

FILED  
Court of Appeals  
Division II  
State of Washington  
2/6/2020 10:35 AM

No. 53696-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

PEGGY L. BROWN and JAY WALTER BROWN, wife and husband,

Respondents,

vs.

DAWEI LU, M.D. and JANE DOE LU, husband and wife and the  
marital community thereof; and MULTICARE HEALTH SYSTEM,

Appellants.

---

APPEAL FROM THE SUPERIOR COURT  
FOR PIERCE COUNTY  
THE HONORABLE EDMUND MURPHY

---

BRIEF OF APPELLANTS

---

FLOYD PFLUEGER & RINGER, SMITH GOODFRIEND, P.S.  
PS

By: Levi Larson  
WSBA No. 39225  
David J. Corey  
WSBA No. 26683

By: Howard M. Goodfriend  
WSBA No. 14355  
Ian C. Cairns  
WSBA No. 43210

200 W Thomas St Ste 500  
Seattle, WA 98119-4296  
(206) 441-4455

1619 8<sup>th</sup> Avenue North  
Seattle, WA 98109  
(206) 624-0974

Attorneys for Appellants

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ASSIGNMENTS OF ERROR .....	2
III.	ISSUES RELATED TO ASSIGNMENTS OF ERROR .....	2
IV.	STATEMENT OF THE CASE .....	3
	A.    Prior to seeing Dr. Dawei Lu for back surgery, Peggy Brown had a long history of back problems. ....	3
	B.    During Dr. Lu’s surgery on Ms. Brown a pedicle screw breached the L5 pedicle, damaging her blood vessels and causing significant bleeding.....	4
	C.    The trial court denied Dr. Lu’s request to continue the trial after his lead counsel withdrew twelve days before trial. ....	5
	D.    The jury returned a \$2.6 million verdict in favor of the Browns after they argued the jury should hold Dr. Lu liable because “he still uses this process to this day” and because it was “critically important to MultiCare who . . . has hundreds of doctors.” .....	7
V.	ARGUMENT .....	10
	A.    The trial court erred in denying a new trial based on the Browns’ improper closing argument that encouraged the jury to award punitive damages and introduced a new theory of negligence unsupported by expert testimony. ....	10
	1.    The Browns improperly requested punitive damages by urging the jury to award damages aimed at deterring Dr. Lu and “hundreds” of other unnamed doctors from committing future malpractice. ....	12

2.	The Browns again engaged in misconduct by raising a new theory of negligence during their rebuttal argument that was unsupported by any expert testimony.....	16
B.	The trial court abused its discretion in not continuing the trial date when Dr. Lu’s counsel withdrew just twelve days before trial. ....	19
VI.	CONCLUSION .....	21

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>FEDERAL CASES</b>	
<i>United States v. Procter &amp; Gamble Co.</i> , 356 U.S. 677, 78 S. Ct. 983, 2 L.Ed.2d 1077 (1958) .....	18
<b>STATE CASES</b>	
<i>Adkins v. Aluminum Co. of Am.</i> , 110 Wn.2d 128, 750 P.2d 1257, clarified on denial of reconsideration, 756 P.2d 142 (1988) .....	11-12, 15
<i>Barr v. Interbay Citizens Bank of Tampa, Fla.</i> , 96 Wn.2d 692, 635 P.2d 441 (1981), amended 96 Wn.2d 692 (1982) .....	13
<i>Bombardi v. Pochel's Appliance &amp; TV Co.</i> , 9 Wn. App. 797, 515 P.2d 540, modified, 10 Wn. App. 243 (1973).....	16
<i>Broyles v. Thurston Cty.</i> , 147 Wn. App. 409, 195 P.3d 985 (2008).....	13
<i>Carabba v. Anacortes Sch. Dist. No. 103</i> , 72 Wn.2d 939, 435 P.2d 936 (1967).....	12
<i>Clausen v. Icicle Seafoods, Inc.</i> , 174 Wn.2d 70, 272 P.3d 827 (2012).....	13
<i>Coggle v. Snow</i> , 56 Wn. App. 499, 784 P.2d 554 (1990).....	19-21
<i>Dailey v. N. Coast Life Ins. Co.</i> , 129 Wn.2d 572, 919 P.2d 589 (1996) .....	13
<i>Disciplinary Proceeding Against Sanai</i> , 167 Wn.2d 740, 225 P.3d 203 (2009).....	19
<i>Gammon v. Clark Equip. Co.</i> , 38 Wn. App. 274, 686 P.2d 1102 (1984), aff'd, 104 Wn.2d 613, 707 P.2d 685 (1985).....	18

