

No. 66073-0-I

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

**ADIL LAHRICHI, REGINE CSIPKE, T. L., M. L., Y. L.,
A. L., Y. L., and AZIZA BENAZZOUZ**

Appellants,

v.

**KATRIN E. FRANK and MACDONALD HOAGUE
& BAYLESS,**

Respondents.

**ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY
The Honorable Julie Spector**

APPELLANTS' BRIEF

**Adil Lahrichi and Regine Csipke
Appellants Pro Se
12875 NE 8th Street, # 14
Bellevue, WA 98005
Tel: 425-562-7220**

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I. INTRODUCTION

Respondents Ms. Katrin Frank and MacDonal Hoague & Bayless (“*Lawfirm*”) represented Appellant Dr. Adil Lahrichi in an employment discrimination lawsuit against his employers (“*FedOpnts*”). However, during that lawsuit, Frank committed wrongdoings, including negligence, malpractice, fraud, and violations of confidentiality contracts and protective orders, as well as permitted FedOpnts to do the same. Dr. Lahrichi discovered Frank’s wrongdoings after his lawsuit was dismissed. Lahrichi and his family (“*Lahrichis*”) are suffering substantial injuries as a result.

In this lawsuit, Lahrichis were deprived from their privileges to conduct discovery and to present confidential evidence and were not afforded sufficient time to prepare their response to summary judgment. Herein, discovery involves privileged and confidential information of Lahrichis. Respondents knew of Lahrichis’ need to protect such information before Lahrichis could proceed with their discovery. Respondents thwarted Lahrichis’ efforts to stipulate on a protective order. Immediately after Lahrichis moved for continuance due to their difficult situation with other court’s deadlines and religious obligations and the ongoing stipulation, Respondents abruptly moved for summary judgment and scheduled Lahrichis’ response within Lahrichis’ difficult schedules.

Respondents aggravated the situation by filing Lahrichis' medical information unsealed, compelling Lahrichis to prepare a motion to seal within the time allocated for their response to Respondents' summary judgment ("*SJ Response*"). Despite Lahrichi's detrimental circumstances, the trial court denied Lahrichis any extension to file their SJ Response. Lahrichis filed an incomplete draft of their SJ Response on the due date and their declarations and exhibits the next day with a motion to late file. Without a protective order, Lahrichis could not submit confidential evidence. At the oral hearing, the trial court erroneously declined to accept from Lahrichis exhibits that were previously unobtainable. The trial court erroneously (1) denied to consider Lahrichis' declarations and exhibits supporting their SJ response; (2) granted summary judgment to Respondents on the malpractice claim; (3) did not rule on the other claims; (4) denied Lahrichis' motion to seal and for a preliminary injunction ("*Seal Motion*"); and (5) denied Lahrichis' motions for reconsideration.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

The trial court erred and abused its discretion:

1. in granting Respondents' summary judgment
 - i. without permitting Lahrichis time to obtain a protective order to conduct their discovery and submit confidential

evidence to make the record complete and amend their claims after it had granted discovery continuance,

- ii. without permitting Lahrichis a time extension to adequately prepare their summary judgment response despite Lahrichi's showing of substantial need, and
 - iii. without considering Lahrichis' declarations and evidence supporting their summary judgment,
2. in denying Lahrichis' motions for late filing
 3. in denying Lahrichis' motion to seal and for preliminary injunction
 4. in denying Lahrichis' motions for reconsideration

B. Issues Pertaining to Assignments of Error

Whether the trial court

1. should have permitted Lahrichis to conduct discovery after granting them continuance to do so before ruling on summary judgment?
2. should have permitted time to Lahrichis to obtain a protective order to present confidential exhibits to oppose summary judgment?
3. should have granted Lahrichis' request for enlargement of time to prepare their response for summary judgment?
4. should have granted Lahrichis' request to late file their declarations and exhibits supporting their summary judgment response?

5. should have accepted previously unobtainable affidavit and exhibits provided by Lahrichis at the oral hearing?

6. should have viewed the facts in light most favorable to Lahrichis instead of Respondents; weighed the evidence, and ruled on disputed facts?

7. should have denied summary judgment, because Lahrichis showed that Respondents provided untrue testimony inconsistent with the facts and that disputed genuine issues of material facts exist?

8. should not have relied on Respondents' erroneous factual allegations and misrepresentations?

9. should have ruled on the other claims besides malpractice?

10. should have applied the discovery rule for the statute of limitations standard ?

11. should have granted Lahrichis' requests to seal/redact and for injunctive relief, because Lahrichis demonstrated compelling reasons ?

III. STATEMENT OF THE CASE

A. Lahrichi signed a retainer contract with Respondents

Frank represented to Dr. Lahrichi that she was an expert in racial and religious employment discrimination. CP 464 (¶ 3). After Frank and her firm evaluated Dr. Lahrichi's case against FedOpnts, Frank stressed to Dr. Lahrichi that his case was exceptionally good and offered to represent

him on a contingency basis.¹ Id. On September 1, 2004, Dr. Lahrichi signed a contingency retainer contract with Frank and her lawfirm. Id. Dr. Lahrichi had minimal knowledge of the law and courts.² CP 464 (¶ 4); CP 979 (¶ 3). Dr. Lahrichi trusted Frank and relied on her assurances to represent him competently and protect Lahrichis' interests. CP 464-65 (¶ 5).

B. Frank and Dr. Lahrichi had other written and verbal contracts to protect Lahrichis' confidential information from public disclosure, which were violated without Lahrichis' knowledge

Throughout the discrimination lawsuit, Dr. Lahrichi stressed to Frank to protect Lahrichis' confidential information CP 850 (¶ 5). Frank frequently assured Dr. Lahrichi that it was and would be soundly protected. Id.; CP 7 (¶ 35); CP 466 (¶ 9). Before discovery began, on December 20, 2004³, Frank signed on behalf of Dr. Lahrichi a contract with FedOpnts, which prohibited Frank and FedOpnts from disclosing Lahrichis' medical, financial, and personnel records, and their contents, to

¹ Dr. Lahrichi was the vice president of technology development of Lumera Corporation (now GigOptix), a technology company. Dr. Lahrichi was discriminated against, mistreated, deprived of his compensation, retaliated against for reporting discrimination and fraud on military government contracts, and misappropriation of investors' funds by his boss Thomas D. Mino, then terminated Dr. Lahrichi after his infant was diagnosed with a life-threatening illness and deprived of his overdue bonus and COBRA.

² Lahrichi is not a native English speaker.

³ This Court may take judicial notice of federal District Court documents, *Lahrichi v. Lumera Corp. et al.*, Case No. 04-02124—referenced herein by “Dkt.#”—as matters of public record available via PACER.

anyone except to individuals⁴ associated with the lawsuit.⁵ CP 849 (¶ 3); CP 854-864. The contract stated that “[n]o party may challenge the confidentiality of medical records and personnel files” (CP 859 (¶ 12)) and those records “(or portions thereof) shall be considered per se CONFIDENTIAL” without a designation as such (CP 857 (¶ 4)), including any *compilations and summaries* thereof. CP 859, lines 10-12. The contract required counsel to file documents containing such information in Federal Court in sealed envelopes. CP 858 (¶ 8).⁶ On December 22, 2004, the Federal Court entered that contract as a stipulated protective order (“*SPO*”). CP 465 (¶ 7); CP 483-92; RP 18, lines 12-16. Dr. Lahrichi entrusted Lahrichis’ confidential records to Frank, e.g., medical, medical insurance, tax, and personnel, and other confidential information, which Frank provided to FedOpnts. CP 465-66 (¶ 8).

Early in the lawsuit, Frank pressured Dr. Lahrichi to attend a confidential settlement conference. On February 24, 2005, Frank signed a second contract on behalf of Dr. Lahrichi with FedOpnts, which deemed that conference entirely confidential and prohibited Frank and FedOpnts from disclosing any information provided by Dr. Lahrichi for settlement to

⁴ Those individuals were also bound by that confidentiality contract and the SPO.

⁵ The Contract was in accordance with privacy laws and statutes, e.g., 70.02 RCW; the 1996 Health Insurance Portability and Accountability Act (HIPAA); 12 U.S.C. 3401.

⁶ In 2004-2005 the Federal Court’s computer system did not permit electronic submission of documents with confidential information under seal.

anyone. CP 467 (¶ 11); CP 496-501. The contract specifically stated

“alternative dispute resolution proceedings, including communications, statements, disclosures and representations made by any party, attorney or other participant in the course of such proceeding, shall, in all respects, be confidential, and shall not be reported, recorded, placed in evidence, disclosed to anyone not a party to the litigation, made known to the trial court or jury, or construed for any purpose as an admission or declaration against interest.” CP 499.

Frank assured Dr. Lahrichi of confidentiality. Consequently, Dr. Lahrichi disclosed to Frank highly confidential information, which Frank provided to FedOpnts in a memorandum marked “CONFIDENTIAL PRIVILEGED FOR SETTLEMENT ONLY.” CP 400 (¶ 3) through CP 401 (¶ 1).

After mediation, *unbeknownst to Dr. Lahrichi*, Frank and FedOpnts began to improperly file, unsealed, Lahrichi’s confidential information violating the SPO.⁷ In July 2005, Frank and FedOpnts filed, unsealed, pleadings, which contained abundant confidential information, as well as personnel records protected by the SPO. CP 16 (¶¶ 95, 96, 98).

Before his deposition, Frank assured Dr. Lahrichi that the confidential information discussed/disclosed in deposition would remain entirely confidential from the public and that FedOpnts were bound by

⁷ Frank and FedOpnts quoted and paraphrased from protected records, copies of actual records and portions thereof, making it publicly accessible. Lumera’s unsealed filings also contained demonstrably false testimonies, misrepresentations, and disgraceful distortions of Lahrichi’s confidential information.

confidentiality contracts and the SPO to protect it from public disclosure. CP 467 (¶ 13); CP 8 (¶¶ 43-46). FedOpnts' counsel intimidated, mistreated, and humiliated Dr. Lahrichi in deposition, although Dr. Lahrichi was visibly ill and under tremendous pain. CP 467-68 (¶¶ 14-15); CP 9 (¶ 47). FedOpnts required Dr. Lahrichi to make humiliating demonstrations in front of several attendees. Id. Frank did not intervene to protect Dr. Lahrichi. CP 9 (¶ 49). Dr. Lahrichi provided confidential information in his deposition. CP 468 (¶ 15).

Before her deposition, Frank assured Dr. Lahrichi's wife, Ms. Regine Csipke, that her deposition would only be about Dr. Lahrichi's medical information and would remain entirely confidential from the public. CP 538 (¶¶ 5-6). FedOpnts violated Csipke by asking her highly personal questions. Frank did not intervene. Id.

Although Dr. Lahrichi produced his medical records for the previous ten years, FedOpnts requested "older" medical records. Frank objected due to their relevancy and staleness. Frank obtained the old records from the hospitals, before FedOpnts filed to compel them. CP 877, see section IV(H)(4). Unbeknownst to Lahrichi, Frank divulged contents of those records to FedOpnts. In September, FedOpnts filed to compel the "old" records. In their pleadings, they freely quoted and paraphrased from Lahrichi's medical records they already had, his mediation brief, and

sealed documents, and included information about his minor child and other private information. Ms. Frank's response included the same medical information. Unbeknownst to Dr. Lahrichi, both counsel improperly filed their pleadings *unsealed/unredacted*, although FedOpnts asserted that Dr. Lahrichi's medical information was protected by the SPO from public disclosure. CP 468 (¶ 17).

