Supreme Court No. 93549-1

Court of Appeals No. 73125-4

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Plaintiffs-Petitioners,

v.

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

Defendants-Respondents.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

Petitioners are Thomas Clark and Alyson Clark, plaintiffs-respondents in the Court of Appeals.

II. COURT OF APPEALS DECISION

The Court of Appeals issued its opinion on June 27, 2016 (App. 1-17) and published the opinion on August 26, 2016 (App. 18).

III. ISSUES PRESENTED FOR REVIEW

In *Teter v. Deck*, 174 Wn.2d 207, 222, 274 P.3d 336 (2012), this Court held that trial courts should grant a new trial where "misconduct of the prevailing party materially affects the substantial rights of the losing party." Applying *Teter*, the trial court in this matter found that "[t]he cumulative effect of Defense counsel's conduct warrants a new trial, as it clearly casts doubt on whether a fair trial occurred." CP 475 ¶ 13. The issues presented for this Court's review are:

1. Whether the Court of Appeals' opinion reversing the trial court's new trial order conflicts with this Court's opinion in *Teter*, which repeatedly emphasizes "the deferential review appropriate to misconduct findings in civil cases" and recognizes that trial courts are in the "best position" to assess whether attorney misconduct has prejudiced a party's right to a fair trial. 174 Wn.2d at 223.
2. Whether this petition involves issues of substantial importance that should be determined by this Court because the Court of Appeals' published opinion – improperly substituting its own judgment for that of the trial court – undermines the authority of trial courts to sanction misconduct and will encourage time-consuming and wasteful appeals of new trial orders.

IV. STATEMENT OF THE CASE

A. Factual Background.

Thomas Clark started having lower back and leg pain in 2008. RP 462, 463; Ex. 103. His physician recommended several different treatments and – when those treatments did not work – referred Mr. Clark to Defendant Andelle Teng, MD. RP 463-65. Dr. Teng concluded that Mr. Clark was experiencing spinal stenosis, which occurs when bone spurs press on the nerves in the spinal canal. RP 184-85, 732. To relieve this pressure, Dr. Teng performed a lumbar laminectomy. RP 1271-72.

Rather than improving after Dr. Teng performed that procedure, Mr. Clark experienced new and worsening symptoms. RP 468-71. Mr. Clark reported these symptoms to Dr. Teng, who recommended physical therapy. RP 471, 473-74. Dissatisfied with that approach, Mr. Clark requested an MRI. RP 471-72; Ex. 31. The radiologist read the MRI as abnormal and concluded that a collection of cerebrospinal fluid was compressing the nerves. RP 205. Despite those findings, Dr. Teng did not recommend any immediate action. RP 473-74, 1300-01. Instead, he advised Mr. Clark to proceed with physical therapy. *Id.*

After reading the radiologist's findings, Mr. Clark sought care from another neurosurgeon, Dr. Richard Wohns, who recommended

surgery. RP 477-78. During that surgery, Dr. Wohns found a cerebrospinal fluid leak (referred to as a "CSF leak"), free-floating bone, and residual spinal stenosis. RP 478. Dr. Wohns described the surgical site following Dr. Teng's procedure as a "mess." RP 396.

Despite Dr. Wohns' efforts to repair the site, Mr. Clark developed a second and then a third CSF leak. RP 241-42, 479-80. Dr. Wohns performed a second reparative surgery and another physician performed a third. RP 241-42, 244-46. Unfortunately, the continuing CSF leak led to meningitis. RP 244. Mr. Clark spent another nineteen days in the hospital, incurring over $300,000 in medical bills. Ex. 4, at 22; Ex. 59.

Mr. Clark is now permanently disabled with "cauda equina syndrome." RP 578. His symptoms include perianal numbness, lack of genital sensitivity and sexual function, reduced muscular function, nerve damage in both his back and feet, and an altered gait. RP 488, 753-54, 761-62. He has difficulty walking and pain and numbness in both legs, and his condition continues to deteriorate. *Id.*; RP 251.

B. Procedural Background.

Mr. Clark filed suit against Dr. Teng and his employer. CP 1-6. In the weeks before trial, it became apparent that Defendants would attempt to blame Dr. Wohns for Mr. Clark's injuries. Plaintiffs moved in limine to

preclude such evidence because Defendants had not pled non-party fault as required by CR 12(i). CP 10-11, 25. Moreover, expert testimony is necessary in medical malpractice actions to establish breach of the standard of care,[1] and Defendants had not identified any expert who would testify that Dr. Wohns violated the standard of care. To the contrary, defense counsel specifically represented, "We are not empty-chairing anyone." CP 48. The trial court granted Plaintiffs' motion. CP 481 ¶ 4.

Plaintiffs were also concerned that Defendants would attempt to portray Mr. Clark as a patient with numerous medical problems who frequently requested treatment that was not medically necessary. Plaintiffs therefore filed a motion to preclude Defendants from offering "evidence of [Mr. Clark's] unrelated health history and medical records." CP 26. The trial court granted that motion, finding that such evidence was inadmissible under ER 403. CP 258 ¶ 5; RP 48. Leaving no doubt as to the scope of its ruling, the court ruled that all of Mr. Clark's medical conditions "above the waist" were inadmissible. RP 49.

Defense counsel repeatedly violated these rulings. Contrary to the trial court's order in limine regarding non-party fault, defense counsel

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[1] *See, e.g., Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wn.2d 136, 144, 341 P.3d 261 (2014) ("The applicable standard of care and proximate causation generally must be established by expert testimony."); *see also* RCW 7.70.040.

used comparative slides in his opening statement to argue that Dr. Wohns did something wrong when he operated on Mr. Clark. *See* RP 151-52 (quoted on page 10 below). And contrary to the trial court's order in limine regarding unrelated medical conditions, defense counsel referenced Mr. Clark's previous neck issues and argued that his symptoms were "nothing new to him." RP 147. The next morning, Plaintiffs filed a motion identifying these violations and requesting a curative instruction. CP 244-48. The trial court denied the motion, but made clear that defense counsel should comply with the court's orders in limine. RP 260.

Despite this admonition, defense counsel again violated the trial court's order in limine regarding unrelated medical conditions by asking Dr. Teng about his earlier treatment of Mr. Clark for unrelated issues. RP 804. The next day, the trial court stated that it was "very upset" when defense counsel "asked Dr. Teng if that was the first time that he had seen Mr. Clark." RP 857. Defense counsel responded: "I bumbled into that one. And I stopped. And I'm sorry if I offended." *Id.* The trial court again warned defense counsel: "don't do that again." *Id.*

Yet just a few days later, defense counsel asked another witness, Dr. Nitin Bhatia, whether there was any indication in Dr. Teng's progress notes (Ex. 115) that Mr. Clark "had a headache" and directed Dr. Bhatia to

"turn to page 84" of the notes. RP 1086. Reading that page as directed by defense counsel, Dr. Bhatia testified: "On February 2nd, which is the day after surgery, [Mr. Clark] woke up with a headache, thinks it's because his CPAP was broken and he had to use BIPAP. And those are machines you use for *sleep apnea*." RP 1087 (emphasis added). Defense counsel elicited this testimony even though the trial court had specifically ruled that "[s]leep apnea is above the waist." RP 49.

