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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 98296-1

GERRI S. COOGAN, the spouse of JERRY D. COOGAN, deceased, and
JAMES P. SPURGETIS, solely in his capacity as the Personal
Representative of the Estate of JERRY D. COOGAN, Deceased,

Petitioners,

v.

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

Respondents,

and

BORG-WARNER MORSE TEC INC. (sued individually and as
successor-in-interest to BORG-WARNER CORPORATION);
CATERPILLAR GLOBAL MINING, LLC (sued individually and as a
successor-in-interest to BUCYRUS INTERNATIONAL
f/k/a BUCYRUS-ERIE CO.); CERTAINTEED CORPORATION;
DANA COMPANIES LLC (sued individually and as successor-in-interest
to VICTOR GASKET MANUFACTURING COMPANY); DEERE &
COMPANY d/b/a JOHN DEERE; FMC CORPORATION (d/b/a
LINKBELT
Cranes and Heavy Construction Equipment); FORMOSA
PLASTICS CORPORATION U.S.A. (sued individually and as parent,
alter ego and successor-in-interest to J-M MANUFACTURING
COMPANY and to JM AIC PIPE CORPORATION);
HOLLINGSWORTH & VOSE COMPANY; HONEYWELL
INTERNATIONAL, INC. f/k/a ALLIED-SIGNAL, INC. (sued
individually and as successor-in-interest to BENDIX CORPORATION);
J-M MANUFACTURING COMPANY, INC. (sued individually and as
parent and alter ego to J-M A/C PIPE CORPORATION); KAISER
GYPSUM COMPANY, INC.; LINK-BELT CONSTRUCTION
EQUIPMENT COMPANY, LP., LLLP; NORTHWEST DRYER &

MACHINERY CO.; OFFICEMAX, INC. (f/k/a BOISE CASCADE CORPORATION); PARKER-HANNIFIN CORPORATION; PNEUMO ABEX LLC (sued as successor-in-interest to ABEX CORPORATION); SABERHAGEN HOLDINGS, INC. (sued as successor-in-interest to THE BROWER COMPANY); ST AND ARD MOTOR PRODUCTS, INC. d/b/a EIS; SPX CORPORATION (sued individually and as successor-in-interest to UNITED DOMINION INDUSTRIES LIMITED f/k/a AMCA International Corporation, individually and as successor in interest to Desa Industries Inc and/or Insley Manufacturing as well as Koehring Company, individually and as successor in interest to Schield Bantam Company); TEREX CORPORATION d/b/a Koehring Company individually and as successor in interest to Schield Bantam Company; and WELLONS, INC.,

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I. INTRODUCTION

After a three-month trial, a unanimous jury found Defendants-Respondents Genuine Parts Company and National Automotive Parts Association (GPC/NAPA) both negligent and strictly liable for exposing Jerry “Doy” Coogan to asbestos and causing his death from malignant mesothelioma. In reversing the damages awarded to Mr. Coogan’s estate and to his family, Division Two failed to give deference to the jury and to the trial court. It second-guessed the jury’s valuation of Mr. Coogan’s damages for pain and suffering from a truly horrific cancer, utilizing an incorrect legal standard to brush aside the damages to his estate as more than what Division Two would have awarded if it had been the factfinder. Division Two similarly overruled the trial court’s discretion to exclude Dr. Schuster’s opinion that Mr. Coogan had alcohol-related stage 3 cirrhosis of the liver, holding that this highly speculative and unfairly prejudicial testimony portraying Mr. Coogan as a heavy drinker should have been allowed as a matter of law. In reaching these erroneous holdings, Division Two’s misstated the facts, particularly where Dr. Schuster was concerned. Its decision should be reversed, and the jury’s verdict reinstated.

This Court should also find that the “misconduct” issues raised by GPC/NAPA do not provide grounds for relief. Even the generally less-deferential Division Two was unwilling to find that the trial court abused

its discretion in determining that the questioning of witnesses by Plaintiffs' counsel did not deprive GPC/NAPA of a fair trial.

Plaintiffs' supplemental argument focuses on the issues addressed by Division Two: the size of the jury's damages award to Mr. Coogan's estate, the exclusion of Dr. Schuster's testimony, and the "misconduct" allegations against counsel. For the Coogans' argument that the jury award to Mr. Coogan's family is not excessive, *see Respondents' Brief Against Genuine Parts Company* at 20-39, and *Petitioners' Reply to Respondents' Answer to Petition for Review* at 13-20. For their argument that there was no misconduct by the Coogan family that would warrant a new trial, *see Respondents' Brief Against Genuine Parts Company* at 55-70, and *Petitioners' Reply to Respondents' Answer to Petition for Review* at 5-13.

II. SUPPLEMENTAL ARGUMENT

A. **The trial court did not abuse its discretion by not granting a new trial as to the jury's award for pain and suffering.**

Division Two improperly substituted its judgment on the value of Mr. Coogan's damages for that of the jury and used an incorrect legal standard in finding that the award shocked the conscience. The jury award in this case included "30 million to Doy's estate for his pain and suffering." *Slip Op.* at 3. Division Two's majority opinion stated "we held (with one judge dissenting) that the \$30 million verdict ... is so excessive that it shocks the court's conscience and therefore a new trial on the estate's claim

is required under CR 59(a)(5).” *Id.*¹ Division Two’s analysis quoted *Kramer v. Portland-Seattle Auto Freight, Inc.*, 43 Wn.2d 386, 395, 261 P.2d 692 (1953) and *Bunch v. King County Department of Youth Services*, 155 Wn.2d 165, 179, 116 P.3d 381, 389 (2005), but only quoted the underlined fragments of the quotation set forth in *Bunch* at page 179 and taken from *Kramer. Slip Op.* at 21, 24.²

The complete sentence from *Kramer* also quoted in *Bunch* thus requires a determination *never made by Division Two, i.e.*, that in addition to being “at first blush as being beyond all measure unreasonable and outrageous,” the damages *also* must “manifestly show the jury to have been activated by passion, partiality, prejudice or corruption.” Not only was no such determination made by Division Two, the court expressly “disagree[d]” with GPC/NAPA’s contention that “the Coogan’s attorney’s questioning of witnesses and comments in closing argument constituted

¹ That holding is reiterated at *Slip Op.* p. 20 and CR 59(a)(5) explicitly requires that the damages be so excessive “as unmistakably to indicate that the verdict must have been the result of passion or prejudice.” However, “passion or prejudice” was not the basis for Division Two’s majority opinion. Division Two discusses three bases for overturning a jury verdict, one of which was “passion or prejudice.” The only basis, however, focused on by Division Two was “shock the conscience.” *Slip Op.* at 21-22.

