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No.: 67479-0

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

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

v.

MICHAEL EMERIC MOCKOVAK, Respondent/Defendant.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Defendant Michael Mockovak is a convicted felon, convicted not of just thinking about murdering his business associate, Dr. Joseph King, or wishing him ill, or even dead. Instead, Defendant took positive steps to retain an assassin to deprive Dr. King of his life, and to take from Dr. King's wife and children the love and support that they derive from their husband and father. Defendant took these terrible steps, he engaged in this heinous conduct, because he wanted to steal from Dr. King his interest in the business that the two surgeons had put together.

The effect of Defendant's murder plot on the King family has been devastating. The family has suffered severe emotional distress and has lived in fear that Defendant would consummate his assassination attempt. The King family has suffered terror, shock, and emotional distress that the victims of such a scheme would without any question feel at the time that the plot is revealed; the confrontation with mortality that it implies; and the terrible nightmare that each of them will live with for the remainder of their lives—the question of what would have happened if the person whose assistance Defendant sought in carrying out his scheme was not the loyal, law-abiding person that he was, but, instead, was a person like Defendant, a person willing to kill for mere money.

The Kings filed this lawsuit for their damages resulting from

Defendant's horrific plot, but the trial court dismissed the suit after Defendant filed a CR 12(b)(6) motion. Defendant based his motion on several different grounds, but none of the grounds has merit and the trial court erred in dismissing the case. Plaintiffs' physical presence during Defendant's tortious conduct was not required, and the trial court erred if it dismissed the case on that basis. The trial court also erred if it dismissed Plaintiffs' claim for solicitation of first-degree murder based on a finding that the criminal statutes under which Defendant was found guilty cannot serve as the basis for civil tort liability. Defendant's request for bail also cannot serve as the basis for dismissing the case. The trial court further erred if it dismissed the case based on a finding of no proximate causation. Finally, to the extent the trial court dismissed the negligent infliction of emotional distress claim based on insufficient objective symptoms of illness, that, too, was error.

This Court can and should consider all of these issues because the appeal from the trial court's July 13, 2012, order was unquestionably timely, and consideration of these issues is essential in reviewing that order. However, Plaintiffs' notice of appeal properly brings up the trial court's June 8, 2012, order for review as well. The Court should find that the entirety of Plaintiffs' notice of appeal was timely, and that the trial court erred in granting Defendant's motion to dismiss.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. Plaintiffs' notice of appeal was timely filed as to the June 8, 2012 order.
2. The trial court erred in granting Defendant's motion to dismiss.

Issues Pertaining to Assignments of Error

1. Does the timely appeal of the trial court's July 13 order bring up the June 8 order for review? (Assignment of Error No. 1)
2. Alternatively, should the Court extend the time to file a notice of appeal because extraordinary circumstances exist and such extension is necessary to prevent a gross miscarriage of justice? (Assignment of Error No. 1)
3. Does the timely appeal of the trial court's July 13 order encompass review of the trial court's grant of Defendant's motion to dismiss? (Assignment of Error 2)
4. Did the trial court err if it dismissed Plaintiffs' emotional distress claims based on a finding that Plaintiffs were not physically present when Defendant plotted the murder? (Assignment of Error No. 2)
5. Did the trial court err if it dismissed Plaintiffs' claim for solicitation of first-degree murder based on a finding that the criminal

statutes under which Defendant was found guilty cannot serve as the basis for civil tort liability? (Assignment of Error No. 2)

6. Did the trial court err if it dismissed the case based on Defendant's request for bail? (Assignment of Error No. 2)

7. Did the trial court err if it dismissed the case based on a finding that Defendant's criminal conduct did not proximately cause Plaintiffs' emotional distress? (Assignment of Error No. 2)

8. Did the trial court err if it dismissed Plaintiffs' claim for negligent infliction of emotional distress based on a finding that Plaintiffs did not allege objective symptoms of illness? (Assignment of Error No. 2)

III. STATEMENT OF THE CASE

A. Relevant Underlying Facts from the Complaint.

Dr. Joseph King and Defendant met as eye surgeons in California in 2000. CP 2 at ¶ 3.1. In 2002, Dr. King and Defendant founded the King & Mockovak Eye Center, Inc., P.S. ("KMEC"), and in 2005 they started Clearly Lasik, Inc. ("Clearly Lasik"). *Id.* at ¶ 3.2. As early as 2004, Dr. King and Defendant began having trouble with their business relationship because Defendant failed to participate equally in the business. CP 2-3 at ¶ 3.3. Their relationship further deteriorated after Defendant's divorce from his wife, Dr. King's sister-in-law, and after a former director of Clearly Lasik filed a wrongful termination suit. CP 3 at

¶ 3.4.

In June 2009, Dr. King and Defendant decided that they were no longer able to practice together and orally agreed to terminate their partnership. CP 3 at ¶ 3.6. In August 2009, they confirmed their agreement in writing and chose December 31, 2009 as the date of separation. *Id.* Because they could not agree on the terms of the separation, they scheduled an arbitration for December 2009. *Id.*

After deciding that he no longer wanted to share profits with Dr. King and because he was the sole beneficiary of a \$4 million dollar life insurance policy on his colleague's life, Defendant decided to have Dr. King killed. CP 3 at ¶ 3.7. Defendant approached a Clearly Lasik employee to be his liaison with what he thought were "Russian hit men." CP 4 at ¶ 3.9. In exchange for performing this service, Defendant promised the employee \$100,000 from the life insurance proceeds. *Id.* Defendant provided the employee liaison with a \$10,000 first installment for the Russian hit men, a photograph of Dr. King, and information that would help the hit men locate Dr. King while he was on vacation with his family in Australia. *Id.* at ¶ 3.10. His plan was for the hit men to kill Dr. King by drowning or shooting him. *Id.* at ¶ 3.8. Once Dr. King was dead, Defendant would pay the hit men another \$15,000. *Id.* While the King family was in Australia in November 2009, the employee liaison called

Defendant and informed him that the hired killers had located Dr. King and should “have something” in a couple of days. *Id.* at ¶ 3.11.

Defendant responded by saying: “Good, good.” *Id.* Defendant was arrested shortly thereafter. *Id.* at ¶ 3.12.

As a result of Defendant’s actions, every member of the King family has suffered severe emotional distress. CP 5-6 at ¶ 3.21.

Defendant, as a result of his long personal and family associations, was, and continues to be, familiar with intimate details of the King family’s lives. CP 4 at ¶ 3.14. Despite convictions for attempted murder and solicitation of murder the King family has continued to live in fear that he will reprise his efforts to procure Dr. King’s death. CP 4-6 at ¶¶ 3.14 and 3.22.

After the Complaint was filed, the case was stayed pending the outcome of the criminal trial. CP 9-10. On February 3, 2011, Defendant was convicted of one count each of Solicitation to Commit Murder in the First Degree, Attempted Murder in the First Degree, Conspiracy to Commit Theft in the First Degree, and Attempted Theft in the First Degree. CP 23-26. The case was thereafter reinstated. CP 86-87.

B. Defendant’s Motion to Dismiss.

Concurrently with the reinstatement, Defendant filed a motion to dismiss the case under CR 12(b)(6). *See* CP 72-85. The motion was

based on several grounds: that no implied private cause of action exists for violation of a criminal statute, that plaintiffs were not present when the conduct occurred, that the family's harm was impermissibly based on Defendant's request for bail, that there was no proximate causation, and that there was no evidence of objective symptoms of illness as required for a claim of negligent infliction of emotional distress.

Plaintiffs' opposition to the motion to dismiss countered the motion on its merits, but also noted that if the Plaintiffs "must replead to meet the minimal requirements of due process in this case, they are prepared to do so," and specifically requested that, if the trial court found that the claim for negligent infliction of emotional distress was insufficiently pled, then the trial court should grant leave to amend the complaint to add specific allegations regarding Plaintiffs' symptoms. *See* CP 89, 96-97.

C. The Trial Court's Orders.

On June 8, 2011, the trial court issued an order granting Defendant's motion to dismiss under CR 12(b)(6). CP 75-76. The trial court's order does not specify whether the dismissal is with or without prejudice, or with or without leave to amend. On June 20, Plaintiffs filed a motion for leave to amend their complaint to add several causes of

action. *See* CP 177-211. Plaintiffs filed this motion within ten days¹ of the trial court's June 8 order. *Id.*

On July 13, the trial court issued an Order re: Motion to Amend. CP 285-86.² This order reads, in part:

By Order dated June 8, 2011 this court granted Defendant's CR 12(b)(6) motion to dismiss Plaintiffs' entire case. In their opposition to Defendant's motion to dismiss, the Plaintiffs asked leave to amend their pleading of their claim of Negligent Infliction of Emotional Distress. This court did not specifically deny the motion to amend at the time it granted the motion to dismiss, but had considered the proposed amendment and did not grant the motion to amend because the proposed amendment would not have cured the defect on which the dismissal was granted. To the extent this court failed to address the motion to amend contained within the Plaintiffs' opposition to the Defendant's motion to dismiss, that motion is now DENIED.

Id. The order went on to note that the entire case had been dismissed on June 8, and it requested additional briefing from the parties as to whether the trial court had jurisdiction to grant Plaintiffs' motion to amend. *Id.*

Plaintiffs provided this additional briefing, but also filed a notice of appeal

¹ The motion to amend the complaint was filed on June 20, 2011. Ten days after June 8, 2011, fell on June 18, 2011, but given that June 18, 2011 was a Saturday the motion was timely filed on June 20, 2011. *See* CR 6(a) ("The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a legal holiday."); RAP 18.6(a) ("The last day of the period so computed is included unless it is a Saturday, Sunday, or legal holiday, in which case the period extends to the end of the next day that is not a Saturday, Sunday, or legal holiday.").

² This order was originally entered with the wrong cause number. The trial court later corrected the cause number and re-filed the order. CP 298-99.

of the June 8 and July 13 orders on July 29, 2011.

D. Proceedings Before This Court.

On September 12, 2011, after Plaintiffs filed their notice of appeal, they received a letter from the Court Administrator Richard D. Johnson. Appendix, Tab 1.³ In this letter, Mr. Johnson suggested that Plaintiffs' notice of appeal might not be timely, and directed Plaintiffs to file a motion to extend the time to file a notice of appeal. *Id.* Plaintiffs timely filed a motion responding to this letter. Appendix, Tab 2. Defendant also filed a motion to dismiss on the same issues. Appendix, Tab 3. The parties each filed opposition (Appendix, Tabs 4 and 5) and reply briefs Appendix, Tabs 6 and 7), and the briefing on this issue concluded on October 31, 2011.

The Court Commissioner issued a ruling on November 30, 2011, holding that the issue of the timeliness of the appeal and the scope of review⁴ “are referred to the panel that considers the appeal on the merits.” Appendix, Tab 8. This brief, therefore, addresses these issues in addition to the underlying merits.

³ Documents created at the appellate court level, and thus not part of the trial court record, have been included in an Appendix at the direction of the Court and for the Court's convenience.

⁴ Plaintiffs' notice of appeal has designated both the June 8 and the July 13 orders for review, and it is undisputed that the notice of appeal of the July 13 order was timely. One of the issues raised in the briefing on the timeliness of appeal, therefore, was the scope of review if only the appeal of the July 13 order was permitted to proceed.

IV. ARGUMENT

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

1. Case Law Dictates that the Notice of Appeal Was Timely Filed.

RAP 5.2(a) provides that, except in certain circumstances not applicable here, “a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section (e).” In section (e), the Rule provides that a notice of appeal of orders deciding certain timely motions designated in that section must be filed within 30 days after the entry of the order. RAP 5.2(e). The civil motions encompassed by this rule are: a motion for judgment as a matter of law under CR 50(b), a motion to amend findings under CR 52(b), a motion for reconsideration or new trial under CR 59, and a motion for amendment of judgment under CR 59. *Id.* Moreover:

The official comment to RAP 5.2(e) makes clear that a timely appeal from such an order encompasses review of the underlying judgment: “Rule 2.4(c) allows the judgment to be reviewed upon review of certain post-trial orders. Rule 5.2(e) accommodates Rule 2.4(c) by starting the time running from the date of the entry of the decision on the designated timely-filed post-judgment motions.”

Structurals N.W., Ltd. v. Fifth & Park Place, Inc., 33 Wn. App. 710, 658

P.2d 679 (1983) (quoting official comment to RAP 5.2(e)); *see also*

Davies v. Holy Family Hosp., 144 Wn. App. 483, 492, 183 P.3d 283

(2008) (an appeal from an order on a motion for reconsideration “allows review of the propriety of the final judgment itself.”). Here, the appeal from the trial court’s July 13 order brings up the June 8 order for review.

The *Structurals* case is instructive. In *Structurals*, the trial court entered judgment on November 13, and, on November 18, counsel for the parties stipulated that amended findings, conclusions, and judgment could be entered. 33 Wn. App. at 713. The trial court entered this stipulated order on November 23, and the appellant filed its notice of appeal on December 17. *Id.* The respondent argued that the November 13 judgment was not timely appealed. *Id.*

The Court disagreed. It held that “[w]hile the stipulation allowing entry of the amended judgment was technically not a motion for amended judgment brought under CR 59, we note that in all practical effect the result is the same as if such a motion had been made and granted.” 33 Wn. App. at 714. Significantly, the Court noted that the stipulation “was entered within 5 days of the November 13 judgment, as required for a post-judgment motion.”⁵ *Id.* The Court also noted that the rules “are designed to ‘allow some flexibility in order to avoid harsh results’; substance is preferred over form.” *Id.* (quoting *Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982)). The Court

⁵ CR 59 now gives parties 10 days to file such a motion.

treated the November 23 judgment as having been entered pursuant to a motion to amend, and held that the appeal was timely.

The rationale of *Structurals* applies here and dictates that Plaintiffs' notice of appeal was timely. It is true that, as in *Structurals*, the trial court's July 13 order was not technically issued pursuant to a motion for reconsideration, a motion to amend findings, or a motion to amend the judgment. However, also as in *Structurals*, Plaintiffs' motion to amend their complaint was specifically filed within ten days of the June 8 order, the timeframe required for a timely motion for reconsideration (CR 59(b)), a timely motion to amend findings (CR 52(b)) and a timely motion to amend the judgment (CR 59(h)).

In addition, as in *Structurals*, the effect of the trial court's July 13 order was a ruling on or a response to one of the civil motions denominated in RAP 5.2(e). Plaintiffs' motion to amend their complaint specifically stated that the trial court's June 8 order "did not specify whether the dismissal was with or without prejudice, or with or without leave to amend." CP 178. Plaintiffs' reply brief in support of their motion to amend their complaint further noted that "the motion was intended to give this Court an opportunity to rectify what seems to Plaintiffs to be an inadvertent failure to grant one of the most important aspects of a proper disposition of a motion to dismiss: the ability to amend the complaint."

CP 236. In response to this briefing, the trial court entered its July 13 order, which stated that the trial court did not grant Plaintiffs' motion to amend contained within their opposition to the 12(b)(6) motion "because the proposed amendment would not have cured the defect on which the dismissal was granted." CP 298. The trial court also held that "[t]o the extent this court failed to address the motion to amend contained within the Plaintiffs' opposition to the Defendant's motion to dismiss, that motion is now DENIED." *Id.*

The effect of the July 13 order, then, is same as if one of the RAP 5.2(e) civil motions "had been made and granted." *Structurals*, 33 Wn. App. at 714. The July 13 order added specific findings regarding Plaintiffs' requests to amend their claim for negligent infliction of emotional distress, and specifically added that such request was denied. These findings and conclusions amended the trial court's June 8 order, as the result is the same as if Plaintiffs had brought a motion to amend the judgment or a motion to amend the findings. *See Structurals*, 33 Wn. App. at 714.⁶

⁶ In the briefing before the Court Commissioner regarding the timeliness of the appeal, Defendant cited to two cases for the proposition that an appellant cannot "bootstrap" an unappealed order into the appeal of "subsequent ancillary rulings: *Carrara, LLC v. Ron & E Enters., Inc.*, 137 Wn. App. 822, 155 P.3d 161 (2007), and *Bushong v. Wilsbach*, 151 Wn. App. 373, 213 P.3d 42 (2009). These cases are both distinguishable for the same reason. In both cases, the party timely filed a notice of appeal of the trial court's post-judgment attorney fees decision, but the appeal of the underlying trial court judgment was untimely. The

Similarly, the July 13 order could be considered an order denying reconsideration of the June 8 order. The July 13 order specifically stated that Plaintiffs' request for leave to amend their claim for negligent infliction of emotional distress was denied. In effect, then, the July 13 order acted as a denial of a motion for reconsideration of the trial court's dismissal of the case. Under *Structurals*, the appeal of the July 13 order encompassed review of the underlying June 8 order and the notice of appeal is timely.⁷

2. Alternatively, the Court Should Extend the Deadline for Filing the Notice of Appeal to Prevent a Gross Miscarriage of Justice and Because Extraordinary Circumstances Exist.

If the Court finds that Plaintiffs' notice of appeal of the June 8 order was not timely filed, it should extend the time to file the notice of appeal. RAP 18.8(b) provides that an appellate court "will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal." These

courts did not allow the timely attorney fees appeal to bring up for review the judgment on the merits because RAP 2.4(b) "makes clear that such an appeal does not allow a decision entered before the award of attorney fees to be reviewed." *Carrara*, 137 Wn. App. at 825; *see also Bushong*, 151 Wn. App. at 377 (the "plain words" of RAP 2.4(b) show that the appeal of the award was untimely). However, RAP 2.4(b) is specific to attorney fee decisions and is not applicable here.

⁷ Plaintiffs freely admit that they did not style their motion as one for reconsideration, or even as a motion to modify or amend findings. This was done specifically in an effort to focus the trial court's attention on what Plaintiffs considered to be the issue before the court at that time. However, the effect of the trial court's July 13 order was the same as if the trial court had ruled on one of those timely post-trial motions.

circumstances are met here.

