No. 95815-7

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 75836-5-I

COURT OF APPEALS, DIVISION I
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.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The petitioner is Michael Moyer, individually and as Personal Representative of the Estate of Grant Moyer, deceased, plaintiff in the trial court and appellant in the Court of Appeals.

II. COURT OF APPEALS DECISION

The Court of Appeals issued its unpublished opinion on April 16, 2018. App. 1-10.

III. ISSUES PRESENTED FOR REVIEW

1. In medical malpractice cases, defendant physicians often attempt to enhance their credibility by testifying that they care deeply about their patients and went to medical school to save lives. When a party presents evidence and argument regarding his or her exemplary character and credibility, does the open-door rule permit the opposing party to complete the tapestry with adverse character and credibility evidence?

2. Both this Court and the Court of Appeals have held in criminal cases that evidence of attempts to influence a witness's testimony is admissible because it reveals a consciousness of guilt. In medical malpractice and other civil cases, is a party's attempt to influence a witness's testimony similarly admissible to show the party's consciousness of the weakness of his or her position on the merits?

IV. STATEMENT OF THE CASE

A. Drs. William Lombardi And Sanjeev Vaderah Performed An Unnecessary And Risky Procedure On 85-Year-Old Grant Moyer Causing His Death.

In the fall of 2012, Grant Moyer began to notice that he occasionally experienced dizziness during physical activity. Ex. 1-011 to 012. Although the dizziness would subside when he stopped whatever activity he was engaged in, Mr. Moyer's primary care physician sent him to Skagit Valley Hospital for testing by cardiologist Dr. Lohavanichbutr (referred to by others as "Dr. Lo"). Ex. 3-006. Dr. Lo discovered that Mr. Moyer had a lesion and a chronic total occlusion ("CTO") in his left anterior descending artery ("LAD"). RP 440-41.[1] Dr. Lo referred Mr. Moyer to Dr. Lombardi, who claimed to be an expert in a new procedure to place a cardiac stent to allow blood to flow past a CTO. RP 1137.

Unbeknownst to the Moyers, Dr. Lo told his partner Dr. Vaderah about Mr. Moyer's condition and the referral to Dr. Lombardi. RP 114 (7/12pm), 155 (7/12pm). Dr. Vaderah had an interest in learning the newer CTO procedure and had been previously proctored by Dr. Lombardi. RP 117-18 (7/12pm). Dr. Vaderah asked Dr. Lombardi if he

[1] The report of proceedings in this appeal was prepared by several court reporters and therefore is not sequentially numbered. Plaintiff cites to the report of proceedings for the afternoons of June 30 and July 6, 7, 11, 12, 13, and 14 using both page number and date (*e.g.*, RP 15 (7/6pm)). The remaining transcripts – sequentially numbered by a single court reporter – are cited solely by page number (*e.g.*, RP 22).

could perform the CTO procedure at PeaceHealth under Dr. Lombardi's supervision. RP 119-20 (7/12pm), 133-34 (7/12pm), 156 (7/12pm).

Dr. Lombardi admitted that he never saw any of Mr. Moyer's medical records or studies before the procedure and did no analysis regarding whether the procedure was medically indicated. RP 1329-30, 1339. Instead, he relied on Dr. Vaderah (*id.*), who testified that he did not recall whose role it was to determine whether the procedure was indicated (RP 153-54 (7/12pm)). Nor did that assessment occur when Mr. Moyer checked into PeaceHealth on February 11, 2013. RP 493 (7/13), 60-61 (7/11pm), 1339. Instead, Mr. Moyer was simply prepped and consented for the procedure. At that same time, Dr. Lombardi disclosed to the Moyers that Dr. Vaderah – a doctor they had *never met* – would perform the procedure under his supervision. RP 1340, 1139, 128-29 (7/06pm).

Dr. Vaderah began the procedure but was unable to properly place the stents, so Dr. Lombardi took over and four stents were placed in Mr. Moyer's LAD. RP 166-67, 172 (7/12pm). According to Plaintiff's experts, the stents were placed largely outside of the portion of the artery where blood flows. RP 39-40 (6/30pm). As a result, when the stents were expanded to allow blood flow, they instead blocked the LAD and its branch vessels. RP 49 (6/30pm). The Moyers were nevertheless told that the procedure was successful, and Mr. Moyer was discharged two days

later even though he had been complaining of nausea, vomiting, and pain and his EKGs showed repeated irregularity indicative of a heart attack. Ex. 7-029 & 041 to 042; RP 479-82, 129 (7/6pm).

Nine days later, Mr. Moyer experienced a cardiac event and was airlifted to PeaceHealth. After examining Mr. Moyer and post-operative imaging, three physicians expressed concerns regarding the previous CTO procedure. Dr. David Jessup concluded that the "previously deployed stents are completely obliterated. They appear to be in a false channel." Ex. 9-002. Dr. Jonathan Lowy wrote that Mr. Moyer's condition "fits clinically with the damage his heart sustained from his procedure." Ex. 9-008 to 009. And Dr. Thomas Oliver likewise concluded that Mr. Moyer's "LAD was ... occluded at the site of prior stents" and "that probably occurred immediately post-procedure before he was discharged from the hospital." Ex. 9-012.

