No. 103135-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KERRY L. ERICKSON; MICHELLE M. LEAHY;
RICHARD A. LEAHY; and JOYCE E. MARQUARDT,
Plaintiffs-Petitioners,

v.

PHARMACIA LLC, a Delaware limited liability company, f/k/a Pharmacia Corporation,
Defendant-Respondent.

REPLY TO ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. The new issue raised in Monsanto's answer fails to satisfy the criteria for this Court's review.

Monsanto's answer conditionally cross-petitions for review on one additional question: whether Division One erred in applying Missouri's law of punitive damages to the plaintiffs' WPLA claims. Answer Br. 31–35.[1] The company advances just one reason why it believes that this issue satisfies RAP 13.4(b)'s criteria for review: The decision below, it claims, conflicts with this Court's "cases establishing Washington's public policy prohibiting punitive damages." *Id.* at 32 (citing *Dailey v. N. Coast Life Ins. Co.*, 129 Wn.2d 572, 574–75, 919 P.2d 589 (1996)).

But Monsanto fails to acknowledge that this issue has been the subject of settled Washington law for decades. In *Kammerer v. Western Gear Corp.*, this Court applied the Restatement (Second) of Conflict of Laws to uphold a Washington court's award of punitive damages under California law. 96 Wn.2d 416, 421–23, 635 P.2d 708

[1] The court of appeals disallowed punitive damages for post-sale failure to warn based on its conclusion that Missouri does not recognize that cause of action—a holding that the plaintiffs challenge in their petition for review. Monsanto's cross-petition, however, asks the Court to go much further by foreclosing punitive damages on *any* of the plaintiffs' WPLA claims, regardless of whether the claims would be available under Missouri law.

(1981). The court held that, where another state has the most significant relationship to the issue of punitive damages, "a Washington court can award punitive damages under the law" of that state. *Id.* at 423.

As Division One explained in another leading case (which Monsanto also fails to cite), *Kammerer* establishes that Washington's policy against punitive damages doesn't prohibit a court from awarding them on a WPLA claim if the court, like the trial court here, determines under choice-of-law principles that the issue is governed by the law of another state. *Singh v. Edwards Lifesciences Corp.*, 151 Wn. App. 137, 144–45, 210 P.3d 337 (2009).

Thus, unlike Division One's choice-of-law decision on the statute of repose, its decision on punitive damages does not conflict with this Court's decisions or raise any open question warranting the Court's review. To the contrary, this Court would need to overrule its own settled precedent to reach Monsanto's preferred outcome—yet the petition never acknowledges this precedent, let alone requests that it be overruled.

II. Division One's decision to award punitive damages was correct under Washington's established choice-of-law rules.

With nothing more to say on the criteria for reviewability, Monsanto devotes the remainder of its cross-petition to a series of merits arguments. Monsanto is wrong on every count. But even if it were correct, it still would not have identified any issue that, under RAP 13.4(b), merits this Court's review.

A. Monsanto's first argument (at 32–33) is that the WPLA includes a "statutory directive" that requires application of Washington's law on punitive damages notwithstanding its established choice-of-law rules. In an argument that the company floated for the first time in its reply below, Monsanto points to the statute's definition of "harm," which—unlike the Model Uniform Product Liability Act on which the statute is based—"includes any damages recognized by the courts of this state." RCW 7.72.010(6).

Nothing in that language, however, prohibits an award of punitive damages. As this Court has explained, the language is intended to *expand*, not restrict, the remedies available under the model act by "allowing for the continued development of the concept through case law." *Washington State Physicians Ins. Exch. &*

Ass'n v. Fisons Corp., 122 Wn.2d 299, 320, 858 P.2d 1054 (1993). The statute thus broadly authorizes "*any* damages recognized"—now or in the future—by Washington courts. RCW 7.72.010(6) (emphasis added); *see S.L. Rowland Const. Co. v. Beall Pipe & Tank Corp.*, 14 Wn. App. 297, 306, 540 P.2d 912 (1975) ("The word 'any' is a broad and inclusive term."). Punitive damages awarded under the law of another state easily satisfy that definition because such awards have repeatedly been "recognized by" the Washington courts—including this Court. *See Kammerer*, 96 Wn.2d at 423 (holding that "a Washington court can award punitive damages under the law" of another state); *Singh*, 151 Wn. App. at 147 (noting that "Washington courts have allowed punitive damages").

