

73125-4

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Case No. 73125-4

COURT OF APPEALS, DIVISION ONE  
STATE OF WASHINGTON

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THOMAS CLARK and ALYSON CLARK,  
husband and wife,

Plaintiffs/Respondents,

v.

ANDELLE TENG, MD,  
and CASCADE SURGERY ASSOCIATES, PLLC  
dba CASCADE ORTHOPAEDICS,

Defendants/Appellants.

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**APPELLANTS' REPLY BRIEF**

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Bertha Baranko Fitzer, WSB#12184  
Jennifer Merringer Veal, WSB#41942  
Fitzer, Leighton & Fitzer, P.S.  
1102 Broadway, Suite 401  
Tacoma, WA, 98402  
(253) 683-4501  
[bertha@flfps.com](mailto:bertha@flfps.com)  
[jen@flfps.com](mailto:jen@flfps.com)

Jeffrey I. Tilden, WSB# 12219  
Gordon Tilden Thomas & Cordell, LLP  
1001 Fourth Avenue, Suite 4000  
Seattle WA 98154  
(206) 467-6477  
[jtilden@gordontilden.com](mailto:jtilden@gordontilden.com)

FILED  
JUN 15 PM 12:01

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## I. INTRODUCTION

Plaintiffs' Reply Brief contains five fatal errors. First, using inappropriately selected quotations, hyperbole and statements taken out of context, plaintiffs attempt to persuade this Court that defense counsel was disrespectful and flaunted the trial court's orders. Second, plaintiffs sidestep the fundamental issue on appeal: that there is no authority permitting a trial court to remove causation from jury consideration in the absence of a motion challenging the sufficiency of the evidence. Third, by ignoring the issue of the legal justification for removing causation via a motion in limine, plaintiffs fall back to an abuse of discretion standard in a case that must be analyzed as an error of law. Fourth, plaintiffs fail to explain how Dr. Teng can be legally responsible for an injury in an area where he did not operate. Finally, plaintiffs fail to analyze the individual acts of alleged misconduct in context of the causation and credibility issues from which they arose.

This Reply addresses each of these flaws. Part II.A outlines a proposed process for analyzing the record. Part II. B discusses the misperception, propounded by plaintiffs, that the trial court found direct violations of the order in limine regarding non-party fault *during* the trial. Part III. A identifies some of the more egregious manipulations of the record contained in Plaintiffs' Brief. Part III. B briefly discusses the

standard of review. Part III. C discusses those examples of “misconduct” that directly rebutted plaintiffs’ causation theory. Part III. D discusses those examples of “misconduct” that impeached Dr. Wohns’ credibility. Part III. E discusses the three alleged incidents of violations pertaining to the motion in limine for conditions above the waist, the one motion that generated substantial concern and findings by the trial court. The last section addresses the request for additional terms.

## **II. REPLY TO PLAINTIFFS’ STATEMENT OF FACTS**

### **A. Reply to Statement of Misconduct.**

#### **1. Methodology**

To assist in understanding the record, the defense has combed the record to locate all objections<sup>1</sup> and citations relevant to this Court’s review and listed them in Appendix A. All of the plaintiffs’ examples of “misconduct” are contained in Appendix B and assigned specific numbers. These documents will be hyper-linked in a corresponding brief pursuant to RAP 10.9.

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<sup>1</sup> Appendix A allows review for speaking objections. Unlike *Teter, infra*, there were no attempts to place inadmissible evidence before the jury.

**2. Plaintiffs inaccurately imply that the trial court found violations of the motion in limine regarding non-party fault during the trial.<sup>2</sup>**

Unlike the judge's discussion of the order regarding medical conditions above the waist, during the trial, the court made no direct findings that the defense violated the order regarding non-fault evidence. Plaintiffs raised this issue in a motion brought the day after the defense opening and a second time just before the cross-examination of defense expert, Dr. Nitin Bhatia.

Regarding the opening statement, the judge's discussion demonstrates that he expressed concern primarily about counsel's reference to the plaintiffs' upper spine issues and that he made no findings relating to the non-party fault motion in limine.<sup>3</sup>

The next substantial discussion occurs during the testimony of defense expert, Dr. Nitin Bhatia. *9 RP 1176:16-24*. Without objecting to testimony, plaintiffs requested the right to cross-examine Dr. Bhatia regarding his opinions on Dr. Wohns' standard of care based on the direct. The court agreed, commenting only: "I do believe the door has

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<sup>2</sup> Plaintiffs allege, "Defense counsel repeatedly accused Dr. Wohns of negligence in violation of the trial court's order in limine regarding non-party fault." *Respondents' Brief* (hereinafter "RB") at 7. The transcript contains no use of the word negligence or fault in relation to Dr. Wohns, but multiple examples of the defense witnesses refusing to criticize Dr. Wohns. *See Appellants' Opening Brief* at 17 for full discussion of this issue.

<sup>3</sup> Review discussion of motion at *3 RP 255-265*.

been opened with the criticisms. *Without going there directly, I think indirectly it has been, I agree with that.*” 9 RP 1177:16-19. The court asked “the parties not to criticize” noting “I would sustain an objection if you objected to that kind of question.” 9 RP 1178:8-10. Thereafter, the next substantial discussion of violations of non-party fault order occurred *after* the defense verdict. See Appendix A.

### III. REPLY ARGUMENT

#### A. Respondents’ Brief Contains Multiple Misstatements of the Record and/or Improper Inferences as to What Occurred [Examples: 7, 19, & 24].

In an attempt to establish pervasive misconduct, Plaintiffs combine the trial court’s statements regarding conditions above the waist with their assertion that the trial judge found repeated violations of the motion in limine regarding non-party fault.<sup>4</sup> Plaintiffs argue, for example:

The trial court declined to give a curative instruction, but made it clear that defense counsel should comply with the court’s orders: “*You didn’t like the ruling, but you agreed with it and you said you would comply with it.*” 3 RP 260. Defendants’ counsel responded: *Absolutely.*” *Id.*

*Respondents’ Brief* (hereinafter “*RB*”) at 8. This quote omits the introductory phrase that restricted the court’s comment to the motion in limine regarding conditions above the waist:

*-- everybody agreed in here before, that everything above the waist was off limits. You didn't like the ruling, but you*

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<sup>4</sup> *RB* at 8.



*agreed with it and you said you would comply with it.*

**MR. FITZER:** *Absolutely.* And I don't -- I haven't seen the transcript. If I said neck, I was in err and I apologize.

