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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

The $81.5 million verdict in this wrongful-death case is in a league of its own. It is not hard to see how this happened. From the first day of trial until the last, Plaintiffs' counsel Jessica Dean ignored the trial court's rulings on proper evidence and proper argument time and again, sights set on the goal of prejudicing the jury against defendants Genuine Parts Company ("GPC") and National Automotive Parts Association ("NAPA"). Meanwhile, Plaintiffs misrepresented decedent Jerry "Doy" Coogan's relationship with his wife (Sue) and daughters (Roxane and Raquel), all the while hiding witness statements that would have exposed the truth.[1] The strategy worked. In the end, the jury capped off the trial concerning Doy's death (which extended eighty-one-and-a-half days from *voir dire* to the verdict) with an extraordinary $81.5 million verdict—the exact result that one would expect after extensive, prejudicial misconduct. The remedies for excessive verdicts and lawyer and party misconduct were tailor made for a case like this one.

The $81.5 million verdict is infirm for other reasons as well. First, the trial court wrongly excluded GPC and NAPA's occupational-medicine specialist, who would have testified that Doy had advanced liver cirrhosis and that he would have lived fewer than five more years even in the absence of his asbestos-related mesothelioma—evidence that was plainly relevant to the jury's damages calculation. That ruling left the jury to deliberate with

[1] We will refer to the late Jerry Coogan by his nickname, "Doy," which was used by Plaintiffs throughout the trial, and to the other claimants by their first names. No disrespect is intended.

the one-sided narrative that Doy was in "great health" apart from the mesothelioma and that he would have otherwise lived for at least *fifteen* more years. Second, the trial court erred by excluding evidence showing that Doy's workplace in the 1960s had spawned a cluster of five asbestos-related diseases. That evidence would have showed that Doy's disease was attributable to that occupational exposure, and not to any exposure during his occasional vehicle-repair work. In excluding both the occupational-exposure evidence and the medical expert's life-expectancy testimony, the trial court took it upon itself to decide important fact questions.

Our judicial system leaves questions such as those for the jury, not a trial court. There was no basis for the trial court to exclude either type of evidence. There was even less of a basis for the trial court to uphold the verdict by denying GPC and NAPA's CR 59 attorney-misconduct and excessiveness challenges, and later refusing to grant relief under CR 60 for the Coogans' misconduct in misrepresenting facts and hiding key evidence. This Court should vacate the judgment and remand for a new trial on all issues as well as discovery into the extent of the Coogans' misconduct.

II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

A. Assignments of Error.

1. The trial court erred by excluding the evidence of five workers' compensation claims related to Wagstaff, Inc., on February 21 and February 22, 2017. 19 RP 198-99; 20 RP 8-9.

2. The trial court erred by denying GPC and NAPA's motion for a mistrial on February 27, 2017. 22 RP 95-96.

3. The trial court erred by excluding the expert testimony of Dr. Gary Schuster on March 6, 2017. 26 RP 165-67.

4. The trial court erred by entering judgment on the jury's verdict on October 6, 2017. CP 16232-33.

5. The trial court erred by denying GPC and NAPA's CR 59(a) motion on December 1, 2017. CP 20293.

6. The trial court erred by denying GPC and NAPA's CR 60 motion on September 12, 2018. CP 22555-56.

B. Statement of Issues.

1. Prejudicial misconduct of Plaintiffs' counsel during trial: Attorney Dean committed prejudicial misconduct by doing the following during trial, all in violation of trial-court rulings: (i) referring to alleged asbestos-related deaths at GPC facilities; (ii) coaxing Doy's brother into blurting out on the witness stand that GPC and NAPA's lawyer had supposedly accused him of killing his brother; (iii) asking one of GPC's corporate representatives why GPC's other corporate representative was supposedly unprepared to testify; (iv) arguing in closing that the jury should put themselves in Doy's shoes and imagine "gasping to breathe as your body rots"; (v) arguing in closing that "something need[ed] to be done" about GPC's "pattern of outrageous conduct"; and (vi) giving her personal opinion on damages and an alternative exposure.

Did the trial court abuse its discretion in denying a new trial under CR 59? (Assignments of Error 2, 4, 5.)

2. Newly discovered evidence and misconduct: The Coogans misrepresented in deposition and at trial the nature of their family's relationships—most significantly, Doy and Sue Coogan's marital relationship—while withholding witness statements that would have discredited the Coogans' deposition and trial testimony.

Did the trial court abuse its discretion in refusing to vacate the judgment and grant relief under CR 60? (Assignment of Error 6.)

3. Excessive verdict: The $81.5 million verdict shocks the conscience because: (i) it exceeds all rational bounds; (ii) the non-economic damages ($80 million) exceed economic-damages ($1.5 million) by a factor of 53:1; (iii) the verdict exceeds the Coogans' closing-argument request by

$50 million; (iv) the verdict exceeds the total settlements of twelve settling defendants by $77.1 million; (v) the $1.5 million economic-damages award was supported by virtually no evidence; and (vi) the $81.5 million verdict exceeds the highest affirmed mesothelioma verdict in this state's history by $75.5 million.

Did the trial court abuse its discretion in denying a new trial under CR 59? (Assignments of Error 4, 5.)

4. Life-expectancy testimony: Gary Schuster, M.D., was prepared to testify that Doy had advanced liver cirrhosis and had fewer than five years left to live. Two of Doy's treating physicians had also identified cirrhosis, the jury instructions asked the jury to consider Doy's "health" and "life expectancy" when calculating damages, and the Coogans' expert testified that Doy was "quite healthy" apart from the mesothelioma.

Did the trial court abuse its discretion in excluding Dr. Schuster's testimony under ER 403 and 702? (Assignments of Error 3, 4, 5.)

5. Alternative-exposure evidence: GPC and NAPA offered five asbestos-related workers' compensation claims from former employees of Wagstaff, Inc., who worked there during the same years as Doy. The evidence showed that the type of asbestos used at Wagstaff was responsible for the vast majority of cases of Doy's disease.

Did the trial court abuse its discretion in excluding the workers' compensation claims as irrelevant? (Assignments of Error 3, 4, 5.)

III. STATEMENT OF THE CASE

A. The trial evidence established that GPC and NAPA played little to no role in causing Jerry "Doy" Coogan's asbestos exposure.

Doy Coogan died in 2015 after being diagnosed with peritoneal mesothelioma, a rare form of mesothelioma typically associated with high cumulative exposure to amphibole asbestos, the most harmful form of asbestos. There are two main types of asbestos. 7 RP 125-27. Chrysotile was the most commonly used type, accounting for 95% of asbestos used in North America and Europe. 7 RP 125. The other type—amphibole—was

less commonly used but was hundreds of times more likely than chrysotile to cause mesothelioma. 7 RP 126-27; 8 RP 48; 42 RP 57; CP 20475. The defense presented evidence that chrysotile cannot cause peritoneal mesothelioma, and while the Coogans' experts disputed this evidence, there was no dispute that amphibole exposure is responsible for the vast majority of cases of peritoneal mesothelioma. *See* 7 RP 136; 8 RP 152, 157-59; 34 RP 33; 45 RP 52; CP 20442-43. In addition, exposure to amphibole asbestos is far more likely to cause pleural plaques (which Doy had) than exposure to chrysotile. CP 20422; 8 RP 158-59. As will be shown, during Doy's working career, he was repeatedly exposed to high airborne concentrations of amphibole asbestos fibers. But the alleged GPC/NAPA exposure did not involve amphibole asbestos. It rather involved chrysotile automotive products that were supposedly connected to GPC or NAPA.

NAPA is a trade organization for auto-parts stores and auto-repair shops; it authorizes member stores to use its name and trademarks for marketing purposes—nothing more. 14 RP 60; 17 RP 147-48. The evidence showed that NAPA does not own any stores, does not operate any stores, and does not sell any products, including asbestos-containing products. 17 RP 147-48. The trial court, however, denied NAPA's motion for judgment as a matter of law. *See* CP 10101-02; 39 RP 50-51.[2]

[2] NAPA is filing its own brief to address this issue on appeal.

GPC is a distributor of automotive parts.[3] *See* 14 RP 68; 21 RP 153-54. Although GPC's Rayloc division remanufactured brakes and clutches using component materials supplied by others (primarily Abex), unlike other defendants that settled, including Abex and Victor/Dana,[4] GPC did not manufacture the asbestos-containing parts used in those products. *See* 14 RP 169-70, 173-74. And although some evidence showed that Doy occasionally used asbestos-containing gaskets, clutches, and brakes distributed by GPC, the evidence showed that GPC did nothing but distribute those products. *See* Ex. 68.

GPC and NAPA were two of thirty-seven defendants sued by the Coogans. One by one during discovery and the first few weeks of trial, those defendants settled or were dismissed. As those defendants exited the case, the Coogans' sights focused more and more on GPC and NAPA. In the end, GPC and NAPA were the only defendants that took the case to verdict and ultimately were saddled with $77.1 million out of the $81.5 million jury verdict, or 94% of the Coogans' damages.[5] *See* CP 16198, 16232-33.

We explain next Doy's exposure history in greater detail.

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[3] GPC is a NAPA member and the primary, though not exclusive, distributor to NAPA-affiliated stores. *See* 14 RP 68; 17 RP 54-55; 21 RP 159.

[4] The Coogans sued Dana Companies, LLC, as the entity subject to liability for Victor gaskets.

[5] The trial court reached the $77.1 million figure by subtracting $4.395 million (the unadjusted total of twelve defendants' settlements) from the $81.5 million jury verdict. *See* CP 16198.

1. For decades, Doy was occupationally exposed to amphibole asbestos while sawing and filing asbestos-cement pipe made by J-M Manufacturing.

Doy spent most of his working career as an excavator, after taking over his grandfather's excavating business in the mid-1970s. 13 RP 44-45; Ex. 68. He testified by affidavit that his excavation work from the 1970s to the 1990s "routinely included the removal and replacement of asbestos cement pipe." Ex. 68 at 4. He dug trenches and installed pipe for private and municipal drainage and wastewater systems. 13 RP 178; 27 RP 96; CP 20359-60, 20381. J-M Manufacturing ("J-M")—another defendant in the case—made and sold the asbestos-cement pipe that Doy installed. CP 20357. That pipe incorporated up to 20% asbestos. Worse still, the pipe incorporated up to 4% of an amphibole asbestos (the most harmful kind of asbestos) known as crocidolite. 7 RP 127; 10 RP 58.

The Coogans' causation case against J-M was strong. As Doy's affidavit explained, it was "routine" for him to cut the asbestos-cement pipe to fit during installation, using a hand or power saw. Ex. 68 at 4; *see also* 10 RP 58, 64-68; CP 20360, 20385-86, 20411, 20526-27. Cutting with a hand saw took 15 to 20 minutes and created a substantial airborne concentration of asbestos fibers—up to a million times the concentration in ambient air. 10 RP 64, 66; Ex. 68 at 4; CP 20360. Doy then filed and rasped the edges of the cut pipe for about another 30 minutes, prolonging the exposure. 10 RP 58, 64. Cutting with a power saw created the greatest airborne concentration of asbestos fibers—up to 60 million times higher than the concentration in ambient air. 7 RP 176-77; 10 RP 62, 64-65. The

Coogans' expert, Carl Brodkin, M.D., described this as an "extremely high" level of exposure. 10 RP 62. J-M's expert agreed with Dr. Brodkin that Doy's asbestos exposures from sawing and filing asbestos-cement pipe were a substantial contributing factor to his disease. CP 20434; 10 RP 67.

The Coogans also elicited evidence of J-M's culpability. J-M knew in 1983—when it took over the asbestos-cement pipe business from its bankrupt predecessor, Johns-Manville—that asbestos exposure was a cause of fatal diseases such as mesothelioma and that Johns-Manville had been sued thousands of times in asbestos cases. CP 20538-42. Yet J-M continued manufacturing and selling asbestos-cement pipe several more years, against the advice of its counsel and without putting any warning on its products. 30 RP 59-64; CP 20349-50, 20360; Ex. 349.

2. For over a year, Doy was exposed to amphibole asbestos while working at Wagstaff, where asbestos-containing sheets were cut and machined.

Another significant amphibole exposure was at Wagstaff, where Doy worked as a machinist for over a year in 1968 and 1969. 43 RP 30, 43; Ex. 111. Wagstaff's business involved manufacturing aluminum-casting molds out of molten metal marinite, a Johns-Manville product that consisted of 40% amosite asbestos—a type of amphibole that is just as harmful as the crocidolite that J-M used in its asbestos-cement pipe. 19 RP 180-82, 43 RP 42-45, 47, 109-10. Wagstaff's manufacturing process involved cutting, drilling, and sanding the marinite sheets—all processes that released amosite fibers into the air. 43 RP 44. GPC's expert, Coreen A. Robbins, Ph.D., testified that Wagstaff workers like Doy were likely exposed on a

daily basis to substantial airborne concentrations of asbestos fibers. 43 RP 128-34; *see also* 19 RP 178-84 (Brodkin). The trial court excluded evidence that five other Wagstaff workers developed asbestos-related diseases (several of which were mesotheliomas) while working at the company in the late 1960s and early 1970s. 19 RP 198-99; 20 RP 8-9.

3. Doy sustained significant occupational exposures while removing and replacing industrial, asbestos-containing gaskets and demolishing a boiler at Boise Cascade.

The J-M and Wagstaff exposures were not Doy's only significant exposures. Doy was also occupationally exposed while working five days a week at a Boise Cascade plywood-manufacturing facility for years in the 1970s. His job included removing and replacing asbestos-containing industrial gaskets on the massive doors of three asbestos-lined dryers. 10 RP 68; CP 20509-11. Doy also spent a week demolishing and removing an old boiler that was lined with asbestos insulation, which may have included amphibole asbestos. 10 RP 71; 16 RP 30; 43 RP 36-37, 155-56; CP 20360-61, 20513. The Coogans' causation expert, Dr. Brodkin, identified Doy's work at Boise Cascade as another significant asbestos exposure. 10 RP 68.

4. Automotive-parts defendants other than GPC and NAPA were largely responsible for Doy's limited exposure to chrysotile asbestos gaskets, clutches, and brakes.

(a) Doy's exposures from personal vehicle maintenance were sporadic and insubstantial.

The Coogans divided Doy's exposures to asbestos-containing gaskets, clutches, and brakes into two time periods totaling nineteen years:

(1) From 1963 to 1970, when Doy was a bystander to his grandfather's work on cars and equipment; and (2) from 1975 to 1987, when Doy himself maintained cars and equipment. 7 RP 121-22; 9 RP 156-57.

The evidence regarding the first period (1963-1970) did not show that Doy was exposed to asbestos from any GPC products. Doy's grandfather used several brands of products, most of which GPC did not distribute. *See, e.g.*, 15 RP 42, 16 RP 125-26 (Worldbestos brakes); 16 RP 124-26 (Raybestos brakes); 16 RP 100-101, 116, 120 (A.W. Chesterton packing). Beyond that, there was no evidence that Doy was present if and when his grandfather used GPC-distributed products.

As for the second period (1975-1987), the Coogans presented evidence that Doy bought automotive parts primarily through a local NAPA-affiliated store, which his brother, Jay Coogan, bought in 1992. 13 RP 71, 78. Although GPC might have distributed some of those parts, Doy was not exposed to any significant dose of asbestos fibers from those products (much less to amphibole asbestos, which causes the vast majority of peritoneal mesotheliomas). GPC's expert, Dr. Robbins, testified that Doy had "no significant exposure to chrysotile asbestos working as a vehicle mechanic." 42 RP 157. She went on to explain that Doy was never a full-time mechanic and that even if he had worked full-time in that capacity, the exposures sustained by full-time mechanics are "very, very small." 43 RP 26.

In fact, although there was evidence that Doy installed clutches that GPC's Rayloc division had remanufactured, the testimony was that he had

only two or three cars with manual transmissions and that he changed clutches on cars or equipment a couple of times a year at most. 9 RP 187; 15 RP 44. And although Jay Coogan testified that his brother bought GPC-Rayloc clutches, both Doy's close friend Richard Berend and Jay Coogan testified that Doy mainly used new Borg-Warner and McLeod clutches, which GPC never sold. 13 RP 163-65; 15 RP 44, 50; 16 RP 8; CP 20364. As for brakes, Berend testified that Doy did no more than five brake jobs per year. 9 RP 156-57; CP 20365. In addition, all Rayloc brakes were "precision ground" at the factory, meaning that they were ready to be installed without modification, and consumers were told not to grind them any further. 14 RP 43-44, 116-17; 15 RP 52-53; 16 RP 9-11.

(b) GPC did not manufacture asbestos-containing parts or components in the first instance, unlike its suppliers, including settling defendants Abex and Victor/Dana.

Most of the asbestos-containing products distributed by GPC originated with other companies—primarily Abex and Victor/Dana. *See* 14 RP 70-74. Doy was said to have used Abex-manufactured American Brakeblok brakes and bulk brake lining, as well as GPC-Rayloc remanufactured brakes, which were made by riveting new Abex brake linings onto used brake shoes. 13 RP 141-42, 148-51; 14 RP 63-64, 70-71, 166-67; 17 RP 147-48. Abex was also significantly responsible for one of Doy's allegedly substantial exposures—the brake band in a 1940s Bantam cable-operated excavator that he used in his excavation business. *See* 9 RP 180-81, 185-86; 13 RP 35-36, 51, 79. According to the Coogans' evidence,

operating this machine involved engaging, several times per minute, a brake band located a few feet behind the operator in the partially enclosed cab. The Coogans' expert testified that this process released asbestos fibers. 9 RP 181-82, 185-86; 13 RP 148-50; 20 RP 24; Ex. 68 at 3.

There was also substantial evidence against Victor/Dana related to its role in manufacturing asbestos-containing gaskets. The Coogans presented documents from Victor's files showing it knew in the 1980s that its gaskets caused disease, including mesothelioma. *See, e.g.,* Exs. 254, 268, 270. And although Victor/Dana had developed asbestos-free gasket material for every application by 1980 (some much earlier), it continued manufacturing asbestos-containing gaskets until 1988, sold them for several years more, and failed to put warnings on gaskets sold to consumers until the early 1990s. 22 RP 127; 24 RP 85-88, 112-14.

B. Following a trial permeated by the misconduct of the Coogans' lead counsel, Jessica Dean, the jury rendered an unprecedented verdict against GPC and NAPA.

Dean engaged in misconduct throughout the entire trial. Her closing argument violated numerous in-limine rulings, including (1) asking the jurors to place themselves in Doy's position in determining damages (a textbook "golden rule" argument); (2) urging the jury to use its verdict to send a message to GPC and NAPA; (3) emphasizing that only a large verdict could accomplish that objective given those defendants' financial wherewithal; and (4) expressing personal opinions and beliefs about the evidence, witness credibility, and the verdict the jury should render. Dean's misconduct is detailed in Section V.A, below.

Although the jury was told at the beginning of trial to expect it to last three to four weeks, the trial ended up lasting twelve. *See* 1/24/2017 ("Jury Voir Dire") RP 7, 9, 18, 24, 31, 64. Three of the statutory beneficiaries of Doy's estate—his daughters, Roxane Coogan and Raquel Baxter, and Sue's daughter, Kelly Marx—attended the trial and testified live. But Doy's wife of four years, Sue, never appeared at trial, and her testimony was presented only through the reading of portions of her discovery deposition.

By the end of trial, GPC and NAPA were the only defendants left. The jury rendered its verdict 81.5 days after the trial began, after deliberating just half a day. *See* 48 RP 9. The jury found against GPC and NAPA on each of the Coogans' liability theories. CP 15018-22. The jury then rendered an unprecedented $81.5 million verdict. CP 15021. Thirty million of that verdict was for Doy's pain and suffering; another $30 million was for the loss of consortium damages allegedly suffered by Sue; another $20 million was for Roxane and Raquel ($10 million each); and the remaining $1.5 million consisted of economic damages based on the value of Doy's household services. CP 15021.

C. The trial court denied requests for post-trial relief by GPC and NAPA under RCW 4.22.060 and CR 59.

The trial court denied GPC and NAPA relief from the verdict three times. It first denied relief in the context of the Coogans' petition for a determination of reasonableness of settlements under RCW 4.22.060. GPC and NAPA requested an offset of significantly more than the $4.395 million

unadjusted total of twelve settlements. CP 15717. Dean had told the jury in closing argument that it should determine the "total loss" from all defendants, settling and non-settling, and that "somebody else" (*i.e.*, the court) would "sort that out" by reducing "the damages by the percentage of fault." 47 RP 125-26. Despite that promise, the trial court did not reduce the total damages by the percentage of fault. The court rather offset the verdict by only $4.395 million, the total amount of the twelve settlements. CP 16187-99. In the process, the court rejected GPC and NAPA's argument that it would be unreasonable to hold them liable for 94% of the Coogans' damages when the conduct of settling parties—including J-M and Boise Cascade—resulted in Doy's most harmful exposures. CP 15716-34.

The trial court also denied GPC and NAPA's CR 59 motion for a new trial or remittitur (second denial of post-verdict relief). CP 16356-72, 20293. The grounds for that motion included Dean's misconduct, the fact that the verdict was 67 times larger than the average award in Washington mesothelioma cases and 241 times greater than the average settlement obtained by the Coogan family, and the 53:1 ratio of noneconomic to economic damages. *See* CP 16356-72.

GPC and NAPA timely appealed from the judgment and the order denying the CR 59 motion, entered in December 2017. CP 20303-08. The trial court's third denial of post-verdict relief is discussed next.

D. After GPC and NAPA filed their notice of appeal, they discovered that the Coogans had misrepresented and hidden material evidence about past family relations.

Sue, Roxane, Raquel and Kelly all claimed damages for loss of consortium. CP 61-62.[6] The four painted a picture in deposition and trial testimony of a "close" family, centered on Doy. Doy and Sue's relationship was consistently described as "happy" and "loving," with Sue working alongside Doy in his excavation business for 20 years. Only after the verdict did GPC and NAPA discover a vastly different story that the jury never heard and that GPC and NAPA could not have known about.

1. Documents that Doy's widow, Sue Coogan, filed in the probate of his estate in March 2016 painted a picture of a happy and loving relationship between Doy and Sue.

Before deposing Sue, Roxane, Raquel, or Kelly, GPC and NAPA's counsel obtained copies of all documents that had been filed to date in the probate proceeding Sue had started after Doy's death in 2015.[7] *See* CP 20571, 20747, 21350, 21378, 21415, 21445. Those documents showed a picture-perfect relationship between Doy and Sue.

For example, in mid-March 2016, Sue filed a declaration in support of her "Petition for Judicial Resolution," which sought a half interest in Doy's separate property. CP 20785-800, 20839-43. She testified that she and Doy had "loved being together, working together, and playing together"

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[6] Although Kelly was described as a "plaintiff" through the beginning of trial, her name was left off the verdict form—presumably because Sue had agreed that her daughter would share in her recovery. CP 15021, 20842, 21305; 6 RP ("A.M. Session") 8-14; 18 RP 82.

[7] The proceeding arose out of a dispute between Sue and Doy's daughters over the distribution of Doy's estate. Part of that dispute involved the daughters' request to remove Sue as the estate's personal representative. *See* CP 20887-99.

and that Doy "trusted" her. CP 20839, 20841. She testified about how she and Doy enjoyed refurbishing classic cars together and attending car shows. CP 20840. She testified further that Doy had taught her how to operate and maintain equipment and design and install septic systems—tasks that she attested became "second nature" as she worked "side by side on a daily basis" with Doy. *Id.* Sue also addressed Doy's relationship with his daughters, Roxane and Raquel. She testified that, despite her best efforts to foster good relations between Doy and his daughters, they had grown apart because the daughters resented her relationship with Doy. CP 20840-41.

In addition to her own declaration, Sue filed eleven declarations by friends and relatives in support of her petition, all of which corroborated her own description of her relationship with Doy. CP 20844-73. Multiple declarants testified that Doy and Sue were "constant companion[s]" and "always together." CP 20852, 20856, 20864, 20867, 20872. One testified that Doy and Sue had a "very loving" relationship and that it was "a pleasure to be around…a couple that got along so well." CP 20852. Another testified that Sue was "honest, loyal, and trustworthy" to Doy and that they were "loving and supportive" and "enjoyed just hanging out with each other." CP 20856. Another testified similarly that they "enjoy[ed] each other" and were "*always* kind and loving to one another." CP 20867 (emphasis added).[8]

[8] This last witness went so far as to gush that trying to describe Doy and Sue's love for each other was "like trying to describe the most beautiful rose you have ever seen to a person who has been blind all of their life." CP 20867.

The declarants also testified that Sue worked daily alongside Doy, throughout their 20-year relationship. CP 20845, 20852, 20854, 20856, 20859, 20861, 20864, 20869. They stated that she operated and maintained heavy equipment, including a loader and dump truck, drew up plans for projects, and installed septic systems. *Id*.

2. GPC and NAPA were not aware of (and could not have been aware of) evidence dating from before depositions in the wrongful-death action, documenting a radically different story of Doy and Sue's relationship—one characterized by distrust, stealing, and violence.

Unbeknownst to GPC and NAPA, in 2015 and 2016, Raquel and other family members were sending messages on social media, and she and Roxane were gathering statements from witnesses, about Doy and Sue's relationship—statements that were entirely at odds with Plaintiffs' testimony and trial narrative in the wrongful-death matter.

In September 2015, when one of Doy's adult granddaughters stated on a private group-messaging thread on Facebook, "I hope the bitch dies"—in reference to Sue—Raquel responded, "Then dad would have to put up with her again[.]"[9] CP 21223, 21226-28. Several months later, in March and April 2016, Roxane and Raquel obtained *two dozen* witness statements from family and friends (later converted into sworn declarations) that portrayed an entirely different picture from the one Sue had presented in her

[9] They apparently did not know that someone with access to the group-messaging thread compiled a record of these statements and passed them along to Kelly, who kept them secret until March 2018, when they were attached to a declaration from Kelly filed by Sue in the probate proceeding, in support of her claim for an interest in Doy's separate property. *See* CP 21223, 21226-28.

probate filing and that the Coogans later presented at trial in the wrongful-death matter. CP 20622-83 (unsworn statements); 21101-217 (sworn declarations). These statements documented that Doy and Sue had a miserable and troubled relationship and that Doy worked alone in his business with virtually no help from Sue. Roxane and Raquel planned to use the statements to oppose Sue's request in the probate proceeding for a half interest in Doy's separate property. *See* CP 21098-99.[10]

Six of the statements addressed the quality of Doy and Sue's relationship. Family friend Gilda Sergnei testified that Doy repeatedly came to her house to "get away from" Sue "because she had been drinking and was fighting with him." CP 21169. Sergnei testified that "[o]ne of the times [was] because she *attacked him with an axe*." CP 21169 (emphasis added). Doy confided in Sergnei that he wanted Sue to "move out." *Id*. Doy's granddaughter Tiffany Hudson testified that Sue drank constantly and that drinking made her "mean [and] obnoxious." CP 21192. She testified that Doy "lived in *misery* with [Sue]." *Id*. (emphasis added). Justin Fox testified that Doy mentioned several times that his shop was where he went to "get away from the house" and "hide," and that after closing the

[10] Sue was asked in written discovery requests (in her capacity as the personal representative of the estate and the 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. Sue repeatedly answered, including in May 2016, 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*.

shop door, Doy would say, "[T]here, don't have to listen to *that* anymore." CP 21142 (emphasis added).

Doy's friend Mark Main testified that "[t]ime after time…[Doy] would come out in the shop and say (and I quote), 'Damn it, that money hungry bitch found my money stash again.'" CP 21188. Doy told Main and his other friends about how he would hide his money better every time, even burying it underground behind the shop, but Sue would always find the money and spend it. *Id.* On a similar note, Candy Eddings characterized Sue as a "gold digger." CP 21105. She testified that one time when Doy and Sue were "having problems," Sue stole $1,500 from Doy and buried it to hide it from Doy. CP 21104. Family friend Heidi Keenan testified that Doy *agreed* with her that Sue was "just after [his] money." CP 21111. She testified that Doy had "told [Sue] to leave on a few occasions…and she refused to leave." *Id.*

In addition, sixteen of the statements disputed the notion that Sue regularly worked with Doy in his excavation business. Their collective testimony supported that Doy worked alone the vast majority of the time, Doy hired friends when he needed help, Sue never maintained any equipment, and the most Sue ever did for Doy was drive a dump truck one summer in 1997, near the beginning of their relationship. CP 21104-05, 21116-17, 21122, 21134, 21138, 21146, 21150, 21154, 21160, 21175, 21179, 21187, 21192, 21195, 21207, 21217.

3. The Coogans kept the defense in the dark about the truth until well after the verdict.

In May 2016, Roxane and Raquel moved to remove Sue as personal representative of Doy's estate and appoint a successor, but their motion did not mention the statements they had collected in March and April. CP 20887-99. Sue agreed to step down, and a substitute personal representative was appointed in June 2016. CP 20938, 20941-42. The probate then effectively went dormant until February 2018. *See* CP 20764.

In the wrongful-death action—beginning with their depositions in the summer of 2016 and continuing with the trial the following year—the Coogans gave testimony consistent with the story that Sue told in her March 2016 probate submission. Sue testified at her July 2016 deposition that she and Doy "had a very loving, romantic relationship." CP 20414. She also testified that she and Doy worked in the excavation business as a "team," including "purchas[ing] everything together." CP 20403. Sue testified that she operated the excavator and dump truck and "installed sewers right along with [Doy]." CP 20402, 20404-05. These statements were among the portions of Sue's deposition that Plaintiffs read to the jury at trial, when Sue did not appear to testify live.

At trial, Kelly testified that Doy and Sue "ma[d]e each other happy." 30 RP 18. She emphasized how they "*always* want[ed] to be with" each other. 30 RP 18-19. She explained, "I love my husband very much, but I definitely wouldn't want to be with him as much as they were together." 30 RP 19. She testified further that Doy was Sue's "rock," her "everything," her "love," and her "best friend." 30 RP 42. The only qualification by Kelly

was that "[e]verybody is not happy all of the time, obviously," after which she added that "overall [Doy and Sue] were happy." 30 RP 40. Kelly also denied any strife between her and Roxane and Raquel, testifying that they had "always gotten along" and there was "no animosity…[or] uncomfortable or uneasy feelings." 30 RP 49, 52.

Roxane testified at trial that she, Raquel, Kelly, Doy, and Sue were a "close family." 18 RP 82. She also testified that she had "a friendly relationship" with Sue while Sue and her dad were together. CP 21458. When asked at her deposition why she and Roxane had sought to remove Sue as personal representative of Doy's estate, Raquel testified that they "just thought it would be a better fit to have somebody else than [Sue]" appointed. CP 21393. Regarding whether and to what extent Sue had worked with Doy in his business, both Roxane and Raquel testified during their depositions that they could not say one way or the other, because they did not have any knowledge on that issue. CP 21394-95, 21456-57.

The trial court largely excluded the limited evidence of family discord GPC and NAPA managed to gather from investigating the probate-court file on the ground that it indicated only discord arising after Doy's death, and that this was not relevant to loss of consortium. 3 RP 97-99; 18 RP 34-39; 30 RP 25-30, 50-51, 66-70; 31 RP 5-16; 31 RP 23-25; 39 RP 4-7. The trial court also stated that this evidence shed no light on the quality of Doy's relationship with his daughters. 39 RP 4-7.

4. Probate filings in 2018 revealed to GPC and NAPA the truth about Sue's life with Doy.

Although defense counsel kept checking, nothing of significance showed up on the docket of the probate proceeding between June 2016 and early 2018. *See* CP 20764, 20747. Then, in February 2018—two months after the trial court denied GPC and NAPA's motion for a new trial under CR 59 in the wrongful-death action—the probate substantively reactivated. *See* CP 20293. Sue moved for summary judgment on her claim for an interest in Doy's separate property, relying on the materials she had submitted when she filed her petition in March 2016. CP 21001-23. In support of their opposition to Sue's summary-judgment motion, Roxane and Raquel submitted the statements they had obtained in March and April 2016, now converted into sworn declarations. CP 21101-217; *see also* CP 21081-86, 21098.

In addition, Roxane attested in her own declaration that the declarations being submitted "contain[ed] accurate descriptions of the personal relationship and (lack of a) working 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. Roxane further testified that she never saw Sue work with Doy or on any equipment. CP 21099.

As rebuttal materials in support of her summary judgment motion, Sue filed a declaration from Kelly, to which Kelly attached the 2015 Facebook statements. CP 21223, 21226-28; *see also* CP 21248.

GPC and NAPA discovered these materials in mid-May 2018, while making a routine check of the probate docket for any new activity. CP 20747. In June 2018, GPC and NAPA filed a motion for relief from judgment under CR 60(b)(3) (newly discovered evidence) and CR 60(b)(4) (misrepresentation of facts or fraud by opposing party). CP 22569-82. GPC and NAPA asked the trial court to vacate the judgment and order a new trial, and further to order discovery into the Coogans' conduct in order to determine whether sanctions beyond a new trial should be imposed.[11] *Id.*

The trial court ordered the Coogans to respond, but ultimately denied GPC and NAPA's CR 60 motion without holding a hearing. CP 22555-56. The court did not analyze the requirements of CR 60(b)(3) or (b)(4). *Id.* The court stated that "there is much unsworn testimony in the form of letters or statements addressed to 'To Whom it May Concern.'"[12] CP 22556. The court further stated that "[m]uch of the material in [the] supporting documentation is hearsay, improper opinion evidence by lay witnesses, and evidence which even if marginally relevant, is wholly outweighed by its prejudicial effect." CP 22555-56.

