No. 97127-7

SUPREME COURT
OF THE STATE OF WASHINGTON

THYCE W. COLYN and AMY J. COLYN,

Respondents,

v.

STANDARD PARKING CORPORATION, a Foreign Corporation; TAYLOR WARN,

Petitioners.

ANSWER TO PETITION FOR REVIEW

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A. Introduction.

Respondents Thyce and Amy Colyn ask the Court to deny Standard Parking's and Taylor Warn's petition for review. The Court of Appeals correctly rejected petitioners' fact-bound appeal in an unpublished decision applying settled law to the undisputed fact that petitioner Warn drove into bicyclist Thyce Colyn's lane of travel without checking for oncoming traffic while Warn attempted a mid-block short cut on a busy Seattle arterial. The unpublished Court of Appeals decision does not conflict with any decision of this Court, or the Court of Appeals, and given the idiosyncratic facts of this tragic vehicle-bicycle collision, presents no issue of interest to anyone but the immediate parties. RAP 13.4(b)(1), (2), (4).

B. Restatement of Issues Presented For Review.

1. Should this Court review the Court of Appeals decision that a parking valet was negligent when he collided with a bicyclist while cutting across an arterial without looking for oncoming traffic in order to take a mid-block shortcut through a parking lot?

2. Did the Court of Appeals correctly hold that a driver who alleges a bicyclist's comparative fault has the burden to prove (or at least present evidence) that the bicyclist with whom he collided, who indisputably had the right of way, had an opportunity

to react to the driver's imprudent decision to short cut across a busy arterial without looking for oncoming traffic?

3. Should this Court review the Court of Appeals decision that petitioners did not preserve for review their argument challenging a parking valet's duty to check for oncoming traffic while cutting across an arterial when the Court of Appeals nevertheless addressed and rejected their argument on the merits.

4. Did the Court of Appeals properly reject petitioners' contention that the trial court "lost the thread" and "forfeited" its discretion in assessing the existence and effect of alleged attorney misconduct during trial, and instead correctly defer to the experienced trial judge's discretionary ruling denying a new trial in the absence of any showing that plaintiff's counsel improperly put before the jury any inadmissible evidence?

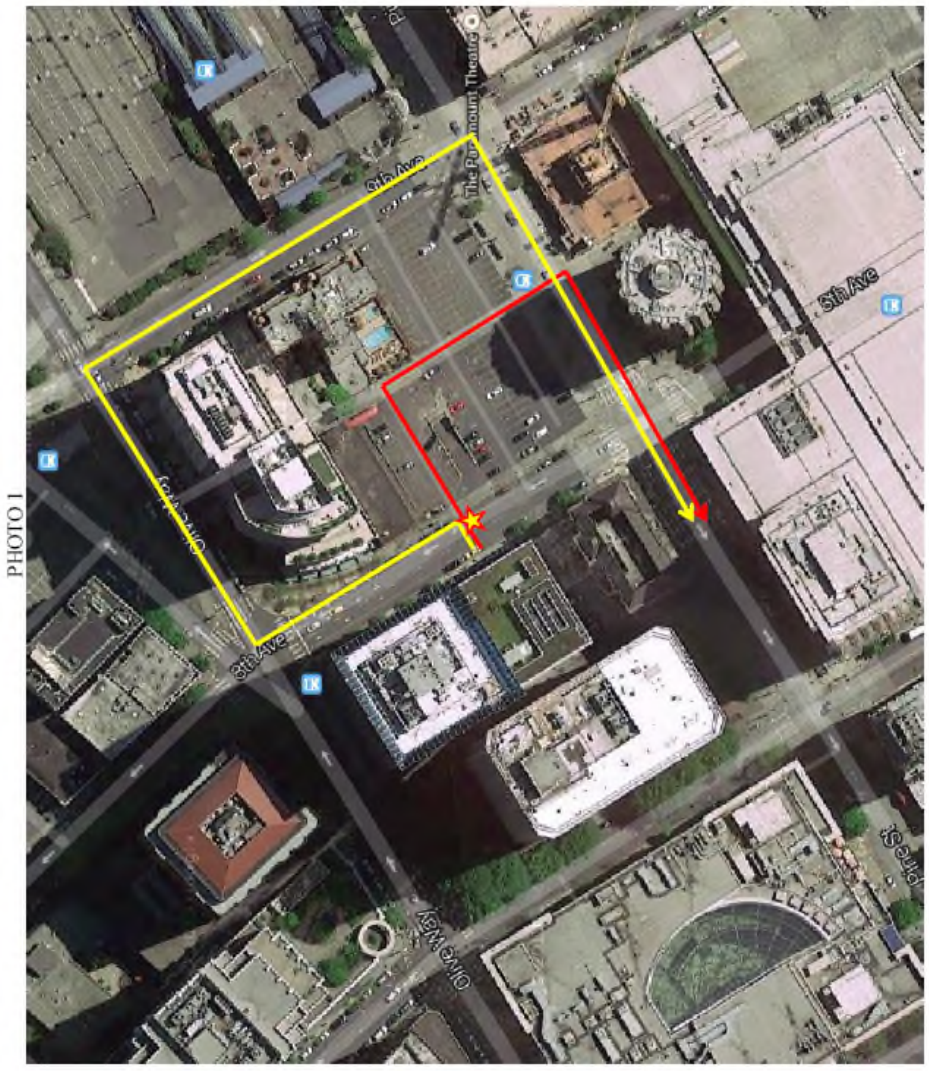
C. Restatement of the Case.

