NO. 95815-7

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL MOYER, individually and as Personal Representative of the Estate of GRANT MOYER, Deceased,

Petitioner,

v.

PEACEHEALTH, a Washington corporation d/b/a PEACEHEALTH ST. JOSEPH'S HOSPITAL; WILLIAM LOMBARDI, M.D.; and SANJEEV VADERAH, M.D.,

Respondents.

RESPONDENTS' JOINT ANSWER TO PETITION FOR REVIEW

Mary H. Spillane, WSBA #11981
Jennifer D. Koh, WSBA #25464
FAIN ANDERSON VANDERHOEF, ROSENDAHL O'HALLORAN SPILLANE, PLLC
Attorneys for Respondents PeaceHealth and Lombardi

701 Fifth Avenue, Suite 4750
Seattle, WA 98104
Ph: (206) 749-0094

Rebecca S. Ringer, WSBA #16842
Amber L. Pearce, WSBA # 31626
FLOYD, PFLUEGER & RINGER, P.S.
Attorneys for Dr. Vaderah

200 West Thomas St., Suite 500
Seattle, WA 98119
Ph: (206) 441-4455

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I. IDENTITY OF RESPONDING PARTY

Respondents PeaceHealth, William Lombardi, M.D., and Sanjeev Vaderah, M.D., jointly submit this Answer to Petition Review.

II. COURT OF APPEALS DECISION

In its April 16, 2018 unpublished opinion in this medical malpractice case, Division I affirmed the judgment on jury verdict in favor of defendants, finding no abuse of discretion in the trial court's challenged evidentiary rulings, concluding that the Moyers failed to show that evidence offered to undermine Dr. Lombardi's credibility "was relevant or helpful to jurors' understanding of the issues at stake." *Slip Op. at 1.*

III. ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals correctly conclude that the judgment on jury verdict should be affirmed because the trial court did not abuse its discretion in making the evidentiary rulings the Moyers challenge?

IV. STATEMENT OF THE CASE

A. Mr. Moyer's Care and Treatment.

Eighty-five-year-old Grant Moyer underwent cardiac testing after increasingly frequent episodes of dizziness with exercise. 7/11 (am) RP 358-60, 366-71; 7/12 (pm) RP 127-30; RP 1191;[1] Ex. 1 at 001-012; Ex. 3

[1] As the Moyers note, *Pet. at 2 n.1*, portions of the reports of proceedings prepared by several different court reporters are not sequentially numbered. Respondents cite to the reports for June 3 and 27, the mornings and afternoons of July 11 and 12, and the afternoons of June 30, July 6, 7, 13, and 14 as "[date (am or pm)] RP [page]." The

at 006-009. Dr. Lohavanichbutr, after performing a cardiac catheterization that revealed a 95% blockage and chronic total occlusion (CTO)[2] in Mr. Moyer's left anterior descending coronary artery (LAD), reviewed the angiogram with his partner, Dr. Vaderah. 7/11 (pm) RP 14-19; 7/12 (pm) RP 108-13, 118, 121-26, 146; RP 1194-95, 1210-11, 1214.

Dr. Vaderah, who had experience treating CTOs, believed a percutaneous coronary intervention ("PCI") procedure could address Mr. Moyer's symptoms and reduce his risk of heart failure or injury, and Mr. Moyer was offered and agreed to undergo a PCI procedure at PeaceHealth in Bellingham. 7/12 (pm) RP 108-18, 120, 126-37; RP 1195-96. Dr. Vaderah arranged to perform the procedure with his mentor, Dr. Lombardi, an expert in and teacher of newer CTO treatment techniques, serving as proctor to observe and assist as needed with technical aspects of the procedure. 7/12 (am) RP 403-08; 7/12 (pm) RP 114-18, 120, 133, 139-42; RP 1087-88, 1195-96, 1302, 1329.

