

No. 34891-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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PERLA SALDIVAR and ALBERT SALDIVAR,

Appellants,

vs.

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

Respondents,

HARISH BHARTI,

Appellant.

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

---

JOINT REPLY BRIEF OF APPELLANTS HARISH BHARTI AND  
PERLA AND ALBERT SALDIVAR

---

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**TABLE OF CONTENTS**

- I. REPLY IN SUPPORT OF STATEMENT OF THE CASE..... 1
  - A. The Inconsistencies In Her Account Do Not Establish That Perla Saldivar Fabricated A Claim Against Dennis Momah. Perla Saldivar Had No Motive To Make A False Claim Of Sexual Abuse..... 2
  - B. Bharti Did Not “Fabricate” The Saldivars’ Claims, Which Were Initially Made To The Department Of Health And Police Without His Involvement. .... 4
- II. REPLY ARGUMENT ..... 6
  - A. The Saldivars’ Challenge To The Trial Court’s Findings Were Preserved Under RAP 10.1(g) By Express Reference To The Brief Of Their Co-Appellant Bharti. Arguments Are Preserved And Should Be Addressed On The Merits..... 6
  - B. The Trial Court’s Rulings Prevented The Saldivars From Defending Against Dennis’ Claims Of Fabrication Or From Challenging Dennis’ Claim That The Saldivars’ Allegations Caused Him Damages And Prevented Bharti From Establishing The Reasonableness Of His Investigation..... 8
    - 1. The Preferred Testimony Of Other Victims Of Sexual Abuse And Employees Of Charles Momah Went To The Heart Of Dennis’ Claim Of Fabrication, His Counterclaims And The Trial Court’s Sanction Award. .... 8
      - a. The Saldivars Preserved Their Attempt To Introduce Impersonation Evidence..... 8

b.	The Impersonation Evidence Was Admissible Under ER 404(b).....	10
c.	The Impersonation Evidence Was Separately Admissible On The Issue Whether Dennis Proximately Caused His Own Damages.....	12
d.	Bharti Was Entitled To Rely On Impersonation Evidence In Asserting The Claims Against Charles and Dennis Momah And U.S. Healthworks. ....	13
e.	The Trial Court Erred In Concluding That The Claims Of Other Women Were Also Fabricated In Imposing Sanctions Against Bharti, In Derogation Of A Contrary Judgment From King County Superior Court.....	15
2.	Professor Klingbeil's Testimony Regarding Perla's Symptoms Of Post Traumatic Stress Disorder Was Admissible And Dispelled Defendants' Contention That Bharti Fabricated Perla Saldivars' Claims. ....	19
3.	The Trial Court Erred In Precluding Ed Fuentes From Testifying That Perla Made A Contemporaneous Complaint Against Dennis Momah.....	22
4.	The Trial Court Erred In Basing Its Credibility Findings On The Department Of Health's Summary Of Perla's Statements Without Allowing The Investigator To Testify.....	24

C. Dennis Momah’s \$2.8 Million Judgment On His Counterclaims Fails As A Matter Of Law..... 28

1. The Saldivars Did Not Waive Their Immunity To Dennis Momah’s Counterclaims Because They Raised RCW 4.24.510 In Seeking Dismissal Of Dennis’ Counterclaims At Trial. .... 28

2. RCW 4.24.510 Provides Absolute Immunity To A Complaint To Government Authorities ..... 29

3. Dennis Has No Claim For Abuse Of Process Because The Saldivars’ Allegations Of Sexual Assault Were Not Made For An Ulterior Purpose Unrelated To Their Claims For Relief..... 32

D. Trial Court Improperly Struck The Saldivars’ Jury Demand Because It Was Timely Filed And Because Respondents Had Actual Notice Of The Saldivars’ Demand For A Jury Trial..... 35

E. The Trial Court Had No Basis For Finding That Bharti And The Saldivars Lied To The Court Regarding The Department Of Health’s Investigation..... 38

F. Dennis Cannot Identify Any Specific Court Order To Support The Trial Court’s Conclusion That Bharti Was Prohibited From Showing His Client A Deposition Of Charles Momah. .... 40

G. The Trial Court’s Legal Errors And Flawed Findings Mandate Reversal Of Its Award Of Sanctions Under RCW 4.84.185, CR 11 And The Court’s Inherent Power..... 43

1.	The Trial Court's Assessment of Fees And Costs Against The Saldivars Under RCW 4.84.185 Must Be Reversed Because Its Findings Are Tainted By Legal Error, By Its Refusal To Allow The Saldivars To Rebut The Charge Of Fabrication And By Its Hostility To The Saldivars' Trial Counsel.....	43
2.	As Bharti Did Not "Fabricate" The Saldivars' Allegation Of Sexual Abuse Against Dennis Momah, The Sanctions Imposed Under CR 11 And The Court's Inherent Power Cannot Stand.....	45
3.	The Trial Court Lacked Authority To Award \$300,000 In Punitive Sanctions In Addition To All Of The Defendants' Fees.....	46
4.	The Trial Court's "Scarlet Letter" Non-Monetary Sanction Violates The First Amendment.....	49
III.	CONCLUSION .....	50

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

***Calhoun v. Liberty Northwest Ins. Corp.***, 789 F. Supp. 1540 (W.D. Wash. 1992) ..... 5

***Kraemer v. Grant County***, 892 F.2d 686 (7th Cir. 1990)..... 22

***U.S. v. Johnson***, 132 F.3d 1279 (9th Cir. 1997) ..... 11

**STATE CASES**

***Batten v. Abrams***, 28 Wn. App. 737, 626 P.2d 984, rev. denied, 95 Wn.2d 1033 (1981) ..... 33

***Bernsen v. Big Bend Elec. Co-op., Inc.***, 68 Wn. App. 427, 842 P.2d 1047 (1993)..... 28

***Bryant v. Joseph Tree, Inc.***, 57 Wn. App. 107, 791 P.2d 537 (1990), aff'd, 119 Wn.2d 210, 829 P.2d 1099 (1992) ..... 46

***Bryant v. Joseph Tree, Inc.***, 119 Wn.2d 210, 829 P.2d 1099 (1992)..... 14

***C.J.C. v. Corporation of Catholic Bishops of Yakima***, 138 Wn.2d 699, 985 P.2d 262 (1999) ..... 35

***Client A v. Yoshinaka***, 128 Wn. App. 833, 116 P.3d 1081 (2005) ..... 49

***Dang v. Ehredt***, 95 Wn. App. 670, 977 P.2d 29, rev. denied, 139 Wn.2d 1012 (1999) ..... 30

***Davenport v. Elliott Bay Plywood Machines Co.***, 30 Wn. App. 152, 632 P.2d 76 (1981), rev. denied, 96 Wn.2d 1025 (1982) ..... 7

<b>Demelash v. Ross Stores, Inc.</b> , 105 Wn. App. 508, 20 P.3d 447, <i>rev. denied</i> , 145 Wn.2d 1004 (2001) .....	20
<b>Detention of A.S.</b> , 138 Wn.2d 898, 982 P.2d 1156 (1999) .....	20
<b>Gooch v. Choice Entertaining Corp.</b> , 355 N.J. Super. 14, 809 A.2d 154 (2002).....	33
<b>Graves v. P.J. Taggares Co.</b> , 25 Wn. App. 118, 605 P.2d 348 (1980), <i>aff'd</i> , 94 Wn.2d 298, 616 P.2d 1223 (1980) .....	38
<b>Harris v. Urell</b> , 133 Wn. App. 130, 135 P.3d 530 (2006) .....	7
<b>Herron v. Tribune Pub. Co., Inc.</b> , 108 Wn.2d 162, 736 P.2d 249 (1987) .....	17
<b>Horwitz v. Holabird &amp; Root</b> , 212 Ill.2d 1, 816 N.E.2d 272 (2004) .....	35
<b>Just Dirt, Inc. v. Knight Excavating, Inc.</b> , ___ Wn. App. __, ___ P.3d __ (No. 3415-2-II, May 1, 2007) .....	47, 50
<b>Kauzlarich v. Yarbrough</b> , 105 Wn. App. 632, 20 P.3d 946, <i>rev. denied</i> , 144 Wn.2d 1007 (2001) .....	30
<b>Keller v. Keller</b> , 52 Wn.2d 84, 323 P.2d 231 (1958) .....	48
<b>Loeffelholz v. C.L.E.A.N.</b> , 119 Wn. App. 665, 82 P.3d 1199, <i>rev. denied</i> , 152 Wn.2d 1023 (2004) .....	32
<b>Maicke v. RDH, Inc.</b> , 37 Wn. App. 750, 683 P.2d 227, <i>rev. denied</i> , 102 Wn.2d 1014 (1984) .....	13
<b>Malgarini v. Washington Jockey Club</b> , 60 Wn. App. 823, 807 P.2d 901 (1991) .....	28
<b>Mark v. Williams</b> , 45 Wn. App. 182, 724 P.2d 428, <i>rev. denied</i> , 107 Wn.2d 1015 (1986) .....	32
<b>Matter of Pearsall-Stipek</b> , 136 Wn.2d 255, 961 P.2d 343 (1998) .....	46

