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

Nancy JAMES as trustee for The Estate of Cherie Rule, Kathryn Ellis as trustee for The Estate of Rena Burns and Lisa McDougal,

Respondents,

v.

Charles MOMAH, also d/b/a Northwest Center for Obstetrics, Gynecology & Infertility,

Appellant.

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STATE OF WASHINGTON
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BRIEF OF RESPONDENTS

Appeal from King County Superior Court
Case No: 05-2-28501-0
The Honorable Judge Deborah Fleck

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A. Reply to Assignments of Error:

Appellant sets forth four assignments of error, which are also set out in the argument. However, appellant fails to provide citations to the record, where each error is alleged to have occurred.

> RAP 10.3(g); Special Provision for Assignments of Error. . . . A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

No error has been assigned to the following facts, which are therefore verities on appeal[1];

- The testimony of Dr. Olson, the plaintiffs' medical expert, as well as counsel's argument and the trial court's ruling on the expert's testimony as to medical malpractice, negligence, standard of care, and causation.

- The "effectiveness" of Appellant's co-counsel, Eric Grotzke, who participated in trial, did visit Appellant, and was not ill.

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[1] Unchallenged findings are verities on appeal. State v. Stenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997); State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). Robel v. Roundup Corp., 148 Wn.2d 35, 42-43, 59 P.3d 611 (2002).

- That the jury verdicts ascribe all of the negligence and outrageous conduct to Charles Momah, alone.

B. Response to Issues Pertaining to Assignments of Error:

1. The issue of "constantly evolving testimony" appears to be limited to only certain testimony of witnesses as to dates, and now we have the Appellant's new claim that there were "chaperones" during his examinations of the victims. This new claim is not supported by any citation to the record.[2]

To the extent Appellant claims the witnesses' testimony was inconsistent with prior testimony, the prior testimony was apparently used in cross-examination of the witnesses, and the Judge and Jury were free to believe or disbelieve the witnesses.

Appellant points to only one incident on the record, where an objection by Respondents' counsel may have assisted a witness' testimony. This objection was based on sound evidentiary principles, as will be argued below. There was no evidence of any "inducements" by Respondents' counsel as to any of the witnesses. Allegations which are

[2] There is a suggestion in the Appellant's Brief that a declaration, or declarations, are attached, but no attachments were served upon Respondent's counsel. The use of any declarations which are not part of the trial court record, is objected to.

not supported by the record, and which are merely the fantasy of the Appellant, should not be considered by this court.

The claim of impersonation of Appellant Charles Momah by his twin brother, Dennis Momah, was not a basis for the jury's verdicts, and therefore is not properly on appeal.

Appellant attempts to personally attack counsel for the Respondents, using materials which were either not before the trial court, or which were found by the trial court to be irrelevant. The personal attacks are highly inappropriate, and will be dealt with briefly below.

2. The claim of "Ineffective Assistance of Counsel" is generally unavailable in a civil action. All cases cited by Appellant are criminal cases, where the 6th Amendment applies and guarantees a right to counsel. There is no such right to counsel in a civil action. Nonetheless, the merits of this claim will be briefly addressed, below.

3. Abuse of discretion in evidentiary rulings. Appellant attaches error to certain evidentiary rulings of Judge Fleck. In each case, Judge Fleck had made a careful decision, and did not abuse her discretion. Those decisions which are set forth specifically in the argument section of the Brief of Appellant, will be addressed below.

4. The claim of "lack of sufficient evidence", and/or the claim of insufficient evidence under RCW 7.70.040, cannot be made on this record.

Respondents' claim of medical negligence was supported by the trial testimony of an expert, Dr. Olson. The Appellant has not assigned any error to Dr. Olson's testimony, has not ordered a transcript of Dr. Olson's testimony, and has not ordered a transcript of Judge Fleck's rulings with respect to Dr. Olson's testimony. Another testifying witness, Dr. Welch, was also not mentioned by the Appellant. The Clerk's notes of the trial testimony, as well as the jury's questions posed to Dr. Olson and Dr. Welch, have been ordered as Respondents Second Supplemental CP.

According to the Clerk's Notes, "Defense argues with regard to what Dr. Olson may testify and that he should be prohibited from testifying about ethics and sexual assaults" – on October 30, 2007 (pg 17 of Notes, 2nd Supplemental CP). Dr. Olson is sworn and examined by telephone (pg 17), then, outside the presence of the jury, "Questions asked by counsel regarding the standard of care opinion testimony outside the presence of the jury" (pg 18), and finally, with the jury present, the examination of Dr. Robert Olson resumes. Dr. Olson was testifying about the standard of care, which Charles Momah violated, and medical negligence.

Appellant admits in his Brief of Appellant, at page 57, that there was evidence of "botched surgery, sexual assaults, and other improper conduct" upon these Respondents. The jury apparently believed that the

"botched surgery, sexual assaults, and other improper conduct" were all perpetrated by this Appellant. Dr. Olson testified that such conduct was medical negligence, and there is no objection to this testimony in this appeal.

C. Reply to Statement of the Case.

This matter involves three victims of "botched surgery, sexual assaults, and other improper conduct" (Brief of Appellant, pg 57) at the gynecological clinics of Dr. Charles Momah, appellant herein. The victims had alleged that Dr. Dennis Momah, twin brother to Charles Momah, had at times participated in the patient care and assaultive behavior, but apparently the jury did not agree. Jury verdicts at Supplemental CP 111 (Jury Verdict for Cherie Rule), Supplemental CP 110 (Jury Verdict for Lisa McDougal), and Supplemental CP 112 (Jury Verdict for Rena Burns) all state the Jury's finding that Defendant Charles Momah was negligent with respect to the plaintiff, that there was no exam or procedure by Dennis Momah, that the plaintiff suffered damages proximately caused by Charles Momah's negligence, and then amounts for economic and non-economic damages.

Lack of Citations to the record.

The Statement of the Case fails to follow the relevant Rules of Appellate Procedure in several respects. RAP 10.3(a)(5) provides the requirements for the Statement of the Case;

> RAP 10.3(a) (5) Statement of the Case. A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

Charles Momah's Statement of the Case is rife with argument. There is no "fair statement" of either the facts or procedure at trial, and many arguments are included that are not relevant to the issues presented for review. There are very few references to the record. The Statement of the Case will be dealt with, page-by-page;

Page 4. Statement of the case, page 4, no citations to the record. Appellant is providing his own unsworn "testimony" about Amy McFarlane, which is not in the trial court record.

Page 5, The trial of Collier v. Momah, which resulted in a defense verdict, had a different plaintiff. The jury's defense verdict in that case cannot be imputed to this second trial, except for the fact that Appellant Charles Momah was represented by the same two attorneys, using the same strategies, in that prior trial, thus negating the "ineffective assistance of counsel claim".

The allegation of a "clandestine investigation" by Respondents' attorney, as well as news media attention on the case are made without any citations to the record. Appellant Charles Momah does not make any allegation that either the Judge or the Jury were in any way influenced by the media attention, thus making these allegations irrelevant.

Page 6, No citations to the record. The allegation that Respondents' counsel somehow orchestrated the criminal case against this Appellant, has already been determined to be false by this court.

Charles Momah appealed his criminal conviction, resulting in a decision by this Court which is published in part. *State v. Momah*, 58004-3-I, 141 Wash.App. 705, 171 P.3d 1064.

In the unpublished[3] portion of the opinion, this court found that prior sexual assaults by Charles Momah upon his patients were properly admitted, that the victims were vulnerable, and those vulnerabilities were particularly exploited by Charles Momah, and this court rejected Charles' Momah's contention that attorney Bharti's conduct was somehow prejudicial to the criminal litigation;

> ". . . The testimony of K.T., C.W., and C.R. was admissible to prove a common scheme or plan. Based on stipulation by the parties, the court found that the acts occurred by a

[3] The unpublished opinion is not cited as "authority", rather, as required under GR 14.1, merely for its recitation of facts pertaining to these parties, contrary to the factual assertions made by Charles Momah.

preponderance of the evidence. The court ruled that the testimony of each of the four charged victims and these three additional witnesses was relevant and not outweighed by its prejudicial effect.

"51 This was not an abuse of the trial court's discretion. The testimony of all seven women, taken together, illustrates Dr. Momah's plan to use his special position of power as a gynecologist to sexually take advantage of his most vulnerable patients.

"52 He convinced each woman that he could help her with her specific problem, making her feel that she had few other options. Each victim testified about a particular vulnerability known to Dr. Momah. For instance, H.P., K.T., C.W., C.R., and S.S. were to some extent dependent on the narcotics or other medications he prescribed to them. Similarly, S.S., K.T., and C.W. experienced severe pain, requiring medication from Dr. Momah. H.P., C.B., and C.W. used medical coupons and relied on Dr. Momah's generosity with respect to payment for services. C.B., R.B., and C.W. desperately wanted to become pregnant, and R.B. and C.W. believed Dr. Momah's promises that he could enable them to get pregnant when other doctors could not.

"53 Once he had gained their trust, he began acting inappropriately. Most of the victims testified that Dr. Momah did not wear gloves or have assistants present during examinations. Many testified that at some appointments, no receptionists or assistants were present in the entire office. Dr. Momah personally called many of the women on the phone throughout their doctor-patient relationships. He performed manual exams and ultrasounds at every, or almost every, appointment with these women, even when the sole purpose of the appointment was to obtain another prescription for the same symptoms or condition.

"54 Finally, he abused their trust by sexually taking advantage of them, usually while they were on the examination table. For example, he made sexually inappropriate comments to all of the women or asked them on dates. He touched all of the women except C.R. in a sexual manner. He used the ultrasound wand in a sexual manner with R.B. and C.B. He had sexual intercourse with H.P. on the examination table.

"55 These acts occurred on multiple occasions for many of these women. If the women objected, he usually became angry or gruff, told them not to tell, threatened them, or told them that no one would believe them.

"56 Each of these acts was proved by a preponderance of the evidence. Each was relevant and cross-admissible to show that the acts against S.S., C.B., and R.B. (Counts II through IV) actually occurred (corpus delicti) because of the similarity of Dr. Momah's acts against the other women. And these non-consensual acts were relevant to rebut Dr. Momah's defense that H.P. consented to have sex with him (Count I).

"57 The evidence was admitted only for the purpose of proving a common scheme or plan, and the jury was so instructed.

. . .

"85 Dr. Momah argues that alleged misconduct by a lawyer who represented witnesses in this case in separate civil litigation was prejudicial to his defense. He also claims the alleged misconduct by the civil attorney is chargeable to the State in this case. Because the record before us fails to substantiate this claim, we reject it.

"86 Dr. Momah moved for an order requesting this court to take judicial notice of findings of fact and conclusions of law from a separate court proceeding. According to the motion, that proceeding addressed alleged misconduct of a civil attorney who is not employed by the State.

"87 A commissioner of this court denied the motion, and a panel of this court denied Dr. Momah's motion to modify. The supreme court denied review of our ruling. Thus, the information Dr. Momah sought to bring before this court to support this appeal is not before us. We will therefore not review this claim on appeal.

"88 We affirm the judgment and sentence."

State v. Momah, 58004-3-I, 141 Wash.App. 705, 171 P.3d 1064.

Charles Momah's conviction was likewise upheld by the Supreme Court, where the majority opinion held;

> We hold the closure in this case was not a structural error. The closure occurred to protect Momah's rights and did not actually prejudice him. The record reveals that due to the publicity of Momah's case, the defense and the trial court had legitimate concerns about biased jurors or those with prior knowledge of Momah's case. The record also demonstrates that the trial court . . . carefully considered the defendant's rights and closed a portion of voir dire to safeguard the accused's right to an impartial jury. . . . Momah affirmatively accepted the closure, argued for the expansion of it, actively participated in it, and sought benefit from it. . . . We affirm the jury's determination of guilt."
> *State v. Momah*, __ Wn.2d __, 217 P.3d 321 (2009).

This section of Statement of the Case also contains improper citation to *Bharti v. Ford*, Superior Court opinion, and an improper citation to *Saldivar v. Momah*, 145 Wn. App. 365, 386, 186 P. 3d 1112 (2008), which does not mention any witnesses or testimony from the instant case. (See Order of Judge Stolz, eliminating all ER 404(b) witnesses, in Appendix – see motion for judicial notice).

Page 7, Improper citation to a Superior Court case, Gordon v. Space Needle Corporation , not relevant to the issues here. Gordon v. Space Needle Corporation was conducted at the trial court level by an entirely different attorney, Scott Engan, who is now on "inactive" status, and was not involved in the trial being appealed from.

Improper citation to Dennis Momah v. Bharti, a case where the Supreme Court accepted review, and that case was settled. Dennis Momah has not appealed, and is not a party to this appeal.

Improper recitation of WSBA investigation, which only pertained to the *Bharti v. Ford* case, which did not pertain to Charles Momah or the Respondents herein.

Page 8, no citations to the record.

Footnote at pages 8 and 9, contains no citations to the record, and appears to cite to unknown declarations, which are not cited to the record below.

Page 9, improper "testimony" by Charles Momah, who did not testify at trial, except for limited portions of a videotaped deposition taken by Mr. Bharti, with defense counsel present. (The full deposition is at CP 295 – 339, but only excerpts were used at trial) Charles Momah's counsel had full opportunity to bring forth any testimony he wished, from Charles Momah, for the trial, and did not do so. (337 – 338). The "testimony" recited at page 9 of the opening brief was not presented at trial.

Page 10 has two citations to the record, Exhibit 31 (medical records and billing records of Ms. Burns, and RP Page 103, where Ms. Burns' medical records were admitted. Other than these citations, page 10 refers to a "criminal trial", which is not on record in this appeal.

Page 11. Allegations of the presence of Ms. Gonzalez, with citations to "Ms. Gonzalez known handwriting", and "Paychex" were not part of the trial record. The only citation to the record was Exhibit 31 with no explanation, how the information on page 11 was obtained from Exhibit 31.

Page 12. There are no citations to the record for the first ¾ of the page, and Charles Momah discusses that "Ms. Burns took advantage of her missing records to fabricate her allegations." This is not in the record.

The quotation at pages 12 – 13 cites to RP Burns' testimony of October 25, 2007, at page 105, where Ms. Burns was being cross-examined by counsel for Charles Momah's.

(Charles Momah inserts the words "Just like Mr. Bharti coached her to say, that is to lie", into the quote, with no citation to the record, and no support in the trial court record).

Page 13 The quotation from Ms. Burns' testimony has the tag end "That was not a real objection, it was a charade" added, as though it were part of the quotation. This actually appears to be argument of the Appellant.

The objection, and Ms. Burns' testimony, were appropriate, as there is no way Ms. Burns could personally authenticate either Charles' Momah's billing records or his medical records. There is no evidence that Ms. Burns was familiar with either the billing records of the medical

records. Charles Momah states, at page 10 of his Brief, that the medical records were provided by an "independent" third party – therefore, even the Appellant would not be able to authenticate those records, let alone his former patient.