The day of the procedure, Dr. Vaderah met with Mr. Moyer and confirmed the plan with Dr. Lombardi. 7/12 (am) RP 409-11; 7/12 (pm) RP 142-44. Dr. Vaderah began the procedure with Dr. Lombardi observing from the control room. RP 1343-44; 7/12 (pm) RP 162-66. When

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remaining, sequentially numbered, transcripts are cited as "RP [page]."

[2] "CTO" refers to an artery blockage existing for at least three months that gradually and progressively narrowed and ultimately became blocked through accumulation of cholesterol buildup, calcification, plaque, or scar tissue. RP 1188-89.

difficulties arose, Dr. Lombardi scrubbed in to assist Dr. Vaderah, using specialized equipment and techniques to bypass the CTO, place stents, and confirm proper placement by observing continuous blood flow down the LAD and past the CTO. RP 1244-49, 1343-44, 1387-91, 1397-1401, 1404-10; 7/11 (pm) RP 38; 7/12 (am) RP 430-33; 7/12 (pm) RP 148-49.

At discharge, Mr. Moyer was ambulatory and had no complaints. Ex. 7 at 039. Nine days later, he was airlifted back to PeaceHealth, where Dr. David Jessup diagnosed an acute myocardial infarction and complete LAD occlusion. Ex. 9 at 003. Mr. Moyer's condition deteriorated and he died. *Id*. at 003-004. A forensic pathologist who had no training in cardiovascular pathology or familiarity with newer PCI techniques for treating CTOs conducted an autopsy at the Moyers' request and concluded that that the stents were misplaced. RP 795, 844, 848, 876-81. Based on the same autopsy evidence, other experts, familiar with the newer PCI techniques, concluded that the stents were properly placed, but that Mr. Moyer had developed stent thrombosis, an unpredictable condition with high myocardial infarction and mortality rates. RP 870, 879-80, 913-14, 917-22, 934-35, 1272-73; 7/11 (am) 274, 278, 280-81, 295.

B. The Lawsuit and Its Procedural History.

Michael Moyer on his own behalf and as personal representative of his father's estate, (the Moyers) sued PeaceHealth and Drs. Lombardi and

Vaderah, alleging negligent stent misplacement that caused "dissecttion, compression, and collapse" of Mr. Moyer's LAD, leading to his death, CP 1-3, which the doctors and PeaceHealth denied, CP 7-11, 12-17, 18-23.

1. The trial court's rulings on defense motions in limine.

The trial court considered extensive argument and briefing before explaining its reasoning in ruling on several defense motions in limine, six of which formed the bases of the Moyers' appeal. *See* CP 413-67, 651-72, 815-58; RP 65-77, 146-49, 198-206, 214-15, 245-47, 669-79. In Motion in Limine No. 6, PeaceHealth and Dr. Lombardi sought to exclude as irrelevant any criticisms of care that an expert would not state constituted a violation of the standard of care, such as opinions suggesting "negligence in the air" or "background" facts or criticisms of "carelessness, confusion, and disorganization." CP 425-26, 1858-64. Given the Moyers' claim that such criticisms "are part of the story," CP 1469-70; RP 50, 60-61, the trial court considered additional briefing, CP 1854-56, 1858-64, and when denying a separate defense motion in limine ruled that "negligence in the air" is not relevant. RP 214-15; CP 462-63.

PeaceHealth and Dr. Lombardi's Motion in Limine No. 17 sought to exclude, as irrelevant and unduly prejudicial, evidence or argument that Dr. Lombardi should have contacted the Moyers after Mr. Moyer's death. CP 436-37. Acknowledging it was "really part of the larger issue" of the

extent to which the Moyers would be allowed to prove their theory that Dr. Lombardi cared more about performing a high volume of procedures than about Mr. Moyer, the trial court stated it would consider each item "separately" and excluded the evidence as "very prejudicial character evidence" that "paints him as a bad person" and "a really callous individual," who "doesn't care about his patient," without "much of a connection" to his performance as a surgeon. RP 146-48.

