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**SUPREME COURT OF THE STATE OF WASHINGTON**

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In re the Dependency of B.K., a minor child.

STATE OF WASHINGTON,  
Department of Children, Youth, and Families,

*Petitioner,*

v.

A.K.,

*Respondent.*

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**SUPPLEMENTAL BRIEF OF  
THE STATE OF WASHINGTON**

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ROBERT W. FERGUSON  
*Attorney General*

TERA M. HEINTZ, WSBA 54921  
*Deputy Solicitor General*

Office ID No. 91087  
PO Box 40100  
Olympia, WA 98504-0100  
360-753-6200  
tera.heintz@atg.wa.gov

KELLY TAYLOR, WSBA 20073  
*Assistant Attorney General*

800 Fifth Avenue Suite 2000  
Seattle, WA 98104  
kelly.taylor@atg.wa.gov

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## I. INTRODUCTION

Due process requires a fair trial and a fair tribunal. The mother, A.K., received both. This Court should reverse the Court of Appeals' determination that the trial court's questioning of witnesses in this case deprived Ms. K of a fair trial in violation of state and federal due process. The Court of Appeals erred by applying the standard governing judicial conduct in a *jury trial*. This standard establishes when a judge's conduct likely influenced a jury's decision-making and thereby violated a defendant's right to neutral adjudication *by the jury*.

An entirely different standard applies to demonstrate unconstitutional bias *by a judge*. While trial judges should always strive to maintain judicial decorum, asking pointed or extensive questions, or even making abrasive, harsh, or hostile remarks in a bench trial does not generally establish unconstitutional bias by the judge. Instead, a violation of due process will be found only where the judge considers extrajudicial material or demonstrates such pervasive favoritism or antagonism as to make fair judgment impossible.

Applying the correct legal standard, the Court of Appeals' decision should be reversed and the trial court's order terminating Ms. K's parental rights affirmed. While the trial court's questioning may have shown impatience, skepticism, and at times harshness, a review of the entire record shows that the judge did not consider extrajudicial material or demonstrate such deep-seated favoritism or antagonism that she could not fairly decide the case. The Department presented overwhelming evidence of Ms. K's

inability to care for or understand the needs of her medically complex child, much of which was based on undisputed testimony by five medical and educational specialists, and by Ms. K herself. Ms. K received a fair trial.

## **II. STATEMENT OF THE ISSUE**

Was Ms. K afforded her due process right to a fair tribunal when the trial judge did not consider extrajudicial material or exhibit such deep-seated favoritism or antagonism as to make fair judgment impossible?

## **III. STATEMENT OF THE CASE**

B.K. is a developmentally delayed boy born on November 26, 2014. Exs. 6, 74. The mother of B.K. is A.K., and the father is J.B.<sup>1</sup> When B.K. was just nine days old, he sustained a blunt force injury to his head causing his skull to fracture. Ex. 6, at 2; Ex. 74, at 1. According to Ms. K, her boyfriend, Lonnie Jackson, was caring for infant B.K. when he was injured. Ex. 6, at 2. Ms. K initially claimed that another child had pulled a blanket out from underneath B.K. Ex. 6, at 2. She later acknowledged that Mr. Jackson “nodded off” while holding B.K. and dropped him to the floor. Ex. 6, at 2. Mr. Jackson was arrested for reckless endangerment in relation to B.K.’s injuries. Ex. 6, at 3. Ms. K was convicted for making false statements to a public servant regarding B.K.’s injury. Exs. 29, 30.

B.K. was placed in protective custody, and Child Protective Services were contacted. Ex. 6, at 2-3. During Child Protective Services’ ensuing investigation, Ms. K admitted she is addicted to opiates and participates in

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<sup>1</sup> The parental rights of the father, J.B., were terminated by default, and he is not involved in this appeal.

methadone treatment. Ex. 6, at 3. Ms. K was not complying with her methadone treatment program at that time. Ex. 6, at 3. The Department filed a dependency petition on January 5, 2015, and the court placed B.K. in licensed foster care. Ex. 3, at 6.

Ms. K agreed that B.K. was a dependent child on March 11, 2015. Ex. 6, at 1. In addition to his developmental delays, he has asthma, anemia, hypotonia, temperamental intensity, hyperdysplasia in his right eye, and sensory processing difficulties. RP 573-83; Ex. 74, at 1. He requires regular and extensive medical treatment and therapy, including appointments with his pediatrician, whom he often sees several times a month. RP 572-73. He has weekly visits to his speech language pathologist, his occupational therapist, and his mental health specialist. RP 680, 328-29, 664. He also regularly sees a physical therapist, a vision therapist, a gastrointestinal specialist, a developmental pediatrician, an ear, nose and throat doctor, and an asthma specialist. RP 235-36, 239-40. Ongoing participation with B.K.'s medical providers is important for "both enhancement of normal development but also prevention of abnormal development." RP 298, *see also* 301-02, 694.

During the two years B.K. was in foster care, Ms. K did not attend any doctors' appointments for B.K. RP 135, 222. Despite reminders from the Department social worker, she also failed to consistently attend B.K.'s therapeutic appointments. Exs. 44, 45, 49, 51, 52, 58A-P; RP 431, 498-99, FF 2.29, 2.30; CP 272-73. She also visited B.K. on an inconsistent basis,

including one gap in visitation lasting four months. FF 2.31, 2.32, 2.33; CP 273; RP 494-95.

The dependency court permitted Ms. K supervised visitation with B.K. twice per week. Ex. 6, at 10. Mr. Jackson was ruled out as B.K.'s father, and was not permitted to have contact with B.K. after June 2015. RP 553. Sometime between October 2015 and January 2016, however, Ms. K allowed Mr. Jackson to have unauthorized contact with B.K. during one of her visits. FF 2.13; CP 270. During the visit, Ms. K took a picture of B.K. and Mr. Jackson together at the Tacoma Mall, and posted it on Facebook. FF 2.13; CP 270.

In December 2015, visitation supervisors raised concerns that Ms. K was not fully supervising B.K. during visits. RP 486. For example, B.K. had fallen out of a stroller after Ms. K failed to buckle him properly into the stroller. RP 530. The Department social worker also raised concerns about reports that Ms. K left B.K. with strangers while she went to the restroom. RP 486.

A five-day termination trial took place in February and March of 2017. CP 267. The trial judge heard testimony from 16 witnesses, and the Court of Appeals correctly notes that the trial court questioned every witness. Slip op.<sup>2</sup> at 2. The judge asked many questions to clarify matters, including to pinpoint dates of particular events. *See, e.g.*, RP 27, 59, 191, 193-98, 351-52, 372, 439, 449, 643, 887, 901. The judge

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<sup>2</sup> A copy of the unpublished opinion from the Court of Appeals is attached: *In re Dependency of B.W.K.*, No. 76675-9 (Wash. Ct. App. Oct. 29, 2018).

also frequently interrupted repetitive testimony. *See, e.g.*, RP 56, 250, 366, 368, 369, 408, 464, 550, 559, 615, 692, 828-29, 843.

The trial judge's questions impacted all of the litigants in this case. The judge asked over 80 questions of Department social worker Piwtorak, nearly 100 questions of Department social worker Blackmer, approximately 134 questions of Ms. K, and over 150 questions of the Court Appointed Special Advocate (CASA). RP 312-27, 374-75, 398-464, 480-558, 626-747, 26-91, 121-36, 217, 918-28. When Ms. K testified for a second time on her own behalf, the trial judge asked her an additional 75 questions. RP 870-907. The judge frequently disapproved of or rejected testimony by Ms. K and her witnesses, as well as witnesses by the Department and the CASA. RP 67 (Ms. K), 232 (Department's witness), 256 (Department's witness), 310-11 (Department's witness), 391 (Department's witness), 437 (Department's witness), 634 (CASA witness), 635 (CASA witness), 654 (CASA witness), 691 (Department's witness), 744 (CASA witness), 786-88 (Ms. K), 803 (Ms. K's witness).

Sometimes the trial judge's questions elicited favorable answers for Ms. K, and sometimes the answers were unfavorable. *See, e.g.*, RP 209, 243, 244. At times, the judge flatly rejected evidence presented by the Department and the CASA. RP 588, 721-22, 725, 730, 733.

The termination of parental rights trial concluded in March 2017. CP 267. Ms. K. made no motion for a mistrial. Ms. K appealed from the termination of parental rights order, and, in her opening brief, she assigned error to none of the trial court's 50 findings of fact. Br. Appellant at 1.

In its October 28, 2018, opinion, the Court of Appeals determined that Ms. K had waived any argument under the appearance of fairness doctrine by failing to raise the issue with the trial court. Slip op. at 4 n.5. The Court of Appeals found, however, that the trial judge's excessive interjections violated Ms. K's right to a fair tribunal in violation of federal and state due process guarantees. Slip op. at 5-6. The Department later moved for reconsideration, and Ms. K moved for publication. The Court of Appeals denied both motions on January 14, 2019. The State thereafter sought review of the Court of Appeals' due process determination. Ms. K did not cross-appeal.

#### **IV. ARGUMENT**

##### **A. Ms. K Cannot Show a Manifest Error**

To challenge the trial court's conduct for the first time on appeal, Ms. K must prove "a manifest error affecting a constitutional right." RAP 2.5(a)(3). This standard requires a showing of "actual prejudice," which demands the error be so obvious on the record that it warrants appellate review. *State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009).

Here, the Court of Appeals erred in finding the trial court's "interjections and questioning" constituted manifest constitutional error. The Court of Appeals not only applied the incorrect standard, but a complete review of the record shows that Ms. K received a fair trial.

**B. The Court of Appeals Erred By Applying Standards Governing Judicial Conduct in a Jury Trial to This Bench Trial**

The Court of Appeals erred by applying the standard governing judicial conduct in a jury trial to find that the trial judge’s questioning of witnesses violated Ms. K’s state and federal due process rights. While Washington has not yet addressed the question of what standard governs determination of judicial bias in a bench trial, federal courts have done so. To prove judicial bias, federal courts uniformly require proof that the judge either considered extrajudicial material or exhibited such a high degree of favoritism or antagonism as to make a fair trial impossible. The Court of Appeals erred in failing to apply this established standard to Ms. K’s federal due process claim. The Court of Appeals also erred in failing to apply this standard to Ms. K’s state due process claim because neither the Court of Appeals, nor Ms. K, conducted the required analysis under *State v. Gunwall*, 106 Wn.2d 54, 58-63, 720 P.2d 808 (1986), to show that Washington’s due process clause provides greater protections than afforded under the U.S. Constitution.<sup>3</sup>

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<sup>3</sup> Absent briefing on the *Gunwall* factors, this Court has repeatedly declined to consider an independent due process claim under article I, section 3 of the Washington Constitution. See *In re Dependency of M.S.R.*, 174 Wn.2d 1, 20 n.11, 271 P.3d 234 (2012). The only exception to the *Gunwall* requirement does not apply here because there is no precedent firmly establishing that article I, section 3 extends broader protection than the Fourteenth Amendment such that a *Gunwall* analysis is unnecessary. See, e.g., *City of Woodinville v. N. Shore United Church of Christ*, 166 Wn.2d 633, 641-42, 11 P.3d 406 (2009). Instead, recent authority found the opposite—that “article I, section 3 should not be interpreted independently from its federal counterpart[.]” *In re of Dependency of E.H.*, 191 Wn.2d 872, 885-87, 427 P.3d 587 (2018).

**1. Unconstitutional Judicial Bias Exists Only When Pervasive Favoritism or Antagonism Renders Fair Judgment Impossible**

Federal courts apply a strict standard for determining whether a trial judge's conduct establishes disqualifying judicial bias. *See Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994). While *Liteky* addressed a statutory motion for recusal, the standard set forth in the case has since been applied to both post-trial due process claims and statutory recusal motions. *See, e.g., Wang v. Holder*, 569 F.3d 531, 541 (5th Cir. 2009) (applying *Liteky* in post-trial due process challenge).<sup>4</sup> As the U.S. Supreme Court explained in *Liteky*, judicial bias cannot just mean an unfavorable disposition towards a party. After all, a judge serving as trier of fact may become “exceedingly ill disposed” towards a party based on the evidence presented; that disposition alone does not constitute bias because the “knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge’s task.” *Liteky*, 510 U.S. at 550-51.

Judicial bias instead refers to favoritism that is “*wrongful or inappropriate*,” either because it is based on an “extrajudicial source,” or because opinions formed during the course of proceedings “display a deep-

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<sup>4</sup> *See also Larson v. Palmateer*, 515 F.3d 1057, 1067 (9th Cir. 2008) (applying *Liteky* standard to denial of fair trial claim); *Bieber v. Dep’t of the Army*, 287 F.3d 1358, 1362 (Fed. Cir. 2002) (proof of judicial bias in motion for new trial and motion for recusal require same showing of “a deep-seated favoritism or antagonism that would make fair judgment impossible”).

seated favoritism or antagonism that would make fair judgment impossible.” *Liteky*, 510 U.S. at 552-54 (emphasis added). “*Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger that are within the bounds of what imperfect men and women” might display. *Id.* at 555-56. Thus, while judges should always strive to maintain appropriate judicial decorum, judicial remarks during the course of a trial “that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not” “constitute a basis for a bias or partiality motion.” *Id.* at 555. In fact, it will rarely suffice. *Id.* at 554.

Applying this standard, courts do not generally treat factors such as the number of questions asked by a judge as establishing judicial bias. *See, e.g., Wang*, 569 F.3d at 541 (“It is commonplace in bench trials for judges to ask questions, and we will not transmute such a commonplace occurrence into a due process violation” unless such questions demonstrate such a degree of hostility that “fair judgment was impossible.”); *United States v. Modjewski*, 783 F.3d 645, 650 (7th Cir. 2015) (“in non-jury proceedings, questioning by the judge will rarely be prejudicial to the defendant”); *First Prof’ls Ins. Co. v. Sutton*, 607 Fed. App’x 276, 289-90 (4th Cir. 2015) (judges in a bench trial are expected to pose “questions pertinent to a factual issue which requires clarification,” “intercede because of apparent inadequacy of examination or cross-examination by counsel,” or “draw

more information from relevant witnesses or experts who are inarticulate or less than candid”).<sup>5</sup>

Courts likewise rarely conclude that harsh, abrasive, or even hostile comments by a judge demonstrates unconstitutional bias, even when directed at witnesses. *See, e.g., In re William S.*, 745 A.2d 991, 995 (Me. 2000) (denying judicial bias claim under *Liteky* in termination of parental rights case because judge’s expressions of frustration at parents’ “trickery” did not show that fair trial was impossible); *United States v. Diapulse Corp. of Am.*, 457 F.2d 25, 30 (2d Cir. 1972) (holding that judge’s “abrasive” and “disparaging comments” to witnesses, while lacking restraint a trial judge “ought ideally to show,” did not demonstrate that the court could not decide case fairly); *White v. Luebbers*, 307 F.3d 722, 731 (8th Cir. 2002) (“[s]o long as the court’s expressed views come from the record of the case itself, or from representations properly made by the parties or their lawyers, nothing improper has occurred”); *United States v. Caramadre*, 807 F.3d 359, 374 (1st Cir. 2015) (rejecting bias claim based on judge’s criticism of defendant because “trial judges are not required either to mince words or to sugar-coat their views” and “[b]lunt language, without more, does not translate into a showing of judicial bias”); *Haynes v. State*, 937 S.W.2d 199, 204 (Mo. 1996) (affirming sentence where judge’s “blunt” criticism of defendant at sentencing did not establish judicial bias).<sup>6</sup>

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<sup>5</sup> The State relies on this unpublished federal opinion per GR 14.1(b) and FRAP 32.1. A copy of the opinion is attached as required under GR 14.1.

<sup>6</sup> *Logue v. Dore*, 103 F.3d 1040, 1046 (1st Cir. 1997) (judge’s comments indicating “grave doubts” about defendant’s credibility outside presence of jury did not

## 2. The Standard Applied by the Court of Appeals Does Not Establish Judicial Bias

The cases cited by the Court of Appeals apply a different standard to judicial conduct in a jury trial.<sup>7</sup> Those cases focus *not* on whether the trial judge prejudged the merits of the case, but rather whether jurors perceived the judge as taking sides in the underlying dispute, thereby interfering with the *jury's* neutral evaluation of the evidence. As those cases recognize, the cause for concern arises because of the “overpowering” position of a trial judge over the jury. *United States v. Hickman*, 592 F.2d 931 (6th Cir. 1979). As this Court explained in *Egede-Nissen*, “[e]very lawyer who has ever tried a case, and every judge who has ever presided at a trial, knows that jurors are inclined to regard the lawyers engaged in the trial as partisans, and are quick to attend an interruption by the judge, to which they may attach an importance and a meaning in no way intended.” *Egede-Nissen v. Crystal Mountain*, 93 Wn.2d 127, 142, 606 P.2d 1214 (1980) (quoting *State v. Jackson*, 83 Wash. 514, 523, 145 P. 470 (1915)).<sup>8</sup>

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establish judicial bias—”[j]udges are not expected to refrain from forming opinions about witnesses’ credibility”); *Pollard v. E.I. DuPont de Nemours Co.*, 213 F.3d 933, 944 (6th Cir. 2000) (judge’s comments spoken in “anger and moral outrage” stemming from conclusions “rightly formed as part of his factfinding duty” do not support claim for judicial bias), *rev’d on other grounds sub nom. Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 121 S. Ct. 1946, 150 L. Ed. 2d 62 (2001).

