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DIVISION II

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NO. 34891-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PERLA SALDIVAR and ALBERT SALDIVAR,

Appellants,

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,

Respondents.

BRIEF OF RESPONDENT DENNIS MOMAH
IN RESPONSE TO SALDIVAR AND BHARTI BRIEFS

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TABLE OF CONTENTS

I. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW1

 A. Issues Pertaining to the Saldivars’ Appeal.....1

 B. Issues Pertaining to Harish Bharti’s Appeal3

II. STATEMENT OF THE CASE.....3

 A. Perla Saldivar’s Healthcare Treatment at U.S. Healthworks.....3

 B. The Saldivars’ Evolving and Varying Allegations, and Harish Bharti’s Participation Therein.....6

 1. The Saldivars complain to MQAC that Dr. Momah inappropriately touched Perla’s buttocks.....6

 2. The Saldivars retain lawyer Harish Bharti.....8

 3. The Saldivars, with Bharti’s assistance, complain to the police that Dr. Momah and/or someone impersonating him inserted his hand into Perla’s vagina on two occasions10

 4. Mr. Bharti files this lawsuit, alleging that Dr. Momah had placed his hands on or in Perla’s vagina on two of three visits, and that on one of the visits she had been seen by both Dr. Momah and a look-alike doctor11

 5. The Saldivars answer interrogatories swearing that Perla saw Dr. Momah on four occasions – May 27 and 29, and June 4 and 26, 2003.....12

 6. Dennis Momah asserts counterclaims, to which the Saldivars plead no affirmative defenses13

7. In deposition, Perla testifies that, when Dr. Momah came back in the room on the first visit, she knew right away that it was a different person, and that on the last visit Dr. Momah did not touch her	13
8. Bharti brings Charles Momah into the lawsuit as a co-defendant, based on a new declaration by Perla	13
9. Albert is deposed and gives inconsistent testimony about his whereabouts during Perla’s clinic visits.....	15
10. Bharti adds new claims against U.S. Healthworks	16
C. The Court Declines to Grant the Saldivars a Jury Trial After They Admit Failing to Timely Serve Their Jury Demand.....	16
D. Charles Momah Is Convicted and Is Unable to Attend Trial, and the Court Enters an Order Allowing for a Videotape Preservation Deposition to be Taken of Charles that the Saldivars Never Take	18
E. The Saldivars’ Varying and Inconsistent Stories, and Bharti’s Role Therein, are Exposed at Trial.....	20
1. In their trial brief, the Saldivars claim that it was Charles Momah who sexually assaulted Perla on two occasions.....	20
2. Albert provides contradictory trial testimony, and Bharti falsely disclaims the making a second complaint to MQAC	20
3. Perla identifies Dennis Momah as the man who molested her on May 28, 2003	23
4. Bharti gets caught having shown Perla a videotape during the noon recess to influence her testimony	24
5. When her testimony resumes, Perla identifies Dennis Momah as the doctor who molested her a second time, in mid-June, 2003	26

6. Perla gets caught in a lie about whether she had had any contact with DOH since 2003	27
7. On cross, the court hears Perla admit changing her story	28
8. The Saldivars and Bharti are caught lying about their involvement in the filing of a second DOH complaint	29
F. The Saldivars Call Dennis Momah, and Make Certain “Offers of Proof,” Before Resting Their Case.....	30
G. The Court Grants Motions to Dismiss the Saldivars’ Claims.....	32
H. The Court Awards Dennis Momah \$2.8 Million on His Outrage and Abuse of Process Counterclaims, and Attorneys Fees for Having to Defend Against a Fabricated and Frivolous Lawsuit	35
I. Judge Stolz Imposes Sanctions on Bharti.....	36
III. ARGUMENT WHY THE JUDGMENTS AGAINST THE SALDIVARS ON THEIR CLAIMS AND DENNIS MOMAH’S COUNTERCLAIMS SHOULD BE AFFIRMED	39
A. The Judgments Against the Saldivars on their Claims and on Dennis Momah’s Counterclaims Should be Affirmed Because the Findings of Fact and Conclusions of Law the Saldivars Leave Unchallenged, or Cannot Challenge, are More than Sufficient to Support the Judgment	40
B. The Trial Court Did Not Abuse Its Discretion in Not Giving the Saldivars a Jury Trial After They Failed to Serve Their Jury Demand.....	45
1. The Saldivars waived a trial by jury by failing to timely serve their jury demand	45

2.	The trial court did not abuse its discretion in not overlooking the Saldivars' waiver of a jury trial	47
3.	Filing the amended complaint adding Charles Momah as a defendant did not revive the right to demand a jury	48
4.	The Saldivars failed to preserve all of the jury trial arguments they make on appeal.....	50
C.	The Trial Court Did Not Abuse Its Discretion, Much Less Commit Reversible Error, in Making Any the Evidentiary Rulings as to the Saldivars' Claims that the Saldivars Challenge on Appeal.....	52
1.	The trial court did not abuse its discretion in excluding cumulative testimony by the Saldivars and Ed Fuentes to "rebut charges of fabrication"	53
2.	The trial court did not abuse its discretion, much less commit reversible error, in admitting Exhibit 37, the MQAC summary of Perla's 2006 interview	55
3.	The trial court did not abuse its discretion in not letting the Saldivars elicit from the investigator who wrote Exhibit 37 testimony that they never represented she could give.....	56
4.	The trial court did not abuse its discretion, much less commit reversible error, in excluding Karil Klingbeil's testimony.....	56
5.	The trial court did not abuse its discretion in excluding non-party testimony concerning Dennis's alleged impersonation of Charles at Charles' clinics	60
a.	When Perla testified at trial that it was Dennis who allegedly molested her both times, Bharti's "impersonation" theory collapsed.....	62
b.	The Saldivars' disclosures about the witnesses were wholly inadequate	63

c. The witnesses were all rebuttal witnesses.....	63
d. It is never an abuse of discretion not to let a party call 80 witnesses on one issue	64
e. What the Saldivars disclosed about Ramos, Bottom, McFarlane, and Basnaw was inadequate and did not demonstrate that any of their testimony would have been relevant or might have made a difference.....	64
6. The trial court did not abuse its discretion in excluding the KOMO TV videotape.....	67
D. The Saldivars are Not Immune from Liability on Dr. Momah’s Counterclaims or for RCW 4.84.185 Attorneys’ Fees.....	70
1. The Saldivars did not timely plead the defense	70
2. RCW 4.24.510 does not immunize against civil liability based on findings that a civil lawsuit was instituted and prosecuted falsely and in bad faith.....	71
3. RCW 4.24.510 does not immunize the Saldivars from liability for attorneys fees under RCW 4.84.185 for filing a frivolous lawsuit	76
E. The Trial Court Properly Concluded that the Saldivars Engaged in Abuse of Process	76
F. Even If the Saldivars’ Conduct Did Not Amount to Abuse of Process, the Judgment Against Them Should Be Affirmed Based on the Trial Court’s Findings and Conclusions in Favor of Dennis Momah on His Tort of Outrage Claim	78
G. The Trial Court Did Not Abuse Its Discretion, Much Less Commit Reversible Error, in Refusing Exhibits 41 and 42	79
1. The exhibits were cumulative of oral testimony.....	79

2. The evidence was not legally relevant.....	80
IV. ARGUMENT WHY THE SANCTIONS AND JUDGMENT AGAINST BHARTI SHOULD BE AFFIRMED	82
A. Bharti cannot escape the finding that he helped Perla Saldivar prepare the change-of-story declaration that she sent to the Federal Way police	84
B. A fabricated claim cannot be the product of a reasonable inquiry	85
C. Bharti lied and violated the court’s orders, as well as a King County Superior Court order	88
D. There was no collateral estoppel.....	90
E. Bharti was not blindsided or denied due process by the sanctions motion or the amount of time he had to respond	91
F. The trial court had authority to order Bharti to pay the \$250,000 and \$50,000 “non-compensatory” sanctions	91
G. The noncompensatory sanctions were deserved and appropriately designed to serve the goals of punishment and deterrence	92
H. The web-posting requirement is not unconstitutional and presents an issue that will soon be moot as a practical matter	95
V. CONCLUSION.....	97

TABLE OF AUTHORITIES

CASES

<u>44 Liquormart v. Rhode Island</u> , 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996).....	95
<u>Adler v. Seligman of Florida, Inc.</u> , 492 So. 2d 730 (Fla. App. 1986), <u>rev. denied</u> , 503 So. 2d 328 (1987).....	49
<u>Alexander v. Food Services of America</u> , 76 Wn. App. 425, 886 P.2d 231 (1994).....	71
<u>Atkins v. Fischer</u> , 232 F.R.D. 116 (D.D.C. 2005).....	94
<u>Batten v. Abrams</u> , 28 Wn. App. 737, 626 P.2d 984, <u>rev. denied</u> , 95 Wn.2d 1033 (1981).....	76
<u>Biggs v. Vail</u> , 124 Wn.2d 193, 876 P.2d 448 (1994).....	83
<u>Boeing Co. v. Heidy</u> , 147 Wn.2d 78, 51 P.3d 793 (2002).....	40
<u>Clement v. America Greetings Corp.</u> , 636 F. Supp. 1326 (S.D. Cal. 1986).....	49
<u>Cowiche Canyon Conservancy v. Bosley</u> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	41
<u>Creech v. AGCO Corp.</u> , 133 Wn. App. 681, 138 P.3d 623 (2006).....	90
<u>Dang v. Ehredt</u> , 95 Wn. App. 670, 977 P.2d 29, <u>rev. denied</u> , 139 Wn.2d 1012 (1999).....	74-75

<u>Detention of A.S.</u> , 138 Wn.2d 898, 982 P.2d 1156 (1999).....	59
<u>Do v. Farmer</u> , 127 Wn. App. 180, 110 P.3d 840 (2005) (CR 11).....	82
<u>Doe v. Gonzaga University</u> , 99 Wn. App. 338, 992 P.2d 545 (2000), <u>aff'd in part, rev'd in part</u> <u>on other grounds</u> , 143 Wn.2d 687 (2001), <u>rev'd on other grounds</u> , 536 U.S. 273 (2002).....	70
<u>Estate of Schneier</u> , 74 A.D.2d 22, 426 N.Y.S.2d 624 (1980).....	49
<u>Eugster v. City of Spokane</u> , 110 Wn. App. 212, 39 P.3d 380, <u>rev. denied</u> , 147 Wn.2d 1021 (2002).....	82, 93
<u>Ex parte Jackson</u> , 737 So. 2d 452 (Ala. 1999).....	49
<u>Fite v. Lee</u> , 11 Wn. App. 21, 521 P.2d 964, <u>rev. denied</u> , 84 Wn.2d 1005 (1974)	76
<u>General Refractories Co. v. Fireman's Fund Insurance Co.</u> , 337 F.3d 297 (3d Cir. 2003).....	77
<u>Ginsberg v. Ginsberg</u> , 84 A.D.2d 573, 443 N.Y.S.2d 439 (App. Div. 1981)	77
<u>Goldin v. Bartholow</u> , 166 F.3d 710, 723 (5th Cir. 1999)	77
<u>Gonzales v. Surgidev Corp.</u> , 120 N.M. 151, 158, 899 P.2d 594, 600 (1995)	77
<u>Havens v. C & D Plastics</u> , 124 Wn.2d 158, 876 P.2d 435 (1994).....	96
<u>Hizey v. Carpenter</u> , 119 Wn.2d 251, 830 P.2d 646 (1992).....	52

<u>Interest of M.B.</u> , 101 Wn. App. 425, 3 P.3d 780 (2000), <u>rev. denied</u> , 142 Wn.2d 1027 (2001)	91
<u>Javit v. Marshall's, Inc.</u> , 670 A.2d 886 (Conn. App), <u>appeal denied</u> , 673 A.2d 1142 (1996).....	49
<u>King Aircraft Sales v. Lane</u> , 68 Wn. App. 706, 846 P.2d 550 (1993)	42
<u>Lockheed Martin Energy System, Inc. v. Slavin</u> , 190 F.R.D. 449 (E.D. Tenn. 1999).....	94
<u>Loeffelholz v. C.L.E.A.N.</u> , 119 Wn. App. 665, 82 P.3d 1199, <u>rev. denied</u> , 152 Wn.2d 1023 (2004)	76-77
<u>Madden v. Foley</u> , 83 Wn. App. 385, 922 P.2d 1364 (1996).....	94
<u>Manteufel v. Safeco Insurance Co. of America</u> , 117 Wn. App. 168, 68 P.3d 1093, <u>rev. denied</u> , 150 Wn.2d 1021 (2003) (CR 11).....	82
<u>Morse v. Antonellis</u> , 149 Wn.2d 572, 70 P.3d 125 (2003).....	40
<u>Mt. Vernon Dodge v. Seattle First Nat'l Bank</u> , 18 Wn. App. 569, 581, 570 P.2d 702 (1977).....	47
<u>Nast v. Michels</u> , 107 Wn.2d 300, 730 P.2d 54 (1986).....	79
<u>Panorama Village Homeowners Association v. Golden Rule Roofing, Inc.</u> , 102 Wn. App. 422, 10 P.3d 417 (2000), <u>rev. denied</u> , 142 Wn.2d 1018 (2001)	52, 55
<u>In re Personal Restraint of Lord</u> , 123 Wn.2d 296, 868 P.2d 835 (1994).....	77

<u>Rapid Settlements, Ltd. v. Symetra Life Insurance Co.</u> , 134 Wn. App. 329, 139 P.3d 411 (2006)	71
<u>Reid v. Dalton</u> , 124 Wn. App. 113, 100 P.3d 319 (2004), <u>rev. denied</u> , 155 Wn.2d 1005 (2005)	73, 76
<u>Right-Price Recreation, LLC v. Connells Prairie Cmty. Council</u> , 146 Wn.2d 370, 382, 46 P.3d 789 (2002)	74
<u>Roberson v. Perez</u> , 123 Wn. App. 320, 96 P.3d 420 (2004), <u>rev. denied</u> , 155 Wn.2d 1002 (2005)	92
<u>Sackett v. Santilli</u> , 101 Wn. App. 128, 5 P.3d 11 (2000), <u>aff'd</u> , 146 Wn.2d 498 (2002)	46
<u>Sidis v. Brodie/Dohrmann, Inc.</u> , 117 Wn.2d 325, 815 P.2d 781 (1991)	77
<u>Silves v. King</u> , 93 Wn. App. 873, 970 P.2d 790 (1999)	80
<u>Skimming v. Boxer</u> , 119 Wn. App. 748, 82 P.3d 707, <u>rev. denied</u> , 152 Wn.2d 1016 (2004)	73
<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971)	47-48, 52
<u>State Owned Forests v. Sutherland</u> , 124 Wn. App. 400, 101 P.3d 880 (2004), <u>rev. denied</u> , 154 Wn.2d 1022 (2005)	51
<u>State v. Camarillo</u> , 115 Wn.2d 60, 794 P.2d 850 (1990)	40

<u>State v. Florczak</u> , 76 Wn. App. 55, 882 P.2d 199 (1994), <u>rev. denied</u> , 126 Wn.2d 1010 (1995).....	59
<u>State v. Jackson</u> , 113 Wn. App. 762, 54 P.3d 739 (2002).....	67-68
<u>State v. King</u> , 131 Wn. App. 789, 130 P.3d 376 (2006).....	59
<u>State v. Meekins</u> , 125 Wn. App. 390, 105 P.3d 420 (2005).....	80-81
<u>State v. S.H.</u> , 102 Wn. App. 468, 8 P.3d 1058 (2000).....	82, 88
<u>State v. Slanaker</u> , 58 Wn. App. 161, 791 P.2d 575, <u>rev. denied</u> , 115 Wn.2d 1031 (1990).....	42
<u>State v. Stevens</u> , 58 Wn. App. 478, 794 P.2d 38, <u>rev. denied</u> , 115 Wn.2d 1025 (1990).....	59
<u>State v. Warren</u> , 134 Wn. App. 44, 138 P.3d 1081 (2006).....	58-59
<u>State v. Wilbur-Bobb</u> , 134 Wn. App. 627, 141 P.3d 665 (2006).....	52
<u>Tegman v. Accident & Medical Inves.</u> , 150 Wn.2d 102, 75 P.3d 497 (2003).....	81
<u>United States v. Bell</u> , 238 F. Supp. 2d 696 (M.D. Pa. 2003).....	96
<u>United States v. Kahn</u> , 2004 U.S. Dist. LEXIS 26635 (M.D. Fla. 2004).....	96
<u>United States v. Prater</u> , 2003 U.S. Dist. LEXIS 16099 (M.D. Fla. 2003).....	96

<u>United States v. Richmond,</u> 2002 U.S. Dist. LEXIS 17247 (N.D. Ill. 2002)	96
<u>Valley View Industrial Park v. Redmond,</u> 107 Wn.2d 621, 733 P.2d 182 (1987).....	79
<u>Wash. State Physicians Insurance Exch. & Association v. Fisons,</u> 122 Wn.2d 299, 858 P.2d 1054 (1993).....	92, 93
<u>Watson v. Maier,</u> 64 Wn. App. 889, 827 P.2d 311, <u>rev. denied,</u> 120 Wn.2d 1015 (1992)	85, 92, 93
<u>Weyerhaeuser v. Health Department,</u> 123 Wn. App. 59, 96 P.3d 460 (2004).....	39
<u>Willener v. Sweeting,</u> 107 Wn.2d 388, 730 P.2d 45 (1986).....	42
<u>Williams v. Union Carbide Corp.,</u> 790 F.2d 552 (6th Cir.), <u>cert. denied,</u> 479 U.S. 992 (1986).....	80
<u>Wilson v. Horsley,</u> 137 Wn.2d 500, 974 P.2d 316 (1999).....	49, 50
<u>Wilson v. Olivetti N. Am.,</u> 85 Wn. App. 804, 934 P.2d 1231, <u>rev. denied,</u> 133 Wn.2d 1017 (1997)	46
<u>Woodhead v. Discount Waterbeds,</u> 78 Wn. App. 125, 896 P.2d 66 (1995), <u>rev. denied,</u> 128 Wn.2d 1008 (1996).....	43,45, 78

STATUTES

RCW 4.22.030	81
RCW 4.22.070	81
RCW 4.24.510	39, 70, 71, 72, 73, 75, 76

RCW 4.84.185	44, 70, 76, 97
RCW 5.44.040	55
RCW ch. 7.21.....	91, 92

RULES

ER 103(a)(1)	55
ER 401	66
ER 402	81
ER 403	54, 64, 80
ER 404(b).....	60, 66
ER 801(d).....	55
ER 803(a)(8)	55
CR 8(c).....	70
CR 11	50, 82, 83, 85, 90, 92, 94
CR 12(a)(4)	71
CR 12(b).....	71
CR 15(a).....	71
CR 30(b)(8)(H)	69
CR 38	46
CR 38(d).....	45-46
RAP 2.5(a)	51, 52, 55

OTHER AUTHORITIES

House Bill Report, SHB 2699 (2002).....72, 73
Laws of 1989, Ch. 234 § 2.....72
Laws of 2002, Ch. 232 § 2.....72
WPI 15.0181

I. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Issues Pertaining to the Saldivars' Appeal.

