

FILED
SUPREME COURT
STATE OF WASHINGTON
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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 98296-1

GERRI S. COOGAN, the spouse of JERRY D. COOGAN, deceased, and
JAMES P. SPURGETIS, solely in his capacity as the Personal
Representative of the Estate of JERRY D. COOGAN, Deceased,

Petitioners,

v.

GENUINE PARTS COMPANY and NATIONAL AUTOMOTIVE
PARTS ASSOCIATION a.k.a. NAPA,

Respondents,

and

BORG-WARNER MORSE TEC INC. (sued individually and as
successor-in-interest to BORG-WARNER CORPORATION);
CATERPILLAR GLOBAL MINING, LLC (sued individually and as a
successor-in-interest to BUCYRUS INTERNATIONAL
f/k/a BUCYRUS-ERIE CO.); CERTAINTED CORPORATION;
DANA COMPANIES LLC (sued individually and as successor-in-interest
to VICTOR GASKET MANUFACTURING COMPANY); DEERE &
COMPANY d/b/a JOHN DEERE; FMC CORPORATION (d/b/a
LINKBELT
Cranes and Heavy Construction Equipment); FORMOSA
PLASTICS CORPORATION U.S.A. (sued individually and as parent,
alter ego and successor-in-interest to J-M MANUFACTURING
COMPANY and to JM AIC PIPE CORPORATION);
HOLLINGSWORTH & VOSE COMPANY; HONEYWELL
INTERNATIONAL, INC. f/k/a ALLIED-SIGNAL, INC. (sued
individually and as successor-in-interest to BENDIX CORPORATION);
J-M MANUFACTURING COMPANY, INC. (sued individually and as
parent and alter ego to J-M A/C PIPE CORPORATION); KAISER
GYPSUM COMPANY, INC.; LINK-BELT CONSTRUCTION
EQUIPMENT COMPANY, LP., LLLP; NORTHWEST DRYER &

MACHINERY CO.; OFFICEMAX, INCORPORATED (f/k/a BOISE CASCADE CORPORATION); PARKER-HANNIFIN CORPORATION; PNEUMO ABEX LLC (sued as successor-in-interest to ABEX CORPORATION); SABERHAGEN HOLDINGS, INC. (sued as successor-in-interest to THE BROWER COMPANY); ST AND ARD MOTOR PRODUCTS, INC. d/b/a EIS; SPX CORPORATION (sued individually and as successor-in-interest to UNITED DOMINION INDUSTRIES LIMITED f/k/a AMCA International Corporation, individually and as successor in interest to Desa Industries Inc and/or Insley Manufacturing as well as Koehring Company, individually and as successor in interest to Schield Bantam Company); TEREX CORPORATION d/b/a Koehring Company individually and as successor in interest to Schield Bantam Company; and WELLONS, INC.,

Defendants.

PETITIONERS' RESPONSE TO RESPONDENTS' JOINT MOTION TO STRIKE PETITIONERS' REPLY TO RESPONDENTS' ANSWER TO PETITION FOR REVIEW, AND FOR SANCTIONS

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I. IDENTITY OF RESPONDING PARTY

The responding party is the Coogan family, specifically Gerri S. Coogan, the spouse of Jerry D. Coogan, deceased, and James P. Spurgetis, solely in his capacity as the Personal Representative of the Estate of Jerry D. Coogan, deceased. They are Plaintiffs below and Petitioners in this Court.

II. ARGUMENT

Respondent GPC/NAPA'S Answer *conditionally* raises three issues for review. Petitioners' Reply was limited to addressing only these three conditional issues in accordance with RAP 13.4(d). The Reply is proper and should be considered.

GPC/NAPA's Answer makes an argument in the alternative. It first argues that review should be denied, but in the alternative it argues that *if* review is granted, three "conditional issues" should also be considered by this Court. The Answer refers to these as conditional issues multiple times:

- The three additional issues are called "GPC and NAPA's Conditional Issues." (Answer, at 3).
- In their conclusion, GPC/NAPA argue: "This Court should deny the Coogans' petition, but if this Court accepts review, it should also accept review of GPC and NAPA's conditional issues." (Answer, at 27).

And the motion acknowledges that these are “conditional issues.” (Motion to Strike, at 1).