<sup>7</sup> The federal cases cited by the Court of Appeals mostly predate the *Liteky* case, raising questions about whether the standard in those cases remain controlling in the jury trial context. Some federal appellate courts, for example, have applied the *Liteky* standard to due process claims in the jury trial context. *See, e.g., Larson*, 515 F.3d at 1067 (analyzing due process claim based on judicial conduct in jury trial under *Liteky*). This Court need not resolve this issue here, as analyzing judicial conduct in the context of a jury trial implicates not only due process concerns, but also constitutional prohibitions against judicial comments on evidence, which is not at issue here.

<sup>8</sup> *See also United States v. Singer*, 710 F.2d 431, 437 (8th Cir. 1983) (a “judge’s slightest indication that he favors the government’s case can have an immeasurable effect

This risk of improper influence is exacerbated because courts cannot pierce the black box of jury deliberations to determine how judicial comments might have influenced jurors. *Egede-Nissen*, 93 Wn.2d at 142. Thus, in each of the cases cited by the Court of Appeals, the appellate court ordered a new trial only after determining the trial judge's conduct, in the totality of the circumstances, likely influenced the jury's deliberations, thereby depriving the defendant of a neutral adjudicator. *See, e.g., United States v. Pena-Garcia*, 505 F.2d 964 (9th Cir. 1974) (reversing conviction because trial court's accusations of perjury and insubordination against defense witnesses and threats to hold defense counsel in contempt likely conveyed that jury should return guilty verdict); *Hickman*, 592 F.2d at 936 (reversing conviction because judge's conduct created "strong impression" to jury of judge's belief in defendant's probable guilt); *United States v. Singer*, 710 F.2d 431, 436 (8th Cir. 1983) (reversing conviction because jury could have inferred from judge's comments and questions that he sided with the government).<sup>9</sup>

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*upon a jury*" (emphasis in *Singer*) (quoting *United States v. Bland*, 697 F.2d 262, 265-66 (8th Cir. 1983)).

<sup>9</sup> The non-jury case cited by the Court of Appeals, *State v. Moreno*, 147 Wn.2d 500, 507, 58 P.3d 265 (2002), does not address judicial bias. In *Moreno*, the prosecutor did not appear for trial, leaving the trial judge to call and examine each witness. The defendant argued that the judge effectively stepped into the shoes of the prosecution in violation of separation of powers and due process. While this Court referred generally to the prohibition against trial judges crossing into the role of an advocate, this Court was addressing circumstances in which the judge literally acted as both prosecutor and judge, such when a judge serves as both grand jury and adjudicator, or when the judge calls, examines, and cross-examines witnesses and advocates for the state in the absence of a prosecutor, while also serving as the adjudicator. *Moreno* has little bearing here.

Factors considered in the criminal jury trial cases cited by the Court of Appeals include the number of questions by the judge, whether such questions were neutral or adversarial, or whether the questions were primarily clarifying. But those factors determine when judicial comments create an undue risk of interference with a *jury's* neutral decision-making. They do not establish unconstitutional bias by the *judge*.

**C. Ms. K Received a Fair Trial**

Applying the correct standard here shows that Ms. K received a fair trial. While the trial judge could (and probably should) have exercised greater restraint in questioning witnesses and commenting on testimony, a review of the entire record shows the judge never exhibited inappropriate, wrongful, or extrajudicial thought processes demonstrating actual bias or prejudice. To the contrary, the trial court's findings were amply supported by a fair evaluation of the evidence.

The Court of Appeals primarily faulted the trial judge for stepping into the role of an advocate, and asking, at times, hostile questions of Ms. K and her supporting witnesses, as well as developing evidence that favored the Department. Slip op. 6. But, as discussed above, asking pointed questions in a bench trial almost never establishes judicial bias. *See* B(1) *supra* pp. 8-11; *see also Delgado v. Holder*, 674 F.3d 759, 767 (7th Cir. 2012) (aggressive questioning by immigration judge does not establish bias). This is particularly true in a termination of parental rights case, where the safety of children is at stake. For example, in *In re Adoption of Norbert*, 83 Mass. App. Ct. 542, 546-47, 986 N.E.2d 886 (2013), the court rejected

a due process claim where the trial court asked over 1,000 questions compared to the 725 questions asked by all other parties combined. While the Massachusetts appellate court did not “condone” (*id.* at 547) such extensive questioning, it found no violation of due process because the trial court did not solicit inadmissible evidence or prevent the mother from submitting admissible evidence, and “the record contain[ed] ample support for the judge’s detailed (and uncontested) findings[.]” *Id.* at 548.

A thorough review of the record and the trial court’s findings compels the same conclusion here. The primary parenting deficiency driving the termination of Ms. K’s parental rights was her lack of appreciation or understanding of B.K.’s medical needs, and her inability to maintain his intensive medical and therapeutic visits in the near future. FF 2.29-2.47. Five medical professionals, two social workers, a CASA volunteer, and B.K.’s foster mother testified about the severity and pervasiveness of B.K.’s medical conditions. RP 287, 292-95, 327, 330-33, 571, 573-80, 662, 665, 678, 681. B.K. is a medically complex child with impairments in his intellectual development, sensory processing, social participation, motor skills, vision system, tactile input, balance, muscle tone and development, feeding and digestion, and verbal and emotional processing. Ex. 74, at 1; RP 330-33, 335-37, 341 (occupational therapist); 223-28 (foster mother); 573-83 (pediatrician); 681 (speech language pathologist). He also suffers recurrent asthma. RP 573.

In light of his special needs, the medical professionals emphasized the importance of early intervention for B.K.’s future development and the

need to integrate information from his medical appointments and therapy sessions into his daily living. RP 298-302, 333-34, 666, 688. They likewise underscored the continued need for treatment into the future, and the risks of interrupting or delaying B.K.'s treatment regimen to his future development and ability to live independently as an adult. RP 341-45, 348, 433, 597-98, 688-89; FF 2.34, 2.37, 2.38, 2.4.

The Department social workers, the CASA volunteer, the family resource coordinator, and B.K.'s foster mother also testified about their repeated efforts to facilitate Ms. K's participation in his medical and therapy appointments. RP 243, 271, 276-79, 431, 460, 498-99, 517-18, 638-39; Exs. 44, 45, 49, 51, 52, 58A-P; FF 2.29, 2.30. Despite such efforts, Ms. K failed to attend a single medical appointment, or consistently attend therapy or visitation. RP 135, 142-44, 588. Six times, Ms. K's visits with B.K. were suspended, each time for missing three visits, and she had no visits for a full four-month period. RP 186-88, 493-95. While Ms. K disputed the *reasons* for these failures, she did not dispute such failures occurred. RP 64-66, 134-35.

Ms. K also possessed only a superficial understanding of her son's medical needs, demonstrated largely in response to open-ended questions asking her to identify those needs. RP 66-67. Ms. K missed many of B.K.'s significant, interrelated medical issues, including his developmental delays, low muscle tone, his feeding problems, and his gastrointestinal issues. RP 66-67, 1031-35; FF 2.29. She also downplayed certain issues, like his hypertropia, which Ms. K identified as an appearance issue, not as a functional problem impairing his mobility. RP 66-67; FF 2.29. She similarly

downplayed his recurrent asthma, testifying that it was “under control,” when, in fact, he experienced asthma flare-ups after visits with her due to her continued smoking. *Compare* RP 67 (Ms. K.’s testimony) with 590-91 (pediatrician’s testimony) and 424 (social worker) and 640-41 (CASA volunteer). Ms. K demonstrated little appreciation that her inability to ensure his attendance at his many medical and therapy appointments posed dire risks to his physical and emotional health. RP 133, 517.

The Court of Appeals, in focusing on the judge’s questioning, did not expressly examine the trial court’s findings to determine whether the judge fairly evaluated the evidence. *See Sarah A. v Dep’t of Health & Soc. Servs.*, 427 P.3d 771, 783 (Alaska 2018) (evaluation of judicial bias claim should include review of record and trial court’s findings to determine if findings were “plausibly tainted by the court’s perceived lack of partiality”). Importantly, Ms. K did not challenge any of the trial court’s factual findings here, or identify any other error by the trial court. Br. Appellant at 1. Nor is there any basis to believe that the outcome would have been different had the judge not extensively questioned witnesses.

To the contrary, most of the trial judge’s lines of questioning that the Court of Appeals found problematic addressed subsidiary issues or cumulative testimony. For example, the Court of Appeals cited the trial judge’s questioning of two witnesses regarding a picture posted on Facebook of Mr. Jackson and B.K. The trial court asked a number of questions to determine if the photo was taken at a time when Mr. Jackson was permitted visitation, or sometime afterward. Slip op. at 12-19. The trial

judge, however, did not rely on this testimony as a basis of the current unfitness findings. Nor was this testimony necessary to establish when the photo was taken. It was self-evident from the photo, as the trial judge later determined. The picture could not have been taken when B.K. was just four months old, because he was obviously much older in the picture, had teeth, and was able to hold his head up independently, which he could not do as an infant. RP 1027-28; FF 2.13.

The Court of Appeals also highlighted the trial judge's skeptical questioning of Ms. K's housemate regarding her offer to allow Ms. K and B.K. to live with her indefinitely. Slip op. at 20-21. The trial judge, however, *credited* this witness's testimony, stating in her oral ruling that she found Ms. K's housemate to be "a very supporting person who cares about the mother and wants to help her." RP 1030. The trial judge's questioning did not demonstrate prejudgment of the evidence. And, while the trial judge did not find that Ms. K's housemate would solve Ms. K's parenting deficiencies, she relied on the undisputed fact that the friendship was relatively new, going back just over four months, and that Ms. K's housemates worked and thus could not transport her to B.K.'s medical appointments in the future. RP 1040-42.

In another example, the Court of Appeals found the trial judge mischaracterized Ms. K's testimony that her attorney had "forged" her signature on a document submitted to the court, and had made an inappropriate comment on Ms. K's credibility. Slip op. at 24-27. Ms. K, however, had previously testified in response to questions by the

Department that her attorney had forged her signature on court documents. RP 88 (“[Mother’s former attorney] signed my name to a document and sent it to the Department that I had no knowledge or consent of . . . . Q: I’m sorry. She signed your name? She *forged* your name to a document? A: *Yes*, that’s what she told me.” (Emphasis added.)). The judge did not mischaracterize Ms. K’s testimony regarding the forgery allegation. The trial court also later explained that she had an obligation to report credible allegations of attorney misconduct to the Washington bar, which is the reason she asked a number of questions and reached a credibility determination on this issue. RP 138-39. This issue was largely collateral.

Even if it were not, reaching interim credibility determinations does not establish bias. *White*, 307 F.3d at 730 (“[t]here is nothing improper about a judge’s sharing his or her tentative impressions or inclinations with the parties in advance of reaching a final decision”). This is especially true given the significant evidence at trial that undermined Ms. K’s credibility. Ms. K had been convicted of lying to a public officer regarding how B.K. fractured his skull, initially claiming that another child had pulled a blanket from underneath him. Ex. 6, at 2; Exs. 29-30. Ms. K later acknowledged that Mr. Jackson had dropped B.K. when he “nodded off” after she had left B.K. in his care. Ex. 6, at 2. Ms. K also testified that she had quit smoking, though other witnesses testified that she still smoked cigarettes daily. RP 60, 94, 439. The trial judge noted the significance of this issue, given B.K.’s recurrent asthma attacks after his visits with Ms. K. RP 1026; FF 2.15; CP 270. In another instance, Ms. K initially denied that B.K. fell out of a stroller during a visit because she had not secured him

properly, though multiple witnesses testified to the contrary. RP 528, 154, 479, 530, 842. These are just some of the many misrepresentations by Ms. K addressed at trial. RP 486, 1023-24, 1027-31.

Moreover, while the trial judge's credibility determinations factored into her decision-making, this is not a case where Ms. K's credibility formed the central basis for the court's termination decision. The trial judge's written findings make clear that her determination of the statutory termination elements did not depend upon disbelieving Ms. K or her witnesses. FF 2.5, 2.7, 2.9, 2.17, 2.44, 2.48, 2.49; CP 268-77. They were based on evidence establishing Ms. K's inability to appreciate or meet B.K.'s extraordinary medical needs now and in the immediate future. FF 2.29, 2.30, 2.44-2.46; CP 272-76.

The tone of the trial judge's questions likewise does not establish a due process violation. The trial judge's tone exemplifies the type of impatient, skeptical, or abrasive questioning that federal appellate courts routinely find insufficient to establish judicial bias. *See* B(1) *supra* p. 10; *see also Larson v. Palmateer*, 515 F.3d 1057, 1067 (9th Cir. 2008) ("neither adverse rulings nor impatient remarks are generally sufficient to overcome the presumption of judicial integrity"). This is particularly true because the trial judge expressed a similar tone with Department witnesses. For example, when the Department's attorney asked the Department social worker about whether Ms. K was currently unfit to safely and adequately parent B.K., the trial judge characterized the testimony as "absolutely not useful." RP 430. When the social worker testified regarding the child's ability to achieve permanency in a foster home and have his needs met there,

the trial judge interrupted the social worker's testimony, criticizing it as "pretty generic." RP 436-37, *see also* RP 232, 256, 310-11, 391, 634-35, 654, 691, 744. The trial judge's critical treatment of both parties highlights that she did not display pervasive favoritism or antagonism for either party.

When considered as a whole rather than in isolation, the trial judge's questioning of witnesses demonstrates a desire to understand the facts and evaluate the witnesses to fulfill her fact-finding role. More importantly, nothing in the record demonstrates that the trial judge exhibited such a high degree of favoritism or antagonism as to make a fair judgment for Ms. K impossible.

The termination trial in this case took place two years ago. B.K. is now four years of age, and he has lived only nine days of his life in Ms. K's care. RP 35. RCW 13.34.020 emphasizes children's right to speedy resolution of these proceedings. Ms. K received a fair trial and the trial court order terminating parental rights should be affirmed.

## V. CONCLUSION

For all of the foregoing reasons, the Court of Appeals decision should be reversed and the order terminating Ms. K's parental rights in B.K. should be affirmed.

RESPECTFULLY SUBMITTED this 17th day of May 2019.

ROBERT W. FERGUSON  
*Attorney General*

*s/ Tera M. Heintz*  
TERA M. HEINTZ, WSBA 54921  
*Deputy Solicitor General*

Office ID No. 91087  
PO Box 40100 : Olympia, WA 98504-0100  
360-753-6200 : [tera.heintz@atg.wa.gov](mailto:tera.heintz@atg.wa.gov)

KELLY TAYLOR, WSBA 20073  
*Assistant Attorney General*  
800 Fifth Avenue Suite 2000  
Seattle, WA 98104

## **APPENDIX**

2018 OCT 29 AN 8: 37

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Dependency of	)	No. 76675-9-1
B.W.K., dob 11/26/2014,	)	
	)	DIVISION ONE
A minor child.	)	
	)	
STATE OF WASHINGTON,	)	
DEPARTMENT OF SOCIAL AND	)	
HEALTH SERVICES,	)	
	)	UNPUBLISHED OPINION
Respondent,	)	
	)	
v.	)	
	)	
ASHLEY KNUCKLES,	)	
	)	
<u>Appellant.</u>	)	FILED: October 29, 2018

SCHINDLER, J. -The trial court interjected more than 800 times during a six-day termination trial, often engaging in lengthy examination of witnesses. While many questions sought clarification and were neutral, many other questions challenged the credibility of the mother and elicited evidence not presented by the parties. Although a court has broad discretion in a bench trial to question witnesses and control the proceedings, the cumulative effect of the court's interjections and questions in this case constitutes manifest constitutional error and denied the mother the due process right to a fair trial. We reverse the order terminating the mother's parental rights to B.W.K. and remand for a new trial before a different judge.

## FACTS

Ashley Knuckles is the biological mother of B.W.K., born November 26, 2014. Knuckles suffered from an addiction to opiates. When B.W.K. was nine days old, Knuckles' boyfriend "nodded off" and dropped the baby. B.W.K. suffered a severe head injury.

In January 2015, the Department of Social and Health Services (Department) placed B.W.K. in foster care and filed a dependency petition. Following a 16-month dependency, the Department filed a petition to terminate the mother's parental rights to B.W.K. During the 6-day trial, without objection, the court interjected and asked questions over 800 times. The court asked questions of every witness, including over 100 questions of the mother and a comparable number of questions of the social worker and the court-appointed special advocate (CASA). The court found the Department met its burden of proving the statutory elements to terminate the mother's parental rights to B.W.K.<sup>1</sup>

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<sup>1</sup> The court must find the following statutory elements by clear, cogent, and convincing evidence:

- (a) That the child has been found to be a dependent child;
- (b) That the court has entered a dispositional order pursuant to RCW 13.34.130;
- (c) That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency;
- (d) That the services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided;
- (e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future... [;]  
... ; and
- (f) That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

RCW 13.34.180(1), .190(1)(a)(i). If the State satisfies these criteria, the court may terminate parental rights if it finds by a preponderance of the evidence that termination is in the "best interests" of the child. RCW 13.34.190(1)(b).

The court found the mother was not credible. In particular, the court did not believe the mother's testimony that a photograph of B.W.K. and her boyfriend was taken at the Tacoma Mall in March or April of 2015. The court found instead that the "photo was actually taken between October 2015 and January 2016" when the boyfriend was prohibited from having unauthorized contact with B.W.K.

The court found the mother was "in compliance with her treatment, which includes behavioral therapy, monthly meetings, methadone dosing and UAI<sup>2</sup> testing (all results negative)." But the court found the mother demonstrated an insufficient understanding or interest in the special needs of the child and an inability to meet those needs.

The court concluded there was little likelihood that conditions could be remedied so that B.W.K. could be returned to the mother's care in the near future and continuation of the parent-child relationship diminished the prospects for early integration into a stable and permanent home.

The court entered an order terminating the mother's parental rights to B.W.K.

