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68020-0

NO. 68020-0-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL EMERIC MOCKOVAK,

Appellant.

BRIEF OF APPELLANT

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

ORIGINAL

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A. ASSIGNMENTS OF ERROR

Appellant assigns error to:

1. The Superior Court's order directing the defendant to pay restitution in the amount of \$1,533.34 to Dr. Joseph King.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The defendant was arrested, charged, tried, and convicted of having unsuccessfully plotted to kill his business partner. After the partner discovered the defendant's unsuccessful plot to murder him, he initiated litigation to prohibit the defendant from continuing to work at their jointly owned medical clinic,¹ and hired another person to replace the defendant, since the defendant could no longer work in the business. As the trial date got nearer, the business partner suffered chest pains indicative of stress, and this caused him to seek a medical assessment of his stress symptoms from a doctor. Eventually, the doctor billed the business partner for the costs of the medical assessment, and the partner sought a court order of restitution directing the defendant to reimburse him for these expenses.

These circumstances raised the following legal issues:

1. If the business partner's stress was caused by the disruption of his business which, in turn, was caused by the defendant's trial and

¹ See CP 26, ¶ 2, and attached Exhibit A, CP 38 (seeking injunction precluding Dr. Mockovak from entering the clinic, contacting any clinic employee or customer, selling any corporate shares, and interfering with the activities of the clinic in any way).

trial publicity which was perceived to be negatively impacting the business, is the expense of treating such stress a direct result of the defendant's crimes for which the Superior Court has the legal authority to order restitution?

2. In order for the Superior Court to order restitution for the expense of the medical assessment of the business partner's stress, must the State prove that the partner's stress resulted from fear of being killed, thus demonstrating that the defendant's crimes were the direct cause of the business partner's stress?
3. Is there sufficient evidence in the record of this case to permit any fact finder to make a finding that the stress suffered by the business partner was the direct result of the defendant's crimes?
4. Where the evidence is undisputed that the business partner paid only part of the doctor's bill, and an insurance company paid the other part, can the Superior Court order the defendant to pay restitution for the entire amount to the business partner, even though the total amount exceeds the partner's "actual expenses incurred"?
5. Can a Superior Court silently exercise its discretionary power to order restitution in an amount up to double the amount of the victim's loss, without expressly stating that it is exercising this

power, and without stating any reasons as to why it is appropriate to order restitution in an amount that exceeds the amount of the victim's loss?

C. STATEMENT OF THE CASE

1. CONVICTIONS FOR ATTEMPTED MURDER AND SOLICITATION OF MURDER

On February 3, 2011, a jury found Dr. Michael Mockovak guilty of Solicitation of Murder 1 and Attempted Murder 1.² These offenses stemmed from an apparent "agreement" between Dr. Mockovak and a man named Daniel Kultin, to kill Dr. Joseph King while he was vacationing in Australia. Kultin pretended to agree to hire professional "hitmen" to kill Dr. King in exchange for payment of a sum of money. Unbeknownst to Dr. Mockovak, Daniel Kultin was an informant working with the FBI. RP 9/22/11, at 18. In actuality, Kultin was never in touch with any "hitmen" and many of his conversations with Dr. Mockovak were secretly tape recorded. As Judge Hayden noted, the defendant's criminal plan was never carried out: "Because it was inchoate. I mean, it was thwarted because it was an attempt, a conspiracy, which the murder never happened." RP 9/22/11, at 15.

On March 17, 2011, the trial court sentenced Dr. Mockovak to prison

on the two murder charges. Roughly five and a half months later, on August 30, 2011, the county prosecutor sent notice of a restitution hearing to Dr. Mockovak's trial attorneys. CP 1. The hearing was initially scheduled to be held before the Honorable Palmer Robinson, the trial judge, on September 8, 2011. CP 1. But Judge Robinson recused herself and the case was reassigned to the Honorable Michael C. Hayden. CP 2-4, 219-220.³

2. DR. KING'S REQUEST FOR RESTITUTION IN THE AMOUNT OF \$220,439.95.

On behalf of Dr. King, the prosecution gave notice that it intended to seek \$220,439.95 in restitution. CP 1. The great majority of that request was for repayment to Dr. King of the cost of attorneys' fees which Dr. King spent in connection with civil litigation which was related in some way to the criminal case. CP 222. The general nature of those civil cases is set forth in the Declaration of John Phillips. CP 26-216. Dr. King spent a total of more than \$200,000 to pay various attorneys to handle civil suits

² A separate appeal from the judgment and sentence which documents Dr. Mockovak's convictions for these offenses, plus the offenses of Conspiracy to Commit Theft 1 and Attempted Theft 1, is pending in this Court under the assigned case number 66924-9-I.

³ By this time Dr. Mockovak had engaged attorney James E. Lobsenz, a shareholder in the law firm of Carney Badley Spellman, P.S., to as his appellate attorney, and he directed Mr. Lobsenz to handle the restitution matter as well. CP 3. Because Judge Palmer Robinson had been Mr. Lobsenz' law partner for many years, and because Judge Robinson's husband Steven J. Hopp was Of Counsel to the Carney law firm, Dr. Mockovak made a motion for recusal, and Judge Robinson granted the motion. CP 2-4, 219-220.

that Dr. King initiated, and to pay a public relations firm that he hired to advise him on how best to handle the alleged negative impact on his eye surgery business which was allegedly being caused by publicity surrounding Dr. Mockovak's criminal conduct and upcoming trial. CP 6-7. In addition, as he acknowledged in his own *Brief in Support of Restitution Request*, "Dr. King hired attorneys to assist with witness preparation and other aspects of Defendant's criminal trial."

A very small portion of Dr. King's restitution request was based on claims of medical expenses. Dr. King sought \$1,533.34 restitution to recoup the amounts he spent paying for the services of a cardiologist whom Dr. King consulted on September 28 and October 19, 2010, roughly one year after Dr. Mockovak's commission of his criminal offenses. CP 243, 245, 257.

A brief hearing was held before Judge Hayden on September 8, 2011 and the matter was continued to September 22, 2011. CP 217.

3. RESTITUTION HEARING OF SEPTEMBER 22, 2011

a. The Denial of Dr. King's Request for Restitution for Nonmedical Expenses.

On September 22, 2011, Judge Hayden heard legal argument on the question of whether Dr. King could possibly obtain restitution for the nonmedical expenses which Dr. King had itemized. Dr. Mockovak argued that because these nonmedical expenses were not the "direct result of the

crime charged,” RCW 9.94.030(53) did not authorize the court to award restitution for these expenses. With respect to the nonmedical expenses for the costs incurred in paying attorneys and paying a public relations firm, Judge Hayden agreed with the defendant. RP 9/22/11, at 28.

b. Oral Ruling That Medical Expenses, Incurred Because of Stress Caused By the Process of Having to Participate in a Trial, Are Not Losses For Which Restitution May Be Ordered.

