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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Respondents,

vs.

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

Appellants, and

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

Defendants.

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

ERRATA PAGES TO RESPONDENTS' BRIEF AGAINST GENUINE PARTS COMPANY

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Attached hereto are the corrected Table of Contents and Table of Authorities (Pages i-x) to *Respondents' Brief Against Genuine Parts Company* filed December 14, 2018. After electronically filing the Brief, counsel discovered that there were errors within the Table of Contents and Table of Authorities.

DATED this 18th day of December, 2018.

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES iv

INDEX TO APPENDICES x

INTRODUCTION 1

RE-STATEMENT OF ISSUES 3

COUNTER-STATEMENT OF THE CASE 3

I. Mr. Coogan's exposures to GPC/NAPA asbestos products were extraordinarily high and occurred repeatedly for decades. 3

A. Brake, clutch, and gasket repair work. 4

B. Operational exposures 9

II. GPC/NAPA bear the greatest responsibility for causing Mr. Coogan's mesothelioma. 11

III. Mr. Coogan suffered immensely from malignant mesothelioma and died a premature death. 16

IV. Mr. Coogan's family was devastated by his death. 19

V. Mr. Coogan's household services were substantial. 20

VI. Jury Verdict and Post-Trial Proceedings 21

ARGUMENT 22

I. The district court did not abuse its discretion in denying a new trial on GPC/NAPA's claim that the verdict is excessive. 22

A. Standard of Review 23

B. The verdict does not shock the conscience. 23

1. The jury is entrusted to determine an appropriate amount of damages..... 24

2. The jury's damages award is supported by the evidence.....26

3. GPC/NAPA initially conceded the award is reasonable 30

4. Substantial deference is given to the trial court's denial of a new trial on grounds of excessiveness..... 31

C. The jury's award is not "excessive" by any measure. 34

1. GPC/NAPA's use of a ratio of economic to non-economic damages is an improper basis for a finding of excessiveness in mesothelioma cases, including this one. 34

2. The award did not exceed Plaintiffs' request..... 36

3. The difference between the verdict and the settlement amounts does not render the verdict excessive..... 37

II. The district court did not abuse its discretion in finding that neither Plaintiffs' counsel, nor the Coogans, engaged in "systematic misconduct." 39

A. Standard of review. 39

B. There was no misconduct by Plaintiffs' counsel during the presentation of evidence. 40

C. There was no misconduct by Plaintiffs' counsel during closing argument. 45

1. GPC/NAPA failed to object…… 45

2. There were no improper statements in closing…… 47

3. There is no identifiable prejudice…..…..... 49

4. GPC/NAPA's accusations against Ms. Dean regarding rulings in other cases are inappropriate and unfounded…….... 50

D. There was no misconduct by the Coogans..... 55

1. All relevant facts about the Coogan family's relationships were known or easily discoverable to GPC/NAPA by the time of trial 56

2. GPC/NAPA failed to show they are entitled to relief under CR 60(b)(3)……..... 60

a. The declarations are not material, not admissible, and would not have changed the result at trial 61

b. GPC/NAPA failed to exercise diligence with regard to the discovery of damages evidence…… 65

3. GPC/NAPA have not demonstrated fraud, misrepresentation, or misconduct by clear and convincing evidence as required for relief under CR 60(b)(4) 68

III. The trial court did not abuse its discretion in excluding Dr. Schuster's opinion under ER 403..... 70

IV. The trial court did not abuse its discretion in excluding workers' compensation claims from the Wagstaff facility. 81

CONCLUSION..... 89

TABLE OF AUTHORITIES

Page(s)

A.C. ex rel. Cooper v. Bellingham Sch. Dist.,
125 Wn. App. 511, 105 P.3d 400 (2004) 48

Adcox v. Children's Orthopedic Hosp. Med. Ctr.,
123 Wn.2d at 26, 864 P.2d 921 73

Andrews v. Struble,
178 N.W.2d 391 (Iowa 1970) 53

Barabin v. AstenJohnson, Inc.,
No. C07-1454 RSL, 2010 WL 5137898, (W.D. Wash. Dec.,
2010)…..……...34

Baxter v. Greyhound Corp.,
65 Wn.2d 421, 397 P.2d 857 (1964) 38

Beal for Martinez v. City of Seattle,
134 Wn.2d 769, 954 P.2d 237 (1998) 68

Bingaman v. Grays Harbor Cmty. Hosp.,
103 Wn.2d 831, 699 P.2d 1230 (1985) 25, 26, 32

Blood v. Allied Stores Corp.,
62 Wn.2d 187, 381 P.2d 742 (1963) 82

Bowers v. Fibreboard Corp.,
66 Wn. App. 454, 832 P.2d 523 (1992) 63

Brundridge v. Fluor Fed. Servs., Inc.,
164 Wn.2d 432, 191 P.3d 879 (2008) 25

Bunch v. King County Department of Youth Services,
155 Wn.2d 165, 116 P.3d 381 (2005) 33, 35, 36

Burnet v. Spokane Ambulance,
131 Wn.2d 484, 933 P.2d 1036 (1997) 88

Carabba v. Anacortes Sch. Dist. No. 103,
72 Wn.2d 939, 435 P.2d 936, 939 (1967) 46

Carson v. Fine,
123 Wn.2d 206, 867 P.2d 610 (1994) 71

Collins v. Clark Cty. Fire Dist. No. 5,
155 Wn. App. 48, 231 P.3d 1211 (2010) 23

Conrad ex rel. Conrad v. Alderwood Manor,
119 Wn. App. 275, 78 P.3d 177 (2003) 24, 26

Dalton v. State,
130 Wn. App. 653, 124 P.3d 305 (2005) 68

Davidson v. Municipality of Metro. Seattle,
43 Wn. App. 569, 719 P.2d 569 (1986) 71

Davis v. Machine Mfg. Co.,
102 Wn.2d 68, 684 P.2d 692 (1984) 81, 83

Domagala v. 3M Company, et al.
No. 62-cv-16-3232 (Minn.. Second Dist.) 53

Estate of Brandes v. Brand Insulations, Inc.,
197 Wn. App. 1043, *review denied*, 188 Wn.2d 1015,
396 P.3d 345 (2017).....34

Estenson v. Caterpillar Inc.,
189 Wn. App. 1053 (2015) 34

Finch v. Covil Corp.,
No. 1:16cv1077 (M.D.N.C. Oct. 5, 2018) 51

Green v. McAllister,
103 Wn. App. 452, 14 P.3d 795 (2000) 25

Haley v. Highland,
142 Wn.2d 135, 12 P.3d 119 (2000) 39

Hill v. GTE Directories Sales Corp.,
71 Wn. App. 132, 856 P.2d 746 (1993) 35

Huntington v. Samaritan Hosp.,
101 Wn.2d 466, 680 P.2d 58 (1984) 68

In re Adoption of B.T.,
150 Wn.2d 409, 78 P.3d 634 (2003) 51

In re LAOSD Asbestos Cases (Dennis)
No. JCCP4674, No. BC 481310, (Cal. Super. Ct. Nov. 1, 2012) 54

In re Marriage of Littlefield,
133 Wn.2d 39, 940 P.2d 1362 (1997) 71

In re Marriage of Maddix,
41 Wn. App. 248, 703 P.2d 1062 (1985) 68

James v. Robeck,
79 Wn.2d 864, 490 P.2d 878 (1971) 24, 26

Jones v. City of Seattle,
179 Wn.2d 322, 314 P.3d 380 (2014) ..... passim

Joyce v. State, Dep't of Corr.,
116 Wn. App. 569, 75 P.3d 548 (2003) 28

Kellerher v. Porter,
29 Wn.2d 650, 189 P.2d 223 (1948) 42

King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.,
142 Wash. 2d 543, 14 P.3d 133 (2000).....51

Kinseth v. Weil-McLain,
913 N.W.2d 55 (Iowa 2018) 53

Kramer v. J. I. Case Mfg. Co.,
62 Wn. App. 544, 815 P.2d 798 (1991) 74, 75, 76, 80

Lockwood v. AC & S, Inc.,
109 Wn.2d 235, 744 P.2d 605 (1987) 70, 71

M.R.B. v. Puyallup Sch. Dist.,
169 Wn. App. 837, 282 P.3d 1124 (2012) 49

McClintock v. Allen,
30 Wn.2d 272, 191 P.2d 679 (1948) 23

Miller v. Kenny
180 Wn. App. 772, 325 P.3d 278 (2014) 48

Miller v. Yates,
67 Wn. App. 120, 834 P.2d 36 (1992) 25

Montgomery v. Brewhaha Bellevue, LLC,
195 Wn. App. 1064 (2016) 64

Paulus v. Access Hotels,
No. BC437739 (Cal. Super. Aug. 27, 2012) 52

Peoples State Bank v. Hickey,
55 Wn. App. 367, 777 P.2d 1056 (1989) 68

Ryan v. Westgard,
12 Wn. App. 500, 830 P.2d 687 (1975) 26, 33

Snyder v. Sotta,
3 Wn. App. 190, 473 P.2d 213 (1970) 47

Sofie v. Fibreboard Corp.,
112 Wn.2d 636, 771 P.2d 711 (1989) 24, 34, 35

Spokane Research & Def. Fund v. City of Spokane,
155 Wn.2d 89, 117 P.3d 1117 (2005) 51

Sprint/United Management Co. v. Mendelsohn,
552 U.S. 379 (1987) 71

State v. Atsbeha,
142 Wn.2d 904, 16 P.3d 626 (2001) 70

State v. Dhaliwal,
150 Wn.2d 559, 79 P.3d 432 (2003) 47

State v. Grayson,
154 Wn.2d 333, 111 P.3d 1183 (2005) 50

State v. Hinkley,
52 Wn.2d 415, 325 P.2d 889 (1958) 43

State v. Lamb,
175 Wn.2d 121, 285 P.3d 27 (2012) 71

State v. Neidigh,
78 Wn. App. 71, 895 P.2d 423 (1995) 43

State v. Ray,
116 Wash.2d 531, 806 P.2d 1220 (1991) 73

State v. Smiley,
195 Wn. App. 185, 379 P.3d 149, *review denied*,
186 Wn.2d 1031, 385 P.3d 110 (2016) 47

State v. Smith,
104 Wn.2d 497, 707 P.2d 1306 (1985) 43

State v. Stenson,
132 Wn.2d 668, 940 P.2d 1239 (1997) 50

State v. Sullivan,
196 Wn. App. 277, 383 P.3d 574 (2016), *review denied*,
187 Wn.2d 1023, 390 P.3d 332 (2017) 47

State v. Thorgerson,
172 Wn.2d 438, 258 P.3d 43 (2011) 47

State v. Walton,
5 Wn. App. 150, 486 P.2d 1118 (1971) 43

State v. Warren,
165 Wn.2d 17, 195 P.3d 940 (2008) 47

Stevens v. Gordon,
118 Wn. App. 43, 74 P.3d 653 (2003) 24, 25, 27

Stewart v. State,
92 Wn.2d 285, 597 P.2d 101 (1979) 81, 83

Washburn v. Beatt Equipment Co.,
120 Wn.2d 246, 840 P.2d 860 (1992) ..... passim

Wooldridge v. Woolett,
96 Wn.2d 659, 638 P.2d 566 (1981) 26

Wuth ex rel. Kessler v. Lab. Corp. of Am.,
189 Wn. App. 660, 359 P.3d 841 (2015) 26, 28, 35, 36

Constitutional Provisions, Statutes and Court Rules

CR 43 59
CR 43(F) 56
CR 59 .....22, 39
CR 59(a) 23, 26, 39
CR 59(a)(5) 25
CR 60 .....22, 56
CR 60(b).....39, 69
CR 60(b)(3) 60, 62, 66
CR 60(b)(4) 68, 69
ER 103(a)(2) 73
ER 403 ..... passim
ER 904 85

INDEX TO APPENDICES

Appendix A: *Finch v. Covil Corp.*, No. 1:16cv1077, Transcript of Jury Trial Proceedings (M.D.N.C. Oct. 5, 2018) (cited in brief at page 53)

Appendix B: *Paulus v. Access Hotels*, No. BC437739, Trial Transcript (Cal. Super. Ct. Aug. 27, 2012) (cited in brief at page 53)

Appendix C: American Board of Trial Advocates (ABOTA) membership materials (cited in brief at page 54)

Appendix D: *Domagala v. 3M*, No. 62-CV-16-3232, Transcript of Opening Argument (Minn. Dist. Ct. Dec. 9, 2016) (cited in brief at page 55)

INTRODUCTION

A unanimous jury verdict was returned against Appellants Genuine Parts Company (GPC) and National Automotive Parts Association (NAPA), and in favor of Plaintiffs/Respondents the Coogan family ("Coogans" or "Plaintiffs"), on the strength of the evidence that decedent Jerry "Doy" Coogan had regular exposure to asbestos from products manufactured, sold, and distributed by GPC/NAPA,[1] that these exposures caused his mesothelioma, and that both Mr. Coogan and his wife and two adult daughters suffered immense loss as a result of his cancer diagnosis and death. GPC/NAPA made strategic decisions to ignore this evidence and instead presented their products as constituting an insignificant part of Mr. Coogan's asbestos exposures. The jury rightly rejected this defense.

GPC/NAPA now embark on a campaign to place the blame for their own failed defense at the feet of both Plaintiffs' counsel and the Coogan family, spending roughly half of their 79-page brief on allegations that counsel and the Coogans have somehow obtained this jury verdict by improper means. The trial court properly rejected these baseless contentions and did not abuse its discretion in doing so.

GPC/NAPA claim that the jury's $81.5 million verdict was returned

[1] GPC raises arguments on behalf of NAPA, a separate Appellant in this case. GPC/NAPA are therefore treated as a single entity herein. The Court would be justified, however, in determining that GPC does not have standing to argue on NAPA's behalf.

after a trial that "lasted eighty-one-and-a-half days from *voir dire* to the verdict," suggesting that the jury based its damages award on the trial days rather than on the evidence. This has no basis in reality. There were not 81.5 days of trial by any measure. Voir dire began on January 23, 2017, and the verdict was reached on April 17, 2017. That is 85 days from beginning to end, about 48 of which were spent in court. GPC/NAPA's accusation against the dedicated members of the jury is unjustified. It serves, however, to demonstrate their general approach of making unsupported accusations of impropriety to distract from the fact that twelve people agreed on the appropriate amount of damages in this case.

GPC/NAPA's remaining arguments fare no better. The trial court did not abuse its discretion in excluding the testimony of Dr. Gary Schuster under ER 403, as his opinion characterizing Mr. Coogan as a heavy drinker substantially outweighed the attenuated relevance of his testimony. There was likewise no abuse of discretion in the exclusion of workers' compensation forms from other workers at the Wagstaff facility where Mr. Coogan briefly worked in the late 1960s given the lack of similarity between those workers and Mr. Coogan.

This Court should affirm under the abuse of discretion standard. The trial court's decisions are not unreasonable or based on untenable grounds, but are instead supported by the ample trial record.

RE-STATEMENT OF ISSUES

1. Did the district court abuse its discretion in denying a new trial on GPC/NAPA's claim that the verdict is excessive?

2. Did the district court abuse its discretion in denying a new trial on GPC/NAPA's claim that there was "systematic misconduct" from Plaintiffs' counsel and the Coogan family?

3. Did the district court abuse its discretion in determining that under ER 403 the prejudice from Dr. Schuster's opinion that Mr. Coogan had Stage 3 cirrhosis of the liver was substantially outweighed by the minimal probative value?

4. Did the district court abuse its discretion in excluding workers' compensation claims from other employees of the Wagstaff facility that lacked substantial similarity to Mr. Coogan's work and diagnosis?

COUNTER-STATEMENT OF THE CASE

I. Mr. Coogan's exposures to GPC/NAPA asbestos products were extraordinarily high and occurred repeatedly for decades.

Although GPC/NAPA does not mount a legal challenge to Plaintiffs' causation evidence, it does suggest that Mr. Coogan had relatively little exposure to GPC/NAPA asbestos products in comparison to other asbestos exposures in his life. The evidence shows otherwise.

Mr. Coogan's exposures to GPC/NAPA asbestos products can be divided into two categories: (1) automotive repair work with brakes, clutches, and engine gaskets on cars, trucks, and heavy equipment, and (2) operational exposures to brakes that were continually engaged during the

operation of heavy equipment used in Mr. Coogan's excavating business.

A. Brake, clutch, and gasket repair work.

Mr. Coogan and his brother stayed with their grandfather, Merle Boyd, when they were children in the 1950s and 1960s. 13 RP 35, 37, 195. They lived in the small town of Kettle Falls, Washington. 13 RP 33. Mr. Boyd made his living as a contractor doing excavating and hauling work. 13 RP 35. He owned a lot of heavy equipment. 13 RP 35-37. Mr. Boyd repaired and maintained his equipment. 13 RP 35-36. Mr. Coogan spent a considerable amount of time with his grandfather in his garage learning how to maintain cars and equipment. Ex. 68, ¶12; 13 RP 37-42; 44 RP 122-24. Mr. Coogan was present when his grandfather changed brakes, clutches, and engine gaskets. 13 RP 38-39, 72-73.

In the early 1970s, while living in Spokane, he often visited Kettle Falls to start learning his grandfather's excavating business. 13 RP 44. He moved back to Kettle Falls in about 1974 to take over the business, which he continued to run up into the 2000s. 13 RP 45, 50-51. This photo, shown to the jury in closing argument, depicts Mr. Coogan at work:

Like his grandfather, Mr. Coogan did all the maintenance work on his excavating equipment. 13 RP 51-52.

Mr. Coogan also had a love of cars from a young age. 13 RP 38. He was in a car club in high school in which he and his friends would get together on a weekly basis to work on cars, including changing brakes, clutches, and engine gaskets. 13 RP 38-39. As an adult, his hobby was fixing up cars, including hot rods, and particularly in the cold months "he was always working on cars" in his shop. 13 RP 52. He did car repair and maintenance throughout the 1970s, 1980s, and 1990s, working on both his own cars and those of his friends and family. 13 RP 52-53. "[H]e could take anything from the ground up and make it run." 13 RP 78.

In the 1970s, Mr. Coogan lived next door to his brother Jay, who ran an auto repair shop out of his house. 13 RP 45-46, 70. Mr. Coogan often visited his brother's repair shop. 13 RP 45-46. Jay Coogan saw his brother working on brakes, clutches, and gaskets. Jay also performed that kind of work around Mr. Coogan. 13 RP 72, 129.

Mr. Coogan purchased almost all of his brakes, clutches, and gaskets from the NAPA auto parts stores in Kettle Falls and in Colville, the neighboring town. Ex. 68, ¶ 7; 13 RP 69-71, 73, 78-79, 140. Their grandfather bought his auto parts at the Colville NAPA store. 13 RP 78. Jay Coogan worked at the worked at the Colville NAPA store in the 1970s and

1980s and eventually owned the store. 13 RP 71, 81.[2] Jay Coogan still has catalogs from his years with NAPA. 13 RP 80-81, 84-85; Exs. 97-103.

GPC/NAPA sold asbestos brakes, clutches, and gaskets. 21 RP 213. NAPA sold Rayloc brakes manufactured by GPC. 13 RP 140-41, 163-64; 14 RP 27. It also carried American Brakeblok brakes manufactured by Abex. 13 RP 140-41, 163-64.[3] The clutches sold at NAPA were Rayloc. 13 RP 163-64; Ex. 98. The gaskets sold at NAPA were Victor. 10 RP 54. 13 RP 86, 121, 127; Ex. 97.

Jay Coogan saw his brother use Rayloc brakes repeatedly throughout his life. 13 RP 147-48. Mr. Coogan was exposed to asbestos during both removal and installation of asbestos brakes. 9 RP 158, 161. When removing brakes and clutches, compressed air was used to blow out the dust collected in the brake drum and clutch assembly. 13 RP 129-31. This is a "dangerous procedure" that puts him at risk of developing mesothelioma. 9 RP 168. His exposures from blowing out brake dust were 50,000 to 12 million times greater than background. 9 RP 163-64.[4]

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[2] Jay Coogan worked at the Kettle Falls NAPA store from about 1974 to 1978, before transferring to the Colville NAPA store. 13 RP 68-70. There were also several years that he ran his own repair shop out of his house, using NAPA parts. 13 RP 45-46, 70.

[3] American Brakeblok was the most common brand of brakes used by Mr. Boyd in the 1960s. 13 RP 142. He also had EIS and Worldbestos brand brakes, although Jay Coogan could not say how often his grandfather used those brands or whether he ever used them around Mr. Coogan. 13 RP 142; 15 RP 42, 46-49.

[4] Studies have measured the asbestos fiber release from using compressed air to blow out brake dust in the range of .1 to 24.9 fibers per cubic centimeter (fibers/cc) of air. 9 RP 161-62. The average background level of asbestos in the ambient air is only 0.000002 fibers/cc. 7 RP 174. Even GPC's expert relied on studies showing that the use of compressed air on

When installing new brakes, Mr. Coogan sanded the brakes and also used an electric arc grinder to shape the brakes to fit the brake drum. 13 RP 132-34, 140. When working with the larger brake bands on his excavation equipment, Mr. Coogan also had to rivet the brakes, which involved drilling holes to connect the brake to the metal shoe. 13 RP 151.[5]

In the 1970s, the EPA warned auto mechanics that brakes and clutches often contain asbestos and that "[m]illions of asbestos fibers can be released during brake and clutch servicing." Ex. 50, p. 1; 10 RP 104-05. "Asbestos released into the air lingers around a garage long after a brake job is done and can be breathed in by everyone inside a garage, including customers." Ex 50, p. 1; 10 RP 106-07; *see also* 9 RP 172.

Plaintiffs' medical expert, Dr. Carl Brodkin, considered that Mr. Coogan did brake jobs over a 19-year period (from 1963-70 and 1975-87), that this work was done on a routine basis, and that his work activities with brakes resulted in "quite intense airborne exposures to asbestos." 9 RP 156-57, 160. This exposure was "very significant," would alone have been sufficient to cause his disease if it was his only exposure, and was a substantial contributing factor in causing his disease. 9 RP 156-57, 159.

NAPA's training manual for its brake technicians affirms this:

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brake drums produces peak exposures that exceeded the 1970s OSHA permissible exposure limit. 40 RP 158-60.

[5] Sanding asbestos brakes results in asbestos exposures of 2.7 to 6.9 fibers/cc, riveting asbestos brakes generates exposures of .1 to 3.5, and arc grinding causes extremely high exposures between .1 and 125 fibers/cc. 9 RP 169.

ASBESTOS

Since the earliest days of the automobile asbestos has been used as a reinforcing fiber in brake linings. Asbestos fibers are strong and heat-resistant (see Figure 5.1) which makes them well-suited for this purpose as well as clutch linings and gaskets. The fibers have a tensile strength equal to that of high grade steel, and can withstand temperatures of up to 600 degrees F. Asbestos is also relatively inexpensive. The fibers come from the minerals chysotile and amphibole, which are mostly found in and supplied from Canada.

The asbestos fibers can account for 40- to 60-percent of the total ingredients in a typical asbestos lining material. But as we've learned in recent years, any amount of asbestos is potentially dangerous because of the potential health hazard it poses if inhaled.

HAZARDOUS DUST

Asbestos is a known carcinogen (cancer-causing agent). The needle-like fibers lodge in the lungs where they remain and become an ongoing source of irritation. This leads to scarring of delicate lung tissue, and eventually the development of cancer in many cases. The destructive process can take 15 to 30 years before the damage starts to cause noticeable health symptoms, so people were often unaware of the dangers posed by asbestos.

As long as the fibers are locked in the friction material itself, they pose no health hazard to service technicians or others. But when asbestos fibers are released in brake dust as a result of normal wear or grinding, they can become a serious health concern.

According to research done by the Occupational Safety and Health Administration (OSHA), the once-common practice of grinding or arcing brake shoes can release tens of

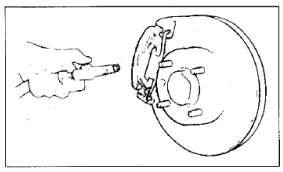


Figure 5.2. Using an air hose to blow brake dust off brake parts can put millions of invisible asbestos fibers into the air (courtesy of Ford Motor Company).

millions of asbestos fibers into the air. We're talking microscopic-sized fibers, much smaller than a human hair and invisible to the naked eye. So in one breath, you can inhale thousands of these fibers and never even realize it.

Likewise, using an air hose to blow brake dust out of brake drums or off brake parts (see Figure 5.2) can also throw millions of fibers into the air, creating a visible as well as an invisible cloud of airborne asbestos dust which not only endangers the technician who's working on the brakes but also everyone else in the shop!

Even something as simple as banging on a brake drum with a hammer to loosen it can jar loose enough brake dust from inside the drum to put over a million asbestos fibers into the air! What's more, once the fibers are airborne they tend to stay airborne for hours. As the dust settles out throughout the workplace, it clings to clothing, work surfaces, you-name-it. And every time the dust gets stirred around (sweeping the floor, air currents created by walking, working, use of air tools, etc.) the dust gets airborne again. Consequently, once the stuff gets into a work environment it can remain there for months, even years, posing an ongoing invisible health risk to all who are exposed.

OSHA says workers should not be exposed to more than 0.2 asbestos fibers per cubic centimeter of air in the workplace. This can be accomplished several ways: by minimizing

Ex. 132, p. 74 (highlighting added).

Rayloc was the main brand of clutch that Mr. Coogan used on his cars and heavy equipment. 13 RP 163, 166. Exposure to asbestos from Rayloc clutches was a substantial factor in causing Mr. Coogan's mesothelioma. 9 RP 188.

The Coogans always used Victor asbestos gaskets from NAPA on hot areas of the engine. 13 RP 86, 88, 90, 97, 102-05, 121-22, 127; 10 RP

21-23, 54; Ex. 97, p. 173.[6] Heat and pressure caused the gaskets to burn onto the metal, and the Coogans had to use scrapers, wire brushes, and electric brushes to remove the asbestos material. 10 RP 23-24, 29; 13 RP 89-90, 98-102; Ex. 97, p. 173. This caused exposures between 55,000 and 15 million times more than ambient levels of asbestos. 10 RP 52.[7]

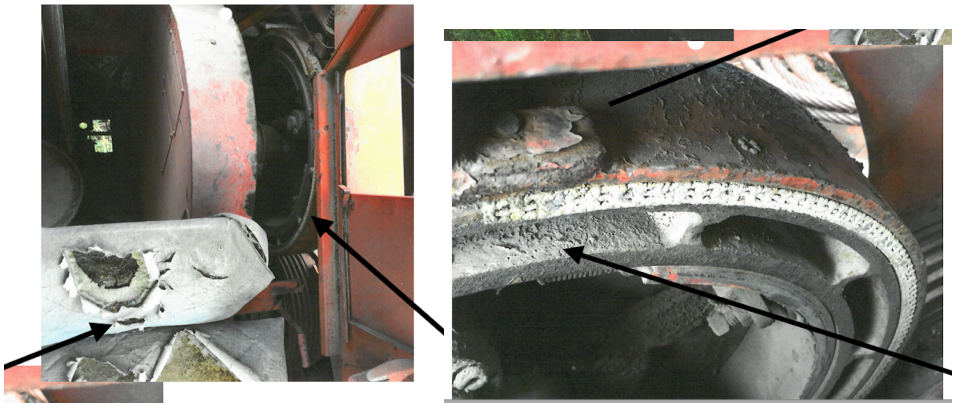
B. Operational exposures

Mr. Coogan owned a Bantam crane that he regularly used in his excavation business and on his own property. 13 RP 51-52, 123; 16 RP 133. Inside the cabin of the Bantam, where the crane operator sits, there was a large brake that engaged every time Mr. Coogan moved the levers that controlled the cables for the backhoe, the drag line, and the bucket. 14 RP 55-57. This photo of his crane shows the cabin where the brake is:

[6] Until 1963, some Victor gaskets made of cork also contained amosite, an amphibole form of asbestos fiber. 23 RP 107-09, 112; 26 RP 53-55; Ex. 249 at bates no. 796; Ex. 289; Ex. 293. Jay Coogan recalled removing Victor cork gaskets. 16 RP 86, 154.

[7] This releases asbestos at levels ranging from .11 fibers/cc to 31 fibers/cc. 10 RP 25. This is an "intense, high concentration of asbestos fibers." 10 RP 53.

Ex. 209. Photos of the inside of the cabin show the torn operator seat from above (left), with the large brake band located about two feet behind it, and a close-up of the dusty brake (right):



Ex. 209. The brake material Mr. Coogan used on his excavation equipment was a bulk asbestos brake band lining that was made by American Brakeblok and purchased at the local NAPA store. 13 RP 150-51; 9 RP 186; 14 RP 171; Ex. 101; Ex. 103. The brakes had to be riveted on to the shoe in the cabin of the Bantam. 13 RP 151, 158, 161. Beveling asbestos brakes causes exposures from 26 to 73 fibers/cc. 40 RP 163-65.

Mr. Coogan moved the crane levers, engaging the brake, about 20 times a minute. 14 RP 57. Every time Mr. Coogan moved the levers and engaged the brake, asbestos fibers were released into the cabin only about three feet from his breathing zone. 9 RP 179. He was exposed to asbestos at a level of 2.09 fibers/cc, which is over one million times ambient asbestos levels. 9 RP 180, 185. These exposures would be continuous for two days

every time he did a well project, and also when Mr. Coogan hauled shale. 9 RP 185. Even if this was the only exposure he ever had, it would alone be sufficient to cause his mesothelioma. 9 RP 181, 186.

II. GPC/NAPA bear the greatest responsibility for causing Mr. Coogan's mesothelioma.

The evidence established that Mr. Coogan's exposures to GPC/NAPA brakes, clutches, and gaskets were his most significant exposures. In opening statement, Plaintiffs' counsel's very first description of Mr. Coogan's asbestos exposures focused entirely on his excavation business and his lifelong enthusiasm for working on cars. 6 RP 16-17. The first defendants mentioned by name were GPC and NAPA and more argument was spent on them than on any other defendant. 6 RP 25-38. The many reasons for this are clear from the evidence.

Mr. Coogan was exposed to GPC/NAPA asbestos products over the greatest span of time. Mr. Coogan was first exposed to GPC/NAPA products as a child in 1956 when learning from his grandfather in his garage. Ex. 68, ¶ 12; 13 RP 37-42, 78; 44 RP 122-24. As an adult, he purchased brake, clutch, and gaskets from NAPA from the 1970s until he was diagnosed with mesothelioma in 2015. Ex. 68, ¶ 7; 13 RP 69-71, 73, 78-79, 140. Given that Rayloc brakes contained asbestos until 2001, 14 RP 33-34, his exposures from GPC/NAPA products spanned 45 years. The exposures were "observed" for 19 years but were activities that Mr.

Coogan attested to doing his whole life. 7 RP 121-22.[8]

The duration of Mr. Coogan's exposures to products sold by GPC/NAPA was longer than to other products. Dr. Brodkin explained that Mr. Coogan's exposures to brakes, clutches, and gaskets were "integral to his occupation," and "something that he routinely did." 7 RP 124. Most significant was the continual exposures he had to asbestos brake dust when operating his Bantam crane. 9 RP 180, 185.

The frequency of exposure to products sold by GPC/NAPA was much greater than to other products. Mr. Coogan had much more frequent exposures from brakes, clutches, and gaskets than he did to any other product. While he used automotive asbestos products as a regular part of his job for years, he was known to cut asbestos-cement pipe only about six times. 7 RP 122; 10 RP 55, 67. Other exposures were one-time events, like the removal of a boiler from Boise Cascade.

Products sold by GPC/NAPA had higher asbestos content than other products. Rayloc brakes contained 25 to 70 percent asbestos. 9 RP 157-58. Rayloc clutches contained 40 percent asbestos. 9 RP 187. Victor gaskets contained 70-83 percent asbestos. 10 RP 21. The amount of asbestos in asbestos cement pipe was 12-20 percent. 10 RP 58. Marinite board had 40

[8] Dr. Brodkin identified Mr. Coogan's mechanic exposures as one of only two significant sources of asbestos exposures. 7 RP 121-22. Even defense expert Dr. Godwin could not rule out any of Mr. Coogan's exposures if they occurred more than 10 to 15 years before Mr. Coogan's diagnosis in 2015. 39 RP 138.

percent asbestos. 43 RP 44.

