73125-4

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Case No. 73125-4

COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON

THOMAS CLARK and ALYSON CLARK,
husband and wife,

Plaintiffs/Respondents,

v.

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

Defendants/Appellants.

APPELLANTS' BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON
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I. INTRODUCTION

The Washington constitution provides that "[t]he right of trial by jury shall remain inviolate . . ." *Const. art. I, § 21.* "The term 'inviolate' connotes deserving of the highest protection and indicates that the right must remain the essential component of our legal system that it has always been." *Davis v. Cox*, 183 Wn.2d 269, 288, 351 P.3d 862 (2015) (citing *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989)). Judge Richard McDermott's order granting plaintiffs' motion for a new trial based on allegations of "misconduct" effectively removes contested issues of causation and credibility from the jury's determination in violation of this rule. The learned trial judge therefore erred.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to follow CR 59(f)'s mandate that "the court shall give definite reasons of law and fact" for its order.

2. The trial court erred by extending the order excluding non-party fault to evidence which directly rebutted plaintiffs' theory of causation in violation of *Const. art. I, § 21.*

3. The trial court erred by applying his order excluding non-party fault to evidence which implicated the credibility and expertise of Dr. Richard Wohns in violation of *Const. art. I, § 21.*

4. The trial court erred in excluding highly relevant, non-prejudicial evidence of medical conditions that related to Mr. Clark's damages and to Dr. Teng's process of reaching a differential diagnosis.

5. The trial court erred by concluding the record supported his factual findings of misconduct.

6. The trial court erred in concluding that there was a potential the plaintiffs did not receive a fair trial and in granting the motion for a new trial.

7. The trial court erred in granting terms.

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Does CR 59(f) require that a trial court make findings and delineate the legal reasons that support his conclusion a new trial is required? (Assignment of Error 1).

2. Did the court deny the defendants their constitutional rights to trial by a jury by extending a motion in limine regarding non-party fault to the disputed issue of causation of Mr. Clark's injuries? (Assignment of Error 2).

3. Did the court deny the defendants their constitutional right to a jury trial by extending the motion in limine regarding fault of a non-party to evidence rebutting plaintiffs' expert's credibility and competence? (Assignment of Error 3).

4. Did the trial court incorrectly exclude relevant, non-prejudicial evidence? (Assignment of Error 4).

5. Is the order for new trial supported by the record? (Assignment of Error 5).

6. Did the trial court err in granting a new trial and awarding monetary sanctions? (Assignment of Error 6, 7).

IV. STATEMENT OF THE CASE

A. Factual statement.

1. Dr. Teng's treatment of Mr. Clark.

Appellant, Dr. Andelle (Dell) Teng, is a board certified, orthopedic surgeon who subspecializes in spinal surgery. *6 RP 795-96.* Respondent, Thomas Clark, first sought care from Dr. Teng in 2009 for issues relating to his cervical spine. *Ex. 1, p. 15.*[1] Mr. Clark returned to Dr. Teng's care on January 19, 2010, following the failure of conservative treatment to resolve issues with his lumbar spine. *Id.* On February 1, 2010, Dr. Teng performed a laminectomy[2] to decompress Mr. Clark's spine at levels L4/5 and L5-S1. Dr. Teng specifically stopped his

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[1] As explained below, plaintiffs failed to redact the very evidence they based their motion for new trial upon from their own exhibits provided to the jury. *See infra* Parts IV.B.6, V.E.2.

[2] A laminectomy is a procedure where the spinal surgeon removes the spinal processes and lamina at one or more levels of the spine in order to decompress the spinal cord. *3 RP 188.* As part of this procedure, the surgeon will also perform a foraminotomy, a procedure where the surgeon decompresses the foramen, the area where the nerves exit the spinal canal. *3 RP 187.*

surgery at the midpoint of L4 because he did not want to worsen instability associated with Mr. Clark's scoliosis. *10 RP 1391; Ex. 1, p. 16.* He did *not* operate at the top level of L4. *7 RP 925.*

Because post-operative headaches can be a sign of a cerebral spinal fluid[3] (CSF) leak, Dr. Teng's hospital progress notes included a discussion of a headache Mr. Clark suffered the day after the surgery, the nature of the headache and its probable cause. *Ex. 115; p. 4.* After discussing the headache with Mr. Clark, Dr. Teng concluded it was not a postural headache associated with a CSF leak. *Id.*

At his first post-operative visit, Mr. Clark complained of pain and additional symptoms. *Ex. 1, p. 2.* Dr. Teng ordered a follow-up MRI. *Ex. 120.* That MRI showed a small "complex[4] fluid collection"[5] that the radiologist acknowledged could be within expected limits. He recommended that Dr. Teng correlate the clinical picture to rule out a CSF leak. *Id.* Dr. Teng conferred with the radiologist, but did not believe that the fluid collection was CSF leak. *Ex. 1, p. 1; 10 RP 1284-87.* At trial, Dr. Teng explained that he recalled the surgery, had not

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[3] Cerebral spinal fluid is the clear, water like fluid that surrounds the brain and spinal cord. Puncturing the protective cover, or dura, of the spinal cord causes the fluid to leak into the adjoining tissues, reducing the amount of fluid available to cushion the brain. *3 RP 200-02.*

[4] The term "complex" is a term of art for radiologists. It refers to a fluid collection that appears to have internal septations or little lines visible on the MRI. *7 RP 898.* This is contrast to a simple fluid collection, which, like CSF, resembles water. *7 RP 909.*

[5] 2.7 cm x 1.6 cm x 4.7 cm. *Ex. 120.*

observed a CSF leak, and Mr. Clark did not have the postural headaches that are the red flags for leaks. *Id.* Unlike a person with a CSF leak who feels worse when standing, Mr. Clark reported that whenever he stood, he felt better. *10 RP 1287.*

Dr. Teng discussed the MRI findings with Mr. Clark on February 19, 2010. *Ex. 121*; *6 RP 738-39.* Dr. Teng told Mr. Clark he did not believe the fluid collection was a CSF leak, but offered to take him back to surgery if Mr. Clark wanted him to explore and evacuate the fluid collection. *Id.* Mr. Clark instead agreed to 6 weeks of physical therapy to deal with the residual pain and other symptoms. *Ex. 121.*

Mr. Clark attended just three physical therapy sessions. *Ex. 123; 6 RP 741.* The physical therapy records document that Mr. Clark reported that some of his symptoms were "improving." *Ex. 123, p. 1.* On his last visit, he had "fairly good" exercise tolerance and could perform stretches that he could not do on his first visit because of pain. *Ex. 123, p. 4.* Mr. Clark canceled the remainder of his physical therapy and never returned to Dr. Teng's care. *6 RP 744.*

2. **Dr. Wohns' treatment of Mr. Clark.**

Mr. Clark obtained a copy of his MRI, along with the report, and sought a second opinion from Dr. Richard Wohns. Dr. Wohns, is a

neurosurgeon who also has a law degree[6] and a business degree. *3 RP 176.* Dr. Wohns performed his first surgery on Mr. Clark on March 23, 2010. *Ex. 5, p. 5.* He testified that he found a CSF leak, sutured it[7] up, glued it over, and checked to make sure it was "totally nonleaking." *3 RP 221.*

In contrast to the post-operative course following Dr. Teng's surgery, Mr. Clark reported the classic postural headaches that are the red flags of CSF leaks the day after Dr. Wohns' first surgery. *Ex. 127, p. 9; 6 RP 748.* On April 9, 2010, Mr. Clark informed Dr. Wohns' office that his positional headaches were getting worse. *Ex. 129, p.1.* Dr. Wohns ordered another MRI, which revealed a "large postoperative fluid collection." *Ex. 3, p. 11.*

Dr. Wohns took Mr. Clark back to surgery on April 13, 2010. He found "a lot of spinal fluid in the wound outside the sac." *3 RP 241-42.* Dr. Wohns testified that he found that his prior repair was intact and that the sutures he had previously placed in the dura appeared to be holding. *Id.* He placed an additional layer of glue and sutured a Duragen[8] seal *above* the previously sutured dural tear. *Id.*

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[6] Judge McDermott taught Dr. Wohns when Dr. Wohns attended law school. *1 RP 32.*
[7] It is significant to note that the sutures used to repair a CSF leak are non-dissolvable. *5 RP 608.*
[8] Duragen is a collagen product that is used to patch the dura and can be sutured down onto the dura to stop a CSF leak. *10 RP 1316.*

3. **Mr. Clark's condition following Dr. Wohns' surgeries.**

On April 19, 2010, Mr. Clark returned to Dr. Wohns' office where he was initially seen by the nurse. *Ex. 134.* She noticed that Mr. Clark's back was actively leaking cerebral spinal fluid. *Id.* The nurse consulted Dr. Wohns, who examined the patient. Dr. Wohns and Mr. Clark agreed to "oversew" the wound. *Id.* Dr. Wohns' physician assistant performed this procedure.[9]

The next day, Mr. Clark went to an emergency room complaining of headaches and a stiff neck. *Ex. 135, p. 1.* His back was actively leaking cerebral spinal fluid and he had developed bacterial meningitis.[10] *Ex. 135.* Mr. Clark was hospitalized and had his third post-operative MRI on April 22, 2010. *Ex. 137.* This MRI revealed a "fluid intensity collection located within the laminectomy bed," which extended to the skin surface. *Ex. 137, p. 1.* Mr. Clark was treated for bacterial meningitis and had lumbar drains placed to divert the leaking CSF.

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[9] At trial there was some confusion as to who did what. The court order faults Mr. Fitzer for stating that the nurse had done the procedure. *CP 474.* The confusion arose because the only documentation of the procedure was listed on a record clearly denominated a "nurse note." *Ex. 134.*

[10] "Meningitis is inflammation of the thin tissue that surrounds the brain and spinal cord, called the meninges. There are several types of meningitis. The most common is viral meningitis, which you get when a virus enters the body through the nose or mouth and travels to the brain. Bacterial meningitis is rare, but can be deadly." U.S. National Library of Medicine, https://www.nlm.nih.gov/medlineplus/meningitis.html.

Ex. 135, p. 63. Mr. Clark was discharged on April 30, 2010. *Ex. 135, p. 90.*

On May 3, 2010, Mr. Clark was referred to the University of Washington Medical Center. *Ex. 4, p. 1.* A fourth post-operative MRI done on May 4, 2010 revealed a CSF collection centered behind the L4 level. *Ex. 141, p. 1.*

Mr. Clark had his last surgery on May 4, 2010 at Harborview Medical Center. *Ex. 4.* A resident performed this procedure. *Ex. 4, p. 8.* The report states that the surgeon first removed the sutures closing the wound and *then* the Duragen patch. *Id.* Importantly, the report states: "underlying dura appeared intact, with the exception of an approximately ¾ cm dural defect in the left posterior aspect of the thecal sac." *Id.* A careful[11] reading of this report indicates the surgeon did not report *sutures* in the dura or in the dural tear.

The unrebutted testimony of the defense neuroradiologist, Dr. Paul Kim, was this tear was at a level of the spine on which Dr. Wohns, *not* Dr. Teng, had operated. *7 RP 922; Ex.174* (Appendix A).

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[11] During closing, Mr. Wampold attempted to rebut this fact by reading from the operative report. *11 RP 1550.* Mr. Wampold's recitation is not consistent with the actual report as it leaves out the word "then" before Duragen thus ignoring the temporal sequence of removing the sutures and then removing the Duragen.