<b><i>Matter of Personal Restraint of Lord</i></b> , 123 Wn.2d 296, 868 P.2d 835, <i>cert. denied</i> , 513 U.S. 849 (1994) .....	34
<b><i>Reid v. Dalton</i></b> , 124 Wn. App. 113, 100 P.3d 349 (2004) , <i>rev. denied</i> , 155 Wn.2d 1005 (2005) .....	31
<b><i>Rogerson Hiller Corp. v. Port of Port Angeles</i></b> , 96 Wn. App. 918, 982 P.2d 131 (1999), <i>rev. denied</i> , 140 Wn.2d 1010 (2000) .....	43, 46
<b><i>Sidis v. Brodie/Dohrmann, Inc.</i></b> , 117 Wn.2d 325, 815 P.2d 781 (1991) .....	34
<b><i>Skimming v. Boxer</i></b> , 119 Wn. App. 748, 82 P.3d 707, <i>rev. denied</i> , 152 Wn.2d 1016 (2004) .....	31
<b><i>State ex. rel. Washington State Public Disclosure Comm'n v. Permanent Offense</i></b> , 136 Wn. App. 277, 150 P.3d 568 (2006) .....	29
<b><i>State v. Buckley</i></b> , 83 Wn. App. 707, 924 P.2d 40 (1996) .....	48
<b><i>State v. DeVincentis</i></b> , 150 Wn.2d 11, 74 P.3d 119 (2003) .....	11
<b><i>State v. Florczak</i></b> , 76 Wn. App. 55, 882 P.2d 199 (1994), <i>rev. denied</i> , 126 Wn.2d 1010 (1995) .....	20
<b><i>State v. Hines</i></b> , 87 Wn. App. 98, 941 P.2d 9 (1997) .....	25
<b><i>State v. Lough</i></b> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	12
<b><i>State v. Meekins</i></b> , 125 Wn. App. 390, 398-99, 105 P.3d 420 (2005) .....	12, 13
<b><i>State v. Roth</i></b> , 75 Wn. App. 808, 881 P.2d 268 (1994), <i>rev. denied</i> , 126 Wn.2d 1016 (1995) .....	11
<b><i>Twelker v. Shannon &amp; Wilson, Inc.</i></b> , 88 Wn.2d 473, 564 P.2d 1131 (1977) .....	31

<b><i>Viereck v. Fibreboard Corp.</i></b> , 81 Wn. App. 579, 915 P.2d 581, <i>rev. denied</i> , 130 Wn.2d 1009 (1996) .....	7
<b><i>Wilson v. Olivetti North America, Inc.</i></b> , 85 Wn. App. 804, 934 P.2d 1231, <i>rev. denied</i> , 133 Wn.2d 1017 (1997) .....	36

## STATUTES & CONSTITUTIONAL PROVISIONS

RCW 4.24.510 .....	28, 29, 31
RCW 4.84.185 .....	43, 44
RCW 5.44.040 .....	25
RCW 5.45.020 .....	25

## RULES & REGULATIONS

CR 8 .....	29
CR 11 .....	<i>passim</i>
CR 15 .....	28
CR 38 .....	36
CR 60 .....	38
ER 404 .....	10, 11, 12
ER 612 .....	43
ER 801 .....	22
ER 803 .....	25
RAP 10.1.....	6, 7
RAP 10.3.....	7

## OTHER AUTHORITIES

Schwarzer, <i>Sanctions Under the New Federal Rule 11 - A Closer Look</i> , 104 FRD 181 (1985).....	48
Tegland 5D <i>Washington Practice</i> 316 (2007).....	43

## **I. REPLY IN SUPPORT OF STATEMENT OF THE CASE**

Dennis treats the validity of the trial court's extraordinary judgment as a simple question of whether "substantial evidence supports [the trial court's] findings of fact." (Resp. Br. at 39) That is the wrong question, where, as here, the trial court did not simply resolve issues of credibility but awarded \$2.8 million in damages and a total of \$600,000 in sanctions based on its determination that the Saldivars' claims of sexual abuse and impersonation by the Momah brothers at U.S. Healthworks were deliberately fabricated by the Saldivars and their attorney Harish Bharti for the improper purpose of ruining Dennis Momah's reputation. The trial court reached this result not from a fair consideration of the evidence, but after a series of rulings that prevented the Saldivars and their counsel from rebutting the defendants' charges of bad faith.

Dennis Momah's defense of this unprecedented judgment rests on several premises that are either demonstrably incorrect or that are based on allegations that the Saldivars were not given a fair opportunity to rebut:

**A. The Inconsistencies In Her Account Do Not Establish That Perla Saldivar Fabricated A Claim Against Dennis Momah. Perla Saldivar Had No Motive To Make A False Claim Of Sexual Abuse.**

Although the Saldivars' testimony was inconsistent with respect to dates and times, Perla Saldivar consistently, and without any motive to lie, insisted that she was sexually molested twice at U.S. Healthworks, and that there were subtle differences in the appearance of the two physicians who abused her. As more fully set out in the opening briefs, Perla's initial declaration to the Department of Health in June 2003 (Ex. 19), her narrative given to the Federal Way Police Department in November 2003 (Ex. 20), her extensive deposition testimony in 2005 (CP 2355-82), and her interview with Department of Health investigator Lynn Larsen-Levier in February 2006 (Ex. 37), consistently related two distinct incidents of sex abuse occurring at two separate visits at U.S. Healthworks.

When she initially brought this action, Perla testified that there were peculiar differences between the two physicians who saw her at her first visit on May 27, 2003. (CP 11, 66) Perla testified that she was seen by two different doctors at her first visit to U.S. Healthworks in her motion to amend the complaint, (CP 34, 66), in her opposition to defendants' motion to dismiss, (CP 2100)

and in her deposition testimony opposing summary judgment. (CP 2351-52, 2362-63) She testified in those declarations and in her deposition that she recognized Charles Momah as “the first person who sexually assaulted me” after watching a news broadcast of his arrest. (CP 2366) This was consistent with her testimony at trial that she was able to tell that there were two different doctors who treated her on May 27 by the fact that the second doctor was wearing an orthopedic shoe, had a heavier accent, and a different hairline. (RP 214-19; *Compare* RP 211-12 and RP 292)

Dennis contends that Perla’s trial testimony established “fabrication” because “Perla was able to remember to testify that it was her vagina that allegedly had been touched, but forgot who she was supposed to say did the touching.” (Resp. Br. at 85-86) But at trial, Perla simply identified Dennis Momah as one of the physicians she saw on her first visit to U.S. Healthworks, (RP 211-13), not as the doctor who sexually abused her on that visit, as Dennis claims.

Although Dennis contends that Perla changed her story only after being improperly coached by her lawyer over a noon recess,<sup>1</sup> Perla described her confusion regarding the two individuals who

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<sup>1</sup> Dennis’ contention that Perla’s identification of Charles as the first individual who abused her was a result of her counsel’s violation of a court order is addressed *infra* at § III.F.

examined her (RP 219-20) before her testimony was interrupted for another witness. (RP 230)

Conflicts between the medical records and the Saldivars' discovery responses or trial testimony regarding the dates of treatment, or whether Perla used the word "vagina" in her initial statements, do not support the trial court's finding that Perla fabricated her claims, especially given the trial court's failure to identify any motive for Perla's alleged "improper purpose of influencing the Depart. of Health to terminate Dennis Momah's license to practice medicine." (CL 6, CP 1534) Although Dennis repeatedly refers to the Saldivars' "improper purpose" behind the Saldivars' allegations to the Department of Health, the Federal Way Police and in this lawsuit, he is similarly unable to identify any reason why the Saldivars would harbor such animus, save for their belief that he abused his authority as a physician to satisfy his own sexual urges at Perla's expense.

**B. Bharti Did Not "Fabricate" The Saldivars' Claims, Which Were Initially Made To The Department Of Health And Police Without His Involvement.**

The trial court found that the Saldivars' attorney Harish Bharti knew that the Saldivars were lying and also conspired with them to fabricate their claims against the Momahs and U.S.

Healthworks. (FF 30-36, CP 1530-31) But it is undisputed that Bharti had nothing to do with Perla Saldivar's initial complaint to the Department of Health in June 2003. (Ex. 19, RP 319-20) Perla prepared her initial narrative at the request of investigator Virginia Renz shortly after contacting the Department of Health in June 2003 to complain that Dennis Momah "touched me improperly on two occasions . . ." (Ex. 19, RP 319-20)

Dennis claims that Bharti was responsible for the Saldivars' complaint to the Federal Way Police Department, citing Perla's "concession" that Bharti "helped" Perla prepare the declaration that she sent to the police in November 2003. (Resp. Br. at 11, citing Ex. 20 and RP 418)<sup>2</sup> In fact, Perla had contacted the Federal Way Police by phone after Virginia Renz referred her to law enforcement. Perla gave an interview to Detective Dennis Wilcox, before she met Bharti. (RP 312, 317, 418; CP 2374)

Dennis' contention that by April 2004, no "patient of Dennis', other than Perla Saldivar, had accused Dennis of any impropriety," (Resp. Br. at 86-87), ignores the fact that dozens of women

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<sup>2</sup> As pointed out in the opening brief, there is nothing "unusual nor improper" in the practice of a party's attorney preparing his or her client's declaration for signature. (Bharti Br. at 25, quoting **Calhoun v. Liberty Northwest Ins. Corp.**, 789 F. Supp. 1540, 1544 (W.D. Wash. 1992)).

contacted Bharti before he filed this action in April 2004 to report that Dennis Momah had touched them in an inappropriate sexual manner while performing examinations at his brother's clinic. (CP 987-88; See CP 1218-19 (McFarlane), 1110-11, 1116-17 (Acker), 1204-11 (LaPoint); See Bharti Br. at 7 n.2)

Dennis' brief contains numerous other inaccurate statements, glosses over the trial court's consistent refusal to allow the Saldivars to prove their case and rebut the respondents' charge of fabrication, and mischaracterizes the evidence before the trial court. The Saldivars address the most significant facts in their reply arguments below.

