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No. 67479-0

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

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

Appellants/Plaintiffs

v.

MICHAEL EMERIC MOCKOVAK,

Respondent/Defendant

BRIEF OF RESPONDENT

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I. INTRODUCTION AND SUMMARY

Plaintiffs ask the Court to ignore settled Washington law on the ground that Defendant's conduct was so awful that he does not deserve the same protections that the law affords to everyone else. Indeed, in the Superior Court, Plaintiffs were explicit about their plea: "The Kings do not believe, and they do not say this lightly, that the Court should grant to Defendant any accommodations, presumption, help, bias, or assistance that is not compelled by a strict due process standard." CP 89. It is a familiar refrain, and a dangerous one. It asks the Court to disregard settled legal requirements – when the losing party must file a notice of appeal, what a plaintiff must allege to state a valid tort claim – because, the Plaintiffs insist, this particular Defendant does not deserve the law's protection. It is, at its core, an appeal to lawlessness. But there is no "really awful Defendant" exception to the Rules of Appellate Procedure or the substantive requirements of Washington's law of torts. The Superior Court should be commended for upholding the law of Washington, even in the face of Plaintiffs' blatant attempts to subvert it.

Defective Appeal. On June 8, 2011, the Superior Court entered a final judgment dismissing Plaintiffs' Complaint. Now that Plaintiffs are confronted with the inescapable fact that they filed their notice of appeal of the June 8 Final Judgment fifty-one (51) days after their Complaint was

dismissed with prejudice, they seek to rewrite what transpired below. Under settled law, the June 8 Final Judgment was a dismissal with prejudice. Plaintiffs had 10 days within which to file a motion to reconsider, but they did not. They instead filed a CR 15 motion to amend their complaint. In this Court, Plaintiffs urge that their CR 15 motion really was, in substance, a timely motion to reconsider, and that the July 13, 2011 Order “could be considered an Order denying reconsideration of the June 8 order.” Appellants’ Br. at 14. In a footnote, Plaintiffs “freely admit that they did not style their motion as one for reconsideration” *Id.* at 14, n.7. Thus, Plaintiffs hope that this Court might think that Plaintiffs made a mere drafting error in the title of the brief, a language gaffe this Court should overlook. It was no such thing: Plaintiffs made a conscious decision not to seek reconsideration of the June 8 Final Judgment in the Superior Court, and they expressly disavowed that they were seeking reconsideration: “Plaintiffs do not seek reconsideration; they seek leave to amend [the Complaint].” CP 236.

Similarly unavailing is Plaintiffs’ attempt to treat the July 13 Order as “bringing up” the June 8 Final Judgment. On July 13, 2011, the Superior Court asked the parties to brief whether the Superior Court had jurisdiction to entertain Plaintiffs’ CR 15 motion. On August 9, 2011, the Superior Court concluded that it lacked jurisdiction to consider the CR 15

motion. Plaintiffs did not appeal the August 9 Order. Accordingly, they have nothing to appeal from the July 13 Order. Plaintiffs likewise have no basis for claiming excusable neglect. Washington does not recognize Plaintiffs' strategic choices as a proper basis for excusing defective and untimely appeals.

Defective Complaint. Plaintiffs continue to portray themselves as if, standing in the shoes of the King County Prosecutor, they simply are seeking the same conviction of Defendant for the same thwarted conduct. But of course they are not. There is a fundamental distinction between conduct that the State can punish through its criminal statutes and conduct that constitutes a private tort for damages. Plaintiffs must allege the essential elements of the torts they seek to assert. They failed to do so, and the Superior Court properly dismissed their claims with prejudice. Plaintiffs accused Defendant of "raising technical objections" (CP 89) and urged the Superior Court to disregard the actual requirements of Washington law and instead to have their case "governed by the hoary dictum that '[f]or every wrong, the law will provide a remedy.'" *Id.* But what Plaintiffs really ask is that the Court ignore the Washington Supreme Court's controlling holdings in *Reid v. Pierce County*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998) and its progeny. Those cases firmly establish that even when behavior is directed toward plaintiffs and the conduct is

outrageous, Washington law requires that plaintiffs be present when a defendant's harmful conduct occurs. *See Reid*, 136 Wn.2d at 204 (Court rejected emotional distress claims by relatives of deceased persons whose autopsy photographs were displayed for the perverse amusement of others because the relatives learned about the conduct only after it occurred). Indeed, even when faced with the most heinous facts, the Washington Supreme Court has repeatedly rejected efforts to expand the standalone tort of infliction of emotional distress. *E.g., Lund v. Caple*, 100 Wn.2d 739, 742, 675 P.2d 226 (1984) (Court rejected plaintiff husband's emotional distress claim, even though husband was the direct object of his pastor's harmful conduct in having sexual relations with the plaintiff's wife, because the husband was not present when the conduct occurred); *Schurk v. Christensen*, 80 Wn.2d 652, 656-57, 497 P.2d 937 (1972) (Court rejected an anguished mother's claim of infliction of emotional distress against her daughter's molester because she was not present when the abuse occurred); *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 57, 176 P.3d 497 (2008) (Court rejected a father's infliction of emotional distress claim regarding his daughter's drowning because the father had not been present when his daughter drowned even though he was present hours later when his dead daughter was pulled from the lake). So, too, Plaintiffs claims here must fail.

Similarly, Plaintiffs' suit seeks illegitimately to hold Defendant liable in tort for properly exercising his constitutional right to seek bail and to ask for a jury trial. Plaintiffs claim that "[b]ecause Mockovak was able to post \$2 million bail, the Kings now live in fear that he will continue his efforts to kill them" (CP 5, ¶ 3.17), and that they will be forced to "re-live" his criminal plan through the criminal jury trial process (CP 4-5, ¶¶3.13-3.21). The Superior Court released Defendant on bail, and there is no contention that Defendant violated the terms of bail. Infliction of emotional distress claims may not be based on a defendant's lawful exercise of constitutional rights. *See Grimsby v. Samson*, 85 Wn.2d 52, 59-60, 530 P.2d 291 (1975) (adopting the limitations on the tort of outrage that are contained in comment g to the Restatement (Second) of Torts § 46, which provides: "The actor is never liable where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.").

Plaintiffs' alleged emotional injuries also were not proximately caused by Defendant but, as alleged in the Complaint, are indirect harms stemming from his arrest, his release on bail, and other aspects of the criminal jury trial process. CP 4-6, ¶¶ 3.13-3.22. Those alleged injuries were not, as a matter of law, proximately caused by Defendant, but were

occasioned by the criminal judicial process itself and therefore are not actionable.

Finally, Plaintiffs also fail to state a tort claim under the criminal statutes for solicitation to commit murder and attempted murder. Plaintiffs cannot cite a single case allowing such a claim. Instead, Plaintiffs seek to transform a case that says a criminal statute can supply a standard of care for an established tort into purported authority for the proposition that the tort itself can be created by the criminal statute. *See* Appellants' Br. at 31.

These are fatal legal defects and they cannot be brushed aside – not even when the Defendant has been convicted of serious crimes.