GPC and NAPA promptly amended their notice of appeal to include the order denying their CR 60 motion. CP 22584-87.

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[11] GPC and NAPA expressly invoked the possible application of the crime-fraud exception to the attorney-client privilege. CP 22582. Less than two weeks after GPC and NAPA filed their CR 60 motion, Sue's probate attorney withdrew from representing her, pursuant to a formal notice of withdrawal under CR 71(c)(1). CP 22542-43.

[12] As the record before the trial court showed, every one of the unsworn statements had been formally converted to sworn testimony before being submitted by Roxane and Raquel. *Compare* CP 20622-83 *with* CP 21101-217.

IV. STANDARD OF REVIEW

An appellate court ordinarily reviews the decision on a motion for a new trial (CR 59) or to vacate a judgment (CR 60) for an abuse of discretion. *Detrick v. Garretson Packing Co.*, 73 Wn.2d 804, 812, 440 P.2d 834 (1968); *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979). The decision is reviewed *de novo* if the trial court determined legal issues. *Edwards v. Le Duc*, 157 Wn. App. 455, 459, 238 P.3d 1187 (2010). It is an abuse of discretion to deny a new trial if the verdict is contrary to the evidence. *Palmer v. Jensen*, 132 Wn.2d 193, 198, 937 P.2d 597 (1997).

The appellate court reviews a trial court's evidentiary rulings—including those about expert testimony—under the abuse-of-discretion standard. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 919, 296 P.3d 860 (2013). A trial court abuses its discretion by making a decision that is manifestly unreasonable or based on untenable grounds. *Lakey*, 176 Wn.2d at 919; *Teter v. Deck*, 174 Wn.2d 207, 215, 274 P.3d 336 (2012). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). It is also an abuse of discretion for a judge to weigh expert evidence and make conclusions about credibility. *Larson v. Georgia Pac. Corp.*, 11 Wn. App. 557, 560, 524 P.2d 251 (1974).

V. ARGUMENT

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

The Coogans marred the trial here in two ways. First, their counsel engaged in misconduct throughout the trial—and did so each time in violation of in-limine rulings, evidentiary rules, and longstanding Washington precedent. Second, the Coogans hid key evidence (including two dozen witness statements) that was relevant to $80 million out of the $81.5 million damages award. Each type of misconduct alone warrants a new trial.

1. GPC and NAPA suffered incurable prejudice as a result of Dean's multiple instances of deliberate misconduct in violation of court rulings.

"The law guarantees to every litigant the right to a fair trial." *Rogers v. Kangley Timber Co.*, 74 Wash. 48, 51, 132 P. 731 (1913). This guarantee includes "the right to have the case submitted to the jury solely upon its merits, and to have the jury determine it uninfluenced by passion or prejudice for or against any other party to the action." *Johnston v. Seattle Taxicab & Transfer Co.*, 85 Wash. 551, 560, 148 P. 900 (1915). A trial court may grant a new trial where misconduct of the prevailing party materially affects the substantial rights of the losing party. *Teter*, 174 Wn.2d at 222; CR 59(a)(2).

The causation case against GPC and NAPA was slim indeed, so Dean tried to overcome that problem by engaging in prejudicial misconduct of all types. Much of this misconduct was in violation of prior rulings by

the trial court. The trial court abused its discretion in denying GPC and NAPA's motion for a new trial based on misconduct of counsel.

2. Dean deliberately engaged in serious misconduct during the presentation of evidence.

"The Rules of Evidence impose a duty on counsel to keep inadmissible evidence from the jury." *Teter*, 174 Wn.2d at 223 (citing ER 103(c)). Persistently asking knowingly objectionable questions is misconduct. *Id*. That type of misconduct is prejudicial even where objections are sustained because "repeated objections, even if sustained, leave the jury with the impression that the objecting party is hiding something important." *Id*.[13]

Dean engaged in misconduct at every turn during the presentation of evidence, both while questioning witnesses and while making objections.[14] There were dozens of those instances, but we discuss here three of the most bold-faced—two of which occurred during counsel's examination of one of GPC's two corporate representatives, Liane Brewer, and one of which occurred during Dean's examination of Doy's brother, Jay Coogan.

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[13] *See also State v. Simmons*, 59 Wn.2d 381, 386, 368 P.2d 378 (1962) ("The cross-examiner must have known that objections would be sustained to the questions, which were obviously designed to prejudice the defendant and to put the defense in the unfavorable position of having to make constant objections.").

[14] "Speaking objections can be another method of exposing the jury to inadmissible evidence and inappropriate argument." *Teter*, 174 Wn.2d at 224.

(a) Asking the Rayloc-deaths question

The first instance involved Dean suggesting to the jurors that many men had died from asbestos exposure at GPC's Rayloc remanufacturing facilities. The trial court had already addressed that topic. *Twice*. By agreement of the parties, the trial court ruled before trial that no party could allude to or present irrelevant evidence about (i) any asbestos exposure by workers at a defendant's manufacturing (and remanufacturing) plants and (ii) any claims by those workers. 5 RP 41-42.[15] Based on that ruling, the trial court rejected two questions that a juror asked the court to put to GPC's corporate representative, Byron Frantz: "When did Rayloc begin taking precautions at its remanufacturing plants to keep its employees safe from exposure to asbestos?" and "Did Rayloc employees at the remanufacturing plant ever sue the company for exposure to asbestos?" CP 9080-81; 17 RP 144-46.

Those rulings were not enough to deter Dean from that line of inquiry. Several days after the trial court rejected the juror's proposed questions, and evidently intent on placing these improper issues before the jury, she echoed these rejected questions in cross-examining GPC's other corporate representative, Liane Brewer. Immediately after asking Brewer whether GPC ever called Doy's family after his death, Dean asked this question: "Do you know how many other men that worked in their

[15] Defendants maintained the evidence was irrelevant and would have been unfairly prejudicial. *See* CP 4681-83, 5364-66. GPC and NAPA joined in all other defendants' motions in limine. CP 4779.

headquarters where they were making Rayloc[] brakes have died from asbestos-related disease and haven't been called?" 22 RP 83-84.

The trial court sustained defense counsel's objection to that question, which assumed facts not in evidence (*i.e.*, that some number of workers had, in fact, died),[16] violated the in-limine ruling excluding evidence of plant conditions and related claims, and disregarded the ruling excluding the juror's proposed questions. Outside the jury's presence, the trial court deemed the question "completely inappropriate in light of the Court's ruling about claims because they have nothing to do with Mr. Coogan." 22 RP 92; *see also* 23 RP 36 ("clearly an improper question").

The trial court attempted to cure the prejudice from the suggestion that Rayloc plant workers had died from asbestos exposure, but that effort exacerbated the problem. The court refused to declare a mistrial despite concluding that it could not give the only curative instruction that could effectively counteract counsel's misconduct—that is, to inform the jury that there were in fact *no* known deaths from asbestos exposure at the Rayloc plants. 22 RP 95-96; 23 RP 53; *see* CP 9495-96 (GPC and NAPA's proposed instruction). Reasoning that this would be a comment on the evidence, the court instead gave an instruction that, similar to counsel's improper question, implied that deaths had in "fact" occurred:

> Yesterday Plaintiffs' counsel asked a question of Ms. Brewer regarding deaths at the Rayloc facility. There will be no evidence

[16] A question that assumes facts not in evidence is improper. *See* ER 103(c). "The standard textbook illustration is the question, 'When did you stop beating your wife?', asked before any evidence of beating has been presented." 5 WASH. PRAC., EVID. LAW & PRAC. § 103.22 (6th ed., 2017 update).

> of deaths at the Rayloc facility related to asbestos exposure in this case. You may not consider such ***fact*** in your deliberations of this case, and you may not discuss that in your deliberations of the case.

23 RP 55 (emphasis added); *see also* 23 RP 53 (defense counsel arguing that the court's announced instruction would "impl[y] that there are deaths").

The prejudice from Dean's false insinuation is palpable. She implied that workers had died from asbestos exposures at GPC's remanufacturing facilities and that no one from GPC's management had called the families of those workers to console them. "Statements not sustained by the record of such a character as to prejudice the minds of the jury against a litigant constitute prejudicial error." *Rogers*, 74 Wash. at 51. The prejudice from statements of this nature cannot be cured by sustaining an objection and instructing the jury to disregard the statements of counsel. "The poison which had been previously instilled into the minds of the jury could not be removed in that manner." *Id*. at 51-52. A mistrial was warranted on this basis alone.

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

That was not the only misconduct during Ms. Brewer's examination. Dean also committed prejudicial misconduct by back-dooring improper suggestions about the preparedness of another GPC representative. Earlier in the case, the trial court had made clear that it would disallow any challenge to Frantz's preparedness to answer questions on the issues that he was designated to address. The court did so when it rejected a question

submitted by a juror for Frantz: "As GPC's corporate representative, is there a reason you have not reviewed materials for this case to better answer questions?" CP 9077; 17 RP 142. As the court put it, "[i]t's a comment on the evidence. You can't characterize the witness's answers." 17 RP 142.

As with the Rayloc-deaths question, Dean marched straight past that ruling. Once she knew from the proposed questions that jurors were interested, she knew exactly where to attack in order to unfairly capitalize on the jury's apparent frustration with GPC. When it came time for GPC's other corporate representative (Ms. Brewer) to testify, Dean asked her a similar but even more argumentative question about Frantz: "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?" 22 RP 101 (emphasis added). As defense counsel interrupted the question to object, the trial court *sua sponte* struck it and directed Dean, "Don't comment on the evidence. . . . Ask your questions." 22 RP 101.

Despite the court's directive and its earlier ruling about the juror's question, Dean did not stop there. She persisted. This question came next: "Do you have any understanding why the people that you know personally, people like Larry Prince were not present"? 22 RP 102. The trial court sustained defense counsel's objection to this question as well, reasoning that the subject was "not relevant" and "the company is entitled to select its corporate representative and why they do that is up to them." 22 RP 102.

Dean's two questions about Byron Frantz were improper in the extreme. They were also in direct violation of the trial court's previous

ruling. GPC and NAPA could not expect to get a fair trial after misconduct such as this, which left the jury with the impression that GPC and NAPA were engaging in a systematic effort to hide "true facts" by producing ill-informed witnesses instead of witnesses who knew the truth.

(c) Eliciting Jay Coogan's outburst

Dean's misconduct during Jay Coogan's testimony also independently requires a new trial. As background to that misconduct: Jay Coogan was unrepresented by counsel in this case even though he sold his brother (Doy) some of the products that allegedly caused his death. At Jay Coogan's discovery deposition, GPC and NAPA's defense counsel asked him whether he had received legal advice and wished to continue testifying unrepresented. CP 16386-90. This exchange plainly had no relevance at trial; Jay Coogan was neither a defendant nor listed as an "empty chair" to which the jury could allocate fault. *See* CP 15018-22. That is why the trial court properly sustained defense counsel's relevance objection when Dean asked him at trial, "Did NAPA ever, in this process, indicate to you that they believed you were the reason your brother got sick?" 13 RP 185.

But despite the trial court's ruling that this subject was irrelevant and not to be broached, Dean sought to elicit the same irrelevant but highly inflammatory testimony on redirect, asking Jay Coogan, "Why is it that you needed to pretty regularly blow off steam during that deposition?" 16 RP 159. Before defense counsel could state her relevance objection to this question, Jay Coogan answered, "Some of the questions that were asked of me in the deposition were very offensive." 16 RP 159-60. That would have

been bad enough, but it did not end there. Immediately after the trial court ruled it would "allow this question and then you need to move on," Coogan supplemented his answer, blurting out unprompted: "At one point she [defense counsel] accused me of killing my brother."[17] 16 RP 160.

The trial court's earlier ruling had put Dean on notice that this area of inquiry was irrelevant and off limits. Yet Dean proceeded to probe the subject even after the trial court sustained GPC's objection. She deliberately elicited the inflammatory statement that defense counsel had supposedly accused Jay Coogan of killing his brother. Although the trial court *sua sponte* struck the outburst, the court's instruction was far from enough to cure the prejudice that Dean intended to engender. 16 RP 160.

The jury heard Doy's brother say that GPC had "accused [him]" of killing his own brother. Neither a juror nor anyone else can disregard something like that.

* * *

At the hearing on the motion for a new trial, the trial court failed to recognize the extraordinary flagrancy of the episodes of misconduct, including the unfounded implications that GPC's own workers had died of asbestos exposure, that GPC and NAPA were withholding the witnesses who knew about past corporate conduct, and that they had accused Jay Coogan of killing his brother, Doy. The trial court instead accused GPC and NAPA of cherry picking isolated incidents from a lengthy trial. 12/1/17 RP 56. It addressed none of the specific instances of misconduct that

[17] Defense counsel did nothing of the sort.

occurred during the presentation of evidence, except to agree with Dean's characterization of Frantz's preparedness to testify. 12/1/17 RP 20 ("I must say I was unimpressed with Mr. Frantz's preparation to answer the questions that were put to him by Plaintiff. He, frankly, sounded to me evasive and unknowing."). The court's agreement did not make the deliberately improper act of characterizing testimony any less improper, and the court's comment reflects application of an incorrect legal standard, which is an abuse of discretion. *Littlefield*, 133 Wn.2d at 47.

3. Dean repeatedly made improper arguments in closing argument, in violation of specific in-limine rulings.

The serious misconduct did not stop with the questioning of witnesses. It is improper for counsel during closing argument to invite the jury to decide a case based on anything other than the evidence and the law, including appeals to sympathy, passion, or prejudice. *See Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 142, 750 P.2d 1257 (1988). We discuss here three of the most shocking examples of Dean's misconduct during closing, each of which independently requires a new trial.

(a) Making "golden rule" arguments

A golden-rule argument is a classic improper argument because it urges the jurors "to place themselves in plaintiff's position." *Adkins*, 110 Wn.2d at 139.[18] The vice of a golden rule argument is that it encourages the jury to "depart from neutrality and to decide the case on the basis of

[18] The argument is called a "golden rule" argument because it invokes a standard of conduct similar to the biblical golden rule: "[D]o unto others as you would have them do unto you." *Adkins*, 110 Wn.2d at 139 (citing NEW TESTAMENT, Luke 6:31).

personal interest and bias rather than on the evidence." *Id.* (citation and internal quotation marks omitted). Arguments like that are appeals to sympathy, passion, or prejudice, and are improper. *Id.* at 140, 142.

The trial court held before trial that golden-rule arguments had no place in the courtroom: "Golden Rule. Obviously we're not going to have that, so that [motion] will be granted." 2 RP 57. The court even gave specific examples of what would be "clearly impermissible" appeals to passion. In the court's list were arguments like: "And how would you like it if it was your dad?"; "And this could have been you"; and "You could have been the person that was out there breathing this stuff and ended up dead." 1 RP 70-72.

Dean yet again had no regard for the court's rulings. In closing argument, she repeatedly urged the jurors to place themselves in Doy's position in determining his estate's damages. The argument was the textbook example of a golden-rule argument. For instance, Dean invited the jurors to imagine themselves helplessly "gasping to breathe as your body rots" and dying a painful death:

> But **you** are required to think about the seriousness of this disease, to think on it.
>
> … It's not two years of your life sucking because **you** have some kind of disease. It's over, after dying one of the worst ways a person can die. . . . When it spread to his lungs, it means **you're** gasping to breathe as **your** body rots. And **you** know there is nothing **you** can do. And **you** tell everyone that **you** love that "everything is fine, don't worry about me."

47 RP 153 (emphases added). Dean then walked the jury through the disease step-by-step, inviting them to imagine themselves learning that they have an incurable disease and then dying in pain and fear:

> … [I]t is something that **you** are required again 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. **You** can do chemo. **You** can drive two hours to Spokane every week to drain stuff out of **you.** **You** can take these medications so **you** can no longer see and think straight. **You're** going to need to. This messes with nerves in **your** chest wall. It messes with **your** ability to eat. There is no other way to survive it. But none of it is going to stop it.
>
> **You** don't really tell **your** family because **you** don't want them to know that. And every day it gets worse. And that's **your** pain, **your** knowledge, **your** fear. "What's Sue going to do without me?" And then **you** die.

47 RP 188-89 (emphases added).

At the hearing on the motion for new trial, the trial court asserted that Dean was asking the jury to consider "[h]ow would *one* feel" rather than "[h]ow would [*you*] feel." 12/1/2017 RP 49-50 (emphasis added). That distinction is a fiction. It ignores the actual language used and the tenor of the argument. *See* 12/1/2017 RP 49-50. Dean used the pronoun "you" not once, nor twice, nor a few times, but dozens of times. Her arguments had one goal and one goal only: inflame the jury's passions and

prejudices by asking them to step into Doy's shoes when he was suffering and dying.[19]

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

Dean's closing argument ignored other trial-court rulings too, including its ruling about sending a message to a wealthy defendant. An argument that asks the jury to consider societal interests beyond the scope of the trial and use its verdict to send a message is an improper appeal to passion and prejudice. *State v. Thierry*, 190 Wn. App. 680, 690, 360 P.3d 940, 946 (2015). In addition, because punitive damages are off-limits in Washington, counsel cannot urge a civil jury to use its verdict to punish or deter the defendant. *Wuth ex rel. Kessler v. Lab. Corp. of Am.*, 189 Wn. App. 660, 706-10, 359 P.3d 841 (2015). An argument that "damages should be awarded to 'make sure this never happen[s] again'" is an improper request for punitive damages. *Id*. (quoting *Broyles v. Thurston Cty.*, 147 Wn. App. 409, 445, 195 P.3d 985 (2008)).

That is why, before trial, the trial court ruled that arguments implicating the financial condition of defendants or suggesting that the jury punish defendants were off the table. 2 RP 46-48. The court reasoned in part that "[w]e don't have punitive damages in this state" and "it's a pretty

[19] This case is distinguishable from prior cases denying relief where counsel did not actually make a golden-rule argument and there was no applicable in-limine ruling. *See Miller v. Kenny*, 180 Wn. App. 772, 816-17, 325 P.3d 278 (2014) (holding that an order banning golden-rule arguments did not excuse the defendant from contemporaneously objecting to improper closing argument where the plaintiffs' counsel's argument was not a golden-rule argument); *A.C. ex rel. Cooper v. Bellingham Sch. Dist.*, 125 Wn. App. 511, 524-25, 105 P.3d 400 (2004) (holding that no golden-rule argument was made).

standard deal. Whether you're dealing with a large corporation or an insurance company or whatever: 'They got all of the money. We don't have anything,' and that is simply not going to be okay." 2 RP 46-47.[20]

No matter to Dean. She made exactly the types of argument that the trial court put off-limits, suggesting that the jury use its verdict to send a message to GPC and that only a substantial verdict would accomplish that objective in light of GPC's financial wherewithal. For example, she stated in reference to GPC that "[y]ou're a multinational company. You have resources." 47 RP 171. She then told the jury that the parties were in trial because GPC and NAPA "clearly did not value this [case] enough," implied that they are "driven by money," and urged the jury to punish them by awarding "*something that matters* for what they took[.]" 47 RP 189-90 (emphasis added). And she left no doubt that she meant "something that matter[ed]" *to GPC and NAPA*: "[I]n a case where you hear millions of dollars thrown around like nothing," counsel argued, GPC and NAPA would "consider a victory" an award of anything less than $30 million for Doy's estate.[21] 47 RP 190-91. With Dean's last words to the jury, she explicitly urged it to send a message with its verdict: "[T]his loss is serious because this [conduct] wasn't a bad day for a bad employee of this company. This is a pattern of outrageous behavior for years. *And something needs to be done.*" 47 RP 193 (emphasis added).

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[20] Multiple defendants, including GPC, sought to exclude arguments based on financial positions and arguments to punish or send a message. CP 4779, 5122, 5334-35, 5347.

[21] Ms. Dean's request for at least $30 million in general damages for Doy Coogan's estate paralleled her earlier reference to asbestos-safety reports procured by the automotive industry that supposedly cost "over 30 million dollars." 34 RP 183; 47 RP 181-82.

These are precisely the kind of arguments that are improper under Washington law and were prohibited under the trial court's in-limine ruling.

(c) Expressing her personal opinions and beliefs

Dean engaged in still more misconduct in closing by giving her personal opinion on causation and damages issues. It is improper for counsel to express a personal opinion or belief to the jury. *State v. Case*, 49 Wn.2d 66, 67-68, 298 P.2d 500, 501 (1956). That is why the trial court ruled before trial that arguments based on counsel's personal opinions or beliefs would not be permitted. 5 RP 62.

Dean did not heed that ruling any more than the others. First, she expressed her opinion that one of Doy's past asbestos exposures about which GPC and NAPA presented evidence was fabricated: "You heard about other exposures. We agree they happened. They were part of the problem. *I think* the Wagstaff one is made up. *If you disagree with me*, okay. There can be more than one proximate cause." 47 RP 185-86 (emphasis added). Next, counsel expressed her personal belief that the Coogans had been denied justice: "*If there is emotion*, it is because *I believe* the lack of justice and respect is profound repeatedly for decades to families all over this country and to one of their own." 47 RP 190 (emphasis added). And finally, on damages, after counsel asked for at least $30 million for Doy's estate, she said that she personally felt this amount was warranted and explained why: "*I'm telling you what I believe is right* for what everybody should pay for what happened to them. And *I believe* with no question that anything below this they're going to consider a victory."

47 RP 191 (emphasis added). These expressions of personal belief—including most significantly counsel's representation that the Wagstaff amphibole exposure was "made up"—were improper and violated the trial court's in-limine ruling.

4. Defense counsel were not required to object to Dean's multiple, flagrant violations of in-limine rulings banning specific types of closing arguments.

Although defense counsel did not object to Dean's misconduct during closing, no objection was necessary under the circumstances. A party is not required to object or move for a mistrial if the misconduct was so flagrant and prejudicial that no instruction would have cured the prejudice. *Carabba v. Anacortes Sch. Dist. No. 103*, 72 Wn.2d 939, 952-54, 435 P.2d 936 (1967); *see also State v. Emery*, 174 Wn.2d 741, 762, 278 P.2d 653, 665 (2012). This is a "well recognized" exception to the general rule that a party must contemporaneously object to misconduct of counsel to preserve the issue for appeal. *Carabba*, 72 Wn.2d at 953. In denying a new trial, the trial court failed to recognize this exception (even though argued by GPC and NAPA) and ruled that a pre-verdict objection is always required. CP 19949-50; 12/1/17 RP 20-22, 57-58 ("I think that the law is that you have to make an objection in a timely way or lose it."). The court thus applied an incorrect legal standard, which is an abuse of discretion.

Our Supreme Court has repeatedly applied the flagrant-misconduct exception in reversing judgments where the prejudice from counsel's misconduct during closing argument was incurable. *See, e.g., Carabba*, 72 Wn.2d at 953-54 (reversing judgment on defense verdict because of

incurable prejudice where defense counsel argued that the jury's finding the school-district defendant liable would create "a risk of exposure that no one can face hereafter"); *Warren v. Hart*, 71 Wn.2d 512, 517-18, 429 P.2d 873 (1967) (same result). Our Supreme Court has also explained that deliberately violating an in-limine ruling is *per se* flagrant misconduct and requires no objection. *See State v. Smith*, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937)[22]; *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 92, 549 P.2d 483 (1976).[23]

It is especially appropriate to treat a deliberate violation of an in-limine ruling as *per se* flagrant misconduct when the violation occurs during closing argument. The danger of potential prejudice is the reason that courts ban these improper arguments in the first place. And misconduct during closing argument is particularly concerning because it occurs near the end of the trial, when all that remains is to submit the case to the jury and when objections are disfavored. As our Supreme Court has explained, requiring

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[22] A plurality of justices concluded that where counsel clearly and deliberately violated a ruling prohibiting examination on a certain subject, prejudice must be presumed and "[t]he fact that the question was not objected to is not controlling." *Smith*, 189 Wash. at 429.

[23] The Court of Appeals has held that only a party that *loses* its motion in limine to exclude evidence has a standing objection, while a party that *prevails* in obtaining a ruling in limine must renew its objection when the ruling is violated. But the flagrant-misconduct exception regarding closing arguments does not depend on a standing objection. *See, e.g., City of Bellevue v. Kravik*, 69 Wn. App. 735, 742-44, 850 P.2d 559 (1993) (recognizing the flagrant-misconduct exception as independent from the standing-objection issue); *State v. Sullivan*, 69 Wn. App. 167, 173, 847 P.2d 953 (1993) (noting that the defendant had failed to demonstrate that the prosecutor's questioning was in deliberate disregard of the trial court's ruling or that any resulting prejudice was incurable).

The federal rules say that a maligned party need not invoke a flagrant-misconduct exception where counsel has violated an in-limine ruling because a party who obtains a definitive ruling has a standing objection. Fed. R. Evid. 103(b). The Washington Rules of Evidence remain silent on the issue.

defense counsel to balance prejudicial misconduct against the concept of "gambling on the verdict" would put them "on the horns of an impossible dilemma," *i.e.*, choosing in the heat of the moment between making an objection that would draw attention to the improper argument or waiving a challenge to an argument notwithstanding its clear impropriety and the resulting prejudice. *Carabba*, 72 Wn.2d at 954.

Other state supreme courts are of the same view, including the Nebraska Supreme Court, which astutely observed:

> Attorneys engaged in the trial of cases to a jury know or ought to know the purposes of arguments to juries. When they depart from the legitimate purpose of properly presenting the evidence and the conclusions to be drawn therefrom, they must assume the responsibility for such improper conduct. They are in no position to demand that opposing counsel shall jeopardize his position with the jury by constant objections to their improper conduct.

Sandomierski v. Fixemer, 163 Neb. 716, 81 N.W.2d 142, 145 (1957). All of this shows that when counsel deliberately violates in-limine rulings, the party whose counsel engaged in misconduct should have the burden to demonstrate the absence of prejudice, and the court should order a new trial unless it is clear from the jury's verdict that the improper argument did not

have its intended effect. *Cf. Conda v. Honeywell Int'l Inc.*, No. A17-1381, 2018 WL 2293530, at *8 (Minn. Ct. App. May 21, 2018).[24]

Dean repeatedly flouted the trial court's in-limine rulings. She was aware of those rulings because she was present and argued at the hearings. She must be presumed to have made a calculated decision to violate those rulings, banking on the fact that either defense counsel would not dare object (lest the jury conclude GPC and NAPA wanted to hide information from them), or that the court would be unwilling to grant a mistrial after twelve weeks of trial.

* * *

This was not the first time that Dean has tried such a gambit. She has engaged in a pattern of misconduct in trials across the country. In one recent case, the Iowa Supreme Court upheld the reversal of a $6.5 million judgment based on Dean's improper closing arguments in violation of rulings on motions in limine, including arguments referring to corporate wealth and sending a message by punishing the defendant. *Kinseth v. Weil McLain Co.*, 913 N.W.2d 55, 71-73 (Iowa 2018). In another case, a Minnesota court granted a mistrial where Dean violated an in-limine ruling

[24] Recently, our Supreme Court reinstated the denial of a new trial where plaintiffs' counsel's closing argument did not violate an in-limine ruling, and counsel in the position of GPC and NAPA's counsel not only did not object but chose to engage opposing counsel's argument by belittling it in their argument. *Gilmore v. Jefferson Cty. Pub. Transp. Benefit Area*, 190 Wn.2d 483, 504, 415 P.3d 212 (2018) ("By rationalizing Gilmore's counsel's statements as a 'technique' and failing to object after being given several opportunities, it is clear that Jefferson Transit's counsel perceived no error and was 'gambling on the verdict.'"). Here, in contrast, the trial court had made an in-limine ruling barring the argument made by counsel, and GPC and NAPA's counsel in no way engaged with opposing counsel's argument.

during opening statements by telling the jury that scientists had started investigating sicknesses at the defendants' plants—almost the exact thing that she did here with the Rayloc-deaths question. *See* Appx. A, *Domagala v. 3M Co.*, No. 62-cv-16-3232, Reporter's Transcript at 39-40 (Minn. Dist. Ct. Dec. 9, 2016).[25] The court there reasoned in relevant part that "what we have is a sequential, constant . . . systematic violation of motions in limine of the type the parties made clear to the court prior to trial were game breaking issues." *Id.* at *41. In yet another case, a California court granted a mistrial after Dean violated an in-limine ruling by suggesting during opening statements that the defendants who were no longer in the case were not responsible for the plaintiff's disease. *See* Appx. B, *In re LAOSD Asbestos Cases*, No. JCCP4674, No. BC481310, Reporter's Transcript at 187 (Cal. Super. Ct. Nov. 1, 2012).[26]

Each case reflects Dean's modus operandi: to win the case at all costs, even if it means ignoring all established rules of procedure and boundaries of fairness. Such behavior should not be tolerated in this state. If the proscriptions against misconduct and the remedies provided are to retain any meaning in our state, then this Court should rule that the trial court abused its discretion when it denied a new trial.

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[25] A decision by a court in another case is a "legislative fact"—an "established truth[], fact[] or pronouncement[]"—of which this Court has inherent authority to take judicial notice. *State v. Grayson*, 154 Wn.2d 333, 340, 111 P.3d 1183 (2005); *see also* ER 201 (authorizing courts to take judicial notice of "adjudicative facts" from "sources whose accuracy cannot reasonably be questioned"); *Thompson v. R.J. Reynolds Tobacco Co.*, 760 F.3d 913, 918 (8th Cir. 2018) (judicial opinions are subject to judicial notice).

[26] *See* note 25, *supra*.

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

Misconduct is prejudicial if it affects or presumptively affects the outcome of the trial. *Adkins*, 110 Wn.2d at 142. Each of the above instances of misconduct *alone* was more than sufficient to warrant a new trial. There was unquestionably prejudice if one considers the cumulative effect of all that misconduct. *See Case*, 49 Wn.2d at 72-74 (curative instructions ineffective to overcome the cumulative effect of "repeated improprieties").

As we explain below, the prejudice comes across most clearly in the size of the $81.5 million verdict and the amounts of the separate components of the jury's verdict. Dean sought to inflame the jury's passions and prejudices, and succeeded. The jury not only awarded the full $30 million in noneconomic damages that Dean requested for Doy's estate (not to mention the $1.5 million in economic damages), but it also awarded the same amount to Doy's widow (who did not attend the trial or testify live), plus $10 million to each of his daughters. *See* CP 15021 (special-verdict form). And the prejudice was not confined to damages alone. Dean's misconduct prejudiced the jury on liability as well, including when she implied that GPC's own workers had died of asbestos exposure and that GPC and NAPA were withholding the witnesses who knew about past corporate conduct.

The trial court abused its discretion in denying a new trial. This Court can remedy the injustice caused by Dean's misconduct only by vacating the judgment and ordering a new trial.

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

Dean's misconduct during trial was bad enough, but there is more. A party cannot receive a fair trial where an opponent withholds highly relevant evidence while simultaneously providing testimony (under oath) that the undisclosed evidence would rebut. That is what happened here. The trial court abused its discretion in refusing to vacate the judgment and grant relief under CR 60(b)(3) or (4).

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

A new trial is warranted under CR 60(b)(3) where the newly discovered evidence (1) would probably change the result if a new trial were granted, (2) was discovered since the trial, (3) could not have been discovered before the trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. *Jones v. City of Seattle*, 179 Wn.2d 322, 360, 314 P.3d 380 (2013). The Coogans below did not dispute the second element. The remaining elements were also met.

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

The newly discovered evidence was material and not merely impeaching, because it was substantively relevant.[27] The quality of the relationship is relevant to a loss-of-consortium claim. Loss-of-consortium damages compensate the deprived person for the loss of the benefits of being in relationship with the impaired person, before that person became impaired. *Lund v. Caple*, 100 Wn.2d 739, 744, 675 P.2d 226 (1984). The jury was instructed here that those benefits in the context of marriage may include "emotional support, love, affection, care, services, and companionship, including sexual companionship, as well as assistance from one spouse to the other." CP 14989 (Court's Instruction 35); WPI 32.04; *see also Lund*, 100 Wn.2d at 744. The jury was instructed for purposes of Roxane and Raquel's damages that those benefits may include "love, care, companionship, and guidance." CP 14989 (Court's Instruction 35).

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[27] The trial court concluded that much of the material submitted was inadmissible hearsay. CP 2555-56. A party that fails to disclose witnesses and statements should not be heard to challenge the admissibility of that evidence, where the nondisclosure prejudices the opposing party's ability to prepare for trial and present the evidence in admissible form. That is precisely what happened here.

In any event, the new evidence is itself admissible and not hearsay. First, many of the statements would not have been offered to prove the truth of the matters asserted. *See* ER 801(c). For instance, GPC and NAPA would not have sought to prove that Sue stole from Doy or attacked him with an axe. Such statements would be offered only for what the making of such accusations within a relationship reveals about the quality of that relationship. Second, Sue, Roxane, Raquel, Kelly, and Doy's estate are all parties (individually or through the personal representative; *see* § V.A.6(b), *infra*), meaning that their statements were nonhearsay and were substantively admissible, as admissions of a party-opponent. *See* ER 801(d)(2).

Loss-of-consortium damages are not presumed. A loss-of-consortium claim is derivative only in the sense that it depends on the occurrence of injury to another; "the claimant suffers an original injury that is the subject of the action." *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 774-76, 733 P.2d 530 (1987). That "original injury" must be proven. Indeed, where the relationship was strained or broken when the impairment arose, a jury is justified in awarding no damages at all. *See, e.g.*, *Copelin v. Russell*, 205 Ga. App. 540, 423 S.E.2d 6 (1992) (affirming zero-damage verdict where evidence supported finding a "troubled marriage"); *Standeford v. Winn Dixie of La., Inc.*, 688 So.2d 602, 606 (La. Ct. App. 1996) (similar); *Gelinas v. Mackey*, 123 N.H. 690, 465 A.2d 498, 501 (1983) (similar).

