No. 97127-7

SUPREME COURT
OF THE STATE OF WASHINGTON

THYCE W. COLYN and AMY J. COLYN,

Respondents,

v.

STANDARD PARKING CORPORATION, a Foreign Corporation; TAYLOR WARN,

Petitioners.

RESPONDENTS' ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON DEFENSE TRIAL LAWYERS

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A. Introduction.

Respondents Thyce and Amy Colyn reiterate their opposition to review of the Court of Appeals' unpublished decision affirming the trial court's judgment on the jury's verdict and order denying defendants' motion for a new trial. This Court should reject the invitation of amicus Washington Defense Trial Lawyers (WDTL) to make new law in Washington by relieving a party seeking a new trial based on the alleged "misconduct of [the] prevailing party" under CR 59(a)(2) from the burden of establishing actual misconduct that prejudiced the moving party's right to a fair trial. WDTL's new burden-shifting argument was not raised by petitioners Standard Parking and Warn, and for good reason – it would overrule over a century of established law requiring the appellate courts to give deference to the trial court's denial of a motion for a new trial because the trial court is in "the best position to effectively determine prejudice and whether attorney misconduct prevented a fair trial." (Op. 24)

WDTL erroneously claims as "misconduct" proper impeachment of a defense witness and a closing argument that focused on the trial court's instructions – conduct by counsel that the Court of Appeals properly held was not misconduct at all. (Op. 26)

As did petitioners, WDTL also erroneously argues that the number of defense objections, mostly on the "on the grounds of lack of foundation or asking leading questions" (Op. 24), standing alone, should suffice to prove prejudicial misconduct under CR 59(a)(2), without the need to identity any inadmissible evidence placed before the jury. This Court should deny the petition for review.

B. WDTL improperly raises an issue that was not presented to the Court in the petition for review or raised in the Court of Appeals.

This Court decides cases only on the basis of the issues argued by the petitioner, and has consistently declined to address issues that are first raised by an amicus curiae. *State v. James-Buhl,* 190 Wn.2d 470, 478 n.4, 415 P.3d 234 (2018) (citations omitted). WDTL's argument that "Washington law places the burden on the wrong party" (WDTL Mem. 7-9), argues an issue that was never raised by petitioners in their petition for review or in the Court of Appeals, and as a consequence, was not addressed below. This Court should reject WDTL's argument for this reason alone.

C. Washington law consistently and properly requires appellate courts to defer to the trial court's assessment of the conduct of counsel to determine whether misconduct undermined the jury's truth finding role.

A reviewing court, which considers only a transcribed report of proceedings, necessarily gives deference to the trial court's firsthand observation of what happened at trial and its effect on the jury. WDTL's argument that Washington law wrongly places the burden on the party seeking a new trial to establish prejudicial misconduct by the prevailing party's counsel would require this Court to abandon this bedrock principle of appellate review. WDTL ignores both the doctrine of stare decisis and the practical limits of an appellate court's power to properly evaluate the context of alleged attorney misconduct and its impact on the jury.

This Court "review[s] a trial court's decision to deny a new trial for an abuse of discretion based on the oft repeated observation that the trial judge, having 'seen and heard' the proceedings, is in a better position to evaluate and adjudge than can we from a cold, printed record." *State v. Perez-Valdez*, 172 Wn. 2d 808, 819, ¶ 20, 265 P.3d 853, 858 (2011) (citations and internal quotations omitted). "The trial court is in the best position to gauge the prejudicial impact of counsels' conduct on the jury. Particularly when the grounds for

a new trial involve the assessment of misconduct during the trial and its potential effect on the jury." *Gilmore v. Jefferson Cty. Pub. Transportation Benefit Area*, 190 Wn.2d 483, 503, ¶ 44, 415 P.3d 212, 222 (2018) (citation and quotation omitted); *Plastino v. City of Seattle*, 119 Wash. 195, 204, 205 P. 404, 408 (1922) ("whether [counsel's argument] was or was not prejudicial to the city, was apparent to the trial court more clearly than it is made to us by this cold record.").