1. Are the Findings of Fact and Conclusions of Law that Perla and Albert Saldivar leave unchallenged, or cannot challenge, sufficient to support the judgments entered against them on their claims, and on Dennis Momah's counterclaims, so as to render moot their assignments of error?

2. Do the unchallenged findings and conclusions establish, as verities, that the Saldivars' allegations were false, that their claims were not well grounded in fact, and that they and their lawyer lied at trial?

3. Did the Saldivars preserve for review each of the arguments they make in their brief?

4. Did the trial court properly exercise its discretion in declining to grant the Saldivars a jury trial after they had waived a jury trial by failing to timely serve their jury demand?

5. Did the trial court properly exercise its discretion in: (a) not letting the Saldivars describe, at greater length than they did, what they claim Perla¹ said to Albert, relatives, and a friend after she first saw Dr. Dennis Momah in May 2003 at the U.S. Healthworks clinic; (b) not letting Ed Fuentes testify to what Perla said to him; (c) not taking testimony from

¹ For the sake of brevity and ease of reference, and meaning no disrespect to anyone, certain parties, lawyers and witnesses are frequently referred to in this brief by their first or last names only.

the author of Exhibit 37; (d) not admitting Karil Klingbeil's opinion testimony; and (e) not admitting Exhibits 41 and 42?

6. Did the trial court properly exercise its discretion in: (a) striking, before trial, testimony from certain rebuttal witnesses who the Saldivars had disclosed would testify that Charles Momah had been impersonated at his clinics by Dennis Momah; (b) not taking, in written form, testimony of seven persons that the Saldivars offered, just before they rested their case-in-chief, as witnesses to alleged impersonation of Charles Momah by Dennis Momah; and (c) not admitting a videotape the Saldivars' counsel represented KOMO TV had made of Charles Momah?

7. If any of the evidentiary rulings to which the Saldivars assign error was an abuse of discretion, was any such error harmless?

8. Does RCW 4.24.510 confer immunity against civil liability for intentional torts stemming from the making of false allegations and giving false testimony in a private lawsuit?

9. Do the trial court's findings of fact support its conclusions of law that the Saldivars engaged in abuse of process?

10. Is the Saldivars' challenge to the conclusions of law that they engaged in abuse of process moot because of their failure to offer argument challenging the trial court's findings and conclusions in Dennis Momah's favor on his tort of outrage counterclaim?

B. Issues Pertaining to Harish Bharti's Appeal.

11. Do the Findings of Fact that Bharti leaves unchallenged establish, as verities, that the Saldivars lied and made claims against Dennis Momah that were false and malicious?

13. Did the trial court properly exercise its discretion in imposing the sanctions it imposed on Mr. Bharti?

II. STATEMENT OF THE CASE

A. Perla Saldivar's Healthcare Treatment at U.S. Healthworks.

On May 12, 2003, Perla Saldivar fell on some steps at work and sustained contusions and cervical/lumbar strains. Ex. 1 (DM0074-89).

Perla began a series of visits to U.S. Healthworks' clinic in Puyallup on May 15, 2003. Ex. 1 (DM0003-12). The clinic was a busy one. CP 1520 (Finding of Fact ["FF"] 6). It was open from 8 a.m. to 7 p.m. on weekdays and from 9 a.m. to 5 p.m. on weekends. Ex. 34. It had 12 to 14 employees. RP 476. Doctors were scheduled for, and worked, shifts of 8 to 12 hours, with two doctors working overlapping shifts each weekday. Ex. 34. On her multiple visits to the clinic, Perla was seen by Dr. Dennis Momah on only two occasions – May 28, 2003 and June 26, 2003. RP 573.

Dennis Momah was born in Nigeria in 1956. RP 332; Ex. 22 (DM 0118). He is a large man. Ex. 22 (DM 0121). He and four of his six

brothers immigrated to the United States. RP 322-23. Each has a medical or law degree. RP 332-33. He completed medical school in Nigeria, and served internal medicine residencies in New York from 1989 to 1992. CP 1651. He is a U.S. citizen. CP 1650. Dennis practiced medicine in other states before moving to Washington, where he became licensed in September 2000. Ex. 27; RP 522. Dennis became board certified as an internist in 2002. Ex. 26. His first job in Washington was at the Puyallup clinic of U.S. Healthworks, which hired him in March 2003. RP 519.

At her May 15 visit, Perla was seen by Dr. Abdullah, who charted, among other things, ecchymoses or contusions on her left buttock and thigh. Ex. 1 (DM0005-06, 0005-8, 0011). He prescribed physical therapy and told Perla to return on May 22. Ex. 1 (DM0006, 0011). On May 22, Perla was again seen by Dr. Abdullah, who again noted contusions to the left buttock and told her to return in five days. Ex. 1 (DM 0022). An appointment was made for May 28. Ex. 1 (DM 0021).

Perla returned on May 28 and signed in at 8:30 a.m.² Ex. 32 (Patient Sign-In sheet for 5-28-03). The waiting room was full. RP 387. Dr. Dennis Momah was the only doctor scheduled to work that day

² There is a date discrepancy in the clinic records regarding Perla's first visit with Dr. Momah. Some records erroneously show a May 27 "DOS" (date of service). See Ex. 1 (DM 0026-27). At trial, Perla did not dispute that May 28 was the date of her first visit with Dr. Momah. See RP 415.

between 8 and 10 a.m., and 10 patients were scheduled to be seen during that time. RP 252; see Ex. 32. Thus, Dr. Momah saw Perla. Ex. 1 (DM 0026-27). He made a note of neck and lumbosacral pain and ordered an MRI of the cervical and lumbar spine. Ex. 1 (DM 0026, 0029).

On June 4, Perla saw Dr. Sorsby, who noted lumbar strain and sciatica, cervical strain, and knee contusion. Ex. 1 (DM0040-41). On June 11, Perla complained of worse pain, and Dr. Sorsby prescribed a corset. Ex. 1 (DM0053). On June 19, Perla saw Laurie Gwerder, ARNP, Ex. 1 (DM0059-62), who noted complaints of lumbar and left leg pain, and urged Perla to resume physical therapy, Ex. 1 (DM0059-62). Nurse Gwerder filled out, and Dr. Momah signed, a Labor & Industries (L&I) form stating that Perla could work a four hour shift. Ex. 1 (DM0063). Dr. Momah did not see or examine Perla on June 19. RP 574, 609.

On June 26, Perla saw Dr. Momah for the second and last time. Ex. 1 (DM0064-65). Dr. Momah completed a report for L&I, stating that Perla could work four hours a day. Ex. 1 (DM0065). Nurse Gwerder referred Perla to a physical therapy clinic, Ex. 1 (DM0068-70), and Dr. Momah referred Perla to a pain specialist, Dr. Jena Schliiter, whom Perla began seeing at U.S. Healthworks' Tacoma clinic, RP 299, 302-04, 562, 640; Ex. 1 (DM0071-72).

Perla told her husband, Albert, after one of her visits to the Puyallup clinic that she had disagreed with a statement by Dr. Momah that she was just trying to get time off from work.³ RP 178.

B. The Saldivars' Evolving and Varying Allegations, and Harish Bharti's Participation Therein.

The Saldivars did not report inappropriate behavior by Dr. Momah to U.S. Healthworks while Perla continued to receive treatment at the Puyallup clinic. CP 2561 (FF 12); RP 88, 397. They also did not mention any inappropriate conduct to L&I, despite frequent telephone contact with L&I. CP 2561 (FF 13).

1. The Saldivars complain to MQAC that Dr. Momah inappropriately touched Perla's buttocks.

In October 2003, the Medical Quality Assurance Commission (MQAC), a division of the Department of Health (DOH), sent Perla a letter, acknowledging receipt of a "recent letter in which you express concerns regarding Dennis S. Momah," and stating that her report had been assigned case number 2003-10-0077MD. Ex. 8. The "recent letter" referred to in the MQAC letter is an undated one, Ex. 19, that Perla wrote herself.⁴ RP 414. In that letter, Perla wrote that Dr. Momah had seen her on May 27, June 19, and June 26, and had "touched me improperly on two

³ Perla continued receiving L&I time-loss benefits through January 2006. RP 378.

⁴ According to the Saldivars' opening statement and Albert's trial testimony, the Saldivars complained to DOH in July 2003, before contacting a lawyer. RP 50-51, 190.

occasions without my consent and with the excuse that he needed to check my injuries.” Ex. 19. The only touching Perla described consisted of being touched on her buttocks and having a referral form “grabbed . . . from my hands” on her last appointment:

During my last appointment I had an argument with Dr. Momah because he was forcing me to be checked, and I requested a nurse, but he got mad and raised his voice telling me that I needed to “cooperate” with him in order for me to be checked. I was trying to believe him, but he uncovered me and touched my buttocks, making me feel uncomfortable and humiliated. I got up as I could and refused to be treated by him one more time unless a nurse was present.

Watching him, I noticed something was wrong, and I requested him to give me a referral to another specialist. He got really mad and asked me what was the reason why I didn’t want to be treated by him. He told me that it wasn’t that simple to change doctors because I was already under his responsibility because I am an L&I case. He also asked me how many days I needed to be out of work. I got the business card of the doctor that I wanted to be referred to and he grabbed it from my hands. He told me that he was going to leave the room to give me some time to think about it and after approximately 25 minutes, Dr. Momah returned and asked if I already thought about that better. Because I didn’t change my mind, he got really mad, opened the door and asked me to leave the room.

Ex. 19, p. 1. Perla concluded the letter by saying: “I don’t understand how the clinic personnel never got worried for the extensive appointments, 3 to 5 hours, that I was there, and how it is possible that the clinic never noticed the illicit acts from Dr. Momah?” Id., p. 2. The letter said nothing

about Perla being seen by two different look-alike doctors or having her vagina touched on any visit. See Ex. 19.

2. The Saldivars retain lawyer Harish Bharti.

Perla and her husband became dissatisfied with MQAC's response and began looking for a lawyer, eventually retaining Harish Bharti. RP 101. Albert testified that he first contacted Bharti in July 2003, and that he and Perla first met with Bharti in August 2003. RP 51, 99, 135. Bharti declared that, when he first met with the Saldivars, they had already complained to MQAC. CP 987 (¶ 2); CP 2559 (FF 7).

During September 2003, Bharti was quoted in newspapers and appeared on national TV shows (including the "Today" show on NBC and "The Early Show" on CBS) accusing gynecologist Charles Momah, and his twin brother Dennis (as Charles' "impersonator"), of sexually abusing and raping patients at Charles' Burien and Federal Way clinics. CP 75-76 and 788-806, 1069-1071. On September 19, 2003, a *King County Journal* article reported:

More than 100 women have contacted a Seattle attorney in recent days to say that they too were sexually harassed and assaulted and subjected to numerous unnecessary and bungled medical procedures by their obstetrician-gynecologist – and a number are saying the doctor's twin brother may also have been involved, the attorney said.

Renowned class-action attorney Harish Bharti so far has filed six civil lawsuits against Dr. Charles Momah, 47 . . .

As more alleged victims of the doctor have come forward, Bharti said, similar accusations are now pointing to Momah's twin brother, Dr. Dennis S. Momah.

* * *

"Several of the victims claim that Charles Momah was permitting Dennis Momah, who is a physician, to come and violate them without their permission," Bharti said Thursday. "He was going there impersonating Charles Momah."

CP 1662. On September 23, 2003, this exchange occurred on "The Early Show" on CBS:

[Hannah] STORM: Mr. Bharti, unfortunately, we're short on time here. But can you just tell me about this twin brother that was also involved? How this came to light? And do you expect the DA to file charges against both men?

Mr. BHARTI: Yes, he's – the – Dennis Momah is a defendant. You know, Hannah, the interesting part is that it took me less than a week to determine that there is a twin, because most of the victims, and my clients would tell me, that on one visit, the doctor would look a little heavier, one week later the patient will come, he would look thinner, and one doctor stuttered, the other one would have no speech impairment. One was so quiet that you had to drag a word out of him and the other was a chatterbox and sweated more.

STORM: What about the charges, Mr. Bharti? What about the charges? Are – is the DA gonna file charges against both men?

* * *

BHARTI: Yeah. The prosecu – two prosecutors have been assigned to this case after I got involved, and they're investigating and I will be very surprised if more legal charges are not filed in the next couple of weeks. But . . .

* * *

BHARTI: . . . but you know, they have to bring – investigate.

CP 1070-1071. The October 19, 2003, *King County Journal* reported that:

Harish Bharti, a Seattle attorney, claims Dr. Charles Momah molested, raped, threatened and performed numerous botched and unnecessary surgical procedures on dozens of vulnerable women.

With 46 civil lawsuits now filed against Momah and at least 15 more expected this week, the doctor has yet to respond to the allegations.

* * *

At least six of the suits now also allege that Momah's twin brother, Dr. Dennis Momah, illegally impersonated his brother and examined several women under Charles Momah's care, said Bharti, who represents all 46 women suing the brothers.

CP 794-795, 1671-1672.

Bharti posted links to those and other news articles and TV interviews on his website. CP 776 (¶ 3) and 788-806. Starting in September 2003, Bharti filed multiple suits against both Charles and Dennis in King County, did not have Dennis served with process, and then later withdrew the suit or the claims against Dennis. CP 776, 796, 799, 950, 1057, 1061, 1652, 1689; 1944-45; RP 566-67. On October 13, 2003, Perla asked U.S. Healthworks for copies of her medical records. Ex. 1 (DM0091).

3. The Saldivars, with Bharti's assistance, complain to the police that Dr. Momah and/or someone impersonating him inserted his hand into Perla's vagina on two occasions.

On November 8, 2003, Perla signed a declaration, Ex. 20, that she

submitted to the Federal Way police, and that Bharti helped prepare, RP

418. It began:

I was a patient of Dr. Dennis Momah from May 27 to June 26, 2003, at [the Puyallup clinic]. I went to see Dr. Dennis Momah for neck, back, shoulder, and knee injuries. On two occasions, Dr. Momah sexually assaulted me by unnecessarily putting his hand in my vagina. I was shocked when he sexually touched me. This type of touching had absolutely nothing to do with my injuries and medical condition.

Ex. 20, p. 1. After describing her contacts with DOH, Perla swore:

I noticed that the doctor who initially saw me was wearing brown leather shoes. However, the same day, forty-five (45) minutes later, when I saw the doctor again, he was wearing an orthopedic shoe on one foot, which was black with velcro. This doctor appeared different to me in weight and he did not remember my telling him about my allergies to medication just a few minutes earlier. I was certain I saw two different persons who looked alike within forty-five minutes. I was not informed about two doctors with the same last names working in the same clinic. I want Dr. Dennis Momah and another doctor who was impersonating Dennis Momah investigated by police and the Health Department.

Ex. 20, pp. 1-2. The Saldivars later received from the investigating detective a letter with which they were dissatisfied. RP 316-18.

4. Mr. Bharti files this lawsuit, alleging that Dr. Momah had placed his hands on or in Perla's vagina on two of three visits, and that on one of the visits she had been seen by both Dr. Momah and a look-alike doctor.

On April 5, 2004, Bharti, as the Saldivars' lawyer, sued Dennis Momah and U.S. Healthworks. CP 6-21. The complaint alleged that Perla

had been seen three times by Dennis at the Puyallup clinic – on May 27, June 19, and June 26, 2003 – and that during two of those visits he had “placed his hands on and in” Perla’s vagina. CP 9 (§§ 4.4-4.5). It also alleged that, on “at least one” of the visits, Perla had been seen by both Dennis and a different physician who looked like him. CP 11 (§ 4.12). It further alleged that, on Perla’s last visit with Dennis, he gave her a gown to change into whereupon Perla, concerned that he “intended to do yet another vaginal examination,” first asked that a female assistant be present, but let Dr. Momah examine her without one present because she wanted to believe he was being sincere after he raised his voice at her, but that Dr. Momah then “began touching [her] buttocks,” prompting her to refuse further treatment. CP 10 (§ 4.8).

5. The Saldivars answer interrogatories swearing that Perla saw Dr. Momah on four occasions – May 27 and 29, and June 4 and 26, 2003.

On July 6, 2004, Perla answered interrogatories, and swore that she had seen Dr. Momah on May 27 and 29, and June 4 and 26, 2003.⁵ RP 382-86. She also swore in interrogatory answers that she had seen Laurie Gwerder on June 19, 2003. RP 384-85. That was true, see Ex. 1

⁵ Perla admitted at trial that it was not true that she had seen Dr. Momah on all of those dates, nor was it true that she had seen him within two days of one another at the end of May, RP 382-84.

(DM0059-63), but the Saldivars' complaint alleged that she saw *Dr. Momah* on June 19. CP 9 (§ 4.4).

6. Dennis Momah asserts counterclaims, to which the Saldivars plead no affirmative defenses.

On September 7, 2004, Dennis asserted counterclaims for intentional and negligent infliction of emotional distress and abuse of process. CP 31-32. The Saldivars did not answer the counterclaims.

7. In deposition, Perla testifies that, when Dr. Momah came back in the room on the first visit, she knew right away that it was a different person, and that on the last visit Dr. Momah did not touch her.

When deposed on September 7, 2004, Perla testified that her visits lasted 4 to 5 hours. RP 390. She also testified that, when Dr. Momah came back into the room on the first visit, “[r]ight away when he opened the door and walked in” she knew he was different. RP 395. She also testified that he “didn’t touch” her on the last, the June 26, visit. CP 629.

8. Bharti brings Charles Momah into the lawsuit as a co-defendant, based on a new declaration by Perla.

Dennis was deposed on September 10, 2004. CP 1618. On September 15, Charles was charged in King County with raping or taking indecent liberties with four patients in 2003, and with insurance fraud. See CP 175. On September 30, 2004, Bharti moved to amend the Saldivars' Pierce County complaint to add Charles as a defendant, CP 34-72, 231-57. and supported the motion with a new declaration by Perla

dated September 29, CP 65-67.

In that declaration, Perla swore that: (a) she learned at Dennis' deposition that Charles Momah is Dennis' twin brother, Ex. 36 (¶ 4); (b) Dennis' "accent and manner of speech" differed from the doctor who first saw her "on or about May 27, 2003;" and (c) "the first doctor" had a scar on his face but that Dennis did not when she saw him at the deposition.⁶ CP 66 (¶ 4). She also swore that, upon seeing a mid-September KOMO 4 News report about Charles' arraignment, and noticing a scar on his face, she realized that (a) "it was Charles Momah that sexually assaulted me during visits to the office of Dr. Dennis Momah;" and (b) Dennis Momah "was the second doctor who treated me." CP 66 (¶¶ 5-7).

