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Court of Appeals
Division II
State of Washington
3/25/2020 3:51 PM
Court of Appeals No. 53696-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

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

Plaintiffs/Respondents,

vs.

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

Defendants/Appellants.

RESPONSE BRIEF OF PEGGY L. BROWN and JAY WALTER
BROWN

Appeal from the Superior Court of Pierce County,
Cause No. 14-2-13460-1
The Honorable Edmund Murphy, Presiding Judge

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TABLE OF CONTENTS

	<u>Page</u>
I. ASSIGNMENTS OF ERROR	1
II. RESTATEMENT OF THE CASE	1
A. Factual Background	1
B. Procedural Background.....	14
IV. ARGUMENT	
A. The trial court did not err in denying Defendants’ Motion for a New Trial pursuant to CR 59.	18
1. Appellants mischaracterize the Browns’ closing argument.....	22
2. Browns’ rebuttal argument did not suggest or request punitive damages	23
3. The jury was repeatedly instructed that lawyers’ comments during closing argument were not evidence	27
4. Appellants waived the ability to complain about the Browns’ closing argument where they failed to contemporaneously object to the Browns’ comments	29
5. The doctrine of invited error prohibits Appellants from complaining about the Browns’ argument on appeal	32
6. The jury’s verdict is not the result of passion or prejudice stirred by improper closing argument.....	36

B.	The Browns did not present a “new theory of negligence” during closing argument	39
C.	The trial court did not abuse its discretion in denying Appellants’ Motion to Adjust Trial Date.....	43
V.	CONCLUSION.....	49

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

A.C. ex rel. Cooper v. Bellingham Sch. Dist., 125 Wn. App. 511, 105 P.3d 400, 408 (2004).....35

Alum. Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 998 P.2d 856 (2000)..... 19

Blomstrom v. Tripp, 189 Wn.2d 379, 402 P.3d 831 (2017)36

Broyles v. Thurston Cty., 147 Wn. App. 409, 195 P.3d 985 (2008).24

Coggle v. Snow, 56 Wn. App. 499, 784 P.2d 554 (1990).....48

Conrad ex rel. Conrad v. Alderwood Manor, 119 Wn. App. 275, 78 P.3d 177 (2003).....39

Gilmore v. Jefferson Cty. Pub. Transp. Benefit Area, 190 Wn.2d 483, 415 P.3d 212 (2018)..... 19, 30

Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S., 112 Wn. App. 677, 50 P.3d 306 (2002).....36

L.M. by & through Dussault v. Hamilton, 193 Wn.2d 113, 436 P.3d 803 (2019).....44

Miller v. Kenny, 180 Wn. App. 772, 325 P.3d 278 (2014)..... 19

Nelson v. Martinson, 52 Wn.2d 684, 328 P.2d 703 (1958)31

Palmer v. Jensen, 132 Wn.2d 193, 937 P.2d 597 (1997)39

State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007).....34, 35

State v. Kong, 198 Wn. App. 1051 (2017).....34

<i>Teter v. Deck</i> , 174 Wn.2d 207, 274 P.3d 336 (2012)	20
<i>Trummel v. Mitchell</i> , 156 Wn.2d 653, 131 P.3d 305 (2006)	44
<i>Washington State Physicians Ins. Exchange Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	30
<i>Wuth ex rel. Kessler v. Lab. Corp. of Am.</i> , 189 Wn. App. 660, 359 P.3d 841 (2015).....	24, 25, 26, 27
 <u>Rules and Regulations</u>	
CR 59	18

I. ASSIGNMENTS OF ERROR

Respondents Brown assign no errors to the trial court's decisions.

II. RESTATEMENT OF THE CASE

A. Factual Background

Mrs. Peggy Brown underwent a Transforaminal Lumbar Interbody Fusion (TLIF) surgery at Good Samaritan Hospital on November 2, 2010.¹ The surgery was performed by Dr. Dawei Lu, an employee of MultiCare Health Systems.² A TLIF is a type of back surgery intended to stabilize movement and promote fusion between adjoining spinal vertebrae by installation of surgical hardware, including a "cage."³ The cage hardware is secured by pedicle screws inserted into the vertebral body through the spinal pedicles.⁴ Two pedicle screws are anchored into both the right and left sides of the cage,⁵ as illustrated on the following page. The illustration on the following page is an image of Exhibit 112.

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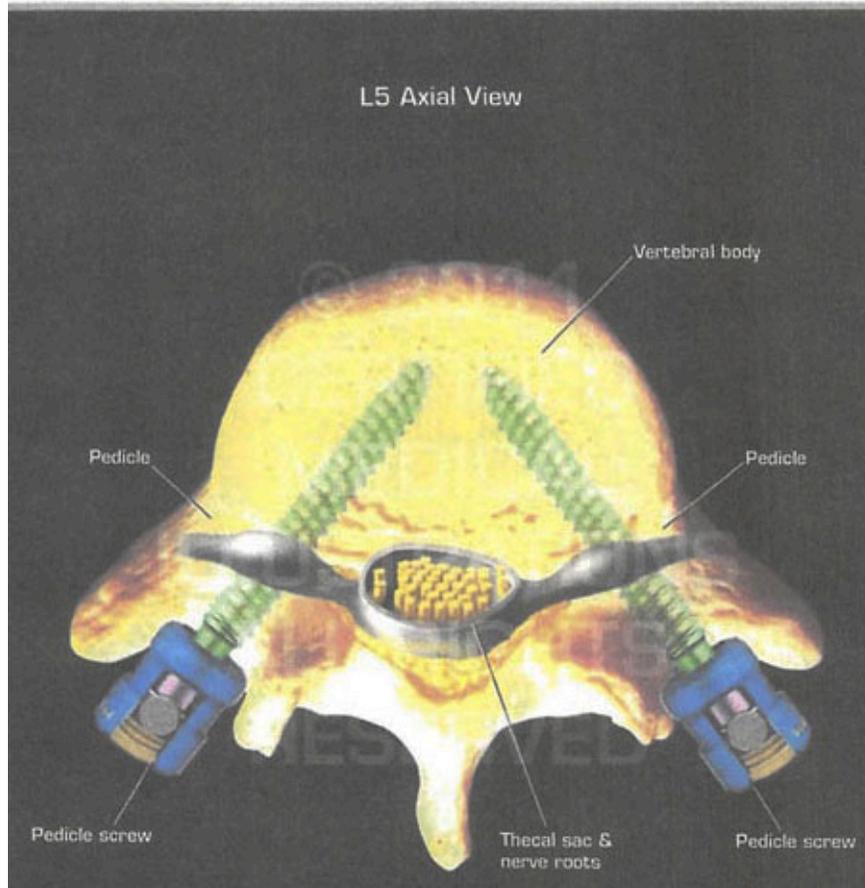
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¹ RP 526, lines 9-12; Exhibit 209.
² RP 526, lines 9-12; Exhibit 209.
³ RP 527, lines 12 - 21; Exhibit 112.
⁴ RP 531, lines 21-23; Exhibit 112.

NORMAL POSITION OF PEDICLE SCREWS OF LUMBAR SPINE



Dr. Lu discussed the TLIF surgery with Peggy Brown and her husband, Jay Brown, prior to the surgery.⁶ At that time he told them that there was an 80-85% chance of success for the surgery.⁷

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⁵ RP 530, lines 1-5; Exhibit 112.

⁶ RP 1225, lines 20-24.

⁷ RP 1225, lines 20-24.

Surgical Procedure

Neurosurgeon, Dr. Richard Wohns, testified that during the surgery, Dr. Lu successfully placed pedicle screws on the left side of the L5 and S1 vertebrae.⁸ However, Dr. Wohns testified that Dr. Lu breached the standard of care when he was attempting to insert a pedicle screw into the L5 vertebra on the right side.⁹ Initially, a Jamshidi needle, which has a hollow core with a sharp point permitting it to be put into the bone,¹⁰ is inserted into the pedicle at an angle such that it will go into the body of the vertebrae.¹¹ Then the K-wire, or guidewire, is run down the Jamshidi needle (through the hollow core) into the bone. The guidewire is pointed and threaded at the end and is driven and locked into the bone.¹² The purpose is to provide trajectory guidance for placement of the pedicle screw, from the point of entry to the vertebral body. Once the K-wire/guidewire is in place, the Jamshidi needle is removed.¹³ The pedicle screw has a hole in the center of it that goes directly over the guidewire. The screw follows the guidewire into the bone along the trajectory of the guidewire. The goal is to achieve a trajectory from the pedicle into the

⁸ RP 530, lines 11-14.

⁹ RP 530, lines 14-15; RP 535, lines 1-8; RP 535, lines 18-25; RP 536, lines 1-4.

¹⁰ RP 530, lines 20-23.