Purporting to recite the "evidence pertaining to negligence and contributory fault" (Pet. 4), the petition relies on not just the testimony of petitioner Taylor Warn, but also "hypotheticals" and "other sources" petitioners admit the jury never considered. (Pet. 6 & n.2) This restatement cites to the undisputed evidence at trial as discussed by the Court of Appeals in its unpublished decision.

1. While crossing a downtown arterial to attempt a mid-block short cut through a parking lot, Warn collided with Colyn's bicycle, causing Colyn serious brain damage.

Respondent Thyce Colyn was commuting home with the flow of traffic in a shared bike lane on 8th Avenue between Pine Street and Olive Way in Seattle when he was struck by a car driven by petitioner Taylor Warn, a valet driver who was nine hours into a shift as an employee for petitioner Standard Parking. (Op. 12-14, 18) Warn was trying to shave time in delivering a guest's car to the Grand Hyatt Hotel on Pine Street by taking a mid-block "shortcut" across two lanes of one-way traffic from the parking garage at the Olive 8 Hotel when he collided with Thyce's bicycle. (Op. 2) The "high energy" force of the collision cracked Thyce's steel bike frame, cracked his bike helmet, and resulted in traumatic brain injury and a shattered pelvic bone, depriving Thyce of the ability to walk and to work. (Op. 3-4; *see* Ex. 10A; RP 496, 520, 644, 664)

Warn's shortcut (shown in red on Ex. 25, reprinted below) allowed him to avoid three one way streets (shown in yellow), but required Warn to cross two one-way lanes of northbound Eighth Avenue traffic, mid-block, to enter an active commercial parking lot before turning right into an alley and right again on Pine Street:



(Ex. 25)

Thyce was bicycling north in the easternmost of the two lanes on Eighth Avenue when the collision occurred. Thyce could not remember and did not testify to the facts of the collision at trial. (RP 1100-34) The responding Seattle Police Officer's dash cam recorded Warn's statement following the collision that he was

looking to his left, away from oncoming traffic, because something "caught his eye," when the front right-hand corner of the Toyota he was driving collided with the front tire of Thyce's bicycle. (Op. 3; RP 225, 1150, 1291; Ex. 208 at 1, 2)

