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 ANSWER TO PETITION FOR REVIEW

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

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I. INTRODUCTION

This Court should decline to review the Court of Appeals, Division Two's unpublished decision affirming the jury's liability verdict against Genuine Parts Company (GPC) and the National Automotive Parts Association (NAPA) and ordering a new trial on damages. None of the RAP 13.4(b) criteria is present. The Coogans—which include Gerri Sue Coogan (Jerry "Doy" Coogan's widow from a four-year marriage) and Doy's estate and its beneficiaries—point to no holding or statement of the law by Division Two that conflicts with any other case. RAP 13.4(b)(1), (b)(2). Nor have they shown that their petition raises any issue of substantial public importance. RAP 13.4(b)(4).

Division Two's vacation of the $81.5 million damages verdict follows from prudent application of precedent. The court ordered a new trial on the $51.5 million in awards for loss of consortium and services because the trial court improperly excluded the defendants' expert, who would have testified that Doy would have lived no more than five years absent mesothelioma—not fifteen as the jury was instructed. And the court ordered a new trial on damages for Doy's estate because the jury's $30 million award for pain and suffering shocked the court's conscience. Neither ruling warrants review of Division Two's unpublished decision.

This Court should deny review. But if it grants review, then it will need to address other issues that GPC and NAPA raised in the Court of Appeals as additional grounds for reversal—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 entire $81.5 million verdict's excessiveness. The need to address these thorny issues would complicate review, and thus counsels against granting review.

II. COURT OF APPEALS DECISION

The Court of Appeals, Division Two, issued its unpublished decision on February 19, 2020, and amended its decision on April 7, 2020.[1] The Coogans did not move to publish the decision under RAP 12.3(e).

III. RESTATEMENT OF THE CASE

GPC and NAPA adopt the statement of facts in the Court of Appeals' unpublished decision, incorporate the statement of the case in their opening brief in the Court of Appeals, and supplement those statements with additional facts in this Answer.

IV. RESTATEMENT OF ISSUES

A. The Coogans' Issues.

1. A physician would have testified that Doy had stage 3 liver cirrhosis and thus had no more than five years to live absent mesothelioma, not fifteen years as the jury was instructed. Division Two ruled consistent with precedent when it unanimously concluded that the trial court acted as a factfinder—not a gatekeeper—by excluding Dr. Schuster's testimony based on the trial court's disagreements with his conclusions. Should this Court nevertheless review Division Two's unpublished decision?

[1] The Coogans filed their petition while a motion for reconsideration was pending. They attached the original version of the Court of Appeals' decision to their petition. Although the differences between the original and amended versions are minor, the pagination differs. For consistency, GPC and NAPA, like the Coogans, refer to the original, rather than the amended, version of the Court of Appeals' decision.

2. Division Two applied well-established precedent in determining that the $30 million verdict for Doy's estate was excessive because that verdict—the largest of its kind in this state—shocked the court's conscience. Should this Court review Division Two's unpublished decision merely to decide whether it agrees with that conclusion?

B. GPC and NAPA's Conditional Issues.

1. The Coogans' attorney committed prejudicial misconduct time and again during witness examination, which Judge Lee concluded in her partial dissent warranted a new trial not only on damages but on liability as well. If this Court accepts review, should it also review the denial of a new trial based on the Coogans' counsel's misconduct?

2. GPC and NAPA discovered after the verdict that the Coogans had misrepresented facts and hidden evidence that was material to their relationship-based damages claims. Division Two did not reach that issue given its other holdings, but if this Court accepts review, should it also review the trial court's denial of GPC and NAPA's motion for relief from the judgment under CR 60(b)(3) and (b)(4)?

3. If this Court reviews the excessiveness of the $30 million verdict for Doy's estate, should it also review the entire $81.5 million verdict for excessiveness—another issue that Division Two did not reach?

V. ANSWERING ARGUMENT

A. The Coogans identify no basis to review Division Two's decision to order, in an unpublished opinion, a new trial on the $51.5 million award for lost consortium and services the jury.

The Coogans argue that Division Two's decision to exclude highly relevant expert testimony pertaining to Doy's life expectancy conflicts with this Court's and the Court of Appeals' precedents. The unanimous Division Two panel was meticulous in its analysis—spending more than 10 pages dissecting the expert-testimony issue—and its unpublished decision conflicts with no precedent applying ER 702 or ER 403. This Court should deny review.

1. Dr. Schuster's opinion that Doy had stage 3 liver cirrhosis meant that he had no more than five years to live absent mesothelioma, not fifteen as the court instructed the jury.

The damages the Coogans sought for loss of consortium and loss of services were based on Doy's having died prematurely from mesothelioma, so Doy's life expectancy absent that disease was highly relevant. *See* CP 14988, 15021. Using pattern instructions, the trial court instructed the jury to consider Doy's "health" and "life expectancy" in determining the Coogans' damages. It also instructed that, according to mortality tables, the average life expectancy of a 67-year-old man (Doy's age when he died) is fifteen years. CP 14989, 14991.