Mr. Moyer died on February 26, 2013. An autopsy confirmed that misplacement of the stents caused a lack of blood flow to critical parts of his heart. CP 2480-81. He is survived by his wife and three children.

B. Plaintiff Sued Defendants For Medical Negligence And Obtained In Discovery Substantial Evidence That Undermined Dr. Lombardi's Credibility.

Michael Moyer, Grant Moyer's eldest son and the personal representative of his Estate, filed this action alleging that Defendants

violated the standard of care by (1) performing a medical procedure that was not indicated, (2) performing the procedure without reviewing Mr. Moyer's records or imaging studies to determine whether the procedure was indicated, (3) occluding Mr. Moyer's LAD and branch vessels during the procedure, and (4) failing to recognize the severity of Mr. Moyer's post-operative condition, failing to advise Mr. Moyer and his family of his condition, and discharging Mr. Moyer in that compromised condition. CP 95-97. While Dr. Lombardi denied these allegations, Plaintiff obtained in discovery critical evidence that would have significantly undermined Dr. Lombardi's credibility at trial.

First, Plaintiff learned in discovery that Dr. Lombardi had previously performed *numerous* CTO procedures without first conducting the necessary medical evaluation. In 2012, PeaceHealth evaluated 140 CTO cases performed by Dr. Lombardi to determine whether they were performed in accordance with federal regulations for reimbursement and the American College of Cardiology's "Appropriate Use Criteria." CP 546-64 (hereinafter "2012 Review"). PeaceHealth concluded that 77 of the procedures – *55 percent* – could not be classified as "appropriate" either because Dr. Lombardi did not have sufficient documentation of medical necessity or because the available documentation showed that the procedure was *not medically indicated*. CP 563.

Second, Defendants produced emails between Drs. Vaderah and Lombardi showing a troubling focus on *quantity* of surgery as opposed to patient care and necessity. In those emails, Dr. Lombardi writes: "hope we get to do Mr. [REDACTED] left main total RCA that looks *juicy*," "we have 4 for you on the 18th," "Sanjeev may come up with a couple more by then," "I have room for a 4th case that day if you find one just have it scheduled," and "I have cath lab time open…if you have cases and want to *play* let me know." CP 736 & Plaintiff Ex. 15 (emphasis added).

Third, when Dr. Lombardi was deposed, he admitted that he made no effort to contact the Moyer family to discuss Mr. Moyer's death following the procedure. CP 955 ("Q. Okay. Did you make any efforts once you learned about Mr. Moyer's death to call the family? A. No, sir."). When asked why he failed to do so, Dr. Lombardi testified: "I can't give you a good reason." *Id*.

Fourth, Plaintiff learned that Dr. Lombardi had approached Dr. Jessup – one of the subsequent treaters who had concluded that the stents were "in a false channel" and "occluded" the artery (Ex. 9-002) – on two separate occasions to complain that the litigation was "upsetting" and that "he felt that people were not helping him." CP 1525-26. One of these conversations occurred shortly before Dr. Jessup's deposition. CP 1525.

C. The Jury Returned A Defense Verdict After Hearing An Exaggerated And One-Sided Portrayal Of Dr. Lombardi's Character And Credibility.

Prior to trial, Defendants filed 64 motions in limine to exclude *all of the evidence* that Plaintiff obtained in discovery that would have allowed him to undermine Dr. Lombardi's credibility, including the evidence described above. CP 436-37, 447-48, 453-60, 663. The trial court granted these motions. *See* RP 74, 77, 146-48, 206, 246-47, 678-79. Indeed, if any criticism did not "rise to the level of negligence," the trial court excluded it as well. CP 425-26; RP 678-79.

Based on these rulings, Plaintiff's counsel expressed concern that Defendants would seek to magnify Dr. Lombardi's credibility by asserting at trial (as medical malpractice defendants typically do) that Dr. Lombardi cares deeply about his patients and became a doctor to save lives. RP 248. In response, the trial court stated: "Well, if they do, that may be a different situation." *Id*. The court adopted a similar approach when it granted Defendants' motion in limine regarding the 2012 Review:

> I'm going to leave the door slightly ajar. I want to – I want to hear what Dr. Lombardi's testimony is and how the testimony comes in with respect to the review or lack of review of records, and there's – I want to see whether or not, within the context of cross-examination, that it might be appropriate. I don't anticipate that it will.
>
> But I want to revisit the issue once I have a better sense of the case. But at this point we're not going to mention it in

> opening statements, and the experts are not going to refer to it.

RP 77. While all of this evidence was excluded, it was understood that the trial court would revisit its rulings if Defendants opened the door.

