

No. 83287-5-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE

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

v.

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

RESPONDENTS' BRIEF

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INTRODUCTION AND SUMMARY

For four decades—until they were banned by every country in the world—Monsanto made and sold PCBs, a type of odorless, long-lasting chemical compound. PCBs were highly profitable, and Monsanto enjoyed a monopoly in the U.S. market. But as Monsanto knew early on, PCBs were also highly toxic. So a monopoly on sales wasn't enough; Monsanto wanted a monopoly on information. Executives at the St. Louis, Missouri headquarters thus orchestrated an elaborate, decades-long plan to conceal the dangers of PCBs, exalting corporate profits over human health.

The plaintiffs are teachers who suffered permanent brain damage from exposure to PCBs that, unbeknownst to them, were found in their school's lighting and caulking. After a seven-week trial, a jury found Monsanto responsible. On appeal, Monsanto doesn't deny that it made and sold the PCBs found in the school. It no longer denies, as it did for years, that its PCBs are toxic. It doesn't deny that the teachers' brain damage is real. And it doesn't deny that the jury set appropriate compensation for the teachers' injury. Yet, taking a kitchen-sink approach, Monsanto's 245-page brief advances every other conceivable attack on the verdict:

I. *Choice of Law.* Monsanto complains (at 27-49, 193-212) that it was unfair to apply the law of its home state, Missouri, to punish and deny repose for its conduct in Missouri. But Missouri obviously has the greatest interest in punishing that conduct, and Monsanto fails to confront a half a century of precedent—including *Johnson v. Spider Staging Co.*, 87 Wn.2d 577 (1976)—mandating the application of the most interested state’s law to each issue. Monsanto identifies no evidence that the legislature meant to override that precedent. And this Court has adhered to *Spider Staging* in cases under the Washington Products Liability Act, holding that the law that applies is that of the state where the tortious conduct occurred. See *Zenaida-Garcia v. Recovery Sys. Tech.*, 128 Wn. App. 256 (2005) (repose); *Singh v. Edwards Lifesciences*, 151 Wn. App. 137 (2009) (punitive damages). It should do likewise here.

II. *Jury Instructions.* Monsanto next contends (at 49-66) that it was entitled to instructions on its proposed “relevant product” and “sophisticated purchaser” defenses. This is meritless. PCBs are the “relevant product”; Monsanto never warned the public; and Monsanto failed to show that it was reasonable to rely on “sophisticated purchasers” who, for decades, never warned anyone.

III. *Experts.* Monsanto devotes 64 pages (at 67-132) to attacks on the plaintiffs’ experts. But virtually all of these attacks—including challenges to the “application of science to [a] particular case”—go to the evidence’s “weight,” not its admissibility. *State v. Copeland*, 130 Wn.2d 244, 272 (1996). The trial court’s discretion on these issues “will not be disturbed by an appellate court except for a very plain abuse thereof.” *Katara v. Katara*, 175 Wn.2d 23, 38 (2012). There was no such abuse here.

IV. *Sufficiency.* The standard of review is an equal, if not greater, obstacle to Monsanto’s plea (at 132-159) to overturn the jury’s verdict for insufficient evidence. Appellate courts don’t retry cases on appeal, which is effectively what Monsanto seeks. And the jury here was presented with overwhelming evidence demonstrating that the plaintiffs had been exposed to dangerous levels of PCBs and that this exposure had caused their injuries.

V. *Non-Party Evidence.* Monsanto next says (at 159-185) that it was error to admit *any* evidence about other people who were present at the same school, at the same time, and who suffered the same type of injury as the plaintiffs—evidence that formed the basis for expert opinions by an epidemiologist and a neuropsychologist.

This evidence, Monsanto says, was “irrelevant.” That can’t be right—the argument defies common sense and the law of evidence. If the plaintiffs were the only people in the school with injuries, surely Monsanto would seize on that as evidence *against* them.

VI. *Punitive Damages.* Monsanto’s final complaint (at 185-244) is that the punitive damages rest on insufficient evidence and violate due process. But the jury had abundant evidence of Monsanto’s disregard for human health. Its diabolical corporate behavior—knowing for decades of PCBs’ toxicity and going to great lengths to hide it—is a textbook case for punitive damages. An award violates due process only when it is “grossly excessive,” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996), such that it “constitutes an arbitrary deprivation of property,” *State Farm Mut. Aut. Ins. v. Campbell*, 538 U.S. 408, 417 (2003). That may be true of trivial cases with 145:1 or 500:1 ratios—but not of cases like this, with truly reprehensible conduct and a 3:1 ratio. The jury’s verdict, in short, did not offend Monsanto’s constitutional rights.

At every step, Monsanto’s complaints are foreclosed—by precedent, by the standard of review, by the record at trial, or by all three. This Court should affirm the jury’s verdict.

STATEMENT OF THE CASE

- A. **Monsanto promotes and sells PCBs for 40 years despite knowing that they pose serious dangers to humans.**
1. **“We know Aroclors are toxic”: In 1955, Monsanto’s St. Louis headquarters rebuffs a “very anxious” request from its own scientists to test PCBs’ toxicity.**

In 1955, Monsanto scientist J.W. Barrett dashed off an urgent memo from his post in London, England to corporate headquarters in St. Louis, Missouri. The subject was polychlorinated biphenyls, or PCBs—“one of Monsanto’s most profitable franchises.” P-360 at 6; *see* P-248 at 47.¹ Monsanto had secured a monopoly over the U.S. market for PCBs and had spent the past decade expanding that market from industrial to consumer uses. P-594 at 4; P-273 at 17. The company had created dozens of different PCB combinations

¹ Trial exhibits are referred to by their exhibit number, preceded by “P-” for Plaintiff and “D-” for Defendant; “Tr.” refers to the Reports of Trial Proceedings; “KRP” refers to the Reports of Proceedings transcribed by Kennedy; “HRP” refers to the Reports of Proceedings transcribed by Hammer; and “CP” refers to the Clerk’s Papers. Unless otherwise indicated, internal citations, alterations, and quotation marks are omitted. “Monsanto” refers to both Monsanto and its successor, Pharmacia.

and was now selling them for use in countless products—paint, perfume, shoe polish, caulk, and light ballasts, to name a few. Tr. 678-79.

What Barrett wanted to know was whether Monsanto had plans to ensure that PCBs were safe for these uses. Sales had exploded “in the last six months,” and he was “very much concerned with the toxicity of Aroclors”—a trade name for PCBs—and was “very anxious” to address the “necessity” of “getting some toxicological data.” P-144 at 1-2. His medical director would soon be “visiting St. Louis,” and he assured Kelly that they “would certainly not do this without full” approval from headquarters. *Id.*

Barrett’s request wasn’t unusual. For more than a decade, it had been standard industry practice to test the toxicity of new chemicals before selling them to the public. As the Industrial Hygiene Foundation of America put it in 1942: “Every new chemical or product should be investigated as to its toxicity before it is prepared in large amounts and released to the public.” P-76 at 35. To meet this standard, chemical companies typically performed two-year chronic toxicity tests evaluating effects of long-term exposure. Tr. 1507-08. This testing was part of being a “good

industrial steward,” and “large producers of synthetic chemicals” typically complied. Tr. 1498; P-76 at 35. Monsanto itself did the same—that is, for virtually “everything but PCB[s].” Tr. 1508.

Yet PCBs are part of a chemical family that’s “presumed to be very toxic,” Tr. 1313, and Monsanto had known for years that they in fact were. In 1934, several factory workers died from PCB inhalation. Tr. 1318; *see* P-653 at 2-3. By 1937, Monsanto understood that “prolonged exposure to Aroclor vapors evolved at high temperatures . . . will lead to systemic toxic effects.” D-20081. Seven years later, Monsanto learned that exposure to PCB fumes caused organ damage in animals. Tr. 685-86; P-89. And by 1952, Monsanto privately regarded “the toxicity hazard of [PCB] fumes” as “well established.” P-120 at 2; *see* P-133. A few years after that, Monsanto began warning its employees (but no one else) that PCB inhalation “usually” causes “systemic poisoning.” P-150 at 10; Tr. 711.

When Barrett’s memo arrived in St. Louis, it wasn’t well received. It landed on the desk of Emmet Kelly, a St. Louis native who had headed the company’s “medical department” since 1946 (and whose 28-year tenure would come to encompass the world’s most notorious chemicals, from DDT to Agent Orange). Kelly

quickly shot down the request. He minced no words: “What is it that you want to prove?” P-145 at 1. “We know Aroclors are toxic,” and the degree of toxicity “does not make too much difference.” *Id.* He recognized that PCB use by “householders” required more caution than “industrial application,” but the “main worry” already on his mind in 1955 was how “the juries” of the future would react. *Id.* at 1-2. He curtly told Barrett that there was no “advantage in doing more work,” and that he did “not believe any more testing would be justified.” *Id.* at 1-2.

2. “Just too toxic for use”: The U.S. Navy refuses to buy PCBs in 1957 because of the risks from inhalation.

It didn’t take long for Barrett’s concerns to be validated. The same week that Kelly put a stop to any testing, his protégé and assistant director, Elmer Wheeler, met with the U.S. Navy “to discuss the toxicity and safe handling of Pydraul 150” (another PCB trade name). P-225. The Navy was considering using PCBs “aboard submarines.” *Id.* Wheeler hoped to persuade them that PCBs were safe for that use—even though, as he noted before the meeting, “submarine crews have had to wear rubber suits and dress up like men from Mars when handling or working with Pydraul 150.” *Id.*

But the Navy wouldn't just take Monsanto at its word. Instead, the Naval Institute of Medical Research conducted a toxicity test on 150 rabbits. P-162; Tr. 727. The results were hard to ignore: "Skin applications of Pydraul 150 caused death in all of the rabbits tested," while a "like amount" of an alternative non-PCB compound killed none. P-162. Even the inhalation of a small amount of PCBs over a 50-day period "caused, statistically, definite liver damage." *Id.*

The Navy had seen enough. When Kelly met with "the Navy people" in early 1957, they told him of their findings. *Id.* They were adamant that "Pydraul 150 is just too toxic for use in a submarine." *Id.* So toxic, in fact, that they feared a "potential leak" and weren't "willing to even put [it] in a trial run" of a few weeks. *Id.*; Tr. 890.

3. "Singularly free of difficulties": Monsanto misrepresents PCBs' dangers to customers and regulators throughout the 1950s and 60s.

Monsanto decided not to share the Navy's findings. A month after learning that all the rabbits had died, Kelly reassured one customer that a "toxicity report" showed that Pydraul 150 "caused no serious side effects" in "the skin of rabbits." P-163 at 1. The effects, he added, were "less than we experience with a 10 per cent aqueous soap solution." *Id.* Over the next decade, he told other customers

the same thing. In 1965, for example, he told DuPont that PCBs caused no more harm in rabbits than a “soap solution.” P-238; *see also, e.g.*, P-166.

Privately, however, Monsanto was concerned that the Navy would publish its findings. Kelly wasted no time. Within months, he was lobbying the Navy to keep the rabbits’ fate under wraps. Kelly enlisted his assistant, Elmer Wheeler, to write a letter to the Navy Medical Research Institute, and dispatched a lobbyist in Washington, D.C. to “deliver[] it personally” in an envelope stamped “Commercially Discrete for Official Use Only.” P-173. Days later, Monsanto’s lobbyist reported back to St. Louis that he had managed to get the Navy to agree that the “Commercially Discrete” information “will not be released to outside groups,” and that if the Navy published any of its scientific findings, it would “avoid all reference” to “Pydraul 150” or “Monsanto.” *Id.* He concluded: “I believe this complies with your interests.” *Id.*

The Navy episode typified Monsanto’s general approach to informing the public about PCBs’ dangers. Although it had promised the U.S. Public Health Service in 1943 that it would warn downstream distributors of PCBs’ toxicity, Monsanto never did so.

P-120 at 1; Tr. 693-97. Instead, even when it received a request in 1958 to put a specific warning label on Pydraul purchased for resale, Monsanto recoiled. P-182 at 1. A memo from St. Louis explained that divulging this information was “of great concern to us” and “not in the best interest of Pydraul sales.” *Id.* When it came to warnings, Monsanto’s policy was to not “give any unnecessary information which could very well damage our sales position.” *Id.*

Monsanto was no more forthcoming with regulators. After the FDA gained regulatory authority over PCBs in foods in 1958, Monsanto made “no effort to provide ‘safety’ data” to the agency. P-653 at 27. As Wheeler later admitted to Monsanto attorneys, that was for reasons “you will probably not like.” *Id.* Monsanto “didn’t have the data to support [PCB] safety,” and had “no intention of spending the money to get the data.” *Id.* When asked why, his answer was coy: “You get intuitive feelings about what’s the smart way to proceed on these things.” *Id.*

But at other times, Monsanto was more direct. Confident that the company’s monopoly would allow it to continue concealing PCBs’ damaging effects, Kelly boasted to an official at the U.S. Public Health Service in 1962: “Our experience [with PCBs,] and

the experience of our customers over a period of nearly 25 years, has been singularly free of difficulties.” P-212.

4. **“The consensus in St. Louis”: Monsanto becomes “very worried” about public scrutiny of PCBs after Swedish scientists publish new toxicity findings.**

Monsanto couldn’t hide the truth about PCBs forever. In late 1966, two Swedish scientists discovered PCBs in the air, fish, wildlife, and “even in the hair of a five month[-old] baby,” P-256 at 1, demonstrating that PCBs had escaped from products and didn’t naturally dissipate. They noted that PCBs and DDT were “equally poisonous,” and “PCB is equally harmful whether absorbed via the skin, through food, or by inhalation.” *Id.* at 1-3. Their report—“the first report of any possible environmental problem with PCB[s]”—was considered a “scientific breakthrough.” P-594 at 6.

But in St. Louis, it looked like an impending disaster. By this point, with profits soaring, Monsanto’s headquarters had moved from an old manufacturing plant downtown to a lush suburban campus, with modernist structures clad in Monsanto’s own plastics. *Architectural Record* 10 (Feb. 1956). The Swedish report prompted an “extensive meeting” by “the St. Louis individuals” in charge. P-265 at 1. They huddled in a boardroom of Monsanto’s sleek new

executive building—dubbed “The Kremlin” by insiders—to debate their next steps. Robin, *The World According to Monsanto* 136 (2008).

Within days of the meeting, Kelly penned a frantic memo to one of Monsanto’s European offices. “I have tried to call you for the last two days.” P-265 at 2. “The consensus in St. Louis,” he reported, “is that while Monsanto would like to keep in the background in this problem, we don’t know that we will be able to so in the United States.” *Id.* The Monsanto brass were thus “very worried about what is liable to happen” when the “media pick up the subject.” *Id.* Anticipating that customers would start to “ask us for some sort of data concerning the safety of these residues in humans,” Kelly ordered the office to hold off on answering. *Id.* Otherwise, it “obviously might be opening the door to an extensive and quite expensive toxicological/pharmacological investigation.” *Id.*

5. **“Sell the hell out of them as long as we can”: As the PCB crisis begins “snowballing,” Monsanto creates a special committee to protect its PCB business.**

By 1969, Monsanto recognized that it was only “a matter of time until the regulatory agencies will be looking down our throats.” P-307 at 1; Tr. 777. A “major feature” appearing in the *San Francisco Chronicle* about a “menacing new pollutant” only

hastened the reckoning. P-308 at 1. A steady drumbeat of PCB-related findings continued into the summer, culminating in news that a 14-year-old had died after a PCB leak. P-594 at 7; *see* P-653 at 57 (study finding “small amounts” of PCBs killed 18 of 25 animals in three weeks—a result Monsanto found “real alarming”).

Now in crisis mode, Monsanto created a special Aroclor Ad Hoc Committee, chaired by Wheeler. It had two objectives: “Permit continued sales and profit of Aroclors” and “Protect [Monsanto’s] image.” P-342 at 1. The committee knew that its task wouldn’t be easy. As one member jotted in his notes: “Subject is snowballing. Where do we go from here?” P-341 at 5.

The committee prepared a report to answer that question. It concluded that “the identification of PCBs as an environmental contaminant is certain” and that “PCB[s] are ‘moderately’ toxic to man.” P-350 at 7, 25. It also concluded that PCBs “are persistent once they become a part of the environment and the rate of degradation is extremely low.” *Id.* Nevertheless, the committee didn’t recommend that Monsanto stop PCB sales, which “had grown more than 464 percent” since 1960, Elmore, *Seed Money* 114 (2021)—mostly from “electrical applications,” Tr. 1581-82. Instead,

the committee settled on a recommendation more in line with a different option discussed at the meeting: “sell the hell out of them for as long as we can.” *Id.*

**6. “Selfishly too much Monsanto profit to go out”:
Monsanto fights to continue PCB sales.**

Wheeler presented the committee’s recommendations to Monsanto’s top executives. P-360. He informed them that the company faced significant legal risk because “[a]ll customers using these products have not been officially notified about known effects nor do our labels carry this information.” P-359 at 9. But he also explained that the committee did not recommend pulling out of PCBs altogether because there’s “selfishly too much Monsanto profit to go out.” P-360 at 49. Rather, Monsanto could “phase out” only the very worst PCBs and “maximize the corporate image by publicizing this act.” *Id.* at 15. Monsanto’s lead executives agreed.

Outwardly, Monsanto continued to insist that PCBs were safe. Not long after the report, it published a letter in *Environmental Magazine* claiming that there had been “no instances” of adverse effects from PCBs and that it was “not true” that PCBs were toxic, P-3675—claims that Monsanto knew were false, Tr. 772.

**7. “Call back all those reports and burn them”:
Monsanto orders the destruction of documents
related to PCBs.**

When Monsanto’s legal department got wind that much of the company’s “knowledge about PCB’s [was now] in a document”—the committee report—it sprang into action. P-653 at 59. A Monsanto lawyer picked up the phone, dialed Wheeler, and ordered: “call back all of those reports and burn them.” *Id.*

From here on out, the legal department would keep a close eye on Monsanto’s PCB paper trail. It directed Wheeler to label the report “ATTORNEY CLIENT PRIVILEGE” before allowing him to “redistribute[]” it to “12 people.” *Id.* It then produced a memo instructing that any documents about PCBs “should be carefully audited from a legal and medical point of view and those which are not helpful in a defense of PCB litigation should not be preserved (except as part of the attorney’s work product in the defense of a case), since such documents would be subject to discovery.” P-594 at 35; Tr. 1589. Monsanto would reissue these instructions to destroy unfavorable evidence twice more, in 1977 and 1981. Tr. 609, 1589.

8. **“We can’t afford to lose one dollar of business”:
Monsanto urges its sales force to “take the offense”
and increase PCB sales in 1970.**

In early 1970, around the time that employees were ordered to “burn” PCB evidence, Monsanto convened a two-day “St. Louis Meeting with General Electric” entitled “PCB-Pollution Problem.” CP 19576. In a memo for the meeting, Monsanto admitted that PCB toxicity data was “not as favorable as we had hoped,” and in fact was “[p]articularly alarming.” CP 19577. But Monsanto gave assurances that it would attempt to make the science conform to its bottom line. “Some of the studies,” it said, “will be repeated to arrive at better conclusions.” CP 19577.²

Wheeler said the same to a colleague in Europe a week later. PCB testing had showed a “greater degree of toxicity” than hoped—“about the same as DDT in animals.” P-380 at 1. And the medical

² Years later, *Chemical Week* would report that a former Monsanto scientist at IBT, the outside lab responsible for testing Monsanto’s PCBs, had—at Monsanto’s behest—“systematically falsified test data.” *Tighter Controls on Toxics Testing*, *Chemical Week*, 145: 32-39 (Aug 24, 1983). At the time, this was described as the “most massive scientific fraud in American history.” *Id.* Criminal convictions followed. But the convictions centered around other chemicals, so evidence of IBT’s fraudulent testing of PCBs was excluded below. We note it here only for context.

department was in possession of even “more discouraging” results, which they would be “repeating” and “not distributing.” *Id.*

Monsanto’s marketing head then issued a directive to his sales force: “We can’t afford to lose one dollar of business.” P-384 at 2. “Our Aroclor sales have increased every year for ten years,” and “[w]e want 1970 to be no different.” P-383 at 10. So if a customer asks about PCBs, “[t]ake the offense.” P-384 at 2. But, he was quick to add, “no answers should be given in writing.” *Id.* Sales associates were informed that a letter “cleared by our Legal Department” was being “mailed from St. Louis” to distributors, but that Monsanto would not “alert our distributors’ customers.” P-383 at 2-3. The point of the letter was not to ensure not that warnings were issued to consumers—only that they were “fully documented” to “support” a defense “should we become involved in legal actions.” P-463 at 1.

