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COURT OF APPEALS, DIVISION II
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,

Respondents,

v.

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

Appellants, and

BORG-WARNER MORSE TEC, INC. (sued individually and as successor-in-interest to BORG-WARNER CORPORATION), *et al*.,

Defendants.

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
Honorable Stanley J. Rumbaugh

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I. INTRODUCTION

When a jury's award exceeds any prior wrongful-death verdict in state history, courts should closely scrutinize whether the verdict breaks with the law. And when the award exceeds the largest such verdict by tens of millions of dollars, alarm bells should be going off.

In its opening brief, GPC gave five reasons why the law does not countenance the jury's extraordinary $81.5 million award. The Coogans have no good response to any of them.

Counsel misconduct. There is no excusing Plaintiffs' counsel Jessica Dean's intentional misconduct during trial. So the Coogans try to whitewash that misconduct by avoiding reference to what Dean actually said, ignoring the preexisting in-limine and trial rulings that prohibited her improper tactics, and otherwise giving only *post hoc* justifications for her behavior. But the record confirms that Dean committed misconduct of the worst kind during trial—and that she committed prejudicial misconduct *again* during closing. As important, the Coogans have no answer to the cases holding that courts can review even un-objected-to misconduct during closing if that misconduct is incurably prejudicial.

Party misconduct. The Coogans' responses to GPC's Rule 60 argument are also divorced from reality. Among other things, the Coogans argue that the new evidence (Facebook messages and 25 witness declarations) does not contradict their trial story about their having a close-knit family and that Sue's physical and emotional assaults on Doy say nothing about what *she* lost when he died. None of the Coogans' arguments

holds water. The jury never would have awarded anything close to $50 million in loss-of-consortium damages had it been privy to the truth and the full picture about the Coogans' relationships. Indeed, the Coogans' litigation misconduct may prove so systematic and egregious that nothing short of dismissal of the action will suffice to restore the integrity of the temple of justice.

Excessiveness. The Coogans appear to think that in a mesothelioma wrongful-death case, juries have *carte blanche* to award a verdict of any amount—even if that verdict is thirteen times greater than the largest affirmed mesothelioma verdict in this state's history, more than triple the largest general-damages award in any Washington personal-injury case, and an extreme outlier on the national stage. That is wrong. No one disputes that Doy Coogan suffered a painful death from mesothelioma. But with all due respect to Doy and his family, that is not the end of the analysis—not for Doy's $30 million pain-and-suffering award, and certainly not for his family's $50 million total loss-of-consortium award. The $81.5 million verdict shocks the conscience and is outside all rational bounds.

Dr. Schuster's testimony. The Coogans defend the trial court's exclusion of Dr. Schuster's cirrhosis opinion by arguing that his *deposition* references to Doy's alcohol consumption would have been unduly prejudicial. They all but ignore the defendants' suggested compromise vis-à-vis Dr. Schuster's trial testimony—that Dr. Schuster could relay his core life-expectancy opinion (that Doy's cirrhosis gave him fewer than five years to live) without a single reference to Doy's alcohol consumption. In all

events, in challenging the probative value of Dr. Schuster's cirrhosis opinion, the Coogans commit the same error as the trial court: They mistake potential cross-examination points—going to credibility and weight, not admissibility—as grounds for excluding Dr. Schuster's medical opinion.

Wagstaff workers-compensation claims. In response to GPC's argument that the trial court erred by excluding five workers-compensation claims from former Wagstaff employees, the Coogans argue that those claims are not relevant. That argument ignores many facts showing otherwise: The claimants worked at the Wagstaff facility during the same time period as Doy (the late 1960s), contracted asbestos-related illnesses like Doy, and even had job responsibilities similar to Doy's (indeed, two of the other claimants were also machinists). On this record, the claims were plainly relevant to evaluating the cause of Doy's disease and should have been admitted.

II. REPLY ARGUMENT

A. The Coogans and their counsel deprived GPC and NAPA of a fair trial by engaging in prejudicial and systematic misconduct.

Throughout the trial, the Coogans' counsel deliberately sought to inflame the jury's passions against GPC and NAPA through improper means. The record belies the Coogans' bold assertion that "[t]here was *no* misconduct by Plaintiffs' counsel" during the presentation of evidence or closing argument. *Respts' Br. adv. GPC* 40, 45 (emphasis added). There was misconduct in quantity. And in each of the instances that GPC has brought to light in this appeal, Jessica Dean did more than just commit

misconduct—she also brushed aside prior rulings by the trial court time and time again.

The notion that GPC cherry-picked half a dozen examples of misconduct from a lengthy trial in which Dean otherwise acted appropriately is both wrong and beside the point. *See Respt's Br. adv. GPC* 40. It is wrong because Dean's *modus operandi* throughout the entire trial was to prejudice the jury against GPC and NAPA through unfair means.[1] And it is beside the point because the instances of misconduct raised on appeal are outrageous and are more than sufficient—both individually and collectively—to warrant a new trial.

1. The Coogans fail in their attempts to sugarcoat Dean's misconduct during the presentation of evidence.

(a) Asking the Rayloc-deaths question

The Coogans do not deny that Dean's asking GPC corporate representative Liane Brewer "how many other men that worked in [GPC's] headquarters where they were making Rayloc[] brakes have died from asbestos-related disease that haven't been called" (22 RP 84–85) assumed facts not in evidence—*i.e.*, that some number of Rayloc plant workers had, in fact, died from an asbestos-related disease. *See GPC Br.* 27–28. Nor do they deny that Dean asked that question in the teeth of two prior court rulings prohibiting it. *See id*.

[1] GPC and NAPA explained some of those other instances of misconduct in their new-trial motion. *See* CP 16366–67. As appropriate, GPC has narrowed the issues for appeal by homing in on Dean's most brazen misconduct.

The Coogans instead argue that the question was merely "an understandable attempt to elicit contrary evidence about whether GPC/NAPA was a caring company," but the record disproves that *post-hoc* explanation. *Respts' Br. adv. GPC* 42. 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, and defense counsel used redirect examination to undercut that suggestion.[2] 22 RP 45–50. The Coogans point to nothing about that examination that could have justified a question that assumed highly inflammatory facts that were not in evidence. Dean deployed the Rayloc-deaths question as a deliberate tactic to prejudice the jury against GPC and NAPA.

The Coogans also assert that defense counsel "invited" retaliatory misconduct and suggest that the trial court found defense counsel's redirect of Brewer improper. *Respts' Br. adv. GPC* 42 (quoting *Kellerher v. Porter*, 29 Wn.2d 650, 189 P.2d 223 (1948)). Nothing of the sort happened. In fact, the trial court *overruled* Dean's objections to defense counsel's

[2] Contrary to the Coogans' assertion, *they* first broached whether GPC or NAPA was a "caring company," not GPC and NAPA. Dean brought up the subject by cross-examining Brewer with excerpts from NAPA's mission statement. 21 RP 206–14. For instance, Dean read, "At NAPA, we go the extra mile to lend a helping hand, and offer support when people need it the most," and then she asked Brewer, "And losing a loved one is probably the time that people need help the most?" 21 RP 212. The trial court sustained an objection to that question because it was argumentative. 21 RP 212–13.

questions on redirect. 22 RP 45–50.[3] Although the court was receptive to a couple of Dean's objections, those objections went to the scope of Brewer's *answers*, not defense counsel's questions. 22 RP 48–49.

These circumstances are nothing like in *Kellerher*. There, the court observed that the record was "replete with acts of misconduct by both counsel" that were "extremely improper" and that the appellants' counsel was "at least an equal offender." 29 Wn.2d at 661–62. Although the court did not recount the precise statements at issue, it observed that they were "to a great extent retaliatory, in that they were invited by language used and conduct displayed by opposing counsel." *Id*. at 662. Here, defense counsel did not ask improper questions or otherwise engage in misconduct in her redirect examination of Brewer (and the trial court did not find otherwise). There is no excuse for Dean's asking her question.

Finally, the Coogans assert that the trial court's so-called "curative" instruction was sufficient to cure the prejudice. *Respts' Br. adv. GPC* 41. But no juror could be expected to disregard the notion that GPC had been responsible for multiple deaths due to asbestos exposure and wanted to keep that "fact" from the jury. As important, the Coogans continue to ignore that the court's instruction, similar to counsel's improper question, implied that deaths *had* occurred. *See GPC Br.* 28–29. They have no response on this

[3] The trial court did sustain an objection to defense counsel's first question on the topic of "caring," but only because the question was vague (the court mused, "I mean[,] not caring about what, the weather?"), not on the ground advanced by Dean, *i.e.*, that the question amounted to improper witness bolstering. 22 RP 45. Although the court subsequently stated that defense counsel was "on thin ice" in asking whether Brewer had sent flowers when Doy Coogan passed away, the court allowed the question, overruling Dean's objection. 22 RP 50.

point. The prejudice from the Rayloc-deaths question is clear, and the court's instruction only exacerbated that prejudice.

(b) Implying that GPC acted in bad faith by selecting Byron Frantz as a corporate witness

The Coogans offer two defenses for Dean's suggestion—during her cross-examination of Brewer—that GPC had deliberately brought an unprepared witness as its other corporate representative. 22 RP 101 ("Do you have any idea why out of this entire family of thousands of [employees] Byron Frantz, a person who couldn't answer any questions, was the one that was brought?"). Neither defense has merit.