II. STATEMENT OF THE CASE

A. Plaintiffs' Complaint.

The Complaint in this case asserts two causes of action. The first is entitled "Solicitation of First-Degree Murder," and claims that violation of a criminal statute constitutes a standalone civil tort (CP 7-8, ¶¶ 4.1-4.3). The second is entitled "Outrage/Negligent Infliction of Emotional Distress," and alleges a common law claim for the same alleged emotional harm (CP 8, ¶¶ 5.1-5.3). The Complaint specifically alleges that Plaintiffs first learned of Defendant's criminal conduct *after* Defendant was

arrested, and that Plaintiffs knew nothing about and were not present for any of Defendant's doomed criminal plan when it unfolded. CP 4, ¶ 3.13. On its face, the Complaint thus alleges that Plaintiffs were completely unaffected by Defendant's doomed criminal plan when it occurred, and that all of Plaintiffs' alleged emotional injuries occurred *only* after Defendant was in custody, when the Superior Court released Defendant on bail, and during the criminal judicial process. CP 4-6, ¶¶ 3.13-3.22 (alleging emotional harm from Defendant's release on bail; from being forced to re-live events through the criminal process; and from worrying about what Defendant might plan once incarcerated). For example, in paragraph 3.17, Plaintiffs claim that "[b]ecause Mockovak was able to post \$2 million bail, the Kings now live in fear that he will continue his efforts to kill them." CP 5, ¶ 3.17. The Complaint does not allege that Defendant violated the terms of his criminal release or encountered any Plaintiff while on criminal release; nor is there any basis for such an allegation. The Complaint also does not allege that any Plaintiff had objective symptoms of illness for their alleged distress from Defendant's release on bail. CP 5-6, ¶¶ 3.21-22.

B. The June 8, 2011 Final Judgment.

Defendant asked the Superior Court to dismiss Plaintiffs' infliction of emotional distress lawsuit because the suit was legally defective in five

distinct respects: (1) Washington law does not recognize a separate civil cause of action for violation of the criminal statute of solicitation of murder; (2) Plaintiffs did not state a claim for intentional or negligent infliction of emotional distress because Plaintiffs were not present when Defendant's conduct occurred; (3) Plaintiffs allege harm from Defendant's exercise of his constitutional right to bail and to a jury trial, which cannot form the basis of civil tort liability; (4) Plaintiffs allege only remote and indirect injuries not proximately caused by Defendant; and (5) solely as to the negligent infliction of emotional distress claim, Plaintiffs did not allege that any of them was under the care of a physician and displayed objective symptoms or illness. CP 72-85.

In opposing Defendant's motion to dismiss, Plaintiffs acknowledged the Complaint's fifth defect noted above, by stating:

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

CP 96. Plaintiffs did not file a separate motion to amend, and they did not submit a proposed order granting leave to amend.

On June 8, 2011, Superior Court Judge Richard Eadie dismissed Plaintiffs' Complaint. CP 175-76 (hereafter "June 8 Final Judgment"). Plaintiffs did not file a motion for reconsideration.

C. Plaintiffs' June 20, 2011 CR 15 Motion.

On June 20, 2011, twelve days after entry of the June 8 Final Judgment, Plaintiffs moved to amend under CR 15 to add two claims: (1) intentional injury to others under Restatement (Second) of Torts § 870; and (2) unjust enrichment. In their CR 15 motion, Plaintiffs told the Superior Court that "[b]y requesting leave to amend to add new causes of action, however, Plaintiffs do not waive their right to appeal the Court's dismissal of their original complaint under CR 12(b)(6)." CP 178, n.2.

Defendant opposed Plaintiffs' CR 15 motion, contending that Plaintiffs were attempting to avoid the rigorous standards for granting a CR 59 motion by filing a CR 15 motion. CP 219-20. Plaintiffs replied by telling the Superior Court that "Plaintiffs do not seek reconsideration; they seek leave to amend [the Complaint]." CP 236.

D. The July 13, 2011 Order.

In response to Plaintiffs' June 20, 2011 CR 15 motion, the Superior Court entered an order on July 13, 2011 ("July 13 Order"). Judge Eadie's July 13 Order distinguished between Plaintiffs' two attempts to amend their Complaint: (i) Plaintiffs' contingent request for

leave to amend embedded in their opposition brief to Defendant's CR 12(b)(6) motion to dismiss; and (ii) Plaintiffs' June 20, 2011 CR 15 motion, filed 12 days after Judge Eadie had dismissed the case.

With respect to Plaintiffs' contingent request in the event the court found the negligent infliction claim "is insufficiently pled," Judge Eadie explained:

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

CP 298.

Turning next to Plaintiffs' June 20, 2011 CR 15 motion, Judge Eadie observed:

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

CP 299. Judge Eadie then asked the parties to brief the following question: "Does this Court have jurisdiction to grant a motion to amend to

add new claims where the entire case has been dismissed, and there are no motions pending to reconsider or modify the Order of dismissal?” *Id.*

E. The July 29, 2011 Notice of Appeal.

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

F. The August 9, 2011 Order.

On August 9, 2011, after receiving the parties’ briefs concerning the Superior Court’s jurisdiction, Judge Eadie ruled that the Superior Court had no jurisdiction to entertain Plaintiffs’ CR 15 motion, and denied it. (“August 9 Order”) CP 296. In so ruling, Judge Eadie stated he did so “based substantially on the authorities cited in Defendant’s Memorandum dated August 4, 2011.” CP 296. Defendant’s August 4 Memorandum explained that the Superior Court lacked jurisdiction because Plaintiffs had not filed a CR 59 motion that would have extended the Superior Court’s jurisdiction. CP 290-95. Plaintiffs did not file a notice of appeal of Judge Eadie’s August 9 Order denying Plaintiffs’ CR 15 motion.

G. Proceedings On Appeal.

On September 12, 2011, this Court’s Administrator sent a letter to the parties stating that “it appears the notice of appeal was not timely

filed,” directing appellants to file a motion to extend the time to file a notice of appeal, and allowing respondent 10 days from the date of service to file a response. Appellants’ Appendix, Tab 1. The Court Administrator set a back-up date to hear a motion to dismiss the appeal for lack of jurisdiction for 10:30 a.m. on Friday, October 14, 2011. When Plaintiffs failed to file a timely motion, Defendant filed a motion to dismiss the appeal as untimely on September 29, 2011. *Id.* at Tab 3. Thereafter, Plaintiffs filed their own motion. *Id.* at Tab 2. When both motions were submitted, this Court’s Commissioner elected to refer the question of whether this appeal is untimely to the merits panel. *Id.* at Tab 8.

III. ARGUMENT

A. Standard of Review.

The Court’s decision regarding whether the appeal is procedurally defective is not subject to a standard of review, as the decision lies with this Court in the first instance.

This Court reviews *de novo* the dismissal of a Complaint under CR 12(b)(6). In doing so, the Court examines the Complaint to determine whether the facts alleged present a cognizable theory of legal recovery. If they do not, then the Court should affirm the Superior Court’s dismissal. CR 12(b)(6); *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190

(1978). If the Complaint does not allege essential elements of a civil tort claim, the Court should affirm. *Havsy v. Flynn*, 88 Wn. App. 514, 519, 945 P.2d 221 (1997) (dismissing tort claim based on plaintiff's failure to allege essential elements of claim). If the Complaint specifically alleges facts that legally preclude a civil tort claim, the Court also should affirm. *Yeakey v. Hearst Communications, Inc.*, 156 Wn. App. 787, 790-93, 234 P.3d 332 (2010) (dismissing tort claim because "plaintiff's allegations show on the face of the complaint an insuperable bar to relief") (citation omitted).

B. Plaintiffs' Appeal of the June 8 Final Judgment Is Untimely and Should Be Dismissed.

RAP 5.2(a) required Plaintiffs to file their Notice of Appeal within "30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed." RAP 5.2(a). Plaintiffs filed their Notice of Appeal of the Superior Court's June 8 Final Judgment on July 29, 2011 – fifty-one (51) days after entry of Final Judgment. Under the explicit requirements of RAP 5.2(a), Plaintiffs' appeal of the June 8 Final Judgment is untimely, and their appeal from that judgment must be dismissed. *See Holiday v. City of Moses Lake*, 157 Wn. App. 347, 353, 236 P.3d 981 (2010) (court dismissed City's appeal of writ of prohibition because it was not filed within 30 days after entry of the writ as required by RAP 5.2(a)).