#### ANALYSIS

The mother contends she is entitled to a new trial because the court violated her right to due process. The mother asserts that in addition to asking an excessive number of questions, the judge "took over the examination of witnesses," impeached and "aggressively cross-examined" her and her witnesses, "made sua sponte objections" to her attorney's questions, and "helped the State and CASA" in eliciting

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<sup>2</sup> Urinalysis.

facts and evidence. Knuckles contends the court "crossed the line from impartiality to advocacy in favor of the State and against appellant."

### RAP 2.5

The State correctly points out the due process claim is raised for the first time on appeal. Under RAP 2.5(a), this court "may refuse to review any claim of error which was not raised in the trial court." However, "manifest error affecting a constitutional right" may be raised for the first time on appeal. RAP 2.5(a)(3). Under RAP 2.5(a)(3), the mother must show "actual prejudice." State v. Kalebaugh, 183 Wn.2d 578, 584, 355 P.3d 253 (2015)<sup>3</sup> (quoting State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)). Actual prejudice is "a plausible showing ... that the asserted error had practical and identifiable consequences in the trial of the case." Kalebaugh, 183 Wn.2d at 584<sup>4</sup> (quoting O'Hara, 167 Wn.2d at 99). After careful review of the record, we conclude the trial court's interjections and questioning constitute manifest constitutional error and actual prejudice.<sup>5</sup>

### Right to a Fair Trial

The Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington State Constitution protect against the deprivation of a

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<sup>3</sup> Internal quotation marks omitted.

<sup>4</sup> Internal quotation marks omitted.

<sup>5</sup> The mother also contends the court violated the appearance of fairness doctrine. Because the appearance of fairness doctrine is not constitutional in nature, we do not consider the argument for the first time on appeal. RAP 2.5(a)(3); In re Guardianship of Cobb, 172 Wn. App. 393, 404, 292 P.3d 772 (2012); State v. Morgensen, 148 Wn. App. 81, 90-91, 197 P.3d 715 (2008). The federal authorities she cites do not address whether appearance of fairness claims are of sufficient constitutional magnitude to be raised for the first time on appeal. However, our Supreme Court has unequivocally held that the "appearance of fairness doctrine, though related to ... due process considerations, is not constitutionally based" and may not be raised as a matter of right for the first time on appeal. City of Bellevue v. King County Boundary Review Bd., 90 Wn.2d 856, 863, 586 P.2d 470 (1978). We are bound by the decision of our Supreme Court. Buck Mountain Owners' Ass'n v. Prestwich, 174 Wn. App. 702, 716, 308 P.3d 644 (2013).

person's liberty without due process of law. The right to a fair trial is a "fundamental liberty" protected by the Fourteenth Amendment and article I, section 3. Estelle v. Williams, 425 U.S. 501,503, 96 S. Ct.1691, 48 L. Ed. 2d 126 (1976); State v. Davis, 141 Wn.2d 798, 824, 10 P.3d 977 (2000). "A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955); State v. Moreno, 147 Wn.2d 500, 507, 58 P.3d 265 (2002).

In general, a trial court does not violate the due process right to a fair trial by asking questions. Moreno, 147 Wn.2d at 506-12. Courts have the authority to interject and question witnesses and may, for example, interject to prevent undue repetition of testimony or ask a witness to clarify testimony. ER 614(b); In re Welfare of Burtts, 12 Wn. App. 564, 577, 530 P.2d 709 (1975); United States v. Morgan, 376 F.3d 1002, 1008 (9th Cir. 2004).

However, the due process right to a fair trial is implicated where the court crosses the line from neutral arbiter to advocate. See Moreno, 147 Wn.2d at 509-511. Although a judge has broad discretion to question witnesses in a bench trial, the judge cannot "take charge of a party's case or ... become a clear partisan." 5A KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE§ 614.5, at 618 (6th ed. 2016); Moreno, 147 Wn.2d at 509-511. "A trial court should not enter into the 'fray of combat' or assume the role of counsel." State v. Ryna Ra, 144 Wn. App. 688, 705, 175 P.3d 609 (2008) (quoting Egede-Nissen v. Crystal Mountain. Inc., 93 Wn.2d 127,141,606 P.2d 1214 (1980)). The greater the involvement of the court, the higher the likelihood the judge is effectively usurping the role of counsel, which calls for reversal. See United States v. Hickman, 592 F.2d 931, 932, 936 (6th Cir. 1979) (convictions reversed where the trial

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court interjected in proceedings more than 250 times, the constant interruptions "frustrated the defense" and infringed right of cross-examination, and the court indicated disbelief in "the defense story").

In determining whether a court's interjections and questioning violate the due process right to a fair trial, courts consider the proceedings as a whole and examine a number of factors, including the frequency and nature of the court's questions, whether the court waited until after counsel questioned the witness, whether the court's questions were clarifying or adversarial, whether the court interjected sua sponte in favor of one party, whether the questioning was impassioned or accusatory, and whether the court usurped counsel's role. See Moreno, 147 Wn.2d at 507-12; United States v. Pena-Garcia, 505 F.2d 964, 967 (9th Cir. 1974); United States v. Saenz, 134 F.3d 697, 702-05 (5th Cir. 1998); United States v. Singer, 710 F.2d 431, 436-37 (8th Cir. 1983); United States v. Van Dyke, 14 F.3d 415, 418-20 (8th Cir. 1994).

We conclude the trial court's interjections and questioning in this case violated the mother's due process right to a fair trial. The sheer number of questions asked by the court is problematic and usurped the role of counsel. But the timing and nature of the questions show the court crossed the line between neutral arbiter and advocate. Instead of waiting to ask questions until after counsel finished speaking, the court interjected relatively early and often during the examination of witnesses. The court disrupted the presentation of evidence and exhibited a level of involvement more akin to an advocate than a neutral arbiter. As the following excerpts demonstrate, the court too often commandeered witness examinations, engaged in hostile and advocate-like questioning, and elicited evidence favoring the Department.

The Department called Knuckles as its first witness. Shortly after the Department began questioning her, the court interjected:

THE COURT: ... I want to draw your attention to page 8 [of the agreed order of dependency], okay, and Provision 4.4, are you there? Where it says Placement?

THE WITNESS: Sorry. These pages are stuck together. Yes, I do see that.

THE COURT: And it says, "DSHS!<sup>6</sup> Supervising Agency is authorized to place the child with a relative who is willing, appropriate and available with reasonable - prior reasonable notice to the party subject to review by the Court. DSHS shall initiate a home study of the maternal grandmother's home in her home state [of Tennessee] as well as the sibling [A.Y.]'s paternal grandmother's home in Kentucky. However, the court order shall be entered before [B.W.K.] is placed outside of Washington State."

Did you read that before you signed this order?

THE WITNESS: [My attorney and I] went through it briefly, but-

THE COURT: So you knew that there was no promise from this order that the child was going to be placed with your mother, right?

THE WITNESS: That's just what I thought when I was signing it, honestly.

THE COURT: Contrary to what it says?

THE WITNESS: Just by what me and the social worker talked about, she just mentioned that [the children] would be out of foster care and with my mom if I signed the paper.

THE COURT: Ms. Knuckles, did you read this order?

THE WITNESS: I can't say that I did, no, ma'am.

THE COURT: Okay.

THE WITNESS: We went through it, but it wasn't - you know, it was just very brief. It was only a few minutes of time that we were together.

[(Department's attorney briefly questions witness.)]

THE COURT: There were hearings after [B.W.K.'s placement in foster care] that you attended. Are you saying [your lawyer] was not telling the court what you wanted to say about how promises had been made that weren't reflected in the order?

THE WITNESS: Well, yes, that's true.

THE COURT: I see. When was the first time you complained that there were promises made to you that weren't reflected in the orders?

THE WITNESS: As soon as I had knowledge a little bit about what's happening, you know, I feel like this -

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<sup>6</sup> Department of Social and Health Services.

THE COURT: When was that, Ms. Knuckles, that you actually made a statement to somebody saying, "This isn't what I agreed to?"

THE WITNESS: It - I know I did it at court when we went when I seen [sic] [my lawyer] at court, but I don't recall a specific date it was.

THE COURT: Did you say this to anybody other than [your lawyer]?

THE WITNESS: Everybody that I've been involved with so far, yes.

THE COURT: So you've said it to your social workers and you've said it to the CASA?

THE WITNESS: That - I'm sorry, said what?

THE COURT: That - that this order didn't reflect what you've been promised.

THE WITNESS: Oh, yes, I talked to my first social worker about it, Cynthia, because she was the one that originally told me.

THE COURT: Anybody else you talked to besides Cynthia and [your lawyer]?

THE WITNESS: Not that I recall.

THE COURT: Okay. Back to you, [Counsel].

[(3 pages of questioning by Department's attorney.)]

THE COURT: Did it occur to you to maybe read the orders to see what they wanted you to do?

THE WITNESS: I was not aware of an order.

THE COURT: Really? You weren't reading any of these court orders that said what services you were required to do?

THE WITNESS: Oh, I had - yeah, I had the paper from the Department that said the -with the - established paternity and the random UAs and stuff, but -

THE COURT: Mm-hmm. And nothing in those said that you had to be off methadone, right?

THE WITNESS: Yeah.

THE COURT: Okay.

[(22 pages of extensive questioning by Department's attorney, several interjections by court.)]

THE COURT: I'm going to stop you here and ask [Knuckles] something else.

What are [B.W.K.]'s particular needs as compared to any other child? What are his special needs?

THE WITNESS: He's different because he needs extra attention. He - his balance and stuff is off, so he can't just be left alone like regular kids with other children. He needs attention 24/7<sup>7</sup>, and that makes it different. He's more high risk than any other children with his needs.

THE COURT: Anything else?

THE WITNESS: No.

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<sup>7</sup> Twenty-four hours a day, seven days a week.

THE COURT: That's it? That's all his needs, is extra attention and 24/7 care?

THE WITNESS: I mean -

THE COURT: Anything else a caregiver needs to give him?

THE WITNESS: Of course, he needs his medical stuff advised and-

THE COURT: What medical stuff needs to be advised?

THE WITNESS: All of his, you know, therapies and appointments and all that. They need to, you know, be taken seriously and -

THE COURT: And how often are those?

THE WITNESS: He's got the therapies that I'm allowed to go to. There are three of them and it's twice a week: Physical therapy, occupational therapy, and speech therapy.

THE COURT: If he returns to you, how are you going to meet his need for 24/7 care?

THE WITNESS: I will be there for him and be able to take care of him responsibly with the help of- and support of my family and my friend.

THE COURT: Which family?

THE WITNESS: My mother and grandmother and grandfather back home in Tennessee.

THE COURT: Does that mean you would take ... [B.W.K.] back home to Tennessee?

THE WITNESS: If I was permitted, yes.

THE COURT: Okay. And who would be providing the 24/7 care back in Tennessee?

THE WITNESS: Well, I mean, I could and - until we got something set up like he is now where he goes to daycare and stuff, but I'd rather him not just be in daycare all day. If it was my choice I'd - you know, take care of him and stuff, and I have the family support and means to where I would be able to stay with him.

THE COURT: How do you know you've got family support to get 24/7 care in Tennessee? How do you know you have it?

THE WITNESS: They've told me. My - my parents and grandparents have told me that they would do anything to help me that they needed to and they have the means to.

THE COURT: And what's the plan for his three times a week therapies and appointments?

THE WITNESS: For back in Tennessee?

THE COURT: Wherever you're taking him.

THE WITNESS: I have researched different doctors and stuff for Tennessee and tried to reach out and see if they would be able to take him - you know, take him in and-

THE COURT: Who specifically have you researched? I mean, where - where are they?

THE WITNESS: There was - I can't remember their names specifically, but it was doctors out of Morristown and Knoxville, Tennessee and specialist - there are specialists and good healthcare in Knoxville, which is close to Tennessee back home.

THE COURT: It's in a different state, isn't it? Or it's still in Kentucky?

THE WITNESS: No, they're both in - no, Knoxville's in Tennessee.

THE COURT: Okay. So how far from your home would Knoxville be?

THE WITNESS: It's just like 30 minutes.

THE COURT: Okay. And who would be providing the care for [B.W.K.]? Name, a facility, or person?

THE WITNESS: It- I don't remember the name of the facility.

THE COURT: Do you know how often he'd be going?

THE WITNESS: Probably the same amount as he is now. I mean, I would set everything up where nothing would be changed except, you know, his living area, pretty much. He would still be going to his therapies and doctors and stuff.

THE COURT: Okay. Back to you.

[(Department's attorney asks Knuckles three questions.)]

THE COURT: How long have you been going [to visits and therapy sessions with B.W.K.] regularly?

THE WITNESS: I got my bus card in mid-December.

THE COURT: So you're saying that you've been attending regularly since mid-December?

THE WITNESS: Well, the visits got - ended up getting canceled in January, but it was - me and Donna [Woodruff of A Place Called Hope], the supervisor [of the visits with B.W.K.], thought it was just the second missed, but Genora [Chappell, a case manager at A Place Called Hope,] had it down as the third. So it ended up - because my text was delayed to her, and she didn't get it until three hours after time had passed. It was too late, and she said it was the third one so they got canceled.

THE COURT: So you haven't had visits since January?

THE WITNESS: No, they're - they're active now.

THE COURT: Okay. When were they reactivated?

THE WITNESS: Just a couple weeks ago.

THE COURT: Have you missed any since then?

THE WITNESS: No.

THE COURT: How about his therapies?

THE WITNESS: No, I haven't missed them since.

THE COURT: You haven't missed any since mid-December?

THE WITNESS: There might have been a Monday one or something at the Puyallup the - that one, but they're - if it conflicted - if the appointments conflicted with the visit, then I chose to go to the visit.

[DEPARTMENT'S ATTORNEY]: If you -

THE COURT: What? You -

THE WITNESS: It's - it's - it's the -

THE COURT: You're saying [B.W.K.) was scheduled for visitation and therapy at the same time?

**THE WITNESS:** No. It's the - like, different appointments, like his doctors' appointments and stuff or if he had a visit that day and he had an appointment earlier that day, my concern was about making the buses and getting back to the appointment - to his visit on time. So I would choose to go to the visit instead of try to go make it and missing the visit and risk missing the visit. Does that make sense?

THE COURT: Not really.<sup>181</sup>

This lengthy questioning demonstrates the trial court's involvement as well as its skepticism of and hostility toward the mother. For example, the court's question, "Did it mean anything to you at all that people were telling you that your child had about a zillion special needs and you had to be there for him," if asked by the Department would have appropriately drawn an objection from the mother's counsel.<sup>9</sup> When a judge in a bench trial engages in this type of argumentative questioning, it puts counsel in an extremely difficult position-object to the inappropriate questions and risk angering the trier of fact, or remain silent to minimize the risk of an adverse outcome.

Many of the court's questions also either elicited or facilitated the admission of evidence supporting the Department. In the following excerpt, the court spends a considerable amount of time asking questions of two witnesses about a photograph of B.W.K. with the mother's boyfriend. The significance of the photograph turned on whether it was taken at a time when the boyfriend was prohibited from attending visits. The court dominated the questioning on this topic, starting with social worker Clarissa

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<sup>8</sup> Emphasis added.

<sup>9</sup> Emphasis added.

Blackmer.

THE COURT: Okay. You got negative visitation reports at the first visit or at the first and second visit?

THE WITNESS: The first and second visit occurred in the same week, and so I got them approximately at the same time.

THE COURT: Was it the first or the second visit that corresponded with the posting of the pictures on Facebook?

THE WITNESS: The posting of the pictures -

[KNUCKLES' ATTORNEY]: Your Honor, again, no disrespect, objection as to hearsay.

THE COURT: It's not hearsay when she saw it herself-

[KNUCKLES' ATTORNEY]: I don't-

THE COURT: - on Facebook. The fact that it appeared on Facebook doesn't make it hearsay when it's photographs.

What was the relationship between the posting of the photographs in terms of when you saw them and the visit?

THE WITNESS: I do not recall actually the exact timing of when I saw the photographs. I know that I addressed it with the mother as soon as I saw them.

THE COURT: How, if at all, could you date what you were seeing in terms of what was posted on Facebook in terms of the visitation? I mean, how could you tell it wasn't some years earlier mall visit?

THE WITNESS: Well, at that point the child was not even a year old.

THE COURT: (Inaudible) just (inaudible) that.

THE WITNESS: The way I actually verified it - and I don't know if the CASA's already testified or not, but she can speak further. I actually connected to the CASA because she was receiving monthly photos of the child, and she frequently received photos while the child was at visits. So I requested copies of all of those photos. And that was how we were able to determine the exact date was because of the outfit that he was in at the mall in those photos and his size-

THE COURT: Uh-huh.

THE WITNESS: - his size, his shape. A four month old obviously looks significantly different than a ten or eleven month old. And so that was how we narrowed it down.

And I was on the phone with the CASA explaining what the concerns were while I was reviewing the pictures. And when we came across that and that the picture matched perfectly what he was wearing, his size, his developmental level at that point in time, that's how we knew it had occurred.

THE COURT: Who knew what the child was wearing on these two particular visits? I mean, where did that information come from?

THE WITNESS: The CASA had photos from the mall of- while the child was at the mall.

THE COURT: The CASA was there for one or both of these visits?

THE WITNESS: For part of the visit.

THE COURT: Both of them or one of them?

THE WITNESS: I - I don't recall on that one. I don't know -

THE COURT: Okay.

THE WITNESS: I don't know that I was aware that the CASA was there until I had asked her for pictures of [B.W.K.]. And I had asked her for the pictures to narrow it down on the developmental level that we're not talking about something that had occurred a month or two prior but something that was much more recent.

THE COURT: Okay. That part of this, the connection between the way the child looked in the photographs and the way he looked in the rest of the photographs, we'll await the CASA's testimony, but I want to come back to this timing. Okay. How soon was it after these visits that, however it was, whether via CASA or otherwise, these photographs came to your attention?