The Coogans first argue lack of prejudice, pointing to a juror's proposed question for Frantz as evidence that the jury had "independently noticed" Frantz's supposed under-preparedness. *Respts' Br. adv. GPC* 42 (citing CP 9077).[4] But one juror's wanting to ask Frantz why he was not better prepared does not establish that the other eleven jurors had a similar impression.[5] Besides that, it is disturbing that the Coogans point to the juror's proposed question to excuse counsel's conduct because the court *rejected* the juror's question as an improper comment on the evidence. *See GPC Br.* 29–30 (citing 17 RP 142). The question was no less improper when asked by Dean in spite of the court's ruling. In fact, Dean's question was doubly improper because she added the suggestion that GPC had

[4] The juror proposed to ask Frantz: "As GPC's corporate representative, is there a reason you have not reviewed materials for this case to better answer questions?" CP 9077.

[5] The trial judge's opinion of Frantz's preparedness, which the Coogans also reference, is completely irrelevant. *See Respts' Br. adv. GPC* 42–43 (citing 12/1/17 RP 20).

brought an unprepared witness *as a tactic*—sending an improper signal designed to provoke the juror who had the question.[6] The Coogans simply ignore this.

The Coogans' second defense for Dean's improper question is that counsel "may comment on a witness' veracity." *Respts' Br. adv. GPC* 43 (quoting *State v. Smith*, 104 Wn.2d 497, 511, 707 P.2d 1306 (1985)). Yet the Coogans cite no authority that counsel may comment on veracity *during witness examination*. For good reason: It is improper to do so. *State v. Stover*, 67 Wn. App. 228, 231–32, 834 P.2d 671 (1992) (holding that counsel's "gratuitous remarks concerning the defense witnesses' credibility" during cross-examination were "improper"). *Smith* and the other cases the Coogans cite are inapposite because they pertain to closing argument, and "[g]reater latitude is given in closing argument than in cross examination." *Stover*, 67 Wn. App. at 232.

Even if it were appropriate to comment on a witnesses' veracity during examination—and it is not—that is not even what Dean did. She focused on Frantz's preparedness to answer questions, which has nothing to do with veracity, *i.e.*, truthfulness. Dean's comment was meant to—and did—suggest that GPC and NAPA had brought an unprepared witness as a representative *in bad faith*. The Coogans offer no defense for making such a blatant comment on the evidence during witness examination. It was

[6] Dean would return to this theme in closing argument: "You're a multinational company. You have resources. You have documents. *Why was he [Frantz] here?* He knew nothing." 47 RP 171 (emphasis added).

plainly intended to inflame the jury's passions against GPC and NAPA.[7] And no juror can reasonably be expected to ignore the suggestion that the defendants were supposedly so desperate to hide bad facts that they intentionally sent an unprepared witness to testify.

(c) Eliciting Jay Coogan's outburst ("[Defense counsel] accused me of killing my brother")

The Coogans' sole defense for Dean's question that elicited Jay Coogan's outburst is that the question ("Why is it that you needed to pretty regularly blow off steam during that deposition?") was somehow called for by defense counsel's cross-examination of Jay Coogan. *Respts' Br. adv. GPC* 43–44. That assertion finds no support in the record. On cross-examination, defense counsel questioned Jay Coogan about the interactions that he had with Dean during the frequent breaks that were taken during his deposition. 13 RP 187–89. On redirect, after asking Jay Coogan ten questions related to the nature of her relationship with him, Dean suddenly asked why he needed to "*blow off steam*" during the deposition. 16 RP 158–60 (emphasis added). Before Dean asked that question, neither defense counsel's questions nor the witness's answers had so much as *hinted* at Jay Coogan's having been frustrated or angry during his deposition, let alone used anything similar to the phrase "blow off steam." *See* 13 RP 187–89. That phrase shows that Dean was fishing for why Jay Coogan was angry at the deposition. She was fishing for his dramatic outburst about supposedly

[7] The Coogans ignore that the trial court applied an incorrect legal standard, thus abusing its discretion, when it relied on its own opinion (that Frantz seemed under-prepared) to justify Dean's improper act of characterizing witness testimony. *See GPC Br.* 32–33.

being accused of killing his own brother. Not surprisingly, Jay Coogan delivered.

Dean deliberately elicited testimony that the court had excluded as irrelevant when it sustained defense counsel's objection to Dean's earlier question, "Did NAPA ever, in this process, indicate to you that they believed you were the reason your brother got sick?" 13 RP 185. It is misconduct to ask questions to which objections were previously sustained. *Snyder v. Sotta*, 3 Wn. App. 190, 193–94, 473 P.2d 213 (1970). Dean's prompting Jay Coogan to provide irrelevant and inflammatory testimony before the jury was indefensible. No juror could reasonably be expected to disregard that testimony, which asserted (falsely so) that GPC and NAPA had blamed Jay Coogan for his brother's death.

2. The Coogans' defense of Dean's improper closing arguments fails.

Dean continued her prejudice-the-jury campaign in closing argument. There is no excuse for that misconduct, either.

(a) Making "golden rule" arguments

Again ignoring first principles, Dean repeatedly urged the jurors to place themselves in Doy's position in determining damages. 47 RP 153, 188–89. The Coogans' explanation that Dean was merely "describ[ing] events from Mr. Coogan's perspective" ignores the actual language she used and its context. *Respts' Br. adv. GPC* 47–48. It is true that the pronoun "you" can be used in an abstract sense. But that is not the sense in which Dean used it. She told the jury it was "required…to *think about[] what it's*

like to sit in that room and [be] told two weeks ago *you* felt fine, and now *you* have a disease *you* can't beat." 47 RP 188 (emphasis added). She then continued using the pronoun "you" while recounting Doy's physical and mental suffering in dramatic, graphic terms, through his ultimate death. 47 RP 188–89; *see also* 47 RP 153.

When Dean asked the jurors to "think about[] what it's like" to suffer like Doy, she was obviously asking them to put themselves in Doy's shoes. That is a golden-rule argument—exactly the type of argument that the trial court put off-limits through its in-limine ruling. *See Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 139, 750 P.2d 1257 (1988); *Braddy v. State*, 111 So.3d 810, 842–43 (Fla. 2012) (concluding that counsel's use of pronoun "you" in describing events suggested jurors put themselves in the victim's position); 1 RP 70–73; 2 RP 57 (court's rulings). And the prejudice from that argument here could never be undone: Once the jurors had started the mental process of putting themselves in Doy's shoes as he suffered, they could not reasonably be expected to disregard the feelings such imagery doubtlessly would generate.

(b) Urging the jury to use its verdict to send a message and punish the wealthy defendant

Dean also committed prejudicial misconduct by repeatedly urging the jury to punish GPC and NAPA with a substantial-enough verdict to inflict financial hardship on a "multinational business." 47 RP 190. In defense of that misconduct, the Coogans now argue that when Dean asked the jury to award "something that matters for what they took" and implored

that "something needs to be done," she was merely asking the jury to compensate the Coogans for their losses. *Respts' Br. adv. GPC* 48–49; 47 RP 190, 193. But even taking those statements in isolation, the Coogans' explanation is implausible (and that is being charitable). Dean's statements unmistakably focused on the impact on GPC and NAPA—not on compensating the Coogans.

The Coogans also ignore that Dean made those statements in the context of multiple references to GPC and NAPA's financial wherewithal, including that they were a "multinational business" with "resources," were "driven by money," would throw "millions of dollars…around like nothing," and would "consider a victory" an award of anything less than $30 million for Doy's estate. 47 RP 171, 189–90. Arguments like that are outside all bounds—and even more so here because the trial court had barred arguments based on the "[f]inancial condition of the parties," including arguments suggesting that the parties were like "David and Goliath." 2 RP 46–48 (trial court forbidding arguments like "They got all of the money. We don't have anything"). Once Dean had improperly invited the jury to consider GPC and NAPA's financial wherewithal, there was no way to erase that out-of-bounds consideration from their minds.

(c) Expressing personal opinions and beliefs

GPC set out in its opening brief three examples of Dean's expressing her personal opinions during closing argument. *GPC Br.* 38–39. The Coogans address only one of those instances—her statement about the Wagstaff exposure. *Respts' Br. adv. GPC* 49. Contrary to the Coogans'

assertion, Dean did more than simply argue that there was "no credible evidence" of that exposure. *Id*. *Much* more. She told the jurors that GPC and NAPA had fabricated the notion that there was such an exposure: "I think the Wagstaff one is *made up*." 47 RP 186 (emphasis added).

Dean's statement cannot be characterized as merely "arguing inferences." *Respts' Br. adv. GPC* 49. It was an inappropriate expression of personal opinion just like the other instances which, by silence, the Coogans now appear to concede were expressions of personal opinion. *Cf. GPC Br.* 38. Each instance was improper and contrary to a pretrial ruling barring arguments based on personal opinions of counsel. 5 RP 62. And that misconduct would have mattered to any jury. No jury could disregard Dean's claim that GPC and NAPA had fabricated evidence to avoid liability. Any reasonable juror would want to punish such despicable conduct.

3. The flagrant-misconduct exception remains viable and applies here, where Dean deliberately violated specific in-limine rulings during closing arguments.

Despite boldly proclaiming that "[t]here was no misconduct by Plaintiffs' counsel during closing argument," the Coogans actually begin their treatment of the issue by avoiding the merits and leading with a waiver argument. *Respts' Br. adv. GPC* 45. According to the Coogans, an objection is always required to preserve the issue of misconduct during closing argument. *Id*. at 46–47.