Since Charles Momah complains, that Rena Burns testified falsely, and argues using her testimony at his criminal trial, it may be helpful to note this Court's opinion of Rena Burns' testimony at that criminal trial;

> "81 Here, the State made a motion in limine to include testimony from victim R.B. regarding traumatic events she had experienced during the period of time relevant to this case. The State wished to use these facts to explain minor inconsistencies, primarily regarding dates, between her trial testimony and prior statements, and Dr. Momah objected to admission of such testimony. The trial court concluded that, assuming Dr. Momah opened the door by pointing out inconsistencies, the State could elicit that R.B. had an in-vitro fertilization procedure a couple days Before one of the relevant interviews, and that her mother died about a month Before another interview. She was not allowed to testify that one of her children later died, that her brother was terminally ill, or the specific circumstances surrounding her mother's death.
>
> "82 R.B. testified part of the day Wednesday and part of the day on Thursday. On Monday, she underwent cross-examination all morning. Just Before the lunch hour, defense counsel cross-examined her regarding the order and dates of appointments she had attended, pointing out apparently inconsistent statements. She responded that it was difficult for her to remember exact dates of events that happened long ago, especially since she had other traumatic events in her life. Defense counsel continued as follows:
>
> Q. What's your birthday? What is your date of birth?
>
> A. December 30th.

Q. What year?

A. 1959. So you are telling me that I am supposed to remember the day and time I am sexually assaulted? I am supposed to remember that today on March 25th, Dr. Momah came and sexually assaulted me, and I am supposed to remember that, because this is the glorifying day that I need to remember? That is a glorifying time in my life? I can remember my daughter's birthday, because you know what, that is a glorifying time in my life. October 24th, 2004 my daughter was born. October 14th my son died . . . . [73]

"Defense counsel objected and moved for a mistrial. The trial court denied the motion for a mistrial, but after the lunch break issued a limiting instruction that R.B.'s son died through no fault of Dr. Momah, and the jury should disregard that fact.[74]

"83 Later, on re-cross, defense counsel asked R.B. whether her mother dying led to incorrect statements in her subsequent interview. R.B. responded:

There could be dates or times that maybe are not exactly right. I mean, just because my mother died on 7/31 of this year - My mother had a massive brain aneurysm at the same time I was being implanted with embryos.[75]

Defense counsel objected, and the court instructed the jury to disregard the statement.

"84 We conclude that the trial court did not abuse its discretion in denying the motion for a mistrial. The circumstances regarding R.B.'s mother and son are entirely irrelevant to this case. True, her credibility in this case was important. But these events in her life were not so prejudicial that the trial court's instructions would have been ineffective.

While the fact that her son died and her mother suffered a brain aneurysm may have garnered sympathy with the jury, they were irrelevant to whether she told the truth when she accused Dr. Momah of sexually abusing her."

State v. Momah, 58004-3-I, 141 Wash.App. 705, 171 P.3d 1064.

There appear to have been similar objections to Rena Burns' testimony at the criminal trial, where, again, Ms. Burns was unable to recall precise dates of events related to Charles Momah. Unfortunately for Charles Momah, Ms. Burns was a credible witness, even without a good memory for dates. This is not a sign that Ms. Burns was "coached" in any way by any counsel, just the opposite, a "coached" witness would have testifies consistently, and perhaps with memorized dates.

Charles Momah had also made unsubstantiated accusations agaisnt Mr. Bharti of prejudicially effecting the criminal trial. This accusation was rejected by this Court;

> "85 Dr. Momah argues that alleged misconduct by a lawyer who represented witnesses in this case in separate civil litigation was prejudicial to his defense. He also claims the alleged misconduct by the civil attorney is chargeable to the State in this case. Because the record before us fails to substantiate this claim, we reject it."
>
> *State v. Momah*, 58004-3-I, 141 Wash.App. 705, 171 P.3d 1064.

The remainder of this page contains argument, and no citations to the record other than the brief testimony from the cross-examination of Ms. Burns.

Page 14 contains improper argument. The testimony, portions of which are cited, was presented to the jury, with extensive cross-examination by counsel for Charles Momah. (RP of 10-25-2007).

Page 15 contains extensive argument, which the only citation to the record as "CP Ex. 3". The list of exhibits (Supplemental CP 485-493) indicates Exhibit 3 has been withdrawn[4].

Page 16 argues that Ms. Burns' testimony, that she paid $5,000 to Charles Momah, was false. However, this was the subject of cross-examination by (RP of 10-25-2007, pg 129). No $5,000 amount was awarded by the Jury to Ms. Burns, so this testimony is not a basis for the jury's verdict, and therefore not relevant to any issue on appeal. (See judgment, CP 439, 440, indicating award to Ms. Burns as $600,000, with no provision for $5,000 out of pocket costs).

Page 18. The extensive citation to Exhibit 48, transcript of deposition of Charles' Momah's criminal trial, was available to Charles Momah's counsel, and the witnesses were cross-examined by capable counsel. On page 19, Charles Momah indicates that the jury in the criminal trial apparently believed Ms. Burns' testimony. The verdict in the criminal trial was upheld by this Court on appeal, with specific references to Ms. Burns' testimony in this Court's decision. That verdict was also upheld by the Supreme Court.

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[4] In his Opposition to Motion, Charles Momah indicates he intended to cite to Exhibit 31.

Page 19, there is reference to a letter to M.Q.A.C., but no mention of an exhibit number from the record below.

Page 20. A mention of Exhibit 47, Letter to M.Q.A.C., and a brief reference to RP of October 18, 2007, pg 30, are the only citations to the record. The rest of this page is argument, or testimony from the criminal trial, which was available to counsel at the trial herein, and used in cross-examination to the extent counsel believed necessary.

Page 21 contains argument as to dates and numbers of office visits and/or surgeries, where the citation to the three Complaints consolidated for trial is CP 232-272.

Page 22 contains argument, inserted into partial excerpted citations to the trial below, as well as the criminal trial not admitted as an exhibit in this case. The argument discusses that the news coverage "prominently featured Mr. Bharti as plaintiff's lawyer", although the citations to Ms. Burns' testimony do not mention Mr. Bharti. The news stories and/or internet stories discussed at page 22 were not in evidence in this case.

This Court as well as the Supreme Court had discussed the news coverage, with reference to the criminal trial. In this case, the civil trial took place some time after news coverage had died down. There is no allegation of ongoing media coverage made by appellant.

Page 23. Charles Momah complains, that Ms. Burns did not testify about any Fentanyl injections at the trial below. Any complaints that Charles Momah has about testimony regarding Fentanyl at the criminal trial and "criminal depositions" never came into the record at the trial court, and is not a proper subject of this appeal. The transcripts from the criminal trial were available to Charles Momah's counsel, to use in cross-examination to the extent he saw fit. Apparently, Charles Momah's objection, in this appeal, is that Ms. Burns did not testify about Fentanyl, and that somehow this fact should have been used to impeach her testimony from the prior criminal trial. Charles Momah, however, fails to show any different answers by Ms. Burns to similar questioning. At the criminal trial, Ms. Burns was questioned by a Prosecutor, and by a criminal defense counsel, not the same attorneys as in the civil trial, so it is entirely possible that the same subjects had merely never come up.

Page 24. This page again complains about testimony during the criminal trial, which was not an issue before the Trial Court, except to the extent it was used in cross-examination.

Page 25. This is argument about whether Ms. Burns underwent tubal reanastomosis (tubal ligation reversal) attempt, or diagnostic laparoscopy, hysteroscopy and endometrial sampling. There are citations to Ms. Burns' testimony, but no citations to the record as to any of the other allegations

(including the nature of the surgeries, or the allegations regarding Cathy (Kathie) Gonzales – who did not testify at trial below. The issue appears to be whether the surgery helped Ms. Burns in any way, and the answer to that appears to be "no". Expert witness testimony, provided by Dr. Olson, was not objected to, and no transcript was ordered for this appeal.

Charles' Momah's charging of $11,000 for the surgery, recited from testimony at the criminal trial, is not an issue in this litigation. (The prior argument about whether Ms. Burns paid $5,000 does not appear to be connected to the $11,000 insurance charge by Charles Momah, which Ms. Burns admits she did not pay).

Page 26. This is argument about whether Ms. Burns should be believed, or an anesthesia technician, Lynn Butler, whose testimony is mentioned but without citation. For the court's convenience, the citation should be RP of 11-05-2007, pg 25. The jury was, of course, free not to believe Lynn Butler, who admitted on cross examination that when the Health Department investigated Charles Momah, she did not give them any statement, and she hired an attorney to represent herself during that investigation, including attorneys from the same firm hired by the Momahs (RP of 11-05-2007, pgs 26, 27), and who claimed that she was not paid at all many times for her work for Charles Momah (RP of 11-05-2007, pg 29). Whether to believe this defense witness was for the Jury to

decide. (Other witnesses' testimony about Lynn Butler, were not ordered by Charles Momah.) Having ordered an incomplete record, Charles Momah cannot allege insufficient evidence to support the jury's verdict. The footnote complains about allegations that Ms. Burns was actually treated by Charles Momah's twin brother. These allegations are not properly part of this appeal, since they formed no part of the basis for the Jury's Verdicts and Judgment. The lawsuit by Dennis Momah against Mr. Bharti is not an issue in this appeal.

Page 27. An allegation is made that Ms. Burns testified in bankruptcy proceedings. It is true that the bankruptcy trustee has been substituted as plaintiff for Ms. Burns due to a bankruptcy filed by Ms. Burns. No "testimony" from Ms. Burns bankruptcy is at issue. Ms. Burns' bankruptcy attorney had merely filed schedules, which failed to list a pending claim against the Momahs as an asset in bankruptcy. It is entirely plausible that the bankruptcy attorney did not know about the claim, and that Ms. Burns did not understand an unliquidated claim to be an asset. This was fully argued at the trial court, and the bankruptcy was re-opened to list this claim. The Bankruptcy Trustee was thereafter substituted as plaintiff, as approved by the Bankruptcy Appellate Panel of the 9th Circuit, in *In re An-Tze Cheng*, 308 B.R. 448 (9th Cir.BAP (Cal.) 2004). This is further argued, in the Argument section, below.

Pages 27 – 34, Lisa McDougal. This section contains some citations to Ms. McDougal's testimony, and some vague references to her medical records (although the medical records span Exhibits 6, 7 and 8, the only references are to Exhibit 8, with no page numbers provided). This section argues at length, that there are factual inconsistencies between the verbal testimony and the written medical records. This testimony was subject to cross-examination, and the Jury was free to chose, which to believe. RP of 11-01-2007, pgs 1 – 76, is the cross-examination of Ms. McDougal by counsel for Charles Momah. The direct examination of Ms. McDougal was not ordered. Therefore, having failed to order the relevant record. Charles Momah cannot argue, that the jury's verdict is not supported by substantial evidence. This argument would normally require that the transcript of the entire trial be ordered[5].

Page 31. Contains argument with citation to the defamation case, of Dennis Momah v. Bharti, which is not an issue in this appeal (the order dismissing Dennis Momah from this case has not been appealed). (See CP 57-58, stipulated order dismissing Dennis Momah), There is also a citation

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[5] "fn 3. . . . As the party seeking review, it was Drum's responsibility to designate the necessary portions of the record. See RAP 9.6(a). In the absence of an adequate record, we decline to review Drum's sufficiency of the evidence claim on this basis." *State v. Drum*, 168 Wn.2d 23, 225 P.3d 237 (2010).

to a "declaration" by attorney Michelle Shaw[6], which was not part of the record, and has no apparent connection to this appeal.

Page 33. Citations to case law regarding "vulnerable adults" do not appear to be relevant to this appeal, and have no place in the Statement of the Case section.

Page 34. Footnote 18 appears to be argument taken from "a defense deposition" of Cathy Gonzales. No such deposition appears in the trial court record, and is therefore not properly before this court.

Pages 34 to 37, Cherie Rule. This section contains testimony and argument by Charles Momah, without citations to the record. Footnote 19 objects to a video of Dennis Momah, who is not part of this appeal.

Page 36, footnote 20, contains an improper citation to a portion of a trial judge's decision that was overturned on appeal.

> "The Saldivars argue that the trial court erred when it excluded, as hearsay, statements Perla made shortly after her visits to U.S. Healthworks to her husband and father as well as her good friend, Wiesniewski, and her translator, Fuentes. Because evidence of Perla's prior consistent statements to friends and family were admissible to rebut Dennis's allegation of recent fabrication and Perla's credibility was directly at issue, the trial court erred when it excluded this evidence.

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[6] From time to time, Charles Momah appears to indicate that certain declarations were attached to his brief. The Brief of Appellant, as provided to Respondents' Counsel, has no attachments at all. Respondents would move to strike any attachments that are not part of the record below.

> "Under ER 801(d)(1), a witness's prior consistent statement is admissible if the witness has been impeached and the statement is offered to rebut a charge of recent fabrication, improper influence, or improper motive.
> ." . . Here, the trial court erred when it excluded Perla's prior consistent statements as hearsay because the Saldivars offered these statements to rebut Dennis's allegation of recent fabrication. Furthermore, because these statements bolster Perla's credibility, it is likely that excluding this evidence had a material prejudicial effect on the trial's outcome which rested on the trial court's finding that Perla was not credible."

Saldivar v. Momah, 145 Wn.App. 365, 401, 186 P.3d 1117 (Wash.App. Div. 2 2008).

Charles Momah has failed to inform this court that the findings he cites were vacated, reversed, and the case was remanded to a different judge for retrial by Division Two of the Court of Appeals. The Court of Appeals has observed as follows:

> "...The record contains unusual circumstances warranting remand for trial before a different trial judge.....Our independent review of the record reveals that, on April 18, 2006, before the trial began, Judge Stolz, on her own motion, entered an order directing Medical Quality Assurance Commission (MQAC) to provide "any and all materials produced by Perla or Albert Saldivar or the Saldivar's [sic] counsel regarding [the] Saldivars, including all statements and transcripts of interviews [with] the Saldivars." 9 Clerk's Papers at 1753. ..... In addition, we ruled that Judge Stolz erred when she excluded the testimony of witnesses who claimed that the Momah brothers frequently impersonated each other in their medical capacity. But, despite ruling that these witnesses would not be allowed to testify, Judge Stolz indicated that she had prejudged the credibility of these witnesses when she stated that she believed this testimony would be false. Because the record demonstrates that Judge Stolz stressed that she did not believe Perla or Perla's corroborating witnesses.....concerns of judicial economy

> and her familiarity with the record do not outweigh the appearance of unfairness that would likely occur if she were to preside over the new trial in this case.
>
> Accordingly, we grant the Saldivars' motion and direct that the new trial on the Saldivars' claims against Dennis and Charles Momah (negligence, lack of informed consent, breach of fiduciary and ethical duties, violation of the Consumer Protection Act, ch. 19.86 RCW, negligent infliction of emotional distress, intentional infliction of emotional distress (outrage), and loss of consortium) be held before a different trial court judge. ....."
>
> Saldivar v. Momah, 2008-WA-0826.181, Order Granting in Part and Denying in Part Motions for Reconsideration, August 26, 2008.

Charles Momah then cites another Superior Court decision, which, had unfortunately followed Judge Stolz' findings, prior to those findings being vacated, and was influenced by those erroneous findings. The Court of Appeals' above-cited opinion, dated in August 2008, was not available at the time of the July, 2008 decision which is being improperly cited by Charles Momah.

