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No. 98296-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

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

Respondents, and

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

Defendants.

**RESPONDENTS GENUINE PARTS COMPANY AND NATIONAL
AUTOMOTIVE PARTS ASSOCIATION'S JOINT
SUPPLEMENTAL BRIEF**

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I. INTRODUCTION

A Pierce County jury rendered an extraordinary \$81.5 million verdict against Respondents Genuine Parts Co. (GPC), an automotive-parts distributor, and the National Automotive Parts Association (NAPA), a trade association that licenses GPC to use its logo, for wrongful death due to asbestos exposure. The Court of Appeals, Division Two, properly ordered a new trial on damages. The new trial should extend to all issues.

The Coogans—which include decedent Jerry “Doy” Coogan’s widow from a four-year marriage, Gerri Sue Coogan (“Sue”), and Doy’s estate and its beneficiaries—maintained a wrongful-death action against multiple defendants after Doy died from mesothelioma at age 67. Doy was exposed to asbestos throughout his working career, including in high-exposure activities like power sawing asbestos-cement pipe, changing industrial dryer gaskets, and demolishing asbestos-lined structures. The Coogans asserted that he was also exposed while changing brakes and clutches, some manufactured by GPC, on his and friends’ vehicles.

Before and during the trial, the Coogans entered into a dozen settlements, together totaling less than \$4.4 million. GPC and NAPA were the sole remaining defendants when the case was submitted to the jury. The jury awarded \$30 million to Doy’s estate for his pain and suffering and \$51.5 million in future damages: \$30 million to Sue for future loss of consortium, \$10 million to each of Doy’s adult daughters for future loss of consortium, and \$1.5 million for future loss of household services.¹

¹ The judgment, after offsets for settlements, was \$77.1 million. CP 16232-33.

The Division Two panel correctly decided—unanimously—that the \$51.5 million in future-damages awards had to be vacated because the trial court committed prejudicial error in excluding a defense medical expert’s opinion that Doy would have had no more than five years to live, had he not contracted mesothelioma—and not the average 67-year-old man’s fifteen years of life expectancy—because he had stage 3 liver cirrhosis. Division Two also properly determined that \$30 million for Doy’s pain and suffering during a six-month period was shocking to the court’s conscience and excessive. Indeed, should it become necessary to reach the issue, this Court should vacate the entire \$81.5 million verdict as excessive.

In addition, as Judge Lee recognized in her partial dissent, a new trial is warranted not just on damages, but also on liability, because of the Coogans’ counsel’s prejudicial misconduct during witness examination and closing argument. Finally, the Coogans’ own misconduct in failing to produce explosive evidence relevant to their noneconomic damages—principally on the quality of Doy and Sue’s relationship—and keeping that evidence hidden by pausing their pending dispute in the probate of Doy’s estate until GPC and NAPA’s motion for a new trial was denied, is another ground to vacate the \$80 million in noneconomic-damages awards. That misconduct also warrants discovery into the misconduct’s full extent as a precursor to possible sanctions, including dismissal for fraud on the court.

II. STATEMENT OF THE CASE

Division Two accurately stated the material facts. GPC and NAPA supplement those facts as warranted in the Argument section of this brief.

III. ARGUMENT

A. This Court should affirm Division Two’s vacation of the \$51.5 million in future-damages awards.

1. Life expectancy is a limiting factor on future damages; pattern instructions told the jury that the average life expectancy of a man Doy’s age was fifteen years.

The damages that Doy’s widow and adult daughters could recover for future consortium and services, lost because of Doy’s premature death, were limited by his remaining life expectancy had he not contracted mesothelioma. *See Lofgren v. W. Wash. Corp. of Seventh Day Adventists*, 65 Wn.2d 144, 147-48, 396 P.2d 139 (1964). The trial court instructed the jury to consider Doy’s “health” and “life expectancy” and that a 67-year-old man’s average life expectancy is fifteen years. CP 14989, 14991. The jury heard from the Coogans’ expert that Doy was “quite healthy before his illness with mesothelioma.” 9 RP 153. It awarded \$51.5 million in future damages based on his premature death. CP 15021.

2. Defense expert Gary R. Schuster, M.D., would have testified that Doy had no more than five years to live, absent mesothelioma, because of stage 3 liver cirrhosis.

The defense was prepared to present evidence that Doy had a disease besides mesothelioma that reduced his life expectancy significantly below fifteen years. In an offer of proof, Gary R. Schuster, M.D., testified that Doy had liver cirrhosis and that it was in stage 3 (of 4). 26 RP 145. This meant that Doy’s life expectancy was no more than five years, and certainly not the average fifteen. 26 RP 145, 150-52. This testimony was obviously relevant to future damages, yet the trial court excluded it under ER 702 and

403. Division Two unanimously concluded that the court abused its discretion and exceeded its proper role. This Court should affirm.

3. The trial court excluded Dr. Schuster’s testimony under ER 702 simply because it disagreed with his conclusions. Division Two correctly concluded that this was an abuse of discretion.

“Trial judges perform an important gate keeping function when determining the admissibility of evidence.” *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 600, 260 P.3d 857 (2011) (citing ER 104). “Courts must interpret evidence rules mindful of their purpose: ‘that the truth may be ascertained and proceedings justly determined.’” *Id.* (quoting ER 102). ER 702 governs the admissibility of expert testimony. *Id.* Expert testimony satisfies ER 702 if (1) “the witness qualifies as an expert” and (2) “the testimony will assist the trier of fact.” *L.M. by and through Dussault v. Hamilton*, 193 Wn.2d 113, 134, 436 P.3d 803 (2019).