In September 2005, FedOpnts filed pleadings to compel Dr. Lahrichi's financial records. They freely quoted/paraphrased from medical, personnel, and tax records and mediation brief, filed Dr. Lahrichi's mediation brief, and included the full names and identifying information of Dr. Lahrichi's minor children. Ms. Frank's response included similar confidential information. Both counsel filed their pleadings improperly *unsealed* in violation of the confidentiality contracts and the SPO. CP 468 (¶ 18). In their unsealed pleadings, FedOpnts asserted strict compliance with the SPO and privacy laws. *Id.*

On September 30, 2005, the District Court issued a supplemental heightened protective order, which affirmed all the provisions SPO and heightened the confidentiality of Lahrichi's tax and bank records, i.e., those records and pleadings and court filings that incorporate, disclose, or refer to them are designated "HIGHLY CONFIDENTIAL—SEALED SUBJECT TO COURT ORDER" and can only be filed sealed. CP 189,

lines 17-22.

In October 2005, FedOpnts' counsel filed a frivolous motion to compel Lahrichi's minor son's medical records. The motion and Frank's response cited the child's full name in the title and repeatedly throughout, quoted from his medical records, and included Lahrichi's medical and mediation information. CP 539 (¶ 9). Frank assured Dr. Lahrichi and Csipke that all the information of the child would be confidential from the public. *Id.* Yet, unbeknownst to Dr. Lahrichi, both counsel filed their pleadings improperly *unsealed*.

On November 1, 2005, the District Court ordered Lahrichi to produce certain old medical records, if they met specific criteria, and concurrently issued a supplemental heightened protective order ("*HPO*") for all Lahrichi's medical records, which affirmed all the provisions of the SPO and heightened the protection of the medical records from per se confidential to per se highly confidential. That order ordered that medical records and portions thereof, and any pleadings or court filings that incorporate, disclose, or refer to them cannot be docketed unless designated "HIGHLY CONFIDENTIAL-SEALED SUBJECT TO COURT ORDER" and those documents and pleadings must be filed under seal. CP 149, lines 12-17. FedOpnts and Frank disagreed about the ambiguous language of the order and whether or not the "old" medical

records feel within the purview of the compel order.

On November 2005, FedOpnts moved for sanctions. In that motion FedOpnts even admitted that they were quoting from medical records, tax records, bank statements, mediation brief, and sealed docket documents. They also filed pages of Dr. Lahrichi's mediation brief. Unbeknownst to Dr. Lahrichi, FedOpnts improperly filed unsealed, those pleadings in violation of all protection in place. Frank did not object to FedOpnts and also filed portions of her response with similar confidential information improperly unsealed. CP 469 (¶ 19).

In November of 2005, FedOpnts filed, unsealed, their summary judgment pleadings containing Lahrichi's and his son's medical information and Lahrichi's financial, personal, and personnel information—also in distorted form, in violation of all the protections in place.

On January 4, 2006, the District Court granted sanctions, based on FedOpnts' gross misrepresentations and distortions, and ordered Dr. Lahrichi to produce medical records. In its order, it also issued a second heightened protective order that reaffirmed the provisions of the SPO and the previous heightened protective orders for medical and financial information. CP 160, line 25 through CP 161, line 23. Dr. Lahrichi immediately provided a release to FedOpnts to obtain the records and paid

the sanctions.

FedOpnts and Frank continued to violate the confidentiality agreements and protective orders. While summary judgment was pending decision, Frank filed to withdraw from the case, which Dr. Lahrichi opposed. Days later, FedOpnts filed an untimely motion and made scandalous accusations against Dr. Lahrichi. Unbeknownst to Dr. Lahrichi, FedOpnts improperly filed that motion unsealed, although it also included abundant per se confidential information from Dr. Lahrichi's personnel file.

C. Dr. Lahrichi discovers unauthorized disclosures

Dr. Lahrichi became pro se on February 10, 2006. On March 2, Dr. Lahrichi's case was dismissed on summary judgment. On April 28, 2006, Dr. Lahrichi stumbled on a document with Lahrichis' confidential information on the internet. CP 842 (¶ 2); CP 900 (¶ 5). Dr. Lahrichi learned from the clerk of the Court thereafter that some pleadings of FedOpnts with Lahrichis' confidential information were publicly accessible. On May 24, 2006, Lahrichi hired Ms. Marilyn Gunther to assist him to remedy the situation. CP 899-900 (¶ 2). Very soon thereafter, Gunther suffered a serious accident that required hospitalization, surgery, and therapy for few months. CP 405 (¶ 1). Upon her return, Gunther petitioned the Ninth Circuit to file a motion to seal

District Court documents, which were improperly filed unsealed, and the “Seal Remand” was ordered on April 11, 2007. Id.

D. The Seal Remand reveals Frank’s violations and failures

The Seal Remand lasted from April 2007 to May 2009.⁸ While assisting Gunther in the Seal Remand, Dr. Lahrichi slowly began to learn about the law, the court system, and Frank’s duties to Lahrichi as counsel. Dr. Lahrichi began to discover Frank’s failures, violations, and fraud and that Frank misled and lied to him and his wife, Ms. Csipke. The Seal Remand revealed startling facts. For example, Frank did not object to FedOpnts’ repeated unauthorized public disclosures. Instead, Frank joined the fray. CP 10-11 (¶¶54-55, 65-66); CP 468 (¶ 16); CP 875; CP 470-72 (¶¶ 24-27); CP 538 (¶ 7). Both counsel improperly filed unsealed over 140 documents, including confidential records and Dr. Lahrichi’s mediation brief.⁹ CP 16 (¶¶ 95-98). Frank never took steps to correct the violations and instead concealed from Dr. Lahrichi communications with FedOpnts showing that Frank was violating the SPO. CP 875. The Seal Remand revealed that Frank diligently protected FedOpnts’ confidential

⁸ FedOpnts hampered Gunther’s efforts in the Seal Remand and cooperated minimally in that effort that was ordered to be a joint effort. Gunther and Lahrichi combed the record and identified the documents that were improperly filed unsealed by Frank and FedOpnts.

⁹ The information includes, e.g. medical, personnel, financial, tax, bank, personal, full name of minors and other identifying information, social security numbers, birthdates, mediation information, including pages of mediation brief, and other private information.

information by always filing it sealed in compliance with the confidentiality contracts and protective orders.

Dr. Lahrichi also learned that Frank had the responsibility (i) to stop FedOpnts' counsel from mistreating Dr. Lahrichi, (ii) to take action against FedOpnts and their counsel for falsely testifying to the Court, for tampering with witnesses and evidence, for not providing requested discovery or providing incomplete discovery, for not properly responding to requests for answers and admissions, for dilatory tactics, and for acting in bad faith, (iii) to respond to issues raised by FedOpnts and raise objections, (iv) to respond to and not ignore FedOpnts' letters, (v) to request crucial discovery and follow up with FedOpnts to produce it, (vi) not to disclose attorney-client privileged information to FedOpnts, and (vii) to inform Dr. Lahrichi and Ms. Csipke. Yet, Frank failed in those duties. CP 9-13 (¶¶ 47-49, 53, 56-58, 67-70, 72, 76); CP 467-68 (¶ 14). Frank also mistreated Dr. Lahrichi and put him under duress. CP 467 (¶ 12).

Dr. Lahrichi also discovered that Frank fraudulently did not file and investigate his retaliation claim against FedOpnts for reporting fraud on government contracts by Mino's, Lahrichi's boss, and employees fraud and Mino's discrimination, did not interview key witnesses, and concealed evidence supporting that claim. CP 10 (¶¶ 58-59). Frank also failed to file

other claims against Microvision and did not include other Appellants as plaintiffs. CP 6 (¶ 28). Frank failed to respond properly to FedOpnts' motion for summary judgment. CP 469 (¶ 20).

E. The Federal Court ordered numerous documents improperly filed unsealed by counsel be sealed/redacted

On March 23, 2009, pursuant to the Seal Remand the federal Court ordered sealed/redacted over 70 documents in 23 docket entries, which were improperly filed unsealed/unredacted. CP 19 (¶ 122); CP 394 (¶ 1); CP 425-426 (¶ 7).¹⁰ However, the Federal Court left unsealed or unredacted documents with confidential information that it had ordered sealed/redacted in other documents and missed to review documents with confidential information. *Id.* The Ninth Circuit ordered parties' briefs as well as the excerpts of record be sealed.

On May 11, 2011, the Ninth Circuit denied Dr. Lahrichi's appeal without explanations and declined to correct the errors of the District Court. Dr. Lahrichi is continuing his efforts to correct those errors.

F. Lahrichis filed an action against FedOpnts and their counsel in Superior Court

On April 27, 2009, Lahrichis filed multiple claims in Superior Court against FedOpnts for their wrongdoings, unlawful acts, and

¹⁰ The Federal Court ordered that documents be treated individually even if filed within a docket.

violations of contracts.¹¹ Thereafter, FedOpnts sought to bar Lahrichis from taking action against them in any court. FedOpnts filed a lawsuit against Dr. Lahrichi in the Federal District Court to dismiss that case in Superior Court asserting the re-litigation exception under the Anti-Injunction Act.¹² Judge Coughenour, who presided over the case, rejected FedOpnts' claims that Dr. Lahrichi was re-litigating previous claims, was a disenchanted litigant, or had opportunity to conduct discovery for his Superior Court claims should be entitled to discovery for their claims. CP 885-98. See excerpts of Judge Coughenour's rulings in section IV(G).

The Superior Court granted FedOpnts their request for absolute immunity for their wrongdoings. Lahrichis are appealing this decision.

G. Lahrichis filed this action against Respondents and sought a protective order to conduct discovery

Lahrichis filed a complaint for separate claims against Respondents.¹³ Discovery involves Lahrichis' confidential information that is protected by the SPO and HPOs, sealed in Federal District Court, entrusted to Respondents, attorney-client privileged, and work product. Lahrichis could not proceed with discovery without ensuring that such

¹¹ *Lahrichi v. Curran*, King County Superior Court Cause No. 09-2-17151-3 SEA.

¹² *Curran v. Lahrichi*, United States District Court Cause No. 2:09-cv-01227.

¹³ E.g., violation of privacy, dissemination of confidential information, libel and defamation, breach of contract, breach of trust, exploitation, negligence, negligent and intentional infliction of emotional distress, bad faith, fraud, and malpractice

information is protected and that Respondents comply with the federal protective orders. Respondents thwarted Lahrichis' efforts to stipulate on a protective order. On March 25, 2010, Lahrichis sent to Respondents a proposed stipulated protective order ("*PSPO*"), which was mirrored on the SPO and HPOs, requesting proposed changes. CP 316; CP 427 (¶¶ 12-13). Respondents proposed none, but instead responded by undermining the PSPO and were unconcerned about harm to Lahrichis. CP 317-18. Lahrichis addressed Respondents' letter comprehensively and again requested proposed changes to the PSPO. CP 319-21. Respondents proposed none and continued to misstate the federal protective orders and misrepresent Lahrichis' efforts to protect their confidential information.¹⁴ CP 427-28 (¶¶ 14-15); compare CP 322-27 with CP 339-42.