Page 37 – 41, Jenny Ramos. This section attempts to rebut the testimony of a witness, a former employee of Charles Momah, who was not a plaintiff in this case. Judge Fleck found this witness was a staff member, and not a patient of Charles Momah. Charles Momah argues, without citation to authority, that Jenny Ramos' testimony was false. However, Ms. Ramos was subject to cross-examination, and it was up to the Jury to

decide, whether to believe her testimony. Jenny Ramos was a rebuttal witness to Dennis Momah. RP of 11-06-2007, page 114, and since Dennis Momah is not a party to this appeal, Jenny Ramos is of limited relevance to this appeal. Jenny Ramos had emailed the Trial Judge, asking to be relieved of her subpoena (RP of 10-22-1007, pg 55). Ms. Ramos was not a willing witness, and not willing to come to court, even after being subpoenaed (RP of 11-05-2007, pg 8). Initial argument on permitting Ms. Ramos to testify as a witness under ER 404(b) is at RP of 10-22-2007, pgs 54 – 61. Ms. Ramos' testimony is at RP 11-07-2007, pages 12 – 37.

Pages 39 – 40, Exhibit 83, Jenny Ramos Interview. This exhibit was available for use in cross-examination of Ms. Ramos at trial.

Pages 40 – 41. Discussion of Kelly Acker. Charles Momah did not order any transcript containing the name "Kelly Acker", so Ms. Acker is not properly before this court.

Jenny Ramos had previously testified in the ***Collier v. Momah*** trial, in which Charles Momah was happy with his counsel's performance, and happy with the result. This Court is asked to take judicial notice of Trial Judge Fleck's findings of credibility for purposes of ER 404(b) testimony in that ***Collier*** trial, and specifically, the Trial Judge's findings as to Jenny Ramos;

> JUDGE FLECK: . . . Based on my review of the declaration, as well as my review of the deposition, I can and do find on a more probable than not basis that during this witness's tenure there Dennis filled in for Charles at times.

Collier trial Excerpt at 26.

Pages 41 – 42. Ineffective Assistance of Counsel. Of course, this allegation cannot be made in this civil case. The allegations in this section are not on the record, and re in fact belied by the record, wherein attorney Eric Grotzke, co-counsel for Charles Momah, was present with Charles Momah at the pre-trial perpetuation deposition (the full deposition is at CP 295 – 339). Attorney Eric Grotzke was co-counsel with Salvador Mungia at trial, (See each volume of RP) and Charles Momah fails to state, why it is insufficient to have Eric Grotzke meet with him in jail, rather than lead counsel, Salvador Mungia. Allegations of a fee dispute are not in the record. Charles Momah cites to ***Collier v. Momah,*** a King County Superior Court case which, where he was represented by the same two attorneys, Salvador Mungia and Eric Grotzke, wherein the same evidence was developed, and Charles Momah was happy with his attorneys' performance.

Pages 42 – 45 Abuse of Discretion. This section appears to be argument, and is not properly part of the Statement of the case.

Page 45, Lack of Sufficient Evidence to Sustain a Verdict. This section is entirely argument, and is not properly part of the Statement of the Case.

Page 44. Here, again, Charles Momah recites portions of a trial judge's findings that had been overturned on appeal.

D. Argument of Respondent.

Summary:

Charles Momah's appeal is a diatribe against counsel, both his own counsel, (including WSBA President Saldivar Mungia) and counsel for the Respondents. The remainder of the Brief of Appellant appears to be unsworn testimony and argument of Charles Momah, which he in hindsight wishes he had presented to the trial court. To the extent Charles Momah brings in new matter, not presented to the trial court, it should not be considered on appeal. All of the materials were clearly available to Charles Momah, and to his attorneys who had already been though the ***Collier v. Momah*** trial, and if relevant, would have been presented to the trial court.

Significantly, Charles Momah had never attempted to complaint about his attorneys during the trial. He never moved for a continuance, never complained that he was not receiving as much attention as he would have liked, and never moved to overturn the verdict before the trial court. The Trial Judge, who had presided over both, the ***Collier v. Momah*** trial,

and this trial, was in the best position to decide the credibility of witnesses, as well as whether there was any difference in the way the two trials were handled. Charles Momah never brought his concerns, if any to the court's attention.

Finally, this is a civil case, and Charles Momah's problems, if any, are of his own making. If he was having a fee dispute with his attorneys, that was not made part of the record, and would not be a basis for a successful appeal of civil monetary judgments.

Matters not subject to appeal.

No part of the judgment stems from any allegations of actions by Dennis Momah. Dennis Momah had been dismissed from the case, (See CP 57-58, stipulated order dismissing Dennis Momah), and has not appealed. Likewise, the plaintiffs have not appealed the stipulated/agreed dismissal of Dennis Momah from the case. There is therefore no issue on appeal properly before this court, stemming from any allegations made against Dennis Momah at trial. Nonetheless, Charles Momah spends a good deal of his brief attempting to re-argue the evidence as to Dennis Momah. The jury verdicts made it clear, the allegations made against Dennis Momah did not form the basis of the verdicts or judgment – the jury believed that all of the wrongful acts were by Charles Momah, and held Charles Momah responsible for his own actions.

Standard of Review

The Jury found, on special verdict forms, that Charles Momah was negligent, that each plaintiff suffered damages that were proximately caused by Charles Momah's negligence, and assigned economic and non-economic damages for each plaintiff. Judgment was entered by Judge Fleck upon the three jury verdicts.

A jury's findings on disputed facts are conclusive, where there is evidence to support the jury's verdict. *Ottomeier v. Hornburg*, 50 Wash. 316, 97 P. 235 (1908).

In addition to the jury verdicts, the Trial Judge made certain findings of witness credibility, outside of the jury's hearing, in order to decide which of the Plaintiffs' proposed ER 404(b) witnesses to allow. The same trial judge had also heard extensive testimony from ER 404(b) witnesses in the ***Collier v. Momah*** trial, which preceded the trial at issue, and this Court is requested by separate motion to take judicial notice of her findings in the ***Collier*** case.

Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). If the

standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. Croton Chem. Corp. v. Birkenwald, Inc., 50 Wn.2d 684, 314 P.2d 622, (1957), Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003)

> "A claim of insufficiency admits the truth of the [Repondent's] evidence and all inferences that reasonably can be drawn therefrom." *Id.* Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).
> State v. Thomas 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

In this case, appellant's argument entirely centers upon the issues of credibility, and the persuasiveness of the evidence. Since the evidence that supports the trial Judge's findings, and all reasonable inferences therefrom, must be taken as true for purposes of this appeal, there is no basis to undermine the Trial Judge's conclusions.

Notably, these witnesses were found credible in the ***Colllier*** trial, in the criminal trial, and on appeal from the criminal trial, this Court cited at length from certain witness testimonies.

Findings of the Trial Court

The unchallenged findings are verities on appeal. State v. Stenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997); State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). Robel v. Roundup Corp., 148 Wn.2d 35, 42-43, 59 P.3d 611 (2002).

Specifically, the trial judge had made findings regarding the sufficiency of the expert witnesses' testimony, none of which is objected to on appeal.

Issue 1. Allegation of "Perjured" or "Fabricated" Testimony

At the beginning of the trial, the Trial Judge made specific findings as to the credibility of the witnesses who testified in this trial, and this same Trial Judge had made findings as to the credibility of witnesses in the ***Collier v. Momah*** trial. Judge Fleck's findings in the Collier trial are attached, and a separate motion for judicial notice is filed herewith.

Charles Momah is now attempting to bring in materials, which, although available at the time of trial, had been found unpersuasive by either his own attorneys or the trial court, to overturn the judge's and jury's determination of credibility of witnesses.

Charles Momah's argument was already rejected by this Court, in his criminal trial appeal;

> "85 Dr. Momah argues that alleged misconduct by a lawyer who represented witnesses in this case in separate civil litigation was prejudicial to his defense. He also claims the alleged misconduct by the civil attorney is chargeable to the State in this case. Because the record before us fails to substantiate this claim, we reject it.
>
> "86 Dr. Momah moved for an order requesting this court to take judicial notice of findings of fact and conclusions of law from a separate court proceeding. According to the motion, that proceeding addressed alleged misconduct of a civil attorney who is not employed by the State.
>
> "87 A commissioner of this court denied the motion, and a panel of this court denied Dr. Momah's motion to modify. The supreme court denied review of our ruling. Thus, the information Dr. Momah sought to bring Before this court to support this appeal is not Before us. We will therefore not review this claim on appeal.
>
> "88 We affirm the judgment and sentence."
>
> *State v. Momah*, 58004-3-I, 141 Wash.App. 705, 171 P.3d 1064.

This clearly is a reference to the findings of Judge Stolz, which at that time had still not been overturned on appeal. Now, however, the Stolz findings were overturned, vindicating the prior courts' rejection of those findings.

On appeal, this court views the evidence in the light most favorable to the prevailing party and defers to the trial court regarding witness credibility and conflicting testimony. *Weyerhaeuser v. Tacoma-Pierce County Health Dep't,* 123 Wash.App. 59, 65, 96 P.3d 460 (2004).

Issue 2. Allegation of "Ineffective Assistance of Counsel".

After two civil trials, Charles Momah for the first time in this appeal alleges that he was dissatisfied with his counsel's performance.

Charles Momah fails to cite to a single <u>*civil*</u> lawsuit that was overturned for "ineffective assistance of counsel". Generally, in a civil setting, there is no right to counsel, and therefore no right to claim ineffective assistance of counsel within the meaning of the 6th Amendment. (Charles Momah even cites to the 6th Amendment in his brief).

> "No relevant authority has been presented that suggests that counsel in a civil case can be removed for alleged incompetence.[7]
> "[7] The Sixth Amendment guarantees criminal defendants the right to effective, competent counsel. *Strickland v. Washington*, 466 U.S. 668, 689-691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We do not question the authority of trial courts enforcing this guarantee to remove counsel if necessary. However, there is no corresponding right to counsel in a civil case (with some limited, and mostly statutory, exceptions). There is no argument here that the guardianship statutes or other legislation provide such authority."
> *American States Ins. Co. ex rel. Kommavongsa v. Nammathao,* 153 Wn.App. 461, 220 P.3d 1283 (Wash.App. Div. 3 2009).

Charles Momah cites to criminal cases, and at times interjects the words "and civil", or "and property" interests, into the citations – but these words do not exist in the original.

Even if this court were to overlook the fact that there is no claim of ineffective assistance of counsel available due to the civil nature of the action, Charles Momah has not even begun to make out a claim of ineffective assistance of counsel against Salvador Mungia.

Closest to the Civil standard, would the standard for immigration cases, which do allow claims of ineffective assistance of counsel. In the immigration context, any claim must meet the following criteria;

First, a claimant would have to make a motion to the trial court. The motion should be supported by an affidavit of the allegedly aggrieved applicant attesting to the relevant facts. Second, before the allegation is presented to the trier of fact, the former counsel must be informed of the allegations and allowed the opportunity to respond. Any subsequent response from counsel, or report of counsel's failure or refusal to respond should be submitted with the motion. Finally, if it is asserted that prior counsel's handling of the case involved a violation of ethical or legal responsibilities, the motion should reflect "whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not." Matter of Lozada, 19 I. & N. Dec. 637, 1988 WL 235454 (BIA 1988).

Of course, this is not an immigration case, so Lozada does not directly apply, but any good faith claim of ineffective assistance of counsel should have been made first to the trial court, with opportunity for counsel to respond. Since this has not been done, this court should not entertain such claims for the first time on appeal.

Issue 3. Allegation of "Abuse of Discretion".

Charles Momah makes several discrete arguments, all of which are to be reviewed, if at all, under an "abuse of discretion" standard.

Charles Momah's first objection is to the admission of a greatly-redacted Exhibit 11, stipulated findings and order of the Medical Qualifications Commission of the Washington State health Department, which was signed by Charles Momah.

A similar exhibit had been admitted in the ***Collier v. Momah*** trial, and some of the evidentiary arguments, made in the ***Collier*** trial, were not repeated in their entirety in the trial at issue.

What was before the Trial Court, was evidence from testimony of a Health Department investigator, that MQAC findings are made upon clear cogent and convincing evidence.

The findings were redacted, to eliminate patients who were not plaintiffs in this case.

Charles Momah had the opportunity to attack the findings, and did so in part in his deposition. His attorneys were involved in the editing process of that deposition, so there were strategic decisions for whether or not they allowed the jury to hear Charles Momah's explanation of the findings, and his signature admitting to the findings.

The admission of a party can be used for any purpose.

> "For more than 75 years this state has recognized and applied the rule that relevant unprivileged admissions of a party-opponent are admissible against him. *Hart v. Pratt*, 19 Wash. 560, 568, 53 P. 711 (1898). Such evidence is not confined to the purpose of impeachment, but it is also entitled to be admitted as substantive evidence. C. McCormick, Evidence § 262, at 629 (2d ed. 1972). *Olson v. Hodges*, 236 Iowa 612, 19 N.W.2d 676 (1945) (error to instruct the jury that an admission could be considered merely as discrediting the party's testimony. Evidence was admissible not only as discrediting testimony of plaintiff, but as substantive evidence against him); *Greenwood v. Harris,* 362 P.2d 85 (Okl.1961) (admissions of defendant physician, though the only expert evidence in an action for malpractice, is sufficient to defeat defendant's motion for a directed verdict at the end of plaintiff's case)."
> *Goodell v. ITT-Federal Support Services, Inc.,* 89 Wn.2d 488, 573 P.2d 1292 (1978).

In this case, the Trial Judge was careful to require that Exhibit 11 be redacted, to eliminate evidence of multiple other victims of Charles Momah. Judge Fleck did not abuse her discretion.

Charles Momah next argues that Judge Fleck abused her discretion in "admitting the false evidence of doctor impersonation." However, the

issue of doctor impersonation was rejected by the jury, which rendered verdicts against Charles Momah. Therefore the jury believed that the evidence of "botched surgery, sexual assaults and other improper conduct" (Brief of Appellant, page 57) were all committed by Charles Momah, himself.

Next, Charles Momah complains that his motion prohibiting any mention of the criminal conviction was denied. He cites ER 404(b), but provides no other authority for his argument.

The criminal conviction was based upon acts similar to those complained of by the three Plaintiffs, and at least one of the plaintiffs had testified in the criminal trial. As this court had previously found, in the appeal of the criminal case;

> ". . . The testimony of K.T., C.W., and C.R. was admissible to prove a common scheme or plan. Based on stipulation by the parties, the court found that the acts occurred by a preponderance of the evidence. The court ruled that the testimony of each of the four charged victims and these three additional witnesses was relevant and not outweighed by its prejudicial effect."
>
> *State v. Momah*, __ Wn.2d __, 217 P.3d 321 (2009).

Charles Momah's criminal conviction stems from his inappropriate sexual conduct with his female patients. This was the same motive, same "common scheme or plan" that caused these victims to file their civil

lawsuit. The criminal conviction was proven beyond a reasonable doubt. Here, the standard was merely a preponderance of the evidence.

More importantly, Charles Momah does not provide any citation to the record to argue that the use of the criminal conviction was in a manner that was unfairly prejudicial.

Next, Charles Momah argues that the trial court should not have ruled that Ms. McDougal was a vulnerable adult.

The vulnerability of Charles Momah's victims, and his exploitation of those vulnerabilities, were described by this court in his criminal appeal. This court found that the victims were vulnerable, and those vulnerabilities were particularly exploited by Charles Momah,;

> "51 This was not an abuse of the trial court's discretion. The testimony of all seven women, taken together, illustrates Dr. Momah's plan to use his special position of power as a gynecologist to sexually take advantage of his most vulnerable patients.
>
> "52 He convinced each woman that he could help her with her specific problem, making her feel that she had few other options. Each victim testified about a particular vulnerability known to Dr. Momah. For instance, H.P., K.T., C.W., C.R., and S.S. were to some extent dependent on the narcotics or other medications he prescribed to them. Similarly, S.S., K.T., and C.W. experienced severe pain, requiring medication from Dr. Momah. H.P., C.B., and C.W. used medical coupons and relied on Dr. Momah's generosity with respect to payment for services. C.B., R.B., and C.W. desperately wanted to become pregnant, and R.B. and C.W. believed Dr. Momah's promises that he could enable them to get pregnant when other doctors could not.

