

NO. 72059-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ANTHONY DICKERSON AND JULIA DICKERSON, husband and wife
and the marital community composed thereof; J.D., a minor child, by and
through her Guardian Ad Litem, ANTHONY DICKERSON; and THE
ESTATE OF JILLIAN ROSE DICKERSON, by and through its
Administratrix, JULIA DICKERSON,

Respondents,

v.

C. SHAYNE MORA, M.D.; BELLINGHAM OBSTETRIC &
GYNECOLOGIC ASSOCIATES, P.S., a Washington Corporation; and
PEACEHEALTH dba ST. JOSEPH HOSPITAL, a Washington
Non-profit corporation,

Appellants

BRIEF OF APPELLANT PEACEHEALTH
d/b/a ST. JOSEPH HOSPITAL

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I. INTRODUCTION

This action arises out of care Julia Dickerson, while pregnant with twins, received at PeaceHealth's childbirth center during an 80-minute visit on February 6, 2008. The Dickersons alleged that PeaceHealth and Nurse Sue Wahl negligently evaluated Ms. Dickerson during that visit, resulting in failure to earlier diagnose twin-to-twin transfusion syndrome and leading to a premature delivery, the death of one twin and injuries to the other. After a five-week trial, the jury returned a verdict for PeaceHealth, finding no negligence and never reaching issues of causation, damages, or fault apportionment. The trial court granted the Dickersons' motions for new trial and monetary sanctions based on alleged violations of orders in limine and alleged misconduct in closing argument.

The trial court erred in so doing. The occurrences the Dickersons cited in their post-trial motions either were not misconduct or violative of orders in limine, or, if deemed technically violative of an order in limine, were minor in the context of the entire trial and corrected by the trial court, and were not ones that fairly could be said to have engendered such a feeling of prejudice as to have deprived the Dickersons of a fair trial.

II. ASSIGNMENTS OF ERROR

The trial court erred in: (1) entering its June 10, 2014 Order Granting Post Trial Sanctions and New Trial; (2) entering its August 4,

2014 Partial Judgment on Sanctions; (3) finding that defense counsel violated orders in limine or committed misconduct; and (4) finding that plaintiffs were denied a fair trial.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

(1) Did the trial court err in granting a new trial without complying with the mandates of CR 59?

(2) Did the trial court err in granting a new trial and awarding monetary sanctions when the occurrences complained of either were not violative of any order in limine or otherwise improper or were minor and corrected by the trial court, and/or were not so prejudicial as to warrant a new trial or monetary sanctions?

IV. STATEMENT OF THE CASE

A. Factual Background.

1. Julia Dickerson's twin pregnancy.

Ms. Dickerson learned in September 2007 that she was pregnant and began seeing Dr. C. Shayne Mora, an OB/GYN with Bellingham Obstetric & Gynecologic Associates. 3/10 RP 25, 29. An ultrasound at about 13 weeks revealed twins with separate amniotic sacs, but a single placenta.¹ 3/5 RP 114-15; 3/10 RP 25-26; *see also* CP 2016. Ms. Dickerson was told that twins do not always share the placenta evenly, and

¹ Such a pregnancy is called a diamniotic/monochorionic or monochorionic/diamniotic ("mono-di") pregnancy. 3/5 RP 115; CP 2016.

this condition, “twin-to-twin transfusion syndrome” (“TTTS”), could lead to one twin getting most of the nutrients, and the other twin not getting enough, so she would need to be monitored. 3/10 RP 27-29. According to Dr. Holmgren, the perinatologist to whom Dr. Mora referred her,² there was a 15% chance of TTTS, and monitoring with ultrasound every two weeks would be needed. 3/10 RP 29-30; CP 2018-19.

In December 2007, Ms. Dickerson began feeling more uncomfortable in her rib cage and back. 3/10 RP 31. She began having concerns that she shared with Dr. Mora about her feeling that she was “too big” for her stage of pregnancy. 3/10 RP 32-34. By January 30, she was at 24 weeks, 5 days gestation, and Dr. Mora’s plan was to schedule her for serial ultrasounds and non-stress tests starting at 32 weeks.³ 3/5 RP 114, 116.

On February 6, 2008, Ms. Dickerson called Dr. Mora’s office complaining of three days of chest pain radiating to her back, decreasing when she was on her hands and knees. 3/5 RP 116-17; 3/19 RP 16. Later that morning, she went to his office where her vital signs were checked and positive heart tones or movement of both twins were noted. 3/5 RP 117;

² Because Ms. Dickerson also had problematic hyperthyroidism, Dr. Mora referred her to an endocrinologist, Dr. Turk. 3/5 RP 115-16; 3/17 RP 26-27; *see also* CP 2030.

³ Dr. Mora testified that performing ultrasounds every two weeks was not his understanding of the standard of care at the time. 3/5 RP 139-40. He laments not noticing that Dr. Holmgren had recommended ultrasounds every two weeks based on some new technology, but did what he had previously done and believed the standard of care was for patients like Ms. Dickerson. 3/5 RP 174-75.

3/11 RP 124; 3/17 RP 40-41; 3/19 RP 16-17.⁴ Told of Ms. Dickerson's symptoms, Dr. Mora instructed that she go to PeaceHealth for evaluation. 3/5 RP 126-27. His office called the childbirth center to provide background on Ms. Dickerson's status and orders for pulse oximetry, a non-stress test (NST), and labs. 3/5 RP 117-18; 3/19 RP 16-18.

According to Dr. Mora, he did not actually order an NST, nor did he have any expectation that an NST would be performed, as that is not a test that would be performed at a 25-week gestation.⁵ 3/5 RP 119-120. The order for an "NST" was a short-form abbreviation meant as a request for monitoring of fetal heart tones. 3/5 RP 119; *see* 3/19 RP 20.

2. Ms. Dickerson's February 6, 2008 visit to PeaceHealth.

Ms. Dickerson arrived at the childbirth center about 11:04 a.m. and was seen by Nurse Wahl, 3/19 RP 14, 38, 50, who would have reviewed the four pages of records Dr. Mora's office faxed over, and completed the triage form, except for parts that did not apply because Ms. Dickerson was not in labor. 3/19 RP 35-45; *see also* 3/11 RP 138. Nurse Wahl recorded assessments at 11:05, 11:30, and noon. 3/19 RP 45. Pulse oximetry was done and was "perfect." 3/19 RP 18-19, 51. Ms. Dickerson's blood

⁴ There was testimony that the reference to "plus plus" in the column for fetal heart tones in Dr. Mora's record meant either positive heart tones or fetal movement of both fetuses, both of which were good signs. *See id.*

⁵ Nurse Wahl, That an NST is not typically done (or reliable) at a 25-week gestational age, was confirmed by Nurse Wahl, 3/19 RP 19-20, 49, and experts for both sides, 3/3 RP 108, 3/11 RP 127-29, 3/17 RP 29-30.

pressure and temperature were normal. 3/19 RP 46. Her elevated resting pulse was of concern. 3/19 RP 46, 53, 55.

At 11:10 a.m., Nurse Wahl charted that labs were drawn and, with electronic fetal monitoring, she was able to get Baby A's heart rate of 136, but not Baby B's heart rate due to fetal movement. 3/4 RP 59-60; 3/19 RP 50-52. Because she got heart tones on Baby A and Baby B was moving, she concluded that the babies were not in distress. 3/4 RP 61-62. She had another nurse try to get a continuous fetal heart rate strip, and at 11:40, charted that she reported to Dr. Mora that two nurses were unable to get a continuous strip for Baby A or fetal heart tones for Baby B, and that Ms. Dickinson's heart rate was 108, 112.⁶ 3/4 RP 58-61; 3/19 RP 52-53.

At 11:50 a.m., Nurse Wahl documented that she was able to get fetal heart rates of 140 by Doppler for both babies, while the mother's heart rate was between 105 and 110 on the monitor. 3/19 RP 34, 54-55.

At 12:08 p.m., Dr. Mora came to see Ms. Dickinson. 3/19 RP 34. Given Ms. Dickinson's hyperthyroidism, the recent change in her thyroid medications, and her constellation of symptoms, Dr. Mora was concerned that she was having a "thyroid storm." 3/5 RP 126-28. He spoke with both Dr. Holmgren and Dr. Turk, the endocrinologist, and the decision

⁶ Difficulty in obtaining continuous heart rate tracings of both babies is not unusual at this gestational age, because the babies can flip and move around a great deal, such that you can hear them only for a short period of time. 3/5 RP 122; *see also* 3/17 RP 36.

was made to readjust Ms. Dickinson's thyroid medication. 3/5 RP 128-29. At 12:20, Nurse Wahl charted that Dr. Mora had spoken with Ms. Dickerson, and was discharging her home. 3/19 RP 34, 55-56.