In Motion in Limine No. 24, PeaceHealth and Dr. Lombardi moved to exclude as irrelevant, more prejudicial than probative, and hearsay, statements Dr. Oliver, who treated Mr. Moyer prior to his death, made to the Moyers about Dr. Lombardi's care. CP 447-48, 1488-89. The trial court ruled that statements Dr. Oliver made that Mr. Moyer overheard were relevant to his pre-death pain and suffering, but excluded others as irrelevant or "highly prejudicial." RP 198-200, 202-04, 669-79.

PeaceHealth and Dr. Lombardi's Motion in Limine No. 25 sought to exclude, as irrelevant, unduly prejudicial, and hearsay, remarks Dr. Lombardi made to Dr. Jessup about being upset about a pending lawsuit, and that "people weren't helping him." CP 448-49, 527-31, 1490. Rejecting the Moyers' claims that the evidence showed an attempt to manipulate a witness probative of Dr. Lombardi's "credibility," CP 1491, the trial court excluded the evidence as irrelevant to standard of care or causa-

tion, and more unduly prejudicial than probative, particularly absent evidence that the comments had any effect on Dr. Jessup. RP 205-06.

PeaceHealth and Dr. Lombardi's Motion in Limine No. 29 sought to exclude, among other things, a power point – the "Cardiac Catheterization Department Chronic Total Occlusion (CTO) Review 2012" (the 2012 Review), CP 546-64, Ex. 16, Gerald Marschke, a non-physician hospital administrator, prepared, CP 453-55, 546, 588-89, containing a chart, CP 563, that classified 140 of Dr. Lombardi's CTO cases, based on whether PeaceHealth had received complete clinical records from outside referral sources, *see* CP 929, 1850-51, as "Appropriate," "Uncertain," "Rarely Appropriate," and "Not classifiable" under Appropriate Use Criteria of the National Cardiovascular Data Registry (NCDR) and American College of Cardiology Cath PCI Registry. CP 457-60, 563, 591-95. Despite the fact that the 2012 Review on its face was a "high level financial review", CP 546, and Mr. Marschke's unrebutted explanation that it did not address medical judgment or clinical indications, CP 1850-51, the Moyers argued that the chart showed Dr. Lombardi had performed CTO procedures that were not clinically indicated and was thus relevant to their theory that he was motivated to perform such procedures regardless of medical necessity. CP 1494-1501. Without deciding whether the evidence related to clinical judgment, the trial court ruled it was not relevant to show negligence, Dr.

Lombardi's motive was not at issue, the evidence was highly prejudicial, and its admission would require extensive rebuttal evidence on a collateral matter. RP 69-74.

In his Motion in Limine No. 12, Dr. Vaderah moved to exclude as more prejudicial than probative, inflammatory, and unduly embarrassing, an email from Dr. Lombardi stating that another patient had "a left main total RCA that looks juicy." CP 663, 742. Rejecting the Moyers' claim that the evidence showed "motive" to perform CTO procedures for the doctors' own entertainment regardless of clinical indications, the trial court excluded the evidence as irrelevant because it involved another patient and suggested only that Dr. Lombardi thought the case was interesting or challenging, not that he didn't care. RP 246-47; CP 1588.