But the defense had evidence disproving that life expectancy. A defense expert, Gary R. Schuster, M.D., would have testified that Doy had stage 3 liver cirrhosis, in addition to mesothelioma. Cirrhosis is lethal at stage 3. If Doy had it, his life expectancy was five years—at most—and certainly not the average fifteen. 26 RP 145, 150-52.

In an offer of proof, Dr. Schuster identified three key findings supporting his opinion that Doy had stage 3 cirrhosis, all of which were visible on a computer-tomography (CT) scan: (1) Doy's liver was nodular (meaning it had tumor-like growths); (2) his portal veins were enlarged; and (3) his spleen was enlarged. 26 RP 147-48; *see also* CP 4714, 5919. The critical finding that pointed to *stage 3* cirrhosis was the latter one—Doy's enlarged spleen. Dr. Schuster explained that an enlarged spleen would

create ascites—a fluid buildup in the abdomen that Doy also had—and that ascites are the hallmark of stage 3 cirrhosis. 26 RP 146-47, 159, 161.

The trial court disagreed with that opinion. In rulings before and during trial, the court excluded Dr. Schuster's testimony under ER 702 and 403. That left the jury with only the Coogans' expert's testimony that Doy was "quite healthy before his illness with mesothelioma." 9 RP 153.

2. Division Two's determination that the trial court acted as a factfinder rather than a gatekeeper in rejecting Dr. Schuster's testimony under ER 702 breaks no new ground.

As Division Two understood, the trial court's disagreements with Dr. Schuster's testimony represented at most potential cross-examination points—not the kind of qualification or foundation-related questions that would warrant exclusion of an expert's opinions under ER 702.

First, Division Two held that the trial court abused its discretion under ER 702 by engaging in fact-finding concerning Dr. Schuster's sources. Citing four journal articles, Dr. Schuster had opined in the offer of proof that one could have liver-function tests within normal range through stage 3, as Doy had. 26 RP 147-51. Yet the trial court interpreted one of the articles' use of the plural "last stages" as ruling out normal test results at stages 3 and 4. 26 RP 165-66. Division Two saw that fact-finding for what it was, explaining that the trial court exceeded its role as gatekeeper by concluding that its own "interpretation of one term in one article outweighed Dr. Schuster's opinion, supported by three other articles[.]"

Slip Op. at 16-17. There is nothing review-worthy about that sound reasoning.

Second, the trial court also disagreed with Dr. Schuster's opinion about the cause of Doy's ascites. Dr. Schuster acknowledged that Doy's tumor would have independently produced ascites, but he stated definitively that an enlarged spleen "is going to create some ascites, as well." 26 RP 146-47. That did not matter to the trial court: It was "convinced" that Doy's ascites resulted entirely from the cancer. 26 RP 166. Such improper fact-finding is no basis for excluding expert testimony under ER 702. Division Two explained that Dr. Schuster had given an opinion and provided the foundation for that opinion, but the trial court "simply disagreed," eschewing its role as a gatekeeper in the process. *Slip Op.* at 17. Again, there is nothing review-worthy about that application of the long-established and well-settled law concerning expert-witness testimony.

Third, the trial court thought it significant that "none of Doy's treating physicians or the examining specialist" had testified that Doy had cirrhosis. CP 5918-19; 26 RP 166. That is no basis for excluding an expert's testimony either. In Division Two's words, "[e]xperts often disagree with each other." *Slip Op.* at 18. There is nothing remarkable about that proposition—certainly nothing warranting this Court's review.

3. Division Two's decision does not conflict with any other ER 403 case.

Division Two also held that the trial court abused its discretion in excluding Dr. Schuster's testimony under ER 403. The trial court thought

that the prejudicial effect of characterizing Doy "as an alcoholic, a chronic, heavy drinker" would outweigh any probative value. 2 RP 97; 26 RP 167. But as Division Two understood, Dr. Schuster's opinion was "undeniably probative of a central issue in the case"—Doy's life expectancy absent mesothelioma. *Slip Op.* at 19 (quoting *Carson v. Fine*, 123 Wn.2d 206, 224, 867 P.2d 610 (1994)). The court also recognized that while Dr. Schuster had mentioned Doy's 20-plus-year history of alcohol consumption in his offer of proof, it was not an "integral part" of his opinions. *Slip Op.* at 18-19; *see* 2 RP 98-99.

The Coogans conjure a conflict between Division Two's unpublished decision and three other ER 403 decisions—but there is no conflict. *See Petition* at 17-20 (citing *Jones v. City of Seattle*, 179 Wn.2d 322, 314 P.3d 380 (2013); *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 815 P.2d 798 (1991); and *Needham v. Dreyer*, 11 Wn. App. 2d 479, 454 P.3d 136 (2019)). The Coogans' cited cases have nothing to do with this case.

