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Court of Appeals  
Division I  
State of Washington

APPEAL NO. 72059-7-1

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

(Whatcom County Court Case No. 11-2-00248-5)

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**ANTHONY DICKERSON AND JULIA DICKERSON, husband and wife and the marital community composed thereof; J.D., a minor child, by and through her Guardian Ad Litem, ANTHONY DICKERSON; and THE ESTATE OF JILLIAN ROSE DICKERSON, by and through its Administratrix, JULIA DICKERSON,**  
**Respondents,**

**v.**

**C. SHAYNE MORA, M.D.; BELLINGHAM OBSTETRIC & GYNECOLOGIC ASSOCIATES, P.S., a Washington Corporation; and PEACEHEALTH dba ST. JOSEPH HOSPITAL, a Washington Non-profit corporation,**  
**Appellants.**

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**Amended Respondents' Brief**

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## INTRODUCTION

This is an appeal from an Order granting the Dickersons a new trial and imposing monetary sanctions because of PeaceHealth's repeated violations of Judge Uhrig's Orders in Limine. Judge Uhrig entered his Order only after first reaching "the inescapable and regrettable conclusion that the cumulative effect of these violations was to deprive the plaintiff a chance at a fair trial." This Court should affirm because Judge Uhrig did not abuse his discretion.

## RESTATEMENT OF THE CASE

### **A. Dr. Holmgren recommended serial ultrasounds for Julia Dickerson's unborn twins.**

On December 27, 2007, Dr. Holmgren performed an ultrasound on Julia Dickerson at the University of Washington Medical Center. Ex. 2. The test disclosed that she was 19-weeks pregnant with twins. *Id.* Dr. Holmgren's report to Ms. Dickerson's Bellingham obstetrician, Dr. Mora, informed him that Ms. Dickerson had a 15% risk of developing Twin-to-Twin Transfusion Syndrome ("TTTS"). *Id.* Dr. Holmgren recommended that Dr. Mora conduct serial ultrasounds at 22, 24, and 26-weeks gestation, to monitor fetal growth. CP 16; 03/05/14 RP 144. An ultrasound is the only way to diagnose TTTS. 03/03/14 RP 42:7; CP 2048:13-17.

**B. Unfortunately, Dr. Mora ignored Dr. Holmgren's recommendation, but after Ms. Dickerson presented in distress, he instructed PeaceHealth to perform a non-stress test.**

Unfortunately, Dr. Mora ignored Dr. Holmgren's recommendation. 03/05/14 RP 139:11-140:7; Ex. 7. On February 6, 2008, Ms. Dickerson made an unscheduled visit to Dr. Mora's office. 03/10/14 RP 34:21. She had not slept for more than a week, and she was frightened for her twins. 03/10/14 RP 34, 35. She feared she was not eating or drinking enough to adequately nourish them. *Id.*, 36. Dr. Mora immediately sent her to PeaceHealth's Childbirth Center in Bellingham. 03/04/14 RP 90:5; 97:7; 98:19-99:1. Dr. Mora's office conveyed instructions to PeaceHealth to perform a non-stress test ("NST") on the babies to determine fetal well-being. Ex. 4; 03/03/14 RP 45:23-46:18.

**C. Unfortunately, PeaceHealth failed to perform a non-stress test.**

PeaceHealth did not perform a NST. 03/03/14 RP 46:23-47:2. Instead, PeaceHealth placed the twins on an electronic fetal monitor. 03/04/14 RP 60:1. PeaceHealth nurses obtained no heartbeat tracing for baby A (Jessica). Ex. 35; 03/17/14 RP 81:4-11. They obtained a total of seven minutes of heartbeat tracing for baby B

(Jillian), but less than three minutes of continuous tracing. Ex. 35; 03/03/14 RP 158:2-5; *Id.* 172:25-173:5; 03/17/14 RP 81:12-17.

A proper NST required more than 20 minutes of continuous tracing on each baby. Ex. 5; Ex. 37; 03/03/14 RP 132:16-133:21; 03/11/14 RP 127:8-21. PeaceHealth nurses apparently failed to read Ms. Dickerson's medical record, which included the instructions from Dr. Holmgren regarding serial ultrasounds. 03/19/14 RP 85:19-86:10.

The PeaceHealth treatment note for that visit contains the following information:

- At 11:00 a.m., on electronic fetal monitor; it is very difficult to get babies on the monitor; baby A at 136, unable to obtain heart beat on baby B.
- At 11:40 reported to Dr. Mora that two nurses were unable to get continuous strip on baby A and unable to get fetal heart tones of baby B.
- 12:20 Dr. Mora in, 12:20 discharged.

Ex. 5; 03/04/14 RP 60:1-13.

**D. PeaceHealth inaccurately told Dr. Mora that Ms. Dickerson and her babies were well.**

PeaceHealth's Nurse Wahl inaccurately informed Dr. Mora that Ms. Dickerson and her babies were well. 03/10/14 RP 40:17-19. Ms.

Dickerson was discharged from PeaceHealth without a diagnosis and without adequate reassurance of fetal well-being. 03/04/14 RP 63:11-19; *Id.*, 64:22-65:2. She was instructed if the pain remained unmanageable to try to sleep on her hands and knees. 03/10/14 RP 40:17-41:25. She asked Dr. Mora's office to make an appointment for her at the University of Washington as soon as possible. 03/10/14 RP 42:18-43:13.