Warn testified that he stopped once for pedestrians while still in the driveway, stopped again before entering Eighth Avenue to let two northbound vehicles pass, and then stopped a third time while crossing Eighth Avenue when he saw "a group of pedestrians on the other side of the street on the sidewalk heading southbound." After two to three seconds, Warn testified he took his foot off the brake and advanced toward the parking lot without looking right for northbound traffic. (RP 1142-44) Warn never saw Thyce, whom he hit in the eastern lane with the right front corner of the car. (RP 1144-46, 1150; Op. 12)

Warn heard a "bang;" in "a flash" the force of the collision shattered the Toyota's front right headlight and threw Thyce over the hood of the car. (RP 1145, 1147, 1150) According to the defense accident reconstructionist, Thyce "gets blasted off to the right, and he ends up underneath the parked car." (RP 1295)

2. The trial court entered judgment as a matter of law on liability, dismissed the defense claim of comparative fault, and rejected the defense argument that misconduct of counsel mandated a new trial. Division One affirmed.

Thyce and his wife Amy Colyn's lawsuit alleged that Standard Parking was vicariously liable for Warn's negligence and directly liable for allowing valets to use the dangerous route Warn was taking when he collided with Thyce. (CP 4-5) King County Superior Court Judge Mary Roberts ("the trial court") granted the Colyns' CR 50 motion, finding defendants liable as a matter of law and rejecting their defense that Thyce was contributorily negligent because there was "no evidence to support a determination that Mr. Colyn failed to exercise ordinary care." (RP 1905) Because Warn was acting in the course of employment, the trial court did not submit the issue of Standard Parking's direct negligence to the jury. (*See* Op. 20, n. 6)

The jury awarded $7,259,238 for Thyce's past and future economic damages, $4 million for his past noneconomic damages, $16 million for his future noneconomic damages, and $11 million for Amy's past and future loss of consortium. (CP 1708-09) The trial court denied defendants' post-trial motion for judgment as a matter of law, as well as their motion for a new trial, rejecting their argument that the verdict was the result of passion and prejudice or

the claimed misconduct of the Colyns' counsel. (CP 2377-78, 1725-26) The Court of Appeals affirmed in an unpublished opinion.

D. Argument Why Review Should Be Denied.

1. The courts below followed settled law in holding Warn negligent as a matter of law in advancing across Thyce's lane of travel without looking for oncoming traffic.

Washington law has always required a driver exiting a driveway to "stop, observe all traffic upon the arterial and yield the right of way to all traffic moving in either direction," as the Court of Appeals properly held. (Op. 10, quoting *Petersavage v. Bock,* 72 Wn.2d 1, 5, 431 P.2d 603 (1967) and citing RCW 46.61.365) Because Warn conceded he failed to look to his right, "uncontroverted evidence established Warn breached the duty to yield by not looking in the direction of the oncoming traffic" before colliding with Thyce and causing the Colyns' life-altering injuries. (Op. 14) None of the intersection collision cases cited by petitioners involve a mid-block shortcut across an active arterial, as Warn attempted here. The Court of Appeals followed settled precedent and its decision presents no issue of substantial public interest.

Though Warn offered three different versions of the collision (Resp. Br. 15-16) on this critical point he was consistent: Warn did not look right toward oncoming traffic before advancing mid-block

across the far lane of Eighth Avenue, where he collided with Thyce. (Op. 12-14) Warn told the investigating police officer that he stopped once to let a northbound car pass on the inside lane. Then, crossing Eighth Avenue, "he had looked left because there was something that had caught his eye. And then the next thing he knew the collision happened with Mr. Thyce, the bicyclist." (RP 221) Warn similarly told his Standard Parking supervisor that "there was no traffic coming, and that he recalled there was a red light for northbound traffic on Eighth Avenue," and so he proceeded across the street "when he saw it was safe." (RP 1086)

At trial, five years later, Warn added additional details, claiming that he stopped once to let pedestrians pass on the sidewalk, stopped a second time before entering the street to let "two vehicles travelling northbound" pass (RP 1142), and then stopped yet a third time before crossing Eighth Avenue, for "two, maybe three seconds" to let another group of pedestrians pass *from his left*, "heading south-bound" on the east side of Eighth Avenue, before advancing toward the parking lot without again looking toward oncoming traffic. (RP 1144) Warn's undisputed testimony that he crossed into Thyce's lane without looking *to his right* fully supports this Court's decision and the trial court's determination that Warn was negligent as a matter of law.

