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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-Appellants.

**BRIEF OF AMICUS CURIAE
WASHINGTON DEFENSE TRIAL LAWYERS**

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Defense Trial Lawyers Association (WDTL), established in 1962, includes more than 750 Washington attorneys engaged in civil defense litigation and trial work. The purpose of WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve our members through education, recognition, collegiality, professional development and advocacy. One important way in which WDTL represents its member is through amicus curiae submissions in cases that present issues of statewide concern to Washington civil defense attorneys and their clients.

The petition in this case implicates applicable concerns for WDTL whose members are increasingly confronted with the confounding problem of dealing with attorney misconduct at trial. For the reasons set forth below, WDTL respectfully requests that this Court accept review of the Court of Appeals' determination that the misconduct in this case was either not prejudicial or was cured by the standard jury instruction on argument and objections of counsel.[1]

II. STATEMENT OF THE CASE

WDTL generally relies upon the facts set forth in Defendants' Petition for Review at 4 – 9, but elaborates further as follows:

Of the 324 objections documented by Defendants at *Appellant's*

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[1] In supporting review of this issue, WDTL does not intend to suggest that defendants' other issues are not also important and worthy of review; our decision to write on this topic simply reflects our belief that we have something to add to what has already been briefed.

Opening Brief, Appx. B, the vast majority concerned leading questions, mischaracterizations, vouching, counsel testifying, arguing, assuming facts not in evidence. *See, generally, id.* Into each of the objectionable questions, plaintiff's counsel was inserting his views in one way or the other. As pointed out in the Petition for Review, by the point in trial at which the defense moved for a mistrial based on plaintiffs' counsel's incorrect accusation that an expert witness had been found to have lied in another case,[2] the defense had lodged 186 objections, 130 of which had been sustained. Nevertheless, the trial judge that, despite her expressed concerns over the impropriety of plaintiffs' counsel's questions, her hands were tied because she was "*not getting objections from the defense*." VRP at 1336:14 – 22.

Furthermore, the impact of defense counsel having to object over and over was craftily woven into plaintiffs' counsel's closing argument when he, on the one hand, acknowledged the right of the defense to deny the allegations and put the plaintiffs to their proof,[3] but then made a point of the fact that the defense fought "every inch, make you prove every

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[2] The impropriety of what plaintiffs' counsel was attempting to do is well recognized. The Court of Appeals has reversed trial results where an expert witness was cross-examined about another court's determination of the expert's methodology, noting that such evidence is both hearsay and unfairly prejudicial. *In re Det. of Pouncy*, 144 Wn. App. 609, 627, 184 P.3d 651, 660 (2008), *aff'd* 168 Wn.2d 382, 229 P.3d 678 (2010).

[3] "And remember, I told you at the very beginning that in a case like this the defendant doesn't need to say they're at fault. Even if they've admitted it before, even if the facts show it, they can still deny it and put us through our burden, force us to have to prove every element, every single inch of ground, every single item of proof. That's their right. They have a right to do that. But they don't have a right at the end of the day to come in and give you frivolous claims, meritless claims not supported by any evidence whatsoever." VRP 1944:25 – 1945:9.

single item of every single thing. You know the consequences. They go into it with eyes wide open. It's their right, but there are consequences." VRP 1959:20 – 24.

After the plaintiffs prevailed on a CR 50 motion (directing a verdict on negligence and comparative fault), plaintiffs' counsel seized the opportunity to drive his point home in closing: "So I apologize that we were here for as long as we were, because those issues, now, we're done. I proved it. I had to bring everything to you, and I fought like the dickens to do it, and I brought it to you, and now those are gone." VRP 1946:13 – 17. It is unjust that plaintiffs' counsel can put the defense in the posture of having to object repeatedly and then later cast the defense in a bad light for doing what the defense has a right and obligation to do.

III. ARGUMENT

A. Washington Law Does Not Adequately Deter Attorney Misconduct.

Washington law does not adequately deter attorney misconduct consisting of persistently asking knowingly objectionable questions during a jury trial. This is because Washington creates a paradox on this issue. To properly preserve the issue for appeal, a party that falls victim to such misconduct must object (which is often the goal of a lawyer who asks knowingly objectionable questions) and should request a curative instruction. Such an instruction, however, is often seen as highlighting or

emphasizing the prejudicial event,[4] and yet is presumed to eliminate the prejudicial effect of attorney misconduct, rendering the issue moot.

