

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

NANCY JAMES AS TRUSTEE FOR)	
ESTATE OF CHERIE RULE,)	No. 61272-7-I
KATHRYN ELLIS AS TRUSTEE FOR)	
THE ESTATE OF RENA BURNS AND)	DIVISION ONE
LISA MCDOUGAL,)	
)	UNPUBLISHED OPINION
Respondents,)	
)	
v.)	
)	
)	
CHARLES MOMAH, also d/b/a)	
NORTHWEST CENTER FOR)	
OBSTETRICS, GYNECOLOGY &)	
INFERTILITY,)	
)	FILED: January 17, 2012
Appellant.)	

Grosse, J. — The appellate court reviews a jury verdict rendered in a civil case to determine whether it is supported by substantial evidence. In order to review the sufficiency of the evidence supporting the verdict, the appellant must provide a record for review that includes all the evidence presented, not merely the evidence supporting the appellant’s position. In this case, Charles Momah, appearing pro se on appeal, seeks to set aside the jury’s verdicts finding that he provided medically negligent treatment to three former patients. But Momah fails to provide a complete record to enable appellate review. He also largely fails to support his factual assertions with accurate citations to the record or support his claims with meaningful legal analysis. These deficiencies are fatal to the claims he raises on appeal. We affirm.

FACTS

Cherie Rule, Rena Burns, and Lisa McDougal sued their former physician, obstetrician/gynecologist, Charles Momah. They alleged medical negligence, failure to obtain informed consent, and violation of the Washington Consumer Protection Act (CPA).¹ Following a nine-day trial, the jury found medical negligence with respect to each plaintiff and awarded damages of approximately \$2.2 million. Two years before the trial in this case, Momah was convicted of several criminal charges, including rape and indecent liberties, based on the testimony of Burns and other former patients. Momah was incarcerated pursuant to those convictions at the time of the 2007 trial in this case. Part of his video recorded deposition testimony from another civil case was presented to the jury. The jury rejected the allegation of each plaintiff that Momah's twin brother, physician Dennis Momah, participated in patient care and assaultive conduct while impersonating Charles Momah. The jury also rejected the plaintiffs' informed consent claims and found that Momah did not violate the CPA.

Momah appeals the verdicts and award of damages. He primarily challenges the evidence supporting the verdicts, claiming that the evidence against him was false, unreliable, and simply insufficient to support the findings of liability. He also challenges several of the court's rulings during the course of the trial.²

¹ Chapter 19.86 RCW.

² To the extent that some of the attachments appended to Momah's brief on appeal consist of evidence not presented at trial, we grant the respondents' motion to strike. And because the standards of RAP 9.11 have not been met, we deny Momah's motion to supplement the record on appeal with additional evidence. Contrary to Momah's belief, none of the evidence he seeks to present negates the evidence supporting the jury's findings of medical negligence.

ANALYSIS

Pro se litigants are held to the same standard as attorneys and must comply with all procedural rules on appeal.³ Failure to do so may preclude appellate review.⁴ An appellant must provide “argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.”⁵ Arguments that are not supported by reference to the record or citation to authority need not be considered.⁶

Momah’s appellate brief contains a 45-page statement of facts which is generally comprised of argument, rather than facts, and contains scores of allegations related to events that occurred outside of the context of this case. Momah’s factual recitation utterly fails to provide a “fair statement of the facts and procedure relevant to the issues presented for review.”⁷ RAP 10.3(a)(5) requires that “[r]eference to the record must be included for each factual statement.” Due to his extensive discussion of matters that are not in the record, most of Momah’s factual assertions are unsupported by citations. In instances where Momah does cite to the record, many of his citations are imprecise or inaccurate.

Furthermore, Momah has not met his burden of providing a sufficient record to

³ In re Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993).

⁴ State v. Marintorres, 93 Wn. App. 442, 452, 969 P.2d 501 (1999).

⁵ RAP 10.3(a)(6).

