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Supreme Court No. 93549-1

Court of Appeals Case No. 73125-4-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Plaintiff-Petitioner,

v.

ANDELLE TENG, MD,
and CASCADE SURGERY ASSOCIATES, PLLC
d/b/a CASCADE ORTHOPAEDICS,

Defendants-Respondents.

DEFENDANTS/RESPONDENTS' RESPONSE TO PETITION FOR REVIEW

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 ORIGINAL

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I. INTRODUCTION

There is no conflict between the Court of Appeals' opinion and *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012). In deciding that the trial court erred in granting the motion for new trial, the Court of Appeals had access to Appellants' extensive corresponding brief, which hyperlinked each factual assertion in each brief to the actual record. As a result, the opinion is fact intensive, but accurate. Applying the appropriate deference, the Court of Appeals' opinion merely identifies the multiple errors which fatally flaw the trial court's order granting a new trial.

These factual errors originated with the pleadings filed by the Petitioners' (hereafter "the Clarks"). Rather than acknowledging their errors, the Clarks insinuate that the same Court that was overruled in *Teter* somehow had a motive to issue a published decision which directly conflicts with *Teter*. This argument is without merit. A trial court abuses its discretion when its factual findings are not supported by the record. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). Here, by adopting verbatim the Clarks' incorrect statement of the facts, the trial court was misled and incorrectly concluded that there was a doubt as to whether the Clarks received a fair trial. The Court of Appeals rectified that error. The Court of Appeals' decision does not conflict with *Teter* and therefore RAP 13.4(b) (1) does not support review.

Nor do the other criteria for review apply. The Clarks' Petition raises no "significant question of law under the Constitution of the State of Washington or the United States. . . ." RAP 13.4(b) (3) and this unique dispute does not implicate an "issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b) (4). For these reasons and those set out below, the Petition for Review should be summarily denied.

II. COUNTER-STATEMENT OF ISSUES

1. In accordance with *Teter*, did the Court of Appeals apply the correct standard of review to determine if the record supported the trial court's order granting a new trial?

2. Have the Clarks demonstrated that the Court of Appeals decision raises issues of "substantial public interest"?

III. CORRECTIONS TO FACTUAL STATEMENT

A. The Court of Appeals correctly summarized the basic facts of this case.

On page two of its opinion, the Court of Appeals succinctly sets out the basic facts of this case:

In 2008, Thomas Clark began to have low back and leg pain. On February 1, 2010, Dr. Andelle Teng operated on Clark's low back. On February 18, Clark had a magnetic resonance imaging test (MRI). Dr. Teng reviewed the MRI and told Clark that he did not have a cerebrospinal fluid (CSF) leak. Clark sought a second opinion from Dr. Wohns. Dr. Wohns operated twice on Clark's low back. An MRI after Dr. Wohns's surgeries

revealed a “large fluid collection” in his low back. Clark had a fourth surgery at Harborview by a resident physician to repair a CSF leak.

Slip Opinion at 2. With this basic framework of events¹ in mind, it is important to highlight some of the more obvious errors and omissions in the Clarks’ Petition for Review.

B. The issue of when Mr. Clark developed the CSF was the central issue in the case and hotly contested. The facts offered by the Clarks ignore the evidence presented by the defense and the actual medical records which identified Dr. Wohns’ surgeries, rather than Dr. Teng’s, as the probable source of the CSF leak.

The Clarks first assert that a radiologist concluded that Mr. Clark had a “collection of cerebrospinal fluid (which) was compressing the nerves.” Petition for Review at 2 (hereafter “PR”). This statement is allegedly supported by the transcript at page 205. In fact, that citation is to the Clarks’ expert, Dr. Richard Wohns, discussing the radiologist’s report. The *actual* report refers to a “fluid collection within the surgical bed.” Ex. 1, p. 3. It then goes on to say that “within the early post-operative time period, a small fluid collection may be within expected limits.

¹ It is impossible to identify all of the factual misstatements contained in the Petition for Review and/or the Clarks’ original brief. It is important to note at the outset, however, that many of the Clarks’ citations to the “record” lead to either the Clarks’ own briefing on the issue, to argument, or to the testimony of their experts. A more complete statement of the facts of the case and procedure are set out at pages 3-28 of the Appellants’ Opening Brief to the Court of Appeals. This Court may also find useful the complete list of objections and allegations of misconduct identified as Appendices A and B to the Appellants’ Reply Brief, which are also appended to this document as Appendices A and B.

