, The Trial Court Barred As Hearsay Any Of The Saldivars' Contemporaneous Statements Supporting Their Allegations of Sexual Abuse.

Dennis Momah claimed that the Saldivars fabricated their allegations in order to obtain money in their lawsuit. (See CP 638 ("their reports to MQAC and the police were to bolster the ultimate claims for money they intended to assert in this suit.")) Nonetheless, the trial court repeatedly barred as hearsay any testimony from either of the Saldivars or interpreter Ed Fuentes regarding what Perla Saldivar or Albert Saldivar contemporaneously reported to others. (See, e.g., RP 88, 91 (sustaining hearsay objections regarding what Perla told Albert), 97 (Albert's report to Department of Health), 105, 107 (Perla's statements when she saw Charles Momah on television), 156 (Perla's statements to Mr. Fuentes), 223 (Perla's

statements to her father), 300 (Perla's statements to Dennis Momah), 434 (Perla's report to Department of Health)) (See CP 701 (Offer of Proof))

Dennis Momah's counsel elicited her client's testimony that Dennis never impersonated Charles Momah and that Charles had never impersonated him. (RP 573) The trial court barred the Saldivars' from introducing evidence from other patients of Charles that Dennis had impersonated his brother and treated them without their consent. (CP 738-45; RP 630-35)

After *sua sponte* directing the Department of Health to produce all statements of the Saldivars, the trial court admitted a narrative summary of an investigator's interview with Perla over the Saldivars' hearsay objection. (Ex. 37; RP 421; CP 556) The trial court refused the Saldivars' requests to admit the Department's tape of the interview, or to allow the author of the report to testify. (RP 656-58, 661)

Dennis Momah claimed that he suffered a stroke, the loss of employment, and humiliation as a result of the Saldivars' report to the Department of Health and claims in their lawsuit. (RP 572, 613, 716-17, 719, 723, 735) The trial court refused to admit as evidence the counterclaims and declarations submitted by Dennis Momah

against other women who claimed they had been sexually abused by him, alleging that they caused his loss of employment, physical and emotional distress. (RP 612-22)

5. The Trial Court Dismissed The Saldivars' Claims, Holding That They Were Fabricated With The Assistance Of Their Lawyer, Entered A \$2.8 Million Judgment Against The Saldivars On Dennis Momah's Counterclaims, Sanctioned Their Lawyer, And Awarded The Defendants Almost \$300,000 In Attorney Fees.

Finding that the Saldivars had manufactured their allegations of sex abuse, the trial court dismissed all of the Saldivars' claims at the conclusion of their case in chief. (RP 699, 702, 708) The trial court held that the Saldivars failed to establish U.S. Healthworks' negligence because they did not complain of a sexual assault or ask anyone except Dennis Momah for a chaperone to be present while Perla was examined. (RP 696-99)

The trial court also dismissed the claims against Charles Momah, who did not attend trial because he was incarcerated. (RP 702) The trial court held that because the Saldivars did not perpetuate his testimony by videotape and could not "authenticate" any images of Charles Momah, the court could not compare Charles' appearance with that of Dennis and evaluate the Saldivars' claim of impersonation. (RP 700-01)

The trial court dismissed the Saldivars' claims against Dennis Momah because of inconsistencies in their testimony. Albert Saldivar testified inconsistently regarding whether he was in, or outside the clinic when Perla claimed to have been assaulted. (RP 702-05) Citing inconsistencies in Perla's testimony, her declarations and the medical records, the trial court held that her allegations of abuse were false. (RP 705-07)

The trial court found that the Saldivars' asserted their complaint for the improper purpose of preventing Dennis Momah from practicing medicine and obtaining money, and awarded him \$1 million in general damages and \$1.8 million in lost wages. (RP 778) The trial court additionally awarded the defendants attorney fees pursuant to the frivolous claim statute, RCW 4.28.185, and CR 11. (RP 778)

The trial court entered findings of fact and conclusions of law reiterating that the Saldivars manufactured false claims of sexual abuse against both Dennis and Charles Momah with the active assistance of their lead counsel, Harish Bharti, that were contradicted by their own prior testimony and the documentary record. (CP 1517-32) The trial court assessed attorney fees and costs against the Saldivars and Mr. Bharti in favor of the defendants

totalling \$293,708.49 (CP 1914, 1922), and, additionally imposed a \$300,000 fine against Mr. Bharti (CP 1537). The trial court denied the Saldivars' timely CR 59 motion, striking many of the exhibits attached to that motion. (CP 1924)

The Saldivars appeal. (CP 1910)

V. ARGUMENT

A. **Dennis Momah's \$2.8 Million Judgment Against The Saldivars, Based On Their Claims Of Sexual Abuse, Fails As A Matter Of Law.**

The trial court awarded Dennis Momah a \$2.8 million judgment against the Saldivars on the grounds that the Saldivars' complaints of sexual abuse, made to government authorities and in this litigation, were an abuse of process and comprised the tort of outrage. But the Saldivars' complaints to government authorities are entitled to absolute immunity, RCW 4.24.510, and the trial court's findings do not support liability for the tort of abuse of process because the trial court found that the Saldivars were motivated by their desire to prevail on their claims made in this lawsuit and to the Department of Health.

1. Dennis Momah Has No Claim For Damages Because The Saldivars' Claim Against Him, Arising From Their Complaint To Government Authorities, Is Entitled To Absolute Immunity Under RCW 4.24.510.

Dennis Momah was awarded damages on his claim that the Saldivars' complaint to the Department of Health, repeated in this lawsuit, was in bad faith and made for an improper purpose. RCW 4.24.510 grants the Saldivars absolute immunity from civil liability for claims based upon a communication regarding any matter of concern to a government agency. The trial court's judgment in favor of Dennis Momah for abuse of process and outrage must be reversed because Momah's counterclaims arise from the Saldivars' privileged complaints.

The Legislature has granted citizens complaining to governmental authorities absolute immunity from suit:

4.24.510. Communication to government agency or self-regulatory organization--Immunity from civil liability.

A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from civil liability for claims based upon the communication to the agency or organization regarding

any matter reasonably of concern to that agency or organization.

Although this statute formerly limited immunity to “a person who in good faith communicates a complaint . . .” Laws 1999, ch. 54 § 1, the 2002 Legislature expanded the immunity “regardless of content or motive . . .” Laws 2002, ch. 232 § 1. The only remaining relevance of a complainant’s motive is to the court’s authority to deny the complainant statutory damages of \$10,000 “if the court finds that the complaint or information was communicated in bad faith:”

A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys’ fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

RCW 4.24.510.

As a remedial statute, RCW 4.24.510 is liberally construed. ***Kauzlarich v. Yarbrough***, 105 Wn. App 632, 649 n.2, 20 P.3d 946 (2001), *cert. denied*, 534 U.S. 1090 (2002) (SLAPP statute is remedial); ***Dautel v. Heritage Home Center, Inc.***, 89 Wn. App. 148, 152, 948 P.2d 397 (1997), *rev. denied*, 135 Wn.2d 1003 (1998) (remedial statutes are liberally construed). Accordingly, the immunity from liability for claims “based upon” a communication to a government agency “as used in RCW 4.24.510 refers to the starting

point or foundation of the claim.” *Dang v. Ehredt*, 95 Wn. App. 670, 682, 977 P.2d 29, *rev. denied*, 139 Wn.2d 1012 (1999).

The Saldivars’ complaint to the Department of Health was the “starting point or foundation” of Dennis Momah’s counterclaims and his resulting judgment. See *Dang*, 95 Wn. App. at 683 (where civil rights, false arrest and imprisonment claims commenced with bank’s complaint to police, bank was immune from liability; “allowing a cause of action for the events surrounding the communication to the police, while immunizing the communication itself, would thwart the policies and goals underlying the immunity statute.”) The Saldivars complained to the Department of Health in July 2003, almost ten months before commencing this action and before they had contacted counsel to pursue a claim against Dennis Momah. (RP 696; CP 6) Dennis Momah lost his job and suffered his damages while the Department of Health investigated the Saldivars’ complaint of sexual abuse and before this lawsuit was filed. (RP 519)

Dennis Momah based his claims for economic harm and emotional distress on the Saldivars’ complaints “to the police and the Medical Quality Assurance Commission of the Department of Health.” (CP 32) The trial court found that Dennis Momah’s damages were “due to the Saldivars’ false allegations.” (FF 24, CP

1526, FF 22-25, CP 1525-27) Dennis Momah's claims were based upon the Saldivars' original complaint alleging sexual abuse to the Department of Health and are barred under RCW 4.24.510.

2. Dennis Momah's Claim For Abuse Of Process Fails As A Matter of Law Because The Saldivars' Objective Of Preventing Dennis Momah From Practicing Medicine Is Not An Ulterior Objective, But Is Contemplated By Their Complaint.

The trial court's conclusion that the Saldivars engaged in the abuse of process for the "improper purpose of influencing the Dept. of Health to terminate Dennis Momah's license to practice medicine" is contrary to law. (CL 6, CP 1533) Dennis Momah cannot bring a cause of action for abuse of process because the Saldivars' purpose was not improper as a matter of law. The absolute privilege provided by RCW 4.24.510 extends to all claims arising from the same core of operative facts. See *Stidham v. Department of Licensing*, 30 Wn. App. 611, 615-16, 637 P.2d 970 (1981) (privilege defense against defamation equally applicable to claim for tortious interference with prospective advantage).