With respect to the request for restitution for the payment made to a cardiologist, when the prosecutor noted that restitution was often ordered for the cost of counseling services, Judge Hayden said he certainly agreed with that proposition, but he inquired about the type of causal relationship that had to exist between the crime charged and the medical expense:

MS. STOREY: . . . Counseling, as a result of the loss, for an emotional –

THE COURT: I don’t have a problem with that.

Mr. Lobsenz says that you don’t get general damages for emotional distress. True.

But counseling damages are routinely ordered, generally in sexual cases, but not necessarily – would you agree, Mr. Lobsenz?

MR. LOBSENZ: Yes.

THE COURT: If he had to go to counseling because his partner was threatening his life, wouldn’t that be compensable?

MR. LOBSENZ: If it was a case involving assault and he had been threatened, then it would be related to the crime and then, yes.

THE COURT: I mean, he had understood according to this case, that his partner was setting up somebody to kill him.

The question is, does that approximately [sic] cause emotional stress?

I would say probably.

If you go to counseling for the consequences of having a threat to your life, is that related?

I would say, "yes." Just like a victim of sexual assault, who has to go into counseling, it is related.

MR. LOBSENZ: I would agree that it is related. I wouldn't agree that it is directly related to the crime charged to [sic] this case, because he wasn't charged with assault.

THE COURT: You and I disagree on that. I don't think he has to be charged with assault. I think that charged – you and I disagree. I think that is related.

MR. LOBSENZ: Maybe I should have said that it has to be directly resulting from the crime charged, whatever crime is charged.

THE COURT: All right. Thank you. [To the prosecutor:] Go ahead.

RP 9/22/11, at 9-10.

The prosecutor then argued that the fact that medical expenses were incurred shortly before the time that *trial was held* – which was one year after the date the crimes were committed – was sufficient to establish the necessary causal relationship between the offenses and the medical expenses. But Judge Hayden interjected and expressed doubt as to

whether it was sufficient to show a relationship between the medical treatment and witness stress caused by the fact that a trial was held:

MS. STOREY: *I would also point out*, Your Honor, with respect to the Bartell Drugs request, *the cardiology request*, the instance – *the timing* during which the prescription was written and filed, and *the cardiology appointments were held*, was the exact same timeframe during which the defense was interviewing Dr. King's employees.

I know from my observations that that caused a great deal of stress throughout the company.

So in terms of Mr. Lobsenz's arguments that it is not relevant, because it [is] a year after the crime, it is relevant, because the stress from the defense interviews --

THE COURT: I am not – let me suggest –

MS. STOREY: -- occurred around the same time.

THE COURT: let me suggest, counsel, *I am not sure that the stress of the trial was the kind of thing that is compensable for appointments to the doctor.*

My view is that if the stress is related to the underlying crime, which is the threat to kill, then the treatment for that stress is related.

I do not think that the courts will say that in – when you are involved in the trial process, that all emotional stress-type treatments is compensable.

I think that the courts would say that is not a direct cause of the crime. But if it is caused by the underlying event, as it would be [in] the [case of]⁴ sexual assault, I think that is compensable.

⁴ Although the transcript does not contain the bracketed words, appellant's counsel has added them because it seems obvious that the court reporter simply missed these words, appellant's counsel believes the State will readily agree that the Court said them, and adding them in will assist this Court to understand what the trial judge was saying. The

MS. STOREY: I guess, Your Honor, if the response to that is that this particular stress would not have occurred, had Dr. Mockovak [not] committed his crime in the first place.

THE COURT: True.

MS. STOREY: -- because of that, I think that it is covered by the statute.

THE COURT: Let me suggest that I don't -- if there is, for instance, a case of the victim takes the stand and being cross-examined by the defense is very stressful -- which it frequently is -- as a consequence of being cross-examined they end up in therapy.

Is that compensable?

MS. STOREY: I would say yes.

THE COURT: *I don't think so.*

MS. STOREY: They wouldn't be in counseling had the defendant not committed his crime.

THE COURT: *I don't think that it is compensable in terms of restitution. I haven't seen a case on it, but I don't think so.*

RP 9/22/11, at 11-12 (emphasis added).

Appellant's counsel noted that the charged crimes were committed during the period between August and early November of 2009,⁵ and that there was never any risk that Dr. King would actually be assaulted:

same is true of the word "not" which counsel believes the court reporter inadvertently omitted from Ms. Storey's next comment.

⁵ The original information alleged that the crime of conspiracy to commit murder was committed between August 3 and November 12, 2009. CP 40. (Later, an amended information shortened the term of the conspiracy by five days, putting the end date at November 7, 2009).

MR. LOBSENZ: As you mentioned, these are inchoate crimes from which nothing ever happened, because Mr. Colton [sic] wasn't in touch with the Russian Mafia. He was in touch with the FBI. There was no risk that anything would ever happen as a direct result of these crimes. None.

RP 9/22/11, at 18. It was not until nearly a year, about 3 months before trial was scheduled to start, that Dr. King went to see a cardiologist, allegedly for some ailment that was directly caused by the defendant's criminal conduct. CP 24.

Judge Hayden then stated that the only expenses that he viewed as proper subjects for an award of restitution were the medical expenses related to a drug prescription and Dr. King's two visits to a cardiologist:

It is my view that the things that are related in this case that would be affirmed on appeal are those related to the Bartell Drugs and Bellevue Cardiology.

I will say that *I think that they are a result of the underlying crime. The victim ends up having stress related health care, having been the victim of an attempted, or inchoate murder.*

I don't think that it takes a stretch to say that will cause him a lot of anxiety for which they might see a psychiatrist or counselor, or go to a cardiologist. I don't have a problem with it. I don't have a problem with that.

As to the rest of it, I am not going to award it. I certainly suggest that this case will go up on appeal and appeal it. I would be happy to see the Court of Appeals broaden those areas that are allowed for restitution, but I don't think that they will do it.

I think that as to the consequences that are caused by being in trial on a criminal case and how those impact the victim, I think the court is going to say, "We are sorry, but that is the cost of our justice system. You don't get repaid for it."

RP 9/22/11, at 27-28 (Emphasis added). With respect to the medical bill paid to the cardiologist (\$1,543.24), at the hearing held on September 22, 2011, Judge Hayden said he was going to exercise his discretion to double that amount. RP 9/22/11, at 30.

c. Factual Dispute Over The Existence Of a Direct Causal Connection Between the Appellant's Criminal Offenses, and The Stress Which Caused Dr. King to Seek Treatment from the Cardiologist.