Alternatively, this could be related to a contained CSF leak from an occult tear.” *Id.* (emphasis added). The radiologist then discussed his findings with Dr. Teng and concludes: “Unclear if this could represent resolving hematoma and blood with Gelfoam/flow seal material.” *Id.* The radiologist² recommended follow-up and consideration of a follow-up MRI to “evaluate for interval changes or resolution.” *Id.*

The misstatement regarding the radiologist’s report allows the Clarks to assert that Dr. Teng caused and then ignored a radiological finding of a CSF leak. This suggestion is without merit. As established at trial, Dr. Teng did not cause the CSF leak.³ Dr. Teng chose not to recommend immediate action because there was no clear finding of a CSF leak, nor was there a correlation between clinical findings and the suspicion that the fluid collection was a CSF.⁴

On page three of their Petition, the Clarks discuss Dr. Wohns’ testimony regarding his surgery. This summary ignores the remainder of the evidence in the case and the fact that Dr. Wohns’ testimony conflicted

² The defense offered the only testimony from a radiologist, neuroradiologist Dr. Paul Kim. The Clarks did not bring the radiologist to court to either explain his report or rebut Dr. Kim’s interpretation of it.

³ The leak was later located at a level at which only Dr. Wohns operated. 7 RP 929; Ex. 175.

⁴ At trial, Dr. Teng explained that he recalled the surgery, had not observed a CSF leak, and Mr. Clark did not have the postural headaches that are the red flags for leaks. Ex. 1, p. 1; 10 RP 1284-87. Unlike a person with a CSF leak who feels worse when standing, Mr. Clark reported that whenever he stood, he felt better. 10 RP 1287.

with the objective evidence. The full list of inconsistencies are set out at pages 13-16 of the Appellants' Opening Brief.

Briefly, the defense negated Dr. Wohns' testimony primarily through the testimony of Dr. Kim. Dr. Paul Kim is the Director of Spinal Imaging and Intervention within the Radiology Department at the University of Southern California (USC) Medical School and is board certified in diagnostic radiology with a Certificate of Added Qualification in neuroradiology. 7 RP 864; 866.

Using slides from presentations prepared for courses offered to his radiology fellows, Dr. Kim compared the teaching slides to the MRI Dr. Wohns asserted showed a poor decompression and a CSF leak. Dr. Kim demonstrated that Mr. Clark's first post-operative MRI showed a normal post-operative spine. 7 RP 871-72; Ex. 167.

Dr. Kim next directly rebutted Dr. Wohns' testimony regarding the "mess" he claimed to have found during his surgery. Dr. Kim testified that he did not know what Dr. Wohns was referring to as an "epidural mass because I don't see one. *There isn't one on the MRI.*" 7 RP 958, lines 11-12 (emphasis added). He testified there was no radiological evidence of an inadequate laminectomy. 7 RP 930. He stated there was

no evidence of a significant bone fragment. 7 RP 930.⁵ He concluded there was no evidence of any abnormality he could attribute to the surgery of Dr. Teng. 7 RP 930.

Taking the jury through the actual images, Dr. Kim demonstrated that the CSF leak was located in the dura at a level where *only* Dr. Wohns had operated. 7 RP 929; Ex. 175.

C. The Clarks' procedural statement omits important events and misrepresents what actually occurred at trial. These errors were then carried over into the trial court's order granting a new trial.

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

Using the previously approved PowerPoint, defense counsel walked the jury through the timing of medical events. CP 578-580. These slides illustrated sequential MRI images, starting with the preoperative MRI through the time the CSF leak was surgically repaired at Harborview

⁵ Dr. Bhatia, the defense spine surgery expert, opined that it would be extremely difficult to leave a bone fragment because the tool used to cut into the bone, required the operator to remove the bone fragment before taking the next "bite" with the tool. 8 RP 1049-50.

and showed the evolution of the CSF leak following Dr. Wohns' surgeries.

Id.

At the conclusion of the openings, *defense* counsel asked the court for permission to be heard outside the presence of the jury and immediately ⁶ registered objections to the Clarks' opening. The Clarks raised no objections. 2 RP 157-58.

The trial court did not find that the defense violated the order during openings. In fact, the trial court made no findings on this topic until *after the defense verdict*. This is established through a review of Appendix A, which is a complete table of *all* objections raised during the trial. In the corresponding brief available to the Court of Appeals, these objections were hyperlinked to the transcript. A review of that table shows that the only two times the trial court even discussed violations of the motions in limine regarding nonparty fault occurred during argument on the Clarks' claimed violations regarding the defense openings⁷ and when Mr. Wampold asked permission to explore standard of care issues

⁶ At page five of the petition, the Clarks correctly state that they filed a motion the day *after* opening raising objections. At page 12, they incorrectly argue "Plaintiffs objected to defense counsel's misconduct immediately after opening statements." In fact, the passage at 2 RP 157-58 reveals that only the defense raised "immediate" objections. The Clarks thought about it overnight and decided in retrospect that there was misconduct. ⁷ 3 RP 256-261. The trial court simply noted at this point that he had not done anything about the defense allegation of misconduct during openings and "I'm not doing anything on yours." 3 RP 261.

with a defense witness.⁸ After this latter exchange, the Clarks next alleged new violations of the nonparty fault issues *after* the jury returned a verdict in favor of the defense.