**THE COURT:** That's my recollection.

3 RP 260:12-19.

**Example 7** cites the following language as aggravating the alleged violation regarding when Dr. Teng met Mr. Clark: “*And when you met Mr. Clark for his low back problem, did you have access to his earlier records and imaging at Cascade?*” *RB at 8* (emphasis in original). The writer then argues that defense counsel further violated the order by “pushing” for an answer “even *after* Dr. Teng pointed out to counsel that he saw Mr. Clark for a ‘different reason.’” *RB at 8:26*. This argument misrepresents the testimony. The question directed Dr. Teng to prior records regarding Mr. Clark’s previous treatment for his lower back problems.<sup>5</sup>

**Example 19** discusses the claim that “over-sewing the wound caused Mr. Clarks’ meningitis.” The *trial judge* elicited this testimony by asking an approved question from a *juror*. 9 RP 1228:11-21.

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<sup>5</sup> The next questions refer to the imaging study done before Mr. Clark met with Dr. Teng. 6 RP 805:1-13. These records were part of Dr. Teng’s decision to perform surgery. *See, e.g., 10 RP 1272-73*. The records, and testimony regarding Cascade Orthopedics’ prior treatment of Mr. Clark’s lumbar back issues, were *never* subject to the motion in limine and were admitted *without* objection. CP 315.

**Example 24** cites in part to *RP 1362*, which is testimony elicited by plaintiffs' counsel.

An additional example of selective use of quotations occurs on page 31, where plaintiffs argue:

After this, the trial court correctly found that defense counsel had clearly argued, contrary to its order in limine regarding non-party fault, that Dr. Wohns had acted improperly: "*I think you would have had to have been asleep to not get that clear inference.*" 11 RP 1570-71.

*RB 31* (emphasis added). By placing the quotation immediately following the statement that the "trial court correctly found that defense counsel had violated the motion in limine" the author implies that the quote is the *judge's* criticism of *defense counsel for misconduct* relating to the order on non-party fault. It is not. Plaintiffs appropriated this quote from the trial court's ruling on the *defense* motion for mistrial:

**THE COURT:** All right. In terms of Dr. Wohns, the clear inference of the testimony presented by the defense through their experts and through Dr. Teng was that Dr. Wohns was inaccurate and not forthright in his testimony and what he said to the jury and what he told people he found during the course of his first surgery.

*I think you would have had to have been asleep to not get that clear inference.* And so I don't like the word "lying," but I honestly believe that that is a conclusion that would have been reasonable for the jurors to make, given the information and evidence that had been presented to them by the defense.

And so I made a ruling on that, I stand by that ruling, I think it's warranted under the facts that have occurred during this trial. It's for the jury to decide on Dr. Wohns's credibility, just as they have to decide on every witness's credibility. It's for them to decide whether or not he was accurate in his description of what he found after his first surgery, and in what he did and in his opinions. And that's just like every other witness.

*11 RP 1570:19-1571:13.*

On page one plaintiffs cite to RP 1195.<sup>6</sup> This incomplete quote is taken from Mrs. Fitzer's argument on *post-trial* motions made in direct response to a criticism<sup>7</sup> of Mr. Fitzer, who was not even in the courtroom:

The Court has made a very serious accusation, and with due respect, Your Honor, I need to address that. Because, in fact, from this side of the bench and this side of the courtroom, with due respect, you, as the judge, acted in a way in this case that suggested that you did not recall that you had a robe on. And I am sorry to say it in that fashion, but I will give you examples.

*12 RP 1595:18-24.* Counsel offered examples and noted that the defense had raised the concern regarding impartiality with the court several times *before* the verdict. *12 RP 1597-98.* Counsel closed her argument with:

Because, though you wear a robe, when the Court makes an incorrect or unfair ruling, the responsibility of the lawyer is to stand up and say, No. Wait a minute. You're wrong. And a lot of times judges don't like being told they're wrong. And I can see how it may seem like there was a deliberate intent to get around your rulings.

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<sup>6</sup> Plaintiffs' citation to the record is incorrect. The quote is from *12 RP 1595*.

<sup>7</sup> "It seemed to me that there were a couple of days that he [Mr. Fitzer] might have forgotten that I was actually now wearing a robe." *12 RP 1587:13-14.*

But here's my last point: Why would we do that on these issues? What benefit would there be, what prejudice is there associated with a breathing machine or with the fact that Dr. Teng met him before? If we were going to deliberately flaunt your rulings, does that make sense that a skilled trial lawyer would somehow sneak in the fact that the guy had [REDACTED]?<sup>8</sup> That is prejudice. That would be something that we get some mileage out of. But we would not get mileage out of these things, these mentions, these incidents. They were part of what had happened to this plaintiff.

*12 RP 1599:23-1600:16.*

**B. Because the trial judge's order exercises no discretion when removing contested issues from the jury's consideration, the correct standard of review is de novo, not abuse of discretion.**

The abuse of discretion standard applies “when it’s not based on an error of law.” *Teter v. Deck*, 174 Wn.2d 207, 222, 274 P.3d 336 (2012). Plaintiffs fail to explain how that standard can apply where the plaintiffs seek to remove, through motions in limine, the issue of whether Dr. Wohns caused plaintiff’s injury. Here, plaintiffs justify the court’s order by arguing that the order in limine precluded evidence “suggesting that Dr. Wohns violated the standard of care *or caused any of the injuries sustained by Mr. Clark.*” *RB 6* (emphasis added). What they do not explain is the procedural mechanism that gave the trial judge the authority

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<sup>8</sup> The medical condition has been blacked out of this brief to protect Mr. Clark’s privacy.

to remove this contested issue from the jury's consideration.<sup>9</sup>

Determination of what occurred; cause in fact, is left to the jury. *Hartley v. State*, 103 Wn.2d 768, 778, 698 P. 2d 77 (1985). Only if a reasonable person could reach only one conclusion, can this issue be removed from the jury's consideration. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 350, 588 P.2d 1346 (1979).

These motions are reviewed de novo because "No element of discretion is lodged in the trial court in such matters unless it can be held as a matter of law that there is no evidence or reasonable inferences therefrom to sustain a verdict for the opposing party." *Brown v. Dahl*, 41 Wn. App. 565, 573, 705 P.2d 781 (1985); *Lambert v. Smith*, 54 Wn.2d 348, 340 P.2d 774 (1959).<sup>10</sup> Plaintiffs did not even attempt to meet, or address, this standard.

