No. 98296-1

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondents,

v.

GENUINE PARTS COMPANY d/b/a NATIONAL AUTOMOTIVE PARTS ASSOCIATION a/k/a NAPA; NATIONAL AUTOMOTIVE PARTS ASSOCIATION,

Appellants,

and

BORG-WARNER MORSE TEC INC. (sued individually and as successor-in-interest to BORG-WARNER CORPORATION); CATERPILLAR GLOBAL MINING, LLC (sued individually and as a successor-in-interest to BUCYRUS INTERNATIONAL f/k/a BUCYRUS-ERIE CO.); CERTAINTEED CORPORATION; DANA COMPANIES LLC (sued individually and as successor-in-interest to VICTOR GASKET MANUFACTURING COMP ANY); DEERE & COMP ANY d/b/a JOHN DEERE; FMC CORPORATION (d/b/a LINKBELT Cranes and Heavy Construction Equipment); FORMOSA PLASTICS CORPORATION U.S.A. (sued individually and as parent, alter ego and successor-in-interest to J-M MANUFACTURING COMP ANY and to JM AIC PIPE CORPORATION); HOLLIN GSWORTH & VOSE COMPANY; HONEYWELL INTERNATIONAL, INC. f/k/a ALLIED-SIGNAL, INC. (sued individually and as successor-in-interest to BENDIX CORPORAT ION); J-M MANUFACTURING COMPANY, INC. (sued individually and as

parent and alter ego to J-M A/C PIPE CORPORATION); KAISER GYPSUM COMPANY, INC.; LINK-BELT CONSTRUCTION EQUIPMENT COMPANY, LP., LLLP; NORTHWEST DRYER & MACHINERY CO.; OFFICEMAX, IN CORPORA TED (f/k/a BOISE CASCADE CORPORATION); PARKER-HANNIFIN CORPORATION; PNEUMO ABEX LLC (sued as successor-in-interest to ABEX CORPORATION); SABERHAGEN HOLDINGS, INC. (sued as successor-in-interest to THE BROWER COMP ANY); ST AND ARD MOTOR PRODUCTS, INC. d/b/a EIS; SPX CORPORATION (sued individually and as successor-in-interest to UNITED DOMINION INDUSTRIES LIMITED f/k/a AMCA International Corporation, individually and as successor in interest to Desa Industries Inc. and/or Insley Manufacturing as well as Koehring Company, individually and as successor in interest to Schield Bantam Company); TEREX CORPORATION d/b/a Koehring Company individually and as successor in interest to Schield Bantam Company; and WELLONS, INC.,

Defendants.

BRIEF OF AMICI CURIAE VIOLENT CRIME VICTIM SERVICES AND CHILD USA

Matthew P. Bergman
Justin Olson
BERGMAN DRAPER OSLUND UDO
821 Second Avenue, Suite 2100
Seattle, WA 98104
(T) 206-957-9510

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes | Page(s)

I. IDENTITY AND INTEREST OF AMICI CURIAE

Violent Crime Victim Services is a grassroots organization based out of Tacoma, Washington, that provides essential services to victims/survivors who have lost love ones to homicide. VCVS acts as an advocate for families by offering access to peer support groups, crisis intervention, mental health referrals, and faith community referrals. VCVS also supports families pursuing civil justice through the court system, which means ensuring that victims receive their constitutional rights, due dignity and respect, and have a meaningful role in the judicial system.

Violent crime leaves indelible physical and emotional scars on survivors that rarely lend themselves to easy quantification. Such damages can be assessed only by an impartial jury exercising its constitutional function to assess the victims' testimony, weigh the evidence, and determine the extent of noneconomic damages. As an advocate for violent crime victims, VCVS has a strong interest in the central issue in this appeal: whether a jury's determination of a plaintiff's non-economic damages may be subordinated to the personal, subjective impressions of the court.

CHILD USA is the leading national nonprofit think tank working to end child abuse and neglect in the United States. CHILD USA pairs

social science research with sophisticated legal analysis to determine the most effective public policies to end child abuse and neglect. CHILD USA produces the evidence-based solutions and information needed by courts, policymakers, organizations, the media, and society as a whole to increase child protection and the common good.