Admittedly, the trial court did make findings of misconduct for three alleged violations of the motion in limine regarding medical conditions “above the waist.” The Clarks spent a large portion of their Court of Appeals brief and three pages of their Petition discussing this issue. The Court of Appeals correctly noted that the allegation concerning the violation during the defense opening was not a violation. *Slip Opinion at 14-15*. And, the Clarks fail to explain why any of the references to other medical conditions caused them prejudice when these exact medical conditions were identified in the Clarks’ own exhibits. For instance, exhibit one, page 15, paragraph one, told the jury that Dr. Teng treated Mr. Clark for his cervical spine issues. “Patient is a 49 year-old male I have seen in the past *for cervical problems.*” Ex. 1, p. 15 (emphasis added).

The Clarks’ exhibit three refers to the other medical conditions that were subject to the motion in limine, including “enlarged heart, heart murmur, irregular heartbeat, pacemaker, palpitation, phlebitis, rheumatic

⁸ 9 RP 1176-77. The trial court simply ruled that Mr. Wampold could cross-examine about standard of care noting: “Without going there directly, I think indirectly I have been, I agree with that. 9 RP 1177.

fever, tires easily, varicose veins.”⁹ Ex. 3, p. 9. The record specifically states: “Complains of sleep apnea, CPAP machine.” *Id.*

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals’ opinion appropriately applies the deference to the trial court required by *Teter*. Unlike *Teter*, the trial court’s order was not supported by the record. The trial court thus abused its discretion in granting the new trial.

The Clarks argue that the Court of Appeals opinion is contrary to *Teter* because the opinion fails to give deference to the trial court’s better ability to observe what occurred at trial and pass judgment on its significance. PR at 9-10. They argue that the Court of Appeals incorrectly reversed based “on nonexistent ‘inaccuracies and inconsistencies.’” PR at 9.

The question of whether or not there were “inaccuracies and inconsistencies” in the trial court’s rulings is at the heart of this dispute. The Court of Appeals had the benefit of not only the corresponding brief, but also a color-coded copy of the actual order for new trial to assist it in analyzing and correcting the trial court’s errors.¹⁰

⁹ The Clarks also did not redact personal identifiers on this and other exhibits. *See, Ex. 3*, which contains Mr. Clark’s date of birth on virtually every page.

¹⁰ This handout appears as Appendix C to this Response.

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

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

CP 473, lines 17-25 - CP 474, lines 1-3 (emphasis in original). This entire section of the order, *including the quotes and emphasis*, is taken verbatim from the Clarks' Motion Re: Defense Violations of Motions in Limine During Opening Statement. CP 244, line 23 – CP 245, line 7.

Unfortunately, the trial court's reliance upon the Clarks' brief generated serious factual errors in its order for new trial.

The Court of Appeals recognized these factual errors. Citing *Gildon v. Simon Property Grp., Inc.*, 158 Wn.2d 483, 494, 145 P.3d 72 (2014), the Court of Appeals' opinion properly states that a trial court

abuses its discretion when it relies on unsupported facts. *Slip Opinion at 10, n. 35.*

Without acknowledging that their incorrect briefing generated the trial court's errors, the Clarks respond to the factual misstatement by suggesting that the trial court "*paraphrased* defense counsel's improper argument." PR at 10 (emphasis is original). They then conclude "that is hardly a basis to find error, let alone a manifest abuse of discretion." *Id.*

In fact, the Clarks' brief, as imported into the trial court's final order, contains quotation marks suggesting reliance on specific statements, not paraphrases. Moreover, the Clarks attempt to change the impact of the factual errors by *removing* the added emphasis that was contained in their original briefing and imported wholesale into the trial court's order. The actual order states: "*this* is what Dr. Wohns did to him" and "the result of Dr. Wohns' care is *this*." CP 473; Appendix C. In contrast, the Court of Appeals opinion analyzes the order accurately reflecting its true content. *Slip Opinion at 12.*

The difference between the emphasized version and the version without emphasis is substantial. By italicizing "*this*" in both "quotations," the trial court is clearly asserting that the defense focus was on placing blame on Dr. Wohns. Placed in proper context, as the Court of Appeals did, there is no such focus. Instead, the actual statements, combined with

the pre-approved PowerPoint shows the changes between the MRIs, emphasizes the temporal, causative link, and avoids a discussion of fault.

The Clarks next claim that the decision improperly imposes an obligation to object at the time of the alleged violation. They begin that argument with the statement: “Plaintiffs objected to defense misconduct immediately after opening statements.” PR at 12. As noted above, the Clarks did not object immediately. Instead they lodged their objection the next day. Their excuse, that they did not object because it would leave the jury with the wrong impression, ignores the reality that there was time to do so on the day in question without any danger of influencing the jury.