The Coogans' only cited case from this Court—*Jones*—does not even mention ER 403, let alone speak to the admissibility of alcohol-related testimony. In *Jones*, the defendant had sought to introduce testimony about many aspects of the plaintiff's post-accident life, including his alcohol consumption. *Jones*, 179 Wn.2d at 357-58. The trial court excluded all of the proposed testimony as not having been disclosed before trial. It also cited ER 403 as an additional basis to exclude the alcohol-related portions. *Id*. at 343, 356. On appeal, the defendant raised only the timely disclosure

issue, waiving any argument about the admissibility of the alcohol-related testimony. *Id.* at 356-57. This Court did not address that testimony, which makes the Coogans' citation to *Jones* puzzling.[2]

The Coogans' other cited cases—the Court of Appeals' decisions in *Kramer* and *Needham*—are no better. In both cases, the defendant did not connect the alcohol-use evidence to any probative issue. In *Kramer*, for instance, the Court of Appeals held that the trial court abused its discretion by allowing the defense to cross-examine the plaintiff with evidence of his alcohol and drug use before and after an accident. *Kramer*, 62 Wn. App. at 559. Although the defendant argued that the evidence was relevant to the plaintiff's work-life expectancy and earning potential, it never made an offer of proof to show that the plaintiff's pre-accident substance abuse had affected his employment. *Id.* Indeed, the Court of Appeals reasoned that "nothing in the record indicates that [the plaintiff's] drug and alcohol use prior to the 1985 accident affected his employment," so "the trial court had no basis to conclude that [the plaintiff's] substance abuse affected his earning capacity or work-life expectancy." *Id.*

The same was true in *Needham*. The Court of Appeals held that the trial court abused its discretion in admitting evidence of a medical-malpractice plaintiff's alcohol use on the day he collapsed (*Needham*, 11 Wn. App. 2d at 493-97), but it did so because the defendant had provided

[2] Even if this Court had addressed the admissibility of the alcohol-related testimony in *Jones*, that case would be distinguishable because the defense offered evidence of alcohol use to support speculative causation and failure-to-mitigate theories, not expert testimony bearing directly on a central issue (as was the case here). *See Jones*, 179 Wn.2d at 328-34.

no evidence that the plaintiff was inebriated or had an elevated blood-alcohol content. *Id*. at 495. Absent that evidence, the alcohol-use evidence was not relevant. *Id.* at 495-96. The court further held that even if the defendant had shown that the evidence had some probative value, it was substantially outweighed by the risk of unfair prejudice from evidence casting the plaintiff as a heavy drinker. *Id*. at 496-97.

Those cases are nothing like this one. Here, the defense established that Dr. Schuster's opinion was probative of Doy's life expectancy, which was a central issue in the case. The Coogans argue that Division Two failed to weigh the opinion's probative value or acknowledge "the uncertainty in Schuster's opinion" (*Petition* at 19), but the only supposed "uncertainty" the Coogans point to is that Dr. Schuster could not estimate how much of Doy's ascites were caused by mesothelioma versus cirrhosis. *Id*. at 19 n.2. That testimony did not undermine Dr. Schuster's opinion that Doy had stage 3 cirrhosis. *Id.* Again, what was critical was that Doy had an enlarged spleen, which Dr. Schuster stated would necessarily cause some ascites and result in stage 3 diagnosis. Division Two understood as much. *See Slip Op.* at 17. According to Division Two, the probative value of Dr. Schuster's testimony was "undeniable." *Id*. at 19 (quoting *Carson*, 123 Wn.2d at 224).

Nor was there any danger of undue prejudice in that testimony, much less the type of undue prejudice that substantially outweighs an opinion's probative value. Dr. Schuster's core life-expectancy opinion had nothing to do with alcohol use—unlike the proposed alcohol-related testimony in *Kramer* and *Needham*. As Division Two observed, Dr.

Schuster in his offer of proof never opined about what caused Doy's cirrhosis. *Slip Op.* at 18. Indeed, Dr. Schuster could have given his opinions about cirrhosis and life expectancy without ever mentioning alcohol use, and he was prepared to do so. *See id*. at 19. That reality gives yet another reason why there is no conflict to resolve between Division Two's unpublished decision and any alcohol-related ER 403 appellate decisions. In any event, this Court should not accept review to engage in ER 403 balancing when the risk of prejudice was zero.

There is nothing review-worthy about Division Two's holdings. The court's unpublished decision conflicts with no decision of this Court or any published decision of the Court of Appeals. Nor does anything in the court's expert-related analysis present an issue of substantial public interest. *See* RAP 13.4(b)(1), (2), and (4). This Court should deny review of Division Two's determination that the trial court erred in excluding Dr. Schuster's cirrhosis opinion.

B. The Coogans identify no basis for this Court to review Division Two's holding (again, in an unpublished decision) that a $30 million award was so excessive that it shocked the court's conscience.

Division Two also applied well-established precedent in vacating the jury's $30 million verdict for Doy's estate because the award was so excessive that it shocked the court's conscience. The Coogans cite no case from this Court or the Court of Appeals that conflicts with the court's holding on that score. And there is none. Nor do the Coogans raise any

issue of substantial public interest concerning their outlier $30 million verdict.

1. Division Two's decision does not conflict with prior decisions setting forth the legal standard for determining a verdict's excessiveness.

