No. 73125-4

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

THOMAS CLARK and ALYSON CLARK, husband and wife and the marital community composed thereof,

Plaintiffs-Respondents,

v.

ANDELLE TENG, MD, and CASCADE SURGERY ASSOCIATES, PLLC dba CASCADE ORTHOPAEDICS,

Defendants-Appellants.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

In *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012), the Supreme Court made clear that trial courts should grant a new trial where the cumulative effect of defense counsel's misconduct and repeated violations of orders in limine casts doubt on whether a fair trial has occurred. As set forth below, the trial court in this case appropriately exercised its discretion in granting such relief based on defense counsel's numerous violations of the court's orders in limine despite *repeated* warnings, including the clearest possible admonition: "don't do that again." RP 857.

Although defense counsel's intent is irrelevant – all that matters is whether Plaintiffs were denied a fair trial – the record here includes *intentional* violations of the trial court's orders in limine. *See, e.g.*, RP 1123 (defense counsel arguing that "the question of him having a headache *has to be explained*" (emphasis added)). And when the trial court expressed concern that defense counsel "might have forgotten that I was actually now wearing a robe" (RP 1587), counsel responded: "*you, as the judge, acted in a way in this case that suggested that you did not recall that you had a robe on*" (RP 1195 (emphasis added)).

Based on *repeated* instances of attorney misconduct, recounted below, the trial court correctly found that "[t]he cumulative effect of Defense counsel's conduct warrants a new trial, as it clearly casts doubt on whether a fair trial occurred." CP 475 ¶ 13. And although the standard of review is highly deferential – "[w]e require a much stronger showing of abuse of discretion to set aside an order granting a new trial than one denying a new trial" (*Teter*, 174 Wn.2d at 215) – *Defendants do not assert that the trial court abused its discretion*. For these reasons, and for the additional reasons set forth below, this Court should affirm.

II. ISSUES PRESENTED

1. Whether the trial court abused its discretion when it granted Plaintiffs' motion for a new trial based on defense counsel's numerous violations of the court's orders in limine.

2. Whether this Court should award attorney fees on appeal because this appeal would not have been necessary but for defense counsel's misconduct and because the appeal is frivolous.

III. STATEMENT OF THE CASE

A. Factual Background.

Thomas Clark started having lower back and leg pain in 2008. RP 462, 463; Ex. 103. His physician at the time recommended several

different treatments, including physical therapy, massage, and steroid injections. RP 463-65. When none of those treatments worked, Mr. Clark's physician referred him to Defendant Andelle Teng, MD. RP 465.

After Dr. Teng met with Mr. Clark, he concluded that Mr. Clark was experiencing spinal stenosis, which occurs when bone spurs develop and press on the nerves in the spinal canal. RP 184-85, 732. To relieve this pressure, Dr. Teng recommended a procedure called a lumbar laminectomy (also called a lumbar decompression). RP 1271-72. Dr. Teng performed that procedure for Mr. Clark on February 1, 2010. RP 252. But rather than improving – as most patients do – Mr. Clark experienced new and worsening symptoms, including lack of motor control and numbness in both of his feet. RP 468-71.

Mr. Clark reported these symptoms to Dr. Teng, who responded by recommending physical therapy. RP 471, 473-74. But Mr. Clark insisted on a post-operative MRI, which was performed on February 18, 2010. RP 471-72; Ex. 31. The radiologist read the MRI as abnormal and concluded that a collection of cerebrospinal fluid was compressing the nerves. RP 205. These circumstances were potentially life-threatening. Cerebrospinal fluid leaks – referred to as CSF leaks – can occur if the dura (a layer of tissue that surrounds the spinal cord) is nicked or torn during

surgery. RP 199-200. CSF leaks can cause significant pain and serious complications like meningitis. RP 244. As a result, if there is a dural tear, a surgeon must repair it. RP 551.

Dr. Teng subsequently reviewed the MRI report. Ex. 121. Despite the radiologist's findings, Dr. Teng did not recommend any immediate action to relieve the compression caused by the collection of cerebrospinal fluid or to determine whether there was a CSF leak. RP 473-74, 1300-01. Instead, Dr. Teng advised Mr. Clark to schedule a follow-up appointment in March (a few weeks away) and proceed with physical therapy. *Id.*

Because Mr. Clark remained concerned about the new symptoms and because physical therapy was not helping relieve the symptoms, he asked to see the MRI report. RP 476. After reading the radiologist's findings, Mr. Clark sought follow-up care from another neurosurgeon, Dr. Richard Wohns, who recommended surgery to relieve the pressure caused by the collection of cerebrospinal fluid and determine whether there was a CSF leak. RP 477-78. During that surgery, Dr. Wohns found a CSF leak, free-floating bone, and residual spinal stenosis. RP 478. Dr. Wohns described the surgical site as a "mess." RP 396.

Despite Dr. Wohns' efforts to repair the site, Mr. Clark developed a second and then a third CSF leak. RP 241-42, 479-80. Dr. Wohns

performed a second reparative surgery and another physician performed a third. RP 241-42, 244-46. Unfortunately, the continuing CSF leak led to meningitis. RP 244. Mr. Clark spent another nineteen days in the hospital – ten with meningitis – incurring over $300,000 in medical bills. Ex. 4, at 22; Ex. 59.

Mr. Clark is now permanently disabled with "cauda equina syndrome." RP 578. His symptoms include perianal numbness, lack of genital sensitivity and sexual function, reduced muscular function, nerve damage in both his back and feet, and an altered gait. RP 488, 753-54, 761-62. He has difficulty walking and pain and numbness in both legs. *Id.* Five years after the original surgery, Mr. Clark's condition continues to deteriorate despite ongoing treatment. RP 251.

B. Procedural Background.

Mr. Clark filed suit against Dr. Teng and Cascade Surgery Associates in January 2013, alleging medical malpractice. CP 1-6. In the weeks before trial, it became apparent that Defendants would attempt to argue non-party fault, including blaming Dr. Wohns for Mr. Clark's injuries, even though they had not pled non-party fault as required by CR 12(i). CP 10-11. Plaintiffs therefore filed a motion in limine to preclude such arguments and specifically identified any argument or evidence

"suggesting that Dr. Wohns violated the standard of care or caused any of the injuries sustained by Mr. Clark." CP 25. The trial court granted that motion. CP 258 ¶ 4.