The Clarks then return to their original complaint about the three alleged violations regarding “above the waist” medical conditions. They argue that the “finding is not affected by isolated references to Mr. Clark’s medical history in two of the many multi-page exhibits that were admitted at trial.” PR at 13. This argument is disingenuous. These references are contained in some of the most important medical records before the jury-- the first page of Dr. Teng’s intake record and Dr. Wohns’ follow-up notes. Ex. 1, p. 15; Ex. 3, p. 9. One cannot have it both ways. On one hand, they claim that the single reference to Mr. Clark’s upper spine during opening, the ambiguous reference to when Dr. Teng met Mr. Clark, and the brief discussion of Dr. Teng’s hospital progress note prejudiced the jury. They

then maintain that important exhibits discussing the critical dates had no impact even though they set out the same information which supposedly caused prejudice.

The Clarks' argument conflicts with the purpose of CR 59. "Under CR 59 (a)(2) a trial court may grant a new trial where misconduct *materially* affects the substantial rights of the losing party." *Teter*, 174 Wn.2d at 222 (emphasis added). In *Teter*, the Supreme Court affirmed the order granting a new trial because "defense counsel repeatedly violated the evidence rules" by making speaking objections and by placing *inadmissible* evidence before the jury. *Teter*, 174 Wn.2d at 223 (emphasis added). Where the jury has the same evidence before it, offered by the plaintiffs, there is no possibility that these alleged violations materially affected the Clarks' right to a fair trial.

The Clarks also argue that the Court of Appeals decision conflicts with *Teter* because there were many examples of an alleged "nonparty fault theme." They draw an analogy to *Teter*, by trying to equate the juror's comment that the juror felt like "strangling" a couple of lawyers to a juror question that was not asked in this case. They argue: "after hearing the testimony and arguments referenced above, one of the jurors asked: "have you thought of bringing a lawsuit against Dr. Wohns?" 12 RP 1603. The Clarks then conclude that the Court of Appeals ignored this

juror question “which provides strong support for the trial court’s extensive findings of misconduct and prejudice.” PR at 17.

With due respect to opposing counsel, this is yet another example of a flagrant disregard for the actual record. The juror question at issue was submitted following Mr. Clark’s testimony. Mr. Clark’s testimony concludes at 6 RP 788.¹¹ Of the 13 examples of this nonparty “theme” offered on pages 14-15 of the Petition, 12 of them occur after Mr. Clark’s testimony. It is thus impossible for any of those 12 examples to reflect prejudice demonstrated by the earlier juror’s question. The timing of the question precludes the conclusion that it provided “strong support for the trial court’s extensive findings of misconduct and prejudice.” PR at 17.

This approach to advocacy is similar to that which the Clarks’ employed in their Court of Appeals’ Response Brief (hereafter “RB”).

On page 31 of that submission the Clarks argue:

After this, the trial court correctly found that defense counsel had clearly argued, contrary to its order in limine regarding non-party fault, that Dr. Wohns had acted improperly: “*I think you would have had to have been asleep to not get that clear inference.*” 11 RP 1570-71.

¹¹ The citations provided in the Petition are to argument of counsel in their briefing and at oral argument on the motion for new trial. The actual juror question is part of the superior court record, but not contained in the Clerk’s Papers as it was not referred to by any party. If needed, the record can be supplemented to include this document if there is any dispute.

RB 31 (emphasis added). By placing the quotation immediately following the statement that the “trial court correctly found that defense counsel had violated the motion in limine” the authors implied that the quote is the *judge’s* criticism of defense counsel for misconduct relating to the order on nonparty fault. It was not. The Clarks appropriated this quote from the trial court’s ruling on the *defense* motion for mistrial:

THE COURT: All right. In terms of Dr. Wohns, the clear inference of the testimony presented by the defense through their experts and through Dr. Teng was that Dr. Wohns was inaccurate and not forthright in his testimony and what he said to the jury and what he told people he found during the course of his first surgery.

I think you would have had to have been asleep to not get that clear inference. And so I don't like the word "lying," but I honestly believe that that is a conclusion that would have been reasonable for the jurors to make, given the information and evidence that had been presented to them by the defense.

And so I made a ruling on that, I stand by that ruling, I think it's warranted under the facts that have occurred during this trial. It's for the jury to decide on Dr. Wohns's credibility, just as they have to decide on every witness's credibility. It's for them to decide whether or not he was accurate in his description of what he found after his first surgery, and in what he did and in his opinions. And that's just like every other witness.

11 RP 1570:19-1571:13 (emphasis added). These, and other misrepresentations by counsel, drove the Court of Appeals clear

skepticism that the order for new trial was factually supported by the record.

Finally, each of these alleged incidents was thoroughly discussed and rebutted in the Court of Appeals' Reply Brief and the appendices. As argued therein, there was no "defense theme" of nonparty fault. Instead, there was a very specific attempt to avoid any improper argument on this topic.