² The full sentence with only the portions quoted by Division Two underlined, reads:

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

misconduct that ... caused the jury to base its verdict on passion and prejudice.” *Slip Op.* at 25.³

GPC/NAPA fail in their attempt at page 13 of their *Answer to Petition* to argue this sentence applies only to the standards for vacating a verdict based specifically on a finding of passion or prejudice. That is because their argument ignores *Kramer’s* discussion at pages 394-95. In both *Kramer* and this case, the losing party appealed from a denial by the trial court of an unconditional new trial⁴ based on an excessive verdict where the trial court “made its verdict without passion or prejudice.” *Id.* at 394. *Kramer* at that same page approvingly cited *Anderson v. Dalton*, 40 Wn.2d 894, 898, 246 P.2d 853 (1952) for the principle that “[i]n the absence of passion or prejudice, however, there would seem to be *no logical basis for granting a new trial unconditionally* on the ground that a judgment is *excessive*, and we *find no case* in which we have granted a new trial unconditionally under such circumstances.” 43 Wn.2d at 394 (emphasis

³Additionally, although the lead opinion incorrectly stated at page 24 that “our determination necessarily is a subjective one,” the requirement that there be a “manifest show[ing] of passion, partiality, prejudice or corruption,” takes this test out of being simply “subjective.” Moreover, contrary to GPC/NAPA’s argument at footnote 3 of their *Answer to Petition for Review*, Division Two rejected GPC/NAPA’s passion or prejudice arguments. *Slip Op.* at 25-36.

⁴As discussed in *Kramer*, an unconditional new trial is one in which a new trial is granted without allowing the plaintiffs to avoid a new trial by accepting a remittitur. 43 Wn.2d at 394-95. The trial court in this case denied defendants’ motion for a new trial and also denied defendants’ motion for remittitur. 12/1/17 RP 59. GPC/NAPA never appealed the denial of a remittitur, so their appeal is limited to the denial of an unconditional new trial.

added). *Kramer* then cited nine cases in Washington in which new trials were granted or verdicts were reduced “when passion or prejudice were either *not* discussed or were found *not to exist*,” and pointed out that in “none of these cases was a clear principle announced or a criterion established by which this issue might be tested objectively.” *Id.* at 394-95 (emphasis added). Immediately afterward, *Kramer* set forth such a principle in the full sentence cited *supra* at footnote 2. That sentence is applicable to verdicts not affected by passion or prejudice as well as cases so affected.

Division Two’s decision was inconsistent with *Kramer* and other Supreme Court cases in another way. *Kramer* held that the “conclusion reached by an appellate court in reviewing the excessiveness of a verdict for damages for wrongful death, *in the absence of passion or prejudice, must be the result of tipping the balance between two sets of factors.*” 43 Wn.2d at 396 (emphasis added). The first set of factors are the facts and circumstances of the case, and the court’s reluctance to interfere in the jury’s decision. The second or “balancing” factor requires the court to give affirmative answers to *each* of three questions.⁵ This holding was also

⁵ [T]he *balancing factor* is the conscience of the appellate court, *when there is an affirmative showing that passion and prejudice played no part in the jury’s determination. Is the amount flagrantly outrageous and extravagant? Is it unjustified in the light of the evidence? Does it disclose circumstances foreign to proper jury deliberations? If it is and does, then it can be said to shock the sense of justice and sound judgment, and the verdict of the jury is excessive.*

Kramer, 43 Wn.2d at 396 (emphasis added).

quoted and followed in *Fosbre v. State*, 70 Wn.2d 578, 586, 424 P.2d 901 (1967) and *Malstrom v. Kalland*, 62 Wn.2d 732, 736, 384 P.2d 613 (1963). *Kramer*, *Fosbre*, and *Malstrom* thus establish that an appellate court's decision to reject a jury verdict on non-economic damages in the absence of passion or prejudice *requires* the appellate court's conclusion *inter alia* that "circumstances foreign to proper jury deliberations" were "disclosed."⁶

Division Two's majority opinion did not make the conclusion of "circumstances foreign to proper jury deliberations" required by those cases. Nor would such a conclusion be proper under the facts and circumstances here. The record here shows that (a) there was much evidence of extreme pain and suffering by Doy Coogan,⁷ (b) that the jury instructions left the decision up to the jury,⁸ and (c) plaintiff described Mr. Coogan's pain and suffering as supporting a \$30 million verdict. Moreover, not only did GPC/NAPA not object to that argument at any time before the jury returned a verdict, they did not make any argument that the \$30 million was

⁶ GPC/NAPA's discussion of *Kramer* at page 14 of their *Answer to Petition* conspicuously omits *Kramer's* requirement as part of the balancing process that there must be a finding of circumstances foreign to proper jury deliberations.

⁷ For example, the trial court found: "By almost any measure, Jerry 'Doy' Coogan endured a slow and horrible death. Further, he had to have been aware of the inevitability of his death for months before his passing." CP 16192.