The discharge decision was Dr. Mora's and Nurse Wahl was not uncomfortable with that decision. 3/19 RP 58. Nor did she believe that an ultrasound was necessary. It looked to her like the babies were doing well – they were moving and had normal heart tones. 3/19 RP 14. If she had thought an ultrasound was needed, or been uncomfortable with the discharge decision, she would have discussed it with Dr. Mora. 3/19 RP 14, 58. According to Dr. Mora, Nurse Wahl did what he wanted her to do, and provided him with the information he needed. 3/5 RP 129-30.

3. The diagnosis of TTTS and the twins' premature delivery.

After her discharge, Ms. Dickerson, still concerned, moved up her next appointment with Dr. Holmgren to February 12, 2008. 3/10 RP 41-43. At that appointment, she was diagnosed with TTTS. CP 2035. An ultrasound that day showed Baby A had anhydramnios, a lack of amniotic fluid, while Baby B had polyhydramnios, excess fluid. CP 2021. Baby A's growth was retarded; Baby B's was normal. CP 2024. Dr. Holmgren performed an amnio reduction, removing about a liter of fluid from Baby B's amniotic sac. CP 2035-36. The next morning, when Baby A appeared to be having fetal heart rate decelerations, which posed a risk of intra-

uterine fetal demise, it was decided to deliver the twins by C-Section. CP 2036-42. The decelerations, not TTTS, was the concern leading to the premature delivery. CP 2058; *see also* 3/18 RP 73.

4. The twins' subsequent course.

The twins were born alive, CP 2046, but one of the twins, Jillian, died at nine days old. 3/10 RP 62. The other twin, J.D., remained in the NICU about four months and then was sent to Children's Hospital. 3/10 RP 56-57. In July of 2008, the Dickersons were able to bring her home. 3/10 RP 70. She had a tracheotomy tube, and needed in-home nursing care because she had to be watched at all times. 3/10 RP 63-68.

One day in July 2008, Ms. Dickerson saw that the nurse had dislodged J.D.'s trach tube and that blood was pouring out. 3/10 RP 72-73. Ms. Dickerson called 911. 3/10 RP 73. She thought J.D. was dead. *Id.* J.D. was transported to the hospital, resuscitated, and transferred to Children's Hospital, where she stayed for about a month before returning home. 3/10 RP 74-75. J.D. has since undergone over 20 surgeries, 3/10 RP 96-97, and still has medical issues, 3/10 RP 108-09.

B. Procedural Background.

1. The lawsuits.

The Dickersons filed two lawsuits – one against Alliance for negligence in connection with J.D.'s hypoxic event in July 2008, *see* CP

1625; and the other against Dr. Mora and his group and PeaceHealth, CP 13-20. They settled with Alliance and Nurse Wencek for \$2.78 million, CP 1625, and with Dr. Mora and his group for \$1 million, CP 223-25.

2. The Dickerson's theory of the case against PeaceHealth.

The Dickersons' claims against PeaceHealth were tried to a jury. *See* CP 623. Their theory of liability, based on testimony of their maternal fetal medicine expert, Dr. Andrew Johnson, and their nursing expert, Joanna McGrath, was that, on February 6, 2008, Nurse Wahl and PeaceHealth failed to comply with the standard of care in monitoring and assessing the well-being of the twins, concluding they were not in distress, and failing to document Ms. Dickerson's and their status before discharge. 3/3 RP 82-84, 88, 118, 121, 131-37, 147-48, 157-58. According to Nurse McGrath, with an order for an NST Nurse Wahl should have obtained at least 20 minutes of fetal monitoring of the twins' heart rates and, when unable to do so, did not have an assessment of the fetuses' well-being, and should have advocated for an ultrasound. 3/3 RP 132-37, 147-48, 157-58. Nurse McGrath also testified that Nurse Wahl violated a number of hospital policies, breaching the standard of care. CP 159-87.

Dr. Johnson testified that serial ultrasounds as Dr. Holmgren had recommended was the standard of care for managing monochorionic twins at the time. 3/3 RP 41. He opined that ultrasound was the only way to

rule out TTTS, and had one been done on February 6, it would have revealed TTTS, which could have been treated with amnio reduction or laser ablation to keep the fetuses in the womb longer. 3/3 RP 42, 49-50, 62-64 75-77. He admitted that laser ablation was the preferred choice, and that it was possible that amnio reduction could lead to early delivery. *See* 3/3 RP 102-04. In his opinion, early diagnosis and intervention would have given Jillian “a chance” at survival, and the delay in diagnosis caused J.D.’s physical and cognitive problems. 3/3 RP 84-85.

3. PeaceHealth’s theory of the case.

PeaceHealth’s theory of the case, based upon the testimony of nursing expert Michelle Murray, maternal fetal medicine expert, Dr. Katharine Wenstrom, and Dr. Martin Walker, the only maternal fetal medicine specialist in Pacific Northwest who does laser ablation therapy, 3/18 RP 63-64, and the one who would have performed it had it been appropriate in Ms. Dickinson’s case, CP 2053-54, 2060, was that Nurse Wahl and PeaceHealth complied with the standard of care in their evaluation of Ms. Dickinson and the twins, and that a TTTS diagnosis and earlier intervention as of February 6, would not have changed the outcome.

Nurse Murray disagreed with Nurse McGrath, and testified that Nurse Wahl complied with the standard of care – she appropriately triaged Ms. Dickinson, took an appropriate history, filled in every pertinent chart

entry on the triage form, drew the labs that were ordered, and appropriately determined that there were normal fetal heart rates and fetal movement. 3/11 RP 129, 135, 138, 144-45, 147, 157. According to Nurse Murray, aside from the fact that it was not possible to get a continuous tracing for 20 minutes due to fetal movement, there was no need for a continuous tracing because Ms. Dickinson was not in labor. 3/11 RP 135-38, 150, 152-53. There was also no reason for Nurse Wahl to advocate for an ultrasound or think there was anything wrong with the twins when they were active and had normal heart rates. 3/11 RP 144, 154-55. Nurse Murray also disagreed with Nurse McGrath's conclusion that Nurse Wahl had violated any hospital policy or procedure. 3/11 RP 148-57.

Dr. Wenstrom agreed there was no reason Nurse Wahl should have advocated for an ultrasound once she found the babies' heart rates with the Doppler. According to Dr. Wenstrom, Nurse Wahl provided "the care that we would expect of any well-trained triage nurse. She assessed the patient properly. She followed the physician's directions. She provided appropriate feedback to the doctor. And she carried out all other duties in a timely manner, gave the patient a lot of attention." 3/17 RP 32-33.

According to Dr. Walker, had he seen Ms. Dickerson on February 6, 7, or 8, 2008, he would not have performed laser ablation; he would have done what Dr. Holmgren did, amnio reduction. 3/18 RP 73. As of

February 6, it was too late for laser.⁷ Ms. Dickerson was 25 5/7th weeks along in her pregnancy, 3/18 RP 64-65, “the die was cast,” and the inevitable premature delivery would have happened regardless of timing of treatment. 3/18 RP 74. Even an amnio reduction done earlier could have made the situation worse, resulting in an even earlier delivery. *Id.* The delivery of the twins was not related to the TTTS, but to unexplained heart rate decelerations in the smaller baby. 3/18 RP 73.

4. Pre-trial motions.

The trial court granted PeaceHealth’s motion for partial summary judgment, determining as a matter of law that Alliance and Nurse Wencek were negligent and that the jury would be allowed to apportion fault to them. CP 1976-79; *see also* CP 961-63, 978.

The Dickersons filed some 63 motions in limine, notable in the breadth of testimony they sought to exclude, CP 122-62, 215-22, while PeaceHealth filed sixteen, CP 61-84. Argument on the motions took two days, *see* 2/19 RP 4-213; 2/20 RP 6-106, with PeaceHealth arguing that the Dickersons were trying to unreasonably parse and script testimony, CP 309; 2/19 RP 26, 29, 43, and the Dickersons’ counsel acknowledging at one point that he did want to script the testimony. 2/19 RP 29. Of the

⁷ The FDA allows laser ablation only through 26 weeks of gestation, but after 24 weeks, it becomes more risky. 3/18 RP 60-61, 65. There is a 10% chance of losing both babies after laser ablation and 90% of the time one baby, and 70% of the time both babies will have some developmental disability after laser ablation. 3/18 RP 60.

motions in limine that were granted, CP 500-03, 507-21, 522-30, the Dickersons' claimed in post-trial motions that PeaceHealth violated eight – Plaintiffs' Motions in Limine Nos. 7, 17, 18, 25, 31, 58, and 63, and Defendants Motion in Limine No. 6. *See* CP 979-85, 1008-28.