## II. REPLY ARGUMENT

### **A. The Saldivars' Challenge To The Trial Court's Findings Were Preserved Under RAP 10.1(g) By Express Reference To The Brief Of Their Co-Appellant Bharti. Arguments Are Preserved And Should Be Addressed On The Merits.**

The Saldivars' brief expressly incorporated both the assignments of error and the arguments made by co-appellant Harish Bharti. (Saldivar Br. at 48-49 & nn. 3, 5) The court must reject Dennis' contention that the Saldivars did not properly assign error to the trial court's findings regarding their "improper purpose" in asserting their claims in this lawsuit. (Resp. Br. at 40-45) RAP

10.1(g) allows a co-appellant to “file a separate brief and adopt by reference any part of the brief of another.” The Saldivars expressly cited RAP 10.1(g) when they “incorporate[d] appellant Harish Bharti’s assignments of error and arguments relating to the imposition of sanctions.” (Saldivar Br. at 49. n.5) “No more was required.” ***Davenport v. Elliott Bay Plywood Machines Co.***, 30 Wn. App. 152, 153-54, 632 P.2d 76 (1981), *rev. denied*, 96 Wn.2d 1025 (1982) (refusing to dismiss appeal of corporation where it has joined in co-appellants’ brief).

Even had the Saldivars not expressly adopted Bharti’s assignments of error, this court will consider the merits of an appeal where an appellant’s challenge to the trial court’s findings is “clearly disclosed” in the issues and the arguments raised in the brief of appellant. See RAP 10.3(g); ***Harris v. Urell***, 133 Wn. App. 130, 137-38, ¶¶ 18, 19, 135 P.3d 530 (2006); ***Viereck v. Fibreboard Corp.***, 81 Wn. App. 579, 582-83, 915 P.2d 581, *rev. denied*, 130 Wn.2d 1009 (1996). The Saldivars argued that the trial court’s findings “that the Saldivars and their counsel fabricated their allegations of sexual abuse against the Momah brothers” were tainted by the trial court’s exclusion of relevant evidence that undermined Dennis’ counterclaims. (Saldivar Br. at 37-48) Where,

as here, the respondent is able to respond to the appellants' arguments, this court should address the appellants' arguments on the merits.

**B. The Trial Court's Rulings Prevented The Saldivars From Defending Against Dennis' Claims Of Fabrication Or From Challenging Dennis' Claim That The Saldivars' Allegations Caused Him Damages And Prevented Bharti From Establishing The Reasonableness Of His Investigation.**

**1. The Proffered Testimony Of Other Victims Of Sexual Abuse And Employees Of Charles Momah Went To The Heart Of Dennis' Claim Of Fabrication, His Counterclaims And The Trial Court's Sanction Award.**

Dennis' reliance on the discretionary nature of a trial court's evidentiary rulings fails to confront the central issue of fairness raised by the trial court's rulings in this case: The trial court entered a \$2.8 million judgment and imposed \$600,000 in sanctions, finding that the Saldivars and Bharti conspired to fabricate false claims against Charles and Dennis Momah, but refused to consider the testimony or evidence from any third persons who would have rebutted the defendants' charges of fabrication.

**a. The Saldivars Preserved Their Attempt To Introduce Impersonation Evidence.**

Dennis initially contends that the Saldivars failed to preserve error in the exclusion of their witnesses. However, the Saldivars

argued that impersonation evidence was relevant in opposing the defendants' motion in limine, (CP 347-48), and again on reconsideration of the trial court's order limiting their witnesses to those with personal knowledge of what took place at the U.S. Healthworks clinic. (CP 410, 414-17)

The Saldivars also argued that impersonation evidence was relevant to the counterclaims asserted by Dennis, particularly given his contention that Ms. Saldivar was the only woman who ever lodged a complaint against him. (See RP 23-25, 614-21; See Exs. 41-44) And although Dennis claims that the trial court had only a "bare list of 61 names," (Resp. Br. at 61, citing CP 468), most of those witnesses had filed declarations detailing impersonation of Charles Momah by Dennis, sexual abuse by Dennis, or both. (See CP 2102-2183)<sup>3</sup> The Saldivars again renewed their attempt to call other victims of impersonation in seeking to introduce rebuttal evidence. (CP 738) They renewed their argument in their motion for a new trial. Their evidentiary issues were well preserved.<sup>4</sup>

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<sup>3</sup> See CP 468 (designation of witnesses), 2104 (Natasha Collier); 2111 (Tanya Basnaw); 2114 (Amy McFarlane); 2123 (Jodi Coyne); and others.

<sup>4</sup> The Saldivars also presented previously unavailable forensic evidence showing that Dennis impersonated Charles in delivering a baby for one of Charles' obstetrical patients. (CP 1573-82) The trial court struck this evidence as well. (CP 1924)

**b. The Impersonation Evidence Was Admissible Under ER 404(b).**

Dennis argues that impersonation evidence was irrelevant because the Saldivars claimed that Charles impersonated Dennis at Dennis' clinic, whereas the other individuals claimed that Dennis impersonated Charles at Charles' clinic. (Resp. Br. at 64-65) This court should reject Dennis' restrictive view of relevance under the peculiar facts of this case in which the trial court found that Saldivars fabricated their claims against Dennis and held that the Saldivars' allegation that Charles impersonated Dennis at U.S. Healthworks was so far-fetched as to defy credulity.

The trial court repeatedly expressed its disbelief that one physician would be able to impersonate another. (See RP 701 ("it's difficult to see how you could have two men the size of Dr. Charles and Dennis Momah pussy footing around the clinic to change off without someone else in the clinic knowing about it."); 5/24 RP 47 ("It's difficult for men who weigh 350 plus pounds to be sneaking around with no one noticing them.") Respondents capitalized on the trial court's skepticism and emphasized inconsistencies in the Saldivars' testimony in arguing that the Saldivars' claims that the Momah twins traded places with each other were necessarily fabricated.

The essence of the “common scheme” exception to ER 404(b) is to allow a party to dispel such skepticism by establishing that similar incidents have happened before. The “similarity” element does not require that the prior acts be identical, only that they are each sufficiently similar that it makes it more likely that the particular defendant committed the act with which he is accused. ***State v. DeVincentis***, 150 Wn.2d 11, 20, 74 P.3d 119 (2003) (“the crux of the inquiries . . . is similarity, not uniqueness.”). See ***U.S. v. Johnson***, 132 F.3d 1279, 1283 (9th Cir. 1997) (“past conduct need not be identical to the conduct charged”). If Dennis was able to successfully impersonate his twin brother Charles, it makes it more likely that Charles would successfully engage in the high degree of planning necessary to impersonate his twin brother Dennis. See ***State v. Roth***, 75 Wn. App. 808, 812-13, 881 P.2d 268 (1994), *rev. denied*, 126 Wn.2d 1016 (1995) (evidence that defendant’s wife from earlier marriage died under suspicious circumstances admissible in prosecution charging defendant with murdering his wife to collect insurance proceeds).

If Dennis had in fact engaged in sexual misconduct while examining other women, it makes it more likely that Perla’s charge that he engaged in that misconduct in this particular instance was

true and not a fabrication. **State v. Lough**, 125 Wn.2d 847, 853-54, 889 P.2d 487 (1995) (evidence that defendant had drugged and sexually assaulted other women admissible in prosecution claiming attempted rape and indecent liberties by defendant accused of drugging victim prior to raping her). The trial court abused its discretion in excluding impersonation evidence under ER 404(b).

**c. The Impersonation Evidence Was Separately Admissible On The Issue Whether Dennis Proximately Caused His Own Damages.**

Despite the fact that dozens of women accused Dennis of egregious breach of his duty as a physician by impersonating his brother Charles, the court found that Dennis suffered \$2.8 million in damages due solely to “the false allegations of Perla Saldivar.” (FF 23-25, CP 1526-27; CL 13, CP 1536) Dennis contends that impersonation evidence could not affect that award, because it establishes “only that the defendant’s conduct and some other cause operated concurrently.” (Resp. Br. at 80-81, *quoting State v. Meekins*, 125 Wn. App. 390, 398-99, 105 P.3d 420 (2005)) But the Saldivars were entitled to prove that Dennis’ own misconduct, which led to lawsuits and complaints to the Department of Health by numerous other women claiming that he had sexually abused them, was the proximate cause of his emotional distress and lost

earnings. In **Meekins**, the court reversed the judgment because the jury was prevented from considering whether the victim's own conduct – his failure to have an operating headlight – and not the defendant's conduct, caused the victim's fatal collision. 125 Wn. App. at 400.