That is wrong: No objection must be made to closing argument where counsel's misconduct is so flagrant that no instruction could have cured the prejudice. *In re Glasmann*, 175 Wn.2d 696, 704–08, 714–16, 286

P.3d 673 (2012). That has been the rule for over 100 years.[8] *See Cranford v. O'Shea*, 75 Wash. 33, 41–42, 134 P. 486 (1913). Indeed, the courts recognized this exception in each of the five cases that the Coogans cite for the proposition that "objections must be made to closing argument to preserve error."[9] *Respts' Br. adv. GPC* 47. As our Supreme Court observed in *Cranford*, requiring an objection to flagrant misconduct would produce "incongruous results": It would penalize a party for failing to make an objection when that objection would have been futile because no instruction could have cured the misconduct's prejudice. 75 Wash. at 41–42.

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[8] By superficially distinguishing *one* of the cases GPC cited (on the basis that a contemporaneous objection was made in that case), the Coogans do not undermine the flagrant-misconduct exception. *See Respts' Br. adv. GPC* 46–47 (citing *Carabba v. Anacortes Sch. Dist. No. 103*, 72 Wn.2d 939, 435 P.2d 936 (1967)). Far from retreating from the exception, the Supreme Court in *Carabba* called it "well recognized" and reaffirmed the exception by rejecting an argument that it should apply only where no objection was made, and not where a party objected but did not move to declare a mistrial. 72 Wn.2d at 952–53 (quoting *Warren v. Hart*, 71 Wn.2d 512, 518, 429 P.2d 873 (1967)). In *Warren* (which the Supreme Court in *Carabba* called "[t]he controlling case," 72 Wn.2d at 953), the Supreme Court applied the flagrant-misconduct exception in reversing a judgment and remanding for a new trial. *Warren*, 71 Wn.2d at 518–19. The court held that the plaintiff did not waive the issue of defense counsel's misconduct during closing argument by failing to object, because no instruction could have cured the prejudice from the improper argument. *Id.*

[9] *See State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011); *State v. Warren*, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Sullivan*, 196 Wn. App. 277, 294, 383 P.3d 574 (2016), *review denied*, 187 Wn.2d 1023 (2017); *State v. Smiley*, 195 Wn. App. 185, 195, 379 P.3d 149, *review denied*, 186 Wn.2d 1031 (2016). What is more, none of these cases supports denying relief here based on failure to object. In *Thorgerson* and *Warren*, the Supreme Court held that an objection was required because an instruction could have cured any prejudice from the misconduct. *Thorgerson*, 172 Wn.2d at 452; *Warren*, 165 Wn.2d at 29–30. That is not the case here. *Dhaliwal* and *Sullivan* are off point because the courts in those cases concluded that no misconduct occurred. *Dhaliwal*, 150 Wn.2d at 579; *Sullivan*, 196 Wn. App. at 296. Here, there was misconduct. Lastly, in *Smiley*, the defense counsel failed to object when an instruction could have cured the prejudice and then "picked up" the improper theme and "made it his own." 195 Wn. App. at 197. Nothing like that occurred here.

The flagrant-misconduct exception applies because Dean's tactics are the textbook illustration of flagrant misconduct and extreme prejudice. It also applies because in-limine rulings barred each of Dean's improper arguments. The Coogans do not dispute that deliberately violating an in-limine ruling is *per se* flagrant misconduct. *See GPC Br.* 40 (citing cases). Indeed, the Coogans say virtually nothing about Dean's having violated in-limine rulings. *See Respts' Br. adv. GPC* at 47–50.

The Coogans' only mention of an in-limine ruling comes in a footnote, where they assert—citing *Miller v. Kenny*, 180 Wn. App. 772, 815–17, 325 P.3d 278 (2014)—that one must object to a golden-rule argument *regardless* of an in-limine ruling. *Id.* at 48 n.32. But in *Miller*, the court concluded that an in-limine ruling barring golden-rule arguments did not apply because, unlike here, the plaintiffs' counsel *did not make* a golden-rule argument. *Id.* at 817. Moreover, requiring an objection notwithstanding an in-limine ruling goes against the purpose of obtaining such a ruling—to avoid the prejudice inherent in making an objection that will draw attention to the improper argument and suggest that the objecting party has something to hide. *See State v. Evans*, 96 Wn.2d 119, 123, 634 P.2d 845 (1981).

No instruction could have cured the prejudice caused by *any* of Dean's instances of misconduct, so it is that much worse when we look at her misconduct in the aggregate. Through her improper questions and later her improper closing argument, Dean systematically sought to portray herself as a trusted authority and paint GPC and NAPA as bad actors of the worst kind. GPC and NAPA tried to preempt those very tactics by seeking

and obtaining in-limine rulings. They are entitled to a trial that they never had—one where opposing counsel plays by the rules and respects the trial court's orders.

4. The Court can and should consider Dean's misconduct in other cases.

And then there is the matter of Dean's similar misconduct in other cases. The Coogans urge this Court not to consider the appendices to GPC's brief, which contain out-of-state orders and opinions finding similar misconduct by Dean in other cases. But the Coogans do not dispute that this Court may consider the Iowa Supreme Court's published decision in *Kinseth v. Weil McLain Co.*, upholding the reversal of a substantial judgment based on Dean's improper closing arguments made in violation of in-limine rulings. 913 N.W.2d 55, 71–73 (Iowa 2018). That decision is damning.

And the Coogans are wrong that this Court cannot take judicial notice of the two other orders. The Coogans' only cited case—*Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005)—is not to the contrary. Unlike here, that case involved "adjudicative" facts—*i.e.*, controlling facts related to the parties to a proceeding.[10] *See id.* at 97–99 (declining to take judicial notice as to issue of whether documents were privileged). The concern with taking judicial notice of adjudicative facts is that such facts must be supported by evidence

[10] *See* FACT, BLACK'S LAW DICTIONARY 709 (10th ed. 2014).

in the case at hand, to avoid basing a decision on hearsay. *See Swak v. Dep't of Labor & Indus.*, 40 Wn.2d 51, 54, 240 P.2d 560, 562 (1952).

A court ruling about counsel misconduct is not an adjudicative fact in the context of this case. But even if it were, there is no hearsay problem because GPC cites the rulings *not* to prove the truth of the matters asserted—*i.e.*, that Dean actually committed misconduct elsewhere—but merely to show that courts *determined* she did and that she nevertheless engaged in similar misconduct here. *See* ER 801(c); *Momah v. Bharti*, 144 Wn. App. 731, 749–50, 182 P.3d 455 (2008). In any case, because GPC does not offer the rulings as "evidence," neither ER 201 nor RAP 9.11 applies. *See Kasey v. Molybdenum Corp. of Am.*, 336 F.2d 560, 563 (9th Cir. 1964) (taking judicial notice of court decisions).

As for the Coogans' defense of Dean's conduct in the three other cases, the court rulings speak for themselves. Even assuming the Coogans' arguments had merit, they serve only to illustrate that Dean's conduct here was worse.

5. The misconduct was prejudicial and warrants a new trial on all issues.

If this Court finds that Dean committed misconduct—and it should, for many reasons—then prejudice is virtually a given. The Coogans' argument that there is "no indication" that Dean's misconduct affected the verdict and thus "no identifiable prejudice" is flat wrong. It is easy to see how the misconduct would produce what the Coogans acknowledge is a "large" damages award. *Respts' Br. adv. GPC* 49–50. By the end of trial,

Dean had plainly gained the jury's trust by improper means and succeeded in inflaming their passions and inciting their prejudices against GPC and NAPA.

Error is prejudicial if it affects or presumptively affects the outcome of the trial. Error is harmless only if it was "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and *in no way* affected the final outcome of the case." *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 311, 898 P.2d 284 (1995) (emphasis added; citation omitted); *see also* RCW 4.36.240. No one could reasonably say that Dean's misconduct "in no way" affected the verdict. How else can one explain a $50 million loss-of-consortium award (which is more than $40 million greater than the largest such award in Washington to date) and a $30 million pain-and-suffering award (more than $20 million greater than the largest such award to date in mesothelioma cases)? *See also GPC Br.* 44. Besides that, the misconduct also prejudiced GPC and NAPA on liability. *See id.* This Court should right those wrongs by ordering a new trial.

6. The Coogans' misconduct involving their family relations deprived GPC and NAPA of a fair trial.

Dean was not the only one who committed misconduct. Her clients participated by withholding material evidence. The Coogans have no good answer to GPC's arguments on that score.

(a) GPC and NAPA were entitled to relief under CR 60(b)(3) (newly discovered evidence).

(1) The undisclosed witness statements were material, were not merely cumulative or impeaching, and would change the result in a new trial.

The Coogans deliberately hid evidence from GPC and NAPA while misrepresenting facts that the evidence would have disproved. That misconduct prejudiced GPC and NAPA's ability to prepare for trial and deprived them of critical evidence during trial. The Coogans' four arguments to the contrary are meritless.

First, it is beside the point that the jury heard generally about "problems in the Coogan family," including tension between Sue and her husband's daughters. *Respts' Br. adv. GPC* 60–61. GPC and NAPA's CR 60 motion focused on the quality of *Doy and Sue's* relationship. 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. Nor did the jury's hearing that Doy and Sue had broken relationships in their past somehow erase the prejudice. That testimony obviously did not speak to Doy and Sue's relationship. The jury had no idea that dozens of witnesses testified to Doy and Sue's dysfunctional, tumultuous relationship.

Second, the Coogans in any event misstate the standard for relief under CR 60(b)(3). It does not require a "direct contradiction." *Respts' Br. adv. GPC* 63. It requires only a meaningful difference between the trial

evidence and the new evidence, *i.e.*, that the new evidence is material, is not merely cumulative or impeaching, and would probably change the result in a new trial. *Jones v. City of Seattle*, 179 Wn.2d 322, 360, 314 P.3d 380 (2013). Those requirements were met here. *See GPC Br.* 46–49.