H. Respondents created a detrimental situation for Lahrichis and opposed Lahrichi's attempts to have sufficient time to respond to summary judgment

On July 6, 2010, Appellants requested Respondents to stipulate for discovery continuance, because Lahrichis were still attempting to reach agreement on the PSPO and were facing a difficult situation due to their back-to-back appeals and personal and religious obligations. CP 462; CP 428 (¶ 16). Lahrichis wrote to Respondents

¹⁴ Respondents trivialize their violations and obfuscate that Lahrichis medical information at issue was copied and paraphrased from Lahrichis' medical records.

The ongoing discussion about the protective order since last March further slowed discovery. Plaintiffs are still attempting to come with you into agreement about the stipulated protective order so that their confidential information in your clients' possession or that will requested/produced is [not][sic] improperly disseminated.

CP 328. Lahrichis moved for continuance and informed the trial court of their difficult situation and their substantial need to, but inability, to conduct discovery without a protective order. CP 99-106. Three days later, on July 9, Respondents unexpectedly filed for summary judgment and set the date for Lahrichis' SJ Response to overlap with Lahrichis' difficult schedule and deadlines. CP 107-311. Respondents escalated the prejudice and filed with their pleadings Lahrichis' medical information unredacted, disregarding Lahrichis' requests and knowing it would cause Lahrichis harm. E.g., among other pages CP 110-112; CP 141-150; CP 152-162.

On July 12, Respondents opposed discovery continuance and continued to file Lahrichis' medical information unsealed/unredacted. CP 312-328. In their reply for continuance, Lahrichis stressed their need for protection to conduct discovery. CP 329-342.¹⁵ On July 14, 2010, the trial court granted continuance.¹⁶ CP 359-60.

¹⁵ Lahrichis' reply included a letter that they were about to send to Respondents before Respondents filed for summary judgment, which addressed Respondents' misrepresentations about the PSPO and federal protective orders and unfounded accusations. CP 339-42.

¹⁶ Lahrichis only received that order by mail on July 20, 2010

Respondents declined to correct their unsealed filings, which compelled Lahrichis to prepare a Seal Motion concurrently with their SJ Response to avert harm.¹⁷ CP 385-98; CP 424-31. However, despite their arduous efforts, Lahrichis realized that they could not complete their SJ Response by the July 26 due date. On July 19, Lahrichis moved for enlargement of time for their SJ Response. CP 343-51; 352-58. The trial court denied Lahrichis' request—opposed by Respondents (CP 361-63)—to hear that motion for enlargement on a shortened schedule. CP 375-76. On July 22, Respondents also opposed the motion for enlargement. CP 365-74. While Lahrichis were readying their reply thereto, on Friday July 23, the trial court heard the motion for enlargement on a shortened schedule and denied it, which deprived Lahrichi from submitting their reply for enlargement. CP 377-78. That reply was essential to show Respondents' misstatements of facts. That afternoon, Lahrichis moved for reconsideration (CP 379-84) and requested at least few days to submit their SJ Response (CP 383, lines 16-17), which was denied. CP 423.

Despite working overtime, Lahrichis were unable to complete their SJ Response by July 26, and filed an incomplete draft without their declarations and exhibits. CP 399-422. Lahrichis stated in their SJ

¹⁷ The preliminary injunction would require Respondents to comply with the federal protective orders and privacy laws and not disseminate confidential information.

Response

Plaintiffs were unwillingly placed in a Hobson's situation, where they were forced to choose between protecting themselves from irreparable harm or to forego their summary judgment and appeal. Plaintiffs have done everything possible to brief this Court of their situation and request an extension of time. Plaintiffs did their best to prepare this response, but could not perfect it due to time constraints and the detrimental circumstances, with which they were inflicted.

CP 419-20. In their SJ response, Lahrichis again requested continuance to conduct discovery. CP 406-07; 408-10. The same day at 4:30 p.m., Lahrichis filed their motion to seal and for preliminary injunction (*"Seal Motion"*) (CP 385-98), which was also supporting their SJ Response. Despite extreme exhaustion from continually working on those and preceding submissions,¹⁸ Lahrichis continued to work on their declarations and exhibits to support the SJ Response. Dr. Lahrichi filed his declaration and exhibits the next day, on July 27 at 1:42 p.m. and Ms. Csipke filed hers on July 28. CP 463-534; CP 537-42. Both declarations and exhibits were incomplete. Lahrichis moved for leave to late file those declarations, which Respondents opposed. CP 543-51; CP 552-58. Lahrichis were unable to submit exhibits with confidential information without a protective order. On August 2, 2010, with their summary judgment reply, Respondents again filed Lahrichis' medical information unsealed and

¹⁸ From July 6, 2010 to July 29, 2010, Lahrichis filed a total of 13 pleadings in this case.

attorney-client privileged information. CP 634, 636. On August 5, Lahrichi filed an objection to Respondents' SJ reply and highlighted their misrepresentations therein. CP 819-22. Respondents also opposed Lahrichis' Seal Motion. CP 559-85. Lahrichis' reply thereto showed Respondents' misrepresentations. CP 617-23, 586-616.

Lahrichis had very little time to prepare for the August 6 oral hearing. Dr. Lahrichi was very ill during his presentation. RP 10 (¶ 4); CP 845, lines 18-21. At the hearing, the trial court declined to accept Gunther's affidavit and other exhibits, which Lahrichis could not previously obtain. RP 10 (¶ 3). Dr. Lahrichi emphasized his key arguments. He again requested continuance, because of Plaintiffs' need to, but their inability, to proceed with discovery and present confidential evidence. RP 12-13.

The trial court denied to consider Lahrichis' declarations and exhibits supporting their SJ response (CP 823-25), their motion to seal (CP 825-28), and granted summary judgment to Respondents on the malpractice claim, but did not rule on the other claims. CP 831-33. Lahrichis filed three motions for reconsideration. CP 835-48; CP 906-17; CP 918-29; CP 849-98; CP 899-902; CP 903-05.¹⁹ The trial court ordered

¹⁹ Lahrichis did not have sufficient time to prepare three reconsideration motions all due the same day, and because Lahrichis had religious obligations. CP 846, lines 17-20.

Respondents to file a response. CP 934-61. Lahrichis filed a reply, which showed Respondents' misstatements. CP 966-65, CP 991-95. The trial court denied reconsideration of its three orders. CP 835-905, CP 906-17; CP 918-29; CP 1056-61.

Lahrichis timely filed their notice of appeal and the clerk's papers. Respondents opposed Lahrichis' motion to seal/redact mostly medical information from the clerk's papers and Lahrichis' reply showed Respondents' many misrepresentations. Appellants submitted a narrative report of proceedings. At the July 1, 2011 hearing for Lahrichis' motion to seal/redact medical information from the clerk papers, Dr. Lahrichi was very ill. The commissioner declined to seal/redact portions of the clerk papers. See *infra* section IV(H).

IV. ARGUMENT

A. Standard of review for summary judgment

The appellate court reviews summary judgment *de novo* and engages in the same inquiry as the trial court. *Benjamin v. Washington State Bar Ass'n*, 138 Wn.2d 506, 515, 980 P.2d 742 (1999). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); CR 56(c). All facts submitted and all reasonable inferences from them are to

be considered in the light most favorable to the nonmoving party. *Clements*, 121 Wn.2d at 249; *Ellis v. City of Seattle*, 142 Wash.2d 450, 13 P.3d 1065, 1069-70 (2000). Even if the facts are undisputed, if reasonable minds could draw different conclusions, summary judgment is improper. *Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wn.2d 282, 295, 745 P.2d 1 (1987).

The moving party has the burden of demonstrating that there are no genuine issues of material fact, regardless of who bears the burden of proof on a particular issue at trial. *Hudesman v. Foley*, 73 Wn.2d 880, 441 P.2d 532 (1968).

Because Appellants are pro se, this Court must consider all their contentions in their motions and pleadings, which are based on personal knowledge and present facts that would be admissible in evidence and which were attested under penalty of perjury to their truth.²⁰ *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004).

In civil rights cases where the plaintiff appears pro se, the court must construe the pleadings liberally and must afford plaintiff the benefit of any doubt. *Bretz v. Kelman*, 773 F.2d 1026, 1027 n. 1 (9th Cir. 1985)

²⁰Verified motions and pleadings are admissible to oppose summary judgment. *McElyea v. Babbitt*, 833 F.2d 196, 197 (9th Cir. 1987); *Johnson v. Meltzer*, 134 F.3d 1393, 1399-1400 (9th Cir. 1998). Pleadings are "verified" if signed under perjury that the contents are true and correct. *Schroeder v. McDonald*, 55 F.3d 454, 460 n.10 (9th Cir. 1995).

(en banc).

In a motion for reconsideration following a nonjury trial, new issues or theories may be raised and preserved for appeal if they are based on the evidence. See, e.g., *Reitz v. Knight*, 62 Wn. App. 575, 581 n.4, 814 P.2d 1212 (1991).

B. The Court abused its discretion when it did not accord Lahrichis time to conduct discovery and offer confidential evidence to show issues of material facts before it ruled on summary judgment

CR 56(f) should be applied with a spirit of liberality. 10B Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE Civil 3d §2740 (1998 & Supp. 2001).

“The primary consideration for a continuance should be justice.”

Coggle v. Snow, 56 Wn. App. 499, 508, 784 P.2d 554 (1990).

When good cause for continuance is evident or is provided, the trial court has the duty to accord parties opportunity to make their record complete before ruling on summary judgment. A failure to accord the nonmoving party time a reasonable opportunity to show an issue of material fact constitutes an abuse of discretion.

Cofer v. Pierce County, 8 Wn. App. 258, 263-64, 505 P.2d 476 (1973).

CR 56(f) does not expressly require a motion for continuance. The trial court overlooked the prejudice to Lahrichis by not affording them time to conduct discovery and to offer critical confidential evidence and facts to oppose summary judgment and demonstrate issues of material facts. The

parties herein are unequally situated, since Lahrichis' confidential information is at issue. Lahrichis, who include minor children, are continuing to suffer substantial harm due to the prior improper disclosures by Frank. Lahrichis demonstrated a legitimate and substantial need for a protective order and showed due diligence to stipulate with Respondents on the PSPO. However, Respondents thwarted Lahrichis' efforts and did not even acknowledge that they would abide by the federal protective orders. CP 387-89 (Section 3); CP 426-27 (¶¶ 10-11). Respondents disregarded Lahrichis' requests and insisted to disseminate Lahrichis' confidential information and harm Lahrichis. *Id.*

Lahrichis could not provide confidential evidence, e.g., documents sealed in federal court without assurances that it would be protected. Additionally, Respondents own the evidence, including Lahrichis' confidential information, client-attorney information, and work product of which public disclosure will harm Lahrichis. Lahrichis also informed the trial court that they needed to depose Frank and other witnesses and had provided evidence that Frank's credibility is at issue. See also CP 411-12.

The trial court held conflicting positions, which is an abuse of discretion. *Chang v. U.S.*, 327 F.3d 911, 925 (9th Cir. 2003). The trial court ruled that Lahrichis are entitled to extra time to conduct discovery and granted continuance, yet ruled on summary judgment without

according Lahrichis opportunity to conduct their discovery and amend their complaint.

CR 56(f) “protects a party opposing a summary judgment motion who for valid reasons cannot by affidavit—or presumably by any other means authorized under Rule 56(e)—present ‘facts essential to justify his opposition’ to the motion.”