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

Each of these examples demonstrate that the defense theme was causation, not fault. Because the trial court's findings are not supported by the record, the trial court abused its discretion in ordering the new trial. There is no conflict with *Teter*, because unlike *Teter*, the record does not support the findings upon which the trial court based its decision.

B. The Clarks' disagreement with the results reached by the jury and the Court of Appeals create no significant issue of Constitutional Law or substantial issue of public interest that this Court should determine.

The Clarks argue that this case somehow involves an issue of public importance and/or implicates constitutional rights. These arguments are equally unsound.

First, they are unsupported by any facts in the record or legal authority. Instead, the Clarks cite to the "experience of the undersigned." They argue that "what happened here has become common in medical malpractice litigation." Again with due respect, counsels' purported, "experience" cannot provide the factual support for argument. RAP 10.3 states that the argument section of a brief¹² is to be based on legal authority and citations to the record. Neither rule contemplates argument based on the limited personal experience of a single law firm.

¹² RAP 13.4(d) incorporates the content requirements of RAP 10.3 into petitions for review except where otherwise specified.

Moreover, consistent with their experience, defense counsel can suggest an equally likely scenario. Subsequent treating physicians, facing a non-negligent, but serious complication frequently align with plaintiffs' counsel before the case is filed. Plaintiffs then argue that the first doctor must have been negligent because doctors never testify against other doctors. Plaintiffs count on this powerful argument to persuade jurors that a bad result must certainly be attributable to the conduct of the first physician.

When treating physicians depart from testifying just about their medical treatment and become paid¹³ experts, they have an interest in the outcome of the litigation. The defense thus has the right to challenge vigorously the subsequent treater/expert's credibility and the substance of his opinions.

As established in Dr. Teng's Court of Appeals' Opening Brief, Reply Brief and the decision of the Court of Appeals, the alleged violations of the order on nonparty fault are based on Dr. Teng's constitutional right to defend himself against a false claim of negligence.

Finally, there is no "profound constitutional issue presented here." The Clarks received a fair trial. For the reasons set out in the Opening

¹³ Dr. Wohns was paid \$12,000 just for his one day of testimony. CP 495-96.

Brief, it is the defense, not the plaintiffs, whose rights will be impaired if the trial court's motion in limine is construed as precluding the defendant's right to argue causation, or attack the incredible and false statements of the Clarks'¹⁴ "expert" just because he also treated Mr. Clark.

Finally, the Clarks raise the specter of "unrepresented" treating physicians being ambushed as part of their argument regarding public interest. The argument does not apply here. Dr. Richard Wohns holds a medical license, has a law degree¹⁵ and a masters of business administration and was well equipped to defend his own interests. Furthermore, had he had any concerns, he could have called his own carrier for representation.

V. CONCLUSION

It is time to end this litigation. The Clarks had a fair trial. The jury resolved the credibility dispute between Dr. Teng and Dr. Wohns in favor of Dr. Teng. The trial court, misled by inaccurate statements in the Clarks' briefing, incorporated factual errors into his order granting a new trial. Because there was no prejudicial misconduct and because the order

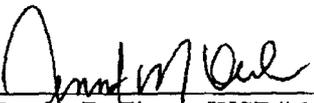
¹⁴ If review is accepted, the defense reserves its right to argue that the correct standard of review is error of law, because the impact of the trial court's ruling is to deny the defendant his constitutional rights to challenge causation and the credibility of an expert witness.

¹⁵ In fact, the trial judge admitted he was Dr. Wohns' ethics professor.

for new trial is not supported by the record, the Court of Appeals correctly reversed the trial court. Review should therefore be denied.

Respectfully submitted this 26th day of October 2016.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on the date set forth below, I caused a true and correct copy of the foregoing Teng's Response to Petition for Review be served on the following in the manner indicated below:

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SIGNED at Tacoma, Washington this 26th day of October, 2016.


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APPENDIX A

Appendix A: List of Objections

Page	Atty	Grounds	Ruling
2 RP 157:14	SFF	Statement in opening regarding missing witness improper	"I agree it shouldn't be repeated.
3 RP 181:3	SFF	Relevancy	Overruled
3 RP 183:21	SFF	Foundation	Sustained
3 RP 214:8	SFF	Editorial comment	Overruled
3 RP 232:24	SFF	Speculation	Sustained in part
3 RP 243:21	SFF	Form	Overruled
3 RP 256:2	MW	Thrust of opening was that it was all Dr. Wohns' fault	3 RP 261 "not going to do anything about opening statements"
3 RP 256:18	MW	Opening statement contained reference to pre-existing neck issues	3 RP 260:5 there is a way of mentioning pre-existing conditions that does not relate to neck issues 3 RP 261 "not going to do anything about opening statements"
3 RP 293:24	MW	Exhibit used that briefly showed reference to heart issue	Would consider curative instruction if there was a problem in the future
3 RP 311:17	SFF	State of mind	Overruled
3 RP 317:22	SFF	State of mind	Overruled
3 RP 318:9	SFF	Relevancy	Overruled
3 RP 328:23	MW	Improper use of deposition testimony	Sustained