In arguing a substantial public interest[1] in exonerating petitioners from the consequences of Warn's hazardous shortcut maneuver, petitioners fail to even cite RCW 46.61.365, the statutory requirement that a driver exiting a driveway must stop, look for oncoming traffic and yield the right of way. No authority supports petitioners' contention that a jury could find that Warn acted reasonably when, after stopping mid-block on Eighth Avenue, he advanced directly into the far lane of traffic while looking away from, rather than toward, oncoming vehicles.

Petitioners' intersection collision cases, in which a jury could find the disfavored driver acted reasonably in advancing into an intersection *after* checking and *observing* oncoming traffic, are inapposite. Warn was not in an intersection, but *mid-block*; he did *not* look in the direction of oncoming traffic before advancing into Thyce's lane of travel. Warn *never saw* Thyce's approaching bicycle. The Court of Appeals thus properly relied on the undisputed fact that Warn "did not see the man on the bicycle because he was looking to the left instead of the right." (Op. 14) These critical facts distinguish *Fetterman v. Levitch*, 7 Wn.2d 431,

[1] Petitioners cite almost exclusively to RAP 2.3(b)(4) (Pet. 2, 12, 14, 17), which governs discretionary review of interlocutory rulings in the trial court, not discretionary review of issues of "substantial public interest" raised by a Court of Appeals decision terminating review. RAP 13.4(b)(4).

109 P.2d 1064 (1941) (Pet. 1, 9-11, 17), the case petitioners now allege is "controlling" (Pet. 11), but which they first cited as additional authority, long after the briefing was closed, a week before oral argument in Division One.

In *Fetterman,* the disfavored driver entered an uncontrolled intersection well before the favored driver's car, which was "plainly visible" to his right, 260 feet away from the intersection and travelling 25 miles per hour. 7 Wn.2d at 433. The disfavored driver slowed to stop in the intersection because a group of small children stepped off the curb to cross. While waiting for the children to clear the intersection, he was struck from his right by the favored driver, who saw the stopped car but did not slow to avoid the collision. The Court held that whether the disfavored driver "acted reasonably in relying upon an unobstructed observation made twenty-five or thirty feet from the intersection was, *at least under all the accompanying circumstances* a question upon which reasonable minds might differ." *Fetterman*, 7 Wn.2d at 440 (emphasis added). The Supreme Court distinguished cases where the disfavored driver "contested the right of way" or "did not see an oncoming vehicle which was plainly within his view." *Fetterman*, 7 Wn.2d at 440.

But there was no intersection here, where Warn took a short cut from a driveway crossed one of two lanes and came to a

complete stop before entering Colyn's lane of travel. Moreover, the key question in intersection collision cases like *Fetterma*n is not whether the disfavored driver "*merely* looked, but whether or not, under the existing conditions and circumstances, he looked from a point or position from which he should have *finally* looked." *Hauswirth v. Pom-Arleau,* 11 Wn.2d 354, 372, 119 P.2d 674 (1941) (emphasis added). Thus, a driver who "undertook to start his car from a dead stop and proceed across [a] highway, without looking" to the right, and without seeing oncoming traffic (as Warn also did here) was negligent as a matter of law in *Delsman v. Bertotti*, 200 Wash. 380, 386, 93 P.2d 371 (1939). So too was a left-turning driver on a four-lane street who, after stopping in the inside lane to let traffic clear, started her turn with "no observation of the roadway" on which an oncoming driver approached in the far lane. *Harvey v. Unger,* 13 Wn. App. 44, 47, 533 P.2d 403 (1975) (distinguishing *Fetterman*).

