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 AUTOMOT IVE 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.); CERTAINTEED CORPORATION; DANA COMPANIES LLC (sued individually and as successor-in-interest to VICTOR GASKET MANUFACTURING COMP ANY); DEERE & COMP ANY 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 COMP ANY and to JM AIC PIPE CORPORATION); HOLLIN GSWORTH & VOSE COMPANY; HONEYWELL INTERNATIONAL, INC. f/k/a ALLIED-SIGNAL, INC. (sued individually and as successor-in-interest to BENDIX CORPORAT ION); 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, IN CORPORA TED (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 COMP ANY); 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' REPLY TO RESPONDENTS' ANSWER TO PETITION FOR REVIEW

Brian D. Weinstein,
WSBA #24497
Alexandra B. Caggiano,
WSBA #47862
Weinstein Caggiano, PLLC
600 University Street, Suite 1620
Seattle, Washington 98101

William Joel Rutzick,
WSBA #11533
Schroeter Goldmark & Bender
810 Third Avenue, Suite 2420
Seattle, WA 98101-1362

Jessica M. Dean
Lisa W. Shirley
Benjamin H. Adams
Dean Omar Branham Shirley, LLP
302 N. Market St., Suite 300
Dallas, TX 75202
214-722-5990

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

I. INTRODUCTION

In their Answer to the Coogans' Petition for Review, Respondents Genuine Parts Company and National Automotive Parts Association (GPC/NAPA), have presented three issues that they contend are "intertwined" with the issues raised by the Coogans. These additional issues are not related to the issues raised in the Petition for Review and are not worthy of this Court's review. Further, this Court should reject GPC/NAPA's attempt to dissuade review by injecting what they characterize as "thorny issues [that] would complicate review." (Answer, at 2). Review of the issues presented by the Coogan family need not be complicated by review of GPC/NAPA's additional issues.

More importantly, the Court should deny review of the additional issues because GPC/NAPA made no effort to argue that the issues meet any of the considerations governing acceptance of review under RAP 13.4(b). There is no contention that the decisions below conflict with the case law of this Court or the Court of Appeals, that there is a significant Constitutional question, or that there is an issue of substantial public interest that should be determined by this Court. The Court should not accept review of issues that even GPC/NAPA do not believe satisfy the criteria for review.

Instead, the additional issues raised by GPC/NAPA are largely part of their campaign to smear the Coogans' counsel and the Coogan family

with unsubstantiated allegations of misconduct. The trial court considered and rejected these arguments. The Court of Appeals majority rejected the contention that counsel had engaged in misconduct and did not reach the issue of family misconduct. And the third issue raised, the size of the damages award to Mr. Coogan's widow and two daughters, was not addressed by the Court of Appeals because the court granted a new trial on damages for other reasons. Again, GPC/NAPA do not contend that any of these issues meet the criteria for review. Indeed, they do not. This Court should decline to review any of the additional issues raised by GPC/NAPA.

II. ARGUMENT

A. This Court should decline review of GPC/NAPA's allegations of counsel misconduct.

The Court of Appeals properly found that the trial court did not abuse its discretion in denying a new trial on the basis of GPC/NAPA's allegations that Plaintiffs' counsel committed misconduct in questioning witnesses and in comments during closing argument. (App. 25). Both the trial court and the Court of Appeals majority disagreed with GPC/NAPA's allegations and found that GPC/NAPA was not deprived of a fair trial. (App. 25). In rejecting GPC/NAPA's contentions, the Court of Appeals recognized that "[u]nless the record shows some prejudicial effect, we must defer to the trial court's denial of a new trial because the trial court is in the best position to assess the prejudicial impact of counsel's conduct on the

jury." (App. 26, citing *Gilmore v. Jefferson Cty. Pub. Transp. Benefit Area*, 190 Wn.2d 483, 503, 415 P.3d 212, 222 (2018)). Here, after careful consideration of GPC/NAPA's arguments, the trial court found no misconduct and no prejudice, and the Court of Appeals properly deferred to that determination.