THE WITNESS: It would have been within the same week -

THE COURT: Okay.

[THE WITNESS]: - otherwise, we would have moved forward with the decreasing of the supervision.

THE COURT: Okay. And when you got this information about these photographs, and you looked at them, then what was the conversation between you and the mother then?

THE WITNESS: When I was able to reach her by phone, I expressed that there were some concerns as far as stepping down on visitation, and I wanted to take the time to talk with her about those concerns and hear her side of things before - before any formal decision was made as far as whether or not we were going to pursue the step-down on the visitation.

THE COURT: And how did you get in touch with mom?

THE WITNESS: I had to utilize the multiple phone numbers that I had until I found one that worked.

THE COURT: Okay. And what happened when you finally got a phone number that worked?

THE WITNESS: She had answered -

THE COURT: And what happened -

THE WITNESS: - on that one.

THE COURT: - then?

THE WITNESS: That's when I broached the subject with her in the manner I just described.

THE COURT: And what was mom's response?

THE WITNESS: Mom's response was initially complete denial that [the boyfriend] had been present at any visit stating it must have been

a visit from - the visits occurred at the DCFSI<sup>101</sup> offices prior to us being aware that [the boyfriend] was not the father, which would have put the child four months - four months of age. And at that point he was nearly - he actually had turned one on Thanksgiving that year, so he just turned one.

There was - so I asked her about that. I also had brought up the concerns from the visitation reports about her not fully supervising [B.W.K.] and not yet demonstrating that she was going to watch him 100 percent of the time. Part of the concerns were that we didn't want [B.W.K.] being left with strangers while she went into the bathroom.

THE COURT: And what did mom say in response to those conversations?

THE WITNESS: She stated that it was all entirely false, and that both visitation - it must have been both reports. That both visitation agencies were lying to make her look bad. And that it was about the money because they would not get paid as much if it switched to monitored.

She then explained that she had documentation to prove all of this and wanted to provide that to me and asked to do an in-person meeting with me, which we scheduled to be I believe the following Thursday or Friday.

THE COURT: Okay.

THE WITNESS: And then that initiated I believe three or four months of my attempt to do that office visit or a phone conversation with her further.

THE COURT: So what happened to the scheduled meeting?

THE WITNESS: She never showed, and she repeatedly would call me after the timing of the meeting to explain why she no-showed for the first I want to say three scheduled meetings. And then after that it was on me to attempt to connect back with her since there was no reason - there was no call, no follow-up on why she no-showed.

THE COURT: So let me get this right. Mom said she had documentation, she scheduled a meeting with you to show it to you, and then she did not show up?

THE WITNESS: Correct.

THE COURT: Did she call you and tell you she wasn't coming?

THE WITNESS: After the fact, yes.

THE COURT: After the fact. And then you scheduled two more meetings?

THE WITNESS: I scheduled multiple more meetings?

THE COURT: I know I got it, but -

THE WITNESS: But.

THE COURT: - this initial time, you scheduled two more meetings after that?

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<sup>10</sup> Division of Child and Family Services.

THE WITNESS: Both of which she no-showed, correct.

THE COURT: Okay. Did she call you in advance of either one of those?

THE WITNESS: No.

THE COURT: Okay. She called afterward to say why she hadn't appeared?

THE WITNESS: That's correct.

THE COURT: And then she didn't schedule another meeting with you?

THE WITNESS: I continually tried to schedule those. I continued my attempts to reschedule. In our subsequent phone calls for her - after she had not shown up for the office visits, we had the conversation about [B.W.K.]'s medical needs and really wanting to make sure she was fully understanding, and she had asked while she was there in person if we could go over [the] medical records, and I expressed I was more than happy to do that, so we had planned on including that in our meeting. And that was of vital importance for her to understand [the] medical needs in order to progress with moving [B.W.K.] home.

THE COURT: Did you succeed in scheduling a meeting with her?

THE WITNESS: No, I never did.

The court not only elicited detailed factual evidence that the Department had not presented, it assumed the role of advocate for the Department. The court also argued with the mother's attorney on evidentiary objections to the court's own questions.

The court continued the questioning about the photograph during the testimony of the CASA Janet Belles:

Q (By [CASA's attorney]) Earlier you testified that you could tell that [the photograph] was in a mall, and you gave an example of the chair-

THE COURT: No, she said specifically she knew it was in this mall-

[CASA'S ATTORNEY]: Okay.

THE COURT: - where the mother had arranged for these test visits. Okay. She mentioned chairs.

Is there anything else in this photograph that tells you where this was?

THE WITNESS: The overhead lights, the tile floors. There is a store head up above here and there's, like, signs. It's a mall.

THE COURT: The mall or a mall?

THE WITNESS: It's the Tacoma Mall.

THE COURT: Okay.

THE WITNESS: And on the heading it actually says, "[B.W.K.] and I chilling at the mall."

THE COURT: I know what it says, but-

THE WITNESS: Sorry.

THE COURT: - I'm not really considering what [the boyfriend] has to say for the truth of what he's saying here. Okay.

THE WITNESS: So I would say it is in a - in the Tacoma Mall where the visits have been happening.

THE COURT: Okay. So what is it about [B.W.K.]'s clothing you mentioned and [B.W.K.]'s appearance? Just didn't get - first of all, you said that you could tell that [B.W.K.] was toddler age. What was it you could tell about ... age by looking at this photo?

THE WITNESS: This photo isn't as clear as the one that I did see.

THE COURT: Mm-hmm.

THE WITNESS: [B.W.K.] had a, like, a sweatshirt that had a train on it.

THE COURT: Okay. Slow down. Is this the photograph that you saw, a terrible reproduction of it?

THE WITNESS: Yes.

THE COURT: Okay. Then looking at this photograph, which is a terrible reproduction of the photograph you saw, is it accurate even though it's not a good reproduction?

THE WITNESS: Yes.

THE COURT: Okay. Looking at this photograph that accurately reproduces what you saw, tell me what it is, first of all, about [B.W.K.] that indicates the timing of this.

THE WITNESS: [B.W.K.]'s age.

THE COURT: Okay.

THE WITNESS: [B.W.K.] looks like ... about 11 months there or a year.

THE COURT: Okay. And what is it about [B.W.K.]'s clothing?

THE WITNESS: I'm not understanding what you're asking.

THE COURT: You said before that there was something about what [B.W.K.] was wearing -

THE WITNESS: Yes.

THE COURT: - okay, that was important? What is it about what [B.W.K.]'s wearing that's important?

THE WITNESS: It was the same shirt that I had a picture of.

THE COURT: Do you remember if that picture showed up in any other photos he took or just on this one visit you took it when you were there?

THE WITNESS: Just- I didn't take this picture.

THE COURT: I know.

THE WITNESS: Oh, sorry. Say it again?

THE COURT: Well, from what you said, if I understand you right, Ms. Belles, this photograph shows [B.W.K.] wearing a shirt, yes?

THE WITNESS: Yes.

THE COURT: And you also had taken a picture of the shirt that he's wearing here at some point, right?

THE WITNESS: Oh, yes. Yes. Yes.

THE COURT: Okay. Do you know whether - when it was that you took the picture of the shirt that [B.W.K.]'s wearing here?

THE WITNESS: It's in my CASA October report. I think it's in the October report.

THE COURT: October or -

THE WITNESS: I am thinking it is now.

Q. (By [CASA's attorney]) Would looking at an October report help refresh your memory as to if that's the report?

A. Yes. Yes. Yeah.

Q (By [CASA's attorney]) I'm handing you what's been marked for identification purposes as CASA's Exhibit 153. If you could take a few moments and look at the front page of the date of your report and then the second page of a photograph, and see if it helps refresh your memory as to the date when you saw [B.W.K.] in that same shirt?

A. It looks like the hearing date was on 11/2/15.

THE COURT: What hearing date?

THE WITNESS: The -

THE COURT: Okay. So here's the question.

THE WITNESS: - permanency plan -

THE COURT: Can you - can you date the photograph? Your photograph, can you date it?

[CASA'S ATTORNEY]: Can I follow up now?

THE COURT: Yeah.

A. Oh, it's right there in front of me, yes, 10/29/2015. I apologize.

Q. Okay.

THE COURT: Okay. What's the significance of that?

THE WITNESS: That would tell me that that picture was around that time period.

Q (By [CASA's attorney]) And if you could turn to the very last page as well?

THE COURT: Around 10/29/15?

THE WITNESS: Yes.

During cross-examination, CASA Belles testified she had been mistaken when she said she recognized chairs in the mall photograph. The court interjected, steered the witness in a different direction, and at one point answered a question for the witness.

Q. Okay. I believe you've testified that you recognized that photo because of the chairs that you recognized. Where are the chairs in that photo?

A. I stated early [sic] that I was mistaken by my memory.

Q. What were you mistaken about?

A. That there were chairs. There were no chairs.

Q. Okay.

THE COURT: What is that chair to the left in the photograph? Aren't those chairs?

THE WITNESS: I think they're signs.

THE COURT: No, to the left. Behind the -

THE WITNESS: Let me see it again.

THE COURT: - just behind [the boyfriend]'s right ear.

THE WITNESS: Let me see it again.

[KNUCKLES' ATTORNEY]: I'm sorry.

THE COURT: Just behind [the boyfriend]'s right ear sitting on the floor there. aren't those chairs?

THE WITNESS: They could be, yes.

THE COURT: Okay.

Q (By [Knuckles' attorney]) Is your testimony that you are seeing chairs or not seeing chairs, or you're not sure?

A. From this picture it's not a good picture, but that could be chairs in the center of the mall, but the reason I know it's in the mall is tile floors, the heading of the stores, the overhead lights and the - there's, like, a directory up above that looks like it has wordings and an arrow may be pointing.

Q. And how do you know it's a particular mall as compared to a different mall?

A. Well, [B.W.K.]'s visits are supervised, so it would have to be where [B.W.K.] goes for his visits, and that would be at the Tacoma Mall.

Q. Okay. But why couldn't it be a picture of [the boyfriend] with [B.W.K.] in a different mall that's not a supervised visit?

THE COURT: Because how would the mother get access to the child. Counsel?

THE WITNESS: She answered it.

THE COURT: Yeah, I mean -

[KNUCKLES' ATTORNEY]: Judge answered it?

THE WITNESS: Yes.

THE COURT: Yeah.

[KNUCKLES' ATTORNEY]: Thank you.<sup>11</sup>

The court assisted the CASA attorney in laying the foundation for admitting e-mail exhibits during the cross-examination of B.W.K.'s foster mother and rejected the objections of the mother's attorney as "nuts."

Q. (By [CASA's attorney]) ... [W]e have in front of us an e-mail that is from [ ]123@hotmail, which I believe is your public e-mail account-

A. Right.

Q. - dated November 4th, 2016 on Friday.

THE COURT: Okay. So...let me ask you is your public e-mail account [ ]123@hotmail.com?

THE WITNESS: Yes.

THE COURT: Okay.

Q. (By [CASA's attorney]) And -

THE COURT: And that's the address you used to communicate with the mother?

THE WITNESS: Yes.

THE COURT: At her address of [ ]47@gmail.com?

THE WITNESS: Yes.

THE COURT: Okay.

[KNUCKLES' ATTORNEY]: But, Your Honor, for the record [the foster mother]'s not authenticated that this is her e-mail because she doesn't have it in front of her to authenticate it, so I am objecting for the record.

THE COURT: That's nuts ..... She just said verbally that this is her e-mail. She doesn't..... have to have it in front of her. Okay. Overruled.

[KNUCKLES' ATTORNEY]: Continuing objection. Thank you.

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<sup>11</sup> (First alteration in original) (emphasis added).

THE COURT: Noted. I think we have sufficient authentication.<sup>12 1</sup>

The court commandeered the examination of the mother's witness Bonnie Kosanovich. Knuckles had been living with Kosanovich. Less than two pages into the testimony, the court began aggressively questioning Kosanovich about the mother's future living arrangements and overruled objections to its own questions.

THE COURT: When are you expecting [Knuckles] to move back to Tennessee?

THE WITNESS: Well, hopefully, she really wants her son back, and then stay here as long as she needs to -

THE COURT: Mm-hmm. When -

THE WITNESS: - until things are ready -

THE COURT: - but when are you expecting her to leave, or are you?

THE WITNESS: We have no expectations of that at the moment.

THE COURT: Okay. Do you expect her to leave next year or two years from now or five years from now?

THE WITNESS: Just when she is ready, when she is able to.

THE COURT: Okay. Can you explain what that means?

THE WITNESS: When she is ready to - I mean, just until she gets on her feet.

THE COURT: And what does that mean?

THE WITNESS: When you have a job, money, another place to go to.

THE COURT: When she has a job, that's when she is going to leave to go back to another state?

THE WITNESS: No. Well, I'm sure she will have help from her room to go back there, but just when - she wants her child back and we will have her just, you know, until the Court says it's okay for her to move out of state.

THE COURT: Okay. So we have a termination trial underway right now. right?

THE WITNESS: Yes.

THE COURT: And you know that's why you're testifying?

THE WITNESS: Yes.

THE COURT: So when do you expect her to leave?

THE WITNESS: There is no expectation. No expectation on it. She could stay as long as she wants.

THE COURT: Okay. So you just want her to stay indefinitely?

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<sup>12</sup> Emphasis added.

THE WITNESS: Just until she is ready to leave.

THE COURT: Have you talked to your husband about this?

THE WITNESS: He is okay with it.

THE COURT: No. I got that. but the two of you haven't discussed her termination date in your home?

THE WITNESS: Well, if that happens, if it's terminated, then she could go back to Tennessee whenever she wants.

THE COURT: So if this trial ends in termination, then she will return to Tennessee? And if it doesn't end in termination, then you're going to keep her in the home until when?

[KNUCKLES' ATTORNEY]: That calls for speculation.

THE COURT: Overruled.

THE WITNESS: Yeah.

THE COURT: It's her home.

[KNUCKLES' ATTORNEY]: Thank you.

THE WITNESS: Well, it's okay with me that she stays as long as she can.

THE COURT: Okay. So if the trial doesn't end in termination, she can stay indefinitely?

THE WITNESS: Yes.<sup>13</sup> 1

During cross-examination of a social worker, the court almost immediately cut off the mother's attorney and challenged the attorney's understanding of the evidence despite the absence of an objection from opposing counsel:

BY [KNUCKLES' ATTORNEY]:

Q. You said it would be very difficult for A Place Called Hope to arrange feeding therapy at someone's home, correct?

THE COURT: No. You misheard. [The witness] said that she could arrange feeding therapy at A Place Called Hope. She did arrange feeding therapy at A Place Called Hope. Morn wasn't there for three feeding therapy sessions in a row, so it moved back to foster mother's home.

[KNUCKLES' ATTORNEY]: Okay.

Q. (By [Knuckles' attorney]) So my question is -

THE COURT: She said it would be difficult-

Q. (By [Knuckles' attorney]) - it possible -

THE COURT: - to arrange a supervised visit in a place like the foster mother's home, which is not a neutral location, but that's a different question from the availability of A Place Called Hope, which she said was available.

[KNUCKLES' ATTORNEY]: Okay.

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<sup>1s</sup> Emphasis added.

Q. (By [Knuckles' attorney]) So it is possible to arrange therapy at a private home, correct?

THE COURT: No, [Counsel]. One more time she said a supervised visit needs to be in a neutral location. She said that's why feeding therapy was arranged at A Place Called Hope until mother didn't appear for three successive therapy sessions. That's what she said. Anything else you want to ask her?

[KNUCKLES' ATTORNEY]: Okay. Well, I wanted to ask that question, but that's fine.

THE COURT: Well, she's answered that one. Okay?

[KNUCKLES' ATTORNEY]: Okay.

During direct examination of Knuckles' mother, the court questioned her aggressively about Knuckles' relationship with her boyfriend L.J. The court's questions were decidedly not neutral in content or tone.

THE COURT: Who is [L.J.]?

THE WITNESS: Who is [L.J.]?

THE COURT: Yep.

THE WITNESS: That's someone [Knuckles] used to date.

THE COURT: How do you know that?

THE WITNESS: From he - because he went to school with my son. And they dated when they were younger.

THE COURT: In Tennessee?

THE WITNESS: Yes. No, Kentucky, actually. Kentucky.

THE COURT: Did their relationship end after Kentucky?

THE WITNESS: I don't know when their relationship ended.

THE COURT: You don't? You don't know who your daughter dates?

THE WITNESS: No, ma'am. My daughter has been out west, a whole country away, for two years. I don't know who she is talking to or what she is doing, who she is seeing. I don't know when they split up. I do not know.

THE COURT: Do you know about [L.J.]'s relationship with her here?

THE WITNESS: I am aware that she went out there - when she initially went out there, that's who - his family was out there.

THE COURT: And?

THE WITNESS: She has no one out there. It was his people that was out there.

THE COURT: Was their relationship still going on at that point?

THE WITNESS: Yeah, I would assume at that point. If she is going out to Washington, I would assume they were going to date -

THE COURT: Do you have any idea -

THE WITNESS: - again or - you know.

THE COURT: Do you have any idea what happened after that?

THE WITNESS: No. I mean, I know about the accident with the baby, but that's about it. I don't know, you know, anything else, other than, you know, the accident, him falling asleep with the baby, and her taking him to the hospital, and then all this happened.

THE COURT: And what happened to [L.J.]?

THE WITNESS: I have no idea. I think he went to jail. I think he might have been in jail when I was there, but I'm not sure. I don't know.

THE COURT: And what happened -

THE WITNESS: Needless -

THE COURT: - to [L.J.] -

THE WITNESS: - to say, I didn't even want to talk or speak or know anything about [L.J.] after this episode -

THE COURT: You -

THE WITNESS: - because, of course, I was upset.