The trauma of child abuse is highly individualized and can have devastating, life-long impacts requiring ongoing psychological care. CHILD USA is interested in this case because child abuse victims' ability to obtain civil remedies in court depends on a reliable decision-making process based on objective, verifiable evidence assessed by juries. CHILD USA is concerned that the Court of Appeals' ruling in this case, if allowed to stand, will encourage judges to overturn jury awards based solely on their idiosyncratic, subjective sense of proportionality, forcing child abuse victims to forgo compensation altogether or face the traumatization of a second trial.

II. INTRODUCTION AND STATEMENT OF THE CASE

The facts of this case are drawn from the briefs of the parties and the Court of Appeals decision. *See Coogan v. Borg-Warner Morse TEC Inc.*, 2020 WL 824192 (Div. Two, 2020), at *1–3; Pet. for Review at 4–8.

III. ISSUES PRESENTED

1. In the absence of a judicial determination that a jury's damage award was unsupported by substantial evidence or the result of passion or prejudice, does the subjective, idiosyncratic "shocks the conscience" test abrogate the jury's exclusive, constitutional role of determining damages in civil cases?

2. Did a divided panel of the Court of Appeals improperly substitute its own subjective judgment on the appropriate determination of damages for the evidence-based judgment of the jury by setting aside the noneconomic damages award to the Coogan estate?

IV. SUMMARY OF ARGUMENT

The right of an injured party to have an impartially selected petit jury hear evidence and reach factual determinations is enshrined in the Washington Constitution, in statutes passed by the Washington Legislature, and in over a century of jurisprudence from this Court. The issue now before this Court tests the strength of a bedrock principle: that a jury's factual findings on damages may not be subordinated to the subjective views of any judge.

In this case, twelve individuals interrupted their lives for nearly three months of solemn attention to this case. These twelve individuals swore to try the matter according to the evidence presented and the

instructions given by the trial court. The jury watched, listened, deliberated, and *unanimously* determined that the noneconomic damages of Jerry "Doy" Coogan amounted to $30 million.

Nevertheless, Division Two of our Court of Appeals held that the trial court abused its discretion by deferring to the jury's determination of damages. In overturning the jury's assessment of damages, the Court of Appeals did not conclude that the jury's award was unsupported by substantial evidence or the result of passion or prejudice. Rather, with only a single paragraph of analysis, a divided Court of Appeals set aside the jury's factual finding of noneconomic damages for the sole reason that the award shocked *the appellate court's* conscience.

The Court of Appeals' holding abrogated the jury's constitutional role to determine the measure of noneconomic damages for concededly subjective reasons alone. Because the "shocks the conscience" test is purely subjective without any grounding in the evidence, it is contrary to Washington law and betrays the promise that the jury's role to determine damages remains inviolate. Amici curiae therefore urge this Court to abandon the subjective "shocks the conscience" test and hold that absent any determination that the jury's determination of noneconomic damages for Jerry Coogan was unsupported by the evidence or the result of passion or prejudice the jury's damage award should be upheld.

V. ARGUMENT

A. The Adequate Measure of Noneconomic Damages is a Constitutionally Protected Function of the Civil Jury.

Article 1, section 21 of the Washington Constitution provides that "The right of trial by jury shall remain inviolate." "The term 'inviolate' connotes deserving of the highest protection." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989). "For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees. In Washington, those guarantees include allowing the jury to determine the amount of damages in a civil case." *Id.*

The Court has repeatedly affirmed that the jury is given the constitutional role to determine questions of fact, and the measure of damages is an ultimate fact squarely within the jury's province. *Bunch v. King Cty. Dep't of Youth Servs*., 155 Wn.2d 165, 179, 116 P.3d 381 (2005) (determining the amount of damages is a constitutional role for the jury); *Sofie*, 112 Wn.2d at 645 ("the measure of damages is a question of fact within the jury's province"); *Bingaman v. Grays Harbor Community Hosp.*, 103 Wn.2d 831, 835, 699 P.2d 1230 (1985) (determination of the amount of damages is "primarily and peculiarly within the province of the jury"); *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971) (the

jury is constitutionally consigned the "ultimate power" to determine the amount of damages). Indeed, even before Washington attained statehood, the territorial Supreme Court indicated that "where the amount of damages is not fixed, agreed upon, or in some way liquidated, *a jury must be called*, unless expressly waived." *Baker v. Prewitt*, 3 Wash. Terr. 595, 598, 19 P. 149 (1888) (emphasis supplied).