Petitioner's reliance on *Fetterman's* holding that the jury in that case could decide that the disfavored driver acted reasonably in failing to look again after observing the only oncoming vehicle over 200 feet away ignores that each case turns on the particular facts and "accompanying circumstances," including whether the disfavored driver was "deceived" by the speed or actions of the

favored driver. *See Plenderlieth v. McGuire,* 27 Wn.2d 841, 845-54, 180 P.2d 808 (1947) (discussing intersection collision cases); *see also Lanegan v. Crauford*, 49 Wn.2d 562, 565-66, 304 P.2d 953 (1956) (duty of favored driver to make sure left-turning traffic clears intersection after light turns green). Unlike in *Fetterman,* Warn was not deceived; he never saw Thyce's bicycle because he failed to look again to his right toward oncoming traffic.

Warn had a duty to do more than "merely look" for oncoming traffic when he initially pulled out of the Olive 8; he had to "finally look" again before advancing from a stop into Thyce's lane of travel on Eighth Avenue. *Hauswirth,* 11 Wn.2d at 372. The Court of Appeals correctly held that the jury had no basis to find Warn acted reasonably because it was undisputed that he "breached the duty to yield by not looking in the direction of the oncoming traffic when he removed his foot from the brake and automatic transmission moved the car forward." (Op. 14)

2. The Court of Appeals properly held that the defense of comparative fault required evidence that Thyce could have avoided the collision in the exercise of reasonable care.

The Court of Appeals also correctly held that a mere allegation of comparative fault could not get the issue to a jury in the absence of some evidence that Thyce acted unreasonably or could have, in the

exercise of due care, avoided the collision. Established law (and petitioners' own expert, RP 1305-06) support the lower courts' holding that Thyce, as the favored party with the right of way, had the right to assume that Warn would yield and not advance into his lane of travel. No reasonable juror could find comparative fault absent evidence that Thyce had notice that Warn, who had stopped to yield to pedestrians, would not continue to yield to other oncoming traffic in the far lane – be they cars, cyclists, or pedestrians.

Washington courts uniformly hold that the favored driver has the right to assume that a disfavored driver will respect the right of way until a reasonable person would conclude that he or she will not yield. (Op. 15-17, discussing *Petersavage,* 72 Wn.2d at 4-5; *Bowers v. Marzano*, 170 Wn. App. 498, 506, 290 P.3d 134 (2012); *Channel v. Mills*, 77 Wn. App, 268, 279, 890 P.2d 535 (1995); *Whitchurch v. McBride*, 63 Wn. App. 272, 276, 818 P.2d 622 (1991), *rev. denied*, 118 Wn.2d 1029 (1992)).[2] Even then, the favored driver is entitled to

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[2] The purpose of this rule is not just to further the free flow of traffic, but to prevent rear-end collisions that would inevitably occur were cars required to come to a halt in the middle of a busy street in anticipation of a disfavored driver ignoring the right of way:

> To rule differently, would, we fear, make shambles of the right-of-way rule . . . . , defeat[ing] the very idea of arterial highways and the right of way at uncontrolled intersections, both of which are designed to allow a continuous flow of traffic at safe speeds.

Petersavage, 72 Wn.2d at 6.

a reasonable amount of time to perceive, decide and react to avoid impact before there can be any contributory fault. *Whitchurch*, 63 Wn. App. at 276-77. To defeat judgment as a matter of law, petitioners were required to come forward with evidence that would have allowed the jury to find the point at which Thyce reasonably should have noticed that Warn was not going to yield the right of way and that Thyce had sufficient time to react and avoid a collision once Warn advanced from a stop into Thyce's lane of travel. (Op. 16-17)

Petitioners do not argue that the Court of Appeals unpublished decision conflicts with any cases of this Court or the intermediate courts. RAP 13.4(b)(1), (2). Petitioners instead allege an "issue of substantial public interest" by positing a series of imaginary "facts," unsupported by the record and never developed in the trial court. Petitioners concede that their accident reconstructionist could not identify the point at which Thyce reasonably could have known that Warn was not going to yield. (Pet. 12-13) To the contrary, as the Court of Appeals recognized, the defense expert testified Thyce would not have had "sufficient 'perception-reaction time' to brake" and avoid the collision. (Op. 19) They offered no other evidence of the required points of notice or impact, relying instead on pure speculation.