GPC/NAPA made and sold asbestos products much longer than the other defendants. GPC/NAPA sold asbestos Rayloc brakes until 2001. 14 RP 33-34. Abex, GPC/NAPA's primary supplier of asbestos brake material, stopped selling asbestos brake material 14 years earlier. Ex. 125; 14 RP 72, 74. GPC/NAPA continued to sell asbestos products after 1987 by finding a supplier in China. 14 RP 73-76. GPC/NAPA continued to sell asbestos brakes many years after it had safer and better alternatives available. Ex. 132. JMM stopped selling asbestos cement pipe in 1988. 31 RP 206. Victor gaskets went asbestos-free in 1988. 24 RP 113, 122.

GPC/NAPA did not warn about asbestos for many years after the other defendants were warning. GPC/NAPA claims it started warning in 1988. 14 RP 174; 17 RP 49-50, 81. Abex, their main supplier, started warning in the mid-1970s and sent a letter to GPC/NAPA informing them that they should also be warning customers. Ex. 169; 14 RP 167-68; 17 RP 71-72, 76, 79-80. For at least 13 years, GPC/NAPA received boxes of bulk brake linings from Abex that included an asbestos warning and then sold them with no warning. 14 RP 167-68, 171, 174.[9] GPC continued to sell asbestos brakes for 26 years after Abex's letter. 17 RP 81.

GPC did not just sell asbestos products. It remanufactured Rayloc

[9] When GPC did allegedly warn, the warning was in such tiny font that not a single witness could recall ever seeing it. Ex. 130; 17 RP 53-56; 21 RP 157-58.

asbestos brakes and clutches. 14 RP 27.

Virtually all of Mr. Coogan's automotive exposures were as a result of GPC/NAPA. Oddly, GPC/NAPA focused on the significance of exposure from Dana (Victor gaskets) and Abex (American Brakeblok brake lining) when those products were distributed and sold by GPC/NAPA. Abex was NAPA's main asbestos brake supplier. 14 RP 167, 173-74. The heavy equipment that Mr. Coogan operated used American Brakeblok bulk asbestos brake linings sold by NAPA. 13 RP 150-51; 9 RP 186; Ex. 103; Ex. 109. Victor gaskets were sold by GPC/NAPA for decades, including the NAPA stores at issue in this case. 13 RP 86, 104-05, 121-22, 127; 10 RP 54; Ex. 97.

Mr. Coogan's J-M Manufacturing (JMM) asbestos cement pipe exposures were considerably less significant. Mr. Coogan's exposures to JMM pipe were much shorter in duration and intensity than his exposures to GPC/NAPA products, and the evidence of his exposure was not nearly as strong. Neither Mr. Coogan nor Jay Coogan ever identified JMM pipe. One of Mr. Coogan's co-workers, Joel Gassaway, did not identify JMM as a brand they worked with. Two other co-workers, Harold Monette and Richard Berend, testified that Mr. Coogan used a hack saw, not a power saw, to cut the pipe. 36 RP 59. Exposures from hack sawing asbestos cement pipe are lower than the exposures Mr. Coogan had from the work he did with products sold by GPC/NAPA. 10 RP 61. GPC/NAPA's own

expert, Dr. Robbins, did not find Mr. Coogan's exposures to asbestos cement pipe to be significant. 43 RP 38-39; 44 RP 69.

Chrysotile asbestos causes peritoneal mesothelioma. While GPC/NAPA contend that exposure to amphibole asbestos fibers are more significant than exposure to chrysotile fibers,[10] the jury heard otherwise.[11] The overwhelming consensus of the scientific community is that chrysotile asbestos causes mesothelioma, including peritoneal mesothelioma. 8 RP 47-48, 168; 9 RP 47-48, 103, 114-18, 126-28, 135-36, 139-41; Ex. 45; Ex. 47; Ex. 48. The mechanism of disease is exactly the same for both pleural and peritoneal mesothelioma. 9 RP 139. Even GPC's expert Dr. Robbins did not make any distinction between pleural and peritoneal mesothelioma when looking at causation. 43 RP 153-55.

III. Mr. Coogan suffered immensely from malignant mesothelioma and died a premature death.

There was no dispute that asbestos exposure caused Mr. Coogan to develop malignant mesothelioma in his peritoneum that metastasized to other parts of his body. 7 RP 79; 11 RP 83, 90-91; 39 RP 94, 133-34; CP

[10] This position is puzzling given that Victor cork gaskets contained amosite asbestos for six years. 23 RP 107-09, 112; 26 RP 53-55; Ex. 249 at bates no. 796; Ex. 289; Ex. 293.

[11] GPC/NAPA moved for directed verdict on the issue of whether chrysotile asbestos causes peritoneal mesothelioma. In denying the motion, the trial court found that "[t]here is certainly a very sharp difference of [expert] opinion, but the jury can decide which opinions they choose to endorse." 39 RP 33. GPC/NAPA have not assigned error to this ruling. Further, evidence showed that to the extent there is a debate, it is due to efforts by the manufacturers of chrysotile asbestos products to sow false doubt about the dangers of exposure to chrysotile. Ex. 480; 42 RP 45, 48; *see also* Ex. 401; 34 RP 170-75.

16928. Mr. Coogan also had pleural plaques in his lungs, a condition always caused by asbestos exposure. 11 RP 83; 39 RP 117-18, 121-22.

His mesothelioma was unusually extensive in that he had tumors in his abdomen, diaphragm, and both lungs. 11 RP 84-88; 39 RP 131-34. The exceptional nature of his metastasized cancer necessitated a "tumor board" comprised of a radiologist, pathologist, chemotherapist, radiotherapist, and surgeons. 39 RP 128-29.

Mr. Coogan had friable tumors throughout his abdomen. 7 RP 140; 11 RP 83. The peritoneum is a membrane that lines the intestines, the inner cavity of the abdomen, and the undersurface of the diaphragm. 39 RP 109. The tumors caused "very severe ascites," which is fluid buildup in the stomach. 11 RP 82; CP 16929. This by itself is "very painful" because the fluid expands the belly and presses on the organs and skin. CP 16929. He had to undergo weekly paracentesis procedures to drain the fluid from his abdomen. 11 RP 85. The tumors spread and obstructed his bowels. 11 RP 84-85. He developed severe malnutrition, anorexia, and cachexia. 11 RP 80-86. Cachexia is a wasting away from lack of nutrients. 11 RP 85. Eventually, there is a complete inability to eat. 11 RP 88. Photographs depict his extreme physical decline over a period of less than four months:

11 RP 89-90. As result of this wasting, weakness, and lack of mobility, Mr. Coogan developed open wounds on his body. CP 16930.

The cancer then spread to Mr. Coogan's lungs, causing large bilateral pleural effusions. 11 RP 85-86; 39 RP 131-34. Effusions crowd the lungs and make it hard to breath. 39 RP 125. Mr. Coogan had to be admitted to the hospital after his lungs collapsed, and "[t]here was significant shortness of breath, there was significant pain." 11 RP 86. Mr. Coogan's doctors report he experienced "air hunger," which creates the "constant[] feeling like you're not able to catch your breath." 11 RP 87.

Mr. Coogan experienced abdominal pain, severe constipation, insomnia, and dehydration. 11 RP 87-88. His inability to take in fluids caused his kidneys to fail. *Id.* With peritoneal mesothelioma, "starvation ensues because people can't keep up their nutrition." 7 RP 140. The pain management required drugs that robbed Mr. Coogan of his ability to think clearly, to focus, to read, or to drive. 11 RP 86-87; CP 16929-30.

Mr. Coogan's mesothelioma was incurable. 11 RP 83. His best hope

was to slow the cancer through surgical resection, rounds of chemotherapy, radiation, and blood transfusions. 18 RP 80, 83-84. He regularly made the two-hour drive to Spokane to drain a liter of fluid buildup from his stomach. 11 RP 82. He had a catheter placed in his chest to drain fluid from his lungs every day. 11 RP 85.

Before he got sick, Mr. Coogan was very active and worked in a physically demanding job. 11 RP 80. Everyone described him as a hard worker. 18 RP 55, 66; 27 RP 84-85; CP 18821. He was impressive at slalom water skiing, he camped with his family, fixed things for his children, took road trips with his wife, played video games with his grandson, wrestled with his grandkids, attended car shows with his wife, played cribbage every Sunday with the family, golfed, renovated his fixer upper home with his wife, mowed the lawn, and grew Early Girl tomatoes. 30 RP 16-18, 34-38; 18 RP 69, 72-73. He greeted everyone with a "howdy, howdy." 13 RP 182; 18 RP 81. His daughter described him as "the person when you met him for the first time, it would feel like you'd known him forever." 18 RP 66. Cancer converted his life to pain and doctors' visits. 11 RP 84-87. He had repeat emergency visits to the hospital, and, finally, hospice care. 11 RP 89.

Mr. Coogan died in six months. 11 RP 90. The average life expectancy of a man Mr. Coogan's age, 67 years old, is 15 years. 47 RP 120. Mr. Coogan's mother was 90 years old at the time of trial. 13 RP 184. The jury could have concluded he would have lived even longer than the

average 15 years, if not for his untimely death from mesothelioma.

IV. Mr. Coogan's family was devastated by his death.

Gerri Sue Coogan, his widow, was "basically broken" by his death. 30 RP 40. At the time of trial, Mr. Coogan had been gone a year and a half but she "struggle[d] daily still." *Id.* Her weight went down to 92 pounds and she could barely leave the house. 30 RP 40-41. She carries a picture of Mr. Coogan and still asks his advice for daily decisions. 30 RP 41-42. As her daughter described, "He was her rock. He was her everything." 30 RP 42.

The Coogans were married for only a few years before his diagnosis, but had been together for over 20 years. 30 RP 17. Her daughter testified that "He was her love. He was her best friend." 30 RP 42. Mr. Coogan brought everyone together and was the center of the family. Mr. and Mrs. Coogan spent time together being active outdoors, with family, and taking meticulous care of their home and 500-acre property. 18 RP 56; 30 RP 16-19, 34-38, 40; 15 RP 41. After living through abusive situations in the past, they both felt lucky to finally find someone they loved that enjoyed the same interests and hobbies. 30 RP 18-20.

Mr. Coogan provided guidance to his family and "had a calming affect about him . . . he had good advice and did keep everybody kind of collected." 30 RP 31-32. Mr. Coogan was the person in his daughters' lives that they could call for anything. 18 RP 71.

Mrs. Coogan "wouldn't leave his side" when her husband got sick.

30 RP 39-40. Roxana Coogan agreed that Mrs. Coogan was "the best nurturer" and "was pretty amazing by his side." 18 RP 77. At the end of Mr. Coogan's life, his wife and daughters were devoted to him and took turns nursing him. 18 RP 59-60, 77-78; 30 RP 39-40. When he passed away, Mrs. Coogan screamed a loud cry of anguish. 18 RP 79.

V. Mr. Coogan's household services were substantial.

Mr. Coogan owned 500 acres of land that had belonged to his grandfather. 15 RP 41; 16 RP 44-45. He and Mrs. Coogan lived in his grandfather's house on the property. 16 RP 44-45; 30 RP 43. Mr. Coogan kept the house and yard in perfect condition. 30 RP 38. Mrs. Coogan is not able to do the yard work that Mr. Coogan routinely did. 39 RP 39.

Mr. Coogan worked on the family's cars and the equipment for his business. 18 RP 68; 30 RP 35. He worked in his garage every day. 18 RP 68. Mr. Coogan grew tomatoes and took care of the family's garden. 18 RP 73; 30 RP 34. He built a greenhouse on the property. 30 RP 34. When Mr. and Mrs. Coogan purchased a retirement home in Lake Havasu, Arizona, he did all the renovations himself. 30 RP 37-38.

Mr. Coogan had a calming manner about him and he gave advice to the entire family. 30 RP 31-32. Mr. Coogan's calmness and guidance were very important to Mrs. Coogan's wellbeing. 30 RP 42. Mr. Coogan always helped Mrs. Coogan make household decisions. 30 RP 41.

Mr. Coogan taught his daughters how to work things out in stressful

situations. 18 RP 74-75. Roxana Coogan described her father as "the counselor, he's the financial advisor, he's the mechanic, you know, the plumber, the excavator, you know, he did everything." 18 RP 71. He was always the first one they called when they needed anything. *Id.*

Mr. Coogan was always there for his daughters in ways big and small. 18 RP 76. His daughter Roxana lived only a mile from him and his presence was a constant in her life. 18 RP 71. He went with her to doctors' visits and rescued her and her kids when they got lost in the wilderness on a camping trip. 18 RP 71 and 75-76.

Mr. Coogan spent a lot of time with his grandkids. 18 RP 55, 69. He took an active role in mentoring his grandchildren, which was a huge help to his daughters and Mrs. Coogan. 30 RP 19-20, 31-32. He taught his children and his grandchildren how to do basic maintenance on their cars. 18 RP 67-69. When his daughters were young, he built a playhouse on the family's property that was used by his daughters and later by their children. 18 RP 69.

VI. Jury Verdict and Post-Trial Proceedings

The jury returned a verdict for the Coogan family, finding GPC/NAPA liable on theories of negligence and strict products liability and awarding damages totaling $81.5 million. 48 RP 9-13; CP 15018-22.[12] The

[12] The jury also found that substantially all of Mr. Coogan's asbestos exposures occurred prior to July 26, 1981, CP 15018, the effect of which is that common law governs rather

jury also found that Mr. Coogan was not negligent. *Id.*

Before entry of judgment, GPC/NAPA asked for a hearing to determine the reasonableness of Plaintiffs' pre-trial settlements with other defendants. CP 15168-78. The court rejected their arguments that Plaintiffs' settlements with other defendants, totaling $4.395 million, were unreasonably low. CP 15488, 15733, 16198. Judgment was entered against GPC/NAPA for $77,115,174.03. *See* Notice of Appeal.

The trial court denied GPC/NAPA's motion for new trial under CR 59 or remittitur under RCW 4.76.030. 12/1/17 RP 59. After appealing, GPC/NAPA asked the trial court for relief from the judgment under CR 60. CP 22569-83. That motion was also denied. CP 22586-87. GPC/NAPA amended their appeal to challenge this ruling. CP 22584.

ARGUMENT

I. The district court did not abuse its discretion in denying a new trial on GPC/NAPA's claim that the verdict is excessive.

The Coogans first address GPC/NAPA's argument that the jury's verdict was "excessive" and that the large award can only be explained by the supposed "passion and prejudice" of the jury, as this faulty premise underlies many of GPC/NAPA's other arguments.

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than the Washington Products Liability Act. *See Fagg v. Bartells Asbestos Settlement Trust,* 184 Wn. App. 804, 812, 339 P.3d 207 (2014).

A. Standard of Review

The denial of a CR 59(a) motion for new trial is reviewed for abuse of discretion. *Collins v. Clark Cty. Fire Dist. No. 5*, 155 Wn. App. 48, 81, 231 P.3d 1211 (2010). Where there is conflicting evidence, it is wholly within the discretion of the trial court to grant or to deny a motion for new trial made upon the ground that the amount awarded is excessive. *McClintock v. Allen*, 30 Wn.2d 272, 277, 191 P.2d 679 (1948).

B. The verdict does not shock the conscience.

GPC/NAPA contend that the size of the verdict "shocks the conscience on its face." Op. Br. 54. In taking this position they ignore the substantial evidence that supported the jury's damages award. While considerable, the award cannot be considered excessive when evaluated, as it must be, with reference to the evidence showing that Mr. Coogan and his family suffered enormous losses stemming from his harrowing death from mesothelioma. Placing a value on the Coogan family's losses was a function uniquely reserved to the jury. This jury was not, in fact, inclined to award a large amount in damages, as several jury members expressed skepticism about damages awards in voir dire. 1/24/17 RP 35-36, 41-42, 44-45.[13] Yet this jury exercised its duty with integrity and based their unanimous award

[13] The jury was comprised of fourteen people (including two alternates), only one of which was challenged by GPC/NAPA for cause. Several jurors were criminal justice officers or members of the U.S. military. 1/24/17 RP 19, 21; 1/25/17 RP 55, 89-90.

on the law as instructed by the trial court and the facts proven at trial. The trial court, in turn, properly exercised its discretion in finding the award supported by the evidence.

1. The jury is entrusted to determine an appropriate amount of damages.

This Court must start with the established premise that the determination of damages is a constitutional function of the jury. *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 269, 840 P.2d 860 (1992). The State Constitution protects the jury's role to determine damages. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 646, 771 P.2d 711 (1989). The amount of damages is an ultimate fact to be determined by the jury. *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971).

"Washington has consistently looked to the jury to determine damages as a factual issue, especially in the area of noneconomic damages." *Sofie*, *supra*, 112 Wn.2d at 648. The jury's role in determining noneconomic damages is "essential." *Id.*; *Stevens v. Gordon*, 118 Wn. App. 43, 59, 74 P.3d 653 (2003).[14]

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[14] *Conrad ex rel. Conrad v. Alderwood Manor*, 119 Wn. App. 275, 299, 78 P.3d 177 (2003) describes this well:

> We as a society make all sorts of judgments about value, ranging from contract/salary compensation for school teachers, professional athletes, corporate executives, and government workers, to the dollar amount placed on a plaintiff's injuries. Here, a jury of 12 people makes and made that decision. And barring some extraordinary factor, which the trial judge did not see here, and neither do we, courts should leave that

Great deference is given to the jury's valuation of damages. The court begins with the presumption that the jury's damages award is correct. *Green v. McAllister*, 103 Wn. App. 452, 461, 14 P.3d 795 (2000).[15] When "excessive" damages are claimed, relief may be granted only if the award is "so excessive" as "unmistakably to indicate that the verdict must have been the result of passion or prejudice." CR 59(a)(5). Before passion or prejudice can justify a new trial, "it must be of such manifest clarity as to make it unmistakable." *Miller*, *supra*, 67 Wn. App. at 124 (internal citations and quotations omitted).

The size of the award is not a reason to infer that it was the result of passion or prejudice. *Brundridge*, *supra*, 164 Wn.2d at 454; *see also Washburn*, *supra*, 120 Wn.2d at 269 ("It is apparent that the amount of a verdict in and of itself cannot sustain a conclusion that it is excessive."); *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 838, 699 P.2d 1230 (1985) ("The verdict of a jury does not carry its own death warrant solely by reason of its size."). GPC/NAPA ask the Court to disregard the *Bingaman* principle when the award meets some unidentified threshold of

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judgment where it is vested by tradition and law—with the jury.

[15] "The jury is the appropriate assessor of damages, and its determination should be overturned only in the most extraordinary circumstances." *Miller v. Yates*, 67 Wn. App. 120, 124, 834 P.2d 36 (1992). Given the jury's special role in valuing damages, courts are "reluctant to interfere" with the award. *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 454, 191 P.3d 879 (2008); *Stevens*, *supra*, 118 Wn. App. at 54, 74 P.3d at 660.

being "eye-popping,"[16] but provides no reasoned basis for doing so. In claiming that the shock-the-conscience standard is otherwise rendered meaningless, GPC/NAPA ignores that the jury's award is always limited by the evidence. A damages award without foundation in the record could meet the standard for a new trial under CR 59(a).

On the other hand, it is well-established that when the amount of the verdict is reasonably within the range of substantial evidence, it cannot be held as a matter of law to be so excessive as to establish that the jury was unmistakably motivated by passion or prejudice. *Washburn*, *supra*, 120 Wn.2d at 269; *see also Wooldridge v. Woolett*, 96 Wn.2d 659, 668, 638 P.2d 566 (1981); *James v. Robeck*, 79 Wn.2d 864, 870-71, 490 P.2d 878 (1971); *Conrad*, *supra*, 110 Wn. App. at 299; *Ryan v. Westgard*, 12 Wn. App. 500, 513, 830 P.2d 687 (1975).

2. The jury's damages award is supported by the evidence.

There was overwhelming evidence showing that Mr. Coogan died an agonizing death from mesothelioma and that his wife and daughters suffered extreme loss as a result of his cancer and premature death. When the court's instructions set forth the proper measure of damages, the jury is presumed to have followed those instructions. *Wuth ex rel. Kessler v. Lab.*

[16] In a legal system built on respect for precedent, it is disconcerting that GPC/NAPA at criticized the trial court's quotation of this precedent language from *Bingaman* as a "platitude." Op. Br. 55.

Corp. of Am., 189 Wn. App. 660, 359 P.3d 841 (2015).

First, with regard to the damages for Mr. Coogan's estate, the jury was instructed that it could award noneconomic damages for "pain, suffering, anxiety, emotional distress, humiliation and fear experienced by Mr. Coogan prior to his death from mesothelioma." 47 RP 118.[17] The jury's award of $30 million to Mr. Coogan's estate was based on the compelling evidence, detailed above, that Mr. Coogan experienced extraordinary physical suffering, as well as emotional pain and fear.[18] While there is no mathematical formula for what a life is worth, the jury's award fairly compensates for Mr. Coogan's pain and suffering and is supported by the evidence of his agonizing death marked by starvation and an inability to breathe.

With regard to the damages of Mr. Coogan's wife and daughters, the jury was instructed that they could award economic damages for the money, goods, and services he would have contributed to them if he had lived, as well as loss of consortium damages for the loss of his relationship, advice, emotional support, affection, and care. 47 RP 119-20. Damages

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[17] The jury was informed 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." *Id.* Indeed, an award for pain and suffering is not susceptible to precise measurement and cannot be proven with mathematical certainty. *Stevens v. Gordon*, 118 Wn. App. 43, 59, 74 P.3d 653 (2003).

[18] Powerfully, GPC/NAPA's counsel acknowledged that this was "the worse diagnosis anyone can imagine." 7 RP 57-58. The jury heard expert testimony, *from the defense*, that peritoneal mesothelioma is "an unfortunate way to die, and there's a lot of pain and suffering." CP 18429.

awards to the family of the injured party may appropriately be in the tens of millions of dollars when supported by the evidence. *See Wuth*, *supra*, 189 Wn. App. 660, 704-06 (affirming trial court's decision not to reduce an award of $25 million in noneconomic damages to the parents of an infant born with birth defects); *Joyce v. State, Dep't of Corr.*, 116 Wn. App. 569, 586 n.3, 75 P.3d 548 (2003), *aff'd in part, rev'd in part on other grounds*, 155 Wn.2d 306, 119 P.3d 825 (2005) (trial court denied remittitur of $18 million in noneconomic damages to four children of the decedent).

Here, the evidence was that Mrs. Coogan was "basically broken" by her husband's death. 30 RP 40. Even a year and a half after his death she was still having difficulty functioning normally. Her daughter described Mr. Coogan as "her rock" and "her everything." 30 RP 42.[19] His calming nature was critical to her well-being. 30 RP 42.

The jury's awards of $10 million to Mr. Coogan's two daughters are also supported by the evidence. Mr. Coogan provided them advice and guidance. His daughters could rely on him for anything, from friendship and financial advice to handyman services when they needed a mechanic or a plumber. At the end of Mr. Coogan's life, his wife and daughters took

[19] While GPC/NAPA has maligned and attacked Mrs. Coogan, which Plaintiffs address in detail below, the jury was well aware that things were not always perfect in the Coogan family but falsely conclude those issues must undermine the depth of her devastation. The jury considered the evidence that Mrs. Coogan experienced an acute loss when he died and that that loss continues long into the future. Its award of $30 million is based on the evidence.

turns caring for him on his deathbed. Even defense counsel noted in her closing argument "this terrible loss that the Coogan family suffered." and that "[i]t's not fair that he died of this horrible disease." 47 RP 194. Defense counsel also described the loss of a parent as "horrible." 47 RP 225.

Finally, GPC/NAPA's effort both to impugn the $1.5 million economic–damage award and to argue that lack of evidence supporting the economic damages "provides more proof of excessiveness" (Op. Br. 60-61) misstates the jury instructions as well as the evidence. Contrary to this argument, the relevant instruction (which was unobjected to) provided the jury with a broader definition of economic damages than simply "household services" and was not limited only to his wife.[20] Moreover, defendants acknowledged in their December 1, 2017 argument seeking a new trial that the jury was entitled to bring its collective life experiences with those matters to bear . . . .," even without "expert testimony." The jury also heard evidence that Mr. Coogan was the family's car mechanic, babysitter, and had extensive involvement in maintaining his own house and the 500 acres

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[20] The Court's instruction at CP 14989 stated:

> If you find for the Plaintiffs, you should consider the following items:
> (1)_ Economic Damages
> You should also consider as future economic damages what benefits of value, including money, goods, and services Doy Coogan would have contributed to Gerri Sue Coogan, Roxana Coogan and Raquel Coogan Baxter in the future had Doy Coogan lived.

This instruction was also read to the jury at 47 RP 119. The jury cannot properly be faulted for following that instruction.

he inherited, including plumbing work, maintenance of the lawns and garden, and excavating the property. He also provided those and other services to his daughter. *See*, *e.g.*, 18 RP 71. He had a second home in Havasu that he and his wife built as a fixer upper and where they intended to do all of the work themselves. Providing all the maintenance for three homes is certainly worth a substantial amount.

It thus is untrue that under the instructions and the evidence, the jury would have been limited to value only "household services that Doy would have provided *to his wife* . . . ." Op. Br. 60 (emphasis added). Under the instructions actually given, the jury could have found that, absent the mesothelioma, Mr. Coogan would have lived as long as his mother, who was still alive at 90. Defendants' $100,000 a year figure was predicated on a maximum life expectancy that omitted relevant evidence and need not have been accepted by the jury. GPC/NAPA implicitly acknowledged that the jury would have been justified in awarding $15,000 a year for the limited subset of services acknowledged by the defendants. 12/1/17 RP 13. Given the actual instruction and actual evidence, the jury could reasonably have found that the value of Mr. Coogan's services plus the services GPC/NAPA ignored, plus the value of his services to his daughter over a considerably greater life expectancy would have come to $1.5 million.

3. GPC/NAPA initially conceded the award is reasonable.

In the reasonableness proceedings, GPC/NAPA argued that the

pre-trial settlements should be evaluated with reference to the jury's damages award of $81.5 million. CP 15718; 8/30/17 RP 50-51, 64-65; CP 16190. They contended that "[t]he settlements are unreasonably low, especially in light of the $81.5 million verdict. GPC/NAPA respectfully ask for a reasonableness offset in the $77-78 million range." CP 15733.[21]

Only in later seeking a new trial did GPC/NAPA decide to switch strategies and claim that the jury awarded too much. GPC/NAPA's initial reaction is an important indication that this verdict is not, in fact, "'flagrantly outrageous and extravagant,'" as it now claims. Op. Br. 54.

4. Substantial deference is given to the trial court's denial of a new trial on grounds of excessiveness.

Not only is deference given the jury's role in awarding damages, but "deference and weight are given to the evaluation of the trial court's exercise of discretion in denying a new trial on a claim of excessiveness." *Washburn*, 120 Wn.2d at 271. The Supreme Court has instructed that "[t]he verdict is strengthened by denial of a new trial by the trial court." *Id.* The trial court is uniquely situated to evaluate the evidence as it was received

[21] In the reasonableness proceedings, GPC/NAPA not only accepted the verdict as a reasonable valuation of the Coogans' damages, they strongly urged the trial court do so, as well. 8/30/17 RP 65. GPC/NAPA argued that the verdict was relevant to consideration of "the nature and the amount of the Plaintiffs' damages." 8/30/17 RP 64:8-15. GPC/NAPA pointed out that "Plaintiffs' damages, economic and noneconomic, they have been constant throughout the case. They have not changed significantly." 8/30/17 RP 64; *see also id.* at 66:10-11 ("[T]he damages in this case are a constant."); 8/30/17 RP 66 ("[T]he damages haven't changed, the nature of the Plaintiffs' damages. They are what they are, Your Honor."); 8/30/17 RP 67 ("[T]he damages are the damages.").

by the jury. *Id.* at 270.[22] "The trial court sees and hears the witnesses, jurors, parties, counsel and bystanders; it can evaluate at first hand such things as candor, sincerity, demeanor, intelligence and any surrounding incidents." *Bingaman*, *supra*, 103 Wn.2d at 835. By contrast, the appellate court "'is tied to the written record'" and "cannot share the experiences of the jury or the trial court." *Washburn*, *supra*, 120 Wn.2d at 270 (quoting *Bingaman*, *supra*, 103 Wn.2d at 835).

GPC/NAPA have cited no cases in which an appellate court granted a new trial for excessive damages when a trial court agreed that the jury's damages award was within the bounds of the evidence. The cases relied on by GPC/NAPA illustrate that such relief is not granted by an appellate court *unless* the trial court found a new trial appropriate.[23]

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[22] Here, the trial court found that the jury's verdict was entitled to the substantial deference provided by law:

> So that brings us to the constitutional role of the jury. Our case law gives enormous deference to the jury as the decider of fact. This jury sat here from the 23rd of January until I believe it was April the 13th and heard evidence day in and day out.
>
> I'm not sure if we missed a trial day or two along the way. I know one afternoon I got sick, and I had to go home. Other than that, I think it went on as scheduled, and on and on and on as scheduled. Their role was discharged. I do not consider the fact that the verdict was large to be evidence that somehow the jury was stoked by passion. It was a 12-0 verdict. It wasn't a 10-2 verdict.
>
> Under these circumstances, and given the enormous deference our Appellate Courts and our constitution gives to the weight of the jury's verdict, I'm going to deny the motion for a new trial and deny the motion for remittitur.

12/1/17 RP 58-59.

[23] For example, GPC/NAPA rely on *Baxter v. Greyhound Corp.*, 65 Wn.2d 421, 425, 397 P.2d 857 (1964), but there the appellate court upheld the grant of a new trial. The appellate

In another case cited by GPC/NAPA, *Bunch v. King County Department of Youth Services*, 155 Wn.2d 165, 183-84, 116 P.3d 381 (2005), the Supreme Court reversed a decision by the Court of Appeals to grant a remittitur when the trial court had not. The Supreme Court found that the jury's award was not excessive "in light of the strong presumption we accord to jury verdicts" and that "[t]he trial court's refusal to remit the damages likewise confirms the award." *Id.* at 182. The Court observed that "[o]ur conscience is apparently more resilient than the Court of Appeals to shocks." *Id.*; *see also Ryan v. Westgard*, 12 Wn. App. 500, 513, 530 P.2d 687 (1975) (upholding a jury's verdict against a claim of excessiveness).

Here, the trial court's ruling strengthens the jury's damages award. *Washburn*, *supra*, 120 Wn.2d at 271. The trial judge spent months with this jury and had the advantage of observing the jury members and their demeanor.[24] He found no reason to believe that the jury had been motivated by passion or prejudice and properly refused to infer such motive from the size of the damages award. His determination that they discharged their duty faithfully, and were not stoked by passion, guides this Court's evaluation and is entitled to substantial deference.

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court, in fact, determined that the trial court had gone too far in ordering an unconditional new trial, and instead granted a conditional new trial that reduced the award. *Id.* at 442. In doing so, the court noted the importance of looking to the trial court for guidance: "[w]e must, to a great extent, be guided by the evidence [and] the reactions of the trial judge, as recorded in his oral decision and order . . . ." *Id.* at 441.

[24] The trial court noted at one point that he has "been a jury watcher for many years, for a long time" on the bench. 21 RP 142.

In the trial court GPC/NAPA sought a new trial but also requested, in the alternative, a remittitur of the damages to $8.5 million. CP 16356. GPC/NAPA has not asked this Court for a remittitur, however. GPC/NAPA may have abandoned this request for alternative given that there has never been a remittitur of a mesothelioma verdict in Washington that was upheld on appeal and considerable authority to the contrary..[25] *Estate of Brandes v. Brand Insulations, Inc.*, 197 Wn. App. 1043, *review denied*, 188 Wn.2d 1015, 396 P.3d 345 (2017)

C. The jury's award is not "excessive" by any measure.

1. GPC/NAPA's use of a ratio of economic to non-economic damages is an improper basis for a finding of excessiveness in mesothelioma cases, including this one.

The Court should reject GPC/NAPA's invitation to compare the ratio of economic damages to non-economic damages under the facts of this mesothelioma case. *Sofie v. Fibreboard Corp.*, *supra*, found unconstitutional a statute that limited non-economic damages by a formula based on "multiplying 0.43 by the average annual wage and by the life expectancy of the person incurring non-economic damages." 112 Wn.2d at

[25] In *Brandes*, the Court reversed the trial court's remittitur from $3.5 million to $2.5 million, finding that the award was supported by substantial evidence and was not unmistakably the product of passion or prejudice. Similarly, in *Barabin v. AstenJohnson, Inc.*, the Western District declined to remit a $10.2 million damages award in a mesothelioma case. No. C07-1454 RSL, 2010 WL 5137898, at *14-15 (W.D. Wash. Dec. 10, 2010), *vacated and remanded on other grounds*, 740 F.3d 457 (9th Cir. 2014); *see also Estenson v. Caterpillar Inc.*, 189 Wn. App. 1053 (2015) (holding the trial court did not abuse its discretion in denying a motion to vacate a $6 million damages award). Plaintiffs are, in fact, unaware of any remittitur upheld in Washington in the last 25 years.