4. **Mr. Clark's condition at time of trial.**

At trial Mr. Clark testified that he had weakness in the right leg, inability to thrust up from his right leg, numbness in the perianal area, sexual dysfunction, balance problems, and other issues, which he attributed to Dr. Teng's surgery. *4 RP 487-88.*

On cross-examination, Mr. Clark acknowledged that in January 2010, prior to his surgery, he had severe symptoms that went down his right buttock, into aspects of his hip, thigh and right leg. *6 RP 728.* He also had numbness and tingling in the same area. *Id.* He agreed that he had told Dr. Teng that he was getting weaker and felt uncoordinated before surgery. *Id.*

Dr. Wohns testified that following the surgeries Mr. Clark did not have normal strength and stabilizing function and had poor balance. *3 RP 249.* He testified these conditions affected activities of daily living, namely "anything that requires use of your legs for strength and balance can be impaired. Recreational activities included." *3 RP 249, lines 12-14.*

B. Procedural statement.

1. Plaintiffs' theory of case and supporting testimony.

Plaintiffs sued alleging that Dr. Teng breached the standard of care by leaving residual stenosis, causing, but not repairing, a CSF leak,

and by not recognizing and treating cauda equina syndrome.[12] Dr. Wohns testified that Dr. Teng breached the standard of care and "caused the cascade of problems" Mr. Clark suffered. *3 RP 252.* Dr. John Regan, plaintiffs' other expert, agreed that Mr. Clark had cauda equina syndrome and that Dr. Teng breached the standard of care by not taking Mr. Clark back to surgery emergently. *5 RP 562.*

To support his testimony, Dr. Wohns used a slide taken from an axial[13] image from the February 18, 2010 MRI to establish his claim that Dr. Teng had done "no foraminotomies,[14] which is required in a case like this." *3 RP 218, lines 3-4.* Dr. Wohns also claimed that he "found a dense mass of tissue" that he sent off for biopsy. *3 RP 217.* He characterized the condition of Dr. Teng's surgical site as "bizarre." *3 RP 299.*

2. Motions in limine.

Both sides extensively briefed and argued motions in limine. *See, e.g., CP 13-35; 117-131; 165-177; 187-198; 205-212.* Of concern in the present appeal are two of plaintiffs' motions, one dealing with

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[12] Cauda equina syndrome is the compression of all the nerves at the bottom of the spinal cord in the lumbar spine. *3 RP 191.*

[13] MRIs can be viewed using either the sagittal images or the axial images. The axial images are those images that are similar to a sliced bread loaf or horizontal slice across the body. *7 RP 875.* A sagittal image is a cut longitudinally or vertical slice. *Id.*

[14] A foraminotomy is a procedure where the surgeon takes a small tool to gently enlarge the foramen, the canals where the nerve roots exit the spine. *7 RP 972-73.*

Mr. Clark's allegedly "unrelated medical conditions[15] and one pertaining to the "fault" of non-parties.[16] *CP 14.*

As to other medical conditions, plaintiffs sought a broad order excluding treatment for sleep apnea, a neck surgery, a heart stent, and a corneal replacement. *CP 26.* The defense opposed extending the motion to evidence relevant to damages and to Dr. Teng's progress note regarding a headache Mr. Clark had the day after Dr. Teng's surgery. *1 RP 49.* The court granted plaintiffs' motion stating the defense could not talk about anything "above the waist." *1 RP 48-49.*

Plaintiffs also sought to exclude "suggestion of fault or causation by non-parties," specifically Dr. Wohns. *CP 25.* The defense responded by agreeing that it would not argue fault, but insisted on its right to challenge causation. *1 RP 30.* Counsel argued that Dr. Wohns' surgery of April 11, 2010 was necessitated only because a CSF leak occurred during Dr. Wohns' March 23, 2010 surgery. *1 RP 31, lines 6-11.* The trial court specifically adopted the defense position, commenting "You can present exactly what you've just told me you're going to present. *That seems to be the gravamen of your case.*" *1 RP 31, line 25 - 32, line 5* (emphasis added).

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[15] Plaintiffs' Motion in Limine #5. *CP 26.*
[16] Plaintiffs' Motion in Limine #4. *CP 25.*

3. Opening statements.

Prior to opening statements, both sides exchanged copies of their PowerPoint slides. *2 RP 123.* When informed that the parties had done so, the court asked: "So there won't be any objections halfway through saying they're showing them something we didn't have our agreement to show?" *2 RP 124, lines 2-4.* Mr. Wampold responded "No" and "There will be no objection." *Id. at lines 5-7.*

Plaintiffs' opening emphasized Dr. Wohns' credentials and the importance of Dr. Wohns' testimony both as a fact witness and as an expert. *2 RP 132, 137.* Counsel stated that what Dr. Wohns found during his surgery was "alarming." *2 RP 135.* Counsel stated that because Dr. Teng had left an unrepaired dural tear, the dura was weakened and "it made it much more difficult for surgeons down the road to repair. . ." *2 RP 139, lines 11-12.*

Casting the credibility of Dr. Wohns and Dr. Teng at the forefront, plaintiffs' counsel told the jury that the defense would deny there was a CSF leak, and that the defense would claim that either Dr. Wohns was wrong or that he was "lying." *2 RP 139.*

Using the previously approved PowerPoint, defense counsel walked the jury through the timing of medical events. *CP 578-580* (Appendix B). These slides illustrated sequential MRI images, starting

with the preoperative MRI through the time the CSF leak was surgically repaired at Harborview and showed the CSF leaks colorized so the jury could see its evolution following Dr. Wohns' surgeries. *Id.*

4. Inconsistencies between plaintiffs' theory of the case and the objective evidence.

The defense rebutted plaintiffs' case by showing the jury the MRIs and illustrating how the plaintiffs' expert's testimony conflicted with the objective evidence. Dr. Paul Kim, the only radiologist[17] to testify in the case, was the foundation to that approach. Dr. Kim is the Director of Spinal Imaging and Intervention within the Radiology Department at the University of Southern California (USC) Medical School. *7 RP 866.* He is board certified in diagnostic radiology with a Certificate of Added Qualification in neuroradiology. *7 RP 864.*

Dr. Kim rejected the claim that the February 18, 2010 MRI showed a CSF leak or compression on the spine sufficient to cause cauda equina syndrome. *7 RP 956.* Using slides from presentations Dr. Kim uses to teach his radiology fellows, he compared the teaching slides to the

[17] Dr. Wohns testified that he had done a "several month" fellowship in neuroradiology during his neurosurgical residency. *3 RP 176.* He is not licensed to practice radiology, is not board certified in radiology, and does not have the "Certificate of Added Qualification" in neuroradiology held by Dr. Kim. *Compare* Wohns' qualifications, *3 RP 176, and* Kim's qualifications, *7 RP 863-64.*

first post-operative MRI and showed the jury that the first MRI was an image of a normal post-operative spine. *7 RP 871-72; Ex. 167.*

Dr. Kim explained that the radiologist's reference to "complex fluid collection" was a term of art and consistent with a finding that the fluid collection on February 18, 2010 MRI was a seroma rather than a CSF leak. *7 RP 909-910.* He rejected Dr. Regan's and Dr. Wohns' opinion that the February 18, 2010 MRI demonstrated significant compression consistent with cauda equina syndrome. *Ex. 171; 7 RP 900-01.* He concluded: "no radiologist would ever say—and no surgeon would ever look at that image and say that there is compression of the thecal sac that would be—that would cause cauda equina syndrome. That's impossible." *7 RP 956, line 22 - 957, line 1.* Dr. Kim also pointed out that Dr. Wohns could not see compression of the thecal sac during surgery because "he's looking at the back of it. He can't tell what effect it has on the spinal canal." *7 RP 958, lines 9-11.*

Dr. Kim directly rebutted Dr. Wohns' testimony regarding the abnormalities he claimed to have found during his surgery on March 23, 2010. Dr. Kim testified that he did not know what Dr. Wohns was referring to as an "epidural mass because I don't see one. *There isn't one on the MRI.*" *7 RP 958, lines 11-12* (emphasis added). He testified there was no radiological evidence of an inadequate laminectomy.

7 RP 930. He stated there was no evidence of a significant bone fragment. *7 RP 930.* [18] He testified there was no evidence of any abnormality he could attribute to the surgery of Dr. Teng. *7 RP 930.*

Finally, taking the jury through the actual images, Dr. Kim demonstrated that the CSF leak found and repaired by the resident at Harborview was at a place on the dura at a level where Dr. Wohns, *not* Dr. Teng had operated. *7 RP 929; Ex. 175* (Appendix C).[19]

The defense spine surgeon, Dr. Nitin Bhatia, corroborated Dr. Kim's testimony regarding the imaging and refuted the standard of care testimony. He reviewed the patient's post-operative course and concluded: "There is absolutely nothing in this post-operative course that looks like a CSF leak, acts like a CSF leak. Absolutely nothing." *8 RP 1090, lines 1-3.* Like Dr. Kim, Dr. Bhatia saw no evidence of a free-floating bone on the MRI scans and added that it would not make "medical sense" that there be such bone at the surgical site. *9 RP 1218, line 23 - 1219, line 1.*

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[18] Dr. Bhatia, the defense spine surgery expert, opined that it would be extremely difficult to leave a bone fragment because the tool used to cut into the bone, required the operator to remove the bone fragment before taking the next "bite" with the tool. *8 RP 1049-50.*

[19] Dr. Bhatia's deposition testimony included a statement that, based on the operative report from Harborview, the dural tear was in a location where Dr. Teng had operated. *9 RP 1202.* However, Dr. Kim based his testimony on the actual imaging that showed the sequence of the surgeries and the specific location of the Harborview repair. *7 RP 979; Ex. 175, 177.*

Finally, Dr. Bhatia confirmed that the only sutures found by the Harborview surgeons were in the muscles above the dural sac in the Duragen patch placed by Dr. Wohns. *9 RP 1222.* This testimony and the operative report directly contradicted Dr. Wohns' operative report for March 23rd, and his claim that he surgically repaired a dural leak left by Dr. Teng. *Compare 3 RP 245 with 9 RP 1222.*

The defense experts undercut Dr. Wohns' expertise by demonstrating Dr. Wohns' inability to recognize bodily structures on an MRI. This testimony concerned Dr. Wohns' use of Exhibit 58 to illustrate his claim that Dr. Teng failed to perform the necessary decompression of the nerve root. *3 RP 231-232.* Using the side-by-side feature of the MRI viewer,[20] Dr. Kim told the jury that Exhibit 58 was taken from a level of the spine where it was *impossible* to see whether the foramen had been surgically decompressed. *7 RP 932, line 13 – 7 RP 933, line 6* (emphasis added). He testified that it would not be appropriate to use Dr. Wohns' exhibit to illustrate compression of the nerve because "it's not in the right area. *The nerve is not on that image.*" *7 RP 934, lines 1-2* (emphasis added).

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[20] The viewer allows the user to simultaneously show the sagittal image and the axial image. Using the tracer on the sagittal image, the viewer can track the location of the corresponding axial image at that level of the spine.

5. "Fault" testimony and argument.

On cross-examination, Dr. Bhatia specifically declined to criticize Dr. Wohns' care. He stated that he had not evaluated the case regarding Dr. Wohns and the standard of care. *9 RP 1224.* He noted that he would not have done Dr. Wohns' first surgery, but he did not think that was a breach of the standard of care. *9 RP 1224-25.*

Like Dr. Bhatia, Dr. Teng refused to criticize Dr. Wohns' care. He repeatedly refused to offer standard of care testimony:

> Q. (By Mr. Wampold) And you're not here to say that Dr. Wohns violated the standard of care by making the determination that Mr. Clark needed surgery, right?
> A. *I'm not making any commentary on that.*
> Q. Okay. And you're also not here to say that Dr. Wohns violated the standard of care in any aspect of how he performed the surgery on Mr. Clark, are you?
> A. *Well, I'm not here for that, no.*
> Q. Okay. And you're -- you have no opinions that he violated the standard of care in any aspect of Dr. Wohns' surgery?
> A. I'm not here for --
> MR. FITZER: I guess I object --
> A. *-- I'm not here to comment on Dr. Wohns' standard of care.*
> Q. (By Mr. Wampold) Okay. But you have -- you have testified previously, have you not, that you have no standard of care criticisms of Dr. Wohns in the way he performed the surgery on Mr. Clark, correct?
> A. I do not have any criticisms on what is presented in the surgery. I don't know what happened in the surgery. I wasn't there, so I can only comment on what Dr. Wohns has reported. *So I'm not making any standard-of-care opinions on it.*

10 RP 1364, lines 5-25 (emphasis added).

Dr. Teng and Dr. Bhatia's testimony was consistent with the defense argument. Counsel told the jury "we didn't come here to play the blame game, but we did come here to show you, as part of our obligation, that things that were done after the 18th (sic) were the cause of his current symptoms." *11 RP 1539, lines 7-10.*

6. Allegations of misconduct.

Plaintiffs' first allegation of misconduct came in the form of a brief filed the day after openings.[21] *CP 244.* The brief accused counsel of violating the motions in limine by referring to Mr. Clark's previous "neck" issues and by claiming that "Dr. Wohns was at fault and had caused all the problems Mr. Clark now faces."[22] *CP 244.* As noted above, plaintiffs had approved the slides and made no objections during, or immediately after, the defense opening.

The defense challenged the factual accuracy of the statements contained in the plaintiffs' brief. The defense denied having "blamed" Dr. Wohns during opening. Counsel observed: "I talked about the progression and identification of symptoms and problems. Never once

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[21] After the openings, the *defense*, but not the plaintiffs voiced an objection. *2 RP 157-58.*

[22] This motion has very specific statements that plaintiffs allege Mr. Fitzer made during opening. *CP 244.* Mr. Fitzer did not make the statements that appear in quotations in that document. *See infra* Part V.C.4.

said fault." *3 RP 257, line 23-258, line 1.* A review of the defense opening reveals this statement is correct.[23] *See, 2 RP 146-155.*

The trial judge stated that he recalled Mr. Fitzer using the word "neck" and commented that his motion has to do with "your mention in opening of his prior neck surgery[24]—which was supposed to be off limits." *3 RP 259.*

An electronic word search of volume two of the trial transcript, which contains the complete opening statements, reveals that no one used the word "neck" that day.[25] After argument, the court declined to take action, commenting that both attorneys were "trying to advance your client's cases in the best way that you can." *3 RP 261, lines 20-21.*

The next allegation of misconduct was raised by the court. On day six of the trial, Mr. Fitzer asked Dr. Teng:

> Q. Do you remember when you first met Mr. Clark?
> A. I do.
> Q. And tell us what you remember about your very first meeting with him.
> A. That is a different reason that I'm...
> Q. I understand. Were there any low back problems involved at that earlier meeting?
> A. No, there wasn't.