Plaintiffs' counsel raised this issue at the next break. When asked to explain her misconduct, defense counsel stated: "The Court's ruling is that it's not relevant to anything, but in this context, the question of him having a headache has to be explained." RP 1123. The court responded: "Then the proper procedure for you, Counsel, is to approach me before his testimony and ask for a ruling on that particular kind of testimony. You can't take it upon yourself to simply violate my order because you think that there is a symptom that has to be explained." *Id.*

Because defense counsel had repeatedly violated the trial court's orders in limine, Plaintiffs' counsel asked the court "to enter a default." RP 1133. The trial court recognized that defense counsel had repeatedly violated its orders in limine – identifying "three violations" (*id.*) – but denied Plaintiffs' motion as follows:

> And as far as your motion to -- for a default, I am going to deny that. I do believe that there has been a violation. I -- I don't know if the violation was on purpose or not. I think sometimes -- I can't get into people's heads, and I would prefer to think the better of people rather than the other, so I'm not willing to make that conclusion. I am however going to reserve a ruling on what I do about that until the end of the trial.

RP 1143. In addition to reserving ruling "until the end of the trial," the trial court told defense counsel again "to follow my rulings." *Id.*

Despite these *repeated* warnings, defense counsel continued in closing argument to violate the trial court's orders in limine. Referring to the reparative surgery that Dr. Wohns performed, defense counsel argued "there was no CSF leak that was obvious before [Dr. Wohns] operated, he now has a CSF leak." RP 1534. Counsel also argued that Mr. Clark "had to go to Harborview [for reparative surgery] because someone else's surgeries [referring to Dr. Wohns] on two occasions failed." RP 1540.

The impact of that misconduct became clear when the jury returned a defense verdict after only five hours of deliberation. RP 1577; CP 284-85. Plaintiffs then filed a motion for a new trial, which the trial court granted based on "[t]he cumulative effect of Defense counsel's conduct." CP 475 ¶ 13. Defendants then filed a motion for

reconsideration, which the trial court denied. CP 660-61. Copies of these orders are attached at App. 19-38.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Court Of Appeals' Opinion Conflicts In Numerous Respects With This Court's Opinion In *Teter* (RAP 13.4(b)(1)).

This Court's opinion in *Teter* sets forth the controlling legal principles in this appeal. Judge (now Justice) González found in *Teter* (a medical malpractice case) that the defendant's lawyer repeatedly violated various orders in limine and concluded that the "cumulative effect of defense counsel's misconduct throughout the trial proceedings warrants a new trial, as it casts doubt on whether a fair trial had occurred." 174 Wn.2d at 215. The defendant appealed and, as here, the Court of Appeals reversed the trial court's order. *Id.*

This Court then granted review and reinstated Judge González's new trial order. In doing so, the Court emphasized that "we require a *much stronger showing of abuse of discretion* to set aside an order granting a new trial than one denying a new trial." *Id.* at 222 (emphasis added). To be reversed, such a ruling must be "*manifestly unreasonable* or based on *untenable* grounds or *untenable* reasons." *Id.* (emphasis added). The Court also emphasized that "[t]he trial court is in the best position to most effectively determine if [counsel's] misconduct

prejudiced a [party's] right to a fair trial." *Id.* at 223 (internal quotation marks omitted; bracketed text in original).

Also significant here, this Court strongly criticized the Court of Appeals' analysis. That court had concluded that Judge González's findings "were too general and nonspecific" and that the instances of misconduct were not "so out of the ordinary or so irregular or flagrant as to deprive the Teters of a fair trial." *Id.* at 222-23 (internal quotation marks omitted). This Court held that "[i]n reaching this conclusion, the Court of Appeals appears to have substituted its own judgment for that of the trial court." *Id.* at 223. Rejecting that analysis, the Court held that the trial court's "findings of misconduct are adequately supported by the record, and we will not substitute our own judgment for the trial court's judgment in evaluating the scope and effect of that misconduct," and it *reinstated* Judge González's new trial order. *Id.* at 226-27.

The Court of Appeals' opinion in this case is contrary to *Teter*. While the Court of Appeals recognized that the standard of review is deferential, it reversed the trial court's new trial order based on nonexistent "inaccuracies and inconsistencies" (App. 17) and ignored the fact that the trial court witnessed defense counsel's conduct over a three week trial, observed each and every violation of its orders in limine, and

was in the best position to assess the resulting prejudice. Indeed, as discussed below, the Court of Appeals made the same mistakes that this Court identified in *Teter*. Just as it did in *Teter*, this Court should grant review and reinstate the new trial order in this case.

The Court of Appeals divided its analysis into five parts. First, the Court of Appeals addressed the triai court's finding that defense counsel improperly argued in opening statement, based on slides showing Dr. Teng's and Dr. Wohns' post-operative MRIs, 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. Wohn's care is this." App. 11-12 (quoting CP 473-74 ¶ 6). The Court of Appeals concluded that "defense counsel made no such statements" and, instead, "actually argued" as follows:

> [T]his is what it looked like with a free spinal cord the last time Mr. Clark left [Dr.] Teng's care.... Here, this is after Dr. Wohns' first and second surgeries. All of this blue is cerebrospinal fluid. It's the fluid that surrounds the brain, it surrounds the spinal cord. It's supposed to be inside the yellow tube. It's not supposed to be outside. None of that was there until after he operated the first time. Then the patient comes back, has another procedure, and the spinal fluid is—actually corroded its way out the back....

App. 12 (quoting RP 151-52). As this block quotation shows, the trial court had *paraphrased* defense counsel's improper argument. That is hardly a basis to find error let alone a manifest abuse of discretion.

The Court of Appeals also concluded that the trial court had "expressly authorized defense counsel to compare and contrast the MRI images included in the PowerPoint slides." App. 13. That ruling reflects a misunderstanding of the trial court proceedings. The trial court authorized defense counsel to contest causation by "saying that the MRI of the 18th of February 2010 ... [d]id not show any kind of leak." RP 30. But as the trial court found, defense counsel went farther than authorized: his "only purpose of utilizing these comparative slides was to show that Dr. Wohns had done something wrong in his surgery." CP 473 ¶ 6.

Second, the Court of Appeals criticized the trial court's findings that "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" and that "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." App. 13; CP 473-74 ¶ 6. According to the Court of Appeals, these statements were factually accurate and consistent with the trial court's "ruling authorizing the defense to contest causation." App. 14. But mere factual accuracy is not a basis to violate an order in limine, and the trial court correctly recognized

these accusations were intended to show "a violation of the standard of care" and not causation. CP 474 ¶ 6. The trial court never authorized any such argument and, indeed, expressly prohibited it. CP 481 ¶ 4.[2]

In its discussion of the above issues, the Court of Appeals also noted that Plaintiffs did not "object before or during the opening statement" (App. 13 n.51) or "timely object to statements about the assistant and the resident" (App. 14). Plaintiffs objected to defense counsel's misconduct immediately after opening statements. *See* CP 244-48. Plaintiffs objected again during trial, but the trial court ruled that it would "reserve a ruling on what I do about that until the end of the trial." RP 1143. Moreover, a central purpose of filing a motion in limine is to *avoid* making repeated objections during trial. As this Court recognized in *Teter*, "repeated objections, even if sustained, leave the jury with the impression that the objecting party is hiding something important." 174 Wn.2d at 223. The Court of Appeals' assertion that Plaintiffs should have

[2] Additionally, under controlling case law, if Defendants are liable to Plaintiffs then they are also liable "for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner." *Henderson v. Tyrrell*, 80 Wn. App. 592, 627, 910 P.2d 522 (1996). For that reason too, there was *no legitimate purpose* in arguing that Dr. Wohns caused Plaintiffs' injuries (or that he violated the standard of care). The trial court gave a curative instruction to that effect, but expressly found that "this instruction was not sufficient to counteract the defense accusations against Dr. Wohns." CP 474 ¶ 7. Plaintiffs briefed this point, but the Court of Appeals ignored it.

objected more often is contrary to this portion of *Teter*.