Regardless, the WPLA's definition of "harm" is not a statutory directive on choice of law. To constitute such a directive, a statute must be "expressly directed to choice of law"—that is, it must expressly "provide for the application of the local law of one state, rather than the local law of another." Restatement (Second) of Conflict of Laws § 6, cmt. a (1971). As an example of such a provision, the Restatement cites § 4-102 of the Uniform Commercial Code, which provides that a bank's "liability is

governed by the law of the place where the branch or separate office is located." *See* Restatement (Second) of Conflict of Laws § 6, cmt. a. Such statutes, however, are "few in number." *Id.* A "court will rarely find that a question of choice of law is explicitly covered by statute." *Id.*, cmt b.

Unlike the Restatement's example, which expressly directs courts to apply "the law of the place," the WPLA's definition of "harm" says nothing about choice of law at all. It says nothing about which state's law of damages applies. The statute just sets forth the remedies available under *Washington* law; it doesn't suggest that these remedies were "intended to have extraterritorial application" (to punish conduct that took place in Missouri, for example) or to supplant *other* states' remedies. Restatement (Second) of Conflict of Laws § 6, cmt. e (1971).

B. Next, Monsanto relies (at 33) on language from a tentative draft of the in-progress Restatement (Third) of Conflict of Laws, which it misreads as requiring that the same state's law must apply to both liability and punitive damages. The first page of the relevant chapter, however, says the opposite: "Like the Restatement of the Law Second, … this Restatement analyzes and resolves choice-of-

law problems in terms of *individual issues*." Restatement (Third) of Conflict of Laws, tentative draft 4, ch. 6, intro. note (2023) (emphasis added). This means that "different issues in a single case or claim" may "be governed by different states' laws," a process that is "called dépeçage." *Id.* Indeed, the tentative draft cites with approval Division One's decision in *Singh* as a paradigmatic case "allowing punitive damages when they are allowed by the state of the tortfeasor's domicile and the state of conduct but not the state of injury." *Id.* § 6.12, reporter's note.

Monsanto relies on a provision of the tentative draft stating that "[t]he law governing the availability of punitive damages is the law selected under the rules" governing choice-of-law in product-liability cases. *Id.* § 6.12. But the product-liability "rules" to which the Third Restatement refers do not, as Monsanto appears to assume, provide that damages are governed by the same law that governs liability. Rather, they provide that "[i]ssues relating to damages are determined by the law selected under the choice-of-law rules *for such damages* or the general [choice-of-law] rules" governing torts. *Id.* § 6.11(c) (emphasis added). In other words, the tentative draft's choice-of-law rules—just like the Second

Restatement's—must be separately applied to *each* "[i]ssue[] relating to damages." *Id.*

In any event, neither this Court nor any other court has adopted the Third Restatement, which is still in draft form. And the Second Restatement—which this Court adopted as the law of Washington in *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580, 555 P.2d 997 (1976)—unambiguously provides that the law governing an issue of damages is the law of the "state of most significant relationship with respect to the *issue of damages*." Restatement (Second) of Conflict of Laws § 171, cmt. b (1971) (emphasis added). "In general, this should be the state which has the dominant interest in the determination *of the particular issue*." Restatement (Second) § 171, cmt. b (emphasis added); *see also id.*, cmt. d ("The law selected by application of the rule of § 145 determines the right to exemplary damages."). Consequently, different states' laws may govern "whether the actor's conduct was tortious" and "the measure of damages," *Id.* §§ 156, 171, including "what limitations, if any, are imposed upon the amount of recovery." *Id.* § 171, cmt. a. Monsanto has not even asked this Court

to overrule *Spider Staging*, but that is what its position would effectively require.