The Rules of Appellate Procedure “were designed to allow some flexibility to avoid harsh results.” *Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982) (citing the Comment to RAP 18.8). The “trend of the law in this state is to interpret rules and statutes to reach the substance of matters so that it prevails over form.” *Weeks*, 96 Wn.2d at 896 (quoting *First Fed. Sav. & Loan Ass’n v. Ekanger*, 22 Wn. App. 938, 944, 593 P.2d 170 (1979)). The appellate court “should normally exercise its discretion to consider cases and issues on their merits unless there are compelling reasons not to do so—even despite technical flaws in an appellant's compliance with the Rules of Appellate Procedure.” *Knox v. Microsoft Corp.*, 92 Wn. App. 204, 213, 962 P.2d 839 (1998). “‘Extraordinary circumstances’ include instances where the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party’s control.” *Shumway v. Payne*, 136 Wn.2d 383, 395, 964 P.2d 349 (1998).

Here, Plaintiffs’ conduct was reasonably diligent. Once Plaintiffs received the trial court’s July 13 order,⁸ Plaintiffs acted diligently and filed their notice of appeal on July 29, 2011. If Plaintiffs’ determination that a timely appeal from the July 13 order would bring up both orders for

⁸ Plaintiffs received a copy of this order via U.S. mail on July 15, 2011. See CP 285.

review was in error, the case law cited in the immediately preceding section of this brief indicates that it was excusable error. As in *Weeks*, “substance should prevail over form.” 96 Wn.2d at 896. Because Defendant had notice and because “applying strict form would defeat the purpose of the rules to ‘promote justice and facilitate the decision of cases on the merits,’” *Weeks*, 96 Wn.2d at 896 (quoting RAP 1.2(a)), the Court should extend the time for Plaintiffs to file their notice of appeal and hold such filing was timely. *See also Knox*, 92 Wn. App. at 212-13 (refusing to dismiss appeal when appellant had timely appealed from the final judgment on the verdict, but had not referenced all of the prior orders he was appealing in his notice of appeal).⁹

B. The Trial Court Erred In Granting Defendant’s Motion to Dismiss.

A trial court’s ruling on a motion to dismiss under CR 12(b)(6) is a question of law that this Court reviews de novo. *Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wn.2d 384, 389, 258 P.3d 36 (2011). A dismissal under CR 12(b)(6) for failure to state a claim is only proper if the defendant establishes beyond a doubt that the “plaintiff can

⁹ Even if the Court determines that Plaintiffs’ notice of appeal of the June 8 order was untimely, it is undisputed that the appeal of the July 13 order was timely. In fact, Defendant’s motion to dismiss before the Court Commissioner only sought dismissal of the appeal of the June 8 order, thereby implicitly agreeing that the appeal of the July 13 order is proper. Appendix, Tab 3. As will be discussed more fully below, the appeal of the July 13 order requires this Court to consider whether the trial court erred in granting Defendant’s motion to dismiss.

prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.” *Fondren v. Klickitat County*, 79 Wn. App. 850, 854, 905 P.2d 928 (1995) (quoting *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961, 577 P.2d 580 (1978)). The court must presume that “plaintiff’s allegations are true and may consider hypothetical facts that are not included in the record.” *Parmelee v. O’Neel*, 145 Wn. App. 223, 232, 186 P.3d 1094 (2008) (rev’d on other grounds). Motions to dismiss are only “sparingly granted” to ensure that “plaintiff is not improperly denied a right to have his claim adjudicated on the merits.” *Fondren*, 79 Wn. App. at 854 (quoting 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1349, at 192-93 (2d ed. 1990)).

1. The Trial Court Erred if it Dismissed Plaintiffs’ Claims for Infliction of Emotional Distress on the Basis that Plaintiffs Were Not Present When Defendant Was Committing His Crimes.¹⁰

¹⁰ Even if this Court determines that Plaintiffs’ notice of appeal encompasses only the trial court’s July 13 order, the Court must still determine whether the trial court erred if it dismissed Plaintiffs’ claims based on the fact that Plaintiffs were not present during Defendant’s tortious conduct. The trial court’s July 13 order specifically stated that Plaintiffs’ proposed amendment regarding the symptoms of their emotional distress “would not have cured the defect on which the dismissal was granted.” CP 285. In order to review this determination of futility, this Court must necessarily determine whether the proposed amendment, would, in fact, have cured the defect upon which dismissal was granted, which involves considering all of the grounds upon which the trial court could have based its dismissal. Therefore, regardless of whether this Court finds the notice of appeal timely as to the June 8 order, this issue of presence is properly before the Court.

a. *Because Dr. King Was the Clear Object of Defendant's Actions, His Presence is not Required.*

Defendant argued below that, because none of the Plaintiffs were present when Defendant's criminal conduct occurred, Plaintiffs' claims for intentional and negligent infliction of emotional distress must be dismissed. *See* CP 78-79. However, the relevant case law establishes that "presence" has only been required where a third party claims emotional distress based on a tortfeasor's conduct directed against another. Because Dr. King was the object of Defendant's attempted murder plot, he is not a third party and his presence during Defendant's criminal conduct was not required.

In order to establish a claim for outrage/intentional infliction of emotional distress, plaintiffs must demonstrate that:

(1) they suffered severe emotional distress; (2) the emotional distress was inflicted intentionally or recklessly, and not negligently; (3) the conduct complained of was outrageous and extreme; and (4) that they personally were either the object of the respondents' actions or an immediate family member present at the time of such conduct.

Chambers-Castanes v. King County, 100 Wn.2d 275, 288, 669 P.2d 451 (1983). For the purposes of a 12(b)(6) motion to dismiss, here, the first three elements are met: Dr. King has alleged that he has suffered severe emotional distress, that Defendant intentionally and/or recklessly inflicted that emotional distress, and that Defendant's conduct was extreme and

outrageous.¹¹ CP 8, §§ 5.1-5.3. Therefore, the only remaining element is the last: whether Dr. King was either the object of Defendant's actions or was an immediate family member present at the time of such conduct.

The trial court found, as a matter of law, that Defendant's convictions for solicitation to commit the first degree murder of Dr. King and attempted murder in the first degree of Dr. King had preclusive effect and constituted "outrageous conduct." CP 213-15. There is no question, then, that Dr. King was the object of Defendant's conduct.

Moreover, none of the cases cited by Defendant at the trial court level¹² support a conclusion to the contrary. In none of these cases was the plaintiff the direct object of the tortfeasor's conduct. Rather, in those cases, the tortfeasor's actions, whether intentional or negligent, were directed at another person. *See, e.g., Lund*, 100 Wn.2d at 741-42 ("[s]uch

¹¹ In fact, the trial court found as a matter of law that Defendant's conduct constituted "outrageous conduct," for the purposes of Plaintiffs' claims. CP 215.

¹² *See Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 57, 176 P.3d 497 (2008) (father who arrived at the scene of the accident after his daughter had drowned could not recover for negligent infliction of emotional distress); *Reid v. Pierce County*, 136 Wn.2d 195, 201-04, 961 P.2d 333 (1998) (relatives of dead people, photographs of whose corpses had been appropriated and displayed by County employees, did not have a cause of action for negligent or intentional infliction of emotional distress); *Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 260, 787 P.2d 553 (1990) (relatives who were not present at the scene of the vehicle accident that killed decedent did not have a claim for negligent infliction of emotional distress); *Lund v. Caple*, 100 Wn.2d 739, 741-42, 675 P.2d 226 (1984) (plaintiff could not assert outrage claims based on pastor's affair with his wife because he was not present during pastor's sexual relations with plaintiff's wife); *Schurk v. Christensen*, 80 Wn.2d 652, 656-67, 497 P.2d 937 (1972) (mother of a molestation victim could not sustain a claim for emotional distress because she was not present during the molestation).

presence is a crucial element of a claim for outrage when the conduct is directed at a third person (emphasis added). As Dr. King was the object of the plot to murder him, the cases cited by Defendant do not apply and do not bar Dr. King from recovery of his emotional distress damages.

Plaintiffs anticipate that Defendant may argue, as he attempted below, that the presence requirement exists regardless of whether the plaintiff was the object of the defendant's conduct. Defendant argued that the Court in *Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 333 (1998), "specifically affirmed the 'presence' requirement even where the plaintiffs there, Hyde and Yarbrough, claimed that 'the actions of the County employees were directed towards them.'" CP 78 (citing *Reid*, 136 Wn.2d at 203). However, Defendant stretches the holding of *Reid* too far.

The plaintiffs in *Reid* alleged that County employees took photographs of their deceased relatives' bodies and misappropriated and showed them to others. 136 Wn.2d at 197-200. The plaintiffs argued that the presence element for intentional and negligent infliction of emotional distress was inapplicable to them because the actions of the County employees were directed at them. 136 Wn.2d at 202-03. The County argued that the presence element was required at all times, and the Court agreed that because the plaintiffs were not present, they could not maintain their outrage claims. *Id.* at 203. However, the *Reid* Court did not address

the issue of whether the County employees' conduct was directed at the plaintiffs. Moreover, the cases that *Reid* cited for the proposition that presence was required involved conduct directed at third parties. *See Lund v. Caple*, 100 Wn.2d 739, 741-42, 675 P.2d 226 (1984) (plaintiff could not assert outrage claims based on pastor's affair with his wife because he was not present during pastor's sexual relations with plaintiff's wife); *Schurk v. Christensen*, 80 Wn.2d 652, 656-67, 497 P.2d 937 (1972) (mother of a molestation victim could not sustain a claim for emotional distress because she was not present during the molestation).

In addition, in analyzing the plaintiffs' outrage claim, the *Reid* court relied heavily on the RESTATEMENT (SECOND) OF TORTS § 46. *See generally Reid*, 136 Wn.2d at 201-04 (discussing the Restatement throughout). The Restatement only cites presence as being required when the conduct is directed at a third person:

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

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

RESTATEMENT (SECOND) OF TORTS § 46 (1965) (emphasis added). In fact, comments to the Restatement (which has been relied upon extensively by Washington courts¹³) support the proposition that presence during the tortious conduct is not always required. *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. i, illus. 15 & 16 (1965) (a tortfeasor who attempts suicide in another's home, and knows that the homeowner is likely to find his body and suffer emotional distress, is liable when homeowner suffers distress after finding tortfeasor lying in pool of gore). In *Reid*, the plaintiffs were clearly not the object of the County employees' tortious conduct, so their physical presence was required. *Reid* does not prevent Dr. King, the object of Defendant's murder plot, from maintaining a cause of action for infliction of emotional distress, even though he was not present at the time of Defendant's conduct. *See, e.g., Dammarell v. The Islamic Republic of Iran*, 2006 U.S. Dist. LEXIS 99679 at *471-75 (D.D.C. Aug. 17, 2006) (noting cases cited by *Reid* all involved conduct directed at third parties, and finding the presence requirement inapplicable when conduct was directed at the plaintiff); *Fanean v. Rite Aid Corp. of*

¹³ *See, e.g., Kloepfel v. Bokor*, 149 Wn.2d 192, 195-96, 66 P.3d 630 (2003) (noting that the elements of outrage were "adopted from the Restatement (Second) of Torts § 46 (1965) by this court in *Grimmsby v. Samson*, 85 Wn.2d 52, 59-60, 530 P.2d 291 (1975)."); *Doe v. Finch*, 133 Wn.2d 96, 100-101, 942 P.2d 359 (1997) (the Washington State Supreme Court has adopted the definition of outrage from the Restatement (Second) of Torts § 46 (1965)).

Delaware, 984 A.2d 812, 818-19 (Del. Super. Ct. 2009) (plaintiff could maintain a RESTATEMENT (SECOND) OF TORTS § 46(1) direct claim for infliction of emotional distress based on pharmacist's disclosure of her sensitive medical information to her family members, since plaintiff alleged she was the direct object of the conduct, despite fact she was not present when information disclosed). *Leo v. Hillman*, 665 A.2d 572, 577 (Vt. 1995) ("In cases where the alleged tortious conduct is directed at the plaintiff, physical presence is not a requirement."). The trial court erred if it dismissed Dr. King's claims on this basis.

b. Dr. King's Wife and Children Were Also the Direct Objects of Defendant's Conduct.

Plaintiffs do not dispute that they were not physically "present" when Defendant was concocting his plot to murder Dr. King. As explained above, physical presence is not required when the victim is the object of the tortfeasor's conduct, as Dr. King clearly was. However, presence is also not required for Dr. King's wife and children, as they, too, were the objects of Defendant's conduct.

Defendant believed that he was working with Russian organized criminals, who would murder Dr. King by shooting or drowning him while he was on vacation with his family in Australia. CP 4. Because such an act would have a clear and obvious impact on Dr. King's wife and three young children, who accompanied Dr. King on vacation, those

family members can also claim for infliction of emotional distress, despite the fact that they were not present when Defendant was planning the murder.

A line of cases discussing the impact of terrorism provides a useful analog. The court in *Dammarell v. The Islamic Republic of Iran*, 2006 U.S. Dist. LEXIS 99679 (D.D.C. Aug. 17, 2006) addressed the claims of plaintiffs whose family members were killed in a 1983 car bombing of the U.S. Embassy in Lebanon. The plaintiffs brought claims against Iran, alleging that it materially supported the terrorists behind the bombing. *Id.* at *4. Surviving parents of a victim killed by the bombing brought a claim for intentional infliction of emotional distress under Washington law. *Id.* at *471-76. The court addressed the presence requirement that appeared to originate in the *Reid* case, and noted that it did not “think that the Supreme Court of Washington intended to *always* require a plaintiff’s presence for there to be a valid claim for intentional infliction of emotional distress.” *Id.* at *473. The court then noted that the presence requirement as stated in the Restatement¹⁴ is raised in the context of conduct directed at a third party. *Id.* The court found that because the *Reid* court relied heavily on the language of the Restatement:

¹⁴ The *Reid* Court “quoted extensively” from *Grimsby v. Samson*, 85 Wn.2d 52, 530 P.2d 291 (1975), which itself relied upon the Restatement (Second) of Torts § 46 (1965). *Dammarell*, 2006 U.S. Dist. LEXIS 99679 at *473.

it is more likely that the court was merely applying the articulation of the rule than that the court intended to expand the presence requirement to *all* plaintiffs asserting an outrage claim. Moreover, the cases to which the court cited to support its conclusion that outrage required the plaintiffs' presence, were all cases in which the plaintiff was claiming emotional distress for conduct directed at a third person.

Id. at *474-75. The court went on to note that although Washington courts had not had the opportunity to consider the contours of the tort of outrage with respect to terrorist activities, numerous other courts have held that terrorists' acts are "directed at" the victims' family members. *Id.* at *475. The court held that because the embassy attack was directed at the victims' family members, "Washington's possible presence requirement is inapplicable." *Id.* at *476.¹⁵

Washington courts have not, perhaps fortunately, had the opportunity to consider the contours of the torts of intentional and negligent infliction of emotional distress with respect to a plot to commit

¹⁵ Courts considering the tort of outrage as applied to terrorism have consistently held that the victims' families are the direct object of the conduct, and so the presence element is not required. *See, e.g., Anderson v. Islamic Republic of Iran*, 753 F. Supp. 2d 68, 86-87 (D.D.C. 2010) (noting the Caveat in the Restatement (Second) of Torts § 46 (1965), that the drafters had no opinion as to whether there may be other circumstances in which the actor may be subject to liability, and holding that non-present plaintiffs may recover for outrage because terrorism is intended to terrorize them); *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 80 (D.D.C. 2010) (same); *Estate of Heiser v. Islamic Republic of Iran*, 659 F. Supp. 2d 20, 26-27 (D.D.C. 2009) (same, noting "[i]f the defendants' conduct is sufficiently outrageous and intended to inflict severe emotional harm upon a person which is not present, no essential reason of logic or policy prevents liability") (citing DAN B. DOBBS, THE LAW OF TORTS § 307, at 834 (2000)).

murder, or to attempt to distinguish an effort to bring about a murder for hire from a plot to commit murder in connection with a terrorist scheme. It is true that Defendant did not plot to blow up a building or detonate a car bomb. The effect on Dr. King's wife and children, after learning of Defendant's plot to murder their husband and father, was one of terror. Anyone plotting the murder of a man with a wife and children must be aware of the significant and horrifying impact that his or her plot will inevitably have on those family members. The approach of the *Dammarell* court is thus equally applicable here. Dr. King's wife and children were the direct objects of Defendant's conduct, and thus their presence is not required.

This conclusion is supported by more than *Dammarell*. For example, in *Hartman v. Banks*, 1995 U.S. Dist. LEXIS 12526 at *1 (E. D. Pa. Aug. 25, 1995), the plaintiff's auto insurer left a voicemail for the plaintiff's employer threatening to expose the employer to criminal liability for failure to withhold taxes in connection with the plaintiff's employment unless the employer pressured the plaintiff into accepting an inadequate settlement. Based on this conduct, the plaintiff brought a claim against the insurer for intentional infliction of emotional distress. The trial court denied the insurer's motion for summary judgment and held that the jury could conclude that the insurer intended that the phone call be

communicated to the plaintiff in order to influence her to accept the settlement, and that presence was adequately alleged because the plaintiff heard the voicemail message. *Id.* at *6.

Similarly, in *Shemenski v. Chapiieski*, 2005 U.S. Dist. LEXIS 7975 (N.D. Ill. Apr. 13, 2005), parents awoke to find that their infant daughter was not breathing. The police arrived and handcuffed and interrogated the husband, preventing him from being at the hospital with his wife and daughter, who passed away. The wife brought a claim against the police for outrage, based on her husband's false arrest and the defendants' refusal to allow him to be with his wife during the critical time around their daughter's death. *Id.* at *23. The court found that the wife could bring this claim based on actions against her: the arrest of the husband, the prevention of his presence at the hospital while knowing the wife was expecting him, and his exclusion from the comforting role that he otherwise could have played. *Id.* at *32-36.