Moreover, Plaintiffs have not appealed from the August 9 Order holding that the Superior Court lacked jurisdiction to entertain Plaintiffs' CR 15 motion. There is, therefore, no challenge to the Superior Court's determination that it lacked jurisdiction to consider Plaintiffs' motion to amend their Complaint. It follows that the Court must affirm the July 13 Order based on the Superior Court's unappealed August 9 holding that it lacked jurisdiction to entertain a CR 15 motion. That fatal jurisdictional flaw also means that the Court must reject Plaintiffs' attempt to revive their untimely challenge to the June 8 Final Judgment.

1. RAP 5.2(e) Does Not Apply to This Appeal.

Plaintiffs try to avoid a straightforward application of RAP 5.2(a) by claiming their CR 15 motion should be treated as if it were a CR 59 motion for reconsideration or to amend judgment or a CR 52(b) motion to amend findings, which under RAP 5.2(e), would have continued the Superior Court's jurisdiction and tolled the deadline for filing Plaintiffs' notice of appeal. The Court should reject Plaintiffs' ploy for a number of reasons.

First, Plaintiffs urge this Court to treat their CR 15 motion as a CR 59 motion for reconsideration, but in the Superior Court Plaintiffs expressly disavowed that their CR 15 motion was a motion for reconsideration. In seeking to excuse their failure to satisfy the standards for reconsideration, Plaintiffs expressly represented to the Superior Court:

“Plaintiffs do not seek reconsideration; they seek leave to amend.” CP 236. Having made that express representation in the Superior Court, Plaintiffs should not be heard here to assert that the Superior Court’s denial of their CR 15 motion “could be considered an order denying reconsideration of the June 8 Order.” Appellants’ Br. at 14.

Second, Plaintiffs failed to make their “equivalency” argument in the Superior Court and are prohibited from first raising it on appeal. In its July 13 Order, the Superior Court noted that “there are no motions pending in this court to reconsider or modify the June 8, 2011 Order,” and the Court then asked the parties to address whether the Court had “jurisdiction to grant a motion to amend to add new claims where the entire case has been dismissed, and there are no motions pending to reconsider or modify the Order of dismissal?” CP 299. In other words, the Superior Court specifically sought the parties’ advice concerning its continuing jurisdiction, and invited Plaintiffs to make the argument they belatedly make here – that their CR 15 motion should be treated as if it were a CR 59 motion that gave the trial court jurisdiction and extended the time for appeal.

What did Plaintiffs do in response to the Superior Court’s invitation? Consistent with their earlier representation that “Plaintiffs do not seek reconsideration; they seek leave to amend [their complaint]” (CP

236), Plaintiffs *did not* claim that the Superior Court retained jurisdiction because their CR 15 motion was the “equivalent” of a CR 59 motion. Accordingly, Plaintiffs are prohibited from first raising on appeal their “equivalency” claim because they failed to make that argument to the Superior Court when invited to do so. *See* RAP 2.5(a) (requiring party to raise issue in trial court to preserve it for appeal); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (requiring a party to raise an appellate issue first before the Superior Court ensures that the trial court will have an opportunity to correct the alleged error and avoid an unnecessary appeal).

Third, and in any event, the August 9 Order disposes of Plaintiffs’ attempts to re-imagine here what actually occurred below. In that order, the Superior Court directly addressed whether it had jurisdiction to entertain Plaintiffs’ CR 15 motion, and the Superior Court ruled that it did not. The Superior Court’s August 9 Order concluded that the court lacked jurisdiction because Plaintiffs had not filed a timely CR 52(b)¹ or 59 motion. *See, e.g.*, CP 299 (“Does the Court have jurisdiction to grant a motion to amend . . . where the entire case has been dismissed and there

¹ Plaintiffs’ attempt to re-characterize their CR 15 motion as a CR 52(b) motion to amend findings is particularly remarkable given that the June 8 Final Judgment did not contain any findings at all, and the July 13 Order thus had no findings to amend.

are no motions pending to reconsider or modify the Order of dismissal?”); CP 297 (concluding the court did not have jurisdiction). Because Plaintiffs failed to appeal from the August 9 Order, that ruling is not subject to review and precludes Plaintiffs’ attempt to re-cast their CR 15 motion. *See, e.g., Detray v. City of Olympia*, 121 Wn. App. 777, 792, 90 P.3d 1116 (2004) (Court held that appellant was barred by *res judicata* from challenging portions of amended land use permit that incorporated conditions from earlier hearing examiner’s decision that appellant had not appealed).

Fourth, even if Plaintiffs were not legally precluded from attempting to re-cast their CR 15 motion, the sole authority they rely upon for this alchemy, *Structurals Northwest, Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 658 P.2d 679 (1981), cannot be stretched to fit the record here. In *Structurals Northwest*, the parties negotiated an amended judgment and submitted their stipulated amended judgment to the Superior Court within the time permitted for CR 59 motions to amend the judgment. 33 Wn. App. at 713. Because the stipulated amended judgment was the same as a stipulated motion to amend the judgment, and because the parties’ jointly participated in timely amending the judgment, the Court of Appeals allowed the notice of appeal filed within 30 days of the stipulated amended judgment. *Id.*

The situation here could not be more different. Here, the parties did not agree to amend the judgment. Plaintiffs told the Superior Court they were moving under CR 15, not CR 59. And Plaintiffs specifically advised the Superior Court that their CR 15 motion did not waive their right to appeal the June 8 Final Judgment. Plaintiffs say that the “*effect* of the trial court’s July 13 order was a ruling on one of the civil motions denominated in RAP 5.2(e)” (Appellants’ Br. at 12 (emphasis in original)), purportedly because Plaintiffs asked the court to rectify its failure to denominate the dismissal as with or without prejudice and because the court did not address Plaintiffs’ offer to amend their pleading to add objective symptoms with respect to the negligent infliction claim. *Id.* at 12. This argument is an invention by Plaintiffs. The June 8 Final Judgment was, as a matter of law, a dismissal with prejudice, and the July 13 Order did not “amend” that result in any way. *See In re Metcalf*, 92 Wn. App. 165, 175 & n.6, 963 P.2d 911 (1998), *cert. denied*, 527 U.S. 1041 (1999) (Washington courts follow the federal jurisprudence and treat a CR 12(b)(6) dismissal as a final judgment); *McLean v. United States*, 566 F.3d 391, 396 (4th Cir. 2009) (“Courts have held that, unless otherwise specified, a dismissal for failure to state a claim under Rule 12(b)(6) is presumed to be both a judgment on the merits and to be rendered with

prejudice). Nor could the July 13 Order amend findings, given the court's August 9, 2011 holding that it lacked jurisdiction to do so.

Moreover, in its July 13 Order, the court did no more than explain what it had done in the June 8 Final Judgment. The June 8 Final Judgment "did not grant the motion to amend [to allege objective symptoms if the court "finds" that the negligent infliction claim "is insufficiently pled"] because the proposed amendment would not have cured the defect on which the dismissal was granted." CP 298. Given the court's unappealed August 9 Order holding that it lacked jurisdiction to do more, the trial court had no authority to do anything more than explain what it had done on June 8.