> "53 Once he had gained their trust, he began acting inappropriately. Most of the victims testified that Dr. Momah did not wear gloves or have assistants present during examinations. Many testified that at some appointments, no receptionists or assistants were present in the entire office. Dr. Momah personally called many of the women on the phone throughout their doctor-patient relationships. He performed manual exams and ultrasounds at every, or almost every, appointment with these women, even when the sole purpose of the appointment was to obtain another prescription for the same symptoms or condition.
>
> "54 Finally, he abused their trust by sexually taking advantage of them, usually while they were on the examination table. For example, he made sexually inappropriate comments to all of the women or asked them on dates. He touched all of the women except C.R. in a sexual manner. He used the ultrasound wand in a sexual manner with R.B. and C.B. He had sexual intercourse with H.P. on the examination table.
>
> "55 These acts occurred on multiple occasions for many of these women. If the women objected, he usually became angry or gruff, told them not to tell, threatened them, or told them that no one would believe them.
>
> "56 Each of these acts was proved by a preponderance of the evidence. Each was relevant and cross-admissible to show that the acts against S.S., C.B., and R.B. (Counts II through IV) actually occurred (corpus delicti) because of the similarity of Dr. Momah's acts against the other women. And these non-consensual acts were relevant to rebut Dr. Momah's defense that H.P. consented to have sex with him (Count I).
>
> *State v. Momah*, 58004-3-I, 141 Wash.App. 705, 171 P.3d 1064.

Here, the trial judge heard similar evidence, Charles Momah's conduct was identical, and therefore the trial judge did not err in finding Ms. McDougal vulnerable.

Furthermore, there was expert testimony that Charles Momah's conduct was grossly negligent. Charles Momah does not assign error to the admission of the expert testimony.

Charles Momah complains, under an abuse of discretion standard, that he should not be held liable for sexual improprieties with his patients, because he was not a psychologist, and no "transference" phenomenon was involved.

However, again, there was expert testimony, to which no error is assigned, that Charles Momah's actions were negligent. This court's own findings, how Charles Momah abused his victims, are set forth above.

Next, Charles Momah complains that Judge Stolz' findings as to the Saldivars and their counsel were not somehow brought before this jury. Charles Momah had been trying to bring those same (now vacated) findings before every court, including the criminal appeal. This court noted that Charles Momah had moved to have Judge Stolz' findings somehow admitted, and that was properly rejected;

> "86 Dr. Momah moved for an order requesting this court to take judicial notice of findings of fact and conclusions of law from a separate court proceeding. According to the motion, that proceeding addressed alleged misconduct of a civil attorney who is not employed by the State.
>
> "87 A commissioner of this court denied the motion, and a panel of this court denied Dr. Momah's motion to modify. The supreme court denied review of our ruling. Thus, the information Dr. Momah sought to bring before this court to

> support this appeal is not before us. We will therefore not review this claim on appeal.
>
> "88 We affirm the judgment and sentence."
>
> *State v. Momah*, 58004-3-I, 141 Wash.App. 705, 171 P.3d 1064.

Contrary to Appellants' assertion, Judge Stolz' findings were not merely vacated due to inadequate findings for review. The appellate court had made specific recitations that Perla Saldivar may have been suffering from PTSD, that Judge Stolz inappropriately rejected expert witness testimony as to PTSD, that Judge Stolz inappropriately rejected all other witness testimony, as well as prior consistent statements of Perla Saldivar. There is no basis to give any reliance to Judge Stolz' findings.

Next, Charles Momah complains that two of the plaintiffs had filed bankruptcy, and that the Court should have dismissed this civil action because it had not been listed in the bankruptcy schedules. However, when a debtor omits a possible claim from a bankruptcy filing, that does not automatically result in dismissal. Courts have held that such dismissal would prejudice innocent creditors of the victims, and would allow the tortfeasor to go unpunished.

The Court of Appeals, Division III, analyzed whether failure to mention a claim that occurred during a bankruptcy proceeding, would preclude filing a suit on the claim later. As that court reasoned;

> "During the time that Robert Johnson was going through bankruptcy, he broke a tooth biting into a McDonalds sandwich. After his bankruptcy case was closed, Mr. Johnson filed a lawsuit against Si-Cor Inc. of Wenatchee and Lopez Foods (collectively referred to as McDonalds). The superior court granted McDonalds motion for summary judgment based on judicial estoppel. Judicial estoppel precludes a party from taking a position inconsistent with a position that the party previously took in litigation. The court reasoned that Mr. Johnson's failure to disclose his claim against McDonalds in his bankruptcy case precluded him from later asserting the claim against McDonalds. Mr. Johnson appeals.
> "We conclude that judicial estoppel applies only if a party's prior inconsistent position benefited the party or was adopted by the court. There is no evidence in this record that Mr. Johnson received a benefit by not disclosing his claim against McDonalds in his bankruptcy case. There is no evidence that the bankruptcy court adopted a position asserted by Mr. Johnson that is inconsistent with the pursuit of his claim against McDonalds. Accordingly, we reverse the summary judgment dismissal and remand for trial."
> *Johnson v. Si-Cor Inc.*, 107 Wn.App. 902, 28 P.3d 832 (2001).

The Johnson decision was considered by the Bankrukptcy Appellate Panel, in a reasoned decision which also concluded that a prior court would have had to specifically rely upon a judicial admission, before judicial estoppel would be invoked. As the BAP opined;

> Judicial estoppel analysis is a two-step process. First, the facts must warrant judicial estoppel. Second, a remedy must be available that does not needlessly punish the innocent.
>
> . . .
>
> The correct solution is often to reopen the bankruptcy case and order the appointment of a trustee who, as owner of the cause of action, can determine whether to deal with the cause of action for the benefit of the estate. *Alary Corp.*, 283 B.R. at 566 n. 14; *In re Mahan,* 104 B.R. 300, 300-01

> (Bankr.E.D.Cal.1989); cf., e.g., *Johnson v. Si-Cor Inc.*, 107 Wash.App. 902, 906-13, (2001); *Kelsey v. Waste Mgmt. of Alameda County,* 76 Cal.App.4th 590, 90 Cal.Rptr.2d 510 (1999).
> "Viewed as a two-party dispute, imposition of judicial estoppel may be unremarkable, but the typical bankruptcy-related flaw in such analysis is the failure to take into account that an unscheduled cause of action is not the debtor's property and that the victims are the debtor's creditors. The equitable balance compels consideration of whether the economic consequences of a judicial estoppel are borne by third parties.
>
> *In re An-Tze Cheng,* 308 B.R. 448, 452, 460 (9th Cir.BAP (Cal.) 2004).

Charles Momah also argues that the bankruptcies themselves should have been mentioned at trial, to impeach the two plaintiffs. However, there are tactical reasons to not bring up victims' bankruptcies to a jury, as a jury verdict may increase due to compassion for a bankrupt plaintiff. Charles Momah does not provide any citation to the record, nor has he ordered the record, to indicate whether his counsel sought to question the plaintiffs about their bankruptcies, or not, as a tactical decision. This issue therefore cannot be reviewed.

Finally, Charles Momah complains that his counterclaims were dismissed, but makes only a two-line comment on the subjects, and makes no other argument. With no citation to the record, no authority, and no argument, this should not be reviewed.

Issue 4. Allegation of "Lack of Substantial Evidence".

Charles Momah alleges, that there could not be sufficient evidence of medical malpractice "without expert opinion". He omits the fact, that there were two experts who testified at trial, Dr. Olson and Dr. Welch. Dr. Olson was allowed to testify about violations of standard of care (see Clerk's Notes, pg 17 of 2nd Supplemental CP), and the jury posed questions to Dr. Olson (2nd Supplemental CP). For example, the jury asked of Dr. Olson, "Does a vaginal ultrasound machine record while the monitor is off?" – indicating that the jury apparently believed testimony that Charles Momah would prod his victims with the ultrasound wand, even when his monitor was not working, so no ultrasound was being conducted.

Dr. Welch was also asked about medical malpractice of Charles Momah.

> Discussion regarding Dr. Welch's testimony and whether he may testify with regard to the consentual sex, between Lisa McDougal and Dr. Charles Momah. Brief argument as to the cause of action, brought by Ms. McDougal and whether it reaches a medical malpractice lawsuit.
>
> Court hears legal argument regarding medical malpractice, as it relates to Lisa McDougal.
>
> Court orders that the parties not inquire of Dr. Welch, on the issue they wished to inquire, about whether he was aware there was a sexual relationship and if he believes that violated the standard of care.
>
> ***Jury present***

> Defendants witness, Dr. Phillip Welch is sworn and examined
>
> ***Jury absent***
>
> Oral argument with regard to Lisa McDougals claim of medical malpractice, due to the sexual relationship.
>
> (Jury Notes, pg 26 – 2nd Supplemental CP)

Dr. Welch testified as to medical malpractice by Charles Momah upon Lisa McDougal, not including the sexual relationship. (Clerk's Notes, 2nd Supplemental CP, at page 26). Therefore, without using the sexual attacks as malpractice, the jury had sufficient evidence, from Dr. Phillip Welch's testimony, of medical negligence. The Jury Question to Dr. Welch "Would it be seen as OK to release a patient from recovery in less than 24 hours if patient's spouse has medical training as CNA?" (2nd Supplemental CP, Jury Questions to Witness). This indicates, the jury was interested in apparent medical negligence testimony.

Not having ordered the transcripts of these proceedings, Charles Momah cannot argue lack of substantial evidence to support the verdict of medical negligence. The basis for Charles Momah's argument, the allegation that there were no expert witnesses, is false.

E. Conclusion, Relief Sought.

The three jury verdicts should be affirmed.

Respectfully submitted this December 16, 2010

Marja Starczewski, WSBA # 26111,
Attorney for Respondents

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed by U.S. mail, postage prepaid, a copy of the foregoing Brief of Respondent, postage prepaid, via U.S. mail on December 16, 2010, to the respondent, at the following address:

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 58004-3-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
DR. CHARLES MOMAH,	)	PUBLISHED IN PART
	)	
Appellant.	)	FILED: November 13, 2007
	)	
	)	

COX, J. — Dr. Charles Momah appeals his judgment and sentence based on convictions o rape and indecent liberties involving several o his medical patients. We hold that he has ailed to carry his burden to show that the trial court violated his constitutional right to a public trial by the manner in which the court conducted voir dire o potential members o the jury who were questioned individually. The court did not abuse its discretion by admitting evidence o certain o Dr. Momah's prior bad acts under the common scheme or plan exception. Likewise, the court did not abuse its discretion by excluding evidence o alleged prior bad acts o one o the witnesses against Dr. Momah. The court properly exercised its discretion in denying Dr. Momah's motion to sever. And the court did not abuse its discretion in denying his mistrial motion. We a irm.

Dr. Momah was a gynecologist and purported ertility specialist with

o ices in Burien and Federal Way. In 2003, one o his patients, H.P., went to a hospital and reported that Dr. Momah had raped her. Once the allegations were made public, many other women came orward with complaints that Dr. Momah had sexually abused them. These allegations became the subject o extensive media coverage.

A ter investigation, the State charged Dr. Momah with seven counts arising rom these incidents. Three o the counts were severed rom the trial in this case. The remaining our counts were tried in this action, including two counts o indecent liberties, one count o second-degree rape, and one count o third-degree rape.

Due to the nature o the charges and the extensive media coverage, a large number o potential jurors were called or voir dire by the parties and the court. Some o the potential jurors asked to be questioned individually, and the court and both counsel agreed to honor those speci ic requests. Some jurors had been exposed to media coverage about the case, also requiring individual juror questioning to avoid jury contamination. We discuss in more detail later in this opinion how voir dire was conducted.

Following the selection o the jurors and alternates, the matter was tried over the course o 15 trial days. The jury ound Dr. Momah guilty as charged.

He appeals.

RIGHT TO PUBLIC TRIAL

Dr. Momah argues that the trial court violated his right to a public trial by

the manner in which it conducted voir dire o the prospective jurors who were questioned individually. Because he ails in his burden to show there was a constitutional violation in this case, we disagree.

Article I, section 22 o the Washington State Constitution guarantees criminal de endants the right to a speedy, public trial. Similarly, article I, section 10 provides that "[j]ustice in all cases shall be administered openly . . . ." These rights extend to jury selection, which is essential to the criminal trial process.[1]

To protect these rights, a court aced with a request or a trial closure must weigh ive actors, re erred herein as the Bone-Club actors, to balance the competing constitutional interests.[2] To overcome the presumption o openness, the party seeking closure must show an overriding interest that is likely to be prejudiced and that the closure is narrowly tailored to serve that interest.[3] The trial court must consider alternatives and balance the competing interests on the record.[4]

This test mirrors the one articulated by the United States Supreme Court to protect the Sixth Amendment right to a public trial and the First Amendment

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[1] In re Pers. Restraint o Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004).

[2] Id. at 805-07 (quoting State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995)).

[3] Id. at 806 (citing Waller v. Georgia, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); Press-Enter. Co. v. Superior Court o Cal., 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)).

[4] Id.

right to open hearings.[5]

We look to the plain language o the closure request and order to determine whether closure occurred, thus triggering the Bone-Club actors.[6]

Once the reviewing court determines there has been a violation o the constitutional right to a public trial right, "[p]rejudice is presumed," and a new trial is warranted.[7]

On the other end o the spectrum rom a ull closure is a trial court's inherent authority and broad discretion to regulate the conduct o a trial.[8] Thus, a "closure" in which one disruptive spectator is excluded rom the courtroom or good cause will not violate the de endant's right to a public trial even absent an analysis o the Bone-Club actors.[9] Likewise, limited seating by itsel is

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[5] Id. (citing Waller, 467 U.S. at 45-47).

[6] Orange, 152 Wn.2d at 808; Bone-Club, 128 Wn.2d at 261; State v. Brightman, 155 Wn.2d 506, 516, 122 P.3d 150 (2005); see also Orange, 152 Wn.2d at 823 (Madsen, J., concurring) ("[I]n order to determine whether a trial closure violates the constitutional standard applicable to the open trial guaranty, a reviewing court must consider . . . the language o the closure ruling . . . ."); United States v. Shryock, 342 F.3d 948, 974 (9th Cir. 2003) ("The denial o a de endant's Sixth Amendment right to a public trial requires some a irmative act by the trial court meant to exclude persons rom the courtroom.") (quoting United States v. Al-Smadi, 15 F.3d 153, 155 (10th Cir. 1994)).

[7] Orange, 152 Wn.2d at 814 (quoting Bone-Club, 128 Wn.2d at 261-62 and citing State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923); Waller, 467 U.S. at 49 & n.9)).

[8] See State v. Gregory, 158 Wn.2d 759, 816, 147 P.3d 1201 (2006).