Plaintiffs also filed a motion to preclude defense counsel "from asking questions, soliciting testimony and offering medical records or other evidence of [Mr. Clark's] unrelated health history and medical records." CP 26. Plaintiffs specifically identified "treatment for sleep apnea, a neck surgery, a heart stent, and a corneal replacement." *Id*. The trial court granted that motion as well, finding that such evidence was inadmissible under ER 403. CP 258 ¶ 5; RP 48. Leaving no doubt as to the scope of its ruling, the court ruled that all of Mr. Clark's medical conditions "above the waist" were inadmissible. RP 49.

Defense counsel repeatedly violated these rulings throughout the trial. Contrary to the trial court's order in limine regarding non-party fault, defense counsel asserted in opening statement:

- "Now I want you to see this. This is what happened – this is what it looked like with a free spinal cord the last time Mr. Clark left [Dr.] Teng's care. These are the pictures after Dr. Wohns' operated." RP 151.
- "Here, this is after Dr. Wohns' first and second surgeries. All of this blue is cerebrospinal fluid…. None of that was there until after [Dr. Wohns] operated the first time." RP 152.

- "Then the patient comes back [to Dr. Wohns], has another procedure, and the spinal fluid is – actually corroded its way out the back. That's when Dr. Wohns' nurse, not Dr. Wohns, sewed him up and sent him home." *Id.*
- "Then, after the second operation that Dr. Wohns performs, you still have this problem, and it's much thicker…. That's several inches of spinal fluid after Dr. Wohns." *Id.*
- "When people have a leak as a result of back surgery or some other problem, there are … what we call postural headaches…. After Dr. Wohns operated, he had postural headaches for obvious reasons." RP 152-53.

Defense counsel repeatedly accused Dr. Wohns of negligence in violation of the trial court's order in limine regarding non-party fault.

Also during opening statement, defense counsel violated the trial court's order in limine regarding unrelated medical conditions. Defense counsel referenced in opening statement Mr. Clark's previous neck issues: "from 2008, we already know, and we will see documentation to establish it, that he had problems with his upper spine." RP 147. Defense counsel then argued that Mr. Clark's symptoms were "nothing new to him." *Id.*

The next morning, Plaintiffs filed a motion identifying these violations of the trial court's orders in limine and asking the court to reiterate to defense counsel that Defendants are precluded from referring to unrelated medical conditions "above the waist" and "that defendants are precluded from offering evidence or argument that Dr. Wohns is at fault or

caused Mr. Clark's injuries." CP 244-48. The trial court declined to give a curative instruction, but made clear that defense counsel should comply with the court's orders in limine: "You didn't like the ruling, but you agreed with it and you said you would comply with it." RP 260. Defendants' counsel responded: "Absolutely." *Id.*

Despite this exchange, defense counsel again violated the trial court's order in limine regarding unrelated medical conditions when Dr. Teng testified. Counsel asked:

> Q. Do you remember when you first met Mr. Clark?
> A. I do.
> Q. *And tell us what you remember about your very first meeting with him.*
> A. That is a different reason that I'm….
> Q. I understand. Were there any low back problems involved at that earlier meeting?
> A. No, there wasn't.
> Q. All right. When did you first meet him in regard to his low back?
> A. In 2010.
> Q. Okay.
> A. Right.
> Q. *And when you met Mr. Clark for his low back problem, did you have access to his earlier records and imaging at Cascade?*
> A. Yes, I did.

RP 804. Although Dr. Teng appears to have recognized that defense counsel was asking improper questions, Defendants' counsel continued to

ask about Mr. Clark's previous medical history even after assuring the trial court that he understood and would comply with the court's order in limine regarding unrelated medical conditions. RP 260 (quoted above).

The next day, the trial court emphasized that it was troubled by the defense counsel's continued violations of the court's orders in limine.

> I am bothered by something that occurred yesterday. And I simply want to put it out there. I take my orders in limine very seriously. When you asked Dr. Teng if that was the first time that he had seen Mr. Clark, I consider that to be very close to a violation of that order in limine. I'm going to put you on notice right now that don't do that again ….
>
> Because I can -- I was very upset. And you need to know that. You thought that maybe I was sitting back here with my eyes half closed. I was listening to every word you said….
>
> And both of you are smart enough and good enough that you -- and you got a lot of things that you can talk about that you don't need to be going where you shouldn't go….
>
> But I do take those really seriously and you both should know that.

RP 857-58. The trial court's warning to defense counsel was clear: "don't do that again." RP 857.

Yet just a few days later, defense counsel *again* violated the court's orders in limine regarding unrelated medical conditions. Counsel asked her witness, Dr. Nitin Bhatia, whether there was any indication in Dr. Teng's progress notes (Ex. 115) that Mr. Clark "had a headache" and

directed Dr. Bhatia to "turn to page 84" of the notes. RP 1086. Reading that page as prompted by counsel, Dr. Bhatia testified: "On February 2nd, which is the day after surgery, [Mr. Clark] woke up with a headache, thinks it's because his CPAP was broken and he had to use BIPAP. And those are machines you use for *sleep apnea*." RP 1087 (emphasis added). Defense counsel elicited this testimony even though the trial court had specifically agreed with Plaintiffs' counsel, earlier in the trial, that "[s]leep apnea is above the waist." RP 49.

Plaintiffs' counsel raised this issue with the trial court at the next break. When asked to explain why she had once again violated the court's order in limine, defense counsel responded: "The Court's ruling is that it's not relevant to anything, but in this context, the question of him having a headache has to be explained because it's distinguished from the postural headache." RP 1123. The trial court responded: "Then the proper procedure for you, Counsel, is to approach me before his testimony and ask for a ruling on that particular kind of testimony. You can't take it upon yourself to simply violate my order because you think that there is a symptom that has to be explained." *Id.*

Because defense counsel had repeatedly violated the trial court's orders in limine, Plaintiffs' counsel requested a commensurate remedy:

"to enter a default." RP 1133. The trial court recognized that defense counsel had repeatedly violated its orders in limine (*id.*, describing "three violations"), but denied Plaintiffs' motion as follows:

> And as far as your motion to -- for a default, I am going to deny that. I do believe that there has been a violation. I -- I don't know if the violation was on purpose or not. I think sometimes -- I can't get into people's heads, and I would prefer to think the better of people rather than the other, so I'm not willing to make that conclusion. I am however going to reserve a ruling on what I do about that until the end of the trial.