Division Two was unanimous in stating the law governing a court's authority regarding an excessive verdict. *See Slip Op.* at 51 (Melnick, J., dissenting) ("The majority correctly states the law[.]"). Following this Court's teaching, Division Two explained that courts may determine that a verdict is excessive because it is "[1] outside the range of substantial evidence in the record, ***or*** [2] shocks the court's conscience, ***or*** [3] appears to be the result of passion or prejudice." *Bunch v. King Cty. Dep't of Youth Servs.*, 155 Wn.2d 165, 179, 116 P.3d 381 (2005) (quoting *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 835, 699 P.2d 1230 (1985)) (emphasis added); *see also Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 268, 280, 840 P.2d 860 (1992); *Slip Op.* at 20.

Division Two relied on the second ground, holding that the jury's award of $30 million to Doy's estate was so excessive that it shocked the court's conscience. *Slip Op.* at 20-24. As the court understood, Washington law limits the amount of damages that a jury may award to an amount that is not "excessive." There was nothing wrong in the court's explaining that the $30 million verdict—which far exceeded the highest mesothelioma verdict that courts in this state have affirmed—shocked the court's conscience. The court's unpublished decision conflicts with no precedents.

The Coogans mishandle this Court's prior decisions in *Bunch*, *Bingaman*, and *Washburn* in arguing otherwise. According to the Coogans, Division Two "made no effort to analyze" the test for whether a verdict is conscience-shocking and "simply stated that the award was too much." *Petition* at 15. That is wrong. The court discussed the applicable standards at length: It recited this Court's test that a conscience-shocking verdict is one whose amount is "flagrantly outrageous and extravagant" (*Slip Op.* at 21 (quoting *Bingaman*, 103 Wn.2d at 837), quoted this Court's further explication that "[a]n 'outrageous' verdict is one that is 'so flagrantly bad that one's sense of decency or one's power to suffer or tolerate is violated'" (*Slip Op.* at 21 (quoting *Washburn*, 120 Wn.2d at 279 (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 1603 (1981)))), analyzed the trial evidence, and concluded in the end that the $30 million verdict for Doy's estate met the excessiveness standard. *Id*. at 22-24.

Attempting to manufacture a conflict, the Coogans also argue that Division Two ignored *Bunch* because the court did not expressly find that the jury was motivated by passion or prejudice, but *Bunch* required no such finding.[3] In *Bunch*, the Court explained that there are three independent bases for challenging a verdict as excessive. *See Bunch*, 155 Wn.2d at 179.

[3] The Coogans are wrong that Division Two determined that the jury's verdict was *not* the product or passion or prejudice. *Petition* at 15 (citing *Slip Op.* at 25). The court did not rule out that passion or prejudice was a factor in producing the verdict. It merely concluded that the Coogans' attorney's misconduct did not cause the jury to base its verdict on passion and prejudice. *Slip Op.* at 25. Regardless, Division Two was not required to find passion or prejudice before vacating the award to Doy's estate and ordering a new trial as to those damages.

Although one of the grounds—passion or prejudice—has long been codified (now in CR 59(a)(5)[4]), that codification "does not attempt to limit the inherent power of the court," so a court may order a new trial on any one or more of the traditional grounds. *Brammer v. Lappenbusch*, 176 Wash. 625, 629-30, 30 P.2d 947 (1934) (interpreting the statutory predecessor to CR 59(a)); *see also Bunch*, 155 Wn.2d at 171-72 (discussing the court's inherent and statutory powers); *Scobba v. City of Seattle*, 31 Wn.2d 685, 699, 198 P.2d 805 (1948) (same).

As the sole authority for their contrary position, the Coogans strip the following sentence from its context in *Bunch*:

> The damages, therefore, must be so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption.

Bunch, 155 Wn.2d at 179 (quoting *Kramer v. Portland-Seattle Auto Freight, Inc.*, 43 Wn.2d 386, 261 P.2d 692 (1953) (quoting *Coleman v. Southwick*, 9 Johns. 45, 6 Am. Dec. 253 (N.Y. S. Ct. 1812))). Read in context, this Court used the quoted text to explain the standard for vacating a verdict based specifically on a finding of passion or prejudice. *See id.* Indeed, the quotation follows this Court's listing of the three grounds in the disjunctive (which, as the Coogans' own citations confirm, this Court has consistently done). *Bunch*, 155 Wn.2d at 179; *Petition* at 8-9 (quoting *Bingaman*, 103 Wn.2d at 835); *see also Washburn*, 120 Wn.2d at 265, 280;

[4] From 1854 until 1967, the rule was statutory. *See Coppo v. Van Wieringen*, 36 Wn.2d 120, 127-28, 217 P.2d 294 (1950). Washington adopted its Rules of Civil Procedure, including CR 59, in 1967.

Rasor v. Retail Credit Co., 87 Wn.2d 516, 531, 554 P.2d 1041 (1976). Beyond that, after the Coogans' quoted sentence, the Court in *Bunch* proceeded to analyze each ground as an independent potential basis for vacatur. *Bunch*, 155 Wn.2d at 179-83. And even beyond that, the case that *Bunch* quoted—*Kramer*—expressly recognized that a court may vacate a conscience-shocking verdict "in the absence of passion and prejudice." *Kramer*, 43 Wn.2d at 395-96. This Court explained that in those circumstances, the court must balance the deference given to the jury's verdict against the court's conscience and find that the amount awarded was "flagrantly outrageous and extravagant." *Id*.