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[23] Counsel did say "you'll hear, testimony about the pressure caused by this CSF after the Wohns surgery." *2 RP 152, lines 21-22.*

[24] Both the trial court and plaintiffs are incorrect about Mr. Clark having neck surgery. *4 RP 354.*

[25] Mr. Fitzer's actual statement was similar to what he told the court he had said: "Now remember, from 2008, we already know, and we will see documentation to establish it, that he had problems with his upper spine that were causing symptoms in his legs. So this was nothing new for him." *2 RP 147, lines 11-15.*

Q. All right. When did you first meet him in regard to his low back?
A. In 2010.

6 RP 804, lines 13-23. These questions drew no objections.

The following day, the court referred to these questions as a potential[26] violation of the motion in limine concerning the prior cervical problems:

> THE COURT: I am bothered by something that occurred yesterday. And I simply want to put it out there. I take my orders in limine very seriously. When you asked Dr. Teng if that was the first time that he had seen Mr. Clark, *I consider that to be very close to a violation of that order in limine.* I'm going to put you on notice right now that don't do that again or I will give a correcting instruction to the jury.
> MR. FITZER: That was not my –
> THE COURT: Because I can -- I was very upset. And you need to know that. You thought that maybe I was sitting back here with my eyes half closed. I was listening to every word you said.
> MR. FITZER: No. I was trying to establish only that Mr. Clark was not a surprise. And I bumbled into that one. And I stopped. *And I'm sorry if I offended.*[27]

7 RP 857, lines 8-23 (emphasis added).

The third "violation" arose on the eighth day of trial when Mrs. Fitzer asked Dr. Bhatia to explain the reference in the medical records to a headache Mr. Clark experienced the day after Dr. Teng's

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[26] Later in the proceedings, the trial court starting referring to this incident as an *actual* violation. *9 RP 1143.*

[27] Later that morning the court sharply chastised a staff member of the defense firm for "signaling" the defense expert during the defense direct. *7 RP 923.* In fact, the staff member was attempting to get the court's attention because a juror had her hand raised and the court did not see it. *7 RP 961.* When this was explained to the court, the judge apologized. *7 RP 966.*

surgery.[28] In retrospect, this was a violation of the court's standing order regarding anything above the waist. By this time, two full weeks had passed since the day-long argument on motions in limine. The question concerned a defense exhibit that the plaintiffs had said they had redacted, but in actuality had done so incompletely. *8 RP 1123.* The un-redacted exhibit consisted of Dr. Teng's progress note documenting his rounds on the patient the day after surgery. *Ex. 115, p. 4.* The record documents that Mr. Clark was complaining of a headache and that he thought it was because the hospital had broken his CPAP machine. *Id.* The question referred Dr. Bhatia to the record and inquired as to whether or not the record described a postural headache consistent with a CSF leak. *8 RP 1087.* Plaintiffs did not object to these questions.

At the next break, plaintiffs cited this line of questions as a third violation and asked the court for a default. *9 RP 1133.* Departing from his previous statement that the exchange quoted above regarding when Dr. Teng met Mr. Clark came "*close*" to a violation, the court accepted the plaintiffs' argument that the reference to the CPAP was the third violation. *9 RP 1133-34.* Severely chastising counsel, the trial court

[28] *8 RP 1086.*

denied the motion for default but reserved ruling on what he would do about the violations of the orders. *9 RP 1143.*

7. Plaintiffs' failure to redact exhibits.

The three violations the court identified during trial consisted of references to Dr. Teng's treatment of Mr. Clark for neck or cervical spine issues and the progress note involving the CPAP headache. However, plaintiffs' own exhibits contain this and other evidence of medical conditions "above the waist." For instance Exhibit one, page 15, paragraph one, told the jury that Dr. Teng treated Mr. Clark for his cervical spine issues. "Patient is a 49 year-old male I have seen in the past *for cervical problems*." *Id.* (emphasis added).

Plaintiffs' Exhibit three refers to other medical conditions that were subject to the motion in limine, including "enlarged heart, heart murmur, irregular heartbeat, pacemaker, palpitation, phlebitis, rheumatic fever, tires easily, varicose veins.[29] *Ex. 3, p. 9.* The record specifically states: "Complains of sleep apnea, CPAP machine. *Id.*

8. Closing argument and defense motion for mistrial.

Plaintiffs' closing argument again focused on discrediting Dr. Teng and praising Dr. Wohns. *11 RP 1491-92.* Mr. Wampold argued

[29] Plaintiffs also did not redact personal identifiers on this and other exhibits. *See Ex. 3,* which contains Mr. Clark's date of birth on virtually every page.

that the jury's decision was important to the "community" and Dr. Wohns was a part of our community. *See, 11 RP 1483, 1487, 1491, 1493.* Counsel asserted that Dr. Wohns "is a very respected surgeon in our area" and that "he's one of the most skilled spinal surgeons in the region." *11 RP 1488.* Repeatedly, Mr. Wampold argued that Dr. Wohns was more credible than Dr. Teng. *See, e.g., 11 RP 1491-93, 1508, 1549-50, 1556.*

The plaintiffs requested over three million dollars in economic and general damages. *11 RP 1522.* To bolster that claim, counsel used a picture of Mr. Clark's deceased daughter, and argued that Mr. Clark "is left with a lifetime of feeling that because of what happened to him with these surgeries, because Dr. Teng's violation of the standard of care at a time when he should have been doing his job, protecting his daughter, the job that all of us parents have, instead of protecting her, he was laying in a sick bed, sick himself." *11 RP 1516, lines 10-15.* Defense counsel objected and the court overruled this objection. *11 RP 1516.*

Plaintiffs objected just *once*[30] during the defense closing. That objection was based on the following argument:

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[30] In contrast, the defense had multiple objections to Mr. Wampold's improper argument regarding it being easier for defendants' to get experts, *11 RP 1556*, and making Dr. Teng accountable and responsible for "something that, to date, he's been unwilling to be responsible for." *11 RP 1523.* These were just the sustained objections. There were other instances where the court cautioned Mr. Wampold that he was

> And then, I guess, the last thing I would say is, maybe I am simply too old to do this. I remember many years ago a Saturday where people said to each other that they would love and honor and support each other for better or for worse, and in sickness or in health. I don't remember any comments being made that I'll only support you if times are tough if I ask somebody else to pay for it.

11 RP 1545. Plaintiffs alleged this argument asked the jury to disregard the court's instruction on loss of consortium. *11 RP 1546.* The defense responded that it was asking the jury to evaluate the claim, not to disregard the instruction. The court simply cautioned Mr. Fitzer that "I think you've gone far enough down this particular path, and you may respond in your rebuttal." *11 RP 1546.* Mr. Fitzer then moved on to the wage loss claim with no additional argument regarding loss of consortium.

Immediately after closing arguments, the *defense* moved for a mistrial arguing they had been denied a fair trial. *11 RP 1564.* The defense identified these errors: 1) multiple instances of improper closing argument by plaintiffs; 2) instructional error; 3) plaintiffs' violations of motions in limine; 4) the incident where the trial court accused an employee of the defense firm of signaling the defense expert witness when she was trying to call the court's attention to a concern by

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standing on the threshold. *11 RP 1519* ("Imagine that you have this pain in your legs the rest of your life").

a juror; 5) the trial court's cutting off of a defense objection without allowing counsel to be heard,[31] and 6) the inability of the defense to put on their case because of the trial court's evidentiary rulings.

11 RP 1564-67.

The court acknowledged that both sides had pushed boundaries but "refused to find that either side went over those boundaries to the point where a mistrial is warranted." *11 RP 1573, lines 15-18.* The court held: "It's for the jury to decide on Dr. Wohns' 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 1571, lines 8-13.*

The next day, the jury returned a defense verdict. *11 RP 1577.*

9. Motion and order granting new trial.

After the verdict, plaintiffs moved for a new trial, citing misconduct of counsel and the "numerous" violations of the trial court's motions in limine pertaining to unrelated medical conditions and fault on the part Dr. Wohns. *CP 328-337.* Before argument on this motion,

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[31] Fearful of claims of making a "speaking objection" such as those involved in *Teter v. Deck,* 174 Wn.2d 207, 274 P.3d 336 (2012), counsel simply stated "objection" and asked to be heard outside the presence of the jury. *7 RP 955.* The court overruled the objection without allowing counsel an opportunity to explain the basis for the objection. *Id.*

Judge McDermott stated that he believed that defense counsel, Steven Fitzer, "might have forgotten that I was actually now wearing a robe." *12 RP 1587, lines 13-15.* He stated that he was "very upset and bothered by that" and that he would recuse himself from any "future trials with Mr. Fitzer or with Mrs. Fitzer, period, because I don't know that Mr. Fitzer's going to be able to think of me other than as a plaintiff's lawyer. . ." *12 RP 1587.*

Counsel was unaware of this concern. Throughout the trial, Judge McDermott had been highly complementary of both attorneys as demonstrated in the following exchange on day six of the trial:

> BY MR. FITZER:
> Q. Good morning, Mr. Clark.
> A. Good morning.
> Q. Again, is it okay if I stand here?
> A. It is.
> Q. All right. As I understood, where we --
> THE COURT: You didn't ask me.
> MR. FITZER: May I begin? You may want to tell the jury we were once opponents.
> THE COURT: We were. We've had cases against one another about -- well, Mr. Fitzer was -- I was a young man at the time, so you can imagine... He was too, unfortunately. This has been probably 25 years ago, I suspect. But in any event -- and Mr. Wampold and I have known each other outside of the courtroom, as well. So I love to tease both of them. *And so every now and then, if I do that, please know that it's because I respect both of them. I hold them both in high esteem and it's enjoyable for me to have them both in my courtroom.* So it's always nice to have lawyers in here that you can do that to. So if I tease them a little bit in front of you, you'll know what's

going on, okay? All right.
MR. FITZER: Okay?
THE COURT: I'm good.
MR. FITZER: Okay. Yes, Your Honor, you are.
THE COURT: Didn't ask for that one. Go ahead.

6 RP 713, line 12-714, line 13 (emphasis added).[32]

The court took the motion for new trial under advisement but commented: "I don't intend to impose sanctions." *12 RP 1606, line 6.* On December 23, 2014, the trial court entered an order granting the motion for new trial and awarding terms. *CP 471-87.*

The defense timely moved for reconsideration, pointing out that the factual statements in the order did not appear in the transcript. *CP 544-45, 559-82, 588-617.* The trial court denied the motion. *CP 660-61.* It also entered an order imposing $82,131.65 in terms against the law firm of Fitzer, Leighton & Fitzer, P.S. *CP 663-65.* Following entry of the judgment on terms, the defense filed a timely notice of appeal. *CP 676-709.*

[32] The transcript is replete with examples of defense counsel treating the court with the appropriate respect and professionalism. Because this appeal should be decided on the objective record, rather than emotions, the court's comments will not be addressed further in the body of this brief. Should this court be concerned about the trial court's comment, Appendix D contains a specific rebuttal to the concerns expressed by the trial court post-trial.

V. ARGUMENT

A. Standard of review.

An appellate court reviews an order granting or denying a new trial for abuse of discretion. *Huntington v. Clallam Grain Co.*, 175 Wn. 310, 27 P.2d 583 (1933). This principle does not apply, however, if such an order is predicated upon rulings on the law, such as those involving the admissibility of evidence or the correctness of an instruction. *Detrick v. Garretson Packing Co.,* 73 Wn.2d 804, 812, 440 P.2d 834 (1968) (citing *Johnson v. Howard*, 45 Wn.2d 433, 436, 275 P.2d 736 (1954)). More recently, the court affirmed that the abuse of discretion standard applies "when it's not based on an error of law." *Teter v. Deck,* 174 Wn.2d 207, 274 P.3d 336 (2012). Errors of law are not subject to the abuse of discretion standard. *Cox v. Gen. Motors Corp.*, 64 Wn. App. 823, 826, 827 P. 2d 1052 (1992). Instead, they are reviewed de novo. *Id; Skamania County v. Columbia River Gorge*, 144 Wn.2d 30, 42, 26 P. 3d 241 (2001).

B. The trial court did not comply with the CR 59(f) mandate that his order contain "definite reasons of law and fact."

CR 59(f) provides:

> In all cases where the trial court grants a motion for 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.

CR 59(f) (emphasis added). Our courts recognize that the "purpose of this requirement 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." *Dybdahl v. Genesco, Inc.*, 42 Wn. App. 486, 488, 713 P. 2d 113 (1986) (citing *Opinski v. Clement*, 73 Wn.2d 944, 951, 442 P. 2d 260 (1968); *Steinman v. Seattle*, 16 Wn. App. 853, 857, 560 P. 2d 357 (1977)). "This purpose is frustrated if the reasons in the order are not stated with sufficient detail to enable review without resort to debatable inference and speculation." *Id.* (quoting *Williams v. Mauseth Ins. Brokers, Inc. v. Chapple*, 11 Wn. App. 623, 628, 524 P. 2d 431 (1974)).