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<sup>9</sup> The order on reconsideration refers to the judge denying plaintiffs' motion for directed verdict. *CP 661*. This motion was actually a motion for default as a requested sanction for **Example 8**, Dr. Bhatia's testimony concerning Dr. Teng's in-hospital progress note. "[T]he defense has systematically violated basically every motion in limine related to that topic. And at this point, we ask the Court to do -- to enter a default because I don't think it's fair to give us a mistrial." *9 RP 1133:5-8*.

<sup>10</sup> See also, *Osborn v. Mason County*, 157 Wn.2d 18, 22, 134 P.3d 197 (2006) (Motion for summary judgment presents a question of law reviewed de novo).

**C. Examples of the defense discussing the temporal sequence of events represent legitimate evidence and argument rebutting plaintiffs' theory of causation and therefore cannot support the order granting a new trial<sup>11</sup> [Examples 1, 2, 3, 4, 5 & 9].**

Fault requires both a negligent act and causal link to the injury.

RCW 4.22.015. WPI 15.01 defines proximate cause as a cause “which in a direct sequence produces the injury and without which such injury would not have happened.” Our courts recognize:

The doctrine of proximate cause in Washington entails the two elements of cause in fact and legal causation. Cause in fact refers to the "but for" consequences of an act; it is the physical connection between an act and an injury. Cause in fact is generally a question for the jury, but it may become a question of law for the court when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion.

*Christian v. Lee*, 113 Wn.2d 479, 507-08, 780 P.2d 1307 (1989) (citations omitted); *see also Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 387 (2013).

Here, from the outset, the defense challenged “cause in fact,” the physical connection between Dr. Teng’s surgery and the CSF leak. That challenge had three elements. First, the defense offered proof that the CSF leak was not present following Dr. Teng’s surgery.<sup>12</sup> Second, the defense

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<sup>11</sup> *CP 474*, ¶6 (emphasis added).

<sup>12</sup> *Ex. 164; 165; 7 RP 850; 900-02*. The only radiologist in the case, Dr. Kim testified: “It [CSF] doesn’t look like that.”

showed the jury that the CSF leak was present after Dr. Wohns' operation.<sup>13</sup> Third, the defense experts showed the jury that the leak was located and repaired in an area of the spine in which *only* Dr. Wohns had operated.<sup>14</sup>

**Examples 1, 2, 3, 4 & 5**<sup>15</sup> are taken from the defense opening which discussed the temporal sequence of events through sequential PowerPoint slides demonstrating when the CSF leak occurred.<sup>16</sup> These examples all rebut cause in fact.

The complaint of improper closing argument contained in<sup>17</sup> **Example 9** refers to the timing of postural headaches. Mr. Clark did not have postural headaches after Dr. Teng's surgery.<sup>18</sup> He first had one immediately following Dr. Wohns' first procedure.<sup>19</sup> This testimony corroborated the defense theory that Dr. Wohns, not Dr. Teng, caused the leak.

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<sup>13</sup> 7 RP 920-21. Dr. Kim testified: "There's a large fluid collection in the back here that was not present after the---on the prior MRI." *Id.* At 920:23-25.

<sup>14</sup> *Ex.* 175; 7 RP 976-981.

<sup>15</sup> These examples correspond with the trial court's findings at CP 473 which included incorrect recitations of the record because the court simply copied verbatim a section of plaintiffs' brief. *See Opening Brief at 37-38.*

<sup>16</sup> These same slides were admitted, without objection as illustrative exhibits 164 and 165. CP 318; 7 RP 850. Compare PowerPoint at *Appellants' Opening Brief Appendix B with Exs. 164 and 165*

<sup>17</sup> There were no objections at the time of the closing or immediately following it. These issues were first raised in the motion for new trial, and/or in Respondent's brief on appeal.

<sup>18</sup> 4 RP 513:15-18; 5 RP 611:16-21.

<sup>19</sup> 6 RP 16-221.

Relying in part on the incorrect recitation of the opening contained in plaintiffs' pocket brief, the trial court based the order for new trial on the defense attack on causation. *CP 473* ("Defense counsel clearly stated that Dr. Wohns was at fault *and caused the problems the Plaintiff now suffers.*"); *CP 474* ("*It was obvious to the Court that the theme of the Defense counsel's case was that any injuries sustained by the plaintiff were caused by Dr. Wohns, not the defendant. This continued throughout the trial.*") (emphasis added). The court is correct that this was defendants' theme, but is incorrect in suggesting that he had authority to remove causation without applying the correct analysis.

The court is also incorrect in stating "the defense counsel clearly stated that Dr. Wohns was at fault." None of the cited examples combine temporal analysis with statements regarding negligence, breach of the standard of care, or fault as defined in RCW 4.22.015. In granting an order for new trial based on causation, the trial court violated the proposition that the right to trial by jury shall remain inviolate. *Const. art. I, § 21*. One cannot honor that proposition, an essential element of our legal system, by denying a defendant's right to challenge causation through evidence that some other physician caused the plaintiff's injuries.



**D. Examples 10-25 directly challenged Dr. Wohns' credibility.**

Plaintiffs do not dispute that credibility is for the jury to decide, *Hilltop Terrace Homeowners Ass'n v. Island County*, 126 Wn.2d 22, 34, 891 P.2d 29 (1995), or the proposition that removal of issues of credibility from the jury's consideration would violate the defendant's right to trial by jury. Placed in context of the plaintiffs' case, these examples directly impeach Dr. Wohns' testimony and challenge his claimed expertise.

The premise that Dr. Teng had injured Mr. Clark rested primarily on Dr. Wohns' testimony that Dr. Teng had botched the surgery by not adequately decompressing the foramen,<sup>20</sup> by not fixing a CSF leak<sup>21</sup> and/or not telling the patient about it,<sup>22</sup> and by leaving bone fragments behind.<sup>23</sup> This testimony was summed up in Dr. Wohns' comment to Mrs. Clark that he had found a "mess," that he had "cleaned it out" and "all went well with him" 4 RP 396:3-5. As the foundation of plaintiffs' case in chief, the validity of all of these statements, along with Dr. Wohns' motive for making them, and his claimed expertise, all became legitimate bases for impeachment.

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<sup>20</sup> Foramen was "untouched." 3 RP 218:6-7.

<sup>21</sup> 3 RP 252:12-13 ("U]nrecognized spinal fluid leak caused the cascade of problems that we've just discussed").

<sup>22</sup> 3 RP 319.