This strategy defined Monsanto’s approach to its PCB business for the duration of its existence. Seeking to create the impression that it was being proactive, Monsanto began selling PCBs only in “closed systems” that would, in theory, prevent the chemical from escaping. P-437. It treated capacitors in light ballasts as one such

use, even though it knew that “[d]isposal of old capacitors”—which all new capacitors eventually become—“presents a problem.” P-15 at 20.³ All the while, Monsanto even continued to develop new variations of PCBs, while rushing to get them to market by taking a familiar shortcut. P-2823 (“No chronic (two year studies) would be anticipated.”).

9. “An embarrassing fact”: Monsanto exaggerates the benefits of PCBs.

Before long, William Papageorge was tapped to be the new “point person within Monsanto on PCB issues.” Tr. 518-19. He told the EPA in 1973 that Monsanto had stopped selling PCBs for most uses, just not for transformers and capacitors. P-3513 at 3. Those uses drove most of Monsanto’s PCB sales, P-155 at 6, but its stated reason for continuing them was that there were “no known substitutes of acceptable quality and none that are fire resistant,” P-3513 at 3.

This new rationale represented another part of Monsanto’s strategy: to make the public believe that PCBs were not only safe, but were somehow *safer* than alternatives. The year before, however,

³ A capacitor is a “charge storing device,” and “smooth[s] voltage” so “we don’t see the [lights] flicker.” Tr. 669-70.

Japan had banned all use of PCBs—with no apparent ill effects. P-645 at 1. And the National Electrical Manufacturers Association told the EPA that it foresaw no “undue hardship resulting” from a U.S. ban. P-3696 at 31. Monsanto executives privately fretted that this would “add fuel to the fire that replacements are possible.” P-645 at 1.

Their fears were well-founded. Good alternatives existed that the EPA concluded would “not result in a significant increase in fire hazards.” P-836 at 41. “Aroclor’s only real reason for use in a transformer” was “its non-flammability.” *Id.* at 50. But the “embarrassing fact” for Monsanto, according to an internal report, was that the number of explosions “was actually lower” with mineral oil than with PCBs. P-273 at 15, 58. Although PCBs “can’t burn,” an explosion “released large quantities” of hydrochloric acid into the air, causing “as much panic and damage as a fire would have.” P-155 at 50-51. And when fires did occur, PCBs made them *more* dangerous, not less so. *See* P-1118 at 2; Tr. 649. Given all this, it was no surprise that an internal market survey from the 1950s had found that the “only ones who would like to see Aroclor go into transformers” were Monsanto’s own executives. P-155 at 55.

There was even less benefit in using PCBs for capacitors in light ballasts, because this use was “not based primarily on the fact that [PCBs are] fire-resistant.” P-248 at 8-9. Given the composition of capacitors, as the EPA would eventually explain, there was “little increase in fire hazard” even when “a flammable liquid is used.” P-836 at 268. Thus, even decades earlier, Monsanto’s market survey had found it “open to debate” just “how essential this characteristic” really was. P-155 at 21.

**10. “A cancer-causing agent over their heads”:
Monsanto continues to publicly deny PCBs’ health
risks even after they are banned globally.**

Despite Monsanto’s persistent efforts to hide the truth, federal regulators had more than enough evidence of the “serious threat” that PCBs posed to “human health and the environment” by the mid-1970s. P-2166 at 1; P-836 at 24. As the head of the EPA said in a 1975 press conference, “it is plain to me that we must, as a society, accept and work toward a goal of eliminating the production” and “use of PCB’s as rapidly as possible.” P-2166 at 2.

With a federal ban looming, Monsanto emphasized short-term sales and public relations. Its head of industrial chemicals told the CEO: “We can probably stay in the PCB business two to three

more years” and advised “using the Corporate PR Department” to both “make a judgment as to PCBs’ adverse impact on Monsanto” and address whether to “get out of the PCB business.” P-786. But even in 1977, knowing that a ban was imminent, Monsanto tried to squeeze every dollar of profit from its monopoly, urging customers to stock up on PCBs for the post-ban years. Tr. 1604.

EPA followed through with the ban in 1979. It outlawed “all manufacturing” and “distribution in commerce” of PCBs in America. Tr. 532; *see* 44 Fed. Reg. 31514. Other countries followed, and today, “PCB production is banned in every country.” Tr. 534.

Just months after the ban, in January 1980, Monsanto issued an internal memo—entitled “Surveillance of Defunct Products”—acknowledging that Monsanto could “be held accountable for environmental and health effects of [PCBs] for so long as they exist in the environment.” P-3271 at 1-2. So it recommended that, when an “environmental hazard or human exposure is alleged, [Monsanto] will, to the extent of [its] knowledge and capability, aid appropriate authorities and other persons, by providing counsel about the significance of the alleged exposure, as well as safe handling and safe disposal practices.” *Id.* at 3; Tr. 784-86. Later that

year, Monsanto reiterated internally that it would “act in a socially responsible manner” by “organiz[ing] and manag[ing] a program for continued surveillance of and to provide stewardship for the defunct [PCB] product line in perpetuity.” P-944 at 2.

None of this happened. *See* Tr. 1595-96, 1608-10. Monsanto first explored cheap alternatives—one idea was to enlist Boy Scouts to remove PCB-containing equipment—and then abandoned plans altogether. P-884. Monsanto executives anticipated public uproar if it ever revealed the full extent to which ordinary consumers were exposed to PCBs—particularly from “fluorescent light fixtures.” P-2531. As one internal memo explained: “By and large the general public is not even aware that PCBs are in their fixtures and it’s probably just as well they aren’t. A lot of people would undoubtedly become very emotional—even panic—if they found out the[re] was a cancer-causing agent hanging over their heads.” *Id.*

So Monsanto continued to do what it had done for decades: obfuscate and deny. In September 1980—just after its pledge to be “socially responsible”—Monsanto issued a press statement about PCB “facts” and “fallacies,” in which it flatly asserted that “PCBs are not ‘human cancer-causing’ agents and they are not ‘deadly’

toxins.” P-956 at 1. Instead, they “are considered mildly toxic on an acute basis when ingested by human—about on the same order as common table salt.” *Id.* Despite decades of evidence to the contrary, Monsanto ended on a defiant note: “There has never been a single documented case in this country where PCBs ever caused serious human health problems.” *Id.* at 2.

These claims, of course, were false. Five years earlier, Papageorge had conceded that PCBs, as Monsanto had known for decades, could have a “real effect to humans—including death.” P-756 at 2.

II. Monsanto’s “sleeper issue”: PCB contamination in schools.

One of PCBs’ “real effect on humans” was the subject of an email that Bob Peirce, a member of Monsanto’s PR team in St. Louis, sent to his colleague in January 2010. He wanted to flag “the ‘sleeper’ issue in PCB contamination”—schools. P-3561 at 1. A couple months later, Peirce followed up, circulating a pilot study investigating PCB contamination in five New York City schools: “This is the sleeper issue, again.” *Id.*

It was an issue that the St. Louis executives had long feared would come to light. In 1981, ABC Network News ran a program about an elementary school in Cincinnati that was forced to close after a motor overheated and exposed children to PCB fumes, causing “skin rashes, swollen eyes and difficulty in breathing.” P-975 at 2-3. Dan Bishop, another Monsanto PR person, crystallized his reaction in a memo to his team: “The local Cincinnati media are having a field day with this one.” *Id.* at 1. “[T]here is a lot of PCB-containing electrical equipment in service throughout the country, with failures occurring every day, somewhere.” *Id.* “If we don’t get this situation in perspective and under control quickly,” Bishop cautioned, “it could easily escalate into a national crisis.” *Id.*

Bishop was right. Monsanto knew that students and teachers were exposed to various sources of PCBs. Tr. 1610-11. As a report by Senator Edward Markey later explained, “the primary pathways of PCB contamination in schools are caulk and leaking fluorescent light ballasts.” P-1889 at 5. The report, issued in 2016, identified “286 cases of PCB hazards in schools in 20 states across thousands of school buildings in the [preceding] ten years.” *Id.* at 9, 14.

Although Monsanto had long been aware of these school-specific risks, it did nothing. Worse than nothing. In 2009, for example, the EPA issued guidance detailing its “concern[s] about potential exposure to PCBs . . . in older schools and buildings.” P-1458 at 3. In response, Peirce paid to place a press release in the *Wall Street Journal* that eerily resembled the defiance and deception of its Monsanto’s public statements decades earlier. “There is no scientific consensus on [PCBs’] health effects,” Monsanto asserted. P-3558 at 2. “[T]he weight of scientific evidence does not support any causal link” between PCBs and any “significant human illnesses.” *Id.*

B. The teachers, staff, and students at Sky Valley Education Center are exposed to dangerous levels of PCBs, and the plaintiffs suffer permanent brain damage as a result of that sustained exposure.

Kerry Erickson, Michelle Leahy, and Joyce Marquardt are former teachers at the Sky Valley Education Center, a K-12 public school in Monroe, Washington. The three women were beloved and “hard-working” teachers who were “extremely dedicated to the education of young people.” Tr. 2531. And they were in good health and full of energy, spending dozens of hours a week on their feet teaching while also developing curriculum.

In 2011, however, things began to change. That year, Sky Valley moved to a different campus, with older “Pod” buildings built in the late 1960s. The teachers’ health deteriorated the longer they spent on campus until eventually, they sustained permanent brain damage. After years of uncertainty, the culprit became clear: dangerously high levels of Monsanto’s PCBs.

1. **“Smokey events” and “brown, oily liquid”:** For years, fluorescent light ballasts at the school emit and leak particularly volatile forms of PCBs.

When the Sky Valley “Pod” buildings were built, 95 percent of magnetic fluorescent-light ballasts contained PCBs. Tr. 1716-17, 1727. Like all PCB-containing light ballasts, those at Sky Valley steadily emitted PCBs into the air even when the lights were off, though emission levels were higher when the lights were on and temperatures rose. Tr. 1755-56; see P-1721 at 11.

Sky Valley’s teachers and students were unaware that PCBs flowed from the fixtures hanging over their heads. The teachers, however, did notice problems with the lights. They encountered “smokey events,” and on several occasions saw “brown, oily □ liquid leaking out of light fixtures.” Tr. 1762-63. When this happened, they “placed trash cans underneath” and told students “not to go near

those.” Tr. 1763. Photos from third-party testing in 2016 also showed dark brown staining. Tr. 1757-59.

This staining evidenced ballast failures. *See* Tr. 1762. Ballast failures, the EPA has explained, “releas[e] PCB vapors into the air and liquid PCBs onto surfaces.” P-1721 at 11; Tr. 1756. Such failures can cause PCB air levels to rise precipitously, especially when the ventilation system is functioning poorly, which in turn enhances the inhalation risks. Tr. 1778, 1819, 1828. Liquid PCBs can also get onto surfaces if the capacitor inside the ballast springs a leak, risking exposure by ingestion or skin contact. Tr. 1760-61.

Sky Valley’s ballasts not only continuously leaked Monsanto’s PCBs for years, but also discharged a particularly volatile and more easily inhaled form of PCB. PCBs are formed by forcing chlorine molecules to attach to two connected benzene rings. There are more than 200 possible molecular combinations, or “congeners.” The more chlorine attached, the “heavier” or “higher-chlorinated” the congener. Tr. 827-28, 1280, 2148. Monsanto combined different proportions of congeners to create its commercial mixtures. Tr. 827-28.

As it turns out, the PCBs that Monsanto sold for light ballasts and caulking were PCB mixtures with a high proportion of lower-chlorinated PCB congeners. Tr. 2080, 2151, 3344. These congeners are more “volatile” and evaporate into the air more quickly than their heavier counterparts. Tr. 1282-83; *see* Tr. 1055, 1287-88. This volatility, in turn, means that lower-chlorinated PCBs pose a greater risk of toxic exposure via inhalation. Tr. 2148.

2. “A single drop”: The teachers’ exposure to PCBs significantly exceeds safe limits.

After moving to the Pod buildings in 2011, the teachers began experiencing a wave of strange and alarming symptoms. Tr. 3014. Although confused about the cause at first, they eventually linked their symptoms to the buildings. *See, e.g.*, Tr. 3012, 3014, 3048-49, 3070-71, 3131. Ms. Marquardt, for instance, felt terrible at the end of every school week, requiring her to “spend all day in bed trying to recover.” Tr. 3017-18. By Monday, she would feel better, but then her symptoms would reappear by the middle of the week. Tr. 3018-20. And Ms. Erickson and Ms. Leahy both noticed that while they felt “pretty sick” at the end of the school year, their symptoms would mostly clear during the summer only to reappear the following

term. Tr. 3070, 3131. But over time, they would not return to normal. For all three, their symptoms would persist in the ensuing years and eventually progress to permanent brain damage.

The three teachers weren't alone. Scores of others at Sky Valley—teachers, students, and staff—fell ill with similar symptoms after the move. Tr. 1072, 1122-24, 2535-36. Teachers started noticing that more students were absent from class than in previous years, Tr. 3013, 3073, 3137-38, and witnessed an “exponential growth” in the number of students showing “bizarre behavior,” Tr. 3137.

No PCB testing was ever done during the time when the three teachers (and numerous others at Sky Valley) developed symptoms. Tr. 1704-05, 1767, 1784. But later testing established the presence of PCBs at the school—and, in particular, the lower-chlorinated combinations most commonly found in light-ballast dielectric fluid (marketed by Monsanto as “Aroclors 1016 and 1242,” the first of which Monsanto didn't manufacture until the 1970s). Tr. 1752-53, 2254.

These PCBs were found in the school's light ballasts, caulk, carpeting, and floor tiles under the carpet. Tr. 1727-28. And the estimated PCB air levels to which the teachers were exposed ranged

from “several hundred to several thousand nanograms per cubic meter”—far above normal exposure levels. Tr. 1725; *see* Tr. 842.

These levels were especially concerning because even tiny amounts of PCBs can result in serious and widespread exposure. A “single drop of Aroclor 1242,” for example, if “evaporate[d]” into “an entire classroom,” would exceed the CDC’s recommended level (1,000 ng/m³). Tr. 1720, 1814. Federal regulators recommend that people facing such air levels either “evacuate the area” or wear, in essence, a “SCUBA pack” and “full face mask.” Tr. 1720; *see* Tr. 1814.

And what the teachers faced was likely even worse. Ballast failures—of which there was evidence at Sky Valley—could result in air levels of 10,000 to 100,000 ng/m³. Tr. 1819. Yet the “conservative” estimates of the teachers’ exposure levels didn’t factor in the likelihood of those failures—or alternative routes of PCB exposure, like skin contact or ingestion. Tr. 1756, 1799, 1800-01.

Testing also determined that the teachers were exposed to furans—a highly toxic byproduct of PCB manufacturing. Tr. 1706-07. Furans were detected on carpets stained by PCB oil that had leaked from failing ballasts. Tr. 1728, 1821. They were also found in

the teachers' blood—which chemical analysis showed most likely resulted from exposure at the school. Tr. 1822-24, 1986, 2031-32.

3. An “explosion of symptoms”: Because of their exposure to lower-chlorinated PCBs at the school, the teachers suffer brain injuries.

The three teachers were each in good health before working at the new campus. But after the move, they experienced an “explosion of symptoms”: headaches, brain fog, lightheadedness, difficulty concentrating and focusing, memory problems, fatigue, and more. Tr. 3131; *see, e.g.*, Tr. 2269-70, 2344, 2347, 3014-18, 3071-72, 3131-33, 3136-39. These symptoms—which worsened as the teachers stayed in the school—all indicated neurological injury. Tr. 1083, 1106-07, 1112-16.

It is “well documented” that repeated inhalation of lower-chlorinated PCBs causes brain damage. Tr. 2148-52, 2458. When these PCBs get inhaled into the lungs and enter the bloodstream, the body metabolizes the chemicals into “monster molecules” known as metabolites that are highly “toxic.” Tr. 1331-33.

Once in the blood, the metabolites can cross the blood-brain barrier and cause severe neurological damage—long after the PCBs have been eliminated from the person's body. Tr. 1332, 1334. The

metabolites interfere with and block electrical responses in the brain, which can inhibit a person's ability to learn and remember. Tr. 2140-42. They also can block the uptake of dopamine in brain cells, resulting in depression, anxiety, and similar psychological conditions. Tr. 2142-43. They can even kill nerve cells—which typically don't regenerate. Tr. 2143-44, 2161, 2610, 2458.

Early health studies of PCBs focused primarily on higher-chlorinated PCB congeners, which persist for decades in the human body and natural environment. Tr. 2155, 2488. But because lower-chlorinated PCBs are more volatile than heavier ones, they are also more quickly metabolized and eliminated by the body. Tr. 2080, 2153. The “half-life” of a lower-chlorinated PCB congener—that is, the time it takes for the amount in the body to fall by half—can be as short as a few months. *See* Tr. 1339, 2481. So blood samples won't necessarily reveal exposure—especially when taken years after the actual exposure. Tr. 2080, 2149, 2251-52; *see* P-2305 at 11. Indeed, studies have shown that even contemporaneous blood tests of teachers definitively exposed to PCB air levels exceeding safe limits still “did not show elevated [blood] PCB concentrations.” P-1162 at 3; *see* P-4393 at 1.

Given these findings, the federal Agency for Toxic Substances has recommended that, “except for large [PCB] exposures, blood should be collected quickly (days to weeks after exposure).” P-1297 at 419. “The lack of obvious elevation months to years after exposure does not, of itself, indicate lack of exposure.” *Id.* at 420; *see also* P-4393 at 6; Tr. 1333-34 (“[E]ssentially silent” metabolites cannot be “measured in any blood sample.”).

Here, although the teachers were exposed to PCBs between 2011 and 2015, their blood samples weren’t taken until 2019. Tr. 1961. Unsurprisingly, with such a large gap, the tests didn’t reveal significantly elevated PCB levels. Tr. 2151. Neuropsychological testing, however, later showed that the teachers had suffered brain injuries and significantly decreased cognitive function from exposure to lower-chlorinated PCBs. Tr. 1083, 1106-07, 1112, 1112-16.

4. “Not a single shred of evidence”: Testing rules out all other potential causes of the teachers’ injuries.

When the teachers first started feeling sick and noticing others doing the same, they theorized a number of possible causes—mold, dust mites, asbestos. Testing disproved them all.