Defendants then opened the door – just as Plaintiff's counsel forewarned (RP 248) – when Dr. Lombardi testified as follows:

- "A large proportion of these patients historically have not been able to get their arteries treated, for a variety of different reasons. And so because I had a large population of these patients, and *I wanted to be able to give them more opportunities, I wanted to learn more about how to treat totally blocked arteries*." RP 1295-96 (emphasis added).
- When asked "what drew [him] to being a doctor and being a cardiologist," he stated "given my mom's health issues, I wanted to be able to do something for her and for other people like her, because, you know, *you want to help people*." RP 1297-98 (emphasis added).
- "I've always liked teaching. I've always liked sharing and trying to help us get better. I think as a teacher, you always get better because your students teach you. And it also helps to force you to stay current and to stay sort of at the front end of things, where I think there's at times a lot of complacency. So I really wanted to be able to teach and help other physicians learn to do what I was doing." RP 1301-02.
- His creation of a "CTO community" is "changing how patients get cared for every day" and watching Dr. Lotun (Dr. Vaderah's expert) testify made him feel like a "proud grandfather, because what he's talking about is what we've been talking about, which is treating patients, not pictures. Learning to get better, teaching and educating other physicians to take care of patients who need to be taken care of." RP 1316-17. These are "*values that I've lived my whole career by*…." RP 1317 (emphasis added).
- "Historically you see a lot of people, they really wanted to hold on to all of their knowledge, because they want to be the superstar and I want to be the bestest ever. The challenge with that though is if

> you don't -- if you have that gift, right, that you're really good at what you do, but you don't give the gift away, then there's so many more people that won't get treated. There's so many people that won't learn. And God forbid, you're not there anymore, who's going to take over? So you want to work really hard to let other people know *so that these people can get taken care of no matter happens*." RP 1317-18 (emphasis added).

The purpose of such testimony was to persuade the jury that Dr. Lombardi is credible and to accept his testimony that Defendants were not negligent.

Dr. Lombardi also testified that in all previous cases that he had done with Dr. Vaderah he "would have reviewed the records, seen the patient the day before, assessed the indications" and that making sure that all paperwork is done is "something we do in every case." RP 1325, 1356. And he explained at length how the data collected by the National Cardiovascular Data Registry supports his testimony. RP 1333-35. Dr. Lombardi so testified despite the fact that this same organization analyzes data relating to Appropriate Use Criteria – *the same data that was contained in the 2012 Review*, which concluded that a large portion of his cases were performed without sufficient information. CP 563.

Recognizing that defense counsel had opened the door to Plaintiff's character and credibility evidence, Plaintiff's counsel asked the trial court to reconsider its prior rulings. RP 1360-62. The trial court acknowledged that "this notion that Dr. Lombardi is doing these procedures to help people is now part of the defense case, and has been for

a while." RP 1364. The court nevertheless ruled that "we're not going to get into those prior procedures and whether or not they were indicated for all the reasons that I've already stated" and confirmed that Plaintiff's character and credibility evidence remained inadmissible. RP 1366.

Seizing this opportunity to magnify Dr. Lombardi's credibility without Plaintiff being able to respond, Dr. Lombardi's counsel emphasized in closing argument that Dr. Lombardi "spent his time teaching and taking care of patients" (RP 589 (7/14pm)), his "mission" is "teaching doctors" (RP 585 (7/14pm)), and he has "devoted his life to teaching this technique" (RP 591 (7/14pm)). And despite the fact that Plaintiff was precluded from offering the 2012 Review, Dr. Lombardi's counsel stated that "when the defense experts were talking, there was *data*…it wasn't just 'oh, well, I think that they shouldn't have done this.'" RP 588 (7/14pm). Dr. Vaderah's counsel similarly asserted that Dr. Vaderah "passe[d] the ball to Michael Jordan." RP 1540.

The cumulative impact of the trial court's rulings became clear when the jury returned a defense verdict after less than five hours of deliberation following a three-week trial. CP 2526-27. Plaintiff appealed, and the Court of Appeals affirmed for the reasons set forth below.

V. WHY THIS COURT SHOULD ACCEPT REVIEW

A. The Court Should Accept Review To Decide The Significant Public Issue Whether A Party's Attempt To Influence A Witness's Testimony Is Admissible In Medical Malpractice And Other Civil Cases To Show The Party's Consciousness Of The Weakness Of His Or Her Position On The Merits. (RAP 13.4(b)(1), (2), and (4)) .

As noted above, Plaintiff learned through discovery that Dr. Lombardi approached Dr. Jessup on two occasions to complain that this litigation was "upsetting" and "he felt that people were not helping him." CP 1525-26. The trial court excluded this evidence, and the Court of Appeals affirmed that ruling because it concluded that "the record is too sketchy to support an inference that Dr. Lombardi intended to threaten Dr. Jessup or interfere with his testimony, and there is no evidence that Dr. Jessup perceived Dr. Lombardi as having that intent." App. 7.