There was no dispute that Dr. Schuster qualified as an expert. *See* 26 RP 165. The sole ER 702 question was whether his opinions would assist the jury. Expert testimony should aid the jury’s understanding of a matter “outside the competence of an ordinary layperson.” *L.M.*, 193 Wn.2d at 137. Testimony will not assist the jury if it lacks an adequate foundation or is otherwise unreliable. *Id.* The trial court’s “proper function” is to “scrutinize the expert’s underlying information and determine whether it is sufficient to form an opinion on the relevant issue.” *Id.* at 137-38. This Court construes possible helpfulness to the trier of fact

broadly and favors admissibility in doubtful cases. *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004).

Dr. Schuster based his opinion on a computer-tomography (CT) scan from when Doy first visited a doctor for symptoms. 26 RP 145-57; CP 5918-19. The key findings were: (1) a nodular liver (it had tumor-like growths), (2) enlarged portal veins, and (3) an enlarged spleen. 26 RP 147; *see also* CP 4714, 5919. The enlarged spleen indicated stage 3. Dr. Schuster explained that it would produce ascites—a fluid buildup in the abdomen—and that ascites are the hallmark of stage 3 cirrhosis. 26 RP 146-47, 159, 161. Doy had ascites. 26 RP 146-47; CP 5919.

None of the three reasons the trial court cited for excluding Dr. Schuster’s testimony under ER 702 amounted to a proper, foundation-related consideration. The court merely disagreed with his conclusions.

First, the trial court disagreed with Dr. Schuster’s interpretation of medical-journal articles. Citing four articles, Dr. Schuster opined that one can have liver-function tests within normal range, as Doy did, “until you reach stage 4.” 26 RP 147-51. The court “heard” Dr. Schuster to say that, according to one article, liver-function tests could remain normal until the “last stages,” which the court interpreted as ruling out normal test results at both stages 3 and 4. 26 RP 165-66. But Dr. Schuster never said that. Division Two saw the trial court’s fact-finding for what it was, explaining that the trial court exceeded its proper role by concluding that its own apparent “interpretation of one term in one article outweighed Dr. Schuster’s opinion, supported by three other articles[.]” *Slip Op.* at 16-17.

Second, the trial court disagreed with Dr. Schuster's opinion about the cause of Doy's ascites. Dr. Schuster acknowledged that Doy's tumor would have independently produced ascites, but stated definitively that an enlarged spleen "is going to create some ascites, as well." 26 RP 146-47. That did not matter to the trial court; it was "convinced" that Doy's ascites resulted solely from the cancer. 26 RP 166. Such improper fact-finding is no basis for excluding expert testimony under ER 702. As Division Two observed, Dr. Schuster gave an opinion and provided the foundation for that opinion, but the trial court "simply disagreed." *Slip Op.* at 17.

Third, the trial court deemed it significant that, although two of Doy's treating physicians and an examining specialist had concluded that Doy had cirrhosis,² none of them testified that he did. 26 RP 166. That is no basis for excluding an expert's testimony, either. In Division Two's words, "[e]xperts often disagree with each other." *Slip Op.* at 18. The absence of similar testimony from another witness did not render Dr. Schuster's testimony unfounded or unreliable.³

Where an adequate foundation is laid, the jury is entitled to evaluate that foundation and accept or reject the expert's conclusions. *See Reese v. Stroh*, 128 Wn.2d 300, 309, 907 P.2d 282 (1995). Division Two correctly concluded that the trial court exceeded its proper role and abused its discretion under ER 702.

² *See* CP 4721, 5918-19, 13925-26, 13950-51.

³ Two other experts would have provided opinions consistent with Dr. Schuster's, but the trial court refused to hear additional offers of proof. *See* 2 RP 99-100; 39 RP 85-87.

4. As Division Two correctly recognized, the trial court’s ER 403 analysis wrongly presumed that the jury must hear about Doy’s history of alcohol use as part of Dr. Schuster’s opinions.

Under ER 403, a trial court has discretion to exclude evidence, despite being relevant, “if its probative value is substantially outweighed by the danger of unfair prejudice[.]” “Unfair prejudice” refers to an “undue tendency to suggest decision on an improper basis,” including by “evidence that is more likely to cause an emotional response than a rational decision by the jury.” *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 257, 744 P.2d 605 (1987). The trial court ruled that, even setting aside ER 702, Dr. Schuster’s testimony must be excluded under ER 403 because of the prejudicial effect of characterizing Doy “as an alcoholic, a chronic heavy drinker.” 2 RP 97; 26 RP 167. But as Division Two recognized, that was not actually the effect of the testimony. The defense proposed that Dr. Schuster give his opinions without even mentioning alcohol. 2 RP 98-99; *see Slip Op.* at 19.

As Division Two correctly recognized, Dr. Schuster’s opinions were “undeniably probative of a central issue in the case”—Doy’s life expectancy absent mesothelioma. *Slip Op.* at 19 (quoting *Carson v. Fine*, 123 Wn.2d 206, 224, 867 P.2d 610 (1994)). The damages for loss of consortium and services were based on lost years with Doy. Dr. Schuster would have testified that Doy’s life expectancy was at least 60% shorter than what the jury heard. To “substantially outweigh” this probative value, the danger of unfair prejudice would have needed to be enormous.