The Coogans mishandle *Jones* in arguing otherwise. Relief was denied there because both the trial evidence and the post-trial video were ambiguous regarding the plaintiff's condition: Although the jury heard that his injuries were disabling, it also heard that he engaged in physical activities at least as rigorous as those depicted in the video. 179 Wn.2d at 362, 365–67. The Supreme Court thus concluded that the trial court did not abuse its discretion in finding that the new evidence was not meaningfully different than the trial evidence.

The Supreme Court in *Jones* distinguished those circumstances from two cases where the new evidence *did* meaningfully differ from the trial evidence. In one of those cases (*Praytor v. King County*, 69 Wn.2d 637, 419 P.2d 797 (1966)), the court reversed the denial of a new trial where the new evidence contradicted an unambiguous assertion that a catch basin had a concrete bottom. And in the other (*Kurtz v. Fels*, 63 Wn.2d 871, 389 P.2d 659 (1964)), the court affirmed a new-trial ruling where post-trial affidavits contradicted the plaintiff's testimony that she never suffered fainting spells before an accident. *See Jones*, 179 Wn.2d at 365–67.

The circumstances here are much more akin to *Praytor* and *Kurtz* than to *Jones*. There was nothing ambiguous about the trial evidence on the quality of Doy and Sue's relationship: The jury heard that Doy and Sue

were a "happy" and "loving" couple who wanted to be together constantly—to the point where Sue took up Doy's classic-car hobby and even worked alongside him in business. None of the trial testimony hinted at any strife in the relationship. And Kelly's qualification that Doy and Sue were "not happy all the time, obviously" did not inject ambiguity into the trial evidence either, especially where she hastened to add that, "overall they were happy." 30 RP 40. The jury saw the picture of Doy and Sue's relationship that the Coogans wanted them to see—a picture of happy and loving spouses who were inseparable and completely devoted to each other.

Nor was the new evidence ambiguous: It told of a relationship characterized by shocking threats of violence, excessive drinking, stealing, and distrust—one that no reasonable person would describe as generally "happy" or "loving," and one in which Doy and Sue did not work together (contrary to Sue's representations). *See GPC Br*. 47–48. It is difficult to imagine a starker contrast in a relationship-based damages case. And contrary to the Coogans' assertions, the new evidence did not just pertain to a time early in Doy and Sue's relationship, before they were married. It pertained to the entire, 20-year relationship.[11] In denying the motion for

[11] The record does not support the Coogans' assertion that the declarations addressed only the early years of Doy and Sue's relationship. Doy's daughters filed the declarations to oppose a petition filed by Sue in probate court. In that petition, Sue sought an equitable lien on the value of Doy's separate property based on her contributions during their entire 20-year relationship. CP 20798. Specifically, Sue referenced improvements she and Doy made to Doy's separate property "*between 1995 and 2015* during their 'marital like' *and* marital relationship." CP 20792 (emphasis added). Further, nothing in the declarations themselves indicates that they are restricted to the first sixteen years of the relationship. *See* CP 21101–21217. Nor is there any indication that the quality of Doy and Sue's relationship changed after they got married.

relief under CR 60, the trial court had nothing to say about the difference in the evidence, which should have been the central focus of its analysis.

Third, there is no merit to the Coogans' argument that how Sue treated Doy was irrelevant to the relationship-based damage awards.[12] Jury instruction 35 (WPI 32.04) directed the jury to consider "the company, cooperation, and aid of the other," as well as "emotional support, love, affection, care, services [and] companionship, including sexual companionship[.]" A relationship requires two contributing partners; nothing in the jury instruction indicates only Doy's contributions should be considered. And as demonstrated by cases that GPC has cited, relationship quality is—of course—highly relevant to loss-of-consortium damages. *See GPC Br.* 47 (citing cases).

Fourth, the Coogans are wrong that "[b]ad conduct is not relevant in a wrongful death case." *Respts' Br. adv. GPC* 64. The unpublished decision the Coogans cite is inapposite. There, the Court of Appeals held that the trial court did not abuse its discretion excluding evidence because it pertained to the decedent's general character, rather than the quality of the relationship that was the subject of the loss-of-consortium claim. *Montgomery v. Brewhaha Bellevue, LLC*, 195 Wn. App. 1064, 2016 WL 6997724 at *8 (2016) (unpublished; *see* GR 14.1). Here, as just discussed, the new evidence bears directly on relationship quality and is thus relevant to loss-of-consortium damages.

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[12] As explained in GPC's opening brief, the evidence was relevant not just to Sue's damages, but also to the $20 million in damages awarded to Doy's daughters and the $30 million awarded to his estate. *GPC Br.* 48–49.

The Coogans also assert that the new evidence is inadmissible as hearsay. But the point of GPC and NAPA's CR 60 motion was not merely that they were deprived of the declarations themselves (which would have been bad enough). GPC and NAPA were also prejudiced in their ability to prepare for trial and develop a response to the Coogans' one-sided and false trial narrative. A party that fails to disclose evidence in response to discovery requests should not be heard to challenge the admissibility of that evidence when the nondisclosure prejudiced the opposing party's ability to prepare for trial and present admissible evidence. *See Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 588–90, 220 P.3d 191 (2009) (holding that a party's ability to prepare for trial was prejudiced by failure to disclose evidence); *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 325–27, 54 P.3d 665 (2002) (similar); *see also GPC Br.* 46 n.27. Had the Coogans disclosed the statements, GPC and NAPA could have developed facts for trial and been able to present witness testimony that would have given the jury a complete—and radically different—picture of Doy and Sue's relationship.

Regardless, even if the declarations themselves needed to be admissible for purposes of obtaining relief under CR 60(b)(3), they were. *See GPC Br.* 46 n.27. The most evocative statements would have been offered not to prove the truth of the matters asserted (*e.g.*, that Sue actually stole from Doy or attacked him with an axe), but rather for what the

statements indirectly revealed about the quality of the relationship.[13] *See* ER 801(c). In addition, Sue, Roxane, Raquel, and Kelly were all treated as parties to the case, meaning that their statements would have been admissible as admissions by party opponents. *See* ER 801(d)(2); *GPC Br.* 51–52. And Doy's statements would have been admissible, too, as statements of his then-existing state of mind. ER 803(a)(3). The Coogans' withholding that critical evidence deprived GPC and NAPA of a fair trial.

(2) This Court should reject the Coogans' attempt to fault GPC and NAPA for accepting the Coogans' representations during discovery.

The Coogans' argument that GPC and NAPA were not diligent ignores *why* GPC and NAPA did not pursue additional discovery on damages. It was not because they made a "strategic decision" to focus their efforts on defending against liability. *Respts' Br. adv. GPC* 65–67. Rather, it was because they were misled by the Coogans' representations and omissions during discovery into believing that further investigation would be unproductive. *See GPC Br.* 15–17, 20, 49–51.

The Coogans' analogy to *Jones* is again inapt. *See GPC Br.* 51 n.30. In *Jones*, as already discussed, the facts disclosed about the plaintiff's condition during discovery were ambiguous. 179 Wn.2d at 365. That was not the case here. Sue testified at her deposition that she and Doy had a "very loving, romantic relationship" and that she and Doy worked in the

[13] Even if some of those statements had been excluded under ER 403, the jury nevertheless would have heard at least *some* conflicting evidence about the quality of Doy and Sue's relationship.

excavation business as a "team." CP 20403, 20414; *see also* CP 20839–42 (Sue's probate declaration). In the context of claims for relationship-based damages, those representations could not have been clearer. Those are the type of categorical statements upon which a party may rely without needing to probe or investigate further. *See GPC Br.* 50 (citing *Kurtz*, 63 Wn.2d at 872, 874–75; *Roberson v. Perez*, 123 Wn. App. 320, 334, 96 P.3d 420 (2004)).

Jones is also off-point because there were clues there that should have led the City of Seattle to investigate the plaintiff's claim that he was completely disabled. For instance, the City learned in discovery that he went hunting, fishing, and camping after his accident and that he played horseshoes. 179 Wn.2d at 365, 367–68. Yet the City chose to focus on investigating other matters and did not interview any of the people that the plaintiff testified he was spending time with or request that he undergo an independent-medical examination. *Id.* at 367–68.

Here, the facts obtained by GPC and NAPA during discovery—in depositions and from the probate file—were all consistent with Sue's testimony that her relationship with Doy was happy and loving. *See GPC Br.* 15–17, 50. GPC and NAPA had no reason to suspect that any of the family and friends the Coogans identified might provide testimony that conflicted with the witness declarations Sue had filed in the probate action or with Sue's own testimony.[14] Due diligence does not require a party to

[14] That GPC and NAPA did not depose witnesses about the probate action is beside the point. The issue is Doy and Sue's relationship, not the probate action itself or the dispute that arose between Doy's daughters and Sue.

assume the other side has been advancing calculated lies or pursue discovery when there is no reasonable basis for believing that the effort will uncover evidence that will contradict or call into doubt an opposing party's unambiguous representations.

(b) GPC and NAPA were entitled to relief under CR 60(b)(4) (party misconduct).