Even in the absence of the statutory privilege under RCW 4.24.510, the abuse of process claim fails as a matter of law because the Saldivars' purpose in bringing their civil action – "making sure that Dr. Dennis Momah would never be permitted to

practice” (CL 6, CP 1534) – is not an improper ulterior purpose of a tort suit alleging sexual abuse by a medical professional. The tort of abuse of process provides a remedy against “one who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed.” *Restatement (Second) Torts*, § 682.

Dennis Momah had to prove both “(1) the existence of an ulterior purpose to accomplish an object not within the proper scope of the process and (2) an act in the use of legal process not proper in the regular prosecution of the proceedings.” ***Mark v. Williams***, 45 Wn. App. 182, 191, 724 P.2d 428, *rev. denied*, 107 Wn.2d 1015 (1986). “The crucial inquiry is whether the judicial system’s process, made available to insure the presence of the defendant or his or her property in court, has been misused to achieve another, inappropriate end.” ***Mark***, 45 Wn. App. at 192. Thus, “institution of a legal proceeding even with a malicious motive does not constitute an abuse of process.” ***Loeffelholz v. C.L.E.A.N.***, 119 Wn. App. 665, 699, 82 P.3d 1199, *rev. denied*, 152 Wn.2d 1023 (2004).

In ***Mark***, a pharmacist claimed that a pharmacy board investigator sought a broad administrative inspection warrant to obtain evidence of criminal activity. The Court of Appeals affirmed

the dismissal of the pharmacist's abuse of process claim because there was no evidence that the inspector "used the legal proceedings to accomplish a purpose for which they were not designed." **Mark**, 45 Wn. App. at 192. The Court of Appeals held that the civil violations and criminal prosecutions are "inextricably related" and "[i]t would be strange indeed if after conducting an administrative investigation in which evidence of criminal activity was obtained, criminal charges could not be filed." **Mark**, 45 Wn. App. at 192. See also **Batten v. Abrams**, 28 Wn. App. 737, 745, 626 P.2d 984, *rev. denied*, 95 Wn.2d 1033 (1981).

In **Batten**, the trial court found that the defendant engaged in the abuse of process by "manufactur[ing] evidence" in an attempt to mislead the court with the goal of vexing, harassing, and intimidating neighbors and others. 28 Wn. App. at 749. The Court of Appeals reversed, holding that even if the defendant manufactured evidence, it was for the "apparent purpose to buttress his case." 28 Wn. App. at 749. Absent an ulterior motive, "the initiation of vexatious civil proceedings known to be groundless is not abuse of process." 28 Wn. App. at 749.

Here, Dennis Momah alleged in his counterclaims that the Saldivars made false reports to the police and the Department of

Health in order “to obtain money from Dr. Momah.” (CP 32) At trial, however, Dennis Momah’s counsel elicited testimony that the Saldivars’ goal was to prevent Dennis Momah from misusing his position of trust to harm innocent women:

Q: You said your real purpose in this lawsuit was to make sure that nothing like this happened to anyone else, correct?

A: Yes.

...

My sole purpose is to support my wife and make sure he never – he doesn’t do this again – anything like this to anyone else.

(RP 179)

Q: By filing lawsuit and reporting to police and reporting to the Department of Health isn’t it true that you and your wife’s expressed purpose . . . was to try and make it so Dr. Momah could never practice again?

A: Correct

(RP 192; see also RP 759-60 (closing argument))

The trial court found that the Saldivars’ purpose was to prevent Dennis Momah from practicing medicine. (FF 9, CP 1522) This is not an ulterior purpose for which the tort of abuse of process provides a damages claim. It would be “strange indeed” if a successful claim that a physician engaged in inappropriate sexual touching, would not, as a direct consequence, also affect the physician’s ability to practice medicine. *Mark*, 45 Wn. App. at 192.

The tort of abuse of process generally requires “some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it.” *Restatement*, § 682, comment b. The Saldivars’ purpose was neither “improper” nor ulterior, but falls within the scope of the Saldivars’ original complaint to the Department of Health as well as within the scope of the Saldivars’ civil claims. This court should reverse Dennis Momah’s \$2.8 million judgment because the abuse of process claim fails as a matter of law.

B. The Trial Court Improperly Struck The Saldivars’ Jury Demand.

The trial court’s findings of fact must be reversed because the factual allegations should have been resolved by a jury and not by a superior court judge. The Saldivars filed their jury demand when they filed their original complaint, on April 5, 2004, (CP 5), but failed to serve the jury demand on the defendants prior to October 11, 2004, the last date to do so under Pierce County Local Rule 38 and the case schedule order. (CP 1) Although the failure to serve the jury demand results in a waiver of the right to jury trial under CR 38(d), the trial court erred because the defendants had actual notice of the jury demand and could not show that they were prejudiced by the failure to serve the jury demand.

The Washington Constitution provides that the “the right of trial by jury shall remain inviolate . . .” Art. I § 21. An “inviolable” right is one that “must not diminish over time and must be protected from all assaults to its essential guaranties.” ***Sofie v. Fibreboard Corp.***, 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). Any waiver of the right to trial by jury under the state constitution “should be narrowly construed in favor of preserving the right.” ***Wilson v. Horsley***, 137 Wn.2d 500, 509, 974 P.2d 316 (1999). Given the importance of the right to jury trial, a jury demand must be construed in plaintiff’s favor, even if a plaintiff fails to strictly comply with CR 38, when the defendant has actual knowledge of the jury demand. ***Wilson v. Olivetti North America, Inc.***, 85 Wn. App. 804, 809-810, 934 P.2d 1231, *rev. denied*, 133 Wn.2d 1017 (1997).

In ***Wilson***, like here, the plaintiff failed to serve a jury demand on the defendant. Division Three reversed a trial court’s order striking the plaintiff’s jury demand because the defendant had notice of plaintiff’s jury demand, holding that the plaintiff substantially complied with Civil Rule 38 by filing the jury demand in a timely manner. The ***Wilson*** court held that defendant’s insistence on strict compliance with the rule, “exalts form over substance” and that denying the plaintiff the constitutional right to a jury trial was an

abuse of discretion. 85 Wn. App. at 810. The *Wilson* court held that substantial compliance with Civil Rule 38 is sufficient if the other party had actual notice of the jury demand. 85 Wn. App. at 810.

The trial court's order in the instant case was similarly an abuse of discretion because the defendants had actual notice of the jury demand over one year before trial. The jury demand was prominently displayed as the fifth document on the superior court's web-based Legal Information Network Exchange (LINX) docket, accessible to the public until Dennis Momah obtained an order sealing the file in February 2005, ten months after the jury demand was filed (CP 2201; see Docket Cause no. 04-2-06677-3), and thereafter still available to counsel of record. Indeed, counsel for each of the defendants conceded that they became aware of the jury demand, at the very latest, when Charles Momah's counsel reviewed the LINX docket after the amended complaint was filed adding Charles Momah as a defendant in December 2004. (CP 513, 522)

There is substantial circumstantial evidence that defendants knew, or at a minimum believed, that the case would be tried to a jury at a much earlier date. Plaintiffs referenced a jury trial in the Track Assignment Request filed on April 5, 2004 with the initial complaint. (CP 2) In July 28, 2004, Dennis Momah sought a

protective order, arguing that pre-trial publicity “taints the jury pool, improperly influencing the jury before the case is underway.” (CP 1948-49. See also CP 73 (Dennis Momah’s Opposition to Motion to Amend: adding new parties would “complicate the issues before the jury and extend the length of the trial.”); CP 91 (U.S. Healthworks Opposition to Amended Complaint: “there is a high likelihood [of] . . . confusion within the jury.”)) These pleadings were filed in advance of the October 11, 2004 deadline for filing a jury demand under the case scheduling order (CP 1) and LR 38.

In *Wilson*, the appellate court reversed even though the order striking jury demand was entered only four days before the trial date, holding the defendant’s contention of prejudice was not credible in light of its advance knowledge that plaintiff had requested a jury. 85 Wn. App. at 810 (defendant “cannot reasonably contend it was prejudiced by Ms. Wilson’s failure to serve the separate jury trial demand.”) Here, the defendants admittedly knew of the jury demand at the latest in early 2005, (see CP 513-14, 522), well over one year before the trial date, and waited until September 2005 to bring their motion to strike the jury demand, still eight months before the May 2006 trial. (CP 506) The defendants’ claims of prejudice were not

sufficient to overcome the Saldivars' constitutional right to trial by jury.