But in reality, there was little to no danger of such prejudice. As Division Two observed, Dr. Schuster in his offer of proof never opined what

caused Doy's cirrhosis. *Slip Op.* at 18. And again, he didn't need to mention alcohol. *See* 2 RP 98-99; *see Slip Op.* at 19. At worst, the jury might have speculated about the cause of Doy's cirrhosis (alcohol abuse is not the only potential cause⁴); that possibility was plainly not a danger that justified exclusion of highly probative expert testimony.

To justify the trial court's ruling, the Coogans have relied on three decisions: *Jones v. City of Seattle*, 179 Wn.2d 322, 314 P.3d 380 (2013); *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 815 P.2d 798 (1991); and *Needham v. Dreyer*, 11 Wn. App. 2d 479, 454 P.3d 136 (2019). Not one of these is on point. The only one from this Court—*Jones*—does not even mention ER 403, let alone speak to the admissibility of alcohol-related testimony. The defendant there waived that issue on appeal. *See Jones*, 179 Wn.2d at 356-57.

Kramer and *Needham* are no better for the Coogans. In each, the defendant sought to present evidence of alcohol use without demonstrating its relevance, so the danger of unfair prejudice easily outweighed any probative value. *See Needham*, 11 Wn. App. 2d at 493-97 (holding that it was an abuse of discretion to admit evidence of the plaintiff's alcohol use on the day he collapsed absent a showing that he was impaired); *Kramer*, 62 Wn. App. at 559 (holding that it was an abuse of discretion to allow cross-examination of the plaintiff about drug and alcohol use absent a showing that it affected his earning capacity or work-life expectancy). In contrast, the defense here established that Dr. Schuster's opinions were

⁴ *See Cirrhosis*, Wikipedia, <https://en.wikipedia.org/wiki/Cirrhosis#Causes> (last visited 9/8/2020).

probative of a central issue: Doy's life expectancy. Meanwhile, as explained, the danger of unfair prejudice was little to none.

This Court should affirm the Division Two panel's unanimous conclusion that the trial court abused its discretion in excluding Dr. Schuster's testimony and that a new trial on future damages is necessary.

B. This Court should affirm the vacation of the jury's overall damages verdict.

1. Our courts have the power and duty to grant relief from an excessive verdict.

This Court has always recognized the judiciary's inherent power and duty to grant relief from an excessive verdict. *See Cunningham v. Seattle Elec. Ry. & Power Co.*, 3 Wash. 471, 475, 28 P. 745 (1892); *see also Bunch v. King Cty. Dep't of Youth Servs.*, 155 Wn.2d 165, 171, 116 P.3d 381 (2005). English common-law courts exercised the same power. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 421-26, 114 S. Ct. 2331, 129 L. Ed. 3336 (1994). This Court "has not hesitated" to grant relief "when it thought [an] award excessive." *Bunch*, 155 Wn.2d at 175-76. It is now more important than ever to perform this essential function, as "the rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries." *Honda Motor*, 512 U.S. at 431.

To be sure, assessing damages for pain and suffering is "primarily and peculiarly within the province of the jury." *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 835, 699 P.2d 1230 (1985); *see also* RCW 4.44.450. And because such harm is nonpecuniary and specific to the individual, the damages "cannot be fixed with mathematical certainty."

Kramer v. Portland-Seattle Auto Freight, Inc., 43 Wn.2d 386, 396, 261 P.2d 692 (1953); *see also* RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1979). For these reasons, the jury must be given “considerable latitude” in setting the amount. *Kramer*, 43 Wn.2d at 396.

Yet the sky is not the limit. “Juries do not have unbridled discretion to award damages,” *Himango v. Prime Time Broad., Inc.*, 37 Wn. App. 259, 268-69, 680 P.2d 432 (1984), and may not punish a defendant by awarding more than full compensation. *See, e.g., Clark v. Icicle Irrigation Dist.*, 72 Wn.2d 201, 207-08, 432 P.2d 541 (1967). Our courts will exercise their inherent power if a verdict “is outside the range of substantial evidence in the record, *or* shocks the conscience of the court, *or* appears to have been arrived at as the result of passion or prejudice.” *Bunch*, 155 Wn.2d at 175 (emphasis added) (quoting *Bingaman*, 103 Wn.2d at 835); *see also Brammer v. Lappenbusch*, 176 Wash. 625, 629-30, 30 P.2d 947 (1934). In addition, the Civil Rules authorize relief if the damages awarded are “so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice” or “there is no evidence or reasonable inference from the evidence to justify the verdict.” CR 59(a)(5), (7).

2. **Division Two properly determined that the \$30 million award for Doy’s estate was shocking to the conscience, given the trial evidence, and that the trial court abused its discretion in denying a new trial.**

The standard for identifying a conscience-shocking verdict is virtually unchanged since its adoption from English common law. Because

there can be no definitive line between a verdict that is excessive and one that is not, the damages “must be so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable and outrageous” or “flagrantly outrageous and extravagant.” *Kramer*, 43 Wn.2d at 395 (quoting *Coleman v. Southwick*, 9 Johns. 45, 52, 6 Am. Dec. 253 (N.Y. Sup. Ct. 1812) (citing English cases)); *see also Honda Motor*, 512 U.S. at 421-26. This Court has explained that an “outrageous” verdict is one that is “monstrous” and “so flagrantly bad that one’s sense of decency or one’s power to suffer or tolerate is violated.” *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 279, 840 P.2d 860 (1992).