⁸ As Judge Melnick noted at *Slip Op.* p. 52:

The jury was instructed that "[t]he law has not furnished us with any fixed standards by which to measure noneconomic (pain and suffering) damages. With reference to these matters you must be governed by your own judgment, by the evidence in this case, and by these instructions." Clerk's Papers at 14988 (Instr. 34).

too big or argue for a lesser figure. To the contrary, GPC/NAPA told the jury during their opening statement that Mr. Coogan's diagnosis was "the worse diagnosis anybody can imagine," (7 RP 58), and also informed the jury early in their closing argument that:

As we discussed at the opening, it's not fair what happened to Ms. Coogan. It is not fair. It's not fair that he died of this horrible disease. It's equally not fair to his family who have also had to go through the loss of their father. If this case was about awarding money to good people, they win.

47 RP 194.

Adams v. State, 71 Wn.2d 414, 431, 429 P.2d 109 (1967), involved a similar situation where the trial court found the verdict to be "excessive" but quoted defense counsel's argument acknowledging that the plaintiff was in a "terrible state" and did not challenge the plaintiffs' argument as to the proper amount of damages. Based on that record, the trial court did not reduce the verdict or grant a new trial and this court affirmed.⁹ The same result should obtain here.

GPC/NAPA's reliance on *Bingaman* and *Washburn*¹⁰ in their *Answer* is also misplaced. *Bingaman* repeatedly relies on and cites *Kramer*'s discussion at pages 394-96, which are the portions of *Kramer* on

⁹ See also *Coachman v. Seattle Auto Mgmt., Inc.*, 787 Fed. Appx. 416 (9th Cir. 2019).

¹⁰ *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 699 P.2d 1230 (1985); *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 840 P.2d 860 (1992).

which the Coogans rely. *See supra*, footnotes 2, 5, 12 and 16. That also applies to *Washburn* since it repeatedly quoted and “was guided by *Bingaman*.” 120 Wn.2d at 268; *see also id.* at 269, 271, 273, 280. Moreover, in determining that the verdict did not “shock the conscience.” *Washburn* relied heavily on the trial court’s ruling in that case that was essentially the same as the trial court’s ruling in this case.¹¹ As in *Bunch*, *Kramer*, *Bingaman*, and *Washburn*, neither the jury nor the trial court abused its discretion particularly given the evidence, the jury instructions and the arguments at trial of both Plaintiffs and Defendants.¹²

B. The trial court did not abuse its discretion in excluding Dr. Schuster’s cirrhosis opinion under ER 702 and ER 403.

In holding that the trial court abused its discretion in excluding Dr. Schuster’s opinion that Mr. Coogan had stage 3 cirrhosis of the liver, Division Two effectively ruled that Dr. Schuster must have been allowed to testify *as a matter of law*. Division Two showed a shocking lack of

¹¹ *Washburn*, 120 Wn.2d at 279 held:

The trial court heard and saw the entire proceedings. Its conscience was not shocked nor is the conscience of this court after a full review of the record and the exhibits. There is no justification for substituting our judgment for that of the properly instructed jury as to what would reasonably and fairly compensate the plaintiff. The jury was instructed that the law has not furnished any fixed standards by which to measure pain, suffering or disability. Neither has the law furnished this court with any fixed standards.

¹² Despite the fact that *Washburn* remains good law, GPC/NAPA rely on three out-of-state cases in an attempt to get this Court to compare individual verdicts in connection with an excessive claim.

deference to the trial court's considered decision that Dr. Schuster's opinion was both unreliable under ER 702 and unfairly prejudicial under ER 403. Its holding flies in the face of established law that a trial court abuses its discretion only when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984). It was not manifestly unreasonable or untenable for the trial court to find that Dr. Schuster's testimony does not meet the reliability requirements of ER 702 or to determine, pursuant to ER 403, that given the speculative nature of Dr. Schuster's opinion any probative value was substantially outweighed by the danger of the unfair prejudice stemming from portraying Mr. Coogan as a heavy drinker.

1. The trial court did not abuse its discretion in finding Dr. Schuster's testimony unreliable under ER 702.

The trial court *must* exclude expert testimony involving scientific evidence unless it satisfies ER 702. *Lahey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 918–19, 296 P.3d 860, 864 (2013). Expert testimony cannot be admitted under ER 702 unless it will assist the trier of fact. *Id.* Unreliable testimony does not assist the trier of fact. *Id.* “[T]he factual, informational, or scientific basis of an expert opinion . . . must be sufficiently trustworthy and reliable to remove the danger of speculation and conjecture and give at least minimal assurance that the opinion can assist the trier of fact.” *State v.*

Maule, 35 Wn. App. 287, 294, 667 P.2d 96 (1983).

After fully considering Dr. Schuster’s cirrhosis opinion both at the motion in limine stage and at trial, the trial court found—twice—that Dr. Schuster lacked an adequate foundation for his opinion that Mr. Coogan had alcohol-related Stage 3 cirrhosis of the liver that reduced his life expectancy. 2 RP 97; 26 RP 165-67. In failing to properly defer to this determination, Division Two misstates the record in a number of respects.

Division Two broadly stated that Dr. Schuster had “reviewed Mr. Coogan’s medical records and diagnostic imaging reports.” *Slip Op.* at 12. In truth, Dr. Schuster based his opinion on *only one initial CT scan* from when Mr. Coogan first presented with symptoms on January 11, 2015, and never identified any other specific records reviewed. CP 4714, 4719; 26 RP 144-47; Ex. 234 (redacted to omit references to alcohol).¹³ Even in the one medical record Dr. Schuster relies on, the reporting doctor noted that Mr. Coogan had normal liver function tests and “no stigmata of liver disease,” but that he did have an “abnormal mass in the mesentery,” and a battery of follow-up tests were ordered. CP 4719, Ex. 234. The trial court correctly found that cirrhosis had been ruled out by Mr. Coogan’s treating physicians

¹³ There is no evidence that Dr. Schuster reviewed most of the medical records cited in the bullet points at pages 66-67 of GPC’s *Opening Brief*. All the references to pages in the range of CP 13925 to 13951 are records attached to the deposition of Plaintiff’s expert Dr. Brodtkin.

based on those later test results. 2 RP 93-94; CP 4724, 4726, 4732-33.¹⁴ Dr. Schuster did not know that, however, because there is no indication that he ever reviewed the important follow-up tests.¹⁵ When Division Two relied on “Dr. Schuster note[] that none of Mr. Coogan’s treating physicians ruled out cirrhosis,” *Slip Op.* at 13, it ignored that Dr. Schuster had no foundation for this and that he was wrong.