Bernal v. American Honda Motor Co., 87 Wn.2d 406, 416, 553 P.2d 107 (1976); See also CP 381-382.

C. Summary judgment is improper because Lahrichis were denied enlargement of time to prepare their summary judgment response despite demonstrating substantial need and good cause for enlargement

The “principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts.” *Schiavone v. Fortune*, 106 S. Ct. 2379, 477 U.S. 21, 27 (1986).

Lahrichis demonstrated good cause and substantial need for enlargement of time to submit their SJ Response. Respondents abruptly filed for summary judgment, while Lahrichis were attempting to stipulate with them on the PSPO and immediately after they learned that Lahrichis were facing a difficult situation with schedules and obligations. Respondents’ SJ motion was complex requiring time for a response. Respondents also set the due date for the response to overlap with Lahrichis’ other schedules and deadlines, which aggravated Lahrichis’

already difficult situation. The deliberate filing of Lahrichis' confidential information unsealed/unredacted by Respondents escalated the prejudice. Respondents knew the harm they were causing Lahrichis. CP 137 (¶ 16); CP 642 (¶ 1). Respondents' unwillingness to correct their unsealed filings and to refrain from disseminating the confidential information oppressed Lahrichis and placed them in a Hobson's choice situation. Lahrichis had to expeditiously protect themselves from harm and respond to summary judgment. Respondents' fierce opposition to Lahrichis' attempts to obtain enlargement shows that Respondents sought to prejudice Lahrichis from having a full opportunity to respond to summary judgment. CP 365-74. Within three weeks, from when Respondents filed their SJ motion to the due date for the SJ response, Lahrichis had to file 15 pleadings in this case due to such opposition. CP 546-47. Lahrichis were deprived from submitting their reply to Respondents' opposition for enlargement, which would have corrected Respondents' misstatements. Thus, Lahrichis indisputably had insufficient time to prepare their SJ Response and were prejudiced.

There was no evidence that Lahrichis sought enlargement to gain tactical advantage, were acting in bad faith, or because they were dilatory. The enlargement would not have prejudiced Respondents. Lahrichis were denied even few days extension, which they had requested as a last

resort.²¹ CP 383, lines 15-17. Lahrichis' sole option was to file their incomplete draft to meet the deadline. CP 419, line 20 through CP 420, line 2. Therefore, Lahrichis were deprived from being fully heard and summary judgment is improper. The Supreme Court "announced that the spirit and inclination of the rules favored decisions on the merits, and rejected an approach that pleading is a game of skill in which one misstep may be decisive" and "decisions on the merits are not to be avoided on the basis of 'mere technicalities.'" *Schiavone*, 477 U.S. at 27 (internal citations omitted).

The trial court overlooked that Dr. Lahrichi was served two days late with the SJ motion. Dr. Lahrichi did not receive the motion by email on the day it was filed as agreed with Respondents for service, but two days later via postal service. CP 852 (¶ 14). To date, Dr. Lahrichi does not receive Respondents' filings by email. *Id.* Dr. Lahrichi raised this issue consistently and unsuccessfully with Respondents. CP 999 (¶ 2).

1. Lahrichis were prejudiced by the trial court's denial to consider their declarations and exhibits

The trial court's denial to consider Lahrichis' declarations and exhibits supporting their SJ response compounded the prejudice on Lahrichis. Lahrichis were overburdened by the workload and were not

²¹ Dr. Lahrichi informed the Court that he received Respondents' SJ motion late.

afforded sufficient time to prepare their SJ Response. CP 546-47. Lahrichis overstretched themselves to meet the deadline and mitigate the detrimental situation in which Respondents placed them. Lahrichis filed their declarations and exhibits, although incomplete, as soon as they could. Dr. Lahrichi filed his declaration with the exhibits at 1:30 pm the next day and Ms. Csipke filed hers the day after. The declarations were filed ten and nine days, respectively, before the oral hearing with the motion to late file. At the oral hearing, the trial court witnessed firsthand that Dr. Lahrichi was very ill. Lahrichis demonstrated substantial need for additional time and met the criteria for excusable neglect. CR 6(b). There was no evidence of bad faith or that Lahrichis were dilatory.

For summary judgment, unlike a trial, there is no prejudice to any findings if additional facts are considered. “[A] party may submit additional evidence after a decision on summary judgment has been rendered, but before a formal order has been entered.” *Meridian Minerals Co. v. King Cy.*, 61 Wash. App. 195, 202-03, 810 P.2d 31, review denied, 117 Wash. 2d 1017, 818 P.2d 1099 (1991); *Applied Industrial Materials Corp. v. Melton*, 74 Wash. App. 73, 872 P.2d 87 (1994). “Until a formal order granting or denying the motion for summary judgment is entered, a party may file affidavits to assist the court in determining the existence of an issue of material fact.” *Cofer*, 8 Wn. App. at 261.

The general policy of the legal system favors resolution of controversies on the merits. Rules of practice and procedure are designed to avoid elevating form over substance, devised to promote the ends of justice, foster resolutions of cases on their merits and not on procedural technicalities, to eliminate (*or at the very least minimize*) technical miscarriages of justice inherent in procedural concepts, and are to be construed in such a manner as to do substantial justice.²²

D. The trial court abused its discretion in denying to accept at the oral hearing Exhibits and affidavits that were not previously obtainable by Lahrichis

The trial court's denial at the oral hearing to accept Gunther's affidavit and other exhibits from Lahrichis prejudiced Lahrichis. RP 10 (¶ 3). Lahrichis were diligent in contacting Gunther to get her approval to submit the exhibits and obtain her affidavit. Gunther had court commitments. Lahrichis made those documents available to the trial court as soon as they could at the hearing. Those documents were decisive to refute Respondents' misstatements and erroneous factual allegations. Evidence can be submitted before a formal order is issued. *Meridian Minerals*, 61 Wash. App. at 202-03; *Applied Industrial Materials Corp.*,

²² *First Federal Sav. & Loan Ass'n v. Ekanger*, 93 Wn.2d 777, 781, 613 P.2d 129 (1980); *Griffith v. City of Bellevue*, 130 Wn.2d 189, 192, 922 P.2d 83 (1996); *Foman v. Davis*, 83 S. Ct. 227, 371 U.S. 178, 181 (1962); *Schiavone*, 477 U.S. at 27; *Bankers Trust Co. v. Mallis*, 98 S. Ct. 1117, 435 U.S. 381, 387 (1978).

74 Wash. App. 73. In addition, Lahrichis should have been permitted to make the record complete. *Cofer*, 8 Wn. App. at 263-64.

E. The trial court erred in considering and ruling only on the malpractice claim

The trial court misapplied the standard for summary judgment. The trial court erroneously ruled on disputed material facts and viewed disputed facts in light most favorable to Respondents instead of Lahrichis, the non-moving party. *Clements*, 121 Wn.2d at 249; *Ellis*, 13 P.3d at 1069-70. The trial court readily accepted Respondents' allegations and conclusory statements, although Lahrichis provided evidence that Respondents misrepresented and misstated the facts and that Respondents lacked credibility. See *infra*.

Lahrichis have separate claims against Respondents.²³ CP 1 (§ 1). Yet, the trial court erred in not considering those claims except for malpractice. Contrary to the trial court, Lahrichis made a showing of *prima facie* for their claims and of genuine issues of disputed material facts. See *infra*.

1. Lahrichis presented sufficient evidence that Frank committed malpractice and negligence and demonstrated that genuine issues of disputed material facts exist

²³ breach of contracts, negligence, fraud, bad faith, violation of privacy, and dissemination of confidential information, libel and defamation, infliction of emotional distress, and exploitation, breach of trust, and malpractice.

Despite being prejudiced by their inability to present confidential evidence to complete the record as discussed supra, Lahrichis demonstrated the prongs for malpractice and negligence and showed that genuine issues of material fact exist. Frank acknowledged a duty of care to Dr. Lahrichi. CP 127, lines 16-18. Frank did not only breach that duty by mishandling Dr. Lahrichi's case and failing to competently prosecute his claims, but did not respond properly to summary judgment and committed other wrongdoings that injured Lahrichis. See infra.

Frank now masks her failures, negligence, and incompetence by conveniently alleging that Dr. Lahrichi's case was not meritorious, which is disputed by Dr. Lahrichi. CP 464 (¶ 3). Respondents were keen to take Dr. Lahrichi's case on contingency after they thoroughly evaluated his claims.

2. Frank failed to file claims to which Lahrichis were entitled

The facts support malpractice and negligence against Respondents. Frank was entrusted to file and prosecute the claims, to which Lahrichis were entitled, including Dr. Lahrichi's retaliation claim. Lahrichi was terminated after he reported to Microvision management Mino's and employees' fraud on government contracts and Mino's misappropriation

of investors' money.²⁴ Dr. Lahrichi had also complained to Todd McIntyre, Microvision's vice president and his previous boss, human resources, and Mino about Mino's discrimination and mistreatment. CP 4 (¶¶ 17, 20). Frank exploited Dr. Lahrichi's inexperience and misled him that she had filed his retaliation claim and was prosecuting it. CP 837, lines 17-19. Frank concealed evidence supporting that claim, which she was required to produce to FedOpnts and the Court, until summary judgment was pending decision. CP 15 (¶ 90). Frank admitted that she produced documents late, but omitted that those documents were supporting the retaliation claim. CP 84 (¶ 90). In the Seal Remand, Dr. Lahrichi uncovered evidence that Frank avoided contacting witnesses related to his retaliation claim. CP 15 (¶ 90). These facts are sufficient to create genuine issues of material fact and require discovery.

Frank's negligence and incompetence is also apparent for failing to file a discrimination claim against Microvision, the employer of Mino and Lahrichi, which should have been a trivial decision for an expert. CP 18 (¶ 107). Frank had overwhelming facts and evidence to support that claim.

Frank failed to include other Appellants in the discrimination

²⁴ Frank had evidence from Microvision and human resources of Lahrichi's complaints. Microvision VP, McIntyre, testified that Lahrichi feared to be retaliated against. Frank also had testimony of the assistant controller, Ms. Sheila Hadersberger, that Dr. Lahrichi's boss was misusing company funds and she was terminated after she reported him to management. CP 12 (¶ 73).

lawsuit, who were injured by FedOpnts. CP 18 (¶ 107).

3. Frank failed to competently prosecute the claims that she filed on behalf of Dr. Lahrichi

The facts show that Frank mishandled discovery and failed in her duties to properly prosecute even the claims that she had filed. Frank was unprepared for and mishandled depositions of witnesses. CP 10 (¶¶ 57-58). The Seal Remand showed that Frank often mixed the facts of the case as evidenced in the pleadings. CP 12 (¶ 71).

Frank failed to request decisive discovery and was negligent to follow up with FedOpnts when they did not produce requested discovery or filed to compel such discovery. CP 10 (¶ 59); CP 12 (¶ 69). Such evidence was necessary to prevail in summary judgment and trial.

Frank did not respond to FedOpnts' letters, which regularly included false testimony, misstatements, and fabrications and were used by FedOpnts to present Dr. Lahrichi to the District Court in false light. CP 11 (¶ 67).