Petitioners now cite the police dashcam video (Pet. 13), which was taken *after* the collision occurred, and shows neither the location

of Thyce's bicycle nor of Warn's car when he accelerated from a stop into Thyce's lane of travel. (Ex. 208) They also rely on a purported "admission" by the Colyns' counsel (Pet. 6, 13), which, as the Court of Appeals held, was not "evidence" at all, but a "hypothetical that Colyn's counsel posed during argument," that there was no evidence that Thyce had a "reasonable reaction time" to avoid Warn's car. (Op. 19-20; RP 1864) And, ignoring RAP 9.11's limitations on new evidence on appeal, petitioners now cite additional "other sources," including the "Measure Distance" feature in "Google Maps" (Pet. 6 n.2), to establish as "fact" evidence never presented below, contrary to *Spokane Research & Defense Fund v. City of Spokane,* 155 Wn.2d 89, 98, ¶ 17, 117 P.3d 1117 (2005) (on appeal, "RAP 9.11 applies in addition to the normal judicial notice standard.").

The Court of Appeals properly reviewed the evidence before the jury, not the "facts" conjured by petitioners for purposes of appeal. As petitioners' trial counsel admitted, "we don't know exactly where" Thyce was when Warn's car began its advance into Thyce's lane of travel. (Op. 8, quoting RP 1876) No one (not even petitioners' expert), "did the math," let alone suggested to the trial court that the jury perform the calculations petitioners first offered on appeal to speculate that Thyce had time to take evasive action.

No one testified that Thyce failed to look ahead as he biked within the speed limit in a lane marked for bike traffic. The jury heard only Warn's testimony that the impact occurred "in the middle of the road" (RP 1146), "at that moment . . . when I took my foot off the brake to allow my – the vehicle to continue moving toward my desired destination of that parking lot." (RP 1144) The Court of Appeals unpublished decision affirming the trial court's judgment as a matter of law (Op. 7; RP 1875-76) comports with settled law and presents no issue of substantial public interest.

3. Petitioners' preservation arguments would present no issue for this Court's review even had the Court of Appeals not rejected their new argument on the merits.

The Court of Appeals noted in a footnote that petitioners did not preserve their argument that Warn, not Thyce, had the right of way and was "entitled to deference from other vehicles until he cleared the road" (Op. 15, n.3), but held in any event "the uncontroverted evidence established Warn breached the duty to yield by not looking in the direction of the oncoming traffic when he removed his foot from the brake . . ." (Op. 14) Petitioners' hyperbole that the Court of Appeals' footnote presents a "departure from the bedrock principles of our adversarial system of appellate justice

[and] is a matter of substantial public interest" (Pet. 20), is wholly without merit, and unfairly maligns both the courts below.

In the first place, the Court of Appeals was correct. Neither petitioners' current protestations nor their citation in the trial court to a WPI stating that the duty to yield is "not absolute" (Pet. 11, 19), changes the fact that they first argued that Warn "was entitled to assume that an approaching . . . . bicyclist would follow the rules of the road" in response to the Colyns' motion to strike *Fetterman*, which petitioners did not cite as additional authority until the eve of oral argument in Division One. (Ans. Motion to Strike 4)

Moreover, the Court of Appeals did not "go outside" the "issues framed by the parties" (Pet. 19) when it rejected petitioners' argument on the merits, holding that Warn acted unreasonably as a matter of law by failing to look right before accelerating from a stop into Thyce's lane of travel. (Op. 14) It certainly did not take a "self-directing board of legal inquiry and research" (Pet. 20) to hold that a driver trying to cross two lanes of traffic mid-block is not entitled to assume the coast is clear, but instead has the affirmative obligation to look for, and not away from, approaching traffic before advancing.