Numerous third parties concluded that “[t]here [wa]s not a single shred of evidence” of a mold problem at Sky Valley. Tr. 2347-48. In 2014, the school brought in EHSI, an indoor environmental consulting company, to do an inspection. Tr. 1766. EHSI’s test results “d[id] not indicate an indoor mold problem.” Tr. 1768; P-1755 at 11. EHSI conducted no PCB testing during its inspection. Tr. 1767. A different company, NVL Labs, reached the same conclusion in February 2016. *See* Tr. 1803-04; P-2351 at 3 (“No fungal growth detected.”). So did the PBS indoor air quality assessment that was conducted later in 2016. Tr. 1804-05, 1809-10. Monsanto’s own inspectors never found any mold either. Tr. 1810.

Mold, then, couldn’t have caused the teachers’ brain damage. Tr. 2249-50, 2347-51, 2366. Nor could dust mites or asbestos, the other hypothesized causes, neither of which were ever detected in meaningful quantities at the school. Tr. 1708, 1770, 1810-11.

By contrast, as discussed above, testing did reveal the presence of lower-chlorinated PCBs in the school environment—in light ballasts, caulk, carpets, and elsewhere. And this was the case even though the testing was conducted after Sky Valley had completed extensive remediation of the buildings. Starting in 2014, the school

began a two-year project to clean and repair light fixtures, replace light ballasts with more modern non-PCB-containing models, remove contaminated carpet, clean inaccessible surfaces, and improve ventilation. Tr. 1704-05, 1764-66, 1780-83, 2062-68.

This remediation meant that the school environment in 2016 was significantly different from what it had been when the teachers developed their symptoms. So the air testing that PBS conducted in February and May 2016—which itself turned up some evidence of PCB contamination—could only hint at “the atmosphere [the] teachers were exposed to during their, roughly, four years in the school.” Tr. 1784. Air tests conducted after May 2016 (which detected “elevated” PCB levels in a number of rooms) were even less useful, because by then the school had removed nearly all the light fixtures and begun “caulking remediation work.” P-2122; Tr. 1786-87. The dust samples that PBS analyzed were similarly flawed: They came from “walking surfaces, like concrete floors, walls, table legs,” which “would not capture and hold onto the dust that accumulates over time.” Tr. 1801, 2073.

5. **“An irreversible event”: The teachers’ permanent brain damage has caused them serious and ongoing harm.**

Due to their health issues, the three teachers all left Sky Valley between 2015 and 2016. Tr. 3017, 3020, 3076, 3140. The permanent brain damage they each suffered from PCB exposure is serious, life-changing, and long-lasting. And it is highly unlikely that any of their brain injuries will heal over time: “PCB neurotoxicity is an irreversible event, from which there is not ever going to be total recovery.” Tr. 2161; *see* Tr. 2258, 2274.

All three teachers suffer from a constellation of neurological symptoms—including severe headaches, brain fog, memory and attention problems, fatigue, and other cognitive dysfunction—that have fundamentally altered their personal and professional lives. Tr. 2864, 2866-67, 2936, 3015-18, 3030-33, 3079, 3111-15, 3142-48.

Ms. Leahy, for example, had to retire early because she could no longer keep up with the demands of her job. Tr. 3148. As a result of her brain injuries, this former star teacher—among the most “loved,” “dedicated,” and “respected” to have ever taught at Sky Valley, Tr. 2543-44—now finds it difficult to do even the simplest of tasks. Tr. 3142-47. Sometimes, it takes her two hours just to make a

pot of coffee. Tr. 3147-48. The “trauma” caused by her injuries has “taken [a] toll on [her] life”; she has not only retired from teaching but moved across the state to Spokane to avoid meeting people who knew her at Sky Valley. Tr. 3145-46. As she explained at trial: “[W]hen you lose your career because of health and it’s not your fault, it affects you so much.” Tr. 3146.

C. The teachers file this lawsuit and—following extensive discovery, over a hundred depositions, 115 pretrial motions, and a seven-week trial—a jury returns a verdict in their favor.

After discovering that PCBs caused their brain damage, Ms. Erickson, Ms. Marquardt, Ms. Leahy, and her husband filed this suit to hold Monsanto accountable. Two hundred other Sky Valley teachers, students, and family members filed similar claims, for a total of 17 suits filed over 13 months.

The plaintiffs here were the first to have their day in court. But trial began only after three years of sweeping discovery and motion practice: 142 depositions, disclosure of voluminous personal and medical histories, and retention of over a dozen experts. In total, the court ruled on 115 separate pre-trial motions.

The parties' arguments were presented to two judges—Judge Richardson and later Judge North, who took a fresh look at multiple issues on which Judge Richardson had ruled. The judges ruled for both sides on key issues. To Monsanto's benefit, the court granted multiple motions to exclude evidence, including among the most straightforward evidence of the company's wrongdoing: the falsification of IBT's toxicology testing of PCBs. *See* CP 13688.

Trial finally began in June 2021 on four claims: (1) design defect, based on the unreasonable danger of PCBs; (2) construction defect, based on the contamination of Monsanto's PCBs by even more highly toxic furans; (3) failure to warn at the time of sale; and (4) failure to warn post-sale when Monsanto obtained ever more evidence of the extent of PCBs' dangers.

Over the seven-week trial, Monsanto challenged nearly every facet of the plaintiffs' case. It subjected each witness to rigorous cross-examination and offered one or more expert witnesses to match each of the plaintiffs'. The jury, too, had an opportunity to question each expert directly.

After two days of deliberation, the jury returned a verdict for the plaintiffs on each claim. Reflecting careful attention to the

evidence, the jury awarded the teachers different damages: \$15 million for Ms. Erickson, \$18 million for Ms. Leahy, and \$17 million for Ms. Marquardt. And reflecting its conclusion that Monsanto's conduct warranted serious punishment, the jury awarded \$45 million in punitive damages to each plaintiff, a ratio of 3:1 (or less).

Following the verdict, three more groups went to trial and two verdicts went for the plaintiffs. In the second case, the jury awarded eight plaintiffs a total of \$27,135,000 in compensatory damages and \$35,000,000 in punitive damages. In the third, it awarded four plaintiffs a total of \$5,683,000 in compensatory damages and \$15,690,000 in punitive damages. The most recent trial resulted in a hung jury. A fifth trial is set for August.

ARGUMENT

- I. **The trial court's decision to apply Missouri law correctly followed half a century of Washington choice-of-law precedent mandating application of the most interested state's law to each issue in the case.**

From its Missouri headquarters, Monsanto directed a decades-long campaign to sell PCBs while actively concealing their danger to human health. Missouri has a powerful sovereign interest in punishing Monsanto for engaging in that conduct within its borders, and in deterring others from engaging in similar conduct

in Missouri. That would be obvious if Missouri were to punish this conduct through its criminal law. It should be just as obvious in a civil case over the same conduct, conduct that demonstrates conscious disregard for the safety of others—the standard for punitive damages. Missouri has an equally strong interest in ensuring that companies within its borders do not enjoy repose when their egregious conduct, by design, takes decades to come to light. And that interest is particularly strong where, as here, the company might otherwise escape liability for misconduct serious enough to warrant punitive sanctions.

Under Washington’s established choice-of-law rules, these important sovereign interests mandate the application of Missouri law on punitive damages and the applicable period of repose.

A. Washington’s choice-of-law test requires issue-by-issue analysis of each state’s interests and policies.

Almost half a century ago, the Supreme Court in *Johnson v. Spider Staging* adopted the choice-of-law test from the Restatement (Second) of Conflict of Laws, which applies the law of the state with the “most significant relationship” to an “issue in tort.” 87 Wn.2d 577, 580, 555 P.2d 997 (1976). The Court set forth a two-part test to

determine the state with the greatest interest. First, a court evaluates each state's connections to the case. *See id.* at 580-81. If those connections point clearly to one state, that state's laws apply. But if they are "evenly balanced," the court proceeds at the second step to consider each state's "interests and public policies." *Id.* at 582.

"Each issue" under this test "receive[s] separate consideration." Restatement (Second) of Conflict of Laws § 145, cmt. d. It is thus common for "different issues in a single case" to be "decided according to the substantive law of different states"—a rule "sometimes referred to as depechage." *Pope Res. L.P. v. Certain Underwriters at Lloyd's, London*, 19 Wn. App. 2d 113, 123 n.21, 494 P.3d 1076 (2021). The doctrine of depechage provides for "application to each issue of the rule of the state with the greatest concern in the determination of that issue." Reese, *Depechage: A Common Phenomenon in Choice of Law*, 73 Colum. L. Rev. 58, 60 (1973). Courts applying depechage have allowed "severance of statutes of limitations, questions of individual causation, damages, and affirmative defenses in accordance with different states' law." *Simon v. Philip Morris Inc.*, 124 F. Supp. 2d 46, 75 (E.D.N.Y. 2000).

In circumstances comparable to this case, the Supreme Court in *Spider Staging* applied its two-part choice-of-law test to deny a company the benefit of a state-law cap on damages in a product-liability case. The plaintiff in *Spider Staging* was injured in Kansas by defective scaffolding designed and manufactured by the company in Washington. 87 Wn.2d at 578. The plaintiff sued in Washington, and the company invoked Kansas’s \$50,000 cap on damages—raising a conflict with Washington law, which imposed no damages cap. *Id.* at 578-79.

On the first step of the test, the Court found that the states’ contacts were “evenly balanced,” requiring an evaluation of the relative interests in Kansas’s damages limit. *Id.* at 582. On the second step, it found that Kansas had “no interest” in limiting the damages of “nonresident defendants being sued in their home state.” *Id.* at 583-84. Washington’s policy of providing “full compensation” to plaintiffs, on the other hand, was “clearly advanced by the application of its own law.” *Id.* at 583. Allowing “[u]nlimited recovery,” the Court explained, would “deter tortious conduct” and “encourage respondents to make safe products for its customers.” *Id.* The Court thus denied the company the benefit of the damages

cap, applying instead the law of the company's home state and the state where it committed the tortious acts.

This Court and the Supreme Court have repeatedly applied *Spider Staging* to both the availability of punitive damages and the period of repose in WPLA cases, holding that these issues are governed by the law of the state where the injury-causing conduct occurred. *See, e.g., Zenaida-Garcia v. Recovery Sys. Tech., Inc.*, 128 Wn. App. 256, 115 P.3d 1017 (2005) (statute of repose); *Singh v. Edwards Lifesciences Corp.*, 151 Wn. App. 137, 143-48, 210 P.3d 337 (2009) (punitive damages). These decisions compel the same result here.

B. Missouri law governs the period of repose.

1. The "most significant interest" test. There is no dispute here that Washington law creates the cause of action and governs compensatory damages. Washington "has an obvious interest in . . . providing redress for injuries that occurred there." Restatement (Second) of Conflict of Laws § 145, cmt. d. Monsanto, however, argues that the trial court also should have applied Washington's rebuttable twelve-year statute of repose rather than Missouri law, which has no repose period. *See* RCW 7.72.060; *Lay v. P&G Health*

Care, Inc., 37 S.W.3d 310, 321-22 (Mo. Ct. App. 2000). But this Court in *Zenaida-Garcia*, applying *Spider Staging* to analogous circumstances, held the opposite. 128 Wn. App. at 264-65.

The question in *Zenaida-Garcia* was which statute of repose applied to the WPLA claim of an Oregon resident injured by farm equipment defectively designed in Washington. *Id.* at 258-59. As in *Spider Staging*, the Court held that the state contacts in these circumstances were “evenly balanced” and that Washington—the state where the tortious activity occurred—had the “weightier policy interests.” *Id.* at 263, 266. Washington, the Court explained, had “strong policy interests in deterring the design, manufacture and sale of unsafe products within its borders.” *Id.* at 266. In contrast, Oregon had “no strong interest in application of its statute of repose to protect a Washington corporation.” *Id.* Applying Oregon’s statute “would not protect Oregon residents, but would merely limit their ability to recover damages.” *Id.* Washington’s longer statute of repose thus applied.

This case is the inverse of *Zenaida-Garcia*: The plaintiffs were domiciled and suffered injury in Washington, while the defendants were domiciled and made their tortious design and warning

decisions in the foreign state (Missouri). As in *Zenaida-Garcia*, the state contacts are “evenly balanced”: The plaintiffs’ domicile and the place of injury favor one state, while the defendants’ domicile and the place of tortious conduct favor another. *See id.*

But here it is Missouri, rather than Washington, that “has strong policy interests in deterring the design, manufacture and sale of unsafe products within its borders.” *Id.* “[B]y not enacting a statute of repose, Missouri has expressed a policy in favor of fully compensating injured victims and a policy against providing asylum to manufacturers of defective products.” *Jaurequi v. John Deere Co.*, 986 F.2d 170, 175 (7th Cir. 1993). The state “has a legitimate interest in the application of its law” to further those policies. *Spider Staging*, 87 Wn.2d at 583-84.

Monsanto nevertheless claims (at 43) that “Missouri has no interest in having its resident businesses deprived of repose protections available to Washington businesses.” But a state “has an obvious interest in regulating the conduct of persons within its territory.” Restatement (Second) of Conflict of Laws § 145, cmt. d. Where the purpose of a rule is to “punish the tortfeasor and thus to deter others,” the “state where the conduct occurred is the state of

dominant interest.” *Id.* at cmt. e. And where the issue is the state’s policy on “immunity, the interest of this state in having its rule applied [is] clear.” *Id.* Because “an entity headquartered in [Missouri] committed the conduct in [Missouri] that resulted in the plaintiff’s damages,” Missouri has “the greater interest.” *Singh*, 151 Wn. App. at 140.

Conversely, Washington has “no interest” in applying its statute of repose in this case. *Zenaida-Garcia*, 128 Wn. App. at 265. “When Washington’s tort reform act” created the state’s statute of repose in 1981, “the legislature announced its desire to balance two interests: protecting Washington industries from excessive litigation, and preserving the right of consumers to seek redress for injuries caused by unsafe products.” *Id.* at 264. Neither interest is served by applying Washington’s statute of repose here.

First, Washington “has no strong interest in application of its statute of repose to protect a [Missouri] corporation.” *Id.* at 266. Monsanto’s reliance on the statute “necessarily presumes that [it] was intended to benefit from the protections of [Washington’s] law.” *Martin v. Good Year Tire & Rubber Co.*, 114 Wn. App. 823, 834, 61 P.3d 1196 (2003). But, as *Spider Staging* explained, a state’s interest

in “protect[ing] defendants from excessive financial burdens . . . is primarily local; that is, a state by enacting a damage limitation seeks to protect its own residents.” 87 Wn.2d at 582-83. The purpose of Washington’s statute of repose, in other words, is “protecting *Washington* industries from excessive litigation.” *Zenaida-Garcia*, 128 Wn. App. at 264 (emphasis added).

Washington’s legislature made that purpose explicit. As the statute’s preamble explains, it was “the intent of the legislature that retail businesses located primarily *in the state of Washington* be protected from the substantially increasing product liability insurance costs and unwarranted exposure to product liability litigation.” RCW 7.72.010 (emphasis added). The bill was championed by Washington businesses, including the state’s flagship manufacturer, Boeing. *See* H. Comm. on Law & Justice, Rep. on S. 3158, at 1 (Wash. Comm. Rec. 1981).

The legislature’s “intention to protect local businesses and manufacturers is not furthered by applying [Washington] law to immunize” Monsanto from liability. *Martin*, 114 Wn. App. at 834-35; *see* Martin, *A Statute of Repose for Product Liability Claims*, 50 Fordham. L. Rev. 745, 771 n.142 (1982) (protecting an out-of-state

manufacturer “would not be within the statutory purpose”). Washington has “no interest in applying its limitation to nonresident defendants.” *Spider Staging*, 87 Wn.2d at 583-84. Its “interest in limiting suits” therefore “should not foreclose lawsuits concerning conduct that occurred wholly within another state’s boundaries.” *Ehrenfelt v. Janssen Pharms., Inc.*, 2016 WL 7335922, at *7 (W.D. Tenn. June 23, 2016); see *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 250 (5th Cir. 1990) (finding no reason to extend local law on repose to bar claims against out-of-state manufacturers).

Second, application of Washington’s statute of repose “would not protect [Washington] residents, but would merely limit their ability to recover damages.” *Zenaida-Garcia*, 128 Wn. App. at 266. The legislature intended “that the right of the consumer to recover for injuries sustained as a result of an unsafe product not be unduly impaired.” *Brewer v. Fibreboard Corp.*, 127 Wn.2d 512, 521, 901 P.2d 297 (1995). For that reason, this Court has noted, Washington’s statute of repose “adopts a [relatively] consumer-friendly approach,” *Martin*, 114 Wn. App. at 833, including a twelve-year repose period

that, when it was adopted, was “the nation’s longest for product liability.” *Zenaida-Garcia*, 128 Wn. App. at 264.

Given Missouri’s lack of any repose period, Washington’s interest in protecting its consumers would not be “served by applying Washington law.” *Martin*, 114 Wn. App. at 835. Rather than protecting those consumers, Washington’s statute of repose would “limit the damages of its own residents” without advancing any state interest. *Spider Staging*, 87 Wn.2d at 583. Applying Missouri law would better compensate Washington consumers, better “deter tortious conduct,” and better “encourage [companies] to make safe products.” *Id.*

In short, Missouri has “strong policy interests” in holding its manufacturers liable for defective products, while Washington has “no interest” in extending its statute of repose out of state. *Zenaida-Garcia*, 128 Wn. App. at 265-66. “When one of two states related to a case has a legitimate interest in the application of its law and the other state has no such interest, clearly the interested state’s law should apply.” *Spider Staging*, 87 Wn.2d at 583. Because that is the case here, the trial court properly applied Missouri law. As in *Spider*

Staging and *Zenaida-Garcia*, the applicable law is the law of the state where the tortious conduct occurred.

2. *Monsanto's "hornbook" rule.* Monsanto does not cite, much less attempt to distinguish, *Spider Staging*, *Zenaida-Garcia*, or other Washington cases applying the state's choice-of-law rules to its statute of repose. Nor does it make any effort to weigh the relative state policy interests, as the "most significant relationship" test requires. Instead, it relies on what it claims to be "hornbook law" providing that "whatever state's law applies to the tort . . . determines the statute of repose." Br. 47. Applying that rule, Monsanto argues (at 29-30) that the plaintiffs' "decision to bring claims under the WPLA"—standing alone—"entitles [it] to the protections of the WPLA's statute of repose."