Here, the trial court found that the Saldivars' allegations caused Dennis to lose his job, destroy his professional reputation and suffer a stroke. (FF 23-25, CP 1526-27) It awarded \$2.8 million in damages without considering the fact that "the harm would have been sustained without [the Saldivars'] misconduct." **Meekins**, 125 Wn. App. at 397. At a minimum, the evidence of Dennis' sexual misconduct was relevant to his claim for damages to his professional earnings and reputation. See **Maicke v. RDH, Inc.**, 37 Wn. App. 750, 752, 683 P.2d 227, *rev. denied*, 102 Wn.2d 1014 (1984) (decedent's felony history probative on issue of earning capacity and to rebut evidence of decedent's good character in wrongful death case).

**d. Bharti Was Entitled To Rely On Impersonation Evidence In Asserting The Claims Against Charles and Dennis Momah And U.S. Healthworks.**

While holding that the testimony of other individuals who had personal knowledge of sexual abuse by Dennis Momah was

irrelevant to any issues in the case, the trial court nonetheless relied on the fact that the Saldivars had no evidence that “the Momah brothers could be readily mistaken one for the other” as a basis for concluding that Bharti and the Saldivars fabricated the claims of impersonation. (5/24 RP 47) Regardless of the admissibility of this evidence, the trial court erred in holding that Bharti did not reasonably rely on other claims of impersonation and abuse by Dennis in investigating the Saldivars’ claims. Dennis’ only response to this argument is that impersonation evidence could not have affected the trial court’s sanctions decision because “a fabricated claim cannot be the product of a reasonable inquiry.” (Resp. Br. at 85) This court should reject Dennis’ circular reasoning, particularly given the undisputed fact that Bharti could not have fabricated the Saldivars’ allegations of sexual abuse because they complained to state authorities prior to Bharti’s involvement. (§ I.B., *supra*)

Even if this court affirms the trial court’s determination that the Saldivars’ complaint was a fiction, the central issue on review of its imposition of sanctions under CR 11 is whether Bharti was entitled to believe the Saldivars and whether he performed a reasonable investigation before he filed this lawsuit. ***Bryant v.***

**Joseph Tree, Inc.**, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992).

The fact that other women had also charged Dennis Momah with sexual abuse made the Saldivars' claims more, not less, credible to an attorney performing a pre-filing inquiry.

**e. The Trial Court Erred In Concluding That The Claims Of Other Women Were Also Fabricated In Imposing Sanctions Against Bharti, In Derogation Of A Contrary Judgment From King County Superior Court.**

While excluding this evidence, the trial court accepted Dennis' argument that the Saldivars' counsel fabricated the claims of other women alleging impersonation and sex abuse by Dennis. (RP 660: excluding rebuttal evidence: "it would be interesting then to find out how many of those complaints are coming from your clients and you've assisted them as well.") Ignoring the final adjudication of another court that actually considered the evidence, the trial court concluded that Bharti's reliance on the impersonation claims of other women was in bad faith. (CP 1644; RP 5/24 at 45-46: "[Bharti] did no investigation whatsoever before filing this case because for him to say he was relying on the statements of his client when he already knew many of his clients were lying or

perhaps manipulated by him is unconscionable.”)<sup>5</sup> The trial court concluded that Bharti had no legitimate basis to file the declarations of other impersonation victims. (CL 7, CP 1534 (Bharti filed declarations of “other alleged ‘victims’ in this case solely to prejudice the court, obtain media attention, and to vex, harass and annoy Dennis Momah” ); FF 33, CP 1530-31 (declarations of others with knowledge of Dennis’ pattern of sexual abuse were “irrelevant and salacious” and filed to “improperly influence public opinion and gain advantage in other litigation.”)

After excluding the evidence, the trial court had no basis to conclude it was false. Dozens of women consistently testified to Dennis Momah’s inappropriate conduct, not just in declarations prepared with Bharti’s assistance, but in sworn deposition testimony under cross examination by Dennis’ lawyers taken in Dennis’ King County action brought separately against Bharti for defamation. (See, e.g., RP 1173-75, 1191, 1296-98, 1307-17, 1349-50, 1370-71, 1377-88) Regardless whether the testimony of other women was admissible in the Saldivars’ case in chief or in

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<sup>5</sup> Although the trial court refused to consider testimony of other women regarding impersonation, it readily accepted as fact Dennis’ self-serving statement to the Department of Health (CP 1679), and concluded that “Dennis wasn’t even in this state when the alleged impersonation occurred.” (5/24 RP 44)

response to Dennis' counterclaims, the trial court fundamentally erred in deciding that this evidence lacked credibility as a basis for imposing sanctions.

The King County Superior Court, based on the evidence that the trial court here refused to consider, held as a matter of law that Bharti's allegation that Dennis had sexually abused women while impersonating his brother was not made with "actual malice" because Bharti relied on the testimony of these women. (CP 1644) Stated differently, Dennis could not establish that Bharti acted with actual knowledge, or in reckless disregard of the falsity of his client's allegations when he repeated them to the press. ***Herron v. Tribune Pub. Co., Inc.***, 108 Wn.2d 162, 170, 736 P.2d 249 (1987). That order, which was placed before the trial court in its hearing on CR 11 sanctions, fatally undermines the trial court's finding that Bharti's assertion of Ms. Saldivar's claims against Dennis Momah was "part of a pattern of behavior by Mr. Bharti to harass Dennis Momah [and] destroy his career." (FF 36, CP 1531)

Dennis argues that the King County Superior Court order is irrelevant because whether the *Saldivars'* allegations were false was not at issue when the King County Superior Court held that Bharti's statements that Dennis had been accused of sexually

abusing patients and impersonating his brother were made in good faith. (Resp. Br. at 90-91) In fact, the Saldivars' allegations were among those considered in King County Superior Court. (CP 1241 (Saldivar deposition taken in King County action))

In any event, Dennis' collateral estoppel argument misses the mark. Bharti did not cite the King County Superior Court's order in ***Momah v. Bharti*** to estop Dennis from defending the Salvidars' claims, but to rebut Dennis' contention in seeking sanctions that Bharti fabricated the claims of other women alleging abuse.<sup>6</sup> The trial court was not free to ignore the King County Superior Court's conclusion that Bharti had a good faith basis for believing these women when that issue was actually litigated in King County and adjudicated without a fair consideration of the evidence in this action.

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<sup>6</sup> Dennis cites to one claimant (among dozens) who retracted her allegations of abuse in the King County action. (Resp. Br. at 93, *citing* CP 776-77, 814-37) That retraction, which was before the King County Superior Court, did not change that court's conclusion as a matter of law that Bharti's accusation of sexual abuse and impersonation against Dennis was made without malice. (CP 1644)

**2. Professor Klingbeil's Testimony Regarding Perla's Symptoms Of Post Traumatic Stress Disorder Was Admissible And Dispelled Defendants' Contention That Bharti Fabricated Perla Saldivars' Claims.**

The trial court based its finding that Perla Saldivar did not suffer any sexual abuse, in part, on the trial court's personal belief that Perla did not exhibit the affect and demeanor of a rape victim. (FF 18, CP 1524: "Even Ms. Saldivar's affect was not credible as she described Dr. Momah's alleged brusqueness with the same level of emotion and same affect that she used when she described the alleged rape.")<sup>7</sup> But the trial court excluded the opinion of a qualified mental health professional that would have explained that Perla was suffering from post-traumatic stress disorder and that her affect was consistent with the avoidant strategies common to victims of PTSD. (CP 439)

The trial court did not just preclude Professor Klingbeil from offering an opinion on Ms. Saldivar's credibility, as Dennis contends, but held that "Ms. Klingbeil is not qualified to opine on psychiatric conditions." (CP 408; See *also* 5/24 RP 42: "Ms. Klingfield [sic] had a master of social work and was in no way

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<sup>7</sup> The trial court's finding directly rebuts Dennis' contention that Perla's mental condition was relevant solely to "the issue of damages on the Saldivars' claims." (Resp. Br. at 59)

qualified to make any kind of diagnosis of post traumatic stress disorder.”) As a professional social worker with years of experience in evaluating victims of sexual abuse at Harborview Medical Center, Prof. Klingbeil was undoubtedly qualified to provide an opinion that Perla suffered from post traumatic stress disorder, as the Saldivars repeatedly argued below. (CP 348, 413) The trial court necessarily abused its discretion in excluding evidence based on an incorrect interpretation of the law. ***Detention of A.S.***, 138 Wn.2d 898, 917-18, 982 P.2d 1156 (1999) (social workers may be qualified by experience and training to offer opinions regarding mental disorders); ***State v. Florczak***, 76 Wn. App. 55, 74, 882 P.2d 199 (1994), *rev. denied*, 126 Wn.2d 1010 (1995) (social worker qualified to testify that victim suffered from PTSD). See ***Demelash v. Ross Stores, Inc.***, 105 Wn. App. 508, 530, 20 P.3d 447, *rev. denied*, 145 Wn.2d 1004 (2001) (“A trial court necessarily abuses its discretion if its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence.”).