In *Sofie v. Fibreboard Corporation*, the Court held that former RCW 4.56.250, which limited the amount of noneconomic damages that may be awarded by a jury in a civil trial, violated article 1, section 23 of the Washington Constitution. 112 Wn.2d at 669. Surveying Washington's long jurisprudence surrounding damage awards, the Court explained that "Washington has consistently looked to the jury to determine damages as a factual issue." *Id.* at 648. Indeed, "[t]he jury's role in determining noneconomic damages is even more essential." *Id.* at 180. Even the Legislature recognized the potential constitutional concerns arising from former RCW 4.56.250 when Senator Talmadge, during floor debates, argued that "when you start to put limitations on what juries can do, you have, in fact, invaded the province of the jury and have not preserved the right to a trial by jury inviolate." *Id.* (citing Senate Journal, 49th Legislature (1986), at 449). The plain language of article 1, section

21, ensuring that the jury's role remains inviolate, "provides the most fundamental guidance" for this bedrock principle. *Id.* at 656.[1]

From these bedrock principles, Washington courts have articulated several rules designed to limit judicial interference with the jury's award of noneconomic damages except in the most extreme—and heavily supported—circumstances. First, the Court must strongly presume that the jury's verdict is correct. *Bunch*, 155 Wn.2d at 179; *Sofie*, 112 Wn.2d at 654. Indeed, "the verdict of a jury does not carry its own death warrant solely by reason of its size." *Bingaman*, 103 Wn.2d at 838. Second, a trial court's denial of a remittitur strengthens the verdict. *Bunch*, 155 Wn.2d at 180; *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 330, 858 P.2d 1054 (1993). Third, a decision by the trial court to refuse remittitur is reviewed for abuse of discretion. *Bunch*, 155 Wn.2d at 180. And finally, the court will not disturb an award of damages made by the jury except where the award is "wholly unsupported by the evidence, obviously motivated by passion or prejudice, *or shocking to the court's conscience*." *Sofie*, 112 Wn.2d at 654–55 (emphasis supplied).

[1] Although not binding, this Court also recognized that the United States Supreme Court's jurisprudence on the Seventh Amendment reached similar conclusions about the jury's role in affixing damages. *Sofie*, 112 Wn.2d at 647. Looking to historical English cases, the United States Supreme Court found that the jury's role in determining damages "was very much within the jury's province and therefore protected by the Seventh Amendment." *Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935). Noneconomic damages are "a matter so peculiarly within the province of the jury that the Court should not alter it." 293 U.S. at 480.

Of the three limited circumstances outlined above, only two pass constitutional muster. The third circumstance, whereby a judge may alter a jury's award of damages when her conscience has been shocked, is a purely subjective question that is antithetical to the weight of Washington jurisprudence giving deference on this issue to the jury. For the following reasons, the Court should jettison the "shocks the conscience of the court" test and reaffirm Washington's constitutional commitment to keep inviolate the role of the jury in determining noneconomic damages.

B. The First Two Tests for Disturbing a Verdict Under Washington Law are Grounded in an Objective Review of the Evidentiary Record and Trial Proceedings.

The first circumstance whereby a court may disturb a jury's award of noneconomic damages arises when the award is "outside the range of substantial evidence in the record." *Bunch*, 155 Wn.2d at 179; *Sofie*, 112 Wn.2d at 654–55. As the description implies, this is an objective test derived entirely from the evidentiary record. The role of an appellate court applying this test is to "'review [] the evidence to determine whether sufficient credible evidence existed, whether or not conflicting or disputed, which would factually support a verdict of the size rendered.'" *Bunch*, 155 Wn.2d at 177 (quoting *Hendrickson v. Konopaski*, 14 Wn. App. 390, 395, 541 P.2d 1001 (1975)).