Contrary to the Court of Appeals' ruling, Washington courts have repeatedly held that such evidence is admissible and that the *jury* must decide the weight and significance of the evidence. In *State v. Kosanke*, 23 Wn.2d 211, 160 P.2d 541 (1945), for example, the defendant attempted to persuade the parents of the victim to move to Idaho to prevent her from testifying. This Court ruled that this "is a circumstance for the jury to consider as not being likely to be the conduct of one who was conscious of his innocence, or that his cause lacks truth and honesty, or as tending to show an indirect admission of guilt." *Id.* at 215.

The Courts of Appeals reached the same result in *State v. McGhee*, 57 Wn. App. 457, 788 P.2d 603 (1990). Relying on *Kosanke*, the court held that a defendant's attempt to influence a witness's testimony by calling him a snitch and making a threatening gesture "has relevance since it reveals a consciousness of guilt." *Id*. at 461. Relevant here, the court specifically rejected McGhee's argument "that his behavior could have been that of a wrongfully accused person" because "[t]he inference was for the trier of fact." *Id.* at 462. Here too, *the jury* should be been permitted to infer a consciousness or guilt – or not – *based on the evidence*. But that evidence was improperly excluded.

The Court of Appeals' ruling in this case – that "the record is too sketchy" (App. 7) – does not make sense in medical malpractice cases, where attempts to influence a witness's testimony are often more subtle than in criminal cases like *McGhee*. Courts in other states have held that such attempts to influence testimony – no less than threatening gestures – are admissible in medical malpractice cases. In *McCool v. Gehret*, 657 A.2d 269, 273 (Del. 1995), for example, the defendant physician asked another physician to tell a witness "that it was inappropriate for doctors to testify against doctors." The Supreme Court of Delaware held that such evidence "has probative value with respect to the tampering party's consciousness of the weakness of his or her position on the merits and

may be considered by the jury for that purpose." 657 A.2d at 277. Similarly, in *Jost v. Ahmad*, 730 So.2d 708, 710 (Fla. Dist. Ct. App. 1998), there was a "communication … to remind Dr. Gray that his testimony 'was to limit collateral damage.'" And in *Meyer v. McDonnell*, 392 A.2d 1129, 1130 (Md. App. 1978), the defendant informed a witness through an intermediary that his testimony would be transcribed and disseminated to others. Although the evidence of these attempts to influence testimony could be described as "sketchy" – as the Court of Appeals ruled here (App. 7) – the court in both cases held that such evidence has substantive value in medical malpractice cases and it is reversible error to exclude it. *Jost*, 730 So.2d at 711; *Meyer*, 392 A.2d at 1134.

Moreover, in Washington, the jury's role in deciding weight and credibility has constitutional significance. This Court recognized over a century ago that "[t]he Constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses." *State v. Thield*, 36 Wash. 365, 366, 78 P. 919 (1904). The trial court's ruling excluding evidence that Dr. Lombardi attempted to influence Dr. Jessup's testimony – which the Court of Appeals erroneously affirmed (App. 7) – prevented the jury from properly performing this constitutional role.

In short, the Court of Appeals' ruling conflicts with opinions of this Court and other courts regarding the admissibility of attempts to

influence testimony in criminal cases. The same issue arises in civil cases, including medical malpractice cases, where such attempts will often be more subtle but just as relevant. This is a recurring issue of substantial public interest that should be determined by this Court.

B. The Court Should Accept Review Because The Court Of Appeals' Open-Door Ruling Conflicts With Decisions Of This Court And The Court Of Appeals And Raises A Significant And Recurring Issue In Medical Malpractice Cases. (RAP 13.4(b)(1), (2), and (4)).

As noted previously, the trial court granted a series of motions in limine excluding evidence that was critically important in undermining Dr. Lombardi's credibility – as described on pages 5-6 above. Even if the trial court correctly decided those motions (an issue that Plaintiff is not asking this Court to review), Defendants opened the door to such evidence when Dr. Lombardi testified that he is "driven to help patients like Mr. Moyer" (RP 366-67), that he is responsible for "pioneering" the CTO procedure (RP 555-56), that he only wants "to help people" (RP 1297-98) and "to be able to teach and help other physicians learn to do what I was doing" (RP 1301-02), and that these are "values that I've lived my whole career by" (RP 1317). Despite this *highly exaggerated and entirely one-sided* portrayal of Dr. Lombardi's character and credibility, the trial court ruled that Plaintiffs' contrary evidence was and remained inadmissible under the

court's previous rulings. RP 1366. The Court of Appeals affirmed those rulings as well. App. 8-10.