The jury awarded $30 million to Sue, purely for the loss of her relationship with Doy. CP 15021. The jury made that award based on the evidence it heard about that relationship. *See* 47 RP 191-92 (the Coogans' closing argument). But it was deprived of other evidence that would have painted a starkly contrasting picture, and thus cannot be deemed merely cumulative or impeaching:

- The jury heard that the relationship was "happy" and "loving"—practically blissful. *See, e.g.*, CP 20414; 30 RP 18-19, 40, 42.
    - The jury did not hear from witnesses who would have testified that the relationship was characterized by "misery," physical assault, excessive drinking, stealing, and distrust. *See, e.g.*,, CP 21104, 21111, 21169, 21188, 21192.
- The jury heard that Doy and Sue enjoyed each other's company and wanted to be together all the time. 30 RP 18-19.

- ➢ The jury did not hear from witnesses who would have testified that Doy would go to his shop or visit friends to "get away from" Sue, that he wanted her to leave for good, and that he had repeatedly asked her to leave. CP 21111, 21142, 21169.

- The jury heard that the closeness of Doy and Sue's relationship extended into business, where Sue worked alongside Doy doing everything from buying materials and maintaining equipment to operating the equipment and installing sewers. CP 20402-05.

  - ➢ The jury did not hear from witnesses who would have testified that Doy typically worked alone or hired friends and that Sue only drove a truck one summer in 1997. CP 21104-05, 21116-17, 21122, 21134, 21138, 21146, 21150, 21154, 21160, 21175, 21179, 21187, 21192, 21195, 21207, 21217.

Had the jury heard the complete story, the outcome of the trial probably would have been vastly different. Indeed—had the jury heard that Sue routinely stole Doy's money, that she once attacked him with an axe, that his life with her was a misery, and that he wanted her to move out, it would not have awarded Sue anything close to *$30 million* in loss-of-consortium damages.

The complete story also would have caused the jury to award less than the $10 million each it awarded to Roxane and Raquel.[28] CP 15021. Those awards were premised in part on testimony that the family had longstanding, "close" relations. *See* 18 RP 82. The jury did not hear from witnesses who would have testified that Doy and Sue's home was an unwelcoming and unpleasant place because of Sue. *See, e.g.*, CP 21104, 21111, 21142, 21169, 21188, 21192. If the jury had heard that new

[28] The jury awarded damages separately to Doy's estate, Sue, Roxane, and Raquel. CP 15021. Plaintiffs had also sought a separate award of damages to Kelly, but the verdict form did not include a line to award damages to her. *See id.*

evidence, it may very well have decided that the story about the "close" Coogan family was a lie and that Doy's relationship with his daughters was similarly not as it was represented to be.

Last but not least, had the jury heard the complete story, it also probably would have awarded less than the $30 million in noneconomic damages it awarded to Doy's estate. CP 15021. The jury was instructed that the estate's noneconomic damages included "[t]he pain, suffering, anxiety, emotional distress, humiliation and fear experienced by Doy Coogan prior to his death[.]" CP 14988. The jury likely concluded—based on the evidence presented to it—that Doy suffered serious mental anguish knowing that he was losing out on an idyllic relationship with his wife for years to come, knowing that his wife would be alone and devastated after his death, and knowing that it would break his wife's and daughters' hearts when he told them about the disease. But if the jury had heard the new evidence (which showed that the "close family" narrative was false), it could reasonably have concluded that Doy did not suffer mental anguish in these respects.

(2) GPC and NAPA were diligent, even in the face of the Coogans' discovery violations.

The level of diligence that is required of a party in GPC and NAPA's position was more than met in this instance. Courts have recognized that a party may be "thrown off the trail" of investigation by false or misleading answers in discovery. *Foerstel v. St. Louis Pub. Serv. Co.*, 241 S.W.2d 792, 795 (Mo. Ct. App. 1951) (reversing denial of a new trial). That was the case

here. For example, Sue testified at her July 2016 deposition that she and Doy "had a very loving, romantic relationship" and that she and Doy worked in the excavation business as a "team." CP 20403, CP 20414. These are the type of categorical statements upon which a party may rely, without an obligation to probe or investigate further. *See, e.g.*, *Kurtz v. Fels*, 63 Wn.2d 871, 872, 874-75, 389 P.2d 659 (1964) (categorical statements by a plaintiff may "forestall [defendant's] further investigation of the point"); *Roberson v. Perez*, 123 Wn. App. 320, 334, 96 P.3d 420 (2004) ("Where a party has resorted to pretrial discovery procedures and the opposing party fails to comply in good faith therewith, such procedure constitutes the exercise of appropriate diligence").[29]

GPC and NAPA also exercised diligence by monitoring the probate proceedings for evidence about family relations. *See* CP 20571, 20747. GPC and NAPA obtained every document filed in those proceedings before they deposed Sue, Roxane, Raquel, or Kelly. CP 21350, 21378, 21415, 21445, 20571, 20747. Sure enough, those documents, and primarily the declarations filed by Sue in March 2016, *did* address family relations: they waxed eloquent about Doy and Sue's relationship, and gave no indication it was anything other than happy and loving.

GPC and NAPA had no specific reason to believe that Doy and Sue's relationship was other than as described in those declarations and by

[29] It was a similar story with the written discovery. Sue was asked to produce in discovery all statements by potential witnesses; that is, statements by persons with any knowledge relevant for discovery purposes to any claims in the case. CP 21567, 21571-72, 21584. She repeatedly represented that all such statements had been produced. *Id*. We now know that is false.

Sue herself. GPC and NAPA could also reasonably presume that to probe any further on the subject would be a waste of time. At no point before the verdict did any information come to light that should have cast doubt on the notion that Doy and Sue's relationship was happy and loving before Doy's death.[30]

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

A party is entitled to vacation of a judgment under CR 60(b)(4) where an adverse party engaged in "[f]raud…, misrepresentation, or other misconduct."[31] A party seeking relief based on misconduct in failing to disclose evidence need not show that the outcome of the trial probably would have been different had the evidence been available. *Taylor v. Cessna Aircraft Co.*, 39 Wn. App. 828, 836-37, 696 P.2d 28 (1985). "[A] litigant who has engaged in misconduct is not entitled to 'the benefit of calculation, which can be little better than speculation, as to the extent of wrong inflicted upon his opponent.'" *Id.* (quotation omitted).

Sue, as a named plaintiff, is an "adverse party" for purposes of CR 60(b)(4). So are Roxane, Raquel, and Kelly, as beneficiaries of Doy's estate. Although estate beneficiaries are required to seek recovery through

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[30] This situation is easily distinguishable from *Jones*, where both the deposition and trial testimony about the plaintiff's physical condition were ambiguous and thus was not contradicted by post-trial surveillance video. 179 Wn.2d at 365-67. The deposition and trial testimony here was unambiguous and was contradicted by the previously undisclosed statements, first discovered after the trial. GPC was as diligent as it could reasonably be expected to have been, particularly where it was thrown off the trail at every turn.

[31] The use of the disjunctive word "or" indicates that fraud need not be established; misrepresentation or other misconduct will suffice. *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 825, 225 P.3d 280 (2009).

a personal representative, the personal representative sues "only in a nominal capacity," acting as "merely a statutory agent or trustee" for the beneficiaries. *Gray v. Goodson*, 61 Wn.2d 319, 326-27, 378 P.2d 413 (1963); *see also* RCW 4.20.010, .020. The recovery is based on the beneficiaries' own losses and belongs to them. *Gray*, 61 Wn.2d at 326-27; *Parrish v. Jones*, 44 Wn. App. 449, 453, 722 P.2d 878 (1986). Indeed, Sue's counsel identified Roxane, Raquel, and Kelly as parties, along with Sue, at Sue's deposition. CP 21305. And at the insistence of the Coogans' counsel, the trial court treated them as parties at trial, allowing them to attend the entire trial when they otherwise would have been subject to exclusion as witnesses.[32] 6 RP ("A.M. Session") 8-14; *see also* 18 RP 82; *see* ER 615.

The Coogans misrepresented facts and committed discovery misconduct by withholding evidence (the witness statements and social-media messages) that flatly contradicted their testimony about damages during depositions and trial. The Coogans' "close family" trial theme was a key part of their damages claims. The Coogans testified in support of that theme and made a point of showing the jury pictures of their family over and over again. *See, e.g.*, 18 RP 54-61, 65-82; 30 RP 13-20, 31-42. But that testimony was squarely at odds with the two dozen witness statements that Raquel and Roxane had solicited back in early 2016 and held under

[32] The Coogans should be estopped from claiming otherwise. Judicial estoppel "precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 224, 108 P.3d 147 (2005).

wraps for the next two years. It was also at odds with the private Facebook messages that Raquel had written and Kelly had collected in 2015.

This was a grave injustice. The Coogans achieved their verdict by unfair means, so the verdict cannot stand.[33] *See Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 824-26, 225 P.3d 280 (2009) (new trial ordered under CR 60(b)(4) where party misrepresented facts); *Stibbs v. Stibbs*, 37 Wn.2d 377, 379, 223 P.2d 841 (1950) (reversing denial of new trial based on fabrication of testimony). The Court should reverse the trial court's judgment, order relief including at minimum a new trial, and remand with instructions to allow discovery pertaining to the extent of the Coogans' misconduct.[34]

B. The $81.5 million verdict is excessive and unmistakably reflects passion and prejudice

Our Supreme Court decided long ago to create a remedy for cases where a jury's damages award dwarfs any amount that a court might expect

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[33] Although GPC and NAPA need not establish fraud to be entitled to relief, the record at the least strongly suggests a conspiracy to commit fraud by withholding evidence and misrepresenting facts, in order to achieve substantial financial gain by manufacturing a story of loving relationships that could persuade a jury to award millions in damages. Sue was at war with Roxane and Raquel in probate court. Yet Sue agreed to give Roxane and Raquel a significantly greater share of the anticipated proceeds of the wrongful-death lawsuit than they were legally entitled to receive. CP 20842. Although Sue claimed that she did this out of out of a generous heart, *id*., a more likely explanation is that she bought Roxane and Raquel's cooperation, and the three of them called a truce given the prospect of receiving millions of dollars. Because the trial court refused to order discovery on the Coogans' misconduct, GPC and NAPA have not had the chance to investigate this issue. CP 2555-56.

[34] 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 could ultimately conclude that the temple of justice has indeed been defiled in this case, and that it must exercise its inherent power to dismiss the Coogans' case with prejudice.

from the facts of a case. That remedy is CR 59's excessive-damages provision: "[A] verdict may be vacated and a new trial granted [where damages are] so excessive . . . as unmistakably to indicate that the verdict must have been the result of passion or prejudice." CR 59(a), (a)(5). The provision applies where damages "shock[] the conscience"—where they are "flagrantly outrageous and extravagant." *Bunch v. King Cty. Dep't of Youth Servs.*, 155 Wn.2d 165, 179, 116 P.3d 381 (2005).

There is no better example of such a case than this one. The jury's $81.5 million award is simply excessive, flagrantly outrageous, and extravagant. But the excessiveness inquiry does not start and stop with the sheer size of the verdict. Other circumstances of the case objectively show that the verdict was flagrantly outrageous and the product of passion and prejudice. Those circumstances include the ratio of non-economic damages to economic damages (53:1), the difference between the Coogans' pre-trial request and the verdict ($10 million and $81.5 million), the difference between the total amount of twelve settlements and the jury verdict ($4.395 million and $81.5 million), the lack of evidence supporting the economic-damages award, and the imbalance between this verdict and the verdict from every other asbestos case in this state's history. By each and every metric, this verdict cannot stand.

1. The verdict shocks the conscience on its face.

The verdict in this case is the archetype of a verdict that shocks the conscience. *Cf. Bunch*, 155 Wn.2d at 179. The excessive-damages inquiry presupposes a comparison to a norm and an understanding of the value of money. *See Ryan v. Westgard*, 12 Wn. App. 500, 513, 530 P.2d 687 (1975)

(question is whether a verdict exceeds the "rational bound[]"); *see also Excessive*, WEBSTER'S NEW INT'L DICTIONARY 763 (1930) ("Greater than the usual amount or degree."); *Excessive*, OXFORD ENGLISH DICTIONARY (2017) (similar). The $81.5 million verdict is as far from the norm in a personal injury or wrongful-death case as it gets. It exceeds all rational bounds. It is 1,414 times greater than the median annual income in the United States and 2,178 times greater than the median annual income in the Coogans' hometown of Kettle Falls, Washington. And it is greater than the total wages that the city of Kettle Falls (pop. 1,447) earns in eighteen months. A wrongful-death damages award on the upper end of eight figures is extravagant by any measure. *Cf. Baxter v. Greyhound Corp.*, 65 Wn.2d 421, 425, 397 P.2d 857 (1964) (rejecting as excessive a damages award of $48,000 to decedent's wife).

The trial court rejected the shock-the-conscience argument by citing the platitude that a verdict "does not carry its own death warrant solely because of its size." *See, e.g.*, 12/1/2017 RP 52, 57 (citing *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 838, 699 P.2d 1230 (1985)). But if that statement is true across the board—including in eye-popping cases like this one—then the shock-the-conscience standard has no teeth at all. CR 59's excessiveness provision would effectively be erased—text reduced to dead letter. Where a verdict exceeds all rational bounds by a wide margin, the size of the verdict is the best evidence of its excessiveness.

The $81.5 million verdict was unprecedented. It cannot be right that the unprecedented nature of this award weighs against finding it excessive. *Cf.*

12/1/2017 RP 54 (trial court implying that remittitur not proper here because Washington appellate courts have never upheld remittitur of asbestos verdict).[35] Exceptional verdicts call for exceptional treatment.

2. Other factors further show that the verdict is excessive.

Five other factors also provide objective indication of the verdict's excessiveness. The point is not that any one of these factors on its own conclusively establishes excessiveness. The point is rather that the proposed factors—individually and collectively—confirm that the verdict is an extreme outlier.

(a) The $78.5 million difference between economic and non-economic damages provides more proof of excessiveness.

A ratio of non-economic damages to economic damages that exceeds the single digits is an important indicator of passion or prejudice. In other words, a one-to-one ratio may be reasonable and appropriate, *see Wuth*, 189 Wn. App. at 706, but a ten-to-one ratio is "shocking," *Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 140, 856 P.2d 746 (1993) (trial court properly remitted verdict). Such a lopsided ratio illustrates a jury's improper effort to punish a defendant rather than compensate the plaintiff. Punitive damages are off limits in tort cases. *Dailey v. N. Coast Life Ins. Co.*, 129 Wn.2d 572, 574, 919 P.2d 589 (1996).

The ratio in this case is an unprecedented 53:1. The jury awarded $80 million in non-economic damages and only $1.5 million in economic

[35] The court did not acknowledge the most likely explanation—that Washington appellate courts have never seen an asbestos verdict that is within $75 million of this one.

damages. CP 15021. If the 10:1 ratio in *Hill* was "shocking," there are no words to describe the ratio here.

The trial court refused to consider the ratio of non-economic damages to economic damages on the basis that the Supreme Court in *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 638, 771 P.2d 711 (1989), had prohibited the inquiry. But *Sofie* is beside the point. In *Sofie*, the Supreme Court struck down a statutory cap on non-economic damages limiting those damages to a mathematical calculation involving the person's average annual wage and his life expectancy. *Id.* at 638. The case has nothing to do with the *Hill* ratio analysis discussed above. No legislative cap is at issue here. Nor is it GPC's argument that a non-economic-damages award can never exceed the product of a mathematical formula. GPC's argument is rather that the 53:1 ratio here provides one meaningful indicator—just one—that the verdict is infirm.

At any rate, Washington Supreme Court precedent shows that the *Hill* ratio analysis is alive and well. In *Bunch v. King County Department of Youth Services*, 155 Wn.2d 165, 181, 116 P.3d 381 (2005), the court applied the ratio analysis and upheld the verdict in part because the non-economic damages were three-quarters the amount of economic damages, not "10 times the amount of the economic damages." Following *Bunch*, the Court of Appeals recently engaged in a similar analysis. *See Wuth*, 189 Wn. App. at 706 (finding that verdict did not meet *Hill* threshold). And it is well established that courts use comparative ratios like this one to determine whether a particular category of damages can withstand scrutiny. *See, e.g.*,

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003) (reversing punitive-damages award and reasoning that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process").

The ratio of economic damages to noneconomic damages is an appropriate and valid tool for judging excessiveness. This 53:1 ratio far exceeds the 10:1 ratio that the Court of Appeals found "shocking" in *Hill*.

(b) The Coogans' pre-trial request ($10 million) and their closing-argument request ($30 million) are further indicators of excessiveness.

The verdict also far exceeds any amount that the Coogans requested at trial. When plaintiffs ask for relief, they typically aim high. That is what happened here. The Coogans did so when they told the trial court in pre-trial filings that the upper range for verdicts in this type of case is $10 million, and they launched past that upper range when they asked the jury in closing to award at least $30 million in general damages to Doy Coogan's estate. *See* 47 RP 190-91. But the jury gave the Coogans even more than those ambitious requests. *Much* more—eight times the Coogans' upper range and $51.5 million more than what they specifically requested in closing argument.

(c) The $77.1 million difference between the verdict and the Coogans' total settlements with a dozen defendants provides additional evidence of excessiveness.

The jury verdict also dwarfs the Coogans' total settlements with twelve other defendants, further underscoring that the verdict was the product of the jury's passion and prejudice. The Coogans entered into twelve settlements before and during trial, for a total of $4.395 million and an average settlement of $366,250. CP 16192. That average included the settlement with J-M—a defendant that according to the Coogans' own causation expert was one of Doy's "major" asbestos exposures (7 RP 121-22)—and the settlements with the three other friction defendants (Abex, Borg Warner, and Victor/Dana). CP 16187.

The Coogans openly conceded at the reasonableness proceeding below that those settlements are in line with both "damages and settlements in other asbestos cases nationwide and in Pierce County." CP 20564. Here is why that matters: the $81.5 million verdict against NAPA and GPC is 241 times greater than the average of the Coogans' twelve settlements and more than 17 times greater than their total unadjusted settlements with twelve defendants. If $336,250 is in keeping with a reasonable, standard damages award in a case like this, then there is no world in which the $81.5 million verdict is reasonable.

(d) The economic-damages award is completely untethered to the record evidence and provides more proof of excessiveness.

This Court has recognized that an economic-damages award without evidentiary support casts doubt on a non-economic-damages award, particularly when the latter award is unusually high. *See Hill*, 71 Wn. App. at 140; *see also Bunch*, 155 Wn.2d at 181 ("[T]he jury's excessive award of economic damages in *Hill* cast suspicion on the award of noneconomic damages."). If that is true, then the $80 million non-economic-damages award here should be shrouded in doubt.

During trial, the Coogans explicitly waived any claim to two categories of economic damages, lost wages and medical expenses. *See* 5 RP 48; 47 RP 70. That left them seeking only one type of economic damages—the value of household services that Doy would have provided to his wife if he had lived. *See* 5 RP 48; 47 RP 5, 187. For those services, the jury awarded $1.5 million.

The evidence supporting these economic damages for household services was vanishingly small. The evidence literally consisted of only the following testimony from Roxane, Raquel, and Kelly:

- Doy built a greenhouse to grow tomatoes and share them with his family. 18 RP 73, 74.
- He was "the mechanic" and "the plumber" for the family. *Id.* at 71.
- He helped "fix[] up" the house and did yardwork like blowing leaves before he became sick. 30 RP 38-39.

That is all. The Coogans presented no testimony about the value of those household services and no testimony about any other services that

could make a $1.5 million award any more plausible. If the jury followed the mortality table—which suggested that Doy would have lived for another 15 years without his disease—then the jury found by implication that he would have provided $100,000 worth of household services *every year* by virtue of his tomato gardening, handiwork around the house, and yardwork. That is simply not a rational damages award. At the hearing on the motion for a new trial, the trial court characterized GPC and NAPA's argument as inviting the court to play "super jury." 12/1/17 RP 53. But an economic-damages award must be within the range supported by the evidence. *Hill*, 71 Wn. App. at 139. This one was not.

The jury's unsupported finding on this score is important because it is indicative of how the jury went about its findings on the other damages calculations. *See Hill*, 71 Wn. App. at 140. That the jury was willing to find $1.5 million in economic damages based on virtually no evidence could be explained only by passion and prejudice. That same passion and prejudice fueled the jury's much larger awards of $50 million for loss of consortium damages and $30 million for pain and suffering. The incredible verdict was born from the jury's passion and prejudice, not the record evidence.

(e) The $75.5 million difference between this verdict and the highest asbestos verdict affirmed in the state provides more proof of excessiveness.

Last but not least, the verdict here exceeds the average mesothelioma verdict in Washington State by $78.5 million and this state's highest affirmed mesothelioma verdict by $75.5 million. In Washington,

prevailing plaintiffs in wrongful-death cases involving the same disease and cause of death as in this case—mesothelioma—have received verdicts in the $1 million to $5 million range. *See, e.g.*, *Sofie*, 112 Wn.2d at 640 ($1.3 million); *Estate of Brandes v. Brand Insulations, Inc.*, 197 Wn. App. 1043, 2017 WL 325702, at *2 (2017) (unpublished) ($3.5 million); *Estenson v. Caterpillar Inc.*, 189 Wn. App. 1053, 2015 WL 5224161, at *3 (2015) (unpublished) ($6 million); *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 27, 935 P.2d 684 (1997) ($1 million). A verdict that is nearly fifteen multiples higher than the largest affirmed verdict in history is nothing if not excessive.[36] This difference further shows that passion and prejudice drove the amount of damages.[37]

The trial court rejected this factor on the basis that our Supreme Court held in *Washburn* that verdicts in similar cases are not relevant to an excessiveness inquiry. *See, e.g.*, 12/1/17 RP 9, 43 (citing *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 268, 840 P.2d 860 (1992)). But *Washburn* is distinguishable because a mass of verdicts in the asbestos context (thirty years' worth) allows courts to assess the norm with relative accuracy. *Cf. Washburn*, 120 Wn.2d at 268 (explaining that, where comparison of verdicts is permitted, "defendants' comparisons would be inadequate"

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[36] One of the loss of consortium awards alone—the $30 million award to Doy's wife—is ten multiples higher than the largest affirmed mesothelioma verdict in this state.

[37] In addition, GPC and NAPA presented evidence of the 30 known prior mesothelioma verdicts from 1984 through 2017. CP 19983-93. Adjusted for inflation, the verdicts ranged from $232,085 to $11,529,351 (the latter verdict was reversed on appeal), for an average of $1,633,537. *Id.* The Coogan verdict exceeded the largest verdict by more than seven times and exceeded the average by about 50 times. CP 19984; *see also* CP 20299 (bar graph of mesothelioma verdicts).

without a "*mass* of past awards"). Indeed, only by so distinguishing *Washburn* can it be reconciled with prior decisions of the Supreme Court where it compared verdicts when evaluating for excessiveness.[38] In all events, a categorical bar on a comparative-verdict inquiry would be at odds with the excessive-damages analysis. That analysis presupposes comparison to a norm.

* * *

All of this is more than to enough to prove excessiveness, but there is one more important point. Proof of counsel's misconduct provides further evidence that a verdict is excessive. *See Baxter*, 65 Wn.2d at 425. The story of counsel's serious misconduct in this case has already been told. The trial court abused its discretion in denying a new trial on the ground that the verdict was excessive. And because that excessiveness resulted from Dean's misconduct, this Court should vacate the judgment and order a new trial on both liability and damages.

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[38] The Supreme Court in *Washburn* evidently overlooked its prior decisions comparing verdicts and authorizing such comparisons. *See, e.g., DePhillips v. Neslin*, 155 Wash. 147, 156-57, 283 P. 691 (1930); *Allison v. Bartelt*, 121 Wash. 418, 423-24, 209 P. 863 (1922); *Phillips v. Thomas*, 70 Wash. 533, 538-39, 127 P. 97 (1912); *Ohrstrom v. City of Tacoma*, 57 Wash. 121, 129, 106 P. 629 (1910); *Olson v. N. Pac. Ry. Co.*, 49 Wash. 626, 630-31, 96 P. 150 (1908); *Walker v. McNeill*, 17 Wash. 582, 594-95, 50 P. 518 (1897); *Mitchell v. Tacoma Ry. & Motor Co.*, 13 Wash. 560, 571-72, 43 P. 528 (1896); *see also Dyal v. Fire Cos. Adjustment Bureau*, 23 Wn.2d 515, 525, 161 P.2d 321 (1945) ("courts have for comparison repeatedly made, and may make, reference to verdicts in other cases"). Because our Supreme Court does not overrule *sub silentio* decisions stating a clear rule of law, seemingly inconsistent decisions must be reconciled. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009). *Washburn* and the earlier cases can be reconciled by giving effect to the Supreme Court's observation in *Washburn* that, where comparison is permitted, it is—as here—based on a "*mass* of past awards." 120 Wn.2d at 268.

C. The trial court abused its discretion by excluding two types of potentially case-dispositive evidence

A new trial on liability and damages is also independently warranted by the trial court's erroneous exclusion of two types of key defense evidence—an expert opinion about Doy's liver cirrhosis by Dr. Gary Schuster and evidence that Doy's workplace in the 1960s generated a cluster of asbestos-related diseases.

1. Dr. Schuster's medical opinion about Doy's cirrhosis spoke directly to his life expectancy.

It was an error of the highest order for the court to exclude Dr. Schuster's medical opinion. That opinion went to the heart of the jury's damages calculus. Here is why:

- The jury was instructed that if it reached damages, it should consider Doy's "*health, life expectancy*, occupation, and habits of industry, responsibility and thrift." 47 RP 120 (emphasis added).
- The jury was also instructed that the "the average life expectancy of a man age 67 years is 15 years" and that this average life expectancy should "be considered in connection with all other evidence bearing on the same question such as that *pertaining to the health, habits and activity of the person*." *Id.* at 120-21 (emphasis added).
- In the opinion of occupational medicine specialist Dr. Gary Schuster, Doy had Stage 3 liver cirrhosis. 26 RP 145. That disease gave him *five years at most to live*, because "he would have had a 20 percent per year mortality, over a five year time frame." *Id.*

The trial court thought that this medical opinion was inadmissible under ER 403 (unfair prejudice) and ER 702 (expert testimony). That was wrong. As courts around the country have recognized, it is hard to imagine evidence that is more probative of a decedent's health and life expectancy. The upshot of the trial court's ruling was that the jury retired to deliberate

with only an incomplete picture of Doy's health and a one-sided characterization of his health—the opinion by the Coogans' expert Dr. Brodkin that Doy was "quite healthy before his illness with mesothelioma." 9 RP 153. Neither ER 403 nor ER 702 requires such a fundamental unfairness.

(a) Dr. Schuster's opinion should have been admitted.

(1) The opinion was admissible under ER 702.

Dr. Schuster's testimony satisfied both of ER 702's requirements. An expert opinion is admissible under that rule if "the witness qualifies as an expert and the testimony will assist the trier of fact." *Lakey*, 176 Wn.2d at 918–19 (citing ER 702). In this case, the trial court recognized that Dr. Schuster was a qualified expert, *see* 26 RP 165,[39] so that left only the question of whether his testimony would have assisted the trier of fact. The answer is yes. Dr. Schuster's opinion that Doy "had a stage 3 level of liver disease or cirrhosis" as of January 2015 (*see* 26 RP 145) spoke to his health, a key ingredient of life expectancy under the jury instructions. According to Dr. Schuster, the Stage 3 diagnosis meant that Doy's mortality rate would have increased by 20% every year from 2015 until it reached 100% in 2020. *Id.* at 145, 151.

Dr. Schuster's opinion was far from guesswork. It was rooted in the medical records of Doy's treating physicians, several of whom concluded

[39] For good reason. Dr. Schuster testified that it was "very common in internal medicine"—one of his areas of practice—to diagnose patients with cirrhosis, and that he was "very comfortable treating it." 26 RP 143.

that Doy had cirrhosis. As Dr. Schuster explained at an offer-of-proof hearing, the treating physicians' written observations backed up that diagnosis. Doy had: (1) "a nodular liver"—a liver with tumor-like growths—"on [a] CAT scan," *id.* at 147; (2) an enlarged spleen, *see id.* at 147, 163; (3) enlarged portal veins, *see id.* at 147, 163; (4) a fluid build-up in the abdomen called "ascites," *see id.* at 146-47, 163; and (5) a history of consumptionGP of between five and eight beers plus a couple of cocktails every day for many years, *see id.* at 155, 167. In Dr. Schuster's opinion, the presence of ascites is what earned a Stage 3 diagnosis instead of a Stage 2 diagnosis. *Id.* at 151. Dr. Schuster's opinion was plainly not the type of unreliable or speculative opinion that would have misled the jury rather than assisted it. *Cf. Lakey*, 176 Wn.2d at 918.

All told, by the time of trial, five physicians had concluded that Doy had cirrhosis. Two of them were Doy's treating physicians, who summarized their findings in four reports:

- Dr. Goodman's Diagnostic Imaging Report (Jan. 11, 2015). When Doy went to the hospital with complaints of abdomen pain, Dr. Goodman examined him and found a "[d]ecreased size of the liver…with nodularity consistent with changes of cirrhosis," and a "spleen enlarged at 14 cm." CP 13925. Dr. Goodman's "impression[s]" included "large amount of ascites" and "[a]ssociated cirrhosis and portal hypertension seen." CP 13926. Dr. Goodman reached these conclusions despite "findings of asbestos exposure" based on "[b]ilateral pleural thickening." CP 13925-26.

- Dr. Nudelman's Consultation (Jan. 11, 2015). Dr. Nudelman noted that Doy admitted drinking "maybe 5 to 8 beers daily and then a cocktail or 2 in addition for many years." CP 5918. Dr. Nudelman also explained that the "CT scan shows a nodular liver, portal

hypertension with varices, increased spleen, and ascites." CP 5919. Although Dr. Nudelman admitted that he was bothered by Doy's "normal liver function tests," he nonetheless concluded that Doy had cirrhosis. *Id.*

- Dr. Nudelman's Diagnostic Imaging Report (Jan. 12, 2015). After an ultrasound test, Dr. Nudelman's impressions were: "Patency of the portal vein," a "[m]oderate amount of ascites," and a "[r]educed size of the liver suggesting cirrhosis." CP 4721.

- Dr. Nudelman's Progress Notes (Jan. 28, 2015). During this follow-up session, Dr. Nudelman again noted that Doy had "a small cirrhotic liver." CP 13950. Dr. Nudelman's sole finding at that point was "[a]lcoholic cirrhosis of liver." CP 13951. He reached this conclusion even after observing that Doy's blood tests were normal. CP 13950.

In addition to Drs. Schuster, Goodman, and Nudelman, two other physicians—Drs. Godwin and Crapo—also thought that Doy had cirrhosis. The trial court disallowed any testimony on that subject. *See* 2 RP 99-100; 39 RP 85-86.

In cases such as this, the scales are weighted in favor of admitting the expert opinion. "Courts generally interpret possible helpfulness to the trier of fact broadly and favor admissibility in doubtful cases." *State v. King Cty. Dist. Court W. Div.*, 175 Wn. App. 630, 638, 307 P.3d 765 (2013). Dr. Schuster's opinion easily passed muster under ER 702.

(2) None of the trial court's four reasons for excluding the opinion is tenable.

The abuse-of-discretion standard is met here because the trial court issued "manifestly unreasonable rulings or rulings based on untenable grounds." *Lakey*, 176 Wn.2d at 918–19.

Reason 1. The court's first reason for excluding the opinion was based on a misunderstanding of Dr. Schuster's testimony about the relationship between a patient's blood tests and the stage of a cirrhosis diagnosis. According to the court, the medical literature (as explained by Dr. Schuster) shows that it was impossible for Doy to have had Stage 3 cirrhosis because his blood tests were at normal levels.[40] 26 RP 165-66. That was not Dr. Schuster's testimony. Dr. Schuster testified that "it's clear in the literature you can have normal liver function tests in the presence of stage 3 cirrhosis" and that "there is a significant group of people that can still have normal liver function tests *until you reach stage 4.*" *Id.* at 148 (emphasis added). Doy's bloodwork did not provide a reason for the trial court to discard Dr. Schuster's opinion. Nor did the trial court's misunderstanding of the medical literature.

Reason 2. The court's second reason involved an assessment of the merits of Dr. Schuster's opinion about the cause of Doy's ascites (a fluid built-up in the stomach). As the court put it, "[t]he ascites[,] I'm convinced based upon the medical information that has been promulgated so far, is the result of the peritoneal mesothelioma." *Id.* at 166. The court reached that conclusion in part by reasoning that Doy's "ascites did not develop, or at least were not discovered, until and contemporaneous with the discovery of advanced peritoneal mesothelioma." *Id.*

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[40] From this erroneous premise, the trial court further reasoned that Doy probably had only Stage 2 cirrhosis and that he could have lived "to the end of his normal life expectancy." 26 RP 166-67. That conclusion of course has no merit given that the court's premise—that a person cannot have normal blood tests at Stage 3—is false.