<i>Hickman v. Desimone</i> , 188 Wash. 499, 62 P.2d 1338 (1936) .....	13-14
<i>Housel v. James</i> , 141 Wn. App. 748, 172 P.3d 712 (2007) .....	17
<i>Kremer v. Audette</i> , 35 Wn. App. 643, 668 P.2d 1315 (1983) .....	18
<i>Malkasian v. Irwin</i> , 61 Cal.2d 738, 394 P.2d 822 (1964).....	16, 18
<i>Reyes v. Yakima Health Dist.</i> , 191 Wn.2d 79, 419 P.3d 819 (2018).....	16
<i>Spokane Truck &amp; Dray Co. v. Hoefler</i> , 2 Wash. 45, 25 P. 1072 (1891) .....	13-14
<i>Teter v. Deck</i> , 174 Wn.2d 207, 274 P.3d 336 (2012).....	11, 15
<i>Trummel v. Mitchell</i> , 156 Wn.2d 653, 131 P.3d 305 (2006).....	20
<i>Warren v. Hart</i> , 71 Wn.2d 512, 429 P.2d 873 (1967).....	12
<i>Wuth ex rel. Kessler v. Lab. Corp. of Am.</i> , 189 Wn. App. 660, 359 P.3d 841 (2015), <i>rev. denied</i> , 185 Wn.2d 1007 (2016).....	13-14, 16
<b>STATUTES</b>	
RCW 7.70.110.....	5
<b>RULES AND REGULATIONS</b>	
CR 40.....	19
CR 59.....	11
<b>OTHER AUTHORITIES</b>	
Douglas Ende, 14A Wash. Prac., Civil Procedure (2018 3d ed.) .....	17

## I. INTRODUCTION

After an eight-day trial of respondent Peggy Brown’s medical malpractice claim against appellant Dr. Dawei Lu, Ms. Brown argued to the jury – despite an express prohibition on arguments about “send[ing] a message . . . to future surgeons” – that it was “critically important” it find Dr. Lu liable because “he still uses this process to this day” and because Dr. Lu’s employer, appellant MultiCare Health System, “has hundreds of doctors” all of whom needed know that it was “negligent to do what he did.” (RP 1534) Ms. Brown violated well-established Washington law by imploring the jury to award her damages not as compensation for Dr. Lu’s *past conduct*, but to deter Dr. Lu and “hundreds” of other unnamed doctors from committing *future* malpractice.

Ms. Brown’s misconduct did not end there. Ms. Brown also introduced a new theory of negligence in closing argument, inviting the jury to speculate about the standard of care without the required expert testimony and denying Dr. Lu the opportunity to rebut the eleventh hour allegation. The jury was undoubtedly influenced by Ms. Brown’s misconduct, as reflected in its \$2.6 million damage award. This Court should reverse and remand for a new trial.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in entering its June 13, 2019, Order Denying Defendants' Motion For Continuance. (CP 89-90)
2. The trial court erred in entering its July 19, 2019, Judgment on Jury Verdict. (CP 136-41)
3. The trial court erred in entering its August 9, 2019, Order Denying Motion For A New Trial. (CP 271-72)

## **III. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

1. Was Ms. Brown's closing argument, in which she stressed to the jury it was "critically important" that it find Dr. Lu liable because "he still uses this process to this day" and because Multicare "has hundreds of doctors" that need to know they cannot "do what [Dr. Lu] did," a prejudicial request to punish Dr. Lu and deter him and others from committing similar acts in the future, justifying a new trial?
2. Did the trial court err in ruling that the Browns did not commit misconduct warranting a new trial by raising in their rebuttal argument a new theory of negligence that had never been addressed by the parties and was unsupported by any expert testimony?

3. Did the trial court abuse its discretion in denying Dr. Lu's motion to continue the trial date after his lead counsel withdrew twelve days before trial?