The order striking the Saldivars' jury demand was erroneous for the additional reason that the right to demand a jury recommenced once the Saldivars amended their complaint in December 2004 to add new claims against a new party. Thus, although LR 38 required a jury demand to be filed by the date stated in the case schedule order, the trial court necessarily modified that scheduling order by authorizing the addition of Charles Momah as a new party in December 2004. (CP 230) The trial court continued the trial date from October 2005 to May 2006 on Charles Momah's motion on September 16, 2005 – the same date on which it struck the plaintiff's jury demand. (CP 544, 547)

Given the primacy of the right to trial by jury, this court should hold that the Saldivars' right to demand a jury trial revived their amendment adding impersonation claims against Charles and Dennis Momah in December 2004. Federal and state courts have held under their versions of Rule 38 that the right to trial by jury is revived where an amended complaint raises new factual issues.¹

¹ See, e.g., *Clement v. American Greetings Corp.*, 636 F. Supp. 1326, 1334 (S.D. Cal. 1986) (plaintiff entitled to jury trial on new issues raised in amended complaint); *Ex Parte Jackson*, 737 So.2d 452, 455

Although Washington courts have not addressed this specific issue, the right to trial by jury is revived where a mistrial is declared or the case is remanded for a new trial on appeal. See *Wilson v. Horsley*, 137 Wn.2d at 509; *Spring v. Dept. of Labor and Industries*, 39 Wn. App. 751, 756, 695 P.2d 612 (1985). Because the waiver of the right to trial by jury is narrowly construed, a party's waiver of a jury trial in the initial proceeding does not include a subsequent trial that was not initially contemplated at the time the waiver was made. *Wilson*, 137 Wn.2d at 510.

Here, any initial waiver could not encompass the new claims of impersonation arising from the addition of Charles Momah as a defendant. This court should reverse and remand for a jury trial.

(Ala. 1999) (new claims raised in an amended pleadings renews period for jury demand); *Javit v. Marshall's, Inc.*, 40 Conn. App. 261, 266, 670 A.2d 886, *cert. denied*, 236 Conn. 915 (1996) (when the original period for claiming a case to the jury has expired, a new period may be created by the filing of an amended pleading, provided that the amended pleading introduces a new issue of fact into the case); *Adler v. Seligman of Florida, Inc.*, 492 So.2d 730, 733 (Fla. 1986), *rev. denied*, 503 So.2d 328 (1987) ("the filing of an amended pleading which injects a 'new issue' into the case revives the time for filing a demand for jury trial"); *Matter of Schneier's Estate*, 74 A.D.2d 22, 28, 426 N.Y.S. 2d 624 (1980) (after being granted leave to amend petition, petitioner was allowed to demand a jury based on the newly revived time period to demand jury); *Morrison v. Wyrtsch*, 93 N.M. 556, 558, 603 P.2d 295 (1979) (defendant allowed to demand jury when time had elapsed after it filed an amended answer including a counterclaim which raised new issues).

C. The Trial Court's Exclusion Of Relevant Evidence Prevented The Saldivars From Proving Their Case And From Defending Against Dennis Momah's Counterclaims And Against The Allegation That They Fabricated Their Claims For An Improper Purpose.

The trial court made a series of rulings that prevented a fair resolution of the issues in this case, especially in light of the defendants' accusations, and the trial court's findings, that the Saldivars and their counsel fabricated their allegations of sexual abuse against the Momah brothers. The trial court refused to consider as hearsay any out of court statements that would have rebutted the defendants' charge of fabrication (*see, e.g.*, RP 88, 91, 97, 105, 107, 156, 223, 300, 434), excluded as irrelevant the testimony of numerous witnesses who had personal knowledge that Dennis Momah routinely impersonated his brother Charles (RP 23-26; CP 410, 504, 550), excluded a videotape offered for identification purposes because it was not "authenticated" (RP 30-32), and excluded expert testimony that would have explained Perla's behavior as symptomatic of post traumatic stress disorder, not reflective of fabrication as the trial court found. (CP 408, 504, 550) Any of these errors justify a new trial.

1. Evidence From Other Patients That Dennis Momah Impersonated His Brother Was Relevant To The Saldivars' Claim Of Impersonation And Relevant To Dennis Momah's Claims That The Saldivars Were Responsible For The Loss Of His Job And Other Damages.

The trial court erred in granting the defendants' pretrial motions excluding as witnesses all persons who had personal knowledge of impersonation except "those who have experience at the Puyallup clinic of U.S. Healthworks during similar time period" as Perla's treatment. (CP 410, 504, 550-53; RP 26) The defense repeatedly claimed that the possibility of one doctor substituting for another without his patient's or his employer's knowledge was so incredible that the Saldivars' claims must have been fabricated. (See RP 676, 687-89 (directed verdict argument)) The trial court adopted this reasoning. (FF 6, 7, CP 1520-21) Yet the trial court excluded the very testimony that would have established that the Momah twins impersonated one another on a routine basis over a period of years.

Numerous witnesses offered testimony that Dennis Momah impersonated his brother Charles at Charles' King County clinics. Former employees of Charles Momah would have testified that Dennis Momah examined Charles' patients several times beginning in 1996, including one instance where a patient complained about a

pelvic examination conducted by Dennis Momah. (CP 443-45, 449 (Jenni Ramos); 456 (Rosemary Bottom)) Several patients of Charles Momah alleged that Dennis Momah had treated and sexually abused them while impersonating his brother. (See, e.g., CP 464 (Amy McFarlane); CP 472 (Tanya Bashaw)) Many of the other witnesses listed by plaintiff had previously testified to impersonation by declaration in response to defendants' Rule 12(c) motion. (CP 468, 2072-2197; see Bharti Br. at 6-7)

This testimony was relevant under ER 401 and ER 404(b) because it buttressed plaintiffs' contention that Dennis and Charles Momah engaged in common plan or scheme of using their similar appearances to trade places with each other at their respective clinics. See *State v. DeVincentis*, 150 Wn.2d 11, 19, 74 P.3d 119 (2003). At a minimum, this testimony became relevant when Dennis Momah opened the door by testifying that he had never impersonated his brother or allowed his brother to impersonate him. (RP 573, See RP 633) See *State v. Brush*, 32 Wn. App. 445, 448, 648 P.2d 897 (1982), *rev. denied*, 98 Wn.2d 1017 (1983) (defendant opens door to testimony regarding specific acts of misconduct by placing his own character in issue).

Even if the trial court could justifiably exclude this evidence from the Saldivars' case in chief, evidence that other individuals had made claims against Dennis Momah for improprieties in the practice of medicine was clearly relevant to his claim that he suffered millions of dollars in lost earnings and emotional distress because of Perla Saldivars' claims against him. (See RP 23-25 (argument on motion in limine)) Yet the trial court excluded not only all witnesses claiming impersonation (RP 26), but also the counterclaims asserted by Dennis Momah in lawsuits filed by other patients in which he claimed that their allegations caused him the same economic damages and emotional distress that he alleged was caused by the Saldivars. (Exs. 41-44; RP 614-21)

Dennis Momah's counterclaims in other lawsuits were admissions that bore on his claim that the Saldivars caused him to lose his job and suffer a stroke. See *Williams v. Union Carbide Corp.*, 790 F.2d 552, 555-556 (6th Cir.), *cert. denied*, 479 U.S. 992 (1986) (in plaintiff's claim that defendant exposed plaintiff to toxic chemicals, trial court erred in refusing to allow defendant to introduce statements in plaintiff's pleadings in earlier suit claiming that the same injuries were caused acetylene exposure), noted in Tegland, 5B *Washington Practice* § 801.53 at 370 n. 4 (4th Ed. 1999). The

trial court erred in entering a \$2.8 million judgment without allowing the Saldivars to rebut Dennis Momah's claim that they caused his damages.

2. The Trial Court Erred In Excluding The Testimony of A Social Worker Regarding Post Traumatic Stress Disorder, Especially When The Court's Adverse Credibility Determinations Were Based On Behavior Consistent With PTSD.

The trial court excluded the testimony of Karil Klingbeil, an MSW, Associate Professor of Social Work at the University of Washington, and former director of Social Work and Harborview Hospital's Sexual Assault Center. (CP 408, 504, 550, *See also* CP 425 (Klingbeil CV)) The trial court excluded Professor Klingbeil's testimony for two reasons – her “testimony about truthfulness or credibility” was inadmissible and “Ms. Klingbeil is not qualified to opine on psychiatric conditions.” (CP 408) Although the trial court properly held that Professor Klingbeil could not testify to Perla Saldivar's credibility, it erred in ruling that she was not qualified to express an opinion that Perla Saldivar suffered from post traumatic stress disorder.

In granting the defendant's motion to exclude Prof. Klingbeil's testimony, the trial court gave the Saldivars two weeks to “produce a report by Karil Klingbeil summarizing all testimony she intends to

offer in this matter.” (CP 408) The Saldivars filed a June 22, 2005 letter and report, along with Ms. Klingbeil’s CV, (CP 425-40) discussing the symptoms of PTSD and her opinion, after examining Perla on two separate occasions, that Perla evidenced PTSD symptoms. (CP 439-40) The trial court refused to reconsider its original order (CP 504) and held that plaintiffs failed to file a supplemental report or identify “any areas of potential testimony by Karil Klingbeil which would be admissible at trial.” (CP 550) This was error because Professor Klingbeil was qualified to testify to Perla’s mental condition.

In *Detention of A.S.*, 138 Wn.2d 898, 917-918, 982 P.2d 1156 (1999), the Court held that a social worker may testify to mental conditions as an expert witness: “[T]he rendering of an opinion on the existence of a mental disorder was clearly within this statutory description of social worker’s scope of practice.” The Court rejected the assertion, adopted by the trial court here, that social workers are categorically barred from acting as expert witnesses on mental health conditions. 138 Wn.2d at 922. In *State v. Florczak*, 76 Wn. App. 55, 74, 882 P.2d 199, *rev. denied*, 126 Wn.2d 1010 (1994), Division One affirmed the admission of a social worker’s expert opinion that the victim suffered from post traumatic stress syndrome.