638-39 n.1. Much as GPC/NAPA advocates, that statute most severely limited non-economic damages for those whose economic damages were limited by their age. Especially following *Sofie*, a person dying slowly and horribly from mesothelioma should not have his or her claim for pain and suffering limited to a ratio of economic damages regardless of the extremity of such pain and suffering. This is particularly true when, for age or other reasons, their economic damages are necessarily limited. Under GPC/NAPA's position, if the CEO of a Fortune 500 company and a truck driver employed by the same company both have mesothelioma and the same amount of pain and suffering, the CEO would be able to recover 50 to 100 times more because of his or her greater economic damages.

GPC/NAPA's discussion of *Hill*, *Bunch,* and *Wuth*[26] is also unpersuasive. *Hill* was an employment discrimination case in which the evidence of non-economic damages in the form of emotional distress supporting damages of $400,000 was described as "meager evidence." 71 Wn. App. at 140. Those facts are wildly different from evidence of intolerable pain from an incurable cancer. Moreover, as noted in *Bunch* at p. 181, the jury's excessive award of economic damages in *Hill* cast suspicion of the award of noneconomic damages." The economic damages

[26] *Hill v. GTE Directories Sales Corp.,* 71 Wn. App. 132, 140, 856 P.2d 746 (1993); *Bunch v. King Cty. Dep't of Youth Servs.,* 155 Wn.2d 165, 181, 116, P.3d 381 (2005); *Wuth, supra,* 189 Wn. App. at 706.

in that case were objectively defined with an upper bound range. The jury's excess award in a context that was easy to ascertain gave the court a basis to have this suspicion. Here, the economic award was both reasonable and encompassed a range of household services; there is no basis to find that it was excessive or that the amount casts doubt on the non-economic damages award.

Bunch also was an employment discrimination matter rather than a personal injury or wrongful death claim where, particularly for older individuals who are not working, the ratio of economic to noneconomic damages are quite different. This is particularly so for older individuals who are not working. Finally, in *Wuth* the Court affirmed a $25 million verdict for the noneconomic damages for the parents of a disabled child by explaining in terms that are applicable to this case, "given the intense and persistent distress felt by the parents in this case, the jury's award is not 'so excessive as to be "flagrantly outrageous and extravagant," particularly in light of the strong presumption we accord to jury verdicts.'" 189 Wn. App. at 706 (quoting *Bunch,* 155 Wn.2d at 182, 116 P.3d 381).

2. The award did not exceed Plaintiffs' request.

As a factual matter, GPC/NAPA are incorrect that the jury awarded more than Plaintiffs requested. Plaintiffs' counsel suggested to the jury that $30 million was the minimum amount that would compensate Mr. Coogan's estate for his pain and suffering. 47 RP 190-91. She argued that "the bottom

of that range for 15 years of life lost should be 30 million dollars at the least." 47 RP 190. The jury obviously agreed. Plaintiffs' counsel did not suggest any particular amount of damages for the losses suffered by Mrs. Coogan, Roxana Coogan, and Ms. Baxter.

Beyond the inaccuracies in GPC/NAPA's argument, the Court should reject the notion that a jury cannot award more damages than requested. As set forth above, the law entrusts juries with the important and difficult task of measuring intangible damages. Here, twelve people carefully considered the evidence presented over the course of almost three months and reached a consensus about what the loss of a husband and a father is worth. That was their decision to make, regardless of what the parties suggested was an appropriate damages award.

3. The difference between the verdict and the settlement amounts does not render the verdict excessive.

Plaintiffs' settlements with other defendants totaled $4.395 million. Since those settlements alone exceed the total verdicts in all but two of the cases set forth at CP 16378-82, that strongly supports an inference that the settling defendants viewed this case as having much higher potential damages than other Washington mesothelioma cases.[27] That in turn

[27] The ranges set forth by GPC/NAPA in footnote 37 are misleading for at least two reasons. GPC is averaging all verdicts over a 33-year period without regard for trends of increasing verdicts in mesothelioma cases over time. For example, the average (mean) verdict in the verdicts in the *first ten years* (1984-1993) was $465,336, while the average (mean) verdict in the verdicts in the *most recent 10 years* (2008-2017) was $4,370,585.60, almost 10 times higher.

undercuts GPC/NAPA's argument that the large size of the verdict was unsupported or was due to passion or prejudice.

GPC/NAPA's argument ignores that the evidence against it was much stronger than that against the settled parties. Further, its argument that the disparity between the settlements and the verdict in this case means that the verdict is not supportable both (a) omits crucial considerations in settlement and, (b) if accepted, would markedly impede settlement. The crucial considerations in settlement include not only the potential verdict *if* plaintiffs win, but also include the likelihood of success and avoidance of risk. The Court is well aware that this case was extensively litigated and there was a real chance of Plaintiffs' losing on liability or causation grounds. It thus makes little sense to argue, as does GPC/NAPA, that the *pre*-verdict $4.3 million in settlements necessarily means that a much higher verdict was not reasonable. Given the possibility of a defense verdict, Plaintiffs'

Secondly, GPC's averages ignore material differences disclosed even in the limited data they provide. A plaintiff's age at death is often considered a relevant factor in determining damages particularly because it relates to life expectancy. The life expectancy chart in the Washington Pattern Instructions, as well as the data provided in CP 16378, shows the close correlation between age/life expectancy and verdicts in five mesothelioma cases decided by verdict in the past 10 years: Brandes, Estenson, Granville, Hammett, and Barabin.

Mr. Coogan was 67 when he died, so according to the same tables his average life expectancy would otherwise have been 15.07 years. He was two years younger than Mr. Barabin and 13 to 22 years younger than the other decedents/plaintiffs. Here there was also much evidence supporting the jury's finding that Mr. Coogan's pain and suffering were extreme even for mesothelioma cases and that the effects of his death were particularly significant to his wife and children. Thus, even based on the limited information supplied by GPC/NAPA, the verdict in this case is far more supported by the evidence than GPC/NAPA acknowledges.

attorneys reasonably settled with most defendants in order to guarantee that Plaintiffs received more than $4 million while also pursuing a verdict against the must culpable defendant that never meaningfully engaged in settlement discussions.[28]

Adopting GPC/NAPA's position also would discourage settlements in multi-defendant cases and is contrary to the reasonableness process established by RCW 4.22.060. Defendants are proposing a system in which settlements found reasonable would first reduce the verdict and then the *same* settlements are used again to remit the already reduced verdict. That would both discourage settlements and be inconsistent with the purposes with *Glover* and RCW 4.22.060.

II. The district court did not abuse its discretion in finding that neither Plaintiffs' counsel, nor the Coogans, engaged in "systematic misconduct."

A. Standard of review.

GPC/NAPA seek relief under CR 59(a) and 60(b). As under CR 59, a trial court's denial of a motion to vacate under CR 60(b) will not be overturned on appeal unless the court manifestly abused its discretion. *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000).

[28] Nor do Defendants make any effort to provide evidence that supporting their implicit assertion that in multi-defendant cases in which most defendants settle there is an established and fixed ratio between the verdict and the prior settlements.

B. There was no misconduct by Plaintiffs' counsel during the presentation of evidence.

GPC/NAPA have selected a handful of examples out of a lengthy trial in an attempt to make the case that "Dean deliberately engaged in serious misconduct during the presentation of evidence." Op. Br. 26. The trial court, which had the benefit of spending months observing the conduct of counsel, the jury, and the witnesses, disagreed with GPC/NAPA's accusations. 12/1/17 RP 56-58. The court found that there was no misconduct:

> I have to point out that in a three-month long trial, it is impossible not to be able to go through a record and pull out this question and that one and string together an argument that looks like there was some prejudice when 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.

GPC/NAPA first contend that Ms. Dean improperly questioned Ms. Brewer regarding calls to the Coogan family and the families of others who have died from exposure to Rayloc brakes. This line of questioning was first broached by defense counsel. GPC/NAPA's counsel elicited testimony from Ms. Brewer about whether NAPA "care[s] about its customers," and in response she testified at length about the ways in which the company's leadership reaches out to its employees with personal greetings, phone calls, and letters. 22 RP 46-48. She went on for so long about it that the trial court finally sustained an objection on the basis that

"[w]e have gone well beyond anything that is relevant." 22 RP 49. Defense counsel kept going, asking about GPC/NAPA's concern for its jobbers, which prompted Ms. Brewer to testify about the company's support for a jobber currently raising money for a wheelchair for someone in Gary, Idaho. 22 RP 49. The court sustained another objection, noting that this was "an appeal to passion." *Id.* Ms. Brewer was also allowed to testify that NAPA sent flowers to Jay Coogan when Mr. Coogan died. 22 RP 50. Even though the court considered this to be "on thin ice," it was still allowed. *Id.*

In this context, Ms. Brewer was asked whether the company made phone calls to the Coogans or to the families of other workers that had died. 22 RP 83-84. The court sustained an objection based on relevancy. 22 RP 84-85. The court did not find that it was "an appeal to passion" even though that was the basis for sustaining an objection to testimony elicited by defense counsel from the same witness. 22 RP 49.

When GPC/NAPA moved for a mistrial, the court agreed to give a limiting instruction, and noted that the jury would be presumed to follow his instructions. 22 RP 95. This is, indeed, the law. *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6, 10 (1982).[29] The jury also heard from the defense that there were no deaths at GPC facilities. 22 RP 84; 41 RP 120.

[29] The jury was also instructed not to attach any significance to the fact that objections were made. 47 RP 96 ("Each party has the right to object to questions asked by another lawyer and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.").

Further, the court recognized that this entire topic was first broached by GPC/NAPA: "to the degree that you did open the door, Ms. Loftis, about the caring nature of NAPA, then it's appropriate for Ms. Dean to try to demonstrate otherwise." 22 RP 95-96.[30] Rather than engaging in any kind of intentional misconduct, in the observation of the trial court Plaintiffs' counsel's question was an understandable attempt to elicit contrary evidence about whether GPC/NAPA was a caring company. When an objectionable question is "invited by language used and conduct displayed by opposing counsel," no prejudice will be found. *Kellerher v. Porter*, 29 Wn.2d 650, 662, 189 P.2d 223 (1948).

GPC/NAPA also complain about Plaintiffs' counsel's comment that Mr. Frantz was unable to answer any questions. GPC/NAPA suggests that counsel planted this idea with her questioning of Ms. Brewer, but that is not the case. The jury had independently noticed that Mr. Frantz had not reviewed materials and was not prepared. CP 9077. This was obvious to everyone in the courtroom. In rejecting GPC/NAPA's misconduct claim, even the trial court agreed that Mr. Frantz was not, in fact, prepared to testify, observing that "I was unimpressed with Mr. Frantz's preparation to answer the questions that were put to him by Plaintiff. He, frankly, sounded

[30] The court further noted that GPC/NAPA's questioning Ms. Brewer about "who is a good person and who is sending flowers . . . [is] really not relevant." 22 RP 95.

to me evasive and unknowing." 12/1/17 RP 20. If the jury also drew this conclusion it was not due to any questioning from Plaintiffs' counsel.

Counsel is allowed "to comment on upon the credibility of witnesses if it is done in a proper manner and the record warrants such comment." *State v. Hinkley*, 52 Wn.2d 415, 419–20, 325 P.2d 889 (1958). "[C]ounsel may comment on a witness' veracity as long as he does not express it as a personal opinion and does not argue facts beyond the record." *State v. Smith*, 104 Wn.2d 497, 511, 707 P.2d 1306 (1985). While credibility issues are for the jury, counsel may argue what inferences the jury should draw about witness credibility from the evidence. *Hinkley*, 52 Wn.2d at 419–20, 325 P.2d 889; *State v. Walton*, 5 Wn. App. 150, 151, 486 P.2d 1118 (1971); *see also State v. Neidigh*, 78 Wn. App. 71, 74, 895 P.2d 423 (1995) (prosecutor's comment that the defendant "concocted a 'fairy tale'" was not an improper comment on credibility but only a reasonable inference from the evidence).

Finally, GPC/NAPA contend that Jay Coogan had an "outburst" that was "intended to engender" prejudice. Op. Br. 32. This argument ignores the context in which Jay testified that GPC/NAPA had accused him of "killing" his brother. Defense counsel suggested to Jay and to the jury that there was something inappropriate about the relationship between him and Ms. Dean. She asked Jay whether he and Ms. Dean had an "intense relationship" or an "intense connection," repeating the question several

times. 13 RP 187-88. She then followed those questions by asking, "And when we met in your RV in Arizona, you went on frequent breaks with Ms. Dean, right?" 13 RP 188. These questions necessitated re-direct to clarify for the jury that there was of course nothing untoward about the relationship between Jay Coogan and Ms. Dean, or the walks they took during Jay's deposition, during which his wife was also present. 16 RP 158-59. There was nothing improper about Plaintiffs' counsel's question regarding the breaks taken during Jay's deposition when it was GPC/NAPA's counsel who raised the issue. The question was not "intended" for any purpose other than rebutting defense counsel's cross-examination. Moreover, the issue of whether Jay Coogan bore some responsibility for selling asbestos products at his NAPA store was mentioned multiple times, by both parties,[31] and was so squarely in front of the jury that they asked a series of questions about this topic, all suggesting that they were sympathetic to GPC/NAPA's point of view. 17 RP 15, 21-22; CP 9072, 9073, 9075.

GPC/NAPA have failed to show that the trial court abused its

[31] Plaintiffs' counsel mentioned in her opening statement that GPC/NAPA had suggested to Jay that he needed a lawyer before answering questions about selling asbestos brakes at his NAPA store. 6 RP 33. Not only did this not elicit any objection from defense counsel, but GPC/NAPA's counsel confirmed it to the Court via a "notice" that she was concerned he was implicating himself. 6 RP 39-43. Thereafter, Ms. Loftis acknowledged in her cross-examination of Jay that she had raised a concern in his deposition about his own liability, 16 RP 174, and also questioned his responsibility for workplace safety and his familiarity with the L&I Bulletin regarding asbestos brakes. 15 RP 25-26.

discretion in determining that there was no misconduct from counsel and no prejudice to GPC/NAPA. The court considered briefing and lengthy oral argument on these issues, and his ruling is based in the trial record and his own observations about counsel's conduct and the effect it had on the jury. The court's reasoning is not unreasonable or untenable and should be affirmed.

C. There was no misconduct by Plaintiffs' counsel during closing argument.

GPC/NAPA's arguments about Plaintiffs' counsel's closing argument should be rejected for three reasons: (1) there was no objection, (2) the comments were not improper, and (3) there was no prejudice.

1. GPC/NAPA failed to object.

If Plaintiffs' counsel's comments had been improper one would have expected GPC/NAPA to make objections. They did not. They did not even place objections on the record when the parties were given the opportunity to do so after arguments were completed. 48 RP 7. Counsel for GPC/NAPA were well aware that such objections were required, observing at one point that "[y]ou don't get to appeal on something you didn't object to." 44 RP 52.

In *Brandes*, *supra*, this Court noted that the defendant's tactical decision not to object to the plaintiff's closing argument indicated that there was not "unmistakable" passion or prejudice involved. 197 Wn. App.

1043, at *9. The court explained that, "[g]iven that we overturn a jury's verdict only in the face of unmistakable passion and prejudice, Brand's inaction shows that any passion or prejudice that may have motivated the jury was not overpowering or unmistakable." *Id.*

GPC/NAPA's failure to object to statements made in Plaintiffs' closing argument was an important factor in the trial court's analysis:

> I'm troubled by the fact that there was no objections made during closing to the things that the Defense is now citing to as an inflammatory factor. I think the law is that you have to make an objection in a timely way or lose it.
>
> That doesn't mean immediately, so that you highlight the problem. But it does mean that it has to be raised in a manner that is designed to give the Trial Court an opportunity to correct the error and to instruct the jury, if necessary.

12/1/17 RP 57-58. GPC/NAPA now contend that no objection is required when the misconduct is "so flagrant and prejudicial that no instruction would have cured the prejudice." Op. Br. 39. They want this Court to believe that the counsel's comments in closing argument were so obviously egregious that no objection ever needed to be made at any time. In support, they rely on *Carabba v. Anacortes Sch. Dist. No. 103*, 72 Wn.2d 939, 942, 435 P.2d 936, 939 (1967), a case in which an objection was, in fact, made. In *Carabba*, there was an objection and a curative instruction, but the Supreme Court determined that this was insufficient to alleviate the particular prejudice in that case. *Id.* at 945. This is essentially the opposite of what occurred here. No objection was ever made by GPC/NAPA even

when the court *invited* the parties to place any objections on the record. 48 RP 7. This strategic decision "must be deemed to be an instance of 'gambling on the verdict.'" *Snyder v. Sotta*, 3 Wn. App. 190, 195, 473 P.2d 213 (1970).

The trial court did not ignore the exception for prejudice that could not be cured; the trial court determined that if there had been such extreme prejudice, GPC/NAPA would have brought it to the court's attention when given the opportunity to do so after the arguments. 12/1/17 RP 57-58. The trial court never had any opportunity to remedy any supposed prejudice. 12/1/17 RP 57-58. GPC/NAPA did not have to object contemporaneously, but they did have to object. *Id.* The court followed the law that objections must be made to closing argument to preserve error. *See, e.g.*, *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011); *State v. Warren*, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Sullivan*, 196 Wn. App. 277, 294, 383 P.3d 574 (2016), *review denied*, 187 Wn.2d 1023, 390 P.3d 332 (2017); *State v. Smiley*, 195 Wn. App. 185, 195, 379 P.3d 149, *review denied*, 186 Wn.2d 1031, 385 P.3d 110 (2016).

2. There were no improper statements in closing.

GPC/NAPA contend Ms. Dean made an impermissible "golden rule" argument by using the word "you" when describing cancer. As the trial court found, this rhetorical device was clearly meant to describe events

from Mr. Coogan's perspective, not to invite the jurors to put themselves in his shoes. 12/1/17 RP 49-50. As a firsthand witness to the argument, the trial court's interpretation is entitled to substantial deference. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010).

Not only did the trial court determine that its in limine order had not been violated, the court further reasoned that if GPC/NAPA had wanted the court to adopt its strained interpretation it would have objected at trial: "It seems like a fairly innocuous objection and easy to correct. So I guess I have a problem with this now months later complaint about pronoun usage that was never raised at the time." 12/1/17 RP 50. This is supported by case law.[32]

There is also no merit to the contention that Ms. Dean encouraged the jury to punish GPC/NAPA. She explained that the jury was being asked to determine the "total loss for this family because of what happened." 47 RP 126. In arguing that the jury should award "something that matters for what they took," counsel was asking the jury to compensate the Coogans for their losses. 47 RP 190. Similarly, counsel's use of the word "outrageous" was appropriate in context. Conduct that is outrageous is also

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[32] *See A.C. ex rel. Cooper v. Bellingham Sch. Dist.*, 125 Wn. App. 511, 524, 105 P.3d 400 (2004) ("[The plaintiff] did not object to the argument she now characterizes as an improper 'golden rule' statement. For this reason alone, A.C. is not entitled to relief on appeal on this point."). Generally, an in limine ruling on the golden rule does not excuse the defendant from making a contemporaneous objection because in most cases any prejudice from golden rule arguments can be cured with an instruction. *Miller v. Kenny*, 180 Wn. App. 772, 815-17, 325 P.3d 278 (2014).

conduct that is negligent. In describing a pattern of outrageous behavior, counsel was referring to the conduct directed at Mr. Coogan over the course of decades. 47 RP 129, 150-51, 160. This was not a "send a message" argument or a punitive argument, but was specifically tied to the evidence that GPC/NAPA had repeatedly failed to protect Mr. Coogan over the course of many years. These are all appropriate considerations for the jury when evaluating liability and damages. Further, in telling the jury that "something needs to be done," counsel was encouraging the jury to "do something" to compensate the Coogans. Nothing in counsel's argument can be fairly read as a plea to punish GPC/NAPA. Again, if this had crossed a line into an improper request for punitive damages, GPC/NAPA would presumably have objected either during or after closing. They never did.

GPC/NAPA finally contend that Ms. Dean improperly stated her own personal opinion about the case. But arguing inferences is entirely within the bounds of permissible argument. *M.R.B. v. Puyallup Sch. Dist.*, 169 Wn. App. 837, 860, 282 P.3d 1124 (2012). That is exactly what Ms. Dean did when arguing that there was no credible evidence of Mr. Coogan's exposure at Wagstaff. There was no misconduct.

3. There is no identifiable prejudice.

The fact that the jury returned a verdict for the Coogans, and awarded a large amount in damages, does not support the conclusion that

Plaintiffs' closing argument was prejudicial. Even if improper comments were made, that "still does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Stenson*, 132 Wn.2d 668, 718–19, 940 P.2d 1239 (1997). There is no indication that the jury decided this case on an improper basis. GPC/NAPA's failure to even suggest this to the trial court before the verdict is further indication that there was nothing wrong with Plaintiffs' counsel's closing argument.

4. GPC/NAPA's accusations against Ms. Dean regarding rulings in other cases are inappropriate and unfounded.

Plaintiffs must respond to the false suggestion that Ms. Dean "has engaged in a pattern of misconduct in trials across the country." Op. Br. 42. Not only is this untrue, it has no bearing on any issue before this Court. There can be no legitimate reason for attacking Plaintiffs' counsel in this manner. And it is inappropriate to ask this Court to punish the Coogan family for rulings made in unrelated cases in other jurisdictions.

Plaintiffs question whether it is a proper use of an appendix to bring before the Court, as GPC/NAPA have done, partial and unrelated rulings in other cases to attack the personal character of counsel. GPC/NAPA's cited authority of *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005), does not support its position that court decisions are "legislative facts" subject to judicial notice. There is no such holding in that case. The law is, in fact, the

opposite. While an appellate court "may take judicial notice of the record in the case presently before [it] or 'in proceedings engrafted, ancillary, or supplementary to it,'" the Court '"cannot, while deciding one case, take judicial notice of records of other independent and separate judicial proceedings even though they are between the same parties.'" *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005) (quoting *In re Adoption of B.T.,* 150 Wn.2d 409, 415, 78 P.3d 634 (2003)). This Court should decline to take judicial notice of the materials cited in GPC/NAPA's appendices.

In addition, RAP 9.11 restricts appellate consideration of additional evidence on review. *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wash. 2d 543, 549, 14 P.3d 133 (2000). Six criteria must be met, including that "additional proof of facts is needed to fairly resolve the issues on review" and "the additional evidence would probably change the decision being reviewed." RAP 9.11(a). None of the required criteria have not been met here.

To the extent the Court is inclined to consider GPC/NAPA's appendices, Plaintiffs ask the Court to likewise take notice of statements in other cases praising Ms. Dean's professionalism. *See, e.g.*, Appx. A, *Finch v. Covil Corp.*, No. 1:16cv1077, Transcript of Jury Trial Proceedings at 127, 133 (M.D.N.C. Oct. 5, 2018) ("I appreciate counsel's professionalism and civility."; "I just repeat again, I appreciate counsel's professionalism and a

well-tried case . . . . it is nice to be in the courtroom with you all."); Appx. B, *Paulus v. Access Hotels*, No. BC437739, Trial Transcript at 154 (Cal. Super. Ct. Aug. 27, 2012) (complimenting counsel for "a fine job," stating "[i]t was a pleasure having you," praising counsel for being "[v]ery professional," stating the "Paulus Family . . . got excellent representation," and that "[i]t was really a pleasure watching the trial and seeing great lawyers do good work . . . ."). Even the trial court *in this case* thanked Ms. Dean for her professionalism. 8/30/17 RP 100.

Ms. Dean has been a first chair trial lawyer in complex cases for over a decade. She has been admitted into American Board of Trial Advocates (ABOTA), which is by invitation only, requires sponsorship, and involves vetting through feedback of opposing counsel in jury trials. *See* Appendix C. The applicant must be found to be of "high personal character and honorable reputation" for admittance. In one of the cases mentioned by GPC/NAPA, *Dennis*, opposing counsel were listed to verify Ms. Dean's character and reputation. *See* Appendix C.

ABOTA membership requires completion of at least ten trials to verdict as lead counsel. At the time of her application ten years ago, Ms. Dean's application listed 24 trials. *See* Appendix C. She has tried many cases to verdict since that time. GPC/NAPA isolated three incidents over her entire career in an attempt to evidence a systemic problem when such a "problem" is nonexistent.

In the first case mentioned by GPC/NAPA, *Kinseth v. Weil-McLain*, 913 N.W.2d 55 (Iowa 2018), the statements were of a different order than those here, involving a direct appeal to "send[] a message" to the defendant and reference to other lawsuits. *Id.* at 71-72. Ms. Dean did not repeat those arguments in this case. Notably, the defendant in *Kinseth* was found to have made timely objections before the case went to the jury. *Id.* at 66-67. The court noted that timely objections "'discourage the wait-and-see approach, in which aggrieved parties refrain from objecting to remarks in a jury argument until after the verdict has been rendered.'" *Id.* at 67 (quoting *Andrews v. Struble*, 178 N.W.2d 391, 401 (Iowa 1970)). Here, of course, GPC/NAPA never voiced any objection before the jury rendered its verdict.

GPC/NAPA also ask this Court to consider trial court rulings in the case of *Domagala v. 3M* in Minnesota District Court. Appx. B to Op. Br. There, the court found that there were violations of in limine rulings in Ms. Dean's opening statement and granted a mistrial at the beginning of the case.[33] There was no intentional disregard of the court's in limine orders—a review of the argument shows that Ms. Dean had a reasoned basis for each statement found objectionable. *Id.* at 7-25. These were issues such as stating a document said "mesothelioma" when it said "cancer," even though

[33] There were seven objections made during Ms. Dean's opening statement, four were sustained although the court later determined that one of those was in error and it should have been overruled. *Id.* at 29-31.

mesothelioma is, in fact, a form of cancer. *Id.* at 24-25. The one referenced by GPC/NAPA in its Opening Brief, a statement interpreted as a reference to plant employee illnesses, was a misunderstanding and was given an interpretation by defendants and the court that was never intended by Ms. Dean. *Id.* at 3, 19-22. In short, the rulings at issue were not warranted and it would be an injustice to use such rulings, which were never subject to appellate review, as evidence of anything that happened in this case.

Finally, GPC/NAPA attach as their Appendix B a trial transcript from *In re LAOSD Asbestos Cases (Dennis)* from November 1, 2012, in Los Angeles Superior Court. This also involved an opening statement. The issue in *Dennis* was a potential violation of plaintiff's *own* motion in limine to preclude defendants from arguing that other defendants no longer in the case were liable simply by virtue of being sued. *Id.* at 159, 165, 168-70, 175. In her opening statement, Ms. Dean made the point that other defendants had been sued but dismissed after the plaintiff learned they were not at fault. *Id.* at 152. The defendants argued that because some defendants were no longer in the case because of settlement, this was a violation of plaintiff's own motion in limine and the defendants should be allowed to talk about those settlements with the jury. *Id.* at 153, 171, 184-85. Given that the case had just started and court's hesitance to get into settlement information, the court granted the mistrial but noted it would be permissible for Ms. Dean to make a similar opening statement that the plaintiff had misidentified some

sources of asbestos exposure as long as those entities were not referenced as parties. *Id.* at 179-80, 182-83, 185-87.

There is no pattern of misconduct. It would be incorrect to draw such a conclusion from individual rulings in other cases that involved a wealth of briefing and arguments not fully before this Court. The Court should disregard GPC/NAPA's ad hominem attacks on Ms. Dean, and decide the issues based on the record in this case. That record demonstrates no abuse of discretion in the trial court's determination that GPC/NAPA's misconduct claims are without merit.

D. There was no misconduct by the Coogans.

After trial, GPC/NAPA decided to extend their misconduct allegations to also include the Coogan family, claiming that representations made in Mr. Coogan's probate proceedings are inconsistent with the damages evidence presented at trial. They fail, however, to point to one false or even misleading statement made by the Coogan family or by counsel. Plaintiffs' trial evidence is not contradicted by any statements made by witnesses in the probate proceeding.

Moreover, GPC/NAPA gave little thought to the damages aspect of this case. They failed to question any witness about Mrs. Coogan's relationship with her husband, failed to interview or call at trial any of the witnesses already known from the probate proceeding at the time of trial, and did not seek to compel Mrs. Coogan's attendance at trial pursuant to

CR 43(f). This was a strategic decision by GPC/NAPA that they now seek to undo by contriving an argument for relief under CR 60 and making false accusations against the Coogans and Plaintiffs' counsel.

1. All relevant facts about the Coogan family's relationships were known or easily discoverable to GPC/NAPA by the time of trial.

Mr. Coogan appointed Sue Coogan as the personal representative (PR) of his estate via his will dated May 6, 2011. CP 20811. A serious disagreement developed between Mrs. Coogan and the adult daughters of Mr. Coogan regarding the proper interpretation of the will. Roxana Coogan and Ms. Baxter filed a TEDRA petition asking the probate court to remove Mrs. Coogan as PR because she was "representing only her personal interests as heir against the legitimate interests of the Estate and Petitioners." CP 20778-79. Roxana Coogan filed a declaration in which she alleged Mrs. Coogan had refused to transfer assets designated for them in the will, refused to pay estate debt, and had withdrawn $110,000 from Mr. Coogan's bank account that was intended for his daughters. CP 20904-07. Mrs. Coogan ultimately resigned as PR. CP 20941.

Mrs. Coogan filed her own TEDRA petition seeking a determination that she had an equity relationship with Mr. Coogan from 1995 to 2011 (before they were married in 2011). CP 20795-98. In support, she submitted a declaration dated March 2, 2016, discussing her relationship with Mr. Coogan and her involvement in his business. CP

20839-43. She alerted the court that the disagreement among the heirs had become quite serious: "Since his passing I have been threatened with bodily harm, and have been accused of fraudulently obtaining funds that my husband intended for me to have." CP 20841. Mrs. Coogan submitted affidavits and declarations from 13 family and friends who supported her contentions. CP 20845-73. Some of those statements acknowledged the tense relationship between Mrs. Coogan and Roxana Coogan and Ms. Baxter. CP 20859, 20873.

This was all part of the public record and known to GPC/NAPA prior to trial. CP 20778-801, 20839-73, 20887-907.

Plaintiffs moved to "preclude irrelevant probate litigation." CP 21696. Plaintiffs sought to exclude evidence of the disagreement that led to Mrs. Coogan's resignation as PR. *Id.* The court invited Defendants to articulate the relevance of this evidence, but GPC/NAPA did not offer any argument and the motion was granted. 3 RP 97-99.

During trial, however, GPC/NAPA advanced the exact same contention that they argue here, that the probate proceedings contradict the image portrayed by the Coogans at trial:

> MS. LOFTIS: . . . . The probate record reflects that there was a big problem with this family getting along and with the daughters not accepting Gerri Sue all the way up until just before the death of Mr. Coogan.
>
> And this is a classic example where Plaintiff is moving to exclude evidence of the other half of the story and then present her half of the story. So I'm alerting you, I guess, Your Honor, that I'm seeing the door opening here to

> the probate records which show a whole different view of this family than what Plaintiff is putting on . . . .
>
> It's what was presented in the probate court that reflects what is really going on with this family even today in terms of them not getting along. And that's been true for twenty years. And so what they're trying to do is present half of the story here to the jury, Your Honor.
>
> * * *
>
> And this peace and harmony, Your Honor, that Doy created in the household is contradicted again by sworn statements in the probate file, so there wasn't peace and harmony in this family.
>
> If we go down that track, that this was a wonderful marriage and there was peace and harmony, that's going to open the door, Your Honor.

30 RP 25-28, 30.

Ms. Marx, Mrs. Coogan's daughter, acknowledged everything was not perfect in the Coogan family: "Everybody is not happy all the time, obviously, but overall they were happy." 30 RP 40. Defense counsel was allowed to ask a series of questions about whether Mrs. Coogan gave up trying to get along with her husband's daughters because they didn't accept her. 30 RP 48-50. While these questions were allowed, the trial court agreed that "[t]he relationship with the sisters among themselves is not relevant." 30 RP 50. Ms. Marx was nonetheless still asked about "friction" between Mrs. Coogan and the daughters. 30 RP 52-53.