Frank turned a blind eye to FedOpnts' attorneys' misconduct for her own interests, including for their false testimony to the Court, for violating ethics and court rules, tampering with evidence and witnesses, and for violating mediation rules, and fabricating evidence. CP 9-15 (¶¶ 47-54, 56-57, 62, 64-68, 70, 72, 76, 79-80, 85, 88-89). Frank did not

object to FedOpnts for violating deposition rules as set by the District Court. Frank did not stop FedOpnts from abusing and humiliating Dr. Lahrichi during his deposition and degrading his religious beliefs despite Dr. Lahrichi being visibly very ill. Frank did not stop FedOpnts when they required Dr. Lahrichi to make humiliating demonstrations of his illness before FedOpnts and others. CP 9 (¶¶ 47-49); CP 467 (¶ 14). Frank did not raise important objections during depositions. Id. Frank failed to stop FedOpnts' counsel for repeatedly helping witnesses in depositions. CP 13 (¶ 76).

Frank did not object to FedOpnts for violating the mediation confidentiality agreement and submitting Dr. Lahrichi's mediation brief as evidence and even filing it unsealed, although it contained also confidential information protected by protective orders. CP 8 (¶ 46); CP 10-11, 14 (¶ 54, 65, 81).

4. Frank failed to properly respond to FedOpnts' summary judgment's motion

For summary judgment, Frank did not need to prove the claims against FedOpnts, but merely show genuine issues of disputed material fact. Frank failed to do so.

Lahrichi disputes that Frank had expertise in racial and religious discrimination. Frank's flagrant errors in her response to FedOpnts

summary judgment affirm her negligence and incompetence. In her summary judgment response,²⁵ The Seal Remand showed that Frank misstated material facts related to all Dr. Lahrichi's claims that were crucial. Frank failed to raise key issues, which would have been trivial for an expert in discrimination, e.g., Frank did not argue that Mino refused to pay Dr. Lahrichi several overdue bonuses and told Lahrichi that he was paid too much, while Mino gave all other employees their bonuses timely. Frank had also testimony from employees that Mino had problems with Lahrichi's compensation.

Frank did not cite many of the racial comments that Mino made to Dr. Lahrichi that would have demonstrated discriminatory intent.

Frank did not include key evidence and testimony, which she had, to contradict FedOpnts' allegations and fabrications and show disputed facts. CP 17 (¶106).

Frank did not properly rebut FedOpnts' claims with caselaw. For example, Frank did not cite caselaw, which is trivial for experts in discrimination, to show that Dr. Lahrichi was not required to provide comparator evidence to establish a prima facie case for discrimination when such evidence is unobtainable. FedOpnts required Dr. Lahrichi to

²⁵ FedOpnts filed two summary judgment motions. Lumera and Mino filed a summary judgment motion separately from Microvision.

show that a similarly situated employee was treated more preferentially, although such employee did not exist at Lumera. Lahrichi and his boss were the only managers at Lumera.

Frank did not object to FedOpnts when they raised new arguments in their reply for summary judgment. Frank made errors in citing references in support of her assertions.

5. Frank's violations of confidentiality contracts and protective orders support negligence, malpractice, violation of privacy, defamation, and breach of contract

In addition to the September 2004 contingency contract (CP 464 (¶ 3; CP 849 (¶ 2))), Dr. Lahrichi and Ms. Csipke entered into multiple confidentiality contracts with Frank and FedOpnts to protect Lahrichis' confidential information from improper disclosure, including (1) the December 2004 contract, which the District Court entered as the SPO (CP 433-442); (2) the February 2005 mediation confidentiality agreement (CP 444-449); (3) several other written²⁶ and verbal contracts from September 2004 through February 2006 (CP 849-851 (¶¶ 3-7)). The confidentiality contracts were supplemented by four protective orders, three of them heightened. The contracts and protective orders were unambiguous and identified the confidential information to be protected and outlined easy

²⁶ Some of those contracts include confidential information, which Lahrichi would provide after getting a protective order.

steps to protect it. CP 484-86 (¶¶ 2-8). Counsel were required to file documents containing the information in sealed envelopes. Id. During the time Frank represented Dr. Lahrichi, when counsel needed to file documents under seal, they were not required to file a separate motion to seal. Counsel only needed to designate the documents with the confidential information “confidential under seal” and place them into sealed envelopes as outlined in the protective orders. Id.

Frank followed Dr. Lahrichi’s filings in the Ninth Circuit and thus knew the harm that would result to Lahrichis if the confidential information were to be improperly disclosed. CP 137 (¶ 16); CP 642 (¶ 1); CP 877. The District Court also reminded Frank and FedOpnts of their duties to comply with the protective orders.

Counsel are reminded that attorneys are officers of the Court who are bound by the Rules of Professional Conduct, by the Federal Rules of Civil Procedure, including discovery Rules 26(g) and 37(c), and by the various protective orders in place regarding the sensitive information produced or ordered produced in this litigation.

CP 160, lines 5-8. In spite of all this and unbeknownst to Dr. Lahrichi, Frank chose to repeatedly violate the confidentiality contracts, the protective orders, court rules, privacy laws. Frank improperly filed Lahrichis’ confidential information unsealed/unredacted and permitted FedOpnts to do the same, all the while, Frank was reassuring Dr. Lahrichi

that counsel were soundly protecting it from public disclosure. CP 17 (¶ 103). In contrast, Frank diligently complied with the confidentiality contracts, protective orders, and court rules regarding confidentiality, to protect FedOpnts' confidential information and always filed it properly sealed. CP 16 (¶ 97). This further shows Frank's negligence.

The trial court erroneously accepted Respondents claim that they did not violate protective orders, confidentiality agreements and improperly filed Lahrichis' confidential unsealed, despite indisputable evidence and expert testimony to the contrary. The trial court did not review the District Court documents, which were improperly filed unsealed and were ordered sealed/redacted, against the provisions of the protective orders and the confidentiality contracts and the confidential records. However, Gunther, an experienced attorney, who spearheaded the Seal Remand, studied the record, and was able to correct violations of Frank and FedOpnts in over 70 documents ordered sealed/redacted by the District Court. The District Court also blamed Frank for willfully filing the confidential information unsealed and for not objecting to FedOpnts' improper disclosures. CP 259, lines 6-8, 15-17.

Lahrichis also provided evidence to the trial court in the form of a letter from FedOpnts' counsel, a seasoned attorney, demonstrating that Frank was violating the stipulated protective order by filing Dr. Lahrichi's

personnel records unsealed. CP 875. Frank concealed that letter from Dr. Lahrichi. The Seal Remand demonstrated that Frank never remedied that violation or subsequent violations. Instead, Frank and FedOpnts escalated their unauthorized disclosures. Lahrichis will provide more evidence once they are permitted to conduct discovery and granted a protective order.

6. Frank's demonstrably false testimony to the trial court and lack of credibility create a genuine issue of material facts

A genuine issue as to the credibility of the movant's evidence requires denial of a motion for summary judgment. *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963); *Morinaga v. Vue*, 85 Wn.App. 822, 935 P.2d 637, review denied, 133 Wn.2d 1012 (1997); *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, 788 P.2d 1096 (1990).

When, at the hearing on a motion for summary judgment, there is contradictory evidence, or the movant's evidence is impeached, an issue of credibility is present, provided the contradicting or impeaching evidence is not too incredible to be believed by reasonable minds. The court should not at such hearing resolve a genuine issue of credibility, and if such an issue is present the motion should be denied.

6 Moore's Fed. Prac. (2d ed.) para. 56.15(4), pp. 2139, 2141; 3 Barron & Holtzoff, Fed. Prac. and Proc. § 1234, p. 134.

The trial court overlooked evidence that Frank sought to cover up her wrongdoings by untruthfully testifying about and omitting and misrepresenting material facts, which raises a genuine issue as to

Respondents' credibility to deny summary judgment.

For example, Frank and FedOpnts violated court rules, protective orders, and confidentiality contracts by filing unsealed documents that contain the full names of *all* Dr. Lahrichi's minor children and their confidential information. CP 468-69 (§ 18). Frank omitted all the important details about those unauthorized disclosures and only told the trial court that Dr. Lahrichi knew that his son's *first* name was mentioned in the pleadings. First, the issue is that Frank improperly filed those documents unsealed, and not whether Dr. Lahrichi knew that his son's name was in the pleadings. Dr. Lahrichi and Ms. Csipke did not know or suspect that counsel were filing such information unsealed. In those pleadings, which were to compel Dr. Lahrichi's son's medical records, counsel included the son's *full* name in the title and repeatedly throughout, personal information, and his detailed medical information copied from his medical records about his treatment, names of his doctors, etc. Neither Dr. Lahrichi nor Ms. Csipke nor the District Court authorized counsel to improperly file those pleadings unsealed and violate protective orders. To the contrary, Frank was assuring Lahrichi and Csipke that all that highly confidential information about their children was soundly protected from public disclosure (CP 466 (§ 9), CP 537 (§ 4)), as evidenced also by FedOpnts' counsel's testimony: "[t]he Stipulated Protective Order entered

in this case is sufficient to protect Plaintiff's son's privacy interest.”²⁷

See also “[t]he parties’ Stipulated Protective Order entered by the Court on December 22, 2004, is sufficient to protect Plaintiff’s privacy” and “[b]ecause Plaintiff’s privacy interest is adequately accommodated by the existing protective order . . .” CP 466 (¶ 10).

In the Seal Remand, the District Court ordered all those pleadings and related exhibits, declarations, sealed in their entirety. CP 303-04 (¶¶ A-B). Furthermore, in downplaying her violations Frank, an officer of the Court, falsely testified to the trial court that in 2005, “there was no court rule that prohibited disclosures of identifiers there was no court rule directing counsel to use initials in referring to persons under the age of 18,” CP 136-37 (¶ 15). Yet, on May 29, 2003, Judge Coughenour²⁸ signed a general order requiring minors to be identified only with initials, which is found in the Court’s website. CP 518-19. The mere fact that Frank made such false statement even without checking the District Court’s website for the rules shows negligence.

Frank untruthfully told the trial court that she had provided “copies of all pleadings that were filed, at or about the time of filing,” which Dr.

²⁷ FedOpnts’ motion compelling Lahrichi’s son’s medical records at 4, lines 17-18, entered October 11, 2006 in *Lahrichi v. Lumera et al.*, Case No. C04-02124-JCC (U.S. District Court Western District of Washington).

²⁸ Judge Coughenour presided over Dr. Lahrichi’s discrimination case.

Lahrichi disputes. Compare CP 470 (¶ 23) with CP 133 (¶7). The Seal Remand revealed that Frank removed communications with FedOpnts' counsel from the files. Frank's concealment of the letter from FedOpnts evidencing that Frank was violating the SPO and filing Dr. Lahrichi's personnel documents unsealed contradicts Frank. CP 468 (¶ 16); CP 875. Dr. Lahrichi only stumbled on that letter some time after the case was dismissed. Therefore, discovery and depositions are necessary to investigate these material facts.

The trial court accepted Frank's highly misleading testimony about Lahrichi's concerns about his medical information. Compare CP 466 (¶¶ 9-10) with CP 135 (¶ 12). The record in the District Court belies Frank. The unauthorized disclosures are not only limited to medical information. CP 468-72 (¶¶ 18-19, 24-27, 29); CP 538-39 (¶¶ 7, 9); CP 875. During the lawsuit, Dr. Lahrichi often voiced his concerns about protection of Lahrichi's confidential information, not only his medical information, to which Frank, FedOpnts, and the District Court attest. *Id.* Gunther scrutinized the record in the District Court. Moreover, the time and efforts that Dr. Lahrichi invested in the Seal Remand to correct the disclosures is sufficient to demonstrate his concerns. CP 470-71 (¶ 24).