Plaintiffs' Motion No. 7 to exclude any witness from testifying that another was lying, CP 124, was unopposed so long as it applied bilaterally. 2/19 RP 75-76; CP 289. Plaintiffs' No. 17 to exclude evidence or suggestion of plaintiffs' fault, CP 125, was agreed, as an unopposed partial summary judgment had already been granted on that issue. 2/19 RP 89; CP 294-95. Plaintiffs' No. 18 to exclude evidence or suggestion that the Dickersons should have conducted their own medical research or investigation, or failed to mitigate damages, CP 125, was agreed for the same reason. 2/19 RP 89; CP 295. Plaintiffs' No. 25 to preclude comparison of the Dickersons' request for damages to such things as "winning the lottery," "windfall," or "getting rich," CP 146-47, was unopposed. 2/19 RP 94; CP 297. Plaintiffs' No. 63 to exclude expert testimony lacking sufficient medical foundation, CP 221-22, was unopposed if applied bilaterally, CP 313, but with disagreement as to its scope, 2/19 RP 70-74.

Motion in Limine No. 31 to exclude evidence or suggestion that any defendant or agent of a defendant was "a 'good,' 'careful,' 'safe,' or 'conscientious,' person or medical provider," CP 127, was opposed, CP

298-99; 2/19 RP 103-07, but the trial court granted the motion for the time being, making clear it could be revisited, 2/19 RP 107.

Motion in Limine No. 58 to exclude any expert testimony that PeaceHealth's policies did not apply, CP 217-18, was opposed, CP 310-11, and the subject of extended argument, 2/19 RP 32-46. The Dickersons argued that such evidence would be contrary to the policies themselves and that the policies defined the standard of care. 2/19 RP 32-38. PeaceHealth responded that the policies are guidelines only and do not define the standard of care; rather clinical judgment must be used in deciding whether and how any policy applies to a particular patient 2/19 RP 39-40, 42-43. The trial court ultimately granted the motion with the understanding that witnesses could testify about the applicability of any given policy, and that "if we need to address it further when the witnesses come up, we certainly can. But for now I'll grant it." 2/19 RP 44-46.

Defendant's Motion in Limine No. 6 to preclude the Dickersons' counsel from making a Golden Rule argument or asking the jurors to put themselves in the Dickersons' position, CP 62, was granted. 2/20 RP 61.

5. Opening Statement

In opening statement, the Dickersons' counsel raised the issue of other defendants' settlements, stating as to Alliance and Nurse Wencek:

In the other case [against Alliance and Wencek] that really has nothing to do with this case -- and I'll explain to you why that has been *settled appropriately*. It's an interesting twist to this thing that everybody admits that the nurse in the Alliance case was negligent because she didn't follow the policies and procedures to safely take care of the child. But the safe policies don't apply in the PeaceHealth case. [2/27 RP 54 (emphasis added).]

Also in opening statement, the Dickersons' counsel made several remarks as to what he "believed" the evidence would show. 2/27 RP 28, 49, 50, 55. He even gave his personal belief as to the evidence, when as to the events of February 6, he stated: "**But believe me**, the standard of care was there. It was just completely ignored." 2/27 RP 35 (emphasis added).

After opening statements, PeaceHealth's counsel objected to the Dickersons' counsel's multiple references to what he believed about the case and the witnesses. 2/27 RP 102-03. The court declined to issue any relief at that time, stating "I don't know exactly what was said or wasn't. I didn't pay any attention to that." 2/27 RP 103.

PeaceHealth's counsel, during opening statement stated, with no contemporaneous objection, that Nurse Wahl was an "experienced, long-time nurse" with 24 years of experience, 2/27 RP 67, and referenced information from a medical record that would be admitted into evidence:

So what happened after Ms. Dickerson left the hospital? Well, there's no contact with Dr. Mora for that six days, until she went to U-Dub. No contact with St. Joseph's; didn't come into the hospital at all for any reason. And then on

February 12, Ms. Dickerson has this, what Dr. Holmgren described in her note, as a regularly scheduled check-up. I suspect that what happened was Ms. Dickerson moved her regularly scheduled check-up up. I think that's what happened. But anyway, on February 12th she goes in for this scheduled appointment, and she's very uncomfortable, not sleeping. She has this new symptom of shortness of breath.

2/27 RP 95-96. PeaceHealth's counsel ended his opening with: "Sue Wahl – a very good nurse – is not negligent in any way." 2/27 RP 101.

The next court day, the Dickersons' counsel objected to the reference to Nurse Wahl being an "experienced, long-time nurse,"⁸ claiming it violated motion in limine number 31:

Your Honor, our motion in limine, Number 31, which the Court granted, was for the exclusion of evidence, argument, inference, suggestion, et cetera, et cetera, that any employee of PeaceHealth is a good careful, safe or conscientious person or medical provider. So, what do we hear in opening? We have here that Sue Wahl is one of the most experienced nurses and OB nurses in Whatcom County ..., Your Honor. She is experienced in medical surgery, intensive care, critical care, and most particularly in maternal care, and for the last 24 years she has been in the labor and delivery units of the hospital. Again, very experienced, longtime nurse. The clear implication being, well, then, of course, she couldn't have made a mistake. [3/3 RP 7-8.]

PeaceHealth's counsel responded that the motion in limine did not cover experience, that it is not inappropriate to discuss experience, and that "every witness, every expert," will be asked about his or her experi-

⁸ Although the Dickersons, in their objection on March 3, did not complain about PeaceHealth's counsel's reference to Sue Wahl being a "very good nurse," they did complain about it in their post-trial motion for sanctions. CP 981.

ence. 3/3 RP 15. Indeed, when the court asked the Dickersons' counsel, whether he was suggesting that Nurse Wahl's experience, "many years['] experience," should not be mentioned to the jury, he responded "No, I'm not saying it can't be mentioned. I'm saying what we don't do is try to extrapolate from that experience." 3/3 RP 17-18.

The Dickersons' counsel also objected to the reference to the six days between Ms. Dickerson's discharge and her appointment at UW, claiming that it violated orders on Plaintiffs' Motions in Limine Nos. 17 and 18 precluding argument that the Dickersons were at fault. 3/3 RP 9. PeaceHealth's counsel responded:

All of those statements that they are worried about here were based on evidence that we are going to present. ...

● * * *

...I think I made the point in the opening that she had a regularly scheduled appointment that she had moved that – the one on the 21st up. ***I think I was just indicating what the facts are going to show when the jury sees those pieces of evidence.***

Now, with regard to Ms. Dickerson being at fault in any of that, I don't – I don't think that we made that intimidation [sic] and certainly we're not going to make that intimidation at all during the course of this. These are just factual matters. She didn't contact the hospital. We're not saying there's anything wrong with that.... Why didn't they [PeaceHealth] do anything that during that week? Because Ms. Dickerson never came back. ***That's not an intimidation that she did anything wrong and we don't have any experts that say that she did anything wrong*** in that regard. [3/3 RP 11-12 (emphasis added).]

The court reminded the jury that what lawyers say is not evidence and that

it had previously determined the Dickersons are not at fault. 3/3 RP 24-25.

6. Dr. Mora's testimony regarding Nurse Wahl.

The Dickersons' counsel read portions of Dr. Mora's deposition to the jury (prior to Dr. Mora's live testimony) where he was asked whether he trusted Nurse Wahl and he answered "Absolutely," and where he was asked whether he trusted Nurse Wahl to share with him any appropriate concerns and he answered "It's fair to say that I trusted her." 3/4 RP 99.

PeaceHealth argued that the Dickersons had opened the door with respect to the order on Plaintiff's Motion in Limine No. 31 regarding testimony that Nurse Wahl was a "good" or "conscientious" nurse, and that "the logical next question is, Why did you trust her? And I'm assuming his testimony is going to be, [b]ecause she's a very good nurse and I've worked with her for many years." 3/5 RP 7-9, 12. The court declined to find that the door had been opened, ruled that testimony by Dr. Mora that Nurse Wahl was "an excellent nurse" would be inappropriate, but indicated that a question "Why did you trust her?" would not be inappropriate, although the answer might violate the order in limine. 3/5 RP 12.

Defense counsel suggested, and the court agreed, that they ask Dr. Mora the question outside the presence of the jury, so that the court could hear his answer and rule, and so that Dr. Mora would not violate the order in limine. 3/5 RP 13, 101-02. This was important because defense

counsel could not speak with Dr. Mora to let him know of the constraints of the court's order.⁹ Dr. Mora was not represented by counsel for PeaceHealth, and in fact had his own counsel. 3/4 RP 17-18.

When Dr. Mora arrived in court, extensive colloquy between the court, counsel and Dr. Mora ensued, outside the presence of the jury. 3/5 RP 101-09. When asked why he trusted Nurse Wahl, he stated:

Well, I've worked with her side by side on a regular basis for probably 15 or 16 years and she is one of the most reliable nurses that we have in labor and delivery and that's from just a wealth of experience and we've established a rapport and that's quite frankly what I base part of the supposition that she told me everything. [3/5 RP 105.]