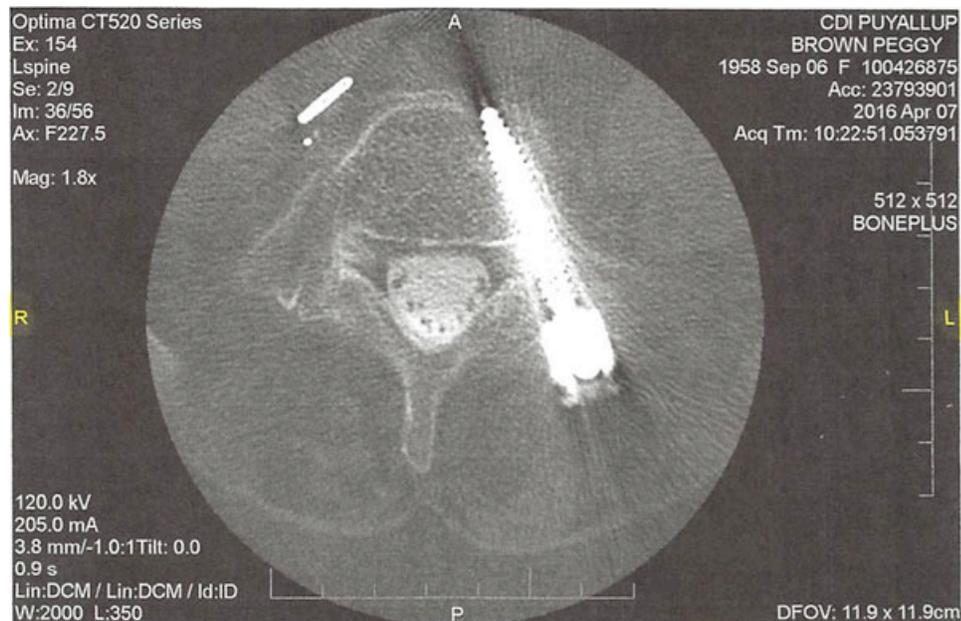
¹¹ RP 531, lines 21-24.

¹² RP 532, lines 16-24; RP 533, lines 3-6.

¹³ RP 533, lines 3-8.

vertebral body.¹⁴ This is what Dr. Lu accomplished on the left side. This is not what happened on the right side.¹⁵

The CT myelography of April 7, 2016 demonstrates that Dr. Lu missed the vertebral body altogether,¹⁶ as shown in Exhibit 127, set out below.



The correctly installed screw is on the left (note “R” and “L” letters on the side of imaging).¹⁷ The path of the right-side screw lines up with the “white line,” which is a surgical clip.¹⁸ Dr. Lu went through the

¹⁴ RP 533, lines 3-8.

¹⁵ RP 529, lines 25; RP 530, lines 1-5; RP 532, lines 2-4; RP 533, lines 15-25; RP 534, line 1.

¹⁶ RP 533, lines 17-21

¹⁷ RP 534, lines 19-25; RP 535, line 1.

¹⁸ RP 419, line 25; RP 420, lines 1-13.

pedicle bone with both the screw and the screwdriver.¹⁹ When Dr. Lu pushed the screw and screwdriver through the bone of Peggy Brown's L5 pedicle on the right, the screw caused injury to the right common iliac artery, the vena cava, the right common iliac vein, and the screw went into the bowel mesentery.²⁰

Dr. Richard Wohns, M.D., testified that Dr. Lu's failure to follow the proper trajectory by pushing the screw and screwdriver through the pedicle and into the iliac vein, the vena cava, the iliac artery, and the bowel mesentery, was not within the standard of care.²¹

In his Operative Report, Dr. Lu attributed the injury while placing the pedicle screw on the right as follows: "There was felt to be a loss of resistance from the bone during the right L5 pedicle screw placement."²² "Upon confirming with C-Arm image, the screw breached the vertebral body and part of the pedicle and into the abdominal cavity."²³

At trial, Dr. Lu eventually admitted that the true cause of the loss of resistance leading to the tragedy was not bone quality, but his own error in failing to follow the correct trajectory:

Q. Dr. Lu, do you believe that---what do you believe was

¹⁹ RP 533, lines 17-23; RP 534, lines 4-7.

²⁰ RP 231, lines 7-9; Exhibit 10.

²¹ RP 535, line 25; RP 536, lines 1-4.

²² RP 1228, lines 3-5; Exhibit 209.

²³ RP 1229, lines 2-4; Exhibit 209.

the cause of the loss of resistance?

A. So, at the time, I think we discussed about the quality of the bone. And now with the benefit of hindsight and also with available images with the CT axial, now it looks like my starting point for the placement of the screw was optimal, but my trajectory for the screw was suboptimal. That was, I think, my -- current thought for the potential complication cause.²⁴

Given that admission, which effectively eliminated any issue of bone quality, the only real question for the jury to decide was whether this “suboptimal trajectory” which caused the surgeon to enter and injure vascular tissue was a violation of the standard of care. Dr. Wohns, the Browns’ neurosurgeon and veteran of approximately 2,000 spinal surgeries,²⁵ testified that Dr. Lu’s wrong trajectory and entry into Ms. Brown’s vascular tissue was a violation of the standard of care.²⁶ Based on their verdict in favor of the Browns, the jury obviously agreed.

Substantial evidence in the record supports the verdict:

- Dr. Lu took multiple X-ray images of the process he allegedly used to establish the trajectory²⁷ but did not preserve the images of the screw in its final position in the vascular tissue.²⁸ Dr. Wohns testified that it was a violation of the standard of care not to do so.²⁹

²⁴ RP 1232, lines lines 1-8.

²⁵ RP 526, line 25; RP 527, lines 1-2.

²⁶ RP 535, lines 9-25; RP 536, lines 1-4.

²⁷ RP 1198, lines 12-14; RP 1199, line 25; RP 1200, lines 1-3 and line 22; RP 120 I, lines 7-8.

²⁸ RP 1303. lines 1-5 and lines 20-23; RP 1302, lines 24-25.

²⁹ RP 537, lines 8-18.

- According to Dr. Schumacher, the radiologist who did the April 7, 2016 myelogram³⁰ and which was the basis of Dr. Lu's acknowledgment of his errant trajectory, Dr. Lu's trajectory missed its objective (the vertebral body) altogether,³¹ contrary to the statement in Dr. Lu's Operative Report (above) that the screw had "breached the vertebral body."
- Dr. Schumacher testified that he had viewed hundreds of thousands of films and had never seen a pedicle screw which penetrated the iliac vein, artery, and ended up in the bowel mesentery.³² He further testified that he saw no radiological evidence of weak or soft bone at L5-S1 in any of the radiological films of Mrs. Brown in the entirety of the Defendant's evidentiary package.³³ He testified that the trajectory of Dr. Lu's errant pedicle screw when it exited Mrs. Brown's pedicle went directly from the exit point to where there is now a surgical clip on Mrs. Brown's posterior iliac vein and artery.³⁴

Nor was Dr. Lu's errant trajectory the failure of hardware or the equipment used by Dr. Lu. Upon cross-examination there was this exchange:

Q. Well, you said an example of hardware would be the screw. And my question to you is there was nothing wrong with this screw, was there?

A. There wasn't anything wrong with the screw.

Q. So there was nothing wrong with the hardware; is that right?

A. There's nothing wrong with the hardware.

³⁰ RP 413, lines 8-9; Exhibits 127 & 127 A.

³¹ RP 442, lines 9-14.

³² RP 431, lines 3-8.

³³ RP 434, lines 20-23; RP 431, lines 3-8.

³⁴ RP 420, lines 3-12.

Q. Okay. So, when you consented her by telling her the hardware could go wrong, the hardware in this case did not go wrong. You went wrong; isn't that right?

A. This is a surgical complication caused by hardware, which was manipulated and handled by me.

Q. Okay, but the hardware did not break. It didn't malfunction. There was nothing wrong with this screw.

A. The screw did not break, did not malfunction.

Q. The problem here is that you used the wrong trajectory, isn't it?

A. The complication is the result of suboptimal trajectory, yes."³⁵

Injuries/Damages

Vascular surgeon, Dr. Mark Ombrellaro, testified that the screw and screwdriver went through the pedicle by 8-12 centimeters, or roughly 5-6 inches.³⁶

Dr. Osborne, vascular surgeon, performed an end-to-end repair of the right common iliac artery injury; closure of a vena cava bifurcation injury; and ligation of the right common iliac vein, which was tied off.³⁷ Peggy Brown was transfused three liters, or 60% of her blood volume, due to

³⁵ RP 1327, lines 3-23.

³⁶ RP. 207, lines 2-8.

³⁷ RP 192, lines 5-25; RP 193, lines 1-13

blood loss.³⁸ This was a life-threatening injury, and Dr. Robert Osborne saved her life.³⁹

As a result of her vascular injuries, Peggy Brown's right leg hurts, swells, and aches.⁴⁰ She now wears a size 7-½ size shoe on her right foot. Her prior size, and her current left-foot size, is six.⁴¹ She also wears compression stockings.⁴² Her current treatment includes compression stockings, blood thinners, and elevation.⁴³ Peggy Brown will be on blood thinners (Xarelto) for the rest of her life.⁴⁴

Peggy Brown described her experience when she woke up after the surgery: "I had this thing [a ventilator tube] down my throat. I tried to pull it out a couple of times because it was scaring me that I couldn't breathe. I felt like I couldn't breathe."⁴⁵

She had sutures or staples from her sternum to her pubis, which she did not expect.⁴⁶ Peggy Brown was scared and wrote a note saying, "I just wanted to die."⁴⁷ She was having hallucinations of people walking down the hallway flicking blood from their hands. There was blood all

³⁸ RP 229, lines 9-15.

³⁹ RP 316, lines 20-25.

⁴⁰ RP 929, lines 22-25; RP 930, lines 1-6.

⁴¹ RP 930, lines 7-12.

⁴² RP 930, lines 13-16.

⁴³ RP 238, lines 16-25.

⁴⁴ RP 240, lines 5-9.

⁴⁵ RP 923, lines 2-4.