That is precisely what Division Two did here. The court applied the correct standard to conclude that the verdict shocked its conscience. That holding conflicts with no precedents—from this Court or otherwise—so review is unwarranted under RAP 13.4(b)(1) and (b)(2).

2. Division Two's decision does not conflict with prior decisions applying the shocks-the-conscience standard.

For similar reasons, the Coogans are wrong that Division Two's decision conflicts with decisions setting forth "settled principles" regarding appellate review of damages awards. *See Petition* at 9-11. Division Two expressly recognized each of the three principles that the Coogans recite—that (1) a jury's verdict is presumptively correct, (2) the trial court's denial of a motion for a new trial "strengthens" the verdict against review, and (3) an appellate court rarely should substitute its judgment for that of the jury on damages. *Slip Op.* at 22.

The court's careful analysis confirms that it applied the correct standard, was mindful of its proper role, and did not reach its conclusion lightly. Division Two recognized that the jury was instructed to consider Doy's "pain, suffering, anxiety, emotional distress, humiliation and fear." *Slip Op*. at 22 (quoting CP 14988). It also "strongly presume[d]" that the jury's verdict was correct, but nevertheless concluded that it was compelled to vacate the verdict for Doy's estate because the amount shocked the court's conscience. *Id*. at 22-24. Based on the evidence, the court concluded, "this is the rare case where we must disregard the jury's verdict and the trial court's refusal to find the verdict excessive." *Id.* at 23.

To support their disagreement with the majority's conclusion, the Coogans rely heavily on Judge Melnick's dissenting opinion. But he seemed to believe that *no* amount of damages would be excessive in this case, stating that "[n]o amount of money could ever compensate Doy for the suffering he endured[.]" *Slip Op.* at 52. That reasoning conflicts with Washington law, which requires courts to vacate or remit an excessive verdict. The excessiveness tool exists for a reason. It exists for outlier and conscience-shocking cases like this.

Besides that, Judge Melnick's dissent also hinged on a factual error, which the Coogans parrot on appeal. According to Judge Melnick, Doy suffered extensively before first visiting a doctor in mid-January 2015, less than six months before his death. *See Petition* at 11-12; *Slip Op.* at 51-52. There is no record support for that statement—and the Coogans' own evidence undermines it. The Coogans' expert, Dr. Brodkin, acknowledged

that Doy "became ill in January of 2015." 7 RP 120. Doy's sole complaint at that initial doctor visit was that he had increasingly noticed bloating and discomfort "*over the last month*." CP 5918 (emphasis added). Three months passed before he received his mesothelioma diagnosis, in April 2015.[5] 9 RP 151; 11 RP 81-82; CP 5924. As the Division Two panel majority noted, Doy's health declined rapidly after that, with the most severe symptoms occurring during the last few months of his life. *Slip Op.* at 23; *see* 11 RP 80-90. He started chemotherapy at the end of April 2015 and died just over two months later, not long after his third treatment, on July 1, 2015. CP 5924; 11 RP 89; 16 RP 78-79, 18 RP 72. Indeed, the Coogans' expert Dr. Brodkin agreed with their counsel that Doy underwent a "radical change" over about four months, explaining that "it was an aggressive cancer and it led to rapid deterioration." 11 RP 90. The Coogans' mischaracterization of the factual record is no basis for this Court to review Division Two's unpublished decision.

Tracking Judge Melnick's dissent, the Coogans also criticize GPC and NAPA for supposedly pursuing an "all or nothing strategy" of arguing "solely about liability" at trial. *Slip Op.* at 51; *see Petition* at 12-13. But GPC and NAPA did not capitulate on damages. *See* 47 RP 225. After the Coogans' attorney requested $30 million for Doy's estate, GPC and NAPA's attorney reminded the jury that we have a "compensatory system," that Washington does not allow punitive awards, and that "[t]his is not your

[5] The Coogans misstate the facts in representing that Doy "died six months after his diagnosis." *Petition* at 6. He died six months after his initial doctor visit—and three months after his diagnosis.

chance to take it out on a big company." 47 RP 190, 225. Neither the Coogans nor Judge Melnick cite any authority for the notion that if a defendant does not propose a specific alternative-damages figure during closing argument, then the defendant somehow waives the right to challenge a verdict as excessive. *See Petition* at 12-13; *Slip Op.* at 51.

Division Two understood that vacating a damages verdict as excessive will happen only rarely, but it also understood that the excessiveness standard exists for a reason.[6] Division Two was shocked by the jury's $30 million award, which amounted to "$164,000 for each day and over $5 million for each month from Doy's first presentation with symptoms to a doctor until his death." *Slip Op.* at 23. The Coogans have not shown that Division Two's unpublished decision on that score conflicts with any prior cases, and so the Court should decline review. *Cf.* RAP 13.4(b)(1), (b)(2).