2. The expert testimony at trial.

At trial, the Moyers' expert witnesses, who admitted to having no or very limited experience with the PCI techniques involved, opined that Drs. Lombardi and Vaderah violated the standard of care by (1) deciding to perform the PCI without a sufficient review of Mr. Moyer's clinical condition; (2) performing it without medical indications; and (3) continuing when difficulties arose, thereby misplacing the stents that ultimately caused infarction, heart failure, and death. RP 453-54, 456-61, 463, 467-69, 476-77, 481-83, 825, 837, 840, 1470, 1481-82; 6/30 (pm) 23-27, 36-

40, 48-50. The defense presented expert witnesses who were acknowledged specialists in, or very familiar with, the use of the newer PCI techniques and who testified that (1) Dr. Vaderah properly assessed Mr. Moyer's clinical condition; (2) the procedure was medically indicated; (3) Dr. Lombardi, as an experienced specialist, properly fulfilled the role of proctor; (4) the doctors properly placed the stents; and (5) the PCI did not cause the stent thrombosis or resultant heart attack and heart failure. RP 911-14, 917-24, 1165-66, 1197-98, 1221-27, 1243-46, 1248-64; 7/11 (am) RP 273-78, 281-83, 290-325, 347-48, 357-71; 7/11 (pm) RP 22-23, 29-32, 36-39; 7/12 (am) RP 382-83, 393, 403-06, 412-14, 416-18, 430-33.

3. Dr. Lombardi's trial testimony.

Dr. Lombardi testified that he became a doctor because he "really enjoyed sciences" and he wanted to "help" people with health issues like his diabetic mother, RP 1297-98, but the bulk of his testimony focused on his specialized experience in interventional cardiology, including his interest and efforts to build his skills in performing, developing, and teaching new procedures and techniques for treating CTOs, the evolving standard of care for interventional cardiologists, and the need for teaching and mentoring them to become as proficient in using newer techniques and technologies as he had in performing over 750 such procedures, RP 1295-1318. He also testified about the details of Mr. Moyer's procedure,

displaying and explaining the angiographic images of Mr. Moyer's procedure, consistent with the testimony of the other defense witnesses. RP 1325-32, 1343-58; *see also* RP 1213-19, 1221-32, 1244-49; 7/11 (pm) RP 36-37; 7/12 (am) RP 430-33; 7/12 (pm) RP 146-49.

4. The Moyers' request to reconsider the in limine rulings.

Then, during a break, the Moyers asked the trial court to reconsider its pretrial rulings, claiming that Dr. Lombardi's testimony that "he's doing this because he wants people to avoid heart failure," *see* RP 1295-96, that his mom's diabetes "drove him to do this [become a doctor]," *see* RP 1297-98, that "he wanted to teach people," *see* RP 1301-02, that he was "so happy" that another cardiologist shared "these values that he is espousing," *see* RP 1317, and that he reports to the NCDR database, *see* RP 1333, opened the door to all of the previously excluded evidence. RP 1360-62. Recognizing that the "notion that Dr. Lombardi is doing these procedures to help people is now part of the defense case," the trial court ruled that it would allow "some questions along the line of whether you were doing this procedure to help patients" or to "aggrandize yourself" "or increase your reputation," but refused to admit "this external evidence" [the 2012 Review] that it "excluded under 404(b)." RP 1363-64.

When the Moyers argued that such questions would not "be very effective cross-examination" if they were not allowed to refer to what they

claimed was "the actual data" showing what percentage of the "140 cases" reviewed were "unnecessary," RP 1364-65, the trial court ruled that it would not allow them "to get into those prior procedures and whether or not they were indicated for all the reasons … already stated," RP 1366. The court then overruled defense objections to two other documents and ruled that the Moyers could use them in cross-examination to argue their "theory of the case" regarding "confusion and the lack of communication between the two physicians." RP 1366-77; *see also* 7/13 (pm) RP 494-96.

5. The judgment on the jury's verdict for defendants.

The jury found the defendants not negligent and judgments were entered on the verdict. CP 2526-27, 2388-93.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

Under RAP 13.4(b), a petition for review will be accepted only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The Moyers seek review under RAP 13.4(b)(1), (2), and (4), of the Court of Appeals' decisions affirming: (1) the trial court's exclusion of

evidence of Dr. Lombardi's statements on two occasions to Dr. Jessup that this litigation was "upsetting" and "he felt that people were not helping him," and (2) the trial court's refusal to find that Dr. Lombardi's testimony opened the door to all of the previously excluded evidence they wanted to present. Because the Court of Appeals' decision is not in conflict with any decision of this Court or published opinion of the Court of Appeals and does not involve an issue of substantial public interest that should be determined by this Court, the Petition should be denied.