Although it is true that no other physician or expert in this case agreed with Dr. Schuster, this was not merely a disagreement among experts, as Division Two found. *Slip Op.* at 18. Dr. Schuster’s lack of knowledge was foundational. Without a review of Mr. Coogan’s medical records, including those that contradicted his opinion, he did not have a reliable basis for his opinion that Mr. Coogan had cirrhosis. This lack of

¹⁴ As the trial court noted, testing of fluid from Mr. Coogan’s abdomen showed that it was “an exudative effusion, and it wasn’t starved of protein, which you would normally see in effusions based on liver disease.” 2 RP 94; CP 4733. A blood test also ruled out cirrhosis. CP 4726 (showing negative test for the primary marker of cirrhosis, mitochondrial antibodies—“ABMITOCH”). One of Mr. Coogan’s treating physicians stated in June 2015 that “[l]iver disease and cirrhosis were initially suspected but he had normal liver function and no evidence of liver disease as the etiology for his symptoms.” CP 4724. Imaging and biopsies confirmed the diagnosis of malignant peritoneal mesothelioma. *Id.*

¹⁵ GPC/NAPA’s lawyer acknowledged at the motion in limine hearing that, “[w]e didn’t have him review a lot of mesothelioma records” 2 RP 92. During the offer of proof, Plaintiff’s counsel pointed out that Dr. Schuster lacked a foundation for his testimony that Mr. Coogan’s physicians did not rule out cirrhosis. 26 RP 152-53. In response, Dr. Schuster agreed that he reviewed “a number” of Mr. Coogan’s medical records and that *of the records he was aware of*, he did not see a physician stating Mr. Coogan did not have cirrhosis. 26 RP 153-54. An expert cannot rely on incomplete records and then claim evidence does not exist. *See Torno v. Hayek*, 133 Wn. App. 244, 250, 135 P.3d 536 (2006) (exclusion of expert testimony for lack of foundation proper when expert had not reviewed current medical records).

scientific support led the trial court to “find [it] to be an extremely tenuous and dubious cirrhosis diagnosis.” 11 RP 78. Indeed, an expert’s opinion should be excluded if he does not consider all relevant data and cherry picks data to create a false impression. *Lakey*, 176 Wn.2d at 918–19.

Not only did Dr. Schuster lack an adequate foundation for his cirrhosis opinion, the trial court further found that he had no medical basis on which to say that Mr. Coogan’s ascites (fluid buildup in the stomach) was related to cirrhosis. 11 RP 78-79; 26 RP 166. This connection to cirrhosis is critical to Dr. Schuster’s testimony on life expectancy; without it, he could not opine that Mr. Coogan had stage 3 cirrhosis and there would be no effect on life expectancy if his cirrhosis was not stage 3 or worse. 26 RP 151, 161; *Slip Op.* at 13. There is no dispute that peritoneal mesothelioma causes ascites—Dr. Schuster admits that. 26 RP 163. GPC/NAPA’s own expert, Dr. Godwin, testified that the peritoneal lining of the abdomen normally produces fluid, but “if there’s something that causes an imbalance, such as a tumor, it causes [fluid to be] produce[d] more rapidly than can be absorbed. That’s ascites.” 39 RP 85. Thus, Mr. Coogan’s ascites is entirely explained by his mesothelioma tumor.

Dr. Schuster alone asserts that “some of” the fluid was from the cirrhosis. CP 4714; 26 RP 146-47, 160. He never provided a basis for this claim. In his deposition, he only addresses the topic by speculating that “one

can't say that some of the evacuation [is] not from the cirrhosis" and "you can't say that the ascites was also not involved with cirrhosis some." CP 4714. He offered no explanation for why Mr. Coogan's ascities were attributable to both the mesothelioma and the alleged cirrhosis. He had no foundation for this in his experience¹⁶ and did not have a single medical article or source of authority to support his conclusion that you can attribute ascites to cirrhosis in a patient that has peritoneal mesothelioma. The trial court was properly concerned with this lack of scientific support, particularly given that the ascites was already attributed to Mr. Coogan's mesothelioma. 11 RP 76. Dr. Schuster admits he could not say how much the cirrhosis contributed to the ascites, stating he could not say it contributed even "one percent." 26 RP 160, 166. No effort was made to rehabilitate him or provide a foundation for his earlier contradictory statement that some of it was, in fact, related to the ascites.

Division Two wrongly faulted the trial court for its conclusion that "[t]he ascites, I'm convinced based upon the medical information that has been promulgated so far, is the result of the peritoneal mesothelioma." 26 RP 166. This was not improper "factfinding," as Division Two asserts, but was the exact question the trial court was required to decide in evaluating

¹⁶Dr. Schuster has never treated a patient with peritoneal mesothelioma, much less had a case involving both mesothelioma and cirrhosis. 26 RP 159, 162.

whether Dr. Schuster had any basis for his assertion that the ascites was related to Mr. Coogan's alleged cirrhosis. The court found there was no scientific basis, only Dr. Schuster's speculation. 2 RP 97; 11 RP 76-77; 26 RP 166.¹⁷ On a mission to salvage Dr. Schuster's opinion, Division Two oddly contends that Dr. Schuster's foundation is that "the level of liver dysfunction and the enlarged spleen mean that ascites would be expected." *Slip. Op.* at 17. This misstates the record. Dr. Schuster admitted that an enlarged spleen is not sufficient to diagnose Stage 3 cirrhosis. 26 RP 163-64 (agreeing that "no one, based on those things alone [enlarged spleen, large portal veins, varices] would stage someone, in the absence of ascites, as a stage 3 cirrhosis patient.>").¹⁸

Division Two also dismissed the trial court's concern that Dr. Schuster could not say the degree to which the alleged cirrhosis caused the ascites, emphasizing Dr. Schuster's testimony that "[t]he point is *he did*