PeaceHealth argued that that was permissible testimony, the Dickersons objected, and the court ruled it was not admissible. 3/5 RP 105-06. Defense counsel then explained to Dr. Mora that he could not comment that Nurse Wahl was a good, careful or conscientious nurse. 3/5 RP 106.

When asked if he understood the limits, Dr. Mora responded:

Not entirely. I think – I mean my intent is to come here and speak the truth and the truth is as I just spoke, that – and I don't want to violate any orders, ***but if you're going to ask me about my experience with this specific nurse and a recollection of an event that occurred eight years ago, it's going to be difficult for me to separate my***

⁹ On March 4, defense counsel sought permission to speak with Dr. Mora to inform him of the court's orders in limine. 3/4 RP 14-15. Plaintiffs' counsel objected. 3/4 RP 15-16. The court denied the request to speak with Dr. Mora directly, but did allow defense counsel to speak with Dr. Mora's counsel. 3/4 RP 17-18. But, on the morning on March 5, 2014, when Dr. Mora was to testify, his attorney was not present, 3/5 RP 12-13, so defense counsel had no way to communicate the scope of the court's orders to Dr. Mora.

relationship with her, my dependence upon her as a trustworthy nurse, a professional, that's part of what makes me confident in my interaction that occurred on that day.

MR. GRAFFE: And I understand that and my – the gist of my questions is to have you say that but not have you then say that she is a good nurse or a conscientious nurse, et cetera, just limit it to the scope of your experience with her over the years.

DR. MORA: What I just said, would that be okay?

MR. GRAFFE: I believe it would be.

THE COURT: *That's fine. I think that sounded fine to me.*

3/5 RP 107-08 (emphasis added).

Later, in front of the jury, Dr. Mora testified as follows:

Q. Finally, Doctor, yesterday a portion of your deposition was read and it was brought out that you trusted Sue Wahl and that you trusted her to share any appropriate concerns?

A. That would be correct.

Q. Okay. Why did you trust Sue Wahl?

A. At that time I probably would have worked with her side by side for approximately 10 years. Her -- she is a nurse whom I trust and I have an excellent rapport with and her experience is vast and her reliability is excellent.

3/5 RP 130. After Dr. Mora's direct examination, and outside the jury's presence, the Dickersons' counsel asked the court to award \$100,000 in terms either against defense counsel or Dr. Mora, arguing, that Dr. Mora's testimony that "her experience is vast and her reliability is excellent" "is exactly where this witness was told not to go." 3/5 RP 131-32. The court indicated it was not going to make any ruling at that time. 3/5 RP 132-33.

7. Ms. Dickerson's testimony.

During her direct testimony, Ms. Dickerson, when asked about how she felt after her visit to PeaceHealth, testified:

A. This is the – this is the end of the road for me, you know, ***I mean the very first thing I would want to do after leaving there is be able to go to U-Dub and see Dr. Holmgren, but because they give me a clean bill of health. I can't go over there in an emergency.*** You know, the best I can do is wait for them, for Dr. Mora's office to move my appointment up, um, and go home and wait.

3/10 RP 41 (emphasis added). During a break in the direct examination, Juror No. 10 submitted a question: “How does a clean bill of health prevent you from seeking medical help elsewhere or how did it prevent you from getting extra help?” CP 831; 3/10 RP 82-83. The underlined words were triple-underlined by the juror. *Id.* After reading the question aloud outside the jury's presence, the Dickerson's counsel argued:

The jury has been twice instructed that the parents are not at fault for any of the health care decisions made in this. It's unfortunate that most jurors don't know how complex health care delivery is in the United States and without a referral by a doctor or a request by a doctor for places that you can't go and things that you can't see, and I don't know how our client would be able to answer this. I think the answer should be repeatedly, including at the end, that our clients are not at fault for any of the things that happened to them. [3/10 RP 83.]

The court responded: “I won't be reading the question in court. If counsel either of you wish to address it at some point in an appropriate fashion, you may do so.” 3/10 RP 84. When the Dickersons' counsel

persisted, the court indicated that it might entertain a closing instruction on the issue. 3/10 RP 84-85. The Dickerson's counsel stated:

Yeah. And I think the court understands the depth of our concerns about the opening statement that made an argument that you will note for four or five days they didn't come back, they didn't contact anybody, they didn't go any place. Someone is still troubled by that I would say. ***But the court corrected it.*** [3/10 RP 85 (emphasis added).]

8. Nurse Murray's disagreement with Nurse McGrath's testimony.

Disagreeing with Nurse McGrath, Nurse Murray testified that the care of Ms. Dickerson on February 6, 2008, was a triage situation, 3/11 RP 145, 157, and that the history taken by Nurse Wahl was appropriate. 3/11 RP 145. Regarding the need for an ultrasound or for going over Dr. Mora's head, Nurse Murray testified that she did not believe an ultrasound was needed "with babies with a normal heart rate and fetal movement," and that there was no need for Nurse Wahl to go over Dr. Mora's head. 3/11 RP 144-45, 154-55. Ultimately, she opined that Nurse Wahl met the standard of care and her assessment was appropriate. 3/11 RP 147, 157.

Regarding Nurse McGrath's testimony, Nurse Murray testified:

Q. I want you to assume that Nurse McGrath testified that there was quote no vital signs for the fetus, closed quote, do you agree with that?

A. Sir, pulse is a vital sign. A heart rate is a vital sign and we have the heart rates, so I can't agree with that.

Q. I want you to assume Nurse McGrath was critical of Nurse Wahl's care because there was no 20 minutes of

continuous tracing of the babies?

A. Well, there was about an hour of monitoring and an attempt to get both to stay under that piece of equipment and they wouldn't stay.

Q. Um, I want you to assume that there was a criticism by Nurse McGrath for a failure to assess fetal presentation and station, do you agree with that?

A. Well, there was a failure to do it but it was moot because she was not in labor. There is no evidence at all she was in labor, so the reasonable prudent nurse wouldn't put a glove on and put their hand in the vagina and push and feel around when a woman isn't in labor. It's not reasonable. It's not thinking about what you are supposed to do for this situation.

3/11 RP 150. When PeaceHealth's counsel asked Nurse Murray, in reference to one of the hospital policies, about Nurse McGrath's criticism that Nurse Wahl did not have "a continuous ten-minute monitoring to establish baseline or 20 minutes of continuous ... tracing to establish fetal well-being," the Dickersons' counsel objected, stating:

MR. SHEPHERD: Your Honor, we had a conversation about this. This witness comes and stands on her own, she is not here to tell this jury Nurse McGrath knows what she is doing or doesn't know what she is doing. She expresses her own opinion that stands up to my cross-examination. Nurse McGrath was cross-examined by PeaceHealth counsel. This is an inappropriate line of questioning.

3/11 RP 151. The court asked that the question be rephrased. *Id.* at 152.

After Nurse Murray's testimony, the Dickersons' counsel objected:

Bringing this witness to criticize my witness, in other words to imply that she is lying or doesn't know what she is talking about, is not appropriate. We talked about that in the motions in limine. Even more troublesome, there was a

representation that they had recently had her look at the policies and procedures and was going to testify that they weren't violated, except as to three of the five policies they had her talk about, she had testified they did not apply which is a violation of the motions in limine, and I would tell the court I'm going to ask for a hundred thousand dollars terms for that, also. And we will wait to deal with it later. [3/11 RP 159-60 (emphasis added).]

PeaceHealth's counsel responded:

... I don't think there is any violation of any order in limine. She put them in context and offered her opinions with respect to Nurse McGrath. She is not testifying at all that anyone is a liar. She just disagrees with her opinions and that's perfectly appropriate [3/11 RP 160.]

9. Jury instructions.

The Court's Instructions to the Jury included: (1) Instruction No. 22, CP 958, instructing the jury that "[t]he conduct of PeaceHealth and Nurse Wahl must be judged based solely upon the medical and care and services she or PeaceHealth provided that day;" (2) Instruction No. 23, CP 959, instructing that "there was no contributory negligence on the part of any plaintiff. Therefore, you may not attribute any portion of the damages in this matter to any acts or decisions of any plaintiff;" (3) Instruction No. 24, CP 960, instructing that "[n]one of the Dickersons were at fault, in any way, for any health care negligence or any damages suffered by the Dickersons in this matter. You must disregard any arguments, inferences or suggestions that any of the Dickersons were at fault in any way;" and (4) Instruction No. 27, CP 964, instructing that "[d]amages are given as

compensation to the plaintiffs for the injuries actually received by them.

They should be commensurate with the injuries, neither more nor less.”