The Court of Appeals' decision conflicts with this Court's opinion in *State v. Renneberg*, 83 Wn.2d 735, 522 P.2d 835 (1974). Before the trial in *Renneberg*, the court ruled that evidence regarding the defendants' drug addiction was inadmissible. *Id*. at 736. But the defendants opened the door to such evidence when they testified at trial. As this Court stated, "[t]he defendant wife voluntarily put her character before the jury" by testifying "to her work experience, that she had attended college, that she had been a candidate in the Miss Yakima pageant, that she had participated in a glee club, drill team, pep club and was the treasurer of a science club." *Id.* at 737-38. The defendant husband, in turn, testified regarding his "lengthy engagement and subsequent marriage to the defendant wife whose character had been so vividly pictured, as to his working in his garden at home and as to the planned attendance at a family barbecue on the day of the alleged crime." *Id.* at 738. The purpose of this testimony was "painting … a picture of a person most unlikely to commit grand larceny." *Id.* This Court held that the State "was entitled to complete the tapestry" with the previously inadmissible evidence of drug addiction. *Id.* The Court referred to such evidence as "character impeachment," which it held "dictates admissibility." *Id.* at 737.

Division Two's opinion in *State v. Gallagher*, 112 Wn. App. 601, 51 P.3d 100 (2002), also is instructive here. The underlying issue in *Gallagher* was whether Gallagher unlawfully manufactured drugs at his home. The trial court granted Gallagher's motion in limine to exclude evidence that police had found syringes in his home. Defense counsel, similar to defense counsel here, then examined a witness about the lack of items associated with drug use at the defendant's house. Division Two affirmed the trial court's ruling that this testimony opened the door to the previously inadmissible evidence. The court explained:

> Here, although Gallagher did not question [the detective] about the existence of syringes, he took advantage of [the detective's] inability to talk about the syringes (because of the order in limine) to convey to the jury the false image that the home was devoid of drug-related activities. The trial court did not allow this unfair advantage to occur.

Id. at 610. Division Two thus agreed with the trial court that the open-door rule precluded the defendant from seeking an "unfair advantage" based on the trial court's previous rulings in limine. Numerous other Washington cases hold the same.[2]

The Court of Appeals' analysis conflicts with these cases. The

[2] *See State v. Brush*, 32 Wn. App. 445, 451–52, 648 P.2d 897 (1982) (bolstering of fireman's credibility opened door to prior convictions); *State v. Riconosciuto*, 12 Wn. App. 350, 354, 529 P.2d 1134 (1974) ("When a defendant testifies to his own good conduct, he may be cross-examined about specific acts of misconduct unrelated to the crime charged."); *State v. Bauman*, 77 Wn.2d 938, 468 P.2d 684 (1970) (same) (quoting *State v. Emmanuel*, 42 Wn.2d 1, 14, 253 P.2d 386 (1953)).

Court of Appeals did not discuss *Gallagher* and the other cases cited by Plaintiff, but it did discuss this Court's opinion in *Renneberg*. It stated:

> Unlike in *Renneberg*, Dr. Lombardi's testimony that he was motivated by a desire to help patients did not open the door to otherwise inadmissible character evidence. Dr. Lombardi put his character at issue to a certain extent with self-serving testimony about his compassionate motivations, but the evidence Moyer wanted to introduce did not negate that testimony. Moyer fails to identify any mischaracterization by Dr. Lombardi that would have been clarified by the excluded evidence. The open door rule does not apply.

App. 8-9. But if "Dr. Lombardi put his character at issue … with self-serving testimony about his compassionate motivations," as the Court of Appeals acknowledged, then the open-door rule *does* apply – just as it did when the defendants offered similar testimony regarding their exemplary character and wholesome values in *Renneberg*.

Moreover, contrary to the Court of Appeals' ruling, the character and credibility evidence at issue here *does* negate Defendants' misleading impression of Dr. Lombardi's character and credibility. For example:

- Dr. Lombardi testified that making sure that all paperwork is done is "something we do in every case" (RP 1356), yet his employer concluded – after a careful review of 140 CTO procedures – that Dr. Lombardi performed *numerous* procedures without sufficient documentation of medical necessity and where the available documentation showed that the procedure was *not medically indicated* (CP 563).
- Dr. Lombardi testified that he only wanted "to help people" (RP 1297-98), yet there are emails showing that he discussed his patients in a disturbing and callous manner – for example, calling one potential procedure "juicy" (CP 736) and telling Dr. Vaderah

that he has "cath lab time open … if you have cases and want to *play* let me know" (Plaintiff Ex. 15 (emphasis added)).

- While Dr. Lombardi testified that he and Dr. Vaderah did nothing wrong, there is evidence that he contacted Dr. Jessup – a subsequent treater who had criticized the CTO procedure – just prior to his deposition to complain that the litigation was "upsetting" and "that people were not helping him." CP 1525-26.
- And while Dr. Lombardi testified that being "the bestest ever" and caring for "patients who need to be taken care of" are "values that I've lived my whole career by" (RP 1316-17), he admitted at his deposition that he made no effort to speak with the Moyer family after learning about Mr. Moyer's death following the procedure and was unable to give a good reason for failing to do so. CP 955 (quoted on page 6 above).