<sup>23</sup> 3 RP 217:18

Plaintiffs recognized this and constantly focused the jury on Dr. Wohns' credibility and competence.<sup>24</sup> Over defense objection, Mr. Wampold asked Dr. Teng: "Are you telling this jury that Dr. Wohns lied in his operative report? Is that what you're telling this jury?" *10 RP 1357:6-11*. Placed in context of Dr. Wohns' testimony, the examples plaintiffs identify as misconduct go directly to impeach Dr. Wohns' claim that his version of events was true and correct.

**Example 11**<sup>25</sup> states that it was "improper" for Dr. Wohns not to order a pre-operative MRI. *RB at 14*. This example is taken out of context. The radiologist recommended a follow-up MRI, a fact Dr. Wohns used to buttress his argument that the radiologist had identified a CSF leak caused by Dr. Teng. *3 RP 206-07*. Dr. Kim testified that an MRI would have been simpler to do and would have confirmed the theory. *7 RP 992-93*. The second citation is Dr. Teng explaining that neither he nor Dr. Wohns could establish a CSF leak that occurred after surgery without the follow-up MRI recommended by the radiologist. *10 RP 1389*. Neither witness used the term "improper" or stated that he breached the standard of care.

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<sup>24</sup> See "choice argument" quoted in Conclusion and Opening Statement at *2 RP 139:15-20*.

<sup>25</sup> **Example 10** will be discussed below.

**Example 12**, Dr. Wohns' ability to read MRI films, goes directly to his competence as an expert.<sup>26</sup> Plaintiffs made an elaborate show of demonstrating that Dr. Teng had lied about decompressing the foramina. 3 *RP 229-231*. As part of that show, Dr. Wohns selected an axial image of the spine and then drew on the whiteboard to show the jury where the foramina had not been decompressed. *Ex. 58*. Using the side-by-side viewing feature of the MRI viewer, Dr. Paul Kim showed the jury that the area of the spine Dr. Wohns used for his illustrative exhibit was an area where the nerve roots *could not* be visualized. 7 *RP 932-33*. Making plaintiffs' lead expert look foolish because he misused MRI images is great impeachment, not misconduct.

**Example 13** faults the defense for challenging Dr. Wohns' testimony that Mr. Clark had cauda equina syndrome. Dr. Teng has an absolute right to rebut Dr. Wohns' diagnosis of cauda equina and demonstrate that he was wrong.<sup>27</sup>

**Examples 14, 17 & 25** implicate credibility evidence on their face. Evidence that Dr. Wohns lied or was wrong in reporting what he did directly rebuts his testimony and implicates Dr. Wohns credibility and

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<sup>26</sup> Plaintiffs' other expert, Dr. John Regan, agreed that he would use the sagittal images to determine whether there was stenosis in the foramen. 5 *RP 628:12-17*.

<sup>27</sup> This example of "misconduct," and other instances where the defense directly contradicts Dr. Wohns, leads the reader to wonder just how Dr. Teng was supposed to defend himself.

competence as an expert. While the defense views calling a witness a liar<sup>28</sup> as improper, establishing the underlying facts to establish deception is appropriate. Finally, the content of **Example 17** was discussed and approved by the trial court outside the presence of the jury *before* the evidence was introduced.<sup>29</sup> The court ruled: “*I think that’s fair game.*”<sup>30</sup>

**Example 15** alleges that the defense said it was “improper” for Dr. Wohns to fail to include the exact location of the CSF leak. *RB at 14*. Dr. Wohns’ failure to document the exact location of the leak he said he found casts doubt on whether one was actually there, and demonstrated that, although he was presented as an expert, he failed to follow protocols for medical records. Again, the word “improper” does not appear in the transcript.

**Example 18** is another example of plaintiffs taking questions out of context. The plaintiffs assert that the defense claimed that “Dr. Wohns should not have ‘over-sewn’ the wound before his second surgery.” *RB at 15*. The actual question and answer inquired whether over-sewing the leak would stop the CSF leak. *9 RP 1175*. As an expert, Dr. Wohns is expected to know this procedure would not have fixed an active leak.

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<sup>28</sup> See, e.g., *10 RP 1357; 11 RP 1492, 1550*.

<sup>29</sup> *9 RP 1150:21 to 1153:9*.

<sup>30</sup> *9 RP 1153:8*

Again, this testimony did not combine the underlying fact with reference to fault or breach of the standard of care.

**Example 20** states that the defense argued that it was improper for Dr. Wohns not to send the CSF fluid out for testing. This statement misrepresents the actual argument. The actual argument does not contain the word “improper” and directly attacked Dr. Wohns’ credibility:

*And by the way, if this is such a huge mess, when you look at the pathology report that's in the hospital record for Auburn, you might ask yourself, if it's a big mess and if it's a CSF leak and this is the first time in 30 years you've ever seen this, why didn't you test the fluid? Why didn't you submit the bone? Why didn't you really document and prove that this mess actually existed, instead of just saying that it did?*

*11 RP 1533:14-21* (emphasis added).

**Example 21** involved direct rebuttal of the claim that Dr. Teng breached the standard of care by not performing corrective surgery.<sup>31</sup> Dr. Bhatia testified affirmatively that Dr. Teng did not breach the standard of care and that it was reasonable and prudent for Dr. Teng not to do the surgery Dr. Wohns did. *8 RP 1117-1118*. Defense counsel followed this up in closing by affirming that the defense was not claiming negligence against Dr. Wohns. Counsel argued that “he [Mr. Clark] had a bunch of problems related to a surgery that several doctors wouldn’t have

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<sup>31</sup> See, e.g., *5 RP 571* (Standard of care requires getting him back to surgery within 24 hours).

performed, *wasn't negligent*, but it did *cause* his problem.” 11 RP 1543:15-16.

**Example 22** involved an objection overruled by the trial court. 9 RP 1223:20.

**Example 23** is a simple statement of fact, a resident fixed what Dr. Wohns did not. Plaintiffs' opening raised the difficulty involved in repairing the leak to explain why Mr. Clark continued to have problems after Dr. Wohns' surgery:

He'll [Dr. Wohns] also explain that all of the subsequent surgeries and the leak repairs and all the things that you'll hear about throughout this trial, that those were all because of Dr. Teng's surgery. *He'll explain that the dural tear, because that dural tear was never repaired by Dr. Teng and was left until Dr. Wohns operated, the duress of that protected layer, it was weakened and it made it much more difficult for surgeons down the road to repair, and it made it much more likely that there would be continued cerebrospinal fluid leaks out of those same tears.*

2 RP 139:5-14. That a resident fixed it, on the first try, undercut plaintiffs' claim that Dr. Wohns had special expertise and that Dr. Teng's negligence had caused Dr. Wohns' inability to repair the leak.