#### IV. STATEMENT OF THE CASE

**A. Prior to seeing Dr. Dawei Lu for back surgery, Peggy Brown had a long history of back problems.**

Appellant Dr. Dawei Lu is an orthopedic spine surgeon employed by appellant Multicare Health System. (RP 1168-74, 1374) Dr. Lu first met respondent Peggy Brown on August 2, 2010. (RP 947, 1209; Ex. 200 at 1) Ms. Brown explained to Dr. Lu that she had a ten-year history of back and leg pain, including a prior spinal surgery in 2000, and that her "back and leg pain has worsened significantly" "[o]ver the last couple of years." (Ex. 200 at 1; RP 949-50, 974-75, 1209) Based on an MRI of Ms. Brown and her reports of pain, Dr. Lu concluded that her pain was caused by spinal stenosis – a narrowing of the passageway for spinal nerves – between her L5 and S1 vertebrae.<sup>1</sup> (RP 982, 1209-10; Ex. 200 at 1-2; *see also* Exs. 303, 304)

---

<sup>1</sup> The L5-S1 joint is at the bottom of the spine and is the transition between the fifth lumbar vertebra and the first bone in the sacrum. (RP 191, 617, 627)

After more conservative treatment options failed, Dr. Lu discussed with Ms. Brown the surgery giving rise to this lawsuit, a procedure known as a transforaminal interbody lumbar fusion (“TILF”). (RP 1210-14; Ex. 200 at 1) TILF surgery relieves the pain caused by spinal stenosis by placing a “cage” between two vertebrae to restore space around the nerve and then fusing together the two vertebrae. (RP 527, 608-11; Ex. 305) The cage is attached to the vertebrae by placing four screws into the pedicles<sup>2</sup> of each vertebrae. (RP 527, 530, 1202; Exs. 107, 305)

**B. During Dr. Lu’s surgery on Ms. Brown a pedicle screw breached the L5 pedicle, damaging her blood vessels and causing significant bleeding.**

Dr. Lu discussed the risks of TILF surgery with Ms. Brown and her husband, Jay Brown, prior to the surgery. (RP 982, 1211-17) Ms. Brown also signed informed consent forms disclosing, among other risks, bleeding significant enough to require a blood transfusion. (RP 982, 1216-17; Ex. 204)

Dr. Lu performed the TILF surgery on Ms. Brown on November 2, 2010, at Good Samaritan Hospital in Puyallup. (RP 526, 914; Ex. 209) Dr. Lu successfully placed pedicle screws on the

---

<sup>2</sup> Pedicles are the bony protrusions that connect the body of vertebrae to the bones on the back of the spine. (RP 417, 1190, 1383; Ex. 107)

left side of the L5 and S1 vertebrae, and the cage separating them. (RP 530, 549, 650) While Dr. Lu was attempting to place a screw on the right side of the L5 vertebra, the screw breached the L5 pedicle and pushed into the bowel mesentery, damaging Ms. Brown's blood vessels and causing significant bleeding. (RP 192-93, 533-34)

Dr. Lu immediately called for a vascular surgeon (RP 1231; Ex. 209 at 3), who stopped the bleeding and repaired the injuries to Ms. Brown's blood vessels. (RP 192-93) Ms. Brown spent a week in the intensive care unit and was ultimately discharged on November 12, 2010. (RP 1160; Exs. 66, 260)

**C. The trial court denied Dr. Lu's request to continue the trial after his lead counsel withdrew twelve days before trial.**

The Browns sued Dr. Lu, Multicare, and Good Samaritan Hospital in October 2014, alleging negligence and failure to obtain informed consent. (CP 1-5, 45)<sup>3</sup> After Multicare stipulated that it would be vicariously liable for any negligence by Dr. Lu, the Browns dismissed their claims against Multicare and Good Samaritan Hospital. (CP 11-12)

---

<sup>3</sup> Ms. Brown filed a request for mediation on October 23, 2013, extending the statute of limitations a year under RCW 7.70.110. (CP 2)

The Browns' negligence and informed consent claims against Dr. Lu went to trial in June 2018 before Pierce County Superior Court Judge Edmund Murphy ("the trial court"). (CP 37) At the end of the Brown's case-in-chief, the trial court dismissed the informed consent claim. (CP 45) However, before the negligence claim was sent to the jury, the trial court granted the parties' joint motion for a mistrial because of juror misconduct. (CP 36, 45-46)