WDTL complains that this long standing rule of appellate deference "incentivizes" the misconduct of trial counsel. (WDTL 4) WDTL "solution" to this supposed problem disparages (as did petitioners) the ability of trial court judges to control proceedings in their own courtrooms and belittles the jury's duty and ability to follow the trial court's instruction to base its verdict on the evidence, rather than counsel's arguments, and not to be influenced by counsel's objections. WDTL fails to acknowledge either of these longstanding principles.

WDTL would turn on its head the presumption that jurors follow the trial court's instructions, upending established law and the constitutionally-mandated right to trial by jury. *See, e.g., Spivey v. City of Bellevue*, 187 Wn.2d 716, 738, ¶ 51, 389 P.3d 504 (2017);

Wuth ex rel. Kessler v. Laboratory Corp. of America, 189 Wn. App. 660, 710, ¶ 106, 359 P.3d 841 (2015), *rev. denied,* 185 Wn.2d 1007 (2016).[1] And, as numerous cases confirm, trial judges are quite capable of policing their courtrooms and, when necessary, providing the remedy of a new trial when misconduct prejudices the fairness of a trial.[2] The appellate courts properly defer to the trial court's "much better position . . . to determine whether or not counsel's [misconduct] resulted in undue prejudice" in reviewing the grant of a new trial, just as it will in reviewing an order denying a new trial. *Discargar v. City of Seattle,* 30 Wn.2d 461, 470, 191 P.2d 870 (1948); *Teter,* 174 Wn.2d at 223, ¶ 31.

WDTL's proposal to place the burden on the respondent to justify the trial court's discretionary denial of a motion for new trial

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[1] WDTL's assertion in support of this proposed new "rule" of appellate review, that a limiting instruction only emphasizes inadmissible evidence, ignores that in this case there was no inadmissible evidence placed before the jury, and no limiting instruction requested or given. (§ D, *infra*)

[2] *See, e.g., Teter v. Deck,* 174 Wn.2d 207, 222-25, 274 P.3d 336 (2012) (WDTL 4-8) (affirming grant of new trial for eliciting testimony and showing exhibits to jury that trial court had ruled inadmissible); *Riley v. Dept. of L&I,* 51 Wn.2d 438, 319 P.2d 549 (1957) (affirming grant of new trial for inflammatory closing argument); *Roberson v. Perez,* 123 Wn. App. 320, 333, 96 P.3d 420 (2004) (affirming grant of new trial for discovery misconduct), *rev. denied,* 155 Wn.2d 1002 (2005); *Osborn v. Lake Wash. School Dist. No. 414,* 1 Wn. App. 534, 539, 462 P.2d 966 (1969) (affirming grant of new trial for deliberately eliciting inadmissible testimony in violation of pretrial order).

would rewrite a well-established standard of appellate review. It also brushes aside this Court's repeated admonition that it will "not lightly set aside precedent." *State v. Kier*, 164 Wn.2d 798, 804, ¶ 10, 194 P.3d 212 (2008). The Court has consistently required "a clear showing that an established rule is incorrect and harmful." *Key Design v. Moser,* 138 Wn.2d 875, 882, 983 P.2d 653 (1999). Even were the Court to overlook the fact that this issue is raised only by amicus, WDTL's cursory assertion that existing law "does not adequately deter attorney misconduct" (WDTL 3-4) falls woefully short of satisfying the burden to establish that existing law is both "incorrect and harmful."

D. As neither WDTL nor petitioners can identify any evidence or argument that tainted the jury's truth finding function, the Court of Appeals properly deferred to the trial court's discretionary refusal to grant a new trial.