RP 1143. The trial court then told defense counsel once again "to follow my rulings." *Id.*

Despite these *repeated* warnings, defense counsel continued in closing argument to violate the trial court's orders in limine regarding non-party fault. Referring to the reparative surgery that Dr. Wohns performed, defense counsel argued: "He [Mr. Clark] gets postural headaches. He never had the cardinal sign of a CSF leak until this surgery was performed." RP 1534. Counsel then added: "there was no CSF leak that was obvious before [Dr. Wohns] operated, he now has a CSF leak." *Id.* And then, again in closing, counsel argued that Mr. Clark "had to go to Harborview [for reparative surgery] because someone else's surgeries [referring to Dr. Wohns] on two occasions failed." RP 1540.

The cumulative impact of that misconduct became clear when the jury returned a defense verdict after only five hours of deliberation following a three-week trial. RP 1577; CP 284-85. Plaintiffs responded by filing a motion for a new trial and compensatory sanctions because defense counsel's misconduct undermined Plaintiffs' right to a fair trial. CP 328-37. The trial court agreed and specifically found that "[t]he cumulative effect of Defense counsel's conduct warrants a new trial, as it clearly casts doubt on whether a fair trial occurred." CP 475 ¶ 13. The court then instructed the parties to address the "specific amounts" that should be awarded as compensatory sanctions. CP 475-76.

Thereafter, Plaintiffs submitted a supplemental memorandum requesting compensatory sanctions totaling $199,131.65. CP 488-92. Defendants, for their part, submitted a memorandum urging the trial court to limit any award of compensatory sanctions to "a flat fee of $50,000" (CP 630) and a motion for reconsideration regarding the trial court's ruling granting Plaintiffs' motion for a new trial (CP 542-58). In response, the trial court awarded compensatory sanctions totaling $82,131.65 (CP 663-65) and denied Defendants' motion for reconsideration (CP 660-61). This timely appeal followed. CP 676-709.

IV. ARGUMENT

A. The Trial Court Did Not Abuse Its Discretion When It Granted Plaintiffs' Motion For A New Trial Based On Defense Counsel's Numerous Violations Of The Court's Orders In Limine.

The Supreme Court's opinion in *Teter* sets forth the controlling legal principles in this appeal. Judge (now Supreme Court Justice) González found in *Teter* (a medical malpractice case) that the defendant's lawyer repeatedly violated the following orders in limine: "order granting plaintiff's motion in limine regarding evidence that Teter failed to mitigate his damages; order limiting the evidence regarding Dr. Lauter's role in the surgery; and [the] prohibition on speaking objections." 174 Wn.2d at 224. Judge González concluded that the "cumulative effect of defense counsel's misconduct throughout the trial proceedings warrants a new trial, as it casts doubt on whether a fair trial had occurred." *Id*. at 215.

The Supreme Court affirmed. Relevant here, the court found that defense counsel's misconduct "unfairly and improperly exposed the jury to inadmissible evidence [and] prejudiced [the Teters]" and that such prejudice "qualifies as a material effect on the Teters' substantial right to a fair trial." *Id*. at 225. The court likewise found that "[e]ven where objections are sustained, the misconduct is prejudicial because it places opposing counsel in the position of having to make constant objections.

These repeated objections, even if sustained, leave the jury with the impression that the objecting party is hiding something important." *Id.* at 223. Based on this prejudicial misconduct, the Supreme Court affirmed the trial court's order granting a new trial. *Id.*

Here, as in *Teter*, defense counsel repeatedly violated the trial court's orders in limine. In addition to the "three violations" (RP 1133) of the court's order in limine regarding unrelated medical conditions discussed on pages 7-11 above, defense counsel *repeatedly* violated the trial court's order in limine regarding non-party fault by arguing and eliciting testimony that:

- it was improper for Dr. Wohns not to order a pre-operative MRI (RP 992-93, 1389);
- Dr. Wohns does not know how to read MRI films and determine whether the foramina were in fact decompressed (RP 932-34, 969-70, 1107, 1330);
- Dr. Wohns was wrong when he diagnosed Mr. Clark with cauda equina syndrome in March 2010 and is wrong that he has cauda equina syndrome today (RP 1119, 1160, 1338, 1362);
- Dr. Wohns either lied or incompetently stated that he did a "total L5 laminectomy" in his operative report (RP 972, 1163, 1172);
- it was improper for Dr. Wohns to fail to include the exact location of the CSF leak that he discovered in his medical record (RP 1165-66);
- if Dr. Wohns identified a CSF leak and did not tell Mr. Clark, that was a violation of the standard of care (RP 320-21, 1169);

- Dr. Wohns must have lied about doing the dural repair because sutures were not found when Harborview did surgery two months later (RP 1164, 1174, 1185, 1535);
- Dr. Wohns should not have "over-sewn" the wound before his second surgery (RP 1175);
- over-sewing the wound *caused* Mr. Clark's meningitis (RP 1228, 1541);
- it was improper for Dr. Wohns to not send the CSF that he found in his March 23 surgery for testing (RP 1533);
- the surgery Dr. Wohns performed was not medically necessary (RP 1118-19, 1223);
- Dr. Wohns failed to fix the first CSF leak and failed to fix the second CSF leak (RP 1223-24);
- a *resident* at Harborview fixed what Dr. Wohns could not (RP 152, 1180, 1224); and
- it was improper for Dr. Wohns not to get Mr. Clark's previous medical records or to discuss the patient with Dr. Teng (RP 1301, 1362).

In addition to these improper standard of care arguments, defense counsel accused Dr. Wohns of "*record manipulation* … to make my client look bad." RP 1535 (emphasis added). All of this occurred in the presence of the jury and in direct violation of the trial court's order in limine and repeated warnings regarding non-party fault.

On this record, the trial court did not err (let alone abuse its discretion) when it found that "Defense counsel violated the Court's rulings and orders multiple times" and that this improper conduct "continued throughout the entire trial." CP 473-74 ¶ 6. Nor did the trial

court abuse its discretion or otherwise err when it again found – after reviewing Defendants' motion for reconsideration with lengthy declarations and attachments (CP 542-620) – that "[t]here were numerous violations by the defense of the Court's Order Re: Motions in Limine," that the court "repeatedly warned Defense counsel to change their conduct," and that "[d]espite all of the Court's warnings, this behavior continued." CP 660-61 ¶¶ 1, 3, 4. The Court should uphold these findings, particularly given "the deferential review appropriate to misconduct findings in civil cases." *Teter*, 174 Wn.2d at 223.