Third, the Court of Appeals criticized the trial court's discussion of defense counsel's violations of its order in limine regarding unrelated medical conditions. The Court of Appeals ruled that defense counsel's reference to Mr. Clark's previous "problems with his upper spine that were causing symptoms in his legs" was permissible because "[l]eg problems are 'below the waist' symptoms." App. 15. But as the trial court correctly recognized, "the upper spine" is *above* the waist. CP 474 ¶ 8. The Court of Appeals also found that two other violations of the trial court's order in limine were not prejudicial because references to "cervical problems" and "sleep apnea" can be found "in Clark's exhibits." App. 15. But the trial court's new trial order is based on "[t]he *cumulative effect* of Defense counsel's conduct" (CP 475 ¶ 13 (emphasis added)), and that finding is not affected by isolated references to Mr. Clark's medical history in two of the many multi-page exhibits that were admitted at trial.

Fourth, the Court of Appeals addressed the trial court's reference to a "defense theme." App. 15. According to the Court of Appeals, this finding was insufficient because the trial court "did not incorporate, adopt, or allude to other specific alleged acts of misconduct listed in the motion for new trial." App. 16. In so holding, the Court of Appeals made the

same mistake that it made in *Teter* when it concluded that Judge González's findings "were too general and nonspecific." 174 Wn.2d at 222. As discussed above, this Court rejected that analysis and focused instead on whether Judge González's findings were "supported by the record." *Id.* at 226.

Here, there is ample support for the trial court's finding that defense counsel improperly argued a "theme of non-party fault." CP 475 ¶ 11. As Plaintiff established in both the trial court and the Court of Appeals (CP 333; Brief of Respondent at 14-15), defense counsel argued and elicited testimony that:

- it was improper for Dr. Wohns not to order a pre-operative MRI (RP 992-93, 1389);
- Dr. Wohns does not know how to read MRI films and determine whether the foramina were in fact decompressed (RP 932-34, 969-70, 1107, 1330);
- Dr. Wohns was wrong when he diagnosed Mr. Clark with cauda equina syndrome in March 2010 and is wrong that he has cauda equina syndrome today (RP 1119, 1160, 1338, 1362);
- Dr. Wohns either lied or incompetently stated that he did a "total L5 laminectomy" in his operative report (RP 972, 1163, 1172);
- Dr. Wohns failed to include in his medical record the exact location of the CSF leak that he discovered (RP 1165-66);
- if Dr. Wohns identified a CSF leak and did not tell Mr. Clark, that was a violation of the standard of care (RP 320-21, 1169);
- Dr. Wohns must have lied about doing the dural repair because sutures were not found when Harborview did surgery two months later (RP 1164, 1174, 1185, 1535);

- Dr. Wohns should not have "over-sewn" the wound before his second surgery (RP 1175);
- it was improper for Dr. Wohns not to order testing of the spinal fluid that he found in his March 23 surgery (RP 1533);
- the surgery Dr. Wohns performed was not medically necessary (RP 1118-19, 1223);
- Dr. Wohns failed to fix the first and second CSF leaks (RP 1223-24);
- a *resident* at Harborview fixed what Dr. Wohns could not (RP 152, 1180, 1224); and
- it was improper for Dr. Wohns not to get Mr. Clark's previous medical records or to discuss Mr. Clark's symptoms with Dr. Teng (RP 1301, 1362).

All of this occurred in the presence of the jury and in violation of the trial court's order in limine and repeated warnings regarding non-party fault.

The Court of Appeals refused to consider these violations because it ruled that Plaintiffs "offer[] no authority requiring us to speculate what other alleged acts of misconduct the trial court did or did not rely upon." App. 16. That authority, which Plaintiffs cited repeatedly, is *Teter*. In *Teter*, Judge González concluded that defense counsel had violated numerous orders in limine and ruled that the "cumulative effect of defense counsel's misconduct ... warrants a new trial, as it casts doubt on whether a fair trial had occurred." 174 Wn.2d at 215. Rather than reverse Judge González's new trial order because he failed to identify specific instances of misconduct, this Court reviewed the report of proceedings and identified "examples" of misconduct (*id.* at 224-25) before concluding:

> We ... hold that the trial court did not abuse its discretion in granting a new trial based on defense counsel's misconduct because the trial court's findings of misconduct are adequately supported by the record, and we will not substitute our own judgment for the trial court's judgment in evaluating the scope and effect of that misconduct.

Id. at 226. The Court of Appeals' refusal to consider specific instances of defense counsel's misconduct in this case directly conflicts with *Teter*.[3]

Fifth, the Court of Appeals similarly attacked the trial court's finding "that in closing '[d]efense counsel continued with his theme of non-party fault.'" App. 16 (quoting CP 475 ¶ 11). In addition to complaining again that the new trial order "does not identify any particular examples" (the issue addressed above), the Court of Appeals noted that defense counsel expressly stated in closing that "[w]e didn't come here to play the blame game." App. 16 (quoting RP 1539). But even after reviewing Defendants' protestations of innocence – as set forth in their motion for reconsideration and supporting declarations (CP 542-620) – the trial court once again found that that "[t]here were numerous violations by the defense of the Court's Order Re: Motions in Limine" and that

[3] The trial court's new trial order in this case precisely tracks Judge González's order in *Teter*. Like Judge González (174 Wn.2d at 215), the trial court here found that "[t]he cumulative effect of Defense counsel's conduct warrants a new trial, as it clearly casts doubt on whether a fair trial occurred" (CP 475 ¶ 13). This similarity is not coincidental: the trial court's new trial order expressly states that the court reviewed Judge González's new trial order in *Teter* before issuing the ruling at issue here. CP 472 (item no. 9 and lines 11-12). The Court of Appeals nevertheless criticized the trial court's order, which also conflicts with *Teter*.

"[d]espite all of the Court's warnings, this behavior continued." CP 660-61 ¶¶ 1, 4. As *Teter* confirms, those findings are entitled to deference.

The jury, too, recognized that defense counsel *was* playing the blame game. In *Teter*, this Court held that the trial court's prejudice finding was "supported by the fact that one member of the jury felt it necessary to inform Judge González's clerk that the juror felt 'like strangling a couple of lawyers.'" 174 Wn.2d at 225 n.13. In this case, after hearing the testimony and arguments referenced above, one of the jurors asked: "Have you thought of bringing a lawsuit against Dr. Wohns?" RP 1603; CP 335-36.[4] The Court of Appeals ignored this juror question, which provides strong support for the trial court's extensive findings of misconduct and prejudice. CP 473-75, 660-61. In that respect as well, the Court of Appeals' opinion conflicts with *Teter*.

B. This Petition Also Involves Issues of Substantial Importance That Should Be Determined By This Court (RAP 13.4(b)(4)).

In the experience of the undersigned counsel, what happened here has become common in medical malpractice litigation. In such cases, the defendant often does not plead non-party fault with regard to a subsequent

[4] The trial court declined to ask the witness the foregoing juror question. Because it was discussed by the court and counsel outside of the courtroom, it is memorialized in briefing (CP 335-36) and argument (RP 1603).

treating physician. As a result, that physician – who is often both a fact witness and an expert witness for the plaintiff – is not a party, is not represented by counsel, and does not retain an expert witness to defend his or her treatment. Trial courts routinely address this issue by entering an order in limine excluding evidence of non-party fault. *See, e.g., Henderson*, 80 Wn. App. at 625 (affirming similar order in limine). Yet in many such cases, defense counsel repeatedly violate the order by arguing that the subsequent treating physician did something wrong and is therefore responsible for the plaintiff's injuries. This misconduct then continues despite the trial court's warnings.