Finally, in *Cahalin v. Rebert*, 10 Pa. D. & C.3d 142 (Pa. Dist. Ct. 1979), a father brought a claim against his mother-in-law for emotional distress, based upon her kidnapping of his children and refusal to tell him their whereabouts. The grandmother argued that since the conduct was committed against the children, and the father was not present, he could not maintain his claim. *Id.* at 150. The court found that depriving the

father of custody was action directed at him, and that the Restatement itself indicates that the presence requirement is not absolute. *Id.* The distress was foreseeable and the demurrer was not sustained. *Id.* at 151.

In each of these cases, the actionable conduct was committed against another person: the employer (*Hartman*), the husband (*Shemenski*), and the children (*Cahalin*). Yet the courts each found that the plaintiffs could bring claims based on their argument that the action in question was directed at them. These cases, as well as the cases discussing terrorism, all reflect the same principle: in certain circumstances, an individual can be the “direct object” of a tortfeasor’s conduct even if that conduct is actually committed against another. The relationship between the plaintiff and the third party, as well as the nature of the conduct itself, dictate that these plaintiffs are the objects of the conduct and that they can bring a claim based on their emotional distress. Here, Dr. King’s wife and children were the direct objects of Defendant’s conduct and can bring their own claims for negligent and intentional infliction of emotional distress.

c. Even if the Court Finds that Plaintiffs Were Not the Object of Defendant’s Actions, the Facts in this Case Are So Egregious as to Warrant a Departure from the Presence Requirement.

The Restatement contains the following caveat: “The Institute expresses no opinion as to whether there may not be other circumstances under which the actor may be subject to liability for the intentional or

reckless infliction of emotional distress.” RESTATEMENT (SECOND) OF TORTS § 46 (1965). The Restatement further states that this Caveat is intended “to leave open the possibility of situations in which presence at the time may not be required.” *Id.*, cmt. 1. This case is just the sort of factual circumstance in which presence should not be required.

Plaintiffs suffered emotional distress after it was discovered that Defendant had been concocting a plot to have Dr. King killed. Defendant was close to the King family: he was Dr. King’s business partner, lived near their family, and had been married to Mrs. King’s sister. CP 2-4. The emotional distress that would obviously be suffered by learning of this murder plot should be recompensed. If the Court finds that Plaintiffs were not “direct objects” of Defendant’s conduct, then it should find that the presence requirement is not applicable to the egregious facts of this case, and permit the family’s claims to go forward.

This is not the sort of case that would open wide the contours of the torts of negligent and intentional infliction of emotional distress. The Restatement recognizes that limiting liability to those present when tortious conduct is directed at a third person:

may be justified by the practical necessity of drawing the line somewhere, since the number of persons who may suffer emotional distress at the news of an assassination of the President is virtually unlimited, and the distress of a woman who is informed of her husband's murder ten years afterward may lack the guarantee of genuineness which her

presence on the spot would afford.

RESTATEMENT (SECOND) OF TORTS § 46 cmt. 1 (1965). This case does not implicate the concerns expressed in the Restatement. It involves a family's emotional distress after learning of a contemporaneous plot to murder one of their own. Such distress is foreseeable and the law should provide a remedy. It simply cannot be that Washington law provides no redress for this type of harm. The Kings should be allowed to proceed with their claims for negligent and intentional infliction of emotional distress.

2. The Trial Court Erred if it Dismissed Plaintiffs' Claim for Solicitation of First Degree Murder on the Basis that the Criminal Statute Could Not, as a Matter of Law, Provide a Basis for a Tort Action.¹⁶

Defendant argued below that Plaintiffs' first claim for relief, Solicitation of First Degree Murder in Violation of RCW 9A.28.030(1) and RCW 9A.32.030(1)(a), should be dismissed because the criminal

¹⁶ Even if this Court determines that Plaintiffs' notice of appeal encompasses only the trial court's July 13 order, the Court must still determine whether the trial court erred if it dismissed Plaintiffs' claim for solicitation of first-degree murder on the basis that the criminal statute could not, as a matter of law, provide the basis for a tort action. The trial court's July 13 order specifically stated that Plaintiffs' proposed amendment regarding the symptoms of their emotional distress "would not have cured the defect on which the dismissal was granted." CP 285. In order to review this determination of futility, this Court must necessarily determine whether the proposed amendment, would, in fact, have cured the defect upon which dismissal was granted, which involves considering all of the grounds upon which the trial court could have based its dismissal. Therefore, regardless of whether this Court finds the notice of appeal timely as to the June 8 order, this issue of whether the criminal statute could not provide the basis for Plaintiffs' tort action as a matter of law is properly before the Court.

statutes under which Defendant was found guilty could not serve as the basis for civil tort liability. *See* CP 76. His only citation for this principle, *Hostetler v. Ward*, 41 Wn. App. 343, 704 P.2d 1193 (1985), does not stand for this proposition. In *Hostetler*, a minor who had been drinking in a public park drove his parents' car and hit and severely injured a motorcyclist. 41 Wn. App. at 345. The motorcyclist alleged that certain criminal statutes that prohibited furnishing alcohol to minors and addressed to the licensing of public places to serve alcohol imposed a duty upon the county to prevent the minor from drinking in a public park. *Id.* at 351-52. The court disagreed, stating that “[p]laintiff has cited no authority, and we are aware of none, supporting the proposition that the Legislature intended the violation of *these* criminal statutes to result in civil liability.” *Id.* at 353 (emphasis added). This was not a general statement that no criminal statute could ever form the basis for civil liability; rather, it was a statement that no court had found that the three statutes at issue could form the basis for civil liability.

In fact, *Hostetler* acknowledged that criminal statutes can be the basis for civil liability when it stated that “[e]ven where there is no clear manifestation of legislative intent to impose civil liability for violation of a statute, a court *may* adopt the requirements of a criminal statute as the standard of conduct of a reasonable person.” 41 Wn. App. at 352

(emphasis in original). In determining whether a cause of action may be implied from a statute the court must consider the following: “first, whether the plaintiff is within the class for whose ‘especial’ benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.” *Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 141 Wn. App. 407, 422, 167 P.3d 1193 (2007) (quoting *Tyner v. Dep’t of Soc. & Health Servs.*, 141 Wn.2d 68, 77, 1 P.3d 1148 (2000)).

All three of these considerations are met here. Plaintiffs’ claims are based on RCW 9A.28.030(1) (criminal solicitation) and RCW 9A.32.030 (1)(a) (first degree murder), which taken together make it a crime to solicit murder. Since Dr. King was the target of Defendant’s murder plot, he is clearly within the class for whose “especial” benefit the statute was enacted. As potential witnesses to his murder and/or potential innocent bystander victims, Dr. King’s family is also part of the protected class since the purposes of the statute include “[t]o forbid and prevent conduct that inflicts or threatens substantial harm to individual or public interests.” RCW 9A.04.020(1)(a).¹⁷ This statement suggests implicit

¹⁷ RCW 9A.04.020 outlines the general purposes of the provisions governing the definition of offenses in Title 9A.

support for creating a civil remedy because civil liability may work as an additional deterrent, especially in cases like this one, where the defendant was motivated by financial gain. See *Fleming v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 2006 U.S. Dist. LEXIS 16602 at *10 (W.D. Wash. Mar. 21, 2006) (“when a statute is enacted for the protection of a particular class of individuals, a violation of its terms may result in civil as well as criminal liability, even though the former remedy is not specifically mentioned therein”). The underlying purpose of the legislation is to prevent harmful conduct, and imposing civil liability can only help further that aim.

Furthermore, “recovery of emotional distress damages has been allowed in conjunction with many intentional or willful acts which violated a clear mandate of public policy.” *Cagle v. Burns & Roe, Inc.*, 106 Wn.2d 911, 916, 726 P.2d 434 (1986). In *Cagle*, the court held that the plaintiff could recover emotional distress damages for wrongful termination of employment in violation of public policy because it constituted an intentional tort, and damages for emotional distress are “recoverable as an element of damages merely upon proof of ‘an intentional tort.’” *Id.* at 919-20 (quoting *Cherberg v. People’s Nat’l Bank*, 88 Wn.2d 595, 564 P.2d 1137 (1977)). The court defined the intent necessary to establish an intentional tort as “an intent to bring about a

result which will invade the interests of another in a way that the law forbids.” *Id.* at 916 (quoting W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS § 130 at 1027 (5th ed. 1984)). It is hard to imagine a clearer mandate of public policy than the public policy against murder, and Defendant certainly intended to bring about a result which would invade the interests of Dr. King and his family: the murder of Dr. King.

The above analysis demonstrates that the trial court erred if it dismissed Plaintiffs’ claim for Solicitation of First Degree Murder in Violation of RCW 9A.28.030(1) and RCW 9A.32.030(1)(a) on the basis that those criminal statutes could not serve as the basis for a civil cause of action. Defendant devoted only a half page of his brief to this issue, and the only case he cited is specific to the facts and statute at issue in that case. In contrast, Plaintiffs demonstrated that all the considerations for determining whether a cause of action could be implied from a statute were present. The trial erred if it dismissed this claim under CR 12(b)(6).

3. The Trial Court Erred if it Dismissed the Case Based on Defendant’s Request for Bail.¹⁸

¹⁸ Even if this Court determines that Plaintiffs’ notice of appeal encompasses only the trial court’s July 13 order, the Court must still determine whether the trial court erred if it dismissed Plaintiffs’ claims based on Defendant’s request for bail. The trial court’s July 13 order specifically stated that Plaintiffs’ proposed amendment regarding the symptoms of their emotional distress “would not have cured the defect on which the dismissal was granted.” CP 285. In order to review this determination of futility, this Court must

Defendant devoted a significant portion of his motion to the proposition that Plaintiffs' harm stemmed from Defendant's request for bail. Defendant based this assertion on one sentence in Plaintiffs' Complaint. *See* CP 5 at ¶ 3.17. Defendant makes too much of this slender reed. Defendant's request for bail was not the genesis of Plaintiffs' severe emotional distress. Rather, it was Defendant's plot to murder Dr. King while on vacation with his family that has caused their injuries. This sentence merely serves to illustrate the fact that the King family will forever live in fear of Defendant, whether out on bail or incarcerated, because he wants Dr. King dead and has demonstrated that he is not above hiring contract killers to do his dirty work. If the trial court dismissed Plaintiffs' claims based on the fact that they could not recover for harm caused by Defendant's lawful exercise of his Constitutional rights, the trial court impermissibly ignored the true source of Plaintiffs' emotional distress: Defendant's murder plot.

4. The Trial Court Erred if it Dismissed the Case Based on a Finding that Defendant's Criminal Conduct was not the Proximate Cause of Plaintiffs' Injuries.¹⁹

necessarily determine whether the proposed amendment, would, in fact, have cured the defect upon which dismissal was granted, which involves considering all of the grounds upon which the trial court could have based its dismissal. Therefore, regardless of whether this Court finds the notice of appeal timely as to the June 8 order, this issue of whether Plaintiffs could base their harm on Defendant's request for bail is properly before the Court.

¹⁹ Even if this Court determines that Plaintiffs' notice of appeal encompasses only the trial court's July 13 order, the Court must still determine

In his motion to dismiss before the trial court, Defendant asserted that his criminal conduct was not the proximate cause of Plaintiffs' injuries. This contention is unsupported. Defendant hired a hit man to kill Dr. King. It is a direct and foreseeable result that Dr. King and his family have suffered a great deal of fear and emotional distress. Both Ninth Circuit cases cited by Defendant below (*Ass'n of Wash. Public Hosp. Districts v. Philip Morris, Inc.*, 241 F.3d 696 (9th Cir. 2001) and *Oregon Laborers Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957 (9th Cir. 1999)) addressed whether an entity that provided health care to smokers had standing under civil RICO and antitrust statutes to sue tobacco companies based on the care that the entity was forced to provide. In contrast, here a family brings claim for suffering they have been forced to endure as a result of a close family friend and business partner's attempt to murder one of their own. There is no question that Defendant's murder plot was the proximate cause of Plaintiffs' suffering. The trial court erred if it granted Defendant's motion to dismiss on these

whether the trial court erred if it dismissed Plaintiffs' claims based on a finding that Defendant's conduct was not the proximate cause of Plaintiffs' injuries. The trial court's July 13 order specifically stated that Plaintiffs' proposed amendment regarding the symptoms of their emotional distress "would not have cured the defect on which the dismissal was granted." CP 285. In order to review this determination of futility, this Court must necessarily determine whether the proposed amendment, would, in fact, have cured the defect upon which dismissal was granted, which involves considering all of the grounds upon which the trial court could have based its dismissal. Therefore, regardless of whether this Court finds the notice of appeal timely as to the June 8 order, this issue of proximate causation is properly before the Court.

grounds.

5. The Trial Court Erred if it Dismissed the Claim for Negligent Infliction of Emotional Distress Based on a Finding that Plaintiffs did not Allege Objective Symptoms of Illness.²⁰

Defendant argued below that Plaintiffs' claim for negligent infliction of emotional distress could not stand because the Complaint does not allege that any of the Plaintiffs received care from a physician, received diagnoses, or had any objective symptoms of illness.²¹ While Plaintiffs did not and do not concede Defendant's interpretation of the case law, Plaintiffs included in their opposition to Defendant's motion to dismiss a request for leave to amend and expand upon their allegations as follows:

Plaintiffs Holly and Joseph King had numerous symptoms as a result of Defendant's negligent infliction of emotional distress. Specifically, both Dr. and Ms. King suffered from nightmares, inability to sleep, chronic stress, and fear,

²⁰ Even if this Court determines that Plaintiffs' notice of appeal encompasses only the trial court's July 13 order, the Court must still determine whether the trial court erred if it dismissed Plaintiffs' claim for negligent infliction of emotional distress based on a finding that Plaintiffs did not adequately allege objective symptoms of illness. The trial court's July 13 order specifically stated that Plaintiffs' proposed amendment regarding the symptoms of their emotional distress "would not have cured the defect on which the dismissal was granted." CP 285. In order to review this determination of futility, this Court must necessarily determine whether Plaintiffs' proposed amendment, would, in fact, have cured the defect upon which dismissal was granted. Therefore, regardless of whether this Court finds the notice of appeal timely as to the June 8 order, this issue of objective symptoms is properly before the Court.

²¹ This same "objective symptomatology" requirement does not apply to claims for outrage/intentional infliction of emotional distress. *See, e.g., Kloepfel v. Bokor*, 149 Wn.2d 192, 198, 66 P.3d 630 (2003) ("objective symptomatology is not required to establish intentional infliction of emotional distress").

among others. Both took melatonin to help them sleep, and Dr. King prescribed an anti-anxiety medication for Ms. King, due to the anxiety and panic she felt as a result of Defendant's conduct.

CP 97. Instead of granting Plaintiffs leave to amend, the trial court dismissed the case. CP 175-76. In its July 13 order, the trial court specifically stated that it did not grant Plaintiffs' motion to amend because "the proposed amendment would not have cured the defect on which the dismissal was granted." CP 285.

If the trial court dismissed the negligent infliction of emotional distress claim on the basis that the Complaint inadequately alleged objective symptomatology and Plaintiffs' proposed amendment would not have cured that defect, the trial court erred. Although objective symptomatology is required for negligent infliction of emotional distress claims, "nightmares, sleep disorders, intrusive memories, fear, and anger may be sufficient." *Hegel v. McMahon*, 136 Wn.2d 122, 135, 960 P.2d 424 (1998). Moreover, to prevail on a motion to dismiss under CR 12(b)(6), a defendant must establish beyond a doubt that the "plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Fondren v. Klickitat County*, 79 Wn. App. 850, 854, 905 P.2d 928 (1995) (quoting *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961, 577 P.2d 580 (1978)). The court must presume that "plaintiff's allegations are true and may consider hypothetical

facts that are not included in the record.” *Parmelee v. O’Neel*, 145 Wn. App. 223, 232, 186 P.3d 1094 (2008) (rev’d on other grounds). Here, if the trial court had found Plaintiffs’ original complaint’s allegations insufficient as to the damages resulting from Defendant’s negligent infliction of emotional distress, the proposed amendment, laying out Plaintiffs’ specific symptoms, was more than sufficient to withstand a CR 12(b)(6) motion.

Moreover, leave to amend “shall be freely given when justice so requires.” CR 15(a). The court should give leave unless prejudice to the opposing party would result. *Kirkham v. Smith*, 106 Wn. App. 177, 181, 23 P.3d 10 (2001). Here, no prejudice to Defendant would have resulted from permitting the requested amendment. The case was in its infancy: the parties had not yet conducted discovery, and Defendant had not even answered the original Complaint. The proposed amendment would have corrected any inadequacies in Plaintiffs’ pleading, and no prejudice to Defendant would have resulted. The trial court erred if it dismissed Plaintiffs’ claim for negligent infliction of emotional distress on the grounds that Plaintiffs did not adequately allege objective symptomatology.

V. CONCLUSION

Plaintiffs' notice of appeal was timely filed as to both the June 8 and the July 13 orders, and this Court should consider all of the issues raised by the two orders on their merits. Even if the Court determines that it may only consider issues raised by the July 13 order, however, the Court can and should reach the merits of the case. The trial court erred in granting Defendant's motion to dismiss, and this Court should reverse and remand for further proceedings.

Respectfully submitted this 20th day of January, 2012.

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP

 for William R. Squires III
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Attorneys for Appellants Joseph King,
M.D., Holly King, and their minor
children WJK, LJK, and CJMK

CERTIFICATE OF SERVICE

The undersigned hereby declares as follows:

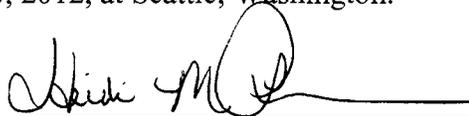
I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys for record for Appellants/Plaintiffs herein.