With all due respect, it was not the court's prerogative to make the medical finding that mesothelioma was the exclusive cause of Doy's ascites. When a trial court evaluates expert testimony, it acts as a gatekeeper, not a factfinder. *King Cty. Dist. Court*, 175 Wn. App. at 638. As our Supreme Court has explained, "[w]hen Washington courts have previously refused to admit expert testimony as speculative, admission hinges on the expert's *basis* for forming the opinion, not on the expert's *conclusions*. When an expert fails to ground his or her opinions on facts in the record, courts have consistently found that the testimony is overly speculative and inadmissible." *Volk v. DeMeerleer*, 187 Wn.2d 241, 277, 386 P.3d 254 (2016) (emphases added).

Dr. Schuster's medical opinion—that the ascites were attributable to both Doy's cirrhosis and his mesothelioma (26 RP 160)—was grounded on facts in the record. Although Dr. Schuster acknowledged that Doy's ascites were caused in part by mesothelioma, he explained that they were also caused by Doy's "liver dysfunction": "[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." *Id.* Dr. Schuster further explained that Doy's enlarged spleen would be expected to contribute to ascites. *Id.* at 147. It was not the trial court's charge to discard Dr. Schuster's opinion by finding as a factual matter that Doy's ascites were caused exclusively by his mesothelioma. *Cf. Reese v. Stroh*, 128 Wn.2d 300, 309-10, 907 P.2d 282 (1995) (reversing trial

court's exclusion of expert testimony and reasoning that "[a] jury can certainly evaluate the foundation for [the expert's] opinion").

It was up to the jury (and the jury alone) to assess Dr. Schuster's credibility when weighed against any contrary opinion by an expert that the Coogans might have called. The trial court's personal view about whether Dr. Schuster's opinion was right or wrong had no bearing on whether the jury was entitled to hear that opinion. The court overstepped its authority by deciding a fact issue and using that decision as a basis to exclude evidence.

Reason 3. The trial court's third reason for excluding the opinion was that none of Doy's treating physicians had "affirmatively testified that Mr. Doy Coogan suffered from cirrhosis of the liver." 26 RP 166. GPC was under no obligation to call the treating physicians at trial. Nor did it matter to the admissibility of Dr. Schuster's opinion that he was not a treating physician. "An expert's testimony not based on a personal evaluation of the subject goes to the testimony's weight, not its admissibility." *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 357, 333 P.3d 388 (2014); *Bolson v. Williams*, 181 Wn. App. 1016, 2014 WL 2211401 at *5 (2014) (unpublished).[41]

Reason 4. The court's fourth and final reason for excluding the opinion was that "the information related to alcohol use"—presumably a reference to both Dr. Schuster's opinion about cirrhosis and observations in

[41] The reason that Dr. Schuster never examined Doy's liver tissue was that the Coogans did not give GPC notice of his death until 19 days after he passed. 4 RP 8-9. He had been cremated in the meantime.

the medical records—was unduly prejudicial. 26 RP 167; *see also* 2 RP 97, 19 RP 138. But courts around the country regularly conclude that reliable evidence of alcohol use is admissible when the jury instructions put life expectancy at issue.[42] The "information related to alcohol use" was admissible.

But another fact makes the ruling even less defensible. During a motion-in-limine hearing, counsel for defendant J-M proposed an eminently reasonable workaround for the potential prejudice associated with evidence of alcohol use. 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." 2 RP 98-99. That workaround would have allowed the defense to elicit highly probative testimony that Doy was in poor health and that his life expectancy was short, while simultaneously protecting the Coogans against the prejudice associated with words like "alcohol," "drinks," "beer," or "cocktails."

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[42] *See, e.g.*, *Blaque v. Chestnut Hill Hosp.*, No. 2382 EDA 2016, 2017 WL 1204998, at *9 (Pa. Super. Ct. Mar. 31, 2017) (evidence of continued alcohol use after cirrhosis diagnosis relevant to life expectancy and admissible); *Fife v. Bailey*, No. CV 3:14-1716, 2016 WL 1404202, at *2 (M.D. Pa. Apr. 11, 2016) (evidence of alcohol and drug use is relevant to life expectancy and admissible); *Stocki v. Nunn*, 2015 WY 75, ¶ 55, 351 P.3d 911, 928 (Wyo. 2015) (holding 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"); *Morris v. Long*, No. 1:08-CV-01422-AWI, 2012 WL 1498889, at *2 (E.D. Cal. Apr. 27, 2012) (evidence of excessive alcohol use admissible because evidence is relevant to plaintiff's work-life expectancy); *Masello v. Stanley Works, Inc.*, 825 F. Supp. 2d 308, 324–25 (D. N.H. 2011) ("A decedent's history of substance abuse is relevant to the issue of damages where there is evidence of its effect on probable life expectancy."); *Coker v. BNSF Ry. Co.*, No. CIV-07-1101-M, 2008 WL 11336698, at *3 (W.D. Okla. Nov. 5, 2008) (same); *Oxford v. Hamilton*, 297 Ark. 512, 515, 763 S.W.2d 83, 85 (1989) ("evidence of the appellant's [alcohol] habits was useful and even necessary to assist the jury in determining his life expectancy").

The trial court was wrong to rule that evidence of Doy's alcohol use alone gave reason to exclude Dr. Schuster's testimony, and it was doubly wrong to ignore the defense's suggested compromise.

(b) The error was prejudicial.

The erroneous exclusion of this evidence was plainly prejudicial. An exclusion is prejudicial if the appeals court cannot know "what value a jury may [have] place[d] on improperly excluded evidence." *Driggs v. Howlett*, 193 Wn. App. 875, 903, 371 P.3d 61 (2016). The jury here was instructed that damages are based in part on life expectancy and that life expectancy is based in part on health. 47 RP 120-21. That instruction also referenced a life-expectancy table, which suggested that "the *average* life expectancy of a man age 67 years"—Doy's age at the time of death—is 15 years. *Id.* at 120 (emphasis added). The trial court barred GPC from presenting evidence that Doy was in unusually poor health, that he had advanced liver cirrhosis, and that he had no more than five years left to live.

When the jurors retired to deliberate, they had only one side's opinion of Doy's health. The Coogans introduced that opinion first in opening statements, when they asserted that Doy "was incredibly healthy [in 2015], still working." 6 RP ("Opening Statements") 6. Their expert Dr. Brodkin soon testified to the same effect: "In Mr. Coogan's case, he was quite healthy before his illness with mesothelioma." 9 RP 153. And the Coogans hit that same idea repeatedly in closing, arguing that Doy "didn't do any wrong here, but he has lost 15 years of his life, the best years," *see* 47 RP 127; "people that work every day like [Doy] did live on average 15

years. And that was taken away from him. These are things that no one disputes,"[43] *see id.* at 128; and last but not least, "the bottom of that range for *15 years of life lost* should be 30 million dollars at the least," *see id.* at 190 (emphasis added).

The Coogans' loss-of-consortium case was built on fifteen years of lost life. Dr. Schuster would have told the jury that Doy would have lived no more than five. The latter evidence was kept away from the jury, so it used only the former when calculating the $50 million in loss-of-consortium damages. The trial court abused its discretion in excluding the evidence. This error by itself warrants a new trial.

2. The trial court abused its discretion by excluding evidence related to Doy's most significant occupational exposure.

The trial court also unfairly hamstrung the defense by precluding evidence of Doy's alternative occupational exposure from Wagstaff, Inc. Wagstaff was a bad place to work when it came to asbestos-related diseases. Doy worked there in the late 1960s and was living proof of that fact. So were five other Wagstaff workers, all of whom contracted asbestos-related diseases after working at Wagstaff's Spokane plant during the late 1960s and early 1970s, and all of whom submitted workers' compensation claims to the company identifying an exposure during that time period.

[43] It is of course false that "no one disputes" that Doy would have lived another 15 years. The whole point of Dr. Schuster's testimony was to show that Doy would not have lived nearly that long.

GPC tried to submit those claims as evidence that Wagstaff, rather than the friction defendants, was responsible for Doy's mesothelioma. *Cf.* Ex. 199. The surprising fact is that the trial court excluded the claims on *relevance* grounds. That was an error of the highest order. The claims spoke directly to the key causation issue of whether Doy contracted mesothelioma from his thirteen months at Wagstaff's plant.

(a) The asbestos-related workers' compensation claims were relevant to causation.

The five workers' compensation claims were relevant to the cause of Doy's mesothelioma because they strongly suggested that Wagstaff—rather than the friction defendants—was the causative exposure. It is not hard to see how. Wagstaff employed only about 40 employees and was in the business of manufacturing aluminum-casting equipment using asbestos boards. *See* 44 RP 73-74; 43 RP 43-44. Doy worked there as a "mechanic specialist" in 1968 and 1969. *See* Ex. 111 at 2 (Social Security records); Ex. 193 at 3 (union records) *see also* 19 RP 150. He was also a member of the "Machinists Union No. 86." Ex. 193 at 2. Testimony from Dr. Robbins—an industrial hygienist—indicated that the job of machinists such as Doy often involved "drilling and cutting and shaping of [the company's products]." 43 RP 40-41. Dr. Robbins went on to say that "there is a potential for a large amount of dust."[44] *Id.* at 41.

[44] GPC sought to introduce declarations from two former Wagstaff employees, which said that machinists during this time period manipulated the asbestos boards and were "caked in white dust." The trial court excluded those declarations on the basis that they were untimely. 19 RP 175-76.

The relevance of the five workers' compensation claims to Doy's case could hardly be more straightforward. The claims showed a cluster of asbestos-related diseases at a small facility during the same time Doy worked there. All five documents showed that the claimants' exposures at the Wagstaff plant occurred in the late 1960s and early 1970s (just like Doy). *See* Ex. 199. All of the claims showed that the claimants worked with asbestos-containing boards during that time (just like Doy). And all of the claimants developed either mesothelioma or asbestosis (just like Doy).[45]

Those claims made it all the more likely that Wagstaff was responsible for Doy's disease as well. According to the Coogans' expert, chances of contracting peritoneal mesothelioma in the general population are 0.0000002 to 0.0000003, while chances of contracting pleural mesothelioma are around 0.000001. 7 RP 135-36. Not so at Wagstaff. The workers' compensation claims showed that three out of 40-odd workers at Wagstaff in the late 1960s and early 1970s contracted mesothelioma (for a risk percentage of about 0.075), while two out of 40-odd workers contracted asbestosis (a disease that the Coogans' expert testified requires "longer periods of exposure" than mesothelioma, *see id.* at 123).

The trial court's ruling was particularly problematic because Wagstaff's boards were 40% amphibole asbestos, the type of fiber that the Coogans' experts agreed was (i) more dangerous than the chrysotile in the products that GPC distributed and (ii) responsible for the significant majority of cases of peritoneal mesothelioma. *See* 8 RP 48, 158-61; 34 RP

[45] Two of the claims included detailed medical findings. *See* Ex. 199 at 3, 19.

33, 37-38; 43 RP 31, 44. The upshot for GPC's defense was that if five men contracted asbestos-related diseases from an amphibole exposure at Wagstaff, the jury would have been more inclined to find that Doy's mesothelioma was attributable to that same exposure and not to the alleged chrysotile exposure to friction products.[46]

(b) The trial court acted as factfinder (for a second time) rather than gatekeeper.

As with Dr. Schuster's testimony, the trial court did the jury's job for it. The court held that the workers' compensation claims were not relevant, reasoning that the defendants had not presented sufficient proof of the similarity of exposures suffered by Doy and the Wagstaff claimants. *See* 19 RP 198; 20 RP 6-7. The court later elaborated that its ruling centered on "the lack of specificity concerning what Mr. Doy Coogan was doing [at Wagstaff]." 20 RP 9.

All of those observations are well and good for jurors to think about, but they have no bearing on the relevance inquiry. "Evidence is relevant if it has '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." *State v. Luvene*, 127 Wn.2d 690, 706, 903 P.2d 960, 969 (1995) (quoting ER 401). *Any tendency*. The workers' compensation claims were not even close to that line. The five claims plainly had a tendency to make

[46] GPC explained as much in a response to the Coogans' motion in limine on the issue: "This evidence is extremely relevant as it shows Defendants' products did not cause Jerry Coogan's disease." CP 6604-05.

it "more probable" that Doy's peritoneal mesothelioma was attributable to Wagstaff rather than the friction defendants.

The court reached the opposite conclusion by pointing to a distinction between the two buildings in Wagstaff's facility, the "machine shop" and the so-called "marinite building." 19 RP 193-94; *see also* 43 RP 126-27. The marinite building was where workers cut the 4 foot by 8 foot boards, where two or three machinists worked, and where the asbestos exposure was more significant. *See* 19 RP 155, 180. The machine shop was a larger building next door.[47] As the trial court saw things, because neither party presented evidence that Doy worked in the marinite building and because all five of the workers-compensation claimants might have worked in that building, it was possible that Doy had an entirely different exposure at Wagstaff than the claimants. *See, e.g.*, 19 RP 194 ("I don't see that the evidence related to these claimants who may have all worked with their nose right in the asbestos for years, drilling and otherwise manipulating it, is particularly salient to what happened to Mr. Coogan."); *see also* 20 RP 8-9 (same); *id.* 11–12 (same); *id.* at 15 (same).

That reasoning has multiple problems. To begin, although the trial court's observations might have been proper subjects of cross-examination by the Coogans, proper topics in an opposing industrial hygienist's report, and proper for the jury to consider, they were not properly the basis of a ruling on *relevance*. CR 12(i) allows parties to present an affirmative defense of non-party fault. *See also Nolan v. Weil-McLain*, 233 Ill. 2d 416,

[47] The two buildings were about twenty feet apart. 43 RP 126-27.

444, 910 N.E.2d 549, 564 (2009) (trial court should not have excluded defense evidence that non-party was responsible for the decedent's mesothelioma). That is what GPC tried to do. It was not the trial court's role to poke holes in GPC's defense and then use that hole-poking exercise as a basis for declining to admit the workers-compensation evidence.

There are other problems with the court's reasoning, too. Because only two or three employees worked in the marinite building, *see* 19 RP 155, the chances are slim that all five of the workers' compensation claimants worked there and were exposed in that capacity. The chances are even slimmer considering that the claimants had four different job titles, including "machinist" (two claimants), "technical service" (one claimant), "assistant technician" (one claimant), and "co-owner" (one claimant). *See* Ex. 199 at 1, 2, 9, 18, 24. And the chances are slimmer still considering that one of the claimants co-owned the business and in all likelihood was not one of the two or three machinists in the marinite building. *Id.* at 24.

What is more, workers like Doy could have contracted asbestos-related diseases even if they did not work in the marinite building. First, there was evidence that Doy was a machinist (the same job title as two of the workers' compensation claimants), that machining involves drilling, cutting, and manipulating things, and that Wagstaff was in the business of using asbestos boards to make equipment. 43 RP 40-41. Second, there was evidence that workers throughout the Wagstaff plant were exposed to a drift exposure by virtue of asbestos fibers floating to the machine shop from the marinite building. 43 RP 128-30.

The trial court had no good reason for speculating that the five workers' compensation claimants might have all worked in the marinite building. The court had even less of a reason to conclude that based on that speculative premise, the workers' compensation claims were not relevant to causation here. The trial court abused its discretion by excluding on relevance grounds evidence that plainly met the low standard for relevance. This evidentiary error is as serious as it gets and warrants a new trial.

VI. CONCLUSION

The Court should reverse the trial court's judgment denying GPC and NAPA's motions under CR 59 and 60. It should then remand the case for a new trial and instruct the trial court to permit GPC and NAPA to conduct discovery regarding the extent of the Coogans' and their counsel's misconduct vis-à-vis the newly discovered evidence.

Respectfully submitted this 17th day of October, 2018.

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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 17th day of October, 2018.

Patti Saiden, Legal Assistant

APPENDIX A

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

---------- File No. 62-CV-16-3232

Delvin Edward Domagala and
Eileen Rose Domagala

Plaintiff,

vs.

3M Company, et al.,

Defendant.

ROUGH DRAFT

TRANSCRIPT OF PROCEEDINGS

12/09-16 - PM SESSION

The above-entitled matter came duly on for hearing before the Honorable John H. Guthmann, Judge of District Court, on the 9th day of December, 2016, City of St. Paul, State of Minnesota.

APPEARANCES:

JESSICA DEAN, ESQ., AARON CHAPMAN, ESQ., and RYAN GOTT, ESQ., appeared on behalf of Plaintiffs.

SUSAN M. HANSEN, Esq., MICHAEL W. DRUNKE, Esq., and ADAM H. DOERINGER, Esq., appeared on behalf of Defendant Georgia-Pacific.

LISA M. ELLIOTT, ESQ., and TREVOR J. WILL, ESQ., appeared on behalf of Defendant Certainteed Corporation.

JON P. PARRINGTON, ESQ., and DANIEL R. GRIFFIN, ESQ., appeared on behalf of Defendant John Crane, Inc.

* * * * *

1 (December 9, 2016) (Approx. 1:30 p.m.)
2 THE COURT: All right. I've been advised that
3 motions -- a couple defendants, all of them, want to
4 bring motions.
5 Who wants to go first?
6 MR. DRUMKE: I'll start I guess. Michael
7 Drumke on behalf of Georgia-Pacific. Georgia-Pacific
8 moves for a mistrial, and we don't make this motion
9 lightly.
10 However, in plaintiff's opening, she violated
11 three motions in limine that were explicit by this court.
12 The first was reference to a ban, which is something that
13 occurred well after 1967.
14 THE COURT: When did it occur?
15 MR. DRUMKE: Well after Georgia-Pacific stopped
16 using asbestos in its product, which makes it
17 particularly egregious. There was as consumer product
18 safety commission ban of consumer spackling products.
19 There's some debate about whether that actually applied
20 to the products that Georgia-Pacific sold, but that would
21 have been in 1978.
22 THE COURT: Georgia-Pacific stopped when?
23 MR. DRUMKE: 1977. But, of course, that's a
24 full decade after the events that are relevant in this
25 case. The prejudice with that particular comment is a

ROUGH DRAFT

1 difficult bell to unring.
2 There was another comment that Ms. Dean made
3 about plants. And we approached and Ms. Dean sought to
4 cure that comment by saying she misspoke, that she didn't
5 mean to say that those were the defendant's plants,
6 although she did name us.
7 The idea that joint compound was banned,
8 however, has now been put in the jury's head. And I'm
9 not sure, other than an instruction from the court, that
10 there is no such ban, period, how you really could
11 possibly cure that.
12 The second motion in limine that was violated
13 was, of course, about plant conditions. Ms. Dean made an
14 attempt to cure that. But, again, the inference was made
15 to the jury that workers, not only at my client's plants,
16 but at the other defendants' plants, were getting sick
17 somehow, and we were covering that up or not telling
18 people about it because we had information that there
19 were people getting sick from being around asbestos at
20 our plants. There is no such information particularly in
21 that timeframe, and Ms. Dean knows that full well.
22 Georgia-Pacific bought the Bestwall -- acquired
23 the Bestwall company at the end of April 1965. The
24 events in this case end in 1967. There is not a single
25 workers compensation case or claim and report of a worker

1 getting sick coming out of Bestwall or the
2 Georgia-Pacific prior to 1967, at least with regard --
3 particularly with regards to asbestos.
4 The last issue is -- and the court was very
5 explicit about the idea of substitutes and post-remedial
6 measures and discussions about the same. That is -- it
7 was a clear motion and ruling -- a clear ruling by the
8 court. It is also Hornbook law, tort law, that
9 post-remedial measures are not relevant. And Ms. Dean
10 certainly, if she had any confusion whatsoever about this
11 court's order, should have asked for guidance. We have
12 been through four days of pretrial proceedings, Your
13 Honor, as you're well aware. We have discussed any
14 number of things, down to in terms of phrases and
15 PowerPoints.
16 If there was some question in her mind about
17 whether or not issues post-'67 were allowable, she ought
18 to have approached Your Honor to have sought guidance.
19 She did not do that. Now the jury thinks that the
20 product that we made somehow could have been made safer
21 much earlier in time, because she has planted that seed
22 in their heads.
23 So, three different instances, three different
24 motions in limine, three clear violations. Our
25 objections were made. The objections were sustained.

1 If this is how the case is going to proceed, I
2 think we're in for a long haul. We're going to have a
3 lot of problems. But I'm most concerned about the fact
4 that these seeds have been planted with the jury now, and
5 it's not clear to me really how any of it can be cured,
6 particularly in the cumulative nature of what was done.
7 THE COURT: Okay. Who wants to go next?
8 MR. GRIFFIN: John Crane, Incorporated, would
9 join the motion for mistrial. But I did want to just
10 address one issue that was slightly different, just due
11 to the timeframe involved for John Crane, Inc.
12 Although I do think it's still violated the
13 motion in limine, we had passed on any argument about
14 workers compensation records, as you recall, until later
15 in the case, until the page and line issues. I just
16 wanted to bring that up in all candor to the court. That
17 was issue that was passed for John Crane, Inc., as it
18 relates to, you know, factory conditions, things of that
19 nature.
20 THE COURT: What about the material safety data
21 sheet issue?
22 MR. GRIFFIN: As in -- I don't think that was
23 impacted by the comments that counsel made.
24 THE COURT: About the mesothelioma, you made an
25 objection?

ROUGH DRAFT

1 MR. GRIFFIN: I'm sorry, Your Honor. Yes.
2 Counsel did make one suggestion to the jury that John
3 Crane, Incorporated, put on its own material safety data
4 sheets that chronic overexposure to asbestos would result
5 in mesothelioma.
6 We talked about that during the pretrial as
7 well. Yes, there are material safety data sheets from
8 1981 forward that cite to lung cancer -- or, rather, just
9 cancer -- and asbestosis as being a potential result of
10 chronic overexposure to asbestos but not for
11 mesothelioma. That was the objection. Thank you, Your
12 Honor.
13 THE COURT: Okay. Certainteed?
14 MR. WILL: Your Honor, I would join in the
15 motion. Certainteed was involved in the comment about
16 worker injuries in plants. There is no evidence of that.
17 That was supposed to be excluded.
18 Also I objected to the comment about the due
19 diligence that supposedly went on. Your Honor overruled
20 the objection. My point was not to what information
21 about asbestos health hazards may have been communicated
22 from (inaudible) or one of its parents. It was the
23 suggestion that all of these lawyers and people doing
24 this deal had investigated and found out all of this
25 information about asbestos health hazards. And there is

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1 absolutely no evidence of that anywhere in this case. It
2 was improper to do. And it poisons the mind of the jury.
3 Thank you, Your Honor.
4 THE COURT: All right. Response?
5 MS. DEAN: Yes, Your Honor. In the order they
6 came up.
7 The first ruling that the court gave was
8 sustaining the objection about a U.S. been a relating to
9 joint compound. We argued foreign bans. We talked about
10 them mainly in the context of brakes. They had an entire
11 motion on CPSC ban that they didn't have heard. This has
12 nothing to do with liability; everything to do with
13 causation.
14 The context in which I brought it up, our
15 response to our motion is this is even stronger than the
16 EPA Gold Book. It is a Consumer Product Safety
17 Commission document, which I can show the court, with
18 medical findings and epidemiology, industrial hygiene and
19 biology, finding an unreasonable dangerous condition from
20 the particular product at issue. It's all about
21 causation.
22 Our briefing indicates that it would be relied
23 on at or before trial. Because of the dates of exposure
24 in this case, it has nothing to do with notice. Like,
25 for instance, the EPA Gold Book, the court ruled, because

1 Ford actually asked that to be heard. The Gold Book in
2 this case was '86. It had nothing to do with the date of
3 exposures, but it was a reliance material at or before
4 trial.
5 THE COURT: You're talking about your argument
6 that Georgia-Pacific specifically experienced a ban, not
7 that there was a ban anywhere else. The objection was
8 that you argued that Georgia-Pacific's product was
9 banned. Speak to the issue.
10 MS. DEAN: The context I recall it coming in
11 was in the section of my opening on causation on how
12 unreasonably dangerous it can be, and that joint compound
13 may be referenced as Georgia Pacific's product, but joint
14 compound's ban --
15 THE COURT: You were talking about notice and
16 liability. You weren't talking about causation. I'm
17 looking at your argument right now. The '20s, the '30s
18 these companies knew.
19 MS. DEAN: In terms of when it was first
20 discussed and overruled early on is when I explained how
21 the product worked, and that four times could be
22 sufficient, and as a result, it was banned. And my whole
23 outline that it came in, it is identifying the four
24 products and the harms --
25 THE COURT: The issue is whether you violated a

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1 motion in limine by telling the jury that
2 Georgia-Pacific's product was banned.
3 MS. DEAN: Because it's unreasonably dangerous.
4 And I believe that, first, that motion which they had and
5 did not come forward on, but, more importantly --
6 THE COURT: What do you mean had and didn't
7 come forward on?
8 MS. DEAN: They had an entire motion in limine
9 on Consumer Product Safety Commission that was not heard
10 that -- there was no discussion of it coming in. In
11 fact, I've indicated -- I was going to talk about it
12 because I think it's one of the most powerful causation
13 pieces of documents that exist because it goes into the
14 different fields of science and why they banned it.
15 So I intended, before you sustained their
16 objection, to explain that why, even though
17 Georgia-Pacific's product had lower levels of dust put
18 into the air, for instance, in Certainteed pipe, that it
19 was banned because it's in a home environment where it
20 keeps coming up over and over again.
21 That is testimony, from everything I understand
22 from your rulings, as long as I can lay the foundation,
23 that that's scientific regulatory article was reviewed
24 and relied on at or before trial, it comes in as a
25 learned treatise. It's something I wanted to preview in

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1 much more detail than what I was allowed.
2 When I heard the court's instruction, I moved
3 on and didn't argue the point. But this is directly
4 related, in my mind, to causation. The only subject when
5 something similar came up was or foreign bans which
6 wasn't even related to this. And, conceptually, I can
7 see why some of the issues are interrelated, but this one
8 is much more akin to EPA, Gold Book, 20 years
9 post-exposure you allowed it in.
10 THE COURT: Right. But by the time the product
11 was banned, Georgia-Pacific wasn't distributing that
12 product.
13 MS. DEAN: So if Georgia --
14 THE COURT: Because they voluntarily removed it
15 from the market. Do you dispute that?
16 MS. DEAN: I don't recall the timeline. I know
17 that there is a different date for when you can't
18 manufacture versus when you can't sell. One's in June
19 and one's in January.
20 THE COURT: Of what to year?
21 MS. DEAN: '77 to '78. But my statements to
22 the jury that Georgia-Pacific's product meant to
23 indicate, and certainly does indicate, joint compound.
24 The idea that I was specifying a particular company's
25 joint compound, I don't think is the import of it. It's

1 certainly not why I understood them to make the
2 objection. I thought they were complaining the foreign
3 ban issue with the statute that's relied on for
4 causation, understood that it's something I could clarify
5 later and moved on. But I don't believe that anything
6 that was stated there wouldn't be permissible. That it's
7 an improper preview of the evidence. That if I'm wrong
8 in it coming in, that that's not something that is easily
9 handled -- I don't think I'm going to be wrong about it
10 coming in. I mean it is a fundamental reliance piece for
11 even their own expert. Dyson is their industrial
12 hygienist relies on it and has referenced it.
13 It didn't warrant I thought having a side
14 conference, but I don't believe there was a violation.
15 THE COURT: Mr. Drumke, when you do your
16 rebuttal, I'd like you to address specifically which
17 motion in limine order you claim that that particular
18 argument violated, to the extent Georgia-Pacific is
19 disputing causation with regard to its product generally,
20 not as to Mr. Domagala specifically, which is a different
21 issue.
22 But whether you concede or not that enough
23 exposure to Georgia-Pacific's joint compound could cause
24 mesothelioma.
25 Do you understand the distinction I'm making?

1 MR. DRUMKE: I believe so, Your Honor.
2 THE COURT: That would relate to a credibility
3 or impeachment type argument that you're denying that
4 your products could possibly cause asbestos-related
5 disease. Sort of like the friction companies argue that
6 encapsulated asbestos that's chrysotile can't cause
7 mesothelioma versus Georgia-Pacific joint compound in a
8 sufficient quantity can, but we just dispute that there
9 was any exposure or that it was sufficient in this
10 particular case. Two different things. I'm trying to
11 get an idea of what position you're taking. Just so I
12 have the motion clearly in mind.
13 Go ahead.
14 MS. DEAN: From my firsthand experience with
15 both Dr. Graham and Mr. Henshaw, they explicitly indicate
16 a very, very similar analysis than what you've heard.
17 They do a lifetime exposure -- they claim you can work
18 day in and day out for a hundred years as a professional
19 drywaller and it wouldn't contribute let alone
20 significantly contribute to the risk of the disease.
21 In other words, there is not a -- this is too
22 attenuated of an exposure. Lifelong drywallers, even if
23 they live four times longer than a normal human being,
24 don't even approach the risk.
25 The second issue that was brought up where the

1 court sustained the objection was on manufacturing. For
2 context, in reviewing the opening slides from
3 Certainteed, their explanation -- or at least as I
4 perceived it -- of the 1964 documents that reference
5 extensive knowledge about the hazards of asbestos is that
6 they thought that those -- the reason they were tracking
7 them, the reason they were sending Lee Horowitz to them
8 -- I may have the first name wrong -- was because they
9 were concerned about manufacturing conditions, which they
10 regulated, and not as to their plants -- I mean to their
11 products.
12 They also had slides that looked at that just
13 basically said early knowledge were about high exposures
14 in different contexts. My intent was to discuss the fact
15 that one -- they still talked about end users earlier on
16 and, second, that those other scenarios still provide
17 probative information.
18 I understand, I haven't been able to look at
19 the transcript, but your reaction was the same as defense
20 counsel, that there was an implication that there were
21 particular defendants' plants. I immediately corrected
22 that. That's not my intention. I'm not aware of any of
23 those plants having an analysis done in early studies.
24 But what you will see in friction plants, textile plants
25 -- I think there's a dozen different manufacturing

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1 facilities in the '40s and '50s that started being the
2 area of concern. And that's what is being referenced, in
3 part -- I think they argue too far -- in Selikoff's 1964
4 analysis. And my point was it also mentions end users.
5 And even then, that triggers a reason for the test.
6 It was not to talk about the plant conditions
7 or analogize them to end users. To the extent that it
8 was perceived or I stated in a way I did not intend, that
9 is an easy thing to rectify. The court told me how to.
10 I made it very clear it wasn't about the defendant's
11 plants, nor do I ever indicate -- plan to indicate or
12 insinuate that.
13 As to the last issue of feasibility, which was
14 already discussed somewhat at length, if we -- I hear the
15 court loud and clear about its ruling and the violation
16 of the motion in limine. What was stated to the jury was
17 an incomplete sentence that did not discuss date. It
18 doesn't at all. If I can't change the court's mind that
19 this goes specifically to feasibility, that it should
20 come in, all that they've heard is that once they started
21 making the effort to change it, they couldn't. And I
22 didn't even complete that thought. Not that that
23 happened in '74, not that they continued to sell for
24 another six years, nothing.
25 What they deduced from that statement is not

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1 something a juror could or did deduce. It wasn't said.
2 I still intend to prove by '66 and '67 -- because there's
3 a lot of documents to this -- that the substitute that
4 they had later was available now. If I have to take out
5 the later and just say, here's the type of materials that
6 were available then, I can figure out how to do that.
7 But there is nothing, despite the court's clear
8 indication that they believed I should have realized and
9 shouldn't have gone into it. There was nothing actually
10 stated to the jury that could not be cured. I don't even
11 think there needs to be a cure. Nothing post-exposure
12 ever got articulated at all. If you don't know the date
13 that they actually did a substitute, that --
14 THE COURT: (Reading from a partial
15 transcript.) Once they put their mind to finding
16 something else to do the same thing, is what you said.
17 MS. DEAN: Right. And for John Crane --
18 THE COURT: Everything that is references
19 there: Once they -- once they put their mind to
20 something else to do the same thing, that all happened
21 after the exposure, everything described in your
22 statement.
23 MS. DEAN: Which we know and they don't. In
24 other words, my point is --
25 THE COURT: Well, they do now because you just

1 told them.
2 MS. DEAN: I don't think that can be deduced
3 from there. What I said about Certainteed and John --
4 THE COURT: That's the only thing that can be
5 deduced from that. There is nothing else that can be
6 deduced from that.
7 MS. DEAN: When it's not tied to a timeline --
8 THE COURT: It's tied to the future.
9 MS. DEAN: I don't even know from what point in
10 time. Once they decided to take it out, they could.
11 THE COURT: Once they decided to take it out,
12 they could. And the only time that was or could be --
13 not could be, the only time it was was after the
14 exposure. We all know it. So you've injected
15 post-exposure evidence in front of the jury. There is no
16 other interpretation that can be made, because the
17 reference is to something we all know is out of the case.
18 MS. DEAN: My point is that once they set their
19 mind to it, could have as easily been in December of '66
20 as February of '67 to June of '68.
21 THE COURT: But that's a fiction that can't
22 ever be shown because you know it never happened.
23 MS. DEAN: But if I --
24 THE COURT: Because you're referring to
25 something that did happen. Your argument that you would

1 like to make is about something that could have happened.
2 What you actually said was something that did happen.
3 And we all know that it happened after the exposure.
4 MS. DEAN: What we're looking at is something
5 that cannot be cured with a curative instruction, the way
6 to handle it -- and if I'm prohibited -- and I have real
7 hopes I can convince the court on feasibility once I
8 brief the issue -- that's going to be in. But even if it
9 doesn't, the evidence that I believe the jury would hear
10 is in the '66 - '67 timeframe that --
11 THE COURT: If they admit it's feasible, and we
12 haven't even gotten there, then post-exposure evidence
13 still stays out.
14 MS. DEAN: Right.
15 THE COURT: Right.
16 MS. DEAN: But then they still hear that --
17 THE COURT: But that doesn't have anything to
18 do with this issue (indicating).
19 MS. DEAN: But what was being discussed to the
20 jury with a PowerPoint behind me saying design defect
21 with a ship is -- was there something out there that
22 didn't involve asbestos? So if they admit that and they
23 hear that or if I show it without context to when or if I
24 convince the court on feasibility, any of those three
25 scenarios, the idea that --

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1 THE COURT: That's when you could mention it
2 for the first time.
3 MS. DEAN: Huh?
4 THE COURT: That's when you're able to mention
5 it for the first time. That's why they didn't object to
6 the ship. That's why they didn't object to all the other
7 stuff you said. They only objected to this (indicating).
8 MS. DEAN: Understood. And I heard the court's
9 order. I'm just saying without context of what that
10 means, I can't see how that single sentence that isn't
11 identified to a timeframe, it's not that, oh, they still
12 sold asbestos in the '90s. There's nothing that it's
13 tied to. Particularly if feasibility is not disputed or
14 a scenario where I still can show that they could find a
15 substitute during that time frame, how that warrants a
16 mistrial.
17 I understand why it has raised concerns with
18 the court that I need to be more clear about what the
19 rulings are and follow them. I heard that loud and
20 clear. I went back and looked at the motion. But I
21 don't see how that warrants a mistrial for a partial
22 sentence that wasn't put into time, where the two
23 scenarios that I see are either an admission of
24 feasibility or some kind of evidence that are relevant to
25 the '67 - '66 timeframe about feasibility.