The Court of Appeals' opinion undermines the authority of trial courts to sanction such misconduct and will lead to time-consuming and wasteful appeals of new trial orders. When attorney misconduct casts doubt on whether a fair trial occurred, a trial court's only recourse is to grant a new trial. But under RAP 2.2(a)(9), such an order is appealable as of right. As a result, a defendant can stall meritorious claims by filing a notice of appeal. *Teter* discourages such appeals by requiring "a much stronger showing of abuse of discretion to set aside an order granting a new trial than one denying a new trial." 174 Wn.2d at 215. By substituting its judgment for that of the trial court and reversing the trial

court's new trial order based on purported "inaccuracies and inconsistencies in the new trial order" (App. 17), the Court of Appeals' opinion upsets this balance – to the substantial detriment of plaintiffs.

The Court of Appeals' opinion also is troubling in other significant respects:

- First, *Teter* reversed a decision by Division One of the Court of Appeals under analogous circumstances yet the same court issued a *published opinion* in this case that *directly conflicts* with *Teter* in numerous respects. *See supra* at 8-17. This case is an opportunity to ensure that Washington courts strictly adhere to this Court's holding in *Teter*.
- Second, the Court of Appeals faulted the trial court for *paraphrasing*, rather than quoting, defense counsel's opening statement. App. 12. The trial court presumably did so because the report of proceedings had not yet been prepared. It is unrealistic to expect trial courts to obtain the report of proceedings (or otherwise transcribe the trial court audio recording) in order to grant a new trial based on attorney misconduct. The Court should clarify this issue.
- Third, the Court of Appeals complained that the trial court, in addressing defense counsel's violations of its order in limine regarding non-party fault during trial and closing argument, did not provide a list of alleged acts of misconduct. App. 13 n.51, 14. The trial court presumably concluded, based on its review of Judge González's new trial order and this Court's opinion in *Teter*, that no such list was necessary. *See supra* at 15-16 & n.3. The Court should grant review to clarify this issue as well.
- Fourth, the Court of Appeals faulted Plaintiffs' counsel for failing to object more often to defense counsel's misconduct. App. 13 n.51, 14. That, too, is contrary to *Teter*. *See supra* at 12. The result is a Catch-22: object too often and the jury concludes that plaintiffs are hiding something important or object only when defense counsel's misconduct is especially

> egregious and risk a waiver holding on appeal. This, too, should be clarified on discretionary review.

Each and all of these issues is substantially important and should be addressed by this Court under RAP 13.4(b)(4).

Finally, it is also important to recognize the profound constitutional issue presented here. In its new trial order, the trial court expressly found that "[t]he cumulative effect of Defense counsel's conduct warrants a new trial, as it clearly casts doubt on whether a fair trial occurred." CP 475 ¶ 13. Plaintiffs were entitled to – but did not receive – a "fair trial" on their claims of medical malpractice. The trial court appropriately recognized that right, yet the Court of Appeals did not even mention it. That, too, is an issue of substantial importance that merits this Court's review.

VI. CONCLUSION

For the foregoing reasons, the Court should grant discretionary review under RAP 13.4(b)(1) and (4).

RESPECTFULLY SUBMITTED this 7th day of September, 2016.

PETERSON | WAMPOLD | ROSATO | LUNA | KNOPP

By_____

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CERTIFICATE OF SERVICE

I certify that on the 7th day of September, 2016, a copy of this document was sent via US Mail to counsel for appellants at the address below:

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SIGNED in Seattle, Washington this 7th day of September, 2016.

Mary Monschein

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

THOMAS CLARK and ALYSON CLARK, husband and wife, and the marital community composed thereof, Respondents, v. ANDELLE TENG, M.D., and CASCADE SURGERY ASSOCIATES, PLLC d/b/a CASCADE ORTHOPAEDICS, Appellants.	)	No. 73125-4-I PUBLISHED OPINION FILED: June 27, 2016

VERELLEN, C.J. — When reviewing an order granting a new trial, we give great deference to trial court findings of misconduct but also focus on the trial court's specific reasons for the new trial. The order granting a new trial in this medical malpractice lawsuit heavily relies on inaccurate facts. The trial court also ignored its ruling expressly authorizing the defense to dispute causation by attributing a cerebrospinal fluid leak to surgeries performed by a nonparty doctor that were "not appropriate."[1] Because core examples of misconduct identified by the trial court are fatally flawed, we conclude the trial court abused its discretion. We reverse the order granting a new trial and the judgment awarding terms. We remand for reinstatement of the jury verdict.

[1] Report of Proceedings (RP) (Oct. 6, 2014) at 30.

FACTS

In 2008, Thomas Clark began to have low back and leg pain. On February 1, 2010, Dr. Andelle Teng operated on Clark's low back. On February 18, Clark had a magnetic resonance imaging test (MRI). Dr. Teng reviewed the MRI and told Clark that he did not have a cerebrospinal fluid (CSF) leak. Clark sought a second opinion from Dr. Wohns. Dr. Wohns operated twice on Clark's low back. An MRI after Dr. Wohns's surgeries revealed a "large fluid collection" in his low back.[2] Clark had a fourth surgery at Harborview by a resident physician to repair a CSF leak.

Clark sued Dr. Teng and his employer for medical malpractice. Clark's theory was that Dr. Teng was negligent in performing the surgery and in failing to treat Clark's CSF leak. Dr. Teng did not plead nonparty fault.

In his motion in limine, Clark argued defense counsel "should be precluded from suggesting" that "any non-parties are at fault" or "that Dr. Wohns violated the standard of care or caused any of the injuries sustained by Mr. Clark."[3] Defense counsel agreed not to argue nonparty fault but insisted on their right to challenge causation; specifically, to argue the MRI taken soon after Dr. Teng's surgery revealed no CSF leak, but the MRI after Dr. Wohns's surgeries did:

> [T]he testimony from our experts is going to be that there was no CSF leak visible on the MRI that was taken on February 18, 2010.[4]
>
> Our witnesses are going to say that on February 18, 2010, there was no evidence of a CSF leak and there was no reason for . . . a surgery.[5]

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[2] Ex. 141.

[3] Clerk's Papers (CP) at 25.

[4] RP (Oct. 6, 2014) at 27.

[5] Id. at 28.

> So his second . . . 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 . . . the postoperative MRI doesn't show any CSF leak. The MRI after Dr. Wohns's surgery shows a big CSF leak.[6]

The court granted Clark's motion in limine about nonparty fault but expressly allowed Dr. Teng to compare and to contrast the February 18 MRI with the one taken after Dr. Wohns's surgeries and to argue that those surgeries were inappropriate:

> I have no problem at all saying that the MRI of the 18th of February 2010 . . . [d]id not show any kind of a leak, and therefore surgery was not appropriate. That's fine.[7]

> If Mr. Fitzer [defense counsel] 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.[8]

> 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. And at the same time, Mr. Wampold's [Clark's counsel] motion No. 4 is granted.[9]

Clark also sought to preclude evidence of his treatment for "sleep apnea, a neck surgery, a heart stent, and a corneal replacement."[10] The court ruled defense counsel could not elicit testimony about "anything above the waist."[11] Defense counsel asked the court to clarify its ruling:

> MS. FITZER: Just so that we know and don't cross over any line, are you saying for any prior medical record? Or are you just saying for the stent and for the neck?

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[6] Id. at 31.

[7] Id. at 30.

[8] Id. at 31.

[9] Id. at 32.

[10] CP at 26.

[11] RP (Oct. 6, 2014) at 49.

COURT: I'm saying anything above the waist. Let's put it that way.