Because the record confirms that defense counsel repeatedly violated the trial court's orders in limine despite continued warnings, it is not necessary to determine whether defense counsel's misconduct prejudiced Plaintiffs' right to a fair trial. That is because, under *Teter*, "misconduct that continues after warnings can give rise to a *conclusive implication* of prejudice." *Id.* (emphasis added). But even without a conclusive implication of prejudice, the prejudice to Plaintiffs is undeniable. The evidence regarding Dr. Wohns was elicited with a singular purpose: to persuade the jury that Plaintiffs had sued the wrong surgeon. And that was *exactly* the message that the jury received. During

trial, a juror asked: "Have you thought of bringing a lawsuit against Dr. Wohns?" RP 1603; CP 335-36.[1]

Additional prejudice was caused by defense counsel's repeated violations of the trial court's order in limine regarding unrelated medical conditions. That evidence improperly suggested that Mr. Clark had other medical conditions that could have caused his damages and/or that Mr. Clark was a generally unhealthy person. On top of that, by repeatedly revealing to the jury medical conditions that Plaintiffs had not previously acknowledged and by directing their witnesses to documents that had not been properly redacted (*see, e.g.*, RP 1086, referring witness to references to sleep apnea on page 84 of Ex. 115), defense counsel necessarily left "the jury with the impression that the objecting party is hiding something important." *Teter*, 174 Wn.2d at 223.

The Court in *Teter* also reiterated that "'[t]he trial court is in the best position to most effectively determine if [counsel's] misconduct prejudiced a [party's] right to a fair trial.'" *Id*. (quoting *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991)) (bracketed text in original). Here too, the trial court was in the best position to most effectively determine

[1] The trial court declined to ask the witness the foregoing juror question. Because it was discussed by the court and counsel outside of the courtroom, it is memorialized in briefing (CP 335-36) and argument (RP 1603).

whether defense counsel's misconduct prejudiced Plaintiffs' right to a fair trial. Having observed that misconduct first-hand, the trial court found that "[t]he cumulative effect of Defense counsel's conduct warrants a new trial, as it clearly casts doubt on whether a fair trial occurred." CP 475 ¶ 13. Because the record supports that finding, and because the standard of review is highly deferential, this Court should affirm.

B. Defendants Do Not Even Attempt To Argue That The Trial Court Abused Its Discretion, And The Arguments They Assert Regarding Trial Court Error Easily Fail.

As noted on page two above, Defendants do not assert anywhere in their brief that the trial court *abused its discretion*. Instead, their only argument is that the trial court *erred*. As a result, if this Court concludes that the applicable standard of review is abuse of discretion, then the appeal can properly be resolved on waiver grounds because there is *no argument* that the trial court abused its discretion. *See, e.g.*, *Stuewe v. State Dep't of Revenue*, 98 Wn. App. 947, 950, 991 P.2d 634 (2000) (where appellant "cites no authority nor makes any argument" regarding an issue on appeal, "these issues are waived"). If the Court instead considers the merits of Defendants' arguments, those arguments fail for the reasons set forth below.

1. Contrary To Defendants' Argument, The Trial Court Issued Detailed Reasons Of Law And Fact And Its Rulings Comply With CR 59(e).

Rather than begin their argument by defending the conduct of their attorneys, Defendants begin by attacking the trial court: they claim that "[t]he trial court did not comply with the CR 59(f) mandate that his order contain 'definite reasons of law and fact.'" Opening Brief at 28. Defendants then claim that the Court should "reverse and *reinstate the jury's verdict* for failure to enter the correct findings." *Id.* at 31 (emphasis added). Defendants are wrong in both respects.

Defendants' argument that the trial court did not adequately state the reasons of law and fact for its rulings is directly contrary to *Teter*. As noted previously, Judge González issued detailed reasons of law and fact in *Teter*. For his reasons of fact, Judge González found that defense counsel repeatedly violated the court's orders in limine. 174 Wn.2d at 215. For his reasons of law, Judge González identified the applicable legal standard and concluded that a new trial was warranted because the "cumulative effect of defense counsel's misconduct throughout the trial proceedings … casts doubt on whether a fair trial had occurred." *Id.*

This case is no different. Just as Judge González did in *Teter*, the trial court here correctly ruled that a motion for a new trial should be

granted "only if the trial court firmly believes that the conduct complained of is of such a level that it casts doubt on whether or not a fair trial occurred." CP 472 ¶ 1. Also like Judge González in *Teter*, the trial court in this matter found that defense counsel repeatedly violated the court's orders in limine:

- "Defense counsel violated the Court's rulings and orders multiple times." CP 473 ¶ 6.
- "This [improper conduct] continued throughout the entire trial." CP 474 ¶ 6.
- "There were numerous violations by the defense of the Court's Order Re: Motions in Limine." CP 660 ¶ 1.
- The court "repeatedly warned Defense counsel to change their conduct." CP 661 ¶ 3.
- The court "expressed frustration and concern about the conduct of Defense counsel." *Id.*
- "Despite all of the Court's warnings, this behavior continued." CP 661 ¶ 4.

Nor is it surprising that the trial court's rulings track those of Judge González in *Teter*, as the court's order granting Plaintiffs' motion for a new trial not only cites CR 59(f) but also states that the court reviewed Judge González's order granting a new trial in *Teter* before issuing the ruling at issue here. CP 472 (item no. 9 and lines 11-12).

The Supreme Court upheld Judge González's approach in *Teter*. Just as Defendants argue here, the court of appeals ruled in *Teter* "that

Judge González's findings were too general and nonspecific to support his conclusion that defense counsel's misconduct deprived the Teters of a fair trial." 174 Wn.2d at 222. The Supreme Court disagreed with that ruling and held that "the Court of Appeals appears to have substituted its own judgment for that of the trial court." *Id.* at 223. It then held that Judge González's findings "are supported by the record" and that Judge González "made these findings under the appropriate legal standard." *Id.* at 225. As the above discussion shows, the same reasoning and result apply equally here.