[9] See id.

insu icient to violate the de endant's public trial right.[10]

Here, Dr. Momah ocuses his argument exclusively on the events o October 11, 2005, the second day o voir dire. It is undisputed that he neither bases his argument on any other day o voir dire nor does he object to voir dire or reasons other than those described below.[11]

On the second day o voir dire, the court convened the trial in Room E-942, the presiding courtroom in the King County Courthouse.[12] During the prior day o voir dire, 48 potential jurors were excused, leaving 52 potential jurors to be examined urther.[13] The record re lects the ollowing exchanges between the court and counsel or the parties regarding questioning o the remaining potential jurors:

> THE COURT: . . . I made a list o jurors who wanted to have private questioning about various issues. On that list I have eight jurors who wanted private questioning.
>
> . . . .
>
> MR. ALLEN [counsel or Dr. Momah]: Your Honor, it is our position and our hope that the Court will take everybody individually, besides those ones we have identi ied that have prior knowledge. Our concern is this: they may have prior knowledge to the extent that that might disquali y themselves, or we have the real concern that they will contaminate the rest o the jury.

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[10] See, e.g., Shryock, 342 F.3d at 974, cited in Brightman, 155 Wn.2d at 517.

[11] Appellant's Opening Brie at 26-27.

[12] Report o Proceedings (Oct. 11, 2005) at 2.

[13] Id.

. . . .

MR. ROGOFF [counsel or the State]: I agree.[14]

Therea ter, the court divided the prospective jurors who were to be questioned individually into two groups, the irst group o 20 to be questioned that morning. The rest were released with instructions to return or questioning that a ternoon.

Shortly a ter the release o the potential jurors, the record re lects that the court, both parties' counsel, Dr. Momah, and the court reporter moved into chambers adjoining the presiding courtroom. Once in chambers, the record states:

> THE COURT: We have moved into chambers here. The door is closed. We have the court reporter present, as well as all counsel and the de endant, along with the Court and juror number 36. . . .[15]

Following questioning by counsel and the court, prospective juror number 36 le t chambers and prospective juror 2 entered chambers. The record does not re lect whether the door to chambers was closed during this questioning or subsequent individual questioning o other prospective jurors during the morning session.

The court recessed or lunch and reconvened in room West 813 o the King County Courthouse or the a ternoon session. The record re lects the

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[14] Report o Proceedings (Oct. 11, 2005) at 2, 4.

[15] Id. at 19-20.

ollowing statement by the court prior to the arrival o the second group o prospective jurors:

> THE COURT: I guess we have twenty olks outside in the hall. What I propose to do is have them come into the courtroom, we will move to the jury room or the individual questioning, and question them one at a time. I thought about having them in the jury room, but there is [sic] only 16 chairs. Secondly, we reserved 50 jurors or tomorrow.[16]

A ter urther colloquy between the court and counsel, the prospective jurors entered the courtroom. The trial judge explained to the group that individual questioning would continue and then adjourned to the jury room with the lawyers or both parties, Dr. Momah, and the court reporter. The record does not re lect whether the door to the jury room was open or closed during any o the individual examinations o the prospective jurors that a ternoon.

Court adjourned or the day at 3:10 p.m., a ter prospective juror number 41 le t the jury room.

Dr. Momah makes two main arguments. First, he argues that this record establishes that the trial court closed voir dire, in ringing on his right to a public trial. Second, he argues that this record supports the view that the burden o proving there was no closure and that the requirements o Bone-Club and its progeny were ul illed shi ted to the State. We disagree with both o these arguments.

Nowhere in this record is there any evidence that the trial judge expressly

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[16] Id. at 105.

closed voir dire to the public or the press in violation o any o the controlling cases. Rather, the record expressly shows that the court, in response to the express request o Dr. Momah, agreed to allow voir dire by individual questioning o prospective jurors who indicated prior knowledge about the case. Signi icantly, his request was based on the concern that prospective jurors might have knowledge about the case that could disquali y them or that they might contaminate the rest o the prospective jurors with such knowledge. In addition, the court and the parties agreed to individually question jurors in response to their express requests. The State agreed that individual questioning was best to avoid the risk o a mistrial due to certain matters that are not relevant to our analysis in this case. There simply is no indication in the record that individual questioning was or the purpose o excluding either the press or the public rom this trial.

We note also that there is nothing in the record to indicate that any member o the public (including members o Dr. Momah's amily) or the press was excluded rom voir dire. The court reporter in this case scrupulously recorded everything that took place during the morning session rom the time the trial judge, both parties' counsel, Dr. Momah, and the court reporter went into chambers adjacent to the presiding courtroom. Similarly, the court reporter also scrupulously recorded all that took place rom the time the trial judge, counsel, Dr. Momah, and the court reporter went into the jury room in room West 813 a ter the noon recess. Other than the entry and exit o the individual jurors and

the questioning that ensued or each, there is nothing in this record indicating any attempt by either the press or the public (including members o Dr. Momah's amily) to gain admittance to witness voir dire. We simply do not know what would have happened i such an attempt had been made either during the morning or a ternoon sessions o voir dire. We will not speculate on whether the trial court would have ordered closure i any attempt had been made by anyone to join the judge, counsel, Dr. Momah, and the court reporter in chambers or in the jury room.

Dr. Momah relies on the seminal Washington cases on courtroom closure. But the closures in each o those cases are distinguishable in important respects rom the October 11 day o voir dire in this case.

In State v. Bone-Club, the trial court "ordered closure" o the courtroom by stating, "All those sitting in the back, would you please excuse yourselves at this time."[17] In discussing whether the de endant could have waived his rights, the supreme court noted, "The ***motion to close***, not De endant's objection, ***triggered the trial court's duty to perform the weighing procedure***."[18]

Similarly, in In re Personal Restraint o Orange, the trial court ordered closure by the ollowing statement:

> *I am ruling* no amily members, no spectators will be permitted in this courtroom during the selection o the jury because o the limitation o space, security, etcetera [sic]. *That's my ruling.*[19]

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[17] 128 Wn.2d 254, 256, 906 P.2d 325 (1995).

[18] Id. at 261 (emphasis added).

[19] 152 Wn.2d 795, 802, 100 P.3d 291 (2004) (emphasis and editorial

The supreme court examined the "***plain language of its ruling***" in order to determine that the trial court had e ectuated a permanent, ull closure o the courtroom that day, thus requiring an analysis o the Bone-Club actors.[20]

In State v. Brightman, the trial court told the attorneys in a pre-trial proceeding to:

> tell the riends, relatives, and acquaintances o the victim and the de endant that the irst two or three days or selecting the jury the courtroom is packed with jurors, they can't observe that.[21]

Although the supreme court did not inquire whether this order had actually been en orced, it emphasized that the court in Orange looked "*solely to the transcript of the trial court's ruling*" to determine whether the order constituted a closure.[22] The court went on to hold:

> ***[O]nce the plain language of the trial court's ruling imposes a closure***, the burden is on the State to overcome the strong presumption that the courtroom was closed.[23]

In this case, the trial court simply never ordered that the proceeding be closed to any spectators or amily members. Looking to the plain language o the transcript, as these cases require us to do, it is apparent that no statement or

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comment in original).

[20] Id. at 808 (emphasis added).

[21] 155 Wn.2d 506, 511, 122 P.3d 150 (2005).

[22] Id. at 516 (emphasis in original).

[23] Id. (emphasis added).

order by the trial court triggered application o the Bone-Club actors or shi ted the burden to the State to prove that the proceeding was open. Rather, the trial court and both parties' counsel recognized the space constraints and the need to question jurors individually. The court concluded that the only way to accommodate these concerns was to leave the jury venire in the courtroom and conduct individual juror questioning in the only other available room — chambers — that was available during the morning session. Similar analysis applies to the court's use o the jury room during the a ternoon session in Room West 813 o the King County Courthouse. Nothing in the trial court's language or actions indicates that any member o the public, aside rom the other members o the jury venire, were excluded rom this proceeding.

The other cases on which Dr. Momah relies are also distinguishable or the same reasons. For example, in NBC Subsidiary (KNBC-TV), Inc. v. Los Angeles County Superior Court, "the public and the press were ushered out o the courtroom" in response to one o the trial court's closure orders.[24]

Relying on the NBC case, Dr. Momah argues that all proceedings conducted in chambers are per se closed to the public. But the court in that case actually concluded that "although in ***some situations*** it may be appropriate to exclude the public and the press rom chambers proceedings," those proceedings are still part o the trial process, subject to the same rules or closure.[25]

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[24] 20 Cal. 4th 1178, 1186, 86 Cal. Rptr. 2d 778 (1999).

The dictionary de initions and other cases Dr. Momah cites likewise do not establish that a proceeding is automatically closed to the public i it occurs in chambers. They are mere observations that proceedings in chambers are o ten closed to the public. Moreover, we conclude that the trial court's statement in this case, "We have moved into chambers here. The door is closed," was also nothing more than an observation. O course, a "door" to a courtroom being closed, which occurs in most court proceedings, is not the same as a "proceeding" in that courtroom being closed to the public.

Dr. Momah also relies on a recent case rom Division Three, State v. Frawley.[26] We decline to ollow that case.

There, the court reversed Frawley's conviction and remanded or a new trial based on the act that one day o voir dire was conducted in chambers, outside Frawley's presence. It is unclear rom the acts o that case whether any member o the public or press was actually prevented rom watching the proceedings, but it appears rom the opinion that the parties were concerned about questioning jurors while other members o the public were present.[27]

In contrast, Dr. Momah was present both in chambers and in the jury room or the October 11 day o voir dire. Another distinction is that the trial court and

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[25] Id. at 1215.

[26] 167 P.3d 593 (Wn. App. 2007).

[27] See id. at 599 (Brown, J., dissenting) (noting that Frawley's agreement with the chambers questioning was based on his pre erence that potential jurors be questioned outside the presence o the public).

the parties here were concerned with questioning potential jurors out o the presence o the rest o the jury venire, not the public or press. Their ailure to mention the public or press implies that they did not intend on excluding either rom observing voir dire.

To the extent that Frawley holds that all in-chambers proceedings are per se closed to the public, we decline to ollow Division Three's reasoning in that case.

To summarize, Dr. Momah has ailed to carry his burden to show that the trial court closed his trial, depriving him o his constitutional right to a public trial. Accordingly, we do not reach whether any closure was justi ied under the standards stated in Bone-Club and subsequent cases.

We a irm the judgment and sentence.

The remaining issues o this opinion are not o precedential importance. Accordingly, the remainder o this opinion is not published.[28]

CHARACTER EVIDENCE

Dr. Momah next argues that the trial court abused its discretion in admitting testimony o three witnesses that Dr. Momah had allegedly sexually abused in the past. Conversely, Dr. Momah argues that the trial court erred in declining to admit evidence that victim H.P. had allegedly consented to sex with another doctor in the past. We reject both arguments.

Evidence o a person's character, trait, or prior bad acts is generally

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[28] See RCW 2.06.040.

inadmissible to prove that he acted in con ormity with a bad character trait.[29] But evidence o other crimes, wrongs, or acts may be admissible or other purposes, such as proo o a motive or a plan. Be ore admitting such evidence, a trial court must:

> (1) identi y the purpose or which the evidence is sought to be introduced, (2) determine whether the evidence is relevant to prove an element o the crime charged[,] and (3) weigh the probative value o the evidence against its prejudicial e ect.[30]

The potential or prejudice rom prior bad acts is highest in sex o ense cases.[31]

The common scheme or plan exception allows proo that the de endant devised a plan to repeatedly commit separate but very similar crimes against similar victims under similar circumstances.[32] It requires proo that the prior acts are:

> (1) proved by a preponderance o the evidence, (2) admitted or the purpose o proving a common plan or scheme, (3) relevant to prove an element o the crime charged or to rebut a de ense, and (4) more probative than prejudicial.[33]

Under this type o plan, there must be a high level o similarity between the acts, "such a concurrence o common eatures that the various acts are naturally to be explained as caused by a general plan o which they are the individual

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[29] ER 404(a)(1), (b).

[30] State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

[31] State v. Ramirez, 46 Wn. App. 223, 227, 730 P.2d 98 (1986).

[32] Lough, 125 Wn.2d at 855.

[33] Id. at 852.

mani estations."[34]

Although the prior acts must be markedly similar to the charged acts, the common scheme or plan exception is to be distinguished rom the modus operandi exception, which requires highly unique and identical circumstances (o ten re erred to as signature crimes) to prove the suspect's identity.[35] Under the common scheme or plan exception, the acts must be highly similar, but not identical or unique.[36]

For example, a common scheme or plan existed in State v. DeVincentis when the de endant molested two children in similar ways.[37] In both circumstances, he be riended young girls, desensitized them by wearing almost no clothing around the house, asked the victims to remove their clothes, and asked them to per orm the same sexual act on him.[38]

And in State v. Lough, a common scheme or plan was proved by the testimony o our women who were in a personal relationship with the de endant, a paramedic. The women each stated that the de endant o ered her a drink or medication o some kind that rendered her unconscious, and then raped her.[39]

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[34] State v. DeVincentis, 150 Wn.2d 11, 19, 74 P.3d 119 (2003) (internal quotations omitted), habeas corpus denied by DeVincentis v. Quinn, No. C06-680-JLR, 2007 WL 1059304 (W.D. Wash. April 5, 2007).

[35] See id. at 21 (noting the importance o this distinction).

[36] Id.

[37] 150 Wn.2d 11, 74 P.3d 119 (2003).

[38] Id. at 16.

Washington's rape shield statute also addresses the admissibility o prior sexual acts. But that statute applies to victims, not criminal de endants.[40] It prohibits the admission o evidence o a victim's prior sexual history on the issue o credibility under any circumstances.[41] One purpose o the statute is to prevent the jury rom relying on the illogical premise that a woman who consents to sex is unchaste, and such an unchaste woman is more likely to consent to sex again in the uture.[42]

Under the statute, a trial court may admit evidence o a victim's prior sexual acts as relevant to the issue o consent, not credibility, i the probative value o the evidence substantially outweighs its prejudicial e ect, and its exclusion would deny substantial justice to the de endant.[43] Evidence o a victim's past sexual behavior is only relevant to the issue o consent i the circumstances o the past acts o consent were similar to those alleged by the de endant.[44] To have such evidence admitted, a de endant must ile a written pretrial motion accompanied by a idavit, stating the o er o proo .[45]

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[39] Lough, 125 Wn.2d at 850.

[40] RCW 9A.44.020(2).

[41] RCW 9A.44.020(2); Gregory, 158 Wn.2d at 789.

[42] State v. Hudlow, 99 Wn.2d 1, 10, 659 P.2d 514 (1983).

[43] RCW 9A.44.020(3)(d).

[44] Hudlow, 99 Wn.2d at 11.

[45] RCW 9A.44.020(3)(a), (b).

Decisions as to the admissibility o evidence are within the discretion o the trial court, and are reversible only or abuse o that discretion.[46] A trial court abuses its discretion when its decision is mani estly unreasonable or based on untenable grounds.[47] We may a irm on any ground supported by the record even i the trial court did not consider the argument.[48]

Dr. Momah's Prior Bad Acts

We conclude that the trial court did not abuse its discretion in admitting testimony o Dr. Momah's alleged acts against other women.

Here, a ter reviewing the relevant elements and case law, the trial court ruled that the testimony o K.T., C.W., and C.R. was admissible to prove a common scheme or plan. Based on stipulation by the parties, the court ound that the acts occurred by a preponderance o the evidence. The court ruled that the testimony o each o the our charged victims and these three additional witnesses was relevant and not outweighed by its prejudicial e ect.