MS. FITZER: Anything above the waist?

MS. ALLEN: Sleep apnea is above the waist.

COURT: That is, yes. I can see that to be kind of nose and sinus and all of that stuff. So, yeah. But below the waist is fair game since that's why Dr. Teng saw him in the first place, I assume.

MS. FITZER: Does that mean we cannot refer to the headache[?]

COURT: You've got to show it's relevant. And something that happened months before, or at least a month before, is not, in my mind, relevant. But if you can give me an offer of proof during the course of the trial where you think that is relevant, I'll reconsider that. And I'll give them an opportunity to answer. It's all [ER] 403, 404. Okay. . . . [S]o I'm going to say this is granted, but in all of these motions, for both defense and plaintiffs, you can move to reopen if you follow what I just indicated.[12]

Before opening statements, the parties exchanged PowerPoint slides without objection.

Clark's counsel in opening statement foreshadowed Dr. Teng's "defenses" to the jury:

> So what are the defenses? Dr. Teng will tell you that Dr. Wohns is mistaken with what he saw[, t]hat he didn't see loose bone, that there wasn't a CSF leak, and that there wasn't a compression of the thecal sac. Either that he's wrong or that he's not telling the truth. But when you hear that, ask yourself whether a 30-year neurosurgeon was wrong about those things or what incentive he would have to not tell the truth.[13]

Defense counsel responded:

> The case started in 2010 when Mr. Clark reported to Dr. Teng that he had some additional problems. 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 is

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[12] Id.

[13] RP (Oct. 7, 2014) at 139.

nothing new for him. There was a preoperative MRI, which I'm going to show you in a minute, and there was a postoperative MRI, and we're going to use those in a second to explain what actually happened in this case.[14]

Mr. Clark saw Dr. Wohns on the 12th, and you've just heard that it was something—at least it sounded like an urgent or emergent situation. Well, there was no surgery by Dr. Wohns for 11 days.[15]

[T]his is what it looked like with a free spinal cord the last time Mr. Clark left [Dr.] Teng's care. . . .

Here, this is after Dr. Wohns' first and second surgeries. All of this blue is cerebrospinal fluid. It's the fluid that surrounds the brain, it surrounds the spinal cord. It's supposed to be inside the yellow tube. It's not supposed to be outside. None of that was there until after he operated the first time. Then the patient comes back, has another procedure, and the spinal fluid is—actually corroded its way out the back. That's when Dr. Wohns' nurse, not Dr. Wohns, sewed him up and sent him home.

Then, after the second operation that Dr. Wohns performs, you still have this problem, and it's much thicker. . . . That's several inches of spinal fluid after Dr. Wohns.

And then this is the MRI after the medical resident and Dr. Chesnut repair it, and there's much less. And you can see where—you'll hear testimony about the pressure caused by this CSF after the Wohns' surgery.

So there's more, as you'll hear, than just the pictures you have seen. When people have a leak as a result of back surgery or some other problem, there are symptoms. First of all, there are what we call postural headaches. So way back here, there's no postural headache. Postural headache is when you stand up and you get this bad headache, and when they lay you flat it goes away, and that's a primary sign of a CSF leak. There's no medical record that Mr. Clark had one of those. After Dr. Wohns operated, he had postural headaches for obvious reasons.[16]

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[14] Id. at 147.

[15] Id. at 148-49.

[16] Id. at 151-53.

The day after opening statements, Clark alleged defense counsel's opening statement violated the order in limine. The court found defense counsel had not violated the order in limine.

Later, the court raised the question of misconduct when defense counsel 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.
>
> Q. All right. When did you first meet him in regard to his low back?
>
> A. In 2010.[17]

The court noted this questioning was "very close to a violation of that order in limine."[18]

Defense counsel referred to headaches and sleep apnea when questioning expert witness Dr. Nitin Bhatia. Clark did not contemporaneously object, but later alleged defense counsel violated the order in limine by eliciting testimony about Clark's preexisting medical conditions "above the waist":

> Q. Okay. Now, turning to Exhibit No. 115, are those Dr. Teng's progress notes as he is following the patient in the hospital?
>
> A. Yes.

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[17] RP (Oct. 15, 2014) at 804.

[18] RP (Oct. 16, 2014) at 857-58. The trial court later found this incident to be an actual violation of the order in limine. See RP (Oct. 20, 2014) at 1133-34.

> Q. Okay. In reviewing those, first of all, is there any indication that this patient had a headache?
>
> A. There was an indication . . .
>
> Q. If you turn to page 84.
>
> A. Page—yeah. Here it is. I was trying to find where I'd seen it. On February 2nd, which is the day after surgery, and he woke up with a headache, thinks it's because his CPAP was broken and he had to use BiPAP. And those are machines you use for sleep apnea, and they strap around the head and help you breathe if you have, if you have sleep apnea.[19]

The court ultimately found defense counsel's questions violated the order in limine.

Plaintiff's exhibits included medical records that Dr. Teng had seen Clark "in the past for cervical problems,"[20] and that Clark had complained "of sleep apnea, CPAP machine."[21]

Near the end of trial, Clark alleged defense counsel had repeatedly violated the order in limine and requested a default judgment. The trial court discussed three violations of the order in limine: defense counsel's opening statement, the testimony of Dr. Teng that he had previously seen Clark unrelated to his back injury, and the reference to headaches associated with the sleep apnea device. The court denied a default judgment, but reserved ruling on another remedy.

After closing arguments, Dr. Teng moved for a mistrial, alleging violations of the consolidated order granting motions in limine. The court denied a mistrial:

> In terms of Dr. Wohns, the clear inference of the testimony presented by the defense through their experts and through Dr. Teng was that Dr. Wohns was inaccurate and not forthright in his testimony and what he said

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[19] RP (Oct. 20, 2014) at 1086-87.

[20] Ex. 1 at 15.

[21] Ex. 3 at 9.

> to the jury and what he told people he found during the course of his first surgery. I think you would have had to have been asleep to not get that clear inference. . . .
>
> . . . It's for the jury to decide on Dr. Wohns's credibility, just as they have to decide on every witness's credibility. It's for them to decide whether or not he was accurate in his description of what he found after his first surgery, and in what he did and in his opinions. And that's just like every other witness.[22]
>
> And as far as inappropriate argument, I think that when you have a highly-contested case, as this was, both sides push the boundaries. Both sides pushed the boundaries in this matter. We argued during the first week that Mr. Fitzer pushed the boundaries in his opening statement. There was a brief that counsel wrote that I reread again last night about how Mr. Fitzer had violated my order in limine. . . . I think that both sides pushed the boundaries as much as they felt they could. But I refuse to find that either side went over those boundaries to the point where a mistrial is warranted.[23]

The jury returned a defense verdict. Clark filed a motion for new trial, claiming defense counsels' repeated violations of the order in limine warranted a new trial. At the hearing, the court found defense counsel "especially violated pretrial orders" during trial.[24] The court granted Clark's motion for new trial, concluding the cumulative effect of defense counsels' misconduct clearly casts doubt on whether a fair trial occurred. The court awarded Clark $82,131.65 in sanctions against defense counsel.

Dr. Teng appeals.

ANALYSIS

"We review a trial court's grant of a new trial for abuse of discretion unless that grant is based on an error or law."[25] Dr. Teng argues we should review the new trial

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[22] RP (Oct. 22, 2014) at 1570-71.

[23] Id. at 1573.

[24] RP (Dec. 19, 2014) at 1586-87.