Page	Atty	Grounds	Ruling
4 RP 366:9	MA	Objection to deposition counter designations for Teng.	Overruled, but defense has to play counter designations in defense case in chief
4 RP 387:17	SFF	Hearsay	Sustained
4 RP 391:11	SFF	Hearsay	Overruled
4 RP 466:17	SFF	"Your Honor" Court cuts off objection	Cautions plaintiffs' counsel
4 RP 478:25	SFF	Colloquy	Overruled
4 RP 485:16	SFF	Technical assessment of physician	Overruled
4 RP 498:23	SFF	Vague & narrative	Overruled
4 RP 503:3	MW	Misquotes testimony	Sustained
4 RP 506:6	MW	Misquotes testimony	Sustained
4 RP 506:6	MW	Relevance	SFF asks different question
5 RP 540:14	SFF	Foundation	Reserves
5 RP 565:20	SFF	Form	Overruled
5 RP 569:11	SFF	Foundation	Overruled
5 RP 570:19	SFF	Foundation	Overruled
5 RP 576:4	SFF	Foundation	Overruled
5 RP 587:16	SFF	Form	Overruled
5 RP 591:13	MW	Objects to objections from both counsel referring to incident where associate defense counsel pointed out plaintiffs' had some concerns that needed	Noted

Page	Atty	Grounds	Ruling
		to be addressed before court admitted evidence [See 5 RP:583.]	
5 RP 592:13	MW	Speaking objection referring to trial court bringing up the topic of redactions in response to the concern raised above at about the exhibit not being ready for admission. Only the court, not defense counsel used the term redactions here. [See 5 RP 583-584]	Noted
5 RP 593:6	SFF	Seeks permission to cross-exam on informed consent based on plaintiff's testimony. Argues that plaintiffs opened the door.	Overruled in part, but would entertain a curative instruction
5 RP 616:13	MW	Objects to SFF misspeaking on name of provider	Granted
5 RP 615:2	CT	Chastises SFF for publishing exhibit admitted at p.600	
5 RP 642:2	SFF	Beyond scope	Overruled
5 RP 670:11	SFF	Hearsay	Overruled
6 RP 702:10	MA w/o jury	Objections to defense exhibits	
6 RP 758:16	SFF	Format	Rephrase
6 RP 767:19	MW w/o jury	Reference to redactions	Court has used word, going forward take up outside jury
6 RP 769:19	MW w/o jury	Objection to one of defense redactions (Exh 104, p. 13)	Sustained

Page	Atty	Grounds	Ruling
6 RP 772:13	BBF w/o jury	Change of admitted exhibit	Overruled
7 RP 851:6	MA w/o jury	MRIs should not go to jury	
7 RP 856:4	MA w/o jury	Exhibit issue	
7 RP 857:8	CT w/o jury	Asking Dr. Teng if first time he had seen Mr. Clark	"very close to a violation of that order"
7 RP 923:11	CT	Hand signaling	
7 RP 936:5	BBF w/o jury	Violation MIL re: Kim SOC	Overruled
7 RP 955:19	BBF	Object, ask to be heard outside jury	Overruled without hearing basis
7 RP 969:24	MW	Leading	Sustained
8 RP 1122:20	MW w/o jury	Violation of motion in limine re: prior conditions	Sustained
9 RP 1144:18	MW w/o jury	Objection to use of monitoring report	CT notes not subject to MIL, but excludes
9 RP 1150:21	BBF w/o jury	Affirmatively raises what defense seeks to elicit from Bhatia in an effort to understand court's ruling on MIL re: fault	"...it seems to me you can ask him what the operative report means to him and what his observations of it are. I think that's fair game."
9 RP 1176:14	MW w/o jury	Violation of MIL re: non-party fault	Grants permission to cross-exam on SOC Wohns, "Without going there directly, I think

Page	Atty	Grounds	Ruling
			indirectly it has been, I agree with that."
9 RP 1194:13	BBF	Misstates testimony	Overruled
9 RP 1214:6	BBF	Misrepresents testimony	Overruled
9 RP 1223:18	MW	"Was leak fixed? General objection to line of questions	Overruled
9 RP 1238:14	BBF Conf	Objection to juror question	Question not asked
10 RP 1257:7	MA w/o jury	Monitoring portion of operative report should be excluded	Sustained
10 RP 1341:4	SFF	Form	Overruled
10 RP 1348:7	SFF	Argumentative, compound	Sustained as to compound
10 RP 1357:9	SFF	Compound	Overruled
10 RP 1358:7	SFF	Questions call for witness to vouch for other witness, interjects attorney's opinion in violation MIL	Overruled, allows standing objection to questions
10 RP 1364:16	SFF	"I guess I object"	Court does not stop to inquire
10 RP 1366:20	SFF	Wampold comment: "Hopefully it's clear to the jury"	Strikes comment
10 RP 1378:1	SFF	Misstates testimony	Sustained
10 RP 1393:11	MW	Outside witnesses' knowledge	Overruled
11 RP 1426:16	BBF	Motion to strike repeated questions about other witnesses "lying"	Denied, not a violation
11 RP 1505:15	SFF	Speculative argument regarding jury feeling bad for young doctor	Overruled
11 RP 1516:16	SFF	Argument for compensation for	Overruled