Appellant's counsel pointed out that the court had approved a bifurcated procedure for addressing the restitution request, and that the September 22nd hearing was *only* supposed to be a hearing for the presentation of *legal* arguments as to whether the Court had the legal authority to grant the State's requests for different types of restitution. RP 9/22/11, at 31. The Court agreed that it had approved the bifurcated procedure for handling factual disputes at a later evidentiary hearing. When appellant's counsel asked for a separate evidentiary hearing to determine whether there was any causal relationship between the crimes and the services of the cardiologist, the Court granted that request. RP 9/22/11, at 31 ("I guess we will have to have a factual hearing, then on the - -whether or not the Bellevue Cardiology [expense] is related.").

Judge Hayden set forth what he saw as the proper analysis of the factual question of whether the cardiologist's services for "stress" were

sufficiently causally related to the defendant's crimes for him to be able to include them in a restitution award:

I guess we can have a factual hearing on the cardiology, upon my return, from which doesn't happen until the beginning of November. But we can have a factual hearing on that.

But it is my view that if it is in any way related to the stress of having the threat of the murder, when you go to the cardiology, that is related. It may also be related to the rest of it.

But if it is related at all to the stress – and I certainly would think it might be. That doesn't take a rocket scientist to say when your partner – when you find out that your partner is trying to get you killed, that might cause some erythema [sic], some heart problems, some psychological problems. It might cause your blood pressure to go up. I don't have a problem with that.

I don't look too hard at it, frankly, because we routinely – when we are talking about the sexual assault victims, we say, it is pretty well recognized that things like that lead to the stress. You get counseled for that, that is not recovery for emotional stress. That is recovery for medical treatment as a consequence of the act.

But you are right, the doctor might say that it had absolutely nothing to do with his fear of having almost been killed.

If the doctor says that, then, there is no basis for me to award it. I think that the doctor will say that it is related.

MR. LOBSENZ: He may, your Honor.

THE COURT: ***He may not. He may say that it has absolutely nothing to do with any of this.***

MR. LOBSENZ: He may say that "I have been seeing Dr. King for cardiology checkups for the last ten years.

THE COURT: He might say this, or he might say that "the stress of all of this, in fact, caused him heart problems."

I am assuming that that is what he would say. *If he doesn't say that. I won't be awarding restitution.*

I didn't know that given there was \$220,000 that got it narrowed down to \$3,000 that Dr. King [sic] would want to make a big issue on the factual inquiry of the matter. If he wants to, that is fine, we will have a hearing.

MR. SQUIRES: That is Dr. Mockovak that is making the issue, not Dr. King. It is Dr. King's medical expense.

THE COURT: *Dr. King's* medical expense and Dr. King is part of the medical pensions [sic]⁶ *burden is to show it is related.*

Dr. Mockovak's attorney is saying, "wait a minute we haven't had the factual showing of the relationship."

Mr. Lobsenz is accurate that this case was supposed to be a legal hearing. He is still contesting the factual relationship. He may do that and we will have a hearing.

RP 9/22/11, at 31-34 (emphasis added).

d. The Superior Court Ruling That Live Testimony from the Doctor Was Unnecessary, But That the Court Needed a Letter That Substantiated the Existence of a Direct Causal Connection Between the Criminal Offenses, and Dr. King's Stress.

The prosecutor then brought up the matter of whether it would be sufficient to present a declaration from the cardiologist, or whether live testimony was going to be required. RP 9/22/11, at 34. Judge Hayden ruled that live testimony would not be necessary:

THE COURT: I don't have to have live testimony from the doctor. All I need is a letter from the doctor, the declaration from

⁶ Most likely the word "pensions" should be the word "expenses".

the doctor. I am not planning to have a live restitution hearing with the doctor present. I have never had that in restitution cases.

RP 9/22/11, at 34.

Appellant's counsel asked if Dr. King's counsel (Mr. William Squires) would furnish him with copies of the cardiologist's medical records for any treatment for heart problems that he had ever provided to Dr. King. RP 9/22/11, at 34. Judge Hayden commented:

THE COURT: I don't know what the records are going to say. I want a declaration of [sic] something from the doctor saying: "This is related," or "it is not." *If he can't say that it is related, then there is no connection.*

RP 9/22/11, at 35. (Emphasis added). Dr. King's attorney agreed to give appellant's counsel something. *Id.*

e. The Written Order Denying All Other Restitution Requests Except for a \$10 Drug Prescription Charge and Reserving The Request for Repayment of the Cardiologist's Bills.

Judge Hayden then entered an order memorializing his ruling denying Dr. King's other restitution requests (except for a request for \$10 for a drug prescription which Dr. Mockovak did not oppose). RP 9/22/11, at 35-36. The Court's written order states:

The above entitled court, having heard a motion for restitution of \$220,438.95. Having heard legal argument the court concludes that the \$10 Bartell's claim is ordered; the court will hold a hearing on whether the cardiology related claims are compensable as restitution. *The remainder of the restitution request is denied as not directly related to defendant's crimes* and is therefore denied.

CP 237 (emphasis added). A second hearing was scheduled for November 4, 2011. RP 9/22/11, at 39.

f. **Supplemental Provision of Dr. King's Medical Records and a Letter From Dr. Crittenden, the Cardiologist.**

In October, appellant's counsel received copies of the medical records of Dr. Gretchen Crittenden of Bellevue Cardiology, and he in turn furnished them to the Court. CP 243-246. These records documented the observations made by Dr. Crittenden on September 28 and October 19, 2010. CP 243, 246. In a supplemental brief submitted to the Court, Dr. Mockovak argued that these records failed to show a direct causal connection between his criminal offenses (committed during the period from August 3 to November 7, 2009) and the services of the cardiologist (rendered in September and October of 2010) as required by RCW 9.94A.030(53).

Under the heading, "History of Present Illness," the record for September 28, 2010 states in pertinent part:

He describes a squeezing-like chest tightness on the left side of his chest. *These seem to occur with stress, of which he has a significant amount in his life.* The pain lasts about five minutes and then goes away. *His stress is related to professional issues.* His business partner hired a hit man to kill him in an attempt to collect life insurance. There is now a criminal investigation going on and *most of the professional work at his clinic has now been dumped on him. As well he has to deal with the partner who is still part of the practice.*

He feels the pain only with tension and not with running. It is right-sided. It does radiate to his shoulder and his abdomen sometimes. It is not associated with shortness of breath or nausea. He has never had a syncope, but he did have presyncope associated with blood sticks in the past. No palpitations.

CP 243 (Appendix A-1) (emphasis added).