**E. Six days later, an ultrasound disclosed severe TTTS: one twin died, the other is severely impaired.**

When Ms. Dickerson arrived at the University of Washington Medical Center on February 12, 2008, she presented with the same symptoms with which she presented at PeaceHealth six days earlier. 03/10/14 RP 44:10. An ultrasound disclosed that Ms. Dickerson was suffering from severe TTTS, stage 3. CP 2045; Exhibit 7. The next morning Dr. Holmgren diagnosed Jessica's status as life-threatening. She decided to recommend an immediate emergency cesarean section because she believed that without the procedure both twins would die. CP 2037:12-15; CP 2039:4-11; Ex. 9. Jessica weighed 560 grams and Jillian weighed 860 grams at birth. Ex. 17.

Jillian Dickerson died nine days later from complications caused by her premature delivery. Ex. 16. Jessica Dickerson lived, but she suffered permanent, serious physical and cognitive injuries. Dep. of McGuinness 9:21-16:22; 03/06/14 RP 106:4-107:2. Jessica was finally discharged from the hospital more than five months after her birth. Exhibit 30. Her medical expenses at discharge exceeded \$2.5 million. Exhibit 71. Post-discharge medical expenses and economic damages for Jessica's lifetime are expected to range between \$5.6 million and \$10.5 million. Ex. 117; 03/12/14 RP 33-34.

#### **PROCEDURAL HISTORY: Motions & Orders in Limine**

The Dickersons filed 63 motions in Limine. CP 122; CP 215. PeaceHealth filed 15. CP 61. Judge Uhrig allowed two days for oral argument on these motions. 02/19/14 RP; 02/20/14 RP. Judge Uhrig's pertinent, and unchallenged, orders in limine were as follows:

1. Prohibiting PeaceHealth from offering evidence argument, inference or suggestion of fault on behalf of any plaintiff. [MIL Order 17 and 18, CP 512];
2. Prohibiting PeaceHealth from offering evidence or argument, inference or suggestion, that PeaceHealth Nurse Wahl was a good, careful, safe or conscientious nurse [MIL Order 31, CP 515];

3. Prohibiting PeaceHealth from offering any “expert” testimony or argument, inference or suggestion, that Ms. Dickerson was not an obstetrics patient when she was treated at PeaceHealth Childbirth Center on February 6, 2008 [MIL Order 56, CP 501];

4. Prohibiting PeaceHealth from offering any “expert” testimony or argument, inference or suggestion, that Ms. Dickerson’s reason for seeking healthcare on February 6, 2008 was not because she was concerned about the well-being of her unborn twins [MIL Order 57, CP 501];

5. Prohibiting PeaceHealth from offering any “expert” testimony or argument, inference or suggestion, that PeaceHealth’s safety policies and procedures were not applicable to the care provided to Ms. Dickerson and her unborn twin girls [MIL Order 58, CP 501];

6. Prohibiting PeaceHealth from offering evidence or argument, inference or suggestion, that any of Dickersons’ witnesses were lying [MIL Order 7, CP 509.];

7. Prohibiting PeaceHealth from offering evidence or argument, inference or suggestion, that Dickersons’ receipt of compensation from PeaceHealth would be “winning the lottery” or a “windfall” or other similarly charged comparisons [MIL Order 25, CP 513]; and

8. Prohibiting counsel from arguing the golden rule. [PeaceHealth’s MIL Order 6, CP 525]

As detailed *infra*, Argument § B, PeaceHealth violated each of these Orders in the jury’s presence. This caused Judge Uhrig to reach “the inescapable and regrettable conclusion that the cumulative effect of these violations was to deprive the plaintiff a

chance at a fair trial.” CP 1460. He, therefore, granted a new trial and awarded sanctions. CP 1456.

## **ARGUMENT**

### **A. The standard of review is abuse of discretion.**

PeaceHealth challenges Judge Uhrig’s discretionary Order granting a new trial and imposing monetary sanctions. The standard of review is abuse of discretion. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). This court will not reverse the trial court’s grant of a new trial absent a manifest abuse of discretion. *Teter v. Deck*, 174 Wn.2d 207, 215, 274 P.3d 336 (2012). The trial court has broad discretion when deciding to grant a motion for a new trial. *State v. Hawkins*, 181 Wn.2d 170, 332 P.3d 408 (2014).

A trial court’s wide discretion in deciding whether or not to grant a new trial stems from ‘the oft repeated observation that the trial judge who has seen and heard the witnesses is in a better position to evaluate and adjudge than can we from a cold, printed record.’ *State v. Wilson*, 71 Wn.2d 895, 899, 431 P.2d 221 (1967).

*Hawkins*, 181 Wn.2d at 179.

**B. The Dickersons' Motions in Limine properly sought to simplify the trial and to resolve evidentiary issues, but PeaceHealth violated eight of Judge Uhrig's Orders in Limine in the presence of the jury.**

The Dickersons' motions in limine were the appropriate procedural tool to resolve evidentiary issues before trial so that improper trial testimony would not unfairly prejudice the Dickersons. CP 122; 215. *State v. Smith*, 189 Wash. 422, 65 P.2d 1075 (1937). Motions in limine are the appropriate manner to resolve evidentiary issues before trial so the jury will not hear inadmissible or unduly prejudicial evidence. *State v. Kelley*, 102 Wn.2d 188, 192-93, 685 P.2d 564 (1984).