Finally, the juridical "issue" petitioners pose is of no interest to the bench, to the bar, or to any member of the public, save perhaps for petitioners' "preservation counsel." RAP 13.4(b)(4). A party who

in 84 pages of briefing fails to address a 77-year-old case, and then submits it on the eve of argument as "controlling authority," should not be surprised if the Court of Appeals does not distinguish it.

4. The trial court, not the appellate court, is in the best position to determine whether counsel engaged in misconduct that tainted the verdict.

The Court of Appeals correctly reviewed the denial of petitioners' motion for a new trial for abuse of discretion and held that the trial court was in "the best position to effectively determine prejudice and whether attorney misconduct prevented a fair trial." (Op. 23-24) Far from "untenable" (Pet. 15), the Court of Appeals followed well established law. *See ALCOA v. Aetna Cas. & Sur. Co.,* 140 Wn.2d 517, 539, 998 P.2d 856 (2000); *Miller v. Kenny,* 180 Wn. App. 772, 815, ¶ 103, 325 P.3d 278 (2014) (both affirming orders denying new trial on grounds of misconduct); *Teter v. Deck*, 174 Wn.2d 207, 222, ¶ 28, 274 P.3d 336 (2012) (affirming order granting new trial as a proper exercise of discretion).

Petitioners' claim that the sheer number of sustained defense objections (in an 8-day trial, during which more than 25 witnesses testified: Op. 6-7) justifies a new trial lacks any support in the case law, and their assertion that "the trial court had lost the critical thread" (Pet. 16) demeans the experienced trial judge. Missing is any

contention that the Colyns improperly put before the jury inadmissible evidence – the basis for the order granting a new trial in *Teter,* 174 Wn.2d at 223, ¶ 32 (defense counsel "repeatedly violated the evidence rules by attempting to put exhibits before the jury that had not been admitted and to elicit testimony regarding subjects that the court had ruled inadmissible or irrelevant."). Here, defense counsel's objections were not to inadmissible evidence but "on the grounds of lack of foundation or asking leading questions" (Op. 24), deficiencies cured when questions were rephrased. *See Bristol v. Streibich*, 24 Wn.2d 657, 658-59, 167 P.2d 125 (1946) (new trial not warranted based on leading questions). The Court of Appeals properly held the denial of a new trial was not a manifest abuse of discretion absent any showing that the jury's truth-finding role was poisoned by inadmissible evidence, or that the jury could not credence the trial court's instruction to disregard any alleged prejudicial statements by the Colyns' counsel.

Petitioners' contention that the severity of the Colyns' injury does not support the verdict (Pet. 16) not only misstates the record but ignores that petitioners did not appeal the sufficiency of the evidence supporting the damages award, and that in any event the size of a verdict, standing alone, is not indicative of passion or prejudice. *Bunch v. King Cty. Dep't of Youth Servs.,* 155 Wn.2d 165,

183, ¶ 32, 116 P.3d 381 (2005); *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 836, 699 P.2d 1230 (1985). The Court of Appeals unpublished decision cogently summarizes Thyce's severe and permanent injuries and the damage to the Colyns' relationship, which changed from "'husband and wife' to patient and caregiver." (Op. 4) Its determination that the trial court did not abuse its discretion in denying a new trial is supported by settled law and presents no issue of substantial public interest. RAP 13.4(b)(4).

E. Conclusion.

This Court should deny the petition for review.

Dated this 10th day of June, 2019.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 10, 2019, I arranged for service of the foregoing Answer to Petition for Review, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 10th day of June, 2019.

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