A. The Court of Appeals' Affirmance of the Trial Court's Exclusion of Evidence of Dr. Lombardi's Two Passing References to Dr. Jessup about this Lawsuit Being Upsetting Is Not in Conflict with Any Decision of this Court or the Court of Appeals and Does Not Involve Any Issue of Substantial Public Interest.

Dr. Jessup, a friend and former partner of Dr. Lombardi, CP 908-09, testified in deposition that, on two occasions after Mr. Moyer's death (the first over a year, and the second a month, before Dr. Jessup's deposition), he saw Dr. Lombardi in a hotel lobby at a professional conference, and Dr. Lombardi mentioned a pending case that was "upsetting," CP 912-13, and stated on the first such occasion that he felt "people were not helping him." *Id.* That was extent of their conversations about the case; having never discussed its substance. *Id.* Dr. Jessup did not even know what case it was, although he assumed it was this one. CP 913.

Characterizing Dr. Lombardi's two passing remarks about the

lawsuit as attempts to influence a witness's testimony or somehow evidencing "consciousness of guilt," the Moyers, *Pet. at 11-14*, assert that the Court of Appeals' decision affirming the exclusion of the remarks conflicts with this Court's decision in *State v. Kosanke*, 23 Wn.2d 211, 160 P.2d 541 (1945), and the Court of Appeals' decision in *State v. McGhee*, 57 Wn. App. 457, 788 P.2d 603 (1990). It does not.

As the Court of Appeals properly recognized, *Slip. Op. at 7*, the trial court did not abuse its discretion in rejecting the Moyers' characterization of the evidence and excluding it, finding the record "too sketchy to support an inference that Dr. Lombardi intended to threaten Dr. Jessup or interfere with his testimony," and no evidence that "Dr. Jessup perceived Dr. Lombardi as having that intent." Neither *Kosanke* nor *McGhee* limits the trial court's discretion to exclude evidence that it views, based on the facts and circumstances of the case, as irrelevant or unduly prejudicial.

The facts and circumstances in *Kosanke* and *McGhee* differ dramatically from the facts and circumstances in this case. In *Kosanke*, the trial court admitted evidence that the defendant (accused of indecent liberties with, and indecent exposure to, a minor female) and his wife attempted to persuade the parents of the child victim to move out of state to prevent the child from testifying. This Court affirmed the admission of the evidence as relevant and admissible as an indirect admission of guilt.

Kosanke, 23 Wn.2d at 214-15. In *McGhee*, the trial court admitted evidence that the defendant, who was accused of planning robberies and a murder committed by accomplices, saw one of the victims who had been arrested on a material witness warrant at the jail and called him a "snitch" and made a threatening (throat-slashing) gesture to him. *McGhee*, 57 Wn. App. at 459. The *McGhee* court determined that the evidence had relevance because it "reveal[ed] a consciousness of guilt and tie[d] the defendant to the victim," and was properly admitted because its probative value outweighed the possibility of unfair prejudice, and it was for the jury to decide the inference to be drawn from the evidence. *Id.* at 461-62.

Kosanke and *McGhee* do not suggest that a trial court necessarily abuses its discretion by *excluding* evidence that a defendant commented to a witness that a case was "upsetting" or that he felt "people weren't helping him," or had some other non-threatening, non-coercive communication with a witness about which an opponent wishes to cast aspersions. To the contrary, *McGhee* stands for the proposition that it is the court's role to both determine relevancy and whether the probative value of the evidence is substantially outweighed by its prejudicial effect. McGhee, 57 Wn. App. at 460. Here, the trial court excluded Dr. Lombardi's statements to Dr. Jessup as irrelevant to standard of care or causation, the central issues for trial, and as more unfairly prejudicial than probative. RP

205-06. The Court of Appeals reviewed those discretionary rulings and properly found no abuse of discretion. *Slip Op. at 7*. The Court of Appeals' decision is not in conflict with *Kosanke* or *McGhee*.