[T]he trial court should grant such a motion if it describes the evidence which is sought to be excluded with sufficient specificity to enable the trial court to determine that it is clearly inadmissible under the issues as drawn which may develop during the trial and if the evidence is so prejudicial in its nature that the moving party should be spared the necessity of calling attention to it by objecting when it is offered during the trial.

*Fenimore v. Drake Construction Co.*, 87 Wn.2d 85, 91, 549 P.2d 483 (1976). They are designed to simplify the trial and to avoid the prejudice that often follows when a party is forced to object, in the jury's presence, to the introduction of evidence. *Id.* at 89.

'The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation.'

*A.C. v. Bellingham Sch. Dist.*, 125 Wn.App. 511, 525, 105 P.3d 400 (Div. 1, 2004). [Citations omitted.]

**1. PeaceHealth violated the Court's Order on MIL 17 and MIL 18, which prohibited PeaceHealth from attributing fault to the Dickersons.**

The Dickersons moved for summary judgment on contributory negligence. CP 1603-5. PeaceHealth did not oppose the motion. Judge Uhrig entered an Order determining that no plaintiff was at fault for the injuries they sustained. CP 46; CP 512.

Out of an abundance of caution, the Dickersons moved to prohibit any evidence or argument, inference or suggestion that any plaintiff was at fault for the injuries they suffered. CP 122, 125, 140. In response, PeaceHealth argued that the motions were pointless, seeking terms for the cost of responding (CP 294-95):

There was (sic) two motions in limine filed by plaintiffs not to place blame on the Dickersons. There was already a partial summary on contributory negligence, which I [PeaceHealth] didn't oppose. It has already been granted. There is no reason to have two additional motions in limine on this subject. . . . I really don't think we need a motion in limine on this.

02/19/14 RP 12:14-18. Judge Uhrig granted the motion. CP 507.

In its opening statement, however, PeaceHealth blamed Ms. Dickerson for the horrific injuries her twins sustained.

This case a little bit easier if you understand, sort of, the global aspect of this. It's really about roles. Whose role was it to make the decisions that were critical in this case? And whose responsibility was it to do those things that needed to be done, or the things that weren't done? Whose responsibility was that?

. . . .

So what happened after Ms. Dickerson left the hospital? Well, there's no contact with Dr. Mora for that six days, until she went to U-Dub. No contact with St. Joseph's; didn't come into the hospital at all for any reason.

02/27/14 RP 61:15-23; *Id.* 94:12-19. The Dickersons moved for sanctions and a curative instruction to address PeaceHealth's improper argument shifting blame to Ms. Dickerson for her alleged failure to seek additional medical care for six days. CP 672; 03/03/14 RP 9:4-25. The Dickersons requested the following curative instruction:

This Court has previously entered an Order declaring that none of the Dickersons were at fault, in any way, for any health care negligence or any damages sought by the Dickersons in this matter. *You must disregard any argument in opening statements suggesting that any of the Dickersons were at fault in any way.*

CP 680 (italics added). PeaceHealth opposed the curative instruction. 03/03/14 RP 11:1-12:18. Judge Uhrig shared the

Dickersons' concerns about PeaceHealth's opening statement. 03/03/14 RP 19:25. Judge Uhrig read a portion of the curative instruction to the jury, but omitted the last (italicized) sentence, thereby failing to tell the jury to disregard any argument suggesting that the Dickersons were at fault. 03/03/14 RP 20:4.

Judge Uhrig did not award sanctions for PeaceHealth's misconduct during opening statement, but he warned counsel that everyone was on a "short leash," and that the court hoped to avoid the need for a mistrial and sanctions, which sanctions might include the costs of all witnesses. 03/03/14 RP 23:3-11.

During Ms. Dickerson's testimony, the jury foreperson submitted the following written questions for Judge Uhrig to ask Ms. Dickerson:

How does a clean bill of health prevent you from seeking medical help elsewhere? **OR** How did it prevent **you** from getting ~~help~~ extra help?

CP 831; 03/10/14 RP 82-83. The Dickersons advised Judge Uhrig that it appeared that the jury had not understood the court's curative instruction and intended to blame Ms. Dickerson for not seeking additional medical attention sooner. 03/10/14 RP 83. Judge Uhrig ruled that he would not ask the juror's questions and that he would

address the problem "at some point" in an appropriate fashion.

03/10/14 RP 84:1-3.

PeaceHealth-retained-expert Nurse Murray testified that PeaceHealth did not perform the non-stress test (NST) that Dr. Mora ordered because the unborn twins did not cooperate with Nurse Wahl:

They were moving around and it was impossible to get a 20-minute segment of tracing.

03/11/14 RP 127:8-21; *Id.* 138:5-13. PeaceHealth-retained-expert Dr. Wenstrom similarly improperly blamed the unborn children for PeaceHealth's failure to do a NST.

But at this age they are flipping around and doing spins and bouncing around over each other, so it's very hard to find them, never mind get a continuous tracing.

03/17/14 RP 36:15-19; *Id.*, 27:7-28:7.

**2. PeaceHealth violated the Court's Order on MIL 31, which prohibited PeaceHealth from characterizing PeaceHealth Nurse Wahl.**

The Dickersons moved for an Order prohibiting evidence or argument, inference or suggestion, that Nurse Wahl was a good, careful, safe, or conscientious person or nurse. CP 150; MIL 31.