Under Washington law, the jury was the sole judge of Dr. Lombardi's credibility, yet the jury was unable to perform that constitutional role because it heard only one side of the story.

It is equally clear that the trial court's rulings excluding critical character and credibility evidence regarding Dr. Lombardi – after defendants opened the door to such evidence – were extremely prejudicial to Plaintiff. Dr. Lombardi (a) vouched for other defense witnesses (RP 1316-17, 1323, 515 (7/13pm)), (b) testified contrary to Plaintiff's expert witnesses (RP 1390-91, 1409-10), and (c) disagreed with the conclusions reached by Drs. Lowy, Oliver, and Jessup (RP 1422), all of whom were critical of the care that Mr. Moyer received from Drs. Lombardi and Vaderah (*see supra* at 4). Defense counsel took full advantage of Dr. Lombardi's enhanced credibility in their closing arguments, referring to

him as "Michael Jordan" (RP 1540), telling the jurors that they "got to know him" (RP 589 (7/14pm)), and asserting that when someone as revered as Dr. Lombardi says "he did this appropriately," surely it must be "correct" (RP 575 (7/14pm)). The jury inevitably agreed. CP 2526-27.

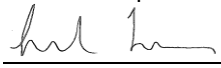
Finally, this is an important and recurring issue in medical malpractice cases. Plaintiff's trial counsel anticipated what happened here because defendants in medical malpractice *often* (and predictably) seek to enhance their character and credibility by telling the jury "how wonderful they are and how much they care about patients, and this is why they went to medical school, and they're so caring and they love their patients, and they loved [the plaintiff], and they wanted to do right by him." RP 248. If and when that happens, the open-door rule permits plaintiffs "to complete the tapestry" – just as this Court held in *Renneberg*. 83 Wn.2d at 738. The Court should accept review to confirm that this same rule applies in medical malpractice cases.

VI. CONCLUSION

For the foregoing reasons, the Court should grant discretionary review under RAP 13.4(b)(1), (2), and (4) .

DATED: May 9, 2018.

PETERSON | WAMPOLD | ROSATO | FELDMAN | LUNA



Leonard J. Feldman

CERTIFICATE OF SERVICE

I certify that on the date shown below a copy of this document was sent as stated below.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL MOYER, individually and as Personal Representative of the Estate of GRANT MOYER, Deceased, Appellant, v. PEACEHEALTH, a Washington corporation d/b/a PEACEHEALTH ST. JOSEPH HOSPITAL; WILLIAM LOMBARDI, M.D.; and SANJEEV VADERAH, M.D., Respondents.	No. 75836-5-I DIVISION ONE UNPUBLISHED OPINION FILED: April 16, 2018

BECKER, J. — In this medical malpractice action, a jury found the defendants not negligent. Appellant contends the trial court committed prejudicial error by excluding evidence he offered to undermine the credibility of one of the doctors. He fails to show that the evidence was relevant or helpful to jurors' understanding of the issues at stake.

FACTS

Eighty-five-year-old Grant Moyer started experiencing episodes when exercising during which he felt so dizzy he thought he might faint. Afterwards, Moyer felt weak and unsteady for an hour or two. These episodes became increasingly frequent. Moyer's primary care physician referred him to Skagit

Valley Hospital for cardiac testing. The testing revealed heart disease that was causing blockage in one of Moyer's arteries. Moyer elected to undergo surgery.

Cardiologists William Lombardi and Sanjeev Vaderah, respondents in this appeal, performed Moyer's surgery on February 11, 2013, at Bellingham's PeaceHealth St. Joseph Medical Center. The procedure involved placing tubes called stents in Moyer's arteries to allow increased blood flow. Moyer was discharged from the hospital two days after the surgery.

On February 22, 2013, Moyer was airlifted from his home in Friday Harbor back to PeaceHealth after displaying symptoms of a heart attack. His condition deteriorated, and he died in the hospital on February 26, 2013.

Moyer was survived by his wife and three adult children. A pathologist performed an autopsy at the family's request. His opinion was that Moyer died due to complications resulting from a misplaced stent.

Michael Moyer, Grant Moyer's son and the representative of his estate, initiated this suit against PeaceHealth, Dr. Lombardi, and Dr. Vaderah on April 17, 2015. The complaint included allegations that the defendants were negligent for (1) performing a procedure that was not medically indicated, (2) failing to adequately review Moyer's medical records and analyze his case before the procedure, and (3) blocking Moyer's artery and collateral branches during the procedure. All defendants denied liability.

Trial began on June 27, 2016. Moyer's witnesses included the pathologist who performed the autopsy and cardiologists who opined that the defendants provided substandard care. The defense countered with expert testimony that

Dr. Lombardi and Dr. Vaderah met the standard of care in their treatment of Moyer and that his death was not caused by their actions. A pathologist disagreed with the conclusion in the autopsy report that the stents were misplaced.