⁶ Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

⁷ See RAP 10.3(a)(5).

review the issues raised on appeal.⁸ We review a jury verdict to determine whether substantial evidence in the record supports it.⁹ In this examination, we determine only whether the evidence could persuade a rational, fair-minded person of the truth of the disputed issue.¹⁰ We do not review the credibility of witnesses or substitute our judgment for that of the jury.¹¹ We review a trial court's evidentiary rulings for abuse of discretion.¹² A court abuses its discretion if its ruling is manifestly unreasonable or discretion is exercised on untenable grounds or for untenable reasons.¹³

Momah has not provided a complete record of the trial proceedings. The testimony of several witnesses who testified on the plaintiffs' behalf is not included in the record on appeal, including the testimony of plaintiff Rule and the two medical expert witnesses presented by the plaintiffs. And while Momah challenges several evidentiary rulings made by the trial court, he fails to provide portions of the record containing the parties' arguments and the court's rulings. Without these critical portions of the record, we cannot evaluate whether the jury's verdicts are supported by substantial evidence in the record or whether the trial court tenably exercised its discretion. Because these omissions affect our ability to review the issues presented on appeal, they are fatal.¹⁴

⁸ RAP 9.2; In re Marriage of Haugh, 58 Wn. App. 1, 6, 790 P.2d 1266 (1990).

⁹ Burnside v. Simpson Paper Co., 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994).

¹⁰ Winbun v. Moore, 143 Wn.2d 206, 213, 18 P.3d 576 (2001).

¹¹ Burnside, 123 Wn.2d at 108.

¹² City of Spokane v. Neff, 152 Wn.2d 85, 91, 93 P.3d 158 (2004).

¹³ Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010).

¹⁴ Bulzomi v. Dep't of Labor & Indus., 72 Wn. App. 522, 525, 864 P.2d 996 (1994) (insufficient record on appeal precludes review); Olmsted v. Mulder, 72 Wn. App. 169,

Even if we could overlook the procedural deficiencies in this appeal, Momah's claims clearly lack merit. Momah essentially argues that the testimony of each plaintiff was not credible because there were inconsistencies between the trial testimony and the patient medical records or prior statements. But because of the incomplete record, we do not know the specific basis for the jury's findings of negligence and cannot assess the materiality of any of the discrepancies. Moreover, it appears that the plaintiffs were cross-examined regarding many of the issues Momah raises. While Momah's argument reflects his disagreement with the jury's assessment of credibility, it does not undermine the sufficiency of the evidence supporting the verdicts.

With respect to plaintiff McDougal, Momah claims that the only basis for her malpractice claim was the consensual sexual relationship she and Momah engaged in while she was his patient. He contends that, as a matter of law, sexual contact between a patient and physician does not amount to medical negligence. But Momah cites no authority that supports his position. At trial, the defense apparently argued that McDougal's claim should be dismissed because no Washington court decision has specifically held that consensual sexual conduct constitutes medical negligence. The trial court denied the motion, and determined that McDougal's theory that Momah abused his position of trust by engaging in a sexual relationship with her and thereby violated the standard of care was not contrary to Washington law. And although the

183, 863 P.2d 1355 (1993) (failure to designate relevant portions of the record precludes review).

expert witness testimony is not in the record, it appears that an expert testified that a physician violates the standard of care by having sexual relations with a patient due to the imbalance of power inherent in a physician-patient relationship. This testimony is consistent with Washington law.¹⁵

Momah devotes a substantial portion of his brief to challenging the evidence that the plaintiffs were treated or assaulted by his brother, Dennis Momah. Momah claims that these allegations were instigated and fabricated by the plaintiffs' attorney. He also challenges the testimony of a former employee whose testimony supported the plaintiffs' allegations. But because the jury rejected all claims involving impersonation, we fail to see the relevance of these arguments.

Momah contends he is entitled to set aside the judgment because his trial counsel rendered ineffective assistance by failing to appropriately consult with him and failing to adequately prepare for trial. Nothing in the record suggests that Momah was dissatisfied with counsel at the time of trial. And since this is a civil matter involving only private parties, ineffective assistance of counsel is not legal grounds for reversal.¹⁶

Momah challenges the court's admission of an agreed order he entered into with the Medical Quality Assurance Commission (MQAC) in which Momah agreed to the

¹⁵ See Loudon v. Mhyre, 110 Wn.2d 675, 679, 756 P.2d 138 (1988) (physician-patient relationship is a fiduciary relationship of the highest degree involving every element of trust, confidence and good faith).

