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No. 98296-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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), *et al.*,

Defendants.

RESPONDENTS GENUINE PARTS COMPANY AND NATIONAL AUTOMOTIVE PARTS ASSOCIATION'S JOINT MOTION TO STRIKE PETITIONERS' REPLY TO RESPONDENTS' ANSWER TO PETITION FOR REVIEW, AND FOR SANCTIONS

Philip A. Talmadge, WSBA No. 6973
TALMADGE/FITZPATRICK
2775 Harbor Ave. SW, 3d Fl., Ste. C
Seattle, Washington 98126-2138
Telephone: (206) 574-6661

Attorneys for National Automotive Parts Association

James C. Grant, Ga. Bar 305410
Jonathan D. Parente, Ga. Bar 425727
Lee A. Deneen, Ga. Bar 774207
ALSTON & BIRD LLP
1201 W. Peachtree St. NW
Atlanta, Georgia 30309

Of Counsel for Genuine Parts Company

Michael B. King, WSBA No. 14405
Timothy K. Thorson, WSBA No. 12860
Jason W. Anderson, WSBA No. 30512
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020

Jeanne F. Loftis, WSBA No. 35355
BULLIVANT HOUSER BAILEY, P.C.
925 Fourth Avenue, Suite 3800
Seattle, Washington 98104
Telephone: (206) 292-8930

Attorneys for Genuine Parts Company

I. IDENTITY OF MOVING PARTIES

Appellants Genuine Parts Company ("GPC") and National Automotive Parts Association ("NAPA") jointly seek the relief described in section II, below.

II. STATEMENT OF RELIEF SOUGHT

RAP 13.4(d) authorizes a reply only where the respondent "seeks review." GPC and NAPA did not seek review, and instead opposed review of any portion of Division Two's unpublished decision. GPC and NAPA explicitly raised the issues to which the Petitioners, the Coogans, have now presumed to reply only as conditional issues, and only to further illustrate why review should be *denied* and the case returned to the trial court for further proceedings, including a new trial on damages.

RAP 13.4(d) does not authorize the petitioner to file a reply in these circumstances. This Court should thus strike the Reply to Respondents' Answer to Petition for Review filed by the Coogans.

In addition, a sanction is warranted under RAP 18.9(a). At least since the last amendment to RAP 13.4(d) regarding replies to answers to petitions for review, promulgated by this Court in 2006—fourteen years ago—there has been no reasonable basis for filing a reply except when a respondent seeks review. The Coogans' reply is a patent attempt to get "the last word" on matters to which no reply is allowed, but which they evidently fear could cost them review of the issues they raised in their petition and ultimately any chance at recovering anything close to the extraordinary damages awards that the Court of Appeals has set aside.

The Coogans' reply is also a classic example of why this Court ultimately limited replies solely to when a respondent's answer seeks review of an issue not raised by the petitioner. The Coogans have mischaracterized the record regarding the issues to which they have presumed to reply in several material particulars, evidently betting that their reply would in fact be the last word on this subject.

In this, the Coogans have miscalculated. This Court should strike the reply and impose a sanction signaling to counsel who should know better that this kind of flagrant violation of the Rules of Appellate Procedure will not be tolerated.

III. FACTS RELEVANT TO MOTION

The Coogans filed a petition seeking review of the Court of Appeals, Division Two's unpublished decision affirming the jury's liability verdict against GPC and NAPA and ordering a new trial strictly on damages. In a joint answer to the Coogans' petition, GPC and NAPA opposed review of any portion of Division Two's decision and did not independently seek review.

In opposing review, GPC and NAPA pointed out that, if this Court granted the Coogans' petition, it would in fairness need to address other issues that GPC and NAPA had raised in the Court of Appeals, including:

> (1) the Coogans' counsel's prejudicial misconduct, which warrants a new trial on both liability and damages, (2) the Coogans' own misconduct, which is another reason to order a new trial on the $80 million in noneconomic damages, and (3) the excessiveness of the entire $81.5 million verdict.

Answer to Petition at 1-2. GPC and NAPA addressed these issues under the heading, "ADDITIONAL ISSUES ***THAT WARRANT DENIAL OF REVIEW***, BUT SHOULD BE ADDRESSED IF REVIEW IS GRANTED." *Answer* at 18 (emphasis added). In sum, GPC and NAPA plainly and unequivocally opposed this Court's granting review and taking up this case. Any review of the three issues was conditioned on this Court's doing precisely what GPC and NAPA asked this Court not to do—grant review.

Nevertheless, the Coogans have presumed to file a reply responding to these three issues.