The proposed amended complaint alleged that Charles *or* Dennis had put "his hands on and in" Perla's vagina during two visits, but allegations as to specific dates were dropped. CP 43 (¶¶ 4.3-4.5) (compare CP 9 (¶ 4.4)). According to the proposed amended complaint, on her last visit, Perla was touched "inappropriately," rather than on the buttocks or in the vagina. CP 44 (¶ 4.8) (compare CP 10 (¶ 4.8)).

Dennis opposed amendment of the Saldivars' complaint on grounds that it would unfairly prejudice his right to a fair trial. CP 79.

⁶ Both Dennis and Charles have scars on their faces, put there by their grandmother when they were three months old to be able to differentiate between them. RP 637.

Dennis' counsel argued that plaintiffs were seeking to prejudice the factfinder by associating Dennis with the sensational claims against Charles, CP 79-80, and that adding Charles would probably require a continuance of the trial, which Dennis wanted as soon as possible in order to clear himself, CP 76-77. The jury-demand deadline passed without the Saldivars having served their jury demand. The trial court allowed the Saldivars to amend their complaint. CP 230.

9. Albert is deposed and gives inconsistent testimony about his whereabouts during Perla's clinic visits.

Albert Saldivar was deposed on June 13, 2005. CP 809. He testified that this lawsuit is "not about the money issue," but was "about making sure that these people don't practice medicine again." CP 810. When Albert was asked whether he realized that all he could get in a civil lawsuit is money, Bharti intervened and said to defense counsel: "You know there are other remedies when a finding is made by a jury, so don't mislead my client." CP 946. Albert testified that he learned of Charles Momah from Bharti in September or October of 2003. RP 135.

Albert testified in deposition that he went to the Puyallup clinic only once, on Perla's third visit to Dr. Momah, and had waited in the car with his son, who was ill and not in school. RP 143, 175-76. He also testified, however, that, when Perla made her "third and final visit" to Dr.

Momah, he had waited outside the door to her exam room and “heard her tell the young girl” that she demanded to be seen by someone else. RP 180-81. He also testified that in July 2003, or on what he thought was the second visit, he saw Dr. Momah in the clinic lobby. RP 141-42.

10. Bharti adds new claims against U.S. Healthworks.

On June 17, 2005, the trial court allowed the Saldivars to re-amend their complaint, CP 376-407, to add new negligence claims against U.S. Healthworks. CP 402-04. The re-amended complaint repeated the First Amended Complaint’s “hands on and in [her] vagina” allegations, CP 380 (¶ 4.5); alleged that Perla had been touched inappropriately (but not specifically on the buttocks) by Dennis *or* Charles during her last visit to the Puyallup clinic, CP 381 (¶ 4.8); and alleged that, on her last visit, Perla had “allowed” Charles *or* Dennis to examine her, despite her fears that he was going to “do yet another vaginal examination” because by raising his voice in anger he made her believe he was “sincere and treating her appropriately.” CP 381 (¶ 4.8).

C. The Court Declines to Grant the Saldivars a Jury Trial After They Admit Failing to Timely Serve Their Jury Demand.

When Bharti brought this lawsuit, he filed, but did not serve, a jury demand. CP 5. The clerk issued an Order Setting Case Schedule, CP 1, which established an October 11, 2004 deadline for demanding a jury, and an October 3, 2005 trial date. CP 1. The case was assigned to Judge

Katherine M. Stolz on May 19, 2004. CP 2527.

In May 2005, Charles moved for a continuance of the October 3, 2005 trial date because he was scheduled to start trial on the King County criminal charges that same day. CP 2534-40. On September 1, 2005, all defendants joined in moving to strike the Saldivars' jury demand. CP 506-512, 519-520, 525-27. When the two motions were heard and decided on September 16, 2005, see RP 544-48, it had been 11 months since the jury demand deadline had passed.

The Saldivars admitted not serving their jury demand, CP 530-533, but contended that they had not waived a jury trial because defense counsel could have learned of the filed jury demand by checking the court file over the internet. CP 530-31. They also contended that defense counsel had known "that this was to be a jury trial," CP 530, because defense counsel had referred to "the jury" or "the jury pool" in several 2004 motion memoranda. CP 531. Those memoranda, however, predated the jury demand deadline and did not concern the issue of whether the trial would be to a jury or the bench, and referred to the "finder of fact" and "the factfinder," as well as to "the jury." See CP 73, 77, 80, 82. The Saldivars offered no legal authority to support their "no waiver" argument. Resting only on their "no waiver" argument, the Saldivars did not offer reasons why, even though they had failed to serve their jury demand, the

court should exercise its discretion to give them a jury trial anyway.

In reply, defense counsel submitted declarations explaining that they do not monitor filings electronically, had not done so in this case, had not known all along that the case would be tried to a jury, and had been assuming since the jury-demand deadline passed on October 11, 2004, that the trial would be to the bench. CP 534-37, 538-39; 9/16/05 RP at 7. Dennis' counsel argued that letting the Saldivars have a jury trial would be unfair to him. CP 536-37. Charles, who had become Dennis' co-defendant over Dennis' objections, was scheduled to stand trial on rape charges in King County starting October 3. While acknowledging that trial of this case would therefore have to be postponed, Dennis' counsel stressed that he wanted a trial as soon as possible and scheduling a jury trial would require a much longer postponement than would be necessary if the case were tried to the bench. CP 537. The court granted defendants' motion to strike the jury demand, CP 547-48, but granted Charles Momah's motion to continue the trial date, setting a new date of May 2, 2006, CP 544-546.

D. Charles Momah Is Convicted and Is Unable to Attend Trial, and the Court Enters an Order Allowing for a Videotape Preservation Deposition to be Taken of Charles that the Saldivars Never Take.

In November 2005, Charles was convicted in King County of rape

and indecent liberties, and sentenced to 20 years in prison.⁷ CP 2342, 2346. On March 13, 2006, the trial court entered an order denying the Saldivars' motion to continue the trial, but providing that any party could take a videotape preservation deposition of Charles, CP 2543; RP 285, 660-61. The court also dismissed all claims against U.S. Healthworks except for claims of negligence in failing to stop having Dr. Momah see Perla, and in failing to provide her a chaperone for exams.⁸ RP 554-55.

At a pretrial conference on April 18, 2006, a plan by Bharti to show photographs or videotapes of one or both of the Momahs at trial was addressed. As the court later recounted it:

. . . we were discussing the fact that Mr. Bharti provided photos or alleged videos in discovery and he would refuse to provide any information whatsoever regarding how those were obtained, who took the photographs and who took the videos?⁹ And, this court told him if you want them to be admitted you're going to have to provide the information so the defense has a chance and opportunity to talk to these people and depose them if necessary. If you want to get them you're going to have to bring whoever took the videos, took the photographs, and they'll have to come in and testify. . . It was also contemplated on April 18th that a preservation deposition of Dr. Charles Momah would be taken because he was languishing and no doubt still is in the King [County] Regional Justice Center and we had a significant discussion about the fact that he would not be

⁷ Charles' convictions are on appeal.

⁸ The Saldivars do not challenge that ruling on appeal.

⁹ See CP 563.

making a personal appearance here because they don't transport civil cases.

5/24/06 RP 6-7. The status of the MQAC investigation of Dennis also came up, see 5/24/06 RP 44-45, and the court ordered DOH to provide all materials produced to it by the Saldivars or their counsel. CP 1753.

E. The Saldivars' Varying and Inconsistent Stories, and Bharti's Role Therein, are Exposed at Trial.

1. In their trial brief, the Saldivars claim that it was Charles Momah who sexually assaulted Perla on two occasions.

A week before trial, on April 28, 2006, the Saldivars filed a trial brief, in which their counsel asserted that "it was Charles Momah who sexually assaulted [Perla] on [May 27] and on June 26, 2003." CP 600.

2. Albert provides contradictory trial testimony, and Bharti falsely disclaims the making a second complaint to MQAC.

Albert testified at trial that he and Perla sued Dr. Momah to make sure he never practices medicine again. RP 112, 179-180, 188, 192, 432.

On direct by Bharti, Albert testified that he first got involved with Perla's complaint against Dr. Momah the evening of May 28, 2003, after he saw her crying while on phone calls with her friend Nancy and her parents. RP 80. He testified that Perla then told him that Dr. Momah had inserted his finger into her vagina and that she thought two different doctors had been involved. RP 82-83, 87. Although he claimed to have called the clinic to ask that Perla not be seen by Dr. Momah again, he

conceded that he did not mention anything about any improper touching. RP 88. He also testified that he had driven Perla to one visit at the clinic in June 2003 where she had seen Dr. Momah, but waited outside a couple of hours, going to a Krispy Kreme store across the street. RP 92-93.

Bharti asked Albert if he had been interviewed by an MQAC investigator, and Albert replied that he had been, in February 2006. RP 124. Bharti asked if the interview had been “related to the investigation of the complaint by Perla Saldivar,” and Albert said yes, and that Perla had been interviewed too. RP 125. Responding to a relevance objection, Bharti said that he was seeking to rebut defense contentions that the MQAC investigation had been closed with no charges brought against Dennis. RP 126; see Ex. 28. Bharti asserted that the MQAC investigation of Dennis had been “reopened,” but “not by my clients.” RP 127-128.

On cross, Albert testified that he had first learned of Charles Momah from newspapers, not from Bharti, RP 134, but he was impeached with his deposition testimony that he had learned of Charles from Bharti in September or October 2003. RP 135.

Albert also testified on cross that he had gone with Perla to the Puyallup clinic once, but sat outside, and had never been in an examination room, or even in the building, when Perla was being seen by Dr. Momah. RP 137, 139-40. When confronted with his contradictory

deposition testimony, Albert then claimed to remember seeing Dr. Momah inside the clinic while he was “in to get a glass of water.” RP 140-41. When asked on which visit he accompanied Perla to the Puyallup clinic and stayed in his car, Albert testified that it may have been the third visit, that he waited alone, and Perla came out crying. RP 142-44. When confronted again with contradictory deposition testimony that his ill son had been with him, RP 143-44, 175-76, Albert testified that he went several times with Perla, that one time he waited a couple of hours and remembered walking across to the street to the Krispy Kreme, and that on the third visit, he now remembered that he might have waited only 20 minutes and was sitting in his car with his son. RP 177. He then testified that his memory about these events was better today than it had been a year before when his deposition was taken. RP 177-78. On cross, Albert’s false deposition statement about waiting outside the door to the examination room on Perla’s “third and final visit” and hearing her tell “the young girl” that she demanded to be seen by someone else was also exposed. RP 180-81.

Before Albert’s testimony concluded, the subject of the Saldivars’ complaints to DOH and the police came up again. Bharti told the court there had been “[n]o more than one complaint” to DOH. RP 189.

3. Perla identifies Dennis Momah as the man who molested her on May 28, 2003.

As one of her lawyers, Ms. Starczewski, began to ask Perla questions, the trial court asked whether there should be an interpreter. Ms. Starczewski and Perla waived an interpreter. RP 193-195.

After Perla related the circumstances of her fall at work, her visit to the emergency room on May 12, 2003, and her initial visits to U.S. Healthworks in Puyallup with Dr. Abdullah and a physical therapist, RP 198-210, Ms. Starczewski asked Perla about her first visit with Dr. Momah on May 28, 2003, and what she had done that day after the visit. RP 211-27. Perla identified Dennis Momah in the courtroom, RP 211, as the person she had seen on May 28, RP 211-13, and testified that he had stood behind her and slid his hand down while she was wearing sweat pants with an elastic band, and that she felt his hand inside her vagina. RP 214-15. Perla testified that he had left her alone in the exam room for 20 to 45 minutes after she demanded to have a nurse present and had twice opened the door and asked passing nurses when the doctor would see her. RP 215-217, 220. She did not claim to have told either nurse that she wanted a chaperone. Perla testified that eventually a doctor opened the door and “it was Dr. Momah.” RP 218. She testified that he asked her name and why she was there, and that he was wearing a “special shoe”

that he had not been wearing before.¹⁰ RP 218. Perla testified that she was “very disappointed” that he had not remembered that he had just left and was asking her again about her pain and what had happened to her. RP 219. Perla testified that, as she left the room she was embarrassed and confused and humiliated, and that the first person she told was her father, a Mexican doctor, to whom she spoke on the phone. RP 221-23. Perla testified that she then told Albert, RP 224, and a friend (also by phone), RP 228-29. The trial then recessed for lunch.

4. Bharti gets caught having shown Perla a videotape during the noon recess to influence her testimony.

When trial resumed in the afternoon, Perla was asked on direct about differences she remembered between a doctor she initially saw on her first visit to Dr. Momah and a man who entered the room later. RP 259-61. After Perla cited differences in the manner of speech, scars, weight, complexion, shoulder bulk, and hands, she started to explain that she was able to identify “him” from “the marks on the face” because “today I saw the video.” RP 259-62. When defense counsel objected, the court asked whether “we’re talking about a video . . . that’s been made available to opposing counsel?” Ms. Starczewski deferred to Bharti.

¹⁰ Dennis sprained his ankle in May or June 2003, RP 546-47, and wore an “orthopedic” shoe that had velcro (Ex. 46) when his regular shoe was too painful to wear, RP 641-42.

THE COURT: Is this a video that's been made available and given to co-counsel [sic]? Are we talking about a video deposition?

MR. BHARTI: Yes.

RP 262. Defense lawyers denied having seen any video depositions. Bharti explained that Perla had referred to a video deposition of Charles Momah in another case, and that "I saw it this morning for the first time," that "I only got it last night," and that "[s]he just saw it during lunch time [and] I have not seen it, either." RP 263-64.

Charles' counsel advised the court that she understood that a King County protective order, CP 1490, 1493, see also CP 1486-89, restricted the persons to whom the video deposition could be shown.¹¹ RP 263. The court asked that a certified copy of the order be obtained, RP 266, and told Bharti that she was "rather upset that you would taint the memory of your client in this case with something in another case [b]ecause now I don't know whether [Perla is] testifying from her memory or from something she observed on this." RP 269.

The next afternoon, the court heard argument on Charles' and U.S. Healthworks' motions to dismiss. RP 272-81. Dennis did not join; his

¹¹ Except for the Saldivars, all of Bharti's clients who sued Charles Momah did so in King County. Dennis was named as a co-defendant in some of those lawsuits, at least initially. See CP 776, 950, 1652, 1689, 1944-45 and RP 566-67. Perla is the only patient of Dennis (rather than Charles) who ever filed a lawsuit naming him as defendant. RP 565, 572, CP 256, 63 (FF 14, 21).

counsel asked the court to complete trial on the merits and reserve until after trial the consideration of sanctions for the Saldivars' counsel's misconduct. CP 272-73. Bharti did not comment. Before ruling on the motions to dismiss, the court observed that Perla's testimony describing differences between the two Drs. Momah had been tainted by viewing the videotape. RP 284. The court reminded Bharti that it had advised him before trial to take a preservation deposition of Charles at the jail. RP 284-85; see also RP 700-01. The court decided against directing verdicts because the case was being tried to the bench. RP 286.

5. When her testimony resumes, Perla identifies Dennis Momah as the doctor who molested her a second time, in mid-June, 2003.

When Perla's direct examination resumed, she testified that she had seen Dennis twice in mid-June. RP 288. She testified that "he touched me again in my vagina" while she was lying, gowned, on a table. RP 290-91. She testified that she got a good look at Dr. Momah. RP 291-92. Asked to point out who she had seen for her second visit, Perla identified the man "in the back [of the courtroom] with the white shirt" RP 292. Perla testified that she saw the Dr. Momah who was in the courtroom again in June 2003 on a third visit and that, although she was taken into an examination room, she was not examined. RP 299. Only one Dr. Momah was in the courtroom, and it was not Charles.

6. Perla gets caught in a lie about whether she had had any contact with DOH since 2003.

Ms. Starczewski asked Perla about her 2003 complaint to DOH. Perla testified that she had not had any contacts with DOH since 2003. RP 323. The court and counsel then addressed the subject of records that the court had ordered DOH to produce, CP 1753, and that MQAC had just delivered. RP 324. The MQAC documents included a declaration Perla had signed dated January 29, 2005, Ex. 45, pursuant to which MQAC had opened a new case, #2005-03-0062MD, in March 2005. RP 324-25; CP 1468-72. The MQAC documents also included a written summary of an interview that Perla had given on February 6, 2006.¹² Ex. 37.

Discussion about the admissibility of the MQAC documents ensued. Counsel for the Saldivars conceded authenticity, RP 326, 329, but objected that a “tape” appeared “to be an out of court statement [that is] not under oath,” RP 325, and, later, that there is “hearsay within these documents.” RP 328B. Dennis Momah’s lawyer responded that MQAC documents are public records and that statements by Perla are admissions.

¹² Perla had told the investigator that she had three appointments with Dr. Momah, and on the first one Dr. Momah slid her sweatpants down, put his hand between her buttocks, and slid his finger into her rectum. Ex. 37. Perla said Dr. Momah then handed her a pill, left for 25 minutes, and then another Dr. Momah, who was shorter and wore a different shirt and shoes, entered the room. Id. She said a translator, Mr. Fuentes, then showed up. Id. Perla said that when she got home she told Albert what had happened, and then telephoned her father, who told her to make a report. Id. With respect to her second and third visits, Perla described arguments with Dr. Momah, but no offensive touching of buttocks, vagina or rectum. Id.

RP 325. The Saldivars' lawyers disputed neither point. Nothing from the MQAC file was offered into evidence at that juncture of the trial.

7. On cross, the court hears Perla admit changing her story.

On cross, Perla again testified that she saw Dr. Momah three times – in late May, June 26, and “around the 16th, 17th” of June. RP 382. She then acknowledged that, although having sworn in 2004 interrogatory answers that she saw Dr. Momah on May 27, May 29, June 4, and June 26, RP 382-384, she had not seen Dr. Momah twice within two days, and speculated that “[m]aybe I was confused,” RP 383-384. She acknowledged having told DOH that her visits with Dr. Momah lasted 3 to 5 hours, RP 389 (see Ex. 19), and having testified in her deposition that the appointments lasted 4 to 5 hours, RP 390.

Perla testified that she was sexually assaulted during a 10- to 20-minute period between the start of her meeting with Dr. Momah on the first visit and when she was left alone in the room for awhile. RP 390-92. She estimated that she had been left alone (except for two times when she looked out and asked nurses when the doctor would return) for about 45 minutes. RP 392-93. Perla initially resisted agreeing that she had believed, immediately upon seeing the doctor who entered the room following her wait, that he was a different person, RP 394-395, but acknowledged having so testified in her deposition, RP 395. She agreed

that the “second part” of her first visit lasted approximately 10 minutes, and that no inappropriate contact occurred during that time. RP 396.

Perla testified that she did not tell anyone at U.S. Healthworks about any inappropriate touching, but had hurried home, “called my friend on the way home,” and “immediately . . . also spoke with my husband,” RP 397, but maybe had gone to physical therapy first, RP 398.¹³

Perla admitted having declared under oath before trial that it was Charles who had assaulted her on her visits to Dennis’ clinic. RP 404. Perla testified that all of her declarations, after the original letter to DOH in 2003 (Ex. 19), were drafted with Bharti’s help. RP 414. She also testified that the account, in Exhibit 19 (which she had written herself), of having had her *buttocks* touched on her “last visit” with Dr. Momah might have been “an error or something.” RP 416.