GPC/NAPA then moved to introduce a redacted copy of Mrs. Coogan's 2016 declaration filed in support of her probate claims. 30 RP 66; Ex. 352. The Court admitted the redacted declaration that discussed the fact that the daughters had been slow to accept her as part of the family.

Ex. 352. Defense counsel argued that more of the declaration should come in because the probate fight provided an alternative explanation for Mrs. Coogan's absence from trial. 31 RP 5-16. The trial court rejected this contention:

> THE COURT: This probate document was in existence. And everybody knew about it from the get-go. That's been a common knowledge among the Defendants in this case.
>
> So if that was something that everybody wanted to explore, there was a simple method by which they could have done so. And, furthermore, if you take this at face value, the death of Doy Coogan was the thing that created further discord in this family . . . .
>
> I think that everybody had an opportunity to require that the widow be here. Nobody chose to do that. Everybody knew about the probate action and that there was some kind of discord. Everybody has these probate documents well in sufficient time to have sent a Notice to Adverse Party to Attend Trial, and nobody did it.

31 RP 9-10. The Court disagreed that Mrs. Coogan's declaration contradicted Ms. Marx's testimony that Mrs. Coogan was too distraught to attend trial. 31 RP 12-13. The Court observed that "I don't have any kind of evidence that indicates that what Ms. Marx said is wrong." 31 RP 14. Defendants' remedy was to call Mrs. Coogan to testify at trial under CR 43. 31 RP 15. They chose not to do so.

In the spring of 2018, Mrs. Coogan moved for summary judgment in the TEDRA proceeding on the issue of whether she shared a "Committed Intimate Relationship" (CIR) with Mr. Coogan prior to their marriage, between 1995 and 2011, such that she was entitled to half of his separate property. CP 21001-23. She re-submitted the declarations she had

filed with her petition in 2016. CP 21026-28. The response denied that Mr. and Mrs. Coogan maintained a CIR and was supported by declarations from a different set of family and friends. CP 21081-86. The declarations either focus on the early years of their relationship or do not reference a time period. None discuss the state of the Coogans' marriage from 2011 until his death in 2015. GPC/NAPA had access to five of the declarants prior to trial and asked them no probate-related questions. CP 21651.[34]

2. GPC/NAPA failed to show they are entitled to relief under CR 60(b)(3).

A motion to vacate the judgment on grounds of "newly discovered evidence" must show: "the evidence (1) would probably change the result if a new trial were granted, (2) was discovered since trial, (3) could not have been discovered before the trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching." *Jones v. City of Seattle*, 179 Wn.2d 322, 360, 314 P.3d 380 (2014).

a. The declarations are not material, not admissible, and would not have changed the result at trial.

There are four reasons the declarations filed in the TEDRA proceeding are not material and would not have changed the verdict. First, the jury was already aware of problems in the Coogan family. They heard

[34] GPC/NAPA suggest that known witness affidavits were requested. Op. Br. 18 n.10. This is not so. GPC/NAPA conducted no discovery on this matter. When GPC/NAPA deposed the beneficiaries, they did not ask for witness statements or even the most basic questions about the nature of the relationship between Mr. and Mrs. Coogan or about any known or observed problems they had as a married couple.

about the tension between Mrs. Coogan and her husband's daughters through the testimony of Ms. Marx as well as through Mrs. Coogan's redacted declaration. The jury was also aware that when Mr. and Mrs. Coogan met, they both had a history of troubled relationships, that Mr. Coogan's first marriage ended because his wife left him, and that Mrs. Coogan had been married three previous times and was never married to her daughter's father. 30 RP 18, 45-46; 18 RP 57-58; 6 RP 34. Ms. Marx acknowledged that her mother and Mr. Coogan were "not happy all of the time." 30 RP 40.

It is precisely because of Mrs. Coogan's imperfections that Mr. Coogan's death had such a huge impact and warranted a large damages award. The jury's award was made because of, not despite, the obvious issues within the Coogan family. Mr. Coogan's guidance were very important to Mrs. Coogan's wellbeing. 30 RP 42. The jury heard that he brought the family together, made Mrs. Coogan happy and calm, and that once he was gone everything deteriorated into rancor and bitterness. 30 RP 40, 42, 48-53; 18 RP 76-79; CP 20839-43.

Second, nothing in the declarations directly contradicts sworn testimony in this case. The evidence that Mr. and Mrs. Coogan had hard times does not contradict the evidence that Mrs. Coogan loved her husband deeply and was devastated by his death. This is a family, with complicated emotions and relationships like any other family. Even Roxana Coogan,

who wrote a declaration alleging that Mrs. Coogan fought with Mr. Coogan and stole from him before they were married, CP 21099, testified to the depth of Mrs. Coogan's anguish over her husband's death and what a devoted caregiver she was to him during his illness. 18 RP 77-79. This is also reflected in the hospice records, which show Mrs. Coogan was steadfast by Mr. Coogan's side throughout his illness,[35] and by the statement from Mr. Coogan's physician that Mrs. Coogan took good care of her husband. CP 20820.

Relief under CR 60(b)(3) is only warranted when the case involves objective, verifiable facts that are later directly contradicted. *Jones*, 179 Wn.2d at 367. It is hard to imagine that facts relating to Mr. and Mrs. Coogan's relationship could ever be construed as objective or verifiable facts that contradict something as subjected as the testimony regarding their *feelings* for each other.

In *Jones*, the "newly discovered evidence" was video surveillance footage of the plaintiff taken after trial that showed he had greater mobility than he had claimed. *Id.* at 337. The Court disagreed that "the images on the surveillance video [are] the smoking gun the City claims they are" because there had been evidence at trial that the plaintiff was somewhat physically active but also had bad days. *Id.* at 363-65. The Court contrasted

[35] CP 22154, 22158-60, 22162, 22165, 22169, 22170-77.

this ambiguity with cases in which contradictory objective facts had been discovered after trial, *i.e.*, a case in which the plaintiff claimed she had never fainted before her accident and it was later discovered she had experienced fainting spells for years, and another case in which it was claimed a storm sewer water system had a concrete lining but a later construction project on the system showed that it had no such lining. *Id.* at 365-66. This case is like *Jones* in that there is no direct contradiction between evidence that Mr. and Mrs. Coogan loved each other and the declarations showing that they at times had alleged but significant conflicts early in their relationship.

Third, the declarations do not address the issues to be considered by the jury in awarding wrongful death damages. "The purpose of the wrongful death statute is to compensate certain relatives of the deceased for injuries to their pecuniary interest, suffered as a result of the wrongful death." *Bowers v. Fibreboard Corp.*, 66 Wn. App. 454, 460, 832 P.2d 523 (1992). The recently filed declarations do not address Mr. Coogan's contributions to his marriage, but instead allege that Mrs. Coogan committed wrongful acts and treated Mr. Coogan badly. Such evidence is not relevant to the determination of what Mrs. Coogan lost from the decedent. Rather, relevant evidence consists of the things Mr. Coogan did for Mrs. Coogan, like arranging their wedding, throwing her surprise birthday parties, providing a home for her grandson, and fixing up their

retirement home together. 30 RP 15-16, 18-20, 37-38, 47. Many happy photographs of them were shown to the jury:

CP 21650, 22178-82.

Finally, the declarations are inadmissible. Bad conduct is not relevant in a wrongful death case. In *Montgomery v. Brewhaha Bellevue, LLC*, 195 Wn. App. 1064 (2016), the defendant sought to introduce "lifestyle" evidence showing that the decedent was a drug dealer and criminal but the evidence was excluded as irrelevant to the question of what he contributed to his daughter's life and unduly prejudicial under ER 403. *Id.* This same logic applies here, where the evidence of bad conduct is on the part of the surviving spouse, not the decedent. That the declarations were offered in the probate proceeding to show that Mr. and Mrs. Coogan did not have an equitable relationship prior to their marriage and are focused on those early years of their relationship, also makes them tangential. The declarations do not address what their relationship was like during their marriage or at the end of Mr. Coogan's life. The only use for such evidence would have been an improper one, namely to convince the

jury that Mrs. Coogan is a bad person who does not deserve to be compensated for her losses.[36]

The declarations also contain hearsay to the extent that they purport to convey what Mr. Coogan said or felt to third persons. ER 801(c); ER 802. An admission of a party opponent is only "the party's own statement" or a statement the party has adopted or authorized. ER 801(d)(2). The trial court excluded parts of Mrs. Coogan's declaration that characterized what Mr. Coogan told her about his wishes for his estate because they were not admissions by a party opponent. 31 RP 21-23. The same reasoning should be applied to exclude Mr. Coogan's purported statements here.

b. GPC/NAPA failed to exercise diligence with regard to the discovery of damages evidence.

Throughout discovery, GPC/NAPA never asked a single witness whether Mr. and Mrs. Coogan ever had any problems in their relationship. They knew in 2016 that there was a probate fight. CP 20778-801, 20839-73, 20887-907. They made a strategic decision not to pursue evidence regarding the issues raised in probate or even conduct the most basic inquiries about Mr. and Mrs. Coogan's relationship.

GPC/NAPA chose to ask little regarding probate and only in the depositions of Ms. Baxter and Ms. Marx. CP 20586, 20591. They chose

[36] One such allegation is the hearsay statement that Mrs. Coogan chased Mr. Coogan with an ax more than 20 years ago. This statement almost certainly would not survive ER 403 analysis, as the trial court ultimately determined about much of the probate evidence generally. CP 22586-87.

not to ask Mrs. Coogan or Roxana Coogan anything about Mrs. Coogan's filings in the probate court. CP 21350-76; 21445-65. They chose not to depose any of the other 13 probate witnesses, other than Richard Berend who was not asked about the probate proceedings or his declaration. CP 21654-79. They also chose not to propound any written discovery on any topic related to probate, Mrs. Coogan's relationship with her husband, or her relationship with his daughters. They never asked any witness whether Mr. and Mrs. Coogan ever had any problems in their relationship. At her deposition, Mrs. Coogan provided a list of her and Mr. Coogan's friends from early in their relationship, CP 22193, but there is no indication that GPC/NAPA interviewed those witnesses. None of those names appear on their witness lists. CP 22234-67.

At trial, GPC paid very little attention to damages. GPC/NAPA failed to ask damages-related questions of the family members at trial, and defense counsel spent almost no time on the subject of damages in her closing argument. 47 RP 224-25. All of their witnesses testified about aspects of causation; none addressed damages.

GPC/NAPA's strategic decision to focus on other aspects of this case demonstrates a lack of diligence that is fatal to their claim for relief under CR 60(b)(3). They could have discovered the "new" declarants if they had conducted any discovery on this issue. In *Jones*, *supra*, "the trial judge denied the motion to vacate primarily because she determined that

the City made a strategic decision to invest its resources in 'an attempt to discredit Mr. Jones and demonstrate that he was responsible for falling down the pole hole' rather than to question the extent of [his] injuries." 170 Wn.2d at 367. When the defendant protested that it would have conducted more discovery on the plaintiff's physical condition if they had been permitted to depose him a second time, the trial court "correctly concluded that 'this claim is belied by the apparent failure of the City to interview and/or depose any of the people with whom Mr. Jones already testified he was spending time prior to trial.'" *Id.* at 367-68. The Court agreed that, because the City's investigative efforts were focused primarily on its alcohol theory instead of the plaintiff's injuries, "the City's motion to vacate [was] an attempt to get 'a second bite of the apple' after its strategic choices proved unwise." *Id.* at 369.

Jones controls this case. GPC/NAPA made the strategic decision to focus their discovery efforts and trial defense on denying that their asbestos products caused Mr. Coogan's injuries, calling only causation witnesses. These strategic decisions were a calculation that "proved unwise." *Jones*, 179 Wn.2d at 369. As in *Jones*, they should not get a second trial because of their own strategic mistakes and lack of diligence.

3. GPC/NAPA have not demonstrated fraud, misrepresentation, or misconduct by clear and convincing evidence as required for relief under CR 60(b)(4).

CR 60(b)(4) provides that a judgment may be vacated for "[f]raud . . . misrepresentation, or other misconduct of an adverse party." The moving party must show that misconduct "prevented a full and fair presentation of its case" and prove its allegations by clear and convincing evidence. *Dalton v. State*, 130 Wn. App. 653, 665, 124 P.3d 305 (2005). The trial court can only vacate the judgment for fraud it makes findings of fact and conclusions of law regarding each of the nine elements of common law fraud. *In re Marriage of Maddix*, 41 Wn. App. 248, 252, 703 P.2d 1062 (1985). Even if there was a misrepresentation, the movant must also show it relied on or was misled by the misrepresentation and that there is a connection between the misrepresentation and the judgment. *See Peoples State Bank v. Hickey*, 55 Wn. App. 367, 371, 777 P.2d 1056 (1989). GPC/NAPA have demonstrated none of these elements.

GPC/NAPA's argument fails because they have not alleged any misrepresentation by an adverse party.[37] No specific allegations of

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[37] Under the law, a wrongful death action may only be maintained by the personal representative of the estate. RCW 4.20.010. A wrongful death action cannot be maintained by the decedent's children or other survivors. *Beal for Martinez v. City of Seattle*, 134 Wn.2d 769, 776, 954 P.2d 237 (1998). The wrongful death beneficiaries include the spouse and children of the decedent, RCW 4.20.020, but they are not parties in the case. *See Huntington v. Samaritan Hosp.*, 101 Wn.2d 466, 469, 680 P.2d 58 (1984).

Here, the named parties are Mrs. Coogan and the PR, Mr. Spurgetis. GPC/NAPA's allegations are leveled primarily at Roxana Coogan, Ms. Baxter, and Ms.

misrepresentation or fraud are made against Mrs. Coogan. Any such allegation would be highly implausible given that she did not even appear at trial. Her declaration admitted at trial acknowledged tension between her and Mr. Coogan's daughters, so that cannot possibly form the basis for their claim of fraud and misrepresentation. Ex. 352. In the trial court, GPC/NAPA contended that she had misrepresented having a "very loving, romantic relationship" with Mr. Coogan. CP 22574-75. In other words, their argument is that the verdict was obtained by fraud because Mrs. Coogan lied about loving her husband. Love and drama are not mutually exclusive (particularly in earlier stages of a relationship). Moreover, the evidence presented from the family members, and corroborated by the hospice records and physicians, was that Mrs. Coogan was devoted to Mr. Coogan and devastated by his death.

Even if GPC/NAPA could try to prove the idea that Mrs. Coogan did not love Mr. Coogan, they certainly cannot do so by clear and convincing evidence. They have not shown a single element of fraud, much less all nine. The trial court did not abuse its discretion in determining that the requirements of CR 60(b) have not been demonstrated. CP 22587. After undertaking "extensive review of [the] supporting materials," the court found much of it to be "hearsay, improper opinion by lay witnesses, and

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Marx. They are not parties, and GPC/NAPA cannot seek CR 60(b)(4) relief based on their alleged conduct.

evidence which if even marginally relevant, is wholly outweighed by its prejudicial effect." *Id.* GPC/NAPA have failed to show that the trial court abused its considerable discretion in its evaluation of the evidence and determination that relief from the judgment is not warranted on the basis of newly discovered evidence or fraud and misrepresentation.

III. The trial court did not abuse its discretion in excluding Dr. Schuster's opinion under ER 403.

The trial court did not abuse its discretion in excluding Dr. Schuster's testimony as unduly prejudicial under ER 403. Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. "'Unfair prejudice' means an 'undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 257, 744 P.2d 605 (1987) (quoting 1 J. Weinstein and M. Berger, *Evidence* ¶ 403[03], at 403–33 (1985)).

This Court will not reverse a trial court's exclusion of expert testimony absent an abuse of discretion, "which occurs only when no reasonable person would take the view adopted by the trial court." *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). "'A court's decision is manifestly unreasonable if it is outside the range of acceptable choices,

given the facts and the applicable legal standard.'" *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012) (quoting *In re Marriage of Littlefield,* 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)). "[T]he trial court's decision is given particular deference where there are fair arguments to be made both for and against admission." *Davidson v. Municipality of Metro. Seattle*, 43 Wn. App. 569, 572, 719 P.2d 569 (1986).

"Because of the trial court's considerable discretion in administering ER 403, reversible error is found only in the exceptional circumstance of a manifest abuse of discretion." *Carson v. Fine*, 123 Wn.2d 206, 226, 867 P.2d 610 (1994); *see also Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 257, 744 P.2d 605 (1987) (no manifest abuse of discretion in excluding evidence under ER 403). Such substantial deference is appropriate because, as noted by the United States Supreme Court, Rule 403 "requires an 'on-the-spot balancing of probative value and prejudice, potentially to exclude as unduly prejudicial some evidence that already has been found to be factually relevant.'" *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379, 384 (1987) (quoting S. Childress & M. Davis, Federal Standards of Review §4.02, p. 4-16 (3d ed. 1999)).

GPC/NAPA has not shown, as they must, a manifest abuse of discretion in the exclusion of Dr. Schuster's testimony. The trial court granted Plaintiffs' motion in limine to exclude Dr. Schuster's testimony on ER 403 grounds, 2 RP 97, 99, but allowed GPC/NAPA to make an offer of

proof at trial. 26 RP 141-67. Dr. Schuster's opinion is that Mr. Coogan had alcohol-related cirrhosis of the liver. CP 4712; 26 RP 145, 155-57. When asked for his opinions at his deposition, Dr. Schuster started with "No. 1, I believe that this man had a huge or significant alcohol ingestion history." CP 4712. In opposing the Coogans' motion to exclude Dr. Schuster's testimony, a co-defendant took one of Mr. Coogan's medical records and highlighted the statement about Mr. Coogan's drinking:

> DATE OF CONSULTATION: 01/12/2015
>
> This is a pleasant 66-year-old white male from Washington State who worked as an excavator during his life, digging dirt, pushing dirt, digging foundations and so forth. Basically the patient says he has been a moderate drinker, maybe 5 to 8 beers daily and then a cocktail or 2 in addition for many years. He has noticed over the last month increasing abdominal girth with discomfort. The patient has no other prior GI complaints. No significant dysphagia, weight loss,

CP 5918.[38] This was characterized as "important." CP 5902.

While GPC/NAPA now contend that they were amenable to a compromise that would have excluded Dr. Schuster's opinions about Mr. Coogan's drinking, these opinions were made a part of its offer of proof:

> Q. And Mr. Coogan, the medical records reflect this, but Mr. Coogan had a substantial history of alcohol use. Is that correct?
>
> A. That was in the record, yes.
>
> Q. All right. And there are a couple of various amounts. One was, I believe, five to seven beers, one was six to eight beers a day, plus a couple of cocktails?
>
> A. Yes.

[38] This same record was admitted as a trial exhibit with the highlighted sentence redacted. Ex. 234.

* * *

> Q. On Mr. Coogan's consumption that we just described, was that over a period of a number of years? It wasn't just a late or current thing?
>
> A. The record I saw mentioned at least 20 years, maybe possibly longer. But I saw 20 for sure.
>
> Q. Of that same consumption?
>
> A. Yes. That's what it stated.

26 RP 155-57.

The point of an offer of proof is to make known the "substance of the evidence." ER 103(a)(2). The offer both "'informs the court of the legal theory under which the offered evidence is admissible'" and "'informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility.'" *Adcox*, *supra*, 123 Wn.2d at 26, 864 P.2d 921 (quoting *State v. Ray,* 116 Wash.2d 531, 538, 806 P.2d 1220 (1991)). GPC/NAPA's offer of Dr. Schuster's opinions about Mr. Coogan's alcohol consumption shows that this was part of what it was proposing to present to the jury, and was properly considered by the trial court in its ER 403 analysis.

There were other indications that Dr. Schuster's opinion was an important piece of GPC/NAPA's effort to raise the issue of Mr. Coogan's alcohol consumption. In arguing that his drinking should be considered by the jury, counsel for GPC/NAPA contended:

> Your Honor, his own brother testified that he drank a six-pack, followed by two cocktails, on a nightly basis. His doctors also indicate that in the medical records.
>
> In addition, we have an expert, Your Honor, that has an opinion . . . that Mr. Coogan was suffering from cirrhosis . . . .
>
> In addition, Your Honor, it goes to life expectancy and it goes to enjoyment of life. I mean, **certainly somebody that is drinking excessively has a different enjoyment of life than the rest of us**, and certainly has a different life expectancy. That's within the common understanding of a lay person.

11 RP 75-76 (emphasis added).

In considering Dr. Schuster's opinion, the trial court noted that in order to be admitted, the court must "find that the evidence will be probative of an issue that is properly before the jury and that the evidence proffered would have relevance beyond it[s] prejudicial effect." 26 RP 165. The court concluded that "even if [Dr. Schuster's opinion] does have some basis, the prejudicial effect of characterizing Mr. Coogan as an alcoholic, a chronic, heavy drinker, is something that I think is unduly prejudicial." 2 RP 97; *see also* 11 RP 78-79; 26 RP 165, 167.

Indeed, it has long been recognized that evidence regarding alcohol is highly prejudicial in a civil case. *See Jones*, *supra,* 179 Wn.2d at 356, 314 P.3d 380; *Kramer v. J. I. Case Mfg. Co.,* 62 Wn. App. 544, 559-60, 815 P.2d 798 (1991). For example, in *Jones*, a city firefighter brought suit against the city of Seattle to recover for severe injuries he sustained when he fell fifteen feet down a fire station pole hole. 179 Wn.2d at 327, 314 P.3d

380. The accident occurred in the middle of the night, and there were allegations that the plaintiff may have been drinking alcohol before the accident. *Id.* at 328-29. The City also sought to defend the case by portraying the plaintiff as an alcoholic whose continued drinking after the accident was inhibiting his recovery. *Id.* at 329. The trial court excluded this evidence because of its minimal probative value and the "tremendous prejudicial effect that getting into alcohol can have." *Id.* at 330. Several witnesses who were going to testify about the plaintiff's alcohol use were also excluded because they were disclosed very late. The error from this exclusion was harmless because "much of the excluded testimony was irrelevant or unfairly prejudicial" because it was related to the plaintiff's alcohol consumption. *Id.* at 356.

In *Kramer*, the Court of Appeals similarly held evidence of the plaintiff's alcohol and drug abuse to be unduly prejudicial and inadmissible. 62 Wn. App. at 559, 815 P.2d 798. The suit involved a workplace injury from an accident with a backhoe. There was no allegation of alcohol contributing to the accident, but the defendant argued that drug and alcohol abuse were habits relevant to earning capacity and life expectancy. *Id.* at 556-57. The court found that it was an abuse of discretion to allow the plaintiff to be cross-examined about his alcohol use because of the low probative value and the "prejudicial impact" of the testimony. *Id.* at 559-60.

The court was concerned that the jury rejected the plaintiffs' liability claims "because it thought poorly of him." *Id.*

This same risk is present here. Introducing evidence of Mr. Coogan's alleged heavy alcohol consumption, and opining that he had alcohol-related cirrhosis of the liver, runs a high risk of causing the jury to think "poorly of him." *Kramer*, 62 Wn. App. at 559-60, 815 P.2d 798. Defense counsel's argument suggests this was the intent. 11 RP 75-76.

The trial court properly applied the balancing test of ER 403, weighing the substantial prejudice of portraying Mr. Coogan as an alcoholic against the tenuous nature of Dr. Schuster's cirrhosis opinion. 2 RP 97; 26 RP 165-67. There were good reasons to finding that Dr. Schuster's opinion had low probative value in comparison to the substantial potential for prejudice.

The proffered relevance of Dr. Schuster's opinion was that the cirrhosis affected Mr. Coogan's life expectancy. 26 RP 145, 151-52. Stage 3 cirrhosis has a life expectancy of 5 years, *id.*, whereas there is no impact on life expectancy from Stage 2 cirrhosis. 26 RP 151. At Stage 2, the mortality rate is 3.5 percent per year, which would be more than 20 years. *Id.* at 151-52. According to the life expectancy tables, as a 67-year-old man Mr. Coogan was expected to live at least 15 years. 47 RP 120. Unless Dr. Schuster could reliably say that Mr. Coogan had Stage 3 cirrhosis, the cirrhosis would have no impact on Mr. Coogan's life expectancy.

A diagnosis of Stage 3 cirrhosis requires the presence of ascites related to cirrhosis. 26 RP 161, 164; Ex. 313, p. 1. Ascites is a condition where excess fluid collects in the abdomen. 39 RP 85; CP 4714. It is undisputed that a patient can have Stage 1 or Stage 2 cirrhosis with no ascites. 26 RP 161-62, 164; Ex. 313, p. 1. Ascites is what distinguishes Stage 3 from the earlier stages. *Id.*

Ascites is also associated with tumors in the abdomen, including peritoneal mesothelioma. 11 RP 81; 26 RP 163; 39 RP 85. In fact, the presence of ascites was one of the symptoms that led to Mr. Coogan's diagnosis with peritoneal mesothelioma. 11 RP 80-81.

Dr. Schuster was unable to provide a basis for attributing any of Mr. Coogan's ascites to his cirrhosis as opposed to his peritoneal mesothelioma. He acknowledged that Mr. Coogan's treating physicians ascribed his ascites to his peritoneal mesothelioma. 26 RP 155; *see also* CP 5924 (progress note referencing "malignant ascities"). He did not deny that the ascites was primarily attributable to Mr. Coogan's peritoneal mesothelioma, testifying that "there is absolutely no question in my mind that the ascites is also contributed to significantly because of the peritoneal tumor. That's not a question." 26 RP 146-47; *see also id.* at 160; CP 4712, 4714. He was completely unable to even estimate how much of the ascites was related to cirrhosis, admitting that he could not say whether it was "zero percent, one percent, [or] 12 percent." 26 RP 160.

In fact, because ascites is so strongly known to occur with peritoneal mesothelioma, at the motion in limine stage a co-defendant argued that Dr. Schuster was *not* relying on the presence of ascities for his cirrhosis opinion: "[b]ecause ascities is also linked to peritoneal mesothelioma, Dr. Schuster did not rely on the presence of ascites in forming his opinion." CP 5901.

Dr. Schuster's ability to distinguish between ascites caused by cirrhosis and by peritoneal mesothelioma was also in question. He has never diagnosed or treated a person with peritoneal mesothelioma. 26 RP 159. He had to research peritoneal mesothelioma on the internet. CP 4710, 4712. He has never testified in an asbestos case before (although he charges $750/hour for trial testimony). CP 4715.

In evaluating Dr. Schuster's opinion, the trial court was concerned that Dr. Schuster "is unable to tease out the degree to which, if any, the cirrhosis was also a factor in the development of these ascites." 26 RP 166. The court further recognized that the medical records only supported peritoneal mesothelioma as the cause of the ascites. 11 RP 76-77; 26 RP 166. The court recognized that without evidence of a Stage 3 diagnosis, the testimony was irrelevant to the issue of Mr. Coogan's life expectancy. 26 RP 166-67. And the opinion that Mr. Coogan had Stage 3 cirrhosis was "too attenuated and in many respects speculative." 26 RP 166.

GPC/NAPA's insistence that Mr. Coogan had cirrhosis is also of limited, if any, relevance given that only Stage 3 cirrhosis affects life

expectancy. There is no mention of Stage 3 cirrhosis in any medical record and no treating physician or other expert in the case ever offered this opinion. While it is true that some of Mr. Coogan's treating physicians initially thought he had cirrhosis,[39] none of them ever diagnosed Mr. Coogan with Stage 3 cirrhosis and all references to cirrhosis are prior to his diagnosis with peritoneal mesothelioma in April 2015. CP 5924. Mr. Coogan's primary treating physician, Dr. Nudelman, eventually ruled out alcohol-related liver disease. CP 4733. A medical record from June 2015 notes that when Mr. Coogan first presented with ascites, "[l]iver disease and cirrhosis were *initially suspected* but he had normal liver functions and *no evidence of liver disease as the etiology for his symptoms*." CP 4724 (emphasis added). Mr. Coogan then had biopsies that "came back showing malignant mesothelioma, epithelioid, diffuse pleomorphic." *Id.*

The medical records thus cast significant doubt on whether Mr. Coogan ever had cirrhosis at all, characterizing this as an initial misdiagnosis. CP 4724. Mr. Coogan's normal liver function tests were another indication that he was misdiagnosed with cirrhosis. This was

[39] GPC/NAPA incorrectly claims that "five physicians had concluded Doy had cirrhosis," inappropriately including defense experts Drs. Godwin and Crapo in this tally. Op. Br. 66. GPC/NAPA points out that it was not allowed to give an offer of proof of Dr. Godwin's testimony on this topic, which is true, but fails to mention that defense counsel represented to the court that in Dr. Godwin's deposition "there's actually no discussion of liver. That wasn't part of what Dr. Godwin is going to say, with the exception of one comment that the ascities can be caused by either a tumor or liver failure." 39 RP 60-61. With regard to Dr. Crapo, he did not offer an opinion about cirrhosis at trial and no offer of proof of made.

properly noted by the trial court in evaluating Dr. Schuster's proposed testimony. 26 RP 165.[40]

There was little probative value to Dr. Schuster's testimony given that he lacked support for his opinion that Mr. Coogan had sufficiently advanced cirrhosis to shorten his life expectancy. Against this tenuous opinion, the trial weighed the significantly prejudicial effect of discussing Mr. Coogan's heavy drinking. The trial court did not abuse its discretion in determining that the minimal probative value of Dr. Schuster's testimony was substantially outweighed by the prejudice that would result from portraying Mr. Coogan as an alcoholic. 2 RP 97, 99; 26 RP 165.

As recognized in *Jones* and *Kramer*, alcohol-related evidence should be excluded as unduly prejudicial.[41] In *Jones*, there was an allegation that alcohol may have contributed to the accident in question, and the Court still found the evidence to be overly prejudicial. 179 Wn.2d at 356, 314 P.3d 380. In both cases, the courts rejected the argument that alcohol use was relevant to issues of the plaintiff's recovery or life expectancy. *Id.* at 328, 356, 384; *Kramer*, 62 Wn. App. at 559-60, 815 P.2d 798. The trial court did

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[40] While Dr. Schuster claimed that there are cases of cirrhosis with normal blood tests in the medical literature, 26 RP 148-50, GPC/NAPA have notably failed to include this scientific support in the record.

[41] GPC/NAPA notably rely only on case law from other jurisdictions in arguing that evidence of alcohol use is relevant to life expectancy. There is no support for this notion in Washington law. Other jurisdictions may draw the line differently, but in Washington such evidence is unduly prejudicial when used to show an impact on recovery or work/life expectancy. *Jones,* 179 Wn.2d at 356, 314 P.3d 380; *Kramer,* 62 Wn. App. at 559-60, 815 P.2d 798. And here GPC/NAPA failed to show that link in any event.

not abuse its discretion in similarly determining that Dr. Schuster's opinions about Mr. Coogan's alcohol consumption and Stage 3 cirrhosis were of minimal value and would have encouraged the jury to decide this case on an improper basis. The court properly excluded his testimony under ER 403.

IV. The trial court did not abuse its discretion in excluding workers' compensation claims from the Wagstaff facility.

There was no abuse of discretion in the exclusion of workers compensation claims from the Wagstaff facility as there was inadequate evidence of connection between Mr. Coogan and claims brought by other Wagstaff workers who may or may not have been doing a job similar to Mr. Coogan, who may or may not have worked in the same building as Mr. Coogan, who had unknown asbestos exposure histories, and who did not have the same disease as Mr. Coogan.

In comparing the Wagstaff workers' compensation claim forms with the circumstances of Mr. Coogan's work at that facility, the trial court did exactly what the law requires. Admission of evidence of prior accidents is generally left to the discretion of the trial court. *Davis v. Machine Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984). "The trial court's admission or exclusion of evidence of prior accidents should be reviewed only for abuse of discretion." *Stewart v. State*, 92 Wn.2d 285, 304, 597 P.2d 101 (1979).

Evidence of prior incidents or accidents occurring under substantially similar circumstances may be admitted to establish a

dangerous or defective condition. *Blood v. Allied Stores Corp.*, 62 Wn.2d 187, 189, 381 P.2d 742 (1963).[42] "Because collateral issues are thereby interjected into a case, as a predicate for admission, there must be a substantial similarity shown between the proffer and the case at bar." *Id.* at 189. The determination of substantial similarity is left to the trial court's informed discretion. *Id.*

Plaintiffs' research found that in every published Washington case involving prior accident evidence, the trial court's decision regarding admission or exclusion was upheld as within the court's discretion. In *Blood*, for example, the plaintiff sought to introduce evidence of previous falls on the same escalators where the plaintiff was injured. 62 Wn.2d at 189, 381 P.2d 742. The plaintiff was given the opportunity to make the required showing, but the trial court determined that the reports it examined were not sufficiently similar and were excluded. *Id.* This decision was affirmed, with the Supreme Court noting that "counsel was not foreclosed from thoroughly meeting collateral requirements as to these or the remaining reports." *Id.* That was equally true here.