Our state has set no cap on the damages a jury may award; a verdict “does not carry its own death warrant solely by reason of its size.” *Bingaman*, 103 Wn.2d at 838. Nevertheless, a court may grant relief because a verdict’s size is shocking to the conscience, even absent evidence that the jury was motivated by passion or prejudice. *Kramer*, 43 Wn.2d at 394-96; *see also Honda Motor*, 512 U.S. at 421-26; *Hayes v. Staples*, 129 Wash. 436, 441-42, 225 P. 417 (1924). The appellate court’s conscience serves as a “balancing factor” against the discretion afforded the jury in determining damages. *Kramer*, 43 Wn.2d at 396.

As the Division Two majority recognized, an appellate court reviews a trial court’s decision to uphold a verdict for an abuse of discretion. *Slip Op.* at 22; *see also Washburn*, 120 Wn.2d at 271. The majority discussed at length the applicable standards, and it properly applied them in concluding that this was the “rare case” where the appellate court must

disregard the jury's verdict and the trial court's refusal to find the verdict excessive. *See Slip Op.* at 20-24. The majority properly determined that the \$30 million verdict for Doy's estate was "beyond all measure, unreasonable and outrageous." *Id.* at 24 (quoting *Bunch*, 155 Wn.2d at 179 (quoting *Kramer*, 43 Wn.2d at 395)).

Although the court vacated the verdict because the amount was shocking, the majority did not simply react to the amount alone. It evaluated the amount in relation to the trial evidence. It observed that Doy's health "apparently was unaffected until the last six months of his life" and that "the more severe symptoms occurred during the last three months." *Slip Op.* at 23. It observed that the \$30 million award "amounted to over \$164,000 for each day and over \$5 million for each month from Doy's first presentation with symptoms to a doctor until his death." *Id.* And it concluded that this was excessive given the relatively short time that Doy was sick. *Id.*

Judge Melnick dissented from that analysis based on a factual disagreement. He wrote that Doy suffered extensively before first visiting a doctor in mid-January 2015, less than six months before he died. *Slip Op.* at 51-52. But there is no record support for that assertion, and the Coogans' own evidence undermines it. Their expert, Dr. Brodtkin, acknowledged that Doy "became ill in January of 2015." 7 RP 120. Doy's sole complaint at the initial doctor visit was that he had noticed bloating and discomfort "*over the last month.*" CP 5918 (emphasis added). Three months passed before he received his mesothelioma diagnosis, in April 2015. 9 RP 151; 11 RP 81-82; CP 5924. Doy's health declined rapidly after that; he started

chemotherapy in late April and died just over two months later, on July 1, 2015. CP 5924; 11 RP 89; 16 RP 78-79, 18 RP 72. Dr. Brodtkin agreed that Doy underwent a “radical change” over about four months, explaining that the cancer was “aggressive” and led to “rapid deterioration.” 11 RP 90.

The Division Two majority was correct that Doy’s suffering was limited to about six months, with the worst symptoms occurring during the latter three months. And it properly concluded that a \$30 million award for that relatively short, albeit agonizing, period was excessive.

3. The entire damages verdict is excessive in light of considerations for evaluating a verdict’s reasonableness.

Not only is the \$30 million award for Doy’s estate excessive, but the remainder of the verdict is excessive as well. Each part of the \$81.5 million verdict is at least as “flagrantly outrageous and extravagant” as the award for Doy’s estate, and this by itself warrants vacating the entire verdict.

The \$50 million in awards for future lost consortium were facially excessive. Again assuming a fifteen-year life expectancy, the \$10 million for each of Doy’s adult daughters amounts to \$667,000 per year (\$1,826 per day), each, while the \$30 million for Sue (who did not attend the trial or testify live) is triple that—\$2 million per year (\$5,479 per day). Certainly, it is difficult to put a price on losing a beloved family member prematurely, but under our tort system, such loss must be compensated rationally. The \$1.5 million award for lost future services was excessive, too, because it bore no reasonable relation to the trial evidence. Assuming that Doy would have lived another fifteen years absent mesothelioma—and not less than five, as Dr. Schuster would have testified—the award amounts to Doy’s

providing \$100,000 per year in household services between ages 67 and 82. The testimony was that Doy was the family financial planner, mechanic, plumber, landscaper, and handyman. *See* 18 RP 71, 73-74; 30 RP 38-39. Those services certainly have value, but as no evidence quantified them, the award is grounded in neither evidence nor reality.

As Division Two observed, there is no objective basis for evaluating whether a verdict should shock the court's conscience; it is inherently a subjective determination. *Slip Op.* at 24. Nevertheless, the court is not without guideposts. A few considerations can serve to calibrate the judicial conscience and illustrate that the verdict here is excessive by any measure.

First, this Court should evaluate a verdict in terms of the value of money to average citizens of the community. For instance, \$81.5 million was 1,316 times the median-annual income in the United States in 2017 and 1,882 times that figure for the Coogans' hometown of Kettle Falls, in Stevens County.⁵ The verdict exceeded the entire town population's annual earnings for 2017 (based on median income) and Stevens County's annual budget for 2019.⁶ It would buy 516 median-priced homes in Kettle Falls—enough for over 70% of the town's households.⁷ The verdict is, by any ordinary person's sense of the value of money, extravagant.

Second, this Court should evaluate the noneconomic-damages awards in relation to the economic-damages award. This Court has

⁵ <https://datausa.io/profile/geo/kettle-falls-wa#income> (last visited 9/8/2020).

⁶ *Id.*; <http://stevenscountywa.gov/commissioners/Commissioners%20Documents/91-2018%20adopting%20the%202019%20budget.pdf> (last visited 9/8/2020).