3. Division Two's unpublished decision implicates no issue of substantial public interest.

Nor does that holding implicate any issue of substantial public interest. Division Two decided not to publish its opinion, which reflects the court's determination that the decision did not resolve an unsettled or new question of law, did not modify, clarify, or reverse an established principle

[6] *See, e.g., Gaddy v. Taylor Seidenbach, Inc.*, _ F. Supp. 3d _, 2020 WL 1041610 (E.D. La. 2020) (remitting a general-damages verdict for wrongful death from mesothelioma six months after diagnosis from $7.5 million to $3 million); *Kimble v. Laser Spine Inst., LLC*, Nos. 617-618 EDA 2019, 2020 WL 1815775 at *11-12 (Pa. Super. Ct. 2020) (vacating a $10 million wrongful-death award as excessive and ordering a new trial on damages); *Robaey v. Air & Liquid Sys. Corp.*, No. 1920275/13, 2018 WL 4944382 at *13-15 (N.Y. S. Ct. 2018) (remitting a mesothelioma verdict from $75 million to $17.5 million).

of law, and was not in conflict with any earlier decision from that court. *See* RAP 12.3(d). As important, the Coogans did not move to publish Division Two's decision—they could have tried to do so on the basis that the decision is "of general public interest"—which further confirms that the decision involves no issue of substantial public interest. *Cf.* RAP 13.4(b)(4); *see also* RAP 12.3(e).

VI. ADDITIONAL ISSUES THAT WARRANT DENIAL OF REVIEW, BUT SHOULD BE ADDRESSED IF REVIEW IS GRANTED

The Court should deny review, but if it decides to grant review, then it should also accept for review three issues that are intertwined with those raised by the Coogans. Two of those issues involve serious counsel and party misconduct; the third concerns whether the entire $81.5 million verdict—as opposed to only the $30 million award to Doy's estate—is excessive. 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 into the scope of misconduct by the Coogans during this litigation. The very existence of these issues, two of which Division Two did not reach, counsels against acceptance of review.

A. If this Court grants review, it should review the Coogans' counsel's misconduct during trial and order a new trial on both liability and damages.

The Coogans' counsel secured a shocking $81.5 million verdict by committing prejudicial misconduct time and again—a point that Judge Lee

recognized in her partial dissent. "The Rules of Evidence impose a duty on counsel to keep inadmissible evidence from the jury." *Teter v. Deck*, 174 Wn.2d 207, 223, 274 P.3d 336 (2012) (citing ER 103(c)). It is misconduct to ask knowingly objectionable questions. *Id.*; *Snyder v. Sotta*, 3 Wn. App. 190, 193-94, 473 P.2d 213 (1970). A new trial is warranted where the misconduct of the prevailing party materially affects the substantial rights of the losing party, such as when the misconduct deprives the losing party of a fair trial by exposing the jury to inadmissible evidence. *Teter*, 174 Wn.2d at 222-25 (citing CR 59(a)(2)). Division Two's failure to apply these principles contravenes *Teter* and other precedent.

The Coogans' attorney, Jessica M. Dean, committed numerous instances of misconduct throughout the trial, many of which GPC and NAPA objected to, dozens of which they raised in a motion for a new trial, and the most prejudicial of which they raised on appeal. *See* CP 16362-67; *Opening Brief of Appellant GPC* at 26-39; *Reply Br. of Appellant GPC* at 4-10.[7] Division Two unanimously concluded that at least one of Dean's questions "clearly was improper" and violated a pretrial ruling. *Slip Op.* at 28. But as only Judge Lee recognized, Dean committed misconduct in at least three instances: (1) when she injected into the trial prejudicial "facts" that were not in evidence (and were false) by implying that many workers had died from asbestos exposure at GPC's Rayloc remanufacturing facilities, (2) when she suggested to the jury that GPC had deliberately sent

[7] NAPA submitted separate briefs in the Court of Appeals, but it also joined in GPC's briefs. *Br. of Appellant NAPA* at 1.

an underprepared witness as its corporate representative, and (3) when she prompted Doy's brother Jay Coogan to state in his examination that defense counsel had accused him of killing Doy. *See Slip Op.* at 45-50.

Each of these instances of misconduct was contrary to earlier court rulings. And as Judge Lee recognized, they were sufficiently prejudicial—both alone and in combination—to warrant vacating the jury's verdict on both liability and damages. *See Slip Op.* at 45-50.

The Coogans' counsel's pervasive and prejudicial misconduct makes this case a poor vehicle to review Division Two's holdings. But if this Court grants review of any of the Coogans' issues, then it should also review the counsel-misconduct issue, adopt Judge Lee's dissenting opinion, and order a new trial across the board.

B. If this Court grants review, it should review the issue of the Coogans' misconduct as an alternative ground to order a new trial on the $80 million in noneconomic damages.

Ms. Dean was not the only one who committed prejudicial misconduct. Her clients did too, which also cuts against this Court's granting review.

Before deposing any of the Coogans, GPC and NAPA's counsel obtained all documents from the probate action that Sue had started after Doy died in 2015. *See* CP 20571, 20747, 21350, 21378, 21415, 21445. Among other things, they found a March 2016 declaration in which Sue attested that she and Doy had "loved being together, working together, and playing together" and that Doy "trusted" her. CP 20839, 20841. Sue also filed eleven declarations by friends and relatives that uniformly supported

her rosy portrait of the relationship (and her claim to a half-interest in Doy's property). CP 28044-73. Nothing in the probate file so much as hinted to the contrary.