Importantly, the Court of Appeals all agreed that there was no abuse of discretion in the denial of a new trial based on comments made during Plaintiffs' closing argument because GPC/NAPA failed to make any objections during trial and only raised this issue after the jury returned a verdict in Plaintiffs' favor. (App 31-36; App. 45 n.8).[1] The Court of Appeals followed *Teter v. Deck*, 174 Wn.2d 207, 226, 274 P.3d 336 (2012) in holding that "[a]n objection is one of the requirements for a new trial based on counsel's conduct." (App. 31). The court noted that GPC/NAPA's failure to object is "strong evidence that [they] did not perceive an error." (App. 31, citing *Gilmore*, 190 Wn.2d at 504). Given that there was no objection, GPC/NAPA were required to show that "'the misconduct was so flagrant that no instruction could have cured the

[1] In fact, no objection was ever made by GPC/NAPA even when the court *invited* the parties to place any objections on the record. This type of strategic decision "must be deemed to be an instance of 'gambling on the verdict.'" *Snyder v. Sotta*, 3 Wn. App. 190, 195, 473 P.2d 213 (1970).

prejudicial effect.'" (App. 31, quoting *Collins v. Clark Cty. Fire Dist. No. 5*, 155 Wn. App. 48, 94, 231 P.3d 1211, 1235 (2010)). GPC/NAPA did not meet that high bar. (App. 31-36).

The Court of Appeals also rejected the contention that there was any prejudice from Plaintiffs' examination of witnesses at trial. (App. 26-30). GPC/NAPA identify three instances they claim amount to prejudicial misconduct from a trial that lasted more than three months. While the Court of Appeals found one single question to be improper, it also found that "[t]his was one isolated question in a complex trial." (App. 28). The trial court, who observed the entire context of the question about whether GPC called the families of other workers who had died of asbestos-related diseases, noted that defense counsel had broached the topic of what kind of actions GPC took towards its employees when there was a death: "to the degree that you did open the door, Ms. Loftis, about the caring nature of NAPA, then it's appropriate for Ms. Dean to try to demonstrate otherwise." 22 RP 95-96. Rather than engaging in any kind of intentional misconduct, in the observation of the trial court, Plaintiffs' counsel's question was an understandable attempt to elicit contrary evidence about whether GPC/NAPA was a caring company. When an objectionable question is "invited by language used and conduct displayed by opposing counsel," no prejudice will be found. *Kellerher v. Porter*, 29 Wn.2d 650, 662, 189 P.2d

223 (1948). The trial court did not find that Plaintiffs' counsel had appealed to passion but simply found the question irrelevant and gave a curative instruction. 22 RP 84-85; 22 RP 95-96; 23 RP 55. The jury also heard from the defense that there were no deaths at GPC facilities. 22 RP 84; 41 RP 120. The Court of Appeals properly held that there was no abuse of discretion in the trial court's denial of a new trial on this ground.

The Court of Appeal further found that the other two complaints of misconduct from GPC/NAPA are without merit and that the trial court did not abuse its discretion in denying a new trial on this basis. (App. 28-30). Judge Lee's dissent on this issue does not grant proper deference to the trial court's determination, based on the court's firsthand observations of counsel's conduct and the effect it had on the jury, that there was no misconduct from counsel and no prejudice to GPC/NAPA. The Court of Appeals properly found no abuse of discretion by the trial court. GPC/NAPA have failed to identify any error in that decision that would warrant review by this Court under the criteria set forth in RAP 13.4(b).

B. This Court should decline review of GPC/NAPA's allegations of family misconduct.

After trial, GPC/NAPA extended their misconduct allegations to include the Coogan family, claiming that representations made in Mr. Coogan's probate proceedings are inconsistent with the damages evidence

presented at trial and that they are entitled to relief from the judgment under CR 60. The trial court rejected this claim after extensive briefing by the parties, and the Court of Appeals did not reach this issue. (App. 24-25 n.2). GPC/NAPA's disparaging allegations against the Coogan family are not worthy of this Court's attention. Indeed, GPC/NAPA make no argument that review of this issue would fit within the RAP 13.4(b) criteria for review. Instead, they argue that the family's conduct "cuts against this Court's granting review" of the issues raised by the Coogans. (Answer at p. 20). This Court should reject this tactic.

GPC/NAPA have never been able to point to one false or even misleading statement made by the Coogan family. Plaintiffs' trial evidence is not contradicted by any statements made by witnesses in the probate proceeding. All relevant facts about the Coogan family's relationships were known or easily discoverable to GPC/NAPA by the time of trial. Moreover, GPC/NAPA have demonstrated none of the criteria necessary for relief from judgment on grounds of "newly discovered evidence."