10. Closing arguments

In closing argument, the Dickersons’ counsel again referenced the other defendants’ settlements, stating:

We are no longer suing Dr. Mora. ***Dr. Mora settled with the Dickersons because he understood and accepted his responsibility*** for this tragedy. We are no longer suing Alliance or Nurse Wencek. After litigation disclosed their role in this tragedy, ***they also understood and accepted their responsibility*** for this tragedy. [3/25 RP 19-20 (emphasis added).]

Despite the order in limine precluding argument that Nurse Wahl was a good, conscientious nurse, the Dickersons’ counsel argued:

I didn’t think I would argue lack of caring, but when I asked Nurse Wahl if she had read the medical records and was aware of the 15 percent chance of TTTS and the need for serial ultrasounds every two weeks and had re-examined her patient with that knowledge, would she have done anything different. She said no.

3/25 RP 29-30 (emphasis added).¹⁰ He then argued that, when Dr. Mora and Nurse Wahl did not discuss the case after learning the outcome, it was either wrong or “nobody cares.” 3/25 RP 30.

Despite the order precluding witnesses from suggesting that others were lying, the Dickersons’ counsel referred to a part of Dr. Holmgren’s

¹⁰ He even appealed to a couple of jurors who were nurses to consider whether they would have answered “no” or would not have done anything differently. 3/25 RP 30.

video deposition, CP 2060, to do just that:

And, then, we have the trial testimony by video of Dr. Holmgren. ***I do not remember any phone conversation with Dr. Mora. I do not want to say he is lying.*** I do not know why he would call me about a thyroid issue and why he would call me about an OB issue if he was not doing the ultrasounds. ***That's her testimony. I do not remember any phone conversation. I do not want to say that he is lying.*** I do not know why he would call me about a thyroid issue and I do not know why he would call me about an OB issue if he wasn't doing the ultrasound.¹¹ [3/25 RP 43 (emphasis added).]

Regarding money, the Dickersons' counsel said:

I told you at the beginning of this case I was going to ask you for more money than PeaceHealth could possibly imagine, but no more than I thought you would understand what children were worth. We are asking for \$12 million for the pain and suffering and death of Jillian and \$24 million for Jessica and her parents. [3/25 RP 67 (emphasis added).]

He also referenced money paid in settlements and by insurance:

The money adds up fast. You have, of course, been told something that you are going to have to struggle [with] but here is what you need to know, when we are talk[ing] about the ***money that has been paid by Alliance and the money that has been paid by Mora, the money that has been paid by the insurance companies,*** when you set the damages in this case and you set it based upon what the damages are, the judge will work through all of who pays what and who gets what and what we do with all of that. ... [3/25 RP 74-75 (emphasis added).]

¹¹ Dr. Holmgren did not testify that she “did not know why he would call me about a thyroid issue”; she testified that “it’s not unusual for physicians to call me and to discuss with me situations regarding her hyperthyroidism without mentioning any obstetric issue.” CP 2063. Nor did she testify that she did not know why Dr. Mora would call here about an OB issue if he was not doing the ultrasounds. See CP 2011-65.

After the Dickersons' closing arguments, PeaceHealth's counsel moved for a mistrial:

MR. GRAFFE: ... Mr. Shepherd *argued that there was a lack of, quote, caring, closed quote, by PeaceHealth in general and in nurse, and Sue Wahl in particular.* It was not a slip of the tongue. His closing arguments is, is, um, largely being read. When he said the word "lack of caring", he referenced lack of caring, ah, he then later, close in time, acknowledged that he was arguing a lack of caring. *I think it is, it's a violation of the order in limine. It cannot be considered anything but an intentional violation, when we have had multiple discussions about that order in limine.* And because of that, I don't want to but I have to, to protect the record, move for a mistrial. It's a clear intentional violation of an order in limine that we have had multiple discussions on and *we have been precluded from bringing out any evidence of Sue Wahl's caring and he intentionally argues to this jury a lack of caring by Sue Wahl.*

* * *

... The record will bear me out. If the court is not inclined to grant that, I think the only other option is a curative instruction that I would submit should be given and it should state as follows: Mr. Shepherd's argument that Sue Wahl is not caring is improper and violates orders of this court and should be disregarded by you.

3/25 RP 50-52. The trial court declined to give a curative instruction or grant the motion for mistrial. 3/15 RP 52.

In his closing argument, PeaceHealth's counsel emphasized that the jury had to determine whether the Dickersons met their burden of proof on every issue, 3/25 RP 83-87, discussed in detail the evidence establishing that Nurse Wahl had acted appropriately and complied with the

standard of care, 3/25 RP 87-106, and pointed out the lack of causation evidence, 3/25 RP 106-17. He then turned to the issue of money, stating:

We talked about money. *We don't think you will get there because as I'll show to you, the evidence is that you answer the first question, no, there was no negligence,* there was no malpractice in this case, I'm not doing my job if I don't address everything Mr. Shepherd addresses, so I'm going to talk about money. *The first thing is we are talking real dollars. Big numbers are thrown around, um, thinking in your own life how long it takes to save money.* [3/25 RP 116-117 (emphasis added).]

Three pages of argument later, PeaceHealth's counsel concluded by asking for a defense verdict, stating:

You know, [co-defense counsel] Mr. Bernham [sic, Burnham] asked you at the beginning of this case ... *if at the end of the day, you come to the conclusion that plaintiff has not met their burden of proof, can you tell this family no? And answer that question no.* And everyone of you said you could. You come back through that door and you say the answer to question number one is no. *Really in the context of this case because we know what happened with the other litigation, he is the one that told you about the settlement. What he is really saying is no, no more. No, no more.* [3/25 RP 120-21 (emphasis added).]

The Dickersons argued that PeaceHealth had opened the door to a Golden Rule argument because of the “how long it takes to save money” comment. 3/25 RP 122. The court agreed. 3/25 RP 122. In rebuttal closing, the Dickersons' counsel responded not only to that comment, but also to the “no more” comment (to which he had voiced no objection). 3/25 RP 131-32.

11. The jury's verdict.

The jury returned a verdict for PeaceHealth, finding no negligence and never reaching questions of causation, damages, or apportionment of fault. CP 974-78.

12. The post-trial motions.

The Dickersons filed post-trial motions seeking (1) a new trial based upon alleged violations of the orders on the Dickersons' Motions in Limine Nos. 7, 17, 18, 31, and 58, CP 1008-41; (2) monetary sanctions, based on alleged violations of the Dickersons' Motions in Limine Nos. 17, 18, 25, 31, 63, and PeaceHealth's Motion in Limine No. 6, CP 979-85, and (3) judgment notwithstanding the verdict, CP 1042-63. PeaceHealth opposed all three motions. CP 1187-99; CP 1333-41; CP 1200-23.

The trial court granted the Dickersons' motions for new trial and monetary sanctions, CP 1456-62, but denied the motion for judgment notwithstanding the verdict on June 10, 2014. CP 1463-64. The trial court attached to its Order Granting Post-Trial Sanctions and New Trial, a "Supplemental Statement and Findings of the Court on Motion for New Trial." CP 1460-62. In the letter, the court specifically referenced only two matters: (1) testimony of Dr. Mora which the court concluded violated the order in limine prohibiting describing nurse Wahl as good, caring or conscientious; and (2) PeaceHealth's counsel's closing argument com-

ments regarding “how long it takes to save money” and “no more money,” which the trial court apparently concluded violated the order in limine precluding any “golden rule” argument. CP 1461. Otherwise, the trial court merely indicated that it concurred with the analysis of the multiple violations of Orders in Limine that the Dickersons set forth in their Motion for a New Trial. CP 1461. The trial court concluded that, while no one violation of a motion in limine was enough to justify a new trial, CP 1460, the cumulative effect of the multiple violations set forth in the Dickersons’ Motion for a New Trial did. CP 1461. In addition to the new trial grant, the court awarded sanctions of \$50,000, plus expert witness fees and other costs that will be duplicated at the second trial. CP 1462.

PeaceHealth filed its notice of appeal on June 18, 2014. CP 1465-76. The trial court subsequently determined the amount of expert witness fees and costs it should award as sanctions, and entered a Partial Judgment on Sanctions for a total of \$105,306.34 on August 4, 2014. CP 2072-74.

V. STANDARD OF REVIEW

Orders granting monetary sanctions for alleged misconduct are reviewed for abuse of discretion. *Roberson v. Perez*, 123 Wn. App. 320, 343, 96 P.3d 420, (2004), *rev. denied*, 155 Wn.2d 1002 (2005) (citing *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (“*Fisons*”). Orders on motions

for new trial are also reviewed for abuse of discretion, *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000) (“*ALCOA*”), unless based on an error of law, subject to *de novo* review. *Teter v. Deck*, 174 Wn.2d 207, 222, 274 P.3d 336 (2012). Ordinarily a stronger showing will be needed to overturn the grant, as opposed to the denial, of a new trial. *ALCOA*, 140 Wn.2d at 537.