Although the issue of the social worker's qualifications as an expert witness was not properly preserved, the appellate court held that her "graduate education in social work and her years of experience qualify her as an expert in that realm [behavior of child sexual abuse victims.]" 76 Wn. App. at 72, fn. 10.

Similarly, here, Prof. Klingbeil was qualified to give an expert opinion that Perla Saldivar suffered from post traumatic stress disorder and to describe the symptoms of PTSD. Moreover, that testimony was critical to rebut the defendants' assertions that Perla's confusion, her decision to return to U.S. Healthworks for treatment after suffering a traumatic event, and her inconsistent recall of the dates and times upon which sexual abuse occurred all indicated Perla's untruthfulness – a position expressly adopted by the trial court in its findings. (FF 3, 17-18, CP 1518, 1524)

Washington courts "have made clear that expert testimony generally describing symptoms exhibited by victims may be admissible when relevant and when not offered as a direct assessment of the credibility of the victim." **State v. Stevens**, 58 Wn. App. 478, 496, 794 P.2d 38, *rev. denied*, 115 Wn.2d 1025 (1990) (expert testimony regarding symptoms associated with child sex abuse admissible to rebut defense theory that behaviors resulted from other

trauma in children's lives). The trial court erred in excluding expert testimony on post traumatic stress disorder that directly rebutted the trial court's findings that Ms. Saldivar did not exhibit the type of behavior normally associated with a victim of sexual abuse.

3. The Trial Court Erred In Excluding The Videotape Offered For Purposes Of Identifying Charles Momah.

The trial court also erred in excluding a videotape of the news broadcast in which Perla identified Charles Momah as the physician who first abused her at U.S. Healthworks because "no one can authenticate this tape . . ." and because it was not relevant. (RP 30-32; see Ex. 5) The tape was clearly relevant to Perla's identification of Charles Momah, as the trial court dismissed the Saldivars' claims against Charles Momah for failure to introduce any physical evidence of his appearance:

Unfortunately, one of the things that a trier of fact, whether it would have been a jury or the judge, would not be able to make any kind of factual determination as to whether or not that [impersonation] was plausible without having some sort of viewing of Dr. Charles Momah. Now, you were unable to provide or unwilling to provide any authentication of the photographs you had in your possession . . .

(RP 700)

The Saldivars were not required to "authenticate" a photograph or videotape. "[A]nyone with first-hand knowledge of the

subject . . . can identify a photograph.” Tegland, 5C *Washington Practice* § 901.19 The person who took the videotape need not testify. ***Kellerher v. Porter***, 29 Wn.2d 650, 668-69, 189 P.2d 223 (1948). Here, Dennis Momah, who was extensively questioned regarding physical differences between himself and his brother, could have identified Charles from photographs or the videotape.

4. The Trial Court Erred In Admitting The Memorandum Of A Department Of Health Investigator While Prohibiting The Saldivars From Calling Her As A Witness.

Over the Saldivars’ hearsay objection, the trial court admitted a Department of Health investigator’s memorandum summarizing her interview with Perla Saldivar. (Ex. 37, RP 421) Defendants used the memorandum to impeach Perla’s testimony. (RP 422, 434-35) However, when the Saldivars sought to call the investigator, the trial court barred her testimony. (RP 656-57, 661) Once the investigator’s hearsay statements were introduced to support the defendant’s theory of fabrication, the trial court erred in not allowing the investigator to testify to what Perla actually said in her interview. (RP 659)

The Department of Health’s memorandum was produced on the trial court’s *sua sponte* order entered during the pretrial conference on April 18, 2006. (CP 556) When the Department of

Health responded to the trial court's order (RP 324), the trial court allowed the defendants to cross-examine Perla with a February 6, 2006 memo authored by investigator Lynn Larsen-Levier. (Ex. 37, RP 422, 434-35) Defendants used the memorandum to argue that Perla did not allege that Dennis Momah had placed his hand inside her vagina, but had said he had touched her rectum. (RP 422, 434-35)

The memorandum itself was hearsay because it reflected the investigator's out of court statements concerning what Perla told the investigator. ER 801(a). Even if a hearsay exception allowed the court to consider the memorandum, however, the trial court erred in not allowing defendants to call the memorandum's author to establish that Perla did not use the word "rectum" in her interview, and to address the trial court's accusation that the Saldivars had filed a new "complaint" with the Department of Health, which formed the basis for her finding that the Saldivars and their counsel had lied to the court. (RP 656-60; FF 27, CP 1527-28)² The trial court erred in basing its credibility findings on a hearsay memorandum when its author was available to testify.

² The trial court also refused to allow the introduction of the audio tape of Perla's interview with Larsen-Levier, which the Department produced with its file. (RP 324, 657)

5. Ms. Saldivar's Out Of Court Statements Alleging Sexual Abuse Were Admissible To Rebut Defendants' Charge of Fabrication.

The trial court also erred in excluding as hearsay the Saldivars' statements made at or shortly after Perla's visits to U.S. Healthworks, including Perla's statements to her husband (RP 88, 91), to translator Ed Fuentes (RP 155-56), to her father (RP 223), and Albert's complaint to the Department of Health (RP 97), among others. The Evidence Rules exclude from the definition of hearsay an out of court statement that is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication," provided that the declarant is subject to cross examination at trial. ER 801(d)(1)(ii).

The excluded statements meet the requirements of this rule. The Saldivars both testified at trial and were subject to cross examination. ER 801(d)(1). The statements were offered to rebut the defendant's charge of fabrication. ER 801(d)(1)(ii). The statements were made before Perla contacted her attorney Harish Bharti, which is when the trial court determined that the Saldivars began their participation in a conspiracy to fabricate allegations of sexual abuse against Dennis Momah. (FF 30, CP 1530) See *State v. Osborn*, 59 Wn. App. 1, 5, 795 P.2d 1174, rev. denied, 115

Wn.2d 1032 (1990) (child's prior statements to witnesses admissible in child rape case to rebut contention that claims were fabricated on behalf of mother after separating from defendant, where statements were made by child before date of separation).

Here, the trial court accepted the defendants' theory that Perla fabricated allegations of sexual abuse against the Momahs. (FF 2, 8, 9, CP 1518, 1521-22) Her statements made to third parties shortly after the alleged abuse occurred were crucial evidence that she was not lying. The trial court abused its discretion in excluding this evidence.

D. The Trial Court's Findings That The Saldivars Fabricated Their Claims And Its Award of Attorney Fees Under RCW 4.84.185 Should Be Reversed And The Case Remanded For A New Trial Before A New Superior Court Judge.

The trial court's findings are tainted by its refusal to allow the Saldivars to fully present their case and defend against defendants' allegations of fabrication. The trial court held that the Saldivars and their counsel alleged impersonation to create public attention, influence public opinion and harass Dennis Momah. (FF 33-34, CP 1530-31)³ Yet in dismissing the Saldivars' claims, finding that they

³ The Saldivars adopt all of Mr. Bharti's arguments regarding sanctions, including his argument that there was no evidence before the court that the Saldivars or their counsel spoke to the media concerning the Saldivars' claims. (Bharti Br. at 32-33)

lied, and granting judgment in Dennis Momah's favor, the trial court systematically precluded the Saldivars from proving that their claims were true – that the Momah twins had systematically engaged in impersonation and attempted to misuse their position of trust for their own pecuniary and sexual gratification.⁴ See ***Cham v. Attorney General***, 445 F.3d 683, 691 (3rd Cir. 2006) (due process requires neutral decision-maker who can fairly evaluate evidence).

The trial court's findings that the Saldivars' claims were fabricated, frivolous and its award of attorney fees under RCW 4.84.185 should be reversed.⁵ In order to safeguard the appearance of fairness, this court should remand this matter to a new Superior Court judge because the trial court cannot reasonably be expected to set aside its previously expressed hostility to the Saldivars and their counsel in any further proceedings. ***Marriage of Muhammad***, 153 Wn.2d 795, 807, ¶19, 108 P.3d 779 (2005); ***Custody of R.***, 88 Wn. App. 746, 762-63, 947 P.2d 745 (1997).

⁴ The trial court similarly struck most of the evidence presented on the Saldivars' motion for a new trial. (CP 1924)

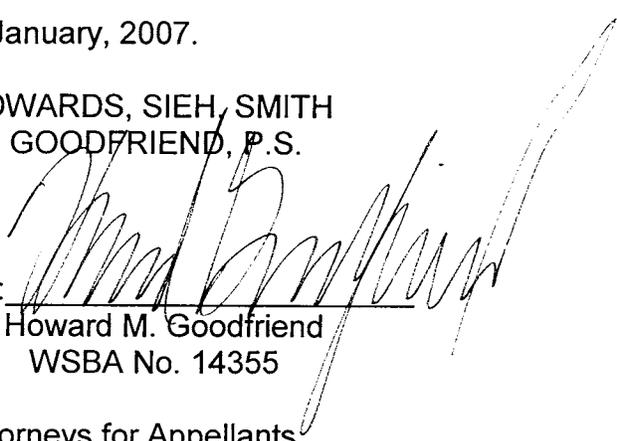
⁵ The Saldivars incorporate appellant Harish Bharti's assignments of error and arguments relating to the imposition of sanctions. RAP 10.1(g).