As a result, there is little to deter counsel from engaging in repetitive misconduct during trial. It will either be deemed cured by a jury instruction, or waived as a result of failing to seek such an instruction. In either case, there are essentially no consequences aside from a stern judicial warning, which had little impact in this case. This appeal presents the Court with the opportunity to address this problem, and perhaps adopt new standards that will effectively deter attorney misconduct.

1. Existing Evidentiary Rules Incentivize Attorney Misconduct.

Washington's Rules of Evidence impose a duty on counsel to keep inadmissible evidence and argument from the jury. *See Teter v. Deck*, 174 Wn.2d 207, 223, 274 P.3d 336, 344 (2012). To avoid waiver, counsel must generally raise a contemporaneous objection to improper questioning or argument. *See, e.g.*, *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 333, 858 P.2d 1054 (1993).

This dynamic creates an inherent risk of abuse. An unscrupulous attorney can intentionally make improper questions or argument, forcing opposing counsel to object repeatedly. This Court has previously

[4] For example, see the trial court's comment in the instant case at VRP 1338:22 – 1339:2:

> THE COURT: Are you requesting a curative instruction? I don't know what would be cured. Nothing wrong has happened that is to be cured. But if you want a curative instruction, let me know what you think you want, Mr. Skinner. I think it will just make it worse.

recognized that such conduct constitutes attorney misconduct, and can be prejudicial:

> Persistently asking knowingly objectionable questions is misconduct. Even where objections are sustained, the misconduct is prejudicial because it places opposing counsel in the position of having to make constant objections. These repeated objections, even if sustained, leave the jury with the impression that the objecting party is hiding something important.

Teter, 174 Wn.2d at 223, 274 P.3d at 344.[5] Such misconduct can present grounds for a new trial. *See* CR 59(a)(2).

When a new trial is sought in response to attorney misconduct, "a court properly grants a new trial where (1) the conduct complained of is misconduct, (2) the misconduct is prejudicial, (3) the moving party objected to the misconduct at trial, and (4) the misconduct was not cured by the court's instructions. *Teter* 174 Wn.2d at 223 at 226, 274 P.3d at 345. A curative instruction, however, is presumed to eliminate any prejudice resulting from attorney misconduct: "A jury is presumed to follow the court's instructions and that presumption will prevail until it is overcome by a showing otherwise." *Carnation Co. v. Hill*, 115 Wn.2d 184, 187, 796 P.2d 416, 417 (1990).[6]

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[5] Federal courts are in agreement. "Where misconduct permeates the proceeding, the jury is necessarily prejudiced. Constant objections are certainly not required, as they could antagonize the jury..." *Anheuser-Busch, Inc. v. Nat. Beverage Distribs.*, 69 F.3d 337, 346 (9th Cir. 1995)(internal quotes and citations omitted).

[6] The problem of multiple objectionable questions presents a different challenge than the flagrantly improper question that raises an instantaneous risk of prejudice that may not be susceptible to cure by instruction. *See* note 7, *infra*.

This creates an environment free of consequence: if opposing counsel timely objects and secures a cautionary instruction, the jury is presumed to follow the instruction, supposedly freeing the proceedings of the taint. If opposing counsel does not "rise to the bait" and object, then she waives any harm resulting from the improper questions. In such an environment, attorney misconduct is not deterred, it is instead incentivized. Counsel wishing to do so are able to ask the right questions the wrong way, injecting their personal views and characterizations, drawing repeated objections from the opposition, casting the opposition as obstreperous, while repeatedly presenting their view of the case and evidence before the jury, knowing that in all but the most flagrant cases,[7] their misconduct will not result in a new trial or reversal on appeal, because: (1) the jury will be instructed to disregard the misconduct, which is presumed to cure any prejudice, or (2) the instruction will not be requested by opposing counsel who does not wish to draw further attention to the matter, resulting in a waiver of the issue. In either case, counsel can ask improper questions with impunity, because there are essentially no consequences, while the potential rewards are undeniable.