The abuse of discretion standard “does not constitute a license for the trial court to weigh the evidence and substitute its judgment for that of the jury, simply because the trial court disagrees with the verdict.” *Bunnell v. Barr*, 68 Wn.2d 771, 775, 415 P.2d 640 (1966). In reviewing a new trial ruling based on alleged misconduct of counsel for abuse of discretion, the appellate court decides 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” *ALCOA*, 140 Wn.2d at 537 (citations omitted). “This rule of abuse of discretion specific to motions for new trial stands in juxtaposition to the general test for abuse of discretion set forth in *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971): ‘that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” *ALCOA*, 140 Wn.2d at 537.

VI. ARGUMENT

- A. The trial court's order granting new trial and supplemental statement do not comply with CR 59(f).

CR 59(f) provides:

In all cases where the trial court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record that cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

“The purpose of CR 59(f) ‘is to permit appellate review of the basic question raised by an order granting a new trial, which is whether the party received a fair trial.’” *Gestson v. Scott*, 116 Wn. App. 616, 620, 67 P.3d 496 (2003) (citation omitted).

Here, the trial court's order granting new trial sets forth no reasons, and the Supplemental Statement attached to the order sets forth only two specific reasons: (1) the testimony of Dr. Mora as to why he trusted Nurse Wahl; and (2) the comments about money PeaceHealth's counsel made in closing. Given that CR 59(f)'s purpose is to permit appellate review, review in this case should be limited to those two matters.

- B. The Two Reasons Identified in the Trial Court's Supplemental Statement Do Not Justify a New Trial or Monetary Sanctions.

The *ALCOA* court approved the following test for evaluating a motion for new trial based on alleged prejudicial misconduct of counsel:

As a general rule, the movant must establish that the conduct complained of constitutes misconduct (and not mere aggressive advocacy) and that the misconduct is prejudicial in the context of the entire record.... The movant must ordinarily have properly objected to the misconduct at trial ... and the misconduct must not have been cured by court instructions. [Citations omitted.]

ALCOA, 140 Wn.2d at 539. The *ALCOA* court also stated the test for determining whether a trial court abused its discretion in granting a new trial based on alleged attorney misconduct as whether “such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent [the] litigant from having a fair trial....” *Id.* at 537.

1. Dr. Mora did not violate any order in limine.

In its Supplemental Statement, the trial court stated its belief that Dr. Mora’s testimony about Nurse Wahl violated the Order on Plaintiff’s Motion in Limine No. 31, prohibiting any evidence that she was a “good,” “careful,” “safe,” or “conscientious” person. The trial court also apparently believed that Dr. Mora’s testimony was PeaceHealth’s counsel’s fault. Both beliefs are erroneous and not supported by the record.

First, one can hardly blame PeaceHealth’s counsel for Dr. Mora’s answer to a question the trial court permitted PeaceHealth’s counsel to ask. PeaceHealth’s counsel did not represent Dr. Mora. Dr. Mora, a former defendant who settled, had his own attorney. 3/4 RP 17-18. PeaceHealth’s counsel could not even speak to Dr. Mora to tell him about

the orders in limine. *See* footnote 9, *supra*.¹²

After the Dickerson's counsel read to the jury parts of Dr. Mora's deposition where he was asked whether he trusted Nurse Wahl, and testified that he did "[a]bsolutely," 3/4 RP 99, and the trial court indicated that asking why he trusted her would not be an inappropriate question, 3/5 RP 12, PeaceHealth's counsel made sure that he first asked the question of Dr. Mora outside the jury's presence so that the trial court could hear the answer and determine whether it would violate the order in limine. 3/5 RP 13, 101-09. Ultimately, the court **approved** the following response by Dr. Mora to the question, "why do you trust Nurse Wahl?":

if you're going to ask me about my experience with this specific nurse and a recollection of an event that occurred eight years ago, it's going to be difficult for me to separate my relationship with her, my dependence upon her as a trustworthy nurse, a professional, that's part of what makes me confident in my interaction that occurred on that day.

3/5 RP 107-08. Then, when PeaceHealth's counsel asked that question in the presence of the jury, Dr. Mora responded:

At that time I probably would have worked with her side by side for approximately 10 years. Her – she is a nurse whom I trust and I have an excellent rapport with and her experience is vast and her reliability is excellent.

¹² *See also, Loudon v. Mhyre*, 110 Wn.2d 675, 675076, 682, 756 P.2d 138 (1988) (prohibiting defense counsel from having ex parte contact with a plaintiff's nonparty treating physician); *Smith v. Orthopedics, Int'l Ltd., P.S.*, 170 Wn.2d 659, 641, 244 P.3d 939 (2010) (prohibiting defense counsel from having ex parte communications with the attorney for plaintiff's nonparty treating physician).

3/5 RP 130. The Dickersons' counsel then objected, asking for \$100,000 in terms, and the court declined to rule. 3/5 RP 131-33. There is no basis for the trial court's post-trial conclusion that defense counsel somehow bore fault for Dr. Mora's response.

Second, there is no basis for inferring that Dr. Mora's response was improper or violative of any order in limine. In its Supplemental Statement, the trial court stated:

[I]t is true that the exact words of Dr. Mora's testimony were not specifically prohibited by the Order in Limine, but the list of prohibited words was not intended to be exhaustive.... Indeed, I find that the testimony violated the Order just as clearly as if the actual words from the Order had been used. I do not fault Dr. Mora, as he was merely testifying to the best of his ability [CP 1461.]

Yet, Dr. Mora's response in front of the jury was not materially different than his response outside the presence of the jury that the Court specifically approved. The response outside the presence of the jury that the trial court said "sounded fine," was that it was his relationship with Nurse Wahl, his dependence on her as a trustworthy nurse, and that she was a professional, that made him confident in his interaction with her that day. 3/5 RP 107-108. In front of the jury, he testified that he worked side by side with her for ten years, trusted her, had excellent rapport with her, and that her experience was vast and her reliability was excellent. 3/5 RP 130. There is no material difference between those two statements.

Dr. Mora's reference to Nurse Wahl's experience should not be a problem, as she and other witnesses testified to their experience, and even the Dickersons' counsel conceded that Nurse Wahl's many years of experience could be mentioned. 3/3 RP 17-18. Dr. Mora's use of the word "trust" could not be a problem, as the Dickersons' counsel read to the jury parts of Dr. Mora's deposition where he testified that he trusted Nurse Wahl. His reference to his having excellent rapport with her was not materially different from his court-approved statement that it was in part his relationship with and dependence on her that led him to trust her. And, his statement that "her reliability is excellent" is basically the same as his statement that she was "a trustworthy nurse," a statement that the trial court said "sounded fine." Indeed, "trustworthy" means "warranting trust; reliable." THE AMERICAN HERITAGE DICTIONARY, p. 1300 (2d ed. 1982). Thus, "trustworthiness" and "reliability" are synonymous. Because there was no material difference between the "court-approved" answer and the answer given in front of the jury, the trial court abused its discretion in finding Dr. Mora's testimony violated the order in limine or justified granting a new trial.

Third, even if some aspect of Dr. Mora's testimony about why he trusted Nurse Wahl could be deemed improper on this record, the trial court instructed the jury that "[t]he conduct of PeaceHealth and Nurse

Wahl must be judged based solely upon the medical and care and services she or PeaceHealth provided that day.” CP 958. Jurors are presumed to have followed the court’s instructions. *A.C. v. Bellingham Sch. Dist.*, 125 Wn. App. 511, 521-22, 105 P.3d 400 (2005). Dr. Mora’s answer could not have engendered such prejudice in the jurors’ minds as to deprive the Dickersons of a fair trial. *See ALCOA*, 140 Wn.2d at 537. Nor could his answer be attributed to PeaceHealth’s counsel, who did not represent him and went to great lengths to avoid having him violate any court order.

2. Defense counsel’s comments in closing argument were not inappropriate or violative of orders in limine.

In its Supplemental Statement, the trial court also cited as reasons for its new trial order two comments PeaceHealth’s counsel made in closing argument: (1) the “No, no more. No, no more” comment, 3/25 RP 121; and (2) the “thinking in your own life how long it takes to save money” comment, 3/25 RP 116-17, which the trial court appears to equate with a Golden Rule argument. CP 1461. A review of those comments in context, and the arguments the Dickerson’s counsel had made that preceded them, shows that PeaceHealth’s counsel’s statements were not inappropriate and did not violate any motions in limine.