1. GPC/NAPA had all relevant facts at trial.

Mr. Coogan appointed Sue Coogan as the personal representative (PR) of his estate via his will dated May 6, 2011. CP 20811. A serious disagreement developed between Mrs. Coogan and the adult daughters of Mr. Coogan regarding the proper interpretation of the will. Mr. Coogan's

daughters filed a TEDRA petition asking the probate court to remove Mrs. Coogan as PR. CP 20778-79. Mrs. Coogan ultimately resigned as PR. CP 20941.

Mrs. Coogan filed her own TEDRA petition seeking a determination that she had an equity relationship with Mr. Coogan from 1995 to 2011 (before they were married in 2011). CP 20795-98. In support, she submitted a declaration dated March 2, 2016, discussing her relationship with Mr. Coogan and her involvement in his business. CP 20839-43. Mrs. Coogan submitted affidavits and declarations from 13 family and friends who supported her contentions. CP 20845-73. Some of those statements acknowledged the tense relationship between Mrs. Coogan and her husband's daughters. CP 20859, 20873.

This was all part of the public record and known to GPC/NAPA prior to trial. CP 20778-801, 20839-73, 20887-907.

Before trial, Plaintiffs sought to exclude evidence of the disagreement that led to Mrs. Coogan's resignation as PR. CP 21696. The court invited Defendants to articulate the relevance of this evidence, but GPC/NAPA did not offer any argument and the motion was granted. 3 RP 97-99.

During trial, however, GPC/NAPA advanced the exact same contention that they argue here, that the probate proceedings contradict the

image portrayed by the Coogans at trial:

> MS. LOFTIS: . . . . The probate record reflects that there was a big problem with this family getting along and with the daughters not accepting Gerri Sue all the way up until just before the death of Mr. Coogan.
>
> And this is a classic example where Plaintiff is moving to exclude evidence of the other half of the story and then present her half of the story. So I'm alerting you, I guess, Your Honor, that I'm seeing the door opening here to the probate records which show a whole different view of this family than what Plaintiff is putting on . . . .
>
> It's what was presented in the probate court that reflects what is really going on with this family even today in terms of them not getting along. And that's been true for twenty years. And so what they're trying to do is present half of the story here to the jury, Your Honor.
>
> * * *
>
> And this peace and harmony, Your Honor, that Doy created in the household is contradicted again by sworn statements in the probate file, so there wasn't peace and harmony in this family.
>
> If we go down that track, that this was a wonderful marriage and there was peace and harmony, that's going to open the door, Your Honor.

30 RP 25-28, 30.

Ms. Marx, Mrs. Coogan's daughter, acknowledged everything was not perfect in the Coogan family: "Everybody is not happy all the time, obviously, but overall they were happy." 30 RP 40. In addition, GPC/NAPA were permitted to admit into evidence a redacted copy of Mrs. Coogan's 2016 declaration, filed in support of her probate claims, that discussed the fact that the daughters had been slow to accept her as part of the family. 30 RP 66; Ex. 352.

The trial court further noted that GPC/NAPA were free to call

Mrs. Coogan to testify at trial under CR 43, but chose not to do so. 31 RP 15. They made that decision with full knowledge about the probate proceedings and the tensions within the family:

> THE COURT: This probate document was in existence. And everybody knew about it from the get-go. That's been a common knowledge among the Defendants in this case.
>
> So if that was something that everybody wanted to explore, there was a simple method by which they could have done so. And, furthermore, if you take this at face value, the death of Doy Coogan was the thing that created further discord in this family . . . .
>
> I think that everybody had an opportunity to require that the widow be here. Nobody chose to do that. Everybody knew about the probate action and that there was some kind of discord. Everybody has these probate documents well in sufficient time to have sent a Notice to Adverse Party to Attend Trial, and nobody did it.

31 RP 9-10.

After the trial and verdict against GPC/NAPA, Mrs. Coogan moved for summary judgment in the TEDRA proceeding on the issue of whether she shared a "Committed Intimate Relationship" (CIR) with Mr. Coogan prior to their marriage, between 1995 and 2011, such that she was entitled to half of his separate property. CP 21001-23. She re-submitted the declarations she had filed with her petition in 2016. CP 21026-28. The daughters' response denied that Mr. and Mrs. Coogan maintained a CIR and was supported by declarations from a different set of family and friends. CP 21081-86. Those declarations are what GPC/NAPA contend are "newly discovered evidence." The declarations either focus on the early

years of their relationship or do not reference a time period. None discuss the state of the Coogans' marriage from 2011 until his death in 2015. GPC/NAPA had access to five of the declarants prior to trial and asked them no probate-related questions. CP 21651.