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. Court rules, like statutes, are interpreted according to the plain-meaning rule.

Court rules are interpreted like statutes. *State v. Stump*, 185 Wn.2d 454, 460, 374 P.3d 89 (2016). The court "strive[s] to determine and carry out the rule drafters' intent." *Id*. (citing *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). The court determines that intent by examining the rule's plain language in the context of related provisions and the rule-making scheme as a whole. *Id.* If the rule's meaning is plain on its face, the court gives effect to that meaning as an expression of the drafter's intent. *Jafar v. Webb*, 177 Wn.2d 520, 526, 303 P.3d 1042 (2013). If the rule is ambiguous, the court discerns the drafter's intent by "reading the rule as a whole, harmonizing its provisions, and using related rules to help identify the legislative intent embodied in the rule." *Id*.

at 526-27 (quoting *State v. Chhom*, 162 Wh.2d 451, 458, 173 P.3d 234 (2007)).

This Court is "uniquely positioned to declare the correct interpretation of any court-adopted rule" and, in particular, the Rules of Appellate Procedure. *Id.* at 527; *see also Stump* 185 Wn.2d at 460.

B. Under the plain language of RAP 13.4(d), no reply is authorized where, as here, the respondent does not "seek review."

Under RAP 13.4(d), a party responding to a petition for review may, in its answer, "seek review of any issue that is not raised in the petition for review." The rule authorizes the petitioner then to file a reply addressing only those issues on which the respondent "seeks review":

> A party may file a reply to an answer ***only if the answering party seeks review*** of issues not raised in the petition for review. A reply to an answer should be limited to addressing only the new issues raised in the answer.

RAP 13.4(d) (emphasis added). This Court "rigorously enforces" this rule, striking replies that fail to comply with the rule's strict limitations. WASHINGTON APPELLATE PRACTICE DESKBOOK § 18.2(7) (Wash. State Bar Ass'n 4th ed. 2016).

The critical language in RAP 13.4(d) is "seeks review." The term "seek" denotes affirmative conduct. It means "to ask for" or "request." *Seek*, WEBSTER'S ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/seek (last visited June 8, 2020). It is clear from the rule's plain language that its ultimate purpose is to provide an opposing party an opportunity to respond when a party asks this Court to review a

decision. In the event that the respondent avails itself of the opportunity to "seek review" in its answer, it is appropriate that the petitioner has the opportunity to oppose the request for review. After all, when a respondent seeks review, this Court may elect to grant review of the respondent's issues alone and deny review of the petitioner's issues. But if the answer does *not* "ask for" or "request" review—if it merely "raises an issue" but does not seek review of that issue, seeking instead only the denial of the petition—then no reply is allowed. Raising such conditional issues appropriately advises the Court of all the issues that should be before it if review is granted. In so doing, a respondent, of course, opposes review.

GPC and NAPA did not "seek review" in their answer. GPC and NAPA explicitly opposed review of any portion of the Court of Appeals' unpublished decision. To be sure, they raised three issues not addressed in the Coogans' petition. But GPC and NAPA did so explicitly not to seek review but to show that, if this Court were to grant the Coogans' request for review, it would in fairness need to grapple with issues not disclosed by the Coogans' petition. As the Coogans repeatedly point out, GPC and NAPA do not contend that any of the issues raised in their answer independently meets the criteria for review. *Reply* at 1, 2, 13-14, 20. Indeed, that is the point. GPC and NAPA did not address the criteria review regarding their issues because they were not seeking review of those issues. They asked this Court to *deny* review of Division Two's unpublished decision, emphasizing that the need to address their issues further "counsels *against* granting review." *Answer* at 2 (emphasis added).

C. The history of amendments to RAP 13.4(d) confirms that no reply is authorized in these circumstances.

Review of the history of amendments to that provision confirms that no reply is authorized where, as here, the respondent does not seek review in its answer—even if the respondent raises a new issue in that answer.

As originally adopted by this Court in 1976, RAP 13.4(d) authorized the petitioner to file a reply in all cases, stating:

> A party may file an answer to a petition for review, or a reply to an answer. If a party wants to raise an issue which is not raised in the petition for review, that party must raise that issue in an answer….

86 Wn.2d 1220 (1976). In 1990, this Court eliminated the right to reply in all cases, instead providing that that "[a] party may file a reply to an answer *only if the answer raises a new issue*." 115 Wn.2d 1135 (1990) (emphasis added).