This was not an abuse o the trial court's discretion. The testimony o all seven women, taken together, illustrates Dr. Momah's plan to use his special position o power as a gynecologist to sexually take advantage o his most vulnerable patients.

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[46] State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

[47] State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

[48] State v. Michielli, 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997).

He convinced each woman that he could help her with her speci ic problem, making her eel that she had ew other options. Each victim testi ied about a particular vulnerability known to Dr. Momah. For instance, H.P., K.T., C.W., C.R., and S.S. were to some extent dependent on the narcotics or other medications he prescribed to them. Similarly, S.S., K.T., and C.W. experienced severe pain, requiring medication rom Dr. Momah. H.P., C.B., and C.W. used medical coupons and relied on Dr. Momah's generosity with respect to payment or services. C.B., R.B., and C.W. desperately wanted to become pregnant, and R.B. and C.W. believed Dr. Momah's promises that he could enable them to get pregnant when other doctors could not.

Once he had gained their trust, he began acting inappropriately. Most o the victims testi ied that Dr. Momah did not wear gloves or have assistants present during examinations. Many testi ied that at some appointments, no receptionists or assistants were present in the entire o ice. Dr. Momah personally called many o the women on the phone throughout their doctor-patient relationships. He per ormed manual exams and ultrasounds at every, or almost every, appointment with these women, even when the sole purpose o the appointment was to obtain another prescription or the same symptoms or condition.

Finally, he abused their trust by sexually taking advantage o them, usually while they were on the examination table. For example, he made sexually inappropriate comments to all o the women or asked them on dates.

He touched all o the women except C.R. in a sexual manner. He used the ultrasound wand in a sexual manner with R.B. and C.B. He had sexual intercourse with H.P. on the examination table.

These acts occurred on multiple occasions or many o these women. I the women objected, he usually became angry or gru , told them not to tell, threatened them, or told them that no one would believe them.

Each o these acts was proved by a preponderance o the evidence. Each was relevant and cross-admissible to show that the acts against S.S., C.B., and R.B. (Counts II through IV) actually occurred (corpus delicti) because o the similarity o Dr. Momah's acts against the other women. And these non-consensual acts were relevant to rebut Dr. Momah's de ense that H.P. consented to have sex with him (Count I).

The evidence was admitted only or the purpose o proving a common scheme or plan, and the jury was so instructed.

Finally, the trial court did not abuse its discretion in concluding that the probative value substantially outweighed any prejudicial e ect o the evidence, given the repeated, similar acts Dr. Momah perpetrated on these women. Although the prejudicial e ect o prior sex acts can be great, this type o evidence is highly probative given the lack o other evidence available in sex cases.[49]

Dr. Momah argues that what happened to some o the women was too

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[49] DeVincentis, 150 Wn.2d at 25.

dissimilar to be probative. We disagree.

Dr. Momah raped H.P., whereas he only said inappropriate things to C.R. (he did not rape or touch her inappropriately). But the trial court was within its discretion in considering the testimony o all seven witnesses together and concluding that Dr. Momah's acts against them could be explained as mani estations o a single plan to use his status as a gynecologist to sexually abuse his patients while they were at their most vulnerable. To the extent that C.R.'s testimony is less probative o the plan than the other witnesses because Dr. Momah did not touch her sexually, it is correspondingly less prejudicial. Dr. Momah made sexual comments to her the way he did with every other victim, and she testi ied to no dissimilar acts that could have prejudiced Dr. Momah.

Dr. Momah counters that the time periods the seven women saw him were too varied to be probative. But to the extent that Dr. Momah's inappropriate acts occurred repeatedly over a long period o time, then the passage o time tends to prove, rather than disprove, the existence o a common scheme or plan.[50] To the extent that the women testi ied that things went normally during their earlier relationship with Dr. Momah and then got worse in recent years, then remoteness is not an issue.

Dr. Momah argues that since rape is a strict liability crime and has no intent element, evidence o a common plan is irrelevant to proving intent. He

[50] See Lough, 125 Wn.2d at 860 (repeated acts over a period o time are probative o common scheme or plan, whereas remoteness in time between acts may lead to a conclusion that the acts are dissimilar).

urther argues that because he does not deny that he had sex with H.P., corpus delicti is not at issue, so the evidence is irrelevant to proving an element o the crime.

His arguments ignore the valid purpose o the evidence as applied to Count I — to rebut his de ense that H.P. consented to the sexual encounter.[51] The lack o consent o numerous other victims under similar circumstances tends to show that H.P. did not consent in this case.

Dr. Momah asserts that Washington's jurisprudence regarding the common plan exception has been highly criticized and eviscerates the rule against propensity evidence. But the Washington Supreme Court in DeVincentis recently re used to overrule the rule as set orth in Lough, and we are bound by that decision.[52]

Finally, Dr. Momah relies on the rape shield statute to argue that his prior sexual acts are not probative o the issues in this case. He argues that the rape shield statute makes clear that prior sexual acts are not probative o either credibility or consent. He misreads the statute. Both the rape shield statute and ER 404(b) allow evidence o prior sexual acts to prove consent under certain circumstances, but never to prove credibility. Under both rules, the prior acts must be similar to the act in question in order to be considered even minimally

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[51] See Williams v. State, 110 So.2d 654 (Fla. 1959) (evidence o a common plan used to rebut the de ense o consent in a rape case), cited with approval in Lough, 125 Wn.2d at 857 n.14.

[52] See DeVincentis, 150 Wn.2d at 25.

relevant to the issue o whether the individual consented in this case. Thus, his argument that prior sex acts are never probative is incorrect. In addition, he cannot rely upon the rape shield statute because by its terms, it applies to victims. It was passed in part to encourage victims o sexual abuse to report their crimes.[53] This policy does not apply to him, an accused sexual perpetrator.

Dr. Momah also assigns error to the jury instruction regarding this ER 404(b) evidence or the same reasons he objects to admission o the evidence. Because the instruction properly allowed the jury to consider his alleged acts against all seven women or the proper purposes discussed above, and or no other purpose, it was proper.

H.P.'s Prior Bad Acts

Dr. Momah argues that the trial court abused its discretion in declining to allow evidence o victim H.P.'s alleged prior sexual experiences with doctors. We disagree.

During the State's direct examination o H.P., the parties and the court had a colloquy outside the presence o the jury. The prosecutor mentioned that in Dr. Momah's interview o H.P., he asked her "whether or not [H.P.] told the de endant that she had slept with other doctors."[54] Dr. Momah stated that he

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[53] Hudlow, 99 Wn.2d at 16.

[54] Report o Proceedings (Oct. 26, 2005) at 62.

wished to question H.P. about such incidents. His oral pro er was as ollows:

> Your Honor, we are not going to raise it to show — First, I was going to bring it up [on cross] be ore I asked her that question. But we would be asking the Court or permission to bring it up, because this is something that Dr. Momah tells us she told him. She denied that she told him and denied that it happened, but this is going to be an issue. And I would be asking or that.[55]

The trial court ruled such evidence inadmissible because it was "not relevant."[56]

This non-speci ic pro er does not meet the requirements o the rape shield statute. Dr. Momah points to no evidence in the record that be ore trial he made a speci ic, written o er o proo , supported by a idavit, explaining how the evidence would be relevant to show consent, rather than credibility. He cites no details about these alleged prior acts that would allow the trial court or this court to conclude that the prior acts are similar enough to this case to be relevant to the issue o consent. Thus, the trial court properly denied his request.

Dr. Momah does not dispute that he ailed to adhere to the procedural requirements o the rape shield statute. He argues, however, that the statute only applies to the types o prior sexual history listed therein and that H.P.'s alleged prior acts in this case do not all within that list.

His argument is de ied by the plain meaning o the statute, which applies to "Evidence o the victim's past sexual behavior ***including but not limited to***" the items in the list.[57] Because Dr. Momah o ered evidence o H.P.'s "past

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[55] Id. at 63.

[56] Id.

[57] RCW 9A.44.020(2), (3) (emphasis added); see also Gregory, 158

sexual behavior," he was required to adhere to the statutory procedures. He ailed to do so, and the trial court did not abuse its discretion in rejecting the evidence.

Dr. Momah also argues that the trial court violated his right to present a meaning ul de ense. But there is no constitutional right to present irrelevant evidence.[58] Evidence o a victim's prior sexual acts is irrelevant to the issue o credibility. It is only relevant to the issue o consent i there are similarities between past acts o consent and the de endant's allegations o consent in this case, making it more likely that the victim consented in this case.[59] Even i minimally relevant, such evidence must be excluded i it is substantially outweighed by its prejudicial e ect.[60] The State has a compelling interest in preventing the admission o such evidence when it has a tendency to con use the jury and inter ere with the act- inding process.[61] Here, Dr. Momah has not shown that the testimony is even minimally relevant, so his right to present a meaning ul de ense is not implicated.

SEVERANCE

Wn.2d at 783 (rejecting the appellant's argument that prior acts o prostitution are exempted rom the statute).

[58] Hudlow, 99 Wn.2d at 15.

[59] See id. at 11.

[60] RCW 9A.44.020(3)(d).

[61] Hudlow, 99 Wn.2d at 18.

Dr. Momah argues that the trial court abused its discretion in denying his motion to sever the our counts tried in this case. We disagree.

Criminal Rule 4.3(a) allows the State to join o enses in one charging document i the o enses:

> (1) Are o the same or similar character, even i not part o a single scheme or plan; or
> (2) Are based on the same conduct or on a series o acts connected together or constituting parts o a single scheme or plan.

Criminal Rule 4.4 allows the trial court to sever joined o enses i doing so "will promote a air determination o the de endant's guilt or innocence o each o ense." A de endant seeking severance has the burden to show that joinder is so mani estly prejudicial that it outweighs the interest in judicial economy.[62]

We review a trial court's ruling on a motion to sever or an abuse o discretion.[63] We consider such actors as "the jury's ability to compartmentalize the evidence, the strength o the State's evidence on each count, the issue o cross admissibility o the various counts, [and] whether the judge instructed the jury to decide each count separately," and we weigh strongly the concern or judicial economy.[64] Jurors are presumed to ollow the trial court's limiting instructions.[65]

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[62] State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990).

[63] Id. at 717.

[64] State v. Kalakosky, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993).

[65] State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

Dr. Momah's argument rests largely on the assumption that he would succeed on the issue o exclusion o character evidence. But as discussed above, testimony about Dr. Momah's prior acts against each o the seven victims was properly admitted against Dr. Momah with regard to each o the our counts. Thus, because all o the testimony was cross-admissible as relevant to prove a common scheme or plan, there was no prejudice in allowing it to be presented in the same trial.

Because o the strong concern or judicial economy and the jury's ability to ollow instructions, a de endant seeking severance must make an even stronger showing o prejudice than required to admit ER 404(b) evidence.[66] There ore, the act that Dr. Momah could not meet this burden under ER 404(b) illustrates his inability to establish prejudice rom joinder o the our counts against him.[67]

Finally, the trial court properly instructed the jury to consider each count separately. The court also instructed the jury that the ER 404(b) evidence should only be considered relevant to a possible common scheme or plan, and or no other purpose. Dr. Momah makes no argument that the jury was unable to

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[66] Bythrow, 114 Wn.2d at 722.

[67] See State v. Smith, 74 Wn.2d 744, 756, 446 P.2d 571 (1968) ("However, since the evidence o the other crimes would have concededly been admissible in separate trials, the de endants were not unduly prejudiced by the joinder."), vacated in part on other grounds by Smith v. Washington, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972), overruled in part on other grounds by State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975).

ollow these instructions.

ORDER IN LIMINE / MISTRIAL

Dr. Momah contends that two violations o an order in limine prejudiced his trial and that his mistrial motion should have been granted. We disagree.

The purpose o a motion in limine is to prevent the jury rom hearing potentially prejudicial matters.[68] A mistrial should only be granted based on a witness' violation o an order in limine i the de endant is so prejudiced by the violation that nothing short o a new trial would ensure that he receive a air trial.[69] Jurors are presumed to ollow the trial court's limiting instructions.[70] The decision to grant or deny a mistrial is within the sound discretion o the trial court and is reversible only or abuse o that discretion.[71] We should only overturn such a decision i there is a substantial likelihood that the evidence a ected the jury's verdict.[72]

Here, the State made a motion in limine to include testimony rom victim R.B. regarding traumatic events she had experienced during the period o time relevant to this case. The State wished to use these acts to explain minor

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[68] State v. Austin, 34 Wn. App. 625, 627-28, 662 P.2d 872 (1983), a 'd, State v. Koloske, 100 Wn.2d 889, 676 P.2d 456 (1984).

[69] State v. Harris, 48 Wn. App. 279, 284-85, 738 P.2d 1059 (1987).

[70] Johnson, 124 Wn.2d at 77.

[71] State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

[72] Id.

inconsistencies, primarily regarding dates, between her trial testimony and prior statements, and Dr. Momah objected to admission o such testimony. The trial court concluded that, assuming Dr. Momah opened the door by pointing out inconsistencies, the State could elicit that R.B. had an in-vitro ertilization procedure a couple days be ore one o the relevant interviews, and that her mother died about a month be ore another interview. She was not allowed to testi y that one o her children later died, that her brother was terminally ill, or the speci ic circumstances surrounding her mother's death.

R.B. testi ied part o the day Wednesday and part o the day on Thursday. On Monday, she underwent cross-examination all morning. Just be ore the lunch hour, de ense counsel cross-examined her regarding the order and dates o appointments she had attended, pointing out apparently inconsistent statements. She responded that it was di icult or her to remember exact dates o events that happened long ago, especially since she had other traumatic events in her li e. De ense counsel continued as ollows:

> Q. What's your birthday? What is your date o birth?
> A. December 30th.
> Q. What year?
> A. 1959. So you are telling me that I am supposed to remember the day and time I am sexually assaulted? I am supposed to remember that today on March 25th, Dr. Momah came and sexually assaulted me, and I am supposed to remember that, because this is the glori ying day that I need to remember? That is a glori ying time in my li e? I can remember my daughter's birthday, because you know what, that is a glori ying time in my li e. October 24th, 2004 my daughter was born. ***October 14th my son died*** . . . . [73]

[73] RP (Oct. 24, 2005) at 109 (emphasis added).

De ense counsel objected and moved or a mistrial. The trial court denied the motion or a mistrial, but a ter the lunch break issued a limiting instruction that R.B.'s son died through no ault o Dr. Momah, and the jury should disregard that act.[74]

Later, on re-cross, de ense counsel asked R.B. whether her mother dying led to incorrect statements in her subsequent interview. R.B. responded:

> There could be dates or times that maybe are not exactly right. I mean, just because my mother died on 7/31 o this year — My mother had a massive brain aneurysm at the same time I was being implanted with embryos.[75]

De ense counsel objected, and the court instructed the jury to disregard the statement.

We conclude that the trial court did not abuse its discretion in denying the motion or a mistrial. The circumstances regarding R.B.'s mother and son are entirely irrelevant to this case. True, her credibility in this case was important. But these events in her li e were not so prejudicial that the trial court's instructions would have been ine ective. While the act that her son died and her mother su ered a brain aneurysm may have garnered sympathy with the jury, they were irrelevant to whether she told the truth when she accused Dr. Momah o sexually abusing her.

ADDITIONAL EVIDENCE

Dr. Momah argues that alleged misconduct by a lawyer who represented

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[74] Id. at 121.

[75] Id. at 136.

witnesses in this case in separate civil litigation was prejudicial to his de ense. He also claims the alleged misconduct by the civil attorney is chargeable to the State in this case. Because the record be ore us ails to substantiate this claim, we reject it.