In short, a lawyer with an ounce of creativity could characterize any post-judgment order as being equivalent to "amending" a final judgment. Yet the Rules of Appellate Procedure bar appeal of a final judgment through post-judgment orders, unless they are orders on the specific post-judgment motions listed in RAP 5.2(e). A CR 15 motion is not one of the post-judgment motions listed in RAP 5.2(e). *See* RAP 2.2(a)(13); *State v. Pilon*, 23 Wn. App. 609, 596 P.2d 664 (1979) (appeal of order revoking probation does not bring up appeal of conviction); *Griffin v. Draper*, 32 Wn. App. 611, 649 P.2d 123 (1982) (appeal of

contempt ruling for failure to comply with final judgment did not bring up the final judgment for appeal).

RAP 5.2(a) requires dismissal of Plaintiffs' untimely appeal of the June 8 Final Judgment. Plaintiffs can cite no applicable authority to extend, under RAP 5.2(e), the time for Plaintiffs to appeal the June 8 Final Judgment, and even if they could, they are legally precluded from doing so.

2. No Extraordinary Circumstance Justifies Extending the Time Limit to Appeal the June 8 Final Judgment.

RAP 18.8(b) sets forth a very narrow basis upon which this Court will allow Plaintiffs' untimely appeal of the June 8 Final Judgment. The Court will grant an extension "only in extraordinary circumstances and to prevent a gross miscarriage of justice," and "ordinarily . . . the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension" RAP 18.8(b). Plaintiffs say that the appellate rules express a preference for deciding cases on the merits (Appellants' Br. at 15-16), but RAP 18.8(b) is an express exception to that "preference." When an appeal is untimely, "finality of decisions" is preferred to allowing an appellant to argue the merits of his appeal.

Plaintiffs rely on *Knox v. Microsoft Corp.*, 92 Wn. App. 204, 962 P.2d 839 (1998), but the case simply demonstrates this important distinction. The *Knox* court held that

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

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

Case law demonstrates that relief under Rule 18.8(b) is sparingly granted. In *Beckman v. Department of Social and Health Services*, 102 Wn. App. 687, 11 P.3d 313 (2000), the Court of Appeals rejected the Attorney General’s request that the court accept a notice of appeal of a \$17.76 million judgment against DSHS that was filed 10 days late. The Court found that plaintiff’s failure to give the Attorney General’s office notice that the judgments had been entered did not constitute “extraordinary circumstances,” notwithstanding the State’s claim that one of the State’s own attorneys deliberately let the appeal period lapse or was, at minimum, negligent in doing so. *Id.* at 695.

In *Reichelt v. Raymark Industries, Inc.*, 52 Wn. App. 763, 764 P.2d 653 (1988), defendant asked the court to accept a notice of appeal filed 10 days late. Defendant explained that one of its two trial attorneys had left the firm during the 30 days allotted to file the notice of appeal and that the

firm's appellate attorney had an unusually heavy work load at the time. The Court of Appeals was unimpressed, noting that "the rigorous test [in RAP 18.8] has rarely been satisfied in reported case law," and that when relief has been granted, generally the notice of appeal had been timely but defective in some way. *Id.* at 765-66. The Court specifically rejected appellant's claim that his opponent would not be prejudiced, noting that prejudice is irrelevant under the rule and that the rule expresses a distinct preference for finality over balancing of relative harms to the parties. *Id.* at 766, n.2.

The *Reichelt* court's observation that relief has been granted only when the notice of appeal is timely but contains technical defects is confirmed by the cases Plaintiffs cite. In *Knox*, plaintiffs filed a timely appeal of summary judgment orders dismissing certain damages and the final judgment, to the extent it precluded the excluded damages. The court allowed the timely appeal, and rejected Microsoft's argument that the failure to include an express reference to the final judgment rendered the notice ineffective. In *Weeks v. Chief of Washington State Patrol*, 96 Wn. 2d 893, 639 P.2d 732 (1982), appellant timely but mistakenly filed the notice of appeal in the Court of Appeals, instead of the Superior Court. The court permitted the appeal because "[i]t . . . appears that though the notice was misdirected, an effort was made at timely compliance with the

Rule (RAP 5.1(a)).” 96 Wn. 2d at 896.² Plaintiffs here filed their notice of appeal 51 days after the June 8 Final Judgment. And Plaintiffs never appealed from the August 9 Order. *Knox* and *Weeks* don’t help them.

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

Here, by contrast, Plaintiffs are represented by able counsel, who knew that they had the right and obligation to appeal the June 8 Final Judgment, and simply didn’t. *See, e.g.*, CP 178. (“By requesting leave to amend to add new causes of action, however, Plaintiffs do not waive their right to appeal the Court’s dismissal of their original complaint under CR 12(b)(6).”). Perhaps Plaintiffs chose not to file a notice of appeal while their CR 15 motion was pending because they thought it might

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

improve the chance that their CR 15 motion would be granted. But strategic choices have never been deemed an “extraordinary circumstance” by this Court.

Plaintiffs also suggest (Appellants’ Br. at 16) that their reliance on *Structurals Northwest* demonstrates that Plaintiffs made an excusable error, but that claim is revisionist nonsense. If *Structurals Northwest* guided Plaintiffs into an excusable error: Why did Plaintiffs not raise the case with the Superior Court? Why didn’t they argue to the trial court that it retained jurisdiction because their CR 15 motion was equivalent to a CR 59 motion? Why did they insist that they were *not* bringing a CR 59 motion, but a CR 15 motion? And why didn’t they appeal the August 9 Order? Plaintiffs have no good answers to any of these questions. Their failure to file a timely notice of the June 8 Final Judgment was in no way “beyond their control.” They just didn’t. *See, e.g., Reichelt, supra; Beckman, supra; cf. Schaeferco, Inc. v. Columbia River Gorge Commission*, 121 Wn.2d 366, 368, 849 P.2d 1225 (1993) (court held that timely filed but untimely served motion for reconsideration precluded timely appeal raising “many important issues”).

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

3. Plaintiffs Have Nothing Left to Appeal.

Finally, Plaintiffs claim that even if their appeal of the June 8 Final Judgment is untimely and they have no good excuse, their timely appeal of the July 13 Order “requires this Court to consider whether the trial court erred in granting Defendant’s motion to dismiss [on June 8].” Appellants’ Br. at 16, n.9. Plaintiffs claim that in order to review the Superior Court’s July 13 conclusion that permitting Plaintiffs to amend their pleadings to add allegations of objective symptoms “would not have cured the defect on which the dismissal was granted” (CP 298), requires this Court to examine “all the grounds upon which the trial court could have based dismissal” in the June 8 Final Judgment. Appellants’ Br. at 17, n.10. *See also id.* at 30, n. 16; 34 n. 18; 35 n. 19; and 37, n.20. Plaintiffs’ hope, accompanied by no citation to authority, and which they never elevate to text but express solely in footnotes, is in fact a mirage. Indeed, the argument undermines the careful structure established by the Rules of Appellate Procedure discussed in the previous sections.

The July 13 Order did two things. It looked back at and described the June 8 Final Judgment, and it looked ahead to the August 9 Order’s holding that the Court lacked jurisdiction to do anything more. Plaintiffs did not timely appeal the June 8 Final Judgment and they filed no appeal of the August 9 Order. By itself, the July 13 Order did not decide

anything. Nor could it, given the court's August 9 Order holding that it lacked jurisdiction to rule on Plaintiffs' CR 15 motion.