2. None of the elements for relief from judgment on grounds of newly discovered evidence are met here.

A motion to vacate the judgment on grounds of "newly discovered evidence" must show: "the evidence (1) would probably change the result if a new trial were granted, (2) was discovered since trial, (3) could not have been discovered before the trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching." *Jones v. City of Seattle*, 179 Wn.2d 322, 360, 314 P.3d 380 (2014).

There are four reasons the declarations filed in the TEDRA proceeding are not material and would not have changed the verdict. First, the jury was already aware of problems in the Coogan family. They heard about tension between Mrs. Coogan and her husband's daughters and knew that Mr. and Mrs. Coogan were "not happy all of the time." 30 RP 40.

Second, nothing in the declarations directly contradicts sworn testimony in this case. The evidence that Mr. and Mrs. Coogan had hard times does not contradict the evidence that Mrs. Coogan loved her husband deeply and was devastated by his death. She was a devoted caregiver to

him during his illness. 18 RP 77-79; CP 20820, 22154, 22158-60, 22162, 22165, 22169, 22170-77. Relief under CR 60(b)(3) is only warranted when the case involves objective, verifiable facts that are later directly contradicted. *Jones*, 179 Wn.2d at 367. It is hard to imagine that facts relating to Mr. and Mrs. Coogan's relationship could ever be construed as objective or verifiable facts that contradict something as subjective as the testimony regarding their *feelings* for each other.

Third, the declarations do not address the issues to be considered by the jury in awarding wrongful death damages. "The purpose of the wrongful death statute is to compensate certain relatives of the deceased for injuries to their pecuniary interest, suffered as a result of the wrongful death." *Bowers v. Fibreboard Corp.*, 66 Wn. App. 454, 460, 832 P.2d 523 (1992). The recently filed declarations do not address Mr. Coogan's contributions to his marriage, but instead allege that Mrs. Coogan treated Mr. Coogan badly. Such evidence is not relevant to the determination of what Mrs. Coogan lost from the decedent.

Finally, the declarations are inadmissible. Bad conduct is not relevant in a wrongful death case. *See Montgomery v. Brewhaha Bellevue, LLC*, 195 Wn. App. 1064 (2016). They are also tangential, as they were offered in the probate proceeding to show that Mr. and Mrs. Coogan did not have an equitable relationship prior to their marriage and are focused

on those early years of their relationship. The declarations do not address what their relationship was like during their marriage or at the end of Mr. Coogan's life. The only use for such evidence would have been an improper one, namely to convince the jury that Mrs. Coogan is a bad person who does not deserve to be compensated for her losses.[2] The declarations also contain hearsay to the extent that they purport to convey what Mr. Coogan said or felt to third persons. ER 801(c); ER 802.

Additionally, GPC/NAPA failed to exercise diligence with regard to the discovery of damages evidence. GPC/NAPA never asked a single witness whether Mr. and Mrs. Coogan ever had any problems in their relationship. They knew in 2016 that there was a probate fight. CP 20778-801, 20839-73, 20887-907. They made a strategic decision not to pursue evidence regarding the issues raised in probate or even conduct the most basic inquiries about Mr. and Mrs. Coogan's relationship.

GPC/NAPA chose to ask little regarding probate and only in the depositions of Ms. Baxter and Ms. Marx. CP 20586, 20591. They chose not to ask Mrs. Coogan or Roxana Coogan anything about Mrs. Coogan's filings in the probate court. CP 21350-76; 21445-65. They chose not to

[2] One such allegation is the hearsay statement that Mrs. Coogan chased Mr. Coogan with an ax more than 20 years ago. This statement almost certainly would not survive ER 403 analysis, as the trial court ultimately determined about much of the probate evidence generally. CP 22586-87.

depose any of the other 13 probate witnesses, other than Richard Berend who was not asked about the probate proceedings or his declaration. CP 21654-79. They also chose not to propound any written discovery on any topic related to probate, Mrs. Coogan's relationship with her husband, or her relationship with his daughters. They never asked any witness whether Mr. and Mrs. Coogan ever had any problems in their relationship.