Judge Uhrig granted the motion. M/L Order 31, CP 515; 02/19/14

RP 109:15.

In opening statement PeaceHealth argued:

Sue Wahl, a little bit about her . . . This is an experienced nurse. One of the most experienced nurses and OB nurses in Whatcom County . . .

02/27/14 RP 67:8-13.

I think you'll agree that this is a case where PeaceHealth, and in particular Sue Wahl -- a **very good nurse** -- is not negligent in any way. [Emphasis added.]

02/27/14 RP 101:6-9. The Dickersons immediately moved for sanctions and requested the following curative instruction:

*The conduct of PeaceHealth and Nurse Wahl on February 6, 2008, must be judged based solely upon the medical care and services provided that day. No witness has or will be testifying as to any care provided to any patient by Nurse Wahl or PeaceHealth in the Childbirth (sic) Center other than Julia Dickerson and her unborn twins. You must disregard any argument in opening statements on health care services before February 6, 2008, or after February 6, 2008, provided by Nurse Wahl or PeaceHealth at the Childbirth Center.*

CP 672, 682; 03/03/14 RP 17:12-18:8 (italics added). Judge Uhrig gave the jury the middle sentence, but declined to give the (italicized) first and third sentences. 03/03/14 RP 25:17-20.

Before PeaceHealth offered Dr. Mora's testimony to the jury, the Dickersons requested that PeaceHealth make an offer of proof. 03/05/14 RP 104. During that offer of proof, Dr. Mora testified that he trusted Nurse Wahl because she was one of the "most reliable" nurses in labor and delivery with a wealth of experience. 03/05/14 RP 105:3-11. The Dickersons objected because Dr. Mora's proffered testimony, especially on reliability, violated the Order in Limine. *Id.* 105:19-22.

Judge Uhrig informed PeaceHealth that character evidence would not be allowed because the Order in Limine prohibited such testimony. 03/05/14 RP 106. PeaceHealth then presented the following testimony from Dr. Mora in the jury's presence:

Q. Okay. Why did you trust Sue Wahl?

A. At that time I probably would have worked with her side by side for approximately 10 years. Her -- she is a nurse whom I trust and I have an excellent rapport with **and her experience is vast and her reliability is excellent.** [Emphasis added.]

03/05/14 RP 130:12-16. The Dickersons immediately moved for \$100,000 in sanctions. *Id.* 131. The trial court reserved and requested briefing. *Id.* 133. As directed, the Dickersons filed and

served their second written motion for sanctions together with another curative instruction on Order in Limine 31. CP 812.

The Dickersons proposed the following curative instruction:

*The conduct of Nurse Wahl on February 6, 2008, must be judged based solely upon the medical care and services provided that day. You must disregard any evidence of Nurse Wahl's character or trait of character offered for the purpose of proving that she acted in conformity to those traits on February 6, 2008.*

CP 817 (italics added).

Judge Uhrig gave no curative instruction at that time. After trial, however, he imposed sanctions for this repeated violation. Post-trial, the court specifically found that the testimony violated the Order and was prejudicial to the Dickersons. CP 1456; CP 1462.

**3. PeaceHealth violated the Court's Order on MIL 56, which prohibited PeaceHealth from offering testimony or argument, inference or suggestion, that Julia Dickerson was not an obstetrics patient on February 6, 2008.**

The Dickersons moved for an Order prohibiting testimony or argument, inference or suggestion, that Ms. Dickerson was not an obstetrics patient when she visited PeaceHealth on February 6. CP 216. Judge Uhrig initially reserved ruling on the motion. CP 501. When the Dickersons renewed the motion during trial, PeaceHealth

offered no opposition. 03/11/14 RP 105:6-110:1. Judge Uhrig granted the motion.

The Dickersons brought MIL 56 because two of PeaceHealth's expert witnesses, Michelle Murray, PhD, and Katherine Wenstrom, M.D., had opined in their pre-trial depositions that Ms. Dickerson was not an obstetrics patient when she was seen at the PeaceHealth Childbirth Center on February 6. Before PeaceHealth began its direct examination of Murray, PeaceHealth assured Judge Uhrig that Murray would not testify that Ms. Dickerson was not an obstetrics patient. 03/11/14 RP 106:8. Judge Uhrig informed PeaceHealth that such testimony was prohibited. 03/11/14 RP 106:12-14. In PeaceHealth's offer of proof, Dr. Murray stated that Ms. Dickerson was an obstetrics patient on February 6 and that she went to the PeaceHealth Childbirth Center because she was concerned about the health of her unborn twins. 03/11/14 RP 109:13-110:12.

Notwithstanding the offer of proof and PeaceHealth's admission that Ms. Dickerson was an obstetrics patient when she visited PeaceHealth on February 6, Dr. Murray told the jury that while Nurse Wahl was treating Ms. Dickerson, she was not acting as an

obstetrics nurse, but as an emergency room "triage nurse."  
03/11/14 RP 205:8-19.

On direct, Dr. Wenstrom gave the same prohibited testimony that Ms. Dickerson was not an obstetrics patient on February 6, because Ms. Dickerson's visit to the PeaceHealth Childbirth Center was an "emergency room" visit. 03/17/14 RP 43:15-25. Dr. Wenstrom further volunteered on cross-examination that Ms. Dickerson was not an obstetrics patient. 03/17/14 RP 71:1-72:11.