Because several of Dr. King's family members had a history of diabetes and myocardial infarctions, Dr. Crittenden recommended that Dr. King have a battery of renal function tests and nuclear stress test. CP 244. Dr. King had these tests and paid another visit to Dr. Crittenden on October 19, 2010. The stress test results indicated that Dr. King had excellent exercise tolerance with no evidence of ischemia." CP 245 (Appendix B-1).

In addition to the medical records, Dr. King's attorney submitted to the Court a declaration to which he attached a copy of a letter from Dr. Crittenden. The doctor's letter states:

To whom it may concern:

Mr. King was seen in September and October of 2010. Mr. King was evaluated for chest pain. In my opinion, ***his symptoms were a direct result of stress suffered from criminal proceedings associated with his practice.***

If you have any further questions, please do not hesitate to contact me.

Sincerely,

Gretchen Crittenden, M.D.

CP 254 (Appendix C) (emphasis added).

Appellant submitted a supplemental brief to the Superior Court in which he pointed out that Dr. Crittenden had *not* opined that Dr. King's stress was the direct result of Dr. Mockovak's *criminal offenses*, but had instead stated that it was the direct result of the "criminal proceedings" devoted to the trial and resolution of the criminal charges alleging those offenses:

The stress to which Dr. Crittenden refers is stress resulting from the subsequent arrest and prosecution of Dr. Mockovak, but not directly from his criminal offenses. After Dr. Mockovak was arrested, his medical license from the State of Washington was suspended and thus he could no longer work at any of the Clearly Lasik eye surgery clinics. As noted in the "new patient" chart notes, this created business problems for Dr. King because "most of the professional work has now been dumped on him." Dr. King had to either find another surgeon to do the work that Dr. Mockovak had been doing, or he had to do the work himself. Dr. King and Dr. Mockovak remained co-owners of the medical practice, and the difficulties of continuing to operate the business with him also caused Dr. King stress.

CP 239-240.

g. Absence of Any Assertion by Dr. King That His Stress In The Fall of 2010 Was Caused by A Fear of Being Killed by Dr. Mockovak.

Although he submitted two briefs in support of his restitution requests, Dr. King never submitted any affidavit or declaration of his own. Judge Hayden said on the record that if the cardiologist said that Dr. King's stress had "to do with fear of almost being killed" then there would be a

basis for the Court to order restitution for payment of the cardiologist's bill. RP 9/22/11, at 32. But despite this invitation to present his own testimony that his stress was caused by this type of fear, Dr. King never made any such assertion. He never asserted that in September and October of 2010 he was stressed because he was afraid of being killed.

h. Evidence of the Portion of the Cardiologist's Bill Paid By Dr. King.

Dr. Mockovak noted that there was nothing in the medical records to support the notion that Dr. King was experiencing stress nearly one year after commission of the crimes because he was afraid he was going to be killed. CP 240. Instead, the medical records indicated that Dr. King was experiencing stress because he had problems associated with how to continue to operate his surgery business without being able to utilize the surgical skills of his business partner Dr. Mockovak, because Dr. Mockovak was in jail awaiting trial. CP 240.

Dr. Mockovak also noted that although he had asked Dr. King's counsel to provide him with records which showed who had paid the cardiologist's medical bills, no such records had been provided. Dr. Mockovak asked for documentation to show whether the bills had been paid by Dr. King out of Dr. King's own personal funds, or whether they had been paid (in whole or in part) by Dr. King's medical insurance provider. CP 240. Dr. King's counsel failed to provide any such

documentation and did not disclose who paid Dr. Crittenden's bills. CP 241. Accordingly, Dr. Mockovak argued that it was impossible to tell whether any restitution which the Court might order should be paid to Dr. King, to make him whole, or to his medical insurance provider. CP 241.

The total amount of Dr. Crittenden's invoices was for \$1,533.34. In reply to Dr. Mockovak's request to identify who paid these bills, Dr. King's counsel asserted that

Premera Blue Cross paid approximately \$695.70 and Dr. King paid \$837.64, for which he has not received any reimbursement from insurance. Squires Decl. at ¶ 4. Of course, Dr. King paid premiums on his Premera Blue Cross medical insurance throughout the period in which his insurer paid his cardiologist. Nevertheless, if the Court feels it is necessary, Dr. King does not object to an appropriate portion of the restitution award being awarded to the insurer, either directly or through an order to Dr. King.

CP 248. See also CP 252, ¶ 4.

i. Final Order Awarding Restitution In the Amount of \$1,543.34.

All parties were then content to rest on the written records and briefs which had been filed with the Court, so as it turned out there was no need for an evidentiary hearing, and the parties advised the court they saw no need for any further opportunity to present oral argument. Accordingly, on November 7, 2010, the Court ruled on the remaining restitution issue regarding the cardiologist's bill, and entered the following written order:

RCW 9.94A.030(53) provides the following definition of the term “victim”:

Any person who has sustained emotional, psychological, physical or financial injury to person or property as a direct result of the crime charged.

E. APPELLATE STANDARDS OF REVIEW

A Superior Court’s order of restitution will generally not be disturbed on appeal absent an abuse of discretion. *State v. Enstone*, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). An abuse of discretion occurs when the trial court’s decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Id.* When deciding whether to enter a restitution order, if the trial court “applied an incorrect legal analysis, it abused its discretion.” *State v. Kinneman*, 155 Wn.2d 272, ¶ 35, 119 P.3d 350 (2005). When a trial court “exceeds its statutory authority in ordering restitution where the loss suffered is not causally related to the offense committed by the defendant, or where the statutory provisions are not followed,” an abuse of discretion occurs. *State v. Vinyard*, 50 Wn. Ap.. 888, 891, 751 P.2d 339 (1988) (vacating restitution order requiring defendant to pay for cost of medical expenses not shown to be causally related to crime committed).

F. ARGUMENT

1. THE SUPERIOR COURT'S AUTHORITY TO ORDER RESTITUTION IS CONFERRED BY STATUTE.

The authority to impose restitution is not an inherent power of the court. *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). “The authority to order restitution is purely statutory.” *State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). *Accord State v. Enstone*, 137 Wn.2d at 682; *State v. Christensen*, 100 Wn. App. 534, 536, 997 P.2d 1010 (2000); *State v. Dedonado*, 99 Wn. App. 251, 255, 991 P.2d 1216 (2000); *State v. Woods*, 90 Wn. App. 904, 906, 953 P.2d 834, *review denied*, 136 Wn.2d 1021 (1998). “[T]he criminal process should not be used simply as a means to enforce civil claims.” *State v. Barnett*, 36 Wn. App. 560, 563, 675 P.2d 626 (1984).