8. The Saldivars and Bharti are caught lying about their involvement in the filing of a second DOH complaint.

Dennis’ counsel offered the MQAC investigator’s summary of Perla’s February 2006 interview. RP 421. Ms. Starczewski objected that the document “contains hearsay” because it is not under oath and is a summary of what the investigator considered important. RP 421.

¹³ Yet, on direct examination, Perla had testified that, after the first visit with Dr. Momah in May 2003, she hurried home, was very upset, and the first person she told was her father over the phone, RP 221-23, then Albert, and then a friend, RP 228-29.

Observing that the document contradicted Perla's trial testimony that she had not had any contact with DOH since 2003, the court admitted the document in evidence as Exhibit 37. RP 421. Perla then testified that Bharti was helping her with her most recent DOH complaint. RP 446.

F. The Saldivars Call Dennis Momah, and Make Certain "Offers of Proof," Before Resting Their Case.

Before resting their case, the Saldivars called Dennis.¹⁴ Ms. Starczewski asked him about his work, licensing, and earnings history, his job status, and his efforts to find employment since 2003. RP 514-27, 562. She also asked him about his work for U.S. Healthcare, his contacts with Perla at the Puyallup clinic, and what some of his chart entries meant. RP 527-62. On cross by his own counsel, Dennis denied impersonating Charles, denied that Charles had impersonated him with his patients, denied that he had ever inappropriately or sexually touched Perla, and reiterated that he had only seen her on two occasions, May 28 and June 26, not June 19, 2003. RP 572-74.

On redirect, Ms. Starczewski offered, but the court declined to admit, copies of two counterclaims that Dennis had brought against Bharti

¹⁴ The Saldivars also called as witnesses Ed Fuentes, RP 162-74, Dr. Sorsby, RP 231-58, Julie Blakeslee, RP 471-511, and Charlyne Michelin, RP 451-59. Two defense witnesses with respect to counterclaim issues, Reginald Momah and Lily Jung, M.D., also testified, out of order, before the Saldivars rested. See CP 758-59 and CP 764-72.

clients other than the Saldivars, Exs. 41 and 42. RP 614-16.¹⁵ The court, however, permitted Ms. Starczewski to elicit from Dennis admissions that he had alleged in those and 17 other counterclaims that Bharti clients other than the Saldivars had caused him to lose his job, have a stroke, and suffer humiliation. RP 615-26.

Ms. Starczewski then told the court that she was submitting an offer of proof, CP 738-45, and requesting “the opportunity to present rebuttal testimony and we have that in written form.” RP 630. She said that it was in written form because the court had stricken the witnesses. RP 630. The offer of proof described what Jenni Ramos, Officer Richard Heintz, “Ms. Franklin,” “Ms. LaPoint,” “MS. Collier,” “Ms. Day,” and “Ms. Acker” would say. Except for Ramos and Heintz, each purportedly had seen Dennis in court in 2005 or at a 2006 deposition and was “100% positive” that it was Dennis “who impersonated Charles Momah in the office of Charles Momah” at various times, all prior to 2003. CP 743-44. The court rejected the offer of proof. RP 632-35.

After Ms. Starczewski finished questioning Dennis, the Saldivars made another offer of proof asking permission to call Albert and members of Perla’s family as witnesses to state what Perla had told them after the appointments at the Puyallup clinic during which Perla claims she was

¹⁵ No other counterclaims were offered, although two more had been marked. CP 762.

abused. RP 650-655; CP 701-702. The court denied the request when it became apparent that the Saldivars' lawyers' plan was to question the relatives over the phone. RP 654-55.

Ms. Starczewski then asked the court to admit "the tape" of Perla's February 2006 interview with the MQAC investigator. RP 657. She said "the tape" would show that Perla had not used the word "rectum." RP 657. She said she had previously asked the court "to review the tape." RP 658. The Saldivars' lawyers never had "the tape" marked. CP 760-62.

The court observed that the MQAC materials showed that Perla and the Saldivars' lawyers had not been truthful in repeatedly telling the court that the MQAC investigation of Dennis which was opened in 2003 based on Perla's letter (Ex. 19) and closed in 2004 (Ex. 8) had been "reopened" but that the Saldivars were not responsible for that "reopening." RP 658-660. Ms. Starczewski asserted that "the reopening of any complaint against Dennis Momah was not at Ms. Saldivar's doorstep." RP 658. The offer of proof was rejected. RP 661.

G. The Court Grants Motions to Dismiss the Saldivars' Claims.

After the Saldivars rested, RP 669, the defendants moved to dismiss the Saldivars' claims, and Dennis moved for a directed verdict of liability on his counterclaims. RP 670-71; CP 659-78, CP 679-86, 687-700. The court recessed, advising counsel that it would hear argument on

the defense motions the next morning. RP 671. The Saldivars' counsel did not ask for more time to respond to the motions to dismiss.

In two memoranda opposing dismissal, CP 731-37, 746-57, the Saldivars asked the court to find Perla credible but conceded that "she may have forgotten a few details surrounding the assault." CP 750. They asserted that, until Perla "recognized Charles from the news," they "had no knowledge of who Charles was, or what Charles had been accused of by others." CP 750-51. The Saldivars also asserted for the first time that RCW 4.24.510 immunized them against liability to Dennis. CP 753.

After hearing oral argument,¹⁶ RP 670-96, the court indicated that it would be "entertaining CR-11 sanctions against Mr. Bharti at the close of this case," RP 696, and granted the defendants' motions to dismiss, RP 697-708. The court declined to grant Dennis' motion for a directed verdict of liability on his counterclaims, RP 708-709.

In granting the motions to dismiss, the court found that Perla's testimony was not credible for multiple reasons. One was Perla's affect:

She was as outraged by his brusque treatment of her as she was by the apparent alleged sexual assault. Her affect was the same.

RP 705. Another was that Perla's testimony had been inconsistent:

¹⁶ Jason Anderson, who attended only part of the first day of trial, see 5/24/06 RP 49, argued for the Saldivars on the motions to dismiss, RP 689-93, and later also made their closing argument on Dennis' counterclaims, RP 768-74.

And, she has made too many sworn statements to too many people with too many variations for this court to know what to believe.

RP 705. Another reason was that Perla's testimony had been tainted by the way her lawyers had prepared her to describe differences between Charles and Dennis:

[W]hile she was testifying last Wednesday she suddenly started discussing a video of Charles Momah which she had seen that day and in my notes I wrote "video?" because what video are we talking about? No video has been disclosed, no video was taken in this case. And, then with a few more questions it turned out she'd seen this video during the lunch hour before she came back to testify at 1:30. Whereupon we then had objections and discussions and in fact found out that the deposition she had been looking at was taken in connection with another case, . . . and it was obvious from her testimony that what she had reviewed was affecting her testimony. Tainting it. . . .

RP 705-706. The court also found Perla's testimony not credible because Perla had lied at trial:

And, we also have Ms. Saldivar testifying that after August of '03 she had absolutely no contact with the Department of Health and that was a lie. She had filed a new complaint. And, she testified[,] she filed that complaint with the assistance of her attorneys who had prior to this case discussing on the record the existence of that complaint and had stood there as officers of the court and assured me they had no knowledge of and had never participated in preparing that additional complaint. So either their client is lying or they lied which is extraordinarily troubling to this court. As a judge I am not accustomed to attorneys who lie. And . . . there has been serious tainting of the testimony of Ms. Saldivar. [RP 706.]

H. The Court Awards Dennis Momah \$2.8 Million on His Outrage and Abuse of Process Counterclaims, and Attorneys Fees for Having to Defend Against a Fabricated and Frivolous Lawsuit.

Most of the evidence in support of Dennis' counterclaims was elicited in the Saldivars' case-in-chief,¹⁷ but after the Saldivars' claims were dismissed, Dennis was recalled briefly to testify on the counterclaims. RP 714-18. The evidence established, and the court found, that Dennis lost his job at U.S. Healthworks because of the complaints that began with Perla Saldivar's letter to the MQAC and that included complaints by patients of *Charles* – and clients of Bharti – that Dennis had “impersonated” Charles and had molested them. RP 572, 646, 2563 (FF 22). Dennis had a stroke in June 2004 because of stress caused by the accusations. RP 581; CP 2564 (FF 23). The accusations left him disgraced here and, because of the internet, in Nigeria as well. RP 569, CP 1689. Although the MQAC notified Dennis in April 2004 that it was not going to take action on Perla's complaint or on those of other Bharti clients, Ex. 28 and CP 1679, Dennis could not afford to renew his medical license, and it lapsed in 2005. RP 523. He was left uninsurable and unemployable. RP 576; CP 2563-64 (FF 22).

¹⁷ Two of Dennis' damages witnesses had been called out of order during the Saldivars' case. RP 331-372 (Reginald Momah) and RP 577-608 (Dr. Lily Jung). The Saldivars' lawyers had also questioned Dennis Momah extensively on causation and damages issues relevant only to his counterclaims. RP 514-27, 530-32, 562-69, 610-21, 623-26, 648-49.

After closing arguments, RP 751-77, the court issued an oral ruling in Dennis' favor, awarding him more than \$2.8 million in damages, RP 777-78, as well as attorneys fees in an amount to be determined under the "frivolous lawsuit" statute, which award would be "separate and apart from the CR 11 motions." RP 778. All counsel agreed to a briefing schedule and a hearing on May 24, 2006. RP 779-81. In the courthouse parking lot after the court recessed for the day, a process server served Dennis with process on behalf of another of Bharti's clients. CP 777-78.

I. Judge Stolz Imposes Sanctions on Bharti.

On May 18, 2006, Dennis filed his motion asking the court to impose sanctions on Bharti under CR 11 and the court's inherent power to control proceedings before it. CP 775-934, 935-57. U.S. Healthworks and Charles Momah also moved for CR 11 sanctions against Bharti. CP 958-68, 969-81. Dennis' counsel provided the court with copies of materials about Dennis on Bharti's website, CP 788-806, information about Bharti's practice of bringing, and then dismissing, claims against Dennis in complaints against Charles, without serving them on Dennis, CP 776 (4), documentation of an instance where Bharti had induced a witness to sign a false declaration, CP 815-18, and an instance where he had made allegations on behalf of a client that the client later disavowed under oath, CP 823-836. Dennis' counsel informed the court that Bharti had caused

Dennis to be served with a complaint in another "impersonation" lawsuit in the courthouse parking lot during trial, CP 777-78 (1), and that he had been sanctioned in a King County case for making baseless accusations and not conducting a reasonable pre-filing inquiry, CP 929-934.

Bharti's response was filed on May 22. CP 982-1441. In that response, Bharti's counsel complained that he had been given only four days to respond to the sanctions motions, CP 1427, 1440, but did not request a continuance and made no representation as to what he would have accomplished with more time. See CP 1465-66.

The court had told Bharti and Ms. Starczewski to appear in person at the May 24, 2006 hearing, but Bharti did not appear. 5/24/06 RP at 11. The court entered Findings of Fact (FF) and Conclusions of Law (CL). CP 2555-76; 5/24/06 RP 52-59. After fee applications were reviewed, judgments were entered on June 23, 2006 against the Saldivars and Bharti. CP 2577-2582. The judgment against the Saldivars awarded damages of \$2,819,037.00 and attorney fees and costs of \$144,205.88 to Dennis, \$108,340.29 to U.S. Healthworks, and \$715.00 to Charles. CP 2581.

The Saldivars moved for a new trial or reconsideration of the findings and conclusions. CP 1539-58. Their motion included a request that the court let them present "their defenses" to a jury. CP 1558. The

arguments that appear at pages 32-36 of the Saldivars' opening brief were made for the first time in their new trial motion. CP 1554-57.

As sanctions under CR 11 and its inherent authority, CP 1928, 2573-74 (CL 12), the court ordered Bharti to pay (1) Dennis' attorney fees and costs (totaling \$144,205.88); (2) U.S. Healthworks' attorney fees and costs (totaling \$108,340.29); (3) Charles' attorney fees and costs (totaling \$40,447.32); (3) Dennis an additional \$250,000 by June 14, 2006; and (4) \$50,000 to the registry of the court by June 7, 2006, and to post the court's findings and conclusion on his website with the same prominence given to other links, and keep it there for as long as his website made reference to the Momahs, and for at least a year. CP 1537; see CP 2578.

The Saldivars timely appealed, CP 1910-1917, as did Bharti, CP 1918-1929. Bharti posted cash supersedeas with respect to the monetary sanctions. Because Bharti did not fully comply with the payment deadlines and posting requirements,¹⁸ the court issued an order requiring Bharti to show cause why he should not be held in contempt. CP 1927. He has not appeared on the show-cause order, as the hearing was stayed by agreed order, CP 2587-89, and has not been rescheduled.

¹⁸ Among other things, Bharti had posted the findings and conclusions only as attachments to his notice of appeal. CP 1769-1770 (¶ 6), 1771, 1793-1794.

III. ARGUMENT WHY THE JUDGMENTS AGAINST THE
SALDIVARS ON THEIR CLAIMS AND DENNIS MOMAH'S
COUNTERCLAIMS SHOULD BE AFFIRMED

Usually, in reviewing a judgment based on findings of fact and conclusions of law, the appellate court's task is to "determine whether substantial evidence supports challenged findings of fact and, in turn, whether the findings support the conclusions of law." Weyerhaeuser v. Health Dep't, 123 Wn. App. 59, 65, 96 P.3d 460 (2004). Here, however, the Saldivars do not argue that any finding of fact is not supported by substantial evidence, or that the trial court's conclusions of law do not support the judgment. Rather they argue that the trial court erroneously declined to overlook their waiver of a jury trial and failed to consider certain evidence, that they are immune from liability to Dennis under RCW 4.24.510, and that they did not commit abuse of process.

The judgments against the Saldivars on their claims, and on Dennis' counterclaims should be affirmed. The findings and conclusions that the Saldivars do not challenge on appeal are more than sufficient to sustain those judgments. The trial court did not abuse its discretion in not giving the Saldivars a jury trial after they failed to timely serve their jury demand, or in making the evidentiary rulings it made. The Saldivars are not entitled to immunity from liability to Dennis under RCW 4.24.510 and did engage in abuse of process. Even if their conduct had not amounted to

abuse of process, the Saldivars would remain liable to Dennis for outrage.

- A. The Judgments Against the Saldivars on their Claims and on Dennis Momah's Counterclaims Should be Affirmed Because the Findings of Fact and Conclusions of Law the Saldivars Leave Unchallenged, or Cannot Challenge, are More than Sufficient to Support the Judgment.

The trial court expressly found Dennis's testimony denying the Saldivars' accusations credible and persuasive, CP 2563 (FF 21), and Perla and Albert's testimony not credible, CP 2556-57 (FF 2-4). Although the Saldivars assign error to those findings, credibility determinations are solely for the trier of fact, and cannot be reviewed on appeal. Morse v. Antonellis, 149 Wn.2d 572, 574, 70 P.3d 125 (2003); Boeing Co. v. Heidy, 147 Wn.2d 78, 87, 51 P.3d 793 (2002); State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The Saldivars offer no argument or authority that the trial court's credibility findings could be vacated or ignored on appeal. It is thus a verity for purposes of appeal that Perla was not molested at U.S. Healthworks either by Dennis or by Charles. Although the dismissal of the Saldivars' claims may be affirmed for that reason alone, other findings left unchallenged by the Saldivars are more than sufficient to support the dismissal of their claims and the award of damages to Dennis on his counterclaims.

The Saldivars assign error to portions of the findings of fact underlined in the appendix to their brief. The Saldivars leave parts of

Findings 1, 4-8, 10, 11, 15-27, 29, 30, and 35 unchallenged, and they challenge no parts of Findings 12-14, 17, 20, 28, 31, 32, 33, 34, and 36-38. Unchallenged findings of fact are verities on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). Thus, the following are among the verities for purposes of the Saldivars' appeal:

20. The Saldivars' numerous contradictory and contrary evidentiary support should have put a reasonable attorney on notice prior to filing this action that *the Saldivars' claims were not well grounded in fact*. CP 2563.

24. Dr. Dennis Momah was planning to build a home and had made a down payment of \$7500 shortly before *the Saldivars made their false allegations*. . . . CP 2564.

30. . . . Harish Bharti had reason to know, prior to his filing the complaint in this action, that *the Saldivars' claims were not well grounded in fact*. . . . CP 2568.

31. This Court finds that *Harish Bharti signed the complaint and amended complaints without a reasonable belief that the allegations asserted against the defendants by Perla Saldivar were well grounded in fact*. CP 2568.

33. This Court finds that Harish Bharti continued to file irrelevant and salacious declarations and statements in the court file in this case that were unrelated to Perla Saldivar's claim after repeatedly being instructed by the Court not to do so. . . . This court finds that *Mr. Bharti's efforts to fill the court file with these salacious and irrelevant materials was for the improper purpose of eliciting media/public attention, to harass and damage the reputation of Dr. Momah, and to improperly influence public opinion and gain advantage in other litigation*. CP 2568-69.

34. . . . *Mr. Bharti amended the complaint in this matter to bring Charles Momah into the case as a defendant without any reasonable basis in fact to do so,*

and . . . this new process was served for the improper purpose of harassing Dennis Momah and escalating the media attention in this case. CP 2569.

35. . . . *Mr. Bharti proceeded to prepare declarations for Ms. Saldivar to sign either knowing they were false or at least in reckless disregard of their truth or falsity.* CP 2569.

36. . . . *Mr. Bharti's improper use of legal process in this case is part of a pattern of behavior by Mr. Bharti to harass Dennis Momah, destroy his career, [and] unduly run up legal expenses,* and gain Mr. Bharti media exposure and leverage in other legal matters brought by Mr. Bharti. CP 2569. [Emphases added to all of the above quotes.]

An unchallenged conclusion of law becomes the law of the case for purposes of appeal. King Aircraft Sales v. Lane, 68 Wn. App. 706, 716-17, 846 P.2d 550 (1993); State v. Slanaker, 58 Wn. App. 161, 165, 791 P.2d 575, rev. denied, 115 Wn.2d 1031 (1990). To the extent that any conclusion of law is really a finding of fact, an appellate court treats it as a finding of fact. Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). Thus an unchallenged conclusion of law is either the law of the case or a verity on appeal.

The Saldivars do not challenge Conclusions 7 and 12, or the second sentence of Conclusion 8, making them either the law of the case or a verity on appeal. No. 7 states:

[The Saldivars], through their counsel of record, used the court and the discovery process to advance their goal of driving Dr. Momah out of the practice of medicine and to destroy his reputation by making numerous unfounded

claims and allegations in declarations, depositions, and pleadings. [Emphasis added.]