C. Even given that an issue-by-issue test applies, Monsanto argues (at 33–34) that Washington has the more significant relationship to the issue of punitive damages. Monsanto's argument again runs headlong into established Washington law. As this Court held in *Spider Staging*, a state's interest in "protect[ing] defendants from excessive financial burdens … is primarily local" because the state typically "seeks to protect its own residents." 87 Wn.2d at 582–83. Washington thus has no "interest in applying its [damages] limitation to nonresident defendants." *Id.* at 583–84. To do so "would not protect [Washington] residents, but would merely limit their ability to recover damages." *Zenaida-Garcia v. Recovery Sys. Tech., Inc.*, 128 Wn. App. 256, 265, 115 P.3d 1017 (2005).

Missouri, on the other hand, has a strong "interest in deterring its corporations from engaging in" misconduct. *Singh*, 151 Wn. App. at 148. So where, as here, "the primary purpose of the tort rule involved is to deter or punish misconduct" rather than "to compensate the victim for his injuries," "the state where the conduct took place" typically has the "dominant interest and thus [the] most

significant relationship." *Barr v. Interbay Citizens Bank*, 96 Wn.2d 692, 698, 649 P.2d 441 (1981). The most "significant factor" in a punitive-damages case is therefore "the jurisdiction in which the bad behavior … occurred." *Singh*, 151 Wn. App. at 145 (applying California's punitive-damages law where "[t]he conduct that serve[d] as the basis of the punitive damage award … occurred in California").

Monsanto does not argue otherwise. Instead, it attempts to distance itself (implausibly) from its home state of Missouri, claiming (at 34–35) that it never manufactured PCBs in the state and that it is no longer headquartered there. Even if those assertions are true, they miss the point. The plaintiffs here did not ask for or receive punitive damages on their claim that Monsanto defectively *manufactured* PCBs, but on their claims for defective design and failure to warn. *See* CP 16553–56. Monsanto doesn't deny that the tortious acts giving rise to those claims—the company's design of the dangerous chemical and its decision not to warn the public

about it—took place at the company's headquarters during the time that those headquarters were still located in Missouri.[2]

D. Finally, Monsanto argues that the jury's award of punitive damages violates Missouri policy because the trial judge court did not follow certain Missouri state-law rules governing punitive awards. *See* Mo. Rev. Stat. § 510.263.4. Monsanto admits, however, that these rules are "procedural" in nature. *See Montoya v. Sloan Valve Co.*, 2021 WL 5865371, at *1 (E.D. Mo. 2021). They govern, for example, how and when to file a motion, the submission of evidence, the burden of proof, and the time in which the trial court should decide the issue. Under ordinary choice-of-law principles, these procedural rules thus apply only in Missouri court. *See*

[2] The evidence on this point is overwhelming. *See, e.g.*, P-145 at 1–2 (1955 memo from the head of Monsanto's St. Louis medical department stating "[w]e know [PCBs] are toxic" but refusing to conduct further testing or warn the public because of the company's "worry" about how "juries" would react); P-144 at 1-2 (Monsanto scientist rejecting action on PCBs without "full" approval from the company's Missouri headquarters); P-182 at 1 (St. Louis memo explaining Monsanto's policy to not "give any unnecessary information which could … damage our sales position"); P-265 at 2 (Monsanto memo stating that "[t]he consensus in St. Louis is that … Monsanto would like to keep in the background in this problem").

Restatement (Second) of Conflict of Laws § 122 (1971); *Boudreaux v. Weyerhaeuser Co.*, 10 Wn. App. 2d 289, 313 n.14, 448 P.3d 121 (2019). And even if these rules could somehow apply in Washington courts, they wouldn't benefit Monsanto here because the company never invoked them. Even in Missouri court, Monsanto would not have been entitled to either a bifurcated trial or an offset of damages because it never filed the motions that the Missouri rules require for such relief. *See* Mo. Rev. Stat. § 510.263.4.

CONCLUSION

This Court should grant the plaintiffs-petitioners' petition for review but deny Monsanto's conditional cross-petition.

I certify under RAP 18.17 that this petition contains 2,107 words, excluding the parts of the document exempted from the word count by RAP 18.17(c).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date stated below, I caused the foregoing brief to be served via Filing Portal and email to the last known address of all counsel of record.

I certify under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

August 15, 2024

/s/ Deepak Gupta
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