This rule requires the trial court to identify both the fact and the prejudice associated with the fact. In *Dybdahl, supra*, the trial court identified five reasons for granting the order for new trial, including four evidentiary rulings. The court reversed the order for a new trial noting that the evidentiary grounds listed did not state why the rulings were erroneous and, "if erroneous, why they were prejudicial so as to warrant a new trial." *Dybdahl*, 42 Wn. App. at 488.

Here, the trial court's order is largely conclusory and fails to identify with sufficient specificity the "definite reasons of law and facts for its order." Nowhere is this more evident than the court's statement that "It was obvious to the Court that the theme of Defense counsel's case was that any injuries sustained by the plaintiff were caused by Dr. Wohns, not the defendant." *CP 474.* Nowhere in the order does the court explain the legal justification for criticizing defendants' causation defense or how a motion in limine could remove an element of the plaintiffs' burden of proof under *RCW 7.70.040.*

The requirement that the trial court identify definite reasons of law and fact exists so that "objective criteria" takes the place of "subjective impressions." *Durkan v. Leicester*, 62 Wn.2d 77, 81, 381 P. 2d 127 (1963). Here the trial court's conclusory statements cannot replace the need for objective criteria under which this court can properly review the decision.

A second difficulty presented by this order is that it contains a catch-all phrase that implies other potential misconduct. These vague references, combined with the judge's post trial comments about "respect" leave the impression that defense counsel must have done something improper in presenting his case.

However, the suggestion of impropriety is not accompanied by specific facts. Deprived of these findings, appellants are left without a clear record to assign error to and to rebut.

The appellate court may reverse and reinstate the jury's verdict for failure to enter the correct findings. *State v. Collins*, 72 Wn.2d 741, 435 P. 2d 538 (1967). Here, appellants suggest that the proper remedy is to assess the validity of the trial court's order solely on the specific accusations of misconduct relating to the motions in limine for non-party fault and medical conditions involving anything "above the waist."

C. The trial court's order incorrectly confuses fault with causation, and extends the original motion in limine to the disputed issue of causation of Mr. Clark's injuries, thereby denying Dr. Teng his constitutional right to have a jury resolve this contested issue.

1. **In ruling on the motions in limine, the trial court affirmed the defense right to challenge causation and specifically approved the causation defense offered by Dr. Teng and counsel.**

From the first day of trial, the court recognized that the defense theory was the inadequacy of plaintiffs' causation claims. In discussing this motion, defense counsel told the court exactly what evidence he would present:

> So his second at Harborview surgery was necessitated only because a CSF leak occurred during Dr. Wohns' first surgery. Now, Wohns said we caused it, and we're going to say -- unless you tell me I can't – the postoperative MRI

> doesn't show any CSF leak. The MRI after Dr. Wohns' surgery shows a big CSF leak.

1 RP 31, lines 6-11. The trial court *approved* of this approach and recognized that it was central to the defense:

> If Mr. Fitzer limits his argument and his testimony as evidence to what he has just described, I'm okay with that. And I can still grant your motion in limine No. 4, and it falls within what both of you are saying. It's when you start walking off that tightrope that we'll have some problems. And, Mr. Fitzer, I will accept what you just said. *You can present exactly what you've just told me you're going to present. That seems to be the gravamen of your case.*

1 RP 31, line 19 - 32, line 4 (emphasis added).

The passage above reveals that at the beginning of trial, the court recognized that evidence of the sequence of events went to undercut plaintiffs' causation theory. Inexplicably, the court reversed course following the verdict and entered an order that equates fault with causation. Because these are distinct elements of a cause of action, the trial court erred.

2. **The order effectively removes the disputed issue of causation from the case in violation of the defendant's constitutional right to a trial by jury.**

RCW 7.70.040 sets out plaintiffs' burden of proof in an action alleging a breach of the standard of care:

> 7.70.040. Necessary elements of proof that injury resulted from failure to follow accepted standard of care.

> The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:
>
> (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances;
>
> (2) Such failure was a proximate cause of the injury complained of.

RCW 7.70.040; Morton v. McFall, 128 Wn. App. 245, 115 P.3d 1023 (2005). Plaintiffs "shall have the burden of proving each fact essential to an award by a preponderance of evidence." *RCW 7.70.030.*

Plaintiffs bear the legal burden to prove causation. *RCW 7.70.040; Berger v. Sonneland*, 144 Wn.2d 91, 111, 26 P.3d 257 (2001). For malpractice actions, this rule is set out in the burden of proof instruction contained in *WPI 5th 105.03*. Plaintiffs must present evidence establishing that each proposition is more probably true than not true. *WPI 5th 21.01*; *O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968). Plaintiff can only meet this burden through expert testimony establishing causation on a more probable than not basis. *McLaughlin v. Cooke,* 112 Wn.2d 829, 837, 774 P.2d 1171 (1989).

The trial court's order violates these rules by removing causation from the case, thereby denying the defendants their constitutional right to a jury trial on this contested issue. *Const. art. I, §21* provides that the

right of trial by jury shall remain inviolate. "The right to a jury trial may not be impaired by either legislative or judicial action." *Geschwind v. Flanagan*, 121 Wn.2d 833, 840, 840 P.2d 1061 (1993) (citing *Brandon v. Webb*, 23 Wn.2d 155, 159, 160 P.2d 529(1945)).

In *Davis*, *supra*, our Supreme Court struck down the anti-SLAPP statute, *RCW 4.24.525,* because it created a truncated adjudication of the merits of plaintiffs' claims without a trial. *Davis*, 183 Wn.2d at 294. The court concluded: "Such a procedure invades the jury's essential role of deciding debatable questions of fact." *Id.*

Here, the order states that "[i]t was obvious to the Court that the theme of Defense counsel's case was that any injuries sustained by the plaintiff were caused by Dr. Wohns, not the defendant." *CP 474.* The court's statement correctly identifies the defense theme, but then holds it was improper. This the court has no authority to do. Causation can be removed from plaintiffs' burden of proof only if, from all the evidence, a reasonable person could reach only one conclusion. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 350, 588 P.2d 1346 (1979) (citing *Morris v. McNicol*, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974)). Unless the facts are undisputed, a jury determines causation. *Baughn v. Honda Motor Co. Ltd.,* 107 Wn.2d 127, 142, 727 P.2d 655 (1986).

Here, there is no question causation was hotly contested. With expert testimony on both side, the court's conclusion that causation evidence and argument was "misconduct" violates the defendants' right to a trial by jury and requires reversal.

3. **The order granting new trial confuses the distinct legal concepts of fault and causation and is therefore in error.**

A "third party fault" or "non-party" defense requires affirmative evidence that the third party violated the applicable standard of care. *Joyce v. Dept. of Corr.*, 116 Wn. App. 569, 595, 75 P.3d 548 (2003), *rev'd in part, aff'd in part*, 155 Wn.2d 306 (2005).

A challenge to the plaintiffs' theory of causation is *not* an affirmative defense and not subject to the evidentiary standards required of plaintiffs' causation testimony. *Wilder v. Eberhart*, 977 F.2d 673 (1st Cir. 1992). Instead it is a denial that the plaintiff has met his or her burden of proof. *Id. See also, Colley v. PeaceHealth,* 177 Wn. App. 717, 732, 312 P.3d 989 (2013) (Court rejected plaintiff's challenge to defense experts on causation on basis that the competing opinions tended to deprive Colley proof of persuasion necessary to cross the 50 percent threshold).

Here, the defense repeatedly distinguished between fault and causation. Dr. Bhatia specifically declined to consider whether

Dr. Wohns violated the standard of care, stating that he had not evaluated the case on Dr. Wohns, and that he did not think there was a breach. *9 RP 1224-25.* Dr. Teng denied that he was offering standard of care opinions *four* separate times. *10 RP 1364.* Counsel told the jury "we didn't come here to play the blame game, but we did come here to show you, as part of our obligation, that things that were done after the 18th (sic) were the cause of his current symptoms." *11 RP 1539, lines 7-10.* Counsel referred to the decision to "oversew" the wound as "reasonable." *11 RP 1540-41.* Finally, counsel argued, that while other doctors would not have performed the surgery it "wasn't negligent, but it did cause his problems." *11 RP 1543, lines 15-16.*

A bad outcome is not, of itself, evidence of negligence/violation of the standard of care. *WPI 5th 105.07; Watson v. Hockett*, 107 Wn.2d 158, 727 P.2d 669 (1986). Here, the defense took great pains to make it clear that they were not alleging Dr. Wohns breached the standard of care just because Dr. Wohns had a bad result. The order's suggestion to the contrary ignores the defense's repeated emphasis on this distinction.

4. The trial court's description of misconduct is not supported by the record.

Paragraph six of the court's order contains the following list of alleged violations of the motions in limine pertaining to the defense opening:

> Counsel put up PowerPoint slides showing Dr. Teng's post-operative MRI and then comparing that to Dr. Wohns' post-operative MRI and specifically stated that "this is what it look like when he was under Dr. Teng's care" and "*this* is what Dr .Wohns did to him" and the result of Dr. Wohns' care is *this*." The only purpose of utilizing these comparative slides was to show that Dr. Wohns had done something improper in his surgery. Defense counsel also went on to insinuate multiple times that a resident at Harborview had to fix Dr. Wohns' surgery; implying that even a student was able to fix something that Dr. Wohns was not. He also stated on more than one occasion that Dr. Wohns' nurse, not Dr. Wohns, stitched up Mr. Clark; again insinuating that allowing the nurse to do so was a violation of the standard of care.

CP 473, lines 17-25 - 474, lines 1-3 (emphasis in original). This entire section of the order, including the quotes and emphasis, is taken verbatim from the Plaintiffs' Motion Re: Defense Violations of Motions in Limine During Opening Statement.[33] *CP 244, line 23 - 245, line 7.* Unfortunately, in relying upon plaintiffs' brief, the order contains significant omissions and multiple errors.

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[33] For ease of reference, the Order is attached as Appendix E. The plaintiffs' Motion Re: Defense Violations on Motion in Limine During Opening Statement is attached as Appendix F.

First, while the order correctly points out that the opening consisted of PowerPoint slides, the court fails to acknowledge that plaintiffs had preapproved these slides before openings, did not object to their use, and raised no contemporaneous objections. *2 RP 123-24.*

Second, the order incorrectly quoted defense counsel's opening. Counsel did not say "*this* is what Dr. Wohns did to him." *CP 473, lines 20-21.* Instead he said, "These are the pictures after Dr. Wohns' (sic) operated." *2 RP 151, lines 23-24.*

Next, the court incorrectly adopted plaintiffs' argument that the "only purpose of utilizing these comparative slides was to show that Dr. Wohns had done something improper in his surgery." In his declaration to support the motion for reconsideration, counsel identified four, very appropriate, purposes for the comparative slides. *CP 565.* The slides represent direct rebuttal of the plaintiffs' theory of the case, and cannot constitute misconduct.

5. **The jury is presumed to follow the court's instructions. If the defense violated the order in limine regarding fault, instruction number six cured any alleged error by informing the jury that if they found Dr. Teng negligent, he was responsible for Dr. Wohns' care.**

Even if some aspect of defense counsel's remarks could be found in violation of the trial court's order in limine regarding fault of non-parties, the court had instructed the jury that:

> If you find that Dr. Teng is liable for injury he caused to plaintiff, he is also liable for any injury or exacerbation of injury cause by treatment performed by another physician that plaintiffs' injury reasonably required, whether or not that other physician's treatment was provided in a proper or negligent matter.

CP 294.

A jury is presumed to follow the court's instructions, and such a presumption will prevail until it is overcome by a showing. *Nichols v. Lackie*, 58 Wn. App. 904, 907, 795 P.2d 722 (1990), *review denied*, 116 Wn.2d 1024 (1991).

Here the trial court gave instruction number six, its "curative" instruction. This instruction told the jury that any injury caused by Dr. Wohns did not excuse negligence on the part of Dr. Teng. *CP 294.* Plaintiffs' counsel repeatedly relied on this instruction, arguing that the bottom line was "that if you find that Dr. Teng's care was below the standard of care, below what a reasonably careful surgeon would do and that it caused real harm to Mr. Clark, they're responsible for everything he's gone through." *11 RP 1510.* He argued that the suggestions that Dr. Wohns did not do his surgeries right or he did something wrong "none of that matters." *11 RP 1509.* He told them that only if you find Dr. Wohns 100 percent responsible would Dr. Teng be "not on the hook." *11 RP 1510.*

"It is presumed, absent a contrary showing that the jury followed the court's instruction." *Dybdahl*, 42 Wn. App. at 490 (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)). There is no evidence that the jury did not follow this instruction. Therefore, plaintiffs cannot overcome this presumption.

D. The trial court's order incorrectly lists as misconduct proper challenges to Dr. Wohns' credibility as a fact witness and competence as an expert. Because the order attempts to remove issues of credibility from the jury's consideration, it violates the defendant's right to have the jury determine these issues.