The Dickersons’ counsel in closing argument attempted to imply that PeaceHealth must be a “bad” hospital and Nurse Wahl must be a

“bad” nurse when he told the jury that they were no longer suing Dr. Mora because he “settled with the Dickersons because he understood and accepted his responsibility for this tragedy,” and were no longer suing Alliance or Nurse Wencek because “[a]fter litigation disclosed their role in this tragedy, they also understood and accepted their responsibility,” 3/25 RP 20. He even went so far as to directly accuse Nurse Wahl of a “lack of caring,” 3/25 RP 29, notwithstanding the order in limine he obtained precluding the defense from presenting evidence or argue that she was or anyone else at PeaceHealth was good or conscientious, CP 515.

Then when the Dickersons’ counsel turned to the issue of money, he reminded the jury that he had said at the beginning of the case that he “was going to ask for more money than PeaceHealth could possibly imagine,” and the asking the jury for \$36 million in general damages alone. 3/25 RP 67. In talking about money he further stated that “[t]he money adds up fast” and referenced the money Dr. Mora, Alliance, and insurance companies had already paid. 3/25 RP 74.

Against this backdrop defense counsel began his closing. He emphasized the Dickersons’ burden of proof, and how the jury had to determine whether they had met it. 3/25 RP 83-87. He detailed how Nurse Wahl met the standard of care. 3/25 RP 87-106. And, he explained the lack of causation evidence. 3/25 106-17. He then addressed the tens of

You know, Mr. Bernham [sic] asked you at the beginning of this case ... if at the end of the day, you come to the conclusion that plaintiff has not met their burden of proof, can you tell the family no? ... And everyone of you said you could. You come back through that door and you say the answer to question number one is no. Really in the context of this case because we know what happened with the other litigation, he [the Dickersons' counsel] is the one that told you about the settlement. What he is really saying is no, no more. No, no more.

3/25 RP 120-21. The Dickersons' counsel, when objecting at the end of PeaceHealth's closing, did not object or request a curative instruction to the "No, no more." comment. *See* 3/25 RP at 121-23. It was not until his post-trial motion that he raised any objection to that comment. CP 981-82. As a result, any claim of error as to that comment has been waived. *See State v. Weber*, 159 Wn.2d 252, 270-72, 149 P.3d 646 (2006) (a party must still object to alleged misconduct even if covered by a motion in limine or the error is waived unless the misconduct is so flagrant that it could not be cured); *A.C.*, 125 Wn. App. at 525 ("[a] standing objection to evidence in violation of a motion in limine, preserving the issue for appeal, is only allowed to the party losing the motion").

The statements PeaceHealth's counsel made in closing argument were not improper. Nor did they constitute a Golden Rule argument.¹⁴ *See A.C.*, 125 Wn. App. at 524. In *A.C.*, the Court of Appeals considered

¹⁴ Nor did they violate the order on Plaintiff's Motion in Limine No. 25 prohibiting referring to the Dickersons' request for damages as "winning the lottery," "windfall," or "getting rich," as the Dickersons claimed in the post-trial motion for sanctions, CP 981.

whether the following constituted an improper “Golden Rule” argument:

And think about really what it boils down to is what’s the value of a dollar. What do you have to go through to get your dollars? What do they mean to you when you have them? Think about what it means to you. ... If you had that amount of money, what would it mean to you? Would it be a lot of money to you? ...

Id. The Court of Appeals concluded that it did not, stating:

[T]his was not an improper ‘golden rule’ argument. The [defendant] was not appealing to the jury to put themselves in its position and then decide whether they would want to be found guilty of negligence. It was telling the jury to determine what amount of money would compensate [plaintiff] and what that money means to them.

Id. The same is true of the statements at issue here, which were far shorter and less emphatic than those made in *A.C.*¹⁵

Although the trial court tried to distinguish *A.C.* by stating that the comments here were not designed to determine how much money was appropriate to compensate plaintiff, “but rather focused on emphasizing the need to award no money whatsoever,” CP 1461, this attempt to distinguish *A.C.* fails. *A.C.* came to the Court of Appeals after a defense verdict, so defense counsel in that case, as here, likely asked for a defense verdict, and then, as here, addressed the issue of damages in the event that

¹⁵ The trial court seemed to think that the two comments – “how long does it take to save money” and “no more” were stated consecutively as part of the same thought or argument, CP 1461, perhaps because that is the way the Dickersons made them appear in their post-trial motion for sanctions, CP 981. But the two comments were not made together as part of the same thought. The “save money” comment was made at page 116-17 of the transcript, while the “no more” comment was made at page 121. They were different parts of the defense closing argument.

the jury found liability. Here, where PeaceHealth's overriding theme was that the Dickersons had not proven their case and the jury should answer "no" to the question whether PeaceHealth was negligent, there was nothing improper about emphasizing that "no money whatsoever" should be awarded to the Dickersons against PeaceHealth.

Moreover, the "how long does it take to save money" comment was in response to the Dickersons' own arguments, asking the jury "for more money than PeaceHealth could possibly imagine" and stating how "the money adds up fast." 3/25 RP 67, 74.

The two statements PeaceHealth's counsel made in closing argument did not constitute misconduct, and amounted to no more than "mere aggressive advocacy," if that. That is not enough to justify a new trial. *ALCOA*, 140 Wn.2d at 539. Nor can it be said that the two comments, especially, when considered in the context of the entire record, including the Dickersons' own closing arguments, and the fact that the jurors never reached the question of damages, so engendered a feeling of prejudice in the minds of the jury as to prevent the Dickersons from having a fair trial. *Id.* at 537. The trial court abused its discretion in granting a new trial and awarding monetary sanctions based on statements PeaceHealth's counsel made in closing argument.

C. The Dickersons' Other Claims of Misconduct Contained in Their Post-Trial Motions, If Considered on Review, Do Not Justify a New Trial or Monetary Sanctions.

As previously noted, review of the order granting new trial should be limited to the two specific reasons the trial court identified in its Supplemental Statement. If, however, this Court chooses to review the other allegations of misconduct the Dickersons raised in their post-trial motions, the result should be the same. The trial court still abused its discretion in granting a new trial and awarding monetary sanctions.

1. Defense counsel did not assert in opening statement that Ms. Dickerson was at fault.

During opening statements, defense counsel stated:

So what happened after Ms. Dickerson left the hospital? Well, there's no contact with Dr. Mora for that six days, until she went to U-Dub. No contact with St. Joseph's; didn't come into the hospital at all for any reason. And then on February 12, Ms. Dickerson has this, what Dr. Holmgren described in her note, as a regularly scheduled check-up.

2/27 RP 95. The Dickersons argued this statement violated the order in limine precluding evidence or suggestion that the Dickersons were at fault.

3/3 RP 7-9. It did not. The statement was a true statement about the timeline of care, and was based on information from Exhibit 7, which was admitted into evidence. CP 651. A party is entitled to state what the evidence will show. *McCarty v. Hagen*, 67 Wn. 2d 434, 438, 407 P.2d 953 (1965) (holding that “the function of an opening statement of counsel

is to briefly state the issues and the proof thereunder which it is expected to elicit.”) At no time did PeaceHealth’s counsel attempt to argue or intimate that Ms. Dickerson was at fault. As PeaceHealth explained at the time, the statement merely explained why PeaceHealth had no further involvement and did nothing more after the February 6, 2008 visit. That was not misconduct or violative of any order in limine.

Even if the statement were construed as suggesting that Ms. Dickerson was at fault, it was cured by the court’s instruction that:

I will remind you [the jury] that the Court has previously entered an order declaring that none of the Dickerson’s were at fault in any way for any health care negligence or any damages sought by the Dickerson’s in this matter, and also no witness has testified or suggested that there was any negligence on the part of the University of Washington or Dr. Calla Holmgren in this matter.

3/3 RP 25. It was also cured by Court’s Instructions Nos. 23 and 24 at the end of the case. *See* CP 959-60. The jury is presumed to have followed those instructions. *A.C.*, 125 Wn. App. at 521-22.

2. Defense counsel’s reference to nurse Wahl’s experience in opening statements was not inappropriate.

In opening statement, without any contemporaneous objection, PeaceHealth’s counsel referred to Nurse Wahl as being “an experienced, long-time nurse” with 24 years of experience. 2/27 RP 67. The next court day, the Dickersons’ counsel objected, claiming that this statement violated the order in limine precluding any reference her being a “good,”

“careful,” “safe,” or “conscientious” nurse. 3/3 RP 7-8; CP 981; 1016-18. After questioning by the court, the Dickersons’ counsel conceded that he was not saying that Nurse Wahl’s many years of experience could not be mentioned. As a treating provider, who could give both fact and opinion testimony, *e.g.*, *Carson v. Fine*, 123 Wn.2d 206, 216, 867 P.2d 610 (1994); *Christensen v. Munsen*, 123 Wn.2d 234, 239-40, 867 P.2d 626 (1994), the jury could properly consider Nurse Wahl’s experience in evaluating her testimony. *See* WPI 2.10.