The cases cited by Defendants, in contrast, can be distinguished easily. In *Dybdahl v. Genesco*, 42 Wn. App. 486, 713 P.2d 113 (1986) (Opening Brief at 29), for example, the trial court granted a new trial for five reasons. The first four reasons were that the trial court admitted certain evidence over the objection of plaintiff's counsel. 42 Wn. App. at 487. The court of appeals found those reasons insufficient under CR 59(e) because the trial court did not indicate why it was erroneous to admit the evidence nor did it explain why the evidence, if improperly admitted, was so prejudicial as to warrant a new trial. 42 Wn. App. at 488. The fifth reason, ignored entirely by Defendants here, was that the trial court commented on the evidence in the presence of the jury. *Id.* This fifth

reason, the court of appeals ruled, "does give sufficiently definite reasons in law or fact for this court to review the order." *Id.* at 489.

The portion of *Dybdahl* relied upon by Defendants is easily distinguishable, and the portion they ignore is fatal to their argument. Unlike the first four reasons for granting a new trial in *Dybdahl,* the trial court's reasons here are sufficiently definite to permit appellate review: the trial court found that defense counsel repeatedly elicited evidence and argument that violated the court's orders in limine – including an order that "was based on ER 403 considerations" (CP 473 ¶ 3) – and then concluded that "[t]he cumulative effect of Defense counsel's conduct warrants a new trial, as it clearly casts doubt on whether a fair trial occurred" (CP 475 ¶ 13). The trial court provided significantly more detail than the trial court did in *Dybdahl* – even when compared to the fifth reason for granting a new trial in *Dybdahl,* which the court of appeals found sufficient. 42 Wn. App. at 489.

Defendants' reliance on *State v. Collins*, 72 Wn.2d 741, 435 P.2d 538 (1967) (Opening Brief at 31), is also misplaced. After the jury in *Collins* found the defendant guilty of second-degree burglary, the trial court granted a new trial for two reasons: (1) failure to give a requested instruction; and (2) because "the court disagreed with the jury's verdict on

the evidence." *Id.* at 744-45. The Supreme Court vacated the trial court's ruling granting a new trial and reinstated the jury's guilty verdict because it concluded that the trial court had not erred by failing to give the requested instruction and that the second reason for granting a new trial "is not a ground for awarding a new trial." *Id.* Here, in contrast, *Teter* confirms that attorney misconduct that casts doubt on whether a fair trial has occurred *is* an established ground for granting a new trial. *See supra* at 13-14. As a result, *Collins* is inapposite.

Lastly, Defendants also claim that the trial court's order granting Plaintiffs' motion for a new trial is deficient because (a) "nowhere in the order does the court explain the legal justification for criticizing defendants' causation defense or how a motion in limine could remove an element of plaintiffs' burden of proof" and (b) "it contains a catch-all phrase that implies other potential misconduct." Opening Brief at 30. Plaintiffs address the fault/causation issue in Section IV.B.3 below and the "other potential misconduct issue" in Section IV.B.4 below. In those respects as well, Defendants are mistaken.

2. Defense Counsel Were Required To Comply With The Trial Court's Order In Limine Regarding Unrelated Medical Conditions Notwithstanding Their Continued Disagreement With Those Rulings, And They Repeatedly Failed To Do So.

In addition to attacking the trial court's order granting Plaintiffs' motion for a new trial, Defendants also attack the trial court's order in limine regarding unrelated medical conditions. According to Defendants, "[t]he trial court's decision that anything 'above the waist' was off limits has no medical basis." Opening Brief at 44. Defendants made that same argument in the trial court. After violating the trial court's order in limine by eliciting testimony that Mr. Clark "woke up with a headache" because of his ongoing treatment "for sleep apnea" (RP 1087), defense counsel told the trial court: "The Court's ruling is that it's not relevant to anything, but in this context, the question of him having a headache *has to be explained* because it's distinguished from the postural headache." RP 1123 (emphasis added). And in response to Plaintiffs' motion for a new trial, defense counsel once again told the trial court: "The evidence you excluded was clearly admissible." RP 1596.

The trial court correctly rejected these arguments, just as other courts have done. In response to defense counsel's argument that Mr. Clark's headache "has to be explained" (RP 1123), the trial court

responded: "Then the proper procedure for you, Counsel, is to approach me before his testimony and ask for a ruling on that particular kind of testimony. You can't take it upon yourself to simply violate my order because you think that there is a symptom that has to be explained." *Id.* The trial court is not alone in so ruling. In *Deskins v. Waldt*, 81 Wn.2d 1, 5, 499 P.2d 206 (1972), for example, the Supreme Court ruled:

> [W]here the court has jurisdiction of the parties and of the subject matter of the suit and the legal authority to make the order, a party refusing to obey it, however erroneously made, is liable for contempt. Such order, though erroneous, is lawful within the meaning of contempt statutes until it is reversed by an appellate court.

Thus, for purposes of this appeal, whether the trial court's order in limine regarding unrelated medical conditions was correct or incorrect is legally irrelevant. All that matters under *Teter* is that defense counsel repeatedly violated the order despite repeated warnings.

Addressing that issue, the closest Defendants come to defending their lawyers' conduct is to claim that they did not use the word "neck" during opening statement. Opening Brief at 19. That is wordplay at best, because counsel was clearly referring to Mr. Clark's neck when he asserted that Mr. Clark "had problems with his upper spine." RP 147. The trial court, who saw the PowerPoint slide that accompanied this

statement, recognized that counsel had improperly referenced Mr. Clark's "prior neck surgery … which was supposed to be off limits." RP 259. In response to the trial court's admonition, defense counsel stated: "what I said was the complaints that [Mr. Clark] had with his legs were nothing new. And that's because when he went in for his *neck issue*, he did a pain diagram in his own handwriting showing that he had right-leg problems." RP 260 (emphasis added). Defense counsel then stated: "So if I erred on that in the course of the very compressed time frame on Tuesday, then I apologize." RP 260.

Despite that "apology," defense counsel *continued* to violate the trial court's order in limine regarding unrelated medical conditions. As noted previously, counsel asked Dr. Teng about his first meeting with Mr. Clark and pushed for an answer even *after* Dr. Teng pointed out to counsel that he saw Mr. Clark for "a different reason." RP 804. Defense counsel then apologized, claiming that he "bumbled into that one." RP 857. Yet a couple days later, defense counsel asked an expert witness about references to a headache in Mr. Clark's medical records. RP 1086-87. Counsel now admits "[i]n retrospect, this was a violation of the court's standing order regarding anything above the waist." Opening Brief at 21. It was one of *many* such violations that occurred during the trial.