**4. PeaceHealth violated the Court's Order on MIL 57, which prohibited PeaceHealth from offering any "expert" testimony or argument, inference or suggestion, that Julia Dickerson's reason for seeking healthcare on February 6, 2008 was unrelated to her concerns for the health of her unborn twins.**

In the offer of proof, Dr. Murray also told Judge Uhrig that, in her opinion, Ms. Dickerson went to PeaceHealth on February 6 because of "concerns about her pregnancy and her twins." 03/11/14 RP 110:4-12. On direct, however, she gave the contradictory opinion that the reason for the visit was Ms. Dickerson's concern about her thyroid. 03/11/14 RP 145:3-10; *Id.* 149:10-25.

On direct, Dr. Wenstrom admitted a NST is usually ordered by a doctor when one is worried about the status of an unborn child.

03/17/14 P 27:7-28:7. Dr. Wenstrom then gave the prohibited testimony that a NST was not necessary because Ms. Dickerson's "complaints" were unrelated to her concerns for the well-being of her unborn children. 03/17/14 RP 135:6-12. She also gave the prohibited testimony that Ms. Dickerson's presenting problem was related to her thyroid and not to her unborn children. 03/17/14 RP 151:4-7. Dr. Wenstrom advanced this prohibited "opinion" testimony, even after she admitted on cross-examination that Ms. Dickerson was likely either stage-one or stage-two TTTS on February 6. 03/17/14 RP 114-115. She further admitted that a mother can go from stage-two to stage-three TTTS quite rapidly. 03/17/14 146:6.

5. **PeaceHealth violated the Court's Order on MIL 58, which prohibited PeaceHealth from offering any "expert" testimony or argument, inference or suggestion, that PeaceHealth's safety policies and procedures were not applicable to the care it provided to Julia Dickerson and her unborn twins on February 6, 2008.**

The Dickersons informed Judge Uhrig that Dr. Murray had testified in her deposition that PeaceHealth's safety policies and procedures did not apply to the February 6 care provided to Ms. Dickerson and her unborn twins. 03/11/14 RP 106:22-107:2.

PeaceHealth represented to Judge Uhrig that PeaceHealth was “not going to have her testify that they were not applicable.” *Id.* 107:8. Notwithstanding that representation, PeaceHealth caused Dr. Murray to mischaracterize the safety policies and procedures as “guidelines” or “parameters to consider” only when the patient was in labor and thus inapplicable to Ms. Dickerson’s February 6 visit. 03/11/14 RP 152:23-25. Similarly, Dr. Wenstrom testified that the policy requiring a 20-minute continuous heartbeat tracing on both babies did not apply to Ms. Dickerson because a nurse would have to “luck out” to get a 20-minute tracing. 03/17/14 RP 161:12-15.

After these repeated violations, and before beginning cross-examination, the Dickersons asked for an additional \$100,000 in terms and reminded the court that it had not yet resolved the pending motions related to the ongoing violations of the Orders, including the one relating to Dr. Mora’s testimony. 03/11/14 RP 161:12-15. The Dickersons also advised Judge Uhrig that PeaceHealth’s foundation for Dr. Murray’s and Dr. Wenstrom’s opinions rested upon testimony given in violation of three motions in limine. 03/17/14 RP 163:15. Judge Uhrig expressed his concern regarding Dr. Wenstrom’s testimony and said the testimony was

prohibited by an order in limine. 03/17/14 161:18; *Id.* 162:6. The Dickersons left to Judge Uhrig's discretion the appropriate corrective action: awarding monetary sanctions, striking the testimony, or giving curative instructions. 03/17/14 RP 164:7-20.

**6. PeaceHealth violated the Court's Order on MIL 7, prohibiting PeaceHealth from eliciting testimony that the Dickersons' witnesses were lying.**

MIL 7 prohibited PeaceHealth from eliciting testimony that the Dickersons' witnesses were lying. CP 509. The Dickersons presented expert testimony that Jessica Dickerson will likely require constant supervision for the rest of her life. 03/05/14 RP 68:17-69:11; *Id.* 208:11-20; 03/11/14 RP 29:13-24; *Id.* 32-33; *Id.* 56; 03/12/14 RP 16:12-18; Ex. 117. PeaceHealth offered the contradictory opinion of Dr. Sells, asking him whether safety could be a reason to conclude that Jessica Dickerson required 24 hour continuous care. In response, Dr. Sells answered: "I certainly wouldn't." Then Dr. Sells volunteered that "Anybody who . . . (testified) that because of her lack of awareness . . . that she needs to have somebody take care of her for the rest of her life is preposterous." 03/18/14 RP 11-19.

Again, the Dickersons asked for monetary sanctions against PeaceHealth for violation of the Order in Limine. CP 124; CP 509; 03/18/14 RP 155:22-156:15. Judge Uhrig said he would address this violation after the break. 03/18/14 RP 156. Dr. Sells disclosed that PeaceHealth did not make him aware of Judge Uhrig's Orders in Limine before his testimony. 03/18/14 RP 157:4-20. PeaceHealth admitted it had not instructed Dr. Sells on Judge Uhrig's Orders. *Id.* 157:24.