The second situation where a court may disturb a jury's award of noneconomic damages occurs when the jury's award "appears to have been arrived at as the result of passion or prejudice." *Bingaman*, 103 Wn.2d at 835. "[S]ometimes there may occur during the trial untoward incidents of such extreme or inflammatory nature that the court's admonitions and instructions could not cure or neutralize them." *Robeck*, 79 Wn.2d at 871. "Before passion or prejudice can justify reduction of a jury verdict, it must be of such manifest clarity as to make it unmistakable." *Bingaman*, 103 Wn.2d at 836. The mere size of the award is insufficient to support a finding of passion and prejudice; rather, the court must identify those specific occurrences in the trial proceedings that caused the judgment of the jury to become "so distorted by passion … that the court has the duty to substitute reason for retribution." *Id.*[2]

Both of the above circumstances—the absence of substantial evidence and the unmistakable presence of passion and prejudice—require an *objective* review of the evidentiary record and trial proceedings, and both may support a determination by the court that disturbance of the jury's award is appropriate. Appellate remittitur has been a part of the

[2] This limitation on a court's ability to increase or reduce a jury's verdict is further enshrined in statute. RCW 4.76.030 provides that the trial court may order a new trial when the damage award is "so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice."

common law since before 1889, when the Washington Constitution was ratified, and has been upheld by the United States Supreme Court. *Bunch*, 155 Wn.2d at 171 (citing *Kennon v. Gilmer*, 131 U.S. 22, 30, 9 S. Ct. 696 (1889)). "When the trial court remits an award it invades the constitutional province of the jury." *Id.* at 176. Nevertheless, remittitur is allowed because it is a "legal conclusion that the jury's damage finding is too high" based upon the evidence in the record and "well-developed constitutional guidelines." *Sofie*, 112 Wn.2d at 654.

C. The "Shocks the Conscience of the Court" Test is Entirely Subjective and Violates Washington's Constitution.

The third and final circumstance whereby a court may disturb a jury's award of noneconomic damages is when the award "shocks the conscience of the court." *Bingaman*, 103 Wn.2d at 835; *Bunch*, 155 Wn.2d at 175. Published authority attempting to clarify this test simply adds more subjective elements, asking whether the damages are "flagrantly outrageous and extravagant." *Bingaman*, 103 Wn.2d at 837. Even this Court has previously acknowledged that the test is purely subjective with results dependent upon the makeup of the bench.

In *Bunch v. King County Dept. of Youth Services*, a jury awarded the plaintiff, a prison guard, $260,000 in noneconomic damages arising from claims of employment discrimination. 155 Wn.2d at 169. The trial

court denied the county's request for a remittitur, but the Court of Appeals reversed and remitted the noneconomic damages to $25,000. *Id.* at 170. In support of its holding, the Court of Appeals determined that "the evidence was insufficient to support the award, it was motivated by passion and prejudice, and it shocked the court's conscience." *Id.* The opinion was later amended to provide the prison guard the option of choosing a new trial on damages alone. *Id.*

In a unanimous opinion, this Court reversed the decision by the Court of Appeals and reinstituted the jury's noneconomic damage determination. *Id.* at 183. The Court recognized that de novo review is appropriate when a trial court remits a damage award, while abuse of discretion is appropriate when the trial court does not:

> When the trial court remits an award it invades the constitutional province of the jury, making the less deferential standard of review appropriate. When the trial court refuses to remit the award then our case law says the verdict is strengthened and the discretion of the trial court should be respected.

Id. at 176.