In considering GPC/NAPA's CR 60 motion, the trial court "undertook extensive review the[] supporting materials" submitting by the parties, finding most to be irrelevant or inadmissible. (CP 22556). The trial court's denial of relief under CR 60 was well-reasoned, supported by the record, and was not a manifest abuse of discretion. *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000). The issue was never even reached by the Court of Appeals. GPC/NAPA failed to show that the declarations would have affected the verdict and were not diligent in pursuing relevant discovery. Review of this issue should be denied.

C. This Court should decline review of the entire verdict for excessiveness.

Finally, GPC/NAPA urge the Court to review the amount of the jury's award to Mr. Coogan's widow and daughters, contending it is "excessive." This argument was rejected by the trial court and not reached by the Court of Appeals. (App. 20). GPC/NAPA have not argued that this

issue meets the review criteria of RAP 13.4(b).

Given the evidence supporting the award, the trial court did not abuse its discretion in denying a new trial on grounds that the verdict was excessive. *McClintock v. Allen*, 30 Wn.2d 272, 277, 191 P.2d 679 (1948). In arguing that the award "shocks the conscience," GPC/NAPA ignore the substantial evidence that supported the jury's damages award to Mrs. Coogan and to Mr. Coogan's two daughters.

It is well established that the determination of damages is a constitutional function of the jury. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 269, 840 P.2d 860 (1992). "Washington has consistently looked to the jury to determine damages as a factual issue, especially in the area of noneconomic damages." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 648, 771 P.2d 711 (1989).[3] Moreover, great deference is given to the jury's valuation of damages. The jury's damages award is presumed to be

[3] *Conrad ex rel. Conrad v. Alderwood Manor*, 119 Wn. App. 275, 299, 78 P.3d 177 (2003) describes this well:

> We as a society make all sorts of judgments about value, ranging from contract/salary compensation for school teachers, professional athletes, corporate executives, and government workers, to the dollar amount placed on a plaintiff's injuries. Here, a jury of 12 people makes and made that decision. And barring some extraordinary factor, which the trial judge did not see here, and neither do we, courts should leave that judgment where it is vested by tradition and law—with the jury.

correct. *Green v. McAllister*, 103 Wn. App. 452, 461, 14 P.3d 795 (2000).[4] When "excessive" damages are claimed, relief may be granted only if the award is "so excessive" as "unmistakably to indicate that the verdict must have been the result of passion or prejudice." CR 59(a)(5). Before passion or prejudice can justify a new trial, "it must be of such manifest clarity as to make it unmistakable." *Miller*, 67 Wn. App. at 124 (internal citations and quotations omitted).

The size of the award is not a reason to infer that it was the result of passion or prejudice. *Brundridge*, 164 Wn.2d at 454; *see also Washburn*, 120 Wn.2d at 269 ("It is apparent that the amount of a verdict in and of itself cannot sustain a conclusion that it is excessive."); *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 838, 699 P.2d 1230 (1985) ("The verdict of a jury does not carry its own death warrant solely by reason of its size."). GPC/NAPA disregard this line of case law, asking this Court to find the loss of consortium awards excessive because they are large.

They also ignore that when the amount of the verdict is reasonably within the range of substantial evidence, it cannot be held as a matter of

[4] "The jury is the appropriate assessor of damages, and its determination should be overturned only in the most extraordinary circumstances." *Miller v. Yates*, 67 Wn. App. 120, 124, 834 P.2d 36 (1992). Given the jury's special role in valuing damages, courts are "reluctant to interfere" with the award. *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 454, 191 P.3d 879 (2008).

law to be so excessive as to establish that the jury was unmistakably motivated by passion or prejudice. *Washburn*, 120 Wn.2d at 269; *Conrad*, 119 Wn. App. at 299. The jury was instructed that they could award economic damages for the money, goods, and services Mr. Coogan would have contributed to his family if he had lived, as well as loss of consortium damages for the loss of his relationship, advice, emotional support, affection, and care. 47 RP 119-20. Damages awards to the family of the injured party may appropriately be in the tens of millions of dollars when supported by the evidence. *See Wuth ex rel. Kessler v. Lab. Corp. of Am.*, 189 Wn. App. 660, 704–06, 359 P.3d 841 (2015) (affirming trial court's decision not to reduce an award of $25 million in noneconomic damages to the parents of an infant born with birth defects); *Joyce v. State, Dep't of Corr.*, 116 Wn. App. 569, 586 n.3, 75 P.3d 548 (2003), *aff'd in part, rev'd in part on other grounds*, 155 Wn.2d 306, 119 P.3d 825 (2005) (trial court denied remittitur of $18 million in noneconomic damages to four children of the decedent).