GPC/NAPA repeatedly requests review of these issues on a conditional basis, if review is granted of any of Petitioners’ issues:

- Each of their three conditional issues are phrased as “if this Court accepts review, should it also review” the additional issue. (Answer, at 3).
- If the Court “decides to grant review, then it should also accept for review three issues that are intertwined with those raised by the Coogans.” (Answer, at 18).
- “[I]f this Court grants review of any of the Coogans’ issues, then it should also review” GPC/NAPA’s allegations of counsel’s misconduct. (Answer, at 20).
- “[I]f this Court accepts review on any issue, then it should also accept review on this question If this Court grants review, then it should also remand with directions to allow discovery” (Answer, at 24).
- “If this Court reviews the excessiveness of any part of the verdict, it should review the entire verdict’s excessiveness.” (Answer, at 26).

GPC/NAPA argued not only that their conditional issues support judgment in their favor, but also entitle them to additional relief from this Court: “Those issues provide alternative grounds for affirming Division Two’s opinion and reversing the trial court’s judgment on damages. They would also warrant additional relief to GPC and NAPA, including a new trial on liability and discovery” (Answer, at 18).

Given that GPC/NAPA framed their issues in this conditional way, repeatedly asking for review of the issues if review is granted to Petitioners, and that they devoted more than nine pages of their Answer to a discussion of these conditional issues, Petitioners properly understood that GPC/NAPA was seeking review of these issues on the condition that the Court accepts one or more of the issues raised in the Petition for Review. Raising issues conditionally in an answer to a petition for review is common practice. *See, e.g., Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 715, 845 P.2d 987, 989 (1993). If Petitioners had ignored these conditional issues and not filed a reply, that would have signaled to this Court that there was no opposition to the granting of review of these additional issues. That is not the case.

Petitioners’ Reply was solely intended to oppose GPC/NAPA’s conditional issues for review. Contrary to the accusations made by GPC/NAPA, there was no other purpose behind the Reply. RAP 13.4(d)

provides in relevant part that “[a] reply to an answer should be limited to addressing only the new issues raised in the answer.” The Reply followed this rule and was limited to addressing the conditional issues raised by GPC/NAPA.

In asking the Court to strike their Reply, GPC/NAPA take the position that there can be no reply to conditional issues. That is not reflected in RAP 13.4(d), which allows a reply when “the answering party seeks review of issues not raised in the petition for review.” The rule does not make any distinction of issues that are conditional and issues that are non-conditional.

GPC/NAPA cite a Drafters’ Comment to the 2006 Amendment, apparently to suggest that raising a conditional issue is different from “seeking review.” The Drafters’ Comment states nothing of the sort. It explains that the amendment “more clearly prohibit[s] a reply to an answer that is not strictly limited to responding to an answering party’s request that the Court review an issue that was not raised in the initial petition for review.” K. Teglund, 3 Wash. Prac., Rules Practice RAP 13.4 (8th ed. 2014). The Drafters’ Comment does not address conditional issues; rather, it discusses a prohibited practice of “attempt[ing] to cast an answering party’s arguments in response to a petition for review as ‘new issues’ in order to reargue issues raised in the petition.” *Id.*

Petitioners did not try to reargue anything in their Reply. Instead, they followed the letter of RAP 13.4(d) in restricting their argument to responding to the three conditional issues raised by GPC/NAPA. Petitioners cannot agree with GPC/NAPA's characterization that it did not seek review because it raised additional issues conditionally. GPC/NAPA repeatedly asked this Court, in the alternative, to accept review of its conditional issues. And those were the only issues addressed in Petitioners' Reply.

Finally, GPC/NAPA's request for sanctions should be denied. Petitioners responded to GPC/NAPA's conditional issues in good faith and did not stray outside the bounds of what is allowed by RAP 13.4(d). The Reply addressed only the conditional issues and nothing else. Petitioners followed the rules of this Court.

III. CONCLUSION

For the reasons set forth above, Petitioners respectfully request that GPC/NAPA's motion be denied. .

Dated this 12th day of June, 2020.

Respectfully Submitted,

s/ William Rutzick

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CERTIFICATE OF SERVICE

I certify under the penalties of perjury under the laws of the State of Washington that on this date I caused a copy of the forgoing document PETITIONERS' RESPONSE TO RESPONDENTS' JOINT MOTION TO STRIKE PETITIONERS' REPLY TO RESPONDENTS' ANSWER TO PETITION FOR REVIEW, AND FOR SANCTIONS, to be served on all counsel of record, via the Appellate E-filing Portal, as follows:

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