Even if Judge Eadie had jurisdiction to do more on July 13, under the doctrine of *res judicata*, this Court has no authority to look behind the June 8 Final Judgment. In the briefing on the motion to dismiss, Plaintiffs made a contingent request to amend if the court found that Plaintiffs had "insufficiently pled" objective symptoms. CP 96-97. Plaintiffs do not contend that an allegation of objective symptoms would have cured the global defects that formed the other bases for the June 8 Final Judgment. Indeed, they admit that alleging objective symptoms would have cured only one defect in the negligent infliction claim. Appellants' Br. at 38-39. What Plaintiffs really want to do is challenge those global defects, but they can't do so, given the *res judicata* effect of the June 8 Final Judgment. *See Detray*, 121 Wn. App. at 792. In short, the July 13 Order does not raise *any* issue for appeal given the *res judicata* effect of the June 8 Final Judgment and the unappealed August 9 Order.

C. The Superior Court Correctly Dismissed Plaintiffs' Legally Defective Complaint.

If the Court were to allow Plaintiffs' untimely appeal, it should reject it as meritless. The Complaint seeks to recover for Defendant's alleged infliction of emotional distress, but it concedes that no plaintiff was present and apprehended the immediate infliction of any intended

harmful act by Defendant. The Complaint alleges that Defendant attempted to arrange for Dr. King to be killed, that Defendant's plan failed, that Defendant was arrested, and that Plaintiffs remained oblivious to the failed plan until after Defendant was safely in jail. Plaintiffs allege that they became distressed about what might have occurred, because Defendant was released on bail, and because they would "re-live" through the criminal process events that they had not experienced in the first place. The Washington Supreme Court has narrowly circumscribed the standalone tort of infliction of emotional distress, and has never authorized such an "after the fact" infliction of emotional distress claim.

1. Washington Law Does Not Recognize a Civil Cause of Action For Violation of the Murder Solicitation Statute.

Plaintiffs' Complaint alleges that Defendant's violation of the solicitation of murder statute, RCW 9A.28.030(1), constitutes a civil tort. CP 7-8, ¶¶ 4.1-4.3. Plaintiffs have cited no authority to the Court recognizing that violation of the solicitation of murder statute constitutes a civil tort cause of action. *See, e.g., Hostetler v. Ward*, 41 Wn. App. 343, 351-52, 704 P.2d 1193 (1985) (rejecting argument that alleged violations of criminal statutes resulted in civil liability, stating that "Plaintiff has cited no authority, and we are aware of none, supporting the proposition that the Legislature intended the violation of these criminal statutes to result in civil liability").

Plaintiffs' argument muddles the fundamental distinction between when violation of a criminal statute constitutes civil tort liability and thus creates a separate cause of action with the separate and distinct doctrine that a criminal statute may supply a standard of conduct for a common law tort claim. Plaintiffs quote *Hostetler* to the effect that "[e]ven where there is no clear manifestation of legislative intent to impose civil liability for violation of a statute, a court *may* adopt the requirements of a criminal statute as the standard of conduct of a reasonable person." Appellants' Br. at 31, quoting *Hostetler*, 41 Wn. App. at 352 (emphasis in original). The quoted statement from *Hostetler* clearly differentiates between a standalone tort based on violation of a criminal statute and using a criminal statute to supply the standard of reasonable conduct to prove an already recognized common law tort claim.

Every case cited by Plaintiffs simply demonstrates that Plaintiffs don't have a standalone statutory tort claim. The civil suit in *Fleming v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 2006 U.S. Dist. LEXIS 16602 at *10 (W.D. Wash. Mar. 21, 2006) (Appellants' Br. at 33), was not a separate cause of action under the criminal statute, but one for common law negligence:

This is not to say that the failure to report [child abuse] constitutes negligence *per se*. As the court stated in *Warner, supra*, that statutory violation can be used only as

evidence of negligence. Plaintiff will still need to prove all of the elements of a common law negligence claim in order to succeed. Thus, the Court merely finds that violation of the statutory duty to report may provide the basis of a negligence claim, as violation of that duty may be evidence of negligence.

Id. at *13. In *Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 141 Wn. App. 407, 432-33, 167 P.3d 1193 (2007) (Appellants' Br. at 32), the court held the victim could sue for the common law tort of intentional infliction of emotional distress for defendant's failure to report child abuse under the criminal statute. The Court did not recognize a standalone cause of action for statutory failure to report child abuse. And the case of *Cable v. Burns & Roe, Inc.*, 106 Wn.2d 911, 726 P.2d 434 (1986) (Appellants' Br. at 33), did not even involve a tort claim for infliction of emotional distress. Instead, the case stands for the unremarkable proposition that if a plaintiff proves the separate tort of intentional wrongful termination, he or she may recover – *as a measure of damages* – the emotional anguish of termination, and that the intentionality associated with wrongful termination satisfies the intentionality requirement for such relief.

In short, no Washington court ever has held that violation of the solicitation of murder statute constitutes a civil tort that would bypass the established elements of a common law claim for intentional or negligent infliction of emotional distress.

2. Plaintiffs' Common Law Claim for Outrage/Negligent Infliction of Emotional Distress Is Defective As a Matter of Law.

In Washington, recognition of a claim of infliction of emotional distress as an independent basis of tort liability has been relatively recent, and our courts have placed significant limitations on the claim. *See, e.g., Brower v. Ackerly*, 88 Wn. App. 87, 97, 943 P.2d 1141 (1997) (“When a plaintiff attempts to recover emotional distress damages in the absence of an independent basis of tort liability, there are special requirements with respect to damages . . .”).

To prove intentional infliction of emotional distress, a plaintiff must prove “(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress on the part of the plaintiff.” *Reid v. Pierce County*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998) (citing *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989) and *Rice v. Janovich*, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987)). A negligent infliction of emotional distress claim is “tested against the “established concepts of duty, breach, proximate cause, and damage or injury.” *Reid*, 136 Wn.2d at 204 (citing *Hunsley v. Girard*, 87 Wn.2d 424, 435-36, 553 P.2d 1096 (1976)). In addition to these required elements of proof, Washington courts have imposed limits on claims for intentional and negligent infliction of emotional distress, including

adoption of the *Restatement (Second) of Torts* § 46, and comment g to that section, which limit the scope of liability for infliction of emotional distress liability, in order “to check against a flood of civil suits.” *Brower*, 88 Wn. App. at 97; *see, e.g., Reid*, 136 Wn.2d at 201-04; *Grimsby*, 85 Wn.2d at 59-60.

As discussed below, Plaintiffs’ Complaint fails to allege key elements of a valid infliction of emotional distress claim and affirmatively alleges facts that are fatal to their claim.

a. Plaintiffs Have No Infliction of Emotional Distress Claim Because Defendant Was in Jail Before Any Plaintiff Knew Anything About Defendant’s Failed Plan.

The Washington Supreme Court has held that a plaintiff must be present when a defendant’s intended harmful conduct occurs. The Complaint not only fails to allege this fundamental element, but it also alleges just the opposite – that Plaintiffs knew nothing about Defendant’s foiled plan until after Defendant was arrested. This is not a trivial requirement for infliction of emotional distress claims. Rather, it represents Washington’s circumscription of the standalone tort for infliction of emotional distress to ensure that a plaintiff experience the distressing conduct “first-hand” and apprehend immediately the defendant’s intended harmful action.