Four years later, in 1994, the Rules Committee had become concerned that this Court's deputy clerk was interpreting RAP 13.4(d) as requiring any party wishing to seek review to file its own petition for review within 30 days of the Court of Appeals' decision. K. TEGLAND, 3 WASH. PRAC., RULES PRACTICE RAP 13.4 at 221-22 (8th ed. 2014). Seeking to avoid the proliferation of "protective" petitions by parties who had substantially prevailed before the Court of Appeals, this Court amended the second sentence of RAP 13.4(d) to state, "If the party wants to seek review of any issue which is not raised in the petition for review, that party must raise that new issue in the answer." 124 Wn.2d 1133-34 (1994). But having clarified that a party who had prevailed before the Court of Appeals need

not file their own petition for review, but instead could "seek review" in their answer to the losing party's petition for review, this Court did not at that time modify the limitation that "[a] party may file a reply to an answer only if the answer *raises* a new issue." *Id*. (emphasis added).

The resulting ambiguity led to a wave of replies to answers that did not seek review of any issue, but argued against review based on a ground that opposing counsel would then recast as the "rais[ing] of an issue" to which they could reply. The Court would rectify this situation a dozen years later, in 2006. The Rules Committee noted that RAP 13.4(d) had been "subject to abuse by petitioning parties who attempt 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." TEGLAND, *supra*, at 224. To bring that abuse to an end, this Court amended the rule to state, "A party may file a reply to an answer only if the answering party *seeks review* of issues not raised in the petition for review." 157 Wn.2d 1441 (2006) (emphasis added). This Court also added the sentence, "A reply to an answer should be limited to addressing only the new issues raised in the answer." 157 Wn.2d 1441. The Committee observed that the amendment was "intended to clarify the rule's purpose by more clearly prohibiting a reply to an answer that is not strictly limited to an answering party's request that the Court review an issue that was not raised in the initial petition for review." TEGLAND, *supra*, at 224.

This Court presumes that an amendment constitutes a substantive change in the law. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 462, 832

P.2d 1303 (1992). The import of the evolution of RAP 13.4(d) gives clear confirmation on top of the already plain language of the rule. The history of RAP 13.4(d) not only confirms that the phrase "seeks review" has critical significance, but shows that this Court distinguishes between an answer that merely "raises a new issue" and one that "seeks review." Only the latter triggers the petitioner's right to file a reply. Again, because GPC and NAPA did not "seek review" in their answer, but in fact opposed review of any portion of Division Two's decision, no reply is authorized. Indeed, the Coogans' reply is precisely the sort of artful evasion of the rules that the 2006 amendment was plainly intended to bring to an end.

D. The Coogans' reply is an improper attempt to get the last word, based on material mischaracterizations of the record, and warrants the imposition of a monetary sanction under RAP 18.9.

The Coogans' reply illustrates why this Court ultimately has adopted the narrowest possible authorization for replies. Where GPC and NAPA did not seek review, the Coogans' reply is nothing more than an improper attempt to get the last word on their own request for review. And not only have the Coogans managed to get the last word (unless their reply is stricken), they have used their unauthorized reply to mislead the Court about what the record reflects in several material respects.

Consider the following three examples:[1]

[1] GPC and NAPA are confining their discussion of the Coogans' mischaracterizations to just these examples because GPC and NAPA do not want to be seen as using this motion as a *de facto* sur-reply in support of their case against review.

First, regarding counsel misconduct, the Coogans are wrong that defense counsel first broached whether GPC was a "caring company" or otherwise invited attorney Jessica Dean's false insinuation that workers had died from asbestos exposure at GPC's Rayloc remanufacturing plant. *Answer* at 4. The record leaves no doubt that Dean had *previously* asked GPC representative Brewer an argumentative line of questions suggesting that GPC and NAPA demonstrated little care for their employees and jobbers; defense counsel then used redirect examination to undercut that suggestion. 21 RP 206-14; 22 RP 45-50. The Coogans point to nothing about that examination that could possibly have justified what followed: a question by Dean that assumed highly inflammatory facts that were not in evidence (and in fact known by Dean to be false). Dean deployed the Rayloc-deaths question as a deliberate tactic to prejudice the jury against GPC and NAPA.