1. The order for new trial improperly impairs the defendant's constitutional right to have the jury determine issues of credibility.

In ruling on the defense motion for mistrial, the court recognized that "It's for the jury to decide on Dr. Wohns' 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 1571, lines 8-13*. Somewhere between that statement and the order granting the motion for new trial, the court lost sight of the defendant's right to challenge, and the jury's right to determine, issues of credibility.

The trial court's initial ruling was correct. The weight of evidence and credibility of witness is a matter for the jury to decide.

Hilltop Terrace Homeowners Ass'n v. Island County, 126 Wn.2d 22, 34, 891 P.2d 29 (1995); *Lian v. Stalick*, 106 Wn. App. 811, 825, 25 P.3d 467 (2001). "An opposing party has the right to attack the credibility of an expert witness by exposing weaknesses in the expert's credentials or in the information upon which the expert's opinion is based." Tegland, 5D WASHINGTON PRACTICE, §705.7. Likewise an expert may "be impeached by the familiar methods of showing bias, prior inconsistent statements, reputation for untruthfulness, contradiction, or any of the other methods available to impeach a lay witness." *Id.*

Through two respected national experts, and through the testimony of Dr. Teng, the defense thoroughly and properly debunked Dr. Wohns' expert testimony by carefully taking the jury through the objective evidence that established Dr. Wohns' claim that Dr. Teng caused a CSF leak and left a "mess" could not be true.[34] The court's ruling, in overturning the jury's reasoned verdict, acts to shield Dr. Wohns from legitimate impeachment in contravention to the rules of evidence and procedure. Here, everyone in the courtroom understood that, because of Dr. Wohns' testimony concerning what he found during

[34] *See supra* Part IV.B.4.

his first surgery, the issue came down to which of the two doctors the jury would believe.

Dr. Teng was the final witness. The following juror question illustrates that Dr. Teng's presentation was central to the jury's determination:

> COURT: You've been very clear and concise in explaining your care of Mr. Clark. Were you this clear with him, ensuring that he understood your decisions and recommendations and felt like he, Mr. Clark, was also heard?
> THE WITNESS: I try to be as concise as I can with patients. Some people can understand better. Some people don't understand as well. I mean, there's always a problem with some people remembering what I've taught them. There's been a lot. You've seen this. I'm sure if you ask questions, you're not going to remember everything we've just taught you. So I can only do it to the best of my ability, which I think I do explain things as best as possible and as clearly as possible.

10 RP 1408, lines 2-15.

This question illustrates that the jury was appropriately weighing the credibility of the witnesses. Because credibility is the sole province of the jury, the trial court erred in granting the motion for new trial.

2. **The trial court's order improperly found that proper challenges to Dr. Wohns' competence as an expert was misconduct.**

First, in paragraph six, the trial court refers to defense "insinuations" that "a resident at Harborview had to fix Dr. Wohns' surgery; implying that even a student was able to fix something that

Dr. Wohns was not." *CP 473-474.* This is not an insinuation. It is fact. A resident *did* fix the CSF leak on the first try. *9 RP 1180; Ex. 4, p.8.* Moreover, this evidence directly rebutted Ms. Allen's claim in opening statement that Dr. Teng's failure to fix a CSF leak made it difficult for Dr. Wohns and subsequent surgeons to repair the leak:

> He'll (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, lines 5-14 (emphasis added).

Second, the evidence rebutted Dr. Wohns' testimony that Dr. Teng's failure to close the alleged leak caused the need for all subsequent surgeries:

> A If it had been done right the first time, there would have been no subsequent surgeries.
> Q And explain why.
> A If the canal adequately decompressed and the spinal fluid leak recognized as such and repaired, more likely than not, we wouldn't have had all the cascade of events thereafter. *The spinal fluid leak can be tricky as you can see just in my hands, we had problems.*

3 RP 253, lines 11-21 (emphasis added). With due respect to Dr. Wohns' skilled hands, evidence that a resident could fix the CSF leak, on the first

try, directly contradicted plaintiffs' statements in opening and Dr. Wohns' claim that Dr. Teng's conduct created a complicated medical condition that even Dr. Wohns could not fix.

E. The trial court erred in basing the order for new trial in part on the conclusion that defense counsel violated motions in limine regarding plaintiffs' prior "above the waist" medical history.

1. The trial court erred by excluding evidence of Mr. Clark's cervical spine issues and the doctor's post surgery progress notes discussing Mr. Clark's headache and its cause.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *ER 401.* Evidence is not relevant unless (1) it has a tendency to prove or disprove a fact, and (2) that fact is of consequence in the other facts and the substantive law. *Id.* (citing *State v. Rice*, 48 Wn. App. 7, 737 P.2d 726 (1987)).

The court's decision that anything "above the waist" was off limits has no medical basis. Dr. Wohns acknowledged that problems in the cervical spine "can affect everything from the neck down."[35] *3 RP 279.* And, as Dr. Teng explained in his post-trial declaration, evidence regarding Dr. Teng's discussion of the post-surgical headache

[35] Based on this testimony, the defense asked the court to reconsider its ruling. *CP 249-54.* The court declined to do so. *4 RP 359.*

and the CPAP machine was important to his assessment of the patient and dictated his post-operative care. *CP 584*. Also, evidence relating to Dr. Teng's prior treatment of Mr. Clark's cervical spinal issues was relevant to damages and an important part of the whole picture of this doctor's relationship to Mr. Clark and should not have been excluded.

2. **Any technical violation of this motion in limine did not result in prejudice, as such evidence was introduced by plaintiffs.**

To the extent this court disagrees, however, the plaintiffs cannot demonstrate that they were prejudiced by these references. Plaintiffs' medical records, which they introduced and claimed to have redacted, contain the exact same information. *Ex. 1, p. 15* ("Patient is a 49 year-old male I have seen in the past *for cervical problems.*" (emphasis added)); *Ex. 3, p. 9* ("Complains of *sleep apnea, CPAP machine.*" (emphasis added)). Given the plaintiffs own failure to redact their exhibits, plaintiffs' complaints about misconduct and allegations that they were prejudiced regarding medical conditions "above the waist" are without merit.

F. The trial court's reference to allegations of violations of the Rules of Professional Conduct has no factual basis and does not provide specific instances to allow appellate review.

On page seven of their brief in support of a new trial, plaintiffs offered other instances of alleged misconduct during closings. The trial

court's order briefly mentions the existence of other "misconduct, but does not specify what these are and concludes that "because of the multitude and gravity of the conduct described herein" it was not necessary to address those arguments. The incidents plaintiffs cite as "misconduct" cannot save the order granting a new trial. First, only one allegation of misconduct was properly supported by an objection. This objection concerned the loss of consortium argument. *11 RP 1546.* The court did not sustain the objection, but simply cautioned counsel not to go any further on that argument. He did not.

Second, there were no violations of the Rules of Professional Conduct's prohibition on statements of belief or of the order on the motion in limine regarding personal beliefs. The statements set out in footnote four of the plaintiffs' brief on the motion for new trial are valid arguments, directing the jury to evidence available to them in the courtroom and their own observations concerning Mr. Clark's physical condition. *See, 11 RP 1544-45.* Plaintiffs voiced no objections to them when they were made, nor did they bring them to the court's attention until after the jury returned the verdict against them. Misconduct cannot be raised for the first time in a motion for new trial unless the misconduct is so flagrant that no instruction could have cured the prejudicial effect. *Sommer v. DSHS*, 104 Wn. App. 160, 171, 15 P.3d 664 (2001); *Warren v.*

Hart, 71 Wn.2d 512, 518-19, 429 P.2d 873 (1967); *Strandberg v. Northern Pacific Railway Co.*, 59 Wn.2d 259, 367 P.2d 137 (1961). While appellants do not believe these issues are properly before the court, to the extent they are cited as other reasons justifying a new trial, the allegations of misconduct in argument are not sufficient to affirm the order.

G. Because the trial court erred in granting a new trial, it erred in granting sanctions.

Under *Washington State Physicians Ins. Exch and Ass'n v. Fisons*, 122 Wn.2d 299, 858 P.2d 1054 (1993) ("Fisons"), the purpose of monetary sanctions is to "deter, to punish, to compensate and to educate." *Fisons*, 122 Wn.2d at 356. Here, up to and including closing argument, the court was of the opinion that while, both sides had pushed boundaries, he "refused to find that either side went over those boundaries to the point where a mistrial is warranted." *11 RP 1573, lines 15-18.* Under such circumstances, the order granting sanctions is inappropriate. The decision granting the order for a new trial and imposing terms cannot be reconciled with the court's prior position. Appellants' respectfully request that the court's decision on terms be reversed.

VI. CONCLUSION

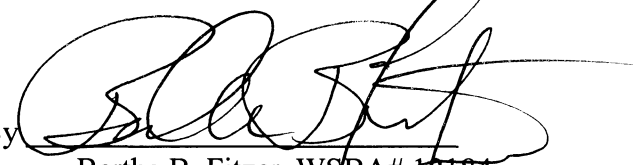
Washington courts are "committed to the rule that, insofar as possible, there shall be one trial on the merits with all the issues fully and fairly presented to the trial court at that time so the court may accurately rule on all issues involved and correct errors in time to avoid unnecessary retrials." *Haslund v. Seattle,* 86 Wn.2d 607, 614, 547 P.2d 1221 (1975). While in egregious circumstances the court may excuse the need to move for a mistrial, the general rule is that the parties may not gamble on a verdict in their favor and then bring up issues in the motion for new trial. *Compare Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012) *with State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009); *City of Seattle v. Harclaon*, 56 Wn.2d 596, 597, 354 P.2d 928 (1960); *Warren v. Hart*, 71 Wn.2d 512, 518, 429 P.2d 873 (1969).

There is no reason to depart from this rule. Throughout this trial, defense counsel attempted to treat everyone in the courtroom with dignity and respect. There was no misconduct. Instead, the defense properly attacked the foundations of the plaintiffs' case on causation. That case rested almost entirely upon the testimony of Dr. Wohns. As an expert and as a fact witness, Dr. Wohns opened the door to valid criticisms of his knowledge and credibility.

The jury listened carefully to all the experts, asking appropriate questions designed to challenge both sides. Ultimately, the jury found Dr. Teng's testimony clearer and more persuasive. Under *Const. Art. I, §*21, these are issues solely within the purview of the jury. Defendants respectfully request this court reverse the order granting a new trial and vacate the judgment on terms.

Respectfully submitted this 11th day of September, 2015.

FITZER, LEIGHTON & FITZER, P.S.

By 

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CERTIFICATE OF SERVICE

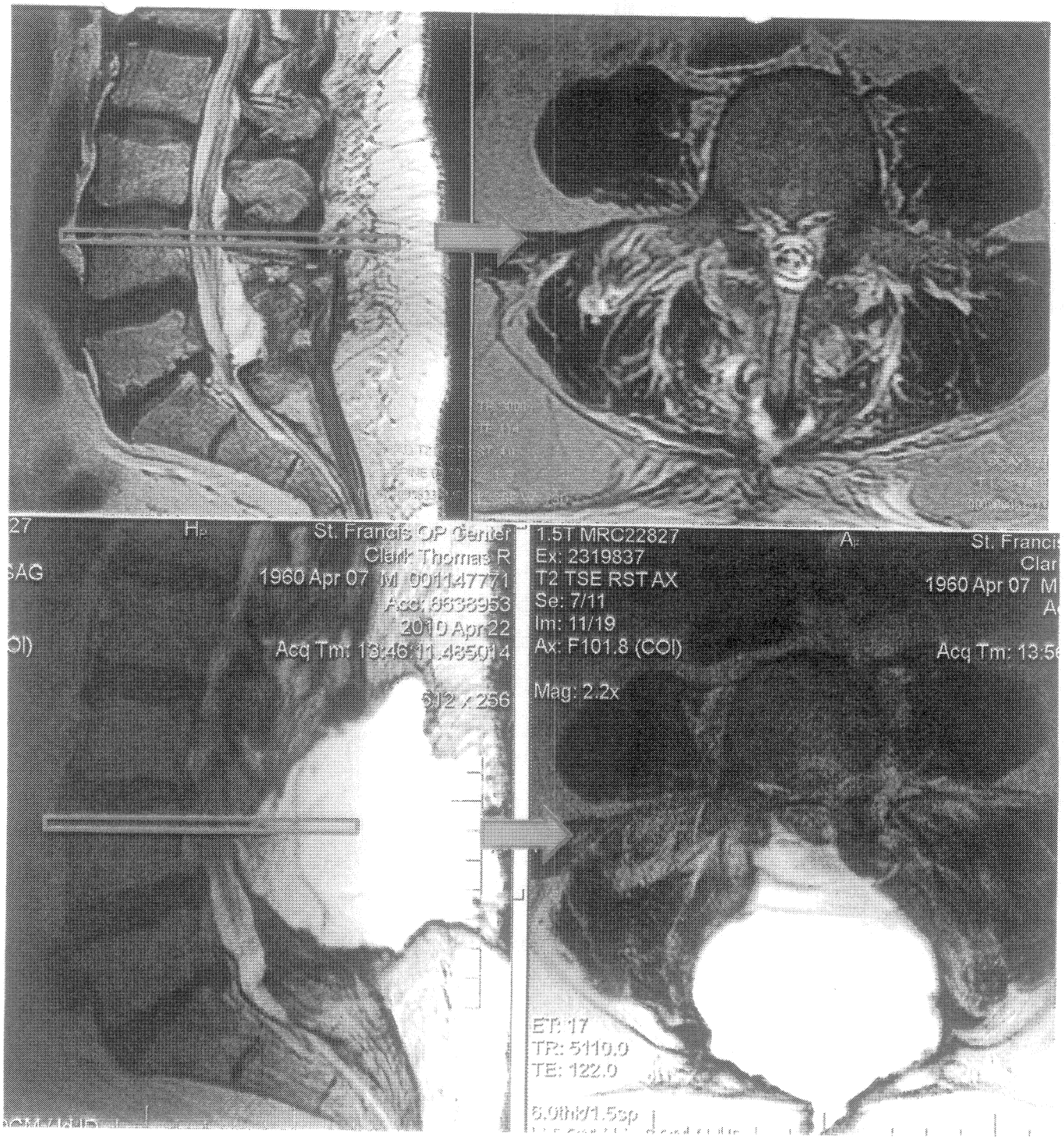
I certify under penalty of perjury of the laws of the State of Washington that on the date set forth below, I caused a true and correct copy of the foregoing document be served on the following in the manner indicated below:

Counsel for Plaintiff: Rodney B. Ray Margullis Luedke & Ray, PLLC 2601 North Alder Street Tacoma WA 98407-6264 roray@mlr-law.com	[X] Via First Class Mail [ ] Via Hand Delivery [ ] Via Electronic Mail
Counsel for Plaintiff: Michael S. Wampold Mallory Allen Peterson Wampold Rosato Luna Knopp 1501 4th Avenue, Suite 2800 Seattle WA 98101-1609 Wampold@pwrlk.com Allen@pwrlk.com	[X] Via First Class Mail [ ] Via Hand Delivery [ ] Via Electronic Mail

SIGNED at Tacoma, Washington this 11th day of September, 2015.

Bertha B. Fitzer, WSBA# 12184

APPENDIX A



Top of L4 level –
Feb 2010 after 1st surgery

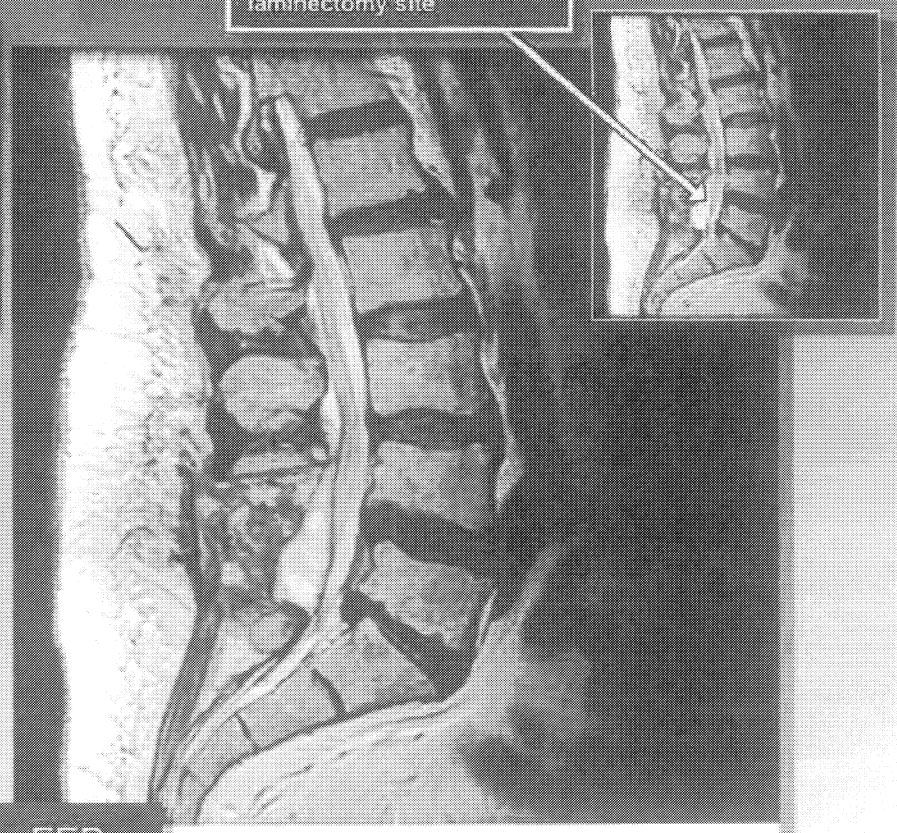
Same level –
Apr 2010 after 2nd surgery

APPENDIX B

Sequential Lumbar MRI Images of Thomas Clark

JAN.

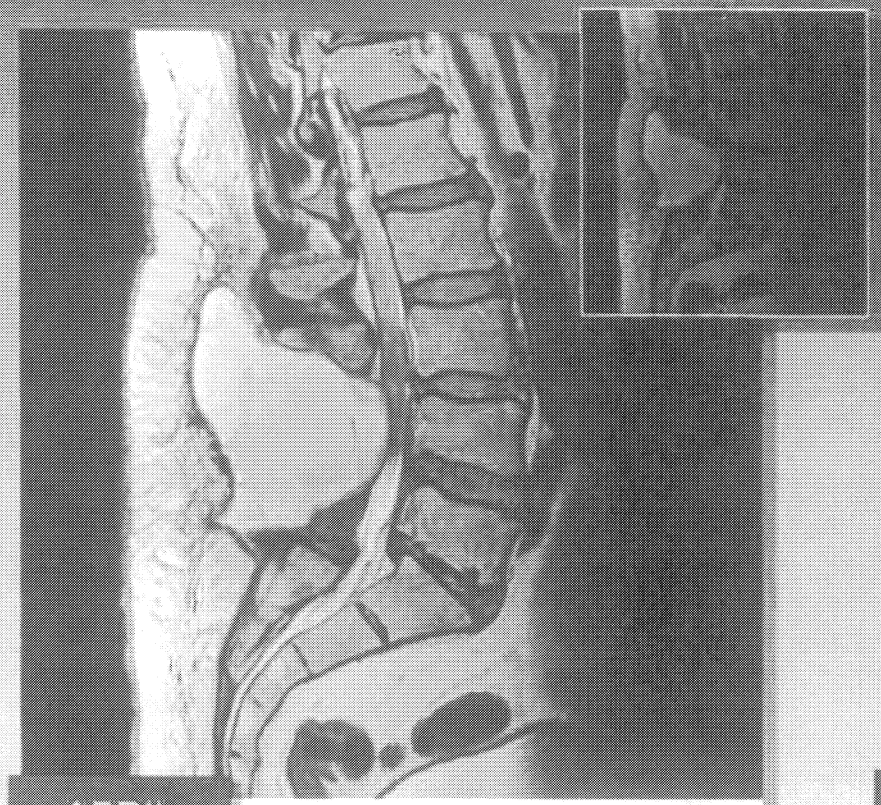
January 13, 2010
Pre-operative image



FEB.

February 18, 2010
fibrotic fluid mass size
(2.7 x 1.6 x 4.7) cm
(1.06 x .63 x 1.85) in

Sequential Lumbar MRI Images of Thomas Clark



APRIL

April 9, 2010
fluid size
(9.14 x 6.45 x 8.96) cm
(3.60 x 2.54 x 3.53) in

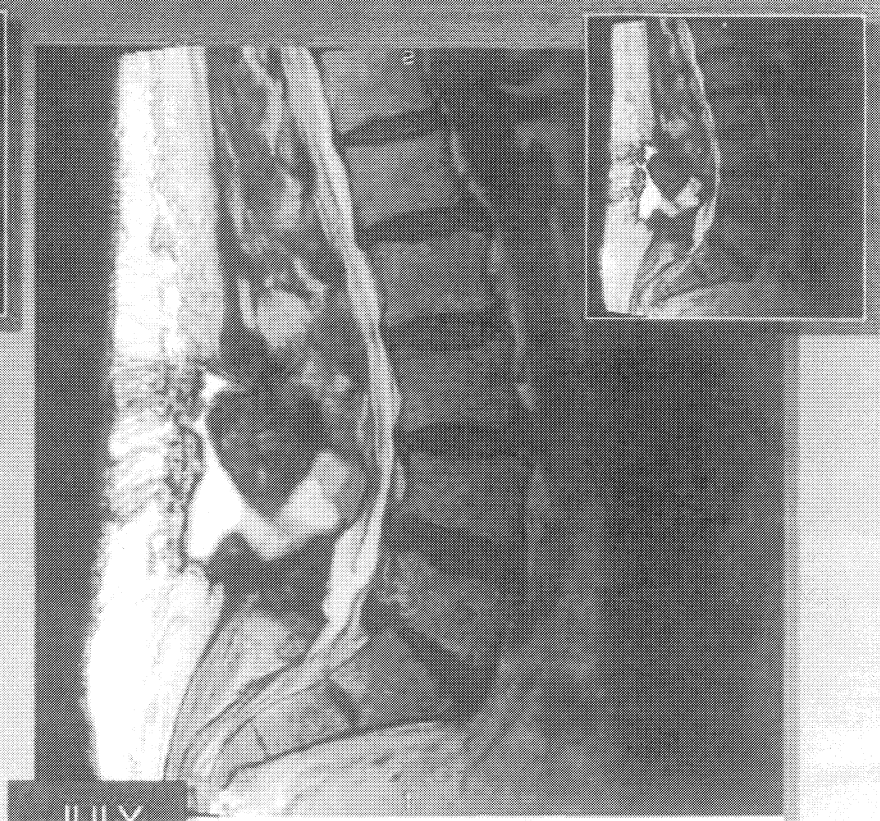
APRIL

April 22, 2010
fluid size
(9.7 x 7.0 x 9.3) cm
(3.82 x 2.76 x 3.66) in

Sequential Lumbar MRI Images of Thomas Clark

MAY

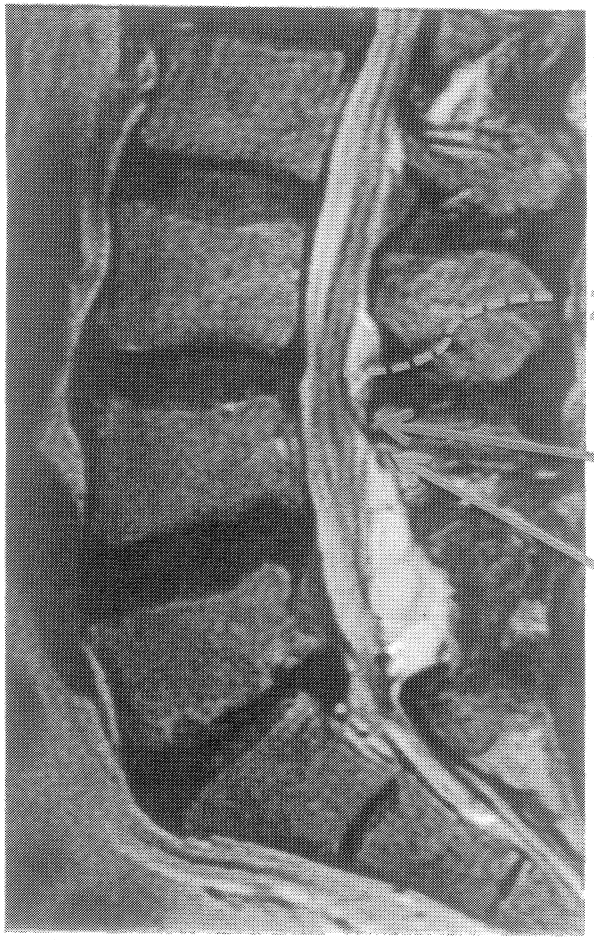
May 4, 2010
fluid size
(6.1 x 7.0 x 6.2) cm
(2.4 x 2.76 x 3.23) in