THE COURT: You didn't want to know anything more about him after that?

THE WITNESS: No, I didn't. I didn't care where he was or nothing. My concern was my children - my grandchildren and my child. I didn't have any concern for [L.J.] at the time.

THE COURT: To your knowledge -

THE WITNESS: Once my children were in CPS<sup>14</sup> custody, I was worried about my chil- - my grandchildren and my child.

THE COURT: To your knowledge, is he still in jail?

THE WITNESS: I don't know. No - I have no idea where [L.J.] is at-

THE COURT: You're not interested -

THE WITNESS: - or what he is doing.

THE COURT: You're not interested in knowing where this man

THE WITNESS: No.

THE COURT: You're not -

THE WITNESS: I'm interested in getting my grandchildren home.

THE COURT: And you're not interested anymore in knowing who your daughter is dating?

THE WITNESS: Well, I'm sure if my daughter wants to share who she is dating, she will tell me.

THE COURT: But you don't ask her?

THE WITNESS: No, I don't.<sup>15</sup> 1

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<sup>14</sup> Child Protective Services.

<sup>15</sup> Emphasis added.

When the Department attempted to "clarify" exhibit 77, the March 2016 response filed by the mother's former attorney concerning a Department social worker's visit summary, the court took over the questioning, repeatedly mischaracterized the mother's testimony, and ended with an inappropriate comment on the mother's credibility.

**D I R E C T E X A M I N A T I O N (Resumed)**

BY [DEPARTMENTS ATTORNEY]:

- Q. So when we were last talking - oh, do you have the exhibit?  
Thank you. You had said that there was a document that your lawyer had signed your signature to without your consent?
- A. Yes, that's what I was told by [the social worker]. I had never seen the document myself.
- Q. So looking at Exhibit 77, had you ever seen this document before?
- A. No.
- Q. Okay. Give me a second here.

THE COURT: You were told by [the social worker] that [your former attorney] had forged your signature?

THE WITNESS: Well, [the social worker] was talking to me and going through this report here and I was saying that I didn't say some of the stuff in here, and she said, "It's got your name. It's got your signature on it." And I was like, "I have never even been around her to sign anything" you know, so I - and I had never seen this or, you know, agreed to it, so - but that's when I found out about it. She was saying that she had had this paper in front of her and, you know, was kind of saying that I was blaming CPS for everything, and I told her I didn't know what she was talking about and she said it had my signature on it. That's why I thought that [my former attorney] had signed my name.<sup>16</sup>

THE COURT: I'm assuming, folks, that this was a file document?

[DEPARTMENTS ATTORNEY]: Yes.

THE COURT: Okay. So let's take a look at that. See the cause number here? It says case No. 15-7? See that?

THE WITNESS: Yes.

THE COURT: Okay. This means that it's attached to this case file, right?

THE WITNESS: Yes.

THE COURT: And you know that this is a court file where all the documents filed in this case go, right?

THE WITNESS: Yes.

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<sup>16</sup> We note the signature on exhibit 77 is "/s/." The typed signature line below the /s/ states the attorney's name followed by "as reported by Mother" and the attorney's bar number.

THE COURT: Okay. But you're telling us that you were informed by the social worker that your attorney had forged your signature. and you never saw this report which was filed with the court?

THE WITNESS: She said that my name was signed to it, and I knew I hadn't signed, so I assumed that she had signed my name to it. Because she said my signature was on it, she didn't -

THE COURT: I'm not following your story at all here. Okay. you're telling me that you were informed by the social worker that your lawyer had forged your name on a document filed with the court. and you never looked at this report?

THE WITNESS: I had asked. She - [the social worker] was supposed to mail me a copy, but I never got a copy of it.

THE COURT: Well. how about talking to your next lawyer about getting a copy of this or looking in the court file yourself?

THE WITNESS: I don't recall having the court file, I'm sorry.

THE COURT: You've never seen this document before today?

THE WITNESS: This one in front of me, 77, no, I haven't.

THE COURT: Which was filed in the court file? You never saw it?

THE WITNESS: No, ma'am, I haven't.

THE COURT: Okay.

[DEPARTMENT'S ATTORNEY]: Just to step back just a second, so now that you have a chance -

THE COURT: I'm admitting 77 as an impeachment item. All right.

(Exhibit 77 is admitted.)

[DEPARTMENT'S ATTORNEY]: All right. Thank you. So

[KNUCKLES' ATTORNEY]: I am sorry. Did you -

THE COURT: I'm admitting 77 for impeachment.

[KNUCKLES' ATTORNEY]: Oh, okay. Thank you.

- Q (By [Department's attorney]) You had a chance to review this document over lunch; is that correct? 77?
- A. This one I brief- - I think I've - [my attorney] showed me briefly right before we come [sic] back.
- Q. Okay. Is - is this the document that [the social worker] read to you?
- A. Yeah, we went - we went through it over the phone, yes.
- Q. Okay.
- A. That's when I initially, you know, found out about it.
- THE COURT: Was -

A. I mean [my former attorney] did tell me, we did have a short phone conversation and told me she was going to submit something to the court but I didn't know what. We didn't talk about what. She didn't send me a copy of it or nothing like that. And then I get a call from [the social worker] and she was saying, you know, what was said and stuff and wanted to know my responses. And I had told her I hadn't - no knowledge of - of saying this or writing this up with [my former attorney] and she said that my name was signed to it, and that's when I got concerned.

THE COURT: So [the attorney] was still representing you then, right?

THE WITNESS: Yes.

THE COURT: And you still had access to your email, correct?

THE WITNESS: It was sporadic when I had Ms. Warner as an attorney with the email and stuff, but we did try to keep contact in phone - through the phone.

THE COURT: You had access to email, did you not?

THE WITNESS: When I would leave to get Wi-Fi<sup>17</sup>, yes.

THE COURT: Well, there's Wi-Fi all over -

THE WITNESS: Yes.

THE COURT: -Tacoma and Pierce County, isn't there?

THE WITNESS: Yes.

THE COURT: Okay. So when you had access to Wi-Fi, which. really. you could have done by going anywhere near a Starbucks, okay. you had Ms. Warner's email address. correct? Your lawyer's email address. you had it?

THE WITNESS: We just talked by phone.

THE COURT: You never had your lawyer's email address?

THE WITNESS: I - I couldn't tell you. I might have it somewhere, but we just talked by phone is the only -

THE COURT: Are you seriously telling me that in all your representation with Ms. Warner you never were aware she had an email address?

THE WITNESS: We just didn't talk about email. We talked by phone.

THE COURT: Is that a "yes" or "no" that you knew she had an email address?

THE WITNESS: Yes.

THE COURT: Okay. And when you talked by phone, I assume you knew her phone number?

THE WITNESS: Yes, I had it in my phone.

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<sup>17</sup> Wireless fidelity.

THE COURT: So if you found out that allegedly she put in a document signed by you - or by her purporting to be you that had been filed in the court file, did you email her or call her?

THE WITNESS: We spoke on the phone briefly, but she had to go to take care of her horses and then I didn't hear back from her.

THE COURT: Ever?

THE WITNESS: Not until she told me she wasn't going to be my lawyer at court no more. We didn't talk again.

THE COURT: I see. Okay. I'll tell you bluntly, okay. I don't believe you.

THE WITNESS: I'm sorry. Your Honor. I'm just telling the

THE COURT: I don't think you are. Ms. Knuckles. Back to you, [Department's attorneyJ].<sup>18 1</sup>

The tenor of the court's questions and remarks was that of an advocate, not a neutral arbiter.

Although we recognize it is appropriate and often necessary for a judge to ask questions of witnesses in a bench trial, and while such questioning is particularly important in cases where the safety of the child is at stake, we conclude the cumulative effect of the interjections and questions in this case demonstrated a lack of impartiality, constitutes manifest constitutional error, and violated Knuckles' due process right to a fair trial. The court asked an excessive number of questions, elicited evidence in support of the Department's case, aggressively challenged the credibility of the mother and other witnesses she called to testify, and helped elicit favorable evidence on behalf of the Department but foreclosed the mother's attempts to cross-examine or elicit

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<sup>18</sup> Emphasis added.

favorable testimony. In so doing, the court crossed the line from neutral arbiter to advocate.<sup>19</sup>

Because the court violated the mother's due process right to a fair trial, we reverse the order terminating the mother's parental rights to B.W.K. and remand for a new trial before a different judge.

Schinkel, A

WE CONCUR:

Mann, ACTJ

Trickey, J. P. J.

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<sup>19</sup> We note this is not the first time we have reviewed a challenge to the interjections and questions of this trial judge. In In re Dependency of G.B., 187 Wn. App. 1017, 2015 WL 1979501, at \*7, the same judge "questioned virtually all of the witnesses." The issue on appeal in G.B. was whether "certain remarks ... and the court's active participation" in the proceedings "exhibited bias and lack of impartiality." G.B., 2015 WL 1979501, at \*1. The Department conceded in its brief that the judge made "harsh comments" about the father and "did not cautiously guard its comments." The opinion focuses on whether the judge harbored "actual or potential bias" against the father and concluded the record did not show such bias. G.B., 2015 WL 1979501, at \*3-\*8. Because the court participated in the proceedings "without aligning herself with counsel for any of the parties," we rejected the due process challenge to the court's interjections and questions. G.B., 2015 WL 1979501, at \*7-\*8.

This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 4th Cir. Rule 32.1.

United States Court of Appeals,  
Fourth Circuit.

FIRST PROFESSIONALS INSURANCE  
COMPANY, Plaintiff,

v.

Kyrsten E. SUTTON, MD, Defendant and  
3rd-Party Plaintiff–Appellee,

v.

The Medical Protective Company, Third Party  
Defendant–Appellant.

First Professionals Insurance Company,  
Plaintiff–Appellee,

v.

Kyrsten E. Sutton, MD, Defendant and  
3rd-Party Plaintiff–Appellant,

v.

The Medical Protective Company, Third Party  
Defendant.

Nos. 13–1721, 13–1722.

|

Argued: Jan. 28, 2015.

|

Decided: June 8, 2015.

### Synopsis

**Background:** Professional liability insurer brought action against insured physician, seeking a declaration that it had no duty to defend or indemnify insured in an underlying malpractice lawsuit in connection with her delivery of a baby. Insured filed a counterclaim seeking a declaration of coverage, and filed a third-party complaint against her previous professional liability insurer, seeking coverage in event that subsequent insurer did not owe coverage. Following a bench trial, the United States District Court for the District of South Carolina, Richard Mark Gergel, J., entered an order holding that previous insurer had a duty to provide coverage and that subsequent insurer was under no duty to do so.

Parties cross-appealed.

**Holdings:** The Court of Appeals, Davis, Senior Circuit Judge, held that:

<sup>[1]</sup> insured's call to previous insurer satisfied policy's reporting requirement, and

<sup>[2]</sup> insured's call to previous insurer did not trigger exclusion in subsequent insurer's policy for medical incidents that were already reported to another insurer.

Affirmed in part, vacated in part, and remanded.

Floyd, Circuit Judge, filed an opinion concurring in part and dissenting in part.

West Headnotes (4)

<sup>[1]</sup> **Insurance**

🔑 Conditions Precedent

South Carolina law requires strict, not substantial, compliance with conditions precedent in insurance policies.

Cases that cite this headnote

<sup>[2]</sup> **Insurance**

🔑 Claims made policies

Under South Carolina law, insured physician's call to professional liability insurer to convey contents of a letter she received from hospital's risk management department regarding a patient's medical records request satisfied policy's reporting requirements, thereby triggering coverage in an underlying malpractice lawsuit in connection with her delivery of a baby, even though insured did not believe that she was reporting a potential claim and she did not identify patient or report any details about delivery, where a reasonable doctor could view such a letter as a first step in patient's decision to initiate litigation, and insured provided all reasonably obtainable information to insurer.

2 Cases that cite this headnote

<sup>[3]</sup> **Insurance**

🔑 Weight and sufficiency

Under South Carolina law, insured physician's uncorroborated testimony that she called professional liability insurer and reported contents of a letter she received

from hospital's risk management department regarding a medical records request was sufficient to carry her burden of proof to show that she satisfied policy's reporting requirements for an underlying malpractice lawsuit in connection with her delivery of a baby, where there was no credible evidence that undermined insured's testimony.

1 Cases that cite this headnote

[4] **Insurance**

🔑 Claims made policies

Under South Carolina law, insured physician's call to professional liability insurer to convey contents of a letter she received from hospital's risk management department regarding a patient's medical records request did not trigger exclusion in subsequent insurer's policy for injuries arising out of a medical incident that was reported to another insurer prior to policy's effective date, where insured did not report to previous insurer any details about acts she performed, any treatment she provided, or any potential errors or omissions that arose during her interactions with patient.

1 Cases that cite this headnote

**\*278** Appeal from the United States District Court for the District of South Carolina, at Charleston. Richard Mark Gergel, District Judge. (2:12-cv-00194-RMG).

**Attorneys and Law Firms**

**ARGUED:** Gabriela Richeimer, Troutman Sanders LLP, Washington, D.C., for Appellant, the Medical Protective Company. George J. Kefalos, George J. Kefalos, P.A., Charleston, South Carolina, for Appellee/Cross-Appellant, Kyrsten E. Sutton, M.D. Thomas C. Salane, Turner Padgett Graham & Laney P.A., Columbia, South Carolina, for Appellee, First Professionals Insurance Company. **ON BRIEF:** John T. Lay, Laura W. Jordan, Janice Holmes, Gallivan, White & Boyd, P.A., Columbia, South Carolina; John R. Gerstein, Troutman Sanders LLP, Washington, D.C., for Appellant, the Medical Protective Company. Oana D. Johnson, George J. Kefalos, P.A., Charleston, South Carolina, for Appellee/Cross-Appellant, Kyrsten E. Sutton, M.D. R. Hawthorne Barrett, Turner Padgett Graham & Laney P.A., Columbia, South Carolina, for Appellee, First Professionals Insurance Company.

Before KING and FLOYD, Circuit Judges, and DAVIS, Senior Circuit Judge.

**Opinion**

Affirmed in part and vacated and remanded in part by unpublished opinion. Senior Judge Davis wrote the opinion, in which Judge King joined. Judge Floyd wrote an opinion concurring in part and dissenting in part.

Unpublished opinions are not binding precedent in this circuit.

DAVIS, Senior Circuit Judge:

These cross-appeals arise out of an insurance coverage dispute related to claims for alleged birth injuries resulting from professional negligence. Dr. Kyrsten Sutton attended the birth of Richard and Amy Moore's son, Nathan. The Moores filed suit in state court for medical malpractice against Dr. Sutton. Dr. Sutton's former insurers, First Professional Insurance Company ("FirstPro") and the Medical Protective Company ("MedPro") disagree as to which, if either, insurer owes Dr. Sutton a duty to defend the lawsuit; accordingly, FirstPro filed this declaratory judgment action in federal court. After a bench trial, the district court ruled that MedPro, but not FirstPro, has a duty to defend Dr. Sutton and pay damages as may be required under the MedPro policy. For the reasons that follow, we affirm in part and vacate and remand in part.

I.

A.

Dr. Sutton is a board certified obstetrician-gynecologist who has practiced medicine in South Carolina since 2000. She admitted Amy Moore to St. Francis Hospital in South Carolina for labor and delivery of her child, Nathan Moore, on June 22, 2004. When Nathan was born, he "was documented to be abnormally depressed with poor color, muscle tone, and respiratory effort," and "required resuscitation in the delivery room." J.A. 715. Eventually, he was transferred to the Medical University \*279 of South Carolina Hospital after experiencing seizures in the nursery.

After Nathan's birth, Amy Moore continued to be treated by Dr. Sutton. With respect to her son's prognosis, she told Dr. Sutton at first that Nathan's treating physicians were uncertain about it, but then "informed [her] that [they] expected him to have some deficits but they may be mild." *Id.* During a later visit with Dr. Sutton in August 2004, Amy Moore told her that Nathan's tests were expected to be normal and that Nathan's treating physician "was hopeful there would be little to no residual [health] problems." *Id.* at 716. During this time, Amy Moore never complained to Dr. Sutton about her care,

treatment, or the delivery, and never expressed an intention to bring a lawsuit.

When Nathan was nearly four years old, Dr. Sutton received a letter from the Risk Management Department at St. Francis Hospital disclosing that it had received a request for Amy Moore's medical records from June 22, 2004 (the day Nathan was born). The letter noted that it was informing Dr. Sutton of the request because of "ongoing Risk Management activities to identify potential claims within our health care system." J.A. 596. The letter further stated that Dr. Sutton could review the medical record, but gave no further details about any treatment or hospitalization provided. At the time she received the letter, Dr. Sutton did not remember Amy Moore as her patient or the treatment she provided her; thus, the only information she knew about Amy Moore was contained in the St. Francis letter.

Critical to the district court's findings and conclusions in this case, Dr. Sutton testified that upon her receipt of the letter, she called her then-insurance company, MedPro, whose policy provided coverage from May 1, 2003 to May 1, 2009. She further testified that during this call, she advised the MedPro representative with whom she spoke of the contents of the letter from St. Francis. There is no documentation of this call in the files of MedPro, and Dr. Sutton has none.

In 2011, Dr. Sutton received a notice of intent to sue from counsel for the Moores, acting as parents and guardians ad litem of Nathan, for the injuries he suffered in connection with his birth ("the Moore Lawsuit"). She referred this claim to her then-current insurer, FirstPro, whose policy insured her from April 1, 2009 to April 1, 2012.