[25] Teter v. Deck, 174 Wn.2d 207, 215, 274 P.3d 336 (2012).

order de novo because the trial court based its decision on an "error of law," namely, the admissibility of evidence.[26] But the evidentiary rulings underlying the order in limine, including arguably drawing a line between evidence of nonparty fault and causation, all involve discretionary rulings.[27] The trial court exercised its discretion in granting a new trial based upon defense counsel's conduct during trial. Abuse of discretion standard applies.

A trial court has "broad discretion" in granting a motion for new trial.[28] We require a "much stronger showing of abuse of discretion to set aside an order granting a new trial than one denying a new trial."[29] The trial court is "in the best position" to gauge the prejudicial impact of counsels' conduct on the jury.[30] Particularly when the grounds for a new trial involve the assessment of misconduct during the trial and its potential effect on the jury, we will give the trial court's order and findings of misconduct "great deference."[31] We are also mindful not to "substitute our own judgment for the trial court's judgment in evaluating the scope and effect of that misconduct."[32]

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[26] Appellant's Reply Br. at 1; see also CR 59(a)(8).

[27] Mutual of Enumclaw Ins. Co. v. Gregg Roofing Co., 178 Wn. App. 702, 728, 315 P.3d 1143 (2013) (evidentiary rulings reviewed for abuse of discretion); Garcia v. Providence Med. Ctr., 60 Wn. App. 635, 642, 806 P.2d 766 (1991) (ruling on a motion in limine reviewed for abuse of discretion).

[28] Bunnell v. Barr, 68 Wn.2d 771, 775, 415 P.2d 640 (1966).

[29] Teter, 174 Wn.2d at 222.

[30] Taylor v. Cessna Aircraft Co., Inc., 39 Wn. App. 828, 832, 696 P.2d 28 (1985).

[31] Levea v. G.A. Gray Corp., 17 Wn. App. 214, 226, 562 P.2d 1276 (1977); see also Teter, 174 Wn.2d at 223.

[32] Teter, 174 Wn.2d at 226.

Analyzing an order granting a new trial "is generally limited to the trial court's reasons for granting a new trial."[33] Those reasons must "adequately support its order."[34] A trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or reasons.[35] But a trial court that "relies on unsupported facts"[36] or "a clearly erroneous assessment of the evidence"[37] necessarily abuses its discretion. It is also untenable if a trial court ignores its own prior rulings when finding misconduct.[38]

The order granting Clark a new trial focused upon alleged violations of the consolidated order on motions in limine.[39] A new trial may be granted when a prevailing party's misconduct materially affects the other party's substantial rights.[40] But the trial court's reasoning is flawed in several respects.

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[33] Cox v. Gen. Motors Corp., 64 Wn. App. 823, 826, 827 P.2d 1052 (1992).

[34] Storey v. Storey, 21 Wn. App. 370, 373, 585 P.2d 183 (1978).

[35] Gildon v. Simon Property Grp., Inc., 158 Wn.2d 483, 494, 145 P.3d 1196 (2006).

[36] Id.

[37] Demelash v. Ross Stores, Inc., 105 Wn. App. 508, 530, 20 P.3d 447 (2001).

[38] See generally West v. Dep't of Licensing, 182 Wn. App. 500, 516-17, 331 P.3d 72 (2014) ("A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; and it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard."); Reidelberger v. Highland Body Shop, Inc., 83 Ill.2d 545, 553, 416 N.E.2d 268 (Ill. 1981) ("Granting a new trial because of conduct of counsel which did not violate the original in limine order and because of what the court in retrospect perceived to be violations of rulings made during the trial, which the record reveals were neither clear nor consistent, constitutes a clear abuse of discretion.").

[39] CP at 473, ¶ 6.

[40] CR 59(a)(2).

First, the trial court heavily relied upon inaccurate facts and ignored its rulings authorizing defense counsel to question causation by attributing the CSF leak to Dr. Wohns's inappropriate surgeries.[41]

The trial court granted Clark's motion in limine to preclude any suggestion of fault or causation by nonparties, including Dr. Wohns. At the same time, the court clarified that defense counsel could argue "the postoperative MRI [did not] show any CSF leak" but the "MRI after Dr. Wohns's surgery show[ed] a big CSF leak" because that is the "gravamen" of Dr. Teng's case.[42] Defense counsel disclosed that their witnesses would testify that "on February 18, 2010, there was no evidence of a CSF leak and there was . . . no need for a surgery."[43] The court responded, "I have no problem at all [with you] saying that the MRI of the 18th of February 2010 . . . [d]id not show any kind of a leak, and therefore surgery was not appropriate. That's fine."[44]

In its order granting a new trial, the court expressed concern with the defense theme that "any injuries sustained by [Clark] were caused by Dr. Wohns."[45] But the specific examples cited in the order are factually inaccurate. The order recites that in opening statement, defense counsel "clearly stated that Dr. Wohns was at fault and caused the problems [Clark] now suffers."[46] The order also purports to quote from

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[41] It appears the trial court may have relied upon factual inaccuracies in Clark's earlier motion objecting to defense counsel's opening statement. Compare CP at 473, ¶ 6, with CP at 244-45.

[42] RP (Oct. 6, 2014) at 31-32.

[43] Id. at 28.

[44] Id. at 30.

[45] CP at 474, ¶ 6.

[46] Id. at 473, ¶ 6.

defense counsel's opening statement, when comparing the MRIs, that defense counsel "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*.'"[47] But defense counsel made no such statements. Defense counsel actually argued:

> There was a preoperative MRI, which I'm going to show you in a minute, and there was a postoperative MRI, and we're going to use those in a second to explain what actually happened in this case.[48]
>
> [T]his is what it looked like with a free spinal cord the last time Mr. Clark left [Dr.] Teng's care. . . . Here, this is after Dr. Wohns' first and second surgeries. All of this blue is cerebrospinal fluid. It's the fluid that surrounds the brain, it surrounds the spinal cord. It's supposed to be inside the yellow tube. It's not supposed to be outside. None of that was there until after he operated the first time. Then the patient comes back, has another procedure, and the spinal fluid is—actually corroded its way out the back. That's when Dr. Wohns' nurse, not Dr. Wohns, sewed him up and sent him home.
>
> Then, after the second operation that Dr. Wohns performs, you still have this problem, and it's much thicker. . . . That's several inches of spinal fluid after Dr. Wohns.
>
> And then this is the MRI after the medical resident and Dr. Chesnut repair it, and there's much less. And . . . you'll hear testimony about the pressure caused by this CSF after the Wohns' surgery.
>
> So there's more, as you'll hear, than just the pictures you have seen. When people have a leak as a result of back surgery or some other problem, there are symptoms. First of all, there are what we call postural headaches. So way back here, there's no postural headache. Postural headache is when you stand up and you get this bad headache, and when they lay you flat it goes away, and that's a primary sign of a CSF leak. There's no medical record that Mr. Clark had one of those. After Dr. Wohns operated, he had postural headaches for obvious reasons.[49]

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[47] Id.

[48] RP (Oct. 7, 2014) at 147.

[49] Id. at 151-53.

The order also criticizes the defense PowerPoint slides: "The only purpose of utilizing these comparative slides was to show that Dr. Wohns had done something improper in his surgery."[50] But the trial court's pretrial ruling expressly authorized defense counsel to compare and contrast the MRI images included in the PowerPoint slides. Clark's counsel also reviewed those slides before opening statements and expressly advised the court there would be no objections during opening that the slides showed something that they had not agreed to show.[51]

Clark argues defense counsels' opening statement implied fault by Dr. Wohns. But the mere mention of Dr. Wohns's name when comparing the MRI images did not imply a breach of the standard of care. And the mere fact of postoperative complications with no evidence of a breach of the standard of care does not imply fault. The trial court expressly authorized the defense to compare the MRI images and contend that Dr. Wohns's surgeries were not appropriate.