CP 2572. The second sentence of Conclusion 8 states:

... Moreover, Harish Bharti actively and knowingly participated in ***this [the Saldivars'] abuse of process*** for his own personal gain. [Emphasis added.]

CP 2572. Conclusion 12 states:

Mr. Bharti drafted multiple contradictory ***declarations by Perla and Albert Saldivar*** that he knew or should have known ***were untrue and*** this was done ***in furtherance of*** both Mr. Bharti's and ***the Saldivars' improper motives and abuse of process.*** [Emphasis added.]

CP 2573-2574.

From these unchallenged findings and conclusions, it is therefore either the law of the case or a factual verity, for purpose of the Saldivars' appeal, that the Saldivars made false and unfounded claims and allegations and gave untrue testimony against Dennis for improper motives and by way of abuse of process. Moreover, the actions of an attorney authorized to appear on behalf of a client are binding on the client. Woodhead v. Discount Waterbeds, 78 Wn. App. 125, 133, 896 P.2d 66 (1995), rev. denied, 128 Wn.2d 1008 (1996). Thus, by not challenging findings and conclusions that their lawyer knew or should have known that their claims were not well grounded in fact and that their lawyer made "numerous unfounded claims and allegations in declarations, depositions, and pleadings," the Saldivars concede, effectively, that they did those things

themselves. Therefore the Saldivars' claims were properly dismissed.¹⁹

Similarly, by leaving unchallenged the findings and conclusions that they “made . . . false allegations,” CP 2564 (FF 24); that Bharti “signed the complaint and amended complaints . . . without a reasonable belief that the [Saldivars’] allegations against the defendants were well grounded in fact,” CP 2568 (FF 31); that Bharti repeatedly filed “irrelevant and salacious declarations and statements in the court file in this case that were unrelated to Perla Saldivar’s claim,” CP 2568 (FF 33), and did so “for the improper purpose of eliciting media/public attention and damage the reputation of Dennis Momah . . .”, CP 2568-69 (FF 33); that Bharti brought Charles into the case “without any reasonable basis in fact to do so” and “for the improper purpose of harassing Dennis Momah and escalating the media attention in this case,” CP 2569 (FF 34); that Bharti prepared declarations for Perla to sign “either knowing they were false or in reckless disregard of their truth or falsity,” CP 2569 (FF 35); and had done those things “to harass” Dennis, destroy his career, unduly

¹⁹ It is not clear whether the Saldivars’ ninth assignment of error pertains to the dismissal of their claims against U.S. Healthworks, or only to the dismissal of their claims against Dennis. The judgment entered against the Saldivars and in U.S. Healthworks’ favor should not be vacated no matter what this Court decides concerning the Saldivars’ appeal from the dismissal of their claims against Dennis, because the Saldivars do not assign error to Findings of Fact 6 and 11 as they relate to U.S. Healthworks or to Findings 12-14 or 17, and because the Saldivars do not challenge the last sentence in either Conclusion of Law 4 or Conclusion 5. The Saldivars also offer no argument in their brief upon which the dismissal of their claims against U.S. Healthworks, or the fee award made to U.S. Healthworks under RCW 4.84.185, could be vacated.

run up legal expenses,” and gain media exposure and leverage in other cases, CP 2569 (FF 36); that Bharti filed numerous declarations in this case for the purpose of vexing, harassing, and annoying Dennis, CP 2572 (CL 7); that they and their counsel used the court and the discovery process to make unfounded claims and allegations to drive Dennis out of practice and destroy his reputation, CP 2572 (CL 7); and that Bharti knowingly participated in the Saldivars’ abuse of process, CP 2572 (CL 8), the Saldivars, who are responsible for the actions of their lawyer in this case, Woodhead, 78 Wn. App. at 133, effectively concede that they did those things and engaged in abuse of process subjecting to them to liability on Dennis’ counterclaims.

The Saldivars offer no argument that the amounts awarded to Dennis as damages or fees are unsupported by substantial evidence. Thus, the verities and law of the case for purposes of appeal provide all the support necessary for the judgment for Dennis on his counterclaims.

B. The Trial Court Did Not Abuse Its Discretion in Not Giving the Saldivars a Jury Trial After They Failed to Serve Their Jury Demand.

1. The Saldivars waived a trial by jury by failing to timely serve their jury demand.

Civil Rule 38(d) provides that:

The failure of a party [1] to serve a demand as required by this rule, [2] to file it as required by this rule, and [3] to pay

the jury fee required by law in accordance with this rule,
constitutes a waiver by him of trial by jury.

The rule is framed in the conjunctive and is clear. Civil Rule 38(d) is constitutional and enforceable. Sackett v. Santilli, 146 Wn.2d 498, 507-508, 47 P.3d 948 (2002). The Saldivars did not fulfill all three of the requirements of CR 38 by the court-ordered deadline for doing so, and therefore waived trial by jury.

Wilson v. Olivetti N. Am., 85 Wn. App. 804, 934 P.2d 1231, rev. denied, 133 Wn.2d 1017 (1997), first relied upon by the Saldivars in moving for a new trial, predates Sackett, and does not support their argument that the court committed reversible error in denying them a trial by jury. In Olivetti, the plaintiff had included a written notice of jury demand on the face of her complaint which was served on the defendant, and a *joint* status report said a jury was being demanded. Olivetti, 85 Wn. App. at 807. The Olivetti court held that written notice of the jury demand had been served and that the joint status report demonstrated that the defendant had actual notice of the jury demand. Id. at 810.

Here, the defendants were not timely served with anything reflecting the Saldivars' jury demand, see CP 534-39, and signed no joint status reports acknowledging that trial would be to a jury. The Saldivars' suggestion that defense counsel *could* have found a jury demand by

checking the court file online does not establish *actual* notice. Nor do statements in court filings by defense counsel (from which the Saldivars quote at page 34 of their brief) establish “actual notice” of a jury demand. The quoted statements are from briefs filed before the deadline for filing and service of the jury demand, and used the terms “jury” and “finder of fact” interchangeably. The trial court was free to accept defense counsel’s declarations denying having known that the Saldivars had filed a jury demand with their complaint. See CP 534-39.

2. The trial court did not abuse its discretion in not overlooking the Saldivars’ waiver of a jury trial.

If a party fails to demand a jury trial according to court rules, the trial court may use *its discretion* to order a jury trial, but absent an abuse of *discretion*, the Court of Appeals will not overturn the trial court’s decision to deny a jury demand after a previous waiver. Sackett v. Santilli, 101 Wn. App. 128, 134, 5 P.3d 11 (2000), aff’d, 146 Wn.2d 498 (2002) (citing Mt. Vernon Dodge v. Seattle First Nat’l Bank, 18 Wn. App. 569, 581, 570 P.2d 702 (1977)) (italics added). Although the Saldivars make no abuse-of-discretion argument (because they continue to maintain there was no waiver), the trial court had tenable reasons for declining to have a jury trial and, thus, did not abuse its discretion. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (trial court does not

abuse its discretion unless its discretion is manifestly unreasonable, or exercised for untenable grounds or for untenable reasons).

As Dennis' counsel pointed out to the court, letting the Saldivars have a jury trial would be unfair to him, especially after the court allowed Charles to become a co-defendant over Dennis' objections, and the trial was going to have to be postponed because of Charles' impending trial on rape charges. CP 536-37. Dennis wanted a trial as soon as possible to clear himself of the Saldivars' salacious allegations, and scheduling a jury trial would require a much longer postponement. As Dennis' counsel explained:

. . . issues of potential jury bias will likely become even more difficult to manage in light of the anticipated publicity surrounding Charles Momah's upcoming criminal trial. However, if this were a bench trial as I had anticipated, the trial would not only be much shorter, the Court could at its discretion could segment the trial as necessary to fit the Court's schedule, *e.g.*, skipping a trial day here or there in order for the Court to attend to different matters as necessary. With a shorter and more flexible trial schedule, I hope that the postponement of the trial date could be kept to a minimum, and that this case could be resolved within 2-3 months after the conclusion of Charles Momah's criminal trial to minimize the prejudice the trial delay will have on my client.

CP 537.

3. Filing the amended complaint adding Charles Momah as a defendant did not revive the right to demand a jury.

In a footnote, Saldivar Br. at 35-36, the Saldivars cite a number of

foreign decisions as support for a “revival” argument that they did not make below until after the case had already been tried to the bench, CP 1557. None of those cases is apposite, much less dispositive, and none involved jury-demand deadlines set by case scheduling orders, as this case did, see CP 1.²⁰

Wilson v. Horsley, 137 Wn.2d 500, 974 P.2d 316 (1999), cited at pages 32-36 of the Saldivars’ brief, is also inapposite and does not aid the Saldivars’ “revival” argument in this case. Although the appellant in Horsley was held to have the right to demand a jury after a bench trial resulted in a mistrial, he raised the issue of “revival” before the case was retried. Horsley, 137 Wn.2d at 508. There was no mistrial here, nor did

²⁰ The rule applied in Clement v. Am. Greetings Corp., 636 F. Supp. 1326, 1334 (S.D. Cal. 1986), was that a jury demand made for the first time in an amended pleading creates a right to jury trial, but only as to new issues of fact that the amended pleading raises, and that the assertion of new legal *theories* alone does not raise new issues of fact. Even if such a rule were or had to be followed in Washington despite the case scheduling order, it would offer the Saldivars no relief. To the extent that the Saldivars’ amended complaints added new issues of fact for purposes of their claims against Dennis Momah, those issues concerned whether Dennis had allowed Charles to “impersonate” him. When Perla identified *Dennis* as her molester at trial, there ceased to be an “impersonation” issue. Nor do the other foreign decisions help the Saldivars. The court in Adler v. Seligman of Florida, Inc., 492 So. 2d 730, 733-34 (Fla. App. 1986), rev. denied, 503 So. 2d 328 (1987), applied the same rule that the Clement court applied. The court in Ex parte Jackson, 737 So. 2d 452, 454 (Ala. 1999), applied a rule that similarly allows a demand for jury trial as to new issues – “one[s] of an entirely different character from those already raised” – to be made within 30 days after the date of the last pleading. Washington law does not tie the jury-demand filing and service period to the last pleading. The court in Javit v. Marshall’s, Inc., 670 A.2d 886, 888 (Conn. App), appeal denied, 673 A.2d 1142 (1996), applied a rule, based on a statute, under which a jury may be demanded within ten days after the filing of an amended pleading, if the amendment introduces a new issue of fact into the case. The court in Estate of Schneier, 74 A.D.2d 22, 28, 426 N.Y.S.2d 624 (1980), held that a jury demand had been made in a timely fashion, and did not address the issue of whether an amendment to a pleading revives the right to demand a jury.

the Saldivars argue before the case was tried to the bench that, under Horsley or any other authority, they were entitled to more time to demand a jury once they amended their complaint to add Charles a co-defendant.

Moreover, the amendment of the complaint that the Saldivars contend should have revived their option to demand a jury was sought in bad faith and in violation of CR 11. The amendment was ostensibly prompted by Perla's realization, from seeing Dennis Momah at his deposition and then seeing Charles on TV, that it had been *Charles* who molested her at Puyallup. At trial, however, she testified that it had been Dennis. Although the court disbelieved Perla, it also recognized that the complaint amendment had been unfounded and was part of the abuse of process for which it found the Saldivars liable. CP 2569 (FF 34-36). Having effectively repudiated at trial the stated basis for bringing Charles into this lawsuit as a co-defendant, it is presumptuous indeed for the Saldivars to cite the addition of the new defendant as a development that revived their right to demand a jury trial.

4. The Saldivars failed to preserve all of the jury trial arguments they make on appeal.

Although the Saldivars opposed motions to strike their jury demand, they did not make the arguments at pages 32-26 of their opening brief until they moved for a new trial, and in that motion they asked the

court only to let them present “their defenses” to a jury. CP 1558. Therefore, even *if* the arguments made in their brief were preserved, they should be considered only in aid of an argument that trial as to Dennis’ counterclaims should be retried to a jury, not that their claims against him or the other defendants were improperly tried to the bench for the reasons they now offer. RAP 2.5(a); State Owned Forests v. Sutherland, 124 Wn. App. 400, 408 n. 14, 101 P.3d 880 (2004) (“We do not generally address arguments raised for the first time on appeal”), rev. denied, 154 Wn.2d 1022 (2005).

In opposing the motion to strike their jury demand, the Saldivars did not argue that the court should exercise its discretion and overlook their waiver of a trial by jury; rather they argued that they had not waived a trial by jury, an argument that was neither supported by legal authority nor even arguably correct. See CP 530-33. By not timely serving their jury demand, the Saldivars did waive a jury. Their only recourse was to try to persuade the trial court to exercise its discretion and give them a jury trial anyway. Having failed to try to do so, any argument that the trial court abused its discretion in not overlooking their waiver of a trial by jury need not be and should not be considered now. RAP 2.5(a); State Owned Forests, 124 Wn. App. at 408 n. 14.

C. The Trial Court Did Not Abuse Its Discretion, Much Less Commit Reversible Error, in Making Any the Evidentiary Rulings as to the Saldivars' Claims that the Saldivars Challenge on Appeal.

The Saldivars complain, Saldivar Br. at 37-48, about several evidentiary rulings the trial court made. The Saldivars' objections to those evidentiary rulings are in some instances different from the objections they asserted below. Where a party did not object to evidence in the trial court on the particular grounds that it raises on appeal, the evidentiary error assigned has not been preserved for review. Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc. 102 Wn. App. 422, 426, 10 P.3d 417 (2000), rev. denied, 142 Wn.2d 1018 (2001); State v. Wilbur-Bobb, 134 Wn. App. 627, 634, 141 P.3d 665 (2006); see also RAP 2.5(a).

Rulings admitting or excluding evidence are reviewed for abuse of discretion. Hizey v. Carpenter, 119 Wn.2d 251, 268, 830 P.2d 646 (1992). A court abuses its discretion by rendering a decision on untenable grounds or for untenable reasons. State ex rel. Carroll, 79 Wn.2d at 26. The trial court had tenable reasons for making the evidentiary rulings to which the Saldivars assign error. And none of the evidence that the Saldivars complain was excluded would likely have dissuaded the trial court as finder of fact from characterizing the contradictions in the Saldivars' trial testimony as "some of the most pronounced this Court has ever seen," CP 2556 (FF 3), or from finding not merely that the Saldivars were not

credible but that their testimony had been fabricated, CP 2556-2557 (FF 3-4). Thus, any arguable error in the evidentiary rulings would be harmless.

1. The trial court did not abuse its discretion in excluding cumulative testimony by the Saldivars and Ed Fuentes to “rebut charges of fabrication”.

The Saldivars complain that they were not allowed to present testimony by Albert²¹, Perla²², and translator Ed Fuentes²³ that “would have rebutted” defense contentions that Perla fabricated her allegations of sexual abuse by the Momahs. App. Br. at 2.²⁴ To the contrary, the trial court let the Saldivars testify that Perla had told Albert, her parents, siblings, and a friend, following her first encounter with Dennis Momah in May 2003 that he had upset her by touching her vagina. RP 82²⁵, 83²⁶, 221-22, 228-30. It was apparent that even though the Saldivars’ first recorded complaint (to DOH/MQAC in July 2003) was about touching of Perla’s buttocks, they insist that Perla was on the phone, within hours after

²¹ See the citations, in the Saldivars’ third assignment of error, to RP 88, 91, 97, 105, 107.

²² See the citations, in the third assignment of error, to RP 223, 291, 300, and 434.

²³ See the citations, in the third assignment of error, to RP 156.

²⁴ The Saldivars offered to prove the making of “prior consistent statements” by Perla to her relatives and friend Nancy through the testimony of her parents, brother, and Nancy, CP 702, but they do not assign error to the trial court’s refusal to let them present such testimony from those witnesses, and do not offer argument concerning that ruling.

²⁵ “He [Albert] can indicate what concerns she [Perla] shared,” followed by testimony from Albert that “[s]he said . . . he had . . . inserted his finger in her vagina.”

²⁶ According to Albert, Perla shared “concerns” about Dr. Momah with her relatives and friend Nancy, and was crying. RP 82, 85-87.

seeing Dr. Momah in late May 2003, tearfully telling confidants he had put his finger in her vagina.

Evidence may be excluded if its cumulativeness outweighs its probative value. ER 403. The “prior consistent statement” testimony that the Saldivars gave at trial did not help their case. To have allowed Perla and/or Albert to give even more of it would only have made things worse for them. There was no error in refusing to hear more of such testimony from the Saldivars, but if there was error it redounded to the Saldivars’ benefit, and so was harmless.

It is unclear from the Saldivars’ brief what they think Ed Fuentes would have said Perla told him. See CP 1591. The court permitted Fuentes to testify that, after Perla told him whatever she told him, he told her she “should not be in an examining room without the presence of a nurse at least,” RP 166, and that “she [should] demand that someone else be there [and] to be very sure as to how she felt about examinations and touching,” RP 169-170. Fuentes did not recall when he had interpreted for Perla, and disclaimed having seen anything inappropriate. RP 172-174. There was no abuse of discretion with respect to what testimony the Saldivars were allowed to elicit from Fuentes and, even if there was, it was harmless.

2. The trial court did not abuse its discretion, much less commit reversible error, in admitting Exhibit 37, the MQAC summary of Perla's 2006 interview

The Saldivars argue, Saldivar Br. at 46, that Exhibit 37, the MQAC summary of Perla's 2006 interview, was hearsay. At trial, however, their counsel objected that Exhibit 37 "*contains* hearsay," RP 421, and did not respond to defense counsel's contention that the document itself is a public record (admissible under ER 803(a)(8) and RCW 5.44.040). A hearsay objection to the document was not timely asserted and thus need not be considered. Panorama Village Homeowners Ass'n., 102 Wn. App. at 426; ER 103(a)(1); RAP 2.5(a). An objection that the document *contains* hearsay lacked merit, because what Exhibit 37 *contains* are statements by Perla. When offered by Dr. Momah, any statement by Perla was an admission, ER 801(d) and, whether offered for its truth or for any other relevant purpose, would not have been hearsay.

A hearsay objection to Perla's statements is also beside the point, because Exhibit 37 was offered not for the *truth* of what Perla had told the investigator, but rather to impeach Perla's testimony that she had had no contact with the MQAC after 2003 (and to impeach her lawyers' representations to the court that neither they nor Perla were responsible for the "reopening" of the 2003 MQAC investigation of Dennis).

3. The trial court did not abuse its discretion in not letting the Saldivars elicit from the investigator who wrote Exhibit 37 testimony that they never represented she could give.

The Saldivars argue, Saldivar Br. at 46, that after admitting Exhibit 37, the court should have let them call the investigator who wrote it, Lynn LeVier.²⁷ They imply that LeVier's testimony would have "establish[ed] that Perla did not use the word 'rectum' in her interview" in February 2006. But the Saldivars never made an offer of proof that LeVier would so testify.²⁸ See CP 703. What the Saldivars *did* do, just before they rested, was ask the court to listen to a *tape recording* of the interview, (which they represented would show that Perla had not said "rectum," RP 657). But they never had the "tape" marked as an exhibit, and did not offer it as one. And they do not assign error to the exclusion of such a "tape" or offer argument as to why the court abused its discretion in not listening to it.