APPENDIX B

APPENDIX B

LIST OF ALLEGED VIOLATIONS FROM PLAINTIFFS' BRIEF

No.	Page	Evidence or Argument alleged to violate motion in limine	Record Cite	MIL Violation	Obj.
#1	6	"Now I want you to see this. This is what happened—this is what it looked like with a free spinal cord the last time Mr. Clark left [Dr.] Teng's care. These are the pictures after Dr. Wohns operated."	151	NP Fault	Next day
#2	6	"Here, this is after Dr. Wohns' first and second surgeries. All of this blue is cerebrospinal fluid . . . None of that was there until after [Dr. Wohns] operated the first time."	152	NP Fault	Next day
#3	7	"Then the patient comes back [to Dr. Wohns], has another procedure, and the spinal fluid is-- actually corroded its way out the back. That's when Dr. Wohns' nurse, not Dr. Wohns, sewed him up and sent him home."	152	NP Fault	Next day
#4	7	"Then, after the second operation that Dr. Wohns performs, you still have this problem, and it's much thicker. . . That's several inches of spinal fluid after Dr. Wohns."	152	NP Fault	Next day
#5	7	"When people have a leak as a result of back surgery or some other problem, there are . . . what we call postural headaches. . . . After Dr. Wohns operated he had postural headaches for obvious reasons."	152-53	NP Fault	Next day
#6	7, 25	"from 2008, we already know, and we will see documentation to establish it, that he had problems with his upper spine." Mr. Clark's symptoms were "nothing new to him."	147	Medical conditions above waist	Next day
#7	8, 26	"Q. Do you remember when you first met Mr. Clark?.... A. And can you tell us what you remember about your very first meeting with him? * * *	804	Medical conditions above waist	No, raised by court

No.	Page	Evidence or Argument alleged to violate motion in limine	Record Cite	MIL Violation	Obj.
		Q. <i>And when you met Mr. Clark for his low back problem, did you have access to his earlier records and imaging at Cascade?</i> A. Yes, I did."			
#8	9-10, 17, 24, 26	Counsel asked her witness, Dr. Nitin Bhatia, whether there was any indication in Dr. Teng's progress notes that Mr. Clark "had a headache" and directed Dr. Bhatia to "turn to page 84" of the notes. Bhatia testimony: "On February 2nd, which is the day after surgery, [Mr. Clark] woke up with a headache, think's it's because his CPAP was broken and he had to use BIPAP. And those are machines you use for <i>sleep apnea</i> ."	1086, 1087, Ex. 115	Medical conditions above waist	At break
#9	11, 31	Closing argument: "He [Mr. Clark] gets postural headaches. He never had the cardinal sign of a CSF leak until this surgery was performed. . . there was no CSF leak that was obvious before [Dr. Wohns] operated, he now has a CSF leak."	1534	NP Fault	No
#10	11, 31	Mr. Clark "had to go to Harborview [for reparative surgery] because someone else's [referring to Dr. Wohns] surgeries on two occasions failed."	1540	NP Fault	No
#11	14	It was improper for Dr. Wohns not to order a pre-operative MRI	992-93; 1389	NP Fault	No
#12	14	Dr. Wohns does not know how to read MRI films and determine whether the foramina were in fact decompressed.	932-34; 969-70; 1107; 1330	NP Fault	No
#13	14	Dr. Wohns was wrong when he diagnosed Mr. Clark with cauda equina syndrome in March 2010 and is wrong that he has cauda equina syndrome today	1119; 1160; 1338; 1362	NP Fault	No