Dennis erroneously argues that the Saldivars never produced a signed report by Professor Klingbeil. (Resp. Br. at 57-58) In fact, after the trial court gave the Saldivars until July 1 to obtain a report summarizing all of Klingbeil’s proposed testimony,

the Saldivars obtained Professor Klingbeil's signed letter, attaching her "professional opinion with regard to . . . Perla Saldivar." (CP 438) That report summarized the basis of her opinion that Perla suffered from PTSD and rebutted the defendants' contention that Perla did not exhibit the symptoms of someone who had suffered a sexual assault. (CP 439-40)

Regardless whether Professor Klingbeil's opinions were admissible, Mr. Bharti was entitled to consider her evaluation, including her assessment of Perla's credibility in light of Professor Klingbeil's interviews with other women who claimed that Dennis Momah sexually abused them while impersonating his brother Charles. (CP 319) Dennis argues that because Bharti did not retain Professor Klingbeil until after he filed the action,<sup>8</sup> her opinion has no relevance in determining whether his investigation was reasonable. (Resp. Br. at 87-88) Dennis cites no authority for the proposition that an attorney's post-filing inquiry can never satisfy the attorney's duty to investigate under Rule 11. To the contrary, although Rule 11 certainly requires a reasonable pre-filing inquiry, an attorney need not complete that investigation prior to filing a

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<sup>8</sup> Bharti retained Klingbeil in May 2004, within a few weeks of filing the Saldivar lawsuit. (CP 318)

lawsuit particularly where, as here, the plaintiff is alleging criminal acts that would necessarily be difficult to verify or independently corroborate.<sup>9</sup> See, e.g., ***Kraemer v. Grant County***, 892 F.2d 686, 689-90 (7<sup>th</sup> Cir. 1990) (reversing sanctions imposed in conspiracy case; “it is not unreasonable to file a complaint so as to obtain the right to conduct that discovery”).

**3. The Trial Court Erred In Precluding Ed Fuentes From Testifying That Perla Made A Contemporaneous Complaint Against Dennis Momah.**

Ed Fuentes, Perla Saldivar’s translator at U.S. Healthworks, would have testified that Perla told him, contemporaneously and before she had ever met with Harish Bharti, that Dennis had touched her in an inappropriate manner, rebutting the charge of fabrication. ER 801(d)(1)(ii). The trial court erroneously held that anything Perla said to Fuentes was “hearsay and it does not come in under any exception to the hearsay rules.” (RP 156, 161)<sup>10</sup> The

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<sup>9</sup> Bharti had discussed with Professor Klingbeil her opinion that Perla’s allegations of impersonation were consistent with the claims of the other women she interviewed at the time Bharti amended the complaint to add the impersonation claim against Charles in September 2004. (CP 36, 318, 319, 439, 989)

<sup>10</sup> Dennis argues that it is unclear what “Fuentes would have said Perla told him,” (Resp Br. at 54), but in her deposition, Perla stated that she told Ed Fuentes that she had been “touched really bad” by Dennis. (CP 1590) The trial court also refused to allow Perla to testify to what she told Fuentes. (RP 291)

trial court limited Fuentes to testifying to what he told Perla – that she should not be examined by Dennis without a third person present – but was not allowed to testify why he gave her that advice. (RP 166, 169-70)

Dennis argues that any error was harmless. (Resp. Br. at 54) But Fuentes was the only independent witness who could have provided unbiased testimony definitively rebutting the defendants' central contention in this case – that Perla conspired with her attorney to fabricate a false allegation of sexual abuse against Dennis. Perla's statements to Fuentes that she was inappropriately touched by Dennis, made shortly after she saw Dennis at U.S. Healthworks, and before she lodged a complaint with the Department of Health, with the Federal Way police, or sought the services of Bharti, would have directly refuted Dennis' claim that Perla and her attorney manufactured the claims of abuse.

Dennis also claims that Bharti could not have relied on Fuentes' statements in investigating Perla's claim because "Fuentes remembered nothing and testified that he had so informed Bharti." (Resp. Br. at 86) Although Fuentes testified that he was not present during Perla's examination, (RP 172-73), the record contains no testimony contradicting Mr. Bharti's declaration that he

interviewed Fuentes prior to filing this lawsuit. (CP 987)<sup>11</sup> Mr. Bharti was entitled to rely on Ed Fuentes, just as he was entitled to rely on the other individuals who corroborated Ms. Saldivar's contemporaneous complaints of inappropriate conduct by Dennis—her parents and her friend Nancy Wiesniewski. (CP 987)

**4. The Trial Court Erred In Basing Its Credibility Findings On The Department Of Health's Summary Of Perla's Statements Without Allowing The Investigator To Testify.**

The Saldivars repeatedly sought to call Lynn Larsen-Levier, the Department of Health investigator who interviewed Perla in the course of the Department's investigation of Dennis Momah. (CP 315 (disclosure of rebuttal witnesses), 702-03 (offer of proof)) The trial court excluded her testimony before trial on defendants' motion in limine, (RP 37), and again after admitting Larsen-Levier's summary of her interview with Perla. (Ex. 37, RP 656-61) The

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<sup>11</sup> Dennis cites CP 172-73, which is Charles Momah's criminal indictment. The transcript at RP 172-73, which contains Fuentes' testimony, similarly provides no support for Dennis' contention that Fuentes "remembered nothing" of his interaction with Perla at U.S. Healthworks.

Saldivars timely objected to admission of the summary of Perla's interview on the ground that it was hearsay. (RP 421)<sup>12</sup>

Dennis' argument that Larsen-Levier's interview summary was "a public record (admissible under ER 803(a)(8) and RCW 5.44.040)" (Resp. Br. at 55) is without merit. Although the Saldivars stipulated that the document was authentic, (RP 328A-329), they objected that the Department of Health had not produced its complete file (RP 328A), and sought to "voir dire whoever actually created it" because Exhibit 37 appeared to be "the summary . . . [of] something else." (RP 325) A summary of an investigation is not admissible under the public record exception where the person creating it is not subject to cross-examination. *State v. Hines*, 87 Wn. App. 98, 102, 941 P.2d 9 (1997) ("The report is a summary of an investigation by the patrolman and as such should be subject to cross-examination by the accused."). See also RCW 5.45.020 (under business record statute, memorandum admissible "if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of

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<sup>12</sup> Dennis contends that the Saldivars' objection was not preserved because they objected that it "contains hearsay." (Resp. Br. at 55, quoting RP 421) Dennis fails to quote the entire objection: "It appears to be a summary of what the investigator thought was important at that time and the investigator is not currently testifying." (RP 421)

business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.”).

Although much of what Ms. Larsen-Levier summarized in Exhibit 37 was consistent with Perla’s trial testimony, defendants used the exhibit to argue, as they do on appeal, that Perla never said that Dennis had touched her “vagina.” (RP 422, 434-35; Resp. Br. at 84-85) There were substantial questions regarding whether that interview summary was complete and whether it accurately reflected Ms. Saldivar’s statements that were tape-recorded, but not transcribed. (RP 421) Ms. Larsen-Levier was available to testify. (RP 327) The trial court should not have admitted the summary without having Ms. Larsen-Levier testify to the circumstances surrounding its creation.

Dennis also argues that the summary was not used to impeach Perla’s substantive testimony, but to undermine her credibility by establishing that she falsely testified that she had no further contact with the Department of Health. (Resp Br. at 55) The trial court accepted Dennis’ argument, that “Ms. Saldivar testified that actor [sic] August of '03 she had absolutely no contact

with the Department of Health and that was a lie.” (RP 706) The trial court’s finding mischaracterizes Perla’s testimony.

On direct, Perla stated that she did not “right now” have any further contact with the Department after investigator Virginia Renz notified her that her 2003 complaint would not result in any further action (Ex. 28; RP 321), and then simply stated “no” when asked if she had any further contacts with the health department. (RP 323) On cross-examination, Perla readily admitted that she was “recently interviewed by an investigator at the Department of Health . . .” (RP 422) In fact, the Saldivars had disclosed Perla’s interview with Ms. Larsen-Levier in opposing summary judgment two months before trial (CP 2261) and had no reason to deny their contacts with the Department.

The trial court erred in holding that Perla lied based on an interview summary, where the circumstances surrounding its creation were so uncertain. The trial court erred in finding that Perla committed perjury without allowing the witness who could have dispelled this uncertainty to testify first hand to what Perla told her and the circumstances surrounding her interview.

**C. Dennis Momah's \$2.8 Million Judgment On His Counterclaims Fails As A Matter Of Law.**

**1. The Saldivars Did Not Waive Their Immunity To Dennis Momah's Counterclaims Because They Raised RCW 4.24.510 In Seeking Dismissal Of Dennis' Counterclaims At Trial.**

The Saldivars did not waive their statutory immunity defense. The Saldivars raised immunity under RCW 4.24.510 in a "Response to Counterclaim" filed on May 10, 2006, after they rested their case in chief and before Dennis presented his case on his counterclaims. (CP 753-57) (See RP 669) This was not an "amended" pleading under CR 15(a), as Dennis argues, but the first responsive pleading filed in answer to Dennis' counterclaims.

The parties addressed the defense of statutory immunity in closing arguments, (RP 769) and again in the Saldivars' post-trial motion. (CP 1551) See *Malgarini v. Washington Jockey Club*, 60 Wn. App. 823, 826, 807 P.2d 901 (1991) (rejecting waiver of immunity defense where "[t]he trial memorandum developed the immunity argument and cited authority on this issue."); *Bernsen v. Big Bend Elec. Co-op., Inc.*, 68 Wn. App. 427, 434, 842 P.2d 1047 (1993) (no waiver of affirmative defense of failure to mitigate damages where "the parties argued mitigation and the trial court ruled on it.").