Monsanto backs up this claim (at 35-36) with citations to just four out-of-state decisions—none of which remotely adopts the rule it describes. The Second Circuit in *Lazard Freres v. Protective Life Insurance Co.*, for example, found "no authority for the proposition that New York courts would apply the law of one jurisdiction to a *breach of contract claim* and the law of another jurisdiction to an affirmative defense to that claim." 108 F.3d 1531,

1540 (2d Cir. 1997) (emphasis added). That is because contractual choice-of-law rules provide that contract defenses challenging the “validity of a contract” are governed by the law of the state of contract formation. *Id.* at 1541. But the court also recognized that the “issues arising out of a *tort claim*” need not “be resolved by reference to the law of the same jurisdiction” and warned that “conflation of the two tests is improper.” *Id.* at 1539 n.5, 1540 (emphasis added).⁴

Monsanto’s argument takes aim at the foundation of Washington’s choice-of-law rules. “Under the principle of depechage,

⁴ The other cases Monsanto cites are no more relevant. *In re ICP Strategic Credit Income Fund Ltd.* held that New York has *not* adopted depechage and therefore does not “require[] a court to conduct a conflict of laws analysis on an issue-by-issue basis.” 568 B.R. 596, 608 (S.D.N.Y. 2017). *Hightower v. Kan. City S. Ry. Co.* held that “a negligence action” and “the affirmative defense of comparative negligence” under Oklahoma law are treated as the same “issue” for choice-of-law purposes. 70 P.3d 835, 842 (Okla. 2003). Finally, *Trenado v. Cooper Tire & Rubber Co.* declined to apply Mexican law to an affirmative defense in a Texas car-crash case, but only because the plaintiffs had “fail[ed] to cite to any Mexican law or to make a cogent choice-of-law argument” for doing so. 2010 WL 9546053, at *6 (S.D. Tex. Jan. 26, 2010). None of these cases even arguably “mandates that the same law governing the underlying claims also governs the defenses to those claims,” much less establishes “hornbook law.” Br. 47-49.

different issues in a single case . . . may be decided according to the substantive law of different states.” *Futureselect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 175 Wn. App. 840, 856 n.15, 309 P.3d 555 (2013). Thus, when “a state court recognizes a claim arising from another state’s law,” that law “need not control every incident of the claim.” *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 155 n.19 (2d Cir. 2013). The “forum state may qualify the rights and obligations to which the statutory cause of action gives birth.” *Id.*⁵

Courts choose the law governing “defenses to the plaintiff’s claim” in the same way they choose the law governing the claim itself—by determining which state has the “most significant relationship” to the issue. Restatement (Second) of Conflict of Laws § 161. The Restatement provides specific rules for applying that test

⁵ See, e.g., *Doctor’s Data, Inc. v. Barrett*, 170 F. Supp. 3d 1087, 1107 (N.D. Ill. 2016) (“[A]lthough Illinois law governs [the plaintiff’s] defamation claims, different state law could govern the defendants’ affirmative defenses to those claims since Illinois courts follow the doctrine of depechage”); *CB Aviation v. Hawker Beechcraft Corp.*, 2010 WL 3221899, at *4 (E.D. Pa. Aug. 12, 2010) (applying one state’s law to a contract claim and another’s “to defendant’s affirmative defense of release”).

to a claim's affirmative defenses—rules that would be meaningless if the law governing the claim always applied. *Id.* §§ 162-170.

A statute of repose, “which exempts the actor from liability for harmful conduct,” is thus “entitled to the same consideration in the choice-of-law process as is a rule which imposes liability.” Restatement (Second) of Conflict of Laws § 145, cmt. c; *see id.* (applying interest analysis to a statute designed to protect defendants from lawsuits). Under that test, courts must examine “the principles behind the statute of repose to determine which state's interests [should] prevail.” *Martin*, 114 Wn. App. at 832-33; *see, e.g., Lillegraven v. Tengs*, 375 P.2d 139, 141 (Ala. 1962) (the fact that “the time limitation and the right which plaintiff seeks to enforce are written in the same statute” is “not conclusive”).

Washington courts have repeatedly applied that test to the state's statute of repose, without regard to whether the statute's liability provisions apply. *See Zenaida-Garcia*, 128 Wn. App. at 264; *Martin*, 114 Wn. App. at 834-35; *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 213, 875 P.2d 1213 (1994); *see also, e.g., Ehrenfelt*, 2016 WL 7335922, at *7 (applying the forum's product-liability statute to the cause of action and the defendant-affiliated state's statute of repose

to permit the plaintiff's suit); *Bruce v. Haworth, Inc.*, 2014 WL 834184, at *8 & n.2 (W.D. Mich. Mar. 4, 2014) (applying a repose period under state law other than that of the claim).⁶

That conclusion is not changed by the fact that, as Monsanto argues (at 32), Washington's statute of repose is a "substantive provision that prescribes the parties' rights and duties." That fact starts the debate; it does not resolve it. If Washington had a procedural statute of repose, there would be no need for a conflict-of-laws analysis; the procedural rules of the forum would always apply. *See* Restatement (Second) of Conflict of Laws § 145, cmt. d (a court always "applies its own state's rules to issues involving process"); *id.* § 142. Choice of law becomes relevant when "different *substantive* issues in a tort case may be resolved under the law of different states." *La Plante v. Am. Honda Motor Co., Inc.*, 27 F.3d

⁶ The Supreme Court in *Rice* did not, as Monsanto claims (at 33-34), hold that application of a state-law cause of action requires application of the same state's statute of repose. *Rice* did not even identify the state law that created the cause of action. It "merely identified one substantive conflict" between Oregon's and Washington's statutes of repose and resolved that conflict by applying Oregon's repose period. Stanton, *Implementing the Uniform Conflict of Laws-Limitations Act in Washington*, 71 Wash. L. Rev. 871, 881 (1996).

731, 741 (1st Cir. 1994) (emphasis added). It is only because “statutes of repose can raise a conflict of substantive law” that a conflicts analysis is necessary at all. *Rice*, 124 Wn.2d at 211.

3. *Relevance of statutory context.* Nor does it matter that Washington’s statute of repose is a statutory provision codified in the WPLA. “Choice of law rules apply equally to claims brought under common law and statutory law.” *Simon*, 124 F. Supp. 2d at 53-54. As the U.S. Supreme Court has made clear, the “necessity” of choice of law “is not any the less [if] . . . the foreign statute is set up as a defense to a suit or proceeding[] under the local statute.” *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 547 (1935).

On the contrary, “[i]n the case of statutes . . . where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is still more apparent.” *Id.* And just as with common-law rules, such statutory conflicts must be “resolved . . . by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight.” *Id.* Choice of law, in other words, is decided on an “issue by issue basis,” not a statute-

by-statute one. *Newmont USA Ltd. v. Am. Home Assurance*, 676 F. Supp. 2d 1146, 1156 (E.D. Wash. 2009).

Washington's legislature could have chosen a different rule. It was free to override established choice-of-law principles by statute, as other states have done with statutes of repose. *See* Or. Rev. Stat. § 30.905(2)(b); Neb. Rev. Stat. § 25-224. But it didn't. Instead, the legislature codified its intent to protect "retail businesses located primarily in the state of Washington." RCW 7.72.010.

When it adopted the WPLA in 1981, *Spider Staging* was already established as the law of the state. The "legislature is presumed to know" that rule. *Segura v. Cabrera*, 179 Wn. App. 630, 650-51, 319 P.3d 98 (2014). And, on questions of choice-of-law, the legislature is presumed to have chosen not to supersede that rule: "The normal presumption, which has been around for years, is that statutes are not intended to alter principles of conflict of laws." Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. Chi. L. Rev. 657, 667 (2013) (citing *Preserving the Inviolability of Rules of Conflict of Laws by Statutory Construction*, 49 Harv. L. Rev. 319 (1935)).

Courts hold that this presumption is overcome “only where we can clearly determine that the Legislature” intended to “supersede choice of law principles.” *State Farm Mut. Auto. Ins. Co. v. ANC Rental Corp.*, 2008 WL 4149006, at *2 (Ariz. Ct. App. Apr. 3, 2008); *see also Calabotta v. Phibro Animal Health Corp.*, 460 N.J. Super. 38, 66 (App. Div. 2019) (refusing to construe statute to “bulldoze” over choice-of-law principles because “the Legislature has shown that when it wishes to issue a ‘statutory directive’ on choice-of-law, it knows how to do it”). This reflects the general rule that “[s]tatutes will not be interpreted as changing the common law unless they effect the change with clarity.” Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 318 (2011).

And here, the legislature didn’t merely refrain from clearly overriding Washington’s common law on the choice of law in products cases. It expressly preserved it. The WPLA provides that “[t]he previous existing applicable law of this state on product liability is modified only to the extent set forth in this chapter.” RCW 7.72.020(1). That “existing applicable law” includes *Spider Staging’s* approach to cases involving consumers injured in one state by products manufactured in another. *C.f. Boudreaux v.*

Weyerhaeuser Co., 10 Wn. App. 2d 289, 298 n.4, 448 P.3d 121 (2019) holding that RCW 7.72.020(1)'s direction to preserve "previous existing law," unless displaced, required application of background rules for "subject matter jurisdiction of Washington's superior courts over product-liability claims"). Because nothing in the WPLA speaks to choice-of-law rules, let alone displaces them, Washington's well-established default rules still govern—and they mandate application of Missouri law here. In these circumstances, "[r]ather than reading the statute to say anything about the overarching topic of choice-of-law analysis, the state's courts will presume that the statute leaves the state's ordinary choice-of-law principles untouched." Nelson, *supra*, 80 U. Chi. L. Rev. at 668.

Monsanto claims otherwise, arguing that the legislature included in the WPLA "a statutory directive" requiring application of Washington law under Restatement (Second) of Conflict of Laws § 6(1). According to Monsanto (at 31-32), the WPLA's provision that "a product seller *shall not* be subject to liability" after the repose period is such a directive because it uses "mandatory, unequivocal language" to "limit the WPLA's scope."

That language, however, says nothing about which state's law applies. To constitute a "statutory directive to choice of law," 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. The language on which Monsanto relies merely establishes a repose period as a substantive rule of *Washington* law. It doesn't provide for the "*application*" of that law in any court. *Id.* (emphasis added). Put another way, it doesn't mandate that Washington's substantive law apply "*regardless of the domicile*" of the defendant. *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1147 (9th Cir. 2002).

As the Restatement explains, a "court will rarely find that a question of choice of law is explicitly covered by statute." Restatement (Second) of Conflict of Laws § 6, cmt. b (explaining that such statutes are "few in number"). The Restatement thus "reinforces the premise that individual state statutes usually do not address, let alone override, the state's ordinary choice-of-law principles." Nelson, *supra*, 80 U. Chi. L. Rev. at 668. The Restatement cites as one example a section of the UCC providing

that a bank's "liability is governed by the law of the place where the branch or separate office is located." U.C.C. § 4-102(b) (1977). Another example is Washington's borrowing statute, which provides rules for determining which state's statute of limitations governs a claim. RCW 4.18.020. Other states have similar choice-of-law directives governing their statutes of repose. *See* Or. Rev. Stat. § 30.905(2)(b); Neb. Rev. Stat. § 25-224.⁷

The WPLA's statute of repose looks nothing like these "rare" choice-of-law directives. Restatement (Second) of Conflict of Laws § 6, cmt. a. Virtually every state statute uses the word "shall" to indicate a mandatory rule of law. But although that may indicate a "statutory directive," it is not enough to indicate a directive "on choice of law." If such generic statutory language were enough, it is "difficult to imagine a claim based on *any* [Washington] statute that would not be viewed as a statutory directive on choice of law."

⁷ "[S]tatutes of repose do not fall under [Washington's] statute of limitations borrowing statute" because they are "treated not as statutes of limitation, but as part of the body of a state's substantive law in making choice-of-law determinations." *Rice*, 124 Wn.2d at 212.

Citizens Ins. Co. of Am. v. Daccach, 217 S.W.3d 430, 465 (Tex. 2007) (Jefferson, J., concurring).⁸

Marriage of Abel, on which Monsanto relies, does not reflect a different approach. 76 Wn. App. 536, 539-40, 886 P.2d 1139 (1995). There, Division Three held that “the trial court erred when it used Montana law to calculate [child] support.” *Id.* at 539. That holding followed from the statute’s language, which required that “[t]he child support schedule” “shall be applied” “in each county of the state” and “in all proceedings in which child support is determined.” RCW 26.19.035. The statute didn’t use “shall” merely to establish an ordinary rule of state law. Instead, it mandated the “application” of Washington’s child-support schedule in all proceedings. Restatement (Second) of Conflict of Law § 6, cmt. a.

The language on which Monsanto relies, by contrast, merely establishes a repose period as a substantive rule of *Washington* law,

⁸ To illustrate “the presumption that generally worded statutes enacted by their own state’s legislature leave room for ordinary choice-of-law analysis,” Professor Nelson pointed to a statute remarkably similar in structure to the WPLA’s repose provision. 80 U. Chi. L. Rev. at 668 (discussing a statute providing that “[n]o nonprofit corporation . . . shall . . . be liable to respond in damages” to a member).

not the application of that law in any court. The WPLA would only resemble the statute in *Abel* only if it directed that the period of repose “shall apply in all proceedings in Washington courts.” The WPLA does no such thing.⁹

Finally, Monsanto’s contrary claim can’t be reconciled with *Zenaida-Garcia*, which applied choice-of-law analysis to decide which statute of repose governed WPLA claims. If Monsanto were correct that the WPLA mandates application of Washington’s repose period, that analysis would have been unnecessary.¹⁰

⁹ The statute in *Abel* is also inapposite because it contained express exceptions for when to “deviat[e]” from the Washington schedule, including an exception based on the child’s residence. RCW 26.19.075(1)(d). And *Abel* didn’t rest on the statute alone; it held that, even absent the statute, “general choice of law principles” would “weigh in favor of applying Washington law.” *Abel*, 76 Wn. App. at 539.

¹⁰ Monsanto is also wrong to suggest that judgment would be entered in its favor if this Court were to conclude that Washington’s law governs the period of repose. The plaintiffs have preserved arguments that exceptions to the WPLA’s statute of repose would apply regardless, and they reserve the right to present those arguments in the event of a remand. CP 9362 (noting that the issue “remains outstanding”).

4. *Dormant Commerce Clause.* In the alternative, Monsanto argues that application of Washington’s choice-of-law rules would violate the dormant Commerce Clause. The “need for interstate harmony consistent with the Commerce Clause,” it argues (at 42), “requires applying the WPLA’s statute of repose to resident and non-resident defendants alike.”

But Monsanto didn’t preserve this argument below. It addressed the Constitution only in a footnote, asserting—without argument or authority—that application of Missouri law “would violate, among other things, the equal protection and due process clauses of Washington’s and United States’ Constitutions, as well as the Privileges and Immunities Clause of the United States Constitution.” CP17082. Monsanto never mentioned the dormant Commerce Clause, much less developed that argument sufficiently to preserve it. *See Desranleau v. Hyland’s, Inc.*, 10 Wn. App. 2d 837, 848, 450 P.3d 1203 (2019).

And it does little better on appeal. It cites no decision that has ever held that a court’s choice of law can violate the dormant Commerce Clause, much less that a state unconstitutionally discriminates against an out-of-state resident by applying the law of

its own state to that resident. That isn't surprising. The doctrine of depechage is rooted in the same principles of federalism and state sovereignty that the dormant Commerce Clause protects. *See* Stevenson, *Depechage: Embracing Complexity to Solve Choice-of-Law Issues*, 37 Ind. L. Rev. 303, 309-10 (2003).

To avoid “infringing on the policy choices of other States,” a state’s limit on remedies “must be supported by the State’s interest in protecting its own consumers and its own economy.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996). By examining those interests when choosing what law to apply, depechage safeguards the right of states to develop and enforce their own laws, while preventing states from regulating beyond their own borders. Far from interfering with interstate commerce, the doctrine ensures that choice-of-law decisions “further harmonious relations between states” and “facilitate commercial intercourse between them.” Restatement (Second) of Conflict of Laws § 6, cmt. d; *see Seizer v. Sessions*, 132 Wn.2d 642, 652, 940 P.2d 261 (1997).

To hold that the Commerce Clause requires application of the forum state’s law would render the Restatement’s choice-of-law rules—and thus the rules of most states—unconstitutional. That

may benefit Monsanto here, but it would *harm* many out-of-state defendants whose home states provide shorter periods. This Court should not entertain this radical proposal in a case in which the issue isn't even preserved.

C. Missouri law also governs punitive damages.

1. The “most significant interest” test. The “same choice of law principles” set forth in *Spider Staging* and *Zenaida-Garcia* “apply to the issue of punitive damages.” *Singh*, 151 Wn. App. at 144; see Restatement (Second) of Conflict of Laws § 171, cmt. d (“The law selected by application of the rule of § 145 determines the right to exemplary damages.”). Courts award damages under 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 (emphasis added). As a result, different states’ laws may govern “whether the actor’s conduct was tortious” and “the measure of damages,” including “what limitations, if any, are imposed upon the amount of recovery.” *Id.* §§ 156, 171.

Likewise, the “law governing the right to exemplary damages need not necessarily be the same as the law governing the measure of compensatory damages.” *Id.* § 171, cmt. d. “This is because

situations may arise where one state has the dominant interest with respect to the issue of compensatory damages and another state has the dominant interest with respect to the issue of exemplary damages.” *Id.* If another state has the most significant relationship to issue of punitive damages, “a Washington court can award punitive damages under the law” of that state. *Kammerer v. W. Gear Corp.*, 96 Wn.2d 416, 423, 635 P.2d 708 (1981); *see Nazar v. Harbor Freight Tools USA Inc.*, 2019 WL 2066127, at *1 (E.D. Wash. Mar. 8, 2019) (same).

This Court’s application of these principles in *Singh*, 151 Wn. App. at 140, forecloses Monsanto’s argument that the trial court should have applied Washington’s bar on punitive damages. In *Singh*, a Washington resident injured in a Washington hospital when a defective heart monitor malfunctioned brought a products-liability claim under Washington law against the California-based manufacturer. *Id.* at 140-41. The manufacturer also designed the monitor and made the decision to conceal the defect from its California “corporate headquarters.” Canvassing Washington decisions on conflicts of law, this Court concluded that “Washington has no interest in protecting companies who commit

fraud.” *Id.* at 145, 147-48. Instead, the most “significant factor” in determining the law governing punitive damages is “the jurisdiction in which the bad behavior . . . occurred.” *Id.* at 145. Because “[t]he conduct that serve[d] as the basis of the punitive damage award . . . occurred in California and that state has an interest in deterring its corporations from engaging in such fraudulent conduct,” the court applied California’s punitive-damages law. *Id.* at 148.¹¹

As the trial court observed, *Singh* is “close factually” to this case. CP 9361. The plaintiffs here, as in *Singh*, are Washington residents who were injured in Washington. “Even though Washington has a strong policy against punitive damages, it has no interest in protecting companies that commit fraud.” *Singh*, 151 Wn. App. at 140. Nor would Washington’s interests be “furthered by

¹¹ The procedural history makes clear that Singh’s punitive-damages award rested *only* on his WPLA claim. The hospital brought a fraud cross-claim and received \$100,000 in punitive damages. But the WPLA provided the sole foundation of Singh’s \$8,350,000 award. See Amended Complaint, *Singh v. Edwards Lifesciences Corp.*, 2006 WL 5738344 (Wash. Super. 2006) (asserting WPLA, CPA, and fraud claims); *Singh v. Edwards Lifesciences Corp.*, 2007 WL 6158356 (Wash. Super. Dec. 10, 2007) (dismissing Singh’s CPA claim); *Singh v. Edwards Lifesciences Corp.*, 2007 WL 5222379 (Wash. Super. Nov. 01, 2007) (dismissing Singh’s fraud claim).

prohibiting punitive damages as to alleged wrongful conduct resulting in the death of its citizens where the conduct occurred outside of its territory.” *Hersh v. CKE Rest. Holdings, Inc.*, 571 F. Supp. 3d 1046, 1055 (E.D. Mo. 2021). This Court has thus held that Washington policy does not prevent an award of punitive damages to further the interests of the state where the tortious conduct occurred. *Kammerer*, 96 Wn.2d at 423.

Here, the defendant, also as in *Singh*, is an out-of-state company that made its tortious decisions—the “bad behavior” at issue—in their home state. Missouri, just like California in *Singh*, has an “interest in deterring its corporations from engaging in” misconduct. *Singh*, 151 Wn. App. at 148. As Monsanto recognizes, “the purpose of punitive damages” under Missouri law is “to punish a defendant for an aggravated act of misconduct and to deter similar conduct in the future.” *Rinker v. Ford Motor Co.*, 567 S.W.2d 655, 668 (Mo. App. 1978). And 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 827 (1982) (quoting Restatement (Second) of Conflict of Laws § 145, cmt. c).

The most “significant factor” in a punitive-damages case is thus “the jurisdiction in which the bad behavior . . . occurred.” *Singh*, 151 Wn. App. at 145. And where, as here, “an entity headquartered in [Missouri] committed the conduct in [Missouri] that resulted in the plaintiff’s damages,” Missouri has “the greater interest in deterring such fraudulent activities.” *Id.* at 140; *see also Bryant v. Wyeth*, 879 F. Supp. 2d 1214, 1222 (W.D. Wash. 2012) (“The place of injury is therefore fortuitous, shifting the focus to the location where the conduct causing the harm occurred.”).