Lastly, Defendants claim that "any technical violation of this motion in limine did not result in prejudice, as such evidence was introduced by plaintiffs." Opening Brief at 45. In support of that argument, Defendants point to trial exhibits that were offered by Plaintiffs and that include references to "cervical problems" and "sleep apnea." *Id.* (citing Ex. 1 at 15 and Ex. 3 at 9). These isolated references – inadvertently missed by *all parties* during pre-trial redactions – are buried within two of the many multi-page exhibits that the jurors had available to them during deliberations. There is no indication that the jury saw these references, nor did the parties point them out, *during trial*. Instead, if the jurors found these isolated references, they did so *after* defense counsel had already violated the trial court's orders in limine to Plaintiffs' substantial prejudice (as discussed on pages 16-18 above).

Defendants' argument regarding this issue also ignores the applicable standard of review. Where, as here, there are competing arguments regarding prejudice, the Supreme Court has recognized that the trial court is in the "best position" to assess the resulting prejudice. *Teter*, 174 Wn.2d at 223 (internal quotations omitted). The trial court here concluded: "In reviewing this *entire matter*, and *after examining the file and the conduct of Defense counsel*, this Court cannot definitively say that

the Plaintiffs had a fair trial." CP 661 ¶ 5 (emphasis added). As in *Teter*, the trial court's findings "are supported by the record," and the court "made these findings under the appropriate legal standard." 174 Wn.2d at 225. Defendants' contrary arguments should be rejected.

3. Defendants Are Also Wrong In Asserting That The Trial Court Confused Fault And Causation Or Otherwise Erred In Granting A New Trial Based On Defense Counsel's Repeated Violations Of The Court's Order In Limine Regarding Non-Party Fault.

Turning to the trial court's order in limine regarding non-party fault, Defendants claim throughout their brief that the trial court's order granting Plaintiffs' motion for a new trial somehow "removes contested issues of causation and credibility from the jury's determination," "incorrectly confuses fault with causation," and ultimately violates "defendant's constitutional right to a trial by jury." Opening Brief at 1, 31, 32. Defendants also claim that "[t]he trial court's description of misconduct is not supported by the record" and that any such violation was "cured" by the trial court's Jury Instruction No. 6. *Id.* at 37, 38. As explained below, each of these arguments fails.

Defendants' first argument – that the trial court somehow confused causation and fault, removed the issue of credibility, and undermined Defendants' right to a fair trial – is hopelessly abstruse. Although

Defendants repeatedly attack the trial court's order granting Plaintiffs' motion for a new trial, their real complaint appears to be with the trial court's order in limine regarding non-party fault, which precluded Defendants from arguing that Dr. Wohns violated the standard of care. CP 258 ¶ 4. As noted previously, defense counsel were required to comply with that ruling – *even if erroneous* – unless and until reversed on appeal. *Deskins*, 81 Wn.2d at 5 (quoted on page 25 above).

If the Court nonetheless examines the propriety of the trial court's order in limine regarding non-party fault, the record supports that ruling as well. Plaintiffs moved in limine to preclude evidence of non-party fault, including evidence or argument "suggesting that Dr. Wohns violated the standard of care," because Defendants had not pled non-party fault as required by CR 12(i). CP 10-11, 25. Defense counsel similarly represented on the record at an expert witness's deposition: "We are not empty-chairing anyone." CP 48. As a result, Dr. Wohns was not a party to the action, was not represented by counsel, and had not retained an expert witness to defend his subsequent treatment of Mr. Clark. The trial court granted an identical motion in limine under similar circumstances in *Henderson v. Tyrrell*, 80 Wn. App. 592, 910 P.2d 522 (1996), and the court of appeals upheld that ruling. *Id.* at 625 (no abuse of discretion

where tortfeasor did not affirmatively plead non-party fault and failed to raise the issue before trial).

Confronted with this unique situation – where Dr. Wohns' treatment of Mr. Clark was undefended as a result of Defendants' strategic choice – the trial court appropriately exercised its discretion to (a) *allow* testimony and argument that Dr. Teng did not violate the standard of care and did not cause any harm to Mr. Clark and (b) *disallow* testimony and argument that Dr. Wohns violated the standard of care. When defense counsel asked for guidance, the trial court explained "if you get to a point where it's a clear inference to everybody in the room that you're accusing Wohns of violating the standard of care, then I think you've gone too far." RP 1151.[2] Contrary to Defendants' argument, the trial court did not remove contested issues of causation and credibility from the jury's determination, confuse fault with causation, or violate Defendant's right to a trial by jury. It merely exercised its discretion to allow Defendants to

[2] This is not the only instance when the trial court provided guidance as to how Defendants could *properly* present their evidence without violating the court's orders in limine. Earlier in the trial, the court explained: "Well, there's ways of saying that that don't violate my order. For instance, several years earlier he previously reported that he had leg pain. I mean, you don't have to relate it to his neck situation." CP 260. The court also told counsel: "you got a lot of things that you can talk about that you don't need to be going where you shouldn't go." RP 858.

present their evidence and defenses *so long as* they did not *argue or clearly infer* that Dr. Wohns had violated the standard of care.

Unfortunately, defense counsel ignored the trial court's rulings and numerous warnings and repeatedly asserted in closing argument that Dr. Wohns had violated the standard of care. *See, e.g.*, RP 1534 ("there was no CSF leak that was obvious before [Dr. Wohns] operated, he now has a CSF leak."), 1540 (Mr. Clark "had to go to Harborview [for reparative surgery] because someone else's surgeries [referring to Dr. Wohns] on two occasions failed"). Defense counsel then accused Dr. Wohns of "record manipulation … to make my client look bad." RP 1535. After this, the trial court correctly found that defense counsel had clearly argued, contrary to its order in limine regarding non-party fault, that Dr. Wohns had acted improperly: "I think you would have had to have been asleep to not get that clear inference." RP 1570-71.