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1 Certainly, with Minnesota law on the importance
2 of a curative instruction, I think that at most is what
3 is needed.
4 Workman's comp, I didn't understand that
5 argument. The only time that discussion of workman's
6 comp came -- and I don't think there was an objection --
7 was in the actual articles from Certainteed that they
8 went to a conference where they were discussing the fact
9 that certain countries were regulating asbestos all the
10 way back in 1931, and new states were starting to have
11 workman's comp law. It wasn't about workman's comp
12 claims for any particular defendant, lawsuits for any
13 particular defendant. Knowledge, which is what the court
14 told me, if it's relevant to knowledge beforehand and not
15 knowledge of their own, but just that these state
16 regulations were coming about. I didn't hear an
17 objection. I don't see how that is of concern. But
18 maybe I misinterpreted --
19 THE COURT: No. I think the reference and
20 argument just now to worker's comp is a reference to the
21 implication -- it references the argument that -- excuse
22 me -- it references the objection that was made that you
23 told the jury that studies were made of Certainteed and
24 Georgia-Pacific employees. And the agreement that was
25 made -- John Crane -- and the agreement that was made,

1 that you weren't going to mention that in opening
2 statement, which is actually separate from the reason I
3 sustained the objection. I sustained the objection on a
4 slightly different basis. But there was an agreement
5 that you weren't going to mention any factory medical
6 conditions caused by asbestos until later in case at the
7 page and line phase. That goes to John Crane.
8 MS. DEAN: I thought they were -- I thought he
9 was trying to bring up my reference to actual workman's
10 comp. Now understanding that that dovetails back into
11 the second, that when I was referencing that, that was to
12 talk about the timeline of the groups that were studied.
13 To the extend I misspoke, I was required to rectify it.
14 That was not intended, nor do I believe, that there were
15 even studies, let alone findings, in those plants. It
16 was rather to address the issue that the reason they had
17 to be concerned is 'cuz they were making this stuff in
18 plants. And the idea that that doesn't translate to
19 wanting to do tests for their products doesn't make
20 sense.
21 THE COURT: Right. And if you had simply said
22 that Certainteed's document following the 1964 conference
23 referenced possible concern about employees in plants,
24 you wouldn't have gotten an objection, because that's
25 what it says.

1 MS. DEAN: And this is meant be much more --
2 THE COURT: Mr. Will, you're nodding. Did I
3 get that right?
4 MR. WILL: You did, yes, Sir.
5 MS. DEAN: This discussion was not just in
6 relation to a single document, but to dozens of documents
7 on the state of the art and kind of a chain of what
8 information came.
9 THE COURT: Right. But there is a difference
10 between saying we're concerned about our workers, we
11 better check into it, and our workers are getting sick.
12 And you made the argument, well, we better look into it,
13 and they never did anything in 1965. They never did
14 anything in '66. They never did anything in '67. You
15 didn't draw an objection because you were accurately
16 describing what the evidence was going to show.
17 MS. DEAN: When the court indicated that you
18 heard what they heard -- and I really say this because
19 it's not what I intended to say -- that I was implying
20 that there was harm in their manufacturing plant. I
21 immediately said, let me cure it. That's not what I
22 intended to say. That's not what I did. And that
23 happened. That happened.
24 It is clear that what was going on in their
25 plants, with the exception potentially with John Crane,

1 which we'll address later, is not supposed to happen. My
2 intent was to say they knew to worry about this 'cuz they
3 had people working with it in this scenario, which should
4 have given them the heads up to do this. To the extent I
5 said anything or implied anything otherwise, the court
6 sustained it, I cured it.
7 And so, in short, on the first issue, I don't
8 believe there is a violation.
9 On the second, I haven't seen the transcript.
10 I'm operating on little sleep. But if the court is
11 telling me I implied that or stated that, there has been
12 a cure that the court recommended at the time.
13 THE COURT: (Handing.)
14 MS. DEAN: Is this -- right. So the ban issue,
15 which doesn't come in here at all --
16 THE COURT: That's not the first one. That's
17 the second one.
18 MS. DEAN: Now that I can see my context, I can
19 see exactly where you're interpreting it, but what I'm
20 saying, the statements are they were talking asbestos in
21 raw form and weaving it into cotton and clothing and
22 there was a lot of effort to looking into that in the
23 '20s and '30s seeing how many --
24 THE COURT: You're reading too fast.
25 MS. DEAN: Sorry. They were talking asbestos

1 in raw form and weaving it into cotton and cloth, and
2 there was a lot of effort looking at them in the '20s and
3 '30s and seeing how many of them were dying from
4 different diseases. Pointing to textile. There is a lot
5 of overlap. Then I write manufacturer. Then they
6 started looking at manufacturing, so not somebody like
7 Del -- I'm trying to give them an admission Del Domagala,
8 who is working with a brake or a gasket or cement pipe,
9 but the people in the plant making it for Certainteed or
10 Georgia-Pacific and John Crane.
11 I was not, nor did I actually say -- I see
12 where you may have thought that's where I was going --
13 that people were dying in their plants. That's what the
14 studies were. I was trying to make a differentiation
15 between end user and manufacturer, and making the exact
16 argument that I did, that even if the literature was
17 about the manufacturing process, to limit their concerns
18 to their manufacturing plants and not to their users is
19 problematic. Never said people were dying there. Never
20 said the studies there were done there.
21 The court heard what I said and agreed with
22 their objection. So, clearly, the implication existed,
23 from the way you heard it. But looking at it in black
24 and white and knowing what I intended to say, which I
25 told you before, I said I looked at it in black and

1 white, I think supports the analysis that, at best, there
2 is that a curative instruction, but no willful violation
3 of a rule happened here.
4 Their final concern was about the MSDS sheets
5 I'm taking Mr. Griffin at his word, that they said
6 asbestosis and cancer versus asbestosis and mesothelioma.
7 There is over --
8 THE COURT: He's right.
9 MS. DEAN: -- over a dozen of them.
10 THE COURT: The ones I've seen, the ones that
11 were attached to the motions.
12 MS. DEAN: I know there was a point in time
13 they only said asbestosis, and there was a point in time
14 they entered in cancer. Again, if I don't prove what I'm
15 going to say, there needs to be consequences to that. I
16 don't see how that is a basis for an MIL. When the court
17 said correct it if you know it's right, and if you know
18 that it's right, and he does, I'm happy to do that. But
19 an admission that it causes asbestosis and cancer, with
20 mesothelioma being a form of cancer, can be an argument
21 about what that admission entails. I just don't see how
22 that's a basis for a motion in limine. It is a detail
23 with significance that is easily dealt with all the time.
24 Attorneys say things that are not evidence that don't
25 bear out and they pay the consequences for it.

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1 Mesothelioma is a form of cancer. They
2 repeatedly, in my memory, indicated that that was a
3 cause. The fact in my mind that I didn't draw the
4 distinction that I had that it was lung cancer
5 potentially instead of mesothelioma, and they only meant
6 that, which is something they devised in litigation, I
7 mean, that wasn't even part of what I was processing.
8 It's the idea that they indicate chrysotile
9 causes these forms of disease, which is contrary to the
10 position they have here and goes to what they knew. And
11 even if only they knew lung cancer and asbestosis, that
12 they can draw the conclusion they didn't mean meso, that
13 still doesn't excuse the fact they didn't have warnings
14 on the packaging.
15 Just, again, look at these issues, understand
16 that the court has some clear instructions to me, but
17 don't understand how it wants a mistrial.
18 THE COURT: Okay. Just a second.
19 (Conference between the Court and Clerk.)
20 THE COURT: Rebuttal?
21 MR. DRUMKE: Your Honor wanted some answers to
22 some specific questions. Georgia-Pacific filed -- in
23 terms of a ban, it's clear that there was a foreign ban
24 motion in limine that the court grant, so Ms. Dean was
25 not specific in what she was stating. She said banned.

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1 Georgia-Pacific joined and adopted that particular motion
2 in limine. We did not file a motion specific to the
3 CPSC. The reason we didn't is we thought that -- we
4 think -- that that is not a learned treatise. That does
5 not speak to causation. The CPSC ban is to consumer
6 spackling products. It's meant -- it's directed to the
7 everyday user, not to the trades. It comes in after
8 Georgia-Pacific has removed the asbestos from its
9 product.
10 There is no -- there is a discussion about the
11 potential harm from asbestos in joint compound that is
12 contained within the comments to the ban. There is no
13 scientific conclusion; in other words, it's not a
14 scientific study, it's not a medical study. The
15 government decides in its wisdom to take a precaution
16 based on information about asbestos generally. That's
17 how they arrive at the ban.
18 So you had asked about whether we contend Mr.
19 Domagala could have gotten mesothelioma from the
20 exposures in this case and --
21 THE COURT: No. I understood that's in dispute
22 in this case. The question is whether Georgia-Pacific
23 agrees that generally, sufficient exposure to the product
24 can cause mesothelioma.
25 MR. DRUMKE: No, we do not.

1 THE COURT: Okay.
2 MR. DRUMKE: And in particular, in this case,
3 because --
4 THE COURT: I know your position in this case.
5 So it's your position that no matter how much you
6 breathe, it can never cause mesothelioma?
7 MR. DRUMKE: A, because of the type of asbestos
8 used and because there is no -- there's been no
9 epidemiologic study that has shown that career drywall
10 workers, using the product over their lifetime, are at
11 increased risk of mesothelioma. There's no such evidence
12 of that.
13 THE COURT: Why did you then object to the ban
14 argument?
15 MR. DRUMKE: Well, I understood that the
16 court's instruction was that the foreign ban was not at
17 issue, and that that was the clear motion in limine. She
18 did not make that distinction as to one ban or another.
19 THE COURT: Right. But I'm talking about
20 focusing in on your explanation as to why you objected to
21 her comment that Georgia-Pacific joint compound was
22 banned in the U.S.
23 MR. DRUMKE: I think I commented, believing
24 that we had filed that motion, the CPSC motion. We did
25 not argue any of our motions, Your Honor. They were all

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1 agreed -- there were no objections to any of them, other
2 than the one.
3 THE COURT: Was your objection valid or not?
4 And, if so, on what grounds?
5 MR. DRUMKE: Only on the foreign ban grounds,
6 Your Honor. And, of course, the post-exposure issue,
7 which we don't think it's relevant in terms of
8 post-exposure evidence, whether it's a subsequent
9 remedial measure by the government or by Georgia-Pacific.
10 Subsequent remedial measure by the government to ban it
11 or Georgia-Pacific to take it out, it's not relevant. We
12 think it falls under that penumbra, if I can use that
13 word.
14 THE COURT: Any other rebuttal?
15 MR. GRIFFIN: No, Your Honor. On behalf of
16 John Crane, no.
17 MR. WILL: Your Honor, on behalf of
18 Certainteed, no, other than I did not hear any
19 explanation of why it was appropriate to tell these
20 jurors that lawyers for Certainteed in 1962 doing due
21 diligence learned about all of these hazards of asbestos.
22 THE COURT: We're going to take a quick recess.
23 MR. DRUMKE: Did you want this page back, Your
24 Honor (handing)?
25 THE COURT: Yes. Thank you.

1 (Brief recess.)
2 THE COURT: Have a seat. First of all, the
3 time was taken because I pulled the transcript for
4 objection number one, the first of the seven objections
5 that took place during the opening statement. And the
6 objection was drawn from the following sentence:
7 It has been found that using this four times is
8 unreasonably dangerous in your entire life, just having
9 it in your home, and it was banned because it was so
10 dangerous.
11 After reading the transcript, the objection
12 should have been overruled. There is no reference to
13 where it was banned. And, in addition, we have a
14 causation issue here. And as long as Georgia-Pacific
15 denies that its product is even capable of causing
16 disease, there is going to be a credibility issue. For
17 example, if Georgia-Pacific stopped selling it, that
18 could impeach its argument that it's not dangerous and it
19 can't cause disease.
20 So Georgia-Pacific's going to have to deal with
21 that. So I'm removing that objection from the equation,
22 and will only consider the other six objections, two of
23 which were overruled.
24 The Paustenbach objection was overruled because
25 I had already overruled those objections prior to the

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1 opening statement. And I didn't hear anything said about
2 Dr. Paustenbach that hadn't already been considered and
3 rejected before the arguments began.
4 I overruled the objection regarding 1962
5 because it was not the subject of a motion in limine;
6 therefore, it was simply a representation of what the
7 evidence would show.
8 Lawyer arguments aren't evidence, so if a
9 lawyer promises a man in a dark hat wearing a trench coat
10 who is going to come in and testify that certain things
11 happened in 1962 and that he was one of the lawyers who
12 vetted the product, and no such evidence occurs during
13 the course of trial, then Mr. Will can stand up and
14 embarrass Ms. Dean at the close of trial and say: She
15 promised a tall man in a black hat wearing a trench coat,
16 and he never showed up. And then the plaintiff would
17 suffer the consequences. That happens all the time.
18 That's the risk all lawyers take when they make promises
19 they can't keep in opening statement. And because of
20 that and the fact that it wasn't the subject of a motion
21 in limine, the objection was overruled.
22 So that leaves the next objection. I sustained
23 an objection that Ms. Dean was conducting a final
24 argument and, frankly, experienced lawyers like the
25 lawyers in this room are very good at walking the line

1 between the proper and the improper when it comes to
2 opening statements. This particular time, Ms. Dean was
3 slightly over the line, insofar as she was arguing jury
4 instructions that hadn't been given yet, hadn't been
5 written yet, and essentially making a final argument
6 about legal standards, and engaging in the same kind of
7 -- excuse me -- using the same kind of language that Ms.
8 Dean herself objected to in the PowerPoint slides that
9 were rewritten prior to the opening statement. That's
10 why I sustained that objection. It's not necessarily out
11 of the ordinary. Things like that happen from time to
12 time, and they alone don't result in mistrials.
13 That leaves the other three objections, all of
14 which were sustained, and two of those three -- excuse
15 me, one of those three -- I struck the argument. So
16 let's take them one at a time.
17 The first one was an argument about Certainteed
18 importing asbestos from South Africa, arguing that the
19 asbestos had nothing to do with structural integrity, and
20 then switching gears and then saying that it's not
21 reasonable. And then switching gears and going to
22 Georgia-Pacific, talking about the form of the drywall,
23 arguing: It wasn't like asbestos curtains put in movie
24 theaters to prevent fires. It had no heat resistance.
25 It just made it go on more easily. And once they put

1 their mind to finding something else to do the same thing
2 -- and then the objection came in mid-sentence. I
3 sustained the objection.
4 Excuse me. That's not the one I wanted.
5 Here's the one I wanted.
6 The first objection is the plant work objection
7 -- sorry -- talking about asbestos in raw form and
8 weaving it into cotton and cloth, and then saying: Then
9 they started looking at manufacturing, talking about
10 scientists studying the link between asbestos and
11 disease. They started looking at manufacturing, not
12 somebody like Del Domagala, who is working with a brake
13 or a gasket or cement pipe, but the people in the plant
14 for Certainteed and Georgia-Pacific and John Crane that
15 are making these products.
16 The clear statement being made, not just an
17 implication, but the clear statement being made is that
18 scientists studied the people in the plants, naming the
19 three defendants, then implying that they discovered that
20 they got sick in those plants.
21 Number one, there was a granting of a motion in
22 limine precluding any such evidence as to Certainteed and
23 Georgia-Pacific based on motions made pretrial that there
24 would never at any point in the case be evidence prior to
25 the exposures that anyone in any Certainteed or

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1 Georgia-Pacific plant or any employee of those companies
2 got sick.
3 With regard to John Crane, there was a separate
4 -- not a ruling, but an agreement, that there would be to
5 mention of anyone getting sick in a John Crane plant
6 until page-and-line rulings were made.
7 So Ms. Dean clearly and specifically and
8 expressly violated the court's order as to Certainteed
9 and Georgia-Pacific and violated an agreement that had
10 the force and effect of an order as to John Crane.
11 That's why the objection was sustained.
12 The second objection that was sustained relates
13 to John Crane. John Crane objected to any use of the
14 material safety data sheets at all. Ultimately, the
15 court agreed that the material safety data sheets could
16 be used as an admission on the issue of causation. The
17 only words in the material safety data sheets were
18 "asbestos" and "cancer." There is no evidence that
19 asbestos -- asbestosis, excuse me, and cancer -- there is
20 no evidence that the material safety data sheets ever
21 said "mesothelioma."
22 As Ms. Dean argued to the jury, there is a
23 difference between the dosages needed to cause
24 asbestosis, lung cancer and mesothelioma. In terms of
25 causation, they are three entirely different things.

1 And, in fact, Ms. Dean rather forcefully argues in her
2 opening statement that mesothelioma at low doses was a
3 game changer. The motion in limine was denied, but made
4 clear in the denial of that motion that you could only
5 use what's on the sheet; you can't add things to the
6 sheet that aren't there, like mesothelioma, or implying
7 that the game changer applied to the admission contained
8 in the material safety data sheets.
9 Now, you could claim in a final argument
10 perhaps that the use of the word "cancer" creates a
11 reasonable inference that mesothelioma should be
12 included. I haven't heard anyone make such a claim or
13 argue that John Crane knew about mesothelioma from its
14 products versus cancer generally. If this issue existed
15 alone, without anything else, I might be less concerned.
16 But this clearly is a violation of the court's order in
17 the sense that the document was misused. A document that
18 plaintiff was on notice that John Crane claimed was
19 prejudicial as written. And certainly adding words that
20 aren't there, coupled with the arguments concerning the
21 game-changing nature of mesothelioma at low doses is a
22 significant issue.
23 And then, finally, the Georgia-Pacific issue
24 with regard to product substitution, I've already read
25 that argument into the record. The argument is made that

1 there was no orientation as to time in the sentence. And
2 that's really the problem with it, because the
3 orientation as to time certainly says some point in the
4 future, when counsel knows that any substitution occurred
5 after the last exposure. The clear implication is that
6 sometime later they changed it, sometime later, after
7 it's too late. And the court, as stated this morning,
8 prohibited this kind of argument, prohibited this kind of
9 evidence. Ordered that its use would be conditioned upon
10 getting permission from the court first.
11 Also important is the fact that the plaintiff
12 made no claim at any time the motion in limine was argued
13 that it would ever have any evidence that would
14 constitute an exception to the subsequent
15 remedial-measures rule. So as the motion in limine was
16 argued, it was ruled upon on its face. Subsequent
17 remedial measures were out of the case unless an
18 exception applies. Plaintiff wasn't claiming an
19 exception applied. It's out of the case. If something
20 changes during the trial, contact the court. Don't bring
21 it up to jury. Ms. Dean brought it up to the jury, and
22 it was a blatant, clear and prejudicial violation of the
23 court's order following the motion in limine.
24 The purpose of motions in limine are to prevent
25 prejudicial content from getting in front of a jury.

1 They are not made lightly. They are important to the
2 parties because the parties know that if the subject
3 matter of the motion in limine gets before the jury,
4 their case could be severely damaged or lost.
5 Both sides in this case made extensive motions
6 in limine. There had to have been 200 of them. I didn't
7 counted them all, but that's probably the best estimate
8 that I can make. They were argued passionately. They
9 were argued as if the entire case hinged upon my ruling
10 in each one. And that's true of all four of the parties
11 in this room. Many were granted. Many were denied.
12 Many were agreed to.
13 They set the ground rules for the trying of a
14 case. The lawyers know clearly what the court's rulings
15 are on those motions before starting the trial, and
16 they're bound to follow those orders, or they're required
17 to accept the consequences.
18 How many violations of a motion in limine
19 warrant a mistrial? There's no hard-and-fast rule. It
20 could be one. It could be two. It could be ten. You
21 have to weigh the significance of the violation against
22 where you are at the trial, the nature of the case, and
23 everything that has gone on in the case.
24 But motions in limine are made for a reason.
25 And the violation of a motion in limine should have some

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1 kind of consequence. That consequence might be an
2 instruction, if it's possible. But sometimes individual
3 violations or the cumulative effect of multiple
4 violations cannot be remedied by any form of instruction.
5 In this particular case, motions in limine were
6 so important to the parties that we spent over two days
7 doing them. We then spent another day and a half picking
8 a jury. During that jury selection, going into it, I
9 expected that a lot of people would not make it to the
10 final jury, based upon the length of the trial. I
11 thought I'd have to excuse a lot of people who don't want
12 to give up their holiday because of the trial of this
13 nature. We had one person who was excused because of an
14 out-of-town vacation. No one mentioned the holidays as a
15 reason not to sit on this jury. We excused a few people
16 because of financial hardship. But the most people who
17 were excused were excused because of bias, bias regarding
18 issues that were argued in connection with the motions in
19 limine. The kind of bias that the parties, particularly
20 the defense, was concerned might exist in this case.
21 Bias against corporations. Bias about the dangers from
22 products. Legitimate concerns explored extensively by
23 the attorneys for all four parties. And jurors were
24 struck.
25 Most of the conversations took place

1 individually, which was just a coincidence, because we
2 happened to show up in the morning knowing that there was
3 one juror in particular at issue at the time. But a lot
4 of the discussion, substantial discussion, was done in
5 front of all the members of the jury who are on this
6 panel who were selected and sworn.
7 They heard the discussion of prejudice. They
8 heard individuals who were struck for cause talking about
9 their opinions, opinions that led to them being struck
10 for cause. Most of them who were struck for cause were
11 struck without any stated objection. And at least one of
12 them was removed over objection by the plaintiff.
13 The nature of those conversations in front of
14 the jury made it all the more important that any
15 introduction of bias or prejudice be carefully and
16 scrupulously policed by the court. It's important to
17 diligently protect against the introduction of bias and
18 the violation of the court's rulings. And it is
19 incumbent upon the attorneys to follow the rules, follow
20 the orders of the court diligently at all times.
21 I probably had to remind Ms. Dean a half a
22 dozen times about referring to her client by first name.
23 That was an order made clear from the beginning. The
24 last time I did it, I waited till the third time before I
25 said anything. And that was after talking to Ms. Dean

1 about it a couple of times. Once or twice, that's okay.
2 Half a dozen or more times, that means that somebody
3 either isn't paying attention or is trying to do it.
4 So what we have is a sequential, constant
5 throughout this argument and systematic violation of
6 motions in limine of the type the parties made clear to
7 the court prior to trial were game-breaking issues. In
8 particular, the implication that Certainteed,
9 Georgia-Pacific and John Crane knew they had sick
10 employees is extremely prejudicial. And just telling the
11 jury it didn't happen doesn't erase it from the memory of
12 the jury. Telling the jury that the material safety data
13 sheet really doesn't mention mesothelioma; it only
14 mentions cancer, a specific instruction, if that was the
15 only transgression, maybe. But it has a cumulative
16 effect.
17 Telling the jury that Georgia-Pacific found and
18 used a substitute for asbestos once they put their mind
19 to it is a clear violation of the court's order that
20 post-exposure knowledge can't be used in the case for
21 liability purposes. And that's what this was being done
22 to argue.
23 So the cumulative effect of these violations,
24 both the minor ones and the major ones, obligate the
25 court to grant a mistrial. So I'll discharge the jury.

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1 We'll start over again. And when we start over again, I
2 don't expect any violations of my orders. I expect the
3 orders to be taken seriously. I don't expect to get
4 seven, eight, nine, ten objections in an opening
5 statement.
6 I've heard a lot of mistrial motions before. I
7 think we had one or two mistrial motions in the Conda
8 case, probably I think during opening statement. We
9 certainly had a mistrial motion in final argument. Ms.
10 Dean, I sustained more than a half a dozen objections to
11 your final argument in the Conda case. I hope that's not
12 a pattern. I've only granted one other mistrial in eight
13 years on the bench in 60 trials. And I declared it on
14 myself for what I did, not for something that an attorney
15 did.
16 So I take it seriously. It weighs on me
17 heavily. I know the blood, sweat and the tears that go
18 into this work. But I don't think I have a choice. It's
19 too pervasive and too serious and too frequent.
20 So we'll start over. I'll bring in the jury.
21 I'll discharge them. And we can talk about starting
22 again on Monday or what other alternatives we might have.
23 Take a recess.
24 (Brief recess.)
25 (The jury panel was assembled and the following

1 proceedings were held.)
2 THE COURT: Have a seat: Members of the jury,
3 the reason you were gone so long is there were motions
4 made to me, and one of the motions was a motion for a
5 mistrial. I've granted that motion. So we are going to
6 be starting from scratch. We'll be starting from scratch
7 with a different jury, which means I'm going to be
8 discharging you from service as jurors. So you will be
9 able to go home and whatever plans you had for the rest
10 of the month, you can go forward with.
11 This happens occasionally in litigated cases.
12 So I can't tell you it's common or uncommon. It's just
13 something that happens in cases. I want to thank you for
14 your service. You've been with us for a big chunk of the
15 week. I don't know how many of you were -- I assume you
16 were sitting around waiting for the case. You came up
17 and sat through what we call the voir dire process. You
18 were very forthcoming and honest. And the attorneys very
19 much appreciate the attention that you gave them in the
20 case, and the honesty with which you answered all of our
21 questions.
22 I know you weren't here for the whole trial.
23 Part of you might be happy. Part of you might be
24 disappointed because you might have a little bit of an
25 investment in the case, now that you have been told that

1 you would be sitting on it and had a day to think about
2 it. So we're sorry that you won't have an opportunity to
3 hear the case. We're sorry for you in that regard. But
4 we certainly know that you have plans and that being on a
5 jury isn't your whole life.
6 So, again, thank you very much on behalf of the
7 citizens of Ramsey County, on behalf of the parties, on
8 behalf of the lawyers. Thank you very much for your
9 service. And we wish you a happy holidays. Leave your
10 juror badges right on your chairs when you leave. You
11 can drop by the jury office and let them know. I'm not
12 sure quite what the protocol is. You might be able to
13 just leave, but it probably is safer just to drop down to
14 the basement and tell them what happened, and they'll
15 tell you that you're done and that you've served the
16 public well. Thank you.
17 (Jury panel exited the courtroom and the
18 following proceedings were had.)
19 THE COURT: Have a seat.
20 MR. GRIFFIN: May I inquire quickly before we
21 begin? Is it permissible for us to speak to the
22 discharged jurors?
23 THE COURT: Yes. I probably should have told
24 them that you might be contacting them. It didn't occur
25 to me that we were far enough into the case that it would

1 provide you with any meaningful information.
2 MR. GRIFFIN: Thank you.
3 THE COURT: But there is no problem with it.
4 All the obligations that I set on them are taken away.
5 And I probably should have mentioned that too.
6 I can get 30 jurors in here on Monday, if you
7 want to start on Monday.
8 MS. DEAN: Yes, Your Honor.
9 MR. DRUMKE: Your Honor, I can't speak for the
10 other defendants, as a practical matter, I don't even
11 know what my experts' availability is. We've been
12 calling since the motion was granted. So we're trying to
13 figure it out. I'm not trying to delay anything, but I
14 think one of our experts is leaving the country. I don't
15 know. And I don't know his schedule.
16 THE COURT: All right. What do we do about
17 this? Any ideas?
18 MS. DEAN: Yes, Your Honor. For instance, Mr.
19 English, Dr. English, which is one of their experts, was
20 leaving the country on the 19th. We could do a trial
21 preservation deposition during the 15th. There are
22 expert problems we need to work with and work around.
23 Always have been willing and would be willing to do so.
24 Whether it be in the timeframe that they knew they were
25 ready. This is a hopefully two-day delay. Taking the

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1 date they already have and make it work, even if it means
2 I have to do it out of turn. Or figure out something
3 with my own experts.
4 But I can't fathom that if they already know
5 which experts that they have coming are coming. And that
6 they're still in this timeframe of the 30th that you've
7 committed to, if we bump that back a few days, that we
8 can't accommodate any requests that they have with regard
9 to scheduling to deal with this mistrial that I created.
10 THE COURT: That's generally my thought as well
11 is that this is a two-day delay. The motions in limine
12 would have happened anyway, and they're done. So a
13 combination of taking witnesses out of turn and trial
14 preservation for either the plaintiff or the defendant
15 should resolve the problem.
16 That's one of the advantages everybody has in
17 having multiple attorneys on the case is that it makes
18 you more nimble. It doesn't make you happier, but it
19 makes you more nimble.
20 Does anyone else want to be heard?
21 MR. GRIFFIN: We did at the break have a chance
22 to speak together on the defense side. And we
23 collectively agreed that the 9th of January worked for
24 the parties, so far as we could tell today with witnesses
25 considered.

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1 THE COURT: 9th of January for what?
2 MR. GRIFFIN: To resume trial. We did propose
3 that date at the break to Ms. Dean, and we, obviously,
4 weren't in agreement on that. But I wanted to report
5 that we had tried to work that out.
6 THE COURT: Okay. Well, my plan is to start on
7 Monday with jury selection, first thing in the morning as
8 soon as the jurors are oriented. Orientation usually
9 runs -- they're usually ready around 9:30, quarter to
10 10:00, and we could start in. Bring up another crop of
11 30. And we know how to do it. We just did it. And I
12 would simply go out another week, in terms of the
13 expected end date, instructing the jury. I know that
14 January 3rd I'm doing an investiture for another new
15 judge in our district. So we would be done on
16 January 3rd at 3:00 p.m. just like the December 22nd
17 investiture.
18 A motion to continue my murder trial was made
19 on Wednesday. I heard that motion at 1 o'clock on
20 Wednesday of this week. And I'm waiting for a
21 post-motion submission on that case. And whether that
22 case gets continued or not won't be known for a while. I
23 mention that because we were going to cut into a partial
24 day for motions in limine on the murder case this month,
25 and that hearing date is still scheduled. That's one of

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1 the dates that I gave you. Which date was that?
2 THE CLERK: The 21st.
3 THE COURT: That's on 21st. The 22nd is the
4 investiture. The 23rd there is no court.
5 MR. DRUMKE: I'm sorry, Your Honor, no court
6 the 23rd?
7 THE COURT: Right.
8 MR. DRUMKE: The 22nd is early end?
9 THE COURT: We end at 3 o'clock. 21st -- what
10 time is the motion?
11 THE CLERK: 9:00 a.m.
12 THE COURT: 9:00 a.m., so we would start court
13 at 10:00 or 10:30 on the 21st.
14 MR. DRUMKE: Still dark on the 15th?
15 THE COURT: Thursday is dark because I'll be at
16 the judicial council meeting. So instead of saying the
17 30th to the new prospective jurors, I will say the 6th --
18 the 7th.
19 THE CLERK: January 2nd is a holiday.
20 THE COURT: It's a holiday. The 3rd is
21 Tuesday. The 6th is Friday. So I will ask them to
22 promise me a commitment through the 6th.
23 MR. PARRINGTON: Your Honor, does the court --
24 is the courthouse closed Friday before New Year's then?
25 THE COURT: The courthouse on the 30th I think

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1 is open. Are you trying to talk me into another holiday?
2 MR. PARRINGTON: No. I'm just trying to figure
3 it out.
4 THE COURT: It might not be that hard. But the
5 court is open. It's open on the 23rd too, but I thought
6 that would be more in the holiday spirit. New Years is
7 just a party, and we can work on the day before that.
8 Anything else?
9 MS. DEAN: I have a copy, as requested, of the
10 statute of repose instruction that was given by Judge
11 Carroll in the Iowa case, if the court would like a copy.
12 THE COURT: Yes.
13 MS. DEAN: I already gave one to
14 Georgia-Pacific's counsel.
15 THE COURT: Let me read it and see if there is
16 anything I can do to help the drafting process.
17 Of course, I don't know how Iowa views advising
18 the jury of the effect of a special verdict question or
19 the instructions that they're given. On its face, this
20 instruction would violate the Minnesota standard. That
21 doesn't prevent parties from stipulating to certain
22 things.
23 But I think that's really only the first three
24 sentences, and then it gets into the real meat and
25 potatoes of the instructions, starting with the word

1 "therefore." And from that point forward, there may be
2 some language that you can work with in fashioning an
3 appropriate instruction. Because it talks about a
4 category of evidence and talks about it differently from
5 the way we talked about it in Conda.
6 Really, an instruction of this nature on the
7 statute of repose is going to be different on a
8 product-by-product basis because they're installed
9 differently, they're built differently. The process is
10 different for each one, and so they have to always be
11 custom made.
12 MR. DRUMKE: We're willing to take a stab at a
13 first draft, Your Honor.
14 THE COURT: Okay. All right. Anything else?
15 MS. DEAN: Not from plaintiff.
16 THE COURT: Okay. Thanks for this
17 (indicating). We're adjourned until Monday at 9 o'clock.
18 (Court adjourned.)
19
20
21 * * * * *
22
23
24
25

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APPENDIX B

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 53 HON. STEVEN J. KLEIFIELD, JUDGE

IN RE LAOSD ASBESTOS LITIGATION	JCCP CASE NO. 4674
C.H. DENNIS, JR. AND RAYMA DENNIS, PLAINTIFFS, VS. 3M COMPANY A/K/A MINNESOTA MINING & MANUFACTURING COMPANY, ET AL., DEFENDANTS.	NO. BC481310

REPORTER'S TRANSCRIPT OF PROCEEDINGS

NOVEMBER 1, 2012

P.M. SESSION

COPY

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OFFICIAL REPORTER POR TEMPORE

1 CASE NAME: C.H. DENNIS, JR. AND RAYMA
2 DENNIS VS. 3M COMPANY, A/K/A
3 MINNESOTA MINING &
4 MANUFACTURING COMPANY, ET AL.
5 CASE NUMBER: BC481310/JCCP CASE NO. 4674
6 LOS ANGELES, CALIFORNIA NOVEMBER 1, 2012
7 DEPARTMENT NO. 53 HON. STEVEN J. KLEIFIELD, JUDGE
8 REPORTER: LAURIE MILLER, CSR NO. #6457
9 APPEARANCES: (AS HERETOFORE MENTIONED.)
10 TIME: 9:15 A.M.
11
12 THE COURT: GOOD AFTERNOON.
13 MS. DEAN: GOOD AFTERNOON.
14 MR. OXLEY: GOOD AFTERNOON, YOUR HONOR.
15 MR. NICHOLS: GOOD AFTERNOON.
16 MR. BLUMENFELD-JAMES: GOOD AFTERNOON, YOUR HONOR.
17 THE COURT: I UNDERSTAND WE'RE WAITING FOR ONE
18 JUROR. AND SO ONE POINT I WANT TO MAKE BEFORE WE -- ARE
19 THEY ALL HERE?
20 THE COURT ASSISTANT: ALL THE JURORS ARE PRESENT,
21 YOUR HONOR.
22 THE COURT: OKAY. BEFORE WE GET TO THE MOTION, I
23 ASSUMED -- I JUST WANT TO MAKE CLEAR THAT THE CASE IS
24 BIFURCATED WITH RESPECT TO THE AMOUNT OF PUNITIVE DAMAGES.
25 THE FIRST PHASE WOULD INCLUDE THE FINDING OF
26 WHETHER OR NOT THERE IS MALICE?
27 MR. NICHOLS: THAT'S CORRECT, YOUR HONOR.
28 THE COURT: IS -- HAS THAT ORDER BEEN MADE?