Second, the court's order indicates that defense counsel improperly insinuated in opening statement that Dr. Wohns violated the standard of care by suggesting he allowed a nurse to stitch up and release Clark and that even a student doctor was able to fix a problem that Dr. Wohns did not fix. The specific statements in opening were:

> Then the patient comes back [to Dr. Wohns], has another procedure, and the spinal fluid is—actually corroded its way out the back. *That's when Dr. Wohns's nurse, not Dr. Wohns, sewed him up and sent him home.*[52]

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[50] CP at 473, ¶ 6.

[51] Additionally, Clark's counsel did not object before or during the opening statement.

[52] RP (Oct. 7, 2014) at 152 (emphasis added).

> And then *this is the MRI after the medical resident and Dr. Chesnut repair it*, and there's much less. And you can see where you'll hear testimony about the pressure caused by this CSF after the Wohns's surgery.[53]

The trial court noted that these comments were examples of the defense theme that "any injuries sustained by the plaintiff were caused by Dr. Wohns, not the defendant."[54] But Clark does not contend that the defense statements about the assistant and resident were factually inaccurate. Nor did Clark timely object to statements about the assistant and the resident. And in condemning the defense theme that Dr. Wohns caused the injuries, the court did not reconcile or even mention its prior ruling authorizing the defense to contest causation, to dispute that Dr. Teng caused the injury, and to argue that Dr. Wohns's surgeries were not appropriate. Further, the trial court did not identify the references to the assistant and resident as independent acts of misconduct that alone would support a new trial. We cannot ignore the factual inaccuracies in the key examples of misconduct identified by the trial court, or the trial court's ruling authorizing the defense causation theory that Dr. Wohns's surgeries were inappropriate. In this setting, counsel's alleged insinuations of fault are not tenable reasons for a new trial.

Third, the order granting a new trial refers to violations of the "above the waist" limitation, "although to a much lesser extent than the accusations against Dr. Wohns."[55] The order specifically refers to defense counsel's opening statement regarding "Clark's prior medical conditions 'above the waist', contrary to the Court's prior rulings."[56] But

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[53] Id. (emphasis added).

[54] CP at 473-74, ¶.6.

[55] Id. at 474, 8.

[56] Id.

defense counsel merely told the jury in opening about Clark's 2008 "problems with his upper spine that were causing symptoms in his legs."[57] Leg problems are 'below the waist' symptoms. Dr. Teng acknowledges that eliciting testimony about headaches related to the sleep apnea machine Clark used while in the hospital without first obtaining the trial court's approval was a violation of the "above the waist" limitation, but contends there was no prejudice. Clark, on the other hand, notes that we must give great deference to the trial court's finding of prejudice.

While we grant "great deference" to the trial court on the scope of misconduct and resulting prejudice, it is not absolute deference. In this case, the court's finding of prejudice is contrary to the record. Specifically, the plaintiff's exhibits included express statements that Dr. Teng had seen Clark "in the past for cervical problems"[58] and that Clark complained "of sleep apnea, CPAP machine."[59] Even under the deferential standard for reviewing prejudice, Clark cites no authority that prejudice exists when the same testimony alleged to be defense misconduct is also before the jury in the form of a plaintiff's exhibit. Clark's sleep apnea and Dr. Teng's prior treatment of Clark for conditions unrelated to his low back problem were before the jury in Clark's exhibits. It was an abuse of discretion to conclude that the same information prejudiced the outcome of this trial.

Fourth, Clark offers numerous other illustrations of alleged misconduct. But in applying the abuse of discretion standard, we are focused on the trial court's reasons for a new trial. The trial court referred to a defense theme, but did not incorporate,

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[57] RP (Oct. 7, 2014) at 147.

[58] Ex. 1 at 15.

[59] Ex. 3 at 9.

adopt, or allude to other specific alleged acts of misconduct listed in the motion for new trial. Clark offers no authority requiring us to speculate what other alleged acts of misconduct the trial court did or did not rely upon.

Finally, the order granting a new trial recites that in closing "[d]efense counsel continued with his theme of non-party fault."[60] The order does not identify any particular examples. Parts of the defense closing argument did point to limited testing and documentation by Dr. Wohns, Clark's postural headaches only after Dr. Wohns's surgeries, and that "someone else's surgeries on two occasions failed."[61] But the defense closing argument also expressly disclaimed any theory of nonparty fault:

> If Dr. Wohns takes him down a different path, and that path causes his problems, then it's not Dr. Teng's fault. You can have cause without fault. 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 which were done after the 18th were the cause of his current symptoms. And that's the whole point.[62]
>
> [A]nd he had a bunch of problems related to a surgery that several doctors wouldn't have performed, wasn't negligent, but it did cause his problem.[63]

In this setting, absent any indication by the trial court of specific examples of misconduct in closing argument, a general reference in the order granting new trial is not compelling.

CONCLUSION

The order granting a new trial heavily relies upon inaccurate facts and ignores the trial court's ruling authorizing the defense to challenge causation by attributing

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[60] CP at 475, ¶11.

[61] RP (Oct. 22, 2014) at 1540.

[62] Id. at 1539.

[63] Id. at 1543.

Clark's injuries to inappropriate surgeries by Dr. Wohns. These inaccuracies and inconsistencies in the new trial order call into doubt the trial court's reliance upon a theme of misconduct. We conclude the trial court abused its discretion in ordering a new trial. We reverse both the trial court's order granting a new trial and the judgment awarding terms to Clark. We remand for reinstatement of the jury verdict.

WE CONCUR:

Trickey, J

Becker, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

THOMAS CLARK and ALYSON CLARK, husband and wife, and the marital community composed thereof, Respondents, v. ANDELLE TENG, M.D., and CASCADE SURGERY ASSOCIATES, PLLC d/b/a CASCADE ORTHOPAEDICS, Appellants.	)	No. 73125-4-I ORDER GRANTING MOTION TO PUBLISH OPINION

Non-party Howard Goodfriend filed a motion to publish the court's opinion filed June 27, 2016. The court has considered the motion and determined that it should be granted.

Now, therefore it is hereby

ORDERED that non-party Howard Goodfriend's motion to publish is granted.

Dated this 26th day of August, 2016.

Verellen, C.J.

Becker, J.

ACJ

Honorable Richard F. McDermott

FILED

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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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EXHIBIT A

Honorable Richard McDermott
Trial Date: 10/6/2014

FILED
KING COUNTY, WASHINGTON

OCT 13 2014

PHOTOCOPY

SUPERIOR COURT CLERK
BY LEANNE SYMONDS
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

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

Plaintiffs,

v.

ANDELLE TENG, M.D. and CASCADE SURGERY ASSOCIATES, PLLC dba CASCADE ORTHOPAEDICS,

Defendants.

Cause No: 13-2-03699-1 KNT

CONSOLIDATED ORDER RE: MOTIONS IN LIMINE

THIS MATTER came on for hearing before the Honorable Richard McDermott on October 6, 2014. Prior to trial, the parties conferred and exchanged Motions in Limine and responses. The Court makes the following rulings:

INTRODUCTION

Pursuant to ER 103(c), the Court instructs counsel to alert their clients and witnesses as to the nature and extent of the rulings below. The Court expects counsel to abide by the letter and spirit of its rulings. In the event either party believes a matter needs to be

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reconsidered, counsel will do so by requesting the opportunity to confer with the Court outside the presence of the jury. Unless otherwise indicated, all rulings apply to all parties.