⁷ <https://datausa.io/profile/geo/kettle-falls-wa#housing> (last visited 9/8/2020).

approved this type of ratio analysis. In upholding the verdict in *Bunch*, this Court reasoned in part that the noneconomic damages were 75% of the amount of economic damages. *Bunch*, 155 Wn.2d at 181. It distinguished that ratio with the one in *Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 856 P.2d 746 (1993), where the Court of Appeals agreed with the trial court that a 10:1 ratio was shocking to the conscience. *Bunch*, 155 Wn.2d at 181 (citing *Hill*, 71 Wn. App. at 140); see also *Wuth ex rel. Kessler v. Lab. Corp. of Am.*, 189 Wn. App. 660, 706, 359 P.3d 841 (2015) (distinguishing *Hill* because a 1:1 ratio was “nowhere near the 10 to 1 ratio we found shocking in *Hill*”). The jury’s \$1.5 million economic-damages award here is, itself, excessive. Yet the ratio between the \$80 million in noneconomic-damages awards and that award is an extraordinary 53:1.⁸

Third, this Court should consider the Coogans’ settlements with a dozen other defendants totaling \$4.395 million—an average of \$366,250 per defendant. That average included the settlement with a manufacturer of asbestos-cement pipe, which Doy routinely cut with a power saw, which contained the most hazardous form of asbestos, and which the Coogans’

⁸ This type of ratio analysis is akin to that which guides evaluation of punitive-damages awards for excessiveness under the Due Process Clause of the United States Constitution. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 424-25, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003) (explaining that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process”). And it is appropriately so. Compensatory damages, especially those addressing mental anguish, often improperly include a punitive element. *Id.* at 426. And regardless, excessive compensatory and punitive awards alike pose a danger of arbitrary deprivation of property. See *Honda Motor*, 512 U.S. at 430-32. Indeed, the United States Supreme Court has recognized that it is appropriate to scrutinize the two types of awards under the same standards, see *id.* at 422 n.2; *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 430 n.12, 435 n.18, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996), and that there “must be an upper limit” on compensatory awards. *Gasperini*, 518 U.S. at 435.

causation expert called a “major” contributor to Doy’s exposure history. CP 16193; 7 RP 121-22. The Coogans conceded that the settlements were in line with both “damages and settlements in other asbestos cases nationwide and in Pierce County.” CP 20564. The \$81.5 million verdict is 241 times greater than the Coogans’ average settlement and 17 times greater than their *total* settlements with twelve other defendants. If a \$366,250 average is consistent with the norm, then \$81.5 million is off the charts.

4. Alternatively, this Court should uphold vacation of the damages verdict because the record reflects that it was the product of passion or prejudice.

The \$81.5 million verdict, and each component of it, is shocking on its face. And that by itself warrants vacating it and ordering a new trial on damages, regardless of whether passion or prejudice motivated the jury. Nevertheless, there are clear indications that the jury was, in fact, so motivated. The sheer size of the verdict is one, but there are others.

For instance, because tort damages remedy individualized harm, awarding equal amounts to claimants can indicate arbitrary action. *See Lane v. Martinez*, 494 S.W.3d 339, 350-51 (Tex. 2015) (vacating awards where the jury’s awarding equal amounts for future loss of consortium and simply dividing round numbers indicated arbitrary action). The jury here awarded precisely the same amount—\$30 million—to Sue Coogan for future loss of consortium as it awarded to Doy’s estate for his pain and suffering. It also awarded the same amount—\$10 million—to each of Doy’s adult daughters for future loss of consortium. Add to that the fact that the jury rendered its total verdict of \$81.5 million eighty-one-and-a-half

days after the trial began, and it becomes apparent that the jury assessed the damages arbitrarily, rather than based on the evidence.

Beyond that, the record shows that the Coogans' counsel deliberately sought to inflame the jury and divert it from reaching a verdict based on careful evaluation of the evidence. As discussed next, their counsel engaged in serious misconduct throughout the trial, as an apparent tactic to obtain an outsized verdict by stirring up sympathy and prejudicing the jury unfairly against GPC and NAPA. And counsel succeeded.

This Court should affirm Division Two's determination that the \$30 million award to Doy's estate was excessive. And should it reach the issue, this Court should rule that the remainder was excessive, as well.

C. This Court should order a new trial on all issues because of counsel and party misconduct, and remand to determine if sanctions are warranted.

1. The Coogans' counsel's misconduct throughout the trial necessitates a new trial on both liability and damages.

The verdict's sheer magnitude naturally causes one to wonder what happened for a jury to return such a verdict. As Judge Lee recognized in her partial dissent, the answer is misconduct by the Coogans' lead attorney, Jessica M. Dean, both in examining witnesses and during closing argument.

(a) Misconduct during witness examination.

"The Rules of Evidence impose a duty on counsel to keep inadmissible evidence from the jury." *Teter v. Deck*, 174 Wn.2d 207, 223, 274 P.3d 336 (2012) (citing ER 103(c)). It is misconduct to ask knowingly objectionable questions. *Id.*; *Snyder v. Sotta*, 3 Wn. App. 190, 193-94, 473

P.2d 213 (1970). A new trial is warranted where a prevailing party's misconduct materially affects the losing party's substantial rights, such as by depriving the losing party of a fair trial by exposing the jury to inadmissible evidence. *Teter*, 174 Wn.2d at 222-25 (citing CR 59(a)(2)).

GPC and NAPA objected to numerous instances of Dean's misconduct, raised dozens in a motion for a new trial, and raised several on appeal. *See* CP 16362-67; *Opening Br. of Appellant GPC* at 26-33; *Reply Br. of Appellant GPC* at 4-10. Division Two unanimously concluded that at least one of Dean's questions violated a pretrial ruling and "clearly was improper." *Slip Op.* at 28. But only Judge Lee recognized that Dean committed at least three instances of misconduct during witness examination and that each was sufficiently prejudicial—and certainly the cumulative effect was sufficiently prejudicial—to warrant vacating the jury's verdict on both liability and damages. Judge Lee was correct.