A new trial was scheduled to begin on June 17, 2019. (RP 11; CP 65) Prior to the second trial, the trial court granted Dr. Lu's motion in limine to "exclude any reference to punitive damages, including any argument that the jury should 'punish' Dr. Lu and/or 'deter' future misconduct." (CP 31) The trial court initially reserved whether a "conscience of [the] community" argument would be appropriate, but later ruled that it would not allow "an argument that is along those lines." (RP 1439)

Dr. Lu's lead counsel during the first trial, Rebecca Ringer, retired in January 2019. (CP 65) Ms. Ringer's second chair during the first trial, Colin Kearns, then became lead counsel for Dr. Lu, but he also withdrew at the end of March 2019. (CP 65) Dylan Cohon then became lead counsel and Levi Larson assumed the role of second chair. (CP 65)

Twelve days before the second trial, on June 5, 2019, Mr. Cohon unexpectedly withdrew from the case, leaving Mr. Larson as lead counsel. (CP 53-54, 65) The next day Dr. Lu filed a motion asking the trial court to continue the trial date to provide Mr. Larson sufficient time to prepare for trial. (CP 56-59) Although Mr. Larson deposed the Browns in 2015, he did not participate in the first trial, and was lead counsel on another trial that was scheduled to conclude on June 6, 2019. (CP 36, 65, 87; RP 5, 8, 14) Mr. Larson thus expressed that he “would be at a severe disadvantage” if he tried the case without a continuance. (RP 6) The trial court denied the continuance, reasoning that Dr. Lu was not unduly prejudiced by the withdrawal of Mr. Cohon because Mr. Larson had previous experience with the case. (CP 89-90; RP 19-20)

**D. The jury returned a \$2.6 million verdict in favor of the Browns after they argued the jury should hold Dr. Lu liable because “he still uses this process to this day” and because it was “critically important to MultiCare who . . . has hundreds of doctors.”**

Dr. Lu proceeded to trial with his new lead counsel. The parties presented their cases during an eight-day trial. The Browns alleged that Dr. Lu was negligent because the trajectory of the pedicle screw caused the screw to breach the pedicle instead of continuing into the body of the vertebra; the Browns’ experts did not criticize Dr.

Lu's handling of the surgical complication after it arose. (*See, e.g.*, RP 253, 531, 535, 550-52) Dr. Lu asserted that his trajectory, while not optimal, did not violate the standard of care and that vascular damage and significant bleeding are among the known risks and potential complications discussed with Ms. Brown prior to the surgery. (*See, e.g.*, RP 593, 605, 656, 684-85, 688)

Prior to closing argument, the Browns asked the trial court for an "advisory opinion" on their "anticipate[d] . . . argument . . . on whether this type of activity is appropriate or not and whether that message should be sent to the employer MultiCare or not." (RP 1435-36) The trial court referred the Browns back to its order on motions in limine, which "exclude[d] any reference to punitive damages including any argument that the jury should punish Dr. Lu and/or deter future misconduct." (RP 1438-39) The trial court further warned the Browns that "[w]hen you start getting into make your decision and send a message to either Dr. Lu or to MultiCare or to future surgeons doing this type of work, I think we're then treading closely to dangerous territory." (RP 1439)

In contravention of the trial court's warning, the Browns told the jury during their rebuttal argument that its determination of whether Dr. Lu was negligent was "critically important" because Dr.

Lu “still uses this process to this day” and because “Multicare . . . has hundreds of doctors”:

Dr. Lu testified yesterday he still uses this process to this day, exactly the same. So your answer to question No. 1 is critically important to Dr. Lu. Is it negligent to do what he did? And it’s also critically important to MultiCare who is a defendant in this case and has hundreds of doctors. Was it negligent to do what he did? Why did this happen?

(RP 1534)

Additionally, the Browns argued during rebuttal that Dr. Lu breached the standard of care by removing a guidewire used to place the pedicle screw too early. (RP 1536) Dr. Lu objected “[t]here has been no expert testimony on this,” prompting the trial court to instruct the jury that “what the attorneys say is not evidence. You’ve heard the evidence. What the attorneys say is argument.” (RP 1536-37)

After the Browns’ rebuttal argument, Dr. Lu moved for a mistrial, arguing that the Browns had violated the trial court’s order prohibiting any arguments about deterring future conduct and “sending a message” to Multicare and its other doctors. (RP 1557-61) Dr. Lu also sought a mistrial because the Browns introduced a new theory of negligence that was unsupported by expert testimony.