¹⁷"[C]onclusions and methodology are not entirely distinct from one another A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

¹⁸At his deposition, Dr. Schuster did not express the opinion that an enlarged spleen causes ascites. CP 4712. He notes that an enlarged spleen is significant in potentially diagnosing cirrhosis but does not state or suggest that an enlarged spleen will always result in ascites or would have in Mr. Coogan's case. *Id.* Similarly, when the motion in limine was argued, defense counsel argued that the enlarged spleen supported Dr. Schuster's cirrhosis diagnosis, not his staging the cirrhosis at stage 3. 2 RP 93. No one, including GPC/NAPA's counsel, suggested that the state of Mr. Coogan's spleen was responsible for the ascites that is the critical link to the stage 3 diagnosis. The enlarged-spleen/ascites theory was offered for the first time during the offer of proof. 26 RP 147. On cross-examination, Dr. Schuster admitted that all three factors related to liver dysfunction (enlarged spleen, large portal veins, varices) are not part of the criteria for staging cirrhosis as stage 3, but are only relevant for making a general diagnosis of cirrhosis. 26 RP 163.

have cirrhosis.” Slip. Op. at 17 (quoting 26 RP at 160, emphasis added by Division Two). But the issue is that Dr. Schuster could not come up with anything to support his diagnosis of stage 3 advanced cirrhosis that was the only diagnosis that, according to Dr. Schuster, would have affected Mr. Coogan’s life expectancy. Division Two attempts to manufacture clarity in Dr. Schuster’s opinion where it does not exist. The fact is that Dr. Schuster was unable to explain how his diagnosis of stage 3 cirrhosis could be solely based on a symptom, ascites, that even he admits is related to another disease. There was no abuse of discretion in the trial court’s determination that Dr. Schuster’s “characterizing [Mr. Coogan’s illness] as stage 3 cirrhosis having an impact on life expectancy, is not supported by the medical evidence.” 11 RP 78-79.

Likewise, the trial court did not improperly “weigh the evidence,” *Slip Op.* at 16, in finding that Dr. Schuster lacked a scientific foundation for his opinion that Mr. Coogan had stage 3 cirrhosis even though his liver function tests were normal. 26 RP 165-66. This conclusion was based on Dr. Schuster’s own testimony that, according to the literature, abnormal liver function tests would occur at the “late stages” of cirrhosis, not just at Stage 4. 26 RP 165-66 (referencing 26 RP 149). Dr. Schuster made other equivocal statements about Stage 3 cirrhosis and liver function, testifying that “you’re at stage 3 where the liver function is about ten percent, you will

absolutely have an elevation of bilirubin. You will have absolute elevation of other tests, the ALTs will go up at that point.” 26 RP 148. The trial court did not find Dr. Schuster’s opinion that Mr. Coogan had Stage 3 cirrhosis to be incorrect, he found that it lacked scientific support and was contradicted by Dr. Schuster’s own testimony. This scrutiny of the underlying basis for an expert’s opinion is entirely proper. *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 357, 333 P.3d 388 (2014); *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 178, 817 P.2d 861 (1991).

Division Two dismissed the trial court’s evaluation of Dr. Schuster’s foundation, insisting that Dr. Schuster’s opinion was supported by four articles from medical journals. *Slip Op.* at 16-17. This finding was improper, as none of these articles were made part of the record. The trial court listened to Dr. Schuster’s explanation of these articles and found, based on Dr. Schuster’s own description, that they did not sufficiently support his opinion. 26 RP 165-66. Division Two has no basis on which to find that this was an abuse of discretion as the articles are missing from the record. There is no way to conclude that the articles constituted a reliable methodology.¹⁹ *See Joiner*, 522 U.S. at 144–46 (analyzing studies relied on by expert and holding that the trial court did not abuse its discretion in finding that

¹⁹ The record also contains no authoritative support for Dr. Schuster’s claim that stage 3 cirrhosis reduces life expectancy to five years.

dissimilar studies did not provide a reliable foundation); *State v. Richmond*, 3 Wn. App. 2d 423, 432, 415 P.3d 1208, *rev. denied*, 191 Wn.2d 1009, 424 P.3d 1223 (2018) (court could not analyze admissibility of expert opinion when substance of proffer was not in the appellate record).

Division Two's distortion of the record does not end there. Incredibly, they twice suggested that Mr. Coogan's alleged cirrhosis and ascites "preexisted" his mesothelioma. First, they misstate Dr. Schuster's opinion, claiming that he believes "Mr. Coogan had *preexisting* stage 3 cirrhosis of the liver." *Slip. Op.* at 6 (emphasis added). Dr. Schuster never stated that the alleged Stage 3 cirrhosis preexisted the mesothelioma. This is fiction. Division Two doubles down on this mischaracterization by implying that Mr. Coogan's ascites preexisted his mesothelioma. *Slip Op.* at 11 ("A CT scan taken in January 2015 (before Mr. Coogan was diagnosed with mesothelioma) showed a large amount of ascites."). The implication that the ascites was unrelated to Mr. Coogan's mesothelioma, or "preexisted" it, is false. Not even Dr. Schuster would go that far, conceding that mesothelioma was the primary cause of the ascites. 26 RP 146-47, 160. The record is clear that Mr. Coogan's mesothelioma existed in January 2015, even if the diagnostic tests had not yet found it. CP 4724; 7 RP 120; 11 RP 90. The trial court, who heard the evidence firsthand, understood this perfectly. 26 RP 166 ("[M]edical records[] indicate that the ascites did not

develop, or at least were not discovered, until and contemporaneous with the discovery of advanced peritoneal mesothelioma . . .”).

Division Two did not defer to the trial court but instead mounted a full defense of Dr. Schuster in an inappropriate attempt to justify his tenuous opinion. Under the proper standard of review, Division Two should have determined that the trial court did not abuse its discretion in excluding Dr. Schuster’s opinion for lacking a reliable scientific foundation.