Although the Dickersons did not object to it in opening statements, they claimed in their post-trial sanctions motion, CP 981, that PeaceHealth’s statement in opening that “Sue Wahl – a very good nurse – is not negligent in any way,” 2/27 RP 101, was improper. Because they did not object to this statement at the time, they waived any claim of error. *See State v. Weber*, 159 Wn.2d at 270-72; *A.C.*, 125 Wn. App. at 525. Even if technically violative of Plaintiff’s Motion in Limine No. 31, the statement did not justify the granting of a new trial or sanctions. It was a passing reference near the beginning of a five-week trial that carried no prejudice. It is not the kind of statement that could be said to engender such prejudice in the minds of the jury as to deprive the Dickersons’ of a fair trial. *See ALCOA*, 140 Wn.2d at 537. Ultimately, the trial court instructed the jury that “[t]he conduct of PeaceHealth and Nurse Wahl must be judged based

solely on the medical and care and services she or PeaceHealth provided that day,” an instruction the jury is presumed to have followed.¹⁶ *A.C.*, 125 Wn. App. at 121-22.

3. The question Juror 10 posited during Ms. Dickerson’s testimony was based on Ms. Dickerson’s testimony, not any conduct by PeaceHealth’s counsel.

During direct examination, Ms. Dickerson testified about how she felt after her discharge from PeaceHealth, stating:

...I mean the very first thing I would want to do after leaving there is be able to go to U-Dub and see Dr. Holmgren, but because they give me a clean bill of health. I can’t go over there in an emergency.....

3/10 RP 41 (emphasis added). During a break in Ms. Dickerson’s direct examination, Juror No. 10 submitted the following question for Ms. Dickerson: “How does a clean bill of health prevent you from seeking medical help elsewhere or how did it prevent you from getting extra help?” CP 831; 3/10 RP 83.

The Dickersons’ counsel argued that this question showed that someone on the jury was still troubled by PeaceHealth’s opening statement reference to the fact that Ms. Dickerson did not come back to Dr. Mora or PeaceHealth in the six days between her discharge from

¹⁶ It seems disingenuous for the Dickersons to claim that the statement in opening that Nurse Wahl was a “very good” nurse was so improper as to justify a new trial, when their own counsel in closing argument decided argue a “lack of caring” on Nurse Wahl’s part, and the trial court refused to do anything about it. See 3/25 RP 29, 50-52.

PeaceHealth and her moved up visit to UW, and was faulting her for it. 3/10 RP 83, 85; *see also* CP 1011-16. That is simply not true. One need only compare the phrasing of Ms. Dickerson's testimony – "because they gave me a *clean bill of health*" – with the phrasing Juror 10 used in the question – "*how does a clean bill of health* prevent you from seeking medical help elsewhere" to see that the question related to Ms. Dickerson's testimony not anything that PeaceHealth had said in opening.

In any event, the court declined to read the question to the witness, but allowed counsel, if they desired, to address that issue with the witness. 3/10 RP 84-85. And, to the extent the Dickersons' counsel was still concerned about what PeaceHealth had said in opening, he admitted that the trial court had "corrected it." 3/10 RP 85. Moreover, plaintiffs' counsel requested, and the court gave, two additional jury instructions stating that the plaintiffs were not at fault. CP 959-60.

4. Nurse Murray did not testify that Nurse McGrath was lying and did not violate any order regarding hospital policies.

The Dickersons claimed, both at the time of Nurse Murray's testimony, 3/11 RP 151, 159-60, and in their motion for new trial, CP 1019-25, that Nurse Murray violated the order on Plaintiff's Motion in Limine No.7 precluding one witness from testifying that another witness was lying, when she was expressed her disagreement with what she was

asked to assume about Nurse McGrath's testimony. There is no question that Nurse Murray disagreed with Nurse McGrath's opinions. *See* pages 21-22, *supra*. But nowhere in that disagreement, or in any other part of her testimony, did Nurse Murray ever testify, nor was she asked to testify, that Nurse McGrath was lying. Indeed, the only person who used the testimony of one witness to suggest that another witness was lying was the Dickersons' own counsel, when, while misstating Dr. Holmgren's testimony, *see* footnote 11, *supra*, he argued in closing:

And, then, we have the trial testimony by video of Dr. Holmgren. ***I do not remember any phone conversation with Dr. Mora. I do not want to say he is lying.*** I do not know why he would call me about a thyroid issue and why he would call me about an OB issue if he was not doing the ultrasounds. ***That's her testimony. I do not remember any phone conversation. I do not want to say that he is lying....***

3/25 RP 43 (emphasis added).

Contrary to the Dickersons' assertions, one expert expressing disagreement with what another expert says is not the same as calling someone a liar. Nor is it improper. *See, e.g., In re Steffen*, 342 B.R. 861, 871 n. 3 (Bankr. M.D. Fla. 2006) (while an expert cannot attack another expert's credibility, critiquing another expert's opinions is proper).

The Dickersons also argued in their motion for new trial that Nurse Murray violated the order on Plaintiff's Motion in Limine No. 58, when she testified that certain policies did not apply. But, that argument ignores

that, while the trial court granted the motion, it did so with the understanding that the experts would be allowed to testify that the policies are guidelines, and their applicability may vary. *See* 2/19 RP 44-46.

Nurse Murray testified that the policies were guidelines and that Nurse Wahl complied with them to the extent applicable in Ms. Dickerson's case. 3/11 RP 148-57. She did not testify that the policies are inapplicable generally, but stated her opinions as to whether, and to what extent, various policies were applicable to Ms. Dickerson. For example, Nurse Murray responded to Nurse McGrath's criticism that Nurse Wahl did not assess fetal presentation and station by stating that, while that was not done, there was no reason to do it because Ms. Dickerson was not in labor. 3/11 RP 150. This is consistent with the court's comments during argument on Motion in Limine No. 58 that the defense experts would be allowed to testify that "we [nurses] may not follow all of them [the policies] to the letter as long as they can explain why." 2/19 RP 45.

D. The Trial Court Abused Its Discretion in Finding that There Were Repeated Violations of Orders in Limine, the Cumulative Impact of Which Warranted a New Trial and Monetary Sanctions.

In its Supplemental Statement attached to the Order Granting Post-Trial Sanctions and New Trial, the trial court acknowledged that it did not find that any single violation of an Order in Limine, standing alone, would justify the grant of a new trial. CP 1460. Rather the trial court concluded

that it was the cumulative impact of repeated violations of orders in limine that led it to grant a new trial and monetary sanctions. CP 1460-62. But, considering the two specific reasons the trial court identified for granting a new trial, or analyzing every purported violation of an order in limine that the Dickersons alleged in their motions for new trial and sanctions, as the preceding arguments show, there were no multiple violations of orders in limine to cumulate to find the kind of prejudice needed to grant a new trial or to impose monetary sanctions.

Before a new trial may be granted on grounds of attorney misconduct, there must be misconduct, not mere aggressive advocacy, and that misconduct must be prejudicial in the context of the entire record, must have been objected to at the time, and must not have been cured by court instructions. *ALCOA*, 140 Wn.2d at 539.

Regarding monetary sanctions, Washington law provides that the purpose of monetary sanctions is “to deter, to punish, to compensate and to educate.” *Fisons*, 122 Wn. 2d at 356. Of course, before sanctions may be imposed, there must be a sufficient factual basis on which to deter, punish, compensate or education.

Here, the two specific occurrences cited by the trial court, as well as the other occurrences identified in the Dickersons’ motions for new trial and monetary sanctions, either were not misconduct or violative of orders

in limine, or, if deemed technically violative of some order in limine, were minor in the context of the entire trial and corrected by the trial court, and could not fairly be said to have engendered in the minds of the jurors such a feeling of prejudice as to have deprived the Dickersons of a fair trial. *ALCOA*, 140 Wn. 2d at 537. Thus, the trial court abused its discretion in granting a new trial and awarding monetary sanctions.

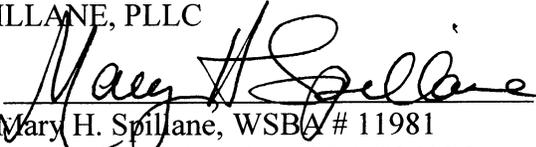
VII. CONCLUSION

For the foregoing reasons, the Order Granting Post-Trial Sanctions and New Trial, and the Partial Judgment for Sanctions, should be reversed and the case remanded for entry of judgment on the jury's verdict.

RESPECTFULLY SUBMITTED this 4th day of March, 2015.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 4th day of March, 2015, I caused a true and correct copy of the foregoing document, "Brief of Appellant PeaceHealth d/b/a St. Joseph Hospital," to be delivered in the manner indicated below to the following counsel of record:

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