(RP 1559-60) The trial court deferred ruling on Dr. Lu's motion for mistrial until after the jury returned its verdict. (RP 1567)

The jury returned a \$2,618,00 verdict in favor of the Browns, awarding Ms. Brown \$2,368,000 in damages and Mr. Brown \$250,000 as loss of consortium damages. (CP 120-21) Dr. Lu moved for a new trial, again arguing that the Browns' improperly asked the jury to "send a message" to Dr. Lu and Multicare and asserted a new theory of negligence unsupported by expert testimony. (CP 142-53) The trial court denied Dr. Lu's motion (CP 271-72) and entered judgment in favors of the Browns. (CP 136-41) Dr. Lu and Multicare timely appealed. (CP 273-83)

## V. ARGUMENT

**A. The trial court erred in denying a new trial based on the Browns' improper closing argument that encouraged the jury to award punitive damages and introduced a new theory of negligence unsupported by expert testimony.**

Despite an explicit instruction from the trial court not to implore the jury to "deter future misconduct" or "send a message" (RP 1438-39), the Browns did just that. The Browns expressly urged the jury to find against Dr. Lu because he "still uses this process to this day" and because it is "critically important" that Multicare and its "hundreds of doctors" know that it was "negligent to do what he

did.” (RP 1534) The Browns then double-downed on their improper rebuttal arguments, introducing an entirely new theory of negligence that no expert had addressed and which Dr. Lu had no opportunity to address. The trial court erred in denying Dr. Lu a new trial based on the Browns’ misconduct in closing argument.

A court should grant 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 v. Deck*, 174 Wn.2d 207, 226, ¶ 36, 274 P.3d 336 (2012); *see also* CR 59(a)(2) (allowing a trial court to grant a new trial based on “[m]isconduct of [the] prevailing party”). “Error is prejudicial if it affects, or presumptively affects, the outcome of the trial.” *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 142, 750 P.2d 1257, *clarified on denial of reconsideration*, 756 P.2d 142 (1988). This Court reviews a ruling on a motion for new trial for an abuse of discretion, giving “much stronger” scrutiny to an order denying a new trial than one granting a new trial. *Teter*, 174 Wn.2d at 215, ¶ 14.

Washington courts have repeatedly held that improper closing arguments require a new trial because the impact of such arguments is significant given “the ‘last heard longest remembered’

principle.” *Adkins*, 110 Wn.2d at 141 (reversal required for counsel’s improper golden rule argument during closing argument); *see also Warren v. Hart*, 71 Wn.2d 512, 518-19, 429 P.2d 873 (1967) (reversing for counsel’s misconduct during closing argument in urging the jury to base their verdict on evidence immaterial to the claims it had to decide); *Carabba v. Anacortes Sch. Dist. No. 103*, 72 Wn.2d 939, 954, 435 P.2d 936 (1967) (reversing based on misconduct that included improper argument suggesting that verdict for plaintiff would require school district to shut down athletic programs). Simply put, arguments that invite the jury “to decide the outcome of the case based on” something other than “the evidence and the law” are improper. *Adkins*, 110 Wn.2d at 142.

- 1. The Browns improperly requested punitive damages by urging the jury to award damages aimed at deterring Dr. Lu and “hundreds” of other unnamed doctors from committing future malpractice.**

The Browns’ argument to the jury that it should find Dr. Lu was negligent because it was “critically important” to deter Dr. Lu – as well as Multicare’s “hundreds of doctors” – from committing future malpractice violates well-established Washington law prohibiting punitive damages. The Browns’ argument was prejudicial misconduct that requires a new trial.

“Since its earliest decisions, [our Supreme] court has consistently disapproved punitive damages as contrary to public policy.” *Dailey v. N. Coast Life Ins. Co.*, 129 Wn.2d 572, 574, 919 P.2d 589 (1996) (citing *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 50-56, 25 P. 1072 (1891)). Punitive damages “are awarded as punishment to a defendant and as a warning and example to deter him and others from committing similar offenses in the future.” *Barr v. Interbay Citizens Bank of Tampa, Fla.*, 96 Wn.2d 692, 699, 635 P.2d 441 (1981), *amended* 96 Wn.2d 692 (1982) (internal quotation omitted)); *see also Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 78, 272 P.3d 827 (2012) (“The purpose of punitive damages is to punish the defendant and deter similar conduct.”). Jury verdicts in tort cases thus “must be compensatory only.” *Hickman v. Desimone*, 188 Wash. 499, 502, 62 P.2d 1338 (1936).