Frank's testimony that Dr. Lahrichi did not object that pleadings contained his medical information is convenient and deceitful. Dr.

Lahrichi was unaware that Frank and FedOpnts were violating protective orders and filing those pleadings unsealed, Dr. Lahrichi would not have tolerated such violations. Furthermore Frank's unauthorized public disclosures and failure prohibit those of FedOpnts' are the issue.

Frank untruthfully testified that she and FedOpnts did not give assurances to Dr. Lahrichi that Lahrichis' confidential information would be protected. Dr. Lahrichi and Ms. Csipke dispute those claims, which are contradicted by the district court record, Frank's and FedOpnts' testimony, the protective orders, and communications between counsel.

Frank testified to the trial court that she did not know that Lahrichis' confidential information was filed unsealed, in spite of overwhelming evidence to the contrary. CP 16 (¶¶ 95, 96, 98); CP 85 (¶¶ 95, 96, 98). Frank contradicted herself when she testified that she had been following closely Dr. Lahrichi's discrimination lawsuit in the Ninth Circuit and read the pleadings, which document the unauthorized public disclosures. FedOpnts' letter to Frank shows that Frank indisputably knew she was violating protective orders. CP 875.

Conflicting statements on a material fact by the same witness preclude granting summary judgment. *Tabak v. State*, 73 Wn. App. 691, 870 P.2d 1014 (1994).

Frank also provided misleading testimony that she did not have Dr.

Lahrichi's old records compelled before the compel order was issued. See section IV(H)(4).

When the entire case turns on credibility of witnesses, however, the court may, and probably should, deny summary judgment altogether. 10B Wright, Miller & Kane, Fed. Prac. & Proc. Civil 3 §2740 (1998) & Supp. 2001. "The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights" for jury trial in civil cases. *Adickes v. SH Kress & Co.*, 398 U.S. 144, 176 (1970).

Lahrichi's evidence that Frank gave false testimony about material facts should have precluded summary judgment. In *Berry v. Coleman Systems Co.*, 23 Wn. App. 622, 596 P.2d 1365, review denied, 92 Wn. 2d 1026 (1979), the grant of a new trial on "substantial justice" grounds was upheld when the Defendant was shown to have lied in answers to interrogatories. Also, the affidavits show disputed issues of material fact making summary judgment improper. *Sarnoff v. Ciaglia*, 165 F.2d 167, 168-69 (3rd Cir. 1947).

7. Lahrichi provided sufficient evidence that Frank committed fraud and acted in bad faith

Fraud is defined as "intentional deception resulting in injury to another" and bad faith as "breach of faith, willful failure to respond to plain, well-understood statutory or contractual obligation." Barron's Law

Dictionary 1996. The essential elements of fraud are (1) the representation of an existing fact (2) which is material and (3) false (4) by a person with knowledge of its falsity or ignorance of its truth and (5) with the intent that it be acted upon by a person who (6) reasonably (7) relies on the misrepresentation (8) in ignorance of its falsity (9) to his or her detriment. *Sigman v. Stevens-Norton, Inc.*, 70 Wn.2d 915, 920, 425 P.2d 891 (1967).

Frank misrepresented her expertise to Lahrichi. Frank had no intention to take Dr. Lahrichi's case to trial. Frank did not file Dr. Lahrichi's retaliation claim, which would have exposed corporate fraud and jeopardized her interests with the opposing lawfirm.

Frank's unauthorized disclosures were not inadvertent, but systematic and started immediately after the SPO was entered and continued even after the heightened protective orders were entered. While Frank was knowingly disseminating Lahrichis' confidential information to the public, she was falsely assuring Dr. Lahrichi—verbally and in writing—that they were protecting it. Frank concealed evidence from Dr. Lahrichi that would perhaps have alerted Dr. Lahrichi to Frank's violations. CP 875. Furthermore, Frank did not correct her unauthorized disclosures, but escalated them and allowed FedOpnts to do the same.

Frank exploited Dr. Lahrichi's and Ms. Csipke's ignorance of the court system and the law and provided them information, which they

realized in the Seal Remand was plain false. Frank also withheld information from Dr. Lahrichi.

Dr. Lahrichi contends that Frank withdrew after she realized that she failed to properly conduct discovery and was inadequately prepared for trial, because she never had the intention to go to trial.

a. The Superior Court Erred when it dismissed claims against MacDonald Hoague & Bayless

Frank is an employee and partner in MacDonald Hoague & Bayless. An employee is “a person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed.” The Black’s Law Dictionary (page 471, 5th Ed. 1979). An agency is “a fiduciary relationship created by express or implied contract or by law, in which one party (the *agent*) may act on behalf of the other party (the *principal*) and binds that other party by words or actions.” The Black’s Law Dictionary (p. 48, West Group, 7th Ed.)

The imposition of a duty as a matter of law is supported by the strong public policy protect individuals from negligent and malicious acts of others and to protect their constitutional rights. The Lawfirm had the power to control and the duty to stop Frank from committing wrongdoings

that injured Lahrichis “A special relationship between the defendant and the intentional tortfeasor may give rise to a duty to control the tortfeasor's conduct for the benefit of third persons.” See *Niece v. Elmview Group Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997). That duty exists “even where an employee is acting outside the scope of employment, the relationship between employer and employee gives rise to a limited duty, owed by an employer to foreseeable victims, to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others.” *Niece*, 131 Wn.2d at 48.

In *C.J.C. v. Corp. for the Catholic Bishop of Yakima*, 138 Wash.2d 699, 985 P.2d 262 (1999), the Washington Supreme Court adopted the New Hampshire Supreme Court's ruling in *Marquay v. Eno*, 139 N.H. 708, 719-21, 662 A.2d 272 (1995), which “did not reject the existence of a duty as a matter of law” and “recognized that a principal's negligent failure to control an agent is not necessarily limited to conduct performed within the scope of employment or during work hours, so long as there is a causal connection between the plaintiff's injury and the fact of the agency relationship.”

Therefore, the Lawfirm is liable because they had an agency and employer-employee relationships with Frank and also knew of and participated in Frank's acts and wrongdoings. The Lawfirm is signatory to

all the verbal and written contracts and agreements that Frank had with Dr. Lahrichi and Ms. Csipke. Moreover, other attorneys from the Lawfirm participated in the case. Another attorney responded to Microvision's summary judgment. The Lawfirm knew that Frank was not an expert in racial and religious discrimination when they evaluated Dr. Lahrichi's case and took it on contingency. The Lawfirm had the duty to assign a competent attorney to the case and to ensure the case is not mishandled. It is also unconceivable that Frank was not providing status reports to the Lawfirm. The Lawfirm knew of their duties to protect Lahrichis from harm. They were negligent to hire and supervise Frank. The Lawfirm had the duty to ensure that Frank does not breach her duties under the retainer contract and confidentiality contracts and to perform according to the standards of professional conduct. In addition, by representing Dr. Lahrichi, Frank was furthering the interests of the Lawfirm. When Frank filed to withdraw from the case, the Lawfirm opposed Dr. Lahrichi's request to assign another attorney to represent him. The Lawfirm knew the harm to Lahrichis if Frank breached her duties. Therefore, even if the Lawfirm denies the contract breaches, violations, and fraud, it is liable in the least for negligence to hire and supervise Frank.

F. The Superior Court erred when it declared that other Appellants are in privity with Dr. Lahrichi

The trial court erred when it declared that Lahrichis failed to demonstrate the existence of a duty to other Lahrichis other than Lahrichi.²⁹ CP 832, lines 21-22. First, the trial court overlooked that Lahrichis are not only claiming malpractice against Respondents. Frank had direct interactions and verbal agreements with Csipke to protect Lahrichis' privacy and to represent their interests. CP 537-38 (¶¶ 4-6). Frank gave assurances to Csipke, a legal guardian of the minor children, that she would do so. *Id.*

Dr. Lahrichi's confidentiality agreement and mediation agreement covers all other Appellants. Frank was also bound by privacy laws. The Stipulated Protective Order covered all Lahrichis.

Even under Lahrichis' malpractice claim, Frank had duty to all Lahrichis, because the six factors under *Trask v. Butler*, 123 Wash. 2d 835, 872 P.2d 1080 (1994) are met. Frank convinced Csipke that it would protect Lahrichis' privacy if Csipke provided certain confidential information about her family. Csipke was a witness for Frank and Frank guaranteed her protection. Any transaction with Dr. Lahrichi directly benefited other Lahrichis. Frank knew the harm that the unsealed filings would cause to all Lahrichis. Frank's misconduct and her improper

²⁹ This Court did not explain how it reached that decision.

disclosures injured Plaintiffs. Frank also committed fraud against Ms. Csipke. Frank gave false information to Ms. Csipke. Other Appellants has no recourse against Frank for her injuries. Therefore, holding Frank liable for fraud, negligence, and misconduct will prevent harm to others and will benefit the profession by promoting ethical conduct.

G. The Superior Court erred in finding that Appellants' claims expired

The trial court erroneously declared "Plaintiffs knew or should have known of the facts giving rise to his claim more than three years before the filing of this action on April 27, 2009. First, the trial court ignored that Lahrichis' breach of contract claims are governed by a *six-year* statute of limitations. Lahrichis' other claims, including malpractice, with statutes of limitations of three years and shorter are applicable since the facts of the case, the nature of the claims, and the fact that Lahrichis lacked the means and expertise to ascertain the wrong warrant application of the discovery rule.

[i]n determining whether to apply the discovery rule, the possibility of stale claims must be balanced against the unfairness of precluding justified causes of action. That balancing test has dictated the application of the rule where the plaintiff lacks the means or ability to ascertain that a wrong has been committed. Thus, the rule has been applied, for example, to cases involving professional services and products liability. *Architectonics Construction Management, Inc. v. Khorram*, 111 Wash.App. 725, 45 P.3d 1142 (2002)

At the time Dr. Lahrichi was untrained in law and could not know that Frank was mishandling his case and committing wrongdoings and fraud. Additionally, Lahrichis had no reason to suspect Frank. Lahrichis fully trusted and relied on her to protect his interests as any layman or client would. CP 464-65 (¶ 5); CP 537-38 (¶ 4). Lahrichi coincidentally discovered that some of Lahrichis' confidential information was publicly accessible on April 28, 2010. Gunther's testimony corroborates Lahrichi's testimony. CP 900 (¶5). Even after this initial discovery, Lahrichis still believed that Frank did not commit wrongdoings, including mishandling his case and fraud. At the time, Lahrichis also did not understand Frank's duties and obligations to them. Therefore, Lahrichis could not have known Frank's failures, wrongdoings, and their injuries. Summary judgment is not as well suited to issues of fact such as intent, knowledge, good faith, and negligence. *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605 (1960). Dr. Lahrichi hired Gunther to assist him, because he was unqualified in law. Dr. Lahrichi only started to learn law, court rules, and the court system out of necessity when he began to assist Gunther in the Seal Remand and in his appeal. Dr. Lahrichi is continuing to learn more about court rules and the law. Even after Gunther began to represent Dr. Lahrichi, she immediately suffered the accident, which prevented her from

studying the record that is large and spanned over 2,300 pages at the time, and delayed discovery of Frank's failures and wrongdoings. FedOpnts also hampered Gunther's efforts to investigate the record. After her recovery, Gunther needed time to study the record. Therefore, it is only in the Seal Remand, which started in April 2007, that Dr. Lahrichi had the ability to discover Frank's failures to prosecute his claims, her incompetence, her duties to Lahrichis, her negligence, and her wrongdoings.