Finally, **Example 24** is supported, in part, by testimony Mr. Wampold elicited. The other citation to the record involves Dr. Teng testifying to the fact that neither the patient nor Dr. Wohns alerted him to Mr. Clark having continued issues. 10 RP 1300:18-1301:15.

**Example 16** is the single instance where defense counsel broached violation of the standard of care regarding Dr. Wohns. The question was: “Doctor, *hypothetically*, if you caused the CSF leak and didn’t tell him, wouldn’t that be a violation of the standard of care?” 3 RP 320:15-17. Dr. Wohns responded in the affirmative. This exchange drew no objection. The line of questioning was in direct response to a question on direct where Dr. Wohns testified that “hypothetically” Dr. Teng would have breached the standard of care by having a CSF leak and not telling the patient about it. This line of questions was part of the plaintiffs’ theme that Dr. Teng knew he had a CSF leak and deliberately hid it from Mr. Clark.<sup>32</sup> Dr. Wohns’ failure to tell Mr. Clark about his leak, which the defense established was in an area in which *only* Dr. Wohns had operated,<sup>33</sup> directly challenged his credibility in accusing Dr. Teng of hiding a CSF leak and raised the issue of his motive for doing so. 3 RP 319:14-19.

**Example 10**, taken out of context, may also suggest fault. This example deals with defense counsel’s statement that Dr. Wohns’ surgeries “failed.” This is an accurate statement of fact, introduced into the case by Dr. Wohns. He testified in direct about the repairs: “the spinal fluid leak

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<sup>32</sup> See discussion at 3 RP 232-240.

<sup>33</sup> See, e.g., 7 RP 900:9-10, 902, 925, 980, 987; 8 RP 1104; 9 RP 1179: Exs. 177 & 178.

can be tricky as you can see just in my hands, we had problems.” 3 RP 253:17-18.

Again, counsel did not combine the reference to “failed” surgeries with improper references to fault concepts. In medical malpractice cases “a bad result, in and of itself, is not negligence.” WPI 105.07; *see also Miller v. Kennedy*, 91 Wn 2d 155, 588 P.2d 734 (1978).

Finally, the argument has to be reviewed in context, which reveals that it was direct rebuttal to Dr. Wohns’ testimony that Dr. Teng had left Mr. Clark partially paralyzed:<sup>34</sup>

And he's never been paralyzed. He's walked in and out of every medical office he's ever been to. *The only time he needed an ambulance is when he had to go to Harborview, and he had to go to Harborview because somebody else's surgeries on two occasions failed.*

11 RP 1540:16-20.

Having asked the jury to choose between the testimony of Dr. Wohns and Dr. Teng, plaintiffs cannot base a motion for new trial on the fact the jury chose Dr. Teng’s testimony over that offered by Dr. Wohns. Ultimately, this verdict was the result of the jury’s respect for Dr. Teng and his care, demonstrated by a juror’s question to Dr. Teng, which he prefaced with the observation: “You’ve been very clear and concise in

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<sup>34</sup> Dr. Wohns testified: “It’s only a violation because of the fact that the patient didn’t do well and worsened and became partially paralyzed after the surgery.” 3 RP 252:22-24.



explaining your care of Mr. Clark.” *10 RP 1408:2-3*. Dr. Wohns’ testimony, on the other hand, conflicted with the objective evidence, and was not credible. *See Appellant’s Opening Brief, pp. 13-16*. The defense showed the jury that what Dr. Wohns said occurred *could not have happened* and they agreed. *Id.*

**E. The order granting new trial cannot be affirmed based on the alleged violations of the order regarding other medical conditions [Examples: 6, 7 & 8].**

In responding to this appeal, plaintiffs argue: “for purposes of this appeal, whether the order in limine regarding unrelated medical conditions was correct or incorrect is legally irrelevant. All that matters under *Teter* is that defense counsel repeatedly violated the order despite repeat warnings.” *RB at 25*. Counsel is incorrect. “Under CR 59 (a)(2) a trial court may grant a new trial where misconduct *materially* affects the substantial rights of the losing party.” *Teter*, 174 Wn.2d at 222 (emphasis added). In *Teter* the Supreme Court affirmed the order granting a new trial because “defense counsel repeatedly violated the evidence rules” by making speaking objections and by placing *inadmissible* evidence before the jury. *Teter*, 174 Wn.2d at 223 (emphasis added). Where the evidence is improperly excluded, no material right can be impaired because the jury may consider all relevant, non-prejudicial evidence. *ER 402*.

The alleged violations of this order involved medical records Dr. Teng prepared and considered in treating Mr. Clark's condition.<sup>35</sup> Neither the trial court nor the plaintiffs explain how ER 403 justified exclusion of the defendant's own medical record referring to conditions important to the physician's differential<sup>36</sup> diagnosis.

Rather than justifying the exclusion, plaintiffs focus on what they refer to as repeat, intentional misconduct and the trial court's admonitions. Appendix A documents there were no violations of this order after the testimony from Dr. Bhatia. Plaintiffs cite the statement it "*has to be explained*" as evidence to support their claim that the violations were intentional. *RB 1*. Again, plaintiffs take this statement out of context. Review of the whole argument demonstrates that counsel informed the court she had been misled by language in the plaintiffs' brief which emphasized prior medical conditions<sup>37</sup> and the failure of the plaintiffs to redact Dr. Teng's contemporaneous progress note. *9 RP 1134:13-19*;

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<sup>35</sup> *Ex. 1, p. 15* (Dr. Teng's intake note of 1/19/2010 "Patient is a 49 year-old male that I have seen in the past for cervical problems."); *Ex. 115, p. 5*. (Dr. Teng's post-surgery progress note: "had H/A w/PCA, Denied H.A. while up walking."). The trial court also excluded, over defense objections, the contemporaneous monitoring report contained as part of Dr. Teng's operative report. *10 RP 1254-1255*.

<sup>36</sup> *CP 584*.

<sup>37</sup> In bringing the violation to the court's attention, plaintiffs' counsel again referred to "*preexisting* medical conditions" and argued that they "continued to have this problem where basically every *preexisting* condition that was excluded by Your Honor is being discussed by the defense." *8 RP 1122-1123*.

*CP 388-89*. After this discussion there were no further allegations this order had been violated. *See* Appendix A.