2. THE COURT MAY RELY ONLY UPON FACTS WHICH HAVE BEEN ADMITTED BY THE DEFENDANT OR PROVEN BY THE STATE.

When determining restitution, the sentencing court may rely on no more information than is admitted by a plea agreement, acknowledged by the defendant, or proved by the State. *Woods*, 90 Wn. App. at 907. “When a defendant disputes material facts for purposes of restitution, the sentencing court must either not consider those facts or grant an evidentiary hearing where the State must prove the restitution amount by a preponderance of the evidence.” *Dedonado*, 99 Wn. App. at 256.

3. RESTITUTION IS LIMITED TO REIMBURSEMENT OF COSTS ACTUALLY INCURRED BY THE CRIME VICTIM AS A DIRECT RESULT OF THE CRIME CHARGED.

RCW 9.94A.753(3) authorizes courts to order defendants to pay restitution to the victims of their crimes. The term “victim” is statutorily defined as a person who has sustained an injury “as a direct result of the crime charged.” RCW 9.94A.030(53). Applying these statutes, courts routinely hold that an “award of restitution must be based on a causal relationship between the offense charged and proved and the victim’s losses or damages.” *Christensen*, 100 Wn. App. at 536.⁷ “Restitution cannot be imposed based on the defendant’s ‘general scheme’ or acts ‘connected with’ the crime charged, when those acts are not part of the charge.” *Woods*, 90 Wn. App. at 907-08; *State v. Dauenhauer*, 103 Wn. App. 373, 378, 12 P.3d 661 (2000); *State v. Misrak*, 69 Wn. App. 426, 428, 848 P.2d 1329 (1993).

In other words, the award of restitution must be based on a causal relationship between the offense charged and the victim’s losses or damages. A defendant may not be required to pay restitution beyond the crime charged or for uncharged offenses.

⁷ *Accord State v. Bunner*, 86 Wn. App. 158, 160, 936 P.2d 419 (1997) (restitution order reversed because medical document “fail[ed] to establish causal connection between the victim’s medical expenses and the crime committed”); *State v. Vinyard*, 50 Wn. App. 888, 891, 751 P.2d 339 (1988) (legal fees must be a direct result of the crime to constitute restitution); *State v. Oakley*, 158 Wn. App. 544, 553, 242 P.3d 886 (2010) (restitution order reversed because damage caused to garage door while fleeing scene was not the direct result of the charged crimes because defendant was not convicted of fleeing the scene but rather for his earlier drive-by-shooting and assault); *State v. Osborne*, 140 Wn. App. 38, 163 P.3d 799 (2007)(restitution order reversed because victim’s back injuries were not caused by crimes to which defendant pled guilty).

Woods, 90 Wn.2d at 908. “The general rule is that restitution may be ordered only for losses incurred as a result of the precise offense charged.” *State v. Misrak*, 69 Wn. App. 426, 428, 848 P.2d 1329 (1993).

4. **HERE, AS IN *VINYARD*, THERE IS NO EVIDENCE THAT DEMONSTRATES THAT DR. KING’S STRESS WAS THE DIRECT RESULT OF THE CRIMES COMMITTED. DR. CRITTENDEN’S LETTER AND THE MEDICAL RECORDS SHOW THAT HIS STRESS WAS CAUSED BY WORRYING ABOUT BUSINESS DIFFICULTIES ALLEGEDLY CREATED BY DR. MOCKOVAK’S TRIAL.**

Nothing in the record indicates that in September and October of 2010, when Dr. King was suffering from stress and consulting a cardiologist, that such stress was caused by Dr. Mockovak’s having formed an agreement with an FBI informant to have Dr. King killed while he was on vacation in Australia in the fall of 2009. On the contrary, the documents in the record show that his stress was *not* caused by Dr. Mockovak’s criminal conduct. If, for example, Dr. Crittenden’s records showed that Dr. King complained in the fall of 2010 that he was having nightmares and anxiety attacks triggered by thoughts about the fact that Dr. Mockovak sought to have him killed in the fall of 2009, then that *would* show a causal connection between the crimes committed in 2009 and the stress experienced in 2010. But no such evidence exists.

Instead, Dr. Crittenden’s records rather unequivocally show that it was not Dr. Mockovak’s criminal acts which caused the stress. Instead, Dr.

King's fears regarding what he perceived to be the negative effects of Dr. Mockovak's trial on the surgery business caused Dr. King's stress. Dr. Crittenden wrote into Dr. King's medical chart: "***His stress is related to professional issues.***" CP 243 (emphasis added). She went further and explained what those "professional issues" were: "most of ***the professional work at his clinic has now been dumped on him.*** As well he has to deal with the partner who is still part of the practice." *Id.*

Dr. Crittenden's subsequent "To whom it may concern" letter also does not provide any support for the restitution order. In her letter Dr. Crittenden said that Dr. King's stress was the direct result of "the criminal proceedings associated with his practice." CP 254. But expenses incurred as a result of criminal proceedings are not the equivalent of expenses incurred as a result of crimes. The "criminal proceedings" included Dr. Mockovak's trial and pretrial proceedings. Because he was a witness at trial, Dr. King had to attend a portion of the trial, and that in turn required him to make arrangements to have some other surgeon cover for him back at the clinic while Dr. King testified. Dr. Crittenden opined that this caused Dr. King's stress. CP 254.

Similarly, Dr. King also asserted that there was a connection between Dr. Mockovak's trial and Dr. King's business expenses, and that these

increased expenses were what caused him to display stress related symptoms:

Dr. King and his wife also incurred medical expenses related to the stress imposed by the Defendant's crime. ***Due to Dr. King's required attendance at trial, Dr. King's company, Clearly Lasik, was forced to pay a surgeon to conduct surgeries in Dr. King's absence. Clearly Lasik also hired a public relations firm to ameliorate the harmful effects of Defendant's conduct and the very public trial on the business.***

CP 222 (emphasis added).

In the court below, the prosecutor also argued that Dr. King suffered from work related stress problems because the *trial* of Dr. Mockovak's case was having disruptive effects on his eye surgery business. She asserted that she had observed that Dr. King's stress was caused by the fact that Dr. Mockovak's trial counsel conducted pretrial witness interviews of clinic employees. RP 9/22/11, at 12. The State reasoned as follows: (1) If Dr. Mockovak had not committed the crimes, he never would have been arrested and charged; (2) If he had never been charged there never would have been a trial; (3) If there had never been a trial, Dr. Mockovak's lawyers would never have had to interview employees of the medical clinic who were listed as prosecution witnesses for the upcoming trial; (4) If there had never been any defense attorney interviews of Dr. King's employees, Dr. King would not have developed symptoms of stress; (5) If he had never developed these symptoms of stress, he never

would have had to see a cardiologist; and (6) If he had never had to see a cardiologist, he never would have incurred a bill for \$1,533.34 for the services of the cardiologist. *Therefore*, according to the prosecutor, Dr. Mockovak's crimes were the direct cause of the \$1,533.34 bill from the doctor.⁸

But this kind of multi-step, indirect, and extremely attenuated causal relationship is not legally sufficient. The Superior Court judge correctly stated on the record that unlike stress caused by the underlying crime, stress caused by having to attend a trial is not within the scope of the statutory authorization for an award of restitution:

My view is that if the stress is related to the underlying crime, which is the threat to kill, then the treatment for that stress is related.