VI. CONCLUSION

This Court should reverse the judgment in favor of Dennis Momah, reverse the sanctions under RCW 4.84.185 and CR 11 and remand for a jury trial on the Saldivar's claims.

Dated this 12th day of January, 2007.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: 
Howard M. Goodfriend
WSBA No. 14355

Attorneys for Appellants
Perla and Albert Saldivar

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 12, 2007, I arranged for service of the foregoing Brief of Appellants Perla and Albert Saldivar, to the court and counsel for the parties to this action as follows:

| | |
|---|--|
| Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402 | <input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail |
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| Ms. Mary H. Spillane Williams Kastner & Gibbs PLLC Two Union Square 601 Union St., Suite 4100 Seattle WA 98101-2380 | <input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail |

DATED at Seattle, Washington this 12th day of January, 2007.

Tara M. Holland
Tara M. Holland

STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

APPENDIX A



The Honorable Katherine M. Stolz

SUPERIOR COURT OF WASHINGTON IN AND FOR PIERCE COUNTY

PERLA SALDIVAR and ALBERT SALDIVAR,

Plaintiffs,

v.

DENNIS MOMAH, JANE DOE MOMAH, and the marital community composed thereof; U.S. HEALTHWORKS MEDICAL GROUP OF WASHINGTON, P.S., a Washington professional services company; CHARLES MOMAH, JANE DOE MOMAH, and the marital community composed thereof and DOES 1-10,

Defendants.

NO. 04-2-06677-3

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After hearing all testimony and reviewing the exhibits offered and admitted during trial, and considering the Defendants' post-trial motions for sanctions, the Court makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

- 1. Perla Saldivar was seen by several different healthcare providers at the US Healthworks Puyallup clinic in May and June of 2003. She was seen only twice by Dr. Dennis Momah: May 28, 2003 and June 26, 2003.

1 2. Perla Saldivar was not sexually assaulted or in any other way inappropriately treated by
2 Dr. Dennis Momah. Plaintiffs presented no evidence that Ms. Saldivar was assaulted by
3 Dr. Momah other than Ms. Saldivar's own testimony. This Court finds that Perla
4 Saldivar's testimony was not credible. Her version of events occurring at the US
5 Healthworks Puyallup clinic was inconsistent with the medical records, patient sign-in
6 sheets, and all other objective evidence. She changed her version of events frequently
7 and her testimony was contrary to common sense. In addition, Ms. Saldivar's trial
8 testimony was repeatedly and effectively impeached with her own prior statements and
9 testimony, conclusively demonstrating that she has significantly altered her story over
10 time on nearly every material fact.

11 3. The contradictions and inconsistencies in Ms. Saldivar's testimony were some of the
12 most pronounced this Court has ever seen. This Court finds that Perla Saldivar
13 knowingly and intentionally fabricated her allegations against Dr. Dennis Momah and Dr.
14 Charles Momah. Ms. Saldivar's testimony and statements have dramatically changed
15 over time. She contradicted earlier statements and testimony she and her husband
16 provided about nearly every fact material to her complaint, including how many times
17 she saw Dr. Momah, who allegedly assaulted her, when and on which appointments the
18 alleged assaults occurred, and the manner in which she claims to have been assaulted.
19 Even Ms. Saldivar's description of which parts of her body she claims were touched by
20 Dr. Momah has changed from one account to another.

21 4. Albert Saldivar has no personal knowledge of the events material to plaintiffs' liability
22 claims—what occurred between Perla Saldivar and Dr. Momah in the examination room
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1 at the US Healthworks Puyallup clinic—and his testimony at trial was not credible. Mr.
2 Saldivar's testimony was repeatedly impeached at trial with his prior sworn testimony.
3 Much of his testimony was changed and/or recanted at trial. For example, Mr. Saldivar
4 testified in his deposition that he was standing right outside the door of the examination
5 room during one of his wife's medical visits with Dr. Momah and even provided detail
6 concerning what he heard his wife say during that visit. Faced with impeachment
7 evidence at trial, on cross examination Mr. Saldivar admitted that he was never inside the
8 US Healthworks Puyallup clinic building during any of his wife's medical visits with Dr.
9 Momah. This and innumerable other contradictions and changes in Mr. Saldivar's
10 testimony has persuaded this Court that he has fabricated his testimony in an effort to
11 support his wife's false and ever-shifting complaints.
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14 5. The testimony of interpreter Ed Fuentes was not credible and did not provide meaningful
15 support for plaintiffs' claims. Ed Fuentes admitted at trial that he had previously told
16 multiple defense counsel in this case that he was not present during any of Perla
17 Saldivar's medical appointments with Dr. Dennis Momah. When called as a witness at
18 trial, Mr. Fuentes testified that despite these earlier statements, and the fact that he had
19 long since destroyed any record he had of his translation appointments in 2003, he
20 suddenly remembered at trial that he was in the examination room with Perla Saldivar
21 during one or more of her medical appointments with Dr. Momah three years earlier. Yet
22 he could not remember how many visits he had attended or the dates (not even the
23 month) of these visit(s). He was unable to describe what either party was wearing, what
24 either party said, or the actions of either party during these visit(s). The Court did not
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1 find Mr. Fuentes' testimony credible. In addition, even if the Court were to believe Mr.
2 Fuentes' sudden recollection of having attended one or more of Perla Saldivar's medical
3 appointments with Dr. Momah, Mr. Fuentes did not claim to have witnessed any
4 inappropriate behavior by Dr. Dennis Momah during these visits. His testimony
5 therefore did not support or corroborate plaintiffs' allegations.

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7 6. Dr. Charles Momah did not impersonate Dr. Dennis Momah at the US Healthworks
8 Puyallup clinic, and Dr. Charles Momah never saw, treated or otherwise had any contact
9 with Perla Saldivar. There were intricate systems and office procedures in place that
10 would make it highly unlikely that any physician could have sneaked into the US
11 Healthworks Puyallup clinic in May or June of 2003 and impersonated another physician
12 without being detected. In addition, there are no doors near the doctor's office that would
13 allow a physician to leave or enter the premises without being observed by multiple
14 people. The US Healthworks Puyallup clinic was very busy on the days Perla Saldivar
15 was treated by Dr. Dennis Momah, and this Court finds that it is not plausible that a
16 physician could be absent from the premises for any significant period of time during the
17 physician's shift without this being noticed by the clinic staff. It is similarly implausible
18 that a doctor could be occupied with a patient for three to five hours as alleged by Perla
19 Saldivar without significantly disrupting the functioning of the clinic and without the
20 clinic staff noticing the situation. Records establish that Dr. Dennis Momah saw
21 numerous patients on both of the days Perla Saldivar saw him. He could not have seen
22 that number of patients if Perla Saldivar's appointment was three to five hours long as
23 she claims.
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1 7. There is no evidence or even allegation in this case that Dennis Momah impersonated
2 Charles Momah. The only evidence before this Court of any alleged impersonation by
3 Charles Momah of Dennis Momah, or any treatment or other contact between Charles
4 Momah and Perla Saldivar, is the testimony of the Saldivars, which this Court does not
5 find reliable or credible. According to the testimony of the Saldivars, Perla Saldivar
6 believes she saw Charles Momah for approximately 10 minutes during one medical visit
7 in May of 2003. Her testimony concerning who she believes she saw during which
8 medical visit has materially changed in different accounts of her story, she never alleged
9 any impersonation until well after the fact, and after she had retained Harish Bharti as her
10 attorney and information about Charles Momah began to appear in the media. Perla
11 Saldivar's initial complaint to the Department of Health, made before retaining Harish
12 Bharti as her attorney, did not mention impersonation or sexual contact. Even her recent
13 accounts of when she believes she saw Charles Momah as opposed to Dennis Momah at
14 the US Healthworks Puyallup clinic have been inconsistent. The Court finds no credible
15 evidence to support an allegation that Charles Momah ever entered the US Healthworks
16 Puyallup clinic, pretended to be his brother Dennis Momah, or had any interaction of any
17 kind with Perla Saldivar.

18 8. The Saldivars changed their testimony about what happened as necessary to achieve their
19 stated goal of preventing Dr. Dennis Momah from practicing medicine. The initial
20 complaint to the Department of Health's Medical Quality Assurance Commission
21 (MQAC) said that Dennis Momah touched Perla Saldivar's buttocks during a low back
22 examination. After retaining attorney Bharti, she made a complaint to the Federal Way
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1 Police Department. Ms. Saldivar testified that Mr. Bharti helped her prepare the
2 declaration provided to the police department. In that declaration, prepared with Harish
3 Bharti's assistance, Ms. Saldivar materially changed her allegations against Dennis
4 Momah and, for the first time, asserted that Dr. Momah inserted his hand into her vagina
5 and that Dr. Charles Momah was impersonating Dr. Dennis Momah. This Court finds
6 that these revised allegations were false, and that attorney Harish Bharti was materially
7 involved in the fabrication of this false, sworn testimony.

9 9. Perla and Albert Saldivar knowingly made false reports to the Department of Health, the
10 Federal Way Police Department and the Pierce County Superior Court alleging that Perla
11 Saldivar was assaulted by Dr. Dennis Momah. These false reports were made for an
12 improper purpose. These false reports were made with the explicit intent of ruining Dr.
13 Dennis Momah's reputation and interfering with Dr. Dennis Momah's ability to make a
14 living as a medical doctor as both Saldivars testified at trial. The false reports were
15 willful and malicious and made to bolster the Saldivar's frivolous civil lawsuit.