With this standard of review firmly set, the Court considered the appellate court's rationale for the first two objective tests. As to the first, the Court found "sufficient evidence to convince an 'unprejudiced, thinking mind' of his anguish, and that is enough to support an award for

emotional distress." *Id.* at 181. As to the second, the Court noted "no indication of anything untoward in the proceedings that justifies setting the verdict aside based on passion and prejudice." *Id.*

Finally, the Court addressed the holding by the Court of Appeals that the noneconomic damages award "shocked its conscience." *Id.* at 181. The Court determined that "the jury's award of noneconomic damages [was] not so excessive as to be 'flagrantly outrageous and extravagant,' particularly in light of the strong presumption we accord to jury verdicts." *Id.* Additionally, the trial court's refusal to remit the damages "likewise confirm[ed] the award." *Id.* at 182. Consequently, the Court held that the appellate court "was not justified to reduce the noneconomic damages … ." *Id.* at 183. The Court concluded its analysis by stating as follows: "Our conscience is apparently more resilient than the Court of Appeals to shock." *Id.* at 182.

The Court's final observation in *Bunch* goes to the heart of the issue in this case—to wit, that different judges will necessarily have different subjective views about what shocks their own conscience. Even looking to whether an award is "flagrantly outrageous and extravagant" invites a subjective analysis untethered to the evidence. Perhaps even more telling, decisions relying upon the "shocks the conscience" test often conflate it with *the other two tests*.

For example, in *Bingaman v. Grays Harbor Community Hospital*, the Court of Appeals acknowledged that the jury's damage award was not outside the range of substantial evidence and that nothing so untoward occurred at trial to arouse the passion and prejudice of the jury. 103 Wn.2d at 836. Nevertheless, the Court of Appeals held that the award shocked its conscience because the jury "must have taken out its wrath on defendants for causing, needlessly, the untimely death of a lovely young woman." *Id.* at 836. While phrased as a "shocks the conscience" remittitur, the Court of Appeals' reasoning was premised on the passion and prejudice test.

Similarly, in *Hill v. GTE Directories Sales Corporation*, the trial court reduced a noneconomic damages award primarily because it was "shocking to the court's conscience." 71 Wn. App. 132, 138, 856 P.2d 746 (1993). The trial court found it shocking because "[t]here was no credible evidence of emotional distress, mental anguish, pain and suffering, or humiliation so sever [*sic*] as to justify an award of $410,000 for non-economic damages." *Id.* at 140. Again, this reasoning is based on the damage award falling outside the range of substantial evidence.[3]

[3] Notably, the Court of Appeals in *Bunch* cited the analysis and holding of *Hill* when it reversed the trial court's denial of remittitur. *Bunch*, 155 Wn.2d at 181. In reversing the Court of Appeals and reinstating the jury's award, this Court distinguished the facts of *Hill* and held that "comparisons of the present case to *Hill* are misguided." *Id.* at 182.

Taken together, the "shocks the conscience" test does not abide by the well-developed constitutional guidelines that support a trial court's exercise of remittitur. It is not a legal conclusion anchored firmly in the evidence or the record of trial proceedings; it is a gut feeling by one particular judge presiding over one particular case at one particular time.[4] The "shocks the conscience" test offends the function of the jury in its deepest integrity and, being a purely subjective test, it cannot be salvaged without savaging decades of precedent.

In *Cox v. Charles Wright Academy, Inc.*, the Court made clear that a judge's personal assessment of damages is of no consequence whatsoever. "Regardless of the court's assessment of the damages, it may not, after a fair trial, substitute its conclusions for that of the jury on the amount of damages." 70 Wn.2d 173, 176, 422 P.2d 515 (1967). The Court even implied that only the first two objective tests are appropriate:

> When the evidence concerning injuries is conflicting, the jury decides whether the injuries are insignificant, minor, moderate, or serious, and it determines the amount of

[4] Attitudes regarding what "shocks the conscience" evolve over time, usually trailing scientific development. Until recently, most courts refused to acknowledge the extensive body of evidence establishing that child sexual abuse victims are so traumatized that they often need decades to come forward, if they ever do. Rebecca Campbell, Ph.D., *The Neurobiology of Sexual Assault: Explaining Effects on the Brain*, Nat'l Inst. of Justice (2012); Bessel A. van der Kolk M.D., et al., *Traumatic Stress: The Effects of Overwhelming Experience on Mind, Body, and Society* (2006). Only in response to this evidence-based approach has understanding of what is "reasonable" shifted in cases of victims of child sex abuse. CHILD USA, 2019 Annual Report, Child Sex Abuse Statutes of Limitation Reform from 2002-2019 (May 5, 2020), *available at* http://www.childusa.org/sol-report-2019.