⁴⁶ RP 921, line 25; RP 922, lines 1-8.

over. She hallucinated people screaming and yelling for help. She couldn't do anything. She was scared.⁴⁸

To Peggy Brown, "it was all real. It was very real. It was real, very, very, very real. I mean, I could see it."⁴⁹

Dr. Gregor Konzelman, Ph.D., is Peggy Brown's treating clinical psychologist.⁵⁰ As a result of Dr. Lu's surgery, he has diagnosed Peggy Brown as having major depression/PTSD with dissociative symptoms, and generalized anxiety disorder.⁵¹

Prior to Dr. Lu's surgery, Peggy Brown's personality was active, bubbly, enthusiastic, energetic, and "the life of the party."⁵² Peggy Brown was very engaged with her children and grandchildren; regularly going to playgrounds, lakes, camping, picnics, and being outside doing things.⁵³ When her grandchildren had medical issues, Peggy Brown was there "100%," including sleeping on the hospital floor when necessary.⁵⁴

After the Dr. Lu surgery, Peggy Brown was "a completely

⁴⁷ RP 922, lines 12-14

⁴⁸ RP 922, lines 19-25; RP 923, line. 6)

⁴⁹ RP 923, lines 12-14.

⁵⁰ RP 315, lines 3-4; lines 14-15.

⁵¹ RP 316, lines 20-25.

⁵² RP 331, lines 1-5.

⁵³ RP 799, lines 13-22.

⁵⁴ RP 805, lines 23-25; RP 806, lines 1-12.

different person.”⁵⁵ “It was, like she fell off a cliff compared to how she was before.”⁵⁶ “It’s like she was in a hole, physically, and wasn’t capable of doing anything...she was depressed...she gave up.”⁵⁷ “Everything about her changed. She was completely different. We didn’t have our mom back when she left the hospital, because so much changed about her from that time.”⁵⁸

Peggy Brown stayed in a bed in the living room of her home for 7-8 years after the Dr. Lu surgery⁵⁹ due to: back pain, PTSD, and right leg pain.⁶⁰ Her right leg would swell due to restricted blood flow where the vein had been damaged.⁶¹ “She was in a lot of pain” and “couldn’t really do anything.”⁶² “She was depressed. She’d lost her social life.”⁶³ “She’d lost her ability to participate in family activities. She certainly wasn’t able to work. Her life had changed in absolutely every area.”⁶⁴

Dr. Konzelman testified that PTSD affects the physiology of the brain.⁶⁵ The amygdala directs adrenalin into the system and is

⁵⁵ RP 818, lines 3-4.

⁵⁶ RP 294, lines 23-25.

⁵⁷ RP 821, lines 20-25.

⁵⁸ RP 822, lines 2-9.

⁵⁹ RP 333, lines 1-6.

⁶⁰ RP 336, lines 1-8.

⁶¹ RP 336, lines 9-11.

⁶² RP 336, lines 8-9.

⁶³ RP 336, lines 12-13.

⁶⁴ RP 335, line 25; RP 336, lines 1-16’

⁶⁵ RP 338, lines 1-4.

responsible for the “fight or flight” reaction in the brain.⁶⁶ When someone has been traumatized, “there is an excessive fight or flight reaction as the body and the mind -- the physiology has been triggered dramatically.”⁶⁷ When the physiology “has been triggered enough,”

the prefrontal cortex that has to do with reason, memory, perception, seems to be -- the activity there seems to be dampened, so people can't use their normal judgment about how big is this threat; is this a real deal. They're terrified. They're extremely frightened.

So it does definitely affect the structure of the brain, and it makes them tend to be hyperalert, hypervigilant. I work with police officers, firefighters, veterans with PTSD, and they tend to be hypervigilant. It's difficult to relax. They have sleep disorders because their body is kind of on a higher level of arousal all the time.⁶⁸

Peggy Brown still has flashbacks which are triggered by smells, something on tv, going past a hospital, sirens,⁶⁹ the sound of a helicopter, doctors, or pain.⁷⁰ Peggy Brown is afraid to go to sleep⁷¹ and avoids things.⁷² Peggy Brown's ongoing PTSD is due to the Dr. Lu surgery.⁷³

Jay and Peggy Brown's relationship was impacted

⁶⁶ RP 338, lines 12-16.

⁶⁷ RP 338, lines 16-19.

⁶⁸ RP 638, lines 20-25; RP 339, lines 1-7.

⁶⁹ RP 321, lines 5-10.

⁷⁰ RP 321, lines 19-21; RP 322, lines 1-11.

⁷¹ RP 322, lines 18-20.

⁷² RP 3222, lines 12-18.

⁷³ RP 324, lines 2-6.

dramatically” as a result of the PTSD.⁷⁴ “They used to go on adventures, do everything together: yard work, house projects, social things, entertainment, out to dinner, shopping, and participating with the grandkids.”⁷⁵ This all “came to an abrupt, screeching halt after the surgery, and Jay was left with doing pretty much everything. He kind of lost his wife essentially.”⁷⁶

Peggy Brown still wakes up from nightmares, screaming, a couple of times a week,⁷⁷ and will have residual PTSD symptoms due to the Dr. Lu surgery for the rest of her life.⁷⁸

Talking about the Dr. Lu surgery “brings up bad memories” for Peggy Brown.⁷⁹ She gets sweaty, stutters, and her throat feels like it’s closing up.⁸⁰ When asked, “[w]hat kept you in your bed for 7-½ years after the Dr. Lu surgery?” Peggy Brown answered, “I was depressed.”⁸¹ She was asked, “[a]bout what,” she answered, “I thought it was my fault. I just thought I did this to myself.”⁸² When she was asked, “[a]nd why did you think you did this to yourself,” she answered, “[b]ecause Dr. Lu said I

⁷⁴ RP 339, line 24.

⁷⁵ RP 339, lines 24-25; RP 340, lines 3-5.

⁷⁶ RP 339, lines 24-25; RP 340, lines 1-2.

⁷⁷ RP 462, lines 12-21.

⁷⁸ RP 343, lines 8-12.

⁷⁹ RP 927, lines 17-18.

⁸⁰ RP 927, lines 17-21.

⁸¹ RP 1048, lines 9-11.

⁸² RP 1048, lines 13-14.

did.”⁸³

B. Procedural Background

Respondents filed this action on October 20, 2014. It was continued twice at the trial court’s request. It was reassigned to Judge Edmund Murphy and went to trial, which unfortunately, ended in a mistrial due to jury misconduct on June 13, 2018.⁸⁴ At that time, by stipulation of the parties, the second trial was scheduled to begin on June 17, 2019.⁸⁵ This was the fourth scheduled trial date.

On June 5, 2019, Levi Larson, who had deposed Peggy Brown and her husband in 2015⁸⁶ and assisted as “second chair” defense attorney in this case from March of 2019,⁸⁷ substituted for Dylan Cohen as Appellants’ “lead counsel.”⁸⁸

On June 13, 2019, Mr. Larson sought a continuance of the trial date, arguing that he would “be behind” the Browns’ lawyers, who had “already tried the case once before.”⁸⁹

Mr. Larson did state:

And continuing this case, I also appreciate, is going to create a hardship for the Plaintiffs. It’s also going to create

⁸³ RP 1048, lines 15-16.

⁸⁴ CP 46; CP 72.

⁸⁵ CP 72.

⁸⁶ CP 72; RP 8, lines 19-21.

⁸⁷ CP 57, fn 1.

⁸⁸ CP 57.

⁸⁹ RP 6.

a hardship for Dawei Lu. I mean, even over the past ten years that he's lived with this case, it's been set, he's taken time off. It's been set, he's taken time off. This comes at a financial hardship to him as well.⁹⁰

Other considerations before Judge Murphy included:

- June 5, 2019, Levi Larson spoke to C. Joseph Sinnitt. At that time, Mr. Larson stated that he had spoken with Dylan Cohen on the preceding Sunday (June 2nd), at which time Mr. Cohen stated that he was leaving the Floyd, Pflueger, and Ringer Law Firm. Mr. Cohen did not give an exit date. Mr. Cohen stated that he would continue to represent the Defendants and would try this case as scheduled. Mr. Larson indicated that was not acceptable to Dr. Lu. Dr. Lu no longer wanted Dylan Cohen to represent him.⁹¹
- Dr. Gregor Konzelman, P.H.D., was Peggy Brown's treating clinical psychologist. He stated that he has diagnosed "Post Traumatic Stress Syndrome with dissociative symptoms that contribute to her physical symptoms." "...if this case is continued, it will cause both emotional and physical harm to Peggy Brown. Any further delay of this case will be harmful to Peggy Brown."⁹²

The Court denied the Motion, finding:

- The case had "already been tried a year ago almost to conclusion"; the court noted (to the defense) . . . and you have the benefit of the entire plaintiffs' case that was presented last year."⁹³ Mr. Larson confirmed that he had the transcripts from the prior trial and that would be a "mitigating factor."⁹⁴
- Mr. Larson was "not unfamiliar [with the case] with having been involved with it, to a certain extent, for four years and having done the deposition of the Browns in

⁹⁰ RP 6, lines 8-15.

⁹¹ CP 72, lines 18-24.

⁹² CP74, lines 24-25; CP 75, lines 1-5.

⁹³ RP 16, lines 6-7.

⁹⁴ RP 15, lines 21-23.