2. Monsanto’s attempt to distinguish Singh. Recognizing the importance of *Singh*, Monsanto spends several pages attempting to distinguish the case on its facts. The gist of its argument (at 206) is that, unlike the defendant in *Singh*, “Monsanto *did not* sell a defective product in Washington” and “had no contact with . . . any other Washington entity with control over the [products] that allegedly injured plaintiffs.” But this cuts *against* Monsanto, not in favor of it. That Monsanto had little or no direct contact with Washington demonstrates how little interest the state has in

applying its punitive-damages policy. The “only [Washington] contacts were the residence of the [plaintiffs] and the fact that [Monsanto’s] product was ultimately purchased and used” there. *Zenaida-Garcia*, 128 Wn. App. at 262. Monsanto’s contacts with Washington “with respect to this particular issue are virtually nonexistent.” *Id.*

Monsanto also argues (at 197) that the legislature foreclosed an award of punitive damages by making the WPLA the exclusive remedy in product-liability cases. But the WPLA provides an exclusive remedy only under *Washington* law. Monsanto cites no language in the statute or other evidence to suggest that this exclusive remedy “was intended to have extraterritorial application.” Restatement (Second) of Conflict of Laws § 6, cmt. e.

It is true that the WPLA “creates a single cause of action for product-related harms that supplants previously existing common law remedies.” *Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 860, 774 P.2d 1199 (1989). The WPLA, however, supplants the remedies previously available under the common-law of *Washington*. See RCW 7.72.010. The Act does not purport to supplant *other* states’ remedies. Nor does it alter the choice-of-law

rules that determine when those remedies apply. *See Perez v. ZTE (U.S.), Inc.*, 2020 WL 3798865, at *20 (N.D. Tex. July 6, 2020) (rejecting the argument that Texas’s statutory definition of “products liability action” constituted a choice-of-law directive”).¹²

Finally, Monsanto argues that application of Missouri law violates its right to due process. Once again, Monsanto’s summary assertion in the trial court (that application of Missouri law “would violate, among other things, . . . due process”) was insufficient to preserve the issue. *See Desranleau*, 10 Wn. App. 2d at 848.

Regardless, the argument is misguided. Due process “prohibits certain choice of law decisions only when the choice of law is arbitrary or fundamentally unfair, such as when the selection of

¹² Nor does it help Monsanto that the statute defines “harm” as “damages recognized by the courts of this state.” RCW § 7.72.010(6). The history makes clear that the legislature intended this language not to direct choice of law, but to “allow[] for the continued development of the concept through case law.” *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 320, 858 P.2d 1054 (1993). The statute defines “harm” under *Washington* law to incorporate decisions of “courts of the state.” But again, that’s a substantive rule of state law; it doesn’t direct that the law be applied extraterritorially to citizens of other states whose state law provides a different rule. It doesn’t mandate that this definition apply “*regardless of the domicile*” of the defendant. *Cairns*, 292 F.3d at 1147.

forum law rested exclusively on the presence of one nonsignificant forum contact.” *Pope Res.*, 19 Wn. App. 2d at 155; see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). As a company that distributed its products in all fifty states (only a few of which bar punitive damages), Monsanto “could not have justifiably relied on” Washington’s limitation in planning its conduct. *Spider Staging*, 87 Wn.2d at 583 n.3. A company that consciously disregards the safety of people of every state can “have few, if any, justified expectations in the area of choice of law to protect.” Restatement (Second) of Conflict of Laws § 145, cmt. b.

Nor can Monsanto reasonably claim that it would be “arbitrary or fundamentally unfair” to subject it to the law of its home state. See *Mahne v. Ford Motor Co.*, 900 F.2d 83, 88 (6th Cir. 1990) (“[D]efendants cannot argue that applying Michigan law would defeat their expectations since the individual defendants reside there and defendant Ford Motor Company has its headquarters in that state.”). The fact that “much of the alleged conduct at issue took place in [Missouri] should have put Defendants on notice that the application of [the state’s] law to Plaintiff’s claims was a possibility.” *Ehrenfelt*, 2016 WL 7335922, at

*7. A defendant “cannot be surprised or unfairly prejudiced by the application of a statute enacted by the state in which [it] is incorporated and manufactures its products.” *Sico N. Am., Inc. v. Willis*, 2009 WL 3365856, at *5 (Tex. Ct. App. Sept. 10, 2009); *see Marchesani v. Pellerin-Milnor Corp.*, 269 F.3d 481 (5th Cir. 2001) (applying the statute of repose of a defendant’s home state comports with fundamental principles of fairness).¹³

3. Post-sale duty to warn. Monsanto devotes the remainder of its argument to disputing the application of punitive damages to just one of the plaintiffs’ claims—that Monsanto violated a post-sale duty to warn of the danger posed by PCBs. That claim, Monsanto argues, cannot support punitive damages because Missouri’s law, unlike Washington’s, imposes no such post-sale duty.

¹³ Monsanto also argues that Missouri imposes certain procedural requirements on punitive-damages awards that are absent under Washington law. But in mandating those requirements in 2020, Missouri’s “legislature expressly stated that the provisions of this act shall apply to causes of action filed on or after August 28, 2020.” *Largent v. Pelikan*, 628 S.W.3d 162, 165 (Mo. Ct. App. 2021) (quoting Mo. Rev. Stat. § 510.262). As Monsanto appears to recognize, those requirements would not apply to this case even under Missouri law. At any rate, Monsanto doesn’t argue that it was prejudiced by the absence of any of those requirements.

Monsanto is mistaken. Missouri recognizes a broad duty to warn users when a product is dangerous. See *Orr v. Shell Oil Co.*, 177 S.W.2d 608, 610 (Mo. 1943). And it has never limited that duty to the time of sale. Rather, the duty arises when “the fact is . . . established” that an “apparently harmless” product “contains concealed dangers.” *Johnston v. Upjohn Co.*, 442 S.W.2d 93, 97 (Mo. App. 1969); see, e.g., *Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 156 (Mo. 2000) (recognizing the continuing duty to warn under Missouri law); *Stanger v. Smith & Nephew, Inc.*, 401 F. Supp. 2d 974, 982 (E.D. Mo. 2005) (recognizing Missouri claim for post-sale duty to warn). Monsanto cites no Missouri cases to the contrary. Instead, it cites the Eighth Circuit’s decision in *Smith v. Firestone Tire & Rubber Co.*, 755 F.2d 129, 135 (8th Cir. 1985). But *Smith* was not about a post-sale duty to warn; it held only that Missouri law imposes no “duty to *recall*” defective products—an entirely different issue. *Id.* at 135 (emphasis added).

Missouri’s “products liability cases have relied heavily on Restatement (Second) of Torts.” *Porter v. Crawford Co.*, 611 S.W.2d 265, 272 (Mo. Ct. App. 1981). The Restatement rule does not exclude a duty to make post-sale warnings, and many courts have

relied on it in permitting post-sale-claims. *See, e.g., In re Gen. Motors LLC Ignition Switch Litig.*, 202 F. Supp. 3d 362, 366-67 (S.D.N.Y. 2016). That growing consensus led the drafters of the in-progress Restatement (Third) of Product Liability to expressly provide for liability for “failure to provide a warning after the time of sale.” Restatement (Third) of Torts: Prod. Liab. § 10(a) (May 2022). Given the Missouri Supreme Court’s long association with the Restatement and the “mandate of [its] organic law that there should be a remedy for every injury,” the Court “has not been reluctant to adopt new forms of action in tort based on Restatement principles” and is unlikely to depart from the Restatement view. *Porter*, 611 S.W.2d at 272.

Even if there were reason to believe that Missouri would reject a post-sale duty to warn, Missouri law would still make punitive damages available based on Monsanto’s violation of *Washington’s* post-sale duty. Monsanto argues that, because a “claim for punitive damages is not an independent cause of action,” it must be based on an “underlying cause of action.” *Harris v. Jungerman*, 560 S.W.3d 549, 555 (Mo. Ct. App. 2018). But there *is* an underlying cause of action here: the plaintiffs’ cause of action under the WPLA.

Contrary to Monsanto's claim, nothing in Missouri law requires punitive damages to be based on a Missouri cause of action. Punitive damages can also, for example, be based on violation of federal law, state or federal regulations, or industry standards. *See, e.g., Coon ex rel. Coon v. Am. Compressed Steel, Inc.*, 207 S.W.3d 629 (Mo. Ct. App. 2006); *Blanks v. Fluor*, 450 S.W.3d 308, 403 (Mo. Ct. App. 2014). And, as explained above, Missouri has an interest in deterring conduct that demonstrates conscious disregard to the safety of others even if the injury occurred in another state.

Once again, Monsanto's argument challenges the very concept of depechage. The natural and expected effect of resolving choice of law issue-by-issue is to sometimes produce "a result that could not be obtained by the exclusive application of the law of one of the interested states." Reese, *supra*, 73 Colum. L. Rev. at 75. But that "presents no difficulty, except in a situation where the purpose of one or more of the rules applied would be distorted." *Id.* "While it might seem strange to apply the law of one jurisdiction to resolve liability issues, and the law of another to resolve damages claims . . . , the application of different states' laws to different issues is not uncommon." *Barrett v. Ambient Pressure Diving, Ltd.*, 2008

WL 4934021, at *2 (D.N.H. Nov. 17, 2008); *see, e.g., In re Air Crash Disaster Near New Orleans*, 789 F.2d 1092, 1098 (5th Cir. 1986) (applying Uruguayan law to a wrongful-death claim but Louisiana law to damages not available under Uruguayan law).¹⁴

Indeed, Missouri courts would themselves apply the state's punitive-damages rule to the Washington claims in this case. Missouri's choice-of-law rules, like Washington's, hold that "[t]he measure and elements of damages are controlled, in tort actions, by the law of the place where the tort was committed, since this pertains to the substance of the right and not to the remedy." *Stevens v. Mo. Pac. R.R., Co.*, 355 S.W.2d 122, 131 (Mo. 1962). Here, "the

¹⁴ *See, e.g., DC3 Ent., LLC v. John Galt Ent., Inc.*, 2006 WL 278573, at *10 (W.D. Wash. Feb. 2, 2006) (applying the California Fair Employment and Housing Act, which allowed for punitive damages, to determine liability, but applying Washington's bar on punitive damages); *James v. Powell*, 19 N.Y.2d 249, 259-60 (1967) (applying Puerto Rico law to liability and New York law to punitive damages without considering merits of defendants' argument that plaintiff failed to state a claim under New York law); *Kilberg v. Northeast Airlines, Inc.*, 172 N.E.2d 526, 529 (1961) (applying forum rules on damages to action brought under Massachusetts wrongful death statute); *In re Air Crash at Belle Harbor, New York on Nov. 12, 2001*, 2006 WL 1288298, at *23 (S.D.N.Y. May 9, 2006) (maritime law governs compensatory damages, but French and New York law governs punitive damages).

place where the tort was committed” is Missouri. The governing law of punitive damages is thus the law of Missouri, and the “fact that these courts would have applied” the state’s punitive-damages rule shows “that an important interest of that state would be served” by also applying it here. Restatement (Second) of Conflict of Laws § 145, cmt. h.

II. The trial court correctly declined to give Monsanto’s proposed “relevant product” and “sophisticated purchaser” instructions because neither finds support in the law or the record.

The trial court afforded Monsanto ample opportunity to argue to the jury that the real cause of the plaintiffs’ injuries was the failure of light ballasts and downstream product manufacturers who, like Monsanto, issued no warnings about the dangers of PCBs. The jury disagreed. Unsatisfied, Monsanto asks this Court to order a new trial because the trial court refused to give two instructions that Monsanto proposed to support its theory of the case. Neither instruction finds support in the law or the record.

A. Monsanto’s argument that the “relevant product” must “fail” misapprehends the WPLA.

Monsanto claims that the jury should have been instructed that it could find that classroom light ballasts—not PCBs—were

the “relevant product” under the WPLA because, to give rise to liability under Washington law, a product must “fail.” This instruction rests on a basic category error. It confuses a limitation on *who* may be sued (the maker of the product or component giving rise to the plaintiffs’ claims) with a substantive standard of liability (that the product must have “failed”). The former has a basis in the text of the WPLA; the latter doesn’t.

The WPLA provides a cause of action for people injured by a defective product in Washington. But it limits who can be liable through a series of statutory definitions. One limitation is that the defendant must be a “manufacturer” or “products seller,” terms defined as those who engage in specific conduct that brings the “relevant product” to market and exposes the injured consumer. RCW § 7.72.010. “Relevant product” is also a defined term, meaning the “product or its component part or parts, which gave rise to the product liability claim.” *Id.* § 7.72.010(3).

Putting this all together, the WPLA imposes liability on those who make or sell the product that the plaintiff alleges has caused harm. By the same token, the WPLA does *not* impose liability on entities only tangentially related to the “relevant product”—such as

a shipping company or advertiser or other companies that developed a component that the plaintiff does *not* allege caused harm. Because those entities aren't in any position to remedy the defect in the "relevant product," the WPLA, like the common law before it, doesn't impose liability. *See Simonetta v. Viad Corp.*, 165 Wn.2d 341, 353, 197 P.3d 127 (2008) (explaining that Washington "generally limit[s] the analysis of the duty to warn of the hazards of a product to those in the chain of distribution of the product, such as manufacturers, suppliers, or sellers").

The trial court correctly applied the WPLA's straightforward definitions and held that, as a matter of law, PCBs are the relevant product here. PCBs are the product that the plaintiffs alleged to be defective and the source of their injuries. They are, in other words, the "component part or parts" that "gave rise to the product liability claim." RCW § 7.72.010(3). The statute's text thus compels that PCBs are the "relevant product," and the case law confirms that conclusion. *See, e.g., Parkins v. Van Doren Sales, Inc.*, 45 Wn. App. 19, 25, 724 P.2d 389 (1986) (holding that the defendant manufactured the relevant product because, although it didn't produce the completed "processing line," "it did design and

manufacture the component parts” that allegedly caused the plaintiff’s injury); *Martinez v. Callahan Mfg., Inc.*, 114 Wn. App. 1083, at *4 (2003) (unpublished) (“[T]he trimmer component is distinct from the main hay press on which Mr. Martinez was injured. The ‘relevant product’ thus is the main hay press, not the trimmer component.”).

In asserting that the court should nevertheless have instructed the jury to the contrary, Monsanto attempts to transform the statute’s textual limits on who may be sued into an atextual standard of substantive liability. To do so, it cherry picks (at 52) language from Division Two’s decision in *Sepulveda-Esquivel v. Central Machine Works, Inc.*, 120 Wn. App. 12, 84 P.3d 895 (2004), to conjure a proposed rule of law that the “the ‘relevant product’ is the product that failed.” But *Sepulveda* merely held that the manufacturer and supplier of a component that is *not* defective are not liable under the WPLA. See *Simonetta*, 165 Wn.2d at 352-53 (“We interpret *Sepulveda* to align the WPLA with the common law limitations in that component sellers are not generally liable when the component itself is not defective.”).

And any “failure” requirement would be fundamentally incompatible with the WPLA. Liability exists under the WPLA even when a product functions exactly as intended if it is “not reasonably safe” in design or lacks adequate warnings. RCW § 7.72.030(1)(a), (b). Defining “relevant product” to require that the product fail to perform as intended would preclude liability on these grounds, thereby immunizing the intentional sale of especially dangerous products. Case law confirms this flaw in Monsanto’s theory: In a subsequent case applying *Sepulveda*, Division Two expressly rejected the same argument that Monsanto attempts here, explaining that liability may attach even when the “relevant product” is “functioning as intended.” See *O’Connell v. MacNeil Wash Sys. Ltd.*, 2 Wn. App. 2d 238, 248 n.3, 409 P.3d 1107 (2017).

Notably, although Monsanto grounds its legal argument in the language of “failure,” its proposed instruction just parroted the statute: “The relevant product is the product which gave rise to the product liability claim.” CP 15715. That is another reason to reject Monsanto’s argument. Even under that instruction, a rational jury could reach only one outcome because the “claim” here is that Monsanto’s PCBs were defective and injured the plaintiffs.

B. The trial court correctly rejected Monsanto’s proposed “sophisticated purchaser” instruction.

Over the four decades that Monsanto sold PCBs for use in consumer goods—including light ballasts and caulk—it never issued a single warning to end users about the dangers of PCBs. Nor did any of the intermediary manufacturers who incorporated the PCBs and made direct sales to the public.

Nonetheless, Monsanto has sought to avoid liability for its long-running failure to warn by invoking the “sophisticated purchaser” defense. When available, this defense—also known as the “learned intermediary doctrine”—allows a manufacturer to discharge its duty to warn where the manufacturer both (a) informs an intermediary of the dangers that end users will face and (b) reasonably relies on that intermediary to convey the warning.

Monsanto’s argument that the trial court erred in refusing to instruct on this defense faces a simple problem: The Washington Supreme Court has expressly declined to adopt the defense outside of the pharmaceutical or medical-device context. At any rate, the evidence at trial did not support such an instruction.

1. The Supreme Court has expressly declined to adopt Monsanto’s sophisticated-purchaser defense.

Under the WPLA, a manufacturer’s “responsibility for affixing an adequate warning to its product” “generally is not delegable.” *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 814, 733 P.2d 969 (1987). In *Ruble v. Carrier Corp.*, the Supreme Court explained that this rule precludes manufacturers from delegating the responsibility to warn to “sophisticated purchasers.” 192 Wn.2d 190, 208-09, 428 P.3d 1207 (2018). The “only scenario” in which there is an exception is the pharmaceutical and medical-device context, where a manufacturer can “fulfill[] its duty to warn when it gives adequate warning to the physician who must prescribe the product.” *Id.* But that carve-out exists “for public policy reasons focused on preserving the physician-patient relationship, and it is considered sui generis.” *Id.* at 209. Thus, the Supreme Court has “expressly declined to adopt the learned intermediary doctrine in other contexts.” *Id.*; see also, e.g., *Nye v. Bayer Cropscience, Inc.*, 347 S.W.3d 686, 704 (Tenn. 2011) (rejecting sophisticated-purchaser doctrine for highly toxic products outside the pharmaceutical context

because the underlying policy considerations—including a doctor’s obligation to prioritize patient health—are absent).

Faced with the Supreme Court’s repudiation of its theory, Monsanto attempts to brush *Rublee* aside as a case about the apparent-manufacturer doctrine. But *Rublee* expressly rejected the proposition that an intermediary’s sophistication precludes liability under the apparent-manufacturer doctrine because such a rule would be “inconsistent” with Washington product-liability law more broadly. *Rublee*, 192 Wn.2d at 207-08. To illustrate that conflict—and to harmonize Washington’s treatment of the apparent-manufacturer doctrine with other product-liability principles—the court rejected the sophisticated-purchaser defense that Monsanto grasps for here.¹⁵

¹⁵ *Zamora v. Mobil Corp.*, 104 Wn.2d 199, 204, 704 P.2d 584 (1985), the only relevant Supreme Court case Monsanto cites, isn’t to the contrary. It held that a company that temporarily owned propane gas on paper—but never manufactured, possessed, or even had an opportunity to inspect it—had no duty to warn end users. In other words, *Zamora* is about an *intermediary* with “no notice” of a product’s danger, not about a *manufacturer* (like Monsanto) with all the requisite knowledge. The remainder of Monsanto’s cases aren’t about the sophisticated-purchaser doctrine at all or are lower court opinions that pre-date *Rublee*. See, e.g., *Lunt v. Mount Spokane Skiing Corp.*, 62 Wn. App. 353, 362, 814 P.2d 1189 (1991)

2. Monsanto presented no evidence that it warned the relevant ballast or caulk sellers of PCBs' dangers or that it reasonably relied on them to warn end users.