In January 2012, FirstPro filed a complaint based on diversity jurisdiction against Dr. Sutton in the District of South Carolina, seeking a declaratory judgment that FirstPro "has no duty to defend or indemnify [Dr.] Sutton for the claims made in the [Moore] Lawsuit." J.A. 26. FirstPro argues that the claim is excluded from coverage based on three exclusions in the relevant policy. Only one of these provisions, Exclusion 11(b), was considered by the district court. That provision states that FirstPro refuses to "defend or pay" for injury or damages "arising out of a medical incident or committee incident which prior to the effective date of this policy was" "reported to an insurer." J.A. 644. FirstPro argues that this exclusion was triggered because Dr. Sutton's 2008 call to MedPro disclosing her receipt of the medical records request qualifies as a "medical incident" that was reported to another insurer.

In response to the declaratory judgment action, Dr. Sutton counterclaimed against FirstPro and filed a third-party complaint against MedPro, arguing that if FirstPro did not owe her coverage, then MedPro did. MedPro argues that it does not owe coverage to Dr. Sutton because it has no record of receiving the call from Dr. Sutton in 2008, and thus, Dr. Sutton failed to \*280 notify MedPro about the potential claim as required under the MedPro policy. MedPro's policy explicitly states that "the Company shall have no duty to defend or pay damages" "on a potential claim unless it was reported to the Company during the term of this policy and the report includes all reasonably obtainable information, including the time, place and circumstances of the incident; the nature and extent of the patient's injuries; and the names and addresses of the patient and any available witnesses." J.A. 592. Dr. Sutton denies that the medical records request put her on notice of a potential claim arising from her delivery of Nathan. In any event, she contends that her call was enough to relieve her of (or satisfy) her duty to report to MedPro a potential claim.

In due course, the Moores intervened as defendants and argued that FirstPro owed Dr. Sutton coverage for the Moore Lawsuit.<sup>1</sup>

<sup>1</sup> Counsel have disclosed that MedPro and the Moores have entered into an agreement under which MedPro will provide coverage no matter the outcome of this appeal, explaining that "[t]his agreement ensures that Dr. Sutton is not left without coverage and ... is not personally exposed to a verdict..." Reply Br. of MedPro at 11. We are satisfied that this agreement does not moot the disputes presented in this case.

#### B.

After the close of discovery, the insurers moved for summary judgment, each arguing, *inter alia*, that as a matter of law, it had no duty to provide coverage for the Moore Lawsuit. The district court denied both motions. With respect to MedPro's motion, the district court stated that there was a genuine issue of fact as to "whether Dr. Sutton reported the 2008 Letter to MedPro" and "whether the information allegedly provided by Dr. Sutton to MedPro was sufficient to report a potential claim regarding Nathan Moore." J.A. 135, 136. As to FirstPro's motion, the court stated that there was a genuine issue of fact with respect to whether Dr. Sutton's phone call to MedPro regarding the St. Francis letter triggered Exclusion 11(b) of the FirstPro policy.

To resolve these issues of fact, the district court held a bench trial on March 2, 2013. It heard testimony

from only two witnesses, Dr. Sutton and Joseph Costy, MedPro's claims specialist. Dr. Sutton testified to the following: (1) she called MedPro and notified the representative that she had received a medical records request letter from St. Francis Hospital; (2) she told the MedPro representative the name 'Amy Moore', gave the representative the date for which the medical records were being requested, and basically read the contents of the letter to the representative; (3) the MedPro representative did not instruct her to take any action with regard to the letter; (4) she received no follow-up communication from MedPro after she made the call; and (5) she did not follow up with St. Francis to review any medical records.

The district court then heard testimony from Costy, who testified as to the procedures of MedPro's call and claims system. He testified that he had conducted multiple searches of MedPro's records and could find no record of Dr. Sutton's call to the company call center in 2008, and that if Dr. Sutton had called, "the persons answering the phones in the call center were trained ... to document any call regarding a possible claim from a South Carolina insured by opening an electronic 'ticket' that was then forwarded to him as the assigned claims adjuster." J.A. 717. Upon questioning by the district court as to the reliability of these call center procedures, Costy testified that the call center \*281 staff and procedures were generally reliable.

Upon conclusion of the bench trial, the district court made several findings of fact. Critically, the district court found credible both Dr. Sutton's testimony that she called MedPro to report the contents of the St. Francis letter and Costy's testimony that he did not receive notification from the MedPro call center regarding Dr. Sutton's call. It further found that it was "more likely than not [that] the MedPro call center failed to follow company procedures to create an electronic 'ticket' regarding the call and to forward the information to Mr. Costy upon receipt of the call from Dr. Sutton." J.A. 719. It concluded that the "MedPro system is dependent upon the call center operators undertaking a series of tasks to start the claims process and, in light of Dr. Sutton's credible and specific memory of making the call to MedPro, the Court is unpersuaded from the evidence in the record that the system is free of human error generally or in this particular matter." J.A. 719.

In light of the above findings, the district court concluded that Dr. Sutton met her burden of showing that she provided MedPro timely and sufficient notice of a potential claim under the MedPro policy. With respect to FirstPro, the court concluded that Dr.

Sutton's call to MedPro about the St. Francis letter qualified as a report of a medical incident to an insurer prior to the inception of the FirstPro policy, and as such, FirstPro met its burden of showing that it is entitled to exclude coverage under Paragraph 11(b) of its policy. Consequently, the court stated it was unnecessary to consider whether the exclusions under Paragraphs 11(a) and (c) of the FirstPro policy applied.

Following the district court's decision, MedPro timely appealed the district court's order that it had a duty to provide coverage for the Moore Lawsuit and Dr. Sutton filed a protective cross-appeal from the district court's order that FirstPro was under no duty to do so.

## II.

Because the district court's decision that the exclusion in Paragraph 11(b) of the FirstPro policy applied rested heavily on its factual determination that Dr. Sutton notified a MedPro representative of the contents of the St. Francis letter in 2008, we first address the MedPro appeal and then resolve Dr. Sutton's protective cross-appeal.

MedPro presents four bases for reversing the district court's judgment: (1) the district court erred as a matter of law in its interpretation of the MedPro policy; (2) the district court erroneously shifted the burden of proof from Dr. Sutton to MedPro; (3) the district court's factual determination that Dr. Sutton reported a potential claim to MedPro is clearly erroneous; and (4) the district court lacked impartiality while conducting the bench trial. None of MedPro's arguments are persuasive, and we therefore affirm the district court's ruling that MedPro has a duty to defend Dr. Sutton in the Moore Lawsuit.

## A.

This Court "review[s] a judgment following a bench trial under a mixed standard of review—factual findings may be reversed only if clearly erroneous, while conclusions of law, including contract construction, are examined de novo." *Roanoke Cement Co., LLC v. Falk Corp.*, 413 F.3d 431, 433 (4th Cir.2005). Under South Carolina law,<sup>2</sup> which takes a formalistic \*282 approach to the interpretation of contracts, " 'insurance policies are subject to general rules of contract construction,' and therefore, [courts] 'must enforce, not write contracts of insurance and ... must give policy language its plain, ordinary, and popular meaning.' " *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 757 S.E.2d 399, 406 (2014) (quoting *Gambrell v. Travelers Ins. Co.*, 280 S.C. 69, 31 S.E.2d 814, 816 (1983)). Thus, when a contract is unambiguous, "it

must be construed according to the terms the parties have used.” *Id.* (internal quotation marks omitted).

<sup>2</sup> The parties agree that South Carolina law governs the construction of the insurance policies at issue in this case.

Under the MedPro policy, the insurer only has a duty to defend or pay damages on a potential claim that “was reported to [MedPro] during the term of the policy and the report includes all reasonably obtainable information, including the time, place and circumstances of the incident; the nature and extent of the patient’s injuries; and the names and addresses of the patient and any available witnesses.” J.A. 592. In concluding that Dr. Sutton’s 2008 call to MedPro satisfied this provision, the district court construed this provision in two ways that MedPro now challenges. First, it determined that Dr. Sutton had to show only substantial, not strict, compliance with the provision. And second, it found that specific information relating to “the time, place and circumstances of the incident; the nature and extent of the patient’s injuries; and the names and addresses of the patient and any available witnesses” need only be reported if that information is reasonably obtainable.

<sup>[1]</sup> MedPro’s reporting provision is properly understood as a condition precedent because an insured must perform the act of reporting before MedPro’s duty to defend or pay damages arises. *See Springs and Davenport, Inc. v. AAG, Inc.*, 385 S.C. 320, 683 S.E.2d 814, 816–17 (Ct.App.2009) (“A condition precedent is any fact, other than mere lapse of time, which, unless excused, must exist or occur before a duty of immediate performance by the promisor can arise.” (internal quotation marks omitted)). Contrary to the conclusion expressed by the district court, South Carolina law requires strict, not substantial, compliance with conditions precedent. *See McGill v. Moore*, 381 S.C. 179, 672 S.E.2d 571, 575 (2009) (holding that party may not “circumvent the contracts condition precedent by arguing substantial compliance”). In light of the clear direction from the South Carolina Supreme Court that insureds must comply strictly with conditions precedent, the district court erred in finding that only substantial compliance was necessary.<sup>3</sup>

<sup>3</sup> The district court relied on non-South Carolina law in its conclusion that only substantial compliance was required.

Notwithstanding the district court’s error in determining what type of compliance was required, it did not err in determining that the policy requires the

specific type of information listed to be reported *only if that information is reasonably obtainable*. MedPro argues that specific information relating to “the time, place and circumstances of the incident; the nature and extent of the patient’s injuries; and the names and addresses of the patient and any available witnesses” must be reported under the reporting provision regardless of whether that information is reasonably obtainable or not. It therefore views the provision as a “non-negotiable minimum” for coverage.

MedPro’s argument is strained, and ultimately unpersuasive, for two reasons. First, the most natural reading of the provision is that the phrase “reasonably obtainable” \*283 modifies all of the specific types of information that comes after it. *See Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 579 S.E.2d 132, 134 (2003) (“When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense.”). Second, even if it can be said that the provision is ambiguous as to whether it requires the specific types of information to be reported regardless of whether they are reasonably obtainable, ambiguity must be construed against both the drafter of the provision and the insurer, i.e., MedPro. *See Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718, 722 (2007) (noting that a general principle of contract construction is that “a court will construe any doubts and ambiguities in an agreement against the drafter of the agreement”); *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455, 459 (2004) (“Where the words of an insurance policy are capable of two reasonable interpretations, the construction most favorable to the insured should be adopted.”). Thus, the district court correctly interpreted the provision to mean that an insured must only give the specific types of information listed in the provision if that information is reasonably obtainable.

Viewing this provision as a whole, MedPro’s duty to defend or pay damages on the Moore Lawsuit only arises if Dr. Sutton strictly complied with a reporting provision that required her to report a potential claim during the term of the policy and supply all reasonably obtainable information. Although it is undisputed that Dr. Sutton called MedPro during the term of the policy, the parties disagree as to whether she (1) reported a potential claim and (2) supplied all reasonably obtainable information.

Under MedPro’s policy, a potential claim is “an incident which the Insured reasonably believes will result in a claim for damages.” J.A. 593. MedPro argues that because Dr. Sutton has consistently

denied reporting a “potential claim” as defined in the MedPro policy and has never believed that the letter described an incident that would result in a damages claim, she did not report a potential claim as required by the policy. Its argument, however, overlooks a critical point: the term “potential claim” is measured with respect to an objective, not subjective, standard. In this light, the proper inquiry is whether a *reasonable person* in Dr. Sutton’s shoes would have believed that the May 2008 letter from St. Francis Hospital described an incident that would result in a claim for damages. Cf. *Matter of Anonymous Member of S.C. Bar*, 315 S.C. 141, 432 S.E.2d 467, 468 (1993) (explaining that Rule 1.7 of South Carolina’s Rules of Professional Conduct, which states that “a lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless the lawyer *reasonably believes* the representation will not adversely affect the relationship with the other client,” is measured under an objective test); *Hook v. Rothstein*, 281 S.C. 541, 316 S.E.2d 690, 703 (Ct.App.1984) (interpreting the term “reasonably believes” in the context of medical malpractice under an objective standard of whether “a reasonable physician of the same branch of medicine as the defendant would have disclosed the risks under the same or similar circumstances”). Because a reasonable doctor could view a letter from a hospital’s risk management department relaying a medical records request as a first step in a patient’s decision to initiate litigation, the evidence here supports a finding that there could exist a reasonable belief that the incident would result in a claim for damages. Therefore, the district \*284 court did not err in determining that Dr. Sutton (even contrary to her own *subjective* state of mind) reported a potential claim under the terms of the policy.

We respect the views set forth in our good friend’s thoughtful dissenting opinion. Contrary to the dissent’s assertion, however, that “[t]his appeal turns on whether Dr. Sutton ‘reported’ a ‘potential claim’ to MedPro during the term of her policy,” *post* at 293, the outcome of this appeal actually turns on the *correctness, under the proper standard of review, of the district court’s factual finding that Dr. Sutton did so.*

Marshalling support from citations to caselaw<sup>4</sup> that nowhere makes an appearance in MedPro’s briefs on appeal, and claiming that “the plain language of the [MedPro] policy requires a subjective/objective hybrid analysis,” the dissent concludes that MedPro owes Dr. Sutton no coverage because she disavowed any belief that she had done anything wrong that could give rise to a claim against her, and would summarily reverse the judgment against MedPro.

4

*Darwin Nat’l Assurance Co. v. Matthews & Megna LLC*, 36 F.Supp.3d 636 (D.S.C.2014); *Greenwich Ins. Co. v. Garrell*, No. 4:11-CV-02743-RBH, 2013 WL 869602 (D.S.C. Mar. 7, 2013). Neither case constitutes controlling authority in this case, nor is either persuasive. The policies in both *Darwin* and *Garrell* include language that is explicitly subjective. For example, in *Darwin*, the policy language provided coverage for a claim only if the Insured had no basis “(1) *to believe* that any Insured had breached a professional duty; or (2) to foresee that any such wrongful or related act or omission might reasonably be expected to be the basis of a claim against any Insured.” 36 F.Supp.3d at 653 (emphasis added). Similarly, in *Garrell*, no coverage existed unless the Insureds had “a basis *to believe* that [the act or omission at issue], or any related act or omission, might reasonably be expected to be the basis of a claim.” 2013 WL 869602, at \*7 (emphasis added). In contrast, the policy language at issue here states that a potential claim is “an incident which the Insured reasonably believes will result in a claim for damages,” with the term “reasonably” modifying the term “believes.” Therefore, while the policy language at issue in *Darwin* and *Garrell* arguably directs a subjective/objective hybrid inquiry, no similar language compels such a dual inquiry here.

The dissent’s application of such an extreme interpretation of the policy language yields harsh results. As the district court properly found, however, *in reliance on the testimony of MedPro’s own witness*, had MedPro properly handled Dr. Sutton’s telephone call upon learning the contents of the letter she received, the proper MedPro official would have obtained the records and, upon her review, immediately treated the matter as a *potential claim*. The policy language did not require the district court to blink at this compelling evidence.

The dissent’s harsh result is not justified by any controlling authority. Not a single opinion from the South Carolina appellate courts or any federal court of appeals has adopted the dissent’s insistence that the MedPro policy’s use of the word “Insured” in its definition of “potential claim” requires such an extravagant reading as the dissent ascribes to it. Notably, the one published federal appellate case that presented an opportunity to deal with this MedPro policy language actually did not deal with it. See *Owatonna Clinic–Mayo Health Sys. v. Med. Protective Co.*, 639 F.3d 806 (8th Cir.2011).

In *Owatonna*, the district court granted summary judgment in favor of the insured on the issue of whether the insured had an objectively reasonable belief that a claim would be filed and conducted a jury trial on the issue of whether the insured

subjectively held that belief. 639 F.3d at 809. The policy language which necessitated \*285 this dual inquiry was materially different from the language at issue in this case. There, the claims made policy provided coverage for “any claim for damages” filed during the policy period and defined a “claim filed” as the receipt, by MedPro during the term of the policy, of “written notice of a medical incident from which [Owatonna Clinic] reasonably believes allegations of liability may result.” *Id.* at 811.

After a trial, a jury found that the insured subjectively believed that a claim for damages would be filed. *Id.* at 809. MedPro appealed and the Eighth Circuit affirmed the judgment on the jury verdict without once mentioning the district court’s underlying analysis of the relevant policy provision and, specifically, without any discussion of or any citation to legal authorities suggesting that the district court’s analysis of the policy language was correct.

Thus, the dissent is correct in saying, as it does, *post* at 9, that “*Owatonna* is inapposite” but not because “the district court here never conducted this subjective/objective analysis.” *Id.* *Owatonna* is inapposite because it tells us nothing about what the Supreme Court of South Carolina would do when it is called upon to interpret the MedPro policy language at issue here.<sup>5</sup> As many precedents show, South Carolina favors coverage in its interpretation of insurance contracts. *See, e.g., M and M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 701 S.E.2d 33, 35 (2010) (“Policies are construed in favor of coverage....”); *S.C. State Budget & Control Bd. v. Prince*, 304 S.C. 241, 403 S.E.2d 643, 646 (1991) (“[I]nsurance contracts are generally construed against the party who prepares them and liberally in favor of the insured.”); *Walde v. Ass’n Ins. Co.*, 401 S.C. 431, 737 S.E.2d 631, 635 (Ct.App.2012) (same); *Cook v. State Farm Auto. Ins. Co.*, 376 S.C. 426, 656 S.E.2d 784, 786 (Ct.App.2008) (“In South Carolina, clauses of inclusion should be broadly construed in favor of coverage, and when there are doubts about the existence or extent of coverage, the language of the policy is to be understood in its most inclusive sense.” (internal quotation marks omitted)).