July of 2015 and having been involved with the case”;

- the case had been tried “and because we have transcripts from that trial, because we’ve got Mr. Larson as an experienced attorney who has in a week and a half pulled together some impressive responses to motions,” the court didn’t “think that there is a substantial injustice to Dr. Lu by going forward with Mr. Larson”;

- due to schedules of the attorneys, availability of expert witnesses, and the fact that the Court would not be available to try the case in 2019 after August of that year, “the options . . . are we start on Monday or we start in 2020”; and

- there would be “a substantial injustice to both Dr. Lu and to the plaintiffs by setting this matter over because it appears that a continuance of any kind is a continuance of a lengthy one.”⁹⁵

The Court concluded:

So the options that I have are we start on Monday or we start in 2020. And given that this case was filed in 2014, has been continued multiple times, has been tried almost to completion a year ago and is lined up and ready to go but for the fact that Mr. Cohen has left the firm but we've got able counsel stepping in, I'm going to deny the motion to adjust the trial date. We're going to start on Monday.⁹⁶

The written Order denying the Motion included findings that the Defendants failed to establish “good cause” or show “extraordinary circumstances where there is no alternative means of preventing a

⁹⁵ RP 19, lines 3 - 25; RP 20, lines 1-15.

⁹⁶ RP 20, lines 16-23.

substantial injustice.”⁹⁷

The defense was presented by attorneys Levi Larson and David Corey. The second trial started on June 17, 2019. After the jury was excused to begin deliberations, Mr. Larson presented a detailed oral motion for mistrial,⁹⁸ but asked the court to reserve ruling until after the jury returned its verdict.⁹⁹

The jury found that Dr. Lu was negligent and proximately caused the Browns’ injuries, and awarded damages in the amount of \$2,618,000.00.¹⁰⁰ Judgment in the total amount of \$2,618,977.94, inclusive of costs, was entered on July 19, 2019.¹⁰¹

On July 29, 2019, Appellants filed a Motion for New Trial, asserting that the trial court erred by denying their Motion to Continue Trial; that during closing argument Browns’ counsel violated an order on a Motion in Limine; and that Browns’ counsel introduced a new theory of negligence during closing argument testimony.¹⁰² The trial court denied the Motion for New Trial, concluding:

- A. Argument by Plaintiffs’ counsel was not misconduct.
- B. Plaintiffs’ counsel did not engage in conduct that

⁹⁷ CP 91.

⁹⁸ RP 1557, lines 11-25 through RP 1562, line 1.

⁹⁹ RP 1567, lines 19-20.

¹⁰⁰ CP 120-121.

¹⁰¹ CP 136-141.

¹⁰² CP 142-154.

materially affected the substantial rights of the Defendants.

C. Comments by Plaintiffs' counsel did not have a prejudicial effect.

D. There was no conduct by Plaintiffs' counsel that was prejudicial in the context of the entire record.

E. Any alleged misconduct was cured by Court Instructions.

F. Conduct by Plaintiffs' counsel did not violate Defendants' right to a fair trial[.]¹⁰³

On August 19, 2019, Defendants filed their Notice of Appeal, requesting review of the Judgment on Jury Verdict and the Order Denying Motion for a New Trial.¹⁰⁴

V. ARGUMENT

A. The trial court did not err in denying Defendants' Motion for a New Trial pursuant to CR 59.

Defendants claim that the trial court erred in denying Defendants' Motion for a New Trial pursuant to CR 59.¹⁰⁵ CR 59(a)(2) provides that a verdict may be vacated and a new trial granted if "misconduct of [the] prevailing party" materially affects the substantial rights of the other party. This Court reviews a trial court's denial of a motion for a new trial under

¹⁰³ CP 271-272.

¹⁰⁴ CP 273-283.

¹⁰⁵ Brief of Appellants, p. 10-18.

CR 59(a)(2) for abuse of discretion.¹⁰⁶

In reviewing the trial court’s decision, a reviewing Court will consider whether “such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial.”¹⁰⁷

“The trial court is in the best position to most effectively determine if counsel’s misconduct prejudiced a party’s right to a fair trial.”¹⁰⁸

Unless some prejudicial effect is clear from the record, we must defer to the trial court. *See Clark v. Teng*, 195 Wash.App. 482, 492, 380 P.3d 73 (2016) (holding that “the trial court is ‘in the best position’ to gauge the prejudicial impact of counsels’ conduct on the jury. Particularly when the grounds for a new trial involve the assessment of misconduct during the trial and its potential effect on the jury” (footnote omitted)).¹⁰⁹

The party seeking a new trial based on counsel’s conduct has the burden of establishing that (1) the conduct was misconduct, (2) the misconduct was prejudicial, (3) the misconduct was objected to at trial, and (4) the misconduct was not cured by the trial court’s instructions.¹¹⁰

On June 6, 2018, the trial court granted in part Defendants’ Motion in Limine No. 19, which stated:

¹⁰⁶ *Alum. Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

¹⁰⁷ *Id.* (quoting *Moore v. Smith*, 89 Wn.2d 932, 942, 578 P.2d 26 (1978)).

¹⁰⁸ *Miller v. Kenny*, 180 Wn. App. 772, 815, 325 P.3d 278 (2014).

¹⁰⁹ *Gilmore v. Jefferson Cty. Pub. Transp. Benefit Area*, 190 Wn.2d 483, 503, 415 P.3d 212 (2018).

“The Court should exclude any reference to punitive damages, including any argument that the jury should “punish” Dr. Lu and/or “deter” future misconduct.”¹¹¹

The court granted Defendants’ Motion in Limine No. 19, writing “as to specific motion, reserve re: ‘conscience of community.’”¹¹²

On June 26th, Browns’ counsel asked the Court for guidance regarding “conscience of the community,”

I anticipate making an argument that the jury’s verdict regarding the Standard of Care or whether Dr. Lu committed negligence is the conscience of the community, the jury, commenting on whether this type of activity is appropriate or not and whether that message should be sent to the employer MultiCare or not. **It’s the jury making a decision regarding the Standard of Care** and being the conscience of the community... providing justice concerning this case.

To me it sounds like normal closing argument. Of course, I’ve got the rebuttal side so if they don’t discuss anything along those lines, then I guess I don’t get to say anything at all about that, but presuming that they will, I would anticipate they’ll discuss the standard of care or negligence. Then I would anticipate making similar arguments in closing, and I just want to make sure that there isn’t going to be a problem if I do, and I think it’s advisable for me to find out if that’s going to be an issue or not.¹¹³

The Court responded:

The Motion in Limine was to exclude **any reference to punitive damages including any argument that the jury should punish Dr. Lu and/or deter future**

¹¹⁰ *Teter v. Deck*, 174 Wn.2d 207, 226, 274 P.3d 336 (2012).

¹¹¹ CP 31.

¹¹² *Id.*

¹¹³ RP 1436, lines 5-25 (emphasis added).

misconduct. When we start using buzz words like “conscience of the community,” we start getting into some dangerous territory in cases of this nature or, really, cases of any nature.

If you’re asking me specifically if the language “conscience of the community” or an argument that is along those lines will be allowed by the Court, my answer to you is no, as far as the advisory opinion, to use that particular tack, that the jury does, as they’ve been instructed, make the determination as to whether there is a violation of the standard of care.

When 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. It's something that we've seen appellate courts not be thrilled with, mainly in criminal cases, but I don't think that they would look kindly on it in a case of this nature as well.¹¹⁴

During his closing argument, Browns’ counsel stated:

[L]adies and gentlemen of the jury, we’ll start with the road map, which is what the judge has given to you and which, at least in my opinion, is probably the simplest way for you to approach this case, and that is the Special Verdict form. The Judge read it to you yesterday. Counsel has referred to it. I’m going to be referring to it and, of course, it’s up on the screen now.

The first question on the Special Verdict form is was Dr. Lu negligent? And the answer to that question is yes, and we’re going to talk about why the answer to that question is yes. And that means a breach of the standard of care. ...

I’m not a doctor, but, as Mr. Wilson has indicated, you have common sense. And when you look at this using common sense the actual answer came from Dr. Lu, and the actual answer came from Dr. Shonnard as to what really happened. You have seen the use of the K-wire, and Dr.

¹¹⁴ RP 1438, lines 24-25; RP 1439, lines 1-21 (emphasis added).

Lu testified yesterday he still uses this process to this day, exactly the same. **So, your answer to Question #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?**¹¹⁵

1. Appellants mischaracterize the Browns' closing argument.

Mr. Sinnitt explained to the jury that it was “critically important” to let Dr. Lu and MultiCare know that Dr. Lu’s conduct, what he did **during Ms. Brown’s surgery** was negligent.

Appellants mischaracterize Mr. Sinnitt’s comments at page 12 of their Brief, where they state:

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**[.]

Mr. Sinnitt used no such words.

The first question on the Special Verdict form, which was displayed to the jury during the Browns’ rebuttal argument, asked “[w]as Dr. Lu negligent?” Browns’ counsel explained to the jury that its answer to that question was critically important to Dr. Lu and MultiCare **to inform them of the standard of care** by finding Dr. Lu had been

¹¹⁵ RP 1532, lines 23-24; RP 1533, lines 1-10; RP 1534, lines 4-20 (emphasis added).

negligent in what he did **during the procedure he performed on Ms.**

Brown.