Since statutory immunity is entirely a legal, and not a factual, issue, Dennis suffered no prejudice by not having the Saldivars' answer in preparing his counterclaims for trial. See ***State ex. rel. Washington State Public Disclosure Comm'n v. Permanent Offense***, 136 Wn. App. 277, 282, ¶ 9, 150 P.3d 568 (2006). Dennis' argument finds no support in CR 8 and, in fact, is undermined by CR 8(f): "All pleadings shall be so construed as to do substantial justice."

**2. RCW 4.24.510 Provides Absolute Immunity To A Complaint To Government Authorities**

Dennis alleged in his counterclaim and testified at trial that he lost his job and suffered emotional distress because of the Saldivars' complaints "to the police and the Medical Quality Assurance Commission," before this lawsuit was filed. (CP 32; RP 562, 572) Dennis' abuse of process and outrage<sup>13</sup> claims are "based upon" a privileged communication because the Saldivars' liability arises out of such a communication under RCW 4.24.510, which provides immunity "from civil liability for claims based upon

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<sup>13</sup> Dennis argues that the Saldivars have failed to challenge their liability for the tort of outrage. (Resp. Br. at 78-79) However, both the abuse of process and outrage counterclaims arise from the Saldivars' privileged complaints to the Department of Health. (Saldivar Br. at 24) A statement made to government authorities regarding a matter within an agency's statutory mandate cannot be "outrageous" as a matter of law under RCW 4.24.510.

the communication to the [governmental] agency or organization regarding any matter reasonably of concern to that agency or organization.” See ***Dang v. Ehredt***, 95 Wn. App. 670, 682-86, 977 P.2d 29, *rev. denied*, 139 Wn.2d 1012 (1999).

Although Dennis now seeks to parse the substance of the Saldivars’ complaint to the MQAC from the identical allegations made in their lawsuit, the trial court refused to do so, concluding that the Saldivars were liable for “false accusations and claims against Dennis Momah made to the Department of Health, the Federal Way Police Department and the Pierce County Superior Court . . .” (CL 6, CP 1533) Dennis now argues that the Saldivars are liable because they “sued Dennis for money damages for allegations that the court as finder of fact found to be false and malicious.” (Resp. Br. at 74) However, the Saldivars’ liability cannot be based on statements made in the course of judicial proceedings because those statements are entitled to an absolute privilege. ***Kauzlarich v. Yarbrough***, 105 Wn. App. 632, 642, 20 P.3d 946, *rev. denied*, 144 Wn.2d 1007 (2001) (“communications made by a party or counsel in the course of a judicial proceeding are absolutely privileged if they are pertinent or material to the

redress or relief sought.”); **Twelker v. Shannon & Wilson, Inc.**, 88 Wn.2d 473, 475, 564 P.2d 1131 (1977).

None of the authorities cited by Dennis supports his contention that RCW 4.24.510 protects complaints to governmental authorities but not subsequent litigation arising from those complaints, because in each of the cited cases no complaint was ever made to a governmental agency. See **Reid v. Dalton**, 124 Wn. App. 113, 126-27, 100 P.3d 349 (2004), *rev. denied*, 155 Wn.2d 1005 (2005) (a losing electoral candidate, who had not made a complaint to any governmental agency, is not immune from sanctions for filing a frivolous lawsuit under RCW 4.24.510); **Skimming v. Boxer**, 119 Wn. App. 748, 758, 82 P.3d 707, *rev. denied*, 152 Wn.2d 1016 (2004) (RCW 4.24.510 inapplicable to claims arising from statements that were made to a newspaper or other private entity).

The Saldivars' complaints, first made to a governmental agency before they ever contacted counsel, did not lose their immunity because they were repeated in the complaints filed in Pierce County Superior Court. Whether based on their statements made to the MQAC, to the Federal Way Police, or their statements

made in these judicial proceedings, Dennis' counterclaims for abuse of process and for outrage must be reversed.

**3. Dennis Has No Claim For Abuse Of Process Because The Saldivars' Allegations Of Sexual Assault Were Not Made For An Ulterior Purpose Unrelated To Their Claims For Relief.**

Dennis was required to establish both that the Saldivars used legal process in an improper or abusive manner, and that they did so with "an ulterior purpose to accomplish an object not within the proper scope of the process." *Mark v. Williams*, 45 Wn. App. 182, 191, 724 P.2d 428, *rev. denied*, 107 Wn.2d 1015 (1986). The trial court's abuse of process judgment here fails on both counts.

There is no "ulterior purpose" because precluding a physician from practicing medicine is a natural and direct consequence of a successful claim for civil liability for engaging in the sexual abuse of patients. (Saldivar Br. at 29-31, discussing *Mark*, 45 Wn. App. at 192) Because of the litigation privilege, the tort of abuse of process does not provide a damages remedy for defending against unwarranted claims, even if those claims are false, asserted in bad faith, and with a malicious motive. *Loeffelholz v. C.L.E.A.N.*, 119 Wn. App. 665, 699, 82 P.3d 1199,

*rev. denied*, 152 Wn.2d 1023 (2004).<sup>14</sup> (CL 8, CP 1534: “these false and malicious claims, asserted through legal process for an improper purpose, constitute an abuse of process . . .”) Even the fabrication of evidence, as the Saldivars were accused of doing here, does not support a claim for abuse of process if accomplished “for the apparent purpose to buttress [a] case.” **Batten v. Abrams**, 28 Wn. App. 737, 749, 626 P.2d 984, *rev. denied*, 95 Wn.2d 1033 (1981). Because the trial court based its judgment for abuse of process on the conclusion that the Saldivars asserted their claims against Dennis to keep Dennis from the practice of medicine, Dennis’ claim for abuse of process fails as a matter of law. (CL 7, CP 1534: plaintiffs “used the court . . . to advance their goal of driving Dr. Momah out of the practice of medicine and to destroy his reputation by making numerous unfounded claims”).

Disavowing the trial court’s conclusion that the Saldivars abused process by asserting “false and malicious claims” against Dennis (CL 8, CP 1534), Dennis now argues that the judgment

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<sup>14</sup> As discussed *supra* § C.2, the substance of a parties’ claims are shielded by the absolute privilege provided to participants in a judicial proceeding. The tort provides a remedy only for the abuse of otherwise legitimate process for an ulterior purpose. See **Gooch v. Choice Entertaining Corp.**, 355 N.J. Super. 14, 20, 809 A.2d 154, 157 (2002) (immunity for statements made in course of judicial proceedings barred claims for abuse of process and infliction of emotional distress, as well as defamation).

should be affirmed because of counsel's litigation tactics, alleging that the "abuse" occurred when "Bharti served process on Charles and made him Dennis' codefendant." (Resp. Br. at 77) But Dennis counterclaimed for abuse of process two months before the Saldivars amended their complaint to add Charles as a party. (CP 32, 34)

Dennis' reliance on the tactics employed by the Saldivars' counsel is legally, as well as factually, flawed because it confuses the court's power to sanction abusive litigation practices with the elements of the tort of abuse of process. (Resp. Br. at 77)<sup>15</sup> Dennis relies on cases that do not address the tort at all, but use the term "abuse of process" in dicta cautioning against abusive litigation tactics. See *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 331, 815 P.2d 781 (1991); *Matter of Personal Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835, *cert. denied*, 513 U.S. 849 (1994). Although our Court has cautioned against abusive litigation tactics in a wide variety of contexts, it has never authorized a party to recover on a counterclaim, or assert a tort

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<sup>15</sup> Dennis cites the trial court's conclusion that Bharti violated CR 11 in adding Charles as a party (CL 7 and 12, CP 1534, 1535-36), but the trial court did not base its judgment for abuse of process on the Saldivars' motion to amend. The merits of the trial court's sanctions are addressed separately at § G, *infra*.

claim, against a plaintiff for the litigation decisions made in an effort to recover damages from a defendant in the absence of an ulterior motive.

Dennis' attempt to support the Saldivars' liability for abuse of process under the doctrine of respondeat superior (Resp. Br. at 78) fails for another reason: Even if this court affirms the findings of CR 11 violations against Bharti, the Saldivars are not vicariously liable in tort for their attorney's choice of litigation tactics. ***C.J.C. v. Corporation of Catholic Bishops of Yakima***, 138 Wn.2d 699, 718-19, 985 P.2d 262 (1999) (employer not liable for employee's intentional torts); ***Horwitz v. Holabird & Root***, 212 Ill.2d 1, 12, 816 N.E.2d 272, 278 (2004) (client not liable for interference with business relations based on attorney's conduct; "an attorney acts pursuant to the exercise of independent professional judgment . . . as an independent contractor whose intentional misconduct may generally not be imputed to the client"). This court should reverse the trial court's \$2.8 million judgment against the Saldivars.

**D. Trial Court Improperly Struck The Saldivars' Jury Demand Because It Was Timely Filed And Because Respondents Had Actual Notice Of The Saldivars' Demand For A Jury Trial.**

The trial court erred in holding that the Saldivars waived their right to trial by jury when their counsel filed, but did not timely

serve, their jury demand, because they substantially complied with CR 38.<sup>16</sup> Dennis argues that non-compliance with CR 38 justifies a finding of waiver. (Resp. Br. at 45-46, *citing Sackett v. Santilli*, 101 Wn. App. 128, 5 P.3d 11 (2000), *aff'd* 145 Wn.2d 498 (2002)) In *Sackett*, the jury demand was neither served nor filed and the defendant did not raise the issue of a jury trial until May 1, 1999, only five weeks before the June 8, 1999 trial date. 101 Wn. App. at 131. Until that time, the plaintiff lacked any notice of the defendant's intention to seek a jury. 101 Wn. App. at 131. By contrast, where a party timely files the jury demand and has referred to it in other pleadings that are filed before the time for demanding a jury has expired, there is substantial compliance with CR 38 that precludes a finding of waiver. *Wilson v. Olivetti North America, Inc.*, 85 Wn. App. 804, 809-10, 934 P.2d 1231, *rev. denied*, 133 Wn.2d 1017 (1997).