<sup>5</sup> Ironically, the ancestor of MedPro’s “reasonably believes” clause is a classic *exclusion from coverage* found in many, if not all, automobile insurance policies, i.e., occurrence policies, not claims made policies. This court is not without experience with so called “reasonable belief” provisions in automobile insurance policies. *See Emick v. Dairyland Ins. Co.*, 519 F.2d 1317, 1325 n. 12 (4th Cir.1975).

In fact, the district court in *Owatonna* simply cited

generally to an unpublished district court opinion applying Texas law, *Empire Indem. Ins. Co. v. Allstate County Mut. Ins. Co.*, 617 F.Supp.2d 456, 463 (N.D.Tex.2008) (“The Allstate policy also contains an exclusion provision that applies when any person uses ‘a vehicle without a reasonable belief that that person is entitled to do so.’ ”), in reasoning that the term “reasonable belief” “in this context has an objective and subjective component.” *Owatonna Clinic–Mayo Health Sys. v. Med. Protective Co.*, Civ. No. 08–417, 2009 WL 2215002, at \*5 (D.Minn. July 22, 2009). But the “context” is not the same; it is black letter law that the interpretation of *coverage provisions* is not the same as the interpretation of *exclusions from coverage*, not in South Carolina and not anywhere. *See McPherson v. Mich. Mut. Ins. Co.*, 310 S.C. 316, 42 S.E.2d 770, 771 (1993) (“[R]ules of construction require clauses of exclusion to be narrowly interpreted, and clauses of inclusion to be broadly construed. This rule of construction inures to the benefit of the insured.”); Erik S. Knutsen, *Confusion About Causation In Insurance: Solutions for Catastrophic Losses*, 61 ALA. L. REV. 957, 967 (2010) (“Most American courts also interpret coverage clauses broadly and exclusion clauses narrowly.”).

Accordingly, we are unpersuaded by the dissent’s arguments and hold that the district court did not err in discounting Dr. Sutton’s ill-informed belief about the potential outcome of a lawyer’s request for \*286 medical records for the treatment of one of her patients.

The only remaining question is whether Dr. Sutton supplied all reasonably obtainable information when reporting the potential claim. We note that this is a close question. The insurance provision lists specific types of information such as the “time, place and circumstances of the incident; the nature and extent of the patient’s injuries; and the names and addresses of the patient and any available witnesses,” J.A. 592, almost none of which Dr. Sutton relayed to the MedPro representative she called in 2008. Although she fully reported the contents of the letter, she did not identify Amy Moore as her former patient or report any details about her labor and delivery of Nathan. Before reporting the contents of the letter to MedPro, she did not review Amy Moore’s records because she had left the practice at which Amy Moore was her patient, and did not contact St. Francis Hospital to review any medical records. Therefore, the nature of the information she gave to MedPro was limited, although she could have obtained at least two sets of Amy Moore’s medical records (the private practice’s records and St. Francis Hospital’s records). The district court reasoned that Dr. Sutton nevertheless complied with the terms of

the provision because she relayed all information that was then known to her at the time of the call. It further stated:

She could have obviously undertaken further inquiry and investigation to obtain additional information, with a consequential delay in reporting the St. Francis letter to Med Pro, but she provided Med Pro at the time of her call “all reasonably obtainable information” then available to her. Had her call received the proper company follow up, she would have most probably been requested to obtain (and would have had the duty to provide) a copy of the hospital and office notes to provide the company additional information concerning the nature of the claim and extent of the child’s injuries. The St. Francis letter, with the name of the patient, the date of the hospitalization, and the reference to the matter as a “potential claim” by the hospital’s Risk Management Department, provided Med Pro sufficient information to alert the company of a potential claim and to begin its claims processing. Med Pro had its duty to investigate the potential claim, which it would have undoubtedly done had information concerning Dr. Sutton’s report to the call center been conveyed to Mr. Costy. Thus, the Court finds that Dr. Sutton complied with the notice requirements....

J.A. 725–26.

We accept the district court’s finding that Dr. Sutton testified credibly that she made the call “shortly after” receiving the letter. In light of its finding, it was not clearly erroneous for the court to find, as it did, that the information described above regarding the details of Amy Moore’s treatment was not reasonably obtainable. Thus, the further finding that its disclosure was not required to trigger coverage is likewise not clear error. This is especially so considering that there was testimony that had the call been properly processed, Costy would have followed up with Dr. Sutton to provide additional information. This suggests that both Dr. Sutton and MedPro had a continuing duty to provide information and to investigate the claim, and that the term “reasonably obtainable” must be measured with respect to the time period during which the information was being given.

<sup>[2]</sup> In sum, the district court did not commit clear error in finding that Dr. Sutton provided all reasonably obtainable information as required by MedPro’s reporting \*287 provision. It therefore did not err in its

legal conclusion that Dr. Sutton complied with the required reporting provision under the MedPro policy.

B.

Next, MedPro argues that, as a matter of law, Dr. Sutton’s uncorroborated testimony that she called MedPro in 2008 and reported the contents of the St. Francis letter was insufficient to carry her burden of proof to show that she met MedPro’s reporting requirement. But the cases it cites in support of its argument are inapposite. For example, MedPro relies on *S.C. National Bank v. Lumbermens Mut. Cas. Co.*, 526 F.Supp. 94 (D.S.C.1981), in which the district court held that the defendant insurer failed to carry its burden of establishing that notice of cancellation of the policy was mailed to plaintiff, where defendant “had neither a certificate of mailing nor a record or any notation in its file to show that notification was actually mailed to Plaintiff.” *Id.* at 95. It also cites a tax reporting case in which the Tenth Circuit held that “absent some proof of an actual postmark or dated receipt, a presumption that tax documents allegedly mailed to the IRS were in fact received does *not* arise based solely upon a taxpayer’s self-serving testimony.” *Sorrentino v. IRS*, 383 F.3d 1187, 1195 (10th Cir.2004). But these cases involve self-serving testimony that a litigant *mailed* notice or some other legally significant paperwork. In the context of mailing, there is usually some other objective evidence, such as a copy of the paperwork mailed, receipt of mailing, or proof of postmark that accompanies a mailing. *Cf. id.* at 1195 (noting that “the taxpayer is in the best position with the clock running to protect himself by procuring independent evidence of postmark and/or mailing, whether by mail receipt, corroborating testimony, or otherwise”). By contrast, in the context of phone calls, there is usually no similarly accessible corroborating evidence that one expects to record the fact of making a phone call. Thus, the district court’s reliance on Dr. Sutton’s testimony, which it found to be credible, is not unreasonable under the circumstances of this case.

Additionally, MedPro relies on the reasoning of *Feldman v. Charlotte–Mecklenburg Board of Education*, No. 3:11–cv–34–RJC–DSC, 2012 WL 3619078 (W.D.N.C. Aug. 21, 2012), for the proposition that “[c]ourts should put aside self-serving testimony from a plaintiff where it is unsupported by corroborating evidence and undermined by other credible evidence.” *Id.* at \*5. But here, although there is no corroborating evidence that Dr. Sutton called MedPro in 2008, there is *no credible evidence that undermines* her testimony of

having the “specific memory of sitting at her desk with the letter and calling MedPro to report the receipt of this correspondence.” J.A. 719. The only evidence that could be viewed to undermine this testimony is the testimony from Costy that there was no record of a call from Dr. Sutton to the MedPro call center in 2008. But whether any member of this panel might have reached the same finding is of no moment; the district court found that evidence of “a number of different persons performing call center duties” and “turnover in those positions and phones being answered by trainees” showed that MedPro’s system was prone to “human error or a failure to follow standard company procedures,” J.A. 718, and that therefore testimony that MedPro received no call from Dr. Sutton in 2008 did not undermine her otherwise credible testimony. In this light, although Dr. Sutton’s specific testimony of calling MedPro in 2008 is uncorroborated, there is evidence in the record to explain why MedPro might not have had any record of such a call that is consistent \*288 with Dr. Sutton having called and reported the contents of the letter. It is surely unremarkable to observe that a litigant’s credible testimony alone may be sufficient to carry the burden of proof. *See, e.g., United States v. Jones*, 977 F.2d 105, 111 (4th Cir.1992) (“There may be circumstances under which a defendant’s self-serving testimony, uncorroborated by other testimonial or documentary evidence, about events this distant in time could properly be thought to carry his heavy burden of proof....”).

<sup>13</sup> Considering that MedPro’s cited cases in favor of its argument are inapposite, that there was no credible evidence in the record that undermined Dr. Sutton’s credible and specific testimony of making the call to MedPro, and that there was evidence in the record to support the district court’s finding of potential human error in MedPro’s call center, we conclude that the district court did not err in finding that Dr. Sutton carried her burden to show that she complied with the reporting provision of the MedPro policy.

### C.

MedPro next argues, in what amounts to a restatement or variation on its sufficiency challenge to the district court’s factual findings, that the district court should not have relied on Dr. Sutton’s testimony that she called MedPro to report her receipt of the medical request letter. As we have said repeatedly, we review a district court’s factual findings for clear error. *Roanoke Cement*, 413 F.3d at 433. A finding is clearly erroneous if “although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”

*Jiminez v. Mary Washington Coll.*, 57 F.3d 369, 379 (4th Cir.1995) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)). “This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.” *United States v. Heyer*, 740 F.3d 284, 292 (4th Cir.2014) (internal quotation omitted). “If the district court’s account of the evidence is plausible in light of the record viewed in its entirety, [we] may not reverse it even though convinced that had [we] been sitting as the trier of fact, [we] would have weighed the evidence differently.” *Id.* (internal quotation omitted). Indeed, as we have said: “In cases in which a district court’s factual findings turn on assessments of witness credibility or the weighing of conflicting evidence during a bench trial, such findings are entitled to even greater deference.” *FTC v. Ross*, 743 F.3d 886, 894 (4th Cir.2014); *see also Benner v. Nationwide Mut. Ins. Co.*, 93 F.3d 1228, 1234 (4th Cir.1996) (“On review, we may neither weigh the evidence nor judge the credibility of witnesses.”); *Pigford v. United States*, 518 F.2d 831, 836 (4th Cir.1975); *United States v. Bagdasian*, 291 F.2d 163, 166 (4th Cir.1961).

MedPro attacks the district court’s finding that Dr. Sutton reported a claim to MedPro in two ways: (1) by arguing that the district court failed to consider the self-serving nature of Dr. Sutton’s testimony and (2) by arguing that the district court erroneously found that MedPro’s procedures were subject to human error. The first assertion is not reviewable on appeal as it essentially asks this Court to review the district court’s finding that Dr. Sutton was a credible witness. *See Benner*, 93 F.3d at 1234.

MedPro’s second argument about the district court’s finding on the reliability of MedPro’s procedures is reviewable. It argues that there was insufficient evidence in the record of the unreliability of MedPro’s \*289 reporting procedures. The district court found that human error was possible in MedPro’s reporting procedures because of turnover; MedPro sought to rebut that finding by arguing that the only evidence of turnover stemmed from Costy’s testimony that one of the call center employees with whom he had been talking had been on the job for only a year. It is true that the testimony of Costy is alone a thin basis for determining that there existed a high rate of turnover that affected the reliability of the call center, and there does not appear to be other evidence of turnover of employees at the call center. But the district court relied on more than just evidence of turnover in concluding that the call center was prone to human error—it relied on records

produced at trial that showed that a number of different persons were performing call center duties and that phones were being answered by trainees. In this light, although the question is close one, there is sufficient evidence for a finding of unreliability, and the district court's finding was plausible when viewed in light of the entire record. *See Heyer*, 740 F.3d at 292.

Furthermore, after finding both Dr. Sutton and Costy's testimony credible, and reviewing records about trainees answering the phone, the district court reasonably inferred that the most probable cause for Costy's lack of documentation of Dr. Sutton's call was human error in the call center. The district court is entitled to draw such reasonable inferences during a bench trial. *Cf. United States v. Bishop*, 740 F.3d 927, 935 (4th Cir.2014) ("In reviewing the district court's judgment, we are mindful that, as the trier of fact, that court was in a better position than we are to evaluate the credibility of witnesses, take into account circumstances, and make reasonable inferences.").

Thus, although the evidence supporting the district court's finding that MedPro's reporting procedures were unreliable is not particularly robust, we cannot say it reaches the outer limit of the deferential standard for clear error. The district court could plausibly find that MedPro's procedures were prone to unreliability and that this unreliability explained why Costy did not receive receipt of Dr. Sutton's call to MedPro to report the contents of the St. Francis letter; the district court, therefore, did not err.

#### D.

MedPro's last assignment of error is that the district court denied MedPro a fair trial by manifesting bias in favor of Dr. Sutton. "Although courts do not generally address the standard of review applicable to assessing judicial bias, we should conduct a plenary review of such an issue because it raises due process concerns." *ePlus Tech., Inc. v. Aboud*, 313 F.3d 166, 178 n. 12 (4th Cir.2002). But, because MedPro failed to raise the issue of bias in the proceedings below and failed to make a motion for recusal, "any alleged errors are subject to plain-error review." *Murphy v. United States*, 383 Fed.Appx. 326, 332 (4th Cir.2010) (unpublished).

As to a district court's questioning of litigants during bench trials, we have stated:

The judge, for example, is entitled to propound questions pertinent to a factual issue which requires clarification. He may intercede because of apparent inadequacy of examination or cross-examination by

counsel, or to draw more information from relevant witnesses or experts who are inarticulate or less than candid. This privilege or duty, however, is subject to reasonable limitations. A trial judge must assiduously perform his function as governor of the \*290 trial dispassionately, fairly, and impartially. He must not predetermine a case....

*Crandell v. United States*, 703 F.2d 74, 77-78 (4th Cir.1983). MedPro argues that the district court's questioning of Costy and Dr. Sutton revealed a predetermination that Dr. Sutton had reported the contents of the St. Francis letter to MedPro in 2008. This is not so. MedPro's characterization of "grilling" Costy with "extensive" questioning is not borne out by the trial transcript. There were only three periods during Costy's testimony in which the district court asked questions, which can hardly be viewed as extensive or overwhelming for Costy. It is clear that the district court's purpose in asking these questions was to gain greater insight into the procedures used by MedPro to document incoming calls from insureds. Specifically, the district court questioned Costy as to the reliability of MedPro's reporting procedures—something that counsel had not yet specifically addressed in great detail in its questioning of Costy. Its questioning, therefore, did not reveal a prejudgment in favor of Dr. Sutton as much as an intent to understand what procedures might have or have not been in place that could explain Dr. Sutton credibly testifying that she had placed the call and Costy credibly testifying that MedPro lacked documentation of such a call.

MedPro further contends that the district court's hostility towards Costy during its questioning also reveals bias against MedPro and in favor of Dr. Sutton. But we discern no such hostility. In fact, the district court explicitly stated in its findings of fact that it found Costy's testimony to be credible, and during the bench trial, the district court stated that it found Costy to be "a very fine [and very honest] witness." J.A. 356. And, although the district court certainly followed up Costy's responses with additional questions, its questioning was measured; indeed, the district court stopped questioning Costy on a particular point when he stated that he did not know or was unsure of the answer. MedPro therefore cannot show hostility towards Costy that evinces a bias against MedPro or in favor of Dr. Sutton.

In any event, hostility towards or critical questioning of one party does not in and of itself equate to bias:

[O]pinions formed by the judge on the basis of facts introduced or events occurring in the

course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.

*Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). What MedPro actually challenges is the district court's *opinion and judgment* stemming from the testimony of Dr. Sutton, that Dr. Sutton testified credibly, and its resulting inquiry into MedPro's reporting procedures based on that reasoned opinion. But without a scintilla of evidence that the district court formed these judgments on the basis of "extrajudicial sources," *see id.*, these determinations must be challenged on their merits, not on the basis of bias.

\* \* \*

In sum, MedPro has failed to point to persuasive indications that any one of its bases for reversal of the district court's judgment has merit. We therefore affirm the district court's judgment that MedPro has a duty to defend Dr. Sutton against \*291 the Moore Lawsuit and pay damages as may be required under its policy.

### III.

Although we are not required to do so, *see supra* n. 1, in the interest of a thorough treatment of the issues presented by the parties, we next address Dr. Sutton's protective cross-appeal of the district court's judgment that FirstPro has no duty to defend Dr. Sutton in the Moore Lawsuit. The district court found that Dr. Sutton's call to MedPro constituted a report of a medical incident to an insurer prior to the inception of the FirstPro policy, which triggered Exclusion 11(b) of the FirstPro policy.

The legal issue presented here is narrow: whether Dr. Sutton's call to MedPro to convey the contents of the St. Francis letter constitutes a report of a medical incident under the FirstPro policy. Dr. Sutton correctly contends that the district court's finding that Dr. Sutton gave MedPro notice of a potential claim does not automatically mean that Dr. Sutton reported a medical incident under exclusion 11(b) of the FirstPro policy. That is because the terms "notice" and "potential claim" are not necessarily equivalent to the terms "report" and "medical incident."

Whether an exclusion is triggered is a question of

contract construction that we review de novo. *See Roanoke Cement Co.*, 413 F.3d at 433. "Insurance policy exclusions are construed most strongly against the insurance company," and FirstPro, as the insurer, "bears the burden of establishing the exclusion's applicability." *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 614 S.E.2d 611, 614 (2005).