On January 20, 2012, I caused a true and correct copy of the foregoing document to be: 1) filed in the Washington State Court of Appeals, Division I; and 2) duly served via Legal Messenger on the following parties:

John W. Phillips
Phillips Law Group, PLLC
315 Fifth Avenue S., Suite 1000
Seattle, WA 98104-2682
Attorneys for Respondent/Defendant

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

DATED: January 20, 2012, at Seattle, Washington.



Heidi M. Powell

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JAN 20 PM 4:12

APPENDIX

TAB 1

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
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September 12, 2011

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CASE #: 67479-0-1

J. & H. King, M.D., et al., App. v. Michael Emeric Mockovak, Res.

Counsel:

The decision being appealed was entered by the trial court on June 8, 2011. The notice of appeal was filed on July 29, 2011. It appears the notice of appeal was not timely filed.

Pursuant to RAP 5.2 counsel for appellant(s) is directed to file a motion to extend the time to file the notice of appeal pursuant to Title 17 and RAP 18.8 with an affidavit of service. Respondent shall have 10 days from the date of service to file a response. If no response is filed, the court will deem that respondent has no objection to the extension.

If such a motion is not filed in this court within 30 days, a motion to dismiss the appeal for lack of jurisdiction will be considered by a commissioner at 10:30 a.m. on Friday, October 14, 2011.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

TWG

TAB 2

No.: 67479-0

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

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

v.

MICHAEL EMERIC MOCKOVAK, Respondent/Defendant.

**APPELLANTS' MOTION FOR A RULING THAT THE NOTICE
OF APPEAL IS TIMELY, OR, ALTERNATIVELY, FOR
EXTENSION OF TIME TO FILE THE NOTICE OF APPEAL**

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Attorneys for Appellants/Plaintiffs
Joseph King, M.D., Holly King, and
their minor children WJK, LJK, and
CJMK

I. IDENTITY OF MOVING PARTY & RELIEF REQUESTED

Appellants Joseph King, M.D. and Holly King, husband and wife and the marital community comprised thereof, and WJK, LJK, and CJMK, minor children by and through their guardians, Joseph King and Holly King (“Appellants”) ask the Court to rule that their notice of appeal is timely. The timely notice of appeal of the trial court’s July 13 order necessarily brought up the trial court’s June 8 order, and pursuant to RAP 5.2 the notice of appeal is timely as to both orders. Moreover, given that the appeal of the July 13 order will proceed regardless of this Court’s decision, and that the review of the July 13 order will necessarily involve consideration of the June 8 order, both the case and judicial efficiency will be better served by expressly allowing appeal of both orders.

Alternatively, if the Court disagrees and holds that the notice of appeal of the June 8 order was not timely filed, it should hold that Appellants have satisfied the requirements of RAP 18.8(b) and permit an extension of time to file the notice of appeal.

II. FACTS RELEVANT TO MOTION

A. Briefing on Defendant’s Motion to Dismiss in the Trial Court

In November 2009, Defendant was arrested for plotting the murder of his business partner, Dr. Joseph King. After a highly-publicized trial, Defendant was convicted of, among other things, solicitation to commit

the murder and the attempted murder of Dr. King. Defendant's crime caused significant distress and other injuries to the King family, for which they seek recompense through the instant lawsuit. *See* Complaint, attached as Exhibit A to the Declaration of William R. Squires III ("Squires Decl.").

In the trial court, Defendant filed a motion to dismiss the case under CR 12(b)(6). *See* Motion to Dismiss Under CR 12(b)(6), attached as Exhibit B to Squires Decl. This motion raised several arguments: that there was no implied private cause of action for violation of a criminal statute, that plaintiffs were not present when the conduct occurred as assertedly required by case law on outrage and negligent infliction of emotional distress, that the family's harm was impermissibly based on Defendant seeking bail, that there was no proximate causation, and that there was no evidence of objective symptoms of illness as required for a claim of negligent infliction of emotional distress.

Appellants' opposition to the motion to dismiss countered the motion on its merits, but also noted that if the Appellants "must replead to meet the minimal requirements of due process in this case, they are prepared to do so," and specifically requested that, if the trial court found that the claim for negligent infliction of emotional distress was insufficiently pled, then the trial court should grant leave to amend the

complaint to add specific allegations regarding Appellants' symptoms.

See Appellants' Opposition to Defendant's Motion to Dismiss Under CR 12(b)(6), attached as Exhibit C to Squires Decl., at 2, 9-10.

B. The Trial Court's Orders

On June 8, 2011, the trial court issued an order granting Defendant's motion to dismiss under CR 12(b)(6). *See* June 8 Order, attached as Exhibit D to Squires Decl. The trial court's order did not specify whether the dismissal was with or without prejudice, or with or without leave to amend. On June 20, Appellants filed a motion for leave to amend their complaint to add several causes of action. *See* Plaintiffs' Motion for Leave to Amend Their Complaint, attached as Exhibit E to Squires Decl. Appellants filed this motion within ten days¹ of the trial court's June 8 order.

On July 13, the court issued an Order re: Motion to Amend. *See* July 13 Order, attached as Exhibit F to Squires Decl. This order read, in part:

By Order dated June 8, 2011 this court granted Defendant's

¹ The motion to amend the complaint was filed on June 20, 2011. Ten days after June 8, 2011, fell on June 18, 2011, but given that June 18, 2011 was a Saturday the motion was timely filed on June 20, 2011. *See* CR 6(a) ("The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a legal holiday."); RAP 18.6(a) ("The last day of the period so computed is included unless it is a Saturday, Sunday, or legal holiday, in which case the period extends to the end of the next day that is not a Saturday, Sunday, or legal holiday.").

CR 12(b)(6) motion to dismiss Plaintiffs' entire case. In their opposition to Defendant's motion to dismiss, the Plaintiffs asked leave to amend their pleading of their claim of Negligent Infliction of Emotional Distress. This court did not specifically deny the motion to amend at the time it granted the motion to dismiss, but had considered the proposed amendment and did not grant the motion to amend because the proposed amendment would not have cured the defect on which the dismissal was granted. To the extent this court failed to address the motion to amend contained within the Plaintiffs' opposition to the Defendant's motion to dismiss, that motion is now DENIED.

The order went on to note that the entire case had been dismissed on June 8, and requested additional briefing from the parties as to whether the trial court had jurisdiction to grant Appellants' motion to amend. Appellants provided this additional briefing, but also filed a notice of appeal of the June 8 and July 13 orders on July 29, 2011.

C. Proceedings Before This Court

On September 12, 2011, Appellants received a letter from the Court Administrator Richard D. Johnson. *See Exhibit G to Squires Decl.* In this letter, Mr. Johnson suggested that Appellants' notice of appeal might not be timely, and directed Appellants to file a motion to extend the time to file a notice of appeal. Appellants were directed to file this motion within 30 days, or by October 12, 2011. This motion responds to Mr. Johnson's request.

Before the 30 days had passed and before Appellants filed their motion, Defendant prematurely filed a motion to dismiss on September 29, 2011. This motion was originally noted for oral argument on October 14, 2011, but the parties have filed a stipulated motion regarding the briefing schedule for these motions, and Defendant will be striking his request for oral argument. The parties wish to have these issues decided on the pleadings.

III. GROUNDS FOR RELIEF SOUGHT

A. Appellants' Appeal Is Timely.

RAP 5.2(a) provides that, except in certain circumstances not applicable here, "a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section (e)." In section (e), the Rule provides that a notice of appeal of orders deciding certain timely motions designated in that section must be filed within 30 days after the entry of the order. RAP 5.2(e). The civil motions encompassed by this rule are: a motion for judgment as a matter of law under CR 50(b), a motion to amend findings under CR 52(b), a motion for reconsideration or new trial under CR 59, and a motion for amendment of judgment under CR 59. *Id.* Moreover:

The official comment to RAP 5.2(e) makes clear that a timely appeal from such an order encompasses review of

the underlying judgment: “Rule 2.4(c) allows the judgment to be reviewed upon review of certain post-trial orders. Rule 5.2(e) accommodates Rule 2.4(c) by starting the time running from the date of the entry of the decision on the designated timely-filed post-judgment motions.”

Structurals N.W., Ltd. v. Fifth & Park Place, Inc., 33 Wn. App. 710, 658 P.2d 679 (1983) (quoting official comment to RAP 5.2(e)); *see also* *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 492, 183 P.3d 283 (2008) (an appeal from an order on a motion for reconsideration “allows review of the propriety of the final judgment itself.”). Here, the appeal from the trial court’s July 13 order brings up the June 8 order for review.

The *Structurals* case is instructive. In *Structurals*, the trial court entered judgment on November 13, and, on November 18, counsel for the parties stipulated that amended findings, conclusions, and judgment could be entered. 33 Wn. App. at 713. The trial court entered this stipulated order on November 23, and the appellant filed its notice of appeal on December 17. *Id.* The respondent argued that the November 13 judgment was not timely appealed. *Id.*

The Court disagreed. It held that “[w]hile the stipulation allowing entry of the amended judgment was technically not a motion for amended judgment brought under CR 59, we note that in all practical effect the result is the same as if such a motion had been made and granted.” 33 Wn. App. at 714. Significantly, the Court noted that the stipulation “was

entered within 5 days of the November 13 judgment, as required for a post-judgment motion.”² *Id.* The Court also noted that the rules “are designed to ‘allow some flexibility in order to avoid harsh results’; substance is preferred over form.” *Id.* (quoting *Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982)). The Court treated the November 23 judgment as having been entered pursuant to a motion to amend, and held that the appeal was timely.

The rationale of *Structurals* applies here and dictates that Appellants’ notice of appeal was timely. It is true that, as in *Structurals*, the trial court’s July 13 order was not technically issued pursuant to a motion for reconsideration, a motion to amend findings, or a motion to amend the judgment. However, also as in *Structurals*, Appellants’ motion to amend their complaint was specifically filed within ten days of the June 8 order, the timeframe required for a timely motion for reconsideration (CR 59(b)), a timely motion to amend findings (CR 52(b)) and a timely motion to amend the judgment (CR 59(h)).

In addition, as in *Structurals*, the effect of the trial court’s July 13 order was a ruling on or a response to one of the civil motions denominated in RAP 5.2(e). Appellants’ motion to amend their complaint specifically stated that the trial court’s June 8 order “did not specify

² CR 59 now gives parties 10 days to file such a motion.

whether the dismissal was with or without prejudice, or with or without leave to amend.” Appellants’ reply brief in support of their motion to amend their complaint further noted that “the motion was intended to give this Court an opportunity to rectify what seems to Plaintiffs to be an inadvertent failure to grant one of the most important aspects of a proper disposition of a motion to dismiss: the ability to amend the complaint.” See Reply in Support of Plaintiffs’ Motion for Leave to Amend Their Complaint, attached as Exhibit G to Squires Decl., at 2. In response to this briefing, the trial court entered its July 13 order, which stated that the trial court did not grant Appellants’ motion to amend contained within their opposition to the 12(b)(6) motion “because the proposed amendment would not have cured the defect on which the dismissal was granted.” The trial court also held that “[t]o the extent this court failed to address the motion to amend contained within the Plaintiffs’ opposition to the Defendant’s motion to dismiss, that motion is now DENIED.”

The effect of the July 13 order, then, is same as if one of the RAP 5.2(e) civil motions “had been made and granted.” *Structurals*, 33 Wn. App. at 714. The July 13 order added specific findings regarding Appellants’ requests to amend their claim for negligent infliction of emotional distress, and specifically added that such request was denied. These findings and conclusions amended the trial court’s June 8 order, as

the result is the same as if Appellants had brought a motion to amend the judgment or a motion to amend the findings. *See Structural's*, 33 Wn. App. at 714.³

Similarly, the July 13 order could be considered an order denying reconsideration of the June 8 order. The July 13 order specifically stated that Appellants' request for leave to amend their claim for negligent infliction of emotional distress was denied. In effect, then, the July 13 order acted as a denial of a motion for reconsideration of the trial court's dismissal of the case. Under *Structural's*, the appeal of the July 13 order encompassed review of the underlying June 8 order and the notice of appeal is timely.⁴

³ In his motion to dismiss the appeal, Defendant cites to two cases for the proposition that an appellant cannot "bootstrap" an unappealed order into the appeal of "subsequent ancillary rulings: *Carrara, LLC v. Ron & E Enters., Inc.*, 137 Wn. App. 822, 155 P.3d 161 (2007), and *Bushong v. Wilsbach*, 151 Wn. App. 373, 213 P.3d 42 (2009). These cases are both distinguishable for the same reason. In both cases, the party timely filed a notice of appeal of the trial court's post-judgment attorney fees decision, but the appeal of the underlying trial court judgment was untimely. The courts did not allow the timely attorney fees appeal to bring up for review the judgment on the merits because RAP 2.4(b) "makes clear that such an appeal does not allow a decision entered before the award of attorney fees to be reviewed." *Carrara*, 137 Wn. App. at 825; *see also Bushong*, 151 Wn. App. at 377 (the "plain words" of RAP 2.4(b) show that the appeal of the award was untimely). However, RAP 2.4(b) is specific to attorney fee decisions and is not applicable here.

⁴ Appellants freely admit that they did not style their motion as one for reconsideration, or even as a motion to modify or amend findings. This was done specifically in an effort to focus the trial court's attention on what Appellants considered to be the issue before the court at that time. However, the effect of the trial court's July 13 order was the same as if the trial court had ruled on one of those timely post-trial motions.

B. Allowing the Appeal of Both Orders to Go Forward Best Serves Judicial Efficiency and Avoids Problems Regarding the Scope of the Appeal.

While Appellants' notice of appeal was filed more than 30 days after the entry of the June 8 order, it is undisputed that the July 13 order was timely appealed.⁵ Therefore, no matter what this Court rules in response to the pending motions, the appeal of the trial court's July 13 order will go forward.

However, if the Court determines that the June 8 order cannot be appealed, then it will create an immediate, complicating issue regarding the scope of the appeal. For example, in order to review the trial court's July 13 order denying Appellants' motion to amend the pleading regarding negligent infliction of emotional distress, the appellate court will necessarily have to determine the correctness of the trial court's determination that the proposed amendment would not have cured the defect upon which the dismissal was granted. In order to determine this, the appellate court will necessarily have to consider the June 8 order and consider the basis upon which the trial court granted the motion to dismiss. Similarly, consideration of the trial court's determination in the July 13 order that the entire case had previously been dismissed

⁵ In fact, Defendant's motion to dismiss only seeks dismissal of the appeal of the June 8 order, thereby implicitly agreeing that the appeal of the July 13 order is proper.

necessarily requires consideration of whether the June 8 order did or did not include leave to amend. Yet it is a virtual certainty that, if only the appeal of the July 13 order goes forward, Defendant will try to limit the scope of the appeal and argue that none of the issues raised in the motion to dismiss briefing are properly appealable. Appellants, of course, will and do contend that the July 13 order necessarily raises and includes the issues decided by the June 8 order. This Court can eliminate the waste of time that will be occasioned by the briefing and disputes over these issues by simply holding that the notice of appeal is timely as to both orders.

Moreover, the issues that are raised by Appellants' appeal are significant ones. The trial court appears to have based its dismissal on the purported "presence" requirement for Appellants' outrage and negligent infliction of emotional distress claims. Defendant's argument in this regard was that, because Appellants were not "present" while Defendant plotted to kill Dr. King, Appellants' outrage and negligent infliction of emotional distress claims were barred as a matter of law. However, as Appellants argued below, presence is only required when the alleged outrageous conduct is directed at a third person. *See Lund v. Caple*, 100 Wn.2d 739, 742, 675 P.2d 226 (1984) (presence required when "the conduct is directed at a third person"). Perhaps even more significantly, the impact of the trial court's holding is to immunize the perpetrator of

attempted murder from his victims' damages suffered thereby if the victim is not physically present when the attempt occurs. This simply cannot be the law in Washington, and Washington's appellate courts have never been confronted with the issue of whether the purported "presence" requirement applies in a case of attempted murder. The significant issues in this case are best served if the Court permits the appeal to go forward clearly as to both orders.

C. Alternatively, the Court Should Extend the Deadline for Filing the Notice of Appeal to Prevent a Gross Miscarriage of Justice and Because Extraordinary Circumstances Exist.

If the Court finds that Appellants' notice of appeal of the June 8 order was not timely filed, it should extend the time to file the notice of appeal. RAP 18.8(b) provides that an appellate court "will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal." These circumstances are met here.

The Rules of Appellate Procedure "were designed to allow some flexibility to avoid harsh results." *Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982) (citing the Comment to RAP 18.8). The "trend of the law in this state is to interpret rules and statutes to reach the substance of matters so that it prevails over form." *Weeks*, 96 Wn.2d at 896 (quoting *First Fed. Sav. & Loan Ass'n v. Ekanger*, 22 Wn.

App. 938, 944, 593 P.2d 170 (1979)). The appellate court “should normally exercise its discretion to consider cases and issues on their merits unless there are compelling reasons not to do so--even despite technical flaws in an appellant’s compliance with the Rules of Appellate Procedure.” *Knox v. Microsoft Corp.*, 92 Wash. App. 204, 213, 962 P.2d 839 (1998). “‘Extraordinary circumstances’ include instances where the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party’s control.” *Shumway v. Payne*, 136 Wn.2d 383, 395, 964 P.2d 349 (1998).