1 MR. NICHOLS: IT'S PART OF THE ORDER THAT'S BEEN
2 MADE, AND IT WAS STIPULATED.
3 THE COURT: IT WAS STIPULATED? OKAY. I TOOK IT AS
4 A GIVEN. I JUST WANTED TO MAKE SURE.
5 OKAY. WELL, I DID FIND THE EXCERPTS. OF COURSE,
6 IT'S NOT THE OFFICIAL TRANSCRIPT, BUT IT'S THE REALTIME
7 WHICH IS SAVED ON THE COMPUTER, AND IT REALLY CONFIRMED WHAT
8 WAS DISCUSSED HERE; THAT THE PLAINTIFFS' OPENING STATEMENT
9 TALKED ABOUT ITS INVESTIGATION. AND IT DOES DESCRIBE HOW
10 THE PLAINTIFFS CAME AND TALKED TO THEM, TO HER FIRM, AND
11 THEY WERE HIRED. THEY FILED A LAWSUIT. THEY WERE TRYING TO
12 FIGURE OUT -- AS THEY WERE TRYING TO FIGURE IT OUT, THEIR
13 FIRM MADE A LOT OF MISTAKES, GOT A LOT OF THINGS WRONG.
14 THEY SUED SEVERAL COMPANIES. THEY HAD -- YOU KNOW, EACH
15 COMPANY HAD TWO ALLEGATIONS AGAINST THEM, AND THEN THEY WERE
16 TRYING TO FIND OUT WHAT CAUSED THE CANCER, WHERE THE
17 ASBESTOS CAME FROM.
18 THEY STARTED THE LAWSUIT, GAVE THE OTHER SIDE AN
19 OPPORTUNITY TO TALK TO MR. DENNIS. AT THAT TIME THEY HAD A
20 MUCH BETTER UNDERSTANDING OF WHAT HE WAS EXPOSED TO.
21 THERE WAS A PRODUCT CALLED -- AND I THINK IT WAS
22 FS DUCTING, I THINK THAT'S WHAT IT WAS CALLED, WHICH TURNED
23 OUT NOT TO BE ASBESTOS BUT FIBERGLASS.
24 LOOKED AT THE AIR-CONDITIONING UNITS. I BELIEVE --
25 I DON'T HAVE IT PRECISELY, BUT I BELIEVE THAT THE -- IT
26 WASN'T STATED EXPLICITLY. IT WAS AT LEAST IMPLIED THAT
27 CARRIER AND -- WHICH IS AN AIR-CONDITIONING COMPANY ALLEGED.
28 I'M NOT SURE.

1 MS. DEAN: I THINK THEY MAY, BUT THE REASON -- THE
2 ID FOR THEM WAS FURNACES WITH THE ASBESTOS GASKETS.
3 THE COURT: OKAY. THANK YOU.
4 ANYHOW, CARRIER AND LEDGE, THEIR DEPOSITIONS WERE
5 TAKEN, AND THEN LENNOX WAS REFERRED TO.
6 SO I SUPPOSE THE INFERENCE IS THERE, EVEN IF IT
7 WASN'T EXPLICITLY STATED, THAT THEY WERE INCLUDED IN THE
8 SUIT, AND THEN IT WAS DETERMINED THAT THEY SHOULDN'T BE. SO
9 THEN THE FOCUS WAS ON GASKETS AND JOINT COMPOUND, AND IT
10 ULTIMATELY CAME -- WHITTLED DOWN TO UNION CARBIDE.
11 SO AS I STATED EARLIER, THE INFERENCE, THE VERY
12 STRONG INFERENCE IS THAT THEY NAMED A BUNCH OF COMPANIES,
13 THEY DID THEIR INVESTIGATION, THEY ELIMINATED ALL OF THEM AS
14 BEING SOURCES OF EXPOSURE AND ENDED UP WITH UNION CARBIDE.
15 AND SO I THINK THAT THE -- AND SO, BASICALLY, THAT
16 THE INFERENCE IS, WELL, THEY'RE THE ONES -- NOBODY ELSE IS
17 RESPONSIBLE BECAUSE THEY'RE NO LONGER HERE, THEY WERE
18 DISMISSED.
19 AND SO I THINK THAT THE DEFENSE NEEDS AN
20 OPPORTUNITY TO STATE THE OTHER SIDE OF IT. IN OTHER WORDS,
21 TO SAY, WELL, JUST BECAUSE THEY WERE DISMISSED DOESN'T MEAN
22 THAT THEIR INVESTIGATION SHOWED THEM THAT THEY HAD NO
23 RESPONSIBILITY.
24 SO WHAT I AM -- MY TENTATIVE, AND YOU CAN JUST BE
25 HEARD ON IT. TENTATIVELY, I WOULD -- MY ORDER WOULD BE THAT
26 PLAINTIFF TURN OVER TO UNION CARBIDE A LIST OF THE
27 DEFENDANTS WITH WHOM THERE WAS A SETTLEMENT.
28 AND YOU KNOW WHO ALL THE DEFENDANTS WERE. THAT'S

1 NOT A SECRET. AND I THINK THAT THE -- THAT UNION CARBIDE
2 OUGHT TO BE ABLE TO STATE IN OPENING STATEMENT THAT THERE
3 WERE CERTAIN COMPANIES WITH WHOM THERE WAS A SETTLEMENT.
4 PROBABLY NAME THEIR NAME.
5 BEYOND THAT, I DON'T THINK IT WOULD BE NECESSARY OR
6 HELPFUL TO GO FURTHER, BECAUSE IF WE THEN START GETTING INTO
7 AMOUNTS OF SETTLEMENTS, THAT OPENS UP A WHOLE CAN OF WORMS
8 WE WOULD NEVER BE ABLE TO GET BACK IN THE CAN. OPEN UP ALL
9 KINDS OF COLLATERAL ISSUES THAT I DON'T THINK WOULD BE
10 HELPFUL TO THE JURORS IN DECIDING THE CASE.
11 MS. DEAN: CAN I RESPOND?
12 THE COURT: YOU CAN BOTH RESPOND.
13 MS. DEAN: THANK YOU.
14 THE COURT: IT'S HIS MOTION, SO I'LL LET HIM BE
15 HEARD.
16 MR. OXLEY: THANK YOU, YOUR HONOR. I THINK PART OF
17 WHAT THE COURT JUST SAID, AND I KNOW WHAT THE COURT'S VIEWS
18 ARE ON A MISTRIAL, BUT I REALLY FEEL THE NEED TO --
19 THE COURT: WHAT ARE MY VIEWS?
20 MR. OXLEY: THAT YOU WEREN'T INCLINED TO GRANT A
21 MISTRIAL.
22 AND I THINK WHAT THE COURT JUST SAID ABOUT THE MORE
23 WE GET INTO SETTLEMENTS, THE MORE THEY ARE A CAN OF WORMS WE
24 CAN'T GET BACK IN, IT EXTENDS BEYOND THAT.
25 BECAUSE IN ORDER TO BE ABLE TO EXPLAIN TO THE JURY
26 WHY THOSE DEFENDANTS AREN'T HERE, WE NEED MORE INFORMATION
27 ABOUT WHAT THE SETTLEMENTS WERE. AND -- OTHERWISE, WE'RE
28 GOING TO END UP IN SOME -- WAS IT AN ADMISSION OF LIABILITY?

1 DID THEY DENY LIABILITY? THOSE SORTS OF THINGS.
2 AND THEN WE HAVE PEOPLE LIKE YOU MENTIONED, AND
3 COUNSEL MENTIONED LENNOX AS THE EXAMPLE OF HOW THEY FIGURED
4 IT OUT, AND THEY LET THEM GO.
5 WELL, LENNOX WAS DISMISSED WITHOUT PREJUDICE IN
6 THIS CASE, WHICH, OF COURSE, MEANS REALLY NOT THAT MUCH. IT
7 MEANS IN THIS CASE THEY'RE NOT HERE, BUT IN THE UNFORTUNATE
8 NEED FOR A WRONGFUL-DEATH LAWSUIT, THEY COULD, OF COURSE, BE
9 SUED AGAIN. AND THAT'S SOMETHING THAT I THINK THE JURY
10 SHOULD NEED TO KNOW ABOUT AS WELL.
11 AND THEN IT GETS INTO, WELL, WHY? WHY DID THEY
12 AGREE TO DO THIS? WAS THERE SOME OTHER DEAL THAT WAS GOING
13 ON THAT THIS WAS PART OF THAT OTHER DEAL? I MEAN, LENNOX IS
14 A PERFECT EXAMPLE OF THE BIGGER CAN OF WORMS THAT HAS
15 ALREADY BEEN OPENED UP BY SOMETHING THAT HAD NOTHING TO DO
16 WITH UNION CARBIDE. AND IT ILLUSTRATES HOW DIFFICULT THE
17 REMEDY IS TO FIX THE PROBLEM BASED ON COUNSEL'S VIOLATION OF
18 THE MOTION-IN-LIMINE ORDER.
19 AND IT SEEMS TO US, AND WE HAD A CHANCE --
20 MR. NICHOLS AND I HAD A CHANCE TO CHAT ABOUT THIS DURING
21 LUNCH -- THAT GETTING -- PUTTING BEFORE THE JURY COUNSEL'S
22 INVESTIGATION OF THIS CASE, THE CONVERSATIONS THAT SHE HAD
23 WITH HER CLIENTS, THE GOING BACK AND FORTH FROM TEXAS TO
24 OKLAHOMA, AND BEING ABLE TO HAVE LAWYERS ON THE GROUND HERE
25 IN LOS ANGELES WHO COULD DO ALL OF THE INVESTIGATION HERE IN
26 LOS ANGELES, IT BRINGS UP ALL OF THOSE ISSUES WHERE THE DOOR
27 HAS BEEN OPENED THAT WE HAVE NO INFORMATION ABOUT.
28 AND IT SEEMED TO US THAT, GIVEN THE SCOPE OF WHAT'S

1 HAPPENED HERE, AND THE INFORMATION THAT WE WOULD NEED TO GET
2 BEFORE WE CAN REALLY PUT -- TRY TO PUT AS MANY WORMS BACK IN
3 THAT CAN AS WE CAN, IT WOULD BE MORE EFFICIENT TO START JURY
4 SELECTION ON MONDAY AND START THIS CASE ANEW WHEN IT'S NOT
5 TAINTED BY WHAT COUNSEL DID TO MAKE THE IMPLICATIONS THAT
6 COUNSEL DID.
7 THIS NEVER SHOULD HAVE COME UP. WE DIDN'T ASK FOR
8 IT. WE HAD NOTHING TO DO WITH IT, AND NOW WE'RE IN A
9 POSITION WHERE ANY REMEDY THAT THE COURT IS GOING TO ALLOW
10 IS NOT GOING TO BE ENOUGH INFORMATION FOR US TO BE ABLE TO
11 COUNTER THAT.
12 THANK YOU.
13 MS. DEAN: I AGREE WITH COUNSEL THAT INTRODUCING
14 SOME OF THE SETTLEMENTS IS GOING TO CREATE COMPLICATIONS,
15 BUT I WANTED TO ADDRESS SOME OF THE THINGS THAT THE COURT
16 SAID.
17 YOU NOTED SOME OF THE BEGINNING STATEMENTS THAT
18 WENT -- ALIGNED WITH MY MEMORY, BUT TOWARDS THE END THE
19 COURT WAS REFERENCING RECORDS AS OPPOSED TO READING FROM THE
20 DRAFT, AND I THINK IT'S IMPORTANT TO CLARIFY A FEW THINGS.
21 FOR INSTANCE, YOU SAID THERE WAS AN INFERENCE
22 CARRIER AND LENNOX WERE DISMISSED, AND THEY WEREN'T HERE,
23 AND THAT WAS JUST GASKETS AND JOINT COMPOUND. ACTUALLY,
24 WHAT WAS SAID WAS THAT FOR LENNOX AND CARRIER, WE LEARNED
25 THAT THE GASKETS WERE ASBESTOS AND THAT EVERY TIME HE
26 REMOVED THEM, HE TOOK OUT THE GUTS, AND THAT INVOLVED THE
27 BLOWER COMPARTMENT AND THAT HE HAD TO TEAR THAT GASKET AND
28 THAT WE CONFIRMED THAT THERE WAS ASBESTOS WITH THE GASKETS

1 AND NOT ONLY INSULATION.
2 MOREOVER, YOU MADE THE STATEMENTS -- AND I DON'T
3 THINK YOU WERE QUOTING FROM MY OPENING STATEMENT, BUT THAT
4 IT WAS ULTIMATELY IMPLIED THAT WE WHITTLED IT DOWN TO UNION
5 CARBIDE. WHAT WAS ACTUALLY STATED WAS THAT I REFERENCED
6 MR. NICHOLS BY NAME AND WITH A HAND AND SAID THAT HE TOLD
7 YOU IN JURY SELECTION THAT THERE'S GOING TO BE DEFENDANTS
8 NOT IN THIS COURTROOM BUT THAT YOU HAVE TO CONSIDER, AND
9 THAT YOU HAVE TO PUT A PERCENTAGE OF FAULT, AND THAT WE
10 ABSOLUTELY AGREE THERE ARE OTHER PARTIES THAT ARE
11 RESPONSIBLE BUT THAT WE'RE ONLY ASKING THEM TO PAY THE PART
12 THAT THEY'RE RESPONSIBLE FOR. AND I PROCEEDED WITH THE FISH
13 ANALOGY THAT THE COURT REMEMBERS.
14 THEY HAVE BEEN TOLD BY MR. NICHOLS IN JURY
15 SELECTION, THEY HAVE BEEN TOLD BY ME DIRECTLY, SO THAT IF
16 THERE ARE ANY IMPLICATIONS -- BECAUSE IT WAS NOT STATED, BUT
17 IF THERE WERE ANY IMPLICATIONS THAT THEY HAVE BEEN
18 DISMISSED, I EXPLICITLY SAID THERE ARE OTHER RESPONSIBLE
19 PARTIES. YOU SHOULD CONSIDER THEIR FAULT, AND WE AGREE. I
20 WENT SO FAR TO SAY THERE ARE PEOPLE THAT EXPOSED HIM TO
21 ASBESTOS WE DON'T EVEN KNOW ABOUT.
22 SO WHAT WE CONTEND IS THAT, FIRST, THEIR REQUEST
23 FOR SETTLEMENTS IS CLEARLY BECAUSE THEY WANT TO DO TWO
24 THINGS: ONE, IF THERE'S ANY IMPLICATIONS, EVEN THOUGH NOT
25 STATED, THAT THEY WERE DISMISSED, SHOW THAT THEY SETTLED.
26 FOR WHAT PURPOSE?
27 THE COURT: WELL, WHY WOULDN'T -- WHAT'S THE
28 MYSTERY? THE OTHER DEFENDANTS WERE BROUGHT IN, AND THEY'RE

1 NOT HERE. THEY HAD TO HAVE BEEN DISMISSED, WHETHER IT WAS
2 FOR A SETTLEMENT OR NOT.
3 MS. DEAN: AND I THINK IF THE COURT WANTS TO GIVE
4 THE INSTRUCTION -- AND THERE'S ACTUALLY A CACI INSTRUCTION
5 ON SETTLEMENTS; THAT WHETHER A PARTY HAS SETTLED OR BEEN
6 DISMISSED FOR OTHER PURPOSES IS NOT FOR THEIR CONSIDERATION.
7 BUT WHAT THE TENTATIVE RULING IS, I BELIEVE, WHICH
8 IS A REQUEST FROM UNION CARBIDE, IS PROBLEMATIC ON TWO
9 GROUNDS: 1152 ON OFFERS OF COMPROMISE EXPLICITLY SAYS
10 YOU'LL NOT BE ABLE TO TAKE A SETTLEMENT AS SOME KIND OF
11 INDICATION THAT THERE WAS LIABILITY.
12 AND I NEVER IMPLIED, STATED, THAT SOMEHOW BECAUSE
13 PEOPLE WERE OR WERE NOT IN THE SUIT, THAT THEY WERE
14 RESPONSIBLE. WHAT I SAID IS, YOU HAVE TO LOOK AT WHAT WE'RE
15 ACTUALLY ABLE TO SHOW, WHICH IS EXACTLY WHAT PROP. 59 SAYS.
16 WHAT ARE WE ABLE TO SHOW ABOUT IF THERE WAS EXPOSURE AND BAD
17 ACTIONS? AND THERE WAS A LEGISLATIVE MANDATE BY CALIFORNIA
18 ABOUT HOW WE CONSIDER SETTLEMENTS; THAT THAT'S ALREADY
19 DETERMINED, HOW YOU CONSIDER PERCENT-FAULT ALLOCATION.
20 IF THERE HAS BEEN ANY HARM HERE IS THAT I USED THE
21 WORD *PARTIES*. AND IF THEY WANT TO MENTION THAT THERE ARE
22 OTHER PARTIES, I UNDERSTAND THE COURT'S RULING ON THAT. BUT
23 BEYOND THAT, AT THE END OF THE DAY, IF LENNOX REALLY WAS AT
24 FAULT, AND WE DISMISSED THEM, LIKE THEY INDICATED, WAS SHOW
25 -- OR WHETHER WE SETTLED DOESN'T BEAR ON LIABILITY. IT'S
26 WHAT IS THE EVIDENCE, AND CAN THEY HOLD THEIR BURDEN OF
27 PROOF ON PROP. 59?
28 AND THEY KEEP SAYING IT'S UNFAIR. I DON'T

1 UNDERSTAND HOW. THEY STILL GET TO PRESENT EVERY PIECE OF
2 EVIDENCE WHERE THEY TOLD THE COURT WITH CONFIDENCE ON THE
3 RECORD YESTERDAY, WE WILL BE ABLE TO SHOW THAT IT IS MORE
4 LIKELY THAN NOT WE WORKED WITH ASBESTOS.
5 THE COURT: WHY WOULD THE OPENING STATEMENT EVEN
6 ADDRESS THE QUESTION OF WHETHER THERE -- ANY OF THESE OTHER
7 POTENTIAL SOURCES OF EXPOSURE WERE DEFENDANTS IN THIS CASE
8 WHEN THERE WAS ALREADY AN AGREEMENT THAT THE FACT THAT A
9 PARTY WAS -- OR SOMEBODY WAS A DEFENDANT STANDING ALONE IS
10 INADMISSIBLE? THERE HAS TO BE EVIDENCE OF EXPOSURE TO IT
11 WHICH IS WHAT I THOUGHT FROM DISCOVERY.
12 MS. DEAN: AND MAYBE MY WORD CHOICE SHOULD HAVE
13 BEEN CLEARER. I BELIEVE THE M.I.L. WAS ONLY FOR THE
14 DEFENDANTS, AND I UNDERSTAND THE COURT THINKS --
15 THE COURT: WELL, IT MIGHT HAVE BEEN, BUT THEN YOU
16 OPENED THE DOOR.
17 MS. DEAN: I AGREE FOR THEM TO MENTION PARTIES.
18 BUT MY THOUGHT IS THIS: IF I WOULD HAVE SAID INSTEAD, WE
19 MADE A MISTAKE BECAUSE IN OUR INITIAL DISCOVERY RESPONSES,
20 WHICH YOU'RE GOING TO HEAR, I BELIEVE, BECAUSE THE EXPERTS
21 ARE RELYING ON THEM IN THIS CASE THAT THERE WERE A LOT OF
22 EXPOSURES THAT TURNED OUT TO BE WRONG, THAT WOULD NOT HAVE
23 ADDRESSED THIS MOTION IN LIMINE. THAT'S WHAT THEIR EXPERTS
24 ALREADY SAID THEY INTEND TO DO, AND THEN I PROCEEDED WITH
25 THE EXACT SAME THING. AND LET ME EXPLAIN WHAT WE LEARNED.
26 LENNOX HAD FIBERGLASS INSTEAD OF ASBESTOS. THE
27 TRANSITE PIPE MAY HAVE HAD ASBESTOS, BUT HE SAID HE NEVER
28 MOVED IT.

1 EVERYTHING ABOUT IT -- THE ONLY REAL, EXCUSE MY
2 NON-LEGAL TERMINOLOGY, BEEF THEY HAVE IS THAT I REFERENCED
3 IT AS *PARTIES* INSTEAD OF THE WAY THEY WERE GOING TO
4 REFERENCE IT AS ALLEGATIONS WE MADE IN WRITTEN DISCOVERY
5 RESPONSES. AND SO IF THEY WANT TO REMEDY THAT BY MENTIONING
6 COMPANIES BY PARTY NAME AS PARTIES AS OPPOSED TO THAT, I
7 THINK IT'S FINE.
8 FURTHER, A FURTHER WAY TO REMEDY THIS, ALTHOUGH I
9 DON'T BELIEVE IT'S NECESSARY, IS TO READ THE INSTRUCTION
10 THAT CACI ENVISIONS; THAT IF THERE HAS BEEN ANY REFERENCE TO
11 A PARTY MAY HAVE BEEN SETTLED OR DISMISSED, IT TELLS THEM TO
12 DISREGARD IT. BUT TO MENTION SETTLEMENTS VIOLATES THE OFFER
13 OF COMPROMISE RULE, AND IT REALLY -- I AGREE WITH
14 MR. OXLEY IT HAS SOME PROBLEMS.
15 LET ME GIVE YOU AN EXAMPLE. WE SETTLED WITH
16 METROPOLITAN LIFE INSURANCE COMPANY. NO ONE'S HEARD
17 ANYTHING ABOUT THAT. IT'S BECAUSE THEY'RE AN INSURANCE
18 COMPANY WE BELIEVE CONSPIRED BY INSURING COMPANIES THAT SOLD
19 ASBESTOS. HOW DO WE DEAL WITH THAT IN TRIAL? HOW -- I
20 MEAN, HOW DO WE EVEN GO THERE?
21 I CAN SHOW THE COURT IN CAMERA THE SETTLEMENTS AND
22 DISMISSALS, BECAUSE I'M JUST A CONSERVATIVE SOUL. I KNOW
23 WHAT THE EVIDENCE IS. I KNOW WHO WE DISMISSED, AND I KNOW
24 WHAT WE DID. AND I WOULD NOT WANT TO IMPLY OR LEAD ANYONE
25 ASTRAY.
26 IT WAS NOT MY INTENTION TO TALK ABOUT SETTLEMENTS
27 OR DISMISSALS. MY INTENTION WAS -- I KNOW THEIR EXPERTS
28 INTEND TO COME IN AND RELY ON DISCOVERY, AND WE'VE LEARNED A

1 LOT SINCE THAT DISCOVERY. WE AMENDED OUR DISCOVERY, WE'VE
2 TAKEN DEPOSITIONS, AND WE'VE GOTTEN EVIDENCE. SO THE
3 TRANSITE PIPE DIDN'T TURN OUT TO BE WORKED ON.
4 AND PROP. 9 ALLOWS ME AND THEM TO ARGUE WHETHER
5 THAT HAPPENED, WHETHER IT WAS SIGNIFICANT, WHETHER IT WAS
6 SUBSTANTIAL, AND I PREVIEWED THAT IN OPENING.
7 THE COURT: WELL, IF YOU WOULD HAVE SAID THAT
8 DURING THE COURSE -- I MEAN, AT FIRST WE -- THERE WERE -- WE
9 CONSIDERED ALL POSSIBLE SOURCES OF EXPOSURE, AND WE EXPECT
10 THAT YOU WILL SEE THAT AT ONE TIME WE RESPONDED TO DISCOVERY
11 NAMING, IN AN ABUNDANCE OF CAUTION, EVERYBODY THAT WE
12 THOUGHT COULD HAVE BEEN A SOURCE OF EXPOSURE, I DON'T THINK
13 WE WOULD BE HERE NOW.
14 BUT, REALLY, WHAT THE COMPLAINT IS, IS THAT THERE
15 WAS REFERENCE TO THE FACT THAT THERE WERE MANY OTHER
16 DEFENDANTS WHO WERE ALL, OBVIOUSLY, DISMISSED.
17 MS. DEAN: AND, YOUR HONOR, TWO THINGS. I FIRST
18 THINK THAT I AT ONE TIME IN THE WHOLE TIME MENTIONED THAT WE
19 SUED OTHER COMPANIES. THE REST OF IT WAS JUST TALKING ABOUT
20 WHO THE COMPANIES WERE, AND I ACTUALLY SAID JUST WHAT THE
21 COURT SAID. *JUST* IS TOO STRONG. LET ME REFERENCE THE
22 TESTIMONY.
23 THAT WE DID AN INVESTIGATION STARTING FIVE YEARS
24 AGO AND WENT OUT -- I TALKED ABOUT WHEAT. I TALKED ABOUT
25 COTTON. I TALKED ABOUT THAT HE DROVE TRUCKS.
26 MY GOAL, WHICH I THINK IS COMPLETELY WITHIN ALL
27 FOUR SQUARES OF WHAT THE LAW PERMITS, IS TO ALLOW THE JURY
28 TO HEAR WHAT HE WAS QUESTIONED ABOUT FOR FOUR DAYS, AND THAT

1 IS WHAT HAD ASBESTOS, AND WHAT HE WORKED WITH, AND THAT WE
2 CONSIDERED AS MANY THINGS AS WE COULD IN HIS DEPOSITION --
3 NOT ATTORNEY/CLIENT PRIVILEGE, NOT IN SECRET MEETINGS FROM
4 OKLAHOMA TO DALLAS, BUT IN HIS DEPOSITION -- SO THAT WE KNOW
5 NOW A LOT ABOUT WHAT ACTUALLY BORE OUT TO BE ASBESTOS-
6 CONTAINING AND WHAT ACTUALLY INVOLVED WORK.
7 AND I -- AGAIN, I THINK THE MOST POWERFUL THING IS
8 I REFERENCED MR. NICHOLS' REPRESENTATION THAT I DIDN'T
9 OBJECT TO IN JURY SELECTION THAT OTHER PARTIES WILL BE
10 CONSIDERED, AND IF THEY'RE NOT IN THE ROOM, HE ASKED THEM,
11 DO YOU MIND? ALL THE JURORS SAID THEY DIDN'T.
12 I TOLD THEM THAT THAT WAS RIGHT; THAT THERE ARE
13 OTHER PARTIES THAT ARE AT FAULT; THAT YOU MUST CONSIDER
14 THEIR FAULT, AND WE AGREE, BUT WE JUST WANT THEM TO PAY
15 THEIR SHARE.
16 THE COURT: YOU'RE USING THE TERM LOOSELY, *PARTIES*,
17 AREN'T YOU? ENTITIES. I MEAN, *PARTY* IS SOMETHING
18 DIFFERENT.
19 MS. DEAN: AND MAYBE I NEED TO BE MUCH MORE CAREFUL
20 IN THE TERMINOLOGY. BUT I BELIEVE THAT THERE IS A SIMPLE
21 WAY TO RECTIFY THAT IN THAT IF THEY BELIEVE THEY'VE BEEN
22 HARMED AND THAT THEY SHOULD NOW BE ABLE TO IDENTIFY THE
23 PARTIES, THE COURT HAS INDICATED THEY WILL ALLOW THEM TO.
24 OR TO ADMONISH ME BEFORE THE COURT THAT WE SHOULDN'T BE
25 USING PARTIES. YOU CAN CONSIDER OTHER COMPANIES'
26 ACTIVITIES, BUT WHETHER THEY WERE IN THE SUIT OR WHY THEY
27 WERE IN THE SUIT OR HOW THEY WERE OUT IS NOT ANYBODY'S
28 CONCERN.

1 THE COURT: WHAT IS THE CACI INSTRUCTION YOU WERE
2 REFERRING TO?
3 MS. DEAN: I LEFT THE WHOLE BOOK IN THE HOTEL.
4 MR. BLUMENFELD-JAMES: I THINK IT'S 207.
5 MS. DEAN: THANK YOU.
6 MR. BLUMENFELD-JAMES: I COULD BE WRONG. I'M
7 SORRY. I LOOKED AT IT AN HOUR AGO.
8 MS. DEAN: IT REFERENCES THE 1152 OFFER OF
9 COMPROMISE.
10 THE COURT: NO. THAT'S NOT IT.
11 MR. OXLEY: YOUR HONOR, ON THIS -- I MEAN, I THINK
12 WE ALL SAW A VERY NICE, WELL PUT-TOGETHER OPENING. THAT
13 WASN'T A SLIP OF THE TONGUE. SHE CHOSE WORDS. SHE SAID
14 THOSE WORDS. IT CREATED AN IMPRESSION. WE ALL HAD IT WHEN
15 WE WERE SITTING HERE LISTENING. THE COURT READ THE
16 TRANSCRIPT, WALKED AWAY WITH THE SAME IMPRESSION, AND WHAT
17 WAS COMMUNICATED WAS EXACTLY WHAT THE COURT SAID EARLIER.
18 AND THE WAY TO FIX THAT IS NOT TO SAY, YOU KNOW WHAT? DON'T
19 THINK ABOUT SETTLEMENTS.
20 I MEAN, I ALREADY TOLD YOU IN OPENING, WE LOOKED
21 INTO THIS, AND NOBODY ELSE IS HERE BUT UNION CARBIDE BECAUSE
22 THAT'S WHERE THE FAULT IS, BUT DON'T EVEN THINK ABOUT
23 SETTLEMENTS. THAT DOESN'T ADDRESS THE ISSUE.
24 WE DIDN'T OPEN THIS DOOR. THEY WANT PROTECTION
25 FROM THE STATUTE, BUT WE DIDN'T OPEN THE DOOR. WE DIDN'T
26 COME IN AND SAY, THEY SETTLED; THEREFORE, THERE'S LIABILITY.
27 THAT DIDN'T HAPPEN. AND THAT STATUTE DOESN'T APPLY, ANYWAY.
28 THE COURT: I AGREE WITH YOU THAT DOESN'T APPLY.