The Moyers, *Pet. at 12-14*, claim that attempts to influence the testimony of witnesses are "often more subtle" in medical malpractice cases than in criminal cases, citing three cases of twenty-to-forty-year vintage from other jurisdictions, *McCool v. Gehert*, 657 A.2d 269 (Del. 1995), *Jost v. Ahmad*, 730 So.2d 708 (Fla. Dist. Ct. App. 1998), and *Meyer v. McDonnell*, 392 A.2d 1129 (Md. App. 1978), they claim illustrate such a "recurring issue of substantial public interest." While the conduct at issue in *McCool*, *Jost*, and *Meyer* arguably may be described as more "subtle" than the conduct at issue in *Kosanke* or *McGhee*, the conduct was by no means equivocal or as "sketchy" as the Court of Appeals found the two remarks at issue in this case.

Contrary to the Moyers' assertion, *Pet. at 13*, the conduct in *McCool*, *Jost*, and *Meyer* can hardly be described as "sketchy." In all three cases, the defendants used influential third parties to communicate a directive or an intimidating message that the witnesses acted upon and/or perceived as a threat or an attempt to influence their testimony.

In *McCool*, 657 A.2d at 273, the defendant twice called another doctor on the medical staff of the plaintiff's expert's hospital, reported that

the expert had written a "derogatory" report "filled with 'outrageous statements,'" and urged him to speak to the expert about his role in the case, that doctor informed the expert that the defendant "had asked him twice to relay the message that it was inappropriate for doctors to testify against doctors," and the expert "believed that the message was intended to coerce or intimidate him into not testifying." In *Jost*, 730 So. 2d at 709-10, the appellate court, while "lacking in detail" because the trial court "prohibited counsel from making an adequate inquiry," concluded that the record supported inferences that the defendant's insurer caused a hospital representative to "remind" the plaintiff's treating physician that the purpose of his "testimony was to limit collateral damage," and that the doctor's testimony could be viewed as having been influenced by that communication. In *Meyer*, 40 Md. at 525-28, in conduct described by the court as "outrageous," the defendant contacted two well-respected mentors of the plaintiff's experts and advised them that the experts' testimony would be transcribed and disseminated to medical societies of which they were members, and when the mentors relayed that information to the experts, one expert felt so intimidated "that he would be unable to testify with a normal degree of candor," and the other, who had an impending appearance for an oral Board-certification exam, was "upset" and "fearful that he might now be blackballed by the Board."

Beyond their own self-serving opinion, the Moyers offer nothing to suggest that subtle witness intimidation is a wide-spread problem unique to medical malpractice cases that requires attention from this Court. The Court of Appeals' decision in no way suggests that evidence of witness intimidation is inadmissible in medical malpractice cases. Indeed, the Court of Appeals' discussion of *McGhee* and *McCool*, *Pet. at 7*, suggests the opposite. The Court of Appeals properly reviewed the trial court's exclusion of Dr. Lombardi's statements for abuse of discretion and found none. No issue of substantial public interest is presented. Unlike other circumstances in which review has been granted under RAP 13.4(b)(4),[3] this case does not involve a novel legal ruling with potential to impact similar pending litigation in Washington.

B. The Court of Appeals' Decision Affirming the Trial Court's Refusal to Find that Dr. Lombardi Opened the Door to All of the Previously Excluded Evidence Is Not in Conflict with Any Decision of this Court or the Court of Appeals and Does Not Involve Any Issue of Substantial Public Interest.