Even if Washington law permitted the sophisticated-purchaser defense as a general matter, the trial court didn't abuse its discretion in refusing to give the proposed instruction. *See State v. Picard*, 90 Wn. App. 890, 902, 954 P.2d 336 (1998) (refusal to give instruction is reviewed for abuse of discretion). If available, the defense applies “only where the manufacturer has supplied to the employer all the information necessary to make its product safe for use by the end user and has ‘reasonable assurance that the information will reach those whose safety depends upon their having it.’” *Mikelsen v. Air & Liquid Sys. Corp.*, 2018 WL 4899305, at *3 (W.D. Wash. Oct. 9, 2018) (quoting Restatement (Second) of Torts § 388).

But a party is only entitled to an instruction when the evidence could support a rational jury returning a verdict in its favor. *See, e.g., State v. Barker*, 103 Wn. App. 893, 899, 14 P.3d 863 (2000). Because this is an affirmative defense, CP 15730, it was Monsanto's burden to present evidence warranting an instruction,

(acknowledging that the doctrine “may seem inapposite” outside the pharmaceutical context and applying it without analysis).

State v. Arbogast, 199 Wn.2d 356, 371, 506 P.3d 1238 (2022). Monsanto failed to do so for three independently sufficient reasons.

First, Monsanto presented no evidence that it warned the relevant intermediary. Monsanto asserts (at 62-63) that information conveyed to GE and Westinghouse satisfied its duty to warn. But Monsanto failed to establish that those companies manufactured the ballasts installed at Sky Valley. And the plaintiffs demonstrated that Universal, a third company unmentioned in Monsanto's brief, did. *See* Tr. 1745. Monsanto offered no evidence that it conveyed any information to Universal, the only ballast manufacturer whose product was actually found at the school, or to any caulk manufacturer at all. This is reason enough to affirm.

Second, Monsanto never conveyed key warning information to ballast and caulk manufacturer intermediaries. The company's internal documents make clear that it knew that inhalation of PCBs leads to systemic poisoning—full stop. *See, e.g.*, P-162 (Navy's refusal to purchase PCBs because of the danger inhalation presented even at room temperature); P-149 at 3-4 (PCBs handled at "cold" temperatures are dangerous); P-3116 at 2 ("Vapors of Askarel at room temperature should not be breathed in a confined space");

P-143 at 2-3 (“[H]azardous concentration could be attained in a room in which a large area is painted with Aroclor-containing paint.”). But when conveying toxicity information to intermediaries, Monsanto warned only of inhalation at extremely high temperatures that end users in classrooms were unlikely to encounter. *See, e.g.*, D-20015 at 20; D-20002 at 5. By doing so, Monsanto withheld the critical information necessary to put intermediaries on notice of the need to warn people like the plaintiffs. Because the sophisticated-purchaser defense is only available “if the employer/purchaser has ‘equal knowledge’ of the product’s dangers,” *Willis v. Raymark Indus., Inc.*, 905 F.2d 793, 796 (4th Cir. 1990), and the record definitively shows that the intermediaries here did not, the trial court did not abuse its discretion.

Third, even if the intermediaries had all the relevant information, by the time the ballasts were installed at the school, it was unreasonable for Monsanto to rely on those companies to convey the necessary warnings. Determining whether a manufacturer “reasonably” relied on an intermediary requires consideration of “the gravity of the risks posed by the product, the

likelihood that the intermediary will convey the information to the ultimate user, and the feasibility and effectiveness of giving a warning directly to the user.” Restatement (Third) of Torts: Prod. Liab. § 2, cmt. i; *see also* Restatement (Second) of Torts § 388, cmt. n (similar). With particularly toxic substances, like PCBs, courts have required more than “passive reliance” on an intermediary to provide warnings for that reliance to be reasonable. *Mikelsen*, 2018 WL 4899305, at *3 (assuming, without deciding, that the defense applies under Washington law). Rather, “[i]f the substance is extremely dangerous, the supplier may need to take additional steps, such as inquiring about the intermediary’s warning practices, to ensure that warnings are communicated.” *Webb v. Special Elec. Co.*, 63 Cal. 4th 167, 190 (2016).

Monsanto presented no evidence that its reliance was reasonable. Ballasts and caulk had been on the market for three decades before they were installed in Sky Valley. At *no point* in that multi-decade span did *any* company issue a single warning to end users—a fact that Monsanto surely knew given the importance of the capacitor business to the company’s bottom line. Nor did Monsanto present evidence that it made any effort at all to inquire

into the intermediaries' warning practices or otherwise ensure that warnings were being passed along. The trial court did not abuse its discretion in refusing to instruct the jury in the face of this barren record. *See, e.g., Willis*, 905 F.2d at 797 (affirming refusal of defense where manufacturer "offer[ed] no evidence . . . that it attempted to ascertain whether [intermediary] could reasonably be relied upon to disseminate information about the dangers of the product").

Finally, for multiple reasons, Monsanto's unsupported suggestion (at 61) that it lacked a feasible means of conveying warnings does not entitle it to an instruction. To start, the infeasibility of direct warnings is a factor considered in assessing the reasonableness of reliance on an intermediary. *See* Restatement (Second) of Torts § 388, cmt. n. Where, as here, no warning is given to end users for thirty years prior to the sales in question, the difficulties a manufacturer may face in issuing a warning cannot render reliance on a non-warning "reasonable." And it was Monsanto's burden to demonstrate that warnings were infeasible. But rather than cite evidence of infeasibility from the record in *this* case, it tries to carry its burden by citing (at 61) other cases with different records.

Maybe because the record here shows that direct warnings were, in fact, feasible. After the public realized the danger that PCBs pose, Monsanto considered conducting an “educational/PR campaign” to directly reach “lighting contractors or maintenance people”—and the company deemed it “worthwhile and productive” to warn them of the risks that ballasts presented. P-2531; *see also* P-884 (“[O]ne idea would be a Monsanto supported program of education beamed at appropriate audiences.”); *cf. Nye*, 347 S.W.3d at 706 (explaining that manufacturer could ensure adequate warnings by engaging in joint information sessions with intermediaries). Monsanto never followed through—instead, choosing to continue its false narrative that PCBs were safe—but its proposed campaign confirms that it *was* feasible to warn end users.

In the end, Monsanto leveraged its market position to hike prices rather than ensure that warnings would reach the plaintiffs and many others like them. The trial court did not abuse its discretion in refusing to instruct the jury on Monsanto’s sophisticated-purchaser affirmative defense.

III. The trial court properly admitted the expert testimony of Dr. James Dahlgren, Kevin Coghlan, and Dr. Richard Perrillo.

Over seven weeks of trial, the jury heard testimony from more than a dozen expert witnesses. Eight of the plaintiffs' experts took the stand, and Monsanto's seven experts testified in response. At the end of the trial, the jury credited the plaintiffs' expert evidence: It found that the plaintiffs' chronic exposure to PCBs while teaching at Sky Valley caused their brain injuries and health problems.

On appeal, Monsanto levies a hodgepodge of attacks against three of the plaintiffs' experts. But nearly all of Monsanto's arguments go to the weight of the experts' testimony—the paradigmatic question for the jury to decide—not its admissibility. The rest of its arguments run afoul of a basic principle of Washington evidence law: The trial court has “broad discretion to determine the circumstances under which expert testimony will be allowed.” *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 354, 333 P.3d 388 (2014). “The exercise of such discretion will not be disturbed by an appellate court except for a very plain abuse thereof.” *Katara v. Katara*, 175 Wn.2d 23, 38, 283 P.3d 546 (2012).

There is no basis for finding any abuse of discretion here—let alone “a very plain abuse.” The parties submitted hundreds of pages of briefing and evidence concerning these experts’ qualifications, scientific theories, and methodologies. After holding numerous hearings, two different judges ruled that the experts’ testimony was admissible. Monsanto offers no sound reason for this Court, on a cold record, to substitute its own judgment for those decisions.

A. Trial courts have “wide” discretion to admit expert testimony, and this Court reviews their admission decisions with significant deference.

1. Rule of Evidence 702 governs the admissibility of expert evidence. “Expert testimony satisfies ER 702 if (1) the witness qualifies as an expert, and (2) the testimony will assist the trier of fact.” *L.M. ex rel. Dussault v. Hamilton*, 193 Wn.2d 113, 134, 436 P.3d 803 (2019). In applying this test, “trial courts are afforded wide discretion.” *Johnston-Forbes*, 181 Wn.2d at 352. “To find abuse of discretion, a court must be convinced that no reasonable person would take the view adopted by the trial court.” *Hamilton*, 193 Wn.2d at 135. “A reviewing court may not hold that a trial court abused its discretion simply because it would have decided the case differently.” *Id.* at 134-35. Rather, so long as the trial court’s “basis

for admission of the evidence is ‘fairly debatable,’” a court should “not disturb the trial court’s ruling.” *Id.* at 135.

2. Washington courts have also required expert evidence to satisfy the “general acceptance” test originally formulated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). It is unclear whether *Frye* survives *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Although the Washington Supreme Court held after *Daubert* that *Frye* continues to apply in “criminal cases,” it never expressly “decid[ed] that *Frye* is the appropriate test for civil cases.” *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 601-02, 260 P.3d 857 (2011). The plaintiffs preserve their right to argue that *Daubert* should apply in civil cases. But, because the plaintiffs’ expert evidence was admissible regardless of the applicable standard, we assume for purposes of this brief that *Frye* applies.¹⁶

“Under *Frye*, the trial court must exclude evidence that is not based on generally accepted science,” and this Court reviews a *Frye* ruling de novo. *Hamilton*, 193 Wn.2d at 117, 128. But “evidence that

¹⁶ The “overwhelming majority” of states have adopted *Daubert*. See Beety & Oliva, *Evidence on Fire*, 97 N.C. L. Rev. 483, 500 (2019); see also *Reese v. Stroh*, 128 Wn.2d 300, 311-13, 907 P.2d 282 (1995) (Johnson, J., concurring) (explaining why *Daubert* is preferable).

does not involve new methods of proof or new scientific principles is not subject to the *Frye* test,” and so is reviewed under the typical abuse-of-discretion standard. *State v. Baity*, 140 Wn.2d 1, 10, 991 P.2d 1151 (2000).

Critically, “*Frye* requires only general acceptance, not full acceptance, of novel scientific methods.” *State v. Russell*, 125 Wn.2d 24, 41, 882 P.2d 747 (1994). And “[w]hile *Frye* governs the admissibility of novel scientific testimony, the application of accepted techniques to reach novel conclusions does not raise *Frye* concerns.” *Lahey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 919, 296 P.3d 860 (2013). “Once a methodology is accepted in the scientific community, then application of the science to a particular case is a matter of weight and admissibility under ER 702.” *Anderson*, 172 Wn.2d at 603.

B. The trial court did not abuse its discretion in admitting Dr. Dahlgren’s opinion that PCB exposure caused the plaintiffs’ brain damage.

Dr. James Dahlgren, a physician and researcher with decades of experience in treating patients suffering from PCB exposure, testified that the plaintiffs were “systematically poisoned” by PCBs and furans during the period they taught at Sky Valley. Tr. 2246. He

also determined that all plaintiffs suffered brain damage and other injuries as a result of this exposure. *See* Tr. 2247-49. The court did not abuse its discretion in admitting Dr. Dahlgren's testimony.¹⁷

1. Dr. Dahlgren is well qualified.

Initially, Monsanto contends (at 120-21) that Dr. Dahlgren is unqualified to testify *at all* on the plaintiffs' injuries and the cause of those injuries. That borders on absurd. Dr. Dahlgren is a UCSF-trained physician who taught as a professor at UCLA Medical School for decades. He specializes in toxicology and, for more than 25 years, has treated patients exposed to PCBs. CP 7281-82; Tr. 2239-45. In addition, he has published more than 30 peer-reviewed studies on toxic exposure, edited a book covering PCBs; and even founded a toxicology lab to measure PCBs in patients. *See id.* So the trial court easily concluded that Dr. Dahlgren is a "well-qualified medical doctor with experience in toxicology generally and exposure to PCBs specifically." CP 16895.

Nevertheless, Monsanto contends (at 123-24) that Dr. Dahlgren still shouldn't have been permitted to testify about the

¹⁷ Because Monsanto raises no *Frye* challenge to this testimony, this Court reviews its admission only for abuse of discretion.

plaintiffs' brain injuries because he isn't a neuropsychologist or neurologist. Wrong. *See* ER 702 (an expert may qualify "by knowledge, skill, experience, training, or education"). Dr. Dahlgren indisputably has considerable experience and knowledge of how and why toxic substances in general—and PCBs in particular—cause injuries, including brain damage. *See* CP 7287-88 (describing the various bases for his "own opinion of the plaintiffs' central nervous system function").

The fact that Dr. Dahlgren didn't conduct a physical examination of the plaintiffs is also irrelevant to admissibility—it simply goes "to the testimony's weight." *Katara*, 175 Wn.2d at 39; *see City of Bellevue v. Raum*, 171 Wn. App. 124, 154 n.25, 286 P.3d 695 (2012) ("The weight, if any, to be given a medical expert's opinion based solely on a medical records review is within the jury's province."). To formulate his opinions, Dr. Dahlgren interviewed the plaintiffs and reviewed their medical records—standard methodology for a medical expert—and considered case records, environmental evidence, and scientific literature. CP 7288-89. Such evidence is "sufficient to persuade a fair-minded, rational person to agree with [the expert's] conclusion." *Raum*, 171 Wn. App. at 154.

Finally, Monsanto weakly suggests (at 120) that Dr. Dahlgren's testimony should be discounted because a handful of courts have excluded his opinion. Not so, Dr. Dahlgren has participated in thousands of toxic-exposure cases, and "over 99% of [his] opinions have been accepted by the courts." CP 7283. That some courts may have excluded an expert in the past is "not remarkable"—"[t]he broad standard of abuse of discretion means that courts can reasonably reach different conclusions about whether, and to what extent, an expert's testimony will be helpful to the jury in a particular case." *Johnston-Forbes*, 181 Wn.2d at 353-54.

2. Dr. Dahlgren's opinions are reliable.

Monsanto's attacks on the reliability of Dr. Dahlgren's opinions also fail.

First, Monsanto claims that Dr. Dahlgren's testimony was inadmissible because he relied on other experts—specifically, opinions from Coghlan and Dr. Perrillo. Br. 122, 125-26. But it's black-letter law that "[o]ne expert may rely on the opinions of another expert when formulating opinions." *Driggs v. Howlett*, 193 Wn. App. 875, 900, 371 P.3d 61 (2016). That's especially so in a "complex case," "where it is unlikely that one person would possess

all the expertise necessary to address every issue.” CP 16785. Both Coghlan’s and Dr. Perrillo’s opinions were properly admitted; they therefore were sufficient bases for Dr. Dahlgren’s testimony.

Regardless, Monsanto neglects to mention that Dr. Dahlgren based his opinions on other evidence that the company does *not* challenge on appeal. For example, he relied on Dr. Mahoney’s epidemiological study as well as Dr. Carpenter’s published studies finding that PCBs have neurotoxic effects. *See, e.g.*, CP 7288; Tr. 2264, 2270, 2287. And his opinions were also grounded in his independent review of the scientific literature and the plaintiffs’ medical records. *See, e.g.*, CP 7268-72, 7283-85, 7287.

Second, Monsanto argues (at 126-32) that Dr. Dalghren’s causation opinions were unreliable under ER 702 because he “selectively ignored” the February 2016 air testing and the plaintiffs’ blood tests. But he explained why: The air testing conducted in 2016 was “done after extensive remediation.” Tr. 2286. As the record makes clear, this remediation made it difficult for the 2016 testing to reveal anything close to “the atmosphere [the] teachers were exposed to during their, roughly, four years in the school.” Tr. 1784. Dr. Dahlgren also explained why lower-chlorinated PCBs present

at Sky Valley often can't be accurately detected in a person's blood, Tr. 2252—which was confirmed by other testimony and evidence unchallenged on appeal, *see, e.g.*, Tr. 1333-35 (DeGrandchamp); Tr. 2149-53 (Carpenter); P-1674 at 10. Thus, contrary to Monsanto's insinuations (at 130-31), this case is nothing like *Lakey*, because unlike the expert there, Dr. Dahlgren *did* “consider all relevant data.” 176 Wn.2d at 921. Monsanto just disagrees about which data is most persuasive—but that doesn't bear on admissibility.

C. The trial court correctly admitted Coghlan's opinion on the plaintiffs' PCB exposure levels.

Kevin Coghlan, an industrial hygienist with over 30 years of experience, testified at trial that the plaintiffs were exposed to unsafe levels of PCBs during the time they taught at Sky Valley. *See* Tr. 1704, 1725. Specifically, Coghlan estimated that the teachers were exposed to PCB air levels of “several hundred to several thousand nanograms per cubic meter” and as high as 9,500 ng/m³—levels that far exceed safe limits. Tr. 1725; *see* CP 18268-69, 18360 (estimating that air values at Sky Valley likely ranged from 340 ng/m³ to 9,500 ng/m³). And this was a “conservative” estimate: It

did not factor in ballast ruptures, PCB oil spills, or alternative methods of exposure like skin contact. Tr. 1799-1801, 1819; CP 11950.

In attacking Coghlan's testimony, Monsanto does not question his qualifications. For good reason. He has personally managed and directed hundreds of environmental investigations in schools and other work settings, and has been selected by the EPA to serve as a principal investigator and peer reviewer for PCB-exposure assessments. CP 7430-31, 18253-54, 18265. Instead, Monsanto contends (at 70-71) that Coghlan's opinions are inadmissible because his methodologies "lacked general acceptance in the scientific community."

Contrary to Monsanto's arguments, "the scientific principles behind Mr. Coghlan's analysis were well-established." CP 16783. He used three independent, but mutually reinforcing, methods grounded in accepted scientific principles to assess Sky Valley's exposure levels. *See* CP 18259-394 (Coghlan's expert report). As the trial court recognized, Monsanto's critiques actually go "not to the scientific theory but to how Mr. Coghlan applied that theory in this particular instance." CP 16783. But "the application of accepted techniques to reach novel conclusions does not raise *Frye* concerns."

Lakey, 176 Wn.2d at 919. It merely goes to the weight to give to the evidence—a question the jury decides.

1. Coghlan’s exposure opinions are based on generally accepted scientific theories and techniques.

Monsanto argues that the methods that Coghlan used to estimate PCB levels do not reflect “generally accepted” science, and so his opinion fails *Frye*. Br. 72-83, 87-95. The company is wrong.

1. Monsanto’s primary obsession on appeal is what it describes as Coghlan’s “carpet back-calculation” methodology. This method is based on the established theory of source-sink dynamics, which investigates “the mechanisms by which PCBs [or other toxic substances] may transfer or migrate from primary sources to other building materials or ‘sinks.’” CP 18294; *see* CP 7451-52, 18294-307; Tr. 1750-51. The approach is grounded in a tenet of fluid dynamics that “the levels of a contaminant in the air and in a sink material are inextricably linked.” CP 7452. Thus, a material (brick, tile, carpet) will passively collect PCBs from surrounding air by mass-transfer processes known as advection and diffusion. CP 11561-62. Although the science of particulate concentration is complex, anyone who has spent time in a smoky bar has experienced the

principles in action: The more smoke in the room, the more one's clothes will smell upon leaving. *See* Tr. 1795.