Finally, plaintiffs fail to rebut the fact that prejudice cannot arise from evidence they also placed before the jury. Their only response is that “there was no indication that the jury saw these isolated references.” *RB 27*. This argument is disingenuous. These references are contained in some of the most important medical records, the first page of Dr. Teng’s intake record and Dr. Wohns’ follow-up notes. *Ex. 1, p. 15; Ex. 3, p. 9*. One cannot claim that the single reference to Mr. Clark’s upper spine during opening, the ambiguous reference to when Dr. Teng met Mr. Clark, and the brief discussion of Dr. Teng’s hospital progress note prejudiced the jury, but then maintain that exhibits available to them during deliberations, did not.

**F. This appeal is not frivolous and no additional terms are warranted.**

The courts have considered the following on ruling whether an appeal is frivolous:

- (1) A civil appellant has a right to appeal under RAP 2.2;
- (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant;
- (3) the record should be considered as a whole;
- (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous;
- (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

*Tiffany Family Trust v. City of Kent*, 155 Wn.2d 225, 240, 119 P.3d 325 (2005).<sup>38</sup> Here, the trial court’s order granting a new trial contained multiple factual errors<sup>39</sup> and specifically faulted the defense for arguing that Dr. Wohns, not Dr. Teng, had caused plaintiffs’ injury. Because this was a valid defense, initially sanctioned by the trial court, the appeal cannot be frivolous.<sup>40</sup>

#### IV. CONCLUSION

In trying to convince the jury to believe Dr. Richard Wohns’ testimony that Dr. Teng left a “mess” and breached the standard of care, plaintiffs’ counsel argued: “So basically, one of the big issues on this violation of the standard of care you’re going to have to talk about back in the jury room is, who are we going to believe? Dr. Teng, a defendant in this lawsuit, or Dr. Wohns?”<sup>41</sup>

Having listened to both Dr. Teng and Dr. Wohns and having seen the actual MRI images, which negated Dr. Wohns’ claims, the jury agreed with the defense that Dr. Teng did not breach the standard of care. In the same way, the plaintiffs offer this Court a stark choice between two views

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<sup>38</sup> Quoting *Green River Cmty Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 442-43, 730 P.2d 653 (1986).

<sup>39</sup> The specific errors were caused by the court’s adoption of the *plaintiffs’* inaccurate recitation of facts concerning the defense opening. Compare CP 244 with CP 474.

<sup>40</sup> The trial court approved that argument: “you can present exactly what you’ve told me you’re going to present.” 1 RP 32:2-3. This “*seems to be the gravamen of your case.*” 1 RP 32:4.

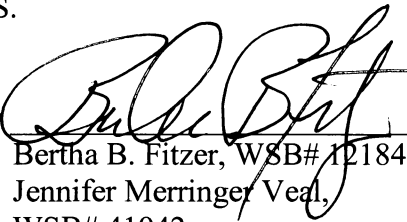
<sup>41</sup> 11 RP 1491:17-20 (Plaintiffs’ closing argument).

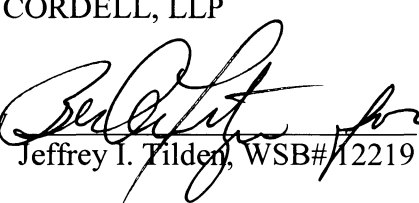
of what occurred below. Plaintiffs base their brief on references to testimony elicited by the court or plaintiffs, and multiple statements taken out of context in an attempt to prove “palpable disrespect for the trial court’s authority.”<sup>42</sup> A close examination of the record demonstrates the fallacy of this approach. Unlike *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012), the trial court’s order here may not be cloaked in discretion because the order implicates the defendant’s constitutional right to have the jury, not the court, decide contested factual issues. Defendants respectfully request that this Court reverse the order granting plaintiffs a new trial and the order granting terms.

Dated this 14<sup>th</sup> day of December, 2015

FITZER, LEIGHTON & FITZER,  
P.S.

GORDON TILDEN THOMAS  
& CORDELL, LLP

By   
Bertha B. Fitzer, WSB# 12184  
Jennifer Merringer Veal,  
WSB# 41942  
Attorneys for Appellant

By   
Jeffrey I. Tilden, WSB# 12219

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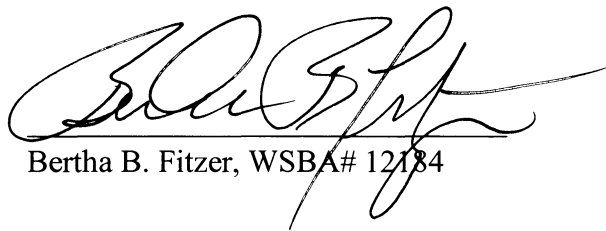
<sup>42</sup> *RB at 38*. The defense disputes the accuracy of the transcript notation that Mr. Fitzer called the judge by his first name. This issue may be resolved on motion practice.

CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on the date set forth below, I caused a true and correct copy of the foregoing Appellants' Reply Brief be served on the following in the manner indicated below:

Counsel for Plaintiff: Rodney B. Ray Margullis Luedke & Ray, PLLC 2601 North Alder Street Tacoma WA 98407-6264 <a href="mailto:roray@mlr-law.com">roray@mlr-law.com</a>	<input checked="" type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Electronic Mail
Counsel for Plaintiff: Michael S. Wampold Mallory Allen Peterson Wampold Rosato Luna Knopp 1501 4 <sup>th</sup> Avenue, Suite 2800 Seattle WA 98101-1609 <a href="mailto:Wampold@pwrk.com">Wampold@pwrk.com</a> <a href="mailto:Allen@pwrk.com">Allen@pwrk.com</a>	<input checked="" type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Electronic Mail

SIGNED at Tacoma, Washington this 14<sup>th</sup> day of December, 2015.