As Browns' counsel stated to the court while the jury was deliberating:

I did not say "send a message." I did not say "this is the conscience of the court." I did not say "this is to deter future behavior." I avoided all of those things which we specifically discussed yesterday. I said Dr. Lu needs to know the answer to question No. 1, and MultiCare and its hundreds of employees need to know the answer to question No. 1. That is not a violation of the Court's order, nor the Court's advice.¹¹⁶

Browns' counsel neither violated the court's order on Motion in Limine No. 19 nor the court's advisory comments.

2. Browns' rebuttal argument did not suggest or request punitive damages.

At pages 12-15 of their Brief, Appellants argue that the Browns "improperly requested punitive damages aimed at deterring Dr. Lu and "hundreds of other unnamed doctors from committing future malpractice." There are two fatal flaws in this argument: (1) no request for punitive damages was made, or even suggested, and (2) the argument addressed the **past** conduct of Dr. Lu, what he did, not future conduct of any physician.

Cases cited by Appellants to support their position that Browns' "improper" comments during closing argument should have resulted in a

new trial, in fact, do not support Appellants' position.

In *Broyles v. Thurston County*, the plaintiff's argued, "We ask you to use your best judgment to determine what fair compensation is and to award that **so that what will happen to these women will never happen again.**"¹¹⁷ The *Broyles* court wrote:

Here the comment, though improper, was unclear, difficult to follow, and confusing at best. "[T]o award that so that what will happen to these women will never happen again" **speaks to future harm to the plaintiffs and asks the jury to award damages to prevent that. . . It is not a clear call to the jury to impose punitive damages.**¹¹⁸

In this case, the Browns did not suggest that a verdict in favor of plaintiffs would prevent future harm, but instead, urged the jury to let the defendants know that the harm previously suffered by Ms. Brown was caused by negligence. Unlike the *Broyles* plaintiff, the Browns neither suggested nor stated that the jury should award damages so what happened to Ms. Brown would "never happen again."

In *Wuth ex rel. Kessler v. Lab Corp. of Am.*,

the trial court reiterated its earlier ruling on the issue, again ruling that the parties "could talk about the policy behind the law," but could not "tell the jury basically to enter a verdict to deter these defendants and to send a message."¹¹⁹

¹¹⁶ RP 1562, lines 18-25; RP 1563, line 1.

¹¹⁷ *Broyles v. Thurston Cty*, 147 Wn. App. 409, 445, 195 P.3d 985 (2008).

¹¹⁸ *Id.*

¹¹⁹ *Wuth ex rel. Kessler v. Lab. Corp. of Am.*, 189 Wn. App. 660, 707, 359 P.3d 841, 865 (2015).

Nevertheless, the plaintiffs' counsel began closing argument by stating:

As you listen to closing statements, I want you to keep in mind there are two reasons under the public policy of the state of Washington that we are allowed to hold defendants accountable for the harm they cause to individual citizens. One you have already heard of. You know it. Compensation. Compensation is balancing the harm caused by the negligence to the family with monetary compensation.

The other public policy is deterrence. Deterrence is not punishment. Punishment is looking back at behavior and trying to punish it with an award. That's not what we are asking for. Deterrence looks forward. The purpose of deterrence is to deter future misconduct, and that is an express public policy of the state of Washington in Washington tort law.¹²⁰

The Wuths subsequently argued that jurors should award general damages to compensate them and “to deter the defendants in this case, noting that ‘deterrence is important as a reminder that we can never elevate the business of medicine over the practice of medicine, that it's okay to make a profit ... but ... the patient has to come first.’”¹²¹

While the jury was out, one defendant again objected to the discussion of deterrence and requested a curative instruction, which the

¹²⁰ *Id.*

¹²¹ *Wuth*, 189 Wn. App. at 707-708, 359 P.3d 841.

court agreed to give.¹²² The other defendant argued that a curative instruction would be insufficient, but the court disagreed that prohibition of any mention of deterrence was improper, and instructed the jury:

[I]t's appropriate for the parties to talk to you about what those policies may be that support our civil tort system. What's not appropriate is for you to award damages in this case to deter these specific defendants or to send some sort of message.

The purpose of damages, as we've outlined in the instructions to you, is to compensate. So the purpose of damages in this case would be to compensate, if you follow me.

There's a difference between what the purposes—what the reasons that support our civil legal system are and what you are to do if you find the damages are appropriate here, which is to assess what is appropriate for compensation.¹²³

The Court of Appeals concluded it was error for the trial court to permit counsel to discuss the issue of deterrence in closing argument,¹²⁴ but ruled:

“At the same time, not every misguided closing argument warrants a new trial.” Here, there is no substantial likelihood that the argument regarding deterrence affected the jury's verdict in this case. **The court's written instructions to the jury set forth the proper measure of damages, as set forth in *Harbeson*, And the court's**

¹²² *Wuth*, 189 Wn. App. at 708, 359 P.3d 841.

¹²³ *Wuth*, 189 Wn. App. at 709, 359 P.3d 841.

¹²⁴ On pages 13-14 of their Brief, Appellants present one sentence from the *Wuth* case out of context, giving a false impression of the *Wuth* holding. On pages 14-15 of the Appellants' Brief, they present two unrelated phrases from a paragraph as if they were related to each other, resulting in a mischaracterization of what the *Wuth* court actually wrote. See ¶ 105 of *Wuth*, 189 Wn. App. at 709-710.

curative instruction during closing arguments flatly refuted any inference the jury could have drawn from the Wuths' and Dr. Harding's arguments that deterrence is a permissible basis for damages.

Washington courts presume that juries follow all instructions given. And LabCorp points to no evidence that the jury had trouble understanding or did not follow the court's instructions. Moreover, the verdicts are well within the range of evidence, indicating that the awards are strictly compensatory, rather than punitive. **Thus any error in allowing argument regarding deterrence was harmless.**¹²⁵

Broyles is not informative here because the Browns' counsel made no suggestion that a damages award would prevent future harm. *Wuth* reinforces the principle that even if an attorney makes a "misguided closing argument," it may not warrant a new trial, and that written jury instructions and curative instructions during closing argument "flatly refute" an argument that every "misguided" comment justifies a new trial. Neither *Broyles* nor *Wuth* supports an argument that the trial court erred in denying Appellants' Motion for a new trial.

3. The jury was repeatedly instructed that lawyers' comments during closing argument were not evidence.

During closing argument, Rogers Wilson, for the Plaintiffs, stated: "This is argument now, and what I say is not evidence. I can refer to the evidence in my argument, and that's what I'm doing, but my statements

¹²⁵ *Wuth*, 189 Wn. App. at 710, 359 P.3d 841 (internal citations omitted; emphasis

are not evidence.”¹²⁶

When Browns’ counsel objected to a point made by Appellants’ counsel the Court ruled: “It’s closing argument. What the attorneys say is not evidence.”¹²⁷ A little later, Appellants’ counsel reminded the jury, “Judge Murphy has also instructed you that the lawyers’ remarks, statements and arguments are not evidence and that you should disregard any lawyer remarks, statement or argument that’s not supported by the evidence.”¹²⁸

Subsequently, the following exchange took place:

MR. WILSON: Your Honor, I’m going to raise a somewhat belated objection to quoting from the record.

The entire record is not before the jury, and counsel is selecting obviously portions which support his argument, but it’s misleading to the jury, I think, to select just certain portions from the record without disclosing the entire --

MR. COREY: **It’s argument, Your Honor.**

THE COURT: Well, the PowerPoint has been reviewed previously, and there wasn’t an objection raised to it prior to the presentation, so it is late. It’s been presented to the jury. The jury’s heard the testimony.

Your recollection individually and collectively of **the evidence** is what counts.¹²⁹

added).

¹²⁶ RP 1450, lines. 22-25.

¹²⁷ RP 1499, lines 20-21.

¹²⁸ RP 1511, lines 20-24.

¹²⁹ RP 1525, lines 24-25; RP 1426, lines 1-13 (emphasis added).

Browns' counsel's argument was not "prejudicial,"¹³⁰ because the jury was told during closing that it had already "heard the evidence," and was instructed numerous times that "[w]hat the attorneys say is argument."

During testimony, there were other instances of the court instructing the jury that "the lawyers' remarks are not evidence."¹³¹

Further, Jury Instruction No. 1 explained to the jurors:

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, **it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by evidence** or the law as I have explained it to you.¹³²

Any potential harm from the Browns' counsel's statement was prevented by repeated instructions that the attorney's comments were argument, not evidence.

4. Appellants waived the ability to complain about the Browns' closing argument where they failed to contemporaneously object to the Browns' comments.

Defendants did not object to the Browns' argument at the time it was presented to the jury. "We have held that 'the lack of a clear and

¹³⁰ CP 271-272.

¹³¹ RP 400, lines 13-15; RP 433, lines 17-18.

prompt objection is strong evidence that counsel perceived no error. ”¹³³

In *Fisons*,¹³⁴ the drug company argued on appeal that the damages award “was based upon obvious passion or prejudice” aroused by certain “portions of the plaintiffs’ attorneys’ closing argument” that violated a court order.¹³⁵ The Supreme Court considered the company’s argument, then wrote:

Most importantly, there was no contemporaneous objection to this analogy. Any perceived inaccuracies in the analogy drawn by plaintiffs' counsel could have been drawn to the attention of the trial court which could have made a curative instruction if necessary.

Even when portions of closing argument are improper or inaccurate, failure to make **contemporaneous** objections usually waives any error unless the argument was so flagrant and prejudicial as not to be subject to a curative instruction. This is especially true when the trial court instructs the jury that arguments are not evidence and that argument not supported by evidence is to be disregarded. In this case, the jury was so instructed and with regard to the debatably improper arguments no contemporaneous objections were made.¹³⁶

In this case, the trial court twice instructed the jury during closing

¹³² CP 102 (emphasis added).