Exclusion 11(b) of FirstPro's policy reads:

We will not defend or pay under this coverage part for:

\* \* \*

#### 11. Any injury or damages:

b. arising out of a medical incident or committee incident which prior to the effective date of this policy was:

I. reported to any insurer; or

II. a pending claim or proceeding; or

III. a paid claim

J.A. 644. As FirstPro points out, this provision is a "prior knowledge provision" which is designed to ensure that insurers do not "contract to cover preexisting risks and liabilities known by the insured." *Bryan Bros. Inc. v. Continental Cas. Co.*, 419 Fed.Appx. 422, 425 (4th Cir.2011) (unpublished). "Thus, it is generally the insured's duty to provide truthful and complete information so the insurer can fairly evaluate the risk it is contracting to cover." *Id.*

"Medical incident," as defined by the FirstPro policy, means "any act, error or omission in the providing of or failure to provide professional services to a patient by [the doctor] or by persons described in the Individual Professional Liability Coverage Part for whom [the doctor is] determined to be legally responsible." J.A. 636. Of particular importance to this case is that the policy treats "all bodily injury(ies) caused by a course of treatment(s) of a patient or of a mother and fetus (or fetuses) from conception through postpartum care" as a single medical incident. J.A. 637. The term "report" or "reported" is not defined by FirstPro's policy in the same manner as "medical incident." Because the FirstPro policy does not define the term "reported," we look to its "commonly accepted meaning." *Bardsley v. GEICO*, 405 S.C. 68, 747 S.E.2d 436, 440 (2013). According to the Oxford English Dictionary, the verb "to report" is commonly \*292 defined as "to give an account of (a fact, event, etc.)," "to describe," or "to convey, impart, pass on (something said, a message, etc.) to a person as knowledge or information." *Oxford English*

*Dictionary Online* (last visited April 17, 2015) (saved as ECF opinion attachment). As FirstPro points out in its brief, it is therefore commonly understood as communicating or conveying information to someone, synonymous with the term “to inform.” Against this background, when Dr. Sutton called MedPro to convey the contents of the St. Francis letter, she “reported” the information in the letter.

<sup>41</sup> But she did not necessarily report a “medical incident” as defined by the FirstPro policy. Beyond reporting the contents of the St. Francis letter, which merely identified Amy Moore as a patient who visited Dr. Sutton on June 22, 2004, Dr. Sutton did not report to MedPro any details about the acts she performed, any treatment she provided, or any potential errors or omissions that arose during her interactions with Amy Moore. The sparse information provided, detailing merely the fact that Amy Moore was a patient of Dr. Sutton’s, can hardly be said to describe a medical incident. Because the policy defines “medical incident” as “any act, error, or omission in the providing of ... professional services,” it contemplates the reporting of acts, errors, or omissions beyond the mere fact of a doctor’s provision of professional services. We therefore decline to adopt FirstPro’s argument that reporting the mere fact of having seen a patient can qualify as a “medical incident” when that report includes no description of any acts, errors, or omissions that took place during the provision of services. Thus, Dr. Sutton’s call to MedPro to report the contents of the St. Francis letter does not trigger the exclusion in 11(b) of the FirstPro policy.

Although the exclusion in 11(b) is not applicable, we remand to the district court to determine (if the case is not otherwise resolved) whether the exclusion in 11(c) of the FirstPro policy applies, an issue the district court did not reach. That exclusion states that FirstPro will not defend or pay for any injury or damages “arising out of a medical incident or committee incident disclosed or which should have been disclosed on our applications, renewal applications, or during the application or renewal process.” FirstPro argues that Dr. Sutton should have disclosed the Moore medical incident in response to two questions in the application for insurance. Question 5(a) of the Application states: “Do you know or is it reasonably foreseeable from the facts, reasonable inferences or circumstances that any of the following circumstances might reasonably lead to a claim or suit being brought against you, even if you believe the claim will not have merit: a request for records from a patient and or attorney related to an adverse outcome.” J.A. 597. Relatedly, Question 7 of the application states: “Do you know or is it

reasonably foreseeable from the facts, reasonable inferences or circumstances that there are outstanding incidents, claims, or suits (even if you believe the outstanding claim or suit would be without merit) that have not been reported to your current or prior professional liability carrier.” J.A. 597. Dr. Sutton responded “no” to these questions. J.A. 597. We remand to the district court to determine whether it was reasonably foreseeable that the St. Francis medical records request letter might reasonably lead to a claim or suit being brought against Dr. Sutton and whether the claim arising from the birth of Nathan Moore was reasonably foreseeable, thereby triggering the exclusion in 11(c).

#### IV.

For the reasons set forth, the judgment is

**\*293 AFFIRMED IN PART AND VACATED AND REMANDED IN PART.**

FLOYD, Circuit Judge, concurring in part and dissenting in part:

I agree with all of the majority opinion except for its conclusion that Dr. Sutton reported a potential claim as defined by the MedPro policy. I therefore dissent from part II.A. of the majority opinion.

#### I.

This appeal turns on whether Dr. Sutton “reported” a “potential claim” to MedPro during the term of her policy—a condition precedent to coverage. J.A. 592. The policy defines a potential claim as “an incident which *the Insured reasonably believes* will result in a claim for damages.” J.A. 593 (emphasis added). Both below and here on appeal, Dr. Sutton has consistently denied believing that she ever reported such a claim. Because South Carolina law requires strict compliance with conditions precedent, her admission would seem to end the matter. But the majority concludes her subjective belief is irrelevant, and instead misconstrues the policy as imposing a solely objective test.

I disagree for two reasons. First, the plain language of the policy requires a subjective/objective hybrid analysis. And second, even assuming that a purely objective standard applies, the record is devoid of any evidence or factual findings supporting the majority’s conclusion that a reasonable physician in Dr. Sutton’s shoes would have viewed the medical records request as a first step to a medical malpractice action. Accordingly, I would reverse.

#### II.

As my friends in the majority correctly recognize, South Carolina law requires that we enforce

insurance contracts according to their plain terms. Maj. Op. at 281–82 (citing *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 757 S.E.2d 399 (2014)). Here, MedPro’s policy defines a “potential claim” as “an incident which the Insured reasonably believes will result in a claim for damages.” J.A. 593. By focusing on the Insured’s reasonable belief, this language requires a mixed subjective/objective analysis. First, did the Insured believe the relevant incident would result in a claim for damages? If the answer to that question is yes, we turn to the second question: is that belief reasonable? Here, Dr. Sutton denies believing that the records request would lead to a claim for damages. Accordingly, we never get past the first step.<sup>1</sup> As such, I would hold that Dr. Sutton failed to comply with the notice requirements in the MedPro policy, and so MedPro does not owe her any coverage.

<sup>1</sup> The word “reasonably” modifies the phrase “believes will result in a claim for damages.” Because Dr. Sutton never had any such belief we need not consider whether her non-existent belief is reasonable.

Courts that have interpreted similar insurance policy language repeatedly apply a similar two-step subjective/objective inquiry. See *Owatonna Clinic–Mayo Health Sys. v. Med. Protective Co. of Fort Wayne, Ind.*, No. CIV. 08–417DSDJJK, 2009 WL 2215002, at \*5 (D.Minn. July 22, 2009), as amended (Aug. 10, 2009), *aff’d in part*, 639 F.3d 806 (8th Cir.2011) (holding that a MedPro policy conditioning coverage on receipt of notice of an incident which the insured “reasonably believes allegations of liability may result” requires both “an objective and subjective” analysis); *Darwin Nat’l Assurance Co. v. Matthews & Megna LLC*, 36 F.Supp.3d 636, 653–54 (D.S.C.2014) (applying a hybrid subjective/objective standard in analyzing \*294 so-called “prior knowledge” provisions in insurance contracts, which exclude coverage for unreported incidents predating the policy period which the insured knew or should reasonably have known would give rise to a claim); *Greenwich Ins. Co. v. Garrell*, No. 4:11–CV–02743–RBH, 2013 WL 869602, at \*7 (D.S.C. Mar. 7, 2013) (citing *Selko v. Home Ins. Co.*, 139 F.3d 146, 152 (3rd Cir.1998)) (same).<sup>2</sup>

<sup>2</sup> Cf. *Am. Cont’l Ins. Co. v. PHICO Ins. Co.*, 132 N.C.App. 430, 512 S.E.2d 490, 493 (1999) (“The policy sets up a subjective standard ... under which a claim is deemed filed if the insured reasonably believes that an express demand for damages will be forthcoming. Therefore, we must view Ms. Chapman’s actions to determine whether she ... had

a reasonable belief that a suit would be filed in the Watson case.”).

Yet the majority concludes the MedPro policy calls for an “objective, not subjective, standard.” Maj. Op. at 283. According to the majority, the “proper inquiry” is “whether a reasonable person in Dr. Sutton’s shoes” would have believed that the medical records request “described an incident that would result in a claim for damages.” Maj. Op. 283. But that is not what the policy says. Rather, the policy plainly states that Dr. Sutton’s reasonable belief controls. Simply put, the majority is not free to rewrite the definition of a “potential claim” by swapping the phrase “what a reasonable person in Dr. Sutton’s shoes believes” for the phrase “what the Insured reasonably believes.” See, e.g., *Torrington Co. v. Aetna Cas. & Sur. Co.*, 264 S.C. 636, 216 S.E.2d 547, 550 (1975) (“[P]arties have a right to make their own contract and it is not the function of this Court to rewrite it or torture the meaning of a policy to extend coverage never intended by the parties.”).

The majority only musters two cases purportedly supporting its conclusion that the phrase “reasonably believes” means an objective analysis applies: *In re Anonymous Member of the South Carolina Bar*, 315 S.C. 141, 432 S.E.2d 467 (1993), and *Hook v. Rothstein*, 281 S.C. 541, 316 S.E.2d 690 (Ct.App.1984). In my view, both are inapposite. Neither addresses contract law, much less language in insurance policies similar to the language at issue here. And both are distinguishable on their facts.

In *In re Anonymous Member of the South Carolina Bar*, the court addressed Rule 1.7 of the South Carolina Rules of Professional Conduct. That Rule states that “a lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless the lawyer reasonably believes the representation will not adversely affect the relationship with the other client.” 432 S.E.2d at 468. The court concluded this Rule sets up an objective standard. But the court did not do so, as the majority implies, because the phrase “reasonably believes” per se requires an objective analysis. Rather, it did so only because the comment to that Rule expressly states that conflicts governed by the Rule are to be measured under the view of a “disinterested lawyer.” See *id.* In contrast, nothing in the MedPro policy states that a potential claim should be measured under the view of a “disinterested insured”—rather, the policy is clear that the view of “the Insured,” Dr. Sutton, controls.

*Hook v. Rothstein* is similarly inapposite. That case establishes that whether a physician departed from a

standard of reasonable medical care in a lack-of-informed-consent action is evaluated under the same objective standard applicable to medical malpractice actions. 316 S.E.2d at 703. Standards for medical malpractice and lack-of-informed-consent actions have no bearing on the meaning of a “potential \*295 claim” as expressly defined in MedPro’s policy.

Admittedly, South Carolina courts have yet to interpret identical contractual language in a published opinion. Contrary to the majority’s assertion, however, I do not believe they would apply a purely objective standard. The plain language of the policy states that Dr. Sutton’s reasonable belief controls—not, as the majority concludes, the belief of “a reasonable person in Dr. Sutton’s shoes.” Because South Carolina courts enforce insurance contracts according to their plain terms, *Bell*, 757 S.E.2d at 406, I am confident they would join courts in other jurisdictions considering similar language and apply a two-part subjective/objective analysis.

The district court also appeared to recognize that the two-step inquiry applies in some instances. In fact, it applied an analogous inquiry in analyzing FirstPro’s claim that Exclusion 11(a) in its policy precluded coverage. J.A. 116. That exclusion states that FirstPro will not defend or pay for any injury or damages arising out of claims made before the effective date if Dr. Sutton “knew or could have reasonably foreseen from the facts, reasonable inferences or circumstances that a claim might be made.” J.A. 647. As the district court acknowledged, this language contains “both a subjective and objective element.” J.A. 116.

Yet the district court concluded that Dr. Sutton’s subjective belief was entirely irrelevant under the similar language in MedPro’s policy, i.e. whether she “reasonably believe[d]” that an incident would “result in a claim for damages”:

Well, she might not have a reasonable belief of a lawsuit, I understand your argument there, but the purpose of the notice provision is to protect, to bring it to your attention so you can do the investigation during the policy period. And now you want to turn it into some, Oh, no, if there is not a subjective belief by the insured that she’s going to get sued, then we don’t have to do it. I’m sorry.

J.A. 108. In doing so, the court—like the majority—ignored the plain language of MedPro’s policy and instead rewrote it to reflect its purported “purpose.” Because courts “must enforce, not write contracts of insurance,” *Bell*, 757 S.E.2d at 406

(quotation omitted), the district court erred as a matter of law. Accordingly, I would reverse.

### III.

Even assuming an objective standard applies as the majority contends, nothing suggests that this standard was satisfied here. As an initial matter, the district court never applied an objective standard. Rather, it concluded that the notice provision was satisfied because MedPro—not Dr. Sutton—would have considered the medical records request to be a “potential claim.” J.A. 102–10, 136, 390.<sup>3</sup> In doing so, the district court rewrote the policy’s definition of a “potential claim” to read “an incident which *MedPro* reasonably believes will result in a claim for damages.” Again, the court was not free to rewrite the policy in this way. *See Hutchinson v. Liberty Life Ins. Co.*, 404 S.C. 20, 743 S.E.2d 827, 829 (S.C.2013) (stating that courts can interpret, but not rewrite, provisions in insurance policies).

<sup>3</sup> Similarly, the court concluded that after Dr. Sutton reported the medical records request to MedPro, MedPro was then responsible for investigating whether the request amounted to a potential claim triggering coverage, regardless of Dr. Sutton’s subjective belief that it would not lead to a claim. J.A. 136.

\*296 The district court relied on *Owatonna Clinic–Mayo Health Sys. v. Medical Protective Co.*, 639 F.3d 806 (8th Cir.2011) for this point. *See* J.A. 136. But that case is inapposite. In *Owatonna*, the district court held that a MedPro policy with similar notice language required a subjective-objective analysis. 2009 WL 2215002, at \*5. The district court granted summary judgment as to the objective component, and held a trial on the subjective component. *Id.*; *see also* 714 F.Supp.2d 966, 967 (D.Minn.2010). MedPro appealed only the district court’s ruling on the objective component, but did not appeal the jury’s findings as to the subjective component.<sup>4</sup>

<sup>4</sup> MedPro also made an additional argument on appeal: that the insured’s notice failed to literally comply with the requirements of the notice provision because it did not include any names, addresses, or other details required by the policy. 639 F.3d at 811–13. The Eighth Circuit disagreed, concluding that the insured’s notice provided sufficient facts to put MedPro on notice of a claim under Minnesota law. *Id.* at 812–13. The district court here appears to have relied on this portion of the Eighth Circuit’s analysis (*see* J.A. 136), while overlooking the portion of the Eighth Circuit’s opinion analyzing whether the insured’s belief that

a claim would be filed was objectively reasonable.

The Eighth Circuit rejected MedPro's assertions, concluding that the insured's belief that it would be sued was objectively reasonable. 639 F.3d at 813. At a minimum then, *Owatonna* establishes that the district court should have applied an objective analysis here (which it failed to do). And the Eighth Circuit only declined to address the subjective component because MedPro did not raise that issue on appeal.<sup>5</sup> As such, *Owatonna* does not support the district court's decision to ignore the subjective inquiry required by the plain language of the MedPro policy (and indeed the objective inquiry as well).

<sup>5</sup> 639 F.3d at 810–11 (“In our case ... the only issue on which there was a trial was the matter of the [Insured's] subjective belief, as to which there was no doubt as to the sufficiency of the evidence, and as to which, more relevantly, there is no issue raised on appeal.”).

Finally, there is little, if any, evidence in the record that a reasonable physician would have believed that the medical records request would result in a claim for damages. In fact, the district court's findings in the related context of FirstPro's Exclusion 11(a) suggest just the opposite: that a reasonable physician would *not* have believed the request would result in a claim. For example, in denying FirstPro's motion for summary judgment, the district court found that the “record evidence suggests that a reasonable physician would not view a request for records by an attorney as a definite sign of an impending claim.” J.A. 139.

And at trial, the court denied Dr. Sutton's motion for a directed verdict as to this Exclusion, finding that additional evidence was needed as to whether Dr. Sutton's belief was objectively reasonable. J.A. 260–62. Ultimately, the court determined a different exclusion applied as to FirstPro, and thus never decided whether Dr. Sutton's belief was objectively reasonable under Exclusion 11(a). The court's comments, however, suggest that this was a much closer issue than the majority suggests. See, e.g., J.A. 363 (inquiring why there was “no evidence [as to] what a reasonable physician would have” believed).

Moreover, un rebutted testimony established that requests for medical records typically do not give rise to medical malpractice claims, but rather arise in other contexts, such as worker's compensation claims or personal injury lawsuits. J.A. 104; 208–09. Thus, as I read the record, equally strong evidence exists that a reasonable physician would not have viewed \*297 the medical records request as a first step to a medical malpractice action. In any event, the district court never undertook this fact-intensive inquiry. Accordingly, assuming an objective standard applies as the majority contends, I would remand to the district court to decide whether Dr. Sutton's belief was objectively reasonable in the first instance.

#### IV.

For the above reasons, I respectfully dissent from Part II(a) of the majority opinion.

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**CERTIFICATE OF SERVICE**

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of the foregoing Supplemental Brief Of The State Of Washington (with Appendix) to be electronically served on Counsel of Record, according to the Court's protocols for electronic filing and service.

DATED this 17th day of May 2019, at Olympia, Washington.

*s/ Wendy Scharber*  
WENDY SCHARBER  
*Legal Assistant*

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Sender Name: Kristin Jensen - Email: kristinj@atg.wa.gov

**Filing on Behalf of:** Tera Marie Heintz - Email: tera.heintz@atg.wa.gov (Alternate Email: Tera.Heintz@atg.wa.gov)

Address:  
PO Box 40100  
1125 Washington St SE  
Olympia, WA, 98504-0100  
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