The evidence was that Mrs. Coogan was "basically broken" by her husband's death. 30 RP 40. Even a year and a half after his death she was still having difficulty functioning normally. Her daughter described Mr. Coogan as "her rock" and "her everything." 30 RP 42. His calming nature was critical to her well-being. 30 RP 42. He was also a source of advice

and guidance to his daughters. They could rely on him for anything, from friendship and financial advice to handyman services when they needed a mechanic or a plumber. His wife and daughters took turns caring for him on his deathbed. Even defense counsel noted in her closing argument "this terrible loss that the Coogan family suffered" and that "[i]t's not fair that he died of this horrible disease." 47 RP 194. Defense counsel also described the loss of a parent as "horrible." 47 RP 225.

GPC/NAPA's argument that the $1.5 million economic–damage award is excessive also disregards the evidence. The jury heard evidence that Mr. Coogan was the family's car mechanic, babysitter, and had extensive involvement in maintaining his own house and the 500 acres he inherited, including plumbing work, maintenance of the lawns and garden, and excavating the property. He also provided those and other services to his daughter. *See, e.g.*, 18 RP 71. Providing the maintenance for multiple homes is certainly worth a substantial amount.

The jury could have found that, absent mesothelioma, Mr. Coogan would have lived as long as his mother, who was still alive at 90. Given the instructions and the evidence, the jury could reasonably have found that the value of Mr. Coogan's services to his widow and daughters over a considerably greater life expectancy would have come to $1.5 million.

Further, the trial court's denial of a new trial strengthens the jury's damages award. *Washburn*, 120 Wn.2d at 271. The trial court is uniquely situated to evaluate the evidence as it was received by the jury. *Id.* at 270. "The trial court sees and hears the witnesses, jurors, parties, counsel and bystanders; it can evaluate at first hand such things as candor, sincerity, demeanor, intelligence and any surrounding incidents." *Bingaman*, 103 Wn.2d at 835. The trial judge here spent months with this jury and had the advantage of observing the jury members and their demeanor. He found no reason to believe that the jury had been motivated by passion or prejudice and properly refused to infer such motive from the size of the damages award. His determination that they discharged their duty faithfully, and were not stoked by passion, is entitled to substantial deference.

The Court should reject GPC/NAPA's invitation to compare the ratio of economic damages to non-economic damages under the facts of this mesothelioma case.[5] *Sofie v. Fibreboard Corp.*, found unconstitutional a statute that limited non-economic damages by a formula based on

[5] The Court should similarly decline to reconsider long held precedent established in *Washburn* that courts are not to compare verdicts when evaluating a claim that a verdict was excessive. (Answer at 26 n.14). Not only has GPC/NAPA failed to offer any reason for reconsideration of this precedent, but GPC/NAPA's criticism of the lower courts' adherence to *Washburn* strongly counsels against review. RAP 13.4(b)(1) requires a *conflict* with precedent, not adherence to precedent.

"multiplying 0.43 by the average annual wage and by the life expectancy of the person incurring non-economic damages." 112 Wn.2d at 638-39 n.1. Much as GPC/NAPA advocates, that statute most severely limited non-economic damages for those whose economic damages were limited by their age. Especially following *Sofie*, it is in appropriate to employ a ratio to limit a family's losses from a loved one's death from mesothelioma.

GPC/NAPA's reliance on *Hill v. GTE Directories Sales Corp.,* 71 Wn. App. 132, 856 P.2d 746 (1993), is also unpersuasive. *Hill* was an employment discrimination case in which the evidence of non-economic damages in the form of emotional distress supporting damages of $400,000 was described as "meager evidence." 71 Wn. App. at 140. Those facts are wildly different from evidence of intolerable pain from an incurable cancer. Here, the economic award was both reasonable and encompassed a range of household services.

Finally, the difference between the verdict and the settlement amounts does not render the verdict excessive. GPC/NAPA's argument ignores that the evidence against it was much stronger than that against the settled parties. Further, its argument that the disparity between the settlements and the verdict in this case means that the verdict is not supportable omits crucial considerations in settlement and, if accepted, would markedly impede settlement. The crucial considerations in

settlement include not only the potential verdict *if* plaintiffs win, but also include the likelihood of success and avoidance of risk. This case was extensively litigated and there was a real chance of Plaintiffs losing on liability or causation grounds. It thus makes little sense to argue, as does GPC/NAPA, that the *pre*-verdict $4.3 million in settlements necessarily means that a much higher verdict was not reasonable. Given the possibility of a defense verdict, Plaintiffs' attorneys reasonably settled with most defendants in order to guarantee that Plaintiffs received more than $4 million while also pursuing a verdict against the most culpable defendants that never meaningfully engaged in settlement discussions.