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[42] GPC/NAPA cite no case law, and the Coogans have found none, that allow admission of prior accidents for the purpose of showing causation. As the trial court noted, causation in groups is determined by the field of epidemiology, and there were no epidemiological studies showing an increased risk of disease among Wagstaff workers. 20 RP 11. Further, "[e]pidemiological studies require that the cadre being studied have similar exposures. Otherwise, you don't know what you're measuring." 20 RP 9. That crucial information is missing here. *Id.*

Likewise, *Stewart* upheld the exclusion of a prior incident on the bridge where the plaintiffs were in a terrible accident. 92 Wn.2d at 288-89, 304-05, 597 P.2d 101. The plaintiffs were struck by oncoming traffic, and one of them was thrown over the bridge, when trying to route other cars around an accident on the bridge. *Id.* at 288-89. The trial court thoroughly reviewed the prior incident, which involved someone jumping from a different part of the bridge in daylight, with the plaintiffs' accident that occurred when the bridge was dark. *Id.* at 304-05. The trial court's finding that the prior incident was not similar enough for admission was upheld. The Supreme Court found that "[r]ather than being an abuse of discretion, the record shows a careful, thoughtful and balanced exercise of that discretion and the evidence was properly excused." *Id.* at 305; *see also Davis*, 102 Wn.2d at 77, 684 P.2d 692 (no abuse of discretion in admitting evidence of a prior accident with a glue spreading machine).

Here, the trial court carefully examined the Wagstaff workers' compensation claim forms, collectively Exhibit 199. 19 RP 187-89, 191-94, 197-99; 20 RP 8-12, 14-16, 20.[43] The court determined that there was a lack of similarity between the claimants and Mr. Coogan because there was no evidence that Mr. Coogan worked in the same part of the facility as the

[43] The number of forms was a moving target—GPC/NAPA initially sought to introduce three claims and then the next day included two more. 19 RP 187-89; 20 RP 17-18.

claimants, had the same job duties that involved exposure to asbestos, or had the same disease. *Id.*

First and foremost, the descriptions of the work included in the claim forms was not shown to be similar to the work performed by Mr. Coogan at Wagstaff. The primary problem was that there was no evidence regarding what work Mr. Coogan did at Wagstaff or what part of the plant he worked in. Mr. Coogan did not mention Wagstaff in his affidavit. Ex. 68. GPC/NAPA provided no witnesses who could testify about what Mr. Coogan's job duties were at Wagstaff. 19 RP 149; CP 4933.[44]

There were two separate buildings at Wagstaff, the Marinite building where asbestos-containing Marinite board was cut and drilled, and the machine shop. 20 RP 141, 143; 44 RP 72. Only two or three employees worked in the Marinite building at any given time, whereas 40 to 45 worked in the machine shop. 20 RP 143; 44 RP 73-74. There was no evidence about which building Mr. Coogan worked in. 20 RP 141, 143. Dr. Robbins admitted in her deposition that she had no information Mr. Coogan worked in the Marinite building, testifying that "we don't have a lot of information

[44] Mr. Coogan's brother, Jay Coogan, had no idea about what Mr. Coogan did there. 13 RP 194; 16 RP 126. The only evidence that he worked there were his social security records showing employment at Wagstaff for seven quarters in 1968-69, and his union records that show he was in the machinists union and that his title at Wagstaff was "specialist." Exs. 192, 193; 19 RP 148-50.

about -- and specific information about what department he was considered to have worked in . . . ." CP 4937.[45]

GPC/NAPA sought to introduce the Wagstaff workers' compensation claims during its cross-examination of Plaintiffs' expert Dr. Brodkin. 19 RP 186-88. Although this was a month into trial, these documents were not listed in GPC's ER 904 designations. 19 RP 190-91; CP 1492-99. Instead of excluding the evidence for non-disclosure, the trial court considered this issue on the merits, reviewed the forms, and heard lengthy arguments in the middle of trial. 19 RP 187-99; 20 RP 5-20.

In deciding that the claims did not bear substantial similarity to Mr. Coogan's work, the trial court found that there was no evidence that Mr. Coogan ever had direct exposure to Marinite board. 19 RP 193. The court properly compared the lack of evidence that Mr. Coogan worked with Marinite to the workers' compensation claimants who all stated that they either worked with Marinite and/or in the Marinite room. Ex. 199; 19 RP 193-94. The workers' compensation claimants alleged that they "worked"

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[45] Nevertheless, GPC/NAPA originally tried to claim, through Dr. Robbins, that Mr. Coogan was exposed to asbestos through handling and cutting Marinite board. CP 4905, 4923-24. Plaintiffs moved to exclude this speculative opinion, and GPC/NAPA was unable to produce any factual basis for what they admitted was an inference their expert was drawing from the fact that Mr. Coogan worked at Wagstaff and some workers were cutting Marinite in the Marinite building. CP 4906-07; 3 RP 19-21. The trial court ruled, however, that GPC/NAPA could proceed on a previously undisclosed "fiber drift" theory that Mr. Coogan had indirect exposure to elevated asbestos levels in the ambient air at Wagstaff due to the cutting of Marinite by other workers. 19 RP 193-94. The fiber drift theory was not disclosed prior to trial. 3 RP 8; CP 4920-47. Plaintiffs therefore did not have the opportunity to move to exclude it along with Dr. Robbins's other unsupported opinion that Mr. Coogan cut Marinite board himself.

with Marinite,[46] "mach[ined]" Marinite in the Marinite shop,[47] and "mach[ined] Marinite using table saw, drill press, & lath[e]s."[48] The court concluded that "I'm concerned about the admission of these workers' compensation claims because I do not know that Mr. Doy Coogan's exposure was in any way similar to the exposure of the people who developed this unfortunate disease and filed these claims . . . ." 19 RP 198; *see also* 20 RP 8. Again, after more arguments the next day, the court reiterated that "there is not sufficient proof in the record to show that the exposures were similar to that of Mr. Coogan." 20 RP 20. The court continued to find that there was no evidence that Mr. Coogan was ever directly exposed to Marinite board. 19 RP 163; 42 RP 109, 150-53.

GPC/NAPA tried to use the workers' compensation claim forms to bridge the deficiency in the evidence about what Mr. Coogan did at Wagstaff and whether he ever worked with Marinite. 20 RP 18. But the court found that the fact that other workers worked with Marinite did not mean that Mr. Coogan worked with Marinite: "I'm concerned about the misleading nature of these claims, which would inferentially put Mr. Doy Coogan in the manufacturing building when there is no evidence that he was ever there." 19 RP 199. "Because of the lack of specificity concerning

[46] Ex. 199, at WAG00002, WAG000025.
[47] Ex. 199, at WAG000019.
[48] Ex. 199, at WAG00003.

what Mr. Doy Coogan was doing there, I'm unwilling to speculate that he was one of the three or four people that was actually working in the room where the material was being manipulated." 20 RP 9. The fact that he was in a machinist union was not sufficient to show he was machining Marinite board. 42 RP 150.[49] The court was also concerned about the lack of detail regarding what the claimants were doing at Wagstaff, in particular the lack of information about the frequency and duration of their exposure to Marinite. 20 RP 11-12, 14-16. The lack of information about what the claimants were doing at Wagstaff made it impossible to conclude that their claims were substantially similar to Mr. Coogan's claims. *Id.* The quality of the underlying claims was also in question, as at least one of the claims was denied. 19 RP 188; Ex. 199, at WAG000025.[50]

Another major difference noted by the trial court is that none of the claimants had mesothelioma. 19 RP 197.[51] GPC/NAPA misrepresent the

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[49] The evidence of Mr. Coogan's work at Wagstaff was so deficient that no expert in this case ever offered an opinion that this was a cause of Mr. Coogan's mesothelioma. Plaintiffs' causation expert Dr. Brodkin was unable to conclude that his work at Wagstaff was a substantial factor in causing his disease because he did not have sufficient information that Mr. Coogan had any asbestos exposure at Wagstaff, much less any of the requisite information about frequency, regularity, and proximity. 19 RP 184-85; 20 RP 139-44. No defense experts offered a causation opinion about Wagstaff, either.

[50] Given that they were produced mid-trial, there was also no way to evaluate the medical claims alleged; most did not have supporting medical documentation verifying an asbestos-related condition.

[51] The court found that "while there was asbestosis noted and plaque in the lungs noted, I didn't see that mesothelioma was involved in any of these . . . ." 19 RP 197. In fact, most of the forms were illegible in the diagnosis section. Ex. 199. The supporting documentation clarifies that not a single one of the claimants had mesothelioma. They had asbestosis, pleural disease, or pleural plaques. Ex. 199. None of those are malignant diseases like what Mr. Coogan had. Asbestosis is scarring of the lungs and both pleural plaques and pleural disease are considered scarring of the lining of the lung, all noncancerous diseases. 7 RP

record in contending that three of the claimants had mesothelioma. Op. Br. 75. That appears nowhere in the record, let alone in the claim forms. This falsehood is part of a pattern of misrepresentation and surprise, including new witnesses and undisclosed documents, that characterized GPC/NAPA's approach to the Wagstaff issue at trial.[52]

While these various undisclosed witnesses and documents were not allowed to be presented to the jury directly, the court still allowed Dr. Robbins to rely on them and to offer speculative opinions that Marinite board was drilled in the machine shop where Mr. Coogan presumably worked and that he had direct exposure to Marinite board at Wagstaff that increased his risk of disease. 43 RP 44, 129-34; 44 RP 75-77; *see also* 42 RP 139, 146-47. The jury thus had the opportunity to fully consider

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107, 111, 131-32. Mesothelioma, on the other hand, is a fatal malignant tumor of the mesothelial membranes around the pleura (lining of the lung) or peritoneum (lining of the abdomen). 7 RP 107, 134-36.

[52] GPC/NAPA asserted their fiber drift theory for the first time at trial—no expert had ever offered this opinion during the discovery phase of the case. The workers' compensation claim forms at issue were also undisclosed until the middle of trial. GPC/NAPA further attempted to surprise Plaintiffs with declarations of two witnesses that were former employees at Wagstaff, one of which claimed to have information about the use of Marinite board in the machine shop. 19 RP 164-66, 172-76; 43 RP 97-105. Because GPC/NAPA knew about these witnesses but did not amend their witness list, and did not disclose the declarations until a month into trial, the court concluded that they were "tactically [] not disclosed" 19 RP 176, and were withheld by GPC/NAPA for "tactical advantage." 43 RP 104-05. Defense counsel admitted these witnesses, Mr. Quick and Mr. Kline, were not timely disclosed. 24 RP 9. They declarations were first provided to Plaintiffs' counsel at the time they were handed to the court more than a month into trial. *Id.* The court found, pursuant to the analysis required by *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997), that the prejudice from the late-disclosed witnesses was too high. 24 RP 10. When that failed, GPC/NAPA attempted to use new, undisclosed documents that were purportedly patents for the products that were being made with Marinite board at Wagstaff. 43 RP 48-64. The court excluded the patents as an "unwarranted surprise." 43 RP 64.

GPC/NAPA's direct exposure theory, the same speculative theory that the workers' compensation claims were offered to support. The jury also heard that there were other cases of mesothelioma out of the Wagstaff facility. 44 RP 79, 89.[53] GPC/NAPA were entirely successful in getting opinions before the jury that should not have been admitted. This belies GPC/NAPA'S contention that there was any prejudice from the exclusion of the workers' compensation claim forms. The jury was allowed to hear all of GPC/NAPA's exposure theories about Wagstaff anyway.

GPC/NAPA ignore the substantial similarity requirement and denigrate the trial court's role in determining relevancy. Under Washington law, the trial court was exactly right. The court considered the similarity of the claim forms very carefully, entertaining lengthy arguments from counsel, and properly exercised its discretion in determining that the substantial similarity requirement had not been met. GPC/NAPA have not shown that there was only one conclusion that could have been reached about similarity. This assignment of error therefore lacks merit.

CONCLUSION

For the reasons set forth herein, the Court should find that the trial court did not abuse its discretion in any respect and affirm the judgment.

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[53] Of the two other Wagstaff workers who supposedly had mesothelioma, one of their medical records state that the pathology was not definitive for mesothelioma and for the other one there was no medical proof of mesothelioma. 42 RP 142-44.

Respectfully submitted this 14th day of December, 2018.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

ANN FINCH, individually and as Executrix of the Estate of Franklin Delenor Finch,

Plaintiff,

vs.

COVIL CORPORATION, et al.,

Defendants.

_____/

Civil Action
1:16CV1077

October 5, 2018
Greensboro, North Carolina

DAY V

TRANSCRIPT OF JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE CATHERINE C. EAGLES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Court Reporter: J. Calhoun, RPR

Proceedings reported by stenotype reporter.
Transcript produced by computer-aided transcription.

1 **I N D E X**

2

3 Charge Conference 3

4

5 Closing arguments:

6 By Ms. Dean 25, 90

7 By Mr. Silverman 73

8

9 Court's Instructions to the Jury 97

10

11

12

13

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down, so somebody needs to be where -- you know, you don't all have to be in here, but somebody needs to be here or right out in the hallway so that we can find you easily in case they have a question or when they reach a verdict.

Anything else we need to address?

MS. DEAN: Your Honor, I, in error, thought I was using my copy, not the Court copy and highlighted Exhibit 22, and ask by the agreement of the parties to substitute that out with an identical not highlighted version.

THE COURT: That is appropriate and I trust you have one somewhere.

MR. SILVERMAN: We'll work on it, Your Honor. You don't need to be involved on that.

THE COURT: All right, good. I trust you on that. I will just say now, I appreciate counsel's professionalism and civility. You all have both been zealous and effective advocates for your clients. I like trials. I know litigants -- I see Ms. Gurgone down there -- are hard for family members and such. I appreciate a well-tried case, so I appreciate all of the lawyers in this matter.

Thank you, very much. We'll be in recess until 2 o'clock.

(Luncheon recess was taken at 12:40.)

(Court in session at 3:35 p.m.)

THE COURT: So the jury sent a note, ready, but 15

minute break. Okay. So from that, which is not at all unusual, I take it that they want a 15 minute break. Some of them probably smoke. That is often the case. That may not be it. They want a 15 minute break, but it sounds like they may possibly have reached a verdict. Ready, but 15 minute break. So that's what they say.

I'm going to bring them in, give them their break, tell them not to talk about it during the break. I'll confirm that they think maybe they have -- I'll say I understand this means maybe you'll have a verdict when you get back from the break, or soon after you get back from the break, and if that's the case, then everybody will know to be here, whoever wants to hear the verdict.

All right, bring the jury in.

(Jury panel is present at 3:37 p.m.)

THE COURT: Good afternoon. I have your note. That is certainly fine, I'll be glad to do that. You also say, ready, which I take it, I'm guessing, means that when you get back from the break, you will very soon have a verdict. You all are nodding. That's fine. I appreciate the advance notice.

So I'm going to give you a 15 minute break. When you come back to the jury room and you are ready to go forward, you have your verdict, and the verdict sheet is all signed, just knock on the door. We will all be waiting on you so you will

not have to wait on us.

Please remember during the break not to talk about the case with each other in small groups or outside the jury room, and to the extent you do leave the jury room, try to avoid any contact with the lawyers, parties, witnesses or family members.

You are excused for 15 minutes and I'll see you back whenever you are ready after that.

(Jury panel was excused at 3:38 p.m. for a recess.)

THE COURT: So 15 minutes, five minutes to four. If I can ask everybody to be in place with anybody you want in the courtroom in terms of your clients, to be here. We might have to wait on them a few minutes, but they were all nodding. It was pretty clear to me they have reached a verdict, and just want to take a few minutes.

MS. DEAN: Make this 15 minutes more stressful.

THE COURT: Well, for you all, yeah. We will be in recess then for 15 minutes.

(Court was in recess.)

THE COURT: The jury sent in a note that they have a verdict, so I just would remind folks in the audience to keep your thoughts to yourself about the verdict, whether you are happy or unhappy or somewhere in between. You'll be able to react later. So anything we need to do before the jury comes in? No.

(Jury panel is present at 3:52 p.m.)

THE COURT: All right. Would the person selected as your foreperson please stand.

Ms. Garrison, has the jury reached a unanimous verdict?

THE FOREPERSON: Yes.

THE COURT: Ms. Winchester will come over and take the verdict sheet and you can be seated.

Ladies and gentlemen of the jury, your foreperson has returned the following verdict:

Was Covil negligent and was that negligence a proximate cause of injury to Mr. Finch? Answer, yes.

Is that your verdict?

(All jurors respond yes.)

THE COURT: Issue two: Did Covil unreasonably fail to provide an adequate warning or instruction and was that negligence a proximate cause of injury to Mr. Finch? Answer, yes.

If this is your verdict, say yes.

(All jurors respond yes.)

THE COURT: Issue three, what amount is the plaintiff entitled to recover for Mr. Finch's wrongful death? Answer, $32.7 million. If this is your verdict?

(All jurors respond yes.)

THE COURT: Is there anything else for the jury for

the plaintiff?

MS. DEAN: No, Your Honor.

MR. SILVERMAN: Your Honor, we would like to reserve --

THE COURT: For the jury.

MR. SILVERMAN: No, Your Honor.

THE COURT: Ladies and gentlemen, I want to thank you for your time and attention in this matter. It was a shorter trial than I told you on Monday, but it was still five days away from your jobs and other obligations. I know it is inconvenient to be a juror, but these kinds of cases have a lot more weight behind them when it is a community decision and, you know, I think pretty highly of most judges most of the time, but I think even higher of jurors. I'm not expressing a particular opinion of this verdict, I'm speaking generally. It is an important role that you serve for our society and all you have to do is read in the paper or on the internet -- I'm old-fashioned, but can read on the internet about how disputes between parties are resolved in other parts of the world to realize that our system is pretty civilized and fair.

I want to thank you for your time and your participation in it. In just a second I'll send you back to the jury room. Ms. Winchester will be back there in a minute; if you need something for your employer, parking things stamped, all of those housekeeping details and as soon as she

is finished with those things, you'll be free to go.

Once you are done, you are free to talk about this case. You can talk about it in small groups as you walk back to your car. You can tell your family, your neighbors, your coworkers about the case, but I want to tell you as well, you are free not to talk about the case. Some people really don't want to talk about it, and it is completely up to you whether you talk about this case and with whom.

You're free to look up anything you want to on the internet now. All of those things that I've told you during the trial, you are released from all of those instructions.

Thank you, very much, for your service, and you are discharged. You can go ahead back to the jury room and Ms. Winchester will be with you there shortly.

(The jury panel was excused.)

THE COURT: I would suggest that you all confer. I will look for a proposed -- I will do a judgment eventually, but it might be faster if you all confer about the form and submit something to me. If there are any post-trial motions, if you all would just talk about the timing for that and a schedule, if you're going to -- you indicated that you might do that, so you can talk with each other. I don't know what the rules are about that. Let me know.

If I don't hear anything from you in a week or so, somebody will probably be calling you up to find out what is

going on. I know you all are tired and need a little bit of a rest, but we do want to move the case towards final resolution.

I just repeat again, I appreciate counsel's professionalism and a well-tried case. I always hate meeting folks under these circumstances but, you know, it is nice to be in the courtroom with you all.

Anything else we need to do before we adjourn?

MR. SILVERMAN: No, Your Honor.

MS. DEAN: No, Your Honor.

THE COURT: Court is adjourned.

(Court was adjourned at 4:00 p.m.)

C E R T I F I C A T E

I, J. CALHOUN, RPR, United States District Court Reporter for the Middle District of North Carolina, DO HEREBY CERTIFY:

That the foregoing is a true and correct transcript of the proceedings had in the above-entitled matter.

Date: 11-19-18

J. Calhoun, RPR
United States Court Reporter
324 W. Market Street
Greensboro, NC 27401

APPENDIX B

1 CASE NUMBER: BC 437739
2 CASE NAME: PAULUS V. ACCESS HOTELS
3 LOS ANGELES, CALIFORNIA MONDAY, AUGUST 27, 2012
4 DEPARTMENT 20 KEVIN C. BRAZILE, JUDGE
5 APPEARANCES: (AS HERETOFORE NOTED.)
6 REPORTER: NANCY SMITH-WELLS, CSR #6931
7 TIME: A.M. SESSION
8
9
10
11 (The following proceedings were
12 held in open court outside
13 the presence of the jury:)
14
15 THE COURT: Good morning everyone. The Court
16 calls the case of Paulus vs. Crane Co.
17 Counsel, please state your appearances for
18 the record.
19 MS. DEAN: Jessica Dean for the Paulus Family.
20 THE COURT: Good morning.
21 MR. PURDY: Good morning. Stuart Purdy for the

22 Paulus Family.

23 THE COURT: Good morning.

24 MR. LOWERY: James Lowery for Crane Co. Good

25 morning.

26 THE COURT: Good morning.

27 MR. DAVIS: Jeff Davis for Crane Co. Only be here

28 for a little while.

1 THE COURT: Okay.

2 MR. FARKAS: And Stephen Farkas for Crane Co.,

3 Your Honor.

4 THE COURT: Okay. Very good. I saw some jury

5 instructions and a verdict form that was submitted looks

6 like early this morning and I made some really slight

7 changes, real slight, and basically I used the word

8 asbestos-containing products because that was used in

9 certain portions and then other places just said

10 products. So for consistency sake, I just used

11 asbestos-containing products.

12 MR. DAVIS: Like on 1203, 1204.

13 THE COURT: I actually gave them to the clerk to

1 a verdict tomorrow.

2 MR. LOWERY: Plus I think there's probably an

3 issue of whether we have witnesses. I would ask for a

4 day's adjournment and then bring them back and then do

5 it then. I think that makes more sense.

6 THE COURT: We'll see what we can arrange.

7 Depends when they come back with a verdict and obviously

8 what they find. We can't delay it much because I didn't

9 really go into a lot with them about the second phase.

10 It's mentioned in the instructions briefly, but --

11 because I don't want them to think, well, decide the

12 case one way so we can leave. I want them to decide the

13 case and if they have to come back, they have to come

14 back. So we'll see what happens, but be ready if they

15 come back with a verdict.

16 MS. DEAN: We haven't had a chance to talk amongst

17 ourselves about what we're anticipating so we can do

18 that now and have a better idea.

19 THE COURT: Right. If they find for punitives, be

20 ready to go. I don't know who your witnesses are and

21 what you plan to produce, but be ready.

22 MR. LOWERY: Well, part of the problem, Your

23 Honor, is the fact that I would anticipate that we'll

24 probably bring Mr. Pantaleoni to testify and he has to

25 come all the way from Connecticut, which physically

26 would take a while for him --

27 THE COURT: A five-hour plane flight.

28 MR. LOWERY: To have him come out here and sit

1 here and nothing is going to happen, that doesn't really

2 work either. That's why I'd ask for a day to get him

3 out here.

4 THE COURT: Right. I strongly urge you to call

5 him today. Let him know the jury is deliberating

6 tomorrow morning. They can have a verdict as early as

7 tomorrow, so he needs to be on a plane, perhaps as early

8 as tomorrow night for Wednesday. Obviously if they come

9 back with a verdict tomorrow, we wouldn't start till
10 Wednesday; come back with Wednesday. I'll give you till
11 Thursday, so I could give that you amount of leeway, but
12 not much more because they're not going to be very happy
13 if they have to stay, but they'll stay.
14 Anything else?
15 MS. DEAN: Sleep.
16 THE COURT: Okay. All right. Well, I want to
17 thank you all for doing a fine job. It was a pleasure
18 having you. Very professional, very well cone by both
19 sides. I think, Mr. Lowery, your clients were
20 well-represented. Paulus Family, you got excellent
21 representation as well. It was really a pleasure
22 watching the trial and seeing great lawyers do good
23 work, so congratulations to you both no matter what the
24 outcome. You all did a good job, nothing to be ashamed
25 of, nothing to be sad about, whatever the outcome is.
26 MR. LOWERY: Thank you, Your Honor.
27 MS. DEAN: Thank you.
28 THE COURT: All right.

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2 (Court was adjourned in the

3 matter at 4:15 p.m.)

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APPENDIX C

American Board of Trial Advocates
By the authority vested in them
do hereby confer upon:
Jessica Michelle Dean
the rank of
Associate
having duly examined her and having verified her
credentials and having found her to possess
the requisite skill, integrity and experience
in the special art of advocacy to qualify
for this rank.
Given this 11th day of October 2014
Mark P. Robinson, Jr.
President
Christopher A. Duggan
Secretary

American Board of Trial Advocates
2001 Bryan Street, Suite 3000, Dallas, Texas 75201
Phone: (214) 871-7523 Fax: (214) 871-6025
national@abota.org www.abota.org

Membership Application

❑ Initiation Fee: Please include check for $300.00 made payable to ABOTA.

Section I — Applicant Information *(Please type or print)*

Name (Mr./Ms./Mrs./Hon.) Nametag preference (First name/nickname):

Firm or Court

Firm or Court Address

City State ZIP E-Mail Address:

Phone ( ) Fax ( )

Bar number Year admitted to Bar:

Law School Year graduated:

Home address City State ZIP

Home Phone ( ) Cell Phone ( ) Preferred address for official ABOTA correspondence: ☐ Office ☐ Home

Date of Birth *(mm/dd/yyyy)*: Ethnicity *(optional)*: Gender *(optiona* ☐ M / F ☐

Section II — Membership Qualifications (Please refer to the reverse side for specific requirement for each class of membership)

I hearby make application for:

☐ Member ☐ Associate ☐ Advocate ☐ Judge

Primary practice or residence (city, state): _____

Years of experience _____ Primary area of practice: ☐ Plaintiff ☐ Defense

A list of tried cases MUST be attached as supporting documentation

- Number of Civil jury trials to a jury verdict or hung jury as lead counsel (Worksheet A) (**Minimum of 10 trials on this form are required for eligibility**): _____
- Number of Civil jury trials to jury verdict or hung jury as associate counsel (Worksheet B): _____
- Number of Civil jury trials that resolved other than by jury verdict or hung jury as lead counsel (Worksheet C): _____
- Number of Felony jury trials to jury verdict or hung jury as lead counsel (Worksheet D): _____
- **Total:** _____

Section III — Applicant Certification

I certify that to the best of my knowledge and belief the information presented herein and/or attached hereto is an accurate summary of my qualifications for membership in ABOTA; further, that if elected to membership I will adhere to the ABOTA Constitution and Bylaws, to the Resolutions duly adopted by the National Board of Directors, to the Code of Professionalism, and to the Principles of Civility, Integrity, and Professionalism. I further certify that I have not been formally disciplined for an ethical violation by any state or federal court, bar association, or disciplinary tribunal other than as disclosed in this Application for Membership and/or in an attachment hereto.

I acknowledge and agree that if elected to membership in ABOTA my membership is both voluntary and a privilege and may be terminated in accordance with the ABOTA Constitution and Bylaws; further, that should my membership be terminated I will immediately return to ABOTA my membership plaque and/or any and all other formal indicia of membership issued to me. I further acknowledge and agree that so long as I am a dues-paying member of ABOTA I will pay all dues, assessments, and/or fees assessed in accordance with the ABOTA Constitution and Bylaws.

Applicant Signature: _____ Date: _____

Section IV — Chapter Nomination and Approval

- As a member of the _____ Chapter, I hereby nominate the foregoing applicant for membership in ABOTA:

Member's Name (please print): _____ Signature: _____ Date: _____

- As a member of the _____ Chapter Executive Committee, I hereby certify that the foregoing applicant has received an affirmative vote of seventy-five percent (75%) of the Executive Board of the local chapter and an affirmative vote of seventy-five percent (75%) of the local chapter present and voting at an official meeting of, or in mailing to, the chapter's general membership.

EC Member (please print: _____ Title (please print): _____

Signature: _____ Date: _____

Membership Eligibility and Classes

Article III of the ABOTA Constitution governs membership eligibility and classes. Initial applications for membership must be for the "Member," "Associate," "Advocate" or "Judge" class of membership. Any trial lawyer who is of high personal character and honorable reputation, and who is a member of the Bar of the state, province, district or territory in which he or she practices, and who has met the qualifications hereinafter prescribed, may become a member of ABOTA upon nomination, election, and payment of initiation fees and dues.

The requirements for admission as a Member, Associate, Advocate and Judge rank are:

Member — Shall have completed (10) civil jury trials to jury verdict or hung jury as lead counsel. The applicant shall further possess the other and additional professional and ethical attributes and accomplishments as becomes one committed to the preservation of the Seventh Amendment. Each such person shall be admitted to the rank of "Member" and shall have all the rights of any other class of membership.

Associate — Shall have at least five (5) years of active experience as a trial lawyer and as a member of the Bar of the state, province, district or territory in which he or she practices, and shall have tried a minimum of twenty (20) civil jury trials to a jury verdict or hung jury as lead counsel or, in the alternative, shall have tried a minimum of ten (10) such civil jury trials and twenty (20) felony criminal trials to a jury verdict or hung jury as lead counsel or, as a second alternative, shall have tried ten (10) civil jury trials to a conclusion in a jury verdict or hung jury as lead counsel and have acquired 200 points under the trial experience equivalency provisions as defined by Bylaw IV, Section 1.

Advocate — Shall have at least eight (8) years of active experience as a trial lawyer and as a member of the Bar of the state, province, district or territory in which he or she practices, and shall have tried a minimum of fifty (50) civil jury trials to a jury verdict or hung jury as lead counsel, or, in the alternative, shall have tried twenty-five (25) civil jury trials to a conclusion in a jury verdict or hung jury as lead counsel and shall have acquired 500 points under the trial equivalency provisions as defined by Bylaw IV, Section 1.

Judge — Any judge who by reason of his or her standing in the community and his or her contribution to the advancement of the cause of justice under the jury system, and who is a member or a former member of a State Bar Association and prior to becoming a judge has acquired the minimum qualifications required of a Member, shall be eligible for admission to membership, provided he or she has received an affirmative vote in accordance with Article III, Section 3, Subsection 3. An applicant under this class of membership shall be required to pay an initiation fee equivalent to that of an associate member and shall be subject to the payment of dues and assessments.

Trial Experience Equivalency

Bylaw IV of the ABOTA National Bylaws establishes the following point system for trial experience equivalency authorized under Article III, Section 2 of the ABOTA Constitution:

Section 1. Trial experience equivalency.
For the purposes of trial experience equivalency, an applicant's trial experience may, at the discretion of the National Board, be measured by the point system described hereinbelow:

- The total number of points required for eligibility to admission are:

(1) For the rank of Member 100, to include at least 10 civil jury trials to jury verdict or hung jury as lead counsel.
(2) For the rank of Associate 200.
(3) For the rank of Advocate 500.

- Points shall be assigned on the following basis:

(1) 10 points for each civil jury trial to jury verdict or hung jury as lead counsel; or a felony criminal trial to a jury verdict or hung jury as lead counsel.

(2) 15 points for any trial described in (1) above which consumes more than 10 trial days.

(3) 20 points for any trial described in (1) above which consumes more than 15 trial days.

(4) 30 points for any trial described in (1) above which consumes more than 20 trial days.

(5) 40 points for any trial described in (1) above which consumes more than 30 trial days.

(6) One-half of the points to which an attorney would be otherwise entitled in cases where the jury returned a verdict will be assign ed in the event the trial is concluded by means other than by jury verdict.

(7) No applicant shall be considered unless he or she shall have tried a minimum of ten (10) civil jury trials to a conclusion for the rank of Member or Associate; twenty-five (25) civil jury trials to a conclusion for the rank of Advocate.

Section 2. Trial Day.
For the purpose of computing trial days, a trial shall be deemed to have commenced upon the swearing of the jury panel.

Section 3. Eligibility.
In order to be eligible for the assignment of points enumerated herein, the attorney must be lead or full-time associate counsel.

Section 4. Lead Counsel.
Lead Counsel is an attorney substantially responsible for the personal representation of the client during the trial. "Substantially responsible" means, at a minimum:

(1) Selecting a jury, or opening, or closing.
(2) Presentation of live witnesses through direct or cross examination.