1 MR. NICHOLS: AND THEN BEYOND THAT, EVERYTHING YOU
2 JUST HEARD, I AGREE THAT THIS IS A BIG PROBLEM, BUT THE WAY
3 TO FIX IT IS NOT TO IGNORE IT, AS MS. DEAN, I THINK, IS
4 REALLY ASKING THE COURT TO DO BECAUSE IT HAD AN IMPACT ON
5 THAT JURY. AND --
6 THE COURT: AND YOU KNOW THAT BECAUSE?
7 MR. OXLEY: BECAUSE IT HAD AN IMPACT ON ALL OF US,
8 AND BECAUSE WHEN THE COURT READ IT, THE COURT WALKED AWAY
9 WITH THE ABSOLUTE IDEA THAT WAS INTENDED TO BE COMMUNICATED.
10 WE NARROWED IT DOWN. WE GOT RID OF LENNOX. OH, BY
11 THE WAY, WE'RE NOT GOING TO TELL YOU IT'S A DISMISSAL
12 WITHOUT PREJUDICE, AND WE CAN GO BACK AND SUE THEM IF WE
13 WANT TO IN THE NEXT LAWSUIT. WE'RE NOT GOING TO TELL YOU
14 THAT WE SETTLED ALL THESE COMPANIES WHO PAID TO GET OUT OF
15 THIS LAWSUIT, AND WE'RE NOT GOING TO TELL YOU THAT WE
16 OPPOSED MOTIONS FOR SUMMARY JUDGMENT FOR LENNOX, FOR
17 EXAMPLE, AS EARLY AGO AS A COUPLE OF WEEKS, YOU KNOW.
18 AND THERE'S A BIG DIFFERENCE BETWEEN SAYING HERE'S
19 SOME INFORMATION THAT WE MENTIONED IN OUR INTERROGATORY
20 RESPONSES. THAT'S A BIG DIFFERENCE THAN WE SUED THEM
21 CLAIMING THEY WERE LIABLE, AND THE ONLY REASON THEY'RE NOT
22 HERE IS BECAUSE THEY PAID TO GET OUT. THAT'S WHAT HAPPENED.
23 I DON'T KNOW WHAT THE LIST IS, BUT I ASSUME THAT'S WHAT
24 HAPPENED WITH A BUNCH OF THEM. AND IT JUST ISN'T RIGHT TO
25 LEAVE THAT IMPRESSION FOR THE JURY AND LEAVE US DEFENSELESS
26 BY NOT KNOWING THE DETAILS OF THE DISMISSALS OR SETTLEMENTS.
27 WE HAVE NO IDEA.
28 I COULD STAND UP NOW AND SAY, HERE'S THE COMPLAINT

1 THAT SUED, YOU KNOW, 26 DEFENDANTS. WHAT GOOD DOES THAT DO?
2 THAT SUPPORTS WHAT WAS COMMUNICATED DURING OPENING: THERE
3 WERE A BUNCH OF FOLKS THAT WERE THERE THAT WERE SUED, AND IT
4 GOT NARROWED DOWN TO US. I CAN SAY SOME OF THEM SETTLED.
5 WELL, YOU KNOW WHAT? THAT'S BECAUSE, AS I HEARD IN ANOTHER
6 CASE WHERE I WAS DEFENDING UNION CARBIDE, OTHER COMPANIES
7 ACCEPTED RESPONSIBILITY, AND THEY PAID, BUT UNION CARBIDE
8 WON'T DO IT. IT OPENS UP THAT CAN OF WORMS. THAT'S
9 OBVIOUSLY WRONG AS WELL.
10 THE REASON THERE'S A MOTION IN LIMINE ON THIS AND
11 AN ORDER ON THE MOTION IN LIMINE, AND THE REASON THAT THEY
12 ASKED FOR IT, FOR THAT MOTION-IN-LIMINE ORDER, IS BECAUSE
13 IT'S WRONG TO BRING UP SETTLEMENTS, TO BRING UP OTHER
14 PARTIES THAT WERE SUED AND TO SAY THEY'RE NOT HERE, EITHER,
15 BECAUSE THEY DIDN'T DO IT OR BECAUSE THEY PAID AND ACCEPTED
16 RESPONSIBILITY TO GET OUT.
17 THAT BELL CAN'T BE UNRUNG, AND WE SHOULD START OVER
18 ON MONDAY. AND IF WE DON'T, WE NEED TO -- BEFORE I OPEN, WE
19 SHOULD HAVE ACCESS TO THE INFORMATION, BECAUSE IT JUST ISN'T
20 RIGHT TO PUT MY CLIENT IN A POSITION OF HAVING TO EXPLAIN
21 AWAY WHAT HAPPENED IN OPENING STATEMENT.
22 THE COURT: WHEN YOU SAY "ACCESS TO THE
23 INFORMATION" YOU MEAN WHO THEY SETTLED WITH?
24 MR. OXLEY: WHO THEY SETTLED WITH, WHO THEY
25 DISMISSED, AND WHY THEY DISMISSED THEM, BECAUSE I THINK WE
26 PROBABLY ALL KNOW THAT THERE ARE SOMETIMES DISMISSALS AS
27 PART OF SOME BIGGER DEAL OR BIGGER PACKAGE.
28 THE COURT: WELL, IF WE GET INTO THAT, THEN THERE'S

1 NO END TO IT.
2 MR. OXLEY: EXACTLY. EXACTLY RIGHT. BUT IT WON'T
3 BE FAIR TO SAY THIS PERSON SETTLED, I.E., THEY ACCEPTED
4 RESPONSIBILITY. WHY ISN'T UNION CARBIDE? OR THEY DISMISSED
5 THEM BECAUSE WE WERE WRONG, WHEN -- AND I DON'T KNOW IF THIS
6 IS TRUE, BUT WHERE THE REALITY MIGHT BE, WE'RE GOING TO GIVE
7 YOU A DISMISSAL IN THIS CASE. WE'VE GOT THESE OTHER CASES.
8 LET'S PUT IT INTO A PACKAGE AND WRAP UP A DEAL.
9 I DON'T KNOW IF THAT HAPPENED, BUT WE SHOULD KNOW
10 TO PROPERLY DEFEND THIS CASE NOW. WE DIDN'T ASK FOR THIS
11 PROBLEM.
12 THE COURT: YOU KNOW, AND I -- YOU SEE, THE OTHER
13 THING THAT BOTHERS ME IS AN OPENING STATEMENT IS A STATEMENT
14 OF WHAT THE PARTY THINKS THE EVIDENCE WILL SHOW, AND THE
15 EVIDENCE -- THE STATEMENT OF WHAT THE EVIDENCE WILL BE
16 INCLUDES THE FACT THAT YOUR FIRM WAS APPROACHED; THAT AN
17 INVESTIGATION WAS DONE; THAT VARIOUS PEOPLE WERE SUED; AND
18 IT'S OBVIOUS THEY WERE ALL DISMISSED EXCEPT UNION CARBIDE.
19 THAT'S THE EVIDENCE. THAT'S WHAT THE PLAINTIFFS SAID THE
20 EVIDENCE WILL SHOW.
21 AREN'T THEY ENTITLED TO DEFEND AGAINST THAT?
22 MS. DEAN: WELL, YOUR HONOR, I THINK THAT THERE'S
23 TWO RESPONSES TO THAT: ONE, I THINK THAT THE EVIDENCE WILL
24 SHOW EXACTLY WHAT MR. OXLEY INDICATED. THEY SAID THERE WERE
25 TWO THINGS THAT THEY COULD WALK AWAY FROM, WHICH IS WHAT I
26 SAID. ONE THAT I ACTUALLY DID SAY, AND THAT IS THAT SOME OF
27 THESE COMPANIES I'M TALKING ABOUT DIDN'T DO ANYTHING. AND
28 THAT'S ABSOLUTELY PROPER UNDER PROP. 51 TO OUTLINE WHAT THE

1 EVIDENCE WILL BE WHAT WE BELIEVE WAS EXPOSURE OR NOT.
2 THE SECOND ONE IS, OR THEY CONCLUDE THAT THEY WERE
3 DISMISSED AND WEREN'T THERE, WHICH WAS ACTUALLY NEVER SAID.
4 WHAT WAS SAID WAS THERE ARE OTHER PEOPLE AT FAULT. WE JUST
5 WANT UNION CARBIDE TO PAY THEIR SHARE. CARRIER AND LENNOX
6 AND DAY AND NIGHT AND PAYNE DID HAVE ASBESTOS GASKETS, EVEN
7 THOUGH THEY DIDN'T HAVE INSULATION. KAISER GYPSUM AND
8 GEORGIA PACIFIC DID SELL ASBESTOS, AND THERE ARE PROBABLY
9 OTHER ONES WE DIDN'T KNOW ABOUT. THAT'S THE FIRST THING.
10 THEN YOU SAID, WELL, HOW ARE THEY GOING TO COMBAT
11 THAT? IF MY WORD CHOICE SAID INSTEAD OF PARTIES WERE SUED,
12 INSTEAD WE RESPONDED TO DISCOVERY, AND YOU'RE GOING TO HEAR
13 FROM THAT RESPONSE THAT WE BELIEVE THERE WAS A LOT OF
14 COMPANIES THAT WERE EXPOSED, BUT SINCE THEN WE'VE LEARNED
15 THAT THAT WAS WRONG, THAT WOULD COME OUT WITH ALL SORTS OF
16 WITNESSES.
17 WHEN WE QUESTION DR. DYSON, HE RELIES ON THAT
18 REPORT. I WOULD SAY, WAIT A SECOND. YOU'RE SAYING YOU'RE
19 RELYING ON THAT CERTAINTEED TRANSITE PIPE WAS LISTED HERE,
20 BUT DID YOU SEE THE TESTIMONY OF MR. DENNIS WHERE HE SAID HE
21 NEVER TOUCHED IT.
22 OR CARRIER. WE SAID IT WAS CARRIER, LENNOX, PAYNE,
23 AND I THINK THERE'S FOUR OTHERS, THAT THEY WERE FURNACES
24 WITH ASBESTOS GASKETS AND INSULATION. WERE YOU PROVIDED THE
25 INFORMATION THAT THEY WERE NOT ALL ASBESTOS GASKETS AND THE
26 INSULATION WAS IN FACT FIBERGLASS?
27 THE DEFENSE -- AND THIS IS WHERE THERE'S A REAL,
28 YOU KNOW, THERE'S EMOTION IN UNION CARBIDE'S ARGUMENT, BUT

1 +IT IS THEIR BURDEN, NOT OURS, AND IT IS THE NORMAL TRIAL
2 THAT THEY HAVE TO SHOW THAT THEY DID IT, AND ME SPENDING MY
3 ENTIRE OPENING PREVIEWING, IF I CHOSE, THAT THEY CANNOT SHOW
4 THAT FOR PROP. 51 IS NOT IN VIOLATION OF ANYTHING.
5 THEIR REAL CLAIM IS DOWN TO THIS: I ONCE USED THE
6 WORD *SUIT*. I INDICATED THAT THERE WERE PEOPLE THAT WE GOT
7 WRONG AND THAT I GAVE A DISCUSSION OF WHY I DIDN'T BELIEVE
8 THEY WERE RESPONSIBLE. AND THEY BELIEVE BECAUSE OF THE
9 MOTION IN LIMINE THAT APPLIED TO THEM THAT WAS AN AGREEMENT,
10 SO WE JUST WOULDN'T HAVE THE COMPLAINT, THAT THAT CAN NEVER
11 BE FIXED. THE WAY THAT A JUDGE -- I'VE SEEN JUDGES FIX IT
12 WHEN IT'S THE DEFENDANTS WHO BRING UP THE COMPLAINT, AS
13 OPPOSED TO US, IS TO SAY, YOU'RE NOT TO CONSIDER THE
14 COMPLAINT OR, IF THE COURT BELIEVES, THAT THEY CAN TALK
15 ABOUT EVERY PERSON WE SUED. BUT THERE WAS NOT A STATEMENT
16 EVER THAT PEOPLE WERE GONE.
17 BREAK IT DOWN. THE DEFENDANTS THAT ARE IN THIS
18 CASE THAT ARE OF ISSUE WAS THAT WE SUED CERTAINTEED FOR
19 TRANSITE PIPE, AND THEY WERE DISMISSED. WE SUED FOUR
20 COMPANIES FOR FURNACES. ONE OF THEM TURNED OUT NOT TO HAVE
21 ANY ASBESTOS; THEY WERE DISMISSED. THE OTHER ONE SETTLED.
22 WE TOLD THEM JUST THAT: THERE WERE SOME THAT HAD ASBESTOS
23 AND SOME THAT DIDN'T. AND I SAID NOTHING ABOUT SETTLEMENT
24 BECAUSE THAT WOULD BE A VIOLATION.
25 WE TALKED ABOUT JOINT COMPOUNDS AND OTHER PEOPLE
26 RESPONSIBLE. I DON'T BELIEVE WE CAN BRING UP THE ISSUE OF
27 SETTLEMENTS, BECAUSE THE M.I.L. ON SETTLEMENTS, NO. 4, WAS
28 NEVER ADDRESSED.

1 WHAT WAS ADDRESSED IS WE SPENT QUITE A BIT OF TIME
2 ON WHERE DID HE SAY HE WORKED? WOULD THAT INVOLVE ASBESTOS?
3 IF IT DID, DID HE TOUCH IT? AND THAT'S ALL CLEARLY WITHIN
4 PROP. 51.
5 IT'S ALL WITHIN THEIR BURDEN OF PROOF TO PROVE THAT
6 IT DID HAPPEN IF I'M SAYING IN MY EVIDENCE THAT IT DIDN'T,
7 AND THAT'S NORMAL OPENING, NORMAL DISCOVERY DISPUTES.
8 THEY ARE MAKING A LARGE ISSUE ABOUT THE USE OF THE
9 WORD PARTY BECAUSE IT RELATES TO AN M.I.L. THAT THEY DIDN'T
10 EVEN ASK FOR, AN AGREEMENT THAT WAS LIMITING THEM, NOT US.
11 AND TO DISPUTE -- IF THE COURT STILL THINKS THAT THAT WAS
12 SOMEHOW ATTRIBUTABLE TO APPLY TO BOTH PARTIES, AND WE SHOULD
13 HAVE TALKED ABOUT FIRST, THERE IS A SIMPLE REMEDY. THERE'S
14 AN INSTRUCTION ON SETTLEMENTS THAT WAS REFINING, BUT THERE'S
15 A NOTION WHY PEOPLE ARE NOT IN THIS CASE IS NOT YOUR
16 CONCERN, IT'S TO CONSIDER EVIDENCE OF FAULT.
17 THE COURT: AGAIN, I'D LIKE TO KNOW WHICH --
18 MR. BLUMENFELD-JAMES: I'M SORRY, YOUR HONOR. I
19 THINK IT'S 217.
20 MS. DEAN: AND I ALSO ASK THE COURT TO LOOK AT THE
21 PART OF THE TRANSCRIPT WHERE I SAID THAT THERE WERE MORE
22 THAN ONE PARTY INVOLVED.
23 THE COURT: I KNOW THAT. I DID SEE THAT.
24 MS. DEAN: OKAY.
25 MR. OXLEY: THE -- YOUR HONOR, WHAT WE'VE HEARD
26 JUST NOW IS IF MY WORD CHOICE WAS DIFFERENT. IT REMINDS ME
27 OF SOMETHING THAT A FRIEND OF MINE USED TO SAY, WHICH WAS,
28 WELL, IF NAPOLEON HAD A PIPER CUB AT THE BATTLE OF WATERLOO,

1 THINGS MIGHT HAVE TURNED OUT DIFFERENTLY.
2 THE FACT OF THE MATTER IS THEY WEREN'T DIFFERENT.
3 SHE SAID WHAT SHE SAID. THE IDEA THAT A MOTION IN LIMINE IS
4 A ONE-WAY STREET, I THINK WE ALL KNOW THAT'S NOT RIGHT. IT
5 APPLIES TO EVERYBODY, AND THE MOTION-IN-LIMINE ORDER ITSELF
6 SAYS IT SHALL NOT BE MENTIONED, PERIOD.
7 PROPOSITION 51, SHE SAID THAT SHE BROUGHT UP, YOU
8 KNOW, WHO WE SUED, AND WE GOT SOME OF IT WRONG, AND THAT WAS
9 TO DEFEND AGAINST OUR PROP. 51 CLAIM. THAT DOESN'T MAKE ANY
10 SENSE.
11 THE WAY TO DO THAT WOULD BE TO MAKE THE ARGUMENT
12 SHE MADE IN FRONT OF YOU THE OTHER DAY, WHICH WAS IN HER
13 VIEW UNION CARBIDE'S GOT SOME HAIR-BRAINED IDEA ABOUT
14 AMPHIBOLE EXPOSURE, BUT HERE'S WHAT THEIR EXPERTS DO OR
15 DON'T KNOW ABOUT THAT.
16 THE COURT: I THINK THAT THE TENOR OF THE MOTIONS
17 IN LIMINE WAS, NUMBER ONE, THAT STANDING ALONE, THE FACT
18 THAT SOMEBODY WAS ALREADY -- IS INADMISSIBLE, SHALL NOT BE
19 MENTIONED. IT WAS MENTIONED.
20 SO IT MAY HAVE BEEN PLAINTIFFS' MOTION. IT WAS
21 VIEWED AT IN THE CONTEXT OF PROHIBITING THE DEFENDANTS FROM
22 DOING IT, DEFENDANT FROM DOING IT, BUT NOW THE CAT IS OUT OF
23 THE BAG, AND IT HAS TO BE MENTIONED.
24 MR. OXLEY: RIGHT. AND THE OTHER PROBLEM IS, IS
25 THAT WHAT WE HEARD IN OPENING, AND WHAT WE'VE HEARD NOW, IS
26 -- I MEAN, SHE JUST SAID ONE OF FURNACE DEFENDANTS SETTLED.
27 WELL, THE JURY DOESN'T KNOW THAT. AND WE DECIDED WHAT --
28 HOW WE'RE GOING TO NARROW THIS CASE.

1 AGAIN, THIS GOES INTO WHAT THE PLAINTIFFS' LAWYERS
2 DID IN MAKING THOSE DECISIONS. THE DOOR HAS BEEN OPENED TO
3 WHAT THEY LOOKED AT, WHAT THEY TALKED ABOUT, AND WHAT THEIR
4 DECISION-MAKING WAS, AND I DIDN'T DO THAT.
5 SHE SAID, WE -- I MEAN, THIS IS NOT A QUOTE,
6 OBVIOUSLY, BUT I HEARD THE COURT SAY SOMETHING SIMILAR TO IT
7 EARLIER, THAT WE LOOKED AT IT, WE INVESTIGATED IT, AND WE
8 DECIDED WITH BOTH OF OUR TEXAS AND OUR LOS ANGELES LAW TEAM,
9 WE FIGURED THIS OUT. WELL, THEN, LET'S GET TO IT, THEN.
10 LET'S FIND OUT WHAT YOU TOOK INTO ACCOUNT IF WE'RE GOING TO
11 GO FORWARD.
12 AND, AGAIN, WITH EVERYTHING THAT HAS BEEN OPENED UP
13 BY THIS, SOMETHING THAT WE DIDN'T ASK FOR -- AND I WOULD NOT
14 BE STANDING ASKING FOR THIS REMEDY, BUT I HAVE TO BECAUSE
15 THERE'S NO WAY TO FIX IT. TO SAY TO THE JURY, DON'T
16 CONSIDER SETTLEMENTS, THAT DOESN'T DO ANY GOOD. TO LET US
17 SAY, HEY, YOU KNOW WHAT? SOME OF THESE PARTIES SETTLED.
18 THEY SUE THEM, AND APPARENTLY THEY THOUGHT THEY GOT IT RIGHT
19 BECAUSE THEY PAID. WELL, AGAIN, WE'RE BACK TO, WELL, WHY
20 DIDN'T YOU PAY, UNION CARBIDE?
21 THIS HAS NO PLACE IN THIS TRIAL, AND IT SHOULDN'T
22 HAVE BEEN BROUGHT UP IN THE TRIAL. I THINK WE SHOULD START
23 AGAIN. AND IF IT DOESN'T, WE NEED TO HAVE INFORMATION. NOT
24 JUST A LIST OF WHO SETTLED, BUT INFORMATION ABOUT THOSE
25 DETAILS, THE DETAILS ABOUT WHY FOLKS WERE DISMISSED, AND --
26 ANYWAY, I'M JUST REPEATING MYSELF, SO I'LL SIT DOWN.
27 THANK YOU, YOUR HONOR.
28 MS. DEAN: AND I'LL TRY NOT TO REPEAT MYSELF.

1 THERE SEEMS TO BE A FIX HERE, AND THAT'S THIS:
2 WHEN WE WERE TALKING ABOUT NOT MENTIONING PARTIES, MY
3 CONCERN WAS SPECIFIC AND IN THE MOTION, AND IT WOULD BE
4 HELPFUL, I THINK, FOR THE COURT TO READ OUR MOTION.
5 THERE WERE A LOT OF DEFENDANTS IN THIS CASE BECAUSE
6 THEY'RE SUED IN THE BEGINNING, AND THAT MEANS THEY MUST BE
7 AT FAULT, AND THAT'S NOT TRUE. EVEN IF THERE'S A GOOD-FAITH
8 BASIS TO SUE, IT DOESN'T MEAN THAT YOU CAN CARRY YOUR BURDEN
9 OF PROOF.
10 AND SO THEY SAY, OKAY, BUT THEN THEY ARGUE THAT
11 WITH THEIR EXPERTS, WHO WE DEPOSED LATER, THAT THEY'RE GOING
12 TO USE OUR INTERROGATORIES, BASICALLY, TO IMPLY THE SAME
13 THING; THAT THEY BELIEVED ALL OF THESE EXPOSURES, AND EVEN
14 THOUGH THERE'S NO EVIDENCE THAT BORE IT OUT, THAT MEANS IT
15 MUST BE SO.
16 I LOOKED AT A POWERPOINT OF MR. OXLEY LAST NIGHT
17 WHERE HE WANTED TO SHOW TRANSITE PIPE, ATTIC INSULATION, A
18 BUNCH OF PRODUCTS THAT AREN'T MENTIONED ANYWHERE OTHER THAN
19 DISCOVERY.
20 THE COURT: LOOK. I THINK WE ALL AGREE BUT FOR
21 YOUR CHOICE OF WORDS -- AND I'M NOT COMMENTING WHETHER IT
22 WAS INTENTIONAL OR NOT INTENTIONAL. THAT DOESN'T REALLY --
23 THAT'S NOT REALLY MATERIAL TO ME.
24 BUT HAD YOUR CHOICE OF WORDS BEEN DIFFERENT, AND I
25 THINK EVERYBODY AGREES THAT THEY COULD -- UNION CARBIDE
26 COULD RELY ON YOUR -- THEY COULD INTRODUCE YOUR
27 INTERROGATORY RESPONSES AND SAY, LOOK, THEY USED THE SHOTGUN
28 APPROACH. THEY SAID ANYBODY AND EVERYBODY EXPOSED HIM TO

1 ASBESTOS. I'M ASSUMING THAT'S WHAT'S BEEN DONE, AND THEN
2 THE EXPERTS COMMENT ON IT. I'M NOT EXACTLY SURE HOW THE
3 EXPERT COMMENTS ON IT. BUT I GUESS THAT'S THE WAY IN WHICH
4 IT WOULD BE USED. SO IT'S LIKE EVEN PLAINTIFFS' NOT SURE
5 WHERE IT CAME FROM.
6 BUT YOU USED THE WORD THAT YOU DID, AND IT JUST
7 CREATES A WHOLE OTHER CONTEXT. IT PUTS IN ISSUE THE REASONS
8 FOR THE DISMISSALS. THE INFERENCES THAT THEY'RE OUT OF THE
9 CASE BECAUSE THEY HAD NO RESPONSIBILITY BASED ON YOUR FIRM'S
10 INVESTIGATION. THAT'S WHAT THE -- THAT'S WHAT YOU SAID THE
11 EVIDENCE WOULD SHOW.
12 MS. DEAN: CAN I ASK THE COURT A QUESTION? MY
13 UNDERSTANDING OF THE LAW, AND I'M TRYING TO SEE IF THERE'S A
14 DIFFERENCE, IS MAKING THE STATEMENT THAT BASED ON OUR
15 INVESTIGATION -- MEANING THE DEPOSITIONS, TALKING TO
16 CORPORATE REPRESENTATIVES, AND I IDENTIFIED WHAT I MEANT BY
17 THAT -- THAT WE LEARNED THE EXPOSURE TO LENNOX ONLY INVOLVED
18 GASKETS AND NOT INSULATION, I DON'T BELIEVE -- AND MAYBE I'M
19 HEARING THIS WRONG -- THE COURT BELIEVES THERE WAS ANYTHING
20 WRONG WITH THAT.
21 IN OTHER WORDS, THE PROBLEM IS NOT THAT BOTH SIDES
22 DID DISCOVERY, AND WE KNOW THAT THOSE DEPOSITIONS AND THAT
23 THAT INFORMATION IS GOING TO COME IN, AND WE'RE GOING TO
24 TALK ABOUT WHETHER THERE'S EXPOSURE OR NOT, IS THAT I
25 REFERENCED IT IN TERMS OF A PARTY ONCE IN THE BEGINNING AS
26 OPPOSED TO SAYING PEOPLE THAT WERE MENTIONED IN DISCOVERY
27 RESPONSES.
28 I CAN'T BELIEVE THAT WE'RE GOING TO WASTE TWO WEEKS

1 OF COURT TIME IN THIS TRIAL AND THAT THAT CANNOT BE CURED.
2 AND, AGAIN, THE IMPLICATIONS THAT THEY WERE
3 THEREFORE NOT HERE FOR WHATEVER REASON IS ONE THAT
4 MR. NICHOLS BROUGHT UP BEFORE I DID. AND IN JURY SELECTION
5 HE TOLD THE JURY THAT THERE ARE GOING TO BE COMPANIES THAT
6 ARE NOT HERE, AND YOU CAN CONSIDER THEIR FAULT.
7 THE COURT: WELL, SURE. THAT'S -- WHAT'S WRONG
8 WITH THAT?
9 MS. DEAN: THE -- I GUESS THE POINT IS THAT THERE'S
10 NOTHING WRONG WITH THAT AND THAT THAT HAS BEEN REAFFIRMED IN
11 THE JURY'S MIND FROM PLAINTIFFS' OPENING AS WELL; THAT YOU
12 ABSOLUTELY CAN CONSIDER THE FAULT EVEN IF THEY'RE NOT HERE.
13 WHAT THEY ARE CONCERNED ABOUT IS WHETHER SOMEHOW
14 MENTIONING THEY'RE A PARTY IMPLIES THAT THEY HAVE GOTTEN OUT
15 OF THE CASE VERSUS SETTLED, AND THERE WAS NO MENTION OF THAT
16 EVER, EVER. AND MORE IMPORTANTLY, WHAT I DID MENTION WAS
17 WHERE I THOUGHT EVIDENCE DIDN'T SHOW ASBESTOS CONTENT.
18 THAT'S PERMISSIBLE. EVIDENCE WHERE THEY SHOWED THERE WASN'T
19 EXPOSURE, THAT'S PERMISSIBLE. AND WHERE THERE WAS EXPOSURE,
20 AND WHERE THERE WAS ASBESTOS, THAT YOU SHOULD HOLD THE OTHER
21 COMPANIES AT FAULT AND ONLY MAKE UNION CARBIDE PAY THEIR
22 FAIR SHARE.
23 AGAIN, WHAT THIS BOILS DOWN TO IS THEY HAVE A LOT
24 OF COMPLAINTS THAT THEY DON'T LIKE WHAT I BELIEVE THE
25 EVIDENCE IS GOING TO SHOW. BUT THE ONLY THING THEY CAN SAY
26 IS THAT REFERENCING NOT THAT THERE WAS AN INVESTIGATION --
27 WE CAN ALL TALK ABOUT HOW WE HAD EXPERTS AND WITNESSES IN
28 DEPOSITION, AND THAT'S WHAT THE EVIDENCE IS GOING TO SHOW,

1 THAT'S HOW WE KNOW THE EVIDENCE IS GOING TO SHOW IT -- IT IS
2 THAT I USED THE WORD *PARTY* WHEN I SHOULD HAVE SAID THE
3 DISCOVERY RESPONSES ARE GOING TO INDICATE. THAT HAS TO BE
4 CURABLE, TO THE EXTENT THAT'S A PROBLEM.
5 AND THE MOTION IN LIMINE WASN'T AT ALL A STATEMENT
6 THAT MENTIONING A PARTY IS IMPERMISSIBLE. IF YOU READ OUR
7 MOTION, THE ACTUAL MOTION, IT'S NOT THAT IT'S IMPERMISSIBLE.
8 THERE'S TWO CASES THAT SAY IT IS FOR IMPEACHMENT VALUE.
9 IT'S IMPERMISSIBLE IF YOU'RE TRYING TO DO IT PRIOR TO THAT.
10 AND SO MY WHOLE BASIS FOR FILING THAT M.I.L. IS YOU
11 CAN'T JUST SAY THAT THEY'RE A PARTY; THEREFORE, THERE'S
12 FAULT, AND THAT'S EXACTLY WHAT MY OPENING SAID. JUST
13 BECAUSE WE BELIEVE THEY'RE A PARTY, WE STILL DO
14 INVESTIGATION. I TALK TO THEIR PEOPLE, THEY TALKED TO OURS.
15 WE DO DISCOVERY. I EXPLAINED A CORPORATE REP DEPO, AND WE
16 LEARNED MORE. AND WHAT WE LEARNED IS THERE WAS FIBERGLASS
17 HERE, THERE WAS ASBESTOS GASKETS HERE.
18 I DON'T THINK THERE'S ANYTHING ABOUT THAT PROCESS
19 THAT ANYONE CAN SAY IS NOT PROPER. THEY JUST DON'T LIKE
20 THAT I MENTIONED IN THE BEGINNING THAT THE PROCESS WAS
21 TRIGGERED BY BEING PARTIES. I HAVE TO BELIEVE THAT TELLING
22 THEM THAT WHETHER A COMPANY IS A PARTY OR NOT IS NOT TO BE
23 CONSIDERED. THEY STILL GET TO, IF I SAID ANYTHING WRONG,
24 ANYTHING, HOLD ME ACCOUNTABLE. I THINK THE WORD THAT WAS
25 USED YESTERDAY WAS CRUCIFIED, AND THE COURT SAID THERE
26 WOULDN'T BE ANY OF THAT. IF I SAID ANYTHING ABOUT WHAT THE
27 INVESTIGATION MEANS, WHAT WE WOULD SHOW FROM HIS DEPOSITION,
28 MR. DENNIS', AND THROUGH THE DEPOSITION OF THE PARTIES, THEY

1 CAN HOLD ME ACCOUNTABLE.
2 THERE WAS NEVER A STATEMENT THAT THERE WAS SOME
3 KIND OF UNDER-THE-TABLE INVESTIGATION, AND THEY KEEP
4 ALLUDING TO THAT. I SAID, HERE'S HOW WE FOUND THINGS OUT.
5 WE TOOK AN 800-PAGE DEPOSITION.
6 YOU KNOW HOW I FOUND OUT ABOUT LENNOX? WE DID
7 THEIR DEPOSITION.
8 YOU KNOW HOW I FOUND OUT ABOUT JOHNS MANVILLE? WE
9 TOOK THEIR INTERROGATORIES.
10 I'M GOING ON AT LENGTH, BUT IT'S CRITICAL HERE THAT
11 THE NOTION OF WASTING TWO WEEKS OF THE COURT'S TIME AND
12 STARTING OVER WITH THE CLIENTS IS A HUGE DEAL, AND NEVER,
13 EVER, IN THE INVESTIGATION DISCUSSIONS WAS IT SOME KIND OF
14 SECRET PLAINTIFF, DALLAS AND L.A. FIRM INVESTIGATING BEHIND
15 THE SCENES. I IDENTIFIED EACH TIME WHAT I WAS TALKING
16 ABOUT. WE FOUND OUT HE WAS A WHEAT FARMER. WE FOUND OUT HE
17 DID COTTON. THAT WAS IN HIS DEPOSITION.
18 THE COURT: WELL, YOU FOUND IT OUT. I MEAN, I --
19 IS THAT AN ISSUE IN THE CASE, WHAT YOUR FIRM FOUND OUT? I
20 MEAN, ULTIMATELY THE TRIAL IS ABOUT WHAT IS THE EVIDENCE.
21 MS. DEAN: AND, AGAIN, THAT IS A WAY OF SAYING
22 THAT'S THE EVIDENCE. WE KNOW THAT EVIDENCE FROM THE
23 DEPOSITION OF MR. DENNIS, BECAUSE THE DEFENDANTS FOR 48
24 PAGES TALKED ABOUT HIS FARM CAREER, AND WHAT HE DID IN HIS
25 FARM, AND IF THAT INVOLVED ASBESTOS OR NOT.
26 SO I HAVE A RIGHT TO PREVIEW THAT WHAT WE LEARNED
27 ALONG THE WAY, PER DISCOVERY, WHICH I, AGAIN, THIS ISN'T A
28 MYSTERY. I DIDN'T LEAVE IT UP IN THE AIR. I MENTIONED DAYS