2. The trial court did not abuse its discretion in its ER 403 balancing of the probative value of Dr. Schuster’s testimony against its potential for undue prejudice.

Under ER 403, the trial court had broad discretion in balancing the relevance of Dr. Schuster’s testimony against the danger of unfair prejudice. *See Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 462, 746 P.2d 285 (1987) (“The weighing of probative value against unfair prejudice under [ER 403] rests within the sound discretion of the trial court.”). This discretion necessarily means that courts “can reasonably reach different conclusions” about the admissibility of evidence without abusing their discretion. *Gilmore v. Jefferson Cty. Pub. Transp. Benefit Area*, 190 Wn.2d 483, 495, 415 P.3d 212 (2018) (reinstating jury verdict overturned by Court of Appeals because trial court had excluded expert testimony) (internal quotation and citation omitted).

The trial court acted within its discretion in striking the ER 403 balance against the admission of Dr. Schuster's testimony. The court found that the opinion had little probative value given its unreliable basis, weighing that against "the prejudicial effect of characterizing Mr. Coogan as an alcoholic, a chronic, heavy drinker," finding it "unduly prejudicial." 2 RP 97; *see also* 2 RP 99 ("I think that the prejudicial value greatly outweighs the probative value, in particular, looking at the data that has been supplied in conjunction with the motion that sets forth the basis for Dr. Schuster's opinion . . ."); 26 RP 166-67 (declining Dr. Schuster's opinion because it was "too attenuated and in many respects speculative," especially "when you couple with that the information related to alcohol use").

Division Two ignored the trial court's ER 403 balancing, finding that any prejudice could have been avoided by prohibiting Dr. Schuster from discussing Mr. Coogan's alcohol consumption. *Slip Op.* at 19. This finding has no basis in the record: attorneys for GPC/NAPA never once offered this compromise. Attorneys for other defendants suggested this solution at the motion in limine stage, 2 RP 98-99, but GPC/NAPA did not even when reasserting the issue at trial as the only remaining defendants. Even though they knew that the trial court had initially excluded Dr. Schuster's testimony in large part due to concern about the prejudice related to drinking, GPC/NAPA made Mr. Coogan's alcohol consumption part of

their offer of proof at trial. They solicited testimony that Mr. Coogan “had a substantial history of alcohol use,” including “five to seven beers [or] six to eight beers a day, plus a couple of cocktails.” 26 RP 155. It cannot be that the trial court abused its discretion in failing to come up with a compromise never offered by GPC/NAPA either before or during trial. Such a compromise would have fooled no one, as it is common knowledge that cirrhosis of the liver is caused by excessive alcohol use.

Division Two is incorrect in its assessment that “Mr. Coogan’s alcohol use clearly was not an integral part of Dr. Schuster’s testimony.” *Slip Op.* at 19. Not only was it made part of the offer of proof, but in his deposition this was his very first opinion. CP 4712 (“No. 1, I believe that this man had a huge or significant alcohol ingestion history.”). GPC/NAPA’s offer of proof demonstrates that Dr. Schuster’s opinion that Mr. Coogan was a heavy drinker was the real reason for his testimony. *See Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 26, 864 P.2d 921, 929 (1993) (an offer of proof “informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility”) (quoting *State v. Ray*, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991)).

The trial court did not abuse its discretion in finding that portraying Mr. Coogan as a heavy drinker would be unfairly prejudicial. Even Division Two acknowledges that “[e]vidence of prior alcohol abuse has the potential

to be very prejudicial.” *Slip Op.* at 18. Its dismissal of that potential for unfair prejudice is contradicted by precedent excluding evidence of alcohol use that is at best tangential to causation or damages and that carries a substantial danger of portraying plaintiffs as unworthy of compensation for their injuries. *See Needham v. Dreyer*, 11 Wn. App. 2d 479, 496–97, 454 P.3d 136, *review denied*, 195 Wn.2d 1017, 461 P.3d 1201 (2020); *Kramer v. J. I. Case Mfg. Co.*, 62 Wn. App. 544, 559-60, 815 P.2d 798 (1991).

The trial court was also entitled to take into account the time and expense that would have been occasioned by conducting a mini-trial on an issue that was speculative at best. *See State v. Donald*, 178 Wn. App. 250, 271, 316 P.3d 1081 (2013) (“reasonable concern about the confusion of issues and possible delay” is a valid basis for trial court’s discretion to exclude expert testimony under ER 403), *rev. denied*, 180 Wn.2d 1010 (2014). Had Dr. Schuster’s cirrhosis opinion been allowed, it would have resulted in additional testimony from the medical experts on both sides of this case,²⁰ as well as rebuttal witnesses that would include at least two of Mr. Coogan’s treating physicians.

²⁰ Plaintiff’s expert Dr. Brodtkin testified in his deposition that there was no evidence that Mr. Coogan had liver disease. CP 4732-33. Counsel for GPC/NAPA claimed that they were going to have their expert Dr. Crapo corroborate Dr. Schuster’s cirrhosis opinion, although there was no offer of proof on this issue when Dr. Crapo testified at trial. 2 RP 99-100. They similarly suggested Dr. Godwin would testify about liver disease but then denied that when he came to trial. 39 RP 60-61.

Division Two ignores the balancing performed by the trial court under ER 403, other than to fault the court for “improperly weighing the evidence” when considering Dr. Schuster’s opinions. *Slip Op.* at 16. This turns the standard of review on its head. Division Two did not defer to the trial court’s broad discretion in ER 403 balancing, and instead substituted its own conclusion about the admissibility of Dr. Schuster’s testimony, in contravention of *Gilmore*, 190 Wn.2d at 495 n.2. The trial court did not abuse its discretion in excluding Dr. Schuster’s testimony after carefully weighing the scant probative value of his speculative cirrhosis opinion against the undeniable prejudice of Mr. Coogan’s alcohol consumption, which even Division Two admitted has the potential for unfair prejudice.

C. The trial court did not abuse its discretion in finding that counsel’s questioning of witnesses did not have a prejudicial effect on the jury’s verdict.