Section 5. Associate Counsel.
An attorney trying the case with lead counsel will be assigned fifty percent (50%) of the points eligible for lead counsel.

Elevation in Rank

Article III, Section 2 of the ABOTA Constitution provides for an additional class of membership as follows:

Diplomate — Shall have at least twelve (12) years of active experience as a trial lawyer and as a member of the Bar of the state, province, district or territory in which he or she practices, shall have held the rank of Advocate for a minimum of three (3) years and shall have tried a minimum of one hundred (100) civil jury trials to a conclusion in a court of general jurisdiction or a federal court, or, in the alternative, shall have tried fifty (50) civil jury trials to a conclusion in a court of general jurisdiction or a federal court and shall have acquired 1,000 points under the trial
equivalency provisions as defined by Bylaw IV, Section 1.

WORKSHEET

AMERICAN BOARD OF TRIAL ADVOCATES (ABODA)

A. CIVIL JURY TRIALS TO JURY VERDICT AS LEAD COUNSEL

CASE NAME OR NUMBER & OPPOSING COUNSEL	COURT WHERE CASE TRIED	DATE OF VERDICT IF KNOWN	TRIAL DAYS	NUMBER OF POINTS
1. Kinseth	Wright County Clarion, Iowa	4/14	20	20

Counsel for Weil McLain:

Ed McCambridge and Jason Eckerly
Segal McCambridge
312.645.7800
Chicago, Illinois

I certify the foregoing trial information is true and correct

TOTAL POINTS 285

_____ _____

Signature Date

A.

March 28, 2010

WORKSHEET

AMERICAN BOARD OF TRIAL ADVOCATES (ABODA)

A. CIVIL JURY TRIALS TO JURY VERDICT AS LEAD COUNSEL

CASE NAME OR NUMBER & OPPOSING COUNSEL	COURT WHERE CASE TRIED	DATE OF VERDICT IF KNOWN	TRIAL DAYS	NUMBER OF POINTS
1. Garvin	Richland County South Carolina	9/13	15	15

Counsel for Durco & Byron Jackson:

Timothy W. Bouch - Leath, Bouch & Crawford
(843) 937-8811
tbouch@leathbouchlaw.com

Counsel for Crane Co.:

David Fusco – K&L Gates
david.fusco@klgates.com
(412) 355-6361

Robert O. Meriwether - Nelson Mullins Riley
(803) 255-9469
robert.meriwether@nelsonmullins.com

2. Whipple	St. Louis	11/13	16	20

Counsel for John Crane:
Dan Griffin – O'Connell, Tivin, Miller & Burns, LLC
(414) 455-8709
dgriffin@otmblaw.com

I certify the foregoing trial information is true and correct

TOTAL POINTS 285

_____ _____

Signature Date

A.

March 28, 2010

WORKSHEET

AMERICAN BOARD OF TRIAL ADVOCATES (ABODA)

A. CIVIL JURY TRIALS TO JURY VERDICT AS LEAD COUNSEL

CASE NAME OR NUMBER & OPPOSING COUNSEL	COURT WHERE CASE TRIED	DATE OF VERDICT IF KNOWN	TRIAL DAYS	NUMBER OF POINTS
1. Betty Estenson, Individually and as Person. Representative of the Estate of Edwin Estenson, Deceased v. Borg Warner Morse Tec, Inc., et al. Case No. 11-2-25571-9 SEA Counsel for Caterpillar: J. Scott Wood // Jan E. Brucker Foley & Mansfield, PLLP 800 Fifth Ave., Ste. 3850 Seattle, WA 98104 (206) 456-5360 swood@foleymansfield.com	Superior Court, King County, Seattle, Washington	5/13	32	40
2. David F. Fortier, et al. v. A. O. Smith Corporation, et al. Case No. FBT-BA-06-5005849-S Counsel for Allis Chalmers Corp.: Jeff L. Ment // Morris Borea Rome McGuigan, PC One State St. Hartford, CT 06103 (860)560-8037 mborea@rms-law.com	Superior Court, Bridgeport, CT	3/09	58	40

I certify the foregoing trial information is true and correct

TOTAL POINTS 285

_____ _____

Signature Date

March 28, 2010

WORKSHEET

AMERICAN BOARD OF TRIAL ADVOCATES (ABODA)

A. CIVIL JURY TRIALS TO JURY VERDICT AS LEAD COUNSEL

CASE NAME OR NUMBER & OPPOSING COUNSEL	COURT WHERE CASE TRIED	DATE OF VERDICT IF KNOWN	TRIAL DAYS	NUMBER OF POINTS
3. Elaine Margie Paulus, Individually and as Personal Representative of the Estate of William Paulus, Deceased; Dee Ann Walker; Gregory Paulus and Mark Paulus v. Access Hotels & Resorts, et al. Case No. BC437739 Counsel for Crane Co.: James A. Lowery - K&L Gates LLP 1717 Main St; Suite 2800 Dallas, TX 75201 (214) 939-4983 james.lowery@klgates.com Geoffrey M. Davis - K&L Gates 10100 Santa Monica Blvd., 7th Flr, Los Angeles, CA 90067 (310) 552-5042 geoff.davis@klgates.com	Superior Court Los Angeles, CA	09/13	19	20
4. Edward Walton and Carol Walton v. Alfa Laval, Inc. et al. Case No. BC361382 Counsel for William Powell: Dennis M. Young Foley & Mansfield, PLLP 1111 Broadway, 10th Floor Oakland, CA 94607 (510) 590-9500 dyoung@foleymansfield.com	Superior Court Los Angeles, CA	2/08	13	15

I certify the foregoing trial information is true and correct

TOTAL POINTS 285

_____ _____

Signature Date

WORKSHEET

AMERICAN BOARD OF TRIAL ADVOCATES (ABODA)

A. CIVIL JURY TRIALS TO JURY VERDICT AS LEAD COUNSEL

CASE NAME OR NUMBER & OPPOSING COUNSEL	COURT WHERE CASE TRIED	DATE OF VERDICT IF KNOWN	TRIAL DAYS	NUMBER OF POINTS
5. Joseph Herbert Smith and Roberta Jean Smith v. Alfa Laval, Inc., et al. Case No. 3412 Counsel for John Crane: Mark I. Tivin O'Connell, Tivin, Miller & Burns, LLC 135 S. LaSalle St.;Ste. 2300, Chicago, IL 60603 (312) 256-8800 mark@otmblaw.com William R. Adams Dickey McCamey & Chilcote, PC 300 Delware Ave., Ste. 1630 Wilmington, DE 19801 (302) 428-6133 wadams@dmclaw.com	Court of Common Pleas Philadelphia, PA	6/11	17	20
6. Richard and Beverly Hecklesberg v. A.W. Chesterton Company, et al. Case No. 100602038 Counsel for John Crane: Mark I. Tivin & William R. Adams Same as above.	Court of Common Pleas Philadelphia, PA	6/11	17	20*

* The Smith and Hecklesberg cases were consolidated and tried together. I did not know if I should include both cases. I included the both as cases tried to verdict but only counted the trial days for one of the two trials. The total points do not include the points for listed for Hecklesberg.

I certify the foregoing trial information is true and correct TOTAL POINTS 285

_____ _____

Signature Date

A.

March 28, 2010

WORKSHEET

AMERICAN BOARD OF TRIAL ADVOCATES (ABODA)

A. CIVIL JURY TRIALS TO JURY VERDICT AS LEAD COUNSEL

CASE NAME OR NUMBER & OPPOSING COUNSEL	COURT WHERE CASE TRIED	DATE OF VERDICT IF KNOWN	TRIAL DAYS	NUMBER OF POINTS
7. Susan K. Lenz, Individually and as Representative of the Estate of Gary W. Lenz, Deceased v. Allis-Chalmers Corporation, et al. Case No. 2006-CP-40-5106 Counsel for Elliott & Garlock: Timothy W. Bouch - Leath, Bouch & Crawford (843) 937-8811 tbouch@leathbouchlaw.com Counsel for John Crane: James H. Elliott, Jr. - Pritchard & Elliott, LLC (843) 805-6550 jelliott@richardsonplowden.com Counsel for Viad: Robert O. Meriwether - Nelson Mullins Riley (803) 255-9469 robert.meriwether@nelsonmullins.com	Court of Common Pleas Richland, SC	05/09	19	20
8. Franklin D. Holdren and Janice A. Holdren v. Alfa Laval, Inc. Case No. 08-0718 Counsel for John Crane: David H. Stillman - Stillman & Associates, P.C. (781) 829-1077 dhs@stillmanlegal.com Counsel for Viad: Peter C. Netburn // Lynda Riesgo Jensen - Hermes, Netburn, O'Connor & Spearing, P.C. (617) 210-7720 pnetburn@hermesnetburn.com	Superior Court Massachusetts	09/09	16	20

I certify the foregoing trial information is true and correct

TOTAL POINTS 285

_____ _____

Signature Date

WORKSHEET

AMERICAN BOARD OF TRIAL ADVOCATES (ABODA)

A. CIVIL JURY TRIALS TO JURY VERDICT AS LEAD COUNSEL

CASE NAME OR NUMBER & OPPOSING COUNSEL	COURT WHERE CASE TRIED	DATE OF VERDICT IF KNOWN	TRIAL DAYS	NUMBER OF POINTS
9. Eva Mulcahy, Individually and as Special Administrator of the Estate of John Mulcahy, Deceased, v. 3M Company et al Case No. 08-L- 006223 Counsel for Crane Co.: Jeffrey S. King - K&L Gates (617) 261-3179 jeffrey.king@klgates.com Counsel for General Electric: John M. Fitzpatrick - Wheeler, Trigg & O'Donnell (303) 244-1874 fitzpatrick@wtotrial.com	Circuit Court, 1st Jud Dist. Cook County, IL	08/09	10	10
10. Ralph Harvey and Mary J. Harvey v. Bondex International, Inc., et al. Case No. 2006-64449 Counsel for Bondex: T. Lynn Walden - Walden Reynard (409) 833-0202 twalden@wrtexaslaw.com Counsel for Kaiser Gypsum: Misti Mosteller - DeHay & Elliston LLP (214) 210-2479 mmosteller@dehay.com	County Court At Law No. 1 Dallas, TX	2008	12	15

I certify the foregoing trial information is true and correct

TOTAL POINTS 285

_____ _____

Signature Date

March 28, 2010

WORKSHEET

AMERICAN BOARD OF TRIAL ADVOCATES (ABODA)

A. CIVIL JURY TRIALS TO JURY VERDICT AS LEAD COUNSEL

CASE NAME OR NUMBER & OPPOSING COUNSEL	COURT WHERE CASE TRIED	DATE OF VERDICT IF KNOWN	TRIAL DAYS	NUMBER OF POINTS
11. Renu Garg v. Medical Center of Arlington Defense Counsel Sabrina R Karels 900 Jackson Street # 100 Dallas, TX 75202-4452 (214) 712-9524	141st District Court Fort Worth, Texas	2004	18	20
RENU K. GARG vs. HCA - ARLINGTON, INC. d/b/a MEDICAL CENTER OF ARLINGTON Tarrant County Cause Number 141-196793-03				
12. Julie Harris v. ? [can't recall the defendant] Defense Counsel: D. Bowen "Bo" Berry 1412 Main Street Suite 2300 Dallas, TX 75202 (214) 915-9822 berry@berryfirm.com	Denton County Denton, Texas	2006	10	10
JULIE HARRIS v. JAMES A. CONYERS, M.D. Denton County Cause Number: 2002.50156.367				

I certify the foregoing trial information is true and correct

TOTAL POINTS 285

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B. CIVIL JURY TRIALS TO JURY VERDICT AS ASSOCIATE COUNSEL

CASE NAME OR NUMBER & OPPOSING COUNSEL	COURT WHERE CASE TRIED	DATE OF VERDICT IF KNOWN	TRIAL DAYS	NUMBER OF POINTS
1. Estelle Firth, Individually and as Personal Representative of the Estate of Thomas Firth, vs. AGCO Corporation, et al Case No. 08-CP-23-9186 Counsel for Garlock: Timothy W. Bouch // Amy Melvin Leath, Bouch & Crawford 92 Broad Street Charleston, SC 29401 (843) 937-8811 tbouch@leathbouchlaw.com	Court of Common Pleas Greenville, SC	6/09	5	5
2. Rafe Ledford and Eveline Ledford v. AGCO Corporation Case No. BC360164 Counsel for General Motors: Eugene Brown, Jr. Felice Brown Eassa & McLeod, LLP 1999 Harrison St., 18th Floor Oakland, CA 94162 (415) 781-7900 eugene.brown@sedgwicklaw.com	Superior Court San Francisco, CA	2008	14	7.5

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C. CIVIL JURY TRIALS THAT RESOLVED OTHER THAN BY JURY VERDICT AS LEAD COUNSEL

CASE NAME OR NUMBER & OPPOSING COUNSEL	COURT WHERE CASE TRIED	DATE OF VERDICT IF KNOWN	TRIAL DAYS	NUMBER OF POINTS
1. Pete and Nancye Bumgardner v. ABB, Inc. et al. Case No. 10-CP-29-855 Counsel for Cleaver Brooks: Steven J. Pugh // Joseph E. Thoensen Richardson Plowden & Robinson (843) 448-1008 spugh@RichardsonPlowden.com jthoensen@RichardsonPlowden.com Counsel for D.B.Riley, Inc.: Tom Radcliffe - Dehay & Elliston (410) 783-7001 tradcliffe@dehay.com	Court of Common Pleas Lancaster, SC	01/11	5	5
2. Lori Ayon, Trustee for the Estate Of Robert Casci, Deceased v. 3M Company, et al. Case No. 62-CV109809 Counsel for Sherwin Williams: Albert H. Parnell - Hawkins Parnell (404) 614-7529 aparnell@hptylaw.com Jason J. Irvin - Hawkins Parnell (214) 780-5202 jirvin@hptylaw.com	Dist Court, 2nd Jud. Dist Ramsey, MN	05/11	3	5

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C. CIVIL JURY TRIALS THAT RESOLVED OTHER THAN BY JURY VERDICT AS LEAD COUNSEL

CASE NAME OR NUMBER & OPPOSING COUNSEL	COURT WHERE CASE TRIED	DATE OF VERDICT IF KNOWN	TRIAL DAYS	NUMBER OF POINTS
3. C.H. Dennis and Rayma Dennis v. 3M Company, et al Case No. BC 481310 Counsel for Union Carbide Corp: William Oxley - Dechert LLP (213) 808-5712 william.oxley@dechert.com Stephen M. Nichols - McKenna Long Aldridge (213) 243-6181 snichols@mckennalong.com	Superior Court Los Angeles, CA	11/12	16	10
4. Millard Fillmore Jackson and Linnie Jackson v. Alfa Laval, Inc. Case No. 2012-CP-235069 Counsel for Crane Co.: Robert O. Meriwether Nelson, Mullins, Riley & Scarbourough (803) 255-9469 robert.meriwether@nelsonmullins.com	Court of Common Pleas Greenville, SC	03/13	4	5

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C. CIVIL JURY TRIALS THAT RESOLVED OTHER THAN BY JURY VERDICT AS LEAD COUNSEL

CASE NAME OR NUMBER & OPPOSING COUNSEL	COURT WHERE CASE TRIED	DATE OF VERDICT IF KNOWN	TRIAL DAYS	NUMBER OF POINTS
5. Carol Palmer, Individually and As Representative of the Estate and Surviving Heirs of Harold Palmer, Deceased And Elizabeth Bohannon, Peggy Naff, Dianne Palmer, Karen Snedecker and Randall Palmer v. Air & Liquid Systems Corporation Case No. 1122-CC08815 Counsel for Yuba Heat Transfer: Clayton E. Dickey // Matthew S. Jensen - Rasmussen, Willis, Dickey & Moore, LLC 9200 Ward Parkway, Ste. 310 Kansas City, MO 64114 (816) 360-1711 cdickey@rwdmlaw.com	22nd Jud. Circuit St. Louis, MO	02/13	2	5
6. Marilyn Creek as Personal Representative of the Heirs and Estate Of James Creek, Deceased v. Alfa-Laval, Inc. Case No. 07-CA-011285 Counsel for Garlock: Ray Harris - Schachter Harris, LLP 220 Canal Centre; 400 East Las Colinas Boulevard Irving, TX 75039 (214) 999-5700 rharris@schachterharris.com	Circuit Court, 13th Jud. Dist. Hillsborough County, FL	07/09	5	5

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C. CIVIL JURY TRIALS THAT RESOLVED OTHER THAN BY JURY VERDICT AS LEAD COUNSEL

CASE NAME OR NUMBER & OPPOSING COUNSEL	COURT WHERE CASE TRIED	DATE OF VERDICT IF KNOWN	TRIAL DAYS	NUMBER OF POINTS
7. Arleen Pellegal, et al. v. Northrop Grumman Systems Corp, etal Case No. 2007-7749 Trial Counsel for Leslie: Lawrence G. Pugh // Jonathan P. Hilbun Pugh Accardo Haas Redecker LLC 1100 Poydras St. New Orleans, LA 70163 (504) 799-4533 lpugh@pugh-law.com	Civil Dist. Court Parish of Orleans, LA	01/09	1	5

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C.

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AMERICAN BOARD OF TRIAL ADVOCATES (ABODA)

D. MAJOR FELONY JURY TRIALS TO JURY VERDICT AS LEAD COUNSEL

CASE NAME OR NUMBER & OPPOSING COUNSEL	COURT WHERE CASE TRIED	DATE OF VERDICT IF KNOWN	TRIAL DAYS	NUMBER OF POINTS
None.				

I certify the foregoing trial information is true and correct

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Signature Date

APPENDIX D

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

Delvin Edward Domagala and
Eileen Rose Domagala

Plaintiffs,

vs. TRANSCRIPT OF PROCEEDINGS

3M Company, et al,

Defendants.

COURT FILE 62-CV-16-3232

ASBESTOS JURY TRIAL

December 9, 2016, Openings, AM

The above-entitled matter came duly on for a jury trial before the HONORABLE JOHN H. GUTHMANN, one of the judges of the above-named court, on December 9, 2016, at the Ramsey County Courthouse, St. Paul, Minnesota.

DRAFT

1 C O U N S E L T A B L E A P P E A R A N C E S

2 JESSICA DEAN, Attorney at Law,
3 AARON CHAPMAN, MICHAEL STROM, Attorney at Law, RYAN T.
4 GOTT, Attorney at Law, appearing on behalf of the
5 Plaintiffs;
6 SUSAN M. HANSEN, Attorney at Law,
7 MICHAEL W. DRUMKE, Attorney at Law, and ADAM H.
8 DOERINGER, Attorney at Law, representing
9 Georgia-Pacific, LLC, Defendant;
10 LISA M. ELLIOTT, Attorney at Law,
11 and TREVOR J. WILL, Attorney at Law, appearing on behalf
12 of CertainTeed Corporation, Defendant;
13 JON P. PARRINGTON, Attorney at
14 Law, and DANIEL R. GRIFFIN, Attorney at Law, appearing
15 on behalf of John Crane, Inc., Defendant;
16
17
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DRAFT DRAFT DRAFT

1 MS. DEAN: No, Your Honor.
2 MR. DRUMKE: No, Your Honor.
3 MR. WILL: No, Your Honor.
4 MR. GRIFFIN: No, Your Honor.
5 THE COURT: All right. Well, this
6 completes my preliminary instructions and at this time
7 members of the jury, we're gonna proceed to the opening
8 statements, and under our rules the plaintiff will be
9 arguing first, so Ms. Dean will be arguing on behalf of
10 the plaintiff.
11 MS. DEAN: Thank you, Your Honor. Good
12 morning, I woke up this morning excited to be able to
13 talk to you. After I'm done with opening statements, I
14 can't even say hello, and ask you how you're day was.
15 We have to ask the questions and think any about what
16 you care about to get the testimony in evidence. We
17 can't sit down and have a the conversation like normal,
18 and so, this first part is meant to try to give you an
19 overview.
20 We are told you might be here until the end of
21 this year of what you're gonna hear 'cause a lot of the
22 times it doesn't come in the most normal order. You
23 have schedules that you're dealing with, court
24 limitations on dark days that you're open and that
25 you're not, and so the hope is that if each of us get a

1 chance to give an overview it will make more sense.
2 I stole this from another lawyer. They said
3 it's kind of like getting a puzzle, one of those 5,000
4 piece puzzle, and the first thing you kind of do is you
5 do the edges and prop up the box, and while you don't
6 have a lot of the pieces at that point, at least, kind
7 of helps figure out where they go, and so that's my hope
8 if for the next hour, hour-and-a-half, outline of what I
9 think you're gonna hear and why we wanted you to be
10 here.
11 I have some slides and some stuff that hopefully
12 will help explain a lot of what you hear. This is a big
13 and important case to both parties. Dell Domagala has
14 stage 4 epithelial malignant Mesothelioma. It's
15 terminal. It can't be cured. Chemotherapy can slow it
16 down, but even then not by a lot. He's doing pretty
17 well for having this diagnosis. They start him with
18 oxygen and particularly now that he's sleeping with it,
19 he feels so much better when he wakes up, but he still
20 is have a hard time, lots the pain and lots of pain
21 medications.
22 You're gonna hear his family is from the city of
23 Luverne. All asbestos no matter where you are in
24 Minnesota that's about three-and-a-half hours away from
25 their home. I hope you get to meet Del and that he can

1 come next week. We're playing that by ear. If not, he
2 has already taken an oath and was asked questions for
3 days so you can at least see him, hear his voice, hear
4 about his experience one way or another. That's Del
5 [pointing.]
6 THE COURT: Ms. Dean.
7 MS. DEAN: That's Mr. Domagala. I
8 apologize, Your Honor. I'm terrible about using first
9 names, and here we're supposed to use formal names.
10 That's Mr. Domagala in the red shirt. That is his crew.
11 I want to introduce you at least to some of them that
12 are here today. Eileen, do you want to stand up.
13 Eileen Domagala. This is his wife of almost 60 years.
14 They met when they were kids. They have grown up
15 together. They've raised six people together. They're
16 responsible for this crew [indicating.]
17 They met in South Dakota, and they lived a lot
18 of their live in Luverne, Minnesota, since then. Here
19 are some of their children. This is Faye. Their oldest
20 daughter is Sharon, and this is Wayne. There are three
21 more. You can sit down. I'm sorry. There are three
22 other children, Doug and Larry and Gary. I don't think
23 you'll ever gonna meet Larry. His wife is battling
24 cancer right now, and Faye's grand baby had surgery this
25 week.

1 You're also gonna hear that if Del can't come
2 here, Eileen wants to be with him.
3 THE COURT: Miss Dean.
4 MS. DEAN: Yes. If Del Domagala cannot be
5 here, Mrs. Domagala will spent time at home. I just
6 want to explain why you're gonna be seeing them coming
7 in and out. This is also a big and important case to
8 these companies.
9 The allegations in these cases are severe. It
10 is our belief that the evidence will compelling show
11 that these companies sold asbestos products all over the
12 country during a timeframe when they absolutely
13 understood that it could hurt people and didn't warn a
14 sole. And so what I'd like to do is explain kind of how
15 we got here by first looking at what is asbestos and
16 what kind of diseases can it cause and when and what
17 type of circumstances.
18 Second, look at the type of products that they
19 sold and why they release asbestos into the air and are
20 unreasonably dangerous. Third, look into the particular
21 legal claims and the reasons why we brought them here.
22 They deal with negligence, not doing what you're
23 supposed to do as a reasonable person, and design defect
24 making a product that's unreasonably dangerous, and
25 finally, we want to delve into Del Domagala's specific

1 experiences with these companies and how he's dealing
2 with the cancer.
3 We still have three more weeks together, and one
4 of the first things I'm gonna say is that I know people
5 are missing vacation time, time with their children,
6 there's not one of you that I'm sure this not a
7 sacrifice for, particularly, in the holidays, and I
8 speak for all of us, for the family, I want to thank
9 you. Thank you not matter what you decide for being
10 here and listening and executing justice however you
11 feel is something that we're grateful for.
12 I am working with Ryan Gott and Aaron Chapman.
13 Aaron is in another hearing but is coming down soon.
14 This is his first case. He's been a lawyer for about a
15 year. So in the three weeks you're gonna hear my voice
16 dominantly, and I'm going to do my best to figure out
17 what you care about and be respectful of your time.
18 You're going to hear, again, that the evidence doesn't
19 always come in the order that makes most sense.
20 So what is asbestos? One of first things you're
21 gonna hear is it's a mineral, a natural occurring rock
22 that is mined and milled from the ground. One of first
23 places where they were studying asbestos hazards are the
24 people that were doing that work, and they were seeing
25 that those people got sick, and the reason it was mined

1 and milled is so that it could be processed, and it was
2 put in about 3,000 or more products sold in the United
3 States.
4 Once it's processed, you're going to hear that
5 people that were making and using their products were
6 getting sick even more often the people that were mining
7 them because it's been ground down. It's small, and the
8 asbestos fibers become much more breathable.
9 The evidence is gonna be three main ways that
10 toxins can hurt you: Skin absorption, ingestion, or
11 inhaling it, breathing it in. For asbestos, the
12 overwhelming way that people get it in their body is by
13 breathing it in because the fibers are incredibly small.
14 We're gonna have someone come in and show you to give
15 some idea, but on a single strand of hair, you get
16 millions upon millions of fibers.
17 You cannot see them with your own eye. You have
18 to have over 5 million particles. For as small as they
19 are, you're gonna hear they're equally indestructible
20 that when they get in our bodies, they stay there and
21 cause damage from damage on a large scale like scaring
22 in the lungs to genetic mutation that causes cancer.
23 One of the first diseases we know that it causes
24 called asbestosis. It is a particular type of scarring
25 of lung that you can distinguishing from other types

1 that is caused directly and only because you breath in
2 asbestos. For some people you breath in enough it just
3 labors your breathing. For other people if you scar
4 your lungs enough where you cannot breath and you die.
5 This is a disease that has been understood for nearly
6 100 years to be caused from exposure to asbestos.
7 The second is lung cancer. It is a cancer that
8 occurred actually in the lung. I'm remarkably clumsy.
9 Sorry. But you can see there with a red ball that
10 that's something that happens along -- it's the same
11 kind of cancer that you get from smoking. The same
12 process, and, again, you're going to hear that this is a
13 disease process that was understood years ago, in the
14 '40s and '50s being caused by exposures to asbestos.
15 The next is Mesothelioma, it's actually not lung
16 cancer. It is a condition from the lining that
17 surrounds your lung. The picture that's kind of shiny
18 is a healthy one, and what it looks like, and what makes
19 it shiny up here is that there is a lining of
20 mesothelial cells that are almost like a Saran Wrap
21 you'd wrap a sandwich in. It's thin. It's moist. It's
22 meant to move with your lungs as you breathe. The
23 purpose of it is also because your lung sits in your
24 chest wall which are lined with nerves, that moisture
25 and lining protects your nerves and your lungs by giving

1 a barrier -- or a layer.

2 What Mesothelioma does is attacks those

3 Mesothelial cells so instead of being a thin, moist,

4 structure it becomes hard and thicken. We and so this

5 is the lung and heart of a very progressive tumor with

6 mesothelial cells. The result to that is similar to

7 asbestosis where you start having problems breathing

8 because it's not allowing your lung to expand. So many

9 people literally suffocate. Another reason why it's a

10 horrific form of cancer is because it is in your chest

11 wall. Once the tumor starts invading those nerves,

12 there's very little that the pain medicine can do. They

13 have break-away pain and morphine, they even started to

14 use radiation just to kill the nerves, but it becomes a

15 hard problem.

16 It is undisputed in this case that this is the

17 type of cancer that Del Domagala has and that it will

18 take his life. Those are not the only diseases and harm

19 that are reeked by asbestos exposures. You're gonna

20 hear that no matter where the asbestos goes, it is has

21 been shown to cause cancer. So it caused cancer just

22 from being breathed in and going through your throat,

23 cancers are found right there. It's in the lungs as I

24 mentioned where it's breathed into. It gets from your

25 lungs to the lining of your lungs, and you're gonna hear

1 from a molecular biologist how that happens. How it
2 gets into our blood system and the lymph system and gets
3 through our body and wherever it toughs causes diseases.
4 It travels to the heart and to the stomach.
5 You're going to hear that these exposures are to
6 asbestos make the use of asbestos unreasonably dangerous
7 in any type of product that raises the asbestos into the
8 air.
9 So that's the first thing you need to evaluate
10 if the product has asbestos. I need to prove that, and
11 second, that there's some kind of work with it that gets
12 the asbestos in the air because if it's undisturbed, if
13 you're not sawing it or sanding it or tearing it apart,
14 you don't have the exposures, but when you're gonna hear
15 once you have the exposures, you have a problem, and let
16 me explain that.
17 One of the things that almost everybody that
18 comes is gonna tell you two things: You need to think
19 about dose. How much do you need before toxins or
20 solvent or a carcinogen causes problems, and you need to
21 think about the total dose over time. Everyone agrees
22 this disease is dose response. The more exposure you
23 have, the greater the chances you have to this cancer.
24 So the question is how much, though, before you
25 trigger that, right, before you start having a problem

1 because some things you can have an exposure to and it's
2 not fine. Some thing yous can have a couple of aspirin,
3 it's great, but you take the whole bottle, you're in a
4 lot of trouble. An extraordinary amount of effort going
5 back over 70 years has happened to figure out what does
6 can we be at and make sure people are okay, and you're
7 gonna hear when I say an extraordinary amount of effort,
8 it's huge. This was considered a magic mineral. It was
9 one of the most useful substances out there. If you had
10 an asbestos blanket, you could stick it in a fire and
11 bring it back out and it's fine because of its heat
12 resistent properties. It was water resist, malleable
13 and cheap. It was used in thousands of products for a
14 reason, and so when they started seeing that people were
15 dying, they wanted to figure out, okay, is there a
16 certain level if just change how we use it or change or
17 methods, then it's okay, and this is what you're gonna
18 hear they found going back into the '50s and '60s.
19 With asbestosis, there is a dose in which you
20 are safe in terms of not dying. You might not be -- to
21 be able to breath as well, but you need to have
22 extraordinary exposures over the course of years if not
23 decades before it kills you. Mesothelioma was a game
24 changer for a couple of reasons. One, it's not caused
25 from smoking. Everyone admits that. Del Domagala also

1 never smoked a day in his life, but more than anything,
2 it was because they were finding it was happening even
3 with very small intermittent brief exposures.
4 It wasn't just from the guy working with it day
5 in and day out. It was from people that only worked
6 with every once in awhile, and then they started
7 realizing, wait, a second, it's also happening to the
8 people who aren't doing the work at all but simply
9 bystanders around it, and they found, wait, it's not
10 happening to the guy that's doing the work. His wife
11 who simply washes his clothes is getting this disease
12 Mesothelioma.
13 Even with woman that aren't washing their
14 husbands' clothes or children or kids or pets, they
15 found it in all of these areas, living near a factory
16 that you never walked into that has asbestos cause
17 people to die of the disease Mesothelioma. It was a
18 game changer.
19 What you're going to hear is going back before
20 the very first day that Del Domagala worked with any of
21 their products. It was understood. We cannot find a
22 safe level. Low levels are hurting people. People are
23 getting hurt when they don't occupationally touch this
24 stuff. It's a problem. One of the best ways that I
25 began understanding it is you're gonna hear there are

1 what they call pollution or background levels to
2 asbestos, that just because brakes have been used on
3 cars as we drive, construction has happened where we
4 teardown buildings, there is asbestos in the air, and
5 what they wanted to know is that enough to make people
6 sick from Mesothelioma?
7 And what they found out there is no way to
8 answer that question. The basis of science is if you
9 want to test something, you need a group that's been
10 exposed and a group that hasn't, and everyone kind of
11 has this background, so the next question was can we
12 figure out then if you're above background, if you're
13 above what's just out there in the air if people are
14 getting sick.
15 And the answer in test after test is yes. Any
16 time you add on an occupational or non-occupational or
17 environmental exposure people start dying, and the
18 National Academy of Sciences look at this issue, and
19 they compared some numbers. And I want to -- that's not
20 helpful -- they compared some numbers. This is Scott
21 and Alex. They help me with everything. And so if you
22 see them they're just part of the team to help with
23 papers and technology and things like that. Thank you
24 so much.
25 The way that they measure the amount of