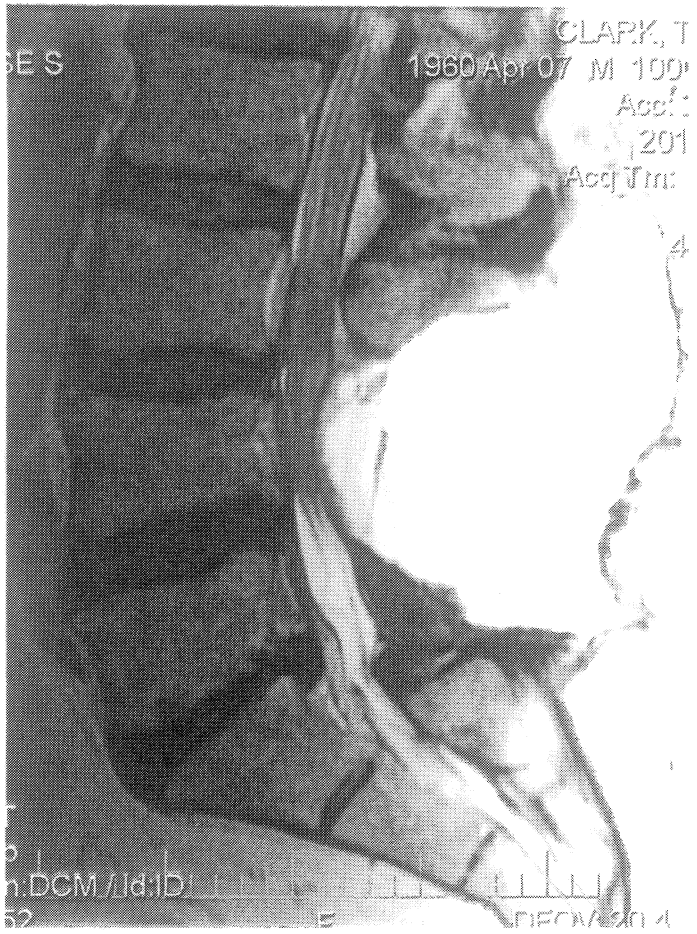
JULY

July 12, 2010
fluid size
(5.1 x 3.2 x 3.2) cm
(2.0 x 1.26 x 1.26) in

APPENDIX C



2/18/2010



4/9/2010

Ex. 175

APPENDIX D

APPENDIX

This appendix addresses the issue of respect for the court raised by Judge McDermott prior to hearing argument on plaintiffs' motion for new trial. The court set out its concerns as follows:

> But I really do want to hear your response to that, because I read over your material and I don't know how I'm going to rule right now. I will tell you, I actually laid awake last night thinking about it because it -- it bothers me that lawyers don't follow the court rules and the court orders. It bothers me probably more than anyone here will understand.
>
> I think that for a while, perhaps, the unique situation that Mr. Fitzer found himself in, having known me in my prior life as a plaintiff's trial lawyer and now as a judge, it seemed to me that there were a couple of days that he might have forgotten that I was actually now wearing a robe. And I felt that way. I don't mind saying it on the record. I will recuse myself from any future trials with Mr. Fitzer or with Mrs. Fitzer, period, because I don't know that Mr. Fitzer's going to be able to think of me other than as a plaintiff's lawyer, and I don't think that's fair to either me or to the people who might appear before me. And I would just simply announce that I had no clue that that was going to happen, but it certainly seemed to be the case during the course of the trial. So I was very upset and bothered by that. I tried my very best to make rulings that I thought were fair and reasonable and were not influenced by what I thought was personally going on in the courtroom. And I'm going to try and make this ruling using the same criteria, whether or not that I think there is, under the law, a sufficient reason to grant your motion.
> I'm not sure. I don't know.
>
> But I've said what I needed to say as far as what my honest beliefs are and, you know, every now and then it does happen to everybody, I guess, who's on the bench. There are people who -- I know some lawyers who can't get it out

> of their mind that some of my colleagues don't do what they used to do. I understand that. It's never happened to me before.

I2 RP 1587-1588.

The court should not be faulted for honest emotions. If the appellate court is concerned about this comment, it is important that it look to determine if there is any objective evidence that supports the court's surprising post-trial revelation. The task of evaluating the validity of the court's comments is complicated by the fact the court did not identify specific instances, which created the concern. These statements surprised both defense counsel given the court's prior statements: 1) that he enjoyed having the attorneys before him; 2) that he respected both Mr. Wampold and Mr. Fitzer; 3) that he held the both "in high esteem" and; 4) that "it's enjoyable for me to have them both in my courtroom." *6 RP 713-14.*

Up to and including the taking of the verdict, the trial court continued to say things inconsistent with the conclusion that there was "disrespect." Post-verdict, Judge McDermott urged the jurors to stay and discuss the case with the lawyers, commenting: "I'm very familiar with both sides. They're nice people, they're not going to yell at you or hassle you, but I think it would be nice for you to talk to the lawyers, and I think

after their investment, they probably are owed that much."*12 RP 1581, lines 5-9.*

At no time did Mr. Fitzer intend to disrespect the court or its orders. *CP 559.* As an officer of the court, Mr. Fitzer recognized his obligations under the Rules of Professional conduct to treat the court, the parties and the process with respect and to refrain from conduct that disrupts the court. A Fellow of the American College of Trial Lawyers, (ACTL), Mr. Fitzer subscribes to their Code of Trial Conduct and to the belief that he must always "display a courteous, dignified and respectful attitude toward the judge presiding, not for the sake of the judge's person, but for the maintenance of respect for and confidence in the judicial office." ACTL Code of Trial Conduct, § 17(b). *CP 560.* He has never had any other judge make this type of allegation against him. *Id; CP 618.* A fair review of the trial transcript reveals Mr. Fitzer followed the dictates of the Rules of Professional Conduct and the Code of Conduct to which he subscribes.

However, because all the lawyers and the court knew each other, there were multiple times when there was light banter. On the second day of trial, the court suggested a contest for the best tie.

> THE COURT: I'm not really sure which one of you wears the -- or wins the tie award today. I really like that tie, but I'm kind of leaning toward --

MR. WAMPOLD: Yeah.
THE COURT: -- his today just -- I think it's pretty classy.
MR. WAMPOLD: I noticed when I came in. I think you might be right.
MR. FITZER: That is a tribute to the chief tie picker.
MS. FITZER: I don't let him buy any of his clothes. It's just -- it's the rule we've had since the day he bought the suit he got married in, and that was an unfortunate mistake.
THE COURT: *Getting married or having that suit?*
MS. FITZER: I think I'll leave that one alone.

2 RP 101. See also, *1 RP 71; 89; 7 RP 858;*

Unlike the attorney in *Teter v. Deck,* 174 Wn. 2d 207, 274 P. 3rd 336 (2012), counsel took pains to strictly limit objections in the front of the jury and to discuss the actual challenges outside their presence. See, *3 RP 243* (Object to the form of the question.)

At *3 RP 232-33,* Mr. Fitzer asked to be heard regarding Dr. Wohns' testimony. He said simply, "I'm going to object at this point in and if necessary we need—I believe we need to take something up." *Id.* Following argument, and the court's ruling, Mr. Fitzer commented: "Thank you. I understand your ruling and appreciate your time." *3 RP 239.*

Again, in Dr. Wohns' testimony, Mr. Fitzer objected stating simply "I'm going to object to the extent it calls for him to comment on my client's state of mind." *3 RP 317, lines 22-23.* Shortly thereafter, Mr.

Fitzer objected on the grounds of relevancy and then to foundation. *3 RP 318.*

In objecting during Mrs. Clark's testimony, Mr. Fitzer made a simple hearsay objection. *4 RP 391.* Ms. Allen offered an improper speaking *response* requiring Mr. Fitzer to ask that the jury be excused:

> Q. Okay. Tell us about what you remember from that one.
> A. I remember Dr. Wohns coming out after the surgery was over. He said that --
> MR. FITZER: Your Honor, I'm sorry, I object; it's hearsay.
> MS. ALLEN: Your Honor, we think this is not hearsay. It's a statement made by a declarant to rebut a recent or implied charge of recent fabrication. There was quite a bit on the stand from Dr. Wohns, that he did not, in fact, see what he said he saw. This is in support of that.
> MR. FITZER: Well, if that's your purpose, Judge, then we should do that outside the presence and determine whether that's accurate or not. Otherwise, my objection stands. Thank you.

Ms. Allen offered other inadmissible hearsay, which the trial court allowed, over defense objection. Still Mr. Fitzer treated the court and his opponent with respect:

> Q. Okay. Tell us about how Tom looked; what you observed of him there.
>
> A. Well, he was visibly -- you know, it was a loss, a huge loss. Physically -- my father, having not seen Tom for a while made a comment -- my father made a comment to me that Tom --
>
> MR. FITZER: Excuse me, Your Honor, I'm going to object. That's hearsay.

MS. ALLEN: Your Honor, it's not offered for the truth, but it's a –

THE COURT: He may testify –

MS. ALLEN: -- it's an observation that his father made.

THE COURT: He may testify. Objection overruled. Go ahead.

A. That Tom looks like he's aged quite a bit. And he had a cane and my dad -- he was real surprised to see him like that. He had -- it had been a while since he'd seen Tom.

5 RP 670.

When counsel needed to ask a follow-up question that was beyond the scope, he respectfully asked the court's permission.

THE COURT: Mr. Fitzer, any follow-up questions from those questions?

MR. FITZER: I have none for those questions. I would have one to reopen, just very briefly. Literally one.

THE COURT: I take my life in my own hands when I say okay, but okay.

3 RP 336, lines 18-23.

Counsel asked permission to show things to the jury.

MR. FITZER: And if you don't mind, I'm going to put it and display it, if I may, since it's been admitted, Judge?

THE COURT: Sure.

3 RP 281, lines 4-6.

Both defense counsel attempted to make sure that they understood the parameters of the court's rulings so that their exhibits and arguments complied with its terms. See *4 RP 357-58.* The following passage illustrates that even on the last day of trial testimony the court was still engaged in banter with Mr. Fitzer and Mr. Fitzer was attempting to make sure he complied with court's orders:

> MR. FITZER: Can he still refer to that portion of his operative report?
>
> THE COURT: Nope.
>
> MR. FITZER: So –
>
> THE COURT: He can say he monitored whatever he monitored, but he can't refer to the -- this -- well, ask me what you're asking. Maybe you and I aren't on the same level here. What are you -- what are you asking?
>
> MR. FITZER: Well, you're on a higher level than I am, but I --
>
> THE COURT: Well, only because I'm sitting -- only because I'm sitting higher. But tell me, what is it that you're requesting?
>
> MR. FITZER: I want to make sure that when I put up the doctor's operative note, which is the first two pages, and we're going through his operative note, if I ask him what intraoperative monitoring is, is that going to run afoul of your ruling?
>
> THE COURT: For what purpose are you asking that question? Because I don't know if the jury would know what that means.
>
> MR. FITZER: Well, that's the point.

> THE COURT: And the plaintiff hasn't introduced evidence that not having that would be below the standard of care. There hasn't been any mention made at all of that.
>
> MR. FITZER: No, but it just leaves a big hole in the middle. I just want you to tell me whether I can -- I mean, I'm going to put up his operative note, but –
>
> THE COURT: Those are the first two pages of 114 is what you're going to put up?
>
> MR. FITZER: Right, yeah.
>
> THE COURT: And your response -- I'm inclined to let you do that.

10 RP 1256. Ultimately, the trial court reversed this ruling and decided the doctor could not refer to his own intra-operative monitoring records. *10 RP 1261.* Mr. Fitzer immediately asked his client whether he understood the court's ruling making sure that he avoided the excluded evidence and testimony when presenting his testimony to the jury. *10 RP 1262.*

When counsel inadvertently violated the court's rulings, he apologized. See *3 RP 260, lines 17-18; 261, lines 8-12.*

On a personal level, Mr. Fitzer, cognizant of the court's desire to attend the funeral of his friend's daughter, attempted to accommodate the court and offered to cut the direct of his client to enable Judge McDermott to attend.

> MR. FITZER: We just wanted to know if Your Honor wants us to interrupt for the funeral?

THE COURT: Yes, I do, but it doesn't look like it's going to happen, so we'll just keep going. I think I gave you a signal, both, yesterday loud and clear that that was important to me, but it --

MR. FITZER: Well, we think --

THE COURT: -- got lost somewhere in the translation.

MR. FITZER: We think they're both important, Judge. And we're happy to interrupt if you want.

THE COURT: Thank you, Counsel, I appreciate that and I consider that a very sincere offer.

MR. FITZER: Both -- both of us are. It's not just -- I'm not just doing this because –

THE COURT: I'm assuming that you're talking for both sides. We'll see how we go. I don't -- we'll see how we do this morning.

10 RP 1265-66. Mr. Fitzer stopped his direct well in advance of the time the court needed to leave and promised he would shorten his direct if needed. *10 RP 1304-05.*

Mr. Fitzer treated the plaintiffs with the same respect as indicated in the passage where he begins to question Mrs. Clark:

MR. FITZER: Can everybody else see the screen? I'm not bothering anybody?

(No audible reply)

Q. (By Mr. Fitzer) All right. Are you a little less nervous now that you've done this for a bit?

A. Um, a little.

Q. Okay. Relax, breathe, there's water there. If you need a break, let us know, fair enough.

A. Sure.

Q. Am I too close to you? Does it bother you being this close?

A. No, you're fine.

4 RP 419-20.

It is not possible to include all the examples of Mr. Fitzer's demonstrating respect to the court, the litigants and the process. While these transcripts excerpts give a flavor of Mr. Fitzer's approach to the court, there may still be a tendency to give the court's comment deference because he was there to see and hear what occurred. A review of the audio recordings will substantiate the defense position that there was nothing in the tone or manner in which Mr. Fitzer addressed the court, witnesses or the jury that suggested disrespect. In fact, his presentation was so low keyed, that post-trial, several jurors chided him for lack of passion while complementing him on his professionalism and competence. *CP 561.*

Finally, the court's displeasure with defense counsel must not be allowed to bleed over to resolution of this case. The plaintiffs' motion for new trial must stand on its merits. For the reasons set out in the body of this brief, the trial court's order should be reversed.