  
 Bertha B. Fitzer, WSBA# 12184

# APPENDIX A

## Appendix A: List of Objections

<b>Page</b>	<b>Atty</b>	<b>Grounds</b>	<b>Ruling</b>
2 RP 157:14	SFF	Statement in opening regarding missing witness improper	"I agree it shouldn't be repeated.
3 RP 181:3	SFF	Relevancy	Overruled
3 RP 183:21	SFF	Foundation	Sustained
3 RP 214:8	SFF	Editorial comment	Overruled
3 RP 232:24	SFF	Speculation	Sustained in part
3 RP 243:21	SFF	Form	Overruled
3 RP 256:2	MW	Thrust of opening was that it was all Dr. Wohns' fault	3 RP 261 "not going to do anything about opening statements"
3 RP 256:18	MW	Opening statement contained reference to pre-existing neck issues	3 RP 260:5 there is a way of mentioning pre-existing conditions that does not relate to neck issues 3 RP 261 "not going to do anything about opening statements"
3 RP 293:24	MW	Exhibit used that briefly showed reference to heart issue	Would consider curative instruction if there was a problem in the future
3 RP 311:17	SFF	State of mind	Overruled
3 RP 317:22	SFF	State of mind	Overruled
3 RP 318:9	SFF	Relevancy	Overruled
3 RP 328:23	MW	Improper use of deposition testimony	Sustained



<b>Page</b>	<b>Atty</b>	<b>Grounds</b>	<b>Ruling</b>
4 RP 366:9	MA	Objection to deposition counter designations for Teng.	Overruled, but defense has to play counter designations in defense case in chief
4 RP 387:17	SFF	Hearsay	Sustained
4 RP 391:11	SFF	Hearsay	Overruled
4 RP 466:17	SFF	“Your Honor” Court cuts off objection	Cautions plaintiffs’ counsel
4 RP 478:25	SFF	Colloquy	Overruled
4 RP 485:16	SFF	Technical assessment of physician	Overruled
4 RP 498:23	SFF	Vague & narrative	Overruled
4 RP 503:3	MW	Misquotes testimony	Sustained
4 RP 506:6	MW	Misquotes testimony	Sustained
4 RP 506:6	MW	Relevance	SFF asks different question
5 RP 540:14	SFF	Foundation	Reserves
5 RP 565:20	SFF	Form	Overruled
5 RP 569:11	SFF	Foundation	Overruled
5 RP 570:19	SFF	Foundation	Overruled
5 RP 576:4	SFF	Foundation	Overruled
5 RP 587:16	SFF	Form	Overruled
5 RP 591:13	MW	Objects to objections from both counsel referring to incident where associate defense counsel pointed out plaintiffs’ had some concerns that needed	Noted

<b>Page</b>	<b>Atty</b>	<b>Grounds</b>	<b>Ruling</b>
		to be addressed before court admitted evidence [See 5 RP:583.]	
5 RP 592:13	MW	Speaking objection referring to trial court bringing up the topic of redactions in response to the concerned raised above at about the exhibit not being ready for admission. Only the court, not defense counsel used the term redactions here. [See 5 RP 583-584]	Noted
5 RP 593:6	SFF	Seeks permission to cross-exam on informed consent based on plaintiff's testimony. Argues that plaintiffs opened the door.	Overruled in part, but would entertain a curative instruction
5 RP 616:13	MW	Objects to SFF misspeaking on name of provider	Granted
5 RP 615:2	CT	Chastises SFF for publishing exhibit admitted at p.600	
5 RP 642:2	SFF	Beyond scope	Overruled
5 RP 670:11	SFF	Hearsay	Overruled
6 RP 702:10	MA w/o jury	Objections to defense exhibits	
6 RP 758:16	SFF	Format	Rephrase
6 RP 767:19	MW w/o jury	Reference to redactions	Court has used word, going forward take up outside jury
6 RP 769:19	MW w/o jury	Objection to one of defense redactions (Exh 104, p. 13)	Sustained

<b>Page</b>	<b>Atty</b>	<b>Grounds</b>	<b>Ruling</b>
6 RP 772:13	BBF w/o jury	Change of admitted exhibit	Overruled
7 RP 851:6	MA w/o jury	MRIs should not go to jury	
7 RP 856:4	MA w/o jury	Exhibit issue	
7 RP 857:8	CT w/o jury	Asking Dr. Teng if first time he had seen Mr. Clark	“very close to a violation of that order”
7 RP 923:11	CT	Hand signaling	
7 RP 936:5	BBF w/o jury	Violation MIL re: Kim SOC	Overruled
7 RP 955:19	BBF	Object, ask to be heard outside jury	Overruled without hearing basis
7 RP 969:24	MW	Leading	Sustained
8 RP 1122:20	MW w/o jury	Violation of motion in limine re: prior conditions	Sustained
9 RP 1144:18	MW w/o jury	Objection to use of monitoring report	CT notes not subject to MIL, but excludes
9 RP 1150:21	BBF w/o jury	Affirmatively raises what defense seeks to elicit from Bhatia in an effort to understand court’s ruling on MIL re: fault	“...it seems to me you can ask him what the operative report means to him and what his observations of it are. I think that’s fair game.”
9 RP 1176:14	MW w/o jury	Violation of MIL re: non-party fault	Grants permission to cross-exam on SOC Wohns, “Without going there directly, I think

<b>Page</b>	<b>Atty</b>	<b>Grounds</b>	<b>Ruling</b>
			indirectly it has been, I agree with that.”
9 RP 1194:13	BBF	Misstates testimony	Overruled
9 RP 1214:6	BBF	Misrepresents testimony	Overruled
9 RP 1223:18	MW	“Was leak fixed? General objection to line of questions	Overruled
9 RP 1238:14	BBF Conf	Objection to juror question	Question not asked
10 RP 1257:7	MA w/o jury	Monitoring portion of operative report should be excluded	Sustained
10 RP 1341:4	SFF	Form	Overruled
10 RP 1348:7	SFF	Argumentative, compound	Sustained as to compound
10 RP 1357:9	SFF	Compound	Overruled
10 RP 1358:7	SFF	Questions call for witness to vouch for other witness, interjects attorney’s opinion in violation MIL	Overruled, allows standing objection to questions
10 RP 1364:16	SFF	“I guess I object”	Court does not stop to inquire
10 RP 1366:20	SFF	Wampold comment: “Hopefully it’s clear to the jury”	Strikes comment
10 RP 1378:1	SFF	Misstates testimony	Sustained
10 RP 1393:11	MW	Outside witnesses’ knowledge	Overruled
11 RP 1426:16	BBF	Motion to strike repeated questions about other witnesses “lying”	Denied, not a violation
11 RP 1505:15	SFF	Speculative argument regarding jury feeling bad for young doctor	Overruled
11 RP 1516:16	SFF	Argument for compensation for	Overruled