At this point, weeks into the trial, Judge Uhrig and counsel for the Dickersons had the following exchange:

THE COURT: Well, um, I don't think there is much we can do without a transcript, without some opportunity for further argument. I do know and often say that words mean things and **we have to look at the words that this witness or any other witness used and to determine, um, perhaps on a serial basis whether or not there was a violation of the motions in limine.** But we can't do it right now. [Emphasis added.]

MR. SHEPHERD: I appreciate that.

THE COURT: But you have notified us of your, I guess your objection and your request for sanctions or other relief, whatever that might be, and I think all we can do right now is bring our jury back in.

MR. SHEPHERD: Would the court allow me one comment on the record?

THE COURT: Sure.

MR. SHEPHERD: There is a third time there hasn't been an admission. They haven't even talked to that witnesses, not even an apology. There is an argument that it didn't occur. It's as though they don't care the time we spent on the motions in limine and what the court ordered. It's very, very disturbing to me.

03/18/14 RP 158:16-159:14. PeaceHealth's counsel admitted his fault for Dr. Sell's improper testimony. *Id.* 160:19-22.

- 7. PeaceHealth violated the Court's Order on MIL 25, which prohibited PeaceHealth from offering evidence or argument, inference or suggestion that the Dickersons' request for compensation or money judgment should be compared to "winning the lottery" or a "windfall" or other similar charged comparisons.**

During closing PeaceHealth argued:

Really in the context of this case because we know what happened with the other litigation, he is the one that told you about the settlement. What he is really saying is no, no more. No, no more.

03/25/14 RP 121:5-8. Regarding this improper closing argument, the trial court determined (CP 1461):

The reference was to 'no more money,' which the clear implication that plaintiffs had already been adequately and fully compensated financially and the further implication that the plaintiffs' receipt of money has to stop again 'here and now,' as it were.

**8. PeaceHealth violated the Court's Order on PeaceHealth's MIL 6, which prohibited counsel from arguing the golden rule.**

PeaceHealth moved for an Order prohibiting Dickersons' counsel from arguing the golden rule. CP 62; CP 73. Judge Uhrig granted PeaceHealth's motion, but he imposed the prohibition on PeaceHealth as well. CP 525. In closing, PeaceHealth violated the spirit and intent of Judge Uhrig's Order by arguing:

The first thing is we are talking real dollars. Big numbers are thrown around, um, thinking in your own life how long it takes to save money.

03/25/14 RP 116:24-117:1.

Regarding this improper closing argument the trial court wrote:

[T]he focus was not on the jury or on the jury evaluating how what amount of money would fairly compensate plaintiff or on what receipt of that money would mean to them (the jury), but rather focused on emphasizing the need to award no money whatsoever, and this Court believes that the only logical inference based upon defense counsel's actual words and inflection was to ask the jury to consider how much these 'real dollars' would impact the jury if the jurors were in the position of the defendants and required to pay it out of their own pockets (by asking them to consider "how long it takes to save money").

CP 1461.

In sum, PeaceHealth violated numerous Orders in Limine – orders that were so clear that PeaceHealth does not challenge any of them, but rather tries to argue around them. The trial court was plainly in the best position to make this decision. The Court should affirm.

**C. PeaceHealth engaged in misconduct when it repeatedly violated the trial court’s unchallenged Orders in Limine.**

As noted, PeaceHealth does not argue that the trial court erred in entering any Order in Limine. Instead, PeaceHealth initially argues that its violations were “alleged” violations, which were not actual violations of any Order. *Opening Brief*, 1. This Court should reject that argument because Judge Uhrig made an express finding that “the jury’s determination was irreparably tainted by the cumulative impact of repeated violation of Orders in Limine.” CP 1461-62.

PeaceHealth then argues that Judge Uhrig’s Order granting a new trial is error because PeaceHealth’s misconduct was “minor” or “technical.” *Opening Brief*, 2. PeaceHealth offers no authority to support its novel argument. Argument unsupported by citation to any authority does not merit judicial consideration. RAP 10.3(a)(6). *State v. Fedorov*, 181 Wn.App. 187, 193, 324 P.3d 784 (Div. 1,

2014); *Joy v. Labor & Indus.*, 170 Wn.App. 614, 629, 285 P.3d 187 (Div. 2, 2012).

A violation of an order in limine is misconduct. *Teter v. Deck*, 174 Wn.2d at 224.

'The judge sees the witnesses, hears the testimony, and has a special perspective of the relationship between the evidence and the verdict which cannot be recreated by a reviewing court from the printed record. For this reason he is accorded broad discretion in granting a new trial.

\* \* \*

'Due to his unique position, the trial judge has become the primary buffer against unjust verdicts. He performs an indispensable function without which our system of justice could not hold out the promise of (a) uniform application of the law.' *Reeves v. Markel*, 119 Ariz. 159, 163, 579 P.2d 1382, 1386 (1978).

*Taylor v. Southern Pac. Transp. Co.*, 130 Ariz. 516, 521, 637 P.2d 726 (Ariz. 1981). Repeated violations of an order in limine is misconduct requiring sanctions to ensure that the misconduct will not continue. *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 352 (9<sup>th</sup> Cir., Cal. 1995).