Because Washington law does not allow the recovery of punitive damages, “remarks during closing argument that [the jury] should find for the plaintiffs so that this does not happen again” are improper. *Broyles v. Thurston Cty.*, 147 Wn. App. 409, 444-45, 195 P.3d 985 (2008); *see also Wuth ex rel. Kessler v. Lab. Corp. of Am.*, 189 Wn. App. 660, ¶ 105, 709-10, 359 P.3d 841 (2015) (“We agree with [defendant] that the trial court erred when it permitted counsel

to discuss the issue of deterrence in closing argument.”), *rev. denied*, 185 Wn.2d 1007 (2016); *Hickman*, 188 Wash. at 501-02 (reversing verdict in tort action and remanding for new trial because admission of improper evidence of malice may have caused jury to award damages as punishment); *Hoefler*, 2 Wash. at 47 (reversing tort verdict and remanding for new trial because jury had been told it could award damages to deter defendant “from being wanton and reckless of the rights of others”).

The Browns’ closing argument improperly requested punitive damages. The Browns stressed to the jury it was “critically important” that it find Dr. Lu liable because “he still uses this process *to this day*.” (RP 1534 (emphasis added)) The Browns likewise asserted it was “critically important to MultiCare who . . . has *hundreds of doctors*,” despite the fact that all claims against Multicare had been dismissed. (RP 1534 (emphasis added)) The Browns’ focus on Dr. Lu’s conduct at the time of trial (as opposed to during the surgery) and their reference to Multicare’s other doctors had only one purpose – to encourage the jury to award damages against Dr. Lu so that he and Multicare’s other doctors would never again “do what he did.” (RP 1534) *See Wuth*, 189 Wn. App. at 709-10, ¶ 105 (argument that “deterrence is important” was improper and

“irrelevant to the jury’s assessment of damages or to any other issue before them”).

The trial court erred in ruling that the Browns’ argument was not prejudicial misconduct warranting a new trial. (CP 271-72) As Dr. Lu argued both immediately after the Browns’ rebuttal argument and after the verdict (RP 1557-59; CP 148-49), the Browns’ inflammatory remarks prevented Dr. Lu from having a fair trial by directing the jury to “send a message” to Dr. Lu and Multicare’s other doctors, rather than basing its verdict “on the evidence and the law.” *Adkins*, 110 Wn.2d at 142. The Browns’ misconduct is especially egregious because the trial court expressly warned them to refrain from imploring the jury to “send a message to either Dr. Lu or to Multicare or to future surgeons doing this type of work.” (RP 1439) *See Teter*, 174 Wn.2d at 223, ¶ 30 (“Misconduct that continues after warnings can give rise to a conclusive implication of prejudice.”); *see also Adkins*, 110 Wn.2d at 141 (stressing that “counsel considered not giving the [improper] argument, but gave it anyway”). This Court should reverse and remand for a new trial untainted by the Browns’ improper argument.

**2. The Browns again engaged in misconduct by raising a new theory of negligence during their rebuttal argument that was unsupported by any expert testimony.**

The Browns' misconduct during closing argument was not limited to their request for punitive damages. During their rebuttal argument the Browns raised an entirely new theory of negligence that had never been addressed by the parties and was unsupported by any expert testimony. Although Dr. Lu objected to this improper argument, the damage was done – the Browns had inserted a new allegation of negligence that Dr. Lu had no opportunity to address, let alone rebut with contradictory evidence. The trial court further erred in denying a new trial based on this misconduct.

“A party’s theory of the case must be supported by substantial evidence before it may be argued to the jury.” *Bombardi v. Pochel’s Appliance & TV Co.*, 9 Wn. App. 797, 808, 515 P.2d 540, *modified*, 10 Wn. App. 243 (1973) (citing *Malkasian v. Irwin*, 61 Cal.2d 738, 747, 394 P.2d 822, 827 (1964)). The requirement for supporting evidence takes on additional significance in medical malpractice cases because “[t]he applicable standard of care in medical malpractice actions must generally be established through expert testimony.” *Reyes v. Yakima Health Dist.*, 191 Wn.2d 79, 86, ¶ 10, 419 P.3d 819 (2018); *see also Wuth*, 189 Wn. App. at 704, ¶ 90

(affirming trial court’s refusal to instruct on theory that was not supported by “competent expert testimony”). “The policy behind this rule is to prevent laymen from speculating as to what is the standard of reasonable care in a highly technical profession.” *Housel v. James*, 141 Wn. App. 748, 759, ¶ 27, 172 P.3d 712 (2007) (internal quotation omitted).