GPC/NAPA ask this Court to adopt Judge Lee’s dissent finding that the trial court abused its discretion in not granting a new trial based on three allegedly improper and prejudicial questions asked of witnesses by the Coogans’ counsel.²¹ Judge Lee’s view is based on a narrow view of the

²¹ Division Two found no abuse of discretion in the trial court’s denial of a new trial based on GPC/NAPA’s challenge to comments made by counsel during closing argument because there was no objection made prior to the verdict. *Slip Op.* at 31-36. Judge Lee agreed. *Slip Op.* at 45 n.8. It appears this argument is now abandoned, as GPC/NAPA did not include any mention of closing argument when it raised the issue of “counsel misconduct” in this Court. *Answer to Petition* at 18-20.

facts, which takes the questions completely out of context, and on a misunderstanding of the law regarding the necessity of evaluating prejudice in light of the whole record.

Twenty years ago, when this Court decided *Aluminum Company of America v. Aetna Casualty and Surety Co.*, 140 Wn.2d 517, 538, 998 P.2d 856 (2000) (hereinafter *ALCOA*), “Washington law on the standard for counsel misconduct as grounds for a new trial in a civil case [wa]s scant.”

At that time, this Court established the adopted the following criteria:

As a general rule, the movant must establish that the conduct complained of constitutes misconduct (and not mere aggressive advocacy) and that the misconduct is prejudicial in the context of the entire record.... The movant must ordinarily have properly objected to the misconduct at trial, ... and the misconduct must not have been cured by court instructions.

Id. at 539 (quoting 12 James Wm. Moore, Federal Practice § 59.13[2][c][I][A], at 59–48 to 58–49 (3d ed. 1999)). The Court thought it important to utilize “a standard that more generally upholds trial court decisions.” *Id.* The Court upheld the trial court’s denial of a new trial based on the trial court’s finding that although the four comments at issue were improper the jury diligently considered all the evidence and was not swayed by counsel’s improper arguments. *Id.* at 541.

In the intervening years, when accusations of attorney “misconduct” have become ubiquitous, Washington courts have applied the standards set

forth in *ALCOA* and have established that overwhelming deference is given to the trial court in evaluating whether alleged attorney misconduct warrants a new trial. *See, e.g., Gilmore*, 190 Wn.2d 483 (reversing Court of Appeals and finding no abuse of discretion in denial of new trial for comments made in closing argument when no prejudice evident from the record); *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012) (reversing Court of Appeals and finding no abuse of discretion in grant of new trial under CR 59(a) for attorney misconduct); *Spencer v. Badgley Mullins Turner, PLLC*, 6 Wn. App. 2d 762, 432 P.3d 821, *rev. denied*, 193 Wash. 2d 1006, 438 P.3d 119 (2019) (no abuse of discretion in denying new trial because alleged attorney misconduct did not prejudice opposing party); *Miller v. Kenny*, 180 Wn. App. 772, 325 P.3d 278 (2014) (no abuse of discretion in denying new trial for alleged attorney misconduct); *Kuhn v. Schnall*, 155 Wn. App. 560, 228 P.3d 828 (2010) (no abuse of discretion in granting new trial due to juror and counsel misconduct); *Collins v. Clark Cty. Fire Dist. No. 5*, 155 Wn. App. 48, 231 P.3d 1211 (2010) (no abuse of discretion in denying new trial based on alleged improper comments in closing argument); *Hoskins v. Reich*, 142 Wn. App. 557, 174 P.3d 1250 (2008) (no abuse of discretion in denying new trial for alleged attorney misconduct).

Several of these cases followed *ALCOA* in noting that attorney misconduct must be found prejudicial in the context of the entire record.

Miller, 180 Wn. App. at 814, 817; *Kuhn*, 155 Wn. App. at 576; *Hoskins*, 142 Wn. App. at 573. Judge Lee did not follow this precedent, and instead faulted the trial court for evaluating prejudice in the context of all the evidence. *Slip Op.* at 45-47. She failed to defer to the trial court’s finding that the comments GPC/NAPA complain about were cherry-picked from “a three-month long trial” to make it appear as if there was prejudice when in fact “the great mass of the evidence is what the jury is supposed to consider and what I have to assume they did consider.” 12/1/17 RP 56. The trial court noted that “[t]his jury sat here from the 23rd of January until I believe it was April the 13th and heard evidence day in and day out,” “[t]heir role was discharged,” there was no evidence “the jury was stoked by passion,” and “[i]t was a 12-0 verdict.” 12/1/17 RP 58.

Judge Lee’s dissent makes the same mistakes this Court identified in *Teter*. There, the trial court granted a new trial on the basis of prejudicial attorney misconduct and the Court of Appeals reversed, finding that the misconduct identified by the trial court was not so irregular or flagrant as to have deprived the plaintiffs of a fair trial. 174 Wn.2d at 222-23. This Court reversed the Court of Appeals and reinstated the trial court’s ruling because “the Court of Appeals appears to have substituted its own judgment for that of the trial court.” *Id.* at 223. Judge Lee has similarly substituted her own judgment about the prejudicial effect of counsel’s questioning of witnesses, failing to defer to the considered judgment of the trial court who observed the

jury and was in the best position to evaluate whether there was prejudice. *Teter*, 174 Wn.2d at 223; *Miller*, 180 Wn. App. at 815.

The case of *Clark v. Teng*, 195 Wn. App. 482, 380 P.3d 73 (2016) *rev. denied*, 187 Wn.2d 1016 (2017), is also instructive. This is the only case Plaintiffs could find where the Court of Appeals found an abuse of discretion in a trial court's ruling on a motion for new trial for attorney misconduct (that was not itself reversed). There, Division One reversed the trial court's *grant* of a new trial because "[t]he order granting a new trial heavily relies upon inaccurate facts and ignores the trial court's ruling authorizing the defense to" make the arguments the court later found to be improper. *Id.* at 499. Thus, there must be serious flaws and inconsistencies in the trial court's reasoning before an abuse of discretion may be found; a mere difference of opinion with the trial court is insufficient.