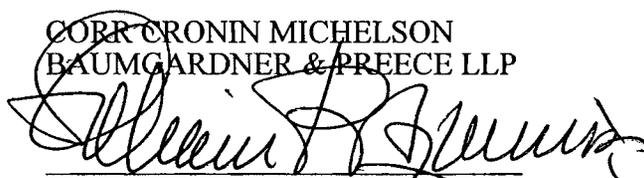
Here, Appellants’ conduct was reasonably diligent. Once Appellants received the trial court’s July 13 order,⁶ Appellants acted diligently and filed their notice of appeal on July 29, 2011. If Appellants’ determination that a timely appeal from the July 13 order would bring up both orders for review was in error, the case law cited in Section A of this motion indicates that it was excusable error. As in *Weeks*, “substance should prevail over form.” 96 Wn.2d at 896. Because Defendant had notice and because “applying strict form would defeat the purpose of the rules to ‘promote justice and facilitate the decision of cases on the merits,’” *Weeks*, 96 Wn.2d at 896 (quoting RAP 1.2(a)), the Court should extend the time for Appellants to file their notice of appeal and hold such

⁶ Appellants received a copy of this order via U.S. mail on July 15, 2011. See Squires Decl. at ¶ 10.

filing was timely. *See also Knox*, 92 Wash. App. at 212-13 (refusing to dismiss appeal when appellant had timely appealed from the final judgment on the verdict, but had not referenced all of the prior orders he was appealing in his notice of appeal).

Respectfully submitted this 10th day of October, 2011.

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP



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Attorneys for Appellants/Plaintiffs Joseph
King, M.D., Holly King, and their minor
children WJK, LJK, and CJMK

CERTIFICATE OF SERVICE

The undersigned hereby declares as follows:

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

On October 10, 2011, I caused a true and correct copy of the
foregoing document to be: 1) filed in the Washington State Court of
Appeals, Division I; and 2) duly served via Legal Messenger on the
following parties:

John W. Phillips
Phillips Law Group, PLLC
315 Fifth Avenue S., Suite 1000
Seattle, WA 98104-2682
Attorneys for Respondent/Defendant

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

DATED: October 10, 2011, at Seattle, Washington.



Donna Patterson

TAB 3

SEP 20 2011
OSMA BUDWIN LLP

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Plaintiffs-Appellants,

v.

MICHAEL EMERIC MOCKOVAK,

Defendant-Appellee.

No. 60406-6-I

DEFENDANT-APPELLEE'S
MOTION TO DISMISS
APPEAL OF JUNE 8, 2011
ORDER OF DISMISSAL

Set for Argument: October 14, 2011,
10:30 a.m.

I. IDENTITY OF MOVING PARTY

Defendant-Appellee Dr. Michael Mockovak ("Defendant") is the moving party.

II. STATEMENT OF RELIEF SOUGHT

Defendant moves to dismiss Plaintiffs-Appellants' ("Plaintiffs") Notice of Appeal of the Superior Court's "Order Granting Motion to Dismiss Under CR 12(b)(6)," dated June 8, 2011 (the "Dismissal Order"). On July 29, 2011, Plaintiffs filed a Notice of Appeal which purports to appeal from both a June 8, 2011 Order and a July 13, 2011 Order. This Motion seeks to dismiss Plaintiffs' appeal of the June 8, 2011 Order.

On September 12, 2011, this Court's Administrator sent a letter to the parties stating that "it appears the notice of appeal was not timely filed," directing appellants to file a motion to extend the time to file a notice of appeal, and allowing respondent 10 days from the date of service to file a response. Exhibit A hereto. The Court Administrator set a back-up date to hear a motion to dismiss the appeal for lack of jurisdiction for 10:30 a.m. on Friday, October 14, 2011. Appellants have not filed the motion the Court Administrator directed them to file, and today is the deadline for a timely motion to dismiss to be heard on October 14, 2011. Respondent, therefore, submits this motion to dismiss for consideration on October 14, 2011, at 10:30 a.m.

Because Plaintiffs' July 29, 2011 Notice of Appeal was filed 51 days after the June 8, 2011 Dismissal Order was entered, the Notice of Appeal violates RAP 5.2(a), which required Plaintiffs to file their notice of appeal "30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed." Accordingly, Plaintiffs' appeal of the Superior Court's June 8, 2011 Order must be dismissed as untimely.

III. FACTS RELEVANT TO MOTION

A. The June 8, 2011 Dismissal Order

On June 8, 2011, Superior Court Judge Richard Eadie, pursuant to CR 12(b)(6), dismissed Plaintiffs' Complaint for infliction of emotional distress. *See* Declaration of John W. Phillips in Support of Defendant-Appellee's Motion to Dismiss Appeal of June 8, 2011 Order ("Phillips Decl."), Ex. A. Plaintiffs did not file a motion for reconsideration.

On June 20, 2011, Plaintiffs filed a motion to amend to add new claims that were not part of the dismissed Complaint. *Id.*, Ex. B. Plaintiffs made clear in filing their motion to amend that they were *not* moving to reconsider the Court's Dismissal Order. *See Id.*, Ex. C (Reply in Support Plaintiffs' Motion for Leave to Amend Complaint (June 27, 2011) at 2, n. 2, stating that "Plaintiffs do not seek reconsideration").

B. The July 13, 2011 Order

In response to Plaintiffs' June 20, 2011 motion to amend, the Superior Court entered an order on July 13, 2011. Judge Eadie's July 13, 2011 Order distinguished between Plaintiffs' two attempts

to amend their complaint: (i) Plaintiffs' request for leave to amend embedded in their opposition brief to Defendant's CR 12(b)(6) motion to dismiss; and (ii) Plaintiffs' June 20, 2011 motion to amend, filed after Judge Eadie had dismissed the case.

With respect to Plaintiffs' request to amend in their opposition brief, Judge Eadie stated:

In their opposition to Defendant's motion to dismiss, the Plaintiffs asked leave to amend their pleading of their claim of Negligent Infliction of Emotional Distress. This court did not specifically deny the motion to amend at the time it granted the motion to dismiss, but had considered the proposed amendment and did not grant the motion to amend because the proposed amendment would not have cured the defect on which the dismissal was granted. To the extent this court failed to address the motion to amend contained within the Plaintiffs' opposition to the Defendant's motion to dismiss, that motion is now DENIED.

Phillips Decl., Ex. D at 1.

Turning next to Plaintiffs' June 20, 2011 motion to amend, Judge Eadie observed:

Plaintiffs now have made a new and different motion to amend to add new causes of action. Motions to amend are to be freely granted, but the entire case was dismissed on June 8, 2011, and there are no motions pending in this court to reconsider or modify the June 8, 2011 Order."

Id. at 2.

Judge Eadie then appropriately asked the parties to brief the following question: “Does this Court have jurisdiction to grant a motion to amend to add new claims where the entire case has been dismissed, and there are no motions pending to reconsider or modify the Order of dismissal?” *Id.* at 2.

C. The July 29, 2011 Notice of Appeal

On July 29, 2011, Plaintiffs filed a Notice of Appeal purporting to appeal from both Judge Eadie’s June 8, 2011 Dismissal Order and Judge Eadie’s July 13, 2011 Order. Plaintiffs’ July 29, 2011 Notice of Appeal was filed fifty-one (51) days after Judge Eadie’s June 8, 2011 Dismissal Order.

D. The August 9, 2011 Order

On August 9, 2011, after receiving the parties’ briefs on the issue of the Superior Court’s jurisdiction, Judge Eadie ruled that the Superior Court had no jurisdiction to entertain Plaintiffs’ June 20, 2011 motion to amend. Phillips Decl., Ex. E.

IV. ARGUMENT

A. UNDER RAP 5.2(a), PLAINTIFFS' APPEAL OF THE JUNE 8, 2011, ORDER OF DISMISSAL IS UNTIMELY AND MUST BE DISMISSED.

RAP 5.2(a) sets forth the time limits for filing a notice of appeal. It provides (emphasis added):

Except as provided in rules *3.2(e) and 5.2(d) and (f)*, a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in *section (e)*.

(Emphases added.) RAP 5.2(a) thus establishes that a party must file a notice of appeal within “30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed” with a few enumerated exceptions, none of which is relevant here. Those exceptions are:

- RAP 3.2(e), which relates to substitution of parties, and obviously does not apply here.
- RAP 5.2(d), which relates to when a statute require a different period than 30 days for filing a notice of appeal, which also is inapplicable here.

- RAP 5.2(f), which relates to notices of appeal by other parties once the first party initiates an appeal, which also does not apply here.

That leaves RAP 5.2(e), which identifies specific motions that extend the time for filing a notice of appeal. RAP 5.2(e) provides:

The motions to which this rule applies are a motion for arrest of judgment under CR 7.4, a motion for new trial under CR 7.5, a motion for judgment as a matter of law under CR 50(b), a motion to amend findings under CR 52(b), a motion for reconsideration or new trial under CR 59, and a motion for amendment of judgment under CR 59.

RAP 5.2(e). Plaintiffs did not move for reconsideration and specifically disclaimed that their motion to amend was a motion for reconsideration under CR 59. Phillips Decl., Ex. C at 2, n. 2. Thus, RAP 5.2(e) also is plainly inapplicable here.

Accordingly, RAP 5.2(a) required Plaintiffs to file their Notice of Appeal within “30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed.” RAP 5.2(a). Plaintiffs filed their Notice of Appeal of the Superior Court’s June 8, 2011 Dismissal Order on July 29, 2011 — fifty-one (51) days after entry of the Dismissal Order. Under the explicit requirements of RAP 5.2(a), Plaintiffs’ appeal of the June 8, 2011

Dismissal Order is therefore untimely and their appeal from that order must be dismissed. *See Holiday v. City of Moses Lake*, 157 Wn. App. 347, 353, 236 P.3d 981 (2010) (court dismissed City's appeal of writ of prohibition because it was not filed within 30-days after entry of the writ as required by RAP 5.2(a)).

B. Plaintiff Can Identify No Extraordinary Circumstances To Justify Extending the Time Limit to Appeal the June 8, 2011 Dismissal Order.

RAP 18.8(b) sets forth the narrow basis upon which this Court may extend the time for Plaintiffs to file their notice of appeal.

That rule provides:

The appellate court will *only in extraordinary circumstances and to prevent a gross miscarriage of justice* extend the time within which a party must file a notice of appeal, a notice for discretionary review, a motion for discretionary review of a decision of the Court of Appeals, a petition for review, or a motion for reconsideration. The appellate court will *ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension* of time under this section. The motion to extend time is determined by the appellate court to which the untimely notice, motion or petition is directed.

RAP 18.8(b) (emphasis added). Thus, not only does the rule provide that granting an extension will occur “only in extraordinary circumstances and to prevent a gross miscarriage of justice,” but it also makes clear that the appellate court will “ordinarily hold that the

desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension”

Indeed, case law interpreting RAP 18.8 demonstrates that it is very difficult to meet its requirements, and that Plaintiffs cannot meet its criteria here. For example, in *Reichelt v. Raymark Industries, Inc.*, 52 Wn. App. 763, 764 P.2d 653 (1988), defendant asked the court to accept a notice of appeal filed 10 days late. Defendant explained that one of its two trial attorneys had left the firm during the 30 days allotted to file the notice of appeal and that the firm’s appellate attorney had an unusually heavy work load at the time. The Court of Appeals was unimpressed, noting that “the rigorous test [in RAP 18.8] has rarely been satisfied in reported case law,” and that when relief has been granted, generally the notice of appeal had been timely but defective in some way. *Id.* at 765-66. The Court rejected defendant’s argument that the plaintiff would not be prejudiced, noting that prejudice is irrelevant under the rule and that the rule expresses a distinct preference for finality over balancing of relative harms to the parties. *Id.* at 766, n. 2.

In *Beckman v. Department of Social and Health Services*, 102 Wn. App. 687, 11 P.3d 313 (2000), the Court of Appeals rejected the Attorney General's request that it accept a notice of appeal of a \$17.76 million judgment against DSHS that was filed 10 days late. The Court found that the plaintiff's failure to give the Attorney General's office notice that the judgments had been entered did not constitute "extraordinary circumstances," notwithstanding the State's claim that one of the State's own attorneys deliberately let the appeal period lapse or was, at minimum, negligent in doing so. *Id.* at 695.

And in *Shumway v. Payne*, 136 Wn. 2d 383, 964 P.2d 349 (1998), the Supreme Court found no extraordinary circumstances for accepting a late motion for discretionary review even though plaintiff had relied on erroneous advice by his counsel about when he needed to file his appeal.

Plainly, under the language of RAP 18.8 and the governing case law, no extraordinary circumstance justifies acceptance of Plaintiffs' late notice of appeal of the June 8, 2011 Order of Dismissal.

C. Plaintiffs Cannot Bootstrap Their Late Appeal of the June 8, 2011 Dismissal Order to the Court's July 13, 2011 Order.

Defendant anticipates that Plaintiffs will claim that filing the June 20, 2011 motion to amend to add new claims fell within the ten-day period for filing a motion for reconsideration, and therefore the motion to amend should toll the time period for filing their notice of appeal. Such a claim is plainly wrong under the law. First, a motion to amend is not a motion for reconsideration, and RAP 5.2(e) narrowly defines the few motions that toll the 30-day deadline for filing a notice of appeal. RAP 5.2(e). The rule's narrow definition does not include a "motion to amend." *Id.* Second, Plaintiffs insisted that their motion to amend was not a motion for reconsideration. Phillips Decl., Ex. C at 2, n. 2.

The case of *Schaefco, Inc. v. Columbia River Gorge Commission*, 121 Wn. 2d 366, 849 P.2d 1225 (1993), is instructive. There, the plaintiffs filed a timely motion for reconsideration within 10 days, but failed to serve the motion until 14 days after the adverse decision. *Id.* at 368. At the time, CR 59 required that both filing and service of a motion to reconsider must occur within 10 days of the

adverse decision. *Id.* at 367. The Court held that a notice of appeal filed 30 days after the Superior Court ruled on the motion for reconsideration was untimely because the motion for reconsideration itself had been untimely. *Id.* at 367-68. The Court further ruled that a trial court did not have the power to extend the time for filing a motion for reconsideration. *Id.* While the Court agreed that Schaefer “raises many important issues” in its appeal, the Court concluded that it would be “improper to consider those questions given the procedural failures of this case.” *Id.* at 368.

Nor can Plaintiffs’ appeal of the July 13, 2011 Order “bring up” an appeal of the underlying dismissal. RAP 5.2(a) allows tolling of the 30-day deadline for filing of a notice of appeal only when specifically delineated motions are filed. The express purpose of the Rules of Appellate Procedure is to prohibit the “bootstrapping” of unappealed orders into the appeal of subsequent ancillary rulings. *See, e.g., Ron & E Enterprises, Inc. v. Carrerra, LLC*, 137 Wn. App. 822, 825-26, 155 P.3d. 161 (2007) (appeal within 30 days after an attorney fee award constituted timely appeal of attorney fee award but not of the earlier judgment on which the attorney fee award was

based); *Bushong v. Wilsbach*, 151 Wash. App. 373, 376, 213 P.3d 42 (2009) (same).

V. CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' appeal of the Superior Court's June 8, 2011 Dismissal Order as untimely under RAP 5.2(a).

DATED this 29th day of September, 2011.

Respectfully submitted,

PHILLIPS LAW GROUP PLLC

By: _____

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Attorneys for Defendant-Appellee
Dr. Michael Mockovak

CERTIFICATE OF SERVICE

I certify that today I caused to be served a true and correct
copy of the foregoing document upon:

William R. Squires III
Steven W. Fogg
Sarah E. Tilstra
Corr Cronin Michelson Baumgardner & Preece, LLP
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154

(Via Messenger)

DATED this 29th day of September, 2011.



Carrie J. Gray

EXHIBIT A

The Court of Appeals
of the
State of Washington

RICHARD D. JOHNSON,
Court Administrator/Clerk

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September 12, 2011

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CASE #: 67479-0-1
J. & H. King, M.D., et al., App. v. Michael Emeric Mockovak, Res.

Counsel:

The decision being appealed was entered by the trial court on June 8, 2011. The notice of appeal was filed on July 29, 2011. It appears the notice of appeal was not timely filed.

Pursuant to RAP 5.2 counsel for appellant(s) is directed to file a motion to extend the time to file the notice of appeal pursuant to Title 17 and RAP 18.8 with an affidavit of service. Respondent shall have 10 days from the date of service to file a response. If no response is filed, the court will deem that respondent has no objection to the extension.

If such a motion is not filed in this court within 30 days, a motion to dismiss the appeal for lack of jurisdiction will be considered by a commissioner at 10:30 a.m. on Friday, October 14, 2011.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

TWG

EXHIBIT A

TAB 4

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RECEIVED
OCT 24 2011
CORR CRONIN LLP

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

Plaintiffs-Appellants,

v.

MICHAEL EMERIC MOCKOVAK,

Defendant-Appellee.

No. 60406-6-I

DEFENDANT-APPELLEE'S
OPPOSITION TO
APPELLANTS' MOTION
FOR A RULING THAT THE
NOTICE OF APPEAL IS
TIMELY, OR
ALTERNATIVELY, FOR
EXTENTION OF TIME TO
FILE THE NOTICE OF
APPEAL

I. IDENTITY OF RESPONDING PARTY

Defendant-Appellee Dr. Michael Mockovak ("Defendant") has moved to dismiss the untimely appeal of Judge Eadie's June 8, 2011 Order of Dismissal (the "June 8 Final Judgment"). *See* Defendant-Appellee's Motion to Dismiss Appeal of June 8, 2011 Order of Dismissal (Sept. 29, 2011) ("Defendant's Motion to Dismiss"). Plaintiffs-Appellants ("Plaintiffs") responded to Defendant's Motion to Dismiss with a motion of their own, entitled "Appellants' Motion for a Ruling that the Notice of Appeal is Timely or, Alternatively, for Extension of Time to File the Notice of Appeal" (Oct. 10, 2011) ("Plaintiffs' Motion"). Pursuant to the

Court's October 12, 2011 Order granting the parties' stipulated briefing schedule for the two motions, Defendant submits this response to Plaintiffs' Motion. For the reasons set forth in Defendant's Motion to Dismiss and below, the Court should deny Plaintiffs' Motion and dismiss Plaintiffs' appeal of the June 8 Final Judgment as untimely.