4. The trial court did not abuse its discretion, much less commit reversible error, in excluding Karil Klingbeil's testimony.

Shortly before the June 18, 2005 discovery cut-off, defendants moved to exclude testimony by Karil Klingbeil, CP 286-87, 289, 294-97, 340-41, on grounds that it was being offered to vouch for Perla's

²⁷ Used here is the spelling in the declaration Ms. LeVier signed after trial, CP 1453.

²⁸ The points for which the Saldivars asked to have LeVier testify, CP 609, 703, 1453, were refuted officially by MQAC. CP 1467-69.

credibility, CP 289, 317-22. Klingbeil's report stated that Bharti had retained her in May 2004, CP 318 (¶ 4), and had asked her to evaluate the Saldivars and other "former Momah patients" for "their truthfulness and credibility" and "to render my expert opinion about whether or not the claims set forth appear to be honest and truthful. . . ." CP 319 (¶ 10). Klingbeil, who first met with Perla in September 2004, CP 439, opined that Perla "suffered a traumatic experience in May 2003, when she went to see Dr. Dennis Momah and was sexually abused there [and] is suffering from Post Traumatic Stress Disorder, related to the events in the U.S. Healthworks clinic," CP 321, and that it is "likely that these reported events actually occurred and were truly reported," CP 322.

In a June 17, 2005 order, the court ruled that Klingbeil's opinions were inadmissible and that she was not qualified to opine on psychiatric conditions. CP 408. The court, however, gave the Saldivars until July 1, 2005, to produce a new report summarizing all testimony that Klingbeil proposed to offer. CP 408. On June 28, the Saldivars moved for reconsideration and for more time to furnish an opinion, CP 411-14, and while submitting an unsigned "preliminary opinion letter [CP 439-40]," admitted not knowing whether Klingbeil had "finalized her review or opinion." CP 414. The unsigned letter contained an opinion that Perla suffered from PTSD, with "symptoms that . . . include the trauma of the

precipitating elements of the sexual assaults perpetrated by Dr. Momah,” CP 439, and that PTSD causes a person to be “overwhelmed,” “confused,” and “in disarray mentally.” CP 440. The Saldivars did not provide a signed report by July 1. Defendants re-moved to strike Klingbeil, and the motion was granted. CP 506, 508, 511, 519-20, 525-26, 550. Klingbeil was never offered as a witness who would attribute any inability or unwillingness on Perla’s part to tell a consistent or credible story to PTSD.

The Saldivars concede, Saldivar Br. at 41, that it was proper not to let Klingbeil testify to Perla’s credibility, but contend that it was reversible error not to let her opine that Perla has PTSD. Saldivar Br. at 41. Their argument lacks merit for several reasons.

First, it is disingenuous for the Saldivars to pretend that Klingbeil’s PTSD opinion was offered as anything other than a Trojan horse for an opinion that Perla was truthfully reporting sexual abuse at Dr. Momah’s hand(s). See CP 319, 439. The Saldivars did not disclose any opinions that they wanted to offer as evidence of injury alone, nor did they explain to the court that they needed Klingbeil to explain why Perla’s versions of events and testimony about them was inconsistent, contradictory, lacking in credibility, and in some instances demonstrably false. No witness may state an opinion about a party’s credibility, State v. Warren, 134 Wn. App.

44, 52-53, 138 P.3d 1081 (2006); State v. King, 131 Wn. App. 789, 797, 130 P.3d 376 (2006) (petition for review pending).

Second, the decisions on which the Saldivars rely, Saldivar Br. at 42-43, do not hold that it is reversible error to exclude a social worker's diagnosis of PTSD. A trial court has discretion to allow a social worker to opine about mental disorders. Detention of A.S., 138 Wn.2d 898, 922, 982 P.2d 1156 (1999). A fair reading of State v. Stevens, 58 Wn. App. 478, 794 P.2d 38, rev. denied, 115 Wn.2d 1025 (1990), and State v. Florczak, 76 Wn. App. 55, 882 P.2d 199 (1994), rev. denied, 126 Wn.2d 1010 (1995), reveals that the courts in those cases held that it had not been an abuse of discretion to allow certain expert testimony in prosecutions for child sexual abuse because the witnesses – a case worker in Stevens and a social worker in Florczak – had been careful to avoid doing what Klingbeil's report said she had been retained to do and was prepared to do, i.e., opine that Perla's accusations of sexual abuse by Dennis were true.

Third, even if it was error not to let Klingbeil testify that Perla has PTSD, the error was harmless because the court, as finder of fact, did not reach the issue of damages on the Saldivars' claims.

5. The trial court did not abuse its discretion in excluding non-party testimony concerning Dennis's alleged impersonation of Charles at Charles' clinics.

In another set of motions filed in mid-June 2005, defendants moved to strike some 116 witnesses whom the Saldivars had disclosed on May 9 as rebuttal witnesses who were likely to testify “regarding impersonation by Dennis and Charles.”²⁹ CP 286-89, 292-94, 299 (¶ 5), 300 (¶ 7), 305, 308-16, 342-43. Alternatively, defendants asked the court to order the Saldivars to disclose what knowledge the witnesses supposedly had relevant to the Saldivars' claim that Charles had impersonated Dennis at the Puyallup clinic in 2003. CP 293-94, 342-43.

The court gave the Saldivars until July 8 to provide a “detailed disclosure” of what the rebuttal impersonation witnesses would testify to, and advised that “only those who have experience at the Puyallup Clinic of US Healthworks during [a] similar time period will be deemed potentially leading to admissible evidence.” CP 410.

In moving for reconsideration, the Saldivars made a new argument, claiming that impersonation evidence was relevant and admissible under ER 404(b), but did not specify on what claims or against which

²⁹ Actually, as defendants elsewhere pointed out, CP 342, the Saldivars' rebuttal witness disclosure listed 126 numbered impersonation witnesses – # 1 through #10 followed by #1 through #116. CP 308-16. Close review indicates, however, that there were more like 80 witnesses, because at least 43 names appeared on the list twice or more, including those of Perla (#13 and #71) and Albert Saldivar (# 17 and #76). CP 310, 313.

defendant(s). CP 415-417. The motion did not name any witnesses for whom the Saldivars did not want to provide more detailed disclosures. A declaration of counsel offered, as attachments, things identified only as “copies of documents from [our] files,” CP 419, consisting of statements attributed: Jenni Ramos (CP 453-54), Rose-Mary Bottom (CP 456-57), Richard Heintz (CP 459-62), Amy McFarlane (CP 464-66), and Tanya Basnaw (CP 472-74), and a bare list of 61 names. CP 468. The motion for reconsideration was denied. CP 2541-42.

On July 7, 2005, the day before the court-imposed deadline, the Saldivars served a supplemental disclosure. CP 477-83. It described, in 13 sentences, what eight non-party “impersonation” witnesses purported to know or believe. Seven – Basnaw, McFarlane, Ramos, Loreena Beltran, Kathy Doyle, Heintz, and Denise Blanchard – had been listed before.³⁰ Basnaw and McFarlane each supposedly could testify “regarding her observations of physical characteristics and personality traits of both Dennis and Charles Momah, including their pattern and practice of impersonation of one another,” and could “testify to the impersonation of the Momah brothers [through “handwritings”]. CP 481-82. Basnaw and

³⁰ The eighth, Kelly Acker, CP 482, had not been mentioned in the Saldivars’ May 9, 2005, disclosure of rebuttal witnesses. CP 308-16.

McFarlane were not disclosed as handwriting experts. Ramos, Acker, Beltran, Doyle, Heintz, and Blanchard were said to be able to testify:

. . . regarding [their] observations of physical characteristics and personality traits of both Dennis and Charles Momah, including their pattern and practice of impersonation of one another.³¹

CP 482. That is all the supplemental disclosure had to say about those eight impersonation witnesses. Defendants renewed their motion to strike, CP 506-12, and on September 16, 2005 the court issued an order striking 95 named lay witnesses. CP 550-53.

- a. When Perla testified at trial that it was Dennis who allegedly molested her both times, Bharti's "impersonation" theory collapsed.

Six days after the Saldivars represented in their trial brief that "it was Charles Momah" who had molested Perla at the Puyallup clinic in May 2003 and again on June 26, 2003, CP 600, Perla ruined Bharti's "impersonation" theory by testifying that Dennis – the man who was in the courtroom – was the culprit on both of the occasions when her vagina was allegedly touched. RP 211-15, 291-92. When Perla at trial identified Dennis as the alleged culprit instead of Charles, it no longer mattered where Charles had been, or what he had looked like, in 2004, 2003, or

³¹ Ramos, according to the July 7 disclosure, "knew the defendant as Dr. Dennis Momah," CP 482, but it did not say how or where or in what context she had "known" either defendant in this lawsuit as Dr. Dennis Momah. In previous motion filings not part of the July 7 supplemental disclosure, Ramos had been described as having worked as a medical assistant at Charles Momah's clinics *in 1996-1997*. CP 442-45.

ever. Witnesses to support an impersonation theory would have had nothing relevant to say. Even before Perla went off-script at trial however, the court had tenable reasons for striking the witnesses.

- b. The Saldivars' disclosures about the witnesses were wholly inadequate.

The Saldivars never offered anything resembling an adequate “disclosure” about any of their 80-odd non-party rebuttal witnesses to “impersonation.” CP 308-16. To the extent that the Saldivars’ rebuttal witness disclosure contained any information about the “impersonation” witnesses at all, it failed to indicate that any had ever even been to Puyallup. The court nonetheless gave the Saldivars an opportunity to cure the deficiencies. CP 410. The Saldivars purported to comply with the “detailed disclosure” requirement by serving information about eight people (one of whom was new) that was no more “detailed” than their first disclosure had been. CP 477-83.

- c. The witnesses were all rebuttal witnesses.

The Saldivars’ impersonation witnesses had all been disclosed as rebuttal witnesses, so they were not witnesses whom the court would have been obligated to allow them to call during their case-in-chief even if the court had denied pretrial motions to strike them. The Saldivars do not assign error to the trial court’s refusal to let them present, before they rested their case at trial, rebuttal testimony of impersonation witnesses “in

written form.”³² RP 630, 635.

- d. It is never an abuse of discretion not to let a party call 80 witnesses on one issue.

The Saldivars assign error, Saldivar Br. at 2-3, to the exclusion of testimony of “other women” who would have testified that Dennis impersonated Charles at Charles’ clinic. Although it is unclear what witnesses they refer to, it cannot be an abuse of discretion to prevent a party from calling 80 witnesses on the same issue. See ER 403. The Saldivars offer no argument to the contrary.

- e. What the Saldivars disclosed about Ramos, Bottom, McFarlane, and Basnaw was inadequate and did not demonstrate that any of their testimony would have been relevant or might have made a difference.

Even if the Saldivars had offered as impersonation witnesses only the four rebuttal witnesses named in their brief – Ramos, Bottom, McFarlane, and Basnaw – the court had tenable reasons for striking them.³³ None had ever been a patient of Dennis, and none claimed ever to have set foot in the Puyallup clinic. None claimed to have seen Charles at the Puyallup clinic in the 2003, and none claimed to know how Charles

³² Seven persons were named in the offer of proof document. Only three (Ramos, Heintz, and “Ms. Acker”) had been among the rebuttal “impersonation” witnesses listed in the July 7, 2005 supplemental disclosure (CP 477-83), and one (Acker) had not been among the 80-odd “rebuttal” witnesses to “impersonation” that the Saldivars had listed as of the deadline for disclosing rebuttal witnesses.

³³ Of the four, only Ramos was among the seven persons whose “testimony” the Saldivars asked the trial court to take “in written form” at trial. CP 738-45; RP 630.

could have impersonated Dennis there.

Ramos claims she saw Dennis impersonate Charles in 1996. CP 743. Basnaw (not among the witnesses whose “written” testimony the Saldivars offered at trial), thinks both Momahs took turns raping her at one of Charles’ clinics prior to 1999. The Saldivars did not controvert, and did not ask the court to disbelieve, Dennis’ testimony that he was not practicing medicine in Washington until March 2003, RP 522, and was working in other states before then, RP 514-15, 530; see also CP 1679-85.

Bottom (also not among the witnesses whose “written” testimony the Saldivars offered at trial), had worked for a paging service, and suspected, because she noticed differences in the voices of people who responded to pages for Charles, that he was sometimes being impersonated by “another individual.” CP 465-66. McFarlane (also not among the witnesses whose “written” testimony was offered at trial), thought Dennis treated her at one of Charles’ clinics in 2002-2003, but did not allege any sexual or other impropriety. CP 464-66.

Thus, even if Perla’s trial testimony had not made impersonation of Dennis at Puyallup a red herring, all these witness could have done was put Dennis at Charles’ clinics on unspecified days before Dennis began working at U.S. Healthworks. Their testimony would not have tended to prove that Charles, without attracting the attention of any clinic staff, had

entered the Puyallup clinic on May 28, 2003 (or on any other day) while Dennis was working, or that Charles had entered an examining room housing Perla, whom Dennis had examined or was going to examine. Even if Dennis had admitted impersonating Charles at one or both of Charles' clinics, the "impersonation" witnesses' testimony would not have been probative on the issue of whether Charles had impersonated Dennis at the Puyallup clinic in May or June of 2003. Thus, Dennis did not "open the door" to the "impersonation" witnesses testimony by denying that he had impersonated Charles.

In their brief, the Saldivars contend that "[t]his testimony" about impersonation was relevant under ER 401 and should have been admitted as "common plan or scheme" evidence under ER 404(b). App. Br. at 39. Even if the Saldivars preserved such an argument,³⁴ the common scheme or plan was one they failed to show could have been pulled off at the *Puyallup* clinic, on the same day with the same patient during the same appointment. Thus, the court had multiple tenable reasons for not admitting the impersonation testimony the Saldivars offered.

³⁴ In connection with the orders striking impersonation witnesses to which they assign error on appeal, the Saldivars did not invoke ER 404(b) until they moved for reconsideration of the order (CP 410) requiring detailed disclosures, CP 416-17, and even then did not explain what element(s) of which claim(s) they contended ER 404(b) made the impersonation testimony admissible to prove.

6. The trial court did not abuse its discretion in excluding the KOMO TV videotape.

The Saldivars challenge the exclusion of what they represented to the trial court, CP 610; RP 30, is a September 2004 videotape of a TV news broadcast showing Charles, contending that it was relevant to Perla's identification of Charles Momah. Saldivar Br. at 44. The Saldivars' argument should be rejected for at least three reasons.

First, whether Perla could identify Charles with help from the TV videotape became a nonissue once Perla testified at trial that she was molested twice and both times by Dennis. Second, the standards for authenticating videotapes are not as lax as the Saldivars claim. Third, the Saldivars ignore the fact that, before trial, Judge Stolz gave them – but they chose not to follow – a road map for laying a foundation for testimony identifying Charles that the court, as evidentiary gatekeeper, would consider acceptable and, as finder of fact, would consider crediting.

No Washington decisions list the steps for laying a foundation for offering a videotape in evidence so that it can be shown and a witness can testify that someone it depicts is someone the witness saw or met on a certain date at a certain place. There is case law, however, explaining how an audio recording is properly authenticated:

A proponent can authenticate a tape recording by 'earwitness comparison' – *i.e.*, by calling a foundational

witness to testify (a) that the witness has personal knowledge of the events recorded on the tape; (b) that the witness has listened to the tape and compared it with those events; (c) and that the tape accurately portrays those events. If the tape records human voices, the foundational witness (or someone else with the requisite knowledge) usually must identify those voices. The witness' testimony provides the necessary 'foundation' if it is sufficient to support findings (1) that the tape is what it purports to be and (2) that the tape's condition at trial is substantially the same as its condition on whatever earlier date is relevant (usually the date on which the tape was recorded). [Footnote omitted.]

State v. Jackson, 113 Wn. App. 762, 766-767, 54 P.3d 739 (2002). Thus (1) the court must be shown that the tape is what its proponent says it is, through testimony of a witness who has personal knowledge of what was recorded on the tape, and (2) the proponent also needs to present testimony of a witness who can testify from personal knowledge that the tape accurately portrays something. Perla could not play the first role because she lacked personal knowledge of where and when the videotape was made. The Saldivars' counsel offered no witness to fill that role, so the TV tape was not properly authenticated.

The trial court had been concerned, properly, that testimony by Perla identifying Charles at trial would be influenced less by any actual memory of what she had seen in May 2003 than by much more recent pictures that Mr. Bharti had told her depicted Charles. RP 284-85; 5/24/06 RP at 6-7; CP 2543. The court gave Bharti a more than fair opportunity to

prepare Perla to come to trial able to give credible testimony identifying Charles (if she could) as a man she had seen on one of her visits to the Puyallup clinic in 2003. Instead, after she had identified *Dennis* as the doctor who allegedly sexually molested her on the two occasions that she claimed molestation occurred, Bharti, over the noon recess minutes before Perla resumed the stand, had her watch a videotape of Charles testifying in another lawsuit, so that she would identify Charles instead.

It is clear from the court's remarks that, had Charles been present (and had Perla remembered the story she was supposed to tell), the court would have let her identify him from the witness stand as a man she had seen at Puyallup in May 2003. See RP 34; 5/24/06 RP at 46-47. But, anticipating that Charles would not be available at the time of trial for Perla to identify him from the witness stand, the court advised Bharti to arrange a videotape preservation deposition (at which Charles would identify himself, and that the videographer could authenticate pursuant to CR 30(b)(8)(H)). RP 284-85, 700; CP 2543. Bharti, however, did not depose Charles. No excuses were offered at trial for not doing so, and none are offered on appeal.

To get the TV tape into evidence, the court told Bharti before trial that he would have to call someone with personal knowledge – someone from KOMO – to lay a foundation showing when, where and of what the

film had been made. RP 31-32, 277, 282-83. Bharti did not call anyone from KOMO. The Saldivars offer no excuses on appeal for not doing so.³⁵

The Saldivars seem to contend, Saldivar Br. at 45, that their claims against Dennis should be reinstated because the court did not let them show the TV videotape to *Dennis* and ask *him* if it depicted Charles Momah. See Br. at 45. Authentication issues aside, the Saldivars never asked the court to let them do that.