Here, Judge Lee largely mischaracterized the allegedly improper questions of counsel and essentially disagreed with the trial court's evaluation of whether those questions deprived GPC/NAPA of a fair trial. Judge Lee also found, *in all three instances*, that the trial court's curative instruction did not cure the prejudice but made it worse. *Slip Op.* at 46, 48, 49-50. This reflects a fundamental misunderstanding of Washington law. Juries are presumed to follow curative instructions. *Wuth ex rel. Kessler v. Lab. Corp. of Am.*, 189 Wn. App. 660, 710, 359 P.3d 841 (2015) (jury

presumed to follow court's instruction that "flatly refuted any inference the jury could have drawn" from improper comments); *see also* 14A Wash. Prac., Civil Procedure § 30:27 (3d ed.) (stating "the curative instruction usually renders the error harmless").

Judge Lee repeatedly disregarded the context of the evidence in concluding that "misconduct" occurred. First, with regard to the question about whether GPC had reached out to the families of others who had died from exposure to Rayloc brakes, the trial court found that GPC/NAPA had *opened the door* to this subject by questioning their corporate representative at length about all the ways GPC showed its employees and customers it was a caring company, including sending flowers to the Coogan family. *See Respondents' Brief* at 40-42. The trial court did not even find counsel's question to be prejudicial; the objection was sustained on relevance grounds. *Id.* While Judge Lee faulted the trial court for its curative instruction, the court's wording was proper and was remarkably similar to the instruction upheld in *Moore v. Smith*, 89 Wn.2d 932, 942-43, 578 P.2d 26 (1978) (finding no abuse of discretion in denial of new trial because "we do not believe [counsel's improper remark] was so flagrant or prejudicial that the court's curative instruction could not neutralize the effect).

With regard to GPC's corporate representative, Byron Frantz, the majority determined that there was no prejudice from counsel's question

about why he was chosen as the corporate representative given that it had been obvious to everyone in the courtroom that he was unprepared to answer questions and given that the court gave a curative instruction. *Slip Op.* at 28-29. Judge Lee simply disagreed, substituting her own view of the prejudicial effect of this question over that of the trial court, who witnessed it, and the Division Two majority. *Slip Op.* at 48. She also took the worst possible view of the question, contending that it “implied GPC selected Byron Frantz as corporate representative in bad faith in order to hide information.” *Slip Op.* at 47. No bad faith is apparent from a question pointing out the obvious fact that GPC’s witness was unable to answer questions. As set forth on page 43 of *Respondent’s Brief*, counsel is permitted to comment on a witness’s credibility.

Judge Lee is also incorrect that Plaintiffs’ counsel did anything wrong in questioning Jay Coogan. She assumes that Mr. Coogan’s “outburst” was “deliberately elicited” by counsel, *Slip Op.* at 49, an assumption with no support in the record. Once again, the context of the testimony is ignored. As set forth in *Respondent’s Brief*, page 44, counsel for GPC/NAPA bizarrely asked Jay Coogan questions about his relationship with Plaintiffs’ counsel and walks he took with her during his deposition. 13 RP 187-88. On re-direct, Plaintiffs’ counsel had to address this topic to make sure the jury understood there was nothing inappropriate going on,

asking Jay Coogan questions about their relationship, including why he felt the need to take breaks during his deposition. 16 RP 158-59. As the majority noted, Jay Coogan volunteered his statement that GPC accused him of killing his brother, an implication that was already before the jury because GPC had repeatedly pointed out that Jay Coogan owned a NAPA store that sold asbestos parts. *Slip Op.* at 30. It is also significant that counsel's line of questioning on re-direct examination never would have been pursued if not for defense counsel's completely baseless insinuation. This topic had to be explored because of *defense counsel's misconduct*. It is inaccurate and unfair to blame the Coogans for a situation of defense counsel's own making. As the majority recognized, not only was there no misconduct by Plaintiffs' counsel, but any possible prejudice was cured by the court's instruction to disregard Jay Coogan's statement. *Slip Op.* at 30.

Judge Lee is off base in her assessment that the trial court "dismissed this allegation of misconduct" without proper consideration. *Slip Op.* at 49. The trial court had no obligation to issue a separate ruling on every accusation that GPC/NAPA flung against the Coogans in their post-trial motion. By their own admission, GPC/NAPA raised "dozens" of misconduct allegations in their motion for new trial. *Answer to Petition* at 19. The trial court carefully reviewed all of the arguments made by GPC/NAPA. 12/1/17 RP 56 ("[H]aving read all of the briefing on this point

-- and I read a number of the cases over again . . .”). The trial court properly found GPC/NAPA’s arguments to be without merit, and in doing so he followed the law requiring him to consider the allegations in the context of the whole record and to presume the jury followed his instructions.

Finally, the United States Fourth Circuit Court of Appeal recently considered similar allegations that a large jury verdict was the product of improper arguments made by Plaintiffs’ counsel Jessica Dean and noted that “having read and considered the entire trial record, we are struck by the lack of any inflammatory argument by Mrs. Finch’s counsel . . .” *Finch v. Covil Corp.*, --F.3d--, No. 19-1594, 2020 WL 5014974, at *8 (4th Cir. Aug. 24, 2020) (affirming verdict of \$32.7 million in wrongful death damages in a mesothelioma case brought under North Carolina law). As this Court noted in *ALCOA*, “mere aggressive advocacy” does not constitute misconduct. 140 Wn.2d at 539. Plaintiffs’ counsel’s aggressive advocacy in this case was not improper, was not prejudicial, and does not warrant a new trial.

III. CONCLUSION

A unanimous jury awarded the Coogans their full damages for the losses occasioned by the horrific death of Mr. Coogan. The trial court did not abuse its discretion in concluding that GPC/NAPA had a fair trial. This Court should reinstate the trial court’s judgment on the jury’s verdict.

DATED this 8th day of September, 2020.

Respectfully submitted,

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