In *Reid*, relatives of deceased persons whose corpses had been photographed and distributed by employees of the Pierce County Medical Examiner's Office asserted claims of outrage and negligent infliction of emotional distress against the County. *Reid*, 136 Wn.2d at 198-200. The Court rejected those claims as a matter of law because no plaintiff was present when the photographs were distributed, but rather, each discovered the employees' outrageous conduct only after it had occurred. Relying on *Lund v. Caple*, 100 Wn.2d 739, 675 P.2d 226 (1984) and *Schurk v. Christensen*, 80 Wn.2d 652, 497 P.2d 937 (1972), the *Reid* Court reaffirmed the rule in Washington that because plaintiffs "were not present when the conduct occurred, they may not maintain tort of outrage actions." *Reid*, 136 Wn.2d at 203 (citing *Lund*, 100 Wn.2d at 742, which held that a plaintiff could not assert outrage claim associated with pastor's sexual relations with plaintiff's wife because plaintiff was not present when the conduct occurred, and *Schurk*, 80 Wn.2d at 656-57, which held that a mother could not assert outrage claim arising from her daughter's molestation because mother was not present for that event).³

³ Washington courts also require that a plaintiff be present for negligent infliction of emotional distress claims. *See Reid* at 204 (citing *Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 260, 787 P.2d 553 (1990)). *Accord, Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 57, 176 P.3d 497 (2008) (rejecting father's negligent infliction of emotional distress claim because he was not present to witness his daughter's death).

Most important here, the *Reid* Court specifically rejected Plaintiffs' argument that they don't need to have been present because Defendant's conduct allegedly was directed toward them.

Plaintiffs Hyde and Yarbrough concede they were not present when County employees appropriated and displayed photographs of the corpses of their deceased relatives. *They argue, however, that the 'presence' element is inapplicable because the actions of the County employees were directed toward them.*

136 Wn.2d at 202-03 (emphasis added). The *Reid* Court held that the distinction had no relevance to application of the "presence" requirement:

While the conduct complained of in the cases before us is the type that would cause a reasonable person to exclaim, "outrageous," Plaintiffs Hyde and Yarbrough were simply not present when the conduct occurred. Even if we were inclined to find the tort of outrage available to Plaintiffs, we would be required to overlook the presence element. We find no support for such a holding in either the *Restatement (Second) of Torts*, the comments thereto, as we adopted in *Grimsby*, or our previous cases.

Id. at 204.

Plaintiffs attempt to deflect the controlling effect of *Reid* in a variety of ways, each of which fails.

First, Plaintiffs engage in wholesale mischaracterization of *Reid*. They claim the Court in *Reid* "did not address the issue of whether the County employees' conduct was *directed* at the plaintiffs" (Appellants' Br. at 20-21), but, as quoted above, that is simply incorrect. In *Reid*, the plaintiffs expressly argued the same point Plaintiffs urge here: "that the

‘presence’ element is inapplicable because the actions of the County employees were directed toward them.” *Id.* at 202-03. The *Reid* Court accepted plaintiffs’ allegation that the tortious conduct was directed toward them, as it was required to do in reviewing a dismissal on the pleadings, and held that the allegation did not obviate the plaintiffs’ obligation to experience the distressing conduct first-hand. Plaintiffs also proclaim that “[i]n *Reid* the plaintiffs were clearly not the object of the County employees’ tortious conduct,” *id.* at 22, but this directly contradicts the *Reid* holding. Indeed, the *only* possible targets for inflicting emotional distress in *Reid* were the plaintiffs because the relatives whose photos were distributed were no longer alive. Having expressly addressed this issue, the Washington Supreme Court’s decision in *Reid* controls.

Second, in an effort to isolate *Reid*, Plaintiffs claim that the cases relied upon by the *Reid* Court did not involve a plaintiff who was the “direct object of the tortfeasor’s conduct,” specifically citing *Lund*. Appellants’ Br. at 19-20. Plaintiffs are simply wrong. Who, other than the cuckolded husband, was the “direct object” of the minister’s harmful conduct in *Lund*? Indeed, every state and federal court in Washington to address the question since *Reid* has required a plaintiff to be present and to immediately apprehend the defendant’s harmful conduct to sustain an

infliction of emotional distress claim. *See, e.g., Bakay v. Yarnes*, 431 F. Supp. 2d 1103, 1112 (W.D. Wash. 2006) (where plaintiffs were not present when their cats were euthanized, they could not recover for outrage); *Cunningham v. City of Wenatchee*, 214 F.Supp.2d 1103, 1115 (E.D. Wash. 2002) (“A plaintiff may not sue for outrage unless he or she was present when the conduct occurred.”). *Reid* thus not only is controlling, but it also represents a long and consistent line of cases under Washington law requiring an infliction of emotional distress plaintiff to be “present” for defendant’s harmful conduct.

Third, Plaintiffs quote *Chambers-Castanes v. King County*, 100 Wn. 2d 275, 288, 669 P.2d 451 (1983), to the effect that a plaintiff suing for “outrage” must personally have been “the object of the respondents’ actions or an immediate family member present at the time of such conduct.” Appellants’ Br. at 19. From this passage Plaintiffs infer that *Chambers-Castanes* held that “presence” is required only when the tortious conduct is directed to a third party, but not when the plaintiff is the “object” of the defendant’s conduct. Plaintiffs’ reliance upon *Chambers-Castanes* is misplaced. As a threshold matter, the Washington Supreme Court’s 1998 decision in *Reid* post-dates by 15 years the 1983 decision in *Chambers-Castanes* and speaks directly to the question of

whether physical presence is required for those who are alleged to be the direct object of the wrongful conduct. *Reid* controls here.

Moreover, the *Chambers-Castanes* decision did not even address the “presence” requirement. The plaintiffs in *Chambers-Castanes* were the object of the County’s outrageous conduct, and they *were* present and immediately heard the County’s repeated false assurances that help was on the way when the police had in fact not been dispatched. Indeed, every infliction of emotional distress case cited in *Chambers-Castanes* involved a plaintiff who was the “object” of defendant’s conduct and was present to immediately experience that harmful conduct. *See id.* at 288-89, citing *Grimsby v. Samson, supra*, at 59-60 (plaintiff immediately apprehended hospital’s refusal to treat plaintiff’s wife forcing him to watch her die); *Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 565 P.2d 1173 (1977) (plaintiff immediately apprehended racist conduct of defendant’s employees toward him); *Phillips v. Hardwick*, 29 Wn.App. 382, 628 P.2d 506 (1981) (plaintiff purchaser immediately apprehended defendant seller’s refusal to vacate premises upon the agreed date, thus preventing plaintiff from taking possession).

Fourth, Plaintiffs cite the Restatement (Second) of Torts, § 46 (1965), (Appellants’ Br. at 21-22), to suggest that they don’t need to have been present or to have experienced defendant’s conduct first-hand. They

quote Section 46's statement that when a defendant's conduct is directed at a third person, an immediate family member "who is present at the time" also has a claim for infliction of emotional distress. "At the time" refers to the time when the defendant is acting injuriously toward the object of his conduct. Just as did the Court in *Chambers-Castanes*, the Restatement assumes that the object of the conduct is present and immediately experiences the defendant's harmful conduct. Indeed, every illustration provided in Section 46 confirms that the "object" of the defendant's conduct must experience first-hand and immediately the defendant's harmful conduct. Plaintiffs say that comment i's illustrations (Appellants' Br. at 22) concerning a defendant's suicide attempt in a friend's kitchen suggest that a plaintiff need not be present, but the illustration demonstrates what Plaintiffs lack here – a first-hand, immediate apprehension of the defendant's harmful conduct.