¹³³ *Gilmore v. Jefferson Cty. Pub. Transp. Benefit Area*, 190 Wn.2d 483, 504, 415 P.3d 212, 222–23 (2018) (quoting *In re Det. of Black*, 187 Wash.2d 148, 154, 385 P.3d 765 (2016), review granted, 189 Wash.2d 1015, 404 P.3d 480 (2017)).

¹³⁴ *Washington State Physicians Ins. Exchange Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993).

¹³⁵ *Fisons*, 122 Wn.2d at 233, 858 P.2d 1054.

¹³⁶ *Fisons*, 122 Wn.2d at 333-334, 858 P.2d 1054 (emphasis added).

argument that “what the attorneys say is argument.”¹³⁷ The court’s Jury Instruction number one also stated, “it is important for you to remember that the lawyers’ remarks, statements, and arguments are not evidence.”¹³⁸ When Mr. Wilson objected during closing argument to Mr. Corey reading from portions of the record that had not been presented to the jury, Mr. Corey himself responded, “It’s argument, Your Honor.”¹³⁹

As in *Fisons*, no contemporaneous objections were made to Mr. Sinnitt’s allegedly “improper” argument. In another case where no contemporaneous objection was made to “the alleged acts of misconduct” and “there was no request for a corrective instruction,” the Court wrote:

Respondents did not make any objection to any of the alleged acts of misconduct and made no request for a corrective instruction. Therefore, unless it can be said that the misconduct was so flagrant, persistent and ill-intentioned, or its wrong so obvious and evil results so certain that the trial court's instruction to disregard it could not neutralize its effect, the failure to object and request to corrective instruction was a waiver of such objection. [Citations omitted.]

We hold, in the instant case, that any misconduct on the part of appellant's counsel could have been cured by an instruction and, therefore, applying the rule above, the respondents waived any objection they might otherwise have been able to urge on this appeal.¹⁴⁰

¹³⁷ RP 1499, lines 20-21; RP 1537 lines 1-3.

¹³⁸ RP 102.

¹³⁹ RP 1525, lines 24-25; RP 1526, lines 1-6.

¹⁴⁰ *Nelson v. Martinson*, 52 Wn.2d 684, 328 P.2d 703 (1958).

Appellants waived any objection to the Browns' so-called "send a message" closing argument by failing to make a timely objection.

5. The doctrine of invited error prohibits Appellants from complaining about the Browns' argument on appeal.

After closing arguments were completed, the court excused the alternate jurors,¹⁴¹ explained procedures during their deliberations to the remaining jurors, reminded them of "the cautionary instructions," and sent them to the jury room.¹⁴² As the judge began to address persons remaining in the courtroom, defense counsel interrupted to say, "I have to make a short record of a motion before we break for the day."¹⁴³

Defense counsel announced,

The defense is going to need to move for a mistrial under CR 59(a)(1) given the entirely inappropriate rebuttal argument that was just delivered.¹⁴⁴

CR 59 governs "new trial, reconsideration, and amendment of judgments." CR 59(a)(1) provides:

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration

¹⁴¹ RP 1553.

¹⁴² RP 1554-1555.

¹⁴³ RP 1556, lines 10-15.

¹⁴⁴ RP 1557, lines 11-14.

granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial....

Defense counsel's well-prepared argument for mistrial, **including the "errors" alleged in this appeal**, covers four and one-half pages of the trial transcript.¹⁴⁵ After the Browns' attorney responded to the oral motion,¹⁴⁶ defense counsel stated:

My respectful prayer for relief is that this does warrant a mistrial for the reasons we already stated. **If Your Honor is going to reserve on that, that might be the most prudent approach** because this may not become an issue if there's a defense verdict.

If Your Honor is thinking that on each of these things could address the irregularity in the proceedings, the defense position on that, Your Honor, is that **we would respectfully ask for no instructions** because I raised this earlier in my moving argument. We're very concerned about me ringing the bell.

So we would ask that Your Honor reserve judgment on this. We'll see what the jury does. It may not be an issue.¹⁴⁷

The court stated, "[s]o you're asking the Court to take it under

¹⁴⁵ RP 1557, lines 11-25; RP 1558, line 1 through RP 1562, line 1.

¹⁴⁶ RP 1562, line 2-25; Page 1563, line 1 through RP 1565, line 16 (emphasis added).

¹⁴⁷ RP 1566, lines 22-25; RP 1567, line 1-11 (emphasis added).

advisement or reserve . . . to be addressed later?”¹⁴⁸ Defense counsel

responded:

I'd ask that you reserve ruling. I don't think that it becomes an issue if there's a defense verdict, and we don't think -- **we don't think it's appropriate to instruct the jury** and re-ring the bell on these prejudicial issues.¹⁴⁹

The court stated, “[a]ll right, I’ll do that.”¹⁵⁰

The decision of an attorney to object or not to object to a perceived error is a “strategic decision.”¹⁵¹ The Supreme Court has stated that “[t]he decision not to object is often tactical.”¹⁵² Appellants’ decision not to object to the alleged “send a message” argument was, admittedly, tactical:

[T]his improper rebuttal argument put the defense in a very difficult position. If we objected and lose, then we underscore the argument

The comments by counsel in rebuttal were, “This is important because Dr. Lu is still doing this procedure and -- quote -- “MultiCare has hundreds of other physicians.” It's one of the most blatant disregard of a motion in limine I've ever seen. And, again, **the reason we didn't object in time was we're in a catch-22. If we stand up and we ring the bell, then we underscore all the things that we're trying to keep out. So that's why we didn't make a motion at that time.**¹⁵³

Appellants made the deliberate choice not to make a

¹⁴⁸ RP 1567, lines 15-18.

¹⁴⁹ RP 1567, lines 19-23 (emphasis added).

¹⁵⁰ RP 1567, line 24.

¹⁵¹ *State v. Kong*, 198 Wn. App. 1051 at *3 (2017). This unpublished case may be cited and considered by the Court as persuasive authority under GR 14.1.

¹⁵² *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125, 134 (2007).

contemporaneous objection that would have enabled the trial court to strike the comments and/or give a curative instruction. After the jury had retired, Appellants requested the court **not** to instruct the jury on the “error” and, in fact, requested the court **not** to rule on the motion for mistrial until **after** the jury had returned its verdict. The strategic choice not to “ring the bell” at a time when the trial court has the opportunity to correct an error has consequences.

Appellate courts will not approve a party's failure to object at trial that could identify error which the trial court might correct (through striking the testimony and/or curative jury instruction). *Scott*, 110 Wash.2d at 685, 757 P.2d 492. Failure to object deprives the trial court of this opportunity to prevent or cure the error. The decision not to object is often tactical. If raised on appeal only after losing at trial, a retrial may be required with substantial consequences.¹⁵⁴

... [W]here the evidence has been admitted notwithstanding the trial court's prior exclusionary ruling, the complaining party [is] required to object in order to give the trial court the opportunity of curing any potential prejudice. Otherwise, we would have a situation fraught with a potential for serious abuse. A party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.¹⁵⁵

“[T]he purpose of requiring an objection in general is to apprise

¹⁵³ RP 1557, lines 17-19; RP 1558, lines 21-25; RP 1559, lines 1-5 (emphasis added).

¹⁵⁴ *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125, 134 (2007).

¹⁵⁵ *A.C. ex rel. Cooper v. Bellingham Sch. Dist.*, 125 Wn. App. 511, 525, 105 P.3d 400, 408 (2004) (quoting *State v. Sullivan*, 69 Wash.App. 167, 172, 847 P.2d 953, review denied, 122 Wash.2d 1002, 859 P.2d 603 (1993)) (footnotes omitted).

the trial court of the claimed error **at a time when the court has an opportunity to correct the error.**”¹⁵⁶ Here, Appellants made a tactical decision to **not** object when the trial court had an opportunity to correct the alleged error. Appellants then urged the trial court to delay ruling on the error, thereby actively seeking to prevent the court from correcting it.

Under the invited error doctrine, a party may not set up an error at trial and then complain of it on appeal. *In re Pers. Restraint of Thompson*, 141 Wash.2d 712, 723, 10 P.3d 380 (2000). The doctrine applies when a party takes affirmative and voluntary action that induces the trial court to take an action that party later challenges on appeal. *Id.* at 723–24, 10 P.3d 380.¹⁵⁷

In this case, not only did Appellants make a deliberate choice not to object at a time the trial court could have given a corrective instruction, they went further by taking the affirmative action of persuading the trial court not to correct the error. Appellants deliberately invited the alleged “error” and may not, therefore, complain about this alleged error on appeal. In any event, there was no error.

6. The jury’s verdict is not the result of passion or prejudice stirred by improper closing argument.

At page 7 of Appellants’ Brief, they write that “the jury returned a \$2.6 million verdict in favor of the Browns after they argued the jury

¹⁵⁶ *Blomstrom v. Tripp*, 189 Wn.2d 379, 394, 402 P.3d 831, 839 (2017) (emphasis added).

¹⁵⁷ *Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S.*, 112 Wn. App. 677, 681, 50 P.3d 306, 308 (2002).

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.’” This is an egregious mischaracterization of the Browns’ closing argument, as discussed above, and implies that the jury verdict was based on passion or prejudice created by improper argument.