Dennis does not dispute the fact that the Saldivars' jury demand was filed with their complaint. The jury demand not only appeared as the fifth document on the Pierce County Superior

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<sup>16</sup> Dennis contends that the Saldivars first raised their arguments regarding the right to trial by jury in their motion for a new trial. (Resp. Br. at 50) This is incorrect. (See CP 530-33 (Opposition to Motion to Strike Jury Demand))

Court's LINX docket, but the heading of the docket sheet itself stated "Jury Size: 6." (CP 2201; see Docket Cause no. 04-2-06677-3) The docket was accessible to all parties and the public until the case was sealed in February 2005, refuting Dennis' contention that "the docket is not accessible." (CP 536, 2204) Further, Dennis acknowledges that each of defendants' counsel had actual notice of the jury demand, at the latest in December 2004 when they moved to amend their complaint to add Charles Momah as a defendant, seventeen months before the case was tried. (CP 513, 522).

Dennis claims he was prejudiced because a jury trial would have delayed resolution of the Saldivars' claims against him more than a nonjury trial would (Resp. Br. at 48), but this "prejudice" arose from the addition of Charles as a defendant and from Charles' motion to continue the trial date, rather than from the Saldivars' failure to serve a jury demand. The trial court entered both its order continuing the trial date until May 2006 and its order amending the case schedule order on September 15, 2005, at the same hearing at which it struck the jury demand. (CP 544-59) Dennis failed to establish any prejudice at all.

Given the primacy of the constitutional right to jury trial<sup>17</sup> and the lack of any prejudice, the trial court's refusal to reinstate the Saldivars' previously filed jury demand was a manifest abuse of discretion. This court should reverse the trial court's judgment for its unreasonable denial of the constitutional right to trial by jury.

**E. The Trial Court Had No Basis For Finding That Bharti And The Saldivars Lied To The Court Regarding The Department Of Health's Investigation.**

Just as Perla did not lie about her contacts with the Department of Health after the Department closed its investigation of her 2003 complaint (RP 422, *see supra* at § II.B.4), Mr. Bharti did not lie to the court when he stated that the investigation against Dennis "has been reopened and it's active and proceeding at this point." (RP 128) That was true, as Ms. Larsen-Levier, the investigator who had interviewed dozens of impersonation witnesses in 2005 before reopening the Saldivar investigation in early 2006, would have testified. (CP 1080-86, 1453-54)

The "lie" upon which the trial court based its adverse credibility findings, as well as the imposition of \$600,000 in

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<sup>17</sup> The constitutional nature of the right to jury trial is of such importance that counsel's unauthorized waiver of that right is grounds for a collateral attack on a judgment under CR 60. **Graves v. P.J. Taggares Co.**, 25 Wn. App. 118, 126, 605 P.2d 348 (1980), *aff'd*, 94 Wn.2d 298, 616 P.2d 1223 (1980).

sanctions against Bharti, was Bharti's statement that the Department of Health "had reopened the investigation of Dennis Momah *on its own . . .*" (FF 27, CP 1527) (emphasis added) Only the most tenuous and ambiguous evidence supported this conclusion: Ms. Saldivar's "admission" that she filed a new declaration with the Department alleging "switching and impersonation." (RP 422) Ms. Saldivar's testimony in fact supports her attorneys' belief that her January 29, 2005 declaration was not a new "complaint" but was filed with the Department "before the case was closed." (RP 446)<sup>18</sup>

The Saldivars sought to call Ms. Larsen-Levier to rebut the allegation "that the reopening of the health department's investigation was somehow caused by Ms. Saldivar." (RP 658) Although Dennis obtained an untimely declaration from one of the

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<sup>18</sup> Dennis' counsel initially took the position, when showing Ms. Saldivar her January 29, 2005 declaration, that the document, prepared with Bharti's assistance, was not itself a "complaint," at all:

A (by Ms. Saldivar): May I see the document please?

Q (by Ms. Ek): This isn't your complaint.

(RP 422) The Saldivars' counsel agreed. See CP 982 (pointing out that the January 29, 2005 declaration "is not a complaint, [but] merely a response to various requests for information from the Department of Health."); CP 991-92 (Bharti provided clients' declarations in response to Department's requests for documents regarding allegations against Dennis Momah)

Department's investigators that the January 2005 declaration was treated by the Department as a new "complaint," that declaration did not contradict the Saldivars' counsels' contention that Bharti sent the Department the declaration in response to a request for information. (CP 982, 991)<sup>19</sup>

The trial court refused to consider the testimony of the Department of Health investigators and accepted at face value Dennis' contention that Bharti and the Saldivars were responsible for instigating a "new" Department of Health investigation against Dennis. The trial court's finding that Bharti lied to the court about the investigation should be reversed.

**F. Dennis Cannot Identify Any Specific Court Order To Support The Trial Court's Conclusion That Bharti Was Prohibited From Showing His Client A Deposition of Charles Momah.**

Neither the trial court's conclusion that Bharti violated "two court orders" or that he disregarded "prior reminders by the court that evidence from other cases . . . should not be referenced or introduced in to this case" (FF 28, CP 1528), is supported by the record. Although Dennis argues that Bharti circumvented the

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<sup>19</sup> Bharti did not have the opportunity to rebut the investigator's declaration characterizing Bharti's clients' declarations as "complaints." Dennis filed the investigator's declaration on the same day that the trial court entered its \$600,000 sanctions award. (CP 1467-68, 1517)

“court’s directives,” (Resp. Br. at 89), Dennis fails to identify any specific “directive” that Bharti violated when he showed Perla a videotaped deposition of Charles Momah.

An order in limine precluded introducing into evidence the unauthenticated video of the newscast from which Perla claimed she first recognized Charles Momah, but that order did not preclude Perla from viewing that or any other video outside of court. (RP 31-35, 38) The trial court authorized a videotaped perpetuation deposition of Charles Momah, but this order was entered because Charles was incarcerated and says nothing about “tainting” Perla’s testimony or precluding Ms. Saldivar from viewing a videotaped deposition of Charles taken in a different action. (CP 2543) Dennis also cites to the unrecorded pretrial conference, summarized by the trial court at the sanctions hearing, at which the trial court allegedly warned Mr. Bharti that in order to admit any photos or videos into evidence he would have to authenticate them with testimony from “who took the photographs and who took the videos.” (5/24 RP 46-47) The trial court entered these orders not to prevent a “tainting” of Ms. Saldivar’s testimony, as Dennis argues, but to allow the trier of fact to determine whether her testimony about physical differences between the Momah brothers was credible. (RP 700)

Dennis also cites the King County Superior Court's order that initially restricted disclosure of Charles' video deposition to the participants in one of the King County cases, (CP 1490-91), but does not address that court's subsequent modification of the protective order to allow the deposition to be used as "background information . . . in all remaining open cases." (CP 1425) Bharti used the video deposition as "background information" under a reasonable interpretation of the King County Superior Court's modified protective order.

Dennis also argues that Bharti improperly "coached" his witness after Perla had "positively identified Dennis as her alleged molester." (Resp Br. at 89) Dennis' contention that Perla had not identified Charles as one of the physicians who abused her is simply wrong. Perla's testimony after viewing the videotape deposition of Charles Momah was consistent with her testimony prior to trial. (RP 259-60) (§ I.A, *supra*)

Because the evidence rules provide a remedy for an opposing party who believes that a witness's testimony has been manipulated by her review of evidence prior to testifying, the proper remedy was not to sanction Bharti for violating a non-existent order, but to cross-examine Perla regarding the basis for her recollection

of Charles' physical characteristics, and if necessary, use the videotaped deposition in cross-examining Perla. See ER 612; Tegland 5D *Washington Practice* 316 (2007). Bharti did nothing improper in showing his witness a video deposition where identity was an issue.

**G. The Trial Court's Legal Errors And Flawed Findings Mandate Reversal Of Its Award Of Sanctions Under RCW 4.84.185, CR 11 And The Court's Inherent Power.**

**1. The Trial Court's Assessment of Fees And Costs Against The Saldivars Under RCW 4.84.185 Must Be Reversed Because Its Findings Are Tainted By Legal Error, By Its Refusal To Allow The Saldivars To Rebut The Charge Of Fabrication And By Its Hostility To The Saldivars' Trial Counsel.**

Although the trial court found Perla's testimony was not credible, that does not support a finding that Perla fabricated false evidence for the purpose of harassment and to destroy a professional's career, as the trial court found here. See *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 930, 982 P.2d 131 (1999), *rev. denied*, 140 Wn.2d 1010 (2000) (rejecting substantive bad faith; "The trial court did not find the testimony credible. But many if not most trials turn upon which party is the most credible."). Here, the trial court would not have made its findings of fabrication had it not erroneously held improper Perla's privileged complaints with the Department of Health and the

Federal Way Police, erroneously concluded that the Saldivars were participants in a conspiracy by Bharti to tarnish Dennis Momah by bringing false claims of impersonation without considering evidence that rebutted the claim of fabrication, and concluded that the Saldivars were vicariously liable for Bharti's litigation decisions.

