No. 97127-7

SUPREME COURT
OF THE STATE OF WASHINGTON

THYCE W. COLYN and AMY J. COLYN, individually and as husband and wife,

Plaintiffs-Respondents,

v.

STANDARD PARKING CORPORATION, a foreign corporation; TAYLOR WARN,

Defendants-Petitioners.

PETITIONERS' ANSWER TO MEMORANDUM OF AMICUS CURIAE WASHINGTON DEFENSE TRIAL LAWYERS IN SUPPORT OF PETITION FOR REVIEW

Marilee C. Erickson, WSBA No. 16144
REED McCLURE
1215 Fourth Ave, Suite 1700
Seattle, Washington 98161-1087
Telephone: (206) 292-4900

Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA No. 30512
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020

Stephen G. Skinner, WSBA No. 17317
Ramona N. Hunter, WSBA 31482
ANDREWS | SKINNER, P.S.
645 Elliott Ave. W, Suite 350
Seattle, WA 98119-3911
Telephone: (206) 223-9248

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION

As the association representing the defense bar in Washington, WDTL is in a position to know about the prevalence of attorney misconduct in our courts and the ramifications. WDTL confirms that counsel misconduct of the type that occurred in this case is a significant and increasing problem, and one that is not addressed fairly under existing case-law rules. Petitioners agree with and adopt WDTL's arguments. This Court should grant review, including to address the problem of counsel misconduct and consider whether to modify the existing rules to ensure that they discourage, rather than encourage, misconduct.

II. ARGUMENT

Improper questions or arguments by counsel convey personal opinions and other inadmissible matters to the jury. Some counsel deliberately use such misconduct as a tactic to inflame the passions and prejudices of the jury.

WDTL precisely identifies the dilemma a party faces when opposing counsel engages in misconduct throughout a trial as occurred here. To avoid waiving any right to complain on appeal, a party victimized by misconduct generally must object and request a curative instruction or move to declare a mistrial. *Warren v. Hart*, 71 Wn.2d 512, 517–18, 429 P.2d 873 (1967). But counsel using misconduct as a tactic are not concerned about drawing objections; persistent objections put a party in a defensive posture before the jury, making it seem that the party has something to hide and that

opposing counsel is having to fight to put on their client's case. *Teter v. Deck*, 174 Wn.2d 207, 223, 274 P.3d 336 (2012).

Meanwhile, a curative instruction does nothing to discourage misconduct, but is presumed to eliminate the prejudice and thus any appeal issue. *Carnation Co. v. Hill*, 115 Wn.2d 184, 187, 796 P.2d 416 (1990). Indeed, here, the Court of Appeals held that the general pattern instruction given at the conclusion of trial was sufficient to cure any prejudice from hearing numerous objections or improper comments by counsel. *Slip Op.* at 25; *see also* CP 1686-88; 6 WASH. PRAC., WASH. PATTERN JURY INSTR. CIV. WPI 1.02 (7th ed.). Under the existing rules, even though the kind of misconduct that occurred here is largely forbidden by ethics rules (*e.g.*, RPC 3.4(e)), the victim of counsel misconduct has the burden to show that a curative instruction did not eliminate the prejudice.

As WDTL points out, Plaintiffs' counsel took full advantage of the existing rules here, making this case an ideal vehicle for this Court to review and reshape the existing rules. Plaintiffs' counsel engaged in misconduct throughout the trial, drawing repeated objections from the defense. Plaintiffs' counsel then characterized the defense, telling the jury during closing arguments that the defense chose to "fight every inch" and that Plaintiffs' counsel "fought like the dickens" to put on his clients' case. RP 1946. The trial court gave Plaintiffs' counsel a stern lecture but allowed Plaintiffs' counsel to continue running amok because it misperceived the situation, believing that it was "not getting objections from the defense"

when in fact defense counsel had by that time lodged 186 objections, 130 of which the trial court had *sustained*. RP 1336.

Misconduct by counsel can deprive a party of a fair trial and lead to an unjust outcome, and the existing presumptions and deference to the trial court can leave misconduct unchecked, particularly where the trial court misapprehends the facts. This Court should grant review and consider whether to modify the existing rules, possibly including by shifting the burden to the party whose counsel engaged in misconduct to establish the lack of prejudice.

III. CONCLUSION

This Court should grant review.

Respectfully submitted this 26th day of July, 2019.

REED MCCLURE

By MBK #14405 for
Marilee C. Erickson, WSBA No. 16144
1215 Fourth Avenue, Suite 1700
Seattle, Washington 98161-1087
(206) 292-4900

CARNEY BADLEY SPELLMAN, P.S.

By Michael B. King
Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA No. 30512
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

ANDREWS SKINNER, P.S.

By MBK #14405 for
Stephen G. Skinner, WSBA No. 17317
Ramona N. Hunter, WSBA No. 31482
645 Elliot Avenue W., Suite 350
Seattle, Washington 98119-3911
(206) 223-9248

Attorneys for Petitioners

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Via Appellate Portal to the following:

Howard M. Goodfriend Catherine W. Smith Smith Goodfriend, PS 1619 8th Ave N Seattle WA 98109-3007 howard@washingtonappeals.com cate@washingtonappeals.com	David M. Beninger Patricia E. Anderson Luvera Law Firm 701 5th Ave Ste 6700 Seattle, WA 98104-7016 david@luveralawfirm.com patricia@luveralawfirm.com
Christopher W. Nicoll Jeremy B. Jones Nicoll Black & Feig PLLC 1325 Fourth Avenue, Suite 1650 Seattle, WA 98101 Melissa O'Loughlin White Chair, Amicus Committee Washington Defense Trial Lawyers cnicoll@nicollblack.com jjones@nicollblack.com melwhite@expediagroup.com	

DATED: July 26, 2019.

Patti Saiden

Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

July 26, 2019 - 3:55 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97127-7
Appellate Court Case Title:	Thyce W. Colyn and Amy J. Colyn v. Standard Parking Corp.

The following documents have been uploaded:

- 971277_Answer_Reply_20190726155320SC959752_7777.pdf
  This File Contains:
  Answer/Reply - Other
  The Original File Name was Petitioners Answer to Memo of Amicus Curiae WDTL ISO Petition for.pdf

A copy of the uploaded files will be sent to:

- anderson@carneylaw.com
- andrienne@washingtonappeals.com
- cate@washingtonappeals.com
- cnicoll@nicollblack.com
- david@luveralawfirm.com
- howard@washingtonappeals.com
- jjones@nicollblack.com
- jpitre-williams@rmlaw.com
- merickson@rmlaw.com
- ramona.hunter@andrews-skinner.com
- sally.gannett@andrews-skinner.com
- stephen.skinner@andrews-skinner.com
- wendy.larson@andrews-skinner.com

Comments:

Sender Name: Patti Saiden - Email: saiden@carneylaw.com
Filing on Behalf of: Michael Barr King - Email: king@carneylaw.com (Alternate Email:)

Address:
701 5th Ave, Suite 3600
Seattle, WA, 98104
Phone: (206) 622-8020 EXT 149

Note: The Filing Id is 20190726155320SC959752