II. STATEMENT OF RELIEF SOUGHT

Defendant asks the Court to grant Defendant's Motion to Dismiss and deny Plaintiffs' Motion.

III. FACTS RELEVANT TO MOTION

Defendant incorporates pages 3-5 of Defendant's Motion to Dismiss. Defendant supplements those facts here, because they bear particularly on Plaintiffs' Motion.

A. The June 8 Final Judgment.

1. Defendant's Motion to Dismiss in the Superior Court.

Defendant asked the Superior Court to dismiss Plaintiffs' emotional distress lawsuit because the suit was defective as a matter of law. Defendant's Motion to Dismiss presented five bases for dismissal: (1) Washington law does not recognize an implied civil

action for violation of the criminal statute of solicitation of murder; (2) Plaintiffs could not state a claim for intentional or negligent infliction of emotional distress because Plaintiffs were not present when Defendant's conduct occurred; (3) Plaintiffs' alleged harms stem from Defendant's exercise of his constitutional right to bail and therefore cannot form the basis for civil tort liability; (4) Plaintiffs alleged only remote and indirect injuries not proximately caused by Defendant; and (5) as to the negligent infliction of emotional distress claim, Plaintiffs did not allege that any of them had been under the care of a physician or displayed any objective symptoms or illness. *See* Supplemental Declaration of John W. Phillips ("Supp. Decl."), Ex. A (Defendant's Motion to Dismiss under CR 12(b)(6)).

In their opposition brief, Plaintiffs addressed one of the problems with their negligent infliction of emotional distress claim by stating:

Defendant contends that Plaintiffs' claim for negligent infliction of emotional distress cannot stand because the Complaint does not allege that any of the Plaintiffs received care from a physician, received diagnoses, or had any objective symptoms of illness. . . . [I]f the Court finds that the claim for negligent infliction of emotional distress is insufficiently pled, the Court should grant Plaintiffs leave to amend their Complaint.

Supp. Decl., Ex. B (Plaintiffs' Opposition to Defendant's Motion to Dismiss) at 9. Plaintiffs did not file any separate motion to amend, and they did not submit a proposed order granting leave to amend.

2. The June 8 Final Judgment.

On June 8, 2011, Judge Eadie dismissed Plaintiffs' case in its entirety. Phillips Decl., Ex. A.

B. Plaintiffs' June 20, 2011 CR 15 Motion ("CR 15 Motion").

On June 20, 2011, twelve days after entry of the June 8 Final Judgment, Plaintiffs moved to amend to add two claims: (1) intentional injury to others under Restatement (Second) of Torts § 870; and (2) unjust enrichment. In their CR 15 Motion, Plaintiffs told the Superior Court that "[b]y requesting leave to amend to add new causes of action, however, Plaintiffs do not waive their right to appeal the Court's dismissal of their original complaint under CR 12(b)(6)." Phillips Decl. Ex. B, at 2, n.2.

Defendant opposed Plaintiffs' motion for leave to amend, contending that it was a transparent attempt to avoid the standards for seeking reconsideration of an order of dismissal under CR 12(b)(6), which plaintiffs could not meet. Supp. Decl. Ex. C

(Defendant's Memorandum Opposing Plaintiffs' Procedurally Improper Motion for Leave to Amend), at 1. Plaintiffs replied by telling the Superior Court that "Plaintiffs do not seek reconsideration; they seek leave to amend [the complaint]." Phillips Decl. Ex. C at 2, n.2.

C. The July 13, 2011 Order ("July 13 Order").

Judge Eadie's July 13 Order addressed Plaintiffs' CR 15 Motion by distinguishing between Plaintiffs' two attempts to amend their complaint: (i) Plaintiffs' request for leave to amend embedded in their opposition brief to Defendant's CR 12(b)(6) motion to dismiss; and (ii) Plaintiffs' CR 15 motion, filed after Judge Eadie had entered the June 8 Final Judgment. With respect to Plaintiffs' request to amend in their opposition brief, Judge Eadie stated:

In their opposition to Defendant's motion to dismiss, the Plaintiffs asked leave to amend their pleading of their claim of Negligent Infliction of Emotional Distress. This court did not specifically deny the motion to amend at the time it granted the motion to dismiss, but had considered the proposed amendment *and did not grant the motion to amend because the proposed amendment would not have cured the defect on which the dismissal was granted.* To the extent this court failed to address the motion to amend contained within the Plaintiffs' opposition to the Defendant's motion to dismiss, that motion is now DENIED.

Phillips Decl., Ex. D at 1 (emphasis added). Turning next to Plaintiffs' CR 15 Motion, Judge Eadie observed:

Plaintiffs now have made a new and different motion to amend to add new causes of action. Motions to amend are to be freely granted, but the entire case was dismissed on June 8, 2011, and there are no motions pending in this court to reconsider or modify the June 8, 2011 Order."

Id. at 2. Judge Eadie then asked the parties to brief the following question: "Does this Court have jurisdiction to grant a motion to amend to add new claims where the entire case has been dismissed, and there are no motions pending to reconsider or modify the Order of dismissal?" *Id.* at 2.

D. The August 9, 2011 Order ("August 9 Order").

On August 9, 2011, after reviewing the parties' briefs on his July 13 question, Judge Eadie denied Plaintiffs' CR 15 Motion. Phillips Decl., Ex. E. In so ruling, Judge Eadie stated he did so "based substantially on the authorities cited in Defendant's Memorandum dated August 4, 2011." *Id.* That memorandum (Supp. Decl., Ex. D) pointed out that the Superior Court lacked jurisdiction to grant a CR 15 motion to add new claims where the Superior Court has entered June 8 Final Judgment and Plaintiffs had not filed a

motion to reconsider or modify the June 8 Final Judgment. Plaintiffs did not file a notice of appeal of Judge Eadie's August 9 Order.

IV. ARGUMENT

A. Under RAP 5.2(a), Plaintiffs' Appeal of the June 8 Final Judgment Is Untimely and Must Be Dismissed.

Plaintiffs' appeal of the June 8 Final Judgment is untimely, because it was filed 51 days after June 8, 2011. Plaintiffs try to avoid a straightforward application of RAP 5.2(a) by saying their appeal should be permitted under RAP 5.2(e), which tolls the filing of a notice of appeal when a timely motion for reconsideration, a motion to amend findings, or a motion to amend the judgment is filed. Yet Plaintiffs admit that the July 13 Order "was not technically issued pursuant to a motion for reconsideration, a motion to amend findings, or a motion to amend the judgment." Plaintiffs' Motion at 8. Thus, the "timeliness" of Plaintiffs' appeal rests on Plaintiffs convincing this Court that their CR 15 Motion should be viewed as the functional equivalent to a motion for reconsideration or to amend the judgment under CR 59. For several reasons, the Court should not be persuaded by Plaintiffs' attempt to recast their CR 15 Motion.

First, when the parties briefed the propriety of Plaintiffs' CR 15 Motion, Defendant argued that Plaintiffs' CR 15 Motion was an attempt to avoid the standards for seeking reconsideration of an order of dismissal under CR 12(b)(6), which Plaintiffs knew they could not meet. Supp. Decl., Ex. C at 1. Responding to that argument, Plaintiffs represented to the Superior Court that "Plaintiffs do not seek reconsideration; they seek leave to amend [their complaint]." Phillips Decl. Ex. C, Reply at 2, n.2. This record should put a full stop to Plaintiffs' attempt to say something different to this Court.

Second, Plaintiffs chose to file a CR 15 Motion, not a CR 59 motion, because of their perception that CR 15 motions are "freely" granted. *See* Phillips Decl., Ex. B. Plaintiffs had no basis for seeking reconsideration or amending the judgment and could not have met the strict standards for granting such motions. *See* CR 59 (a) (listing limited bases for reconsideration, including "irregularity," "misconduct," "accident or surprise," or "newly discovered evidence").

This is not a trifling point. The Rules of Appellate Procedure narrowly define the motions that extend the time to file an appeal, because those motions also constitute the narrow jurisdiction the Superior Court retains after a final judgment is entered. Consistently, RAP 7.2(e) authorizes the Superior Court to “hear and determine” only “post judgment motions authorized by the civil rules” under CR 59, or “actions to change or modify a decision that is subject to modification by the court that initially made the decision” under CR 60. These criteria are narrow, consistent with the narrow jurisdiction retained by the Superior Court after entering a final judgment. Rather than trying to fit within those narrow criteria, Plaintiffs elected instead to file a CR 15 motion. Having attempted to avail themselves of the more liberal standards under CR 15, Plaintiffs should not be heard in this Court to claim that they really were pursuing the procedurally more demanding tests of a CR 59 motion.

Third, in its August 9 Order, the Superior Court held that because Plaintiffs did not bring a timely motion for reconsideration or to amend the judgment under CR 59, the Superior Court lacked

jurisdiction to rule on Plaintiffs' post-judgment CR 15 Motion. *See* Phillips Decl., Ex. E. Plaintiffs did *not* appeal the Superior Court's August 9 Order denying their CR 15 Motion. That ruling thus is *res judicata* and the law of the case here. Accordingly, Plaintiffs are legally precluded from contradicting the Superior Court's holding that Plaintiffs failed to move for reconsideration or to amend the judgment under CR 59. If Plaintiffs wanted to contest the Superior Court's ruling that they did not file a CR 59 motion, Plaintiffs were required to appeal the August 9 Order. Plaintiffs failed to do so. *See, e.g., Detray v. City of Olympia*, 1221 Wn. App. 777, 792, 770 P.3d 1116 (2004) (Court held that appellant was barred by *res judicata* from challenging portions of amended land use permit that incorporated conditions from earlier hearing examiner's decision that appellant had not appealed); *Sunland Investment, Inc. v. Graham*, 54 Wn. App. 361, 773 P.2d 873 (1989) (party who fails to cross-appeal on issue it lost at trial is barred by law of the case doctrine from challenging the unappealed lost issue in the context of adversary's appeal).

Fourth, Plaintiffs' argue that their CR 15 Motion had the same practical effect as a CR 59 motion. The Court should reject such nonsense. A lawyer with an ounce of creativity could characterize any post-judgment order as being equivalent to "amending" the final judgment. But the Rules of Appellate Procedure bar appeal of a final judgment when post-judgment orders are entered, unless they are the specific post-judgment motions listed in RAP 5.2(e). A CR 15 motion is not one of the post-judgment motions listed in RAP 5.2(e). See RAP 2.2(a)(13); *State v. Pilon*, 23 Wn. App. 609, 596 P.2d 664 (1979) (appeal of order revoking probation does not bring up appeal of conviction); *Griffin v. Draper*, 32 Wn. App. 611, 649 P.2d 123 (1982) (appeal of contempt ruling for failure to comply with final judgment did not bring up the final judgment for appeal).

Plaintiffs rely on one case, *Structurals Northwest, Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 658 P.2d 679 (1981), to equate their CR 15 Motion with a CR 59 motion.¹ *Structurals* does

¹ Plaintiffs also cite *Davies v. Holy Family Hospital*, 144 Wn. App. 483, 1183 P.2d 283 (2008), but that case is simply a straightforward application of RAP 5.2(e), which extends the time for appeal of a

not save Plaintiffs from their failure to file a timely notice of appeal. In *Structurals*, the parties negotiated an amended judgment and submitted their stipulated amended judgment to the Superior Court within the time permitted for CR 59 motions to amend the judgment. 33 Wn. App. at 713. Because the stipulated amended judgment was the same as a stipulated motion to amend the judgment, and because the parties' jointly participated in timely amending the judgment, the Court of Appeals allowed the notice of appeal filed within 30 days of the stipulated amended judgment. *Id.* The situation here could not be more different.

Here, the parties did not agree to amend the judgment. Plaintiffs told the Superior Court that they were moving under CR 15, not CR 59; and Plaintiffs specifically advised the Superior Court that their CR 15 Motion did not waive their right to appeal the June 8 Final Judgment. Moreover, in its August 9 Order, the Superior Court held that Plaintiffs had not filed a timely motion under CR 59, and Plaintiffs did not appeal the Superior Court's August 9 Order, which is *res judicata* here.

judgment through timely filing of a motion for reconsideration under CR 59.

Plaintiffs say that the “effect of the July 13 order . . . is the same as if one of the RAP 5.2(e) civil motions ‘had been made and granted,’” because Plaintiffs asked the Superior Court to “rectify” its June 8 Final Judgment, and the Superior Court then “amended [its] June 8 order.” Plaintiffs’ Motion at 9. Plaintiffs are taking liberties with the record. Nowhere in Plaintiffs’ CR 15 Motion (Phillips Decl. Ex. B) did Plaintiffs ask the Superior Court to “rectify” the June 8 Final Judgment. In two pages, Plaintiffs simply argued that leave to amend “shall be freely given” under CR 15.

Nor did the Superior Court’s July 13 Order amend its June 8 Final Judgment. Judge Eadie stated that:

By Order dated June 8, 2011 this court granted Defendant’s CR 12(b)(6) motion to dismiss Plaintiffs’ entire case. In their opposition to Defendant’s motion to dismiss, the Plaintiffs asked leave to amend their pleading of their claim of Negligent Infliction of Emotional Distress. This court did not specifically deny the motion to amend at the time it granted the motion to dismiss, but had considered the proposed amendment *and did not grant the motion to amend because the proposed amendment would not have cured the defect on which the dismissal was granted.*

Phillips Decl., Ex. D (emphasis added).

Judge Eadie's description of his June 8 Final Judgment was obvious on the face of the judgment. Moreover, under settled law, when a dismissal does not grant leave to amend, the dismissal is with prejudice. *See In re Metcalf*, 92 Wn. App. 165, 175 & n.6, 963 P.2d 911 (1998), *cert. denied*, 527 U.S. 1041 (1999) (Washington courts follow the federal jurisprudence and treat a CR 12(b)(6) dismissal as June 8 Final Judgments); *McLean v. United States*, 566 F.3d 391, 396 (4th Cir. 2009) ("Courts have held that, unless otherwise specified, a dismissal for failure to state a claim under Rule 12(b)(6) is presumed to be both a judgment on the merits and to be rendered with prejudice).

In short, RAP 5.2(a) requires dismissal of Plaintiffs' appeal of the June 8 Final Judgment, and RAP 5.2(e) does not extend the time for Plaintiffs' appeal of the June 8 Final Judgment.

B. RAP 5.2(e) Does Not Contain an Exception to Avoid Confusion.

Plaintiffs next suggest that the Court should accept their untimely appeal of the June 8 Final Judgment because otherwise the Court will become mired in confusion about the scope of Plaintiffs' appeal of the July 13 Order. Plaintiffs' premise about confusion is

wrong, but the threshold answer to Plaintiffs' argument here is simply that RAP 5.2(a) affords no exception to permit an untimely appeal (of the June 8 Final Judgment) to avoid supposed confusion over the scope of review of a timely appeal (of the July 13 Order). Nor have Plaintiffs cited any authority for such an exception.

Moreover, despite Plaintiffs' attempts to suggest confusion, the governing legal principles are clear. Because the June 8 Final Judgment has not been timely appealed, it is *res judicata* for purposes of Plaintiffs' appeal of the July 13 Order. Plaintiffs thus are precluded from contradicting *all* the bases that support the June 8 Final Judgment. That is the plain legal principle that Plaintiffs are seeking to avoid by asking this Court to allow a late appeal. The legal principle is fatal, but it isn't confusing.

Plaintiffs also seek to sow confusion by arguing that they plan to attack the July 13 Order on various grounds. As with any appeal, Plaintiffs' contentions can be sorted out in the briefing and at argument. But suffice it to say here that Plaintiffs face the further daunting obstacle that on August 9 the Superior Court held that it lacked jurisdiction to grant Plaintiffs' CR 15 Motion, and Plaintiffs

never appealed that August 9 ruling. Accordingly, Plaintiffs also are bound by the Superior Court's August 9 determination that it lacked jurisdiction to grant a post-judgment CR 15 motion.

C. Plaintiffs Can Identify No Extraordinary Circumstances To Justify Extending the Time Limit to Appeal the June 8 Final Judgment.

RAP 18.8(b) sets forth a very narrow basis upon which this Court will allow Plaintiffs' untimely appeal of the June 8 Final Judgment. The Court will grant an extension "only in extraordinary circumstances and to prevent a gross miscarriage of justice," and "ordinarily . . . the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension" RAP 18.8(b). Plaintiffs ignore this governing language.

Plaintiffs say that the appellate rules express a preference for deciding cases on the merits, but they ignore that RAP 18.8(b) is an express exception to that principle. When an appeal is untimely, "finality of decisions" is preferred to allowing an appellant to argue the merits of his appeal. Plaintiffs rely on *Knox v. Microsoft Corp.*, 92 Wn. App. 204, 962 P.2d 839 (1998), but the case demonstrates this important distinction. The *Knox* court held that

[c]ases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, *subject to the restrictions in rule 18.8(b)*.

92 Wn. App. at 213 (emphasis added). This case is “subject to the restrictions in rule 18.8(b).” Because Plaintiffs did not timely appeal the June 8 Final Judgment, the interest in “finality” outweighs Plaintiffs’ interest in pursuing their untimely appeal.

As Plaintiffs’ own cases reveal, relief under Rule 18.8(b) is sparingly granted, usually for technical defects involving a timely appeal. Indeed, the *Knox* case illustrates that point. In *Knox*, the plaintiffs filed a timely appeal of summary judgment orders eliminating certain damages and the final judgment, to the extent it precluded the excluded damages. Microsoft unsuccessfully claimed that the timely notice of appeal was defective because it did not adequately reference the final judgment. The court allowed the timely appeal and rejected Microsoft’s argument that the failure to include an express reference rendered the notice ineffective. The other case relied upon by Plaintiffs, *Weeks v. Chief of Washington State Patrol*, 96 Wn. 2d 893, 639 P.2d 732 (1982), also involved a timely appeal, but the appellant mistakenly filed the notice of appeal

in the Court of Appeals. The court permitted the appeal because “[i]t . . . appears that though the notice was misdirected, an effort was made at timely compliance with the Rule (RAP 5.1(a)).” 96 Wn. 2d at 896.² Plaintiffs here filed their notice of appeal 51 days after the June 8 Final Judgment. *Knox* and *Weeks* don’t help them.