<b>Page</b>	<b>Atty</b>	<b>Grounds</b>	<b>Ruling</b>
		death of daughter improper	
11 RP 1519:4	SFF	Improper argument “imaging that you have this pain in your legs for rest of life.”	Not over the line, but rephrase
11 RP 1523:22	SFF	Improper argument: “make Dr. Teng be accountable for something, to date, he’s been unwilling to be responsible for.”	Sustained
11 RP 1524:22	SFF w/o jury	Error in plaintiffs’ closing, request for 105.07	Denied
11 RP 1546:1	MW	Improper argument: Love & honor, “don’t remember any comments being made that I’ll only support you if times aren’t tough if I ask somebody else to pay for it.”	Cautions counsel “far enough down path
11 RP 1556:13	SFF	Improper argument: “Who do you think it’s easier to get experts? A patient who’s going to criticize doctors---	Sustained
11 RP 1557:3	SFF	Object to “let’s hear from Dr. Park”	Overruled
11 RP 1557:6	SFF	Object to: Could have had Dr. Park come in to say what he was thinking.	Overruled
11 RP 1564	BBF	Motion for mistrial, have not received fair trial, evidentiary rulings, improper argument of counsel, asking defendant to comment of whether another witness is lying,	Denied: “It’s for the jury to decide on Dr. Wohns’ credibility, just as they have to decide on every witnesses’ credibility”

# APPENDIX B

**APPENDIX B**

**LIST OF ALLEGED VIOLATIONS FROM PLAINTIFFS' BRIEF**

<b>No.</b>	<b>Page</b>	<b>Evidence or Argument alleged to violate motion in limine</b>	<b>Record Cite</b>	<b>MIL Violation</b>	<b>Obj.</b>
#1	6	"Now I want you to see this. This is what happened—this is what it looked like with a free spinal cord the last time Mr. Clark left [Dr.] Teng's care. These are the pictures after Dr. Wohns operated."	151	NP Fault	Next day
#2	6	"Here, this is after Dr. Wohns' first and second surgeries. All of this blue is cerebrospinal fluid . . . None of that was there until after [Dr. Wohns] operated the first time."	152	NP Fault	Next day
#3	7	"Then the patient comes back [to Dr. Wohns], has another procedure, and the spinal fluid is-- actually corroded its way out the back. That's when Dr. Wohns' nurse, not Dr. Wohns, sewed him up and sent him home."	152	NP Fault	Next day
#4	7	"Then, after the second operation that Dr. Wohns performs, you still have this problem, and it's much thicker. . . That's several inches of spinal fluid after Dr. Wohns."	152	NP Fault	Next day
#5	7	"When people have a leak as a result of back surgery or some other problem, there are . . . what we call postural headaches. . . . After Dr. Wohns operated he had postural headaches for obvious reasons."	152-53	NP Fault	Next day
#6	7, 25	"from 2008, we already know, and we will see documentation to establish it, that he had problems with his upper spine." Mr. Clark's symptoms were "nothing new to him."	147	Medical conditions above waist	Next day
#7	8, 26	"Q. Do you remember when you first met Mr. Clark?.... A. <i>And can you tell us what you remember about your very first meeting with him?</i> * * *	804	Medical conditions above waist	No, raised by court

No.	Page	Evidence or Argument alleged to violate motion in limine	Record Cite	MIL Violation	Obj.
		Q. <i>And when you met Mr. Clark for his low back problem, did you have access to his earlier records and imaging at Cascade?</i> A. Yes, I did.”			
#8	9-10, 17, 24, 26	Counsel asked her witness, Dr. Nitin Bhatia, whether there was any indication in Dr. Teng’s progress notes that Mr. Clark “had a headache” and directed Dr. Bhatia to “turn to page 84” of the notes.  Bhatia testimony: “On February 2nd, which is the day after surgery, [Mr. Clark] woke up with a headache, think’s it’s because his CPAP was broken and he had to use BIPAP. And those are machines you use for <i>sleep apnea</i> .”	1086, 1087, Ex. 115	Medical conditions above waist	At break
#9	11, 31	Closing argument: “He [Mr. Clark] gets postural headaches. He never had the cardinal sign of a CSF leak until this surgery was performed. . . there was no CSF leak that was obvious before [Dr. Wohns] operated, he now has a CSF leak.”	1534	NP Fault	No
#10	11, 31	Mr. Clark “had to go to Harborview [for reparative surgery] because someone else’s [referring to Dr. Wohns] surgeries on two occasions failed.”	1540	NP Fault	No
#11	14	It was improper for Dr. Wohns not to order a pre-operative MRI	992-93; 1389	NP Fault	No
#12	14	Dr. Wohns does not know how to read MRI films and determine whether the foramina were in fact decompressed.	932-34; 969-70; 1107; 1330	NP Fault	No
#13	14	Dr. Wohns was wrong when he diagnosed Mr. Clark with cauda equina syndrome in March 2010 and is wrong that he has cauda equina syndrome today	1119; 1160; 1338; 1362	NP Fault	No



<b>No.</b>	<b>Page</b>	<b>Evidence or Argument alleged to violate motion in limine</b>	<b>Record Cite</b>	<b>MIL Violation</b>	<b>Obj.</b>
#14	14	Dr. Wohns either lied or incompetently stated that he did a “total” L5 laminectomy” in his operative report	972, 1163, 1172	NP Fault	No
#15	14	It was improper for Dr. Wohns to fail to include the exact location of the CSF leak that he discovered in his medical record	1165-66	NP Fault	No
#16	14	If Dr. Wohns identified a CSF leak and did not tell Mr. Clark, that was a violation of the standard of care	320-21; 1169	NP Fault	No
#17	15	Dr. Wohns must have lied about doing the dural repair because the sutures were not found when Harborview did surgery two months later.	1164; 1174; 1185; 1535	NP Fault	No
#18	15	Dr. Wohns should not have “over-sewn” the wound before his second surgery	1175	NP Fault	
#19	15	Over-sewing the wound <i>caused</i> Mr. Clark’s meningitis	1228; 1541	NP Fault	No
#20	15	It was improper for Dr. Wohns not to send the CSF that he found in his March 23 surgery for testing	1533	NP Fault	No
#21	15	The surgery Dr. Wohns performed was not medically necessary	1118-19; 1223	NP Fault	No
#22	15	Dr. Wohns failed to fix the first CSF leak and failed to fix the second CSF leak	1223-24	NP Fault	No
#23	15	<i>a resident</i> at Harborview fixed what Dr. Wohns could not	152, 1180, 1224	NP Fault	Next day as to 152, no other objections
#24	15	It was improper for Dr. Wohns not to get Mr. Clark’s previous medical records or to discuss the patient with Dr. Teng	1301-02, 1362	NP Fault	No
#25	15	Defense counsel accused Dr. Wohns of “record manipulation. . . to make my client look bad.”	1535	NP Fault	No