Plaintiffs also ignore the limiting effect of Section 47 of the Restatement (Second) on the tort of infliction of emotional distress. Section 47 provides that "conduct which is tortious because intended to result in bodily harm to another . . . does not make the actor liable for an emotional distress which is the only legal consequence of his conduct." Comment "a" to Section 47 explains the significance of this limitation to an infliction of emotional distress claim under Section 46:

The rule stated in § 46 creates liability only where the actor intends to invade the interest in freedom from severe emotional distress. The fact that the actor intends to invade some other legally protected interest is insufficient to create liability where the only effect of his act is the creation of emotional distress, *unless the emotional distress consists of an apprehension of the immediate infliction of an intended harmful or offensive contact*

(Emphasis added.)

The illustration provided in Section 47 is directly on point to this case:

A, who is annoyed by the barking of B's dog, shoots at the dog intending to kill it. He misses the dog. B suffers severe emotional distress. A is not liable to B.

Here, the Complaint alleges that Defendant's criminal plan was thwarted and no one was hurt, and that Plaintiffs did not even know about the thwarted plan until after Defendant was incarcerated, when, as a consequence of their belated discovery, they are alleged to have experienced emotional distress. Plaintiffs had no "apprehension of the immediate infliction of an intended harmful or offensive contact." Under the Restatement and Washington law, Plaintiffs have no claim for infliction of emotional distress.

Fifth, Plaintiffs rely heavily on *Dammarell v. The Islamic Republic of Iran*, 2006 WL 2382704 (D.D.C. Aug. 17, 2006) (*see* Appellants' Br. at 22-26), but that case is no precedent here. *Dammarell* was a suit by survivors and relatives of the 1983 terrorist car bombing of the U.S.

Embassy in Beirut orchestrated by the Iranian government. The Iranian government did not even appear to defend itself, so the case was uncontested before a magistrate judge. Citing *Reid* and a line of cases that have faithfully followed *Reid*, the magistrate judge acknowledged that “Washington courts appear to have also adopted a requirement that a plaintiff be present when the extreme and outrageous conduct occurred,” 2006 WL 2382704 at *175. Nonetheless in the context of that uncontested case, the magistrate judge noted case law holding that “terrorist” acts are intended to inflict emotional pain on the relatives of victims, and then speculated that the *Reid* Court did not intend “to *always* require a plaintiff’s presence” to assert a valid infliction of emotional distress claim. *Id.* at *176. Accordingly, the magistrate judge held – with no opposition – that the Washington parents of an embassy victim were targets of the terrorist act and could sue for infliction of emotional distress even though they had not been present for the defendant’s conduct in Beirut.⁴ Even the

⁴ Relying on *Dammarell*, Plaintiffs also claim that not only Dr. King but the rest of the King family were the target of Defendant’s conduct (Appellants’ Br. at 23-26), even though the Complaint alleges that Defendant’s plan was solely to harm Dr. King. CP 3–4, ¶¶ 3.7 – 3.11. Plaintiffs attempt to analogize successful global acts of terrorism, whose very purpose is to terrorize a community, to a failed murder plot about which no plaintiff knew anything. But Plaintiffs offer no support in the law for that leap, which would erode a fundamental requirement of the tort of infliction of emotional distress – that the plaintiff be present and experience first-hand defendant’s intended harmful conduct.

magistrate judge, however, did not venture so far as Plaintiffs want this Court to go. Plaintiffs' argument here would mean that Washington parents of an employee of the Beirut embassy could sue for infliction of emotional distress if Iran orchestrated a car bomb attack on the embassy but failed in its attempt, leaving their son unharmed. No Court would permit such a claim.

And sixth, Plaintiffs cite five other cases (Appellants' Br. at 23, 26-28), to suggest that no Plaintiff needed to know about or be present for Defendant's harmful conduct. None of them was decided under Washington law, and all of them involved a plaintiff's first-hand experience of a defendant's harmful conduct, an element that is completely lacking here. *See Fanean v. Rite Aid Corp. of Delaware, Inc.*, 984 A.2d 812, 815 (Del. Super. Ct. 2009); *Shemenski v. Chapieski*, 2005 WL 991831, at *9-11 (N.D. Ill. Apr. 13, 2005); *Hartman v. Banks*, 164 F.D.R. 167, 168 (E.D. Pa. Aug. 25, 1995); *Cahalin v. Rebert*, 10 Pa. D. & C.3d 142, 144, 150 (Pa. Comm. Pl. April 10, 1979); *Leo v. Hillman*, 164 Vt. 94, 101, 665 A.2d 572, 577-78 (Vt. 1995).

Not only have Plaintiffs failed to cite any Washington case, but they have also failed to cite *any* case from *any* jurisdiction authorizing an infliction of emotional distress claim based on a plaintiff's after-the-fact discovery of what might have occurred but didn't. That is what Plaintiffs

have alleged, and the claim fails as a matter of law under controlling Washington Supreme Court precedent.

b. Plaintiffs Have No Infliction of Emotional Distress Claim Because Plaintiffs Allege Harm From Defendant's Exercise of His Constitutional Right to Bail and to a Jury Trial.

Consistent with the “after-the-fact” character of Plaintiffs’ infliction of emotional distress claim, Plaintiffs alleged emotional distress *after* Defendant’s arrest from his release on bail and because of the criminal trial process. Plaintiffs claim that “Defendant makes too much of this slender reed,” (Appellants’ Br. at 35), but these are the only allegations in the Complaint that articulate a basis for Plaintiffs’ alleged emotional distress. In paragraph 3.17, Plaintiffs claim: “Because Mockovak was able to post \$2 million bail, the Kings now live in fear that he will continue his efforts to kill them.” CP 5, ¶ 3.17. In paragraph 3.18, Plaintiffs claim “[t]he King family will have to relive the distress of this incident for an extended period of time as the criminal charges process through the criminal justice system.” *Id.*, ¶3.18. Under Washington law, such infliction of emotional distress claims are legally untenable.

Defendant has a constitutional right to bail under the United States and Washington Constitutions:

From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), 18 U.S.C.A., federal law has unequivocally

provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

Stack v. Boyle, 342 U.S. 1, 4, 72 S. Ct. 1 (1951) (citing *Hudson v. Parker*, 156 U.S. 277, 285, 15 S. Ct. 450 (1895)); *see also* Wash. Const. Art. 1, § 20 (“All persons charged with crime shall beailable by sufficient sureties, except for capital offenses . . .”). Defendant also has a constitutional right to a jury trial on the criminal charges against him. Wash. Const. Art. I, § 21. Defendant exercised his constitutional rights, and there is no allegation that he failed to meet the requirements imposed by Judge Robinson, which included having no contact with Plaintiffs.

When the Washington Supreme Court first recognized the tort of outrage in Washington in 1975 in *Grimbsy v. Samson*, it adopted comment g to the Restatement (Second) of Torts § 46, which provides:

The actor is never liable . . . where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.

Restatement (Second) of Torts § 46, comment g (1965); *Grimbsy*, 85 Wn.2d at 59 (adopting comment g).

Here, by exercising his constitutional right to obtain release on bail and to a trial by jury, Defendant did “no more than to insist upon his legal

rights in a permissible way.” Even though Judge Robinson’s decision to grant bail may have disappointed Plaintiffs and, even though the criminal trial process may have caused them some distress, the law does not let them recover for that distress because it flows from the proper exercise of constitutional rights and orders entered by Judge Robinson. Courts have consistently rejected as a matter of law infliction of emotional distress claims stemming from a defendant’s lawful exercise of legal rights. *See Keates v. City of Vancouver*, 73 Wn. App. 257, 264-65, 869 P.2d 88 (1994) (rejecting outrage claim as a matter of law because alleged outrageous conduct was lawful investigation of crime); *Springer v. Rosauer*, 31 Wn. App. 418, 426, 641 P.2d 1216 (1982) (rejecting outrage claim because employer had legal right to discharge employee without cause in absence of contract, citing comment g); *Jackson v. Peoples Federal Credit Union*, 25 Wn. App. 81, 86-88, 604 P. 2d 1025 (1979) (rejecting outrage claim against creditor because creditor had legal right to pursue collection remedy, citing comment g); *cf. Thompson v. Sikov*, 490 A.2d 472, 473-474 (Pa. Super. 1985) (rejecting outrage claim because defendant had constitutional right to make allegedly harmful remarks, citing comment g).⁵

⁵ While no Washington court has addressed it, other courts that have adopted comment g have also found it applicable to claims of negligent

There is simply no question that a defendant cannot be held liable in tort for exercising his constitutional rights. For this reason as well, the Complaint fails as a matter of law.

c. Plaintiffs Have No Infliction of Emotional Distress Claim Because They Allege Only Remote and Indirect Injuries.