Because the trial court relied on its tainted findings that the Saldivars fabricated their claims in finding that this action was frivolous, this court should reverse the award of almost \$300,000 in attorney fees against the Saldivars under RCW 4.84.185. As there was a factual basis for the Saldivars' claims that Dennis Momah sexually assaulted Perla Saldivar, that he let his brother Charles impersonate him at the U.S. Healthworks clinic, and that U.S. Healthworks refused the Saldivars' request to provide a chaperone or nurse while being examined,<sup>20</sup> the sanctions under RCW 4.84.185 against all respondents should be reversed.

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<sup>20</sup> Contrary to the contention of U.S. Healthworks (U.S. Healthworks Joinder at 2), the Saldivars challenged the trial court's imposition of sanctions under RCW 4.84.185 in favor of U.S. Healthworks in their opening brief. (Saldivar Br. at 48-49 and nn.3, 5; Bharti Br. at 22-23; *see supra* at § II.A)

**2. As Bharti Did Not “Fabricate” The Saldivars’ Allegation Of Sexual Abuse Against Dennis Momah, The Sanctions Imposed Under CR 11 And The Court’s Inherent Power Cannot Stand.**

Dennis dismisses the requirement under Rule 11 that a complaint must be both unsupported by the facts and unsupported by a reasonable investigation before sanctions may be imposed, arguing simply that a “fabricated claim cannot be the product of a reasonable inquiry.” (Resp. Br. at 85) It is undisputed that Bharti did not “fabricate” the claim of sexual abuse against Dennis Momah, first made to the Department of Health months before he was contacted by the Saldivars. (§ I.B, *supra*)

Mr. Bharti did not “blindly rely” on his clients. (Resp. Br. at 85) He reviewed Perla’s medical records from U.S. Healthworks, and, although they predictably did not provide any evidence that either of the Momahs sexually assaulted Ms. Saldivar, the signature pages of her records corroborated her allegations that she was seen by two different “Dennis Momahs” at U.S. Healthworks. (CP 1408) He discussed Perla’s allegations with each of the individuals to whom she allegedly complained of sexual abuse, each of whom supported Perla’s statements. (CP 987) Within a month of filing the lawsuit, he had her examined by an expert in post-traumatic abuse and rape trauma. (*See supra*, at II.B.2) Finally, he

considered the corroborating testimony of dozens of other women who claimed impersonation and sex abuse by Dennis Momah. (CP 987-88) Sanctions must be reversed where as here “the trial court does not appear to have given any consideration” to the substantial evidence that counsel relied upon before filing suit. ***Bryant v. Joseph Tree, Inc.***, 57 Wn. App. 107, 120, 791 P.2d 537 (1990), *aff'd*, 119 Wn.2d 210, 829 P.2d 1099 (1992).

In finding Bharti guilty of bad faith, the trial court improperly concluded that Bharti pressed the Saldivars claims to advance the equally fabricated claims of other clients, as part of an overriding scheme to harass and harm Dennis Momah. If Bharti had a good faith basis for believing his clients, those sanctions for bad faith litigation conduct must be reversed. See ***Rogerson Hiller Corp.***, 96 Wn. App. at 929; ***Matter of Pearsall-Stipek***, 136 Wn.2d 255, 266-67, 961 P.2d 343 (1998) (both reversing sanctions for bad faith litigation conduct in absence of improper motive).

**3. The Trial Court Lacked Authority To Award \$300,000 In Punitive Sanctions In Addition To All Of The Defendants' Fees.**

The trial court's sanctions against Bharti totalled almost \$600,000 – \$292,993.49 of which were compensatory sanctions in respondents' attorneys fees and costs and \$300,000 were non-

compensatory sanctions payable to the Pierce County Superior Court (\$50,000) and to Dennis Momah (\$250,000). (CP 1537, 1922) Dennis' contention that "no Washington decision limits to fees that an adversary has actually incurred . . . the sanction that a court can order a lawyer to pay . . ." (Resp. Br. at 94) is wrong. This court has recently reversed an award of attorney fees under CR 11 because it was in an amount greater than the documented fees attributable to counsel's conduct. ***Just Dirt, Inc. v. Knight Excavating, Inc.***, \_\_ Wn. App. \_\_, ¶ 36, \_\_ P.3d \_\_ (No. 3415-2-II, May 1, 2007). In fact, no Washington case has awarded CR 11 sanctions in an amount in excess of a parties' attorney fees incurred in responding to a frivolous pleading.

There is no authority to give Dennis \$250,000 in additional damages on top of compensatory damages and actual attorney fees, and Dennis does not attempt to defend that award on appeal. In response to Bharti's argument that statutory contempt proceedings limit the trial court's authority to impose a \$50,000 fine under its "inherent" power, Dennis' only reply is that "Bharti was not held in contempt." (Resp. Br. at 91) However, the due process protections granted a party who is subject to punishment under the trial court's inherent power are triggered by the nature of the

punishment or remedies imposed, not by the label chosen by the court or by the parties. See **State v. Buckley**, 83 Wn. App. 707, 714, 924 P.2d 40 (1996) (contempt sanctions held “punitive, even though the trial court’s printed form used the language of remediation”).

Our Supreme Court has long warned that the court’s inherent power to punish is “capable of arbitrary and capricious abuse.” **Keller v. Keller**, 52 Wn.2d 84, 90, 323 P.2d 231 (1958)<sup>21</sup> Dennis’ argument that the trial court had a basis for finding that the \$500 fine designated by the Legislature as the exclusive remedy under RCW ch 7.21 for the disobedience of a court order or other contempt sanctions under the court’s inherent power was “inadequate” does not support the excessive fine levied here. (Resp. Br. at 91-92)

The trial court imposed unprecedented sanctions against Bharti, acting as judge, prosecutor and jury, in an amount that is

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<sup>21</sup> Even under the federal version of Rule 11, which unlike its Washington counterpart expressly authorizes “an order to pay a penalty into the court” a substantial fine requires heightened procedural protections. see generally, Schwarzer, *Sanctions Under the New Federal Rule 11 - A Closer Look*, 104 FRD 181, 202 (1985) (fine imposed without procedural protections of criminal contempt “risks reversal on appeal”).

unrelated to the expenses actually incurred or to Bharti's ability to pay and on four days notice.<sup>22</sup> The sanctions should be reversed.

**4. The Trial Court's "Scarlet Letter" Non-Monetary Sanction Violates The First Amendment.**

Dennis does not attempt to justify the trial court's order directing the content of Bharti's website under the First Amendment, arguing only that Bharti inadequately briefed the First Amendment and that those sanctions will be moot, when they expire one year after entry. But this court will review an issue of public interest that may become moot "before the parties could obtain relief, and there is a reasonable expectation" that others "will be subjected to the same action in the future." *Client A v. Yoshinaka*, 128 Wn. App. 833, 842, ¶ 13, 116 P.3d 1081 (2005).

The trial court imposed its sanction under the court's inherent authority for the express purpose of discouraging other women from pressing claims against the Momah brothers. The trial court's order not only exceeds the proper scope of the regulation of purely "commercial" speech, but also exceeds the trial court's authority to impose sanctions for perceived ethical violations. See

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<sup>22</sup> Dennis' argument that Bharti waived his right to contest sanctions by not personally appearing at the sanctions hearing is erroneous. Although the trial court was upset that Bharti did not attend the sanctions hearing, it did not order that Bharti personally appear when, at the conclusion of the trial, it set the sanctions hearing. (RP 777-81)

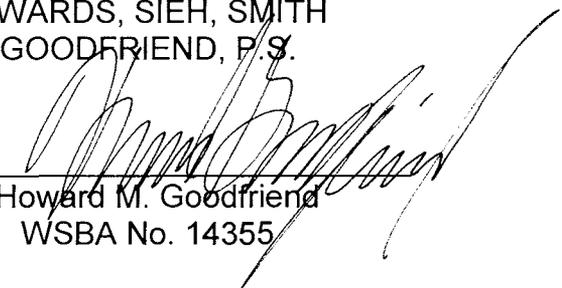
**Just Dirt, Inc.**, No. 3415-2-II at ¶ 31 (bar association, not court, has exclusive authority to remedy violations of Rules of Professional Conduct).

### III. CONCLUSION

The trial court's judgments against both the Saldivars and their counsel should be reversed. In the event of a remand, this court should direct that any further proceedings be conducted by a new superior court judge in order to preserve the appearance of fairness.

Dated this 14<sup>th</sup> day of May, 2007.

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

By: 

Howard M. Goodfriend  
WSBA No. 14355

Attorneys for Appellants Harish Bharti  
and Perla and Albert Saldivar

**DECLARATION OF SERVICE**

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

That on May 14, 2007, I arranged for service of the foregoing Joint Reply Brief of Appellants Harish Bharti and Perla and Albert Saldivar, to the court and counsel for the parties to this action as follows:

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**DATED** at Seattle, Washington this 14<sup>th</sup> day of May, 2007.

  
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Tara M. Holland