The facts regarding the unauthorized disclosures also support Lahrichis. Frank and FedOpnts improper disclosures violated not only the protective orders, privacy laws, and court rules, but also the December 2004 and February 2005 mediation confidentiality contracts and other written agreements, which are governed by a six-year statute of limitations. CP 483-92; CP 496-501. Frank also violated multiple verbal confidentiality contracts that she had with Lahrichis. The fact that Dr. Lahrichi repeatedly and diligently requested Frank to protect Lahrichis' confidential information, requests that were acknowledged by Frank, FedOpnts, and the District Court, is sufficient to demonstrate that Lahrichis could not have known of the violations and the discovery rule is applicable. CP 464-65 (¶ 5); CP 146. lines 9-12; see also supra. Lahrichis would not have tolerated such violations and wrongdoings. CP 470-71 (¶ 24); CP 538-38 (¶ 8).

Frank also concealed her violations from Dr. Lahrichi and often gave Dr. Lahrichi and Ms. Csipke information, which they came to discover when assisting Gunther, was utterly false. “Estoppel will preclude a defendant from asserting the statute of limitation when his actions have fraudulently or inequitably invited a plaintiff to delay commencing suit until the applicable statute of limitation has expired.” *Del Guzzi Construction Co. v. Global Northwest Ltd. Inc.*, 105 Wash. 2d 878, 885, 719 P.2d 120 (1986) (internal citation omitted).

The trial court’s finding also contradicts the District Court’s November 19, 2009 findings when it dismissed FedOpnts preliminary injunction action seeking to bar Lahrichis’ action against them in Superior Court.³⁰

The conduct that Lahrichi alleges was harmful arose *during the course of the prior litigation*. The pertinent facts were categorically unavailable to him when he filed his original lawsuit in federal court. Although Lahrichi mentioned many of these claims in the context of the motion to retax, the factual allegations were nascent and developing. More importantly, Lahrichi had no opportunity to engage in discovery concerning those allegations because the scope of discovery was limited to the facts underlying his discrimination lawsuit. There is simply not a sufficient factual nexus between the allegations against the attorneys and the issues presented to the Court in the limited remand from the Ninth Circuit, and it cannot be said that Lahrichi

³⁰ After Plaintiffs filed action against Federal Defendants with similar claims in this Court (Case No. 09-2-17151-3-SEA), Federal Defendants’ counsel filed a preliminary injunction lawsuit in the federal District Court.

had a full and fair opportunity to litigate his claims against the attorneys in the prior federal proceeding.

CP 894, lines 5-14. The motion to retax costs was filed on May 8, 2006.

H. Motion to Seal and Preliminary Injunction

Lahrichis are appealing the Superior Court's order denying their request to seal redact medical information from documents filed by Respondents in this lawsuit. The documents requested be sealed are CP 141-150 and CP 152-162 from Dr. Lahrichi's federal lawsuit, and those requested to be redacted are CP 101-130, CP 131-139, CP 164-171, CP 195-230, CP 316-28. Redacted versions of the documents are provided. CP 698-722; CP 723-32; CP 735-43; CP 744-79; CP 780-93.

1. This Court's Commissioner erred when he denied sealing or redacting portions of the clerk's papers and adopted Respondents' misrepresentations

Lahrichis requested the documents at issue for sealing/redacting, which are included in the clerk's papers, be redacted in this Court pending appeal. On July 1, 2011, Commissioner James Verellen denied Lahrichis' request. The order shows that the commissioner overlooked the grave harm that Lahrichis are suffering and accepted Respondents' misrepresentations and omissions about the confidential information at

issue, the Seal Remand,³¹ and the protective orders to oppose sealing/redaction. See Lahrichis' reply in the Superior Court (CP 617-623; CP 586-93) and Lahrichis' March 11, 2011 reply in this Court for detailed account.

2. The medical information at issue was copied from Lahrichis' medical records

Respondents continually obfuscate that the medical information at issue was copied and paraphrased from medical records and is protected by the federal protective orders and privacy laws. See March 11 Reply, p. 6 (Reply to Paragraph (c)). Respondents consistently misrepresent the medical information at issue as "general terms" or "general references" to trivialize their violations, which the Commissioner accepted. Lahrichis could not thus far provide a copy of the medical records to the Superior Court and this Court, since Respondents thwarted Lahrichis' efforts on the PSPO. Notwithstanding that, the quotes in the excerpts of FedOpnts' pleadings from the discrimination lawsuit (CP 634; CP 636), filed by Respondents, already show testimony by FedOpnts that the medical information and medical terms at issue are copied and paraphrased from Dr. Lahrichi's medical records. CP 634, lines 21-23; CP 636 (¶ 5). The

³¹ Respondents made numerous misleading and false statements about the Seal Remand to prejudice Lahrichis, although they did not participate in it and the documents are sealed.

medical information and terms refer to, discuss, and describe Lahrichis' condition. They are not "general references."

3. Respondents' misstate the provisions of the federal protective orders

Lahrichis showed that Respondents misstated the provisions of the federal protective orders in Superior Court (CP 620 (¶ 6)) and in this Court. March 11 Reply, pp. 9-12 (¶ 3). The Commissioner adopted Respondents' misrepresentations that the protective orders only require the actual medical records to be filed sealed (July 1, 2011), whereas the SPO and the HPOs also require information copied and paraphrased from medical records be filed only under seal. The SPO prohibits public disclosure of Lahrichis' medical, financial, and personnel records. CP 484, lines 8-18. It classifies medical and personnel records (*or portions thereof*) as per se confidential without a designation as such as well as *summaries and compilations thereof* and to be filed only under seal. CP 485, lines 7-8; CP 486, lines 8-14; CP 487-88 (¶ 14). The heightened protective orders require the same. The heightened protective order deems that the medical records and any document that incorporates, references, or discusses those records are per se highly confidential without a designation as such and must be filed under seal.

The documents produced pursuant to Orders 2 and 3 shall not be docketed for any reason unless they are designated

“HIGHLY CONFIDENTIAL-SEALED SUBJECT TO COURT ORDER” and also filed under seal. Any pleadings and court filings that incorporate, disclose, or refer to the documents produced pursuant to Orders 2 and 3 also shall be designated “HIGHLY CONFIDENTIAL-SEALED SUBJECT TO COURT ORDER” and filed under seal.

CP 149, lines 12-17. See also CP 161, lines 11-16.

Protective orders and privacy laws would be futile if they would classify the medical records per se highly confidential to be filed sealed and permit information quoted and paraphrased from those records be filed unsealed/unredacted.

4. Respondents misstate the facts about the discovery orders

Respondents misrepresented the facts about 11/1/05 and 1/4/06 discovery orders (CP 141-150; CP 152-162) from the discrimination lawsuit to this Court. March 11 Reply, pp. 9-12 (¶ 3). Lahrichi requested the sealing of those non-dispositive discovery orders since they contain extensive medical information Dr. Lahrichi. The medical information is specific, references and discusses Lahrichi’s conditions and medical history, and is quoted from Dr. Lahrichi’s medical records.

Respondents gave this Court and the Superior Court the false impression that they did not have the old records before FedOpnts filed to compel them in September 16, 2005, which resulted in the 11/1/05 discovery order, to insinuate that the medical information was not from

medical records. The Commissioner overlooked Lahrichis' evidence that Frank had all the records before FedOpnts filed to compel. Lahrichi had produced his medical records from 2000 to 2005 to Respondents and FedOpnts in early 2005 (CP 145:2-6). Lahrichi provided Frank a copy of a release form from his "old" 1989 records in August 2005.³² Lahrichi provided to this Court an email dated August 26, 2005 from Respondents to FedOpnts showing that Frank requested and received Dr. Lahrichi's old medical records from the medical facilities, before FedOpnts filed to compel them in mid September 2005. CP 877. The Commissioner misapprehended the purpose of the email. The records from 2000-2005, the release form, and the old medical records contain the medical information at issue.

Frank's and FedOpnts' submissions leading to the 11/1/05 discovery order quoted and paraphrased the medical information and terms from those medical records, a fact that is confirmed by FedOpnts' admission in their submission to compel. CP 634:21-23; CP 636, ¶5.³³ Those submissions were improperly filed unsealed and unredacted in violation of the SPO. The 11/1/05 discovery order restated the information

³² Lahrichi had also stumbled upon discharge papers from his old medical records.

³³ Lahrichis pointed out to Respondents in several communications their misstatements of the stipulated protective order as well as in his prior filings in Superior Court. Compare CP 336-337; CP 339-342; CP 621:6-19 with CP 567:23 through CP 568.

from those submissions and was improperly filed unsealed in violation of the SPO and HPO included therein. The 11/1/05 discovery order included the first heightened protective order for medical records supplemental to the SPO. CP 149, lines 12-17.

Thereafter, Frank and FedOpnts again filed submissions with that same medical information improperly unsealed in violation of the SPO and that heightened protective order. The 1/4/06 discovery order again restated information from those submissions, yet was also improperly filed unsealed in violation of the SPO and the previous HPO and the second supplemental heightened order that it also included. CP 161, lines 11-16.

Both those discovery orders create an unacceptable dichotomy, because they concurrently prohibit the public disclosure of the medical information they contain and remind counsel not to disclose that same information to the public. CP 160, lines 2-8.

In its guidelines for the Seal Remand, the District Court ordered that information, which “refers to Plaintiff’s medical condition,” must be sealed and had specifically ordered Dr. Lahrichi to present the redaction requests for those discovery orders. However, the District Court overlooked to review those documents in the Seal Remand. Those discovery orders were ordered sealed in the Ninth Circuit and are presently sealed in that Court. CP 507-08.

5. The confidential information at issue has been ordered sealed in many documents

In the Seal Remand, the District Court ordered the same and similar medical information redacted from numerous documents, including dispositive documents. CP 425-26 (¶¶ 7-8). However, due to its errors and oversights, the information was left unredacted in some documents, which Dr. Lahrichi sought to correct on appeal.³⁴ Id. The Ninth Circuit has ordered the parties' opening and response brief sealed as well as the excerpts of record, which include the documents at issue herein. The Ninth Circuit declined to correct the errors, when it ruled on Dr. Lahrichi's appeal on the merits. Dr. Lahrichi will be petitioning the Supreme Court and the District Court.

6. Lahrichi showed compelling reasons for sealing/redacting the confidential information

[T]he court may order the court files and records in the proceeding, or any part thereof, to be sealed or redacted if the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record. . . Sufficient privacy or safety concerns that may be weighed against the public interest include findings that: (A) The sealing or redaction is permitted by statute; or (B) The sealing or redaction

³⁴ The District Court redacted confidential information in one page, but left the same information unredacted on the same page. The District Court also ordered confidential information sealed/redacted from dispositive pleadings and missed to seal/redact the same information in some non-dispositive pleadings. The District Court missed to review documents with confidential information, which were presented for review.

further . . . a protective order entered under CR 26(c); or . . .
(F) Another identified compelling circumstance exists that requires the sealing or redaction.