Because Plaintiffs had no first-hand experience of Defendant's failed conduct, all of Plaintiffs' alleged emotional injuries occurred *after* Defendant's arrest. Plaintiffs claim that they were harmed by Defendant's release on bail (*id.*, ¶ 3.17), from being forced to live through the criminal trial proceedings (*id.*, ¶ 3.18), and from worrying about what might befall them after Defendant was convicted and incarcerated. *Id.* Plaintiffs insist that Defendant's criminal conduct proximately caused their distress because that distress was a foreseeable consequence of their discovery of his foiled plan. Appellants' Br. at 36. Foreseeability is not, however, the measure of proximate cause. The United States Supreme Court has

infliction of emotional distress. *See, e.g., Kemps v. Beshwate*, 103 Cal. Rptr. 3d 480, 484 (Cal. App. 2010) (rejecting claim for negligent infliction of emotional distress because defendants' allegedly harmful conduct was "constitutionally protected conduct in a judicial proceeding"); *Swerdlick v. Koch*, 721 A.2d 849, 863-64 (R.I. 1998) (rejecting claim for negligent infliction of emotional distress because "defendant's surveillance was a legitimate attempt to 'document an alleged zoning violation'" and "defendant may not be held liable 'when he has done no more than insist on his legal rights in a permissible way . . .'" (citing comment g; other citations omitted).

explained that “proximate cause” is properly understood “to label generically the judicial tools used to limit a person’s responsibility for the consequences of that person’s own acts.” *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). “The general tendency of the law, in regard to damages at least, is not to go beyond the first step.” *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 534 (1983) (quoting *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918) (Holmes, J.); 1 J. Sutherland, *The Law of Damages* 55-56 (1882)).

The Complaint specifically alleges that Plaintiffs were completely unaware of and unaffected by “the first step” – Defendant’s doomed conduct when it occurred. They complain only of secondary injuries stemming from Defendant’s exercise of his constitutional rights to bail and a jury trial. In Washington, where our courts have placed significant limitations on the tort of intentional infliction of emotional distress, *Brower v. Ackerly*, 88 Wn. App. at 97, Plaintiffs’ alleged post-arrest emotional distress associated with the criminal process is too remote to be compensable. *See Bishop v. Michie*, 137 Wn.2d 518, 531-32, 973 P.2d 465 (1999) (where plaintiff was struck and killed by a probationer allegedly as a result of the defendant’s negligent supervision of the

probationer, but after a court's decision not to revoke probation, held, "[a]s a matter of law, [that] the judge's decision not to revoke probation under these circumstances broke any causal connection between any negligence and the accident"); 16 D. DeWolf & K. Allen, *Washington Practice: Tort Law and Practice* § 4.25 at 167 (2006) ("In cases where the defendant's allegedly negligent act is followed by a decision of the judiciary, causing injury to the plaintiff, it may be argued that the independent decision of the court breaks the chain of causation.").

Even if Plaintiffs had compensable emotional distress injuries – which they do not – it would be impossible for a trier of fact to segregate compensable from uncompensable injuries. How could the trier of fact distinguish compensable distress from the distress associated with being a witness and attending a criminal trial, which is plainly uncompensable? Such a conundrum is why claims of remote injuries are rejected by the courts. *See, e.g., Association of Washington Public Hospital Districts v. Philip Morris, Inc.*, 241 F.3d 696, 701-04 (9th Cir. 2001), *cert. denied*, 534 U.S. 891 (2001) (court rejected Washington common law claims for remote injuries that produced foreseeable damages, but which were "entirely speculative in nature"). For this reason as well, the Complaint fails as a matter of law.

d. The Law Applies to All Litigants.

Plaintiffs thus are left with their plea that the Court should not apply Washington law to bar their claims because Defendant has been convicted of soliciting murder, and he is a really awful person. That is not a legal principle but an invitation to abandon the principled application of the law. The Washington Supreme Court no doubt did not find sympathetic the defendants in *Reid*, who decided to entertain their office colleagues by showing autopsy photos of the plaintiff's loved ones; or the defendant in *Schurk* who sexually abused the plaintiff's daughter; or the defendant minister in *Lund* who had sex with the plaintiff's wife. There also is no question that exercise of one person's constitutional rights can be distressing to others *See, e.g., Snyder v. Phelps*, 562 U.S. ___, 131 S. Ct. 1207, 1219 (March 2, 2011) (reversing jury verdict for intentional infliction of emotional distress because Plaintiffs had a constitutional right to picket the funeral of a soldier while holding placards that read, among other things, "Thank God for Dead Soldiers," "You're Going to Hell," and "God Hates the USA/Thank God for 9/11").

This case does not call for unique treatment by this Court any more than did the defendants in *Reid*, *Lund*, *Schurk*, or *Snyder*. Washington law prevents plaintiffs from recovering for emotional distress for their "after-the-fact" discovery of what might have happened but didn't. As a leading

tort scholar has observed with respect to such allegations,
“[o]ccasionally . . . courts have demonstrated an unfortunate willingness to
discard basic doctrines of tort law to go after ‘unpopular’ defendants
As wisdom prevailed, these cases were overruled or modified by the
courts” V. Schwartz, “The Remoteness Doctrine: A Rational Limit
on Tort Law,” 8 *Cornell J.L. & Pub. Policy* 421, 425 (1999). Basic
fairness requires this Court to apply the law and affirm dismissal of
Plaintiffs’ Complaint.

IV. CONCLUSION

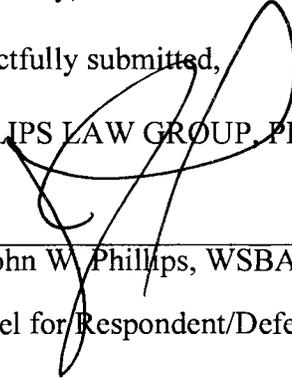
For all the foregoing reasons, this Court should dismiss this appeal
as untimely and barred by the unappealed August 9 Order. If this Court
were to proceed to the merits, the Court should affirm the Superior Court’s
dismissal of the Complaint as failing to state a claim under Washington
law.

DATED this 21st day of February, 2012.

Respectfully submitted,

PHILLIPS LAW GROUP, PLLC

By:



John W. Phillips, WSBA #12185

Counsel for Respondent/Defendant

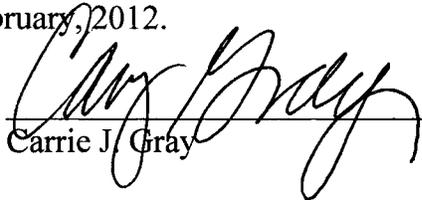
CERTIFICATE OF SERVICE

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

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

(Via Messenger)

DATED this 21st day of February, 2012.


Carrie J. Gray