Finally, Plaintiffs rely on *Shumway v. Payne*, 136 Wn.2d 383, 964 P.2d 349 (1998), to suggest that this case presents extraordinary circumstances, such as where “the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party’s control.” *Id.* at 395. But in *Shumway*, the Supreme Court found no extraordinary circumstances for accepting a late motion for discretionary review even though a *pro se* plaintiff had relied on erroneous advice by his trial counsel about when to file his appeal. The facts in *Shumway* were far more compelling than here, but even those facts were deemed insufficient.

Here, Plaintiffs are represented by able counsel, who knew that they had the right and obligation to appeal the Superior Court’s

² The *Weeks* court quoted from *First Fed. Sav. & Loan Ass’n v. Ekanger*, 22 Wn. App. 938, 593 P.2d 170 (1979), but that case does not even address an untimely appeal, but rather a trial court’s authority to cure technical defects in a party’s notice by publication.

June 8 Final Judgment, and simply didn't. *See, e.g., Phillips Decl. Ex. B, Motion to Amend at 2, n. 2* (“[b]y requesting leave to amend to add new causes of action, however, Plaintiffs do not waive their right to appeal the Court’s dismissal of their original complaint under CR 12(b)(6).”). Perhaps Plaintiffs chose not to file a notice of appeal while their CR 15 Motion was pending because they thought it might improve the chance that their CR 15 Motion would be granted. But strategic choices have never been deemed an “extraordinary circumstance” by this Court, and Plaintiffs have presented no evidence that they were “reasonably diligent,” that they made an “excusable error,” or that their failure to file a timely notice of the June 8 Final Judgment was in any way “beyond their control.” *See, e.g., Reichelt v. Raymark Industries, Inc.*, 52 Wn. App. 763, 764 P.2d 653 (1988) (Court rejected appeal that was 10 days late even though trial attorney had left firm and appellate attorney was busy); *Beckman v. Department of Social and Health Services*, 102 Wn. App. 687, 11 P.3d 313 (2000) (Court rejected notice of appeal of a \$17.76 million judgment filed 10 days late despite alleged

malfesance of Assistant Attorney General). The facts here are far less compelling than in *Reichelt* and *Beckman*.

In short, Plaintiffs have failed to meet the rigorous standards for permitting their untimely appeal of the June 8 Final Judgment.

V. CONCLUSION

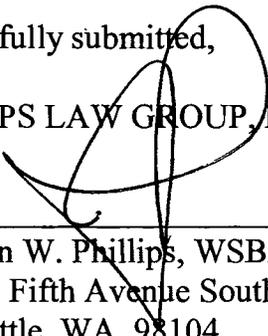
For the foregoing reasons, the Court should dismiss Plaintiffs' appeal of the Superior Court's June 8 Final Judgment.

DATED this 24th day of October, 2011.

Respectfully submitted,

PHILLIPS LAW GROUP, PLLC

By: _____


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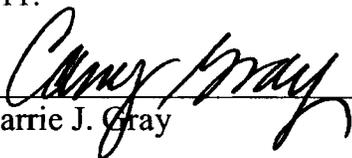
CERTIFICATE OF SERVICE

I certify that today I caused to be served a true and correct copy of the foregoing document upon:

William R. Squires III
Steven W. Fogg
Sarah E. Tilstra
Corr Cronin Michelson Baumgardner & Preece, LLP
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154

(Via Messenger)

DATED this 24th day of October, 2011.



Carrie J. Gray

TAB 5

No.: 67479-0

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

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

v.

MICHAEL EMERIC MOCKOVAK, Respondent/Defendant.

**APPELLANTS' OPPOSITION TO
DEFENDANT-APPELLEE'S MOTION TO DISMISS
APPEAL OF JUNE 8, 2011 ORDER OF DISMISSAL**

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Attorneys for Appellants/Plaintiffs
Joseph King, M.D., Holly King, and
their minor children WJK, LJK, and
CJMK

Appellants Joseph King, M.D. and Holly King, husband and wife and the marital community comprised thereof, and WJK, LJK, and CJMK, minor children by and through their guardians, Joseph King and Holly King (“Appellants”) hereby incorporate by reference the entirety of their arguments and authorities in (1) Appellants’ Motion for a Ruling that the Notice of Appeal is Timely, or, Alternatively, for Extension of Time to File the Notice of Appeal; and (2) Declaration of William R. Squires III in Support of Appellants’ Motion for Ruling that Notice of Appeal is Timely, or, Alternatively, for Extension of Time to File the Notice of Appeal. For the Court’s convenience, a copy of that motion and the supporting declaration and exhibits is included herewith as Exhibits 1 and 2.

Respectfully submitted this 10th day of October, 2011.

CORB CRONIN MICHELSON
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King, M.D., Holly King, and their minor
children WJK, LJK, and CJMK

CERTIFICATE OF SERVICE

The undersigned hereby declares as follows:

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

On October 10, 2011, I caused a true and correct copy of the foregoing document to be: 1) filed in the Washington State Court of Appeals, Division I; and 2) duly served via Legal Messenger on the following parties:

John W. Phillips
Phillips Law Group, PLLC
315 Fifth Avenue S., Suite 1000
Seattle, WA 98104-2682
Attorneys for Respondent/Defendant

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

DATED: October 10, 2011, at Seattle, Washington.



Donna Patterson

EXHIBIT 1

No.: 67479-0

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

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

v.

MICHAEL EMERIC MOCKOVAK, Respondent/Defendant.

**APPELLANTS' MOTION FOR A RULING THAT THE NOTICE
OF APPEAL IS TIMELY, OR, ALTERNATIVELY, FOR
EXTENSION OF TIME TO FILE THE NOTICE OF APPEAL**

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Attorneys for Appellants/Plaintiffs
Joseph King, M.D., Holly King, and
their minor children WJK, LJK, and
CJMK

I. IDENTITY OF MOVING PARTY & RELIEF REQUESTED

Appellants Joseph King, M.D. and Holly King, husband and wife and the marital community comprised thereof, and WJK, LJK, and CJMK, minor children by and through their guardians, Joseph King and Holly King (“Appellants”) ask the Court to rule that their notice of appeal is timely. The timely notice of appeal of the trial court’s July 13 order necessarily brought up the trial court’s June 8 order, and pursuant to RAP 5.2 the notice of appeal is timely as to both orders. Moreover, given that the appeal of the July 13 order will proceed regardless of this Court’s decision, and that the review of the July 13 order will necessarily involve consideration of the June 8 order, both the case and judicial efficiency will be better served by expressly allowing appeal of both orders.

Alternatively, if the Court disagrees and holds that the notice of appeal of the June 8 order was not timely filed, it should hold that Appellants have satisfied the requirements of RAP 18.8(b) and permit an extension of time to file the notice of appeal.

II. FACTS RELEVANT TO MOTION

A. Briefing on Defendant’s Motion to Dismiss in the Trial Court

In November 2009, Defendant was arrested for plotting the murder of his business partner, Dr. Joseph King. After a highly-publicized trial, Defendant was convicted of, among other things, solicitation to commit

the murder and the attempted murder of Dr. King. Defendant's crime caused significant distress and other injuries to the King family, for which they seek recompense through the instant lawsuit. *See* Complaint, attached as Exhibit A to the Declaration of William R. Squires III ("Squires Decl.").

In the trial court, Defendant filed a motion to dismiss the case under CR 12(b)(6). *See* Motion to Dismiss Under CR 12(b)(6), attached as Exhibit B to Squires Decl. This motion raised several arguments: that there was no implied private cause of action for violation of a criminal statute, that plaintiffs were not present when the conduct occurred as assertedly required by case law on outrage and negligent infliction of emotional distress, that the family's harm was impermissibly based on Defendant seeking bail, that there was no proximate causation, and that there was no evidence of objective symptoms of illness as required for a claim of negligent infliction of emotional distress.

Appellants' opposition to the motion to dismiss countered the motion on its merits, but also noted that if the Appellants "must replead to meet the minimal requirements of due process in this case, they are prepared to do so," and specifically requested that, if the trial court found that the claim for negligent infliction of emotional distress was insufficiently pled, then the trial court should grant leave to amend the

complaint to add specific allegations regarding Appellants' symptoms.

See Appellants' Opposition to Defendant's Motion to Dismiss Under CR 12(b)(6), attached as Exhibit C to Squires Decl., at 2, 9-10.

B. The Trial Court's Orders

On June 8, 2011, the trial court issued an order granting Defendant's motion to dismiss under CR 12(b)(6). *See* June 8 Order, attached as Exhibit D to Squires Decl. The trial court's order did not specify whether the dismissal was with or without prejudice, or with or without leave to amend. On June 20, Appellants filed a motion for leave to amend their complaint to add several causes of action. *See* Plaintiffs' Motion for Leave to Amend Their Complaint, attached as Exhibit E to Squires Decl. Appellants filed this motion within ten days¹ of the trial court's June 8 order.

On July 13, the court issued an Order re: Motion to Amend. *See* July 13 Order, attached as Exhibit F to Squires Decl. This order read, in part:

By Order dated June 8, 2011 this court granted Defendant's

¹ The motion to amend the complaint was filed on June 20, 2011. Ten days after June 8, 2011, fell on June 18, 2011, but given that June 18, 2011 was a Saturday the motion was timely filed on June 20, 2011. *See* CR 6(a) ("The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a legal holiday."); RAP 18.6(a) ("The last day of the period so computed is included unless it is a Saturday, Sunday, or legal holiday, in which case the period extends to the end of the next day that is not a Saturday, Sunday, or legal holiday.").

CR 12(b)(6) motion to dismiss Plaintiffs' entire case. In their opposition to Defendant's motion to dismiss, the Plaintiffs asked leave to amend their pleading of their claim of Negligent Infliction of Emotional Distress. This court did not specifically deny the motion to amend at the time it granted the motion to dismiss, but had considered the proposed amendment and did not grant the motion to amend because the proposed amendment would not have cured the defect on which the dismissal was granted. To the extent this court failed to address the motion to amend contained within the Plaintiffs' opposition to the Defendant's motion to dismiss, that motion is now DENIED.

The order went on to note that the entire case had been dismissed on June 8, and requested additional briefing from the parties as to whether the trial court had jurisdiction to grant Appellants' motion to amend. Appellants provided this additional briefing, but also filed a notice of appeal of the June 8 and July 13 orders on July 29, 2011.

C. Proceedings Before This Court

On September 12, 2011, Appellants received a letter from the Court Administrator Richard D. Johnson. *See* Exhibit G to Squires Decl. In this letter, Mr. Johnson suggested that Appellants' notice of appeal might not be timely, and directed Appellants to file a motion to extend the time to file a notice of appeal. Appellants were directed to file this motion within 30 days, or by October 12, 2011. This motion responds to Mr. Johnson's request.

Before the 30 days had passed and before Appellants filed their motion, Defendant prematurely filed a motion to dismiss on September 29, 2011. This motion was originally noted for oral argument on October 14, 2011, but the parties have filed a stipulated motion regarding the briefing schedule for these motions, and Defendant will be striking his request for oral argument. The parties wish to have these issues decided on the pleadings.

III. GROUNDS FOR RELIEF SOUGHT

A. Appellants' Appeal Is Timely.

RAP 5.2(a) provides that, except in certain circumstances not applicable here, "a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section (e)." In section (e), the Rule provides that a notice of appeal of orders deciding certain timely motions designated in that section must be filed within 30 days after the entry of the order. RAP 5.2(e). The civil motions encompassed by this rule are: a motion for judgment as a matter of law under CR 50(b), a motion to amend findings under CR 52(b), a motion for reconsideration or new trial under CR 59, and a motion for amendment of judgment under CR 59. *Id.* Moreover:

The official comment to RAP 5.2(e) makes clear that a timely appeal from such an order encompasses review of

the underlying judgment: “Rule 2.4(c) allows the judgment to be reviewed upon review of certain post-trial orders. Rule 5.2(e) accommodates Rule 2.4(c) by starting the time running from the date of the entry of the decision on the designated timely-filed post-judgment motions.”

Structurals N.W., Ltd. v. Fifth & Park Place, Inc., 33 Wn. App. 710, 658 P.2d 679 (1983) (quoting official comment to RAP 5.2(e)); *see also Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 492, 183 P.3d 283 (2008) (an appeal from an order on a motion for reconsideration “allows review of the propriety of the final judgment itself.”). Here, the appeal from the trial court’s July 13 order brings up the June 8 order for review.

The *Structurals* case is instructive. In *Structurals*, the trial court entered judgment on November 13, and, on November 18, counsel for the parties stipulated that amended findings, conclusions, and judgment could be entered. 33 Wn. App. at 713. The trial court entered this stipulated order on November 23, and the appellant filed its notice of appeal on December 17. *Id.* The respondent argued that the November 13 judgment was not timely appealed. *Id.*

The Court disagreed. It held that “[w]hile the stipulation allowing entry of the amended judgment was technically not a motion for amended judgment brought under CR 59, we note that in all practical effect the result is the same as if such a motion had been made and granted.” 33 Wn. App. at 714. Significantly, the Court noted that the stipulation “was

entered within 5 days of the November 13 judgment, as required for a post-judgment motion.”² *Id.* The Court also noted that the rules “are designed to ‘allow some flexibility in order to avoid harsh results’; substance is preferred over form.” *Id.* (quoting *Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982)). The Court treated the November 23 judgment as having been entered pursuant to a motion to amend, and held that the appeal was timely.

The rationale of *Structurals* applies here and dictates that Appellants’ notice of appeal was timely. It is true that, as in *Structurals*, the trial court’s July 13 order was not technically issued pursuant to a motion for reconsideration, a motion to amend findings, or a motion to amend the judgment. However, also as in *Structurals*, Appellants’ motion to amend their complaint was specifically filed within ten days of the June 8 order, the timeframe required for a timely motion for reconsideration (CR 59(b)), a timely motion to amend findings (CR 52(b)) and a timely motion to amend the judgment (CR 59(h)).

In addition, as in *Structurals*, the effect of the trial court’s July 13 order was a ruling on or a response to one of the civil motions denominated in RAP 5.2(e). Appellants’ motion to amend their complaint specifically stated that the trial court’s June 8 order “did not specify

² CR 59 now gives parties 10 days to file such a motion.

whether the dismissal was with or without prejudice, or with or without leave to amend.” Appellants’ reply brief in support of their motion to amend their complaint further noted that “the motion was intended to give this Court an opportunity to rectify what seems to Plaintiffs to be an inadvertent failure to grant one of the most important aspects of a proper disposition of a motion to dismiss: the ability to amend the complaint.” *See Reply in Support of Plaintiffs’ Motion for Leave to Amend Their Complaint*, attached as Exhibit G to Squires Decl., at 2. In response to this briefing, the trial court entered its July 13 order, which stated that the trial court did not grant Appellants’ motion to amend contained within their opposition to the 12(b)(6) motion “because the proposed amendment would not have cured the defect on which the dismissal was granted.” The trial court also held that “[t]o the extent this court failed to address the motion to amend contained within the Plaintiffs’ opposition to the Defendant’s motion to dismiss, that motion is now DENIED.”

The effect of the July 13 order, then, is same as if one of the RAP 5.2(e) civil motions “had been made and granted.” *Structurals*, 33 Wn. App. at 714. The July 13 order added specific findings regarding Appellants’ requests to amend their claim for negligent infliction of emotional distress, and specifically added that such request was denied. These findings and conclusions amended the trial court’s June 8 order, as

the result is the same as if Appellants had brought a motion to amend the judgment or a motion to amend the findings. *See Structuralis*, 33 Wn. App. at 714.³

Similarly, the July 13 order could be considered an order denying reconsideration of the June 8 order. The July 13 order specifically stated that Appellants' request for leave to amend their claim for negligent infliction of emotional distress was denied. In effect, then, the July 13 order acted as a denial of a motion for reconsideration of the trial court's dismissal of the case. Under *Structuralis*, the appeal of the July 13 order encompassed review of the underlying June 8 order and the notice of appeal is timely.⁴

³ In his motion to dismiss the appeal, Defendant cites to two cases for the proposition that an appellant cannot "bootstrap" an unappealed order into the appeal of "subsequent ancillary rulings: *Carrara, LLC v. Ron & E Enters., Inc.*, 137 Wn. App. 822, 155 P.3d 161 (2007), and *Bushong v. Wilsbach*, 151 Wn. App. 373, 213 P.3d 42 (2009). These cases are both distinguishable for the same reason. In both cases, the party timely filed a notice of appeal of the trial court's post-judgment attorney fees decision, but the appeal of the underlying trial court judgment was untimely. The courts did not allow the timely attorney fees appeal to bring up for review the judgment on the merits because RAP 2.4(b) "makes clear that such an appeal does not allow a decision entered before the award of attorney fees to be reviewed." *Carrara*, 137 Wn. App. at 825; *see also Bushong*, 151 Wn. App. at 377 (the "plain words" of RAP 2.4(b) show that the appeal of the award was untimely). However, RAP 2.4(b) is specific to attorney fee decisions and is not applicable here.

⁴ Appellants freely admit that they did not style their motion as one for reconsideration, or even as a motion to modify or amend findings. This was done specifically in an effort to focus the trial court's attention on what Appellants considered to be the issue before the court at that time. However, the effect of the trial court's July 13 order was the same as if the trial court had ruled on one of those timely post-trial motions.

B. Allowing the Appeal of Both Orders to Go Forward Best Serves Judicial Efficiency and Avoids Problems Regarding the Scope of the Appeal.

While Appellants' notice of appeal was filed more than 30 days after the entry of the June 8 order, it is undisputed that the July 13 order was timely appealed.⁵ Therefore, no matter what this Court rules in response to the pending motions, the appeal of the trial court's July 13 order will go forward.