Dr. Momah moved or an order requesting this court to take judicial notice o indings o act and conclusions o law rom a separate court proceeding. According to the motion, that proceeding addressed alleged misconduct o a civil attorney who is not employed by the State.

A commissioner o this court denied the motion, and a panel o this court denied Dr. Momah's motion to modi y. The supreme court denied review o our ruling. Thus, the in ormation Dr. Momah sought to bring be ore this court to support this appeal is not be ore us. We will there ore not review this claim on appeal.

We a irm the judgment and sentence.

/s/ Cox, J.

WE CONCUR:

/s/ Appelwick, C.J. /s/ Grosse, J.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

NATASHIA COLLIER, TESSA GEARE, et al, Plaintiffs, v. DENNIS MOMAH, CHARLES MOMAH, et al, Defendants.	No. 05-2-05525-1 KNT 60121-1 ORIGINAL

EXCERPTS FROM THE VERBATIM REPORT OF PROCEEDINGS

BEFORE THE HONORABLE DEBORAH D. FLECK

May 1, 3, and 9, 2007

King County Regional Justice Center

Kent, Washington

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2007 JUL 17 AM 10:44

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1 EXCERPT FROM PROCEEDINGS
2 May 1, 2007
3 (After sworn pretrial testimony of Darla Harper,
4 the following proceedings commenced:)
5 THE COURT: Counsel, I'm prepared to rule. I'm
6 going to go ahead and admit that only for pretrial
7 purposes. That's Exhibit 94.
8 I believe I've heard argument a number of times
9 on this general issue, and I've heard direct and cross
10 examination of Ms. Harper. I've had the opportunity to
11 assess her credibility.
12 And I do find by a preponderance of the evidence
13 that certain things occurred: That she was a patient of
14 what she thought was Dr. Charles Momah during the time
15 that she was pregnant with her son and through the
16 delivery of her son; that she had vaginal examinations
17 at almost every appointment; that the probe was used,
18 that it moved around a lot; she had a lot of concerns
19 about it; that she noted that the monitor was not
20 working; that he always explained that as waiting for a
21 part; he never wore gloves; there was no chaperone. In
22 retrospect, she feels that he attempted to stimulate her
23 in a sexual manner.
24 Conversation about things that led her to, in
25 retrospect, suspect that two different people were

1 involved: She had a number of pieces of testimony that
2 would demonstrate the things that she noticed.
3 She testified about her mother being present,
4 about the videotape issue, and still pictures, about
5 providing those pictures to Mr. Spivack. And through
6 the use of Exhibit 93, apparently corroborated by
7 Dr. Charles Momah's own testimony, she's able to
8 identify the doctor on the left as Charles and the
9 doctor on the right as Dennis, and that both of them
10 were present during the delivery of her child, as she
11 has some still pictures that she's able to use and
12 identify.
13 So I do find that the behaviors associated with
14 this claim, some of them are present, and can be
15 admitted for the purpose of showing under 404(b) a
16 common scheme or plan.
17 And with respect to the issue of lack of informed
18 consent and the twin issue, testimony would be
19 admissible to prove that element. And I have not heard
20 argument from counsel regarding the issue of medical
21 negligence or what constituted the medical negligence,
22 but I take it that it is multiple unnecessary procedures
23 from Dr. Olson.
24 And I do find that these claims are sufficiently
25 unusual that there is a need for this evidence and the

1 need for this type of corroboration. While other types
2 of corroboration you have argued could possibly have
3 been produced, I don't believe that restricts my ability
4 to consider the need for this particular evidence.
5 You've talked about handwriting, for example, looking at
6 the charts, and trying to use a handwriting expert.
7 Live testimony from a live witness with a
8 relatively similar -- high degree of similarity in the
9 claims, given the nature of this claim, I think creates
10 the need for the evidence. There is secrecy involved in
11 any kind of sex abuse offense.
12 And although this witness was not a child, she
13 was a pregnant woman, in stirrups, disrobed, a disrobed
14 state, in a prone position, and it's not a robed person
15 seated across the desk from one another, there is a type
16 of vulnerability that exists in this type of claim.
17 The issue of physical proof, as with abuse of
18 children, with penetration, sexual events, there often
19 is not physical proof that something inappropriate has
20 gone on. And I think, in this case, there's also the
21 lack of confidence in the ability of the jury to assess
22 the credibility of one woman who may be emotional; that
23 is, the plaintiff.
24 At least as to this witness, this witness
25 provides some corroboration, and this goes, as

1 DeVincentis and Luff did, to the issue of whether the
2 events occurred. There is some aspect of identity, as
3 there was in the case you cited to me, but it's a very
4 unusual type of identity issue. The focus here is on
5 whether the events that have been alleged occurred.
6 You mentioned other staff. Apparently, I think
7 it's Ms. Ramos is other staff, who may be able to
8 provide corroboration as well. So I am going to
9 authorize this witness to testify as a 404(b) witness,
10 because I do not find that it is more prejudicial than
11 probative. I do find that it is more probative than
12 prejudicial in this case.
13 So part of what I've just gone through addressed
14 that prejudice element. So I'd like to have the witness
15 come back in, have Ms. Allen bring the jury out, and
16 hope that we can finish with this witness today.
17 Before Mr. Bharti goes out, is there anything you
18 want to argue in terms of limitations on her testimony,
19 counsel? I'm not suggesting that there should be. I
20 just want to address it, without having the jury go out
21 again.
22 MR. MUNGIA: No. Obviously, in this little part
23 I wasn't objecting, because I didn't need to. Part of
24 the standard hearsay, there's a hearsay objection, but
25 nothing, a big chunk of -- no, I can't think of

1 anything.
2 THE COURT: All right.
3 Ms. Allen, would you please conduct the jury in?
4 Mr. Bharti, would you please bring the witness
5 back in?
6 (End of excerpt.)
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1 EXCERPT FROM PROCEEDINGS
2 May 3, 2007
3 (After sworn pretrial testimony of Jeanine
4 LaPoint, the following proceedings commenced:)
5 THE COURT: Okay. She gave the deposition five
6 years after his birth, and she's testified today, seven
7 years later.
8 As I indicated before our recess, based on my
9 observation of Ms. LaPoint and her demeanor, I find her
10 generally credible and quite credible. Just as with the
11 two witnesses yesterday, there was some headway made in
12 impeaching them on one or more issues perhaps of some
13 significance.
14 What you have raised about her statement in '05,
15 in her deposition about two years ago, July of '05, I
16 think, and her testimony today, in May of '07, about a
17 quite material issue, who delivered the baby, and she
18 has given different answers, I still come back to am I
19 persuaded by proof by a preponderance of the evidence
20 that based on her testimony that she was treated during
21 a period of time between '98 and 2002 by Charles Momah
22 and someone other than Charles Momah, who apparently
23 appeared like Charles Momah?
24 Her testimony doesn't distinguish between them
25 nearly as clearly as others do, they both did this, they

1 both did that, unlike others who have said one does
2 this, one does that. And you have made a record about
3 at least two, maybe three other points where that issue
4 arose.
5 Nevertheless, I am satisfied by a preponderance
6 of the evidence that treatment by more than Charles
7 Momah in his individual capacity occurred based on her
8 testimony. And so I will authorize her testimony, and I
9 will admit it for the purpose that we have been going
10 through all of this, one of the 404(b) factors, of
11 common scheme or plan, as with the other two witnesses.
12 It is relevant to prove the lack of informed
13 consent of being treated by another individual. And I
14 do find that her testimony is more probative than
15 prejudicial essentially for the similar reasons I
16 indicated for Ms. Harper, including the need for the
17 evidence, some secrecy surrounding this.
18 Although she indicated her husband was present,
19 at least her then husband was present for at least some
20 of these, the absence of physical proof of the events,
21 and because it's such an unusual circumstance, the
22 ability of a jury to assess Ms. McFarlane's credibility,
23 saying that there were two individuals, they happened to
24 be twins, she believes, and she never gave permission.
25 I know that's not the answer you wanted to hear,

1 Mr. Mungia, but it is the decision I am making on this
2 witness. And you're standing, so I know you want to say
3 something about what I have just said.
4 And as soon as you do that, I do want to move on
5 to some other issues that we can take care of, in
6 particular, whether this will be the last witness, the
7 last such witness, because I think we are virtually out
8 of time. But let me hear from you, as you are standing.
9 MR. MUNGIA: Yes, Your Honor. I understand her
10 testimony is coming in. What I wanted is some
11 pre-testimony rulings that none of this stuff about, you
12 know, there's malpractice of my twin, he caused my
13 twin's death, any kind of medical opinions.
14 THE COURT: Right.
15 MR. MUNGIA: Those don't come in.
16 THE COURT: They do not.
17 Understood?
18 MR. BHARTI: That is very obvious, Your Honor.
19 (End of excerpt.)
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1 EXCERPT FROM PROCEEDINGS
2 May 9, 2007
3 (After sworn pretrial testimony of Richard Heintz
4 and argument of counsel, the following commenced:)
5 THE COURT: The purpose is the same, as it has
6 been for the other witnesses, to demonstrate a common
7 scheme or plan of substituting one doctor for another.
8 It is relevant to the informed consent cause of action.
9 I can find from listening to this witness that on
10 a more probable than not basis that, under his
11 observation, Dr. Dennis Momah was substituting a handful
12 of times for Dr. Charles Momah. And in looking at
13 balancing the probative value against prejudice, the
14 evidence is probative, because it directly addresses the
15 substitution of one doctor to work for another.
16 It is probative because it at least covers, in
17 light of Dennis Momah's testimony, as I best recall it
18 from yesterday, some period of time when Dennis,
19 according to him, visited Washington.
20 In terms of prejudice, as Mr. Bharti has just
21 indicated, it's not as prejudicial as the patients'
22 testimony, because it doesn't address the kinds of
23 activities that occurred during the actual examinations.
24 A limiting instruction could be used to address
25 the prejudicial effect, and the issue at this point

1 would be cumulative. I am going to allow some
2 additional testimony in rebuttal, but how much we
3 actually get to I don't know.
4 I've indicated, based on what I allowed in of
5 Charles's deposition, that you need to call Collier.
6 You want to call Tucker, and you want to call this
7 witness. And so we need to have a hearing on Collier.
8 I don't know whether we can finish hearings on Tucker
9 and Collier.
10 MR. BHARTI: Your Honor, may I just --
11 THE COURT: Please don't interrupt me.
12 MR. BHARTI: Sorry.
13 THE COURT: So I'm going to address the
14 cumulative issue as we get through the morning and into
15 the early afternoon.
16 MR. BHARTI: Thank you, Your Honor.
17 THE COURT: So, as of now, I'm not finding that
18 additional testimony in rebuttal is cumulative, and I do
19 find the elements of 404(b) to have been met. So this
20 testimony would be admissible, if we can get to it.
21 MR. BHARTI: Thank you, Your Honor.
22 (End of excerpt.)
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1 EXCERPT FROM PROCEEDINGS
2 May 9, 2007
3 (During Natashia Collier's sworn pretrial
4 testimony, the following proceedings commenced:)
5 DIRECT EXAMINATION
6 BY MR. BHARTI: (continuing)
7 Q. Just tell the Court what nightmares you were
8 having and what happened when you were under, if you
9 know.
10 A. Well, I don't know exactly what happened when I
11 was under, but I went into the room and the
12 anesthesiologist put me under, and I woke up obviously
13 in a lot of pain, but very unusual pain, I thought,
14 relating to the surgery.
15 And I just shortly thereafter -- I mean, at
16 first, when you wake up, I wasn't really feeling like
17 myself, but when I started feeling more like myself, I
18 started feeling as if there was something that had gone
19 wrong related to the surgery.
20 And I started having nightmares of Charles coming
21 up toward me with his penis out, and I was feeling, when
22 I was around him, that feeling that you sometimes get if
23 you have sex with somebody you really shouldn't have had
24 sex with, or, you know, a relationship that had gone a
25 wrong way.

1 And at the time I thought, well, maybe it's just
2 because I had a surgery. I had never had a surgery
3 before, and it was a very personal invasion. But it
4 never went away.
5 And I had talked to my friend who was dating him
6 at the time, and she told me that if I felt that way
7 about him that I should probably, you know, give it some
8 credence and not try and dismiss it right away. But I
9 don't really know exactly what happened when I was
10 under.
11 THE COURT: Counsel, the point of this testimony
12 is?
13 MR. BHARTI: Your Honor, the only part I thought
14 was the nightmares my client was having when she went
15 through this, and having nightmares.
16 And I believe if she said I don't remember
17 anything about nightmares, the jury's going to think
18 this woman is a nut. But Momah's other victims were,
19 you know, like Ms. Collier, they went through the same
20 experience.
21 So that is all the connection I see. But there
22 was some deposition testimony about that. She had a
23 feeling that this guy violated her while she was under.
24 THE COURT: All right. Is there --
25 MR. BHARTI: But I don't need that testimony,

1 Your Honor, that part. I need only nightmares.
2 THE COURT: Is there an objection to nightmares?
3 MR. MUNGIA: Well, there's an objection to
4 nightmares, Your Honor. It's irrelevant and
5 speculation. And I don't want to have to ask for
6 objections about this. So I make an objection.
7 THE COURT: I'm not going to allow nightmares in.
8 You put on Dr. Levy and you take his testimony as it
9 comes. You put on your client, of course, and you take
10 her testimony as it comes.
11 And we're getting way too far afield, in my view,
12 to put in nightmares, especially because it's a dream
13 state, and the witness candidly doesn't know what may or
14 may not have happened. So she speculates it may be
15 because she had surgery, and she never had surgery
16 before. So I'm not going to allow that.
17 Is there anything else you want --
18 MR. BHARTI: No, Your Honor.
19 THE COURT: -- from this witness?
20 MR. BHARTI: Thank you.
21 THE COURT: Anything else you want from this
22 witness?
23 MR. MUNGIA: No, Your Honor.
24 THE COURT: All right. You may step down and
25 step outside the courtroom.

1 (Witness exits.)
2 MR. BHARTI: We'll put this exhibit back.
3 THE COURT: It's now eight minutes after. We've
4 got the jury coming at 1:00. What are your plans in
5 terms of testimony this afternoon, Mr. Bharti? You want
6 Ms. Ramos at 1:00, and then what?
7 MR. BHARTI: We can put, Your Honor, Heintz and
8 Collier, and then I have Tucker, went back to fetch his
9 wife, and if he can, you know, get -- like, at 4:30, I
10 asked him to come, but around 3:15. And I have
11 Ms. Bartels sitting here. This is third, fourth. But I
12 don't think there's any possibility that we can even get
13 to that, so I said I would send them away.
14 THE COURT: You said one or the other, Ms. Ramos
15 or Ms. Bartels. If I allow Ms. Ramos, I'm not going
16 have Ms. Bartels.
17 MR. BHARTI: Okay. Agreed.
18 THE COURT: I need to hear argument on Ms. Ramos
19 and Ms. Collier, and then we're going to take a recess.
20 I'm going to ask the lower bench if you can stick with
21 this a little bit longer.
22 (Affirmative responses.)
23 THE COURT: Let's start with Collier, argument.
24 MR. MUNGIA: Your Honor, she has one trip, one
25 treatment that she's basing this opinion on, so it's

1 unlike others where they say multiple times. Just one
2 now. And this one is a very brief statement, and so the
3 doctor's acting kind of weird, he's acting weird after
4 he broke up with a woman. And, again, I think the
5 probative value of that outweighs the prejudicial
6 effect. I mean --
7 THE COURT: The other way around.
8 MR. MUNGIA: The other way around, both of you
9 are telling me, and the prejudicial effect -- I am
10 getting tired. I am running on little sleep.
11 THE COURT: I understand.
12 MR. MUNGIA: Outweighs any probative value that
13 this witness can bring in, Your Honor. It seems like
14 we're getting farther and farther afield. And, plus,
15 it's cumulative, I think, for those two bases.
16 THE COURT: I'm going to allow Ms. Collier to
17 testify very briefly. She has a good foundation and a
18 relationship that's both personal and as a medical
19 professional.
20 The purpose is the common scheme or plan, that it
21 goes directly to rebut Dennis Momah's testimony that he
22 never, ever stepped behind the counter. I do find on a
23 more probable than not basis that based on her testimony
24 that there was someone else serving on that one incident
25 her in Charles Momah's place.