D. The Saldivars are Not Immune from Liability on Dr. Momah's Counterclaims or for RCW 4.84.185 Attorneys' Fees.

1. The Saldivars did not timely plead the defense.

Immunity under RCW 4.24.510 is an affirmative defense. Doe v. Gonzaga University, 99 Wn. App. 338, 351, 992 P.2d 545 (2000), aff'd in part, rev'd in part on other grounds, 143 Wn.2d 687 (2001), rev'd on other grounds, 536 U.S. 273 (2002). CR 8(c) requires "any . . . matter constituting an avoidance or affirmative defense" to be "set forth affirmatively"

³⁵ The Saldivars' trial counsel did try to propose one below, however. Ms. Starczewski asked to show the TV videotape "that shows Charles Momah of [sic, or] the reporters calling him Dr. Momah and there's an admission there on the tape that that person is Charles Momah." RP 30. The court responded that it did not "see legally how you can call something an admission by some reporter yelling after somebody saying Dr. Momah, and Dr. Momah turns around." RP 31. The Saldivars' counsel had no answer for that, but Ms. Starczewski later asserted:

The problem is that we wanted to maintain this trial free from the interference of the media and Your Honor['s order] that we needed to have someone from the media come in and testify as to the KOMO-4 video rendered that difficult.

RP 277. The court responded that "[t]o claim that I'm inviting the media in [by insisting on a proper foundation for the videotape] has to be one of the most novel ideas I've heard." RP 282.

in a responsive pleading, and CR 12(b) requires “[e]very defense, in law or fact [to] be asserted in the responsive pleading” to a claim for relief in a counterclaim. A party is required to serve an answer to a counterclaim within 20 days. CR 12(a)(4). An affirmative or avoidance defense is waived unless timely asserted in a responsive pleading. Alexander v. Food Servs. of Am., 76 Wn. App. 425, 428-429, 886 P.2d 231 (1994).

Dennis asserted his counterclaims in September 2004, CP 31-33, or 20 months before trial. The Saldivars did not reply to Dennis’ counterclaims. They did not claim immunity under RCW 4.24.510 until part way through trial on his counterclaims. CP 753; RP 769-72. Once a case is on the court’s trial calendar, leave of court is required to amend a pleading to add an unpleaded defense. CR 15(a). The Saldivars did not seek leave to add any immunity defense. The RCW 4.24.510 defense was not timely asserted. The issue of immunity was not preserved for review.

2. RCW 4.24.510 does not immunize against civil liability based on findings that a civil lawsuit was instituted and prosecuted falsely and in bad faith.

A question of statutory interpretation is one of law. Rapid Settlements, Ltd. v. Symetra Life Ins. Co., 134 Wn. App. 329, 332, 139 P.3d 411 (2006). As a matter of law, RCW 4.24.510 would not immunize the Saldivars against liability on Dennis’ counterclaims even if they had timely pleaded that defense or obtained leave of court to plead it belatedly.

The so-called “anti-SLAPP”³⁶ statute, RCW 4.24.510, was enacted in 1989. Laws of 1989, Ch. 234 § 2. It provides in pertinent part:

A person who communicates a complaint or information to any branch or agency of federal, state, or local government . . . , 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.

The purpose of the statute is “to help protect people who make complaints to [the] government from civil suits regarding those complaints,” and was meant to address “a situation where a citizen reported a tax violation to a state agency and the [tax violator] sued the citizen for defamation.” House Bill Report, SHB 2699 (2002)³⁷ (explaining the background to 2002 amendments to the statute). SLAPP suits are lawsuits that “are instituted as a means of retaliation or intimidation against citizens or activists for speaking out about a matter of public concern.” *Id.*

As enacted in 1989, the statute included an “in good faith” clause, that was eliminated in 2002. Laws of 2002, Ch. 232 § 2. Testimony for the amendment noted that SLAPP suits “are usually filed by deep pocket plaintiffs against average citizens of modest means [and e]ven if the suits are eventually dismissed, the time, cost and emotional toll of years of

³⁶ SLAPP is an acronym for “Strategic Lawsuits Against Public Participation.” See House Bill Report SHB 2699.

³⁷ For the House Bill Report, see <http://apps.leg.wa.gov/documents/billdocs/2001-02/Pdf/Bill%20Reports/House/2699-S.HBR.pdf>.

litigation makes people give up,” and that “[p]eople should be able to petition their government, regardless of good or bad intentions, *as long as they are seeking government action.*” House Bill Report, SHB 2699 (2002) (italics added).

Someone who brings a private lawsuit for private relief is not “seeking government action.” The purpose of the anti-SLAPP statute is, and always has been, to prevent suits against people who petition the government to take official action, not to shield persons, who file private lawsuits seeking private relief, from counterclaims for abuse of process or for pressing fabricated claims in those lawsuits to ruin another person. Once the Saldivars became *plaintiffs*, they ceased to be among the class of persons who could claim protection from liability under RCW 4.24.510. RCW 4.24.510 does not immunize against liability for things asserted in the context of a lawsuit. Reid v. Dalton, 124 Wn. App. 113, 126, 100 P.3d 319 (2004), rev. denied, 155 Wn.2d 1005 (2005). That the Saldivars’ allegations in this lawsuit happened to *repeat* some things that Perla had previously complained about to MQAC and/or the Federal Way police did not cloak their allegations (and them) with immunity. RCW 4.24.510 does not confer immunity against liability for a communication not made to influence a government action or outcome. Skimming v. Boxer, 119 Wn. App. 748, 758, 82 P.3d 707, rev. denied, 152 Wn.2d 1016 (2004) (citing

Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 146 Wn.2d 370, 382, 46 P.3d 789 (2002)).

The Saldivars argue, Saldivar Br. at 25-26, that Perla's 2003 letter to the MQAC, Ex. 19, was the "starting point or foundation" for everything that happened afterward between them and Dennis, and cloaked everything they did to Dennis with anti-SLAPP immunity, citing Dang v. Ehredt, 95 Wn. App. 670, 977 P.2d 29, rev. denied, 139 Wn.2d 1012 (1999). Their argument is specious. In Dang, a bank customer was mistakenly accused by a teller of, and detained (briefly) by the police for, trying to pass a counterfeit check. She sued the bank for false arrest. The trial court dismissed her claims on summary judgment based on the anti-SLAPP statute, and the Court of Appeals affirmed. Dang, 95 Wn. App. at 673. But the bank only called the police; it did not sue the customer to recover damages for itself. The Saldivars did not only call the police (or the MQAC); they also sued Dennis for money damages based on allegations that the court as finder of fact found to be false and malicious. Dang does not suggest that, had the bank gone on to make false allegations against the customer in a private damages lawsuit, the bank's previous call to the police would have insulated it against liability for abuse of process or outrage.

The "starting point or foundation" language in Dang from which

the Saldivars' immunity argument springs was used in the Court of Appeals' explanation for rejecting the bank customer's argument that, even if RCW 4.24.510 did bar her claim against the bank for making the phone call to the police, it did not bar her claim against the bank for keeping her driver's license and detaining her on its premises until police could arrive in response to the phone call. Dang, 95 Wn. App. at 681-82. The court's point was that the keeping of the license and of the customer in the bank were part of the complaint-communication process; they "surround[ed] the communication to the police." Id. at 683.

This case is different. Suing Dennis for allegedly putting his hands in Perla's vagina, and/or letting Charles do that to Perla, was not part of, and did not "surround" the communication of Perla's complaint to the MQAC or police. The MQAC or police did not require, authorize, urge, or cause the Saldivars to sue Dennis, or make him defend a lawsuit, in which his brother was joined, and which was rife with false salacious allegations that he sexually molested and enabled his brother to sexual molest Perla Saldivar. Whether or not the Saldivars sued Dennis did not affect, and could not have affected, the MQAC's decision to investigate and/or bring charges against him as a licensee of the State. Perla's complaints to the MQAC were not the "starting point or foundation," as the Dang court used that phrase, of what the Saldivars did to Dennis.

3. RCW 4.24.510 does not immunize the Saldivars from liability for attorneys fees under RCW 4.84.185 for filing a frivolous lawsuit.

The trial court found the Saldivars' claims against Dennis frivolous and awarded him \$253,260 in attorneys fees under RCW 4.84.185. The Saldivars offer no argument that the amount awarded as fees was excessive. Although the Saldivars have not expressly argued that they have immunity from liability to Dennis for attorney's fees under RCW 4.84.185 for having asserted frivolous claims against him, just in case their immunity argument might be so construed, Reid, 124 Wn. App. at 125-26, makes clear that the anti-SLAPP statute does not supersede RCW 4.84.185.

- E. The Trial Court Properly Concluded that the Saldivars Engaged in Abuse of Process.

The "mere institution of a legal proceeding even with a malicious motive does not constitute an abuse of process." Fite v. Lee, 11 Wn. App. 21, 27-28, 521 P.2d 964, rev. denied, 84 Wn.2d 1005 (1974). The "gist" of a claim for abuse of process "is the misuse or misapplication of the process, after it has once been issued, for an end other than that which it was designed to accomplish." Batten v. Abrams, 28 Wn. App. 737, 745, 626 P.2d 984, rev. denied, 95 Wn.2d 1033 (1981). "In other words, the action requires 'a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself,

which constitutes the tort.”” Loeffelholz v. C.L.E.A.N., 119 Wn. App. 665, 699-700, 82 P.3d 1199, rev. denied, 152 Wn.2d 1023 (2004). Thus, the tort can be predicated on a party’s misuse of any of the tools of litigation available to a litigant. See In re Personal Restraint of Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994) (submission of “1,200-plus pages of briefing . . . far exceeds zealous advocacy and borders on abuse of process”); Sidis v. Brodie/Dohrmann, Inc., 117 Wn.2d 325, 331, 815 P.2d 781 (1991) (observing that it would arguably constitute an abuse of process to name numerous “John Doe” defendants but serve just one “easy target” defendant to obtain the benefits of RCW 4.16.170, which tolls the statute of limitations as to unserved defendants).³⁸

The trial court found not only that the Saldivars had *instituted* court proceedings for an improper purpose, CP 2560, 2568, 2572 (FF 9, 30; CL 7, 8, 12), but also that Bharti had served process upon Charles and made him Dennis’ co-defendant to harass, destroy, prejudice, and make the litigation expensive for Dennis, CP 2565, 2569, 2572-74 (FF 26, 34, 36; CL 7, 12). The court could not sensibly have found otherwise. Perla

³⁸ See also General Refractories Co. v. Fireman’s Fund Ins. Co., 337 F.3d 297, 302, 304, 310-11 (3d Cir. 2003) (applying Pennsylvania law and suggesting that an abuse-of-process claim can be based on behavior in responding to discovery requests or on misrepresentations made to opposing counsel and the court); and Ginsberg v. Ginsberg, 84 A.D.2d 573, 574, 443 N.Y.S.2d 439 (App. Div. 1981) (abuse of process liability could be imposed because party repeatedly used subpoena processes to exhaust the opponent’s financial resources).

insisted at trial that the doctor in the courtroom, Dennis, was the man who touched her vagina twice at the Puyallup clinic in 2003. Not only was that testimony found to be false, and not only did it contradict the Saldivar's trial brief, but also it completely scuttled the theory upon which Bharti had obtained a court order allowing process to be served upon Charles so that Dennis would be forced to defend himself with an accused rapist as a co-defendant – a co-defendant who also was his twin brother and who allegedly had been “impersonating” Dennis when Perla was molested. Perla signed a declaration for the motion to amend her complaint, saying it had been Charles who molested her, and then at trial testified that Dennis had done it. By bringing Charles into the case under false pretenses, even if it were Bharti's doing, the Saldivars are vicariously liable because he was acting on their behalf. Woodhead, 78 Wn. App. at 133. Thus, judgment was properly entered against the Saldivars for abuse of process.

F. Even If the Saldivars' Conduct Did Not Amount to Abuse of Process, the Judgment Against Them Should Be Affirmed Based on the Trial Court's Findings and Conclusions in Favor of Dennis Momah on His Tort of Outrage Claim.

The Saldivars were held liable to Dennis for abuse of process, CP 2569, 2572 (FF 34-36, CL 6-8), and outrage (or intentional infliction of emotional distress), CP 2572 (CL 9). Although the Saldivars assign error to the trial court's conclusion (CL 9) that they committed outrage, they

offer no argument or authority that the trial court's conclusion that the Saldivars are liable for outrage is not supported by the findings of fact, or that any of the findings of fact relating to the tort of outrage counterclaim are not supported by substantial evidence. An assignment of error for which no corresponding argument is made is deemed abandoned. Valley View Indus. Park v. Redmond, 107 Wn.2d 621, 630, 733 P.2d 182 (1987).

A trial court ruling may be affirmed on any ground supported by the record, whether or not the ground was considered by the trial court. Nast v. Michels, 107 Wn.2d 300, 308, 730 P.2d 54 (1986). That being so, it must follow that, when either of two conclusions of law is sufficient to support a judgment, error in reaching one is not enough to require vacation of the judgment. The outrage findings and Conclusion 9, to which the Saldivars assign error, but offer no argument, thus suffice to sustain the judgment against the Saldivars on Dennis' counterclaim.

G. The Trial Court Did Not Abuse Its Discretion, Much Less Commit Reversible Error, in Refusing Exhibits 41 and 42.

1. The exhibits were cumulative of oral testimony.

The point for which the Saldivars offered Exhibits 41 and 42 (two counterclaims by Dennis in other Bharti cases)³⁹ was made in their counsel's examination of Dennis at trial. RP 615-626. Dennis admitted

³⁹ Two other Dennis Momah counterclaims were marked as exhibits, but Nos. 41 and 42 are the only ones that the Saldivars actually offered in evidence. RP 762.

that he had alleged in Exhibits 41 and 42, as well as in 17 other counterclaims, that other Bharti clients had also caused his stroke, job loss, and humiliation. Thus, the counterclaim documents themselves were cumulative. It is not error, much less prejudicial error, to exclude cumulative evidence. ER 403; Silves v. King, 93 Wn. App. 873, 885, 970 P.2d 790 (1999) (erroneous exclusion of cumulative evidence is harmless).

2. The evidence was not legally relevant.

The Saldivars' argument based on Williams v. Union Carbide Corp., 790 F.2d 552 (6th Cir.), cert. denied, 479 U.S. 992 (1986), App. Br. at 40, is beside the point. That court was applying Arkansas law. The argument also would fail even if Dennis had denied what the copies of his counterclaims were offered to prove.

The Saldivars seem to argue that the counterclaims are admissions by Dennis that others contributed to his injuries and losses, such that his damages should be reduced by their shares of liability, if any, for his damages. They cite no authority for such a proposition, and it is demonstrably incorrect. Under our state's tort law, "[t]he same harm can have more than one proximate cause, and evidence is not relevant . . . if it shows only that the defendant's conduct and some other cause operated concurrently." State v. Meekins, 125 Wn. App. 390, 398-99, 105 P.3d 420

(2005) (footnotes with citations omitted).⁴⁰ Evidence offered to show that other Bharti clients concurrently caused Dennis' misfortunes was not relevant. Irrelevant evidence is not admissible. ER 402.

Furthermore, the Saldivars were held liable for intentional torts. Although the finder of fact must segregate harm resulting from an intentional tort from the harm that resulted from a concurring *non-intentional* tort, see Tegman v. Accident & Med. Inves., 150 Wn.2d 102, 115-16, 75 P.3d 497 (2003), there has to be some evidentiary basis for doing so. The Saldivars neither pleaded nor offered evidence that Dennis suffered all or some segregable portion of the harms for which he was awarded damages because of someone else's *negligence*.

Finally, RCW 4.22.030, specifies that, "except as otherwise provided in RCW 4.22.070," tort liability is joint and several. RCW 4.22.070 does not apply to intentional torts or intentional tortfeasors. Tegman, 150 Wn.2d at 115. Thus, the Saldivars' liability would be joint and several even if the trial court had completely excluded all evidence and testimony that Dennis had blamed other Bharti clients for his losses and injuries.

⁴⁰ See also WPI 15.01 ("There may be more than one proximate cause of an injury").

IV. ARGUMENT WHY THE SANCTIONS AND JUDGMENT
AGAINST BHARTI SHOULD BE AFFIRMED

The court sanctioned Bharti under its inherent power to provide for the orderly conduct of proceedings before it as well as under CR 11. CP 2573-74 (CL 12); CP 1928. A trial court's decision regarding the imposition of sanctions, whether under its inherent power or under CR 11, is reviewed for abuse of discretion. State v. S.H., 102 Wn. App. 468, 473, 8 P.3d 1058 (2000) (court's inherent power); Do v. Farmer, 127 Wn. App. 180, 189, 110 P.3d 840 (2005) (CR 11); Manteufel v. Safeco Ins. Co. of America, 117 Wn. App. 168, 175-76, 68 P.3d 1093, rev. denied, 150 Wn.2d 1021 (2003) (CR 11). The abuse of discretion standard "recognizes that deference is owed to the trial judge who is better positioned than an appellate court to decide the issue." Eugster v. City of Spokane, 110 Wn. App. 212, 231, 39 P.3d 380, rev. denied, 147 Wn.2d 1021 (2002).

The trial court found all the things it needed to find in order to impose sanctions. A trial court's inherent authority to sanction litigation conduct is properly invoked upon a finding of bad faith. State v. S.H., 102 Wn. App. at 475. The court here found bad faith, CP 2565-66 (FF 27), and its findings of active participation in claim fabrication and of repeatedly lying to the court at trial surpass findings "merely" of bad faith.

In imposing sanctions under CR 11, a trial court must specify the sanctionable conduct and make a finding that “either the claim is *not* grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, *or* [that] the paper was filed for an improper purpose.” Biggs v. Vail, 124 Wn.2d 193, 201, 876 P.2d 448 (1994). The findings entered below do all of those things: they specify the sanctionable conduct, find the claims not grounded in fact, find that Bharti did not make an adequate inquiry, and find that he had acted for improper purposes. See CP 2555-76.

With a barrage of incomplete or inaccurate assertions of fact, abstract legal propositions, and citations to decisions involving far less egregious misconduct than occurred here, Bharti seeks to persuade this Court to pick apart the package of sanctions the trial court imposed upon him. While Bharti would have this Court believe that he did nothing wrong, that he is just a good and diligent lawyer who fell short of proving the elements of a difficult case because the finder of fact found his client not credible, the record tells a different story. The trial court got the ending right, and this Court should affirm.

Bharti finds himself saddled with almost \$600,000 in sanctions and a website disclosure order because, among other things:

[He] was an active and knowing participant in the

fabrication of Perla Saldivar's ever changing accusations against Dennis Momah made to the Federal Way Police Department, the Washington Department of Health and this Court. CP 2568 (FF 30).

[He] knowingly and in bad faith lied to th[e trial] Court at the April 18, 2006 pretrial conference. CP 2565-66 (FF 27).

[He acted with the intention] to harass Dennis Momah, destroy his career, unduly run up legal expenses, and gain [himself] media exposure and leverage in other legal matters. . ." CP 2569 (FF 36).

Bharti fails to brief his way out of the economic consequences of such conduct.

A. Bharti cannot escape the finding that he helped Perla Saldivar prepare the change-of-story declaration that she sent to the Federal Way police.