Second, regarding party misconduct, the notion that GPC and NAPA "*had all the relevant facts at trial*" (*Reply* at 6), is patently false. GPC and NAPA's CR 60 motion focused on the quality of *Doy and Sue's* relationship before Doy's death. The jury heard nothing about problems in that relationship beyond a single statement by Sue's daughter Kelly that Doy and Sue were not "happy all the time" (30 RP 40)—a statement that could have never alerted the jury to the possibility that Doy and Sue's relationship was a living hell for Doy, particularly when weighed against all of the testimony from Sue, her daughter, and Doy's adult daughters claiming that Doy and Sue had a loving relationship. The jury had no idea

that dozens of witnesses had signed statements in March and April 2016 describing Doy and Sue's dysfunctional and tumultuous relationship. The Coogans kept those statements hidden until after the trial, entry of judgment, and the denial of GPC and NAPA's motion for a new trial.[2]

Third, regarding excessiveness, the Coogans barely try to conceal their attempt to get the last word on the excessiveness issue they raised in their petition, while arguing that this Court should simply ignore whether the record-breaking verdict as a whole was excessive. By continuing to advance the notion that Doy was Sue's "rock" and "her everything" and that she was "basically broken" by her fourth husband's death (*Answer* at 16), the Coogans still fail to acknowledge the explosive evidence that they kept from GPC and NAPA and the first jury that would have, at minimum, significantly undermined the happy-and-loving-relationship narrative that undergirded the jury's extraordinary damage awards.

Given that the Coogans' reply is both plainly unauthorized and substantively misleading, this Court should not only strike it but should impose a monetary sanction under RAP 18.9(a). GPC and NAPA do not make this request lightly. But the Coogans' reply clearly violates RAP

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[2] The Coogans' wrongdoing left GPC and NAPA with only the evidence that, after Doy's death, there had been a falling out between Sue and Doy's adult daughters. But, and as the trial court correctly recognized, that the survivors ended up falling out over the decedent's estate is at best only tangentially relevant to the issue of the quality of the relationship between the decedent and the survivors before the decedent's untimely passing. This is what made the Coogans' misconduct so egregious—they had, by withholding contrary evidence, been able to paint a picture during discovery and at trial of a loving relationship between Doy and Sue that GPC and NAPA could not deny precisely because the evidence to the contrary had been hidden from them.

13.4(d); their counsel had no reasonable basis to conclude that they were entitled to file a reply.[3] The reply is thus nothing more than an improper attempt to get the last word, while interjecting innuendo and making factual assertions that are patently contrary to the record. This Court should not countenance this kind of tactic, which should have been laid to rest for good by the 2006 amendment to RAP 13.4(d).

V. CONCLUSION

This Court should strike the Coogans' unauthorized reply and impose a monetary sanction under RAP 18.9.

Respectfully submitted this 8th day of June, 2020.

TALMADGE FITZPATRICK

By *s/ Philip A. Talmadge*
Philip A. Talmadge,
WSBA No. 6973
2775 Harbor Avenue SW, Third Floor, Suite C
Seattle, Washington 98126-2138
(206) 574-6661

Attorneys for Appellant National Automotive Parts Association

CARNEY BADLEY SPELLMAN, P.S.

By *s/ Michael B. King*
Michael B. King,
WSBA No. 14405
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

Attorneys for Appellant Genuine Parts Company

[3] The Coogans' experienced Washington counsel did not have to trace the history of the evolution of RAP 13.4(d)'s rule on replies to answers through the hardback volumes of the Washington Reports. The text of the rule is clear. And if counsel was uncertain about the scope of the right to file a reply, simply consulting the relevant volume of Tegland would have fully disclosed to them that history, including the on-point statement of the Rules Committee previously quoted in this motion, leaving no doubt that there was no right to reply to the GPC and NAPA answer.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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Benjamin R. Couture Brian D. Weinstein Alexandra B. Caggiano WEINSTEIN COUTURE, PLLC 601 Union St, Ste 1620 Seattle, WA 98101 service@weinsteincouture.com brian@weinsteincouture.com alex@weinsteincouture.com	Jessica M. Dean Benjamin H. Adams Lisa W. Shirley DEAN OMAR & BRANHAM, LLP 3900 Elm Street Dallas, TX 75226 jdean@dobllp.com LShirley@dobllp.com BAdams@dobllp.com CWeeks@dobllp.com jwall@dobllp.com
Jeanne F. Loftis BULLIVANT HOUSER BAILEY, PC 925 Fourth Avenue, Suite 3800 Seattle, Washington 98104 jeanne.loftis@bullivant.com	William Joel Rutzick Schroeter Goldmark & Bender 810 3rd Ave, Ste 500 Seattle, WA 98104-1657 rutzick@sgb-law.com
Philip A. Talmadge Talmadge/Fitzpatrick 2775 Harbor Ave SW, 3rd Floor Ste C Seattle, WA 98126-2138 phil@tal-fitzlaw.com	

DATED this 8th day of June, 2020.

*S:/ Patti Saiden*________
Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

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