**D. This Court should reject PeaceHealth's technical (and technically incorrect) arguments and affirm the New Trial Order.**

Civil Rule 59 allows the trial court to grant a motion for a new trial based upon a party's misconduct. CR 59(a)(2). PeaceHealth argues that Judge Uhrig's new trial order included only two specific

reasons: Dr. Mora's prohibited testimony regarding Nurse Wahl, and PeaceHealth's closing argument regarding the golden rule. PeaceHealth's argument is flawed, however, because it ignores the clear language of Judge Uhrig's Order:

Plaintiff has detailed the various grounds for their motion quite thoroughly and I concur with plaintiff's analysis and summary of the probable impact upon the jury, but I think it necessary to comment briefly upon two of the matters that seemed to me to be among the most striking.

CP 1461. The clear meaning of this sentence is that Judge Uhrig chose to comment only on two of PeaceHealth's violations.

Judge Uhrig's Order also incorporated what he described as Dickersons' "detailed" grounds for their new trial and sanctions motions and he concurred with Dickersons' analysis. CP 1461; CP 979; CP 986; CP 1008; CP 1082. Judge Uhrig concluded that PeaceHealth's misconduct allowed the jury to "repeatedly hear matters which were not appropriate for them to consider." CP 1460. Further, Judge Uhrig concluded that it would defy common sense to expect a jury to "disregard" what they repeatedly heard or to expect that any court instruction could cure PeaceHealth's misconduct. CP 1460. Finally, Judge Uhrig articulated that the "cumulative" and

“repeated” violations of his Orders in Limine deprived the Dickersons of any chance at a fair trial. CP 1456, 1460.

A new trial may be granted based on the prejudicial misconduct of counsel if the conduct complained of constitutes misconduct, not mere aggressive advocacy, and the misconduct is prejudicial in the context of the entire record. . . . (The trial court is) in the best position to evaluate the impact of counsel’s misconduct.

*Kuhn v. Schnall*, 155 Wn.App. 560, 576-77, 228 P.3d 828 (Div. 1, 2010) *rev. denied*, 169 Wn.2d 1024, 238 P.3d 503 (2010).

Judge Uhrig specifically concluded that it defies logic to believe that repeated curative instructions could un-ring the bells PeaceHealth was never supposed to ring. CP 1460.

A new trial may be granted based on prejudicial misconduct of counsel if the moving party establishes that the conduct complained of constitutes misconduct, as distinct from mere aggressive advocacy, and that the misconduct is prejudicial in the context of the entire record. *Aluminum Co. of Am. v. Aetna Cas. & Surety Co.*, 140 Wash.2d 517, 539, 998 P.2d 856 (2000).

One type of misconduct that may justify a new trial is unfairly and improperly exposing the jury to inadmissible evidence. *Teter v. Deck*, 174 Wash.2d 207, 223–25, 274 P.3d 336 (2012). . . .

The trial court is in the best position to most effectively determine if counsel’s misconduct prejudiced a party’s right to a fair trial. *Teter*, 174 Wn. 2d at 223.

*Miller v. Kenny*, 180 Wn.App. 772, 814-15, 325 P.3d 278 (Div. 1, 2014).

Misconduct can be so flagrant that instructions cannot cure it. *Teter*, 174 Wn.2d at 225. The trial court abuses its discretion only if it relies on unsupported facts, takes a view no reasonable person would take, or applies the wrong legal standard. *Mayer*, 156 Wn.2d at 684. This Court should not substitute its judgment for Judge Uhrig's judgment regarding the scope and effect of PeaceHealth's misconduct. *Teter v. Deck*, 174 Wn.2d at 226.

Ordering a new trial cannot be an abuse of discretion when:

(1) the conduct complained of is misconduct, (2) the misconduct is prejudicial, (3) the moving party objected to the misconduct at trial, and (4) the misconduct was not cured by the court's instructions.

*Teter v. Deck*, 174 Wn.2d at 226. Each time PeaceHealth violated one of Judge Uhrig's Orders in Limine, the Dickersons objected. Judge Uhrig's Order granting a new trial contained his express findings that PeaceHealth's misconduct prejudiced the Dickersons and that his instructions did not cure the misconduct. Because all four prongs of the test are met, this Court should affirm Judge Uhrig's decision ordering a new trial.

**E. The Court should affirm the Sanctions Order, which is well supported by the record.**

PeaceHealth does not argue that the monetary sanctions that Judge Uhrig imposed are excessive. PeaceHealth has not suggested a different sanction that might discourage similar misconduct on PeaceHealth's part at a second trial. PeaceHealth only argues that before Judge Uhrig can impose sanctions he must make sufficient factual findings. *Opening Brief*, 49.

Monetary sanctions are left to the trial court's discretion to fashion "appropriate" sanctions, which exercise of discretion is given wide latitude. *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 355, 858 P.2d 1054 (1993). "The purposes of sanctions orders are to deter, to punish, to compensate and to educate." *Physicians Ins.* 122 Wn.2d. at 356. After PeaceHealth violated Judge Uhrig's prohibition against attributing fault to Ms. Dickerson during its opening statement, Judge Uhrig warned PeaceHealth that sanctions could include the costs of all witnesses. 03/03/14 RP 23:3-11. PeaceHealth chose to ignore this warning.

Dickersons' trial costs exceeded \$140,000. See Appendix C attached hereto. Dec. of Shepherd Re: Expert Fees and Costs.