Bharti asserts that the Saldivars retained him after they had already complained to the MQAC *and* to Federal Way police. Bharti Br. at 5, 15, 18. That effort to finesse the facts is emblematic of (although rather more adroit than) the conduct that got Bharti sanctioned. However, the evidence, including Bharti's own pretrial declaration, CP 987 (¶ 2), and FF 8 (which he does not challenge), establishes as a verity that the Saldivars retained him after Perla made her "touched-on-the-buttocks" complaint to the MQAC, Ex. 19, but *before* she sent Exhibit 20, which Bharti helped her prepare, to the Federal Way police, see RP 418, claiming, for the first time, about impersonation of one 350-pound doctor,

see Ex. 22 (DM 0121), by another and about having hands put in her vagina during two separate clinic visits.

B. A fabricated claim cannot be the product of a reasonable inquiry.

Blind reliance on a client's assertions, even when augmented by a consultant's perfunctory advice to sue, will seldom constitute a prefiling inquiry sufficient to satisfy CR 11. Watson v. Maier, 64 Wn. App. 889, 897, 827 P.2d 311, rev. denied, 120 Wn.2d 1015 (1992). As a potential claim becomes more complex, the lawyer's responsibility for careful prefiling inquiry becomes greater as well. See Watson, 64 Wn. App. at 898 ("if the facts of a case are particularly complex, this is all the more reason for counsel to carefully inquire into them before commencing legal action"). It stands to reason that still more careful inquiry is warranted when the client's story is complex and that a lawsuit based on it would accuse a doctor of sexual assault.

This, though, is not a case of a lawyer blindly relying on his client's story, or even of a lawyer blindly accepting a client's logistically implausible story of twins conspiring at a busy clinic during the same hour to have one impersonate the other and sexually molest the other's patient. This is a case of a lawyer relying on a story he helped his client fabricate. The fabrication was confirmed at trial when Perla was able to remember to testify that it was her vagina that allegedly had been touched, but forgot

who she was supposed to say did the touching. The trial court got it right: the “impersonation” story was never Perla’s, but had been fabricated with Bharti’s active participation. There is no such thing as a reasonable pre-filing investigation when the lawyer has helped fabricate the client’s story.

Bharti says he interviewed Albert Saldivar, Ed Fuentes, and Nancy Wiesniewski before filing the lawsuit. Br. at 5. But that does not establish a reasonable pre-filing inquiry. When deposed, Fuentes remembered nothing and testified that he had so informed Bharti. CP 172-173. Albert had no personal knowledge of any interaction Perla had ever had with “Dr. Momah.” Neither did Ms. Wiesniewski. Perla’s medical records reflect neither misconduct by Dr. Momah nor any complaints by her about him. The only relevant documents available to Bharti in aid of a pre-filing “investigation” consisted of Perla’s 2003 letter to the MQAC, Ex. 19, and the November 8, 2003, declaration, Ex. 20, that Bharti drafted to change her story so he could put Charles Momah into the Puyallup examining room.

Bharti says he believed the Saldivars because other clients had been telling him similar stories of being treated at Charles’ clinics by different but look-alike doctors. Bharti Br. at 19, 21. But not one of those other clients had ever been a patient of Dennis Momah’s, and Bharti was keenly aware by April 2004, when he filed this lawsuit, that no patient of

Dennis', *other than Perla Saldivar*, had accused Dennis of any impropriety, and that even Perla (until Bharti helped her prepare her complaint to the Federal Way police) had not accused Dennis of anything more than touching her buttocks (while she was being seen in a follow-up visit for injuries to, among other things, her buttocks). Bharti did not bother, even during discovery in this lawsuit, to ascertain whether Dennis had been living in Washington during times when many of his other clients' stories would have required Dennis to be at Charles' Burien clinic or Federal Way clinic.⁴¹ Bharti has never claimed that he made any inquiry to determine whether it would even have been possible for Charles, without anyone noticing, to have dropped what he was doing at Burien or Federal Way and walked through the Puyallup clinic on the morning of May 28, 2003 – a day Dennis was working – past the people working there, and into the examination room where Perla was waiting.

Nor did Bharti retroactively satisfy his obligation to adequately investigate the facts by getting Klingbeil and others to say Perla seemed credible. This suit was filed in April 2004. Klingbeil did not meet Perla until September 2004. CP 439. There is no evidence that Bharti told

⁴¹ There is evidence put in the record by the Saldivars' counsel that Dennis had been able to show MQAC that he was not even in the State of Washington on dates various of Bharti's clients were claiming he had been impersonating Charles at one of Charles' clinics. See CP 1679-85.

Klingbeil, or others, what Perla had told the MQAC in 2003. That they were willing to say that Perla seemed credible is meaningless.

C. Bharti lied and violated the court's orders, as well as a King County Superior Court order.

The record is clear that Bharti repeatedly falsely denied that his clients had caused the MQAC to resume investigating Dennis Momah for sexual misconduct. RP 127-28, 189. He let Perla deny under oath that she had done something he helped her do. RP 323, 422. He let Ms. Starczewski repeat his lie. RP 658. Sanctions are appropriate under the court's inherent power if an act "affects 'the integrity of the court and, [if] left unchecked, would encourage future abuses,'" State v. S.H., 102 Wn. App. at 475 (quoting Gonzales v. Surgidev Corp., 120 N.M. 151, 158, 899 P.2d 594, 600 (1995)), or if "the 'very temple of justice has been defiled' by the sanctioned party's conduct," id. (quoting Goldin v. Bartholow, 166 F.3d 710, 723 (5th Cir. 1999)). Lying to the court insults the court's integrity and defiles "the very temple of justice."

But lying to the court is not the only thing of which Bharti was guilty. He tried to circumvent court rulings in order to coach Perla to advance his "impersonation" theory on the witness stand. He coached Perla during a noon recess by having her watch, on the sly, a videotape that Judge Fleck in King County had prohibited him from using except in

the lawsuit in which it had been taken. And, after claiming he had not seen the tape himself, RP 263-64 (as if that mattered), he asserted that “I showed this video deposition to Ms. Saldivar for identification purposes” and did so “in good faith” believing it was his professional responsibility to do so. CP 993.

Bharti’s use of the video deposition occurred against a backdrop of pretrial rulings in which the trial court had tried to keep him from tainting Perla’s testimony and from using videotapes as evidence without disclosing them to the defense. Bharti did not take the trial court’s suggestion and depose Charles Momah on videotape. Bharti did not satisfy the trial court’s insistence on having the purported KOMO TV tape properly authenticated before trying to have Perla identify Charles Momah from it at trial. Bharti did not seek permission from Judge Stolz or Judge Fleck to show Perla the deposition videotape to enable her to profess to remember what Charles Momah looked like (or looked like in 2003). Rather, Bharti waited until after Perla had already positively identified Dennis as her alleged molester, and then used a noon recess to show her the deposition videotape. And, no one would have known that Bharti had done so had Perla not included in her answer to a question the words “Well, today I saw the video” RP 262. The court was properly incensed not only at Bharti’s attempt to circumvent its directives, but also

at his reckless indifference to the effect that his coaching would have on his client's credibility.

D. There was no collateral estoppel.

Bharti argues, Bharti Br. at 31-32, that Judge Stolz was precluded from allowing Dennis to "relitigate" the issue of Bharti's good faith in this lawsuit because Dennis' defamation suit had been dismissed. He offers no support for a proposition that imposition of sanctions under CR 11 or a court's inherent authority is somehow precluded by collateral estoppel. Even were that possible, collateral estoppel does not apply.

The defamation suit was dismissed because King County Superior Court Judge Robinson concluded that Dennis had not shown that he could prove that Bharti had known that the client allegations he had repeated in the press about Dennis impersonating Charles were false. CP 1634-47. Collateral estoppel does not apply unless the issue decided in the prior adjudication is identical with the one presented in the second action. Creech v. AGCO Corp., 133 Wn. App. 681, 687-88, 138 P.3d 623 (2006). Bharti has insisted that he never publicized the Saldivars' allegations. CP 994 ("I have not made any statements to the media relating to Saldivars' allegations"). He does not cite to anything in the record indicating that there was any issue in the defamation lawsuit as to whether he had known specifically that the Saldivars' allegations are false. Because there was no

identity of issues, there was no collateral estoppel.

E. Bharti was not blindsided or denied due process by the sanctions motion or the amount of time he had to respond.

Bharti's argument, Bharti Br. at 44-45, that he was given too little time – four days – to respond to Dennis Momah's sanctions motion, and that the sanctions orders thus denied him due process, is meritless. The briefing schedule and hearing date were set with either his consent or his acquiescence. RP 779-81. Although Bharti's present counsel, who first appeared on May 22, 2006, CP 2553-54, complained to the court about having only four days to put together a written response to the sanctions motions, CP 1427, 1440, he did not ask for additional time or say what more time would have allowed him to accomplish.

F. The trial court had authority to order Bharti to pay the \$250,000 and \$50,000 "non-compensatory" sanctions.

Bharti argues, Bharti Br. at 43-44, that the trial court's authority was limited under RCW Chapter 7.21 to fining him \$500 per violation, and that the judgment against him has to be vacated to the extent it imposes \$300,000 in non-compensatory sanctions (the \$250,000 payable to Dennis Momah and the \$50,000 payable to the registry of the court). He is incorrect. Bharti was not held in contempt and, as the court held in Interest of M.B., 101 Wn. App. 425, 452, 3 P.3d 780 (2000), rev. denied, 142 Wn.2d 1027 (2001), a court may deviate from limit imposed on

punitive fines for contempt under RCW Chapter 7.21 if those limits are “in some specific way inadequate.” As explained below, a sanction limited to \$500 per violation in addition to a requirement that Bharti pay the defendants’ attorney fees and expenses would have been wholly inadequate to serve the goals for which courts may impose sanctions.

G. The noncompensatory sanctions were deserved and appropriately designed to serve the goals of punishment and deterrence.

The purposes of sanctions are to deter, to punish, to compensate and to educate. Wash. State Physicians Ins. Exch. & Ass’n v. Fisons, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993); Roberson v. Perez, 123 Wn. App. 320, 337, 96 P.3d 420 (2004), rev. denied, 155 Wn.2d 1002 (2005). Lesser sanctions against Bharti would not have served those purposes adequately.

In Watson v. Maier, 64 Wn. App. 889, the Court of Appeals upheld as within the trial court’s discretion an award under CR 11 of all of the attorney fees that had been incurred by a defendant, a surgeon, whom the court found there had been no legal or factual basis for suing. In Watson, the defendant managed to get the claim against him dismissed on summary judgment, and his fees amounted only to \$4,200. 64 Wn. App. at 895. Dennis was forced to incur \$144,205 to defend himself in a trial against salacious and career-wrecking charges. U.S. Healthworks and

Charles were forced to incur fees of \$108,340 and \$40,447 respectively. The sanctions in this case, as in Watson, properly compensated for the fees the defendants actually incurred because of Bharti's participation in the fabrication of the claims. Bharti does argue that the amount imposed as compensatory sanctions was excessive.

By requiring Bharti to pay Dennis an additional \$250,000 and the \$50,000, and to post the court's findings and conclusions on his website, the trial court sought to punish Bharti and deter him from future misconduct. See Fisons, 122 Wn.2d at 356. The trial court was, of course, familiar with Bharti's misconduct in this lawsuit, and was in a much better position than an appellate court to gauge the types and amounts of sanctions necessary to punish Bharti for what he had done and to deter him from future misconduct. Eugster, 110 Wn. App. at 231. The court was also aware that Bharti had been ordered in June 2005 to pay \$7,000 in sanctions for filing a King County lawsuit without a good faith basis for believing it to be well grounded in fact, 5/24/06 RP 50, CP 778 (¶ 12), 924-34, and that claimants on whose behalf he had made accusations in other Momah lawsuits had testified under oath that the charges attributed to them had been false, CP 776-77 (¶¶ 6-8), 814-37.

Bharti argues, Bharti Br. at 29-30, that he was improperly sanctioned for his conduct in King County litigation. He was not. Judge

Stolz was entitled, indeed obligated, to take into account Bharti's conduct elsewhere and at other times when making her determination as to what types and severity of sanctions would be reasonably calculated to get his attention and make him mend his ways. See Madden v. Foley, 83 Wn. App. 385, 392, 922 P.2d 1364 (1996) (court should fashion a penalty that deters litigation abuses most efficiently and effectively); Lockheed Martin Energy Sys., Inc. v. Slavin, 190 F.R.D. 449, 459 (E.D. Tenn. 1999) (court may consider past conduct in fashioning an appropriate CR 11 sanction); Atkins v. Fischer, 232 F.R.D. 116, 129 (D.D.C. 2005) (court may consider whether lawyer has history of similar misconduct in other cases). Given his track record and the lack of contrition he exhibited for his conduct in this lawsuit, the trial court was right to conclude that "[u]nless Mr. Bharti is seriously impacted in his pocket book he's just going to keep this up." 5/24/06 RP 44-48, 50; CP 2569 (FF 37).

No Washington decision limits to fees that an adversary has actually incurred, or to any other measure or amount, the sanction that a court can order a lawyer to pay for doing what Bharti did. The only standard, subject to review for abuse of discretion, is what it will likely take to accomplish the goals not only of compensation, but also of punishment and deterrence. Bharti repeatedly, to garner media attention, filed lawsuits against Dennis in King County, without serving him, only to

later withdraw the claims. CP 779, 950; RP 566-567. He brought Charles into this case as a defendant based on an “impersonation” theory that his own client disavowed at trial. There was evidence that he had induced others to make or had authored false allegations in at least two other lawsuits. CP 776-77 (¶¶ 6-8), CP 814-37. The court properly imposed sanctions designed to impress upon Bharti the seriousness of his misconduct, to punish him, and to deter him from engaging in such misconduct again.

Bharti complains that the sanctions imposed create the danger of a “chilling effect” on lawyers’ “enthusiasm or creativity.” Bharti Br. at 14. If fabricating allegations and testimony to stir a media frenzy (or for any other reason) is creativity and enthusiasm, a chilling effect is, hopefully, *exactly* what the sanctions imposed in this case will have on any lawyer who might contemplate doing what Bharti has been sanctioned for doing.

H. The web-posting requirement is not unconstitutional and presents an issue that will soon be moot as a practical matter.

Bharti’s First Amendment argument is inadequately briefed. It does not acknowledge, let alone discuss the application of, the leading decision on governmental regulation of commercial speech, 44 Liquormart v. Rhode Island, 517 U.S. 484, 501, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996), that observes, among other things, that:

When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.

Nor does Bharti explain, even conceptually, how case law allowing and/or limiting “governmental regulation” of commercial speech would apply to sanctions imposed by a court on a lawyer for misconduct during the course of a lawsuit and in person at a trial. See Havens v. C & D Plastics, 124 Wn.2d 158, 169, 876 P.2d 435 (1994) (appellate court will not address constitutional arguments that are not supported by adequate briefing).

None of the decisions Bharti cites suggests that a truth-in-advertising requirement such as that imposed here is unconstitutional. Similar posting requirements are not unheard of. See United States v. Kahn, 2004 U.S. Dist. LEXIS 26635 *10 (M.D. Fla. 2004); United States v. Prater, 2003 U.S. Dist. LEXIS 16099 *54 (M.D. Fla. 2003); United States v. Bell, 238 F. Supp. 2d 696, 706 (M.D. Pa. 2003); United States v. Richmond, 2002 U.S. Dist. LEXIS 17247 *10 (N.D. Ill. 2002). That Bharti is a lawyer is irrelevant, as is the fact that the findings in this case have been accessible over the internet by means other than logging on to his website.

The web-posting requirement was an appropriate practical remedy and was constitutionally permissible. Prospective clients would want to know, and deserve to know, before retaining Bharti, that one set of clients whose claims he took to trial in the Momah matter about which he created so much publicity were left with a \$3,000,000 judgment against them for intentional torts and attorney fees.

V. CONCLUSION

For the foregoing reasons, this Court should: (1) affirm the dismissal of the Saldivars' claims against all defendants, and the awards of attorney fees made to them under RCW 4.84.185; (2) affirm the judgment and \$2,819,037 damages award entered in Dennis Momah's favor on his counterclaims against the Saldivars; (3) affirm the judgment entered against Harish Bharti and in favor of all defendants; and (4) affirm all of the sanctions imposed on Mr. Bharti.

RESPECTFULLY SUBMITTED this 12th day of April, 2007.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 12th day of April, 2007, I caused a true and correct copy of the foregoing document, "Brief of Respondent Dennis Momah," to be delivered by U.S. mail, postage prepaid, to the following counsel of record:

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



Carrie A. Custer

Respondent Charles Momah MD concurs with the arguments presented by Dennis Momah MD and incorporates those arguments by reference as if fully set forth herein. Respondent respectfully requests the Court: (1) affirm the dismissal of the Saldivars' claims against all defendants, and the entry of judgment against the Saldivars; (2) affirm the judgment entered against Harish Bharti and in favor of all defendants; and (3) affirm all of the sanctions imposed on Mr. Bharti.

DATED this 12th day of April, 2007.

LAWRENCE & VERSNEL PLLC

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STATE OF WASHINGTON
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DEPUTY

NO. 34891-8-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

PERLA and ALBERT SALDIVAR

Appellants,

v.

DENNIS MOMAH, JANE DOE MOMAH, and the marital community
composed thereof; US HEALTHWORKS MEDICAL GROUP OF
WASHINGTON PS, a Washington Professional Services Company;
CHARLES MOMAH, JANE DOE MOMAH, and the marital community
composed thereof; and DOES I – 10

Respondents.

JOINDER OF RESPONDENT US HEALTHWORKS MEDICAL
GROUP OF WASHINGTON PS,
a Washington Professional Services Company

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ORIGINAL

Respondent U.S. Healthworks Medical Group of Washington, PS (U.S. Healthworks) concurs with the arguments presented by Dennis Momah MD and incorporates those arguments by reference as if fully set forth herein.

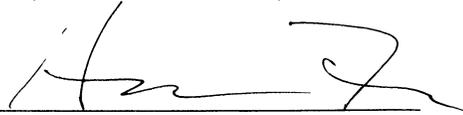
In addition, U.S. Healthworks argues that neither the Saldivars nor Mr. Bharti have raised any issues on appeal regarding the trial court's ruling that their claim against U.S. Healthworks be dismissed. CP 1533. Further, they do not argue that the trial court's findings that "Harish Bharti had reason to know, prior to filing the complaint in this action, that the Saldivars' claims were not well grounded in fact," (CP 1530), were improper as they relate to the claim against U.S. Healthworks. Another example of claim they asserted without any basis is the claim of conspiracy against U.S. Healthworks. The Saldivars and Mr. Bharti had no knowledge of any facts to support a claim that U.S. Healthworks intentionally conspired to commit a sexual assault against Perla Saldivar. Even after discovery including numerous depositions of U.S. Healthworks employees, they refused to strike that frivolous claim.

Respondent therefore respectfully requests the Court: (1) affirm the dismissal of the Saldivars' claims against all defendants, and the entry of judgment against the Saldivars; (2) affirm the judgment entered against

Harish Bharti and in favor of all defendants; and (3) affirm all of the sanctions imposed on Mr. Bharti.

Dated this 12 day of April, 2007.

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