No.	Page	Evidence or Argument alleged to violate motion in limine	Record Cite	MIL Violation	Obj.
#14	14	Dr. Wohns either lied or incompetently stated that he did a "total" L5 laminectomy" in his operative report	972, 1163, 1172	NP Fault	No
#15	14	It was improper for Dr. Wohns to fail to include the exact location of the CSF leak that he discovered in his medical record	1165-66	NP Fault	No
#16	14	If Dr. Wohns identified a CSF leak and did not tell Mr. Clark, that was a violation of the standard of care	320-21; 1169	NP Fault	No
#17	15	Dr. Wohns must have lied about doing the dural repair because the sutures were not found when Harborview did surgery two months later.	1164; 1174; 1185; 1535	NP Fault	No
#18	15	Dr. Wohns should not have "over-sewn" the wound before his second surgery	1175	NP Fault	
#19	15	Over-sewing the wound <i>caused</i> Mr. Clark's meningitis	1228; 1541	NP Fault	No
#20	15	It was improper for Dr. Wohns not to send the CSF that he found in his March 23 surgery for testing	1533	NP Fault	No
#21	15	The surgery Dr. Wohns performed was not medically necessary	1118-19; 1223	NP Fault	No
#22	15	Dr. Wohns failed to fix the first CSF leak and failed to fix the second CSF leak	1223-24	NP Fault	No
#23	15	a <i>resident</i> at Harborview fixed what Dr. Wohns could not	152, 1180, 1224	NP Fault	Next day as to 152, no other objections
#24	15	It was improper for Dr. Wohns not to get Mr. Clark's previous medical records or to discuss the patient with Dr. Teng	1301-02, 1362	NP Fault	No
#25	15	Defense counsel accused Dr. Wohns of "record manipulation. . . to make my client look bad."	1535	NP Fault	No

APPENDIX C



Not Relevant



Relevant Causation Evidence



Factually Inaccurate

KEY



Improper Legal Standard



Insufficient to Satisfy CR59



Harmless Error

Honorable Richard F. McDermott

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SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

8

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

NO. 13-2-03699-1 KNT

9

v.

ORDER GRANTING PLAINTIFFS' MOTION
FOR NEW TRIAL

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

(CLERK'S ACTION REQUIRED)

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

20

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

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

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

- 12
- 13
- 14 1. A Motion for a new trial is one of the most difficult motions a trial court is asked to rule
- 15 on and should be granted only rarely and only if the trial court firmly believes that the
- 16 conduct complained of is of such a level that it casts doubt on whether or not a fair
- 17 trial occurred.
- 18 2. Prior to the beginning of this trial the parties briefed and argued a number of Motions
- 19 in Limine. The Court entered a Consolidated Order Re: Motions in Limine on October
- 20 13, 2014, during trial, which accurately reflects the Court's oral rulings prior to trial.
- 21 That Order is attached hereto as Exhibit A to this Order.
- 22
- 23 3. In addition to the Orders contained in Exhibit A, the Court also ruled that the defense
- 24 was precluded from discussing or otherwise talking about any of the plaintiff, Thomas
- 25

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

4 4. Also prior to trial, Defense counsel told the Court that he had no witnesses who would
5 testify that Dr. Richard Wohns, plaintiff's subsequent treating physician and one of the
6 plaintiff's expert witnesses, had violated the standard of care or was negligent, and
7 furthermore, he disclosed that he had previously represented Dr. Wohns. The Court,
8 therefore, ruled that the plaintiff's motion to exclude arguments or accusations of fault
9 by non-parties including Dr. Wohns, was granted.

10
11 5. Throughout the trial both parties worked diligently to redact medical records to be
12 shown to the jury. This was an effort by both sides to comply with the pre-trial rulings.

13
14 6.

15
16 Defense counsel clearly stated that Dr. Wohns was at fault

17
18
19 specifically stated

20 "this is what Dr. Wohns did to him" and "the result of Dr.

21 Wohns' care is *this*".
22
23
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1 Wohns was not. [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 7. A curative instruction was requested by Plaintiffs' counsel after opening statements.

9 The court gave such an instruction [REDACTED]

10 [REDACTED]

11 8. [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 9. Plaintiffs' counsel argues that defense deliberately failed to properly redact medical

17 records which were shown to the jury. The Court agrees that some unredacted

18 records were shown, but is unable and unwilling to blame Defense counsel for this.

19 However, the Court can conclude that Plaintiffs' counsel bore the lion's share of the

20 task of properly redacting records and often were required to spend significant

21 amounts of time to properly clean up records the defense was introducing.

22 10. There are other arguments by Plaintiffs' counsel that Defense counsel interjected his

23 own personal beliefs in closing argument, contrary to the Rules of Professional

24

25

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

3 11. In closing argument, Plaintiffs' counsel attempted to address the accusations against
4 Dr. Wohms in an obvious attempt to refute the defense. In his closing, Defense
5 counsel continued with his theme of non-party fault. The Court's Order in Limine had
6 not been modified.
7

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

11 13.

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18 Based upon the foregoing reasons,

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20 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

- 21 1. Plaintiffs' Motion for a New Trial is hereby granted;
- 22 2. The judgment entered on November 3, 2014 is hereby vacated;
- 23 3. Plaintiffs' request for terms is granted. Both parties are instructed to submit pleadings
- 24
- 25

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

3
4 Done in open Court this 23rd day of December, 2014.

5
6 

7
8 Honorable Richard F. McDermott

9
10 **Copy Received via Email:**

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