Turning to whether the trial court's findings are supported by the record, Defendants claim that the trial court's order granting Plaintiffs' motion for a new trial "contains significant omissions and multiple errors." Opening Brief at 37. Defendants' arguments do not withstand scrutiny:

- Defendants claim that the trial court incorrectly quoted defense counsel (Opening Brief at 38), but they ignore the fact that the trial court issued its ruling without the benefit of a verbatim report of proceedings and was therefore paraphrasing.
- Defendants claim that Plaintiffs did not contemporaneously object (*id.*), but they ignore the fact that Plaintiffs objected the very next day.[3]
- Defendants claim that there were "very appropriate … purposes" for their arguments (Opening Brief at 38), but they ignore the fact that these excuses are not credible given defense counsel's continuing misconduct.

These arguments ignore the trial court record, as the above discussion shows, and likewise ignore "the deferential review appropriate to misconduct findings." *Teter*, 174 Wn.2d at 223.

But even if the Court accepts these arguments, Defendants focus on the trial court's findings regarding opening statement and ignore the court's *additional* findings that defense counsel's improper conduct "continued throughout the entire trial" and that "[i]t was obvious to the Court that the *theme of Defense counsel's case* was that any injuries sustained by the plaintiff were caused by Dr. Wohns, not the defendant." CP 474 ¶ 6. Defendants have not refuted these findings, nor can they.

[3] In addition, Defendants concede – as they must – that a party is not required to object if "the misconduct is so flagrant that no instruction would have cured the prejudicial effect." Opening Brief at 46. As discussed on pages 33-35 below, the trial court here appropriately found that its curative instruction "was not sufficient to counteract the defense accusations against Dr. Wohns." CP 474 ¶ 7.

The jury recognized that obvious theme as well, which is why one juror wanted to know: "Have you thought of bringing a lawsuit against Dr. Wohns?" RP 1603; CP 335-36; *see also* footnote 1 above.

Nor did the trial court grant Plaintiffs' motion for a new trial based on any *individual* violation of its orders in limine. Instead, the trial court made clear in its order that it was providing pertinent "examples" of defense counsel's misconduct. CP 473-74 ¶ 6 ("As an example…"; "This is only an example."). The court then granted a new trial based on "[t]he *cumulative effect* of Defense counsel's conduct," which "clearly casts doubt on whether a fair trial occurred." CP 474 ¶ 13 (emphasis added). The trial court's order denying Plaintiffs' motion for reconsideration similarly refers to "numerous violations," repeated "warnings," and continued expression of "frustration and concern." CP 660-61. No amount of excuses or explanations can change these facts.

Perhaps because the record is so overwhelming, Defendants also attempt to argue that the trial court "cured any alleged error by informing the jury that if they found Dr. Teng negligent, he was responsible for Dr. Wohns' care." Opening Brief at 38 (citing Jury Instruction No. 6 at CP 294). The fatal flaw in this argument is that Defendants completely ignore

the trial court's rulings regarding this very issue. In its order granting Plaintiffs' motion for a new trial, the trial court found:

> A curative instruction was requested by Plaintiffs' counsel after opening statements. The court gave such an instruction but feels that this instruction was not sufficient to counteract the defense accusations against Dr. Wohns.

CP 474 ¶ 7. Defendants then asked the trial court to reconsider its ruling. CP 542-58. In response, the trial court again recognized that it "gave a curative instruction." CP 661 ¶ 3. But after "reviewing this entire matter" and "examining the file and the conduct of defense counsel," the court denied Defendants' motion for reconsideration. CP 660-61.

The trial court's ruling is both legally and factually sound. In *State v. Ramos*, 164 Wn. App. 327, 263 P.3d 1268 (2011), the court recognized that *isolated* instances of attorney misconduct, "standing alone," can be remedied by giving a curative instruction. The court also recognized that this legal principle does not apply where the misconduct "was not isolated." *Id.* at 340. Thus, even when an improper examination of a witness is not by itself prejudicial, a party's right to a fair trial may be compromised when that questioning is "coupled with" other misconduct, such as "improper arguments in closing." *Id.* at 337. In other words, the law is clear – and common sense confirms – that there is a point at which

"an instruction could not have cured the prejudicial effect" of a lawyer's prejudicial argument. *Id*. at 341.

The trial court here concluded, similar to the court in *Ramos*, that defense counsel crossed that line between *isolated* misconduct – which can be remedied by a curative instruction – and *continuing* misconduct – which is so prejudicial that it clearly casts doubt on whether a fair trial occurred *even after* a curative instruction is given. That is because, as discussed throughout this brief, defense counsel's misconduct started in opening statements and "continued throughout the entire trial," including closing argument. CP 474-75, ¶¶ 6, 11. And defense counsel not only attacked Dr. Wohns' competence as a treating physician, they accused him of "record manipulation … to make my client look bad." RP 1534. In this respect as well, the Court should appropriately defer to the trial court's ruling that its curative instruction "was not sufficient to counteract the defense accusations against Dr. Wohns." CP 474 ¶ 7.

4. The Court Does Not Need To Reach Defendants' Arguments Regarding "Other Misconduct," Which In Any Event Fail.

Defendants also claim that the trial court's order granting Plaintiffs' motion for a new trial is deficient because it "briefly mentions the existence of other 'misconduct,' but does not specify what these are."

Opening Brief at 46. The trial court explained why it did not reach these additional instances of alleged misconduct: "Because of the multitude and gravity of the conduct described herein, the Court does not feel it necessary to address these arguments." CP 475 ¶ 10. Because the trial court did not identify or rely on any of these alleged violations of its orders in limine in granting Plaintiffs' motion for a new trial, they are not directly relevant to the issues on appeal. And contrary to Defendants' speculation (Opening Brief at 47), Plaintiffs are not asking this Court to affirm the trial court's order based on this "other misconduct." The court's order is amply supported by defense counsel's *identified* misconduct – as set forth above.

In addition to their irrelevant argument regarding "other misconduct," Defendants have attached to their opening brief a lengthy appendix (thereby circumventing the page limit in RAP 10.4(b)) to purportedly show that their lawyers treated the trial court "with the appropriate respect and professionalism." Opening Brief at 27 n.32. Even if that were true, the appeal – as Defendants note – "should be decided on the *objective record*." *Id*. (emphasis added). Plaintiffs recognized that point in the trial court as well and explained that whether defense counsel *intended* to violate the trial court's orders in limine is irrelevant. CP 453-

54; RP 1589. As one court noted, "[t]he test is not whether the [misconduct] was deliberate or inadvertent but whether the [losing party] was denied a fair trial." *State v. Essex*, 57 Wn. App. 411, 415, 788 P.2d 589 (1990).[4] The Court should therefore ignore Defendants' improper "appendix" of additional argument.