Insisting that certain testimony by Dr. Lombardi[4] opened the door to all previously excluded evidence they wanted to present to impugn his character and credibility, the Moyers contend, *Pet. at 14-19*, that the Court

[3] *See, e.g., State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (Court of Appeals' holding had "potential to affect every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA sentence was or is at issue").

[4] Some of what the Moyers cite as testimony by Dr. Lombardi, *Pet. at 14,* was actually statements by his counsel made in opening statement, *see* RP 366-67, and in a question to another witness, *see* RP 555-56.

of Appeals' affirmance of the trial court's failure to so find conflicts with this Court's decision in *State v. Renneberg*, 83 Wn.2d 735, 522 P.2d 835 (1974), and decisions of the Court of Appeals, such as *State v. Gallagher*, 112 Wn. App. 601, 51 P.3d 100 (2002). It does not.

The facts and circumstances in *Renneberg* and *Gallagher* differ dramatically from the facts and circumstances in this case. In *Renneberg*, 83 Wn. 2d at 738, this Court held that the trial court properly admitted previously excluded evidence of the defendant's husband's drug addiction after the defendant wife put her good character before the jury, "painting … a picture of a person most unlikely to commit grand larceny." And, in *Gallagher*, 112 Wn. App. at 610, the Court of Appeals affirmed admission of previously excluded evidence of syringes found in defendant's home after the defendant opened the door by questioning a detective about the lack of drug paraphernalia found, conveying "the false image that the home was devoid of drug-related activities."

The Moyers ignore the trial court's broad discretion in ruling on evidentiary matters, including application of the open door rule. *Taylor v. Intuitive Surgical, Inc.*, 187 Wn.2d 743, 765-766, 389 P.3d 517 (2017) (no abuse of discretion in prohibiting rebuttal evidence as confusing and prejudicial despite claim that testimony opened the door); *Lodis v. Corbis Holdings, Inc.*, 192 Wn. App. 30, 52-53, 366 P.3d 1246 (2015) (no abuse

of discretion in reversing prior ruling mid-trial after plaintiff opened the door despite trial court's repeated warnings).[5] That this Court in *Renneberg* or the Court of Appeals in *Gallagher* found no abuse of discretion in admitting the evidence at issue in those cases under the open door rule does not mean that the Court of Appeals here had to find an abuse of discretion in the trial court's refusal to admit the previously excluded evidence at issue in this case under the open door rule.

The purpose of the open door rule "is to prevent a party from mischaracterizing evidence by only revealing advantageous details of a particular subject." *City of Seattle v. Pearson*, 192 Wn. App. 802, 819, 369 P.3d 194 (2016). But, where a party presents no evidence creating a false or misleading impression, admission of previously excluded, unfairly prejudicial evidence is not justified. *Id.* (abuse of discretion to admit highly prejudicial evidence of current legal limit of THC concentration when defendant did not present any false or misleading evidence by showing lack of any per se legal limit at time of the offense). A trial court does not abuse its discretion by denying a party "carte blanche" to

[5] *See also Gallagher*, 112 Wn. App. at 609-10 (reviewing trial court's ruling on open door for abuse of discretion); *State v. Brush*, 32 Wn. App. 445, 452-53, 648 P.2d 897 (1982) (no abuse of discretion where trial judge "allowed the parties to present extensive argument," "viewed the witnesses, heard the testimony firsthand, and went to commendable lengths in exercising his discretion before determining" that the defendant's testimony had opened the door); *State v. Riconosciuto*, 12 Wn. App. 350, 355, 529 P.2d 1134 (1974) ("control of the cross-examination of the defendant was within the discretion of the trial court"; no abuse in applying open door rule).

introduce unlimited evidence of collateral matters that risk significant unfair prejudice to another party. *Lodis*, 192 Wn. App. at 51 (no abuse of discretion in prohibiting retaliatory discharge plaintiff from presenting evidence of each incident of alleged discriminatory conduct of which he was aware regardless of whether it concerned conduct he openly opposed before his discharge).