GR 15(c)(2). Sealing/redaction must be harmonized with the Ishikawa factors. *Seattle Times Co. v. Ishikawa*, 97 Wash. 2d 30, 640 P.2d 716 (1982); *Dreiling v. Jain*, 151 Wash.2d 900, 93 P.3d 861 (2004). The moving party must make a showing of the need; parties present during closure must be given opportunity to object; the Court must weigh competing interests of the public and Defendants; the method to curtail access must be least restrictive; and the duration for sealing must be limited and its extension must be justified. *Id.* The Ishikawa factors also govern dispositive pleadings.

7. Dissemination of the information serves no purpose but to inflict more irreparable harm on Lahrichis

The Supreme Court held that the public's right to access court records is not absolute, particularly when the records or their contents could be misused or cause undue harm. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-598 (1978). Washington Courts follows the same standard. GR 15(c)(2). In particular, the Washington State Supreme Court has expressed the nature of facts protected by the right of privacy, which includes information about people's illnesses. *Cowles Publ'g Co. v. State Patrol*, 109 Wn.2d 712, 721, 748 P.2d 597 (1988) (quoting Restatement (Second) of Torts sec. 652D, at 386 (1977)). Dr. Lahrichi and his minor's

son's medical information is of no interest or significance to the public. The information was collateral to the Discrimination lawsuit, dealing only with damages. The District Court classified it per se highly confidential in the protective orders, and ordered it not to be disclosed to the public and only for discovery and not yet admissible for trial. CP 160, lines 2-8; CP 160, line 24 through CP 161, line 23. The discrimination lawsuit was dismissed without trial and the dismissal was so far affirmed on appeal. The information was only made accessible, because it was improperly file unsealed. Therefore, sealing/redacting will not prejudice the public. Instead, it would protect Lahrichis' constitutional rights, protect Lahrichis from harm, and renew trust of the public in the judicial system that litigants do not lose their privacy rights when they seek court intervention.

8. Respondents demonstrated no prejudice by the sealing/redaction of the medical information

Respondents' claims of prejudice are suspect and unsubstantiated. In the Discrimination lawsuit, Respondents adamantly advocated that the information at issue must be protected, which led to confidentiality contracts and multiple protective orders and frequently assured Dr. Lahrichi that the information is soundly protected. CP 466 (§ 9). Yet, in this lawsuit, Respondents thwarted Lahrichis' efforts to have a protective order and rushed to disseminate the information to trivialize their violations,

knowing they are harming Lahrichis. The facts show that Respondents are exploiting Lahrichis' need to protect their confidential information as a tool of oppression.

Respondents only claimed that they would be burdened to seal/redact such confidential information. Protecting Lahrichis against harm outweighs those administrative burdens that are exaggerated and unsubstantiated. Lahrichis provided the PSPO as a practical solution. The PSPO is aligned with the federal protective orders, privacy laws, and statutes, with which FedOpnts have been ordered to comply. The PSPO defines the information to be sealed, i.e., medical, personnel, financial, and mediation, which is straightforward to identify. Respondents are very familiar with Lahrichis' medical, personal, and financial records, and the mediation brief that Frank had drafted. Lahrichis also offered to assist Respondents. Moreover, Respondents are seasoned attorneys, who routinely deal with confidential information. CP 131 (¶ 2).

Sealing/redacting the medical information at issue will not affect Respondents' ability to advocate. Using confidential information for advocacy and filing it sealed/redacted are separate issues. The District Court and the Ninth Circuit already ordered that same medical information sealed/redacted in many documents.

In addition, the District Court ruled that:

All CONFIDENTIAL information shall be used solely for the purposes of this [Federal Discrimination] action, i.e., prosecuting or defending the claims asserted ***in this action, and shall not be used for any other purpose whatsoever.*** (emphasis added)

CP 177 (§13). See also CP 149, lines 10-12 and CP 161, lines 9-11.

9. The requests to seal/redact to seal/redact are minimal

Lahrichis' sealing/redaction requests in the Superior Court and this Court are specific and minimal and would not obstruct the understanding the judicial process. Lahrichis have provided redacted versions of the documents for this Court to see the redactions in context. CP 698-93. For example, Lahrichis are only requesting to redact few words related to medical information from the discrimination lawsuit complaint (CP 735-43), only few words of medical information from Respondents pleadings (CP 698-722; CP 723-32), and from the summary judgment order issued in the discrimination lawsuit. CP 745-79.

10. The Commissioner overlooked the harm to Lahrichis

The Commissioner's finding that the information has been publicly available for quite some time overlooks these special circumstances. Lahrichis have been hampered by procedural complexities in their efforts to correct the unauthorized disclosures. The Commissioner's finding compromises information sealed in court records, defeats the Seal Remand and Lahrichis' ongoing efforts to limit the dissemination of the

information to avert more harm. More importantly, the Commissioner overlooked that the dissemination of the information is causing devastating injuries, including but not limited to violation of their privacy, damage to their emotional, physical, and economic well-being, and career and reputation, loss of life enjoyment, great emotional distress, and discrimination.

Lahrichi's interests for sealing/redaction exceed compelling reasons. In *Indigo Real Estate Services v. Rousey*, 215 P.3d 977, 980 (Wash. 2009), Indigo was afforded confidentiality to protect against future threats to find housing and employment. The harm to Lahrichis is real and ongoing and damaging an entire family. First, the information is offensive and violates Lahrichis' privacy and should be sealed/redacted in accordance with the guidelines in *Cowles Publishing Co.*, 109 Wash. 2d at 721. The exposure of the information injures Lahrichis' wellbeing and hamper their prospects for healing. The psychological damage on Dr. Lahrichi and his entire family, including the minor children is horrendous. The Supreme Court has declared that such medical information is covered by absolute psychotherapist-patient privilege. *Jaffee v. Redmond*, 518 U.S. 1 (1996). See also *In re Sealed Cases*, 381 F.3d 1205, 1215-1218 (D.C.Cir. 2004); RCW 70.02.

Additionally, in *Indigo* this Court reiterated GR 31 that access to

court records is *not* absolute and shall be consistent with reasonable expectations of privacy as provided by article 1, section 7, of the Washington State Constitution “no person shall be disturbed in his private affairs, or his home invaded, without authority of law”. *Indigo*, 215 P.3d at 982. Consistent with this policy this Court identified by rule particular records and information to which access is restricted, which includes health records and financial records.

Burchfiel v. Boeing Corp., 205 P.3d 145 (Wash. 2009) demonstrate that the exposure of such medical information is adverse to employment. Accessibility to the confidential information at issue has been ruinous to Appellant Lahrichi’s career, employment prospects, and reputation. Lahrichi was a vice president, had a stellar career in science and technology, and was sought after by prestigious companies, whereas today his career and reputation are ruined. Lahrichi was unable to find employment for many years, of which Respondents are well aware. Employers routinely conduct searches on candidates as part of their screening, and a simple search will permit access to such information.³⁵

Respondents’ improper unsealed filings in the Superior Court create multiply venues for the public to access Lahrichis’ medical

³⁵ Respondents’ improper unsealed filings in the Superior Court create multiply venues for the public to access Lahrichis’ medical information in the Court’s database system.

information in the Court's database system.

11. Lahrichis' request for preliminary injunction is justified

Respondents thwarted Lahrichis' efforts to have a protective order. Despite the federal protective orders, Respondents filed Lahrichis' medical information unsealed/unredacted with complete disregard despite (1) Lahrichis' repeated requests not to do so, (2) knowing they are harming Lahrichis, (3) knowing of Lahrichis' ongoing and immense efforts to correct the prior unauthorized disclosures and limit dissemination of the information, and (4) ongoing discussions about a protective order. CP 428-30 (¶¶ 18-21); CP 462.

Respondents' counsel stated that he was "under no obligation" to seal Lahrichis' confidential information or protect it when Lahrichis' courtueously requested him to remedy his disclosures. CP 428-29 (¶ 18). Therefore, a preliminary injunction ordering Respondents to comply with the federal protective orders and privacy laws is warranted to avert more harm to Lahrichis. A party seeking preliminary injunctive relief must establish (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of either have or will result in actual and substantial injury. *Wash. Fed'n of State Employees v. State*, 99 Wn.2d 878, 888, 665 P.2d 1337 (1983). A clear

legal or equitable right exists when the moving party can show that it is likely to prevail on the merits. *Rabon v. City of Seattle*, 135 Wn.2d 278, 285, 957 P.2d 621 (1998). The movant is not required to establish with absolute certainty his likelihood of success; he only needs a "strong argument" in his favor. *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 423 (8th Cir. 1996). Respondents should not be permitted to use Lahrichis' need to protect their confidential information as a tool to oppress Lahrichis.

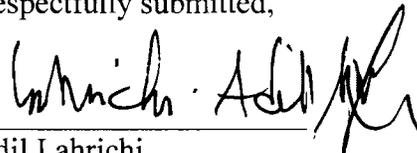
V. CONCLUSION

Lahrichis have been irreparably injured by Respondents. Respondents should not be granted relief for harming Appellants. What Respondents did to Lahrichis was gruesome, malicious, and unjust in all the possible variations ascribed to those terms, and perhaps is unprecedented. In this lawsuit, Lahrichi were prejudiced by Respondents, who created detrimental circumstances for Lahrichis to hamper their ability to respond to summary judgment. Lahrichis were denied their privileges to conduct discovery, to make their record complete, and from presenting confidential evidence to have their day in court. Respondents used Lahrichis' need to protect their confidential information as a tool to oppress Lahrichis. Respondents should not be permitted to do so. Respondents are continuing to disseminate Lahrichis' confidential information to rationalize their prior violations and are knowingly

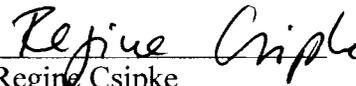
damaging an entire family in the process. The responsibility of this Court is to see that justice is done and that Lahrichis are not prejudiced and deprived from their constitutional right to plead their case to obtain at least some relief. The Supreme Court has consistently declared, "justice must satisfy the appearance of justice". *Levine v. United States*, 362 U.S. 610, 80 S.Ct. 1038 (1960), citing *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (1954). For all these reasons supra and because the factual allegations show that Lahrichis are entitled to relief, the dismissal was premature and Lahrichi respectfully request that this Court remand this case and grant them their requests to seal/redact their confidential information.

DATED this 15th day of August, 2011.

Respectfully submitted,



Adil Lahrichi
Appellant Pro Se and next friend to
minor children Appellants T.L.,
M.L., Y.L., A.L., and Y.L.
12875 NE 8th Street, #14
Bellevue, WA 98005
425-562-7220



Regine Csipke
Appellant Pro Se and next friend to
minor children Appellants T.L.,

M.L., Y.L., A.L., and Y.L.
12875 NE 8th Street, #14
Bellevue, WA 98005
425-562-7220

CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

On August 15, 2011, I caused a true and correct copy of the foregoing documents be (1) filed with the Court of Appeals, Division I, 600 University St., Seattle, WA 98101-1176 via U.S. Priority Mail; and (2) duly served as indicated below on the following parties' counsel:

Steven A. Rockey (WSBA# 14508)
Rockey Stratton, P.S.
521 Second Avenue West
Seattle, WA 98119-3927
Tel: 206-223-1688
Fax: 206-223-0946
Email: sarservice@erslaw.com
Email: dndijulio@erslaw.com

Attorney for Respondents
[via U.S. Mail, postage prepaid]

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: August 15, 2011 at Bellevue, Washington.



Regine Csipke