Coghlan applied these source-sink principles to Sky Valley carpet samples removed in 2015 before the school's remediation was complete. Using an EPA study that modeled how PCBs in the air deposited onto materials,¹⁸ Coghlan measured the PCB levels in the carpet samples and then reconstructed the levels in the air. *See* CP 11558-74 (detailing this analytical process). These calculations revealed that the "air values at [Sky Valley]" in late 2015—after substantial remediation was completed—still "likely ranged from 340 to 9,500 ng/m³." CP 18269, 18360. That "conservative" range far exceeded safe exposure limits. Tr. 1798-99, 1814.

In attacking Coghlan's analysis, Monsanto doesn't question the underlying science of source-sink dynamics. Nor does it criticize the published and peer-reviewed EPA study on which Coghlan relied. Instead, Monsanto argues that Coghlan's analysis violated *Frye* because he "reversed" the EPA study's model: While the study

¹⁸ Guo et al., U.S. Env't Prot. Agency, EPA/600/R-11/156A, Laboratory Study of Polychlorinated Biphenyl (PCB) Contamination and Mitigation in Buildings (2012) (*available at* P-1649).

estimated PCB deposits on materials based on known PCB air levels, Coghlan estimated PCB air levels based on the PCB deposits measured in the carpet samples. Br. 75-81.

This misunderstands the *Frye* inquiry. *Frye* asks only whether the expert's scientific theory is generally accepted. And here, as the trial court recognized, "the scientific principles behind Mr. Coghlan's analysis were well-established": He took an "established formula" right out of an EPA study that Monsanto acknowledges is valid and generally accepted. CP 16893.

That Coghlan reversed the formula from that study—using simple algebra, *see* CP 11559-60—does not mean that he invented a "novel" theory or methodology. The *Frye* test does not require that "every deduction [that an expert makes to be] drawn from generally accepted theories" be generally accepted in the scientific community. *Anderson*, 172 Wn.2d at 611 (emphasis added). Yet that is all that Monsanto is concerned with here: Coghlan's "deduction" that if known air PCB levels can be used to model deposits in materials, the reverse is also possible. Nothing about that deduction violates the *Frye* test. *Cf. Hamilton*, 193 Wn.2d at 131.

Put differently, Monsanto's complaint is that Coghlan *misapplied* source-sink dynamics by using the EPA's model to estimate PCB air concentrations from known sink material deposits. But challenges that go to the "application" of "generally accepted . . . science to [a] particular case" is "a matter of weight," not admissibility." *State v. Copeland*, 130 Wn. 2d 244, 272, 922 P.2d 1304 (1996); *see* Tegland, 5B Wash. Prac., Evidence Law and Practice § 702.19 (6th ed. 2020). The trial court thus correctly rejected Monsanto's argument.¹⁹

2. Monsanto's attacks on Coghlan's other estimates of PCB exposure levels fare no better. *See* Br. 87-94.

¹⁹ Monsanto also suggests (at 80-82) that *Frye* is implicated because the EPA chamber study was conducted under controlled conditions, while the carpet samples might have been contaminated by "tracking" or other sources. But the possibility of an alternative contamination source doesn't implicate *Frye*; Coghlan still applied the generally accepted theory underlying the EPA study. Monsanto was entitled to argue for possible confounding sources at trial, and it did so. And Monsanto fails to mention that Coghlan not only addressed the tracking in his reports but even decided to exclude the carpet samples with extraordinarily high and non-uniformly distributed PCB levels that potentially suggested tracking or another source of contamination that was not PCB transfer from the air. CP 11950; *see also* CP 18333, 18360.

As noted, because there was no contemporaneous air-level data, Coghlan used “multiple approaches” that were mutually reinforcing to estimate the exposure levels for when the plaintiffs taught at the school. Tr. 1785. For instance, he used a well-regarded EPA study²⁰ analyzing pre-remediation and post-remediation PCB levels in comparable schools as a cross-check for the estimates he generated from the carpet samples. CP 18350-52, 18361-62. Focusing on data about the schools in the study that were “of similar vintage and use similar ventilation strategies as [Sky Valley],” CP 7456, Coghlan calculated a “remediation factor” to estimate the PCB levels at Sky Valley before it was remediated, *see* Tr. 1785-90. And he applied that factor to samples from the 2016 air testing results—the very data Monsanto urged the jury to consider—to produce a range of possible estimates. *See id.*

Again, Monsanto doesn’t challenge the peer-reviewed, published EPA study that Coghlan used to cross-check his estimates. Nor does Monsanto contend that it’s generally

²⁰ Thomas et al., U.S. Env’t Prot. Agency, EPA/600/R-12/051, Polychlorinated Biphenyls (PCBs) in School Buildings: Sources, Environmental Levels, and Exposures (2012) (*available at* P-1670).

unreasonable to use comparable data from a gold-standard study as a benchmark. Instead, Monsanto argues (at 90-94) that Coghlan's analysis was suspect because the schools in the study weren't actually comparable, and because Coghlan should have used averages instead of "singular" data points.

But, once again, Monsanto's critiques go "not to the scientific theory but to how Mr. Coghlan applied that theory in this particular instance." CP 16893; *see Lakey*, 176 Wn.2d at 919. Monsanto's experts had the opportunity to testify that Coghlan improperly compared Sky Valley to the schools in the study, and Coghlan himself acknowledged that "the preference is to use sampling data from the actual environment." CP 7456. Of course, that is exactly what he did by analyzing the carpet samples.²¹ Regardless, the purported deficiencies that Monsanto raises about Coghlan's application of the EPA data just concern the weight of

²¹ Thus, even if the trial court erred in admitting Coghlan's testimony about his EPA study cross-check, any error was not prejudicial because it was "cumulative" of the estimates he generated from the carpet samples. *See Brown v. Spokane Cnty Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983).

his testimony. *See Anderson*, 172 Wn.2d at 603. The jury was more than capable of deciding that issue.

2. Coghlan’s opinions are admissible under ER 702.

In addition to its *Frye*-based objections, Monsanto argues that the trial court abused its discretion by admitting Coghlan’s testimony because (1) he ignored the 2016 air testing results; (2) the carpet samples were unreliable; and (3) the court improperly considered the lack of other available evidence. Each argument fails.

First, Monsanto repeatedly (and incorrectly) insinuates that Coghlan should have deferred to the 2016 testing results. Br. 69-70, 72, 87-88, 94 & n.20. But, as he explained, “[n]early all PCB tests conducted at [Sky Valley] were done after the light fixtures were cleaned and remediated, at least to some degree, and after the ventilation systems were repaired and adjusted.” CP 7457. “These actions,” Coghlan concluded, “would alter the PCB exposures in a measurable way.” *Id.*; *see also* Tr. 1783-87, 2073. So it made little sense to “rely[] only on data that had limited relevance to the Plaintiff’s exposures.” CP 7451. In any case, Coghlan “did not entirely discard or ignore the environmental data” collected in 2016—he specifically “used these data to ground the range of likely exposures the

Plaintiffs had to PCBs in the environment at Sky Valley.” *Id.* That Monsanto placed greater weight on the 2016 testing results than Coghlan did does not make his testimony inadmissible.

Second, Monsanto’s argument that Coghlan’s testimony was inadmissible because the underlying carpet samples were unreliable misstates both the record and the law.

As to the record: To ensure the validity of his results, Coghlan himself tested the sample containers to assess whether there was any cross-contamination. *See, e.g.*, Tr. 1791-94, 2021-23. It showed that “the likelihood of cross-contamination, of contamination from another source, was very low.” Tr. 1793-94; *see also* CP 7442-46.

As to the law: Monsanto identifies no case suggesting that the admissibility of an expert’s analysis of physical evidence turns on the reliability of the underlying evidence itself. That is because “criticisms of [a] test in [a] particular case, such as whether the proper procedures were carried out . . . are questions regarding whether this particular test was properly conducted and hence go to the issue of weight, not admissibility.” *State v. Gentry*, 125 Wn.2d 570, 588, 888 P.2d 1105 (1995).

Third, Monsanto contends (at 96-97) that the trial court erred in admitting Coghlan's testimony based on a "misguided rationale" that unreliable evidence is permissible when there is a "lack of other available evidence." That misrepresents the record. Although the trial court did remark on the absence of "the ideal kind of evidence," it specifically rejected Monsanto's *Frye* challenge because Coghlan conducted a "valid test" applying a "test that the EPA does." HRP 1558-59. Monsanto's other arguments, the court continued, went "to the weight that the jury should give to [Coghlan's testimony] rather than its admissibility." *Id.* The trial court got it right.

D. The trial court did not abuse its discretion in admitting Dr. Perrillo's opinions about the plaintiffs' brain injuries.

Monsanto's final expert target is Dr. Richard Perrillo, an experienced forensic and clinical neuropsychologist who has evaluated thousands of individuals over 40 years of practice. He serves on multiple standardization committees for the most widely used neuropsychological tests in the world. *See* CP 6465-67, 7311-12. Dr. Perrillo spent hours evaluating each of the plaintiffs, conducting a battery of neuropsychological tests to assess their

cognitive function. Tr. 1068, 1072. He also evaluated dozens of other teachers and students from Sky Valley. Tr. 1072, 1122-24. Based on these evaluations, Dr. Perrillo concluded that each of the plaintiffs suffered cognitive impairment evidencing acquired brain damage. *See* Tr. 1083, 1106-07, 1112-16. He also determined that PCB exposure was the likely cause. Tr. 1083, 1228, 1234-35.

Monsanto complained in the trial court—and does so again on appeal—that Dr. Perrillo employed unreliable methodologies to reach his conclusions. After carefully considering the parties’ briefing and evidence, the trial court determined that none of these complaints “justify excluding his testimony.” CP 16784. There is no sound basis for disturbing that conclusion on appeal.

1. Monsanto waived any *Frye* challenges to Dr. Perrillo’s testimony.

Monsanto didn’t mention *Frye* once in its motion to exclude Dr. Perrillo’s testimony. *See* CP 6425-31. Instead, it just contended that his testimony was “unreliable” under Rule 702. CP 6427. It said the same thing in its reply brief on that motion. *See* CP 9954-60. And again, in its new-trial motion, Monsanto argued only that Dr. Perrillo “should have been excluded under ER 702.” CP 16607-08.

Now, however, Monsanto contends for the first time that Dr. Perrillo's opinions were inadmissible under *Frye*. See Br. 103-20. It's too late. Because "[a]n argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal," Monsanto has waived its *Frye* challenges to Dr. Perrillo's testimony. *Silverhawk LLC v. KeyBank Nat'l Ass'n*, 165 Wn. App. 258, 265, 268 P.3d 958 (2011); see RAP 2.5(a). So the only question on appeal is whether the trial court abused its discretion in finding Dr. Perrillo's testimony admissible under Rule 702.

2. Dr. Perrillo's opinions are admissible.

Monsanto contends that the trial court erred in admitting Dr. Perrillo's testimony about (i) the nature and extent of the plaintiffs' brain damage, and (ii) the likely cause of that damage. Not so.

Brain damage. In attacking Dr. Perrillo's methods, Monsanto spends pages and pages detailing what it and its experts believe to be the best way to evaluate changes in cognitive function. See Br. 105-20. But its own arguments make clear that its concerns are about *how* Dr. Perrillo conducted the neuropsychological tests of the plaintiffs here—not whether his testing methodologies reflect generally accepted scientific theories. As we have explained, such

arguments go to the weight of the expert evidence, not its admissibility. *See, e.g., Anderson*, 172 Wn.2d at 603; *State v. Gregory*, 158 Wn.2d 759, 830, 147 P.3d 1201 (2006).

Monsanto has waived any *Frye* challenge to Dr. Perrillo's testimony. But even if it hadn't, its challenge fails. Monsanto concedes that the generally accepted method for assessing "neuropsychological deficits" is to compare pre-injury "level[s] of function" (also known as "premorbid levels") to current functioning. Br. 106-07; *see* Tr. 1076-77. It also concedes that the Test of Premorbid Function is a generally accepted method for determining a patient's pre-injury scores. Br. 105-07. Yet these are the precise methods that Dr. Perrillo used. *See* Tr. 1086, 1099, 1106, 1118, 1162, 1169-70; *see* CP 6602, 6622, 6640-41. And other courts have found "Dr. Perrillo's assessment[s]" using these methods to be "persuasive." *See Doe v. Prudential Ins. Co.*, 245 F. Supp. 3d 1172, 1188 (C.D. Cal. 2017).

The problem, according to Monsanto, is that Dr. Perrillo didn't perform the above methods correctly *here*. In particular, it critiques Dr. Perrillo's selection of which data (*i.e.*, pre-injury scores and post-injury test results) to compare, and his decision to create

“composite scores.” But neither of these critiques shows that Dr. Perrillo failed to apply “generally accepted” scientific principles and techniques. *See Chinnock v. Safeco Ins. Co. of Am.*, 2022 WL 1469545, at *3 (D. Colo. May 10, 2022) (noting that whether “Dr. Perrillo improperly relied on composite scores” was “a dispute about how to interpret Plaintiff’s test results,” not a basis for “render[ing] Dr. Perrillo’s opinions inadmissible”).

The Supreme Court has explained why the strategy that Monsanto has deployed against Dr. Perrillo’s testimony—dressing up critiques of an expert’s application as *Frye* challenges—must be rejected. “Requiring general acceptance of each discrete and ever more specific part of an expert opinion,” the Court cautioned, “would place virtually *all* opinions based upon scientific data into some part of the scientific twilight zone.” *Hamilton*, 193 Wn.2d at 131 (emphasis added). When an expert applies accepted scientific principles, as Dr. Perrillo did here, the trial court’s job is done, and it is up to the jury to decide whether the expert’s analysis is persuasive.²²

²² The record shows that Dr. Perrillo’s methods *are* generally accepted. Monsanto’s expert, Dr. Schoenberg, testified that “the use of composite scores is common” in neuropsychology. CP 9969. As

Causation. This Court should also reject Monsanto’s objections (at 100-05) to Dr. Perrillo’s testimony that PCBs were the likely cause of the plaintiffs’ brain damage.

To start, Monsanto is just wrong that, “because he is not a medical doctor,” Dr. Perrillo “lacks the required qualifications” to testify about the cause of the plaintiffs’ brain injuries. Br. 100-03. Washington courts “look beyond . . . credentials.” *Hamilton*, 193 Wn. 2d at 135. And “[t]he idea that neuropsychologists, as a group, lack the competence necessary to testify on the causation of organic brain injury is the minority view.” *Huntoon v. TCI Cablevision, Inc.*, 969 P.2d 681, 690 (Colo. 1998). By contrast, “[a] majority of jurisdictions have allowed such testimony.” *Bennett v. Richmond*,

Monsanto concedes (at 115-18 & n.27), other neuropsychology experts have recommended that “clinicians may choose to compute a mean scale (or other standard) score across all EF tasks as such composites have been repeatedly shown to be more reliable than individual tasks.” Suchy, *Executive Functioning: A Comprehensive Guide for Clinical Practice* 129-31 (Oxford Univ. Press 2016); CP 7316. That’s enough to overcome Monsanto’s (waived) *Frye* objection.

960 N.E.2d 782, 785 (Ind. 2012) (citing cases). Accordingly, numerous courts have admitted Dr. Perrillo's causation opinions.²³

Monsanto's attack (at 103-05) on the reliability of Dr. Perrillo's methodology is also baseless. The neurological symptoms that the plaintiffs experienced, Dr. Perrillo explained, were consistent with the scientific literature finding that chronic exposure to PCBs had significant and harmful neuropsychological effects. P-3727; CP 7317-18; *cf. Doe*, 245 F. Supp. 3d at 1188 (highlighting that "Perrillo quoted substantial scholarly literature" establishing a cause of brain damage). And the plaintiffs' post-exposure cognitive deficits were also consistent with Dr. Perrillo's evaluation of the dozens of other people who had "the same environment in common" with the teachers, and whose symptoms evidenced "the same pattern . . . of acquired brain injury." Tr. 1123-24; *see* CP 7242-43. In combination with the evidence ruling out alternative environmental causes, these findings made it highly likely that the plaintiffs (and the other

²³ *See, e.g., Chinnock*, 2022 WL 1469545 at *2; *Doe*, 245 F. Supp. 3d at 1181-83; *Perea v. Conner*, 2015 WL 1111478, at *3 (D.N.M. Apr. 8, 2015) (denying defendant's motion to preclude Dr. Perrillo from testifying "as to [l]egal [c]ausation of" the plaintiff's brain injury).

people Dr. Perrillo tested) all “were exposed to a toxic substance at the school, and that that substance was PCBs.” CP 7242.

3. Dr. Perrillo’s opinions caused no prejudice.

Monsanto’s complaints about Dr. Perrillo’s opinions fail for another reason: It can’t establish prejudice. “[E]rror without prejudice is not grounds for reversal,” and “[e]rror will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial.” *Brown*, 100 Wn.2d at 196. Yet, on appeal, Monsanto doesn’t even *try* to demonstrate that it was prejudiced by the admission of Dr. Perrillo’s opinions. *See* Br. 105-20. It cannot.

Proof of injury was overwhelming. To start, Monsanto conceded to the jury, “we are not challenging that the symptoms, complaints, these teachers are experiencing are real.” Tr. 4776; *see* Tr. 4737, 4740. That alone defeats prejudice. Further, Dr. Dahlgren testified, based on his interviews with the plaintiffs and an extensive review of their medical records, that all of the plaintiffs suffered “brain damage.” Tr. 2247-48; *see also* Tr. 2258, 2345. Testimony from the plaintiffs—as well as their family, friends, and colleagues—further supplied evidence of harm.

The lack of prejudice is equally apparent as to Dr. Perrillo's causation opinions. Several other experts whom Monsanto doesn't challenge at all on appeal—including Dr. Richard DeGrandchamp and Dr. David Carpenter, one of the world's leading experts on PCB toxicology—testified extensively about PCBs' neurotoxicity and the mechanisms by which PCBs seriously damage the brain. Tr. 1496-97, 1503, 2140-44, 2149-50, 2458. And Dr. Dahlgren specifically testified that the plaintiffs' brain damage was caused by systemic poisoning as a result of inhaling PCBs and furans. Tr. 2246-47, 2251-52, 2263.

All of that expert testimony, coupled with significant evidence ruling out other environmental causes, overwhelmingly supports the jury's finding that PCB exposure caused the plaintiffs' injuries—even without Dr. Perrillo's causation opinions. *See Barriga Figueroa v. Prieto Mariscal*, 193 Wn.2d 404, 415, 441 P.3d 818 (2019) (“Improper admission of evidence constitutes harmless error if the evidence is cumulative.”).

IV. This Court should reject Monsanto’s attempt to relitigate the jury’s verdict, which was firmly supported by substantial evidence.

The jury heard hundreds of hours of testimony from 46 witnesses and saw thousands of pages of exhibits. Based on this evidence, the jury ruled for the plaintiffs on all of their claims, finding that the teachers had been exposed to hazardous levels of PCBs and furans while teaching at Sky Valley, and that this exposure caused their brain injuries and other health issues.

Monsanto argues on appeal that this verdict should be set aside for lack of evidence. Br. 132-59. But the evidence presented at trial more than withstands Washington’s exceedingly deferential standard for reviewing a jury verdict. Monsanto asks this Court to disregard this evidence and to resolve the factual conflicts in *its* favor—to improperly assume the jury’s sacrosanct role in Washington’s constitutional system. That it cannot do. This Court should affirm the jury’s verdict.