Contrary to the Moyers'assertions, *Pet. at 17-18*, Dr. Lombardi's testimony did not create false impressions about whether he (1) performed a "time-out" at the beginning of each surgery to confirm proper paperwork is signed; (2) was motivated by a general desire to help people in addition to his interest in science; (3) was upset about a lawsuit and a lack of "help"; or (4) was a pioneering specialist with extensive experience in performing and teaching the kind of PCI techniques used in Mr. Moyer's case. RP 1297-98, 1316-17, 1356. As the Court of Appeals properly concluded, *Slip Op. at 9*, to the extent Dr. Lombardi put his character at issue with testimony about his compassionate motivations, the evidence the Moyers wanted to introduce did not negate that testimony, and the open door rule did not apply. And, as the Court of Appeals also properly observed, *Slip Op. at 9-10*, to the extent the Moyers claimed that the previously excluded evidence was relevant to undermine Dr. Lombardi's credibility, the evidence they wanted to introduce was not relevant to

refute his denial of negligence and his portrayal of himself as compassionate was not a central issue in the case.

Finally, the Court of Appeals did not hold or suggest that the open door rule does not apply to medical malpractice cases. Thus, acceptance of review is not warranted under RAP 13.4(b)(4) in order for this Court to "confirm," as the Moyers request, *Pet. at 19*, that the open door rule "applies in medical malpractice cases."

VI. CONCLUSION

For all these reasons, the Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 5th day of June, 2018.

FAIN ANDERSON VANDERHOEF, ROSENDAHL O'HALLORAN SPILLANE, PLLC

By 

Mary H. Spillane,
WSBA #11981
Jennifer D. Koh,
WSBA #25464
Attorneys for Respondents PeaceHealth and Lombardi

FLOYD, PFLUEGER & RINGER, P.S.

By 

Rebecca S. Ringer,
WSBA #16842
Amber L. Pearce,
WSBA #31626
Attorneys for Respondent Vaderah

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 5th day of June, 2018, that I caused a true and correct copy of the foregoing document, "Respondents Joint Answer to Petition for Review," to be delivered in the manner indicated below to the following counsel of record:

Counsel for Appellant:
Leonard J. Feldman, WSBA #20961
Michael S. Wampold, WSBA #26053
PETERSON WAMPOLD ROSATO LUNA KNOPP
1501 4th Ave., Suite 2800
Seattle, WA 98101-3677
Ph: (206) 624-6800
Email: feldman@pwrlk.com
wampold@pwrlk.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☑ E-file / E-mail

Co-counsel for Respondent PeaceHealth:
Miranda K. Aye, WSBA #40582
JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP
925 Fourth Ave., Suite 2300
Seattle, WA 98104
Ph: (206) 223-4770
Email: Miranda@jgkmw.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☑ E-file / E-mail

Co-counsel for Respondent Dr. Lombardi:
Elizabeth A. Leedom, WSBA #14335
Rhianna M. Fronapfel, WSBA #38636
BENNETT BIGELOW LEEDOM PS
601 Union St., Suite 1500
Seattle, WA 98101-1363
Ph: (206) 622-5511
Email: eleedom@bbllaw.com
rfronapfel@bbllaw.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☑ E-file / E-mail

Co-counsel for Respondent Dr. Vaderah:
Rebecca S. Ringer, WSBA #16842
Amber L. Pearce, WSBA # 31626
Floyd, Pflueger & Ringer, P.S.
200 West Thomas St., Suite 500
Seattle, WA 98119
Ph: (206) 441-4455
Email: rringer@floyd-ringer.com
APearce@floyd-ringer.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☑ E-file / E-mail

DATED this 5th day of June, 2018, at Seattle, Washington.

s/Carrie A. Custer
Carrie A. Custer, Legal Assistant

FAVROS LAW

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