The Browns’ expert orthopedic surgeon never testified that Dr. Lu breached the standard of care by prematurely removing the wire used to guide the pedicle screw. (See RP 519-84) Yet, the Browns stressed this unsupported theory of negligence in their closing argument:

[I]f he’s got the guidewire up into the body of the vertebra, if he simply follows the guidewire halfway into the body of the vertebra as he testified – he claims that’s where the guidewire was – if he simply followed it, the screw would have gone along the guidewire and into the body of the vertebra, but he withdrew the guidewire. He took the guidewire out too soon, so instead of following the guidewire into the body of the vertebra, he took a completely wrong course. . . . That is a breach of the standard of care.

(RP 1536)

This argument unfairly prejudiced Dr. Lu and requires a new trial. See Douglas Ende, 14A Wash. Prac., Civil Procedure § 30:41 (2018 3d ed.) (“Among the types of errors that are not cured by any efforts of the trial court are . . . making prejudicial statements in the

trial that are not supported by the evidence”); *see also Malkasian*, 394 P.2d at 828 (affirming order granting new trial because counsel “invite[d] the jury to speculate as to unsupported inferences”). The Browns’ reliance on a new theory of negligence was especially prejudicial because they did not raise it until the very end of the case – during their rebuttal argument – denying Dr. Lu any opportunity to address it or present contradictory evidence. *Cf. Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 280, 686 P.2d 1102 (1984) (Washington courts prohibit the “blindman’s bluff” version of trial in favor of “a fair contest with the basic issues and facts disclosed to the fullest practicable extent.”) (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682, 78 S. Ct. 983, 986, 2 L.Ed.2d 1077 (1958)), *aff’d*, 104 Wn.2d 613, 707 P.2d 685 (1985); *Kremer v. Audette*, 35 Wn. App. 643, 648, 668 P.2d 1315 (1983) (“[A] plaintiff . . . is not allowed to withhold substantial evidence supporting any of the issues which it has the burden of proving in its case in chief in order to present this evidence cumulatively at the end of defendant’s case.”) (quoted source omitted). The Browns new rebuttal argument improperly “sandbagged” Dr. Lu, depriving him of the chance to fairly defend himself.

**B. The trial court abused its discretion in not continuing the trial date when Dr. Lu’s counsel withdrew just twelve days before trial.**

The Browns were represented at trial by two experienced trial attorneys that had *already tried their entire case*. By contrast, the trial court forced Dr. Lu to go to trial with a lead counsel that had twelve days to prepare a defense of the Browns’ multi-million dollar lawsuit. The trial court abused its discretion in denying Dr. Lu a continuance that would have allowed his counsel adequate time to prepare for a complex medical malpractice trial.

Under CR 40(d), a continuance should be granted if “good cause is shown for a continuance.” A ruling on a motion for a continuance is reviewed for an abuse of discretion. *Coggle v. Snow*, 56 Wn. App. 499, 504, 784 P.2d 554 (1990). In exercising this discretion, a court should “consider the necessity of prompt disposition of the litigation; ‘the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation . . .; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing’ on the exercise of the discretion vested” in the court. *Disciplinary Proceeding Against Sanai*, 167 Wn.2d 740, 748, ¶ 11, 225 P.3d 203

(2009) (quoting *Trummel v. Mitchell*, 156 Wn.2d 653, 670-71, 131 P.3d 305 (2006)).

The trial court abused its discretion in refusing to continue the trial date based on the withdrawal of Dr. Lu's lead counsel on the eve of a difficult medical malpractice trial. While the Browns' counsel had more than a year to prepare for trial – after having already tried their case – Dr. Lu's new lead counsel, Levi Larson, had just twelve days. The trial court made much of the fact that Mr. Larson had been involved in the case years earlier, but as Mr. Larson explained he was not involved in the first trial and only began preparing for his role as lead counsel after his partner abruptly and unexpectedly left the case. (RP 14) Moreover, Mr. Larson's prior experience was irrelevant because – as the Browns themselves emphasized – their theory of liability changed dramatically between when Mr. Larson took their depositions in 2015 and the second trial in June of 2019.<sup>4</sup> (RP 936, 1466-67)