By verdict rendered July 15, 2016, the jury determined that none of the defendants were negligent. This appeal followed.

ANALYSIS

Moyer challenges evidentiary rulings. We review for an abuse of discretion. Hollins v. Zbaraschuk, 200 Wn. App. 578, 580, 402 P.3d 907 (2017), review denied, 409 P.3d 1061 (2018). A court abuses its discretion when it makes a decision for untenable reasons or on untenable grounds. Hollins, 200 Wn. App. at 582-83.

The court heard defense motions in limine and ruled certain items of evidence inadmissible, primarily on the basis that they were irrelevant or unduly prejudicial. Moyer argued during the trial that the defendants "opened the door" to the previously excluded evidence. The court maintained its pretrial rulings.

Moyer contends exclusion of the evidence was reversible error. He claims the evidence was relevant to his theory that the defendant doctors were performing a high number of surgeries without adequate regard for whether those surgeries were medically indicated.

Relevance is a threshold requirement for admission of evidence. ER 401. The evidence must have some tendency to make the existence of any fact of consequence to determining the action more or less probable. ER 402.

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403.

PowerPoint presentation on "appropriate use"

Through discovery, Moyer obtained a PowerPoint presentation prepared in 2012 by Gerald Marschke, the administrative director of cardiovascular services at PeaceHealth. The presentation is described on its title page as a "high level financial review" pertaining to chronic total occlusion procedures, the type of surgery that Dr. Lombardi and Dr. Vaderah performed on Moyer.

The presentation included statistics about the number of such surgeries done at PeaceHealth that satisfied "appropriate use criteria" developed by the American College of Cardiology. Of the 140 cases reviewed—all performed by Dr. Lombardi—45 percent were classified "appropriate," 22.1 percent were classified "uncertain," 9.3 percent were classified "rarely appropriate," and 23.6 percent were designated "not classifiable." Moyer interprets this data as showing that Dr. Lombardi had a pattern of performing chronic total occlusion procedures that were not medically indicated.

The record does not bear out Moyer's interpretation. Marschke is identified in the testimony as an administrator, not a physician. His declaration explains that the 2012 review was concerned with proper documentation, not medical necessity. Cases classified as "appropriate" were those where the hospital had the medical records to meet the criteria for each category. Cases were classified as "uncertain," "rarely appropriate," or "not classifiable" if criteria points were missing because of a lack of medical records or documentation.

Marschke declared that the findings in the review "did not cause me or anyone at the hospital any concern that Dr. Lombardi was failing to properly assess the indications for procedures he performed, or that any of his procedures were not clinically indicated." Marschke testified that one concern was that Medicare reimbursement might, at some point in the future, be tied to compliance with the appropriate use criteria.

Moyer did not rebut Marschke's testimony. Dr. David Jessup, a PeaceHealth physician who was knowledgeable about Marschke's review, confirmed that the concern motivating the review was proper documentation of the growing number of surgeries of this particular type. He said,

> I recall that Gerry [Marschke] had identified that a large number of the records that were not classifiable were due to poor documentation. And it was the belief that it was difficult for one physician to manage all the transfer of medical records from referring physicians. And we would build a different process that would allow Dr. Lombardi to continue to do the work he was doing and utilize administrative assistants to help obtain the records so he would have it available for him when he saw the patients in the clinic or before the procedure was done.

Dr. Lombardi was asked about "appropriate use" during his trial testimony. He testified that he is a "principal investigator" for the entity that develops the appropriate use criteria. A little later, he also testified that before beginning a surgery, PeaceHealth providers do a "time-out" to ensure, among other things, that all necessary paperwork is on file. None of his testimony establishes that the PowerPoint discussion of "appropriate use" criteria was even minimally relevant to Moyer's theory that Dr. Lombardi was doing unnecessary surgeries. Allowing jurors to hear that only 45 percent of Dr. Lombardi's surgeries were

deemed "appropriate" would have been prejudicial because it sounds like a criticism of his clinical judgment. Admitting the PowerPoint presentation would have required explanations of collateral matters, including several cases besides Moyer's. A trial court has discretion under ER 403 "to control distracting 'side issues.'" Riggins v. Bechtel Power Corp., 44 Wn. App. 244, 253, 722 P.2d 819, review denied, 107 Wn.2d 1003 (1986). We conclude the trial court had a tenable basis for excluding the PowerPoint.

Potential operation was "juicy"

The trial court excluded an e-mail in which Dr. Lombardi told Dr. Vaderah he hoped they would get to do an operation "that looks juicy." In other excluded e-mails, the two surgeons discussed scheduling up to four surgeries in a day. Moyer argues that the e-mails were relevant to his theory that Dr. Lombardi and Dr. Vaderah were more concerned with doing a large number of surgeries than with doing them carefully. We disagree. The e-mails would have had an inflammatory effect and virtually no probative value. It was not an error to exclude them. Similarly, it was not error to exclude testimony that Dr. Lombardi did not call the Moyer family after Moyer's death. Like the description of a surgical procedure as "juicy," this evidence would have suggested that Dr. Lombardi lacked personal warmth without proving anything about the quality of his treatment of Moyer.