In this case,

The jury determined that the total damages granted to Plaintiff Peggy L. Brown were \$2,368,000.00 inclusive of \$312,000.00 in past medical expenses. The jury found that the total damages to Plaintiff Jay Walter Brown were \$250,000.00. Total damages granted to both Plaintiffs by the verdict of the jury were \$2,618,000.00.¹⁵⁸

The Browns outlined the past and projected future medical expenses caused by the negligence of Dr. Lu, which totaled \$595,744.78.¹⁵⁹ The jury was informed that insurance had paid \$311,293.50, “for which they’re asking for reimbursement.”¹⁶⁰ Dr. Konzelman testified that Peggy Brown will require future treatment for her problems.¹⁶¹ Dr. Ombrellaro testified that Peggy Brown’s vascular injuries will require future treatment and medical supplies in the amount of \$223,104.48.¹⁶²

¹⁵⁸ RP 136-137.

¹⁵⁹ RP 1471 through 1474, line 3.

¹⁶⁰ RP 1474, lines 4-5; Exhibit 143-008.

¹⁶¹ RP 340, lines 6-12.

¹⁶² RP 246-247; Ex. 143-008.

Brown's counsel then addressed general damages:

PTSD, Peggy Brown has suffered PTSD for seven or eight years. In terms of our general damages, we're asking for damages for her mental suffering from the PTSD only. So the number that I give you for general damages will be PTSD, not back pain related to the surgery. That pain in her leg, we're asking for that, and that's in the figure that I'm going to give you from the vascular surgery and it's your judgment to sort that out, but we're not asking for pain and suffering that she had as a result of the surgery with the exception of the vascular damage.

So what is a reasonable figure for noneconomic damages for the seven or eight years that Ms. Brown suffered PTSD? And we think that figure is \$3 million. We think that figure is \$3 million in noneconomic damages for the PTSD that she went through for seven or eight years and to some extent is still going through. And you've heard the testimony about what that is, symptoms and the fears. And you've heard all of that, and I don't need to repeat it. \$3 million.

For Mr. Brown, who has cared for his wife and will have to care for her for the rest of her life, their lives together, we're asking for \$500,000 for the loss -- call it loss of consortium, \$500,000.

So, the total of the damages then would be these economic damages, \$500,000 for Mr. Brown and \$3 million for Peggy Brown. Those are the total of the damages that the plaintiff is asking for.¹⁶³

Thus, the total of the damages sought were \$595,744.75

economic and \$3.5 million non-economic.

“Determination of the amount of damages is within the province of

¹⁶³ RP 1474, lines 10-25; RP 1475, lines 1-12.

the jury, and courts are reluctant to interfere with a jury's damage award when fairly made.”¹⁶⁴ Here, the jury’s award was substantially less than what the Browns requested.

“Before passion or prejudice can justify reduction of a jury verdict, it must be of such manifest clarity as to make it unmistakable.” . . . Absent such passion or prejudice, the amount of damages must be so excessive as to be outside the range of evidence or so great as to shock the court's conscience. . . . There must be no reasonable evidence or inference to justify the award.¹⁶⁵

The trial court expressly found that “argument by Plaintiffs’ counsel was not misconduct,” and “comments by Plaintiffs’ counsel did not have a prejudicial effect,”¹⁶⁶ and the Appellants do not claim that there is no reasonable evidence or inference to justify the award.

B. The Browns did not present a “new theory of negligence” during closing argument.

Appellants take a small excerpt from Browns’ rebuttal argument out of context and assert that it raised a “new theory of negligence that was unsupported by any expert testimony.”¹⁶⁷ Appellants are wrong in two ways: (1) no “new theory of negligence” was raised; and (2) the argument is supported by expert testimony.

¹⁶⁴ *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597, 599 (1997) (citing *Fisons*, 122 Wn.2d at 329, 858 P.2d 1054).

¹⁶⁵ *Conrad ex rel. Conrad v. Alderwood Manor*, 119 Wn. App. 275, 293, 78 P.3d 177, 187 (2003) (internal citations omitted).

¹⁶⁶ RP 271 - RP 272.

¹⁶⁷ Appellants’ Brief, page 16.

The alleged “new theory of negligence” is based on the following language of Browns’ counsel during rebuttal:

[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. He went like this. **He missed the vertebral body altogether. Ten degrees, doesn't matter; he completely missed it. That is a breach of the standard of care.**¹⁶⁸

Appellants’ counsel interrupted:

MR. COREY: Excuse me, Your Honor. This is a theory of the case that has absolutely zero expert support in the record. There has been no expert testimony on this.

THE COURT: Again, what the attorneys say is not evidence. You've heard the evidence. What the attorneys say is argument.¹⁶⁹

Browns’ counsel’s argument did not “raise a new theory of negligence”¹⁷⁰ during closing arguments. Browns’ counsel plainly and clearly stated that “miss[ing] the vertebral body altogether” was a breach of the standard of care. He said that Dr. Lu “**missed the vertebral body altogether. Ten degrees, doesn't matter; he completely missed it. That**” --

¹⁶⁸ RP 1535, lines 7-25; RP 1536, lines 1-21 (emphasis added).

¹⁶⁹ RP 1536, lines 22-25; RP 1537, lines 1-3.

¹⁷⁰ Appellants’ Brief, page 16.

i.e., missing the vertebral body -- “is a breach of the standard of care.”

This argument was entirely proper and was not “new.”

Contrary to Mr. Corey’s objection, the Browns’ argument is based on and supported by the expert testimony of Dr. Wohns:

Q. Doctor, you've testified that the screw did not go into the vertebral body, but instead **missed the vertebral body altogether**. Showing you Exhibit 127 and 127A, would you please tell the jury what these are?

...

A. So again, left, right. There's an R, L. Left side of the screw, good starting point, good trajectory, locked into the bone. **Right side, you can see the trajectory where it starts at a good starting point, but it doesn't go this way with a similar angle like on that acrylic model**. You can see symmetrical screws. **This time on the right, the L5 screw went this way in and out of the pedicle and then into the area where the blood vessels and the bowel mesentery area.**

...

Q. **This now identifies the trajectory of the screw from Dr. Lu's surgery?**

A. Yes.

Q. And, Doctor, **is the trajectory that Dr. Lu utilized within the standard of care or not?**

A. **It is not.**¹⁷¹

The jury had also previously heard expert testimony about the K-

¹⁷¹ RP 534, lines 14-18 and lines 24-25; RP 535, lines 1-8, lines 14-17, lines 15-20 (emphasis added)

wire. During presentation of the Browns' case, Dr. Richard Wohns demonstrated the procedure Dr. Lu had performed on Ms. Brown on an anatomically accurate acrylic model, during which he explained that the K-wire, which has "little threads" on the end, is

driven into the bone and gets locked into the bone. Again, what you're doing is **creating trajectory guidance for your placement of the screw** because the screw has a hole down the center of it and goes directly over the K wire like this. **So as your K wire is locked in, removing the Jamshidi with just the K wire in, you can thread that screw down over the K wire, which is locked in bone, and thread it into the bone going through the pedicle into the vertebral body, achieving exactly that trajectory.**¹⁷²

Dr. Lu himself testified that the "complication" during Ms. Brown's surgery was "a result of a sub-optimal trajectory."¹⁷³ He stated that the "complication" during Ms. Brown's surgery "took place **somewhere between me taking out the guidewire** and taking a handle of the screwdriver and try to -- triangulate my angle."¹⁷⁴ Dr. Lu continued,

So the guidewire is this way, so when I put in the screw to about this point, **I take out the guidewire**. And by this point, I'm doing everything just freehand with the guidance of the C-arm imaging. So at some point during the transition, **me taking out the guidewire**, getting ahold of the screwdriver again and try to advance it using the grip, the angle shifted.¹⁷⁵ . . .

¹⁷² RP 532, lines 22-25; RP 533, lines 1-8 (emphasis added).

¹⁷³ RP 1327, lines 20-23.

¹⁷⁴ RP 1295, lines 9-12 (emphasis added).

¹⁷⁵ RP 1295, lines 24-25; RP 1296, lines 1-6 (emphasis added).

When the wire came out and I started to advance, somewhere in there the angle changed and it sheared off.¹⁷⁶

Browns' counsel argued during rebuttal that Dr. Lu had breached his standard of care by taking out the guidewire too soon and thereby, missing the vertebral body altogether. The jury sat through demonstrations and explanations of the entire procedure and, by the time of closing argument, were familiar with the K-wire. The essence of Dr. Wohn's testimony is that you leave the K-wire in as a guide until you enter the vertebral body. Argument that the K-wire was taken out too soon is reasonably based on evidence.¹⁷⁷ There was no new "theory" presented by the Browns during rebuttal argument, and Dr. Lu suffered no prejudice from closing argument based on expert testimony.

The trial court correctly concluded that "there was no conduct by Plaintiffs' counsel that was prejudicial in the context of the entire record," any alleged misconduct was cured by Court Instructions," and "counsel did not violate Defendants' right to a fair trial."

C. The trial court did not abuse its discretion in denying Appellants' Motion to Adjust Trial Date.

This Court reviews a trial court's decision to deny a continuance

¹⁷⁶ RP 1357, line 25; RP 1358, lines 1-2 (emphasis added).