It was thus no surprise to defense counsel when Sue testified at her July 2016 deposition that she and Doy "had a very loving, romantic relationship." CP 20414. That testimony would later be read into evidence at trial, in lieu of live testimony from Sue. CP 20343, 20414. Along the same lines, Sue's adult daughter, Kelly Marx, testified at trial that Doy and Sue "ma[d]e each other happy" and "always want[ed] to be with" each other. 30 RP 18-19; *see also* 30 RP 42. Doy's adult daughter, Roxana, also testified that she, Doy's other daughter (Raquel), Kelly, Doy, and Sue were a "close family." 18 RP 82. The jury premised its relationship-based damages awards on that evidence.

But all along, the Coogans were hiding the real story from GPC and NAPA. Unbeknownst to GPC and NAPA, the Coogans were aware during the 2017 depositions and trial that dozens of friends and family members would have painted an entirely different picture. Indeed, in March and April 2016, Roxana and Raquel obtained two dozen written statements—which were later converted into sworn declarations—but kept them out of the probate record until more than a year after the Coogans' trial against GPC and NAPA concluded.[8] As told by their own family and friends, Doy lived in "misery" with Sue and wanted her to leave. CP 21111, 21169, 21192. Doy would visit friends to "get away from" Sue because she drank

[8] *Compare* CP 20622-20683 (statements) *with* CP 21101-21217 (declarations).

constantly and that made her "mean [and] obnoxious." CP 21169, 21192. One time, Doy had to leave because Sue was attacking him with an axe. CP 21169. Doy felt that Sue generally was "just after [his] money." CP 21111. He would hide money, even burying it underground, but Sue would always find it, leading Doy to remark to friends, "Damn it, that money hungry bitch found my money stash again." CP 21188.

Besides these undisclosed declarations, the Coogans also secretly kept a copy of a relevant conversation that had occurred in a private, group-messaging thread on Facebook in September 2015. In that conversation, when one of Doy's adult granddaughters stated, "I hope the bitch dies"—in reference to Sue—Raquel responded, "Then dad would have to put up with her again[.]" CP 21223, 21226-28.

Neither Sue (who was then personal representative of Doy's estate) nor any of the other estate beneficiaries disclosed any of these witnesses or statements in the wrongful-death case.[9] The Coogans also kept the probate action materially dormant until February 2018—two months after the trial court denied GPC and NAPA's motion for a new trial—when Sue filed a summary-judgment motion. *See* CP 20293, 21001-23. Roxana and Raquel then finally filed the statements (now declarations) that they had collected

[9] Sue was asked in written discovery requests (in her capacity as the personal representative of Doy's estate and its beneficiaries) to "produce any and all written statements…signed, authenticated, or otherwise adopted by any potential witness in this case, regardless of whether or not You intend to call them as a witness at trial." CP 21567, 21571-72, 21584. She repeatedly answered, including after the witness statements had been obtained, that she (and the beneficiaries by extension) had no responsive documents "[o]ther than the affidavit of Jerry Coogan, previously produced." *Id.*

two years earlier, and Sue submitted a responsive declaration by Kelly, attaching the 2015 Facebook conversation.[10] *See* CP 21101-217, 21223, 21226-28; *see also* CP 21081-86, 21098, 21248. GPC and NAPA found the undisclosed materials while making a routine check of the probate docket for any new activity in May 2018. CP 20747.

GPC and NAPA promptly moved for relief from the judgment under CR 60(b)(3) (newly discovered evidence) and CR 60(b)(4) (misrepresentation or other misconduct). CP 22569-82. They asked the trial court to vacate the judgment, order a new trial, and order discovery into the Coogans' conduct to determine whether sanctions beyond a new trial should be imposed.[11] *Id.* GPC and NAPA expressly invoked the possible application of the crime-fraud exception to the attorney-client privilege. CP 22581-82.

The trial court denied GPC and NAPA's motion without holding a hearing and without analyzing CR 60(b)(3) or (b)(4). CP 22555-56. Ignoring that the witness statements that Roxana and Raquel collected had been converted into sworn declarations before filing, the court stated that "there is much unsworn testimony in the form of letters or statements addressed to 'To Whom it May Concern.'" CP 22555-56.

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[10] Roxana attested in her own declaration that the declarations she and Raquel were submitting "accurate[ly]" described the relationship between her father and Sue. CP 21098. She added that her father "didn't trust" Sue and that after one of their fights, Sue had stolen $10,000 and left Doy for weeks. CP 21099.

[11] A court has the inherent power to sanction a party for bad-faith litigation, because "the very temple of justice has been defiled." *State v. S.H.*, 102 Wn. App. 468, 475, 8 P.3d 1058 (2000) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)).

The trial court abused its discretion in denying GPC and NAPA's motion on the ground that the statements would be inadmissible. *See id.* The Coogans' fact-hiding prejudiced GPC and NAPA's ability to prepare for trial, including by depriving them of the opportunity to develop facts and present them in admissible form.[12] *See Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 588-90, 220 P.3d 191 (2009). A party cannot receive a fair trial where an opponent withholds relevant evidence while simultaneously providing testimony (under oath) that the undisclosed evidence would rebut.