17 10. The type of back/knee/shoulder examination performed by Dr. Dennis Momah on Perla
18 Saldivar on May 28, 2003 and June 26, 2003 is not the type of examination for which the
19 standard of care ordinarily would require a female chaperone. Perla Saldivar's testimony
20 that she asked Dr. Momah to call a nurse into the room after her examination began was
21 not credible. She admits to having spoken to two nurses during the course of her May 28,
22 2003 appointment, while Dr. Momah allegedly was not even in the room, and she did not
23 ask for a nurse chaperone either time. Rather, she asked these nurses, allegedly shortly
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1 after being sexually assaulted, what was taking Dr. Momah so long, seemingly impatient
2 for his return.

3 11. Perla Saldivar admits that she did not ask any employee at US Healthworks other than
4 Dr. Momah to have a nurse present in the room during her examination. This Court did
5 not find Ms. Saldivar's testimony that she asked Dennis Momah for a nurse chaperone to
6 be credible.
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8 12. The Saldivars did not report any alleged inappropriate behavior by Dr. Dennis Momah to
9 US Healthworks contemporaneous with her treatment at the US Healthworks Puyallup
10 clinic.

11 13. The Saldivars did not report any alleged inappropriate behavior by Dr. Dennis Momah to
12 the Department of Labor and Industries, despite frequent telephone contact with the
13 Department during the relevant time period.
14

15 14. US Healthworks had no reason not to schedule Perla Saldivar to see Dr. Dennis Momah
16 in May of 2003. US Healthworks had not received any patient complaints about the
17 quality of care provided by Dr. Dennis Momah or about any alleged inappropriate
18 behavior by Dr. Dennis Momah.

19 15. No credible evidence was presented at trial that Perla Saldivar ever asked US
20 Healthworks to schedule her June 26, 2003 appointment with a doctor other than Dr.
21 Momah. To the contrary, Perla Saldivar testified that she went to see Dr. Momah that
22 day to have him sign a transfer of physician slip for the Department of Labor &
23 Industries.
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1 16. Perla Saldivar's testimony that she was not examined by Dr. Momah on June 26, 2003,
2 but merely went to see him on June 26, 2003 to get him to sign a Labor and Industries
3 form authorizing a change of physician was not credible. The medical records reflect that
4 Dr. Momah examined and treated Ms. Saldivar on June 26, 2003. In addition, the L & I
5 form requesting a change of physician does not require or even have a space for the
6 signature of a physician. And even if a physician signature had been desired, there was
7 no reason that Perla Saldivar needed Dennis Momah's signature on the form.

9 17. This Court is not persuaded that Perla Saldivar ever asked US Healthworks not to
10 schedule her to see Dr. Dennis Momah. Even in Ms. Saldivar's version of events, this
11 was merely expressed to US Healthworks as a scheduling preference. Ms. Saldivar
12 admitted that she was told on arrival at the clinic that she probably could not be
13 scheduled to see a different physician on that date. Nonetheless, Ms. Saldivar made no
14 effort to reschedule her appointment for a different date when Dr. Momah was not
15 scheduled to work.

17 18. The only evidence of alleged medical negligence arose from plaintiffs' own statements
18 that she was sexually assaulted during her medical examination, and the Court does not
19 find this allegation to be credible. Even Ms. Saldivar's affect was not credible as she
20 described Dr. Momah's alleged brusqueness with the same level of emotion and same
21 affect that she used when she described the alleged rape.

23 19. This Court further finds that in addition to the numerous contradictions and changes in
24 Ms. Saldivar's story, her ultimate position did not comport with the documentary and
25 other evidence presented. The Court finds that Ms. Saldivar was attempting to conform
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1 her testimony to the medical records, but that in continually contorting her testimony in
2 furtherance of this effort, she was vulnerable to impeachment and was effectively
3 impeached at trial.

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5 20. The Saldivars' numerous contradictions and contrary evidentiary support should have put
6 a reasonable attorney on notice prior to filing this action that the Saldivars' claims were
7 not well grounded in fact.

8 21. Although the Court did not even need to consider Dennis Momah's testimony in reaching
9 its decision to dismiss plaintiffs' claims at the close of plaintiffs' case, the testimony of
10 Dr. Dennis Momah was consistent and credible. Dr. Dennis Momah testified that he did
11 not sexually assault Ms. Saldivar or touch her improperly in any way. He testified that he
12 did not trade places with his brother Charles, and that he, not Charles, saw and treated
13 Perla Saldivar at the Puyallup clinic on May 28 and June 26, 2003. Dr. Dennis Momah is
14 a board certified doctor of internal medicine, licensed to practice in Washington and other
15 states during the relevant time period. US Healthworks has received no patient
16 complaints about Dr. Momah's alleged sexual improprieties other than from the
17 Saldivars, who were not credible witnesses. In contrast, Dennis Momah's demeanor and
18 testimony were convincing and credible and the Court found his testimony to be
19 persuasive.

20
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22 22. Dr. Dennis Momah lost his employment at US Healthworks as a direct result of the
23 Saldivars' allegations that were fabricated with the active assistance of attorney Harish
24 Bharti. With the exception of a brief, temporary position, Dr. Momah has been unable to
25 work since he lost his job at US Healthworks. He has made significant efforts to obtain
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1 employment and has been unable to do so. He is uninsurable as a result of the Saldivars'
2 allegations and therefore unemployable by US Healthworks and other employers.

3 23. Dr. Dennis Momah suffered a stroke in June of 2004 that was proximately caused by the
4 false allegations by Perla Saldivar. This Court found Dr. Lily Jung's testimony on this
5 point very persuasive. This Court further finds that all of the medical bills contained in
6 Trial Exhibit No. 23 were reasonably and necessarily incurred for the treatment of Dennis
7 Momah's stroke and thus compensable in this action.

8
9 24. Dr. Dennis Momah was planning to build a home and had made a down payment of
10 \$7500 shortly before the Saldivars made their false allegations. Dennis Momah lost this
11 down payment because he could not afford to proceed with the project after losing his job
12 due to the Saldivars' false allegations.

13
14 25. Dr. Dennis Momah suffered extreme emotional distress as a result of the Saldivars'
15 conduct, as manifested by the stroke, symptoms of depression, loss of enjoyment of life,
16 and a reduced ability to function from day to day. He also suffered embarrassment and
17 humiliation as a result of these unfounded allegations. Because he lost his job and his
18 ability to earn an income in his chosen profession, he had to borrow money from family
19 and friends just to survive, and had to live with family members because he could not
20 afford to maintain a separate home. It was emotionally difficult for Dr Dennis Momah to
21 deal with financial dependence on others and with having to financially depend upon
22 others. This emotional burden was compounded by the cultural and family expectations
23 that he should be sending money to friends and extended family member in the village
24 where he grew up in Nigeria, which he was unable to do after losing his job. Dr. Dennis
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1 Momah felt degraded and diminished as a result of the Saldivars' misconduct. The
2 humiliation and emotional pain and suffering, as well as the financial loss, will extend
3 indefinitely into the future. Dr. Dennis Momah will have to record the fact of the
4 complaints and lawsuits on future applications for employment and insurance, which will
5 perpetuate the problems caused by the Saldivars' false claims.
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7 26. The Saldivars moved to amend their complaint after criminal charges were filed against
8 Charles Momah in order to add Charles Momah as a defendant. The Saldivars' amended
9 complaint was not well grounded in fact and was intentionally filed for the improper
10 purpose of furthering their effort to assure that the Momah brothers' reputations were
11 destroyed and that they would never again be permitted to practice medicine. New
12 process was served with this amended complaint in furtherance of this improper purpose.
13 In addition, the declaration filed by Perla Saldivar in support of the motion to amend
14 (Trial Exhibit 14), contained false testimony provided under oath. This Court was
15 persuaded by Perla Saldivar's own admission and the circumstantial evidence that
16 attorney Harish Bharti actively participated in the construction of Perla Saldivar's false
17 sworn statement offered in support of the motion to amend plaintiffs' complaint.
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19 27. Harish Bharti assured this Court that neither he nor his client Perla Saldivar submitted
20 any new materials to the Department of Health after Perla Saldivar's original complaint
21 to the Department was closed without action in April of 2004. Mr. Bharti vociferously
22 represented to this Court that the Department of Health had reopened the investigation of
23 Dennis Momah on its own, without any further complaints or materials submitted by or
24 on behalf of Ms. Saldivar. During the trial of this matter, and in response to a direct court
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1 order, the Department of Health produced a new complaint against Dr. Dennis Momah by
2 Perla Saldivar, in the form of a sworn declaration, submitted in 2005 and containing a
3 2005 complaint number. When confronted with this declaration on cross examination,
4 Ms. Saldivar admitted to having filed this second complaint against Dennis Momah and
5 explained that attorney Harish Bharti assisted her in doing so. Consequently, either Perla
6 Saldivar was lying on the stand when she said that attorney Bharti helped her to prepare
7 this second complaint to the Dept. of Health, or Harish Bharti was lying to this Court at
8 the pretrial conference when he assured this Court that neither he nor Ms. Saldivar had
9 filed any additional materials with the Department of Health. Based upon an evaluation
10 of the surrounding circumstances and the witness's demeanor, and the spontaneity with
11 which Ms. Saldivar exclaimed that Mr. Bharti assisted her in preparing this second
12 complaint once she was confronted with the inconsistent statement at trial, this Court
13 finds that Harish Bharti knowingly and in bad faith lied to this Court at the April 18, 2006
4 pretrial conference.