I. AGREED MOTIONS IN LIMINE

1. ER 904 EXHIBITS

____ RESERVED ____ DENIED _X_ GRANTED

2. REFERENCE TO SETTLEMENT POSTURE

____ RESERVED ____ DENIED _X_ GRANTED

3. REFERENCE TO EITHER PARTY MAKING MOTIONS IN LIMINE

____ RESERVED ____ DENIED _X_ GRANTED

4. NO DISCUSSION OF LIABILITY INSURANCE

____ RESERVED ____ DENIED _X_ GRANTED

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5. NO DISCUSSION OF LIABILITY INSURANCE RATES

____ RESERVED ____ DENIED __X__ GRANTED

6. REFERENCE TO PRIOR LITIGATION BY PLAINTIFF AND DEFENDANT OR EXPERT WITNESS MEDICAL NEGLIGENCE SUITS

____ RESERVED ____ DENIED __X__ GRANTED

7. SUGGESTION OUT OF STATE WITNESSES NOT FAMILIAR WITH WASHINGTON STANDARD OF CARE

____ RESERVED ____ DENIED __X__ GRANTED

II. PLAINTIFFS' MOTIONS

1. EVIDENCE OF CONSENT FORMS

____ RESERVED ____ DENIED __X__ GRANTED

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2. LIMITS ON DR. KIM'S TESTIMONY

X RESERVED ____ DENIED ____ GRANTED

3. LIMITS ON DR. BHATIA'S TESTIMONY

X RESERVED ____ DENIED ____ GRANTED

4. FAULT BY NON-PARTIES

____ RESERVED ____ DENIED X GRANTED

5. UNRELATED MEDICAL HISTORY

____ RESERVED ____ DENIED X GRANTED

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6. EPRESSIONS OF APOLOGY OR REMORSE

____ RESERVED ____ DENIED X GRANTED

7. ARGUMENTS NON-ECONOMIC DAMAGES WILL NOT MAKE PAIN GO AWAY

____ RESERVED ____ DENIED X GRANTED

8. DEFENDANT'S REPUTATION FOR PROVIDING QUALITY CARE

____ RESERVED ____ DENIED X GRANTED

9. RIGHT OF PLAINTIFFS TO MEET WITH TREATING PROVIDERS

X RESERVED ____ DENIED ____ GRANTED

10. EMPLOYMENT OF ATTORNEYS

____ RESERVED ____ DENIED X GRANTED

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11. WINNING THE LOTTERY ARGUMENTS

____ RESERVED ____ DENIED __X__ GRANTED

12. CONSULTING WITNESSES

____ RESERVED ____ DENIED __X__ GRANTED

13. EVIDENCE OF COLLATERAL SOURCES

____ RESERVED __X__ DENIED ____ GRANTED

An agreed list of all bills with an explanation pursuant to RCW 7.70.080 is permitted and suggested.

14. COMPARATIVE FAULT

____ RESERVED ____ DENIED ____ GRANTED

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III. DEFENDANTS' MOTIONS IN LIMINE

1. EXPERT OPINIONS NOT DISCLOSED

____ RESERVED ____ DENIED __X__ GRANTED

2. EVIDENCE OF PRIOR LAWSUITS INCLUDING BREACH OF EMPLOYMENT CONTRACT SUIT BROUGHT BY DR. TENG AGAINST FORMER EMPLOYER

____ RESERVED ____ DENIED __X__ GRANTED

3. LAY WITNESSES TESTIFYING ON MEDICAL ISSUES INCLUDING SOC

____ RESERVED ____ DENIED __X__ GRANTED

4. TESTIMONY FROM RICHARD WOHNS CONCERNING LEGAL STANDARDS, DEFINITIONS OR DOCTRINES

____ RESERVED ____ DENIED __X__ GRANTED

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5. CLAIMS THAT DR. TENG IS RESPONSIBLE FOR DEATH OF MR. CLARK'S DAUGHTER

____ RESERVED ____ DENIED X GRANTED

6. PUNITIVE ARGUMENTS/ARGUMENTS JURY IS THE CONSCIENCE OF THE COMMUNITY

____ RESERVED ____ DENIED X GRANTED IN PART

"Punitive" Arguments Not permitted
"Conscience of Community" is permitted
"Deterrence" Not permitted without prior consent and Argument

7. SETTLEMENT OFFERS, DEMANDS, NEGOTIATIONS

____ RESERVED ____ DENIED X GRANTED

8. EXISTENCE OF INSURANCE

____ RESERVED ____ DENIED X GRANTED

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9. WRONG NUMBER BUT AGREED TO 24 HOUR NOTICE

____ RESERVED ____ DENIED X GRANTED

10. STATEMENTS OF ATTORNEY'S PERSONAL BELIEF

____ RESERVED ____ DENIED X GRANTED

11. GOLDEN RULE ARGUMENTS

____ RESERVED ____ DENIED X GRANTED

12. MENTION OF MOTIONS IN LIMINE

____ RESERVED ____ DENIED X GRANTED

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IT IS FURTHER ORDERED AS FOLLOWS:

The attorneys are required to make any motions and documents for clarification or re-consideration before the court out of the jury's presence.

DONE IN OPEN COURT this 13th day of October, 2014.

Richard F. McDermott

HONORABLE RICHARD McDERMOTT

PRESENTED BY:
FITZER, LEIGHTON & FITZER, PS

By _____
Steven F. Fitzer, WSB# 6792
Bertha B. Fitzer, WSB# 12184
Attorney for Defendants

APPROVED BY:
PETERSON WAMPOLD ROSATO
LUNA KNOPP

By _____
Michael S. Wampold, WSBA # 20653
Mallory C. Allen, WSBA # 45468
Attorney for Plaintiffs

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Honorable Richard F. McDermott

FILED

15 JAN 23 PM 3:44

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,	NO. 13-2-03699-1 KNT
v.	ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION
ANDELLE TENG, MD, and CASCADE SURGERY ASSOCIATES, PLLC dba CASCADE ORTHOPAEDICS Defendant.	(CLERK'S ACTION REQUIRED)

THIS MATTER, HAVING COME ON BEFORE THE UNDERSIGNED JUDGE, BY Motion for Reconsideration filed by Defense counsel. The Court has reviewed all pleadings and attachments filed in support of said motion as well as prior material filed by both parties relating to Plaintiffs' Motion for a New Trial. Having reviewed said material, the Court makes the following findings:

1. There were numerous violations by the defense of the Court's Order Re: Motions in Limine.
2. As a consequence, Plaintiff's counsel on several occasions requested relief.

3. In response to the Plaintiff's counsels' motions, the Court gave a "curative instruction", denied Plaintiffs' motion for a directed verdict, repeatedly warned Defense counsel to change their conduct, and expressed frustration and concern about the conduct of Defense counsel.
4. Despite all of the Court's warnings, this behavior continued.
5. In reviewing this entire matter, and after examining the file and the conduct of Defense counsel, this Court cannot definitively say that the Plaintiffs had a fair trial.

IT IS THERFORE, HEREBY ORDERED: the Defense Motion for Reconsideration of the Court's Order Granting the Plaintiff's Motion for a New Trial is Denied.

Done this 23rd day of January, 2015.

Honorable Richard F. McDermott

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Subject: Clark vs. Teng, et al., Court of Appeals No. 73125-4

Attached for filing is a Petition for Review in the following case:

Case name: Thomas Clark and Alyson Clark vs. Andelle Teng, MD, and Cascade Surgery Associates, PLLC dba Cascade Orthopaedics
Court of Appeals Cause No.: 73125-4
Filing attorney: Leonard J. Feldman, 206-624-6800, WSBA No. 20961, feldman@pwrlk.com

Mary

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