Almost half of those costs, \$58,000.00, were the trial costs of expert witnesses. *Id.*

Trial courts have the inherent power to impose sanctions on parties and attorneys for "discovery violations, contempt, and the government's wrongful conduct." *Allied Prop. and Cas. Ins. Co. v. Good*, 919 N.E.2d 144, 153 (Ind.Ct.App.2009) (holding that courts have the inherent power to sanction parties for intentionally violating motions in limine and causing a mistrial), *trans. denied*. The purpose of this power is to protect the integrity of the judicial system and to secure compliance with the court's rules and orders. *Id.* at 154.

*Nationstar Mortg., LLC v. Curatolo*, 990 N.E.2d 491, 495 (Ind.App., 2013).

The sanction cannot be minimal. Courts should craft the sanction to deter future misconduct. Judge Uhrig acted within his discretion in considering repeated violations of his Orders from opening statement through closing argument. *Physicians*, 122 Wn.2d at 365.

### **CONCLUSION**

For the reasons stated above, the Court should affirm the trial court.

DATED this 4<sup>th</sup> day of June 2015.

SHEPHERD AND ABBOTT



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### DECLARATION OF SERVICE

I, Jen Petersen, declare that on June 4, 2015, I caused to be served a copy of the foregoing **Amended Respondents' Brief**, in the above matter, on the following person, at the following address, in the manner described:

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Fain Anderson Vanderhoef ( ) Messenger Service  
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 4<sup>th</sup> day of June, at Bellingham, Washington.

  
\_\_\_\_\_  
Jen Petersen

# APPENDIX A

## **RAP 10.3(a)(6)**

### CONTENT OF BRIEF

(a) Brief of Appellant or Petitioner. The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated:

(6) Argument. The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. The argument may be preceded by a summary. The court ordinarily encourages a concise statement of the standard of review as to each issue.

## APPENDIX B

## **CR 59(a)(2)**

### **NEW TRIAL, RECONSIDERATION, AND AMENDMENT OF JUDGMENTS**

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from the juror's own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors...

## APPENDIX C



1 I, Heather C. Shepherd, declare under penalty of perjury under the laws of  
2 the state of Washington as follows:

3  
4 01. I am over the age of 18, am competent to testify, and make this  
5 declaration based upon personal knowledge.

6 02. I am a Rule 9 Legal Intern at Plaintiffs' law firm, and at all times  
7 during this litigation was either a paralegal or Rule 9 Legal Intern. In addition to  
8 my paralegal duties, I am responsible for managing the firm's billing.

9 03. I hold a Bachelor of Arts degree, a Masters in Business  
10 Administration, and am more than two-thirds through the Rule 6 Law Clerk  
11 Program.

12 04. I was personally responsible for booking and overseeing all expert  
13 witness travel, accommodations, and other costs.

14 05. Plaintiffs incurred more than \$140,000.00 in costs in this litigation  
15 alone. The costs outlined below in this declaration were incurred only in relation  
16 to trial, pursuant to the Court's June 10, 2014, Order.

17 06. Five experts retained by Plaintiffs attended and testified at trial:  
18 Anthony Johnson, D.O.; Joanna McGrath, MSN; Gregory Yim, M.D.; Lowell  
19 Bassett, Ph.D.; and, John Fontaine, M.A.

20 07. Plaintiffs incurred the following costs and fees related to Dr.  
21 Johnson's attendance and testimony at trial:

- 22 • \$8,950.00 in preparation, travel time, and testimony
- 23 • \$385.43 miscellaneous expenses (car rental and airport parking)
- 24 • \$1,770.51 in airfare and airline fees
- 25 • \$259.04 in lodging

1           08. Plaintiffs incurred the following costs and fees related to Ms.  
2 McGrath's attendance and testimony at trial:

- 3           • \$8,500.00 in preparation, travel time, and testimony
- 4           • \$1,233.00 in airfare
- 5           • \$521.11 in lodging
- 6           • \$132.46 in rental car

7           09. Plaintiffs incurred the following costs and fees related to Dr. Yim's  
8 attendance and testimony at trial:

- 9           • \$17,408.38 in preparation, travel time, and testimony
- 10          • \$348.73 in miscellaneous travel expenses
- 11          • \$1,148.70 in airfare
- 12          • \$376.36 in lodging

13          10. Plaintiffs incurred the following costs and fees related to Dr. Bassett's  
14 attendance and testimony at trial:

- 15          • \$10,762.50 in preparation, travel time, and testimony
- 16          • \$217.82 in lodging and expenses

17          11. Plaintiffs incurred the following costs and fees related to Mr.  
18 Fountaine's attendance at trial:

- 19          • \$5,989.90 in preparation, travel time, and testimony
- 20          • \$302.40 in mileage expenses

21          12. Plaintiffs incurred additional costs and expenses at trial for  
22 treating health care provider testimony, both videotaped and live, experts who  
23 did not testify, and lay witnesses, however those amounts are not included in  
24 this declaration.

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13. Plaintiffs incurred additional fees and costs from the five above-identified expert witnesses for depositions, discovery and other pre-trial matters, however those amounts are not included in this declaration.

14. The costs and fees incurred by Plaintiffs related to expert testimony at trial total \$58,306.34.

Dated this 25<sup>th</sup> day of June 2014, at Bellingham, WA.

  
\_\_\_\_\_  
Heather C. Shepherd