I do not think that the courts will say that in – when you are involved in the trial process, that all emotional stress-type treatments is compensable.

⁸ The nursery rhyme example is pertinent here:

For want of a nail the shoe was lost.
For want of a shoe the horse was lost.
For want of a horse the rider was lost.
For want of a rider the battle was lost.
For want of a battle the kingdom was lost.
And all for the want of a horse shoe nail.

http://www.rhymes.org.uk/for_want_of_a_nail.htm

Thus, the absence of a nail was an indirect, highly attenuated "cause" of the fall of the reign of a king. But the law would not view it as even a proximate cause of the loss of the kingdom, much less as "a direct result" of the act of failing to properly shoe a horse. RCW 9.94A.030(53).

I think that the courts would say that is not a direct cause of the crime. But if it is caused by the underlying event, as it would be [in] the [case of] sexual assault, I think that is compensable.

RP 9/22/11, at 11-12.⁹

After crimes are committed, some charged defendants plead guilty and others go to trial. For those who choose to go to trial, the criminal proceedings last longer, and for people, such as the crime victim, there frequently will be stress associated with having to attend the trial and having to give testimony. For Dr. King, there was the stress of having “most of the professional work at his clinic dumped on him” while he prepared to attend the trial. CP 243, 222. But neither the stress caused by having to attend trial and testify, nor the stress caused by having to pay business expenses that would not have been incurred absent a trial, qualifies as something for which restitution is authorized, because neither is directly caused by the crime itself. “Restitution cannot be imposed based on . . . acts ‘connected with’ the crime charged, when those acts are not part of the charge.” *State v. Woods*, 90 Wn. App. at 907-08.

⁹ Since a crime victim will virtually always suffer less stress if the defendant pleads guilty than if he elects to go to trial, it would violate due process by chilling a defendant’s exercise of the right to go trial if the restitution statute were construed to permit higher restitution awards against defendants who elect to go to trial than were permitted in cases of defendants who enter a guilty plea. *Cf. State v. Frampton*, 95 Wn.2d 469, 479, 627 P.2d 922 (1981) (unconstitutional to authorize death penalty only for those defendants who go to trial and not for those who plead guilty).

In *Vinyard* the defendant pleaded guilty to custodial interference in the second degree. She committed the crime by taking Stephen, her youngest child, from her former husband's custody and leaving the State with him. Fifteen months later she and the child were found in Texas, she was arrested, and the child was returned to the father in Washington State, 50 Wn. App. at 889-90. "After Stephen's return, Mr. Vinyard took him to a psychologist for therapy," and thereby incurred treatment expenses. *Id.* at 890. The sentencing judge ordered the defendant to pay restitution in the amount of \$2,030.51 for the child's psychological therapy. *Id.* Applying the settled rule requiring a direct causal connection between the crime and the expense incurred, the Court of Appeals vacated the part of the restitution order which required the defendant to pay this expense:

There was no proof in the record, other than Mr. Vinson's testimony, that the medical expenses included for psychological counseling, present or future, resulted from the crime committed by Ms. Vinyard. Although it is reasonable to believe that Stephen suffered psychologically from his involvement in the ordeal, still there must be some competent testimony showing a connection between the criminal acts and the need for treatment.

Vinyard, 50 Wn. App. at 893. The court remanded with directions for the trial court to determine whether and to what extent the therapy expenses incurred were causally related to Mrs. Vinyard's crime. *Id.* at 894.

The appellate court also found the portion of the restitution awarded for reimbursement of medical expenses incurred by the father to be improper, and ordered it stricken from the restitution order:

Finally, medical expenses incurred by Mr. Vinyard as a result of a fall while in Arizona investigating his son's abduction were included in the order of restitution. *We find no direct causal connection between Mrs. Vinyard's crime and Mr. Vinyard's accident.* Thus, we conclude this expense was also improperly included in the order of restitution.

Vinyard, 50 Wn. App. at 894 (emphasis added).

Similarly, in *State v. Bunner*, 86 Wn. App. 158, 159, 936 P.2d 419 (1997), the defendant pleaded guilty to child rape, and at sentencing he was ordered to pay restitution of \$13,554.96 for the costs of the child victim's medical treatments and counseling, and another \$10,549.14. The defendant objected that no evidence had been presented to demonstrate that these expenses were factually related to his criminal acts, and thus argued he could not be ordered to pay them. The trial judge ruled that no such evidence was necessary, because a report from the Office of Provider Services (apparently a DSHS department) had already determined that payment of these amounts was appropriate. *Id.* The Court of Appeals reversed the restitution award stating that the DSHS report did not state any causal connection between Bunner's crime and the expenses incurred:

Here, the trial court relied upon the inference that DSHS's Office of Provider Services would not have paid the medical bills if they were not related to Bunner's crimes. The court admitted, however,

that it has “no idea” of how a causal relationship from the document alone is established. As the State concedes, this summary, which does not indicate why medical services were provided, ***fails to establish the required causal connection between the victim’s expenses and the crime committed.***

Bunner, 86 Wn. App. at 160 (emphasis added).

In the present case, the trial court judge stated, “the doctor might say that it [the stress] had absolutely nothing to do with his fear of having almost been killed.” RP 9/22/11, at 32. In fact, the doctor said the stress was created by the “criminal proceedings” and by “professional issues” created by the criminal proceedings. CP 243, 254. Thus, the doctor never said the stress was related to Dr. King’s fear of being killed. This is not surprising since by the time he saw the cardiologist, it had been nearly a year since Dr. Mockovak’s conspiratorial plan to kill Dr. King had ended. As Division Two noted in *State v. Hahn*, 100 Wn. App. 391, 996 P.2d 1125 (2000), a causal connection between the crime and subsequent medical treatment cannot simply be inferred when there is a substantial period of time between the two events.¹⁰ Moreover, even while the conspiracy was allegedly in existence during the fall of 2009, Dr. King was never in any real danger because there never were any real “hitmen” and the second conspirator was an undercover FBI agent. Since the doctor

¹⁰ “Even if we infer a connection from the fact that nearly all of the individually listed services were provided within five days [of the crime], these services only account for

never said the stress was caused by the crime committed, *Bunner* and *Vinyard* are directly on point and control. The burden of proof was on the State to establish the required direct causal connection. The State failed to carry that burden. Here, as in *Bunner* and *Vinyard*, the restitution order should be vacated.