¹⁷⁷ See fn 172.

motion for abuse of discretion.¹⁷⁸ A trial court abuses its discretion when its decision is manifestly unreasonable, or based on untenable grounds or untenable reasons.¹⁷⁹

In exercising its discretion, a court may properly consider the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the court.¹⁸⁰

A reviewing court may not hold that a trial court abused its discretion ““simply because it would have decided the case differently.”” [Citation omitted.] To find abuse of discretion, a court ““must be convinced that ““no reasonable person would take the view adopted by the trial court.””” [Citation omitted.]¹⁸¹

Appellants cite CR 40(d), which states, “when a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a continuance.” PCLR 40 provides:

If a motion to change the trial date is made after the Deadline to Adjust Trial Date, the motion will not be granted except under extraordinary circumstances where there is no alternative means of preventing a substantial injustice.

¹⁷⁸ *Trummel v. Mitchell*, 156 Wn.2d 653, 670, 131 P.3d 305 (2006).

¹⁷⁹ *Id.* at 671, 131 P.3d.

¹⁸⁰ *Id.* at 670-671, 131 P.3d 305.

¹⁸¹ *L.M. by & through Dussault v. Hamilton*, 193 Wn.2d 113, 134–35, 436 P.3d 803, 814 (2019).

Appellants' assertion at page 20 of their Brief that Levi Larson "had just twelve days" to prepare for trial is sheer nonsense. Mr. Larson deposed the Browns in preparation for that trial.¹⁸² Mr. Larson was second chair for the defense from March, 2019. Mr. Larson also worked on preparation for the second trial, as described by Browns' counsel:

[T]he Court can clearly see from the materials submitted by Mr. Larson, he's definitely up to speed regarding the issues that have been presented to the Court that we are aware of.¹⁸³

The Court noted, "you have the benefit of the entire plaintiffs' case that was presented last year," and added:

it's not the same as walking into a case without having any idea of what the trial is going to look like or -- I mean, the trial's already been laid out and everything.

You'd been second chair since Mr. Cohen took over the case back in March?

MR. LARSON: This is true, Your Honor

THE COURT: . . . Is there a substantial injustice to Dr. Lu if Mr. Larson goes forward on Monday with trial? As I indicated, it's not a normal case from the standpoint of it's already been tried a year ago almost to conclusion, to the sorrow of all of us. The plaintiffs had presented their case at that time, and the defense had Dr. Lu on the stand when we had the issue with the juror. So it's not like you're walking into a case without having an understanding of what was presented.

¹⁸² RP 8, lines 19-21.

¹⁸³ RP 9, lines 11-14.

It's also a case that you're not unfamiliar with having been involved with it, to a certain extent, for four years and having done the deposition of the Browns in July of 2015 and been involved with the case.

I have to weigh the potential of this injustice to Dr. Lu against the injustice against the Browns if the Court grants a continuance. It doesn't sound like I have the option of doing a short continuance, that any short continuance is going to be a lengthy continuance.

So we have attorneys' schedules that are not going to be available until at least August, and then we have the issue of the unknown availability of the experts, and we have the Court not being available to try the case after August which, I think, is the least of all of those.

Because this is a case that's been tried and because we have transcripts from that trial, because we've got Mr. Larson as an experienced attorney who has in a week and a half pulled together some impressive responses to motions, I don't think that there is a substantial injustice to Dr. Lu by going forward with Mr. Larson.

I think there is a substantial injustice to both Dr. Lu and to the plaintiffs by setting this matter over because it appears that a continuance of any kind is a continuance of a lengthy one. If I had the ability from everybody to say we can start this case next month, I would consider that, but that's not in front of me.

So, the options that I have are we start on Monday or we start in 2020. And given that this case was filed in 2014, has been continued multiple times, has been tried almost to completion a year ago and is lined up and ready to go but for the fact that Mr. Cohen has left the firm but we've got able counsel stepping in, I'm going to deny the motion to adjust the trial date. We're going to start on Monday.¹⁸⁴

¹⁸⁴ RP 16, lines 6-19; RP 19, Lines 3-25.

Appellants argue “...their theory of liability changed dramatically between when Mr. Larson took their depositions in 2015 and the second trial in June of 2019.” The record that they cite is Mr. Wilson’s closing argument wherein he states that the Plaintiffs’ original theory of the case, as of 2014, was that Dr. Lu pushed too hard.¹⁸⁵ The CT scan was taken April 7 of 2016.¹⁸⁶ Plaintiffs learned at that time that Dr. Lu used the wrong trajectory.¹⁸⁷ This was disclosed to the defense.”¹⁸⁸ The defense expert, Dr. Shonnard was questioned about it in his deposition (which was taken 3/31/2017).¹⁸⁹ Defendants were well aware that Plaintiffs’ theory of liability was that Dr. Lu used the wrong trajectory long before and during the first trial in June of 2018.

It should also be noted that Judge Murphy stated after the jury began to deliberate:

Dr. Lu, you should be happy with the counsel you’ve had, I believe, because they’ve been very prepared and thorough I believe it was a well-trying case on both sides. . . .”¹⁹⁰

Contrary to Appellants’ assertion at page 20 of their Brief, this case is certainly **not** “similar to *Coggle*.” First, in *Coggle*, a continuance was sought for the hearing on a motion for summary judgment pursuant to

¹⁸⁵ RP 1466, lines 19-20.

¹⁸⁶ RP 1466, line 22.

¹⁸⁷ RP 1467, lines. 21-23.

¹⁸⁸ RP 1468, lines 13-14.

CR 56(f), not continuance of the trial.¹⁹¹ Second, the *Coggle* plaintiff had to find “**new counsel**” who **began** representing the plaintiff one week after the opposing party filed a motion for summary judgment.¹⁹² Third, “little discovery had been pursued” by the plaintiff’s former counsel.¹⁹³ In spite of these facts, the trial court denied the plaintiff’s CR 56(f) motion.¹⁹⁴ Not surprisingly, the Court of Appeals reversed the trial court, writing, “We cannot discern a tenable ground or reason for the trial court’s decision. We hold that the trial court improperly exercised its discretion in denying the motion for a continuance.”¹⁹⁵

This case is nothing like *Coggle*. Mr. Larson is not “new counsel” for the Appellants. The Court had tenable grounds and reasons to deny a fourth continuance of this case.¹⁹⁶ There was no prejudice to Dr. Lu. The Appellants do not cite or allege a single occurrence of a deposition not taken, a preparation that was incomplete, or a task or a duty which was unfulfilled due to a change of counsel. There were none. This Court should rule that the trial court did not abuse its discretion in denying a continuance of the trial.

¹⁸⁹ RP 1468, lines 15-16.

¹⁹⁰ RP 1570, lines 6-8; lines 21-22.

¹⁹¹ *Coggle v. Snow*, 56 Wn. App. 499, 501, 784 P.2d 554 (1990).

¹⁹² *Id.* at 508, 784 P.2d 554.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 503, 784 P.2d 554.

¹⁹⁵ *Id.*

Dr. Lu testified that the true cause for the “loss of resistance” leading to the tragedy was his failure to follow the correct trajectory: “...my trajectory for the screw was suboptimal.”¹⁹⁷ Given that admission, the only real question for the jury to decide was whether Dr. Lu’s “suboptimal trajectory,” which caused him to push the screw and screwdriver through Peggy Brown’s bone and through her vein and artery and into her bowel mesentery, was a breach of the standard of care. The jury concluded that it was. Whether the case would have been continued another year, or not, the result would still have been the same.

VI. CONCLUSION

The trial court:

- Oversaw the trial, and heard all testimony and argument;
- Considered the Appellant’s Motion for New Trial and all documents submitted in relation thereto;
- Concluded that argument by Plaintiff’s counsel was not misconduct;
- Concluded that Plaintiff’s counsel did not engage in conduct that materially affected the substantial rights of the Defendants;
- Concluded that comments by Plaintiff’s counsel did not have a prejudicial effect;
- Concluded that there was no conduct by Plaintiffs’ counsel that was prejudicial in the context of the entire record;

¹⁹⁶ RP 16, lines 6-19; RP 19, lines 3-25.

¹⁹⁷ RP 1231, lines 24-25; RP 1232, lines 1-8.

- Concluded that any alleged misconduct was cured by Court Instructions;
- Concluded that conduct by Plaintiffs' counsel did not violate Defendants' right to a fair trial, and
- Denied Defendants' Motion for a New Trial.

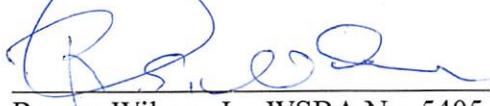
Dr. Lu admitted wrongdoing. The jury concluded it was a breach of the standard of care. If this case were to be retried years from now, the result would be the same.

The parties tried to conclusion a case thoroughly known to both sides, free from prejudicial harm, where each side presented all of their claims and defenses. The Jury decided in favor of the Plaintiffs and rendered a verdict which was supported by substantial evidence.

This court should deny the appeal and confirm the Trial Court's decision.

Respectfully submitted this 25 day of March 2020.


C. Joseph Sinnitt, WSBA No. 6284


Rogers Wilson, Jr. WSBA No. 5405

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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 March 25, 2020, I arranged for service of the foregoing: Response Brief of Peggy L. Brown and Jay Walter Brown, to the court and to the parties of this action as follows:

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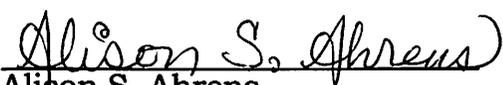
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Transmittal Information

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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

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