This case is similar to *Coggle*. In that malpractice case, the plaintiff's counsel retired and new counsel began representing the plaintiff only one week after the opposing party filed a motion for

---

<sup>4</sup> The Browns originally alleged that Dr. Lu was negligent in using too much force to place the pedicle screw, but after obtaining a CT scan in 2016, they alleged that he took an erroneous trajectory. (RP 936, 1466-67)

summary judgment. 56 Wn. App. at 508. The trial court denied the plaintiff's request for a continuance and granted the defendant's motion for summary judgment, rejecting his new counsel's assertion that he needed additional time to respond to the summary judgment motion. Division One of this Court reversed, holding that the trial court abused its discretion and reasoning that denying a continuance unfairly punished the client for his counsel's retirement and that a week was insufficient time for plaintiff's new counsel "to follow through on work begun by previous counsel." 56 Wn. App. at 508.

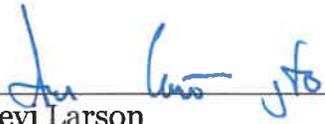
As in *Coggle*, the trial court abused its discretion in refusing to grant a continuance. Dr. Lu's counsel required more than twelve days to prepare for trial and the trial court's denial of a continuance unfairly punished Dr. Lu.

## **VI. CONCLUSION**

This Court should reverse and remand for a new trial untainted by prejudicial punitive damages arguments, theories not supported by expert testimony, and with counsel who has not been put at an unfair disadvantage.

Dated this 8th day of February, 2020.

FLOYD PFLUEGER & RINGER, SMITH GOODFRIEND, P.S.  
PS

By: 

Levi Larson  
WSBA No. 39225  
David J. Corey  
WSBA No. 26683

By: 

Howard M. Goodfriend  
WSBA No. 14355  
Ian C. Cairns  
WSBA No. 43210

200 W Thomas St Ste 500  
Seattle, WA 98119-4296  
(206) 441-4455

1619 8<sup>th</sup> Avenue North  
Seattle, WA 98109-3007  
(206) 624-0974

Attorneys for Appellants

## 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 February 6, 2020, I arranged for service of the foregoing Brief of Appellants, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
Levi Larson David J. Corey Floyd Pflueger & Ringer, PS 200 W Thomas St Ste 500 Seattle, WA 98119-4296 <a href="mailto:llarson@floyd-ringer.com">llarson@floyd-ringer.com</a> <a href="mailto:dcorey@floyd-ringer.com">dcorey@floyd-ringer.com</a>	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Rogers Wilson Jr 918 N Yakima Ave Tacoma, WA 98403-2424 <a href="mailto:rswilson@rarelegal.com">rswilson@rarelegal.com</a>	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Charles Joseph Sinnitt 2102 N Pearl St Ste 302 Tacoma, WA 98406-2550 <a href="mailto:jsinnitt@sinnittlaw.com">jsinnitt@sinnittlaw.com</a>	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

**DATED** at Seattle, Washington this 6<sup>th</sup> day of February, 2020.

  
\_\_\_\_\_  
Sarah N. Eaton

**SMITH GOODFRIEND, PS**

**February 06, 2020 - 10:35 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53696-0  
**Appellate Court Case Title:** Peggy Brown, et al., Respondents v. Dawei Lu, M.D., et al., Appellants  
**Superior Court Case Number:** 14-2-13460-1

**The following documents have been uploaded:**

- 536960\_Briefs\_20200206103432D2399031\_1251.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was 2020 02 06 Brief of Appellants.pdf*

**A copy of the uploaded files will be sent to:**

- alison@sinnittlaw.com
- cate@washingtonappeals.com
- dcorey@floyd-ringer.com
- howard@washingtonappeals.com
- jsinnitt@sinnittlaw.com
- llarson@floyd-ringer.com
- rswilson@rarelegal.com

**Comments:**

---

Sender Name: Sarah Eaton - Email: sarah@washingtonappeals.com

**Filing on Behalf of:** Ian Christopher Cairns - Email: ian@washingtonappeals.com (Alternate Email: andrienne@washingtonappeals.com)

Address:  
1619 8th Avenue N  
Seattle, WA, 98109  
Phone: (206) 624-0974

**Note: The Filing Id is 20200206103432D2399031**