(1) Implying that GPC-manufacturing workers died from asbestos exposure.

First, Dean injected prejudicial "facts" that were not in evidence by implying that workers had died from asbestos exposure at GPC's Rayloc remanufacturing facilities. The topic was banned under an agreed pretrial ruling, which prohibited evidence about (i) any asbestos exposure by workers at any defendant's manufacturing (and remanufacturing) plants and (ii) any claims by those workers. 5 RP 41-42. Based on that ruling, the trial court had rejected two questions that a juror wrote for GPC 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 did not matter to Dean. Seeking to incite passion and prejudice, she echoed the rejected questions while cross-examining GPC’s other representative, Liane Brewer. Immediately after asking her whether GPC ever called Doy’s family after his death, Dean asked: “Do you know how many other men that worked in their headquarters where they were making Rayloc[] brakes have died from asbestos-related disease and haven’t been called?” 22 RP 83-85. The trial court sustained defense counsel’s objection to that question and, outside the jury’s presence, deemed it “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”).

But the court’s remedy only worsened the sting. The court concluded that it could not give the only curative instruction that could neutralize the misconduct—that is, to inform the jury that there were in fact *no* known deaths from asbestos exposure at the Rayloc plant. 23 RP 53-54; *see* CP 9495-96 (GPC’s prop. instruction). Yet the court refused to grant a mistrial (22 RP 95-96) and instead gave an instruction that, similar to the improper question, implied that deaths had in “fact” occurred. 23 RP 55.

Division Two unanimously concluded that Dean’s question “clearly was improper” and violated the pretrial ruling. *Slip Op.* at 28, 45. Yet the majority concluded that the misconduct was insufficiently prejudicial to warrant reversal, because it was “one isolated question in a complex trial.”

Id. at 28. As Judge Lee correctly recognized, however, the implication of Dean’s question was “extremely prejudicial to GPC,” and the trial court’s instruction actually accomplished what the Coogans intended with the objectionable question, seemingly confirming that there *was* evidence of deaths from exposure at the Rayloc facility. *Id.* at 46. Judge Lee further recognized that neither the length nor complexity of the trial was a sufficient reason to find that the improper question was not prejudicial, and that the damages verdict demonstrated the prejudice. *Id.* at 46-47.⁹

(2) Implying that GPC deliberately sent an underprepared witness as its corporate representative.

Dean committed more misconduct while examining Brewer when she suggested that GPC had deliberately sent an underprepared witness (Frantz) as its other corporate representative. The trial court had earlier made clear that it would disallow questions that challenged Frantz’s preparedness generally. The court rejected this question that a juror submitted 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, “It’s a comment on the evidence. You can’t characterize the witness’s answers.” 17 RP 142.

Yet Dean asked Brewer 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*

⁹ See also *Andren v. Dake*, 2020 WL 4747648 at *10 (Wash. Ct. App. 2020) (unpublished, nonbinding) (rejecting the notion that the length of a trial is an appropriate factor in assessing prejudice from misconduct).

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.” 22 RP 101. Yet even that did not stop her. This question came next: “Do you have any understanding why the people that you know personally, people like Larry Prince were not present”?¹⁰ 22 RP 102. The 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.

The Division Two majority skipped over whether these questions were improper and concluded that regardless, they were not prejudicial because “Frantz’s lack of preparedness was apparent.” *Slip Op.* at 29. That analysis misses the point. Though improper, it was not the suggestion that Frantz was underprepared that was unduly prejudicial. Rather, as Judge Lee understood, it was the suggestion that GPC deliberately sent an underprepared witness to testify, as a bad-faith litigation tactic. *Slip Op.* at 48. And because the trial court’s comment that GPC was “entitled to select its corporate representative and why they do that is up to them” did not address that implication, it did nothing to cure the prejudice. 22 RP 102.

(3) Eliciting an inflammatory accusation about defense counsel.

Last but certainly not least, Dean prompted Doy’s brother Jay Coogan to state that defense counsel had accused him of killing his brother.

¹⁰ Larry Prince was a former chief-executive officer of GPC. 22 RP 46-48.

As background: Jay Coogan was unrepresented by counsel in this case even though he sold Doy some of the products that allegedly caused his death. At Jay Coogan's deposition, defense counsel asked him whether he had received legal advice and wished to continue testifying unrepresented. CP 16386-90. Because that issue was irrelevant at trial, the trial court properly sustained defense counsel's objection when Dean asked him, "Did NAPA ever, in this process, indicate to you that they believed you were the reason your brother got sick?" 13 RP 185.

Despite the court's ruling that this subject was off-limits, Dean sought to elicit the same irrelevant and 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 object, 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 the exchange 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, "At one point she [defense counsel] accused me of killing my brother." 16 RP 160.

The Division Two majority found no misconduct by concluding that the witness "volunteered" the information. *Slip Op.* at 30. But as Judge Lee observed, the record does not reflect a proper exercise of discretion—the trial court "summarily dismissed this allegation of misconduct without considering (1) whether, and to what extent, Dean elicited the outburst or (2) what specific prejudice was caused by the outburst, and whether the

prejudice was cured.” *Id.* at 49. And even though the court struck the outburst and instructed the jury to disregard it, when the court in doing so remarked “even if true,” it validated the irrelevant evidence rather than curing the prejudice. *Id.* at 49-50; *see* 16 RP 160.