¹⁶ Nicholson v. Rushen, 767 F.2d 1426, 1427 (9th Cir.1985).

revocation of his license to practice medicine in Washington. The version of the document admitted at trial was redacted and the only allegations included in the admitted version of the document were those related to plaintiff Rule. The allegations pertaining to eighteen other patients were omitted. With respect to Rule, Momah acknowledged the allegations that he performed “medically unnecessary laparoscopy surgeries” on her in 2003 and that he operated in an “uncertified office operating room without appropriate facilities or equipment.” He acknowledged that the procedure to terminate her ectopic pregnancy specifically put Rule in danger because the procedure carried a significant risk of bleeding and he was unable give blood if needed.

Momah claims that this document should have been excluded because it was an out-of-court statement, highly prejudicial, and was “not supposed to be used in any other proceedings.” The report of proceedings containing the arguments of the parties with respect to admission of the exhibit and the court’s ruling is not included in the record on review. Not knowing the basis for the court’s ruling, we are unable to assess whether the court reasonably exercised its discretion. Nonetheless, it appears that the document was admissible as a non-hearsay admission of a party opponent.¹⁷ Contrary to Momah’s claim, nothing in the document prohibited its admission in this civil proceeding. And while the agreed order was undoubtedly unfavorable, as Momah acknowledges, he did not actually stipulate to the conduct recited, but only acknowledged the allegations for purposes of the MQAC proceedings.¹⁸

¹⁷ ER 801(d)(2).

¹⁸ The order states:

Momah also challenges the court's admission of his conviction for second degree rape based on allegations made by plaintiff Burns.¹⁹ But again, the portion of the transcript where the court ruled that his conviction was admissible is not in the record before us. Without knowing the basis for its ruling, we cannot say that the trial court abused its discretion.

Throughout his brief, Momah raises claims based on the allegedly unethical conduct of the plaintiffs' trial counsel. Momah argues that he should have been allowed to present evidence to the jury that counsel had been sanctioned by the trial court in another case. But Momah fails to acknowledge or appreciate that the appellate court reversed the sanctions imposed in that case.²⁰ More fundamentally, there was no motion for sanctions based on counsel's conduct in this case. The validity of the judgment in this case rests upon the sufficiency of the evidence presented at trial. Momah fails to substantiate his claim that trial counsel's conduct in other lawsuits in any way calls into question the verdicts and judgment rendered in this case.

Momah also claims the court erred by denying his motion to dismiss the claims of Burns and Rule because they failed to disclose the instant lawsuit in bankruptcy filings. However, according to the record, this issue was resolved when both

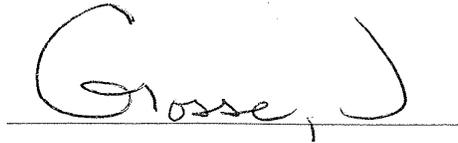
Without admitting the allegations herein, and specifically denying any criminal conduct, the Respondent acknowledges the following allegations and, for purposes of this proceeding only, does not dispute them.

¹⁹ The trial court excluded Momah's criminal convictions related to the other three individuals who were not parties to this civil lawsuit.

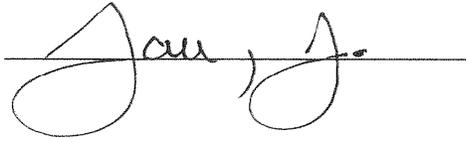
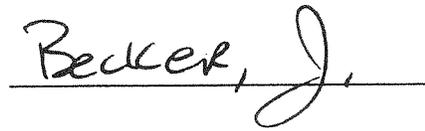
²⁰ Saldivar v. Momah, 145 Wn. App. 365, 405, 407, 186 P.3d 1117 (2008), review denied, 165 Wn.2d 1049, 208 P.3d 555 (2009).

bankruptcies were reopened and the trial court allowed the bankruptcy trustees to substitute as plaintiffs in this case. In light of this, Momah provides no reasoned argument as to why dismissal was appropriate.²¹ We decline to consider this argument further.

Affirmed.

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WE CONCUR:

Handwritten signature of Jan, J. in cursive script, written over a horizontal line.Handwritten signature of Becker, J. in cursive script, written over a horizontal line.

²¹ Contrary to Momah's assertion, the trial court did not prohibit the defense from referring to the plaintiffs' bankruptcies. Instead, it specifically ruled that the defense could inquire of Burns and Rule about any potentially untruthful disclosures made during their bankruptcy proceedings.