1 Mesothelioma asbestos in the air is they actually have
2 ways to say how many fibers they are. They look at
3 fibers in the sugar cube in a square centimeter, and
4 they look at how many fibers are in the air. They've
5 gone out in population like St. Paul, Minneapolis, or
6 San Francisco, and measured it, and what they find is
7 that you don't even found one fiber. You don't even
8 find one one-hundredth of a fiber in that area. You
9 find an incredibly small number, and they compared that
10 to another incredibly small number, right? We're
11 talking about the remarkably small levels, and if you're
12 talking about the disease Mesothelioma just that
13 increase caused five times as many people to start dying
14 of Mesothelioma, incredibly useful product. We can't
15 use it anymore. It is too dangerous. There are other
16 properties of asbestos you're gonna hear make it
17 dangerous. One is the aerodynamics. It's not just that
18 you can breath it in, the length and ratio of the fiber
19 makes it so that it spins in the air. When you do some
20 kind of manipulation of the work even though you don't
21 see it, it stays there. It can take hours for one fiber
22 to go from being in the air to getting in the ground,
23 and you can easily kick it back up.
24 This is particularly important for some of the
25 products in this case where the exposure happen in the

1 home where if you don't have a specialized vacuum
2 cleaner, it's called a hepa filter vacuum cleaner or a
3 mask, getting a filtration system doesn't help at all,
4 sweeping it up doesn't help at al, vacuuming it, if it's
5 not specialized, it just stirs its back up because the
6 fibers are tiny. They get through the pores of whatever
7 system you have, and you keep bringing the asbestos
8 backup into the air.
9 For some exposures in this case like the ones
10 that happen outside to asbestos cement pipe. That means
11 you can have incredible significant exposures, but
12 because you're outside, they're gonna be limited in
13 time. For other exposures that happen in the home,
14 you're gonna hear that they kept happening over and over
15 again, that it kept coming back into the air.
16 Another thing that you're going to hear is that
17 it is a latent disease. Scientists can explain things
18 much better than I will come and explain this and why it
19 takes so long, but the basic idea that you can be
20 exposed to something and you don't see the bad effects
21 of it until later is latency.
22 Someone coughs and they don't cover your face,
23 three days later you have the flu. This is more extreme
24 and this is undisputed as well. When you're exposed to
25 asbestos, it takes decades for the genetic errors to

1 occur that result in cancer. So you're exposed to the
2 product, and the reason why we're talking about things
3 in the '60s and '70s and '80s, is the first time Del
4 Domagala know that he's gonna have cancer when he was
5 diagnosed in April of this year, and that's normal.
6 You're also gonna hear about individual
7 suseptibility. If it's so dangerous, if woman washing
8 clothes get this, why isn't everyone sick? Hundred of
9 thousands of people have worked with asbestos in this
10 country, and what you're gonna hear is it has to do with
11 our body's defense mechanism and there is individual
12 suseptibility.
13 Some of these concepts are really clear. If you
14 have a blonde-hair, blue-eyes sister, and then you have
15 someone that has dark hair and dark eyes, some are more
16 susceptible to sunburn and melanoma than the other.
17 It's tied to our genetics, right? Same with smoking.
18 We all have an uncle that smoke for 45 years and is
19 A-okay, and we know the that guy that did it for six
20 months ends up in the hospital with cancer. The doctors
21 are gonna explain it's very similar with asbestos that
22 the idea that why, why is it that this guy worked with
23 asbestos can be fine but his wife gets sick, that this
24 guy can do it for 20 years and be fine and this one does
25 it for four months and gets sick. Is not entirely --

1 we're getting better. The soon we know that, I think,
2 the sooner this can be cured, but that baseline concept
3 there is individual suseptibility that if you expose a
4 bunch of people by selling a product all over the
5 country some significant large hundreds of them numbers
6 of people will die was understood in the '50s and '60s,
7 well understood.
8 And finally you're gonna hear that Mesothelioma
9 is called a signal tumor. Certain tumors just the
10 existence of them signals the cause, right? Lung cancer
11 signals tumor for smoking. Asbestos is considered in
12 the literature a signal tumor for exposures to asbestos.
13 I just said a sentence that didn't make sense.
14 Mesothelioma is a signal tumor for asbestos.
15 Since it was first discovered there are few
16 expectations of other things. There is a fiber in
17 Turkey that's very, very similar called aronite.
18 There's some radiation that can cause it. Things that
19 aren't an issue in this case, but what is at issue in
20 this case is that the vast majority of people, the
21 overwhelming number of people that can this disease, it
22 can be directly linked to working with asbestos. I got
23 ahead of myself. This the idea that they tried to find
24 a safe level and haven't been able to.
25 Finally, you're going to hear that this it is

1 the accumulative dose that the person has to a toxin
2 that causes the disease. The sun is a perfect example.
3 Again, it's not the first time you went out in sun or
4 necessary the last time. It's having the exposure
5 repeatedly over and over again. Not your first
6 cigarette not necessarily your last one. It's the
7 cigarettes over time.
8 Now, you need to give enough time for latency
9 for the disease to occur, but you'll hear that everyone
10 agrees that the exposure in the '50s, '60, '70s, and
11 '80s are the time frame where had a cumulative dose that
12 are responsible for why he has this cancer today.
13 So how do you handle that as a juror, 'cause
14 you're gonna hear it's not just one exposure that causes
15 disease. It's the exposures from different companies,
16 and I want to be the first one to tell you it's not just
17 the companies in the room. There were other people that
18 exposed him to asbestos repeatedly in that same
19 timeframe. You're gonna hear from Judge Guthmann you
20 get to allocate a percentage of fault. This company
21 exposed a lot more.
22 This company used a product that was
23 particularly dust releasing. This company had really,
24 really extensive knowledge, and you get to consider
25 those factors and identify how much each company is at

1 fault. The next thing I want to do is give you a little
2 bit of a preview for why companies that are still here
3 in our mind, what products that they made that released
4 asbestos, starting with Georgia-Pacific.
5 Georgia-Pacific made drywall and joint compound,
6 so used in the construction process. They bought
7 drywall were CertainTeed in the time before this issue
8 in this case, and they sold it to the American public.
9 It is a product that's used in home and residual and
10 business construction, and you'll hear that the way that
11 it works, is you put up walls, and in order to make them
12 stay, you nail them in. It's drywalled. It's nailed
13 in, and you have seams and nail holes that are going to
14 show up if you don't do something, and you don't want to
15 paint a wall and see indentations from nails or from
16 seams from on of the boards are coming together. That's
17 the product that Georgia-Pacific makes called joint
18 compound.
19 Some people called it mud. You literally took a
20 bag, took a bag, a 25 pound bag of dust. It looks like
21 flour. It had a pound of asbestos, literally trillions
22 of fibers in every bag, that you mixed with water, and
23 then trowel on the nail and seams. You let that dry.
24 You then sand it because you want to have a flush,
25 smooth area. It dries. It shrinks. You have a second

1 layer you. Do the same thing.

2 Once it's done, you have to clean it up. All of

3 those different steps have been measured. The mixing

4 releases millions of fibers into the air every time you

5 do it and they go back to the ground and get kicked back

6 up through the entire construction process. It has been

7 found that using this four times is unreasonably

8 dangerous, in your entire life, just having it in your

9 home, and it was banned because it was so dangerous --

10 MR. DRUMKE: Objection, Your Honor.

11 THE COURT: Sustained.

12 MR. DRUMKE: Move to strike.

13 THE COURT: The argument is stricken.

14 MS. DEAN: Part of the reason this product

15 is considered so dangerous is because it's used in the

16 home and because it's brought backup over and over

17 again, and you're going to hear from experts about the

18 extraordinary amount of information indicating what this

19 danger is.

20 CertainTeed, in this case the product at issue

21 is the asbestos-cement pipe. You're gonna hear that

22 asbestos-cement pipe was put into the ground for two

23 main purposes: Sewer line and waterlines. Homes need

24 to get water in and their sewage out. You have a sewage

25 line in the home connected to the line from the city

1 which are call the mains. They manufacture the pipe for
2 both of those.
3 Asbestos-cement pipe had about -- 15 to
4 20 percent asbestos in it. It is something that in
5 order to work, in order to get the different pipes
6 connected in, you have to manipulate it. You saw it or
7 cut it or use a hammer and chisel, I mean, something to
8 make division to make sure the pipe is the length that
9 you need it to move around trees, to deal with the
10 things that you have to deal with.
11 Once a cut is made, you also have to file the
12 edges so that the two mating surfaces can happen. Your
13 gonna hear that that may be the highest exposure of any
14 exposures that he had, that the actual action of filing
15 and cutting this type had extraordinary exposures. They
16 didn't last as long because they were done outside, but
17 it has been evaluated and considered doing this work
18 even a couple of times is extraordinarily dangerous.
19 And then there is John Crane. John Crane
20 mentioned to you yesterday that they made sealants,
21 gaskets and packing. I want to talk just a little bit
22 about what those are, and the waste and water plant
23 where Del Domagala worked, you have pipes. You have
24 pumps. You have valves. And they were connected
25 together with flanges. You literally had circular

1 connections that could be screwed together, but if you
2 have water or waste or sewage going through them, it
3 would leak where the connection was without a seal.
4 So every pipe-to-pipe connection or every
5 connection you have a pipe to a pump that could push the
6 material through or every connection you had to a pipe
7 to a valve which controlled the flow had these gaskets.
8 There were hundreds of them in the cities that he worked
9 at.
10 John Crane for years until 1985 sold
11 asbestos-containing gaskets. When they're used in
12 systems, they stick onto the edge. Any time you have
13 repair or maintenance and you break a pipe apart or you
14 need to get into the pump that has a big seal along the
15 casing of the pump, those gaskets stick to both sides.
16 They're scraped off. Sometimes you take a screwdriver
17 to get them off. That's been studied and measured
18 millions of fibers are put into the air, and he did that
19 repeatedly.
20 Packing is just a different type of seal. It
21 doesn't result in as much exposure, but it is the second
22 exposure in this case. Let's say you have a valve and
23 you turn it, right, like what you see for your hose but
24 much larger where the moving parts are that turn it,
25 they had rope packing that you would stick in, that

1 would keep any kind of liquid from coming out.
2 Once that has been used, it gets dried and
3 brittle and has to be picked up. That's another
4 exposure you're gonna hear get described. I mentioned
5 already it's the cumulative dose. There were other
6 companies that made gaskets and packing that are no
7 longer here. There are other companies that made
8 asbestos-cement pipe. There are other companies that
9 made drywall. There are other products that I hadn't
10 mention. I think I mentioned yesterday tractors and
11 cars. He did some work on that. I am focusing on these
12 three companies because they're the ones that are here.
13 You're gonna here from our experts that all these
14 exposure mattered. All of them are part of the reason
15 that Del Domagala is fighting cancer right now.
16 So it's not enough they made an asbestos
17 product. There is more that we have to prove. There's
18 a reason why we asked you to consider their actions and
19 inactions for years. The two reasons are negligence and
20 design defect. I want to spend a few minutes talking
21 about what those things mean and what evidence you're
22 gonna hear about them. Starting with negligence.
23 So in many states you cannot text and drive.
24 There is a rule on the books. Don't do it. It's
25 nonsense, and a few there aren't. Negligence is acting

1 unreasonably. If you don't abide by the law, that is
2 acting unreasonably, but it's broader than that. If you
3 do something an ordinary, reasonable person would not
4 do, you're texting while you're driving, you hit a kid,
5 you can be held Responsible under negligence, and that's
6 important in this case because you're gonna have some --
7 some other defendants where the exposures were they're
8 ruled and you violated them, but there were also
9 exposures before there were some of those rules. So
10 we're gonna talk a lot about what was reasonable? What
11 was expected, not based on today's standards but based
12 on the standards that were made then. We did a lot of
13 inquiry to figure out about that and determine what was
14 considered reasonable in the '60s, '70s, and '80s.
15 One of the first places that we look at talking
16 is the medical professionals about the standard of care
17 of what people expected, the safety rules that existed
18 in the '60s, '70s, '80s, and you're gonna hear they were
19 the same in that entire timeframe first. If you're
20 gonna make a product and you're gonna sell it to the
21 America public, you need to do research to determine if
22 the components of your product are known to cause harm.
23 Do that before you sell not after.
24 Two, if you find that there's a potential harm
25 and it's not clear if that harm applies to you, figure

1 it out. Test it. Do something before you start selling
2 it. Three, if there is a potential harm and there is
3 something else out there that does the job just as well,
4 use that thing. Don't use the one that has the harm.
5 And four, if you can't get rid of the harm, you're bear
6 minimum for an occupational, medicine, and science
7 perspective is to pass on that information that gives
8 other people the right to decide how they're gonna
9 handle that problem and pass on your full extent of
10 knowledge and that hazard and how you avoid it. That's
11 how we learn how to gauge what was reasonable in the
12 '60s.
13 You're also gonna get direction from the law.
14 Judge Guthmann is gonna give you instructions at the
15 end, and what you're gonna hear is that there is a
16 remarkable amount of -- you get need to do research.
17 Are your expected to be an expert in what you sell and
18 look at what's out there. You need to test, substitute
19 if it's unreasonably dangerous, and at the very least,
20 warn.
21 MR. WILL: Excuse me, Your Honor, I object.
22 THE COURT: Sustained.
23 MS. DEAN: The next place we looked outside
24 of law and medicine is to go to the companies. You're
25 gonna hear that you can look to industrial standards,

1 what were the companies doing back then. I think the
2 first thing you're gonna hear is it's not a legal
3 defense to say other people were doing it. It's a
4 concept we kind of learned as kids just because you
5 wanted your brother do it, don't mean you're okay.
6 We did get guidance from company on what they
7 believes was excepts of them back the in '60s and '70s.
8 There's remarkable amount of agreement. They want to be
9 on the same playing field. When you're selling
10 products, you want to be able to have to meet the same
11 requirements as other people. If you spend all the time
12 to learn a product, figure out how to make it, figure
13 out who to sell it to, get a stream of production out
14 the door making a bunch of money. It can be very
15 disturbing that if you learn something that's gonna cut
16 off all your business, and if that happens, everybody
17 wants to have the same rules about what you do, and
18 there company representatives in it. You got to
19 research before you sell. You got to test. You
20 substitute. And at the very minimum, you pass on the
21 information.
22 In thinking about this yesterday, there was some
23 comments about how important it was to think about other
24 people's obligations in that same process, the people
25 that were using the products, too. So I thought about

1 that some, and you're gonna hear at least in this is
2 there are different people who have a role in making
3 sure people didn't get hurt and didn't die working with
4 asbestos. There's first the companies that chose to
5 make a living, making or selling an asbestos-containing
6 product.
7 Next, you had for at least the products in this
8 case that are used with your job an employer that is
9 involved with how those products that are purchased are
10 being used, and then finally, you have Del Domagala.
11 You have the person who's using the product, right? And
12 you're going to hear that there's a remarkable amount of
13 agreement about what is expected out of a reasonable
14 person in each one of these categories.
15 Here, for the companies, the ones that are
16 making and selling the asbestos product, the key is to
17 identify the danger, right? Research test and once
18 you've identify it, identify it to others. Let them
19 know what it is. That's what your obligation is.
20 For the employer, you're gonna hear it's about
21 controlling danger, that they are in the best position
22 to tell the employee here the work practices, here's
23 what you need to do to have personal protective
24 equipment available to put in a ventilator where the
25 work is gonna be done, that is much of what is

1 considered and needed from them.
2 And for the person actually using it, you're
3 gonna hear that they have to take personal
4 responsibility -- sorry, and follow the controls. The
5 reason I mention this is because what you're gonna hear
6 is what can become a massive problem particularly with
7 things that don't cause instantaneous harm but that
8 cause harm way down the road. If a person making the
9 product fails to identify the danger, then the employer
10 is limited in controlling it, and the person using it is
11 limited in following the controls because they are
12 unknown, right? These all tie together. Everyone has a
13 responsibility, but there's a huge start to the process
14 here. This is particularly important, in fact, I think
15 you will hear critical with certain types of products.
16 One, products where the harm is not obvious.
17 You know a saw can hurt you, right. Two, where the
18 danger is extraordinary, serious can result in death,
19 and three, when the harm is not part of public
20 knowledge, and in this case, you're gonna hear asbestos
21 hits all of them. The harm is not obvious. Somebody
22 will tell that this is called the onion principle. You
23 cut an onion, it can make you cry, right.
24 There are certain toxins or solvents that if you
25 sniff them, you will literally push yourself back. The

1 thin about asbestos that indicates to a person if
2 they're not told that it's harmful. You have to have
3 millions of fibers before you can see it. It doesn't
4 smell. It doesn't have a taste. It doesn't burn your
5 skin. It doesn't itch your throat. There is nothing to
6 let an ordinary person working with it to have any idea
7 that they had anything to worry about unless someone
8 let's them know.
9 The second thing we've talked about the
10 complications of harm here isn't a rash. It isn't a
11 temporary problem. It ends your life. And then the
12 final thing is it common knowledge because if it's not
13 common knowledge, this duty, this idea of being
14 reasonable becomes critically important, and you're
15 gonna hear in the '60, '70s, and even the '80s that many
16 companies understood and acknowledges the harm, had an
17 internal memo discussing this that the public was left
18 in the dark.
19 So the next thing I'd like to talk about is what
20 did they know. Back in the time when they were selling
21 these products about the dangers of asbestos --
22 [WHEREUPON, there was a discussion
23 held off the record.]
24 MS. DEAN: 'Cause I want to talk generally
25 about how this information came out. You're gonna hear

1 that in the beginning the people that were focused on
2 the most are the guys that are going in those giant
3 mines and are pulling out the asbestos. They're mining
4 and milling it, and then there became a concern with a
5 group of workers called textile workers. They were
6 taking asbestos in raw form and weaving it into cotton
7 and clothe, and there was a lot of effort looking at
8 them in the '20s and '30s and seeing how many of them
9 were dying of different diseases. A lot of these
10 overlapped. Then they started looking at manufacturing.
11 So not somebody like Del Domagala who is working
12 with a brake or a gasket or cement pipe but the people
13 in the plant for CertainTeed and Georgia-Pacific and
14 John Crane that are making these products.
15 MR. DRUMKE: Objection, Your Honor.
16 THE COURT: Approach.
17 [WHEREUPON, there was a discussion
18 held off the record at the bench.]
19 THE COURT: The objection is sustained.
20 MR. DRUMKE: Move to strike, Your Honor.
21 THE COURT: And the argument is stricken.
22 MS. DEAN: So I misspoke here. I was not
23 saying when they were meaning to say when they were
24 looking at manufacturing that they were looking in their
25 particular plant. They were looking at manufacturing

1 facilities more broadly, and I don't have any
2 information about what was happening if their particular
3 plants, but what I mean more broadly is that they looked
4 at miners and textilers and then places where they were
5 marking asbestos products in terms of order they have
6 thing, and I'm sorry if I made that unclear.
7 And then the next group that they were looking
8 at people that are using the products, the mechanic
9 that's working on the brakes. The insulator that's
10 putting on insulation, the plumber that's cutting
11 asbestos from the pipe, and what you're going to hear is
12 that before the very first day that Del Domagala ever
13 touched any of their products, people in every one of
14 these groups were identified as dying from asbestos
15 disease.
16 You'll also are going to be able to see the
17 documents where this is being discussed, and not just
18 discussed privately in medical journals and scientific
19 articles and trade organizations where I can show their
20 membership were over and over again they're showing no
21 matter where they look in the process, people are
22 getting these diseases not just asbestosis or lung
23 cancer but also the disease that Del Domagala has.
24 What you're also gonna here is that in the '30s,
25 '40s and '50s most, but not all, of the literature was

1 about this, and part of the reason we need your help, we
2 need your guidance, is that CertainTeed and
3 Georgia-Pacific where the exposures were in '60s for
4 those the companies are gonna say this shouldn't have
5 made us worried about our products that we were selling
6 to the public.
7 What you're gonna hear from our end is that once
8 you decide to put a pound in asbestos in every bag of
9 joint compound or 20 percent of asbestos in this pipe
10 and we know it's manipulated, and you have not just an
11 occasion but over and over and over that indication that
12 causes harm and that they believed there is no safe
13 level, that you need to investigate, that you need to
14 look.
15 So the next thing I'd like to do is spend the
16 time not just talking about what's in the public
17 literature that you're gonna hear about, about asbestos
18 and disease, but some of the specifics that we learned
19 from their own files, their own documents, and I want to
20 use CertainTeed as an example. We're gonna get to the
21 specifics of the exposure, but it's undisputed that when
22 Del Domagala was exposed and working as a plumber, it
23 was in the 1960s, and 1966 to 1967, so part of what we
24 wanted to know is not just what CertainTeed could have
25 learned if they looked, but what they actually knew.

1 And one of the first things that we found out is
2 while they had been selling different asbestos products
3 in earlier years, the asbestos product at issue in this
4 case they bought that line in 1962 from another company.
5 So in 1963, they're buying an entire process that
6 already exists with multiple plants throughout the
7 country where they're making asbestos-cement pipe and
8 selling it. You do due diligence. There are lawyers
9 and accountants and investigators looking at the harm
10 associated with this product.
11 MR. WILL: Objection, Your Honor.
12 THE COURT: Approach.
13 [WHEREUPON, there was a discussion
14 held off the record at the bench.]
15 THE COURT: Overruled.
16 MS. DEAN: So this 1962 date is really
17 important. This is to four or five years before
18 Mr. Domagala is exposed, and while you're gonna here
19 everyone agrees you need he to be looking at the
20 literature anyway, this is the concentrated time to
21 consider whether they should double down into asbestos,
22 get another product line, and start selling it, and
23 you're gonna hear that they not only chose to start
24 selling a whole new line of asbestos, that they
25 particularly also decided to start using a different

1 fiber type.

2 Now, I haven't gotten into this, you're gonna

3 get into a lot of this with the expert, but there are

4 different types of asbestos. One that was first

5 identified as being really hazardous for Mesothelioma,

6 the one that is month potent for causing this disease,

7 is only sold in South Africa. It was not used a lot in

8 this country, and when CertainTeed decided to increase

9 the amount of asbestos used in the 1960s in a timeframe

10 you're gonna here there was the explosion of information

11 about Mesothelioma dangers is in 1962 when they started

12 using the most dangerous type of asbestos and importing

13 them from South Africa. The actual records from this

14 transition, they don't have, right? But what they do

15 have and a lot of time has passed and there's no blame

16 in that, but there are many records that they don't

17 have. And they had a few, and I think they're

18 extraordinary telling, and I think you're gonna hear of

19 the few records they have talking about the dangers of

20 asbestos, they point in one direction. Every record we

21 find from when they bought this business to when Del

22 Domagala starting cutting their pipe indicated the same

23 message. We got a problem here. Asbestos is killing

24 people.

25 I want to talk about, you're gonna here that

1 they have one of their health and science professionals
2 go to a conference. This conference was so important it
3 had some different people from across the world to talk
4 about asbestos causing Mesothelioma that they made a
5 book out of it. Years later, they took all the speeches
6 talking about asbestos, identifying asbestos-cement
7 pipe, talking about Mesothelioma, and wrote it down. So
8 you can see based on what was written down what folks
9 were being told. They went to this conference in New
10 York. They sat in the room and heard this information,
11 and you're gonna hear they then created a memo from
12 their health and safety professionals to send out to the
13 company talking about what they learned.
14 In 1930, they acknowledge it. It was understood
15 that asbestos caused asbestosis and cancer. That wasn't
16 just something that was out there in medical literature.
17 It's something that they acknowledged that they learned
18 in this conference in '64, that it was actually being
19 regulated by some countries in the '60s states all over
20 the United States they were starting to regulate it in
21 workman's comp laws that this was a real issue.
22 This is an extreme hazard not just that they're
23 mentioning cancer and asbestosis but they acknowledged
24 that these diseases and how often they're happening is
25 an extreme hazard, that there are repeated findings.

1 This isn't the first time we're seeing this over and
2 over and over again of asbestos exposure causing the
3 cancer that Del Domagala has Mesothelioma.
4 Asbestos cement products were singled out
5 two-thirds of increase of world use of asbestos from --
6 from this product they just decided to get into and that
7 the Mesothelioma risks are not from these long exposures
8 for long period of time like asbestos but were risks,
9 and these were the words used from low exposures. It
10 went further to say there is documentation that the
11 reason this is happening with cancer suseptibility
12 matters. Certain people are more susceptible and that's
13 why we're seeing more of these deaths, that latency is
14 an issue, that just 'cause you're not seeing people die,
15 yes, you started the business two years ago, you will,
16 you will in a few decades. It's gonna happen.
17 And I think I forgot one but it also indicates
18 that one of the lowest exposures simply living around a
19 factory, they started seeing people and their pets and
20 their family members die of Mesothelioma. What's their
21 reaction? Their health professional says more research
22 is needed, and we're selling this stuff, we need to know
23 more. This was in '64. Not in '64 or '65 or '66 or the
24 last day Del Domagala is working as a plumber do they
25 investigate any research to find out if people using

1 their pipes throughout the country are harmed, not a
2 test, not a single effort to learn about that. They do
3 not warn. They mark the memo confidential, and they
4 keep it to themselves, undisputed. You're gonna hear
5 similar evidence for what they knew and how they reacted
6 to it. I want to spend a little time talking about John
7 Crane because it is a whole different time period
8 because when he left working as a plumber, he went to
9 work in the waste and water facility, and that's when he
10 started working with gaskets and packing, so that
11 timeframe is after he left Swenson Plumbing in '67
12 extended until he retired. The reason, though, that he
13 did not retire in 985, the reason it shows that is that
14 when John Crane stopped selling asbestos. So the
15 timeframe of what we're thinking about what did they
16 know and when did they know it matters from what was
17 known before '67 to 1985, and here you're gonna hear the
18 same evidence that was available to the public,
19 information that was available to John Crane that
20 they -- the evidence and the regulatory response
21 increased, particularly, in the 1970s.
22 You're gonna hear that OSHA came out in 1971 and
23 started coming in effect in 1972. What the OSHA
24 regulations say out of all the different toxins and
25 workplace problems because OSHA is trying to control the

1 work place, the number one problem we have as a country,
2 what we have to have an emergency response to is
3 asbestos. That one out of every three cancer deaths in
4 the country are attributed to exposures to asbestos. We
5 have an epidemic problem. That was available to John
6 Crane before over a decade before the last exposures in
7 this case. I want to be spend a minute, if you don't
8 mind, switching and talking about OSHA relates to this
9 which diagram I gave of just what was reasonable and
10 expected. When OSHA, these very standards that
11 different groups have indicated that you expect from
12 people became law and let me explain what I mean. So
13 OSHA comes out and says not only are you potentially
14 responsible for negligence, we now have a federal rule
15 you'll be violated if you don't identify the danger.
16 There was an obligation that if you made a
17 product that released asbestos in the air above the
18 levels that they identified, you must warn. No longer
19 an option. If you don't you violate federal law. The
20 rest of this federal law applied to the employer, and
21 they start identifying the specific things that an
22 employer can do to control the hazard, wet things down,
23 have a shower. Make sure they take off their clothes
24 and that they don't bring them home to their wives.
25 Things like that.

1 The employer can put in the shower, they're the
2 ones that get the hepa filter or the moon suit and those
3 become law. Another law came out during the timeframe
4 in which John Crane was selling this stuff. It's the
5 called The Hazard Communication Act. It more explicitly
6 made this a requirement. It actually said you have to
7 have a Material Safety Data Sheet that identifies the
8 cancer toxin risk that are associated with the product.
9 So we learned that first there just no question
10 John Crane admits they all aware of the hazards of
11 asbestos, but they also in writing admit that they're
12 gaskets, the product they are selling, creates a risk of
13 asbestosis and Mesothelioma.
14 MR. GRIFFIN: Your Honor, objection. May
15 we approach?
16 [WHEREUPON, there was a discussion
17 held off the record at the bench.]
18 THE COURT: Objection sustained.
19 MS. DEAN: And more specifically you'll see
20 the MSDS sheet where in the section where they talk
21 about health hazards, they identify not only how much
22 asbestos are in their gaskets, it was up to 70 percent.
23 There is more asbestos in gaskets that anything else,
24 and they put in writing that it causes asbestosis and
25 cancer. Much of this trial where they absolutely new

1 and should have known about the dangers of asbestos when
2 they were exposing them.
3 The second theory has to do with design defect.
4 It's the idea that you cannot sell an unreasonably
5 dangerous product, and we talked to you a little bit
6 what that means. Do you have to have a product that is
7 always safe, that if it caused harm that you would pull
8 it off the market, or do you evaluate the cost and the
9 benefits.
10 And you're gonna get instructions on the
11 different things you think about when it's unreasonably
12 dangerous. That's why you're gonna hear evidence about
13 hour serious the harm is, how likely the harm is. The
14 benefits of the product and why asbestos was used.
15 Why do I have a ship that is burning up on the
16 scene? Asbestos was really helpful for a lot of things.
17 You're gonna hear that there is a famous United States
18 Navy when they weren't using asbestos this ships. This
19 is a picture of it, and a fire started and everyone
20 died, everyone aboard that ship, and it became Navy
21 protocol that you had to use asbestos in ship building.
22 Lots of asbestos was used for a variety of
23 reasons but the most important is if you're under attack
24 and a fire started, we want some way to control it to
25 save the lives of sailors. It also was a lighter and

1 cheaper material that made you move faster which when
2 you're in combat is important. When you're asked the
3 question about in that context even though the asbestos
4 kills people, it's really having a life saving value,
5 it's a harder question. It's a harder question. Those
6 are not the facts you're going to here about these
7 products.
8 Asbestos cement pipe was sold by CertainTeed
9 when another product was on the market that they made
10 for the exact same purposes that doesn't cause any
11 health hazards. It's crawled PVC pipe. There was zero
12 reason why a city or home needed to have asbestos in
13 their pipe. There isn't even a cost difference that
14 they're able to recognize. Then why was it done?
15 You're gonna hear from, I believe, they're
16 corporate representatives and the way this works is the
17 company picks a person to speak for them, so we can ask
18 them questions. There was only two or three companies
19 that made asbestos cement pipe. CertainTeed at that
20 time was the second biggest having 30 percent of the
21 market. If they can convince a city to use asbestos
22 cement pipe even if they didn't know it was them, their
23 chances of getting the contract skyrocketed. With PVC,
24 they were one of many.
25 The reason you're gonna hear asbestos was used

1 was in order to make more sales not because it saved
2 lives. More specifically another thing that we learned
3 about CertainTeed is why we were using the stuff from
4 Africa? You're gonna hear about the other type of
5 asbestos they used which is called white asbestos as
6 opposed to blue was used to make the pipes stronger so
7 when it went into the ground, it had structural
8 integrity. PVC pipe did the same thing, but that's why
9 the white. Why didn't you use the blue. Why did you go
10 all the way to South Africa. It had nothing to do with
11 the structural integrity. It had nothing to do with
12 making the pipe work better. They could produce it
13 faster, 30 percent faster if they used the more
14 dangerous stuff, and so part of what you're going to
15 hear is that we believe those are not reasonable actions
16 within unreasonable dangers product.
17 It's similar evidence for the other companies.
18 Georgia-Pacific again made that mud, powder form.
19 You're gonna hear that it wasn't put on walls in order
20 to make them fire resistant. I wasn't like asbestos
21 curtains put in movie theaters to keep fires. It had no
22 heat resistence -- it just made it go on more easily,
23 and once they put their mind to finding something else
24 to do the same thing --
25 MR. DRUMKE: Objection, Your Honor.

1 MS. DEAN: Quickly.
2 THE COURT: Approach.
3 [WHEREUPON, there was a discussion
4 held off the record at the bench.]
5 THE COURT: Members of the jury, we're
6 going to take a brief recess, don't talk about the case.
7 Why don't you head off to the jury room, and we'll have
8 you back in a few minutes.
9 [WHEREUPON, the jury left the
10 courtroom.]
11 THE COURT: All right. I've excused the
12 jury, so we can air this out more in open. The
13 objection was made sort of in mid-sentence. It looks
14 like Ms. Dean was arguing that Georgia-Pacific joint
15 compound wasn't used as a fire retardant or for its fire
16 retardant properties, and once a substitute was found
17 and then a sentence got cut off, presumably, they used
18 something different or stopped using asbestos. Why
19 don't you state your objection, Mr. Drumke.
20 MR. DRUMKE: Your Honor, there is no
21 evidence about -- that's coming into this case about
22 substitutes. The industry custom and practice in the
23 state of the art in terms of joint compound in 1966 and
24 1967 was that every major manufacturer of joint compound
25 had asbestos in its products.