5. SINCE THE STATUTE LIMITS RESTITUTION TO REIMBURSEMENT FOR “ACTUAL EXPENSES INCURRED,” THE TRIAL COURT ERRED IN AWARDING DR. KING RESTITUTION FOR MORE THAN THE AMOUNT HE ACTUALLY INCURRED.

RCW 9.94A.753(3) provides in pertinent part that “restitution ordered by a court pursuant to a criminal conviction shall be based on . . . *actual expenses incurred* for treatment for injury to persons” Dr. King’s attorney eventually provided the Superior Court with a declaration which stated that Dr. King himself actually paid Dr. Crittenden only \$837.64. CP 248. The rest of Dr. Crittenden’s bill (\$695.70) was paid by Premera Blue Cross. CP 248. Thus, the Superior Court awarded Dr. King *more* than the amount of his “actual expenses incurred.” Since this contravenes the statutory command of RCW 9.94A.753(3), this was an abuse of discretion.

\$3,921.52 of DSHS’ total claim of \$24,662.37. Thus, \$20,740.85 remains unexplained.” *Hahn*, 100 Wn. App. at 400, citing *Bunner*, 86 Wn. App. at 160.

6. IT IS ABUSE OF DISCRETION TO ORDER RESTITUTION IN EXCESS OF THE VICTIM'S ACTUAL LOSS JUST FOR THE SAKE OF SEEING WHETHER AN APPELLATE COURT WILL UPHOLD SUCH AN ORDER. SIMPLY WANTING TO SEE WHAT AN APPELLATE COURT WILL SAY ABOUT THE FACTORS WHICH INFORM THE EXERCISE OF DISCRETION IS NOT A TENABLE REASON FOR EXERCISING SUCH DISCRETION.

Appellant acknowledges that while RCW 9.94A.753(3) states that the amount of restitution ordered shall be “based on” the amount of the victim’s actual loss, it also authorizes a Superior Court sentencing judge to award restitution in excess of that amount so long as the total amount does “not exceed double the amount of the . . . victim’s loss from the commission of the crime.” Initially, at the September 22, 2011 hearing, the sentencing judge said that he intended to “double” the requested amount of \$1533.34 to \$3,000.00. RP 9/22/11, at 30. At the time of this hearing, Dr. King had not yet provided any information as to how much of Dr. Crittenden’s bill he had actually paid himself. Thus, at the time of the hearing, the sentencing judge was proceeding on the assumption that that Dr. King had paid all of it.

The sentencing judge expressed curiosity as to what kind of circumstances would justify a restitution order directing payment of an amount that was double the amount of the victim’s loss:

[M]y experience is not that – that the Court of Appeals and the Supreme Court make criminal restitution a much narrower area for

compensation, than you would get in a civil case. It is a much narrower causation test.

So you know what I am going to do? I am going to double it.

MR. LOBSENZ: That is your prerogative, Your Honor.

THE COURT: I want to find out what happens, when the trial judge doubles it. It is the \$10, the \$229.89, \$190.00, \$127.46, and \$985.89.

MS. STOREY: I am not a mathematician, I am a lawyer. Under my flawed math – anybody can correct me if I am wrong – that comes up to \$1,543.24, double that is \$3,086.86.

RP 9/22/11, at 30. The sentencing judge asked if Dr. Mockovak wanted a factual hearing (on the issue of whether there was a sufficient causal relationship between the cardiologist's services and the crimes committed) and counsel replied he wanted a factual hearing if the judge was going to order restitution of \$3,000. RP 9/22/11, at 31. The judge then stated, "I guess we will have to have a factual hearing, then on the – whether or not the Bellevue Cardiology is related . . ." *Id.*

A month and a half later, the sentencing judge learned that Dr. King had paid only a little more than half the doctor's bill. It is possible that he decided, at this time, to exercise his statutory power to order an amount of restitution higher than Dr. King's actual loss. Under the doubling provision of RCW 9.94A.753(3) he had discretion to order restitution up to the amount of \$1,675.28 (2 X \$837.64). The State may argue that even

though he did not *say* that he was exercising that power in the text of his restitution order, that in fact was what the sentencing judge did.

But even assuming, *arguendo*, that this is what the sentencing judge did, for three reasons the record demonstrates a clear abuse of discretion. First, when a judge fails to give any reasons at all for exercising discretion in a particular manner, and where no logical reason is apparent from the record, an abuse of discretion exists. That is to say, an exercise of discretion to increase punishment for no reason at all is, by definition, an abuse of discretion. The seminal case on abuse of judicial discretion defines judicial discretion as follows:

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously.

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

Discretion exercised for no reason is the antithesis of discretion exercised with regard to what is right under the circumstances. Discretion exercised for no reason at all is a perfect example of discretion exercised arbitrarily or capriciously. Assuming, *arguendo*, that the sentencing judge intended to rely on his statutory doubling power, his failure to give any reason for such an exercise of discretion is by definition an abuse of discretion.

Second, the Superior Court judge abused his discretion because the only justification he gave for exercising this discretionary power was simply, “I want to find out what happens,” when a trial judge’s doubling decision is appealed. RP 9/22/11, at 30. He merely wanted to see if his “exercise of discretion” would be affirmed. But exercising a discretionary power just to see if one can be affirmed is an untenable reason. It is the very essence of caprice to do something just because one can. *See In re Sumey*, 94 Wn.2d 757, 768, 621 P.2d 108 (1980).¹¹

No other potential reason appears, even implicitly, in the record of this case. Therefore, the exercise of the power granted by RCW 9.94A.753(3) to order restitution in excess of the victim’s actual loss (if that is in fact what the sentencing judge intended) was an abuse of discretion because a desire to see what an appellate court will do is not an objective criterion for determining “what is right under the circumstances” of the case before the court. *Carroll*, 79 Wn.2d at 26.

Third, when discretion is exercised without any articulation as to why, the Superior Court fails to create a record that is adequate for meaningful appellate review. A completely unexplained exercise of discretion cannot

¹¹ “If ‘capricious’ is used in a popular sense, it denotes: “Marked or guided by caprice; given to changes of interest or attitude according to whims or passing fancies: not guided by steady judgment, intent or purpose ...” Webster’s Third New International Dictionary (1963). “Capricious” has been legally defined in various ways: e. g., apt to change suddenly, freakish, whimsical, humorous (Citation omitted); or freakish, whimsical, fickle, changeable, unsteady, and arbitrary. (Citation omitted).”

be upheld simply on the basis of some kind of appellate court hunch that the judge below must have had some tenable reason.” See, e.g., *Knecht v. Marzano*, 65 Wn.2d 290, 294, 396 P.2d 782 (1964) (“discretion equated only with the feelings and hunches of the trial judge is not amenable to objective appellate evaluation and appellate review, for the end result would be nonreviewable trial judge discretion – in essence no appeal whatsoever.”) As the Court said in *State v. Williams*, 96 Wn.2d 215, 228, 634 P.2d 868 (1981):

Objectively assessable reasons or facts must be set out so that meaningful appellate review of the exercise of discretion is possible.