APPENDIX E

Honorable Richard F. McDermott

FILED

14 DEC 23 PM 4:21

KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

THOMAS CLARK AND ALYSON, CLARK, husband and wife and the marital community composed thereof Plaintiffs, v. ANDELLE TENG, MD, and CASCADE SURGERY ASSOCIATES, PLLC dba CASCADE ORTHOPAEDICS Defendant.	NO. 13-2-03699-1 KNT ORDER GRANTING PLAINTIFFS' MOTION FOR NEW TRIAL (CLERK'S ACTION REQUIRED)

THIS MATTER, HAVING COME ON BEFORE THE UNDERSIGNED JUDGE, of the above entitled Court upon the Plaintiff's Motion for a New Trial, and the Court, having considered said motion, having heard argument, having reviewed the pleadings and files in this matter, specifically including the following:

1. Plaintiffs' Motion for a New Trial;
2. Declaration of Mallory C. Allen and seven (7) attachments;
3. Proposed Order;
4. Defendant's Response to Plaintiffs' Motion for a New Trial;

5. Declaration of Bertha B. Fitzer and six (6) attachments;
6. Reply on Plaintiffs' Motion for a New Trial;
7. Reply Declaration of Mallory C. Allen;
8. Defendant's Surreply to Plaintiffs' Motion for New Trial;
9. Copy of an Order Granting New Trial in the matter of Teter v. Deck; King Co. No. 06-2-13627-6 SEA;
10. "Code of Pretrial and Trial Conduct" of the American College of Trial Lawyers submitted by Defense counsel.

and being otherwise fully advised in this matter, now makes the following Order and Statement of Reasons pursuant to CR 59(f):

1. A Motion for a new trial is one of the most difficult motions a trial court is asked to rule on and should be granted only rarely and only if the trial court firmly believes that the conduct complained of is of such a level that it casts doubt on whether or not a fair trial occurred.
2. Prior to the beginning of this trial the parties briefed and argued a number of Motions in Limine. The Court entered a Consolidated Order Re: Motions in Limine on October 13, 2014, during trial, which accurately reflects the Court's oral rulings prior to trial. That Order is attached hereto as Exhibit A to this Order.
3. In addition to the Orders contained in Exhibit A, the Court also ruled that the defense was precluded from discussing or otherwise talking about any of the plaintiff, Thomas

Clark's, prior medical conditions which were "above the waist". This ruling was based on ER 403 considerations and the Court made it very clear in open court on the record that all of the plaintiff's medical conditions "above the waist" were excluded.

4. Also prior to trial, Defense counsel told the Court that he had no witnesses who would testify that Dr. Richard Wohns, plaintiff's subsequent treating physician and one of the plaintiff's expert witnesses, had violated the standard of care or was negligent, and furthermore, he disclosed that he had previously represented Dr. Wohns. The Court, therefore, ruled that the plaintiff's motion to exclude arguments or accusations of fault by non-parties including Dr. Wohns, was granted.
5. Throughout the trial both parties worked diligently to redact medical records to be shown to the jury. This was an effort by both sides to comply with the pre-trial rulings.
6. In spite of all of this argument and the Court's clear rulings and admonitions, Defense counsel violated the Court's rulings and orders multiple times. As an example, in his opening statement, Defense counsel clearly stated that Dr. Wohns was at fault and caused the problems the Plaintiff now suffers. Counsel put up PowerPoint slides showing Dr. Teng's post-operative MRI and then comparing that to Dr. Wohns' post-operative MRI and specifically stated that "this is what it looked like when he was under Dr. Teng's care" and "*this* is what Dr. Wohns did to him" and "the result of Dr. Wohns' care is *this*". The only purpose of utilizing these comparative slides was to show that Dr. Wohns had done something improper in his surgery. Defense counsel also went on to insinuate multiple times that a resident at Harborview had to fix Dr. Wohns' surgery; implying that even a student was able to fix something that Dr.

Wohns was not. He also stated on more than one occasion that Dr. Wohns' nurse, not Dr. Wohns, stitched up Mr. Clark; again insinuating that allowing the nurse to do so was a violation of the standard of care. This is only an example. It was obvious to the Court that the theme of Defense counsel's case was that any injuries sustained by the plaintiff were caused by Dr. Wohns, not the defendant. This continued throughout the entire trial.

7. A curative instruction was requested by Plaintiffs' counsel after opening statements. The Court gave such an instruction but feels this instruction was not sufficient to counteract the defense accusations against Dr. Wohns.

8. Again, in opening statement, Defense counsel referenced plaintiff, Thomas Clark's prior medical conditions "above the waist", contrary to the Court's prior rulings. This too continued throughout trial, although to a much lesser extent than the accusations against Dr. Wohns.

9. Plaintiffs' counsel argues that defense deliberately failed to properly redact medical records which were shown to the jury. The Court agrees that some unredacted records were shown, but is unable and unwilling to blame Defense counsel for this. However, the Court can conclude that Plaintiffs' counsel bore the lion's share of the task of properly redacting records and often were required to spend significant amounts of time to properly clean up records the defense was introducing.

10. There are other arguments by Plaintiffs' counsel that Defense counsel interjected his own personal beliefs in closing argument, contrary to the Rules of Professional

Conduct. Because of the multitude and gravity of the conduct described herein, the Court does not feel it necessary to address these arguments.

11. In closing argument, Plaintiffs' counsel attempted to address the accusations against Dr. Wohns in an obvious attempt to refute the defense. In his closing, Defense counsel continued with his theme of non-party fault. The Court's Order in Limine had not been modified.

12. The jury returned a verdict in favor of the defense. The verdict came back after approximately five (5) hours of deliberations for a trial which took close to three (3) weeks to try.

13. The cumulative effect of Defense counsel's conduct warrants a new trial, as it clearly casts doubt on whether a fair trial occurred. This Court cannot know for certain what effect the cumulative conduct of Defense counsel had, but this Court can and does find without a doubt that under all the facts and circumstances here it cannot definitively state that a fair trial occurred in this matter.

Based upon the foregoing reasons,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs' Motion for a New Trial is hereby granted;
2. The judgment entered on November 3, 2014 is hereby vacated;
3. Plaintiffs' request for terms is granted. Both parties are instructed to submit pleadings

supporting and describing specific amounts requested and opposing said request in writing and the Court shall enter a separate order.

Done in open Court this 23rd day of December, 2014.

Richard F. McDermott

Honorable Richard F. McDermott

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APPENDIX F

FILED
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CASE NUMBER: 13-2-03699-1 KNT

Honorable Richard McDermott

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THOMAS CLARK AND ALYSON CLARK, husband and wife and the marital community composed thereof,

Plaintiffs,

v.

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

Defendants.

NO. 13-2-03699-1 KNT

PLAINTIFFS' MOTION RE: DEFENSE VIOLATIONS OF MOTIONS IN LIMINE DURING OPENING STATEMENT

During opening statement defense counsel violated two motions in limine. Defense counsel repeatedly violated the motion concerning the third-party fault of Dr. Wohns despite the fact that the Court determined that although defense counsel could argue that Dr. Teng did not cause Mr. Clark's injuries, defense counsel was precluded from blaming Dr. Wohns for those same injuries. Next, defense counsel referenced Mr. Clark's previous neck issues despite the fact that the Court explicitly instructed counsel that he was precluded from discussing any medical conditions of Mr. Clark "above the waist."

First, much of the focus of defendants' opening statement was that Dr. Wohns was at fault and had caused all of the problems that Mr. Clark now faces. Counsel put up PowerPoint slides showing Dr. Teng's post-operative MRI and then comparing that to Dr. Wohns post-operative MRI and specifically stated that "this is what it looked like when he was under Dr.

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Teng's care" and "*this* is what Dr. Wohns did to him" and "the result of Dr. Wohns' care is *this*." The only purpose of utilizing these comparative slides was to show that Dr. Wohns had done something improper in his surgery. Defense counsel also went on to insinuate multiple times that a resident at Harborview had to fix Dr. Wohns' surgery; implying that even a student was able to fix something that Dr. Wohns was not. He also stated on more than one occasion that Dr. Wohns' nurse, not Dr. Wohns, stitched up Mr. Clark; again insinuating that allowing the nurse to do so was a violation of the standard of care.

As a remedy for the first violation of the motions in limine and in an attempt to cure the prejudice that has occurred, plaintiffs ask that the Court read a curative instruction on defendants' liability for subsequent medical treatment to the jury before Dr. Wohns is cross examined on Thursday morning. Plaintiffs also request that the Court reiterate that defendants are precluded from offering evidence or argument that Dr. Wohns is at fault or caused Mr. Clark's injuries.

Second, counsel stated that Mr. Clark had issues with his neck in 2008 and that pain in his back and legs was "nothing new to Mr. Clark." This was precisely the argument and the related prejudice that plaintiffs sought to prevent by moving in limine on Mr. Clark's unrelated medical history. This Court was unequivocal in its ruling that defendants were precluded from making argument or eliciting testimony on any condition "above the waist," i.e. "sleep apnea, a neck surgery, a heart stent, and a corneal replacement, among other unrelated conditions." *See* Plaintiffs' Motions in Limine p. 14.

And not only was the statement a clear violation of the motion in limine, it lacks any expert support whatsoever. Defense expert Dr. Bhatia was asked a clear question of what his causation opinions were and he failed to even mention pre-existing conditions as being related to Mr. Clark's current symptoms, let alone *neck* issues somehow having any relation to cauda equina syndrome:

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Q All right. Doctor, one of the other statements that's in the witness disclosure that I've read said that you are expected to offer causation testimony.

Is that something that you have been asked to do in this case?

MR. FITZER: It's what he has just been discussing with you. You asked him what caused -- whether there was a dural leak or what caused it. He has answered that already.

MS. ROSATO: Okay. Let me be more specific.

Q Are you going to be offering any opinions about the cause of Mr. Clark's current symptoms of right leg weakness, numbness, tingling, bladder issues? That kind of things? Are you going to be offering any opinions on what the cause of those conditions is?

A If I'm asking for my opinion on them, I am happy to discuss them.

MS. ROSATO: Are you asking him?

MR. FITZER: Yes. Go ahead. Ask him.

BY MS. ROSATO:

Q Okay. I am asking, too. Go ahead.

MR. FITZER: Consider yourself asked.

THE WITNESS: Fair enough.

The distinct cause of them is unclear. As we have talked about, the post-operative MRI scan after Dr. Teng's surgery is not an uncommon set of findings at that time point, and really not very worrisome.

Mr. Clark then underwent surgery with Dr. Wohns shortly thereafter, had a spinal fluid leak, underwent attempted repair, developed meningitis after surgery with Dr. Wohns and an infection, underwent another surgery to repair that.

That many operative interventions – not surprising that someone has some continued pain and other symptoms. That all being said, there isn't any indication of a particular anatomic or medical finding that clearly explains Mr. Clerk's symptoms.

BY MS. ROSATO:

Q Okay. Do you have an opinion on a more probable than not basis as to what the cause of

Mr. Clark's current symptoms are?

MR. FITZER: I object to the form, but go ahead and answer it, please.

THE WITNESS: I don't have a more probable than not cause of it. I don't think -- I think given this set of circumstances, there is no clear cause of his current complaints.

Nitin Bhatia Dep., p. 50:12-52:8. Counsel was precluded from mentioning pre-existing conditions in opening statement both because of the Court's order on plaintiffs' motions in limine and because defendants have no expert support for such argument.

Plaintiffs ask only that from this point forward defendants comply with that order in limine and refrain from mentioning any pre-existing medical conditions.

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DATED this 8th day of October, 2014.

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INSTRUCTION NO. _____

If you find that Dr. Teng is liable for causing the plaintiff Tom Clark's injury, defendants Dr. Teng and Cascade Orthopedics are also liable for any additional bodily harm resulting from efforts of third persons in rendering aid or medical treatment which the plaintiff's injury reasonably required, irrespective of whether such acts are done in a proper or a negligent manner. Negligent or harmful medical treatment is within the scope of risk created by the defendants' original negligent conduct. If you find that Dr. Wohns'—or any other medical provider's—subsequent treatment was negligent or improper, defendants are liable for any additional harm that this treatment caused.

See Henderson v. Tyrell, 80 Wn. App 592, 626-27, 910 P.2d 522 (1996) (approving use of this jury instruction if evidence of harmful treatment is heard), *citing Lindquist v. Dengel*, 92 Wn.2d 257, 595 P.2d 934 (1979). *See also Martin v. Cunningham*, 93 Wash. 517, 518, 161 P. 355 (1916) (defendant responsible for all aggravations of the plaintiff's symptoms).