Comments to another physician

When Moyer returned to the hospital on February 22, 2013, Dr. Jessup was involved in his treatment. According to Dr. Jessup's deposition testimony, Dr. Lombardi approached him at professional conferences on two occasions after Moyer's death and described this litigation as "upsetting" and said that other PeaceHealth physicians "were not helping him." This was the extent of their conversation about the litigation. The trial court excluded Dr. Jessup's testimony about these comments by Dr. Lombardi. Moyer argues that the comments should have been admitted because they reveal Dr. Lombardi's "consciousness of guilt."

A defendant's threatening conduct towards a witness in a criminal case can be admitted as evidence that the defendant had a guilty conscience. State v. McGhee, 57 Wn. App. 457, 461-62, 788 P.2d 603, review denied, 115 Wn.2d 1013 (1990). A defendant doctor's intimidating communication to an expert witness in a medical malpractice case—that it was "inappropriate for doctors to testify against doctors"—has been held admissible to show the defendant's consciousness of the weakness of his position if he acted with intent to interfere with anticipated testimony. McCool v. Gehret, 657 A.2d 269, 273, 277 (Del. 1995). But here, the record is too sketchy to support an inference that Dr. Lombardi intended to threaten Dr. Jessup or interfere with his testimony, and there is no evidence that Dr. Jessup perceived Dr. Lombardi as having that intent. Excluding the evidence was not an abuse of discretion.

The "open door" rule

When one party introduces evidence on a particular topic, the "open door" rule allows the opposing party to also introduce evidence on that topic if necessary to clarify a false impression. Hollins, 200 Wn. App. at 586. "To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths." State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

Moyer argues that during trial, the defendants "opened the door" to some of the excluded evidence by presenting Dr. Lombardi as caring and compassionate. For example, Dr. Lombardi testified that he became a doctor "to help people," and that he has striven to improve patient care by developing new surgical techniques for treating occluded arteries. Moyer claims he should have been allowed to complete the picture with the e-mail in which Dr. Lombardi described an operation as "juicy" and with the fact that Dr. Lombardi did not offer condolences to the Moyer family.

Moyer likens this case to State v. Renneberg, 83 Wn.2d 735, 522 P.2d 835 (1974). In Renneberg, a criminal defendant described her life to the jury in glowing terms that implied she was a wholly respectable and upstanding citizen. In a ruling that was affirmed on appeal, the trial court allowed the State to introduce evidence that the defendant used drugs; the legitimate purpose of the evidence was to counter the impression she had created that she was a type of person most unlikely to commit grand larceny. Unlike in Renneberg, Dr.

Lombardi's testimony that he was motivated by a desire to help patients did not open the door to otherwise inadmissible character evidence. Dr. Lombardi put his character at issue to a certain extent with self-serving testimony about his compassionate motivations, but the evidence Moyer wanted to introduce did not negate that testimony. Moyer fails to identify any mischaracterization by Dr. Lombardi that would have been clarified by the excluded evidence. The open door rule does not apply. See City of Seattle v. Pearson, 192 Wn. App. 802, 818-19, 369 P.3d 194 (2016).

Moyer claims the excluded evidence was relevant to undermine Dr. Lombardi's credibility. His argument is not supported by the case on which he principally relies, Erickson v. Robert F. Kerr, M.D., PS, 125 Wn.2d 183, 190, 883 P.2d 313 (1994). In Erickson, a woman's suicide led to a lawsuit against her doctor. The claim was that the doctor had negligently failed to properly diagnose and treat the woman's clinical depression. Erickson, 125 Wn.2d at 185. In a conversation with the woman's husband after the suicide, the doctor asked about the woman's health, apparently forgetting that she had died. Erickson, 125 Wn.2d at 186. The court held this comment should have been admitted as evidence of the doctor's forgetfulness. The doctor relied on his memory, rather than records, when rendering treatment and when testifying about the treatment he provided. Erickson, 125 Wn.2d at 191. Evidence that the doctor had a faulty memory was relevant to the credibility of his testimony denying negligence.

The evidence Moyer wanted to introduce, in contrast, was not relevant to refute Dr. Lombardi's denial of negligence. The credibility of Dr. Lombardi's portrayal of himself as compassionate was not a central issue.

In summary, the rulings in limine did not constitute an abuse of discretion, and defense testimony during the trial did not create a situation where those rulings had to be revised.

The judgment on the verdict is affirmed.

Becker, J.

WE CONCUR:

Mann, ACJ

Cox, J.

PETERSON WAMPOLD ROSATO FELDMAN LUNA

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