Because GPC/NAPA dismiss the evidence supporting the damages award to Mr. Coogan's family, have failed to show that the award is the product of passion or prejudice, and have not met any of the criteria for review under RAP 13.4(b), there is no reason for this Court to grant review of this issue.

III. CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court deny review of the additional issues raised by GPC/NAPA. Their own briefing fails to argue that any of their issues meet the criteria for this Court's review under RAP 13.4(b).

Dated this 2nd day of June, 2020.

Respectfully Submitted,

s/ William Rutzick
William Rutzick, WSBA #11533
Schroeter Goldmark & Bender
810 Third Avenue, Suite 2420
Seattle, WA 98101-1362
(206) 622-8000
SGBasbestos@sgb-law.com

Brian D. Weinstein, WSBA #24497
Alexandra B. Caggiano, WSBA #47862
Weinstein Caggiano, PLLC
600 University Street, Suite 1620
Seattle, Washington 98101

Jessica M. Dean
Lisa W. Shirley
Benjamin H. Adams
Dean Omar Branham Shirley, LLP
302 N. Market St., Suite 300
Dallas, TX 75202
214-722-5990

CERTIFICATE OF SERVICE

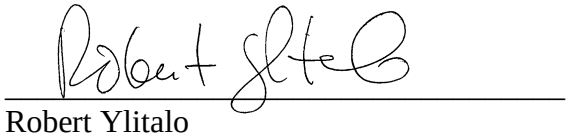
I certify under the penalties of perjury under the laws of the State of Washington that on this date I caused a copy of the forgoing document, PETITIONERS' REPLY TO RESPONDENTS' ANSWER TO PETITION FOR REVIEW, to be served on all counsel of record, via the Appellate E-filing Portal, as follows:

Counsel for National Automotive Parts Association
Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Counsel for GPC and National Automotive Parts Association
Michael B. King, WSBA #14405
Jason W. Anderson, WSBA #30512
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020
Email: king@carneylaw.com
Email: anderson@carneylaw.com

Counsel for GPC and National Automotive Parts Association
Jeanne F. Loftis
Brendan Philip Hanrahan
BULLIVANT HOUSER BAILEY, PC
888 SW 5th Avenue #300
Portland, Oregon 97204-2017
Email: Jeanne.loftis@bullivant.com
Email: Brendan.hanrahan@bullivant.com

DATED at Lynnwood, Washington on this 2nd day of June, 2020.



Robert Ylitalo
ylitalo@sgb-law.com

SCHROETER GOLDMARK BENDER

June 02, 2020 - 10:40 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	98296-1
Appellate Court Case Title:	Gerri S. Coogan, et al. v. Genuine Parts Company, et al.
Superior Court Case Number:	15-2-09504-3

The following documents have been uploaded:

- 982961_Answer_Reply_20200602103614SC228081_5534.pdf
  This File Contains:
  Answer/Reply - Reply to Answer to Petition for Review
  The Original File Name was Petitioner Reply to Petition for Review.PDF

A copy of the uploaded files will be sent to:

- LShirley@dobllp.com
- SGBasbestos@sgb-law.com
- alex@weinsteincaggiano.com
- anderson@carneylaw.com
- bhanrahan927@gmail.com
- brian@weinsteincaggiano.com
- garrett@sgb-law.com
- jdean@dobslegal.com
- jeanne.loftis@bullivant.com
- king@carneylaw.com
- matt@tal-fitzlaw.com
- phil@tal-fitzlaw.com
- service@weinsteincaggiano.com
- service@weinsteincouture.com
- thorson@carneylaw.com
- wright@sgb-law.com

Comments:

Sender Name: Robert Ylitalo - Email: ylitalo@sgb-law.com
Filing on Behalf of: William Joel Rutzick - Email: rutzick@sgb-law.com (Alternate Email:)

Address:
810 Third Ave.
Suite 500
Seattle, WA, 98104
Phone: (206) 622-8000

Note: The Filing Id is 20200602103614SC228081