Although the Coogans' misconduct may well have amounted to fraud, that cannot be determined until GPC and NAPA are afforded an opportunity to conduct discovery into the extent of the misconduct. Without the benefit of discovery, GPC and NAPA did not presume to allege fraud in support of their request for relief under CR 60(b)(4). Nor were they required to. CR 60(b)(4) provides for vacation of a judgment based on "[f]raud…, misrepresentation, or other misconduct of an adverse party." *See Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 825, 225 P.3d 280 (2009); *GPC Br.* 51 n.31. GPC and NAPA asserted misrepresentation or other misconduct and requested discovery. CP 22526–27, 22581–82.

That standard was met here. To begin, Sue undisputedly was an "adverse party." Contrary to the Coogans' suggestion (*see Respts' Br. adv. GPC* 68–69), her failure to appear at trial does not shield her from findings of misconduct. Nor is it material that Sue acknowledged that there was tension between her and Doy's daughters. Again, the issue is her relationship with Doy. Sue's testimony that she and Doy had a "very loving, romantic relationship" and that she worked with Doy was a

misrepresentation. *See* CP 20403, 20414. GPC and NAPA were not required to prove that Sue "did not love" Doy. *Respts' Br. adv. GPC* 69. It was sufficient to show that she misrepresented the quality of the relationship. The evidence discovered after the trial clearly showed that.

In addition, Sue's testimony is not the full extent of her known misconduct. She was repeatedly asked, in her capacity as then-personal representative of Doy's estate, to produce "any and all" statements by persons with knowledge relevant to the case, and she answered that all such statements had been produced.[15] CP 21567, 21571–72, 21584; *see also GPC Br.* 18 n.10. That answer was false as of September 2015 when Raquel, an estate beneficiary, made a relevant statement in a Facebook message. And it was certainly false as of April 2016, when Roxane and Raquel gathered two-dozen highly relevant statements. As personal representative, Sue was obligated to make a "reasonable inquiry" before responding to the discovery requests and to answer truthfully. CR 26(g). A reasonable inquiry necessarily would have included checking with the estate's beneficiaries.

That was more than sufficient misconduct to warrant relief under CR 60(b)(4). But the misconduct was not just by Sue. The Coogans' assertion that the estate beneficiaries were not parties, while technically correct as GPC acknowledged, ignores their legal status as beneficiaries. It

[15] Contrary to the Coogans' assertion, the fact that GPC and NAPA did not themselves propound the request for production is immaterial. *See Respts' Br. adv. GPC* 60 n.34. GPC and NAPA were entitled to the benefit of discovery requests served by co-defendants and were not required to duplicate them.

also ignores GPC and NAPA's judicial-estoppel argument based on the Coogans' identification of the beneficiaries as parties and their request to be treated as parties at trial. *See GPC Br.* 52. Roxane, Raquel, and Kelly all knew about undisclosed facts and statements and participated in hiding evidence. Kelly, in particular, testified at trial about how close, happy, and loving Doy and Sue supposedly were. 30 RP 18–19, 40, 42. That was a misrepresentation.

The trial court abused its discretion in denying relief under CR 60. Misconduct warrants relief if it prevented a full and fair presentation of a party's case. *Dalton v. State*, 130 Wn. App. 653, 665, 124 P.3d 305 (2005). The Coogans' misrepresentations and omissions prevented GPC and NAPA from making a full and fair presentation of their case. The court failed to analyze the requirements of either CR 60(b)(3) or (b)(4), ignored the need for discovery compelled by the disturbing circumstances surrounding the misconduct and omissions, and did not even hold a hearing before denying relief. *See* CP 22555–56. Its stated reasons for denying the motion begged the questions before it. This Court should reverse and remand for a new trial and order discovery to reveal the full extent of the Coogans' misconduct (including inquiry of their attorneys under the crime-fraud exception to the attorney-client privilege).[16]

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[16] The facts may ultimately warrant striking the complaint as a sanction for bad-faith litigation conduct that caused "the very temple of justice [to be] defiled." *George E. Failing Co. v. Cascade Drilling, Inc.*, 197 Wn. App. 1019, 2016 WL 7470094 at *2 (2016) (unpublished) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991) (citation omitted)).

B. The $81.5 million verdict is excessive because it was unmistakably born of passion and prejudice.

No mesothelioma verdict in this state has ever come within $75 million of this verdict. More than that, no general-damages verdict in *any* Washington personal-injury case has come within $55 million of this one. The $81.5 million verdict breaks with all precedent and cannot stand.

1. The Coogans are wrong that an outlier verdict withstands scrutiny so long as a plaintiff presented evidence of suffering and death.

The Coogans argue that because they presented evidence of Doy's suffering and death, the jury was effectively entitled to award any amount that it saw fit. *Respts' Br. adv. GPC* 24–28. That is wrong. GPC does not dispute that Doy suffered a painful death, but that cannot be the end of the excessive-damages legal analysis. The Coogans' one-step test—determine whether there is evidence of someone's suffering and death—guarantees that a Washington appellate court will *never* reverse a wrongful-death damages award as excessive, no matter how unprecedented.[17]

But CR 59(a) exists for a reason. By its plain language, it empowers courts to distinguish between verdicts that are reasonable and those that are not—*i.e.*, verdicts that are "so excessive…as unmistakably to indicate that the verdict must have been the result of passion or prejudice." CR 59(e); *see also Ryan v. Westgard*, 12 Wn. App. 500, 513, 530 P.2d 687 (1975) (question is whether a verdict exceeds the "rational bound[]"). As GPC's

[17] The Coogan's argument that "the jury's award is always limited by the evidence" (*Respts' Br. adv. GPC* 26) is a truism. The evidence limits a jury's award only if courts assign a particular range of values to particular types of evidence.

opening brief explained, that standard presupposes comparison to a norm. *GPC Br.* 54–55. Courts cannot determine whether an award is excessive unless they compare that award—whether implicitly or explicitly—to what they know is *not* excessive in a given type of case.[18]

Which brings us to our next point: The Coogans cite no verdict in the same ballpark as this one. In the section of their brief entitled "the jury is entrusted to determine an appropriate amount of damages," the Coogans cite fourteen cases purportedly standing for that proposition, but the largest verdict among those cases is $8 million. *Respts' Br. adv. GPC* 24–26. The average is $1.7 million. And even if we look elsewhere in the Coogans' brief, they cite no Washington verdict higher than the $25 million general-damages award in *Wuth ex rel. Kessler v. Laboratory Corporation of America*—a verdict that compensated parents for a lifetime of damages associated with the wrongful birth and wrongful life of their deformed child. 189 Wn. App. 660, 706, 359 P.3d 841 (2015). The general-damages award here is more than triple the *Wuth* award, which itself was record breaking. Nothing in the Coogans' cited cases suggests that courts should rubber stamp any verdict so long as a plaintiff introduces evidence of someone's suffering and death.

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[18] The Coogans do not dispute that notwithstanding our Supreme Court's refusal to compare individual verdicts in *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 840 P.2d 860 (1992), our state has a long history of using a *mass* of past awards as a benchmark. *See GPC Br.* 62–63 & n.38; *see also Clark v. Icicle Irr. Dist.*, 72 Wn.2d 201, 208, 432 P.2d 541, 545 (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").

The Coogans' cited mesothelioma verdicts also confirm the $81.5 million verdict's excessiveness. The highest mesothelioma verdict the Coogans found is a $10.2 million verdict that the Ninth Circuit reversed on appeal. *See Barabin v. AstenJohnson, Inc.*, No. C07-1454 RSL, 2010 WL 5137898 (W.D. Wash. Dec. 10, 2010), *vacated by* 740 F.3d 457 (9th Cir. 2014). The highest *affirmed* mesothelioma verdict that the Coogans cite is the $6 million verdict in *Estenson v. Caterpillar*, 189 Wn. App. 1053, 2015 WL 5224161 (2015) (unpublished).[19] The Coogans even concede that the average mesothelioma verdict from the past ten years—which includes *Barabin*'s now-reversed $10.2 million verdict—is $4.37 million.[20] *Respts' Br. adv. GPC* 37 & n.27.

Out-of-state precedent further confirms this verdict's excessiveness. For example, a New York court held in 2018 that a $75 million mesothelioma verdict against automotive gasket manufacturers (including Dana, a defendant here) was excessive on close facts. *See Robaey v. Air &*

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[19] The *Barabin* verdict included a $1.5 million loss-of-consortium award to Mrs. Barabin. *Barabin v. AstenJohnson, Inc.*, No. C07-1454 RSL, 2010 WL 1506430 at *1 (W.D. Wash. Apr. 14, 2010). The *Estenson* verdict included a $2 million loss-of-consortium award to Mrs. Estenson and $175,000 awards to each of Mr. Estenson's four children. 2015 WL 5224161 at *3. Those awards are nothing like the ones here—a $30 million award to Mrs. Coogan and $10 million awards to both of Doy's daughters.

[20] The Coogans suggest that an above-average verdict was appropriate here because Doy was younger than the decedents in the five cases that yielded the $4.37 million average. *Respts' Br. adv. GPC* 37 & n.27. But Doy's life expectancy at time of death was not a factor in his $30 million pain-and-suffering award. 47 RP 118 (pain and suffering relates to time "prior to death"). And even if we assume that Doy's life expectancy might have otherwise justified a higher verdict than the verdicts in those other cases, it could never justify an $81.5 million verdict. Doubling the $4.37 million average would yield an $8.7 million verdict. Tripling the average would yield a $13.11 million verdict. And even if we quadrupled the average, that would yield a $17.48 million verdict—still almost five times smaller than the verdict here.