(b) Misconduct during closing argument.

It is improper to appeal to sympathy, passion, or prejudice. *See Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 142, 750 P.2d 1257 (1988). Pretrial rulings barred improper “golden rule” arguments, “send a message” arguments, and arguments based on counsel’s opinions or beliefs. 1 RP 70-72; 2 RP 46-48, 57; 5 RP 62. Yet Dean invited the jurors to put themselves in Doy’s shoes (golden rule), including by imagining that “you’re gasping to breathe as your body rots...[a]nd you know there is nothing you can do.” 47 RP 153; *see also* 47 RP 188-89. She implored the jury to send a message with a verdict that was “something that matters for what [GPC and NAPA] took,” because they were “driven by money” and would “consider a victory” anything less than \$30 million for Doy’s estate alone, and because “something needs to be done” to stop “a pattern of outrageous behavior.” 47 RP 189-93. And her use of personal opinions included stating “I think” one of Doy’s most significant exposures was “made up” and expressing what she believed was right for the jury to do. 47 RP 185-86, 190-91.

Division Two ruled that because GPC and NAPA did not contemporaneously object, they had to establish that the misconduct was “so flagrant that no instruction could have cured the prejudicial effect.” *Slip Op.* at 32 (quoting *Collins v. Clark Cty. Fire Dist. No. 5*, 155 Wn. App. 48,

94, 231 P.3d 1211 (2010)). But contrary to Division Two’s analysis, the flagrant-misconduct standard is met here.¹¹ And regardless, a plurality of this Court has explained that deliberately violating a pretrial ruling is per se flagrant, such that no objection is required and prejudice is presumed. *State v. Smith*, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937); *see also* Fed. R. Evid. 103(b). This Court should reaffirm that principle order a new trial.

* * *

The cumulative effect of Dean’s misconduct is undeniable. Her improper questions, compounded by harmful curative instructions, left the jury with false impressions that were unfairly prejudicial. To top it off, as designed, her improper closing arguments inflamed the jury and produced a verdict based on passion and prejudice. A new trial is needed on all issues.

2. The Coogans kept hidden, until after the denial of a new-trial motion, evidence that would have undercut their noneconomic-damages claims. This misconduct warrants a new trial on those damages and a remand to determine if sanctions should be imposed.

(a) The Coogans hid the fact that dozens of witnesses would have testified that Doy and Sue’s relationship was miserable, not “happy” and “loving” as the jury heard.

Before deposing the Coogans, GPC and NAPA’s counsel obtained the court file in the probate action Sue started in Stevens County after Doy died. *See* CP 20571, 20747, 21350, 21378, 21415, 21445. They found a March 2016 declaration in which Sue attested that she and Doy had “loved

¹¹ *See Opening Br. of Appellant GPC* at 39-42; *Reply Br. of Appellant GPC* at 13-16; *cf. State v. Loughbom*, _ Wn.2d _, _ P.3d _, 2020 WL 4876927 at *2-3 (2020) (holding that repeated references to an improper theme were flagrant and ill intentioned).

being together, working together, and playing together” and that Doy “trusted” her. CP 20839, 20841. Eleven declarations by friends and relatives uniformly supported that rosy portrait (and Sue’s claim to a half-interest in Doy’s separate property). CP 20844-73. Nothing in the probate file so much as hinted to the contrary.

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

But all along, the Coogans knew that dozens of witnesses would have painted an entirely different picture. In March and April 2016, Roxana and Raquel obtained two dozen written statements. As told by family and friends, Doy lived in “misery” with Sue and wanted her to leave. CP 21111, 21169, 21192. Doy would visit friends to “get away from” Sue because she drank constantly and that made her “mean [and] obnoxious.” CP 21169, 21192. Doy once had to leave because Sue was attacking him with an axe. CP 21169. Doy felt that Sue generally was “just after [his] money.” CP 21111. He would hide cash, even burying it underground, but Sue would

always find it, leading Doy to remark to friends, “Damn it, that money hungry bitch found my money stash again.” CP 21188.

The Coogans also secretly possessed a copy of a conversation that had occurred in a private, group-messaging thread on Facebook after Doy’s death: when one of Doy’s adult granddaughters stated, “I hope the bitch dies”—in reference to Sue—Raquel responded, “Then dad would have to put up with her again[.]” CP 21223, 21226-28.

Neither Sue (then Doy’s estate’s personal representative) nor any of the other estate beneficiaries disclosed any of these witnesses or statements in the wrongful-death case.¹² Not only that, but the Coogans kept the probate action materially dormant until two months after the trial court denied GPC and NAPA’s motion for a new trial. *See* CP 20293, 21001-23. Sue then filed a summary-judgment motion, Roxana and Raquel filed the statements they had collected two years earlier (now converted into sworn declarations¹³), and Sue submitted a declaration by Kelly, with the Facebook thread.¹⁴ *See* CP 21101-217, 21223, 21226-28; *see also* CP 21081-86, 21098, 21248. Soon after, GPC and NAPA found the materials in a routine check of the probate docket. CP 20747.

¹² Sue was asked in written discovery requests (in her capacity as the personal representative of Doy’s estate and its beneficiaries) to “produce any and all written statements...signed, authenticated, or otherwise adopted by any potential witness in this case, regardless of whether or not You intend to call them as a witness at trial.” CP 21567, 21571-72, 21584. She repeatedly answered, including after the witness statements had been obtained, that she (and the beneficiaries by extension) had no responsive documents “[o]ther than the affidavit of Jerry Coogan, previously produced.” *Id.*

¹³ *Compare* CP 20622-20683 (statements) *with* CP 21101-21217 (declarations).