Division Two found it unnecessary to reach the CR 60 issue, having already vacated all damages awards on other grounds. *Slip Op.* at 24-25 n.2. But if this Court accepts review on any issue, then it should also accept review on this question because the Coogans' misconduct requires vacatur of the $80 million in noneconomic damages. If this Court grants review, then it should also remand with directions to allow discovery into the extent of the Coogans' misconduct.

C. If this Court grants review, it should also review the entire verdict for excessiveness.

Division Two also did not reach the issue of whether the $50 million in loss-of-consortium-damages awards or the $1.5 million for loss of services were excessive, because it vacated those awards based on the erroneous exclusion of Dr. Schuster's testimony.[13] *Slip Op.* at 20. If this

[12] In any event, the new evidence was itself admissible and not hearsay. *See Opening Br. of Appellant* GPC at 46 n.27; *Reply Br. of Appellant GPC* at 23-24.

[13] The $50 million in loss-of-consortium damages included a $30 million award to Sue and $10 million awards to Doy's two adult daughters.

Court grants review of the excessiveness of the $30 million award to Doy's estate, then it would only make sense to review the entire verdict, which was excessive by any measure.

If the $30 million award to Doy's estate was excessive—and it was—then the combined $50 million in loss-of-consortium awards necessarily shock the conscience on their face. Neither this Court nor the Court of Appeals has affirmed a loss-of-consortium award approaching that range. Indeed, even if Doy had fifteen years to live at the time of trial—and not less than five years, as Dr. Schuster would have testified—it is "flagrantly outrageous and extravagant" for Sue to receive $30 million for loss of consortium and for each of Doy's daughters to receive $10 million. *Bingaman*, 103 Wn.2d at 837. Those awards gave Sue $2 million for each year without Doy ($5,479 per day) and his adult daughters $667,000/year ($1,826 per day).

Those awards are shocking on their face. They also violate other excessiveness guideposts that this Court and the Court of Appeals have approved, including the ratio between the economic and noneconomic damages awarded. *See Bunch*, 155 Wn.2d at 181. In *Hill*, for instance, the Court of Appeals affirmed a remittitur because a 10:1 ratio of non-economic-to-economic damages shocked its conscience. *Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 140, 856 P.2d 746 (1993). The ratio here is five times greater than the ratio in *Hill*: The ratio between the $80 million noneconomic-damages awards and the $1.5 million economic-damages award is an extraordinary 53:1.

That ratio indicates an improper effort to punish a defendant rather than compensate the plaintiff. *See id.* So does the jury's decision to award $1.5 million for loss of services when the Coogans presented almost no evidence concerning the services Doy would have provided the family—never mind any evidence quantifying the value of those services. *See Opening Br. of Appellant GPC* at 60-61; *Reply Br. of Appellant GPC* at 36-37. And so does the fact that the verdict against GPC and NAPA was 241 times greater than the average of the Coogans' settlements with 12 other defendants and 17 times the aggregate total of $4.395 million—settlements that the Coogans conceded were in line with both the "damages and settlements in other asbestos cases nationwide and in Pierce County." CP 16192, 20564.

If this Court reviews the excessiveness of any part of the verdict, it should review the entire verdict's excessiveness.[14]

VII. CONCLUSION

Division Two's unpublished decision does not warrant this Court's review. The Coogans identify no conflicts between that decision and any precedent and no issue of substantial public interest. In all events, other

[14] The courts below found themselves bound to avoid comparing the verdict to those in other cases, under *Washburn*, 120 Wn.2d 246. *Slip Op.* at 24; 12/1/17 RP 9, 43. Reviewing the entire verdict would allow this Court to clarify whether comparison with a "mass of past awards" is allowed, *id.* at 268, and to reconcile *Washburn* with the dozens of earlier decisions in which this Court compared verdicts. *See, e.g., Clark v. Icicle Irr. Dist.*, 72 Wn.2d 201, 208, 432 P.2d 541 (1967) (reducing a wrongful-death verdict because it was "more than double (almost treble) any prior award we have ever approved for the loss of the services of a child"); *see also Opening Br. of Appellant GPC* at 63 n.38 (citing cases). The highest previous mesothelioma verdict was $10.2 million, and the others were far lower. *See* CP 16374-82, 20299 (comparing 30 prior Washington mesothelioma verdicts).

issues that the Coogans ignore in their petition—including their own misconduct, their counsel's misconduct, and the entire verdict's excessiveness—confirm that this case is not the right vehicle for the Court to review the Coogans' presented issues.

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.

Respectfully submitted this 18th day of May, 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
Jason W. Anderson,
WSBA No. 30512
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

BULLIVANT HOUSER BAILEY, P.C.

By *s/ Jeanne F. Loftis*
Jeanne F. Loftis, WSBA No. 35355

Attorneys for Appellant Genuine Parts Company

ALSTON & BIRD LLP
James C. Grant, Ga. Bar 305410
Jonathan D. Parente, Ga. Bar 425727
Lee A. Deneen, Ga. Bar 774207

Of Counsel for Genuine Parts Company

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:

☒ Via Appellate Portal to the following:

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 18th day of May, 2020.

S:/ Patti Saiden
Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

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