Although intent is irrelevant, it is nonetheless significant – as noted previously – that defense counsel *admitted* in the trial court that she *intentionally* violated the court's orders in limine. RP 1123 ("the question of him having a headache has to be explained"). Defendants *continue* to attack the trial court's orders in limine on appeal, failing once again to recognize that lawyers cannot disobey a trial court's ruling simply because they disagree with that ruling. And when the trial court expressed concern that defense counsel "might have forgotten that I was actually now wearing a robe" (RP 1587), counsel responded: "you, as the judge, acted in a way in this case that suggested that you did not recall that you had a

[4] *See also State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983) ("[T]he judge should not consider whether the statement was deliberate or inadvertent. That inquiry diverts the attention from the correct question: Did the remark prejudice the jury, thereby denying the defendant his right to a fair trial?").

robe on" (RP 1195).[5] This palpable disrespect for the trial court's authority explains why, "[d]espite all of the Court's warnings" regarding defense counsel's misconduct, "this behavior continued." CP 661 ¶¶ 3-4. Because the trial court did not abuse its discretion in finding that the "cumulative effect" of this misconduct "clearly casts doubt on whether a fair trial occurred" (CP 475 ¶ 13), this Court should affirm.

C. Because The Trial Court Did Not Abuse Its Discretion In Granting Plaintiffs' Motion For A New Trial, The Court Should Affirm The Trial Court's Ruling Awarding Sanctions And Award Attorney Fees On Appeal (RAP 18.1).

Turning finally to the trial court's award of compensatory sanctions, Defendants claim only that "[b]ecause the trial court erred in granting a new trial, it erred in granting sanctions." Opening Brief at 47. Accordingly, if this Court affirms the trial court's order granting a new trial, as it should for the reasons set forth above, there is *no argument* that the trial court *independently* erred (let alone abused its discretion) in granting compensatory sanctions *or* in determining the *amount* of those sanctions. The Court should therefore affirm on that issue as well. That leaves one final issue, which is whether the Court should award attorney

[5] *See also* RP 536 ("THE COURT: Good morning, everybody. MR. WAMPOLD: Good morning, Your Honor. MS. ALLEN: Good morning, Your Honor. MR. FITZER: Good morning, Richard.").

fees *on appeal*. In accordance with RAP 18.1, Plaintiffs respectfully submit that the Court should do so for the following two reasons:

First, the Court should award fees on appeal to compensate Plaintiffs for defense counsel's misconduct. Where, as here, an attorney's misconduct causes opposing counsel to unnecessarily incur fees and expenses, courts have adopted a "compensatory" approach to terms. In *Deutscher v. Gabel*, 149 Wn. App. 119, 132, 202 P.2d 355 (2009), for example, the plaintiff's attorney misrepresented to the court that a particular witness was "newly discovered" and then sought discovery and sanctions based on that misrepresentation. The trial court concluded that plaintiff's counsel had violated the duty of candor and awarded terms "limited to time and costs related to [plaintiff's] groundless request for discovery at trial on the subject of an allegedly recently discovered witness … and for her baseless request for sanctions against a defense lawyer." *Id.* at 132 (quoting trial court's ruling). The court of appeals affirmed, emphasizing that although "'[i]mposing sanctions upon an attorney is a difficult and disagreeable task' for a trial judge … it is a necessary task 'if our system is to remain accessible and responsible.'" *Id.* at 136 (quoting *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp*, 122 Wn.2d 299, 355, 858 P.2d 1054 (1993)).

The Ninth Circuit upheld a similar result in *Lasar v. Ford Motor Company*, 399 F.3d 1101 (9th Cir. 2005).[6] The trial judge in *Lasar* granted the plaintiff's motion for mistrial because the defendant's attorney, like defense counsel here, repeatedly violated the court's orders in limine. *Id.* at 1108. The court awarded terms totaling $61,397 and required the defendant to reimburse the court for the cost of empaneling the jury. *Id.* The Ninth Circuit affirmed, noting that the amount of the award was "carefully tailored" to reimburse "those costs that were incurred as a result of the mistrial." *Id.* at 1117-18.

The same reasoning and result apply in this appeal. Because of defense counsel's misconduct, the first trial must be repeated and the fees and expenses incurred in that trial were necessarily wasted. The trial court awarded fees and expenses accordingly. CP 663-64. But those are not the only costs that have been and will be incurred because of the mistrial. This appeal, too, is a *direct result* of defense counsel's misconduct: but for that misconduct, an appeal regarding defense counsel's misconduct would not have been necessary. And there may be a second appeal –

[6] Washington courts have relied on federal case law in awarding sanctions based on attorney misconduct. *See State v. Gassman*, 175 Wn.2d 208, 211, 283 P.3d 1113 (2012).

focused, as it should be, on the parties' claims and defenses. Under *Teter*, defense counsel are responsible for those additional fees and expenses.[7]

Second, the Court can also award fees on appeal because Defendants filed a frivolous appeal. "RAP 18.9(a) authorizes this court to award compensatory damages when a party files a frivolous appeal." *West v. Thurston County*, 169 Wn. App. 862, 868, 282 P.3d 1150 (2012). "An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of success." *Id.* (internal quotation marks omitted). Given the highly deferential standard of review, Defendants' failure to argue abuse of discretion, and the overwhelming record of defense counsel's misconduct despite continued warnings, the Court can properly conclude there was "no reasonable possibility of success" and award fees on appeal on that basis as well.

[7] At Defendants' request, the trial court entered judgment against *defense counsel's law firm* (Fitzer, Leighton & Fitzer, P.S.) and not against Defendants. CP 556, 664, 709. Plaintiffs did not oppose that request.

V. CONCLUSION

For the foregoing reasons, the trial court's judgment should be affirmed. In addition, the Court should award attorney fees on appeal.

RESPECTFULLY SUBMITTED this 26th day of October, 2015.

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CERTIFICATE OF SERVICE

I certify that on the 26th day of October, 2015, a copy of this document was sent via US Mail to counsel for appellants at the address below:

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