> damages. Aside from the requirement that there be substantial evidence to support the verdict, the jury is the final arbiter of the evidence, for it determines the credibility of witnesses, the weight of their testimony, and the consequence of all other evidence.

Id. at 176 (citing *Scanlan v. Smith*, 66 Wn.2d 601, 404 P.2d 776 (1965); *Richards v. Sicks' Rainier Brewing Co.*, 64 Wn.2d 357, 391 P.2d 960 (1964); *Pritchett v. City of Seattle*, 53 Wn.2d 521, 335 P.2d 31 (1959); *McUne v. Fuqua*, 45 Wn.2d 650, 277 P.2d 324 (1954)). The Court's admonition in *Cox* has stood the test of time. *See, e.g.*, *Bunch*, 155 Wn.2d at 174 (citing *Cox*); *Robeck*, 79 Wn.2d at 869 ("If the evidence supports the verdict and the trial has been conducted without error of sufficient gravity to warrant a reversal, the trial court cannot substitute its view of damages for those of the jury.").

D. The Court of Appeals Improperly Substituted the Jury's Dispassionate, Evidence-Based Determination of Noneconomic Damages for its Own Subjective Assessment.

The Court of Appeals' application of the "shocks the conscience" test in this case demonstrates why that standard should be abandoned in favor of the remaining two objective, constitutionally sound tests for disturbing a verdict. In the instant case, the Court of Appeals held that the trial court abused its discretion in refusing to grant a new trial. *Coogan v. Borg-Warner Morse TEC Inc*., 2020 WL 824192, at *12 (Feb. 19, 2020). The court did not find that the amount of noneconomic damages fell

outside the range of substantial evidence or that the verdict was the unmistakable result of passion or prejudice. *Id.* at *11. Instead, the sole basis for its decision was that the award shocked its conscience. *Id.*

The court recognized that "the Washington Constitution delegates to the jury the determination of damages and protects that role," which it considered to be "particularly essential in determining noneconomic damages." *Id.* (citing *Bunch*, 155 Wn.2d at 179; *Sofie*, 112 Wn.2d at 645-46). The court agreed that it "should be … reluctant to interfere with the conclusion of a jury when fairly made" and must "strongly presume the jury's verdict is correct." *Id.* The court further acknowledged that "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," and that a "verdict is strengthened by the trial court's denial of a new trial." *Id.* (citing *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 271, 840 P.2d 860 (1992)). Nevertheless, having set forth layer after layer of delegation, deference, and strong presumption, the Court of Appeals ignored them all to instead embrace its own subjective assessment of Mr. Coogan's pain and suffering.

It cannot have escaped this Court's notice that the entirety of the appellate court's analysis on this issue—applying law to facts to reach a conclusion—encompasses a single paragraph. Within this single

paragraph, the "particularly essential" role of the jury to assess noneconomic damages was abrogated, deference to the trial court's discretion was not recognized, and no presumption was made that the verdict was correct. The amount was too high simply because the Court of Appeals felt it was too high.

Most significantly, the majority flatly acknowledged that its "determination [was] necessarily a subjective one." *Id.* Indeed, the majority recognized that it had "no objective basis for evaluating whether a verdict is excessive under CR 59(a)(5)." *Id.*[5] The court "simply believe[d], at first blush, that the pain and suffering verdict here is 'beyond all measure, unreasonable and outrageous.'" *Id.* (quoting *Bunch*, 155 Wn.2d at 179). As part of its ruling, the court remanded the case for a new trial on damages only. *Id.* at *1.