Liquid Sys. Corp., No. 190275/13, 2018 WL 4944382 at *13–15 (N.Y. Sup. Ct. Oct. 11, 2018). In that case, Mrs. Robaey developed peritoneal mesothelioma—the same disease as Doy—from laundering her husband's dust-ridden clothes and working next to him while he scraped asbestos-containing gaskets and swept up the dust. *Id.* at *1. The jury awarded Mrs. Robaey $50 million for four-and-a-half years of past pain and suffering and one year of future pain and suffering, and it awarded her husband $25 million for past and future lost consortium. *Id.* *1. The court held that both awards were excessive. *Id.* at *14–15. In doing so, the court acknowledged that a New York jury verdict—same as a Washington verdict—should be given "great deference" under the law and recognized the suffering in Mrs. Robaey's extreme pain and her husband's loss of his "soulmate." *Id.* at *15. But the court nevertheless reduced the $75 million total verdict to $17.5 million—$16 million for Mrs. Robaey's five-and-a-half years of pain and suffering and $1.25 million for her husband's lost consortium. *Id.* To our knowledge, even that reduced verdict far exceeded the highest affirmed mesothelioma verdict in New York State history. *See id.* at *13–14.

* * *

The point is not that prior verdicts from this state or any other state operate as a cap on all mesothelioma verdicts going forward. The point is that those verdicts—and wrongful-death verdicts more generally—confirm that the $81.5 million verdict here is so excessive that it was unmistakably the result of passion or prejudice.

2. The Coogans mishandle the cases applying a ratio-based analysis.

Those other verdicts are not the only sign of excessiveness. Another is the disparity between the $80 million general-damages award and the $1.5 million economic-damages award—a disparity that appellate courts in this state have recognized time and again as a useful metric for gauging excessiveness. *See Bunch v. King Cty. Dep't of Youth Servs.*, 155 Wn.2d 165, 181, 116 P.3d 381 (2005) (applying ratio analysis and upholding verdict in part because noneconomic damages were only three-quarters of economic damages); *Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 140, 856 P.2d 746 (1993) (10:1 non-economic-to-economic-damages ratio is "shocking"); *Wuth*, 189 Wn. App. at 706 (1:1 ratio is not shocking).

In response, the Coogans suggest that those cases are no longer good law after *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989). But that cannot be right because *Sofie* preceded all those cases. In any event, *Sofie* has no bearing on courts' using a noneconomic-to-economic-damages ratio as one gauge of excessiveness. In *Sofie*, the Supreme Court invalidated a statutory cap that limited non-economic damages to a mathematical equation involving a person's wages and life expectancy. 112 Wn.2d at 638. Nothing of the sort is at play here. GPC's argument is that the imbalance between the $1.5 million economic-damages award and $80 million general-damages award provides one indicator of excessiveness (among many), not that courts should cap a plaintiff's damages based on a mathematical equation.

Sofie aside, the Coogans' attempts to avoid the ratio cases betray the weakness of their argument. The Coogans try to distinguish *Bunch* and *Hill* by suggesting that those cases are limited to the employment-discrimination context (*Respts' Br. adv. GPC* 35–36), but one will search those cases in vain for any such limitation. And the Coogans ignore the court's ratio analysis in *Wuth*—no doubt because that court found significant that the verdict reflected a 1:1 ratio between general damages and economic damages. *Wuth*, 189 Wn. App. at 706.

The 53:1 ratio between non-economic and economic damages here confirms this verdict's excessiveness.

3. The $77.1 million difference between the verdict and the Coogans' twelve settlements with other defendants further confirms the verdict's excessiveness.

The Coogans offer a handful of reasons why the $77.1 million difference between the verdict ($81.5 million) and the Coogans' twelve settlements with other defendants ($4.395 million) is not relevant to excessiveness, but none is persuasive. First, the Coogans suggest that the supposedly high amount of total settlements should have put GPC and NAPA on notice of a potential $81.5 million verdict. *Respts' Br. adv. GPC* 37. That is nonsense. The average of those settlements—which included settlements by other automotive defendants—was $366,250. Besides that, the $4.395 million included a settlement by a company responsible for one of Doy's "major" asbestos exposures (the Coogans' words, not ours). 7 RP 121–22. Nothing about that defendant's settlement or the eleven others justifies a verdict that is 222 times greater than the average.

The Coogans also argue that considering the verdict-to-settlements discrepancy would discourage settlements, but they do not explain why that would be the case. *Respts' Br. adv. GPC* 39. And we can't think of any reason. This Court's considering the verdict-to-settlements ratio would not disincentive defendants from settling other cases in the future.

The Coogans are also wrong that GPC is "proposing a system in which settlements found reasonable would first reduce the verdict and then the *same* settlements are used again to remit the already reduced verdict." *Respts' Br. adv. GPC* 39. The point of the reasonableness stage is to determine a settlement's reasonableness, not a verdict's. The trial court's finding the settlements reasonable does not preclude GPC's argument that the $81.5 million verdict is excessive and unreasonable.

4. The verdict far exceeded the Coogans' pre-trial request for damages.

The Coogans do not try to explain their pre-trial filing's concession that $10 million reflects the upper range for damages in a mesothelioma case. *Cf. Respts' Br. adv. GPC* 36–37; *see* CP 17554–55. There is nothing to say. If $10 million is at the upper range,[21] then there is no world in which the $81.5 million verdict is reasonable.

[21] It is. To our knowledge, Washington appellate courts have never affirmed a mesothelioma verdict higher than the $6 million verdict in *Estenson*. 2015 WL 5224161 at *3.

5. The jury's $1.5 million economic-damages award was supported by threadbare evidence, which further confirms the total verdict's excessiveness.

In response to GPC's argument that virtually no evidence supported the estate's $1.5 million economic-damages award, the Coogans suggest that the jury might have properly awarded damages for things other than household services. *Respts' Br. adv. GPC* 29 & n.20. But during trial, the Coogans explicitly disclaimed any such damages. *See, e.g.*, 47 RP 5 (Dean: "[T]he only economic damages in the instructions that we're seeking is what future or past is needed for his wife and kids like around the house[.]"). The Coogans should be estopped from arguing that the jury might have properly awarded economic damages for anything other than household services.[22]

In any case, the household-services evidence the Coogans adduced could never support a $1.5 million economic-damages award. On this point, the Coogans cite only one page of testimony, where Doy's daughter testified that "[Doy's] the counselor, he's the financial planner, the excavator, you know, he did everything." *See Respts' Br. adv. GPC* 29–30 (citing 18 RP 71). General testimony of that nature could never prove by a preponderance that Doy's household services were worth $1.5 million for his remaining

[22] It is true that the trial court's jury instruction (which mirrored the pattern instruction) allowed the jury to "consider as future economic damages what benefits of value, including money, goods, and services Doy Coogan would have contributed" to his family. 47 RP 119. At the jury-instruction hearing, GPC and NAPA asked the trial court to instruct the jury on what it could *not* award in this case. 47 RP 68–71. The trial court rejected that argument, but in doing so, it noted that the jury could not lawfully award damages for categories of economic damages (like medical expenses) for which the jury heard no evidence. 47 RP 70–71.

life expectancy.[23] And even if the Court considered the Coogans' other vague references to Doy's services—which are unsupported by record citations—the general dearth of economic-damages evidence confirms that the remaining $80 million in damages were born of passion and prejudice.

6. GPC and NAPA never admitted the verdict's reasonableness.

The Coogans also betray the weakness of their excessiveness argument by asserting that "GPC/NAPA initially conceded the award is reasonable." *Respts' Br. adv. GPC* 30. According to the Coogans, GPC and NAPA made that concession at the statutorily required reasonableness proceeding, when they argued that in light of the $81.5 million verdict, the trial court should offset that verdict by significantly more than the $4.395 million in total settlements. *Id.* at 30–31.

The Coogans' concession argument is frivolous. GPC and NAPA never suggested (much less conceded) that the verdict was reasonable at the reasonableness proceeding. That proceeding requires trial courts to determine whether a *settling defendant's settlement* is reasonable—with the goal of reimbursing a non-settling defendant for its extinguished

[23] According to GPC and NAPA's expert Dr. Schuster (whom the jury never heard from), Doy's life expectancy was less than five years. According to the life-expectancy table that the jury received, Doy's life expectancy was around 15 years. Even if we take the higher of those figures, the jury's economic-damages award assumes that Doy would have provided at least $100,000-per-year in household services.

Recognizing that they cannot defend $100,000-per year in household services, the Coogans argue that Doy (who was 67 when he died) might have lived *twenty-three* more years because his mother lived until she was 90. *Respts' Br. adv. GPC* 18–19. The Coogans cite no evidence for that speculation other than testimony showing that Doy's mother passed away at 90 years old. *Id.* This Court should not consider the Coogans' speculation given the life-expectancy table (which gave Doy 15 years to live) and Dr. Schuster's testimony (which gave Doy less than 5 years).

contribution claim. *See, e.g.*, *Adams v. Johnston*, 71 Wn. App. 599, 604, 860 P.2d 423 (1993). Given that purpose, GPC and NAPA argued below that it was not reasonable for the trial court to subtract only $4.395 million from the $81.5 million verdict—saddling GPC and NAPA alone with 94% of the Coogans' damages—because that result would not reimburse GPC and NAPA for their extinguished contribution claims. CP 15717–19. The reasonableness proceeding was not the time or place for GPC and NAPA to challenge the verdict's excessiveness. GPC and NAPA conceded nothing.

C. The trial court abused its discretion by excluding Dr. Schuster's medical opinion.

Dr. Schuster's medical opinion was that Doy had Stage 3 liver cirrhosis and that this disease gave him five years or less to live. *See* 26 RP 145, 151. The trial court excluded that opinion on Rule 403 grounds, but nothing in that rule (much less Washington precedent) supported that result. *See* 26 RP 167; *see also* 2 RP 97, 19 RP 138.