¹⁴ Roxana attested in her own declaration that the declarations she and Raquel were submitting “accurate[ly]” described the relationship between her father and Sue. CP 21098. She added that her father “didn’t trust” Sue and that after one of their fights, Sue had stolen \$10,000 and left Doy for weeks. CP 21099.

(b) The trial court refused to allow discovery into the misconduct or hold a hearing, let alone grant relief under CR 60.

GPC and NAPA promptly moved to vacate the judgment under CR 60, order a new trial, and authorize discovery to inform whether sanctions should be imposed. CP 22569-82. The trial court denied the motion without a hearing and without analyzing CR 60's requirements. CP 22555-56. Ignoring that the statements were converted into sworn declarations before filing, the court stated that "there is much unsworn testimony in the form of letters or statements addressed to 'To Whom it May Concern.'" CP 22556. It further reasoned that "[m]uch of the material...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.

(c) At minimum, the Coogans' misconduct is an alternative ground to vacate the \$80 million in noneconomic-damages awards.

Division Two found it unnecessary to reach the denial of the CR 60 motion, having vacated the damages awards on other grounds. *Slip Op.* at 24-25 n.2. But the issue remains not only an alternate ground to vacate the \$80 million in noneconomic-damages awards; it also warrants authorizing discovery that may support sanctions. A party cannot receive a fair trial where an opponent withholds relevant evidence while simultaneously providing testimony (under oath) that the undisclosed evidence would rebut. The trial court abused its discretion in denying the CR 60 motion and refusing to authorize discovery.

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

Newly discovered evidence warrants a new trial under CR 60(b)(3) where it (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*, 179 Wn.2d at 360. All five elements exist here.

Relationship quality is at the core of a loss-of-consortium claim. *See Lund v. Caple*, 100 Wn.2d 739, 744, 675 P.2d 226 (1984); *see also* CP 14989 (Court's Instruction 35). Based on the one-sided evidence it heard, the jury awarded Sue \$30 million and Roxana and Raquel each \$10 million, purely for the loss of their relationships with Doy. CP 15021; *see also* 47 RP 191-92 (Coogans' closing argument). The jury also awarded \$30 million to Doy's estate, based in part on the mental anguish he was presumed to have suffered at the thought of leaving behind his "close" family and causing them grief. The evidence kept from the jury would have painted a starkly contrasting picture, and thus cannot be deemed merely cumulative or impeaching. The jury almost certainly would not have awarded the same damages had it heard that evidence.

GPC and NAPA were amply diligent. Sue's deposition testimony that she and Doy "had a very loving, romantic relationship" (CP 20414) is the kind of categorical statement 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); *Roberson v. Perez*, 123 Wn. App. 320, 334, 96 P.3d 420 (2004). Even so, GPC and NAPA did investigate further, including by monitoring the Stevens County probate action. CP 20571, 20747, 21350, 21378, 21415, 21445. 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.

The trial court abused its discretion in denying relief based on inadmissibility. *See* CP 22555-56. Nondisclosure prejudices a party's ability to prepare for trial, including by depriving it of the opportunity to develop facts and present them in admissible form.¹⁵ *See Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 588-90, 220 P.3d 191 (2009).

(2) 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 "misrepresentation" or "other misconduct." The Coogans misrepresented facts and committed misconduct by withholding evidence that flatly contradicted the testimony on which they premised their loss-of-consortium claims.¹⁶ A verdict achieved by such unfair means cannot stand.¹⁷

¹⁵ In any event, the new evidence was itself admissible and not hearsay. *See Opening Br. of Appellant GPC* at 46 n.27; *Reply Br. of Appellant GPC* at 23-24.

¹⁶ The Coogans were all adverse parties for purposes of CR 60(b)(4). *See Opening Br. of Appellant GPC* at 51-52; *Reply Br. of Appellant GPC* at 27-28.

¹⁷ *See Stibbs v. Stibbs*, 37 Wn.2d 377, 379, 223 P.2d 841 (1950) (reversing denial of new trial based on fabrication of evidence); *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 824-26, 225 P.3d 280 (2009) (affirming vacation of judgment where party misrepresented facts); *see also Golik v. CBS Corp.*, 306 Or. App. 202, 214-22, _ P.3d _ (2020) (affirming new-trial order where party failed to produce documents).

(d) The evidence of misconduct also warrants discovery to determine if sanctions are called for, including dismissal for fraud on the court.

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 record developed to date raises material concerns about a scheme to manipulate both the Stevens County probate action and this action to hide the true nature of Doy and Sue’s relationship. As GPC and NAPA pointed out to the trial court in moving for discovery, this concern implicates the fraud exception to the attorney-client privilege. CP 22582 (citing *State v. Hansen*, 122 Wn.2d 712, 720, 862 P.2d 117 (1993)). This Court should remand with express direction to allow discovery on these concerns.

* * *

This Court should reach the party-misconduct issue as an alternative basis to vacate the \$80 million in noneconomic-damages awards and remand with directions to allow discovery on the Coogans’ misconduct to determine if sanctions—including dismissal with prejudice—are warranted.

IV. CONCLUSION

The extraordinary verdict in this case is excessive, was unfairly obtained, and cannot stand. This Court should order a new trial on all issues and authorize discovery on the Coogans’ misconduct.

Respectfully submitted this 8th day of September, 2020.

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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 8th day of September, 2020.

s/ Patti Saiden
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