However, if the Court determines that the June 8 order cannot be appealed, then it will create an immediate, complicating issue regarding the scope of the appeal. For example, in order to review the trial court's July 13 order denying Appellants' motion to amend the pleading regarding negligent infliction of emotional distress, the appellate court will necessarily have to determine the correctness of the trial court's determination that the proposed amendment would not have cured the defect upon which the dismissal was granted. In order to determine this, the appellate court will necessarily have to consider the June 8 order and consider the basis upon which the trial court granted the motion to dismiss. Similarly, consideration of the trial court's determination in the July 13 order that the entire case had previously been dismissed

⁵ In fact, Defendant's motion to dismiss only seeks dismissal of the appeal of the June 8 order, thereby implicitly agreeing that the appeal of the July 13 order is proper.

necessarily requires consideration of whether the June 8 order did or did not include leave to amend. Yet it is a virtual certainty that, if only the appeal of the July 13 order goes forward, Defendant will try to limit the scope of the appeal and argue that none of the issues raised in the motion to dismiss briefing are properly appealable. Appellants, of course, will and do contend that the July 13 order necessarily raises and includes the issues decided by the June 8 order. This Court can eliminate the waste of time that will be occasioned by the briefing and disputes over these issues by simply holding that the notice of appeal is timely as to both orders.

Moreover, the issues that are raised by Appellants' appeal are significant ones. The trial court appears to have based its dismissal on the purported "presence" requirement for Appellants' outrage and negligent infliction of emotional distress claims. Defendant's argument in this regard was that, because Appellants were not "present" while Defendant plotted to kill Dr. King, Appellants' outrage and negligent infliction of emotional distress claims were barred as a matter of law. However, as Appellants argued below, presence is only required when the alleged outrageous conduct is directed at a third person. *See Lund v. Caple*, 100 Wn.2d 739, 742, 675 P.2d 226 (1984) (presence required when "the conduct is directed at a third person"). Perhaps even more significantly, the impact of the trial court's holding is to immunize the perpetrator of

attempted murder from his victims' damages suffered thereby if the victim is not physically present when the attempt occurs. This simply cannot be the law in Washington, and Washington's appellate courts have never been confronted with the issue of whether the purported "presence" requirement applies in a case of attempted murder. The significant issues in this case are best served if the Court permits the appeal to go forward clearly as to both orders.

C. Alternatively, the Court Should Extend the Deadline for Filing the Notice of Appeal to Prevent a Gross Miscarriage of Justice and Because Extraordinary Circumstances Exist.

If the Court finds that Appellants' notice of appeal of the June 8 order was not timely filed, it should extend the time to file the notice of appeal. RAP 18.8(b) provides that an appellate court "will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal." These circumstances are met here.

The Rules of Appellate Procedure "were designed to allow some flexibility to avoid harsh results." *Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982) (citing the Comment to RAP 18.8). The "trend of the law in this state is to interpret rules and statutes to reach the substance of matters so that it prevails over form." *Weeks*, 96 Wn.2d at 896 (quoting *First Fed. Sav. & Loan Ass'n v. Ekanger*, 22 Wn.

App. 938, 944, 593 P.2d 170 (1979)). The appellate court “should normally exercise its discretion to consider cases and issues on their merits unless there are compelling reasons not to do so--even despite technical flaws in an appellant's compliance with the Rules of Appellate Procedure.” *Knox v. Microsoft Corp.*, 92 Wash. App. 204, 213, 962 P.2d 839 (1998). “‘Extraordinary circumstances’ include instances where the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party’s control.” *Shumway v. Payne*, 136 Wn.2d 383, 395, 964 P.2d 349 (1998).

Here, Appellants’ conduct was reasonably diligent. Once Appellants received the trial court’s July 13 order,⁶ Appellants acted diligently and filed their notice of appeal on July 29, 2011. If Appellants’ determination that a timely appeal from the July 13 order would bring up both orders for review was in error, the case law cited in Section A of this motion indicates that it was excusable error. As in *Weeks*, “substance should prevail over form.” 96 Wn.2d at 896. Because Defendant had notice and because “applying strict form would defeat the purpose of the rules to ‘promote justice and facilitate the decision of cases on the merits,’” *Weeks*, 96 Wn.2d at 896 (quoting RAP 1.2(a)), the Court should extend the time for Appellants to file their notice of appeal and hold such

⁶ Appellants received a copy of this order via U.S. mail on July 15, 2011. See Squires Decl. at ¶ 10.

filing was timely. *See also Knox*, 92 Wash. App. at 212-13 (refusing to dismiss appeal when appellant had timely appealed from the final judgment on the verdict, but had not referenced all of the prior orders he was appealing in his notice of appeal).

Respectfully submitted this 10th day of October, 2011.

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children WJK, LJK, and CJMK

CERTIFICATE OF SERVICE

The undersigned hereby declares as follows:

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

On October 10, 2011, I caused a true and correct copy of the
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Seattle, WA 98104-2682
Attorneys for Respondent/Defendant

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

DATED: October 10, 2011, at Seattle, Washington.



Donna Patterson

EXHIBIT 2

No.: 67479-0

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

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

v.

MICHAEL EMERIC MOCKOVAK, Respondent/Defendant.

**DECLARATION OF WILLIAM R. SQUIRES III
IN SUPPORT OF
APPELLANTS' MOTION FOR RULING THAT NOTICE OF
APPEAL IS TIMELY, OR, ALTERNATIVELY, FOR EXTENSION
OF TIME TO FILE THE NOTICE OF APPEAL**

1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP
William R. Squires III, WSBA 4976
Steven W. Fogg, WSBA 23528
Sarah E. Tilstra, WSBA 35706
Attorneys for Appellants/Plaintiffs
Joseph King, M.D., Holly King, and
their minor children WJK, LJK, and
CJMK

I, William R. Squires III, state and declare as follows:

1. I am an attorney representing Appellants Joseph King, M.D. and Holly King, husband and wife and the marital community comprised thereof, and WJK, LJK, and CJMK, minor children by and through their guardians, Joseph King and Holly King, in the above-captioned matter. I have personal knowledge of the facts stated below and I am otherwise competent to testify regarding these matters.

2. Attached hereto as Exhibit A is a true and correct copy of the Complaint in this matter, filed on December 31, 2009.

3. Attached hereto as Exhibit B is a true and correct copy of Defendant's Motion to Dismiss Under CR 12(b)(6), filed on April 18, 2011.

4. Attached hereto as Exhibit C is a true and correct copy of Appellants' Opposition to Defendant's Motion to Dismiss Under CR 12(b)(6), filed on May 5, 2011.

5. Attached hereto as Exhibit D is a true and correct copy of the trial court's Order Granting Motion to Dismiss Under CR 12(b)(6), entered on June 8, 2011.

6. Attached hereto as Exhibit E is a true and correct copy of Motion for Leave to Amend Their Complaint, filed on June 20, 2011.

7. Attached hereto as Exhibit F is a true and correct copy of the trial court's Order re: Motion to Amend, entered on July 13, 2011.

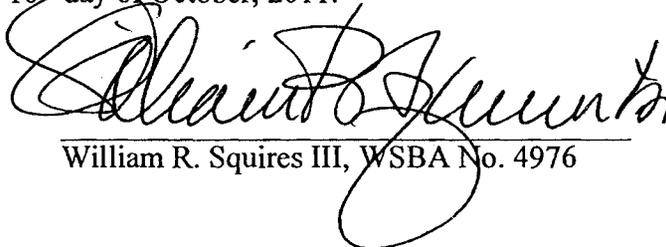
8. Attached hereto as Exhibit G is a true and correct copy of the September 12, 2011 letter from Court Administrator Richard D. Johnson.

9. Attached hereto as Exhibit H is a true and correct copy of the Reply in Support of Plaintiffs' Motion for Leave to Amend Their Complaint, filed on June 27, 2011.

10. Our firm received a copy of the trial court's July 13 order on July 15, 2011.

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

Dated this 10th day of October, 2011.



William R. Squires III, WSBA No. 4976

CERTIFICATE OF SERVICE

The undersigned hereby declares as follows:

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

On October 10, 2011, I caused a true and correct copy of the
foregoing document to be: 1) filed in the Washington State Court of
Appeals, Division I; and 2) duly served via Legal Messenger on the
following parties:

John W. Phillips
Phillips Law Group, PLLC
315 Fifth Avenue S., Suite 1000
Seattle, WA 98104-2682
Attorneys for Respondent/Defendant

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

DATED: October 10, 2011, at Seattle, Washington.


Donna Patterson

TAB 6

No.: 67479-0

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

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

v.

MICHAEL EMERIC MOCKOVAK, Respondent/Defendant.

**REPLY IN SUPPORT OF APPELLANTS' MOTION
FOR A RULING THAT THE NOTICE OF APPEAL IS
TIMELY, OR, ALTERNATIVELY, FOR EXTENSION
OF TIME TO FILE THE NOTICE OF APPEAL**

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JAN 20 PM 4: 13

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Seattle, Washington 98154-1051
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Fax (206) 625-0900

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BAUMGARDNER & PREECE LLP
William R. Squires III, WSBA 4976
Steven W. Fogg, WSBA 23528
Sarah E. Tilstra, WSBA 35706
Attorneys for Appellants/Plaintiffs
Joseph King, M.D., Holly King, and
their minor children WJK, LJK, and
CJMK

I. REPLY ARGUMENT

Defendant's opposition attempts to muddy the waters by citing inapposite case law and making irrelevant distinctions. However, RAP 5.2(e) and the rationale in *Structurals N.W., Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 658 P.2d 679 (1983) dictate that the entirety of Appellants' notice of appeal is timely. The Court should permit the entire appeal to go forward.

Defendant cites *State v. Pilon*, 23 Wn. App. 609, 596 P.2d 664 (1979) and *Griffin v. Draper*, 32 Wn. App. 611, 649 P.2d 123 (1982) for the proposition that Appellants' motion to amend is not one of the motions listed in RAP 5.2(e) and therefore does not bring up the June 8 order for review. However, both cases are distinguishable.

In *Pilon*, the issue was whether the defendant could appeal from an order revoking his probation when his notice of appeal was filed timely from the order revoking probation, but more than 30 days after the original judgment. 23 Wn. App. at 611. The defendant apparently did not seek review of the original judgment, nor did he file any motion in the trial court that was equivalent to a RAP 5.2(e) motion. And in *Griffin*, the party filed a motion for reconsideration ten months after the entry of judgment. The party argued that the motion for reconsideration was necessary due to the contempt orders that had been entered against it for

failure to comply with the original order. 32 Wn. App. at 614. The court held that, although the party had a right to appeal from the contempt order, this appeal did not bring forward the original judgment for review. *Id.* But the party's motion for reconsideration was not filed timely, nor did the contempt order (which was timely appealed) appear to be entered in response to any motion equivalent to those listed in RAP 5.2(e). In contrast, here Appellants filed a motion to amend within 10 days of the original judgment, and filed their notice of appeal within 30 days of the trial court's July 13 order responding to that motion to amend. *Pilon* and *Griffin* are thus inapplicable.

Structurals N.W., Ltd. v. Fifth & Park Place, Inc., 33 Wn. App. 710, 658 P.2d 679 (1983) is more analogous than either *Pilon* or *Griffin*. As in *Structurals*, the second order was not technically issued pursuant to one of the civil motions denominated in RAP 5.2(e). As in *Structurals*, the post-judgment motion was filed within the timeframe for a RAP 5.2(e) civil motion. And, as in *Structurals*, the effect of the trial court's July 13 order was a ruling on or a response to one of the civil motions denominated in RAP 5.2(e). Defendant's attempt to distinguish *Structurals* is therefore inapposite.

Defendant repeatedly states that because Appellants did not appeal the August 9 order, Appellants cannot contest the trial court's finding that

Appellants did not bring a motion for reconsideration or a motion to amend findings. Of course, as an initial matter Defendant is incorrect, as Appellants have appealed the July 13 order, which specifically held that “there are no motions pending in this court to reconsider or modify the June 8, 2011 Order.” Regardless, Appellants do not contest that their motion to amend was not titled as a motion for reconsideration or a motion to amend findings. However, the effect of the trial court’s July 13 order is the same as if one of the RAP 5.2(e) civil motions “had been made and granted.” *Structurals*, 33 Wn. App. at 714. The appeal of the July 13 order encompassed review of the underlying June 8 order and the entire notice of appeal is timely.

Defendant also attempts to brush off Appellant’s arguments regarding judicial efficiency and scope of appeal. Yet the issues regarding the complications that would occur if only the July 13 order appeal were to go forward are legitimate. The Court can eliminate the waste of time that will be occasioned by the briefing and disputes over these issues by holding that the notice of appeal is timely as to both orders.

Defendant also does not contest that the issues that are raised by Appellants’ appeal are significant ones. The impact of the trial court’s dismissal is to prevent a victim from recovering damages based on an attempted murder if the victim is not physically present when the attempt

occurs. This simply cannot be the law in Washington, and Washington's appellate courts have never been confronted with the issue of whether the purported "presence" requirement applies in a case of attempted murder. The significant issues in this case are best served if the Court permits the appeal to go forward clearly as to both orders.

The concerns engendered by Appellants' appeal and by the potential waste of time that would occur if the Court rules as Defendant suggests also constitute "extraordinary circumstances" pursuant to RAP 18.8(b). The Rules of Appellate Procedure "were designed to allow some flexibility to avoid harsh results." *Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982) (citing the Comment to RAP 18.8). Here, the Court should hold that, if Appellants' appeal was untimely, the extraordinary circumstances presented by the case and the gross miscarriage of justice that would otherwise result dictate that the appeal should be permitted to proceed pursuant to RAP 18.8(b).

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Respectfully submitted this 31st day of October, 2011.

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP



William R. Squires III, WSBA No. 4976

Steven W. Fogg, WSBA No. 23528

Sarah E. Tilstra, WSBA No. 35706

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Attorneys for Appellants/Plaintiffs Joseph
King, M.D., Holly King, and their minor
children WJK, LJK, and CJMK

CERTIFICATE OF SERVICE

The undersigned hereby declares as follows:

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

On October 31, 2011, I caused a true and correct copy of the
foregoing document to be: 1) filed in the Washington State Court of
Appeals, Division I; and 2) duly served via Legal Messenger on the
following parties:

John W. Phillips
Phillips Law Group, PLLC
315 Fifth Avenue S., Suite 1000
Seattle, WA 98104-2682
Attorneys for Respondent/Defendant

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

DATED: October 31, 2011, at Seattle, Washington.



Donna Patterson

TAB 7

RECEIVED
OCT 31 2011
CORR CRONIN LLP

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Plaintiffs-Appellants,

v.

MICHAEL EMERIC MOCKOVAK,

Defendant-Appellee.

No. 60406-6-I

DEFENDANT-APPELLEE'S
REPLY IN SUPPORT OF
MOTION TO DISMISS
APPEAL OF JUNE 8, 2011
ORDER OF DISMISSAL

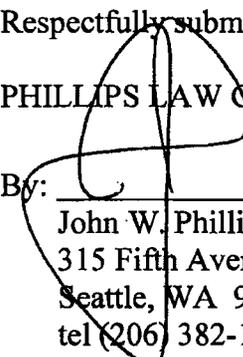
Because Plaintiffs-Appellants filed no substantive response to Defendant-Appellee Dr. Michael Mockovak's ("Defendant") Motion to Dismiss Appeal of June 8, 2011 Order of Dismissal, Defendant incorporates by reference as his Reply in Support of his Motion to Dismiss, the entirety of his argument and authorities in (1) Defendant-Appellee's Motion to Dismiss Appeal of June 8, 2011 Order of Dismissal (September 29, 2011); (2) Declaration of John W. Phillips in Support of Defendant-Appellee's Motion to Dismiss Appeal of June 8, 2011, Order of Dismissal (September 29, 2011); (3) Defendant-Appellee's Opposition to Appellants' Motion for a Ruling that the Notice of Appeal is Timely, Or Alternatively, for

Extension of Time to File the Notice of Appeal (October 24, 2011);
and, (4) Supplemental Declaration of John W. Phillips in Support of
Defendant-Appellee's Opposition to Appellants' Motion for a
Ruling that the Notice of Appeal is Timely, Or Alternatively, for
Extension of Time to File the Notice of Appeal (October 24, 2011).

DATED this 31st day of October, 2011.

Respectfully submitted,

PHILLIPS LAW GROUP, PLLC

By: 

John W. Phillips, WSBA #12185
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104
tel (206) 382-1168 / fax (206) 382-6168

Attorneys for Defendant-Appellee
Dr. Michael Mockovak

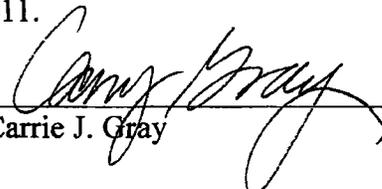
CERTIFICATE OF SERVICE

I certify that today I caused to be served a true and correct copy of the foregoing document upon:

William R. Squires III
Steven W. Fogg
Sarah E. Tilstra
Corr Cronin Michelson Baumgardner & Preece, LLP
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154

(Via Messenger)

DATED this 31st day of October, 2011.


Carrie J. Gray

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 JAN 20 PM 4:13

TAB 8

The Court of Appeals
of the
State of Washington

RICHARD D. JOHNSON,
Court Administrator/Clerk

DIVISION I
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November 30, 2011

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CASE #: 67479-0-1

J. & H. King, M.D., et al., App. v. Michael Emeric Mockovak, Res.

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on November 30, 2011:

The issue of the timeliness of the notice of appeal as to the June 8, 2011 trial court order and the scope of review addressed in the parties' motions, answers and replies are referred to the panel that considers the appeal on the merits. Appellant is granted an extension to December 22, 2011 to file the opening brief.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

TWG