The court's ruling also created an injustice of the highest order. The jury received only a one-sided picture of Doy's life expectancy—the opinion by the Coogans' expert that Doy was "quite healthy before his illness with mesothelioma" and a life-expectancy table showing that the average man in Doy's position would have lived *fifteen* more years. 47 RP 120–21; 9 RP 153; *see also* 6 RP 6 (Dean arguing in opening that Doy was "incredibly healthy").[24]

[24] The trial court instructed the jury to consider Doy's "health, life expectancy, occupation, and habits of industry" as part of its damages calculus. 47 RP 120–21.

1. The defendants' proposed compromise eliminated any potential for undue prejudice.

The Coogans defend that injustice primarily with this syllogism: Dr. Schuster mentioned Doy's alcohol consumption in his deposition testimony and proffer; he would have mentioned that issue again in his trial testimony; and if he had done so, that testimony would have violated Rule 403. *Respts' Br. adv. GPC* 71–74. To state the argument is to understand its weakness. To begin, it ignores that under the defendants' proposed compromise, Dr. Schuster would have never mentioned Doy's alcohol consumption at trial. *Compare* 2 RP 98–99 (defense suggesting to the trial court that the parties could "bring in the evidence of the valid medical opinions of [Dr. Schuster] without calling [Doy] names or saying that he was alcoholic[,] but just saying he had cirrhosis of the liver"), *with* 2 RP 97 (trial court reasoning that "even if [Dr. Schuster's opinion] does have some basis, the prejudicial effect of characterizing Mr. Coogan as an alcoholic, chronic, heavy drinker, is something that I think is unduly prejudicial"). Dr. Schuster's life-expectancy opinion didn't require him to touch on Doy's alcohol consumption. The point of his opinion was to show that Doy had a disease other than mesothelioma (cirrhosis) that would have cut his life short—an opinion that, by itself, had zero potential for undue prejudice.

The Coogans have no good response to that compromise. Their only argument is that Dr. Schuster's proffer testimony—which included references to Doy's drinking—suggests that he would have made those same references in trial testimony. *Respts' Br. adv. GPC* 72–73. That is nonsense. The admissibility of Dr. Schuster's cirrhosis opinion did not

hinge on his references to Doy's drinking. If the trial court had followed the defense's proposed compromise by allowing Dr. Schuster's cirrhosis opinion but disallowing references to Doy's drinking, then Dr. Schuster would have been bound to follow that order on pain of contempt. The Coogans' view of the proffer testimony—that Dr. Schuster's opinion was admissible only if the entirety of that testimony was admissible—does not reflect how proffers work.[25]

The rules of evidence do not protect parties against evidence that harms their case. *See Carson v. Fine*, 123 Wn. 2d 206, 224, 867 P.2d 610, 621 (1994) ("Evidence is not rendered inadmissible under ER 403 just because it may be prejudicial."). The rules protect against only *unduly* prejudicial evidence. *Id.* Under the defendants' compromise approach, Dr. Schuster's testimony would not have brushed close to that standard. Beyond that, the trial court's error was compounded by the Coogans' expert's opinion that Doy was "quite healthy" apart from his mesothelioma. 9 RP 153; *see also Carson*, 123 Wn.2d at 225 ("[Rule 403] may not be utilized to exclude the otherwise admissible opinion of a party's expert on a critical issue, while allowing the opinion of his adversary's expert on the same issue."); 5 K. TEGLAND, WASH. PRAC., EVID. LAW & PRAC. § 403.2 (6th ed.,

[25] *See State v. Young*, 158 Wn. App. 707, 721–22, 243 P.3d 172 (2010) (approving trial court's decision to limit certain aspects of defendant's expert's opinion); *State v. Bell*, 57 Wn. App. 447, 453–54, 788 P.2d 1109 (1990) (affirming trial court's decision, after offer of proof, to admit certain parts of expert's proposed testimony and exclude others); *see also Everett v. Am. Gen. Life Ins. Co.*, 703 F. App'x 481, 483 (9th Cir. 2017) (noting that "it is possible that [an expert's] testimony could be admissible only in part"). For similar reasons, there is no merit to the Coogans' argument that Dr. Schuster's deposition references to Doy's alcohol consumption bore on the admissibility of his cirrhosis opinion at trial. *Cf. Respts' Br. adv. GPC* 72.

updated 2018) ("If evidence has already been admitted on behalf of one party, similar evidence offered by the opposing party should not be excluded under Rule 403.").

2. In any event, Rule 403 did not preclude Dr. Schuster's references to Doy's alcohol consumption.

But even if the defendants had not suggested that compromise, Dr. Schuster was entitled to mention Doy's alcohol consumption as a fact supporting his opinion that Doy had Stage 3 cirrhosis. The Coogans reach the opposite conclusion by citing *Jones*, 179 Wn.2d 322, and *Kramer v. J. I. Case Manufacturing Co.*, 62 Wn. App. 544, 815 P.2d 798 (1991), but neither case says that ER 403 precludes an expert opinion about cirrhosis that relies in part on a plaintiff's alcohol consumption.

In *Jones*, in the middle of trial, the defendant tried to introduce testimony from three witnesses who would have testified about many aspects of the plaintiff's post-accident life, including his alcohol consumption. 179 Wn.2d at 357–58. The trial court excluded all of the proposed testimony as untimely and also excluded the alcohol-related parts because they were unduly prejudicial. *Id.* at 343, 356. On appeal to the Supreme Court, the defendant argued only the timeliness issue, waiving any argument about the admissibility of the testimony's alcohol-related parts:

> The trial judge excluded testimony on th[e] subject [of alcohol]—without regard to its source—as irrelevant and unduly prejudicial. The City did not challenge that ruling in its appeal to this court. Exclusion of the purely alcohol-related testimony offered by Powell, Gordon, or Winquist is thus necessarily harmless.

Id. at 356–57.

The Supreme Court in *Jones*, then, never analyzed whether Rule 403 barred the witnesses' alcohol-related testimony. Nothing in that opinion suggests that trial courts should exclude evidence of alcohol consumption that bears on life expectancy and informs a physician's opinion on cirrhosis.

Kramer is no better for the Coogans: That case dealt with alcohol-related testimony that was not relevant to any point in issue. In *Kramer*, the Court of Appeals held that the trial court erred by allowing the defense to cross-examine the plaintiff with evidence about his alcohol consumption before and after an accident. 62 Wn. App. at 559. Although the defendant argued that the evidence was relevant to the plaintiff's work-life expectancy and earning potential, the evidence had a missing link—it did not show how the plaintiff's alcohol consumption would have affected his work-life expectancy and earning potential. *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.*; *see also Colley v. Peacehealth*, 177 Wn. App. 717, 733, 312 P.3d 989 (2013) (characterizing *Kramer* as holding that alcohol-related "evidence should have been excluded because there was no proof that substance abuse had actually affected the plaintiff's life expectancy or his employment prospects"). In other words, the evidence concerning the plaintiff's alcohol consumption was not relevant without other evidence showing the extent of the plaintiff's substance abuse or its effects on his employment.

Kramer has no bearing on this case. Dr. Schuster's medical opinion—that Doy's alcohol consumption led to cirrhosis and that Doy had less than five years to live—is the link that was missing in *Kramer*. If the jury had heard and accepted Dr. Schuster's opinion, then it would have concluded that Doy had fewer than five years to live instead of fifteen.[26]

There is no merit to the Coogans' argument that *Kramer* and *Jones* establish a rule that alcohol-related evidence "is unduly prejudicial when used to show an impact on recovery or work/life expectancy"—a rule that, in any event, would break with the rule in many other jurisdictions.[27] *Respts' Br. adv. GPC* 80 n.41. But even if those cases established such a rule, Dr. Schuster's cirrhosis opinion was *still* admissible under the defendants' proposed compromise, which risked zero undue prejudice to the Coogans. Either way, the trial court committed reversible error by excluding Dr. Schuster's opinion.

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[26] This Court need not decide whether GPC and NAPA could have introduced evidence of Doy's alcohol consumption—as relevant to Doy's health and habits—separate and apart from Dr. Schuster's opinion.

[27] GPC's opening brief cited cases from seven other jurisdictions holding that alcohol-consumption evidence is admissible if the jury is instructed to consider a plaintiff's or decedent's life expectancy. *GPC Br.* 71 n.42 (citing, *e.g.*, *Stocki v. Nunn*, 2015 WY 75, 351 P.3d 911, 928 (Wyo. 2015) (evidence that plaintiff drank a six-pack per day was admissible because of the life-expectancy instruction, which asked the jury to consider the plaintiff's "occupation, health, habits, activities")). Many of those cases did not involve an expert opinion quantifying the effects of alcohol consumption.

The Coogans' only response to those cases is that through *Jones* and *Kramer*, Washington has "draw[n] the line differently" than all those other jurisdictions. *Respts' Br. adv. GPC* 80 n.41. That argument misreads *Jones* and *Kramer*. In addition, the Coogans' proposed rule would handcuff defendants from presenting an entire category of evidence that is relevant to the pattern jury instructions, which instruct the jury to evaluate a plaintiff's life expectancy by considering his "health" and "habits." 47 RP 120–21.

3. The Coogans' remaining challenges to Dr. Schuster's Stage 3 diagnosis are cross-examination points, not reasons to exclude his testimony.