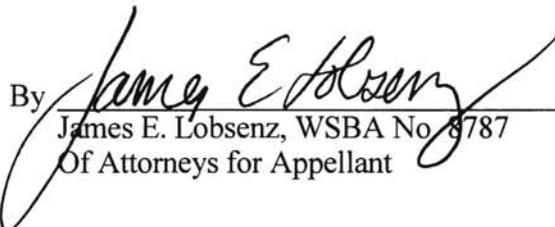
This is particularly true in criminal cases where the convicted defendant enjoys a state constitutional right to appeal. See *State v. Rafay*, 164 Wn.2d 644, 650, 222 P.2d 86 (2009); Wash. Const., art. I, § 22.

G. CONCLUSION

For all of the reasons stated above, appellant asks this Court to vacate the restitution order entered below.

DATED this 20th day of June, 2012.

CARNEY BADLEY SPELLMAN, P.S.

By 
James E. Lobsenz, WSBA No. 8787
Of Attorneys for Appellant

APPENDIX A

KING, JOSEPH

DOB: 08/22/1967

September 28, 2010

NEW PATIENT

REASON FOR VISIT: Mr. King is a 43-year-old man who is here for risk assessment and chest tightness.

HISTORY OF PRESENT ILLNESS: He describes a squeezing-like chest tightness on the left side of his chest. These seem to occur with stress, of which he has a significant amount in his life. The pain lasts about 5 minutes and then goes away. His stress is related to professional issues. His business partner hired a hit man to kill him in an attempt to collect life insurance. There is now a criminal investigation going on and most of the professional work at his clinic has now been dumped on him. As well, he has to deal with the partner who is still part of the practice.

He feels the pain only with tension and not with running. It is right-sided. It does radiate to his shoulder and his abdomen sometimes. It is not associated with shortness of breath or nausea. He has never had syncope, but he did have presyncope associated with blood sticks in the past. No palpitations.

PAST MEDICAL HISTORY: Questionable cholesterol and questionable glucose. He does do fasting glucoses at home and they range from 95 to 120.

FAMILY HISTORY: He has brothers with diabetes. His father has diabetes and an MI. His grandfather had diabetes and his grandparents have had MIs.

SOCIAL HISTORY: Nonsmoker, one drink every other day. He sleeps 7 hours a night. He has three young children, ages 5, 4 and 2 and so he is up at least once a night.

MEDICATIONS: None

ALLERGIES: No Known allergies

REVIEW OF SYSTEMS: For complete review of systems please see patient health history questionnaire.

PHYSICAL EXAMINATION:

VITAL SIGNS:	Weight is 168 pounds. Blood pressure is 110/72. Heart rate is 55.
HEENT:	Pupils equal, round. Oropharynx pink and moist.
NECK:	Supple. No lymphadenopathy.
CHEST:	Clear to auscultation.
HEART:	Regular rate without murmurs, rubs or gallops.
EXTREMITIES:	No clubbing, cyanosis, or edema.

KING, JOSEPH
September 28, 2010

New Patient
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KING, JOSEPH
September 28, 2010 - Continued

SKIN: No rashes or lesions.
PSYCH: Alert, oriented, and appropriate.

ASSESSMENT AND PLAN: Mr. King is a 43-year-old man with chest tightness on the left side radiating to his abdomen and shoulder. He has a family history of diabetes but has not had significant medical workup in the past. At this time, I recommend getting a renal panel with fasting glucose, fasting lipid panel and hemoglobin A1c. We also recommend, given his left-sided chest pain, to risk stratify him using a nuclear stress test. The option of stress echo was discussed, but Dr. King opted for a nuclear stress test given the improved sensitivity.

Finally, recommend getting a CIMT to evaluate carotid intimal thickness for further risk stratification.

GC/rc



Gretchen Crittenden, M.D.

KING, JOSEPH
September 28, 2010

New Patient
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APPENDIX B

KING, JOSEPH

DOB: 08/22/1967

October 19, 2010

TEST RESULTS

REASON FOR VISIT: Mr. King is a 43-year-old man. He initially presented with occasional chest tightness secondary to extreme stress in his life. Apparently his business partner hired a hit man to kill him.

HISTORY OF PRESENT ILLNESS: His stress test revealed excellent exercise tolerance with no evidence of ischemia.

PHYSICAL EXAMINATION:

VITAL SIGNS:	Weight is 169 pounds. Blood pressure is 120/60 Heart rate is 56.
HEENT:	Pupils equal, round. Oropharynx pink and moist.
NECK:	Supple. No lymphadenopathy.
CHEST:	Clear to auscultation.
HEART:	Regular rate without murmurs, rubs or gallops.
EXTREMITIES:	No clubbing, cyanosis, or edema.
SKIN:	No rashes or lesions.
PSYCH:	Alert, oriented, and appropriate.

ASSESSMENT AND PLAN: Mr. King is a 43-year-old man who underwent risk assessment for coronary artery disease. He has excellent exercise tolerance. He had CIMTs which reveal carotid intimal thickness either equal to or less than his age. He had a hemoglobin A1c that was borderline elevated and he was told to watch his glucose and his cholesterol was excellent. He will return to the clinic in one year.

GC/rc


Gretchen Chittenden, M.D.

APPENDIX C



October 11, 2011

Joseph W. King

To Whom It May Concern:

Mr. King was seen in September and October of 2010. Mr. King was evaluated for chest pain. In my opinion, his symptoms were a direct result of stress suffered from criminal proceedings associated with his practice.

If you have any further questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Gretchen Crittenden". The signature is stylized and overlaps with the printed name below it.

Gretchen Crittenden, M.D.

GC/vfh

NO. 68020-0-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL EMERIC

MOCKOVAK,

Appellant.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, hereby declares as follows:

1. I am a Citizen of the United States and over the age of 18 years and am not a party to the within cause.

2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.

3. On June 21, 2012, I caused to be served VIA E-MAIL and US MAIL one copy of the following document on:

DONNA WISE
Senior Deputy Prosecuting Attorney
Criminal Division - Appellate Unit
516 Third Avenue W554
Seattle WA 98104
Donna.Wise@kingcounty.gov

Entitled exactly:

BRIEF OF APPELLANT



LILY T. LAEMMLE
Legal Assistant

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 JUN 22 AM 10:13

ORIGINAL