WDTL's allegations of misconduct are long on hyperbole but woefully short on identifying *any* inadmissible evidence that the Colyns improperly placed before the jury, or any manner in which their counsel undermined the jury's truth-finding role. Before granting a new trial, the court must not only find misconduct, must find that misconduct had substantial likelihood of affecting the jury's verdict, and must provide "definite reasons of law and facts for its

order." CR 59(f); *see Carnation Col, Inc. v. Hill,* 115 Wn.2d 184, 186-87, 796 P.2d 416 (1990) (requiring moving party to show "a substantial likelihood the [misconduct] affected the verdict."). As did petitioners, WDTL ignores the Court of Appeals' holding that much of the conduct complained of by petitioners in their overlength 55-page brief and 60-page appendix was *fair* conduct, not *mis*conduct, and that to the extent counsel's questions to witnesses and argument in the heat of trial were improper, they did not prejudice "the right to a fair trial." (Op. 26)

The Court of Appeals properly rejected petitioners' "most flagrant example of misconduct" (Op. 26, quoting App. Br. 45) – the Colyns' impeachment of the defense expert with evidence that the expert had been sanctioned for giving false testimony in another lawsuit and implying that Warn had changed his story to claim for the first time at trial that he stopped in the middle of the Eighth Avenue before colliding with Thyce's bicycle. The Court of Appeals held this evidence and testimony admissible – the trial court properly allowed the Colyns to impeach the expert under ER 608(b) with a specific and relevant instance of misconduct, and to point out that Warn's "testimony at trial differed significantly from what he told Officer Belfiore immediately following the collision." (Op. 26)

WDTL also ignores that the form of counsel's questions, standing alone, could not establish prejudicial misconduct regardless of who bore the burden of proof under CR 59(a)(2). Although many trial tacticians would argue that such questioning should be avoided as ineffective before a jury (just as repeated objections can be ineffective), neither petitioners nor WDTL have ever explained how leading questions, or questions that lack foundation, are "misconduct" at all. The Court of Appeals properly refused to find any prejudice because when the trial court sustained an objection to a leading question or one based on lack of foundation, "the Colyn's attorney rephrased the question." (Op. 25)

The Colyns' counsel did not violate an order in limine or place before the jury inadmissible evidence. The Court of Appeals thus properly distinguished this case from those in which counsel intentionally placed before the jury irrelevant and prejudicial evidence as "not analogous." (Op. 26, citing *Miller v. Staton*, 64 Wn.2d 837, 394 P.2d 799 (1964)). *See also Teter*, 174 Wn.2d at 223, ¶ 32 (counsel "repeatedly violated the evidence rules by attempting to put exhibits before the jury that had not been admitted and to elicit testimony regarding subjects that the court had ruled inadmissible or irrelevant.").

WDTL asserts that it was "unjust" to "cast the defense in a bad light" by arguing in closing that petitioners asserted "meritless" defenses to liability, but cites no authority holding that it was misconduct to do so, particularly in light of the trial court's instruction that the arguments of counsel are not evidence. (CP 1687, Op. 25-26) The Court of Appeals properly held that counsel "did not commit misconduct by discussing the significance of the instructions that state Warn and Standard Parking were negligent as a matter of law and Thyce was not negligent." (Op. 27)

The Court of Appeals properly analyzed the petitioners' allegations of misconduct and not only deferred to the trial court's refusal to grant a new trial on the grounds of misconduct of counsel but held that "the record as a whole does not support finding prejudicial misconduct." (Op. 26) WDTL offers no basis for reviewing that decision under RAP 13.4(b).

E. Conclusion.

This Court should deny the petition for review, and WDTL's invitation to use further review of the Court of Appeals unpublished decision affirming the judgment on the jury's verdict to upend the standards governing appellate review of a trial court order granting or denying a new trial.

Dated this 26th day of July, 2019.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 26, 2019, I arranged for service of the foregoing Respondents' Answer to Brief of Amicus Curiae Washington Defense Trial Lawyers, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 26th day of July, 2019.

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