1 The substitution efforts that Georgia-Pacific
2 undertook post-date Mr. Domagala's exposures in 1967.
3 There is gonna be no expert that's gonna come in here
4 and testify -- she has no foundation to say that there
5 was a commercial viable substitute to be made or that
6 Georgia-Pacific -- she can argue that Georgia-Pacific
7 should have found a substitute, but not that
8 Georgia-Pacific, that it was viable either commercially
9 or scientifically.
10 She's alluding to things that were happening in
11 the industry and that Georgia-Pacific did well after
12 Mr. Domagala's alleged exposure, and I understood the
13 Court's ruling that post-1967 conduct and anything about
14 subsequent remedial measures, as I understand the law in
15 Minnesota, product liability law cross the country is
16 admissible to show negligence.
17 THE COURT: Response.
18 MS. DEAN: It's helpful to let me complete
19 my sentences. What I was going to say is I think I was
20 in the middle of the sentence that says when they put
21 their mind to it, they were able to find a replacement
22 with materials that were available in the 1960s since he
23 had this exposure.
24 THE COURT: That wouldn't have eliminated
25 the objection you put before the jury that they found a

1 substitute and you're prohibited from bringing any
2 evidence of the fact that they substituted asbestos to
3 Georgia-Pacific joint compound because that happened
4 after 1967. That's part of a motion in limine ruling
5 that I made.
6 So the completion of the sentence that you just
7 proposed is a direct violation of an order that I gave
8 you not to do it. You can't do it. You can't say
9 Georgia-Pacific found a substitute for asbestos and use
10 that to make a liability claim.
11 MS. DEAN: I don't understand the legal
12 pendings of that or understand that to be the order, and
13 my memory --
14 THE COURT: Couldn't have been any more
15 clear, zero post-exposure information can be used to
16 prove liability unless it proves something that happened
17 before 1967, and they didn't substitute before 1967, so
18 it's not probative of that, so you can't do it.
19 MS. DEAN: I understood liability. I
20 understood causation didn't fall into that.
21 THE COURT: Correct. It has nothing to do
22 with causation either. Obviously, if there's no
23 asbestos, it can't cause, but that's not a backdoor plus
24 you were also ordered that if you're gonna do it, you
25 have to get advance approval from the Court which you

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1 didn't seek, so you violated my order twice.
2 MS. DEAN: So I didn't see this governed by
3 order. The entire --
4 THE COURT: Don't bring up anything after
5 1967 as it relates to Georgia-Pacific unless you get my
6 permission, everything violates the order. I told you
7 that.
8 MS. DEAN: Now -- I don't think it could be
9 clearer. If the Court will allow me to speak for a
10 moment. When we were discussing this, there was a
11 discussion about talking about knowledge documents that
12 happened after. I didn't even perceive that this was
13 discussed. When we, for instance, discussing Bendix's
14 efforts to find replacement parts, it was well after the
15 time of exposures. You allowed that testimony at their
16 request to discuss that was it was extraordinary cost.
17 THE COURT: Right. There was no motion to
18 exclude it and a motion to exclude it wasn't granted,
19 and counsel wasn't instructed directly that they can't
20 bring it into the case. So there's no analogy. As you
21 just said Bendix wanted it, so they chose not to object
22 to it because they felt that the use of that information
23 that could be -- the use they could make of the
24 information provided a greater help to them than the
25 potential harm. That's a decision that they made. They

1 could have asked to exclude it, and they didn't.
2 MS. DEAN: Explaining my mind set on why
3 their motion which only talked about knowledge and why
4 that experience did not make this order as clear to me,
5 and I would ask --
6 THE COURT: I just said there is no
7 relationship between the two.
8 MS. DEAN: I'd ask the Court --
9 THE COURT: We had a separate motion here.
10 I granted the motion. I explained why. I explained the
11 scope, and explained the sole way counsel could
12 introduce anything that came -- that was after the date
13 of the exposures, that is, get permission first.
14 MS. DEAN: Which I understand and will seek
15 after openings and we have an opening because the notion
16 that one of the elements that I have the burden of
17 proof, I think, it's a forced element of the design
18 defect factors is the ability to provide a substitute.
19 THE COURT: But the fact that they did
20 provide a substitute later doesn't advance that ball.
21 You would have to do that based only information before
22 the date of the exposure. What they did later, you
23 can't bring in.
24 MS. DEAN: And I think with the context of
25 the testimony where there's an indication that when --

1 THE COURT: One last thing: You never
2 argue at any point while this motion was argued that one
3 of the exception to the prohibition on subsequent
4 remedial measures applied. It never happened. Because
5 you never argued that any of the exceptions for
6 subsequent remedial measures applies, it wasn't never
7 even addressed. It wasn't briefed either.
8 MS. DEAN: I didn't think it was part of
9 discuss and clearly the Court's telling me I should
10 have, but I genuinely believed it was talking about
11 knowledge document.
12 THE COURT: Any post-exposure evidence that
13 you intend to use to establish the liability of any
14 defendant is inadmissible. I said it almost in those
15 identical words.
16 MS. DEAN: Then, if you are indicating that
17 we need to actually -- I'm going to do that at another
18 time. I'm here for opening. I'm not to tough this, but
19 I think there is not only evidence relevant to the
20 burden of proof but no prejudice that unlike brakes that
21 that took millions of dollars to do so this, a very
22 concerted, short effort by industry, it wasn't just
23 Georgia-Pacific to do the replacement was done with the
24 products that were available in the '50s and would be
25 applicable to the timeframe. I understand what the

1 Court --

2 THE COURT: That would be to show

3 feasibility.

4 MS. DEAN: Yes.

5 THE COURT: I haven't heard from the

6 defendants whether they admit it was feasible. If they

7 admit it was feasible, you can argue it was feasible,

8 but -- and it's been -- it's been admitted it's

9 feasible, but that doesn't mean you can bring in

10 evidence. You can only bring in the evidence if there's

11 a dispute about whether it was feasible, but that would

12 be an exception to the rule prohibiting subsequent

13 remedial measure, and you didn't argue that the

14 exception applied. You didn't argue it was feasible.

15 You briefed this motion. You never mentioned anything

16 of the exceptions. We argued the motion. You didn't

17 bring up any of the exceptions. You didn't argue that

18 there was a feasibility dispute. You didn't argue that

19 it was feasible to do this with material that was

20 available before 1967. None of that was done. You

21 didn't bring it up which I think properly assumed meant

22 you couldn't do it, wouldn't do it, didn't plan on doing

23 it, and was waiving your right to do it. Maybe, I was

24 naive to think that what you did was evidence of what

25 you planned in this case.

1 MS. DEAN: I believe that their motion was
2 making a difference between knowledge documents and
3 causation. I didn't even consider feasibility. I
4 understand what the Court's saying, but I didn't believe
5 when we were responding to their motion that that was
6 even part of it.
7 THE COURT: Feasibility is a liability
8 issue. The motion extended to everything related to
9 liability. The distinction was not knowledge versus
10 causation. The distinction was liability versus
11 causation.
12 MS. DEAN: I hear the Court --
13 THE COURT: Product liability standard.
14 MS. DEAN: I'm explaining why our response
15 was limited in the way it was. I hear you saying that
16 clearly if I'm going to ever talk about feasibility that
17 exception has to be revisited outside the presence of
18 the jury. Whether it was an error or not, I'm telling
19 the Court the first time I appreciated that distinction
20 is on the break.
21 THE COURT: You might have to brief, and
22 you might have to provide me with the documents that you
23 think you want to offer. You're gonna have to talk to
24 the defense to say if feasibility is in dispute or not
25 which would indicate whether or not the evidence is

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1 admissible and on and on and on which I thought we did
2 before trial.
3 MS. DEAN: Both from or page lines and -- I
4 was surprised by the objection and so I understand the
5 Court assaying --
6 THE COURT: I don't know why you're
7 surprised by the objection, and I've got two or three
8 other objections that were sustained where you violated
9 the motions in limine, too. So you're either
10 intentionally violating my orders or you need to get
11 your hearing checked.
12 MS. DEAN: Understood.
13 THE COURT: Okay. We're gonna take a brief
14 recess.
15 MR. DRUMKE: Your Honor, before the recess,
16 I just want to make sure I understood that the
17 preserving mistrial motions, those want to be heard at a
18 different time. There's three of them.
19 THE COURT: We'll hear them before you guys
20 argue once Miss Dean's done. I just need to give my
21 court reporter a break.
22 MR. DRUMKE: Understood. Thank you, Your
23 Honor.
24 [WHEREUPON,
25 THE COURT: Back on the record. We'll

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1 complete Ms. Dean's opening statements. We will take
2 lunch. I'll send out the jury for lunch. I've been
3 told there'll be mistrial motions, and we'll take those
4 up first before any further argument takes place and the
5 jury can remain in the jury room during that, so that's
6 sort of the agenda. Okay. The motion will be
7 sustained -- the objection will be sustained, and the
8 then we'll move on. Let's get the jury.
9 [WHEREUPON, the jury entered the
10 courtroom at 11:52 a.m.]
11 THE COURT: All right. For the record, the
12 last objection is sustained. Ms. Dean, you may
13 continue.
14 MS. DEAN: So we were talking about design
15 defect. I want to also mention as it relates to John
16 Crane with the gaskets and packing. You're gonna hear
17 that during the time that Del Domagala that there were
18 certain applications for gaskets and packing where there
19 wasn't a suitable substitute. If you're in a nuclear
20 power plant and later years if of steam system with a
21 lot of pressures that that wasn't available. You're
22 also gonna hear about the applications he used. There
23 was no reason asbestos had to be there, that there were
24 substitutes available and sold by John Crane that didn't
25 have asbestos and no risk for cancer.

1 The next kind of part I want to talk about is
2 just a little bit about how we learned about the
3 particular exposure in this case. I've already
4 mentioned which products it was, but I hope to fill in
5 the gaps what you're gonna hear. First of all, your'
6 gonna hear as a young man who grew up on a farm in
7 Bryant, South Dakota, where he worked on a farm and
8 worked with tractors, not very often, but he'd have to
9 do maintenance on them and also cars.
10 So his first exposures actually were when he was
11 a young kid on a farm with his dad, couple of brake jobs
12 on John Deere tractors and also the same with Ford
13 brakes. He then moved to Madison, South Dakota, with
14 his family. The first job he had wasn't licensed. He
15 had no apprenticeship, in the '60s that wasn't required,
16 was working for a place called Swenson Plumbing.
17 He worked in 1966 and 1967, and you're gonna
18 hear that he did work from fixing a toilet to putting in
19 a fixture to putting in pipe to installing furnaces, to
20 taking out furnaces, mainly residential, some limited
21 non-residential work.
22 Most of this evidence comes in from what Judge
23 Guthmann defined as direct evidence from his testimony
24 under oath, but we also wanted to give you more to see
25 if there were other things that made what he has

1 described, what he indicated to be more likely true,
2 more reasonable, given the context. And here's what we
3 learned. First of all, we've learned things from
4 Georgia-Pacific. We had a chance to ask them questions,
5 and they verified all sorts of things.
6 Georgia-Pacific was sold. It had asbestos every
7 month that he said he used it was sold in South Dakota.
8 The name that sounded familiar to him but he wasn't sure
9 Bestwall was also on the bag exactly in the timeframe
10 that he said it in the sizes and the way that he said it
11 was worked, so that was one thing we were able to do
12 after his deposition figure out.
13 There are some documents that helped us. We
14 asked for social security securities records, a little
15 bit hard to read, but they verify that he worked for
16 Swenson and Sons, Inc., that he was there in the years
17 that he said in '66 and '67, and he remember distinctly
18 being there in the summer. He was he there for longer.
19 He said he started in the fall and ended in December.
20 It turns out he started in the summer and ended in
21 January but got roughly the right years. We were able
22 to show that he was there, but we kept looking. We
23 tried to see if it made sense what he described, and
24 I've told you, Georgia-Pacific is not the only joint
25 compound. He remembered Gold Bond. He remembered USG.

1 He was asked lots the questions about this.
2 One of things he was asked by Georgia-Pacific do
3 your remember Murco? He thought about, no. I don't
4 think I ever heard of that in my life. That's where
5 Murco was sold. That's where the work was done, made a
6 lot of sense. I mean, a part of what we've learned from
7 the companies for joint compound, at least, a lot of the
8 distribution was regional, that the cost margins from
9 selling the product from one place to another was small,
10 and if you were shipping it too far, didn't make sense.
11 He's like, well, what about Welco? Do you
12 remember that joint compound. I've never heard that.
13 We did our research. That's where Welco sold. Again,
14 what he was saying made sense even though it was all the
15 way back to the 1960s. We asked Georgia-Pacific. They
16 had over 100 distribution centers in one of few
17 companies that sold all over the country. No dispute
18 that where it was worked at when it was work made sense
19 for what they were selling at the time.
20 We also wanted to find out if is how he
21 described the work, when he described the work being --
22 and something I should make clear. I don't think I
23 have. He wasn't doing this himself. I get so into the
24 details, I think I sometimes forget. Let me back up.
25 He's a plumber not a dry waller. They're doing

1 new construction. They're building homes. And so he's
2 there while electricians are doing certain work,
3 painters are doing work, dry wallers are doing work,
4 plumbers are doing work. He, expect for once in a house
5 he did for his own project, is exposure to bystander is
6 not first hand. I don't think I ever mentioned that, so
7 I probably should have started there.
8 He was around this enough that he was asked
9 extraordinary amounts of questions. We how big were the
10 drywall? When did you do this work? How did you do it.
11 And we were able to talk to Georgia-Pacific, get
12 information from their experts that his work practices
13 about how it was done made sense, but then we went
14 further.
15 There was a lot of questions asked of him by
16 Georgia-Pacific by what they call construction
17 sequencing. When are different folks coming in as
18 contractors to build a house? Does it make sense for a
19 plumbers to be around a drywaller? He's asked questions
20 about that a lot. I think you're gonna hear in their
21 open about that a lot. There's a coworker that they
22 found, and he only worked with four guys. It's good we
23 found one of these people and asked him questions. And
24 you're gonna hear that some work that a plumber does
25 makes no sense to be around a dry waller.

1 When you're coming in and laying pipe, there's
2 no drywall to be around. Sometimes they come in after
3 the walls are already there, and they have to put holes
4 in them and mess with the drywall, but there is a
5 suggestion you're gonna hear from Georgia-Pacific that a
6 plumber wouldn't around a dry waller, so we tried to
7 investigate that more. This is the coworker that the y
8 found. His name is Lee Schoeberl. He worked for
9 Swenson in '62 or '63, and he remembers leaving around
10 '66, '67. He doesn't remember Del Domagala. He said
11 maybe he left before Domagala got there. He doesn't
12 know. Del Domagala only worked there for about six
13 months, and they don't remember each other, but he was
14 asked about all these sequencing questioning, right.
15 Would you have there here then? Would you have been
16 there then. Then I asked him questions.
17 Do you know what drywall is versus plaster and
18 another type of material that was used? How did it
19 work? What did it look like? Describe the entire
20 process just the way Del did. Well, did you ever do
21 that yourself? No. How do you know it? How do you
22 know that. 'Cause as a plumb in construction for years,
23 I've been around it thousands of times.
24 You're gonna hear the construction process has a
25 normal sequence. You're also gonna here it's just as

1 often it's not in that sequence. There are time delays,
2 time delay, material delays, different subs coming in,
3 different things become worked, and it is common sense
4 there is overlap here.
5 He also says something that I think is very
6 important. Lots of these people didn't cleanup after
7 themselves. They all got cleaned up at the end before
8 you have the family move in. So you have a bag of 25
9 pound dust, one pound of it being asbestos. It is
10 mixed. It's put on the ground, and electricians and
11 plumbers and people are coming through for weeks
12 tracking it through the house. That's why this is a
13 problem. And so, again, part of the reason we talk
14 about the burden of proof is there's nothing about
15 things that happened in the '60s that are crystal clear,
16 but we think the evidence is gonna be it's more likely
17 than not.
18 One of the things we hope to find from
19 Georgia-Pacific that are actually invoices. Did you
20 tell to Madison? Did you sell to Swenson? Did you sell
21 to the local suppliers and lumber yards there. They
22 just don't have those anymore. Let me tell you a little
23 bit more about CertainTeed, exact same timeframe, exact
24 same timeframe exact same job. We wanted to learn a
25 little bit more. He described that his work with pipes

1 were about four times once a week. He said he put in
2 the sewer pipe. He didn't work as much with the water
3 pipe, that he recalled doing that not with the city.
4 They were never contacted out by the City of Madison to
5 put in the big mains that went to the street. They were
6 brought in to connect the house to the mains either
7 because there were the crack, and that was most of his
8 work particularly in the winter when you're fixing a
9 problem, more rarely with new homes, and then when you
10 have to do that work, you have to cut it.
11 Same question, the first thing we have is to try
12 to figure out from CertainTeed is what he saying make
13 sense. You're gonna hear in big ways and small that
14 what he described is spot son, 13 foot pipe, typically,
15 4 and 6 inches in diameter, had to be cut a couple times
16 in a typical run. The texture of the pipe, the name
17 that was put on the pipe, the fact that it's gravity fed
18 instead of like water pipe that required some kind of
19 pressure, and he was asked extraordinary details where
20 we were able to take what he remembered, compare it to
21 what CertainTeed believed would happen, and it added up,
22 but then, again, they found this gentleman.
23 And Mr. Schoeberl I think whose testimony you're
24 gonna hear confirms all sorts of things, that the
25 coworkers remember that my client remembered after five

1 years were the right people, that a fundamental big part
2 of their business was laying pipe, that they had a saw
3 and that they had a hammer and chisel to the cut the
4 pipe.
5 His particular expertise was not sewer pipe. He
6 said he only did that three to four times a year, but he
7 was laying water pipe almost every day, that that's part
8 of what was happening with the growth of Madison at that
9 time. How the pipe was -- I mean, little details. The
10 fact that they carried it on the truck and what truck
11 kind of truck they remembered the same. The fact that
12 when you lay pipe it has to be dug in the ground, and
13 they didn't have their own hoe to do that and had to go
14 hire someone, I mean, confirmation after confirmation
15 after confirmation, but on one huge point we did not get
16 confirmation.
17 We asked about him about joint compound because
18 he was also around it. Did you know it contained
19 asbestos? Did you know that there was harm in it? What
20 he tells you is I hate lawyers. I hate lawsuits that
21 they bring, and I don't believe asbestos can hurt a
22 sole. I'll believe it for a minute. There's some
23 expletives put if there, right? It's important for two
24 reasons: What you're gonna hear, this is a person that
25 bears out the problem with asbestos. No matter how many

1 times he can be told this kills people, he worked with
2 it for years and around it for year, and he's fine. It
3 gives a false sense of security unless you are fully
4 warned because of the nature of the harm.
5 But when he was asked about asbestos cement
6 pipe, I don't believe it existed. It's not anywhere.
7 Not ever. That's his testimony, and I want to show how
8 stark the conflict is. He said it was a clay or cast
9 iron. You're gonna hear, and it's undisputed, clay pipe
10 came in 5 foot lengths. Cast iron pipe and plastic pipe
11 were 25 foot lengths. The asbestos cement pipes were in
12 13. They looked different. They feel different. The
13 weight is remarkably different. There is no confusion
14 of what you're working with.
15 And his point is, I went to the area where we
16 stored the stuff, ask there's no asbestos cement pipe,
17 not ever. So we wanted to look into that. Why would he
18 say that? And part of what you're gonna hear is that we
19 found another coworker. The son that owned it and was
20 working there in these exact same years. I was in high
21 school. I didn't do it a lot, but asbestos cement pipe
22 was there. I used the clay more. I probably only used
23 it once a year, but there's no question it was there.
24 You also have this. We talked to CertainTeed
25 about their sales. Did you sell, and what they say is

1 for the vast majority of the times that mattered, we
2 don't have records. We didn't keep or sales records at
3 any time in 1966 and any time that he worked there in
4 1967, but they did find records later in '67 and in '68,
5 and what they showed is the exact type of pipe with the
6 exact same length and diameter being sold throughout the
7 state of South Dakota, that they're plant in St. Louis
8 was selling it all over the state for the purposes that
9 our client said and they had a distributor that was
10 selling it all throughout the state.
11 What else did we learn? That the other type of
12 pipe that our client remembered, 'cause he didn't
13 remember CertainTeed. He remembered CertainTeed and
14 Johns Manville and he remembered PVC. Johns Manville
15 records were almost exactly the same, very limited.
16 They didn't keep them, but evidence they were selling
17 this pipe for the exact use, the vertical mains all
18 throughout the state of South Dakota, and so I think,
19 particularly, here more than anything when you have one
20 coworker that says that I've even it, another one that
21 says I haven't, and our client swearing that he
22 remembers it. We need your help.
23 John Crane, first he thought he worked at John
24 Crane a little bit later towards the end of the year.
25 Once he got the social security, we realized he actually

1 worked with John Crane a little bit longer and started
2 there in early 1967. That's what the social security
3 records helped us with and retired working at the city
4 the Luverne.
5 So he started off at the City of Madison working
6 in the waste and water plaint maintaining the pipes and
7 plumps and valves throughout there, throughout that
8 city. The city is about 5,000 people. He moved his
9 family about a hour away to Minnesota in the city of
10 Luverne, work there for 28 years. That's where he
11 retired. Did very similar work, a little bit smaller of
12 a community about 5000. He indicated that he remembered
13 John Crane gaskets being most, and A.W. Chesterton
14 packing being there which is another company that's
15 involved in this. First thing, are their documents.
16 John Crane doesn't have them. They didn't keep them.
17 What about the city? City of Madison does not. The
18 city of Luverne did.
19 They were credibly limited, but they proved
20 exactly what Del Domagala said, asbestosis was being
21 used in these systems. You can see it written in the
22 documents. They only had packing records not gaskets,
23 but what they show is that asbestos was being used in
24 these systems by A.W. Chesterton as he remembered even
25 though they weren't hot steam, even though there were

1 other things that contain asbestos that could have been
2 used. They didn't give us any information about
3 gaskets, the product that John Crane he remembered the
4 most, so we continued looking.
5 This is a person that they found was a Ron Lindt
6 [phonetic], Del was asked coworkers' name, who trained
7 him and who supervised him, and he remembered all of
8 that. One of the few places they copied materials from
9 Power Process. With that information we were able to
10 further verify. Mr. Lindt indicated, first, I
11 remembered Del. I remember him well. He was a hockey
12 nut. He traveled hundreds of miles with his three boys
13 all the times, and that's what he talked about. That's
14 the first thing that he remembers.
15 The second thing that he remembered is that he
16 was a super hands on supervise and did a lot of work.
17 He also verified that they supplied to the city of
18 Luverne just like Del said --
19 THE COURT: Mr. Dean.
20 MS. DEAN: Just as Mr. Domagala said, I
21 apologize, Your Honor and that they did so for
22 mechanical seals which is an alternative to packing,
23 that Del remembered -- Mr. Domagala remembered, and that
24 he also -- they also sold the packing from A.W.
25 Chesterton.

1 Then we asked about the gaskets. He said we
2 sold them gaskets. I know they used asbestos gaskets,
3 but we didn't sell those. He also indicated that he
4 knew from being in this industry during the years that
5 mattered starting in 1977 on that John Crane asbestos
6 gaskets were widely available. We continued to get this
7 verification.
8 He gave us further details that those gaskets
9 would be gray sheet gaskets, that there was asbestos in
10 them into the mid '80s, that they get brittle when
11 they're put in the system and have to be scraped off.
12 He describes scraping them off with a brush or
13 screwdriver, that A. W. Rochester and John Crane made
14 those gaskets. These are all details that Mr. Domagala
15 was asked about extensively when he was deposed in June
16 and July over the course of days, and also further
17 confirm what Mr. Domagala said. You never remembered
18 seeing a warning from anybody telling him this was
19 dangerous.
20 I want to speak a little bit about how this
21 evidence comes in. You're gonna hear from various
22 experts, a Harvard doctor who's a pathologist. You're
23 gonna hear from the former head of OSHA that they
24 brining. You're gonna hear from am industrial
25 hygienist, pulmonologist, a lot of people are gonna come

1 here to talk to you.
2 The first thing that you're gonna find is with
3 many of them they've been doing this for decades and
4 have made on both sides extraordinary amounts of money,
5 extraordinary amounts of money in this litigation, and
6 so part of what you have to pars through is bias, right?
7 I want to give you an example, though, of our experts
8 compared to what I think you're gonna hear from theirs,
9 but sometimes a small picture of a gentleman by the name
10 of Dr. Arnold Brody. He was a professor at Tulane, and
11 then moved to North Carolina, has studied asbestos
12 disease since the 1960s, was a pioneer, one the very
13 first people in the '60s not learning about what
14 asbestoses diseases are caused, that was already know,
15 but how. How did they migrate from our throats into our
16 lungs throughout the body. Do they go to the lymph
17 system? Do they go through to the blood system, and
18 he's gonna come and explain how that happens and how our
19 body fights against it and why for some people after the
20 latency period they still get sick. He didn't get
21 involved in the litigation until about 15 years after he
22 had been studying, researching, and taking care of
23 asbestos issues that had nothing to do with the
24 courtrooms, and that's the first time he was asked to
25 testify.

1 His work is funded by the National Institute of
2 Health not by lawyers. Every single study he has done
3 company and there are over 200 published studies that he
4 has about asbestos and it happens that have been
5 published in some of the best journals around the world.
6 All of them are studied by people they're trying to
7 figure out the disease not by litigation.
8 The person on the right is a gentleman by the
9 name of Dr. Paustenbach. He's an industrial hygienist
10 that worked, first, as a vice president and owner of
11 Xponent and started his own company called ChemRisk.
12 He's not coming. People that he has hired ChemRisk are,
13 and I believe every witness that takes the stand on
14 their side relies on what he and his coworkers have
15 provided.
16 MR. WILL: Objection, Your Honor.
17 THE COURT: Overruled.
18 MS. DEAN: You're gonna hear that he got
19 involved with studying asbestos in approximately 2001.
20 That corresponded when companies approached him and
21 said, hey, do you want to be an expert and get involved
22 in asbestos in 2001? In the time frame that he's done
23 that work, we know he's made over 30 million dollars
24 just from asbestos litigation. Prior to being asked to
25 be this expert, you're gonna hear that he has absolutely

1 no research about asbestos.

2 You're also going to hear that not only Dr.

3 Paustenbach but the people that are coming that rely on

4 him, Mr. Henshaw who's the former head of OSHA, Mr.s

5 Madl that comes. They're both -- Dr. Madl that's

6 coming. Mr. Henshaw is not a doctor but an industrial

7 hygienist with an engineering background, have had their

8 worked publicly criticized, had things they've submitted

9 to journals be questions to be taken out. Dr. Brody has

10 spent his life studying this and has never had an issue.

11 And so part of what you have to confer is not just what

12 we said but who said it and if you believe what they're

13 saying.

14 Another form of the testimony that you're gonna

15 give -- get the through videos, again, I'm hoping -- I'm

16 hoping Mr. Domagala will be here, but whether it's

17 Mr. Domagala or their corporate representatives, we have

18 a bunch of videos to show in the case where people have

19 taken an oath as if they're on the stand, but I mention

20 this because I think you're gonna hear about six minutes

21 of testimony over the course of ten hours to suggest

22 that Mr. Domagala is in not honest, and he was just

23 doing what his attorneys said. I think that's gonna the

24 be the argument.

25 I ask you to wait until you hear him in the

1 context with his voice, with his understanding of what
2 happened, because the evidence about Mr. Domagala is
3 gonna be he's a man that was married to the same woman
4 for 59 years, that raised six good kids, that held his
5 last job for decades. This was in the City of Luverne
6 paper when he retired.
7 Both at the city of Madison and the city of
8 Luverne there is repeated comments about how hard
9 working he is. One of the repeated problems that he
10 doesn't delegate enough, about how he made the city
11 water better, about his kindness, about his work ethic.
12 He made mistakes. In his career, there is things that
13 he messed up in his job, but overwhelmingly I think
14 you're gonna hear about a man that was diligent, and
15 there's nothing about how he conducted himself that put
16 him in this situation, nothing.
17 The last thing I want to talk to you about and
18 we spent most of our time talking about the '60s, '70s,
19 and '80s, you're gonna hear Del Domagala, I think, it
20 was almost exactly a year ago, it was on December 12 of
21 last year, went into the hospital with a heart attack.
22 There was a lot of fluid building around his heart.
23 They really quickly did a surgery, put a stint in that
24 took care of the heart problem, but when doing that,
25 found a massive buildup in his lung, fluid buildup.

1 They tried to take care of it where they take
2 liters, literally liters of fluid out and test it and
3 couldn't figure out what was going on. That happened
4 repeatedly. Finally, because they couldn't figure out
5 what was happening, they do a biopsy where they
6 literally take the tissue out so they can figure out
7 what's going on, and I don't believe there's any dispute
8 that he had Mesothelioma. It's stage four. Usually
9 this cancer is stage four when they catch it.
10 In April they were told you have cancer. It is
11 incurable. We can do chemo immediately. It might give
12 you a few more months. In his deposition he was in the
13 middle of that chemo. You're gonna hear that he
14 responded horribly. It was incredibly hard on him.
15 They eventually said he wasn't getting a good response
16 and it was too hard to continue.
17 When he was given an option, his family to do
18 decide whether to this or not, they wanted to try to
19 fight. The good news is he's feeling much better now
20 that he's distance himself from the chemo. The bad news
21 is the cancer is growing.
22 When they first found out about this, Del
23 Domagala is a person that worked in the city in a small
24 town where everybody know everything, right. He's
25 always worked out of his own problems. He has never

1 been in a situation like this. It is the first time
2 that he's found that he's been in this situation, but I
3 think the evidence is going to be that this family has
4 gone through an extraordinary amount. Eileen Domagala
5 wants to be here to tell you about what they've been
6 through, but they are not here because they seek
7 sympathy. They are here because they believe in the
8 rules, and they were ignored and that they are facing
9 the consequences because of that, and that's not right.
10 At the end of day, I think what was going to be
11 disputed is that this did not have to happen. There are
12 certain things that happen in our life that we cannot
13 control or have to wait and find out later it happened,
14 why bad things happen. This was something that was
15 preventable, and all that literature I discussed with
16 about asbestos causing disease, a constant thing in the;
17 30s and '40s and '50s, this doesn't have to happen, and
18 we can prevent this problem with education and testing,
19 and they simply didn't do it.
20 I've talked a long time. I look forward to
21 proving some of things that I've said, and I'm just very
22 much appreciate you listening. Thank you.
23 THE COURT: Members of the jury, at this
24 I'm going to give you a lunch break. I'm gonna ask you
25 to come back at 1:45 to be in the jury room by 1, 40

1 don't talk about the case, follow all the instructions
2 that I've given you throughout this matter including as
3 prospective jurors, and we'll see you after lunch.
4 [WHEREUPON, the jury left the
5 courtroom at 12:34 p.m.[
6 THE COURT: All right. You can be seated.
7 We'll come back in an hour. Thank you.
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Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51253-0
Appellate Court Case Title:	Gerri S. Coogan, et al., Respondents v. Borg-Warner Morse Tec, Inc., et al., Appellants
Superior Court Case Number:	15-2-09504-3

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GERRI S. COOGAN, the spouse of JERRY D. COOGAN, deceased, and JAMES P. SPURGETIS, solely in his capacity as the Personal Representative of the Estate of JERRY D. COOGAN, Deceased, Plaintiffs/Respondents, v. GENUINE PARTS COMPANY, and NATIONAL AUTOMOTIVE PARTS ASSOCIATION a/k/a NAPA Defendants/Appellants..	No. 51253-0-II DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington as follows:

1. I am an employee of Schroeter Goldmark & Bender, over the age of 18, not party to this action and competent to make the following statements:

2. **On December 18, 2018**, copies of the Errata Pages to Respondents' Brief Against Genuine Parts Company and this Declaration of Service were filed with the Court of Appeals, Division II, and served upon all attorneys of record for the parties by having said copies sent via

messenger, U.S. Mail, Federal Express, electronic mail and/or E-Service through the Electronic Portal as follows:

Counsel for National Automotive Parts Association Philip A. Talmadge, WSBA #6973 Talmadge/Fitzpatrick/Tribe 2775 Harbor Avenue SW Third Floor, Suite C Seattle, WA 98126	☐ Via Facsimile ☐ Via First Class Mail ☐ Via Messenger ☐ Via Email ☒ E-Service through the Electronic Portal
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DATED: December 18, 2018, at Seattle, Washington.

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