17 28. Mr. Bharti, in violation of two court orders and numerous prior reminders by the court
18 that evidence from other cases and other claims were not part of this case and should not
19 be referenced or introduced into this case, showed a videotaped deposition of Dr. Charles
20 Momah taken in another case to Perla Saldivar the morning before she testified. The
21 videotape had not been provided to defense counsel. Mr. Bharti had the tape only
22 because he represented the plaintiff in the suit in which the deposition was taken. The
23 deposition was subject to a protective order entered by a King County Superior Court
24 judge that prohibited its showing to Ms. Saldivar. Mr. Bharti knowingly and in bad faith
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1 violated the King County court's order and this Court's order in response to defendant's
2 motion in limine concerning the use or reference of discovery material obtained in other
3 cases by showing the videotape to Ms. Saldivar and thereby tainted her testimony.

4 29. Plaintiff sought to introduce portions of medical expert Dr. Olsen's testimony by
5 deposition in this case. Because of a number of concerns the Court had about Dr. Olsen's
6 foundation to provide certain opinions he offered, as well as concerns the court had about
7 Dr. Olsen having based his opinion on statements made by Mr. Bharti's other clients that
8 are irrelevant to Perla Saldivar's claim and are not reasonably relied upon by physicians
9 in the ordinary course of their practice, coupled with the concern that plaintiff's counsel
10 refused to produce to defendants some of the materials upon which Dr. Olsen's testimony
11 was founded, this Court ruled that Dr. Olsen's deposition testimony was insufficient and
12 potentially tainted and that his testimony therefore had to be presented live if it was to be
13 admitted at all. Plaintiffs' counsel advised that Dr. Olsen had scheduling problems, so
14 the Court, out of an abundance of caution, reviewed Dr. Olsen's entire deposition
15 transcript. Dr. Olsen testified in his deposition that there was nothing in the written
16 materials that he reviewed that demonstrated any impropriety or violation of the standard
17 of care by the defendants. His opinions on the standard of care were based on what he
18 was told by Harish Bharti and Perla Saldivar factually occurred between Ms. Saldivar and
19 Dr. Momah. Because the Court did not accept Ms. Saldivar's testimony as credible, Dr.
20 Olsen's deposition testimony, if admitted, would not have affected the Court's decision in
21 this case. Nor would this Court have expected Dr. Olsen's live testimony to have
22 affected the Court's decision because it too would necessarily have been based on the
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1 non-credible testimony of Perla Saldivar. Further, the Court accepted in ruling on the
2 motion to dismiss at the close of plaintiffs' case, without need for expert testimony, that
3 the alleged conduct, if it actually occurred, would be a breach of the standard of care.
4 The Court's dismissal of plaintiffs' claims was based upon a factual finding that the
5 alleged inappropriate conduct by the defendants did not occur.
6

7 30. This Court finds that Harish Bharti had reason to know, prior to his filing the complaint
8 in this action, that the Saldivars' claims were not well grounded in fact. In addition, this
9 Court finds that Harish Bharti was an active and knowing participant in the fabrication of
10 Perla Saldivar's ever changing accusations against Dennis Momah made to the Federal
11 Way Police Department, the Washington State Department of Health and this Court.
12

13 31. This Court finds that Harish Bharti signed the complaint and amended complaints in this
14 matter without a reasonable belief that the allegations asserted against the defendants by
15 Perla Saldivar were well grounded in fact.

16 32. This Court finds that attorney Harish Bharti signed plaintiff Perla Saldivar's responses to
17 Dennis Momah's interrogatories in this case, and that even a casual examination would
18 have revealed that her response to Interrogatory No. 3 concerning the dates she claimed
19 to have been seen by Dr. Dennis Momah at US Healthworks was inconsistent with the
20 evidence and untrue.
21

22 33. This Court finds that Harish Bharti continued to file irrelevant and salacious declarations
23 and statements in the court file in this case that were unrelated to Perla Saldivar's claim
24 after being repeatedly instructed by the Court not to do so. This placed an undo burden
25 on the Court. This court finds that Mr. Bharti's efforts to fill the court file with these
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1 salacious and irrelevant materials was for the improper purpose of eliciting media/public
2 attention, to harass and damage the reputation of Dr. Momah, and to improperly influence
3 public opinion and gain advantage in other litigation.

4
5 34. This court finds that Harish Bharti amended the complaint in this matter to bring Charles
6 Momah into the case as a defendant without any reasonable basis in fact to do so, and that
7 this new process was served for the improper purpose of harassing Dennis Momah and
8 escalating the media attention in this case.

9 35. This Court further finds that a number of the material changes in Perla Saldivar's version
10 of factual events, most of which were provided via sworn testimony, were prepared with
11 the active assistance of attorney Harish Bharti, and that Mr. Bharti had reason to know
12 that many of these contradictory statements were untrue. Yet Mr. Bharti proceeded to
13 prepare declarations for Ms. Saldivar to sign either knowing they were false or at least in
4 reckless disregard of their truth or falsity.

15
16 36. This Court finds that Mr. Bharti's improper use of legal process in this case is part of a
17 pattern of behavior by Mr. Bharti to harass Dennis Momah, destroy his career, unduly run
18 up legal expenses, and gain Mr. Bharti media exposure and leverage in other legal
19 matters brought by Mr. Bharti.

20
21 37. Mr. Bharti has been sanctioned by this Court during the discovery phase of this case, and
22 has been sanctioned under CR 11 less than one year ago by a King County court for the
23 filing and pursuit of meritless claims. However, these sanctions have been ineffective in
24 deterring Mr. Bharti's repeated misconduct.

1 38. This Court finds that attorney Marja Starczewski materially assisted Harish Bharti in his
2 pursuit of this frivolous action in reckless disregard of the truth of falsity of the claims
3 being asserted.
4

5 **II. CONCLUSIONS OF LAW**

6 1. All of the claims asserted by plaintiffs against the defendants in this case arise from the
7 same alleged factual nexus. All arise from plaintiffs' allegations that Dr. Dennis Momah
8 sexually assaulted Perla Saldivar during a physical examination and/or that Dr. Charles
9 Momah impersonated Dr. Dennis Momah and sexually assaulted Perla Saldivar during a
10 physical examination at the US Healthworks Puyallup clinic. Because the Court does not
11 find any credible evidence that Dr. Dennis Momah sexually assaulted or in any other way
12 inappropriately treated Perla Saldivar, and because the Court does not find any credible
13 evidence that Perla Saldivar was ever seen by Dr. Charles Momah, all claims by plaintiffs
14 in this case are dismissed with prejudice.

15
16 2. All claims by plaintiffs of failure to obtain informed consent are hereby dismissed as a
17 matter of law. There is no amount of "information" that a physician could provide to a
18 patient that would justify the alleged misconduct in this case. Even if plaintiffs'
19 allegations were credible, and the Court expressly finds that they are not credible, there
20 would be no basis for an informed consent claim. Because the Court finds the alleged
21 conduct did not occur, there clearly was no need to get "informed consent" to perform the
22 alleged conduct.
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- 1 3. The Court has received no credible evidence that Dr. Charles Momah ever saw or treated
2 Perla Saldivar. All of plaintiffs' claims against Dr. Charles Momah *et. ux.* are dismissed
3 with prejudice.
- 4 4. Plaintiffs have failed to provide any credible evidence that US Healthworks had and
5 breached a duty not to schedule Perla Saldivar to see Dr. Dennis Momah on May 28,
6 2003 or June 26, 2003. Nor have plaintiffs presented credible evidence that the
7 scheduling by US Healthworks was a proximate cause of harm to the plaintiffs.
8 Plaintiffs' claim against US Healthworks for negligence in scheduling Perla Saldivar to
9 see Dr. Dennis Momah is dismissed with prejudice.
- 10 5. Plaintiffs have failed to provide any credible evidence that US Healthworks breached any
11 duty to provide Ms. Saldivar with a female chaperone during her medical visits, and have
12 failed to provide any credible evidence that any alleged failure to provide a chaperone
13 was the proximate cause of harm to the plaintiffs. The Court has found that Dr. Dennis
14 Momah did not exhibit any inappropriate behavior toward Perla Saldivar during her
15 medical appointments. Plaintiffs' claim that US Healthworks should have provided Ms.
16 Saldivar with a chaperone is dismissed with prejudice.
- 17 6. The Saldivars' false accusations and claims against Dennis Momah made to the
18 Department of Health, the Federal Way Police Department and the Pierce County
19 Superior Court were willful and malicious. The claims were advanced for an improper
20 purpose. The Saldivars pursued their lawsuit to prevent Dr. Dennis Momah from
21 practicing medicine. They issued new process to bring Dr. Charles Momah into this
22 litigation to allow them to assert "switching" and/or "impersonation" claims against
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1 Charles and Dennis Momah with the improper purpose of influencing the Dept. of Health
2 to terminate Dennis Momah's license to practice medicine, to harass and professionally
3 destroy Dennis Momah, and to fulfill their improper but self-proclaimed motive of
4 making sure that Dr. Dennis Momah would never be permitted to practice his chosen
5 profession again. Their efforts, with the active and improper assistance of their attorney
6 Harish Bharti, were intentional and calculated to achieve an improper purpose.