The Coogans also try to discredit Dr. Schuster's Stage 3 cirrhosis opinion, but none of their arguments speaks to admissibility. Their primary argument is that Dr. Schuster "was unable to provide a basis for attributing any of Mr. Coogan's ascites"—fluid build-up in the stomach—"to his cirrhosis as opposed to his peritoneal mesothelioma." *Respts' Br. adv. GPC* 77. That is wrong. Dr. Schuster testified in his proffer that Doy's cirrhosis created an "enlarged spleen" that was "going to create some ascites." 26 RP 147. He also testified that when a cirrhosis patient's "portal pressure goes up…then you develop varices" and that "you will start to see some ascites."[28] *Id.* at 146; *see also id.* at 160 ("[I]t would be expected that there would likely be some fluid accumulating, some ascites given perisplenic and periportal hypertension based on the varices and the findings that we're seeing."). The Coogans' and the trial court's lay speculation that Doy's mesothelioma caused *all* of his ascites should have never precluded Dr. Schuster's professional conclusion to the contrary. *See, e.g.*, 5A TEGLAND, *supra*, § 705.7 ("Rule 705 allows the cross-examiner to probe the knowledge…of the witness, as well as the basis for the witness's opinion.").

The same is true of the Coogans' other concerns about Dr. Schuster's opinion and training. If Dr. Schuster had testified at trial, the Coogans could have cross-examined him about his experience with mesothelioma cases, his explanation for why a patient's blood tests can

[28] Doy had both varices and ascites. *GPC Br.* 67–69.

return normal even if they have Stage 3 cirrhosis, the fact that he did not personally examine Doy, and his hourly rate. *Cf. Respts' Br. adv. GPC* 78. None of those quibbles with Dr. Schuster's training or reasoning was a ground to exclude his medical opinion. *See GPC Br*. 68–70.

Nor was the Coogans' speculation that Doy might not have had cirrhosis at all. The Coogans' only support for that speculation is one physician's note (after Doy's mesothelioma diagnosis) that "[l]iver disease and cirrhosis were initially suspected." *Respts' Br. adv. GPC* 79 (quoting CP 4724). But that one note did not rule out cirrhosis. Indeed, the same physician had previously concluded *three times* that Doy had cirrhosis. *See GPC Br*. 66–67. And even if that physician's note could only be construed as implicitly ruling out cirrhosis (it cannot), Dr. Schuster was entitled to disagree with him. Dr. Schuster pointed to myriad facts supporting his Stage 3 cirrhosis opinion. *Id.* at 65–66. His opinion spoke to a key ingredient of the jury's damages calculus and was admissible.

D. The workers-compensation claims for five of Doy's Wagstaff colleagues showed that Doy contracted mesothelioma from that facility.

The trial court also abused its discretion by excluding five workers-compensation claims showing that Wagstaff Machine Works, Inc. (a company with around forty employees), spawned a cluster of asbestos-related diseases among employees who worked there alongside Doy. The Coogans try to defend that ruling by pointing to several unknowns about those claimants—their exposure histories outside of Wagstaff, whether they

worked in Wagstaff's "machine shop" or its "marinite room," and the exact nature of their job responsibilities—and then speculating that the claimants' exposures were *maybe* not sufficiently similar to Doy's. *Respts' Br. adv. GPC* 81. But the law did not require evidence that the claimants were Doy's clones. The law instead requires relevance, which means "any tendency to make the existence of any fact that is of consequence…more probable or less probable than it would be without the evidence." ER 401.[29] GPC and NAPA far exceeded that bar here: The claimants contracted asbestos-related illnesses from work at the same workplace during the same time period as Doy (the late 1960s), and two of them even had job responsibilities similar to Doy's. *GPC Br.* 75. The law requires no more.

The Coogans again offer several cross-examination points related to this evidence, but none proves that the evidence was inadmissible. To begin, the Coogans argue that no record evidence proves that the claimants' job responsibilities at Wagstaff were similar to Doy's while he worked there. *Respts' Br. adv. GPC* 87. That is false. Two of the men were

[29] The Coogans are wrong that "GPC/NAPA cite no case law…that allow [sic] admission of prior accidents for the purpose of showing causation." *Respts' Br. adv. GPC* 82 n.42. *See GPC Br.* 77–78 (citing *Nolan v. Weil-McLain*, 233 Ill. 2d 416, 910 N.E.2d 549, 564 (2009)). At any rate, neither of the two sufficient-similarity cases cited by the Coogans supports their argument that the compensation claims were irrelevant to Doy's Wagstaff exposure. In *Blood v. Allied Stores Corp.*, 62 Wn.2d 187, 189 & n.2, 381 P.2d 742 (1963)—which involved a plaintiff's fall down an escalator—the Supreme Court was "unable to consider the merits of th[e] assignment" that the trial court improperly excluded evidence of prior accidents because none of that evidence was in the appellate record. And in *Stewart v. State*, 92 Wn.2d 285, 304, 597 P.2d 101 (1979), an automobile-accident case, the Supreme Court affirmed the exclusion of testimony about a prior injury on a bridge because there was no evidence that the first injury was anything like the plaintiff's. The dissimilarities included, among other things, the fact that the first injury involved a man jumping off the bridge while the plaintiff's injury involved a multi-car pileup. *Id.*

"machinists," just like Doy. Ex. 199 at 1, 9; Ex. 193 at 2 (Doy was member of Machinists Union). Those employees' claims show that they sawed, drilled, and machined marinite board, and that at least one of them worked in the so-called machine shop, which was just twenty feet away from the marinite room.[30] *Id.*; *see also* 43 RP 126–27. On top of that, GPC and NAPA proved that Wagstaff was in the business of cutting, molding, and selling marinite board and that a machinist's job would have involved working with that board. 43 RP 40–41; *see also* 19 RP 180–82, 43 RP 42–45, 47–48, 109–10 (describing marinite production at Wagstaff). At the very least, the evidence undercuts the Coogans' theory that Doy *could have* worked as a machinist at a marinite-producing plant without ever being exposed to marinite—all while his fellow machinists were sawing, drilling, and machining that material every day. *Cf. Respts' Br. adv. GPC* 85 ("no evidence that Mr. Coogan ever had direct exposure to Marinite board"); *id.* at 86 (similar).

The Coogans also argue that none of the claimants suffered from peritoneal mesothelioma (Doy's disease), but that says nothing about the claims' admissibility. All five showed asbestos-related diseases: One worker had asbestosis (Ex. 199, Claim 2), two had asbestos-related pleural disease (*id.*, Claims 3 & 5), and two had both asbestosis and asbestos-related pleural disease (*id.*, Claims 1 & 4). In each case, a significant asbestos

[30] The Coogans suggested at trial that asbestos exposures were more concentrated in the marinite room than the machine shop. In excluding the workers-compensation claims, the trial court adopted that theory and speculated that all of the claimants might have worked in the marinite room. *See, e.g.*, 19 RP 194. The claims disprove that speculation. At least one of the claimants—and likely others—worked in the machine shop. Ex. 199 at 9.

exposure caused the claimant's disease. *See* 7 RP 166 (asbestosis and pleural plaques are markers of "significant asbestos exposure").

Nor did it matter for admissibility purposes that it was unknown whether Doy worked in Wagstaff's machine shop or marinite room. The workers-compensation claimants worked in both buildings. *Compare* Ex. 199 at 9 (machinist worked in machine shop), *with id.* at 18 (assistant technician worked in marinite room). Regardless, the Coogans admit that "[o]nly two or three employees worked in the Marinite building at any given time" (*Respts' Br. adv. GPC* 84), so it is highly unlikely that the remaining four claimants—one of whom was Wagstaff's co-owner—contracted their diseases from working in that building. 43 RP 126–27. GPC and NAPA did not need to pinpoint the exact location of Doy's work station for the workers-compensation claims to become relevant.

The Coogans also note that the workers-compensation claims did not include the claimants' other exposure history. *Respts' Br. adv. GPC* 81. Yet the relevance of those claims was not that any one of the claimants contracted an asbestos-related disease, but rather that *five employees* (not including Doy) traced their diseases to an exposure in a shop with around 40 employees while working alongside Doy. The relevance standard did not require GPC and NAPA to disprove all non-Wagstaff causes of the claimants' asbestos-related diseases before introducing those claims.[31]

[31] The Coogans' argument that "[t]he quality of the underlying claims was also in question, as at least one of the claims was denied" (*Respts' Br. adv. GPC* 87) is frivolous. The cited claim was denied because the claimant was a corporate officer at Wagstaff and the company did not provide officer-insurance coverage at the time of his exposure. Ex. 199 at 25. The denial had nothing to do with the claimant's asbestos exposure.

A final point: The Coogans appear to argue that excluding the claims was not prejudicial because the jury heard limited testimony from GPC and NAPA's industrial hygienist suggesting that Doy might have been exposed to asbestos at Wagstaff. *Respts' Br. adv. GPC* 88–89. But there is a world of difference between that testimony—which was couched in terms of possibilities—and evidence showing a *cluster* of asbestos-related diseases among Doy's former colleagues. The excluded evidence is impactful. It relates to an amphibole asbestos exposure, which causes almost all peritoneal-mesothelioma cases. *GPC Br.* 5. It should have come in.

III. CONCLUSION

The $81.5 million verdict was tainted by party misconduct, lawyer misconduct, the jury's passion, and prejudicial evidentiary decisions. This Court should reverse the judgment and remand for further proceedings.

Respectfully submitted this 14th day of March, 2019.

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By MBK #14405 for
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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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DATED this 14th day of March, 2019.

Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

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