1 OF DISCOVERY IN THE DEPOSITION, THAT IN HIGH SCHOOL THERE
2 WAS AN EXPOSURE BECAUSE HE WAS A WHEAT FARMER. AFTERWARDS,
3 HE WAS AN OPERATOR; THAT WAS AN EXPOSURE. THEN HE WAS A
4 TRUCK DRIVER.
5 THIS WASN'T IN REALITY, OR WHAT WAS STATED, OR ANY
6 OTHER FORM, FROM SECRET INVESTIGATIONS DONE BY PLAINTIFFS
7 UNDER THE TABLE. IT WAS FROM DEPOSITIONS THAT I REFERENCED
8 IN THE OPENING.
9 YOU CAN LOOK THROUGH THE ENTIRE OPENING. EVERY
10 SINGLE THING I TALKED ABOUT IN PREVIEWING PROP. 51 ISSUES
11 WAS RELATED TO DISCOVERY AND EVIDENCE THAT I BELIEVE THE
12 JURY WILL HEAR THAT HAPPENED IN THIS CASE OR HAS BEEN
13 DESIGNATED IN THIS CASE.
14 WE KNOW LENNOX HAD FIBERGLASS. WE TOOK THEIR
15 DEPOSITION.
16 WE KNOW THAT THE BRAKES WEREN'T SANDED BECAUSE WE
17 DID THE CEDARS DEPOSITION.
18 WE KNOW THE JOINT COMPOUND AT ISSUE WERE KAISER
19 GYPSUM AND GEORGIA PACIFIC BECAUSE OF THE DEPOSITIONS IN
20 THIS CASE. WE KNOW THAT THOSE RELATED TO UNION CARBIDE FROM
21 INVOICES WE GOT IN THIS CASE.
22 WE KNOW CARRIER HAD ASBESTOS GASKETS FROM A
23 DEPOSITION I TOOK IN THIS CASE.
24 THERE IS A LOT OF THE COURT AND DEFENSE COUNSEL
25 INDICATING WHAT THE JURY MIGHT THINK THAT SEEMS TO BE
26 CONTRARY TO ACTUALLY WHAT WAS SAID. AND I'M SAYING THAT
27 BOLDLY BECAUSE THIS MATTERS.
28 I NEVER EVER INDICATED THAT THERE WERE SOME

1 ATTORNEY/CLIENT THINGS THAT I'M NOT FIRST EXPOSING. I SAID
2 THE OPPOSITE. WHEN WE INVESTIGATED THIS CASE, THIS IS WHAT
3 WE LEARNED WHEN THEY ASKED QUESTIONS. WHEN WE INVESTIGATED
4 LENNOX, THIS IS WHAT WE LEARNED.
5 AND THAT'S EXACTLY WHAT OPENING IS: PREVIEWING
6 WHAT YOU'RE GOING TO HEAR AT TRIAL BASED ON WHAT WE EXPECT
7 IS GOING TO BE HEARD FROM OUR WORK AND DISCOVERY.
8 INVESTIGATION IS THE SAME THING AS DISCOVERY. IT'S JUST A
9 LESS LEGAL WAY OF SAYING IT. THERE IS NO PROHIBITION OF
10 THAT.
11 THEIR ONLY REAL COMPLAINT -- AND WHEN WE STARTED
12 THIS BEFORE LUNCH -- IS THAT I USED THE WORD PARTY WHEN
13 THEIR OWN EXPERTS PLAN ON RELYING ON INTERROGATORIES THAT
14 REFERENCE ALL OF OUR ALLEGED EXPOSURES BY NAME AND WORK
15 HISTORY SHEET AND CASE REPORT, AND THAT'S LEGAL.
16 THE COURT: WELL, WAS THERE A MOTION IN LIMINE MADE
17 AS TO THOSE? WAS THERE A MOTION TO PRECLUDE THE DEFENDANT
18 FROM READING PRIOR INTERROGATORY RESPONSES? BECAUSE IT'S SO
19 MISLEADING AT THE TIME THAT YOU ANSWERED IT OR AT THE TIME
20 YOU DO THE CASE REPORT, THAT IT'S -- PLAINTIFF REALLY HAS TO
21 NAME ANYBODY WHO COULD POSSIBLY CREATE AN EXPOSURE BECAUSE
22 THEY NEED TO PRESERVE -- PLAINTIFF NEEDS TO PRESERVE HIS
23 RIGHTS. AND IT'S FUNDAMENTALLY UNFAIR UNTIL THE PARTIES
24 LOOK INTO EVIDENCE FOR THEM TO JUST SAY, OKAY, HERE'S THE
25 INTERROGATORY ANSWER, HERE'S THE CASE REPORT. THEY NAMED 25
26 DIFFERENT COMPANIES.
27 WAS THERE A MOTION IN LIMINE FOR THAT?
28 MS. DEAN: ACTUALLY, YOUR HONOR, WE LOOKED INTO

1 THAT, AND I CAN FIND THIS, BUT I DON'T KNOW IT OFF THE TOP
2 OF MY HEAD, BUT THERE'S AN EXPLICIT RULE IN THE CIVIL
3 PRACTICE CODE THAT SAYS THAT INTERROGATORY RESPONSES, EVEN
4 IF AMENDED -- WHICH WE AMENDED OURS IN ORDER TO CLARIFY ALL
5 OF THE THINGS WE'RE SAYING -- STILL CAN AS AN ABSOLUTE RIGHT
6 BE RELIED ON BY THE PARTY OPPONENT. AND IT GOES ON TO SAY
7 THAT WE CAN'T EVEN READ OUR AMENDMENT IF THEY SHOW A SHOWING
8 OF ANY KIND OF FRAUD.
9 IN OTHER WORDS, I'M NOT ALLOWED TO, IN OPENING, OR
10 AT ANY POINT IN TIME THAT I'M AWARE OF, SAY ABOUT HOW UNFAIR
11 IT IS THAT THE INITIAL DEFENDANTS WERE INCLUDED ON A
12 GOOD-FAITH BASIS. THOSE ARE TALKING ABOUT LEGAL ISSUES. I
13 HAVE TO AVOID IT. I'M NOT GOING TO PRECLUDE THEM FROM
14 RELYING ON INTERROGATORY RESPONSES.
15 BUT WHAT I CAN DO SQUARELY WITHIN THE RULES IS SAY
16 THAT WE DID DISCOVERY, AND I ANTICIPATE YOU'RE GOING TO HEAR
17 THAT THE THINGS THAT WE THOUGHT WERE BAD IN THE BEGINNING
18 TURNED OUT NOT TO BE, OR THE FURNACES WERE BAD, BUT NOT AS
19 BAD AS WE THOUGHT, BECAUSE IT WAS GASKETS AND NOT
20 INSULATION. OR THAT THE BRAKES DID HAVE ASBESTOS, BUT HE
21 DIDN'T SAND THEM. I MEAN, THAT'S PRECISE LY WHAT I'M
22 ALLOWED TO DO.
23 THE COURT: OKAY. LOOK. I THINK WE GET BACK TO
24 THE POINT WHERE IF YOU HAD SAID THAT WE ANTICIPATE THAT
25 THERE WILL BE SOME EVIDENCE THAT AT ONE POINT IN TIME WE
26 NAMED ALL KINDS OF DIFFERENT COMPANIES IN RESPONSE TO
27 DISCOVERY THAT WE THOUGHT WOULD HAVE SOME RESPONSIBILITY
28 AND, YOU KNOW, INDEED, YOU KNOW, MAYBE SOME OF THEM WILL OR

1 MAYBE SOME OF THEM DO, BUT, YOU KNOW, THEY WERE ALL NAMED IN
2 AN ABUNDANCE OF -- I MEAN, WHATEVER IT IS YOU'D WANT TO SAY.
3 MS. DEAN: AND WHAT I WOULD SUGGEST IS IF --
4 FIRST -- AND I CAN SHOW THE COURT LAW REFERENCING PARTIES TO
5 THE SUIT IS NOT PERMITTED. THE MOTION IN LIMINE WAS NOT A
6 FINDING THAT THERE IS ANYTHING WRONG WITH INDICATING THAT
7 THERE WERE OTHER PARTIES, OR COUNTER-PARTIES, OR ANYTHING
8 LIKE THAT. THERE'S CASE LAW ON IT.
9 RATHER, IT WAS AN AGREEMENT THE DEFENDANTS DIDN'T
10 BRING IT UP UNLESS THEY WERE TO SHOW INDEPENDENT EVIDENCE.
11 SO, AGAIN, IT'S NOT THAT I THINK SOME THINGS ALLIED
12 TO OTHER SIDES, BUT WHEN I BROUGHT IT UP, IT WASN'T TO SAY
13 BECAUSE YOU'RE A PARTY, YOU'RE AT FAULT. IT WAS TO DO
14 EXACTLY WHAT THE COURT INDICATED; THAT THERE WERE PARTIES
15 THAT INITIALLY WE THOUGHT MIGHT BE THERE, BUT WE GOT SOME OF
16 THEM WRONG. WE FIGURED OUT IN THE DISCOVERY PROCESS.
17 SO THERE'S NOTHING ABOUT REFERENCING A PARTY THAT
18 IS INHERENTLY AGAINST ANYTHING IN THE CIVIL CODE. IN FACT,
19 THERE'S CASE LAW THAT SAYS YOU CAN REFERENCE A COMPLAINT AND
20 COUNTER-PARTIES.
21 THE MOTION IN LIMINE WAS NOT DIRECTED TO US, SO
22 IT'S NOT LIKE WE VIOLATED A MOTION IN LIMINE, AND THAT,
23 MOSTLY, AT THE END OF THE DAY, IF WE JUST ASSUME SOMEHOW
24 SAYING PARTY, NOT TO SAY, BECAUSE THEY'RE A PARTY IS WRONG,
25 BUT TO SAY BECAUSE THEY'RE A PARTY WE INVESTIGATED, AND WE
26 FIGURED THINGS OUT, I CAN'T FATHOM THAT ANYTHING MORE THAN
27 AN INSTRUCTION TO DISREGARD AS OPPOSED TO A MISTRIAL IS
28 NECESSARY.

1 THE COURT: LET ME JUST LOOK AT 217.
2
3 (PAUSE IN THE PROCEEDINGS.)
4
5 THE COURT: ALL RIGHT. WELL, LET ME -- I'M JUST
6 GOING TO GO BACK IN CHAMBERS. I KNOW WE'RE TAKING A LONG
7 TIME ON THIS, BUT I DO AGREE IT'S AN IMPORTANT THING, AND
8 WHATEVER DECISION I MAKE, OBVIOUSLY I WANT TO MAKE THE RIGHT
9 ONE, SO LET ME JUST --
10 MS. DEAN: CAN I GIVE THE COURT THAT RULE I JUST
11 REFERENCED?
12 THE COURT: WHAT'S THAT?
13 MS. DEAN: THE FACT THAT YOU CAN USE
14 INTERROGATORIES? AND MAYBE THE AMENDMENT -- I DON'T KNOW IF
15 CITING THAT RULE FOR THE RECORD IS HELPFUL.
16 THE CODE OF CIVIL PROCEDURE SECTION 2030.310. AND
17 JUST THE CONTEXT WAS THAT AN OPPOSING PARTY CAN USE
18 INTERROGATORIES, AND YOUR REMEDY IS THEN USE YOUR AMENDMENT,
19 AND EVEN THAT CAN BE LIMITED. BUT THEN --
20 THE COURT: 2030.310?
21 MS. DEAN: 2030.310.
22 THE COURT: WELL, 2030.410 -- 2030.310 HAS TO DO
23 WITH AMENDMENT OF AN ANSWER. 2030.410 SAYS "AT THE TRIAL OR
24 ANY OTHER HEARING IN THE ACTION, SO FAR AS ADMISSIBLE UNDER
25 THE RULES OF EVIDENCE, THE PROPOUNDING PARTY, OR ANY PARTY
26 OTHER THAN THE RESPONDING PARTY, MAY USE ANY ANSWER OR PART
27 OF AN ANSWER TO AN INTERROGATORY ONLY AGAINST THE RESPONDING
28 PARTY."

1 SO OBVIOUSLY THE COURT HAS DISCRETION TO KEEP THAT
2 OUT.
3 MS. DEAN: YOUR HONOR, THE COURT'S RIGHT. I INTEND
4 TO DO THAT. SURE THERE'S EVIDENTIARY OBJECTIONS, BUT I
5 THINK THE POINT IS THAT YOU CANNOT RELY ON THE AMENDMENT TO
6 SUPPLEMENT THE ORIGINAL.
7 MR. OXLEY: I'M NOT GOING TO ARGUE ANYTHING. I
8 JUST WANTED TO MENTION ONE THING --
9 THE COURT: YES.
10 MR. OXLEY: -- AS PRACTICAL MATTER.
11 THE COURT: YES.
12 MR. OXLEY: COUNSEL HAS SAID SHE HAS A LIST OF HER
13 SETTLED AND WHO WAS DISMISSED THAT'S CONFIDENTIAL. I'M
14 ASSUMING THAT THERE ARE PROVISIONS IN THESE SETTLEMENT
15 AGREEMENTS THAT SAYS IT'S CONFIDENTIAL, AND IT SAYS YOU
16 PROBABLY HAVE TO GIVE NOTICE TO THE OTHER SIDE IF YOU GET AN
17 ORDER THAT SAYS YOU HAVE TO TURN THAT OVER.
18 I MENTION THAT FOR A PRACTICAL REASON. I THINK
19 IT'S GOING TO BE FASTER AND MORE EFFICIENT FOR THE PARTIES,
20 OBVIOUSLY NOT FOR THE COURT. THIS IS A HUGE PROBLEM FOR THE
21 COURT THAT UNION CARBIDE DIDN'T CREATE AND FOR THE JURY
22 COMMISSIONER AND EVERYONE ELSE, AND I UNDERSTAND THAT. BUT
23 FROM A MOVING-ON-WITH-THE-CASE STANDPOINT, IT MAY BE MORE
24 EFFICIENT TO EMPANEL A NEW JURY ON MONDAY, AVOID ALL OF THIS
25 TOGETHER, START WITH A CLEAN SLATE, AND JUST MOVE FORWARD.
26 THE COURT: ARE THERE CONFIDENTIALITY ISSUES?
27 MS. DEAN: YES. THE EXISTENCE OF A SETTLEMENT
28 WOULDN'T BE A PROBLEM, BUT THE AMOUNT, WHICH THE COURT

1 DOESN'T SEEM INCLINED --
2 THE COURT: RIGHT. BUT THE DETAILS CONCERNING --
3 THE CONFIDENTIALITY WOULD BE AS TO WHAT? THE AMOUNT?
4 MS. DEAN: THE AMOUNT.
5 THE COURT: THE AMOUNTS. WELL, I DON'T KNOW HOW WE
6 GET AROUND THAT, EITHER. I SUPPOSE IF YOU'RE ORDERED BY A
7 COURT TO RELEASE THAT INFORMATION, I SUPPOSE THEN THERE
8 WOULD BE NO CHOICE. IT WOULDN'T BE A VIOLATION, BECAUSE YOU
9 WERE ORDERED TO DO IT, BUT THAT CERTAINLY DOES PUT INTO PLAY
10 THE RIGHTS OF OTHER PARTIES.
11 MR. OXLEY: EXACTLY.
12 MS. DEAN: YEAH. I THINK THAT THERE IS A MUCH
13 SIMPLER SOLUTION TO ANY ALLEGED PROBLEM.
14 THE COURT: I UNDERSTAND.
15 MS. DEAN: YEAH.
16 THE COURT: OKAY.
17 MR. OXLEY: THANK YOU, YOUR HONOR.
18 THE COURT: YOU'RE WELCOME.
19 MR. OXLEY: DO WE HAVE TIME TO RUN DOWN THE HALL?
20 THE COURT: YOU DO.
21
22 (A RECESS WAS TAKEN.)
23
24 THE COURT: WELL, I WAS LOOKING AT CACI 109, WHICH
25 IS THE ONE ABOUT THE REMOVAL OF CLAIMS OR PARTIES. AND, FOR
26 EXAMPLE, WE HAD -- I THINK THE JURY WAS AWARE THAT AT THE
27 BEGINNING, THAT KAISER GYPSUM WAS A DEFENDANT, AND THIS
28 PARTICULAR INSTRUCTION WAS NOT REQUESTED, BUT IT WOULD HAVE

1 BEEN APPROPRIATE TO GIVE. AND IT SAYS "(NAME OF PARTY) IS
2 NO LONGER A PARTY TO THIS CASE. DO NOT SPECULATE AS TO WHY
3 THIS PERSON IS NO LONGER INVOLVED IN THIS CASE. YOU SHOULD
4 NOT CONSIDER THIS DURING YOUR DELIBERATION."
5 THERE'S NO AUTHORITY, REALLY, FOR IT. IT'S IN
6 CACI. NOR IS THERE AUTHORITY IN THE BAJI INSTRUCTION, WHICH
7 WAS THE EARLIER VERSION OF IT. BUT, CLEARLY, THE CONCEPT
8 BEHIND IT IS PARTIES GET REMOVED FROM CASES, AND THE JURY IS
9 NOT TOLD WHY. AND THAT, I THINK -- AND THEY'RE NOT TO
10 SPECULATE ABOUT WHY THE PARTY IS REMOVED.
11 IN THIS SITUATION WE HAVE A -- AND INTENTIONAL OR
12 NOT, THE IMPRESSION WAS CLEARLY GIVEN TO THE JURY, AFTER
13 LOOKING AT WHAT I HAVE OF THE TRANSCRIPT, THAT THERE WERE
14 OTHER PARTIES WHO WERE -- THERE WERE OTHER ENTITIES THAT
15 WERE NAMED IN THIS CASE. THEY WERE DEFENDANTS IN THE CASE.
16 AND DURING THE COURSE OF THE INVESTIGATION, MISTAKES WERE
17 MADE. PLAINTIFF MADE MISTAKES AS TO WHO IT WAS THAT WAS
18 RESPONSIBLE. AND CLEARLY THOSE ENTITIES OR PARTIES ARE NO
19 LONGER IN THE CASE.
20 SO THE JURY IS GIVEN THE FIRM -- GIVEN THE FIRM
21 IMPRESSION THAT IT'S PLAINTIFFS' POSITION THAT THERE WERE
22 PARTIES IN THIS CASE WHO WERE HERE, PLAINTIFFS MADE
23 MISTAKES, THEY'RE NO LONGER HERE. THEREFORE, THE CONCLUSION
24 IS THEY'RE NOT RESPONSIBLE, OR AT LEAST PLAINTIFF THINKS
25 THEY'RE NOT RESPONSIBLE.
26 SO THEN THE DEFENSE SAYS, WELL, WAIT A MINUTE. YOU
27 DIDN'T DISMISS THEM BECAUSE YOU THOUGHT THEY WEREN'T
28 RESPONSIBLE. THERE WERE SEVERAL OF THEM THAT YOU SETTLED

1 WITH. YOU GOT MONEY FROM THEM. SO YOU DIDN'T THINK THAT AT
2 ALL. AND I DON'T KNOW HOW ELSE THE DEFENSE CAN CONTRADICT
3 OR OPPOSE WHAT HAS BEEN REPRESENTED IN THE OPENING
4 STATEMENT.
5 SO THEN LET'S SAY WE DO HAVE THESE CONFIDENTIALITY
6 ISSUES, WHICH ARE ANOTHER COMPLICATING FACTOR. BUT LET'S
7 SAY THE COURT WAS INCLINED TO ORDER THE PLAINTIFF TO TURN
8 OVER INFORMATION CONCERNING SETTLEMENTS. AND SO THEN
9 DEFENDANTS STAND UP, AND THEY SAY, WELL, THE -- THEY DIDN'T
10 DISMISS THESE -- AND I MAY BE REPEATING MYSELF. THEY DIDN'T
11 DISMISS THESE THINGS BECAUSE THEY DIDN'T THINK THEY WERE
12 RESPONSIBLE. THEY GOT MONEY.
13 SO THEN WHAT HAPPENS? THE PLAINTIFF SAYS, WELL,
14 WAIT A SECOND. I MEAN, IF THEY WANT TO EXPLAIN IT, THE
15 PLAINTIFF SAYS, WELL, NO, THERE WERE GOOD REASONS TO LET
16 THEM OUT AND TAKE MONEY, AND THERE WERE TONS OF REASONS WHY
17 SETTLEMENTS ARE REACHED. AND, FRANKLY, THE REASONS WHY
18 SETTLEMENTS WERE REACHED WERE SO VARIED THAT IT WOULD BE
19 DIFFICULT, REALLY, FOR THE JURY TO UNDERSTAND. AND THEN
20 WHAT?
21 WELL, THEN WE GET INTO, WELL, YOU MADE THE WRONG
22 CHOICE, OR THAT REALLY WASN'T THE REASON WHY YOU SETTLED
23 WITH THEM. AND, OBVIOUSLY, WE CAN'T GET INTO THAT IN FRONT
24 OF THE JURY.
25 SO ALL THESE THINGS HAVE NOW BEEN PLACED BEFORE THE
26 JURY, AND THE AGREEMENT BEFORE TRIAL THAT THE -- AND, OF
27 COURSE, I WILL DRAW YOUR ATTENTION TO THE FACT THAT THE
28 STIPULATION AND ORDER REGARDING MOTIONS IN LIMINE SAYS "THE

1 AGREEMENTS REACHED HEREIN ARE WITHOUT PREJUDICE. THE
2 PARTIES HAVE FURTHER AGREED THAT SHOULD SOMETHING OCCUR
3 DURING TRIAL THAT IN THEIR OPINION WOULD OTHERWISE PERMIT
4 THE USE OF EVIDENCE, WHICH THESE AGREEMENTS WOULD EXCLUDE,
5 THAT THE PARTY WILL ASK TO APPROACH THE BENCH AND ADDRESS
6 THE RELEVANCE OF SUCH EVIDENCE OUTSIDE THE PRESENCE OF THE
7 JURY."
8 AND THAT SITUATION HAS COME UP, BECAUSE THE
9 AGREEMENT REGARDING MOTIONS IN LIMINE TO EXCLUDE EVIDENCE OR
10 REFERENCE TO SETTLEMENTS OBTAINED IN THIS MATTER
11 SPECIFICALLY STATES THAT EVIDENCE OF SETTLEMENTS IS NOT
12 ADMISSIBLE, WILL NOT BE MENTIONED DURING OPENINGS OR TRIAL
13 UNLESS SOMETHING OCCURS DURING TRIAL THAT WOULD CREATE AN
14 EXCEPTION. AND IN MY VIEW THAT HAS OCCURRED. THE
15 SETTLEMENTS -- THE ISSUE OF SETTLEMENTS HAS NOW BECOME AN
16 ISSUE IN THE CASE.
17 THERE WAS ALSO AN AGREEMENT THAT THERE WILL BE NO
18 MENTION OF FORMER PARTIES. AND, GRANTED, THE INTENTION MAY
19 HAVE BEEN THAT THE DEFENDANTS WOULD NOT MENTION THE FORMER
20 PARTIES, BUT EVEN IF THAT WAS THE INTENT, I MEAN, IT SAYS
21 EVEN IF A FORMER PARTY IS DISCUSSED, THE FACT THAT THEY WERE
22 A PARTY WILL NOT BE REFERENCED. I WOULD THINK THAT THAT
23 WOULD APPLY EQUAL LY TO BOTH SIDES.
24 BUT EVEN IF, AS CLAIMED, IT WAS DIRECTED TO THE
25 DEFENDANT, THE FACT THAT THE PLAINTIFF HAS PUT FORMER
26 PARTIES IN ISSUE, THAT OPENS THAT DOOR.
27 SO THEN THE DEFENDANT CAN DISCUSS FORMER PARTIES,
28 AND THEN THAT WOULD BRING INTO PLAY, I SUPPOSE, THAT THEY

1 COULD TELL THE JURY EVERY FORMER PARTY THAT WAS IN THE CASE.
2 AND SO THEN THE QUESTION IS, ALL RIGHT, WELL, THEN,
3 WE HAD THIS INVESTIGATION. WHY ARE THEY NO LONGER PARTIES?
4 AND WE GET WAY BEYOND THE TYPICAL SITUATION WHERE SOMEBODY
5 IS HERE, THEY'RE NO LONGER HERE, AND THE COURT CAN TELL THE
6 JURY NOT TO SPECULATE AS TO WHY THEY'RE NO LONGER HERE.
7 WHEN THE PLAINTIFF SAYS, EVEN IF INADVERTENTLY, THAT THE
8 REASON WHY A FORMER PARTY IS NOT HERE IS BECAUSE WE MADE A
9 MISTAKE, THEN I JUST THINK THAT IT'S NOT POSSIBLE TO UNRING
10 THE BELL. IT HAS NOW BECOME AN ISSUE IN THE CASE, AND WE
11 WOULD GET INTO JUST A MORASS. AND I DON'T SEE ANY WAY TO
12 LIMIT IT.
13 I AGREE IT IS NOT ENOUGH JUST TO -- EVEN IF
14 THERE'S -- YOU KNOW, AGAIN, PUTTING CONFIDENTIALITY ASIDE,
15 EVEN IF THE REMEDY, AT LEAST TENTATIVE REMEDY, WOULD BE TO
16 ALLOW THE DEFENSE TO STAND UP AND SAY, YES, THERE WERE THESE
17 OTHER SETTLEMENTS, THAT'S SUBJECT TO INTERPRETATION AS
18 STATED. HOW IS THE JURY TO EVALUATE THAT? DOES IT MEAN
19 THAT THERE WAS RESPONSIBILITY ON THE -- FOR THE OTHER SIDE,
20 AND CAN'T THAT BE USED AGAINST THE DEFENDANT, SAYING -- EVEN
21 THE JURY CAN CONSIDER, WELL, THEY SETTLED, WHY IS UNION
22 CARBIDE TAKING THIS THING TO TRIAL?
23 SO I JUST DON'T SEE HOW WE CAN CURE THIS. AS MUCH
24 AS I AM LOATHE TO GRANT A NEW TRIAL MOTION, I THINK I HAVE
25 NO CHOICE BUT TO DO THAT.
26 SO THE -- I MEAN A MISTRIAL MOTION. SO I MISSPOKE
27 ABOUT THAT.
28 SO THE MOTION FOR MISTRIAL IS GRANTED.

1 MR. OXLEY: THANK YOU, YOUR HONOR.
2 MS. DEAN: YOUR HONOR, CAN WE REQUEST TO HAVE,
3 BEFORE WE TAKE A WEEK AND A HALF OF WORK, AN OPPORTUNITY TO
4 BRIEF THIS AT 9:00 TOMORROW MORNING? THERE IS CASE LAW THAT
5 EXPLICITLY INDICATES THAT MENTIONING THE EXISTENCE OF THE
6 PARTIES ARE ACCEPTABLE, AND I ALSO BELIEVE I CAN FIND
7 AUTHORITY FOR THE NOTION THAT WHAT THE COURT EXPLICITLY SAID
8 WAS THE FUNDAMENTAL PROBLEM IS THE REASON THEY WERE A PARTY
9 IS A MISTAKE IS SOMETHING THAT IS ACCEPTABLE.
10 IN OTHER WORDS, INDICATING THAT OUR BELIEFS AND
11 TESTIMONY AND SWORN STATEMENTS WERE MISTAKEN IN PREVIEWING,
12 THAT IS NOT INAPPROPRIATE. THERE ARE WITNESSES IN
13 DEPOSITION AND INTERROGATORY STATEMENTS THAT MAKE STATEMENTS
14 THAT THEY LATER CONTRADICT, AND PREVIEWING THAT, I DON'T
15 BELIEVE, CREATES ANY KIND OF PROBLEM.
16 AND I BELIEVE WITH BOTH THE CLEARCUT PRECEDENT THAT
17 YOU ARE ALLOWED TO REFERENCE THE EXISTENCE OF PARTIES AND
18 THE NOTION THAT INDICATING THAT PARTIES ARE NO LONGER HERE
19 BECAUSE THERE WASN'T EVIDENCE OF EXPOSURE OR ASBESTOS OR
20 THERE WAS SOME KIND OF MISTAKE IS ACCEPTABLE.
21 THE COURT: BUT AS I SAID, ONCE -- THE REASON WHY
22 THEY ARE NO LONGER A PARTY, THEY'RE -- I MEAN, WHEN IT'S
23 SAID THERE WAS A MISTAKE, THEY'RE ENTITLED TO CONTRADICT
24 THAT. I MEAN, THAT'S WHAT AN OPENING STATEMENT IS. THIS IS
25 WHAT THE EVIDENCE IS GOING TO SHOW. AND THEY SAY, NO,
26 THAT'S NOT TRUE. AND I DON'T THINK THAT I -- I'M NOT SURE
27 WHAT THE PURPOSE OF BRIEFING WOULD BE AT THIS POINT BECAUSE
28 I HAVE NOW ALREADY DECLARED A MISTRIAL.

1 AND WHAT I THINK THAT WE OUGHT TO DO IS HAVE THE
2 JURY IN, EXPLAIN TO THEM THAT -- AND I'M NEVER REALLY SURE
3 HOW MUCH I SHOULD GO INTO DETAIL ABOUT WHAT I HAVE DONE.
4 TYPICALLY WHAT I WILL DO IS -- NOT THAT I GRANT
5 MISTRIAL MOTIONS ALL THE TIME, BUT THERE HAVE BEEN OCCASIONS
6 WHERE THERE HAVE BEEN SETTLEMENTS OR WHATEVER, AND I DON'T
7 TELL THE JURY WHY THEIR SERVICES ARE NO LONGER NEEDED. I
8 JUST TELL THEM THAT WE REACHED A POINT IN THE CASE WHERE WE
9 WILL NOT BE NEEDING A JURY, AND I LEAVE IT TO THE PARTIES,
10 IF THEY WANT TO SAY ANYTHING TO THE JURORS ABOUT WHAT
11 HAPPENED. I DON'T KNOW THAT IT SERVES MUCH PURPOSE. SO
12 THAT'S TYPICALLY THE WAY I DO IT, UNLESS SOMEBODY HAS
13 ANOTHER SUGGESTION.
14 AND THEN AFTER I DO THAT, WHAT I WOULD SUGGEST IS
15 FOR YOU TO TALK ABOUT WHEN YOU DO WANT TO COME BACK.
16 COUNSEL SUGGESTED MONDAY. I DON'T KNOW IF THAT WORKS.
17 MS. DEAN: YES, YOUR HONOR.
18 THE COURT: RIGHT.
19 MS. DEAN: THIS IS AN EXPEDITED CASE. AS SOON AS
20 POSSIBLE IS BETTER.
21 THE COURT: WE'LL HAVE TO DO A LITTLE LOOKING INTO
22 WHAT WE CAN DO. AND CERTAINLY I WILL HONOR THE PREFERENCE.
23 MR. OXLEY: AN ARGUMENT ON THAT IS AS SOON AS THE
24 COURT CAN GET US, WE'RE READY. SO AS SOON AS THE COURT CAN
25 GET US IN, THAT'S GREAT. IF IT'S NOT MONDAY, THAT'S FINE.
26 BUT IF IT IS, THAT'S GREAT.
27 THE COURT: OKAY. WE'LL FIND OUT. SO -- MICHAEL
28 IS CALLING NOW.

(THE JURY ENTERED THE COURTROOM AT 3:02 P.M.)

THE COURT: WELCOME BACK AFTER THAT LONG DELAY. YOU'RE NOT GOING TO BE SITTING HERE VERY LONG.

FOR LEGAL REASONS, WE WILL NOT BE PROCEEDING WITH THE TRIAL AT THIS POINT. THINGS DO HAPPEN DURING THE COURSE OF A TRIAL. SO AS I SAID, WE WILL NOT BE NEEDING YOUR SERVICES ANYMORE, AND YOU ARE GOING TO BE EXCUSED.

I HOPE YOU DON'T THINK THAT IT WAS A WASTE OF TIME. IT WASN'T FROM MY PERSPECTIVE, AND IT PROBABLY WOULD HAVE BEEN, AS I'VE SAID BEFORE, A REALLY GOOD EXPERIENCE FOR YOU, BUT IT'S NOT GOING TO HAPPEN.

SO YOU WILL BE FREE TO DISCUSS YOUR EXPERIENCE WITH WHOMEVER YOU WISH. I DON'T KNOW TO WHAT EXTENT YOU WILL WANT TO DO THAT. YOU DON'T HAVE TO TALK TO ANYBODY ABOUT IT, BUT YOU WILL BE FREE TO DO SO.

SO WITH THAT BEING SAID, PLEASE LEAVE YOUR NOTEBOOKS ON THE CHAIRS. AS I SAID EARLIER, WHATEVER NOTES YOU TOOK WILL BE COLLECTED AND DESTROYED. AND THAT, REALLY, IS ABOUT IT. SO YOU'LL NEED TO CHECK OUT IN THE JURY ASSEMBLY ROOM, AND YOU ARE EXCUSED.

(THE JURY EXITED THE COURTROOM AT 3:05 P.M.)

JUROR NO. 8: CAN I ASK A QUESTION?

THE COURT: YES.

JUROR NO. 8: YOU KNOW HOW YOU'RE SAYING IF YOU'VE BEEN PART OF A JURY AND VERDICT? NEXT TIME I'M HERE, WHAT

IS THIS CALLED?

THE COURT: IF YOU WANT TO -- YOU KNOW, I'M NOT COMFORTABLE ANSWERING THAT. IF YOU STEP IN THE HALL, ANYBODY WHO WANTS TO TALK TO YOU ABOUT IT --

MS. DEAN: CAN WE GO OUT?

THE COURT: YOU CAN CERTAINLY GO OUT IN THE HALL AND COME BACK WHEN YOU'RE READY.

--OOO--

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

I, LAURIE MILLER, RPR, CSR 6457, COURT REPORTER PRO TEMPORE IN AND FOR THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT, CONSISTING OF PAGES 151 THROUGH 191, INCLUSIVE, IS A TRUE AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES AND IS A FULL, TRUE AND CORRECT STATEMENT OF THE PROCEEDINGS HAD IN SAID CAUSE.

DATED THIS 2ND DAY OF NOVEMBER, 2012.

LAURIE MILLER, RPR, CP, CLR
CSR #6457

CARNEY BADLEY SPELLMAN

October 17, 2018 - 11:13 AM

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