7
8 7. Harish Bharti filed numerous declarations by other alleged "victims" in this case solely to
9 prejudice the court, obtain media attention, and to vex, harass and annoy Dennis Momah.
10 Throughout the proceedings plaintiffs, through their counsel of record, used the court and
11 the discovery process to advance their goal of driving Dr. Momah out of the practice of
12 medicine and to destroy his reputation by making numerous unfounded claims and
13 allegations in declarations, depositions and pleadings.

14 8. These false and malicious claims, asserted through legal process for an improper purpose,
15 constitute an abuse of process for which the Saldivars are liable to Dr. Dennis Momah.
16 Moreover, Harish Bharti actively and knowingly participated in this abuse of process for
17 his own personal gain.
18

19 9. The Saldivars' false accusations of sexual assault and impersonation constitute
20 outrageous conduct beyond all bounds of human decency in a civilized society, and the
21 Saldivars are liable to Dr. Dennis Momah for the tort of outrage (a/k/a intentional
22 infliction of emotional distress).

23
24 10. The Saldivars' advancement of this lawsuit was a violation of the statutory prohibition
25 against frivolous lawsuits set forth in RCW 4.84.185 and the Saldivars are liable to Dr.
26

1 Dennis Momah and US Healthworks for all actual/reasonable costs and attorneys' fees
2 incurred in this matter.

3 11. The Saldivars' abuse of process and intentional infliction of emotional distress
4 proximately caused severe harmed to Dr. Dennis Momah.

5 12. Harish Bharti has committed multiple violations of Civil Rule 11, and other conduct
6 sanctionable by this court under its inherent authority to sanction litigation conduct,
7 including the following:

- 8 • filing the original and amended complaints in this action without a reasonable belief
9 that the claims asserted were well grounded in fact;
- 10 • filing the original and amended complaints in this action without conducting a
11 reasonable investigation of the facts;
- 12 • filing the original and amended complaints in this matter for the improper purpose of
13 harassing the defendants, increasing the cost of litigation, asserting salacious false
14 allegations to damage the reputation of the defendants and gain personal media
15 attention for Harish Bharti and financial leverage for other litigation asserted by Mr.
16 Bharti;
- 17 • Signing plaintiffs' responses to interrogatories that contradicted plaintiff's sworn
18 testimony and are inconsistent with the medical records and evidence in this case;
- 19 • Filing and pursuing a motion to compel the deposition of Steve McLaughlin after the
20 deposition sought had occurred and refusing to withdraw the motion when this was
21 pointed out to counsel, necessitating the expenditure of needless time and expense by
22 the court and defendants;
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- 1 • Harish Bharti drafted multiple contradictory declarations by Perla and Albert Saldivar
2 that he knew or should have known were untrue and this was done in furtherance of
3 both Mr. Bharti's and the Saldivars' improper motives and abuse of process;
4
5 • Harish Bharti lied to this Court on April 18, 2006 when he stated as an officer of the
6 court that neither he nor his client had provided additional materials to the
7 Washington State Department of Health in furtherance of a complaint against Dennis
8 Momah since the Department had closed its investigation in 2004.
9
10 • Harish Bharti showed a videotape of a deposition of Charles Momah taken in a
11 different case to his client Perla Saldivar during trial in an effort to improperly
12 influence her testimony in violation of this Court's order in limine and a King County
13 Superior Court protective order.

14 13. The Court hereby makes the following award in this case and orders that final judgment
15 be entered accordingly:

- 16 • Plaintiffs' claims against all defendants are dismissed with prejudice;
17
18 • Judgment shall be entered in favor of Dennis Momah and against the Saldivars in
19 the amount of \$2,819,036 plus all attorneys' fees and costs incurred in this
20 litigation; minus those incurred exclusively in pursuit of the counterclaim;
21
22 • Judgment shall be entered in favor of US Healthworks and against the Saldivars
23 for all attorneys' fees and costs incurred in defending US Healthworks in this
24 litigation;
25
26 • Judgment shall be entered in favor of Charles Momah, with an award of statutory
fees and costs pursuant to RCW 4.84.010.

1 • Attorney Harish Bharti is ordered to personally pay and/or perform the following
2 sanctions:

3 i. Attorneys fees and costs shall be paid to Dennis Momah and his attorneys;

4 ii. Attorneys fees and costs shall be paid to US Healthworks and its
5 attorneys;

6 iii. Attorneys fees and costs shall be paid to Charles Momah and his
7 attorneys;

8 iv. An additional sanction of \$250,000.00 shall be paid to Dennis Momah no
9 later than June 14, 2006.

10 v. An additional sanction of \$50,000.00 shall be paid to the registry of the
11 Court for the Superior Court of the State of Washington, County of Pierce
12 no later than June 7, 2006.

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15 vi. Harish Bharti shall, by noon on May 26, 2006, post on his law firm
16 website, these Findings of Fact and Conclusions of Law. This posting
17 should be prominently displayed on Mr. Bharti's website, in the same font
18 size as other displayed links, with the title "Result In First Civil Case
19 Tried Against Charles and Dennis Momah" with a link to the full
20 documents; i.e., these Findings of Fact and Conclusions of Law. This
21 posting shall remain on Mr. Bharti's law firm website for as long as any
22 reference to the Momahs is made on Mr. Bharti's website, but not less
23 than one year from the date of this Order.
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1 vii. This Court has specifically considered lesser sanctions, but believes that
2 the above listed sanctions are the least severe sanctions that stand a
3 reasonable chance of deterring Mr. Bharti's misconduct.

- 4 • Attorney Marja Starczewski is hereby sternly and formerly admonished by this
5 Court for her role in the filing and pursuit of this frivolous action, and is hereby
6 warned that future reckless participation in meritless or frivolous litigation shall
7 justify the application of significant monetary sanctions. An attorney has a duty
8 of reasonable inquiry and is not permitted to file or pursue meritless claims. Each
9 attorney of record in a matter has an independent duty to comply with CR 11 and
10 otherwise fulfill his/her obligations as an officer of the court, and this duty is not
11 diminished simply because an attorney is not lead counsel in a matter or is taking
12 instruction from other counsel.
13 4

15 14. The court file in this matter is hereby unsealed and any restrictions implied by the sealing
16 of the court file are lifted.

18 Hereby Ordered this 24th day of May, 2006.

KATHERINE M. STOLZ

21 Hon. Katherine M. Stolz

APPENDIX B

The Honorable Katherine M. Stolz
FILED
IN COUNTY CLERK'S OFFICE

A.M. JUN 23 2006 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

SUPERIOR COURT OF WASHINGTON IN AND FOR PIERCE COUNTY

PERLA SALDIVAR and ALBERT SALDIVAR,)

Plaintiffs,)

v.)

DENNIS MOMAH, JANE DOE MOMAH, and the marital community composed thereof; U.S. HEALTHWORKS MEDICAL GROUP OF WASHINGTON, P.S., a Washington professional services company; and DOES 1-10,)

Defendants.)

NO. 04-2-06677-3

JUDGMENT

Clerk's Action Required

I. JUDGMENT SUMMARY

- 1. Judgment creditors: Dennis Momah, M.D.
US Healthworks Medical Group of Washington, PS
Charles Momah, M.D.
- 2. Attorneys for judgment creditors: For Dennis Momah, M.D.:
Tyna Ek, WSBA #14332
Soha & Lang, P.S.
701 Fifth Avenue, Suite 2400
Seattle, WA 98104
206-684-1800

For US Healthworks Medical Group of Washington, PS

John C. Graffe, WSBA #11835
 Heath Fox, WSBA #29506
 Johnson, Graffe, Keay & Moniz
 925 Fourth Ave., Suite 2300
 Seattle, WA 98104
 (206) 223-4770

For Charles Momah, MD

John C. Versnel, WSBA #17755
 Vanessa Vanderbrug, WSBA #31668
 Lawrence & Versnel PLLC
 601 Union Street, Suite 3030
 Seattle, WA 98101
 (206) 624-0200

3. Judgment debtors: Perla Saldivar and Albert Saldivar
4. Amount of Principal Judgment
 in favor of Dennis Momah, M.D.: \$2,819,037.00
5. Costs and attorney fees to
 Dennis Momah, M.D. \$144,205.88
6. Costs and attorney fees to
 US Healthworks Medical
 Group of Washington, PS \$108,340.29
7. Statutory attorneys' fees and cost to
 Charles Momah, MD \$ 715.00
8. Interest to accrue on principal judgment and the attorneys' fee and cost awards at a rate of 6.849 percent per annum until paid in full.

II. JUDGMENT

1. This matter having come on for a bench trial before the undersigned judge of the Pierce County Superior Court, the Court having heard testimony presented by plaintiffs and by defendants, and having admitted and reviewed exhibits offered by all parties, found as a factual matter that plaintiffs' claims of improper sexual contact were not credible or supported by the evidence as outlined in detail in the Findings of Fact and Conclusions of law entered by the Court. All of plaintiffs' claims against all defendants were therefore dismissed at the close of plaintiffs' case after weighing and evaluating the evidence.