1 And this is, in my view, less inflammatory,
2 because it simply is an identification issue. It's not
3 getting into unnecessary treatment, although you may
4 want to be heard since she did testify to repeatedly
5 asking her to come back, and wanting a variety of
6 treatments, which she kept trying to push away.
7 I guess what I was thinking was that there wasn't
8 a lot of prejudicial specificity about treatment as
9 there had been with other witnesses.
10 Mr. Bharti, are you --
11 MR. BHARTI: Your Honor, I'm trying to stay away
12 from the -- it's too noisy, the computer. I can't hear,
13 standing there.
14 THE COURT: Are you wishing to have her testify
15 similarly to what she testified in this hearing?
16 MR. BHARTI: Yes.
17 THE COURT: As to him calling her at home or
18 having his office call her at home to come in for repeat
19 visits and so on?
20 MR. BHARTI: Your Honor, whatever my direct was
21 prior to the second part I wanted, too. But it's up to,
22 you know, the time frame. So whatever the Court would
23 permit me.
24 THE COURT: I was addressing the issue about how
25 prejudicial her testimony is compared to its probative

1 value. Calls at home and repeated invites to come in
2 and have various kinds of treatment is probative in
3 Ms. McFarlane's case. And I found her testimony to be
4 rather matter of fact, not tearful, as some of the other
5 witnesses have been.
6 And, as I said earlier, I do believe it is
7 offered to rebut Dennis Momah's testimony and other
8 evidence that has been admitted on the issue of
9 procedures and unnecessary procedures.
10 There was specific testimony by Ms. Collier that
11 she had surgery in the clinic, in the Momah clinic, not
12 the hospital, and later went to the hospital.
13 Is there an objection to that, Mr. Mungia?
14 MR. MUNGIA: Yes. Before I forget, yes, there
15 is, because that's not part of their claim, because it
16 was done inside the clinic, and it doesn't relate to any
17 of their causes of action.
18 And before I forget, I was also going to ask this
19 Court, get a ruling now she can't testify to staff
20 calling her. I mean, that's hearsay. She can certainly
21 testify that Dr. Momah called her.
22 MR. BHARTI: Your Honor, may I have a moment?
23 THE COURT: Yes, Mr. Bharti.
24 MR. BHARTI: Your Honor, the testimony was
25 identical, three exams, Amy McFarlane procedure,

1 surgical procedure went through, and one surgery, namely
2 D&C, hysteroscopy, she went through the same, and
3 happened in the clinic, what happened to Amy exactly.
4 And the calling by the staff, it's not for the
5 truth of the matter. But they brought in their experts
6 showing those documents, and the doctor was trying to
7 fill in as if he was a mind reader that the client came
8 in. He was saying patient asked to come in. He was
9 trying to interpret. And then I think Amy was called,
10 and staff was calling people.
11 And you heard from Ms. Maitland, also, that she
12 called patients, and she heard other staff call. So
13 that is a pattern of practice here of making calls,
14 trying to get people in when they don't even need any
15 procedure or medical treatment, just to bill, and
16 fraudulent billing, as well as unnecessary procedures.
17 Thank you.
18 THE COURT: Do you have a claim for fraudulent
19 billing?
20 MR. BHARTI: Your Honor, we're claiming that he
21 was -- Consumer Protection Act. We have in there that
22 this fellow was charging all kind of money every week,
23 doing ultrasound exam. That is not debatable. He was
24 charging $700, every woman, every week, which normal
25 doctors don't do for years, and this is a total fraud.

1 Our expert testified it is fraud. I heard him say
2 it was fraud, and this is the Consumer Protection Act
3 issue.
4 THE COURT: Who said it was fraud?
5 MR. BHARTI: Dr. Olson.
6 THE COURT: And do you have bills in evidence?
7 MR. BHARTI: Yes, Your Honor. They didn't
8 provide to their expert, but he would have.
9 THE COURT: What about the bills that have not
10 been admitted?
11 MS. STARCEWSKI: They have been admitted.
12 THE COURT: Which exhibit number?
13 MS. STARCEWSKI: Thirty-one.
14 MR. BHARTI: Your Honor, the expert was asked
15 about one, $700, cross-examination on one bill, was at
16 least discussed in the testimony of Dr. Welch.
17 MR. MUNGIA: Your Honor, can I just be very
18 specific and focused? My objection is based on hearsay,
19 and I'm addressing the hearsay objection.
20 THE COURT: And the response was it's not offered
21 for the truth, but for the fact that the contact
22 occurred.
23 MR. BHARTI: Yes, Your Honor.
24 MR. MUNGIA: That's the truth. You can't say
25 it's not being offered for the truth when you're saying,

1 but they're calling to tell me to keep on coming in
2 there. I mean, either he's saying it's all true or not.
3 You can't get around the hearsay exception by simply
4 saying, oh, I'm not offering it for the truth.
5 You got to think, well, then why are you doing
6 this? I mean, of course you're offering it for the
7 truth. You're offering it for the truth, and I was
8 asked to come in there, I was being told to come back
9 there. Of course it's for the truth.
10 MR. BHARTI: Your Honor, this is for the pattern
11 here.
12 THE COURT: It's for what?
13 MR. BHARTI: Pattern of practice, that the
14 patient didn't need any of these.
15 THE COURT: That's not the issue. The issue is
16 whether it's hearsay or not, and --
17 MR. BHARTI: And we have a claim of civil
18 conspiracy as well, Your Honor.
19 THE COURT: Conspiracy with whom?
20 MR. BHARTI: This -- you know, Dennis and Charles
21 conspired. Charles permitted Dennis to come in and do
22 these exams on them.
23 And as an offer of proof we have Jenni Ramos, who
24 knew Dennis as Dennis, and saw him, assisted him in
25 surgeries, as well as pelvic exams and breast exams and

1 Pap smears.
2 THE COURT: I would allow her to testify to the
3 fact of receiving calls from the office without
4 identifying that there was a request that she come in
5 when it's a staff person. She received a call, and if
6 they draw an inference, they draw an inference.
7 But just the fact of receiving a call could be to
8 report things. It could be to request her to come in, I
9 guess. And she has testified that she was glad that she
10 was moving, to changing her phone number. She can
11 testify to that.
12 She can testify to Dr. Momah occasionally calling
13 her, and she can testify to the frequency with which she
14 received phone calls, but not what their request was.
15 MR. MUNGIA: May I just add something to the
16 record? I want to make it clear on the record that,
17 also, if that's the basis of the ruling, then it's a
18 relevancy, because getting phone calls just leads to
19 speculation. And so it's not relevant.
20 THE COURT: I think it leads to an inference,
21 taking all of the testimony of this and other witnesses
22 together. And I hear your point that it's speculative,
23 but I believe that it also leads to an inference.
24 Ms. Ramos. I'm going to stand on the record that
25 I have analyzed on Ms. Collier.

1 So, Ms. Ramos, is there an argument that you wish
2 to make on her? Have you made it already, Mr. Bharti?
3 MR. BHARTI: You know, Your Honor, Ms. Ramos, as
4 I indicated, she's the only witness who knew Dennis as
5 Dennis Momah. She didn't speculate or see similarities.
6 She knew him.
7 And Dennis Momah was covering two days a week,
8 and sometimes even more when Charles wouldn't be there,
9 and she would know that Charles is not going to be
10 there, and Dennis is going to cover. She --
11 THE COURT: Let me hear from Mr. Mungia.
12 MR. MUNGIA: Thank you, Your Honor.
13 As I said before, I think it's still a 404(b)
14 analysis. She doesn't have any direct testimony. It
15 just goes to this common plan or scheme of having Dennis
16 Momah substitute in for Charles. So we start there.
17 And they always have the burden of proof. I don't
18 think this Court, in light of all the evidence, now can
19 say more likely than not what Ms. Ramos is saying
20 actually happened. Her scheme doesn't fit anybody
21 else's as common plan and scheme. That's the test,
22 common plan or scheme.
23 She has Dr. Dennis Momah going in there twice a
24 week, wearing a lab coat with his name on it, and not
25 hiding that at all. I mean, this does not fit this

1 so-called common plan or scheme that the plaintiffs have
2 been trying to say that Dennis Momah would impersonate
3 without anybody knowing. And, you know --
4 THE COURT: Without patients knowing, I think, is
5 what the assertion is.
6 MR. MUNGIA: I think -- I haven't heard anybody
7 saying the staff would know, either, for this
8 impersonation purpose. But maybe I missed something.
9 But I haven't heard any staff member saying, oh,
10 yeah, we knew that it was going on, this impersonation.
11 So I don't think it falls within this common plan or
12 scheme.
13 First of all, it doesn't come within that,
14 because it's not the same plan or scheme; it's something
15 different. And, two, I don't think you can evaluate her
16 credibility simply by the cold deposition. And I think,
17 in light of everything else, I just think it's more
18 likely than not what she's saying did not happen.
19 And it's from my memory, because I did not have
20 the file with me, but I will stand by my recollection
21 this was a witness that was not identified yesterday
22 when we were trying to get that transcript.
23 MR. BHARTI: Your Honor?
24 THE COURT: Yes.
25 MR. BHARTI: Your Honor, Momah's practice was

1 nobody stayed there for a while. There is no witness
2 other than her who worked this long, you know. And even
3 Momah was trying to deceive her, too. Never Dennis
4 Momah introduced himself, never spoke to her, never
5 greeted her, never said anything. And he came through
6 the back door, Dennis Momah, when he entered first time.
7 Charles came through the front door.
8 And so she understood that Dennis is seeing
9 patients. And she also testifies the expectation of the
10 patients was to see Charles. And she also says that one
11 patient complained to her when last Dennis examined her;
12 the pelvic ultrasound was very rough. And this is
13 consistent with what you just heard from this witness;
14 when Dennis was, it was rough.
15 And so he was trying to fool this woman, too.
16 But since she was there for a whole year, and she was
17 new. So the plan was -- and their defense is
18 fabrication. You heard Charles Momah talk on and on
19 that, Dennis Momah, on the stand, trying to intimidate
20 the counsel as well, that, as if this is all kind of
21 fabrication.
22 THE COURT: All right. I've heard enough.
23 The purpose here is, again, for common scheme or
24 plan, having one doctor fill in for another, and it's
25 relevant to the issue, as I have said with other

1 witnesses, to the lack of informed consent claim.
2 Based on my review of the declaration, as well as
3 my review of the deposition, I can and do find on a more
4 probable than not basis that during this witness's
5 tenure there Dennis filled in for Charles at times.
6 And under State v. Kilgore, at 147 Wn.2d. 288,
7 where an offer of proof by an attorney was found to be
8 adequate, in light of all of the testimony that I have
9 now heard, as well as a review of these documents, I can
10 make, I believe, that finding on a more probable than
11 not basis. And this witness is unique in being a staff
12 person as opposed to being a patient. I believe that
13 makes her rebuttal evidence more necessary.
14 I don't think it is particularly inflammatory,
15 with the exception of the references on Pages 43 and 44
16 of the deposition, where there's a reference to him
17 squeezing her right breast, and leaning over and trying
18 to kiss her, et cetera. Her reason for leaving the
19 clinic associated with those statements is unnecessary
20 to this purpose, and it will not come into evidence.
21 (End of excerpt.)
22
23
24
25

1 C E R T I F I C A T E

2

3 STATE OF WASHINGTON)
)ss.
4 COUNTY OF KING)

5

6 I, Bridget O'Donnell, Official Court Reporter in
7 this Court, do hereby certify that I was present and
8 reported in Stenotypy Excerpts from the Verbatim Report
9 of Proceedings in the matter of COLLIER ET AL V. MOMAH
10 ET AL, King County Superior Court Cause No. 05-2-05525-1
11 KNT, before the Honorable Deborah D. Fleck, Superior
12 Court Judge, in the city of Kent, state of Washington,
13 on May 1, 3, and 9, 2007;
14 That I have transcribed my Stenotype notes into
15 typewritten form, and that the attached 26 pages
16 represent a true and accurate transcription of said
17 notes, and that I am certified to report Superior Court
18 Proceedings in the State of Washington.
19 Wherefore, I have affixed my signature this 10th
20 day of July, 2007.

21

22

23

24 Bridget O'Donnell
BRIDGET O'DONNELL, RPR, CRR
25 Official Court Reporter

FILED
KING COUNTY WASHINGTON

MAY 30 2006

SUPERIOR COURT CLERK
RAMONA HARKINS
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY	
NATASHIA COLLIER et al., Plaintiff vs. DENNIS MOMAH, et al, Defendant	NO. 05-2-05525-1 KNT ORDER ON CIVIL MOTION GRANTING DR. DENNIS MOMAH'S MOTION TO DISMISS ON STATUTE OF LIMITATION GROUNDS CLERK'S ACTION REQUIRED

The above-entitled Court, having heard a motion on defendant, Dr. Dennis Momah's motion to dismiss. The Court having considered the motion to dismiss, along with the supporting documents, including the declaration of Dr. Dennis Momah, and the 2004 letter of dismissal from the Department of Health.

IT IS HEREBY ORDERED that the defendant's Dennis Momah's motion is granted and the above entitled ~~cause~~ plaintiffs' claims are as to Dennis Momah is hereby dismissed. Defendant, Dr. Dennis Momah, shall continue with his case on his counterclaims. The Court finds that the tolling provision of RCW 4.16.350 does not apply.

3

DONE IN OPEN COURT THIS DATE: May 26, 2006

JUDGE

Presented d by: A. O'Farrin WSBA# 19846
Attorney for Dr. Dennis Momah

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FILED
IN OPEN COURT
JUN 17 2005
Pierce County Clerk
By _____ Deputy

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

PERLA SALDIVAR, Plaintiff(s) , vs. DENNIS MOMAH, Defendant(s) .	Cause No: 04-2-06677-3 **ORDER** re: Lay Witnesses

Plaintiffs have until July 8, 2005 to provide a detailed disclosure of what the lay witnesses they have disclosed in this case will testify about in this matter. Of those witnesses disclosed as having knowledge of impersonation, only those who have experience at the Puyallup Clinic of US Healthworks during similar time period will be deemed potentially leading to admissible evidence. Defendants may renew their motion to strike after July 8, 2005.

DATED this 17 day of ~~June~~ 2005

Judge KATHERINE M. STOLZ

~~JEFFREY COWAN~~ Marja Starczewski
Attorney for Plaintiff(s)
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~~John Cornelius Versnel~~ Vanessa Vanderburg
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