In this case, plaintiff's counsel is very experienced and successful. And yet, one court has dubbed him the "King of Leading Questions." *Miller v. Kenny*, 180 Wn. App. 772, 814-15, 325 P.3d 278, 299 (2014).

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[7] "The rule is that a new trial should not be granted because of misconduct of counsel, unless there has been a request to the trial judge to give the jury a corrective instruction, except where the misconduct was so flagrant that no instruction would cure it." *Strandberg v. N. P. R. Co.*, 59 Wn.2d 259, 264, 367 P.2d 137, 140 (1961)

Not surprisingly, the issues that arose hundreds of times in the instant case have played out in the same way before. *See, id.* at 814, 325 P.3d at 299 ("Beninger repeatedly asked leading questions of his own witnesses, drawing numerous objections."). The problem is that a skilled and experienced lawyer like Mr. Beninger is fully capable of asking non-leading questions and of not vouching for or against a witness' credibility in the context of his examinations, yet he clearly chooses the path he repeatedly takes. In the end, he creates the circumstances that enable him to say "I fought like the dickens…[,]" VRP 1946, and to remind the jury that the defense fought "every inch" of the way, VRP 1959, leading to a powerfully prejudicial argument that the defendant did not want to be held to account – that it did not accept responsibility. *See* VRP 1959:13-24.

2. <u>In Cases of Pervasive Attorney Misconduct, Washington Law Places the Burden on the Wrong Party</u>.

In order to obtain relief from the prejudicial effect of pervasive attorney misconduct, in all but the most flagrant cases, Washington law places upon the aggrieved party the burden of proving that prejudice was not cured by the court's instructions. *Teter*, 174 Wn.2d at 226, 274 P.3d at 345. This approach makes little sense, particularly in a case like this one, where pervasive misconduct was part of a choreograph of sorts, designed to subliminally – and not so subliminally – culminate in making the defense appear to be clawing and scratching to avoid responsibility, lending improper passion to the eventual entreaty to hold the defendants to

account! Instead, parties[8] who engage in an intentional pervasive pattern of misconduct, as in this case, should bear the burden of establishing (a) that there has been no prejudice, or (b) that any prejudice can be cured through jury instructions.

Washington law evidences a clear intent to deter such conduct, and ensure that parties obtain a fair trial. For instance, RPC 3.4(e) expressly states that "[a] lawyer shall not, in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence . . . or state personal opinion as to the . . . credibility of a witness." And, as noted above, pervasive attorney misconduct is considered presumptively prejudicial. *See Teter*, 174 Wn.2d at 223, 274 P.3d at 344; *see also Lopez v. Josephson*, 305 Mont. 446, 459, 30 P.3d 326, 336 (2001) ("misconduct pervaded the proceedings to such an extent that prejudice must be presumed…."). Nevertheless, unless the party victimized by pervasive misconduct can overcome the presumption that a curative instruction eliminates the prejudicial effect of such misconduct, as was the case here, there are no consequences beyond admonishment.

Placing the burden on the party engaging in pervasive misconduct would be a much more effective deterrent. If counsel knew she would be required to demonstrate that the repeated knowing use of improper

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[8] We fully recognize that there are cases in which aggressive defense counsel have crossed the line and committed misconduct. *See, e.g., Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012). Hence, the rule we urge is neutral and should be applied to any party who runs afoul of it.

questions or argument was not prejudicial, she would be far less likely to engage in such conduct.

IV. CONCLUSION

Pervasive attorney misconduct and how to protect against and disincentivize it are issues of substantial public interest that should be determined by this Court pursuant to RAP 13.4(b)(4). They are certainly of considerable interest to the WDTL.

Respectfully submitted this 28th day of June, 2019.

By: /s/ Christopher W. Nicoll
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DECLARATION OF SERVICE

The undersigned does hereby declare and state as follows:

On the date set forth below, I caused to be served:

- **BRIEF OF AMICUS CURIAE WASHINGTON DEFENSE TRIAL LAWYERS**

in the within matter by arranging for a copy to be delivered on the interested parties in said action, in the manner described below, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on June 28, 2019 at Seattle, Washington.

/s/ Ian McDonald
Ian McDonald, Legal Assistant

NICOLL BLACK & FEIG

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