It is particularly offensive to constitutional principles to force victims to undergo the trauma of a second trial-absent any determination that the jury's award was unsupported by substantial evidence or the result of passion or prejudice – for no other reason than a judicial conscience

[5] Notably, CR 59(a)(5) is *not* the "shocks the conscience" test upon which the Court of Appeals relied. Rather, that rule allows for a new trial when damages are "so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice." CR 59(a)(5). As explained previously, that is an objective test anchored to specific "untoward" occurrences within the trial proceedings. The reference to this rule by the Court of Appeals is presumed to have been in error.

was shocked.[6] Should a second jury reach the same determination of damages to Jerry Coogan's estate, would the Court of Appeals again have its conscience shocked and remand the case a third time?

Despite citing *Bingaman* in support of its holding, the Court of Appeals' analysis certainly suggests that the verdict "carri[ed] its own death warrant solely by reason of its size." *Bingaman*, 103 Wn.2d at 838. And in *Bingaman*, the Court foreshadowed the dangers of appellate overreach that occurred in this case:

> Because of the favored position of the trial court, it is accorded room for the exercise of its sound discretion in such situations. 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. The appellate court, on the other hand, is tied to the written record and partly for that reason rarely exercises this power.

103 Wn.2d at 835 (internal citations omitted). The dissenting opinion by Judge Melnick emphatically highlights this point.

In opposing the court's conclusion, Judge Melnick found nothing at all about the noneconomic award that shocked his own conscience. *Id.* at *26. Indeed, Judge Melnick pointed out that the "long standing rules

[6] Indeed, the Respondents seek a new trial on numerous grounds, many of which appear to have been waived by the Respondents at trial or otherwise rejected by the trial court. It is no accident that "granting or refusing to grant a new trial is entirely discretionary with the trial court," which sits in the best position to gauge the true impact of these issues on the jury. *Danielson v. Cartsens Packing Co.*, 115 Wash. 516, 517, 197 P. 617 (1921).

that [courts] utilize … exist because the jury has heard the testimony, evaluated the witnesses, and decided what facts have been proved." *Id.* at *27. Not surprisingly, Judge Melnick had a vastly different impression of the underlying evidence of Mr. Coogan's suffering:

> Doy died a horrible death as a result of the asbestos poisoning. He suffered both from tumors that caused bowel obstruction and fluid buildup, as well as malnutrition and excessive fluid around his lungs. Doy experienced breathlessness caused by the fluid buildup, pain-related insomnia, constipation, dehydration, and kidney failure. He had difficulty drinking liquids. He suffered from severe muscle wasting and malnutrition.

Id. at *27. Consequently, the jury's noneconomic damages did not shock Judge Melnick's conscience. *Id.* As he explained, "[n]o amount of money could ever compensate Doy for the suffering he endured as a result of peritoneal mesothelioma." *Id.*

Judge Melnick's dissent demonstrates how a subjective test to disturb a jury's award is fundamentally flawed. In this case, two sincere appellate judges found the jury's damages award to be "beyond all measure, unreasonable and outrageous." Conversely, both the trial court judge and Judge Melnick found the award to be supported with the evidence.[7] As with this Court in *Bunch*, their consciences were

[7] Respondents' offer of "guideposts" simply sharpens this point. In their joint supplemental brief, Respondents point to median incomes, mathematical equations, and average settlements to justify why two judges felt shocked by the award while ignoring the point that two *other* judges, and 12 jurors, did not. Respondents' Joint Suppl. Br. at

"apparently more resilient" than that of their fellow judicial officers "after reading a cold record." *Id.* at *27; *Bunch*, 155 Wn.2d at 182. No litigant should ever fear the abrogation of a jury's verdict based upon who sits on the bench in their case. For these reasons, the Court of Appeals erred.

VI. CONCLUSION

The opinion by the Court of Appeals in this case challenges the fundamental, constitutional principle in Washington State that, where a fair trial has occurred, the role of the jury in measuring noneconomic damages should remain inviolate. Despite there being a fair trial here, a divided panel determined that its conscience was shocked and that the jury's fulfillment of its duty, without passion and well-supported by evidence, was nevertheless invalid. If we are to remain faithful to Washington's long jurisprudence and ideals, the Court should jettison the subjective "shocks the conscience" and reverse the Court of Appeals.

DATED this 25th day of September 2020.

BERGMAN DRAPER OSLUND UDO, PLLC

By: */s/ Justin Olson*
Matthew P. Bergman, WSBA # 20894
Justin Olson, WSBA # 51332
Attorneys for Amicus Curiae

14–15. Rather than "calibrate the judicial conscience," these suggestions mock the notion that jurors are "particularly essential in determining noneconomic damages." If these "guideposts" were proper considerations for noneconomic damages, then jurors would be so instructed.

CERTIFICATE OF SERVICE

I certify under the penalties of perjury under the laws of the State of Washington that on this date I caused a copy of the foregoing document, , to be served on all counsel of record, via the Appellate E-filing 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
(206) 574-6661
phil@tal-fitzlaw.com; matt@tal-fitzlaw.com

Counsel for GPC and National Automotive Parts Association
Michael B. King, WSBA #14405
Jason W. Anderson, WSBA #30512
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020
Email: king@carneylaw.com
Email: anderson@carneylaw.com

Counsel for GPC and National Automotive Parts Association
Jeanne F. Loftis
Brendan Philip Hanrahan
BULLIVANT HOUSER BAILEY, PC
888 SW 5th Avenue #300
Portland, Oregon 97204-2017
Email: Jeanne.loftis@bullivant.com
Email: Brendan.hanrahan@bullivant.com

Counsel for Petitioner
William Rutzick, WSBA #11533
Schroeter Goldmark & Bender
810 Third Avenue, Suite 2420
Seattle, WA 98101-1362
rutzick@sgb-law.com

Brian D. Weinstein, WSBA #24497
Alexandra B. Caggiano, WSBA #47862
Weinstein Caggiano, PLLC
601 Union Street, Suite 2420
Seattle, Washington 98101
brian@weinsteincaggiano.com; alex@weinsteincaggiano.com;
service@weinsteincaggiano.com

Jessica M. Dean (Admitted *Pro Hac Vice*)
Lisa W. Shirley (Admitted *Pro Hac Vice*)
Benjamin H. Adams (Admitted *Pro Hac Vice*)
Dean Omar & Branham, LLP
302 N. Market St., Suite 300
Dallas, TX 75202
214-722-5990
jdean@dobslegal.com
lshirley@dobllp.com

DATED at Seattle, WA this 25th day of September 2020.

/s/ Stephanie Simmons
Stephanie Simmons

BERGMAN DRAPER OSLUND UDO

September 25, 2020 - 12:51 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	98296-1
Appellate Court Case Title:	Gerri S. Coogan, et al. v. Genuine Parts Company, et al.
Superior Court Case Number:	15-2-09504-3

The following documents have been uploaded:

- 982961_Briefs_20200925124939SC876224_9285.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was CooganG_PLD_Brief of Amicus Curiae_Final.pdf
- 982961_Motion_20200925124939SC876224_6320.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was CooganG_PLD_Mtn Leave to File Amicus Curiae Brief.pdf

A copy of the uploaded files will be sent to:

- LShirley@dobllp.com
- alex@weinsteincaggiano.com
- anderson@carneylaw.com
- bhanrahan927@gmail.com
- brian@weinsteincaggiano.com
- jdean@dobslegal.com
- jeanne.loftis@bullivant.com
- justin@bergmanlegal.com
- king@carneylaw.com
- matt@bergmanlegal.com
- matt@tal-fitzlaw.com
- phil@tal-fitzlaw.com
- rutzick@sgb-law.com
- service@bergmanlegal.com
- service@weinsteincaggiano.com
- service@weinsteincouture.com
- thorson@carneylaw.com

Comments:

Sender Name: Stephanie Simmons - Email: stephanie@bergmanlegal.com
Filing on Behalf of: Justin Olson - Email: justin@bergmanlegal.com (Alternate Email: service@bergmanlegal.com)

Address:
821 2nd Avenue
Suite 2100
Seattle, WA, 98104
Phone: (206) 957-9510

Note: The Filing Id is 20200925124939SC876224