A. The standard of review for sufficiency of the evidence for a jury verdict is extremely deferential.

Washington’s constitution grants juries the “ultimate power” to weigh evidence and determine facts. *Coogan v. Borg-Warner Morse Tec Inc.*, 197 Wn.2d 790, 812, 490 P.3d 200 (2021). The

credibility of witnesses and weight given to evidence are “within the province of the jury”; “even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered.” *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994).

An appellate court may overturn a jury verdict only when it is “clearly unsupported by substantial evidence.” *Faust v. Albertson*, 167 Wn.2d 531, 538, 222 P.3d 1208 (2009). And “the test for substantial evidence is modest”: Evidence is “sufficient if it would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *Nw. Pipeline Corp. v. Adams Cnty*, 132 Wn. App. 470, 475, 131 P.3d 958 (2006).

When reviewing a jury verdict for sufficient evidence, this Court must defer to the jury’s constitutional role by “presum[ing] that the jury resolved every conflict and drew every reasonable inference in favor of the prevailing party.” *Coogan*, 197 Wn.2d at 812-13. And “even greater deference” is owed when, as here, the trial court denied a motion for a new trial. *Id.* at 811.

The question facing this Court is therefore narrow: Drawing every reasonable inference and resolving every evidentiary conflict in favor of the plaintiffs, was there sufficient evidence to sustain the jury's verdict? The answer is yes.

B. The jury's verdict is firmly supported by substantial evidence of exposure-based causation.

In chemical-exposure cases, specific causation considers “whether a particular individual suffers from a particular ailment as a result of exposure to a substance.” *In re Hanford Nuclear Rsrvt. Litig.*, 292 F.3d 1124, 1133 (9th Cir. 2002). To prove specific causation, the plaintiff must establish that it is more probable than not that she was exposed to the defendant's toxin and that the exposure caused subsequent disease or disability. *See, e.g., Potter v. Dep't of Lab. & Indus.*, 172 Wn. App. 301, 313, 289 P.3d 727 (2012); *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 319-320, 189 P.3d 178 (2008). The “more probable than not standard does not require absolute certainty.” *Bruns v. Paccar, Inc.*, 77 Wn. App. 201, 215, 890 P.2d 469 (1995).²⁴

²⁴ *See also Abuan v. Gen. Elec. Co.*, 3 F.3d 329, 333 (9th Cir. 1993) (“[P]recise data on the exact degree of exposure to each chemical' is not required.”); *Henricksen v. ConocoPhillips Co.*, 605

Exposure. Here, there was a plethora of evidence at trial showing that the plaintiffs were exposed to dangerous levels of PCB and furans at Sky Valley—far more than necessary to sustain the verdict. *See Nw. Pipeline*, 132 Wn. App. at 475.

Start with the experts: Coghlan told the jury that his “conservative” estimate was that the teachers were exposed to PCB air levels ranging from “several hundred to several thousand nanograms per cubic meter.” Tr. 1725, 1798-99; *see* Tr. 1705-06, 1818-19. These levels indisputably exceed safe exposure limits. Dr. Carpenter testified that PCB air levels of just 18 to 40 ng/m³ were “associated with significant elevations of diseases” likely “caused by inhalation of PCBs.” Tr. 2451. The Snohomish County health district cautioned that it would “not approve opening [the school] for the 2016-2017 school year if the concentrations of PCBs in the air [we]re not below 100 ng/m³.” P-2124 at 1-2. And, NIOSH, the federal agency tasked with researching workplace health and safety, recommends that “if someone is in an environment that’s higher

F. Supp. 2d 1142, 1157 (E.D. Wash. 2009) (It is “not always necessary for a plaintiff to quantify exposure levels precisely.”).

than a thousand nanograms per cubic meter,” they should wear a “full-faced, supplied-air respirator.” Tr. 1814; *see* P-881 at 17-18.

Ignoring this evidence entirely, Monsanto contends (at 141-46) that plaintiffs were not in fact exposed to PCBs at sufficient levels to cause injury. But, unlike Monsanto, this Court is not permitted to ignore the evidence. To the contrary, it *must* affirm “so long as there was evidence which, if believed, would support the verdict.” *Burnside*, 123 Wn.2d at 107-08.

In any case, Monsanto’s argument about exposure doesn’t even make sense on its own terms. The company asserts (at 141) that Coghlan’s exposure estimates included “concededly safe exposure levels.” As Dr. Carpenter’s testimony shows, there was no such concession. But even if so, Monsanto doesn’t dispute the ranges also contained concededly *dangerous* exposure levels. The jury had enough information to conclude that the plaintiffs were exposed to those higher levels—especially because Coghlan’s estimates were conservatively low. Tr. 1799-801, 1819; CP 11950.²⁵

²⁵ Monsanto repeatedly insists that the plaintiffs’ estimated levels of exposure fell below OSHA’s and Washington State’s exposure limits. Br. 15, 17, 127, 132, 141-42. But, again, the company simply ignores the trial evidence—including statements from

Monsanto’s argument that the plaintiffs’ blood tests undermine Coghlan’s estimates similarly asks this Court to turn a blind eye to the trial record. The company asserts (at 136) that blood tests are the “most reliable”—indeed, the “only”—way to estimate PCB exposure. But numerous experts testified that the opposite is true, including experts whom Monsanto never tried to exclude, such as Dr. Carpenter and Dr. DeGrandchamp. *See, e.g.*, Tr. 2149-52 (“[L]ower chlorinated” PCB combinations may “not be reflected in [a] blood sample” after several years because their half-lives are “so short.”); Tr. 1333 (explaining that when PCBs transform into dangerous metabolites, they can’t be “measured in the blood”). And the jury also considered the findings of federal health researchers, who have made clear that “[t]he lack of obvious elevation [in blood] months to years after exposure does not, of itself, indicate lack of exposure.” P-1297 at 420; *see* P-1674 at 10.²⁶

OSHA—establishing that these limits are both outdated and poorly suited for determining safe exposure levels in the school environment. *See* Tr. 2038-41; P-1823 at 3.

²⁶ This extensive evidence of exposures demonstrates that Monsanto’s reliance (at 133-35) on *Potter* is misplaced: In *Potter*, “there [wa]s *no* objective evidence in the record that Potter was

Because it can't counter this evidence, Monsanto just ignores it. It argues (at 139-40) that the blood tests *must* have been able to detect the plaintiffs' exposure because the half-life for the relevant PCB combinations is 5.5 years—and the plaintiffs left Sky Valley “only approximately 3-4 years prior to the testing of their blood samples.” But this is just cherry-picking one technical detail and ignoring an abundance of contrary evidence, including published scientific studies, showing that the PCBs' half-life is far shorter. *See, e.g.*, Tr. 1339 (between “six months” and “4.8 years”); Tr. 2481 (“weeks to maybe two years”); P-1297 at 420 (“6-7 months” to “2.6 years”).

Causation. Monsanto's sufficiency argument aimed at causation is just as weak. Evidence is “sufficient” to prove causation “[i]f, from the medical testimony given and the facts and circumstances proven by other evidence, a reasonable person can infer that the causal connection exists.” *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 636-37, 600 P.2d 1015 (1979); *see also Intalco Aluminum v. Dep't of Lab. & Indus.*, 66 Wn. App. 644, 655, 833 P.2d

exposed at her office to chemicals at levels” capable of causing her injuries. 172 Wn. App. at 312, 316 (emphasis added). Here, there is.

390 (1992) (same).²⁷ Here, Dr. Dahlgren testified that the levels of PCB and furan exposure at Sky Valley were hazardous to human beings. And other evidence—including independent third-party testing results—also ruled out alternative causes for the plaintiffs’ injuries.

Monsanto’s sole response (at 149) to this evidence is that neither Dr. Dahlgren “nor any of plaintiffs’ other experts, testified that PCB levels as low as 70, 340 or 47 ng/m³ can cause injury.” Monsanto repeats the same mistake it made in attacking the exposure evidence: It ignores that Coghlan’s estimate included higher levels, too. And Monsanto does not dispute that Dr. Dahlgren testified that those levels *do* cause neurological injuries, and did, in fact, cause the plaintiffs’ brain damage. Tr. 2247-48, 2263-64. Monsanto also ignores—again—Dr. Carpenter’s

²⁷ Monsanto’s argument (at 151-52) that the superior court’s reliance on *Intalco* was “misplaced” is wrong. As explained, the plaintiffs presented significant evidence of PCB exposure; the level of toxin exposure need not match the 12-years of exposure in *Intalco* to meet the “more probable than not” standard. And the fact that Dr. Dahlgren wasn’t the plaintiffs’ attending physician doesn’t undermine his testimony: his credibility and the weight to be given to his opinions are firmly “within the jury’s province.” *City of Bellevue v. Raum*, 171 Wn. App. 644, 154 n.25, 833 P.2d 390 (1992).

testimony that even 18 to 40 ng/m³ were “associated with significant elevations of diseases” likely “caused by inhalation of PCBs.” Tr. 2451.

Monsanto has identified some conflicting evidence. It has not come remotely close to identifying a verdict “clearly unsupported by substantial evidence.” *See Faust*, 167 Wn.2d at 538.

C. Sufficient evidence supports the jury’s finding that the plaintiffs were injured by furans.

Monsanto next contends that the jury’s verdict on the construction-defect claim must be reversed because the plaintiffs presented “no evidence that they were injured by exposure to furans.” Br. 152-56. Once again, Monsanto misrepresents the record and ignores the highly deferential standard of review.

At trial, the jury was presented with significant evidence that the plaintiffs had been exposed to and injured by furans—an unintentional chemical byproduct created in the manufacturing process that is potentially more toxic than PCBs themselves. Tr. 577-59, 1706-07, 2248, 2273. The plaintiffs’ blood tests detected furans at “elevated” levels, “especially for Michelle Leahy.” Tr. 2031; *see* Tr. 1822-24. And, based on their chemical profile, these furans were

traced back to the PCB light fixtures at Sky Valley as the most likely source. Tr. 1822-1824, 2032. Testing at the school also detected furans in dust samples and in PCB oil that had leaked onto the carpet—and those furans likewise matched the chemical profile of the PCBs in the light ballasts. Tr. 1707, 1728, 1821-22.

Despite this testimony, Monsanto asserts that there was “*no* evidence that any furans detected at [Sky Valley] came from anything other than background environmental sources.” Br. 154. And, despite specific evidence that the plaintiffs’ blood contained “elevated” furans levels, the company falsely asserts that “it is undisputed that plaintiffs’ blood did not show an unusual level of exposure to furans.” *Id.* Monsanto just misstates the record.

The jury considered Monsanto’s arguments and evidence about furans, and disagreed. This Court must respect its finding. *See Coogan*, 197 Wn.2d at 812-13.

Finally, even if this Court were to reverse the jury’s construction-defect finding, that would not require vacatur of the punitive-damages award. *See* Br. 152-53, 156. The trial court *did not allow* the jury to award punitive damages on the construction-defect claim. *See* CP 16549 (jury instruction on punitive damages); Tr. 4592

(court observing that “punitives” could not be awarded “for construction defect”); Tr. 4594 (plaintiffs’ counsel “conced[ing] that I don’t think we have a punitive case . . . based on a construction defect”). So, contrary to Monsanto’s assertion (at 153 n.33), there’s absolutely no way that the jury could have “tie[d] its punitive damages award” to this claim. *See Coogan*, 197 Wn.2d at 808 (“[J]urors are presumed to follow the court’s instructions.”).

D. Sufficient evidence supports the jury’s finding that Monsanto’s failure to warn caused the plaintiffs’ injuries.

In a 1977 memorandum discussing PCBs in light ballasts, Monsanto acknowledged that “[a] lot of people would undoubtedly become very emotional—even panic—if they found out the[re] was a ‘cancer-causing’ agent hanging over their heads.” P-253I. Now faced with the consequences of its decision to conceal that information, Monsanto argues the opposite: that a warning would have made no difference and that its concealment of PCBs’ dangers, consequently, didn’t cause the plaintiffs’ injuries. Monsanto had it right the first time—and the evidence, construed most favorably to the verdict, undoubtedly supports the jury’s causation finding.

Start with the school district. As an initial matter, Monsanto wrongly assumes that the relevant time period to assess whether the district would have heeded a warning is when the school moved to Sky Valley in 2011. But a school district is always charged with fostering a safe environment for young children and their teachers, and nothing in the record suggests that the district would have introduced a toxic chemical into its brand new building in 1968 if it had been adequately warned.

Regardless, the evidence supports a reasonable inference that the school district would have heeded a warning in 2011, too. Once the district learned of the real risk of PCBs after teachers raised the alarm, Tr. 2539, it hired consultants to conduct testing, prepare a report, and, eventually, remediate the facilities. The jury could reasonably infer from those endeavors that, had the district been warned, it would have remediated the building before bringing in students and teachers or never moved to Sky Valley at all.

Monsanto asserts (at 157) that all of this is meaningless because the school district already knew of the dangers of PCBs in 2000. That's incorrect. Monsanto's argument rests on the district's knowledge of an insurance notice that reported, "[w]hen people are

exposed to high levels they could get sick.” D-22168 at 2. This tepid notice is a far cry from warning of a “cancer causing agent” or that “inhalation will cause systemic poisoning.” The jury, given the district’s subsequent conduct, was entitled to infer that a full warning would have made a difference.²⁸

The evidence also supports an inference that the teachers would have heeded a warning—either by demanding immediate remediation or changing jobs. Once the plaintiffs learned of the risk they faced, they took it upon themselves to seek out a fix and, eventually, left jobs they loved to avoid further health consequences. Tr. 3017, 3020, 3076, 3140. The jury could thus reasonably infer that they would have heeded a direct warning provided in advance.

Monsanto attempts (at 158) to avoid these multiple routes to causation by characterizing the trial court’s decision upholding the verdict as applying a “heeding presumption.” But the company’s

²⁸ Monsanto also insinuates that the school district had knowledge of EPA guidance from 2000 (ten years before Sky Valley opened) that addressed PCBs. Even assuming that guidance could have put the district on notice, Monsanto relies on speculation from an expert witness, not a district employee, who merely “assume[d]” that the district received the guidance. Tr. 2180. The jury was entitled to reject that speculation.

argument confuses an inference with a “presumption.” A heeding presumption shifts the burden to the defendant so that, even on a completely silent record, the plaintiff still wins. *See, e.g., Raney v. Owens-Illinois, Inc.*, 897 F.2d 94, 95 (2d Cir. 1990). An inference draws from the evidence.

Here, the record provided plenty of evidence to support a finding of causation—no presumption necessary. It shows that Monsanto knew that members of the public could “panic” if they knew the risks, and that everyone owed a warning originally lacked full information and changed their conduct once they got it. Courts routinely find sufficient evidence to support causation based on similar records. Consider, for example, the Second Circuit’s decision in a case with analogous facts:

In this case, it was reasonable to infer that Raney would have heeded a manufacturer’s warning. There was no evidence that Raney was aware of asbestos hazards, and they were not obvious. Though everyone might not agree that an asbestos worker would have sought other employment had he been warned of asbestos hazards, a prediction as to what a worker, alerted to the hazards, would have done is generally within the range of reasonable dispute that makes matters appropriate for submission to a jury.

Raney, 897 F.2d at 96; *see also Budd v. Kaiser Gypsum Co., Inc.*, 21 Wn. App. 2d 56, 75-76, 505 P.3d 120 (2022) (upholding failure-to-warn verdict based on inference of causation). The same result follows here.

V. The trial court did not abuse its discretion in admitting evidence of other teachers' and students' injuries and in any event, the evidence was duplicative and harmless.

The plaintiffs weren't alone in suffering injuries from PCB exposure at Sky Valley. Over one hundred other students and teachers did, too. Two of the plaintiffs' experts took this into account: Dr. Pamela Mahoney, an epidemiologist with decades of experience, examined health surveys completed by 164 of these people, and Dr. Perrillo performed neuropsychological testing on 49 people other than the plaintiffs. To help the jury understand how they reached their conclusions, the experts testified about this evidence and how they analyzed it.

Monsanto now argues that the trial court shouldn't have admitted this evidence because it is not "relevant." Common sense shows that cannot be correct: Surely, if the plaintiffs here were the only people in all of Sky Valley to claim injuries from PCBs, Monsanto wouldn't agree that evidence of everyone else's good

health had no bearing on the case. In fact, Monsanto *did* introduce evidence about the experience of workers exposed to PCBs in other settings. The rule cannot be “tails I win, heads you lose.” And even setting aside the multiple grounds for relevance—forming the foundation of expert opinions; providing circumstantial evidence of causation; and preventing the jury from drawing an unjustified adverse inference based on the absence of evidence—there was no possible prejudice here because the supposedly prejudicial effect Monsanto identifies was duplicative of other concededly proper evidence.

A. The trial court did not abuse its discretion in concluding that evidence of other teachers’ and students’ injuries is relevant.

Across 27 pages of argument (at 159-85), Monsanto studiously ignores the expansive definition of relevance and deferential standard of review under Washington law. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.” ER 401. And this Court will not reverse a trial court’s determination of relevance absent a “manifest abuse of discretion.” *See, e.g., In re Welfare of Shope*, 23 Wn. App. 567, 569, 596 P.2d 1361

(1979). Under these standards, there is no plausible basis to find an abuse of discretion here. For starters, the evidence at issue was obviously relevant because it was a central factual basis on which Dr. Perrillo and Dr. Mahoney relied to form expert opinions on two key issues in the case: causation and injury.

The evidence is also relevant because, as Monsanto recognized below, CP 13723, harm to non-parties is admissible if the injuries “occurred under the same or substantially similar circumstances.” *Toftoy v. Ocean Shores Props., Inc.*, 71 Wn.2d 833, 835, 431 P.2d 212 (1967); *see also, e.g.*, McCormick on Evidence § 200 (8th Ed. 2020) (“Causation is frequently in genuine dispute, and circumstantial evidence may be of great value in pursuing this elusive issue. Thus, receptivity to evidence of similar happenings to show causation is heightened when the defendant contends that the alleged conduct could not possibly have caused the plaintiff’s injury.”); *Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613, 618 (8th Cir. 1983) (“Under Fed.R.Evid. 401, evidence of similar occurrences might be relevant to . . . the lack of safety for intended uses, the standard of care, and causation.”). Here, each of the teachers and students attended the same school, during the same time, and suffered comparable

injuries, including all 49 people Dr. Perrillo examined suffering from acquired brain injury. Same injury, same place, same time—no abuse of discretion.

And there is yet another reason why the evidence is relevant: Jurors are apt to see the absence of evidence as evidence of absence. Jurors come to a case with preconceptions about what the proof will be. *See generally Old Chief v. United States*, 519 U.S. 172, 188 (1997). When a prosecutor charges a crime that involves “using a firearm to commit an offense,” jurors expect to see a “gun in evidence.” *Id.* And when that evidence is missing, there’s a risk that jurors will “draw[] a negative inference” that punishes the party who failed to satisfy their expectations. *Id.* (quoting Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 Cal. L. Rev. 1011, 1019 (1978)).

For these reasons, evidence that preempts such a negative inference is considered relevant. *See, e.g., United States v. Angelini*, 607 F.2d 1305, 1311 (9th Cir. 1979); *Commonwealth v. Dillon*, 925 A.2d 131, 138-39 (Pa. 2007); *see also* McCormick on Evidence, *supra*, § 185 (“[W]here a jury would expect to receive a certain kind of evidence, testimony explaining why that evidence is not available

could be helpful and should be considered relevant.”). Here, the evidence of injuries to teachers and students played exactly this role, as the trial court recognized. KRP 855. In a case involving a toxic substance in a heavily trafficked building, jurors expect to see some evidence that people other than the plaintiffs suffered injury from exposure and, in its absence, may infer that exposure levels weren’t high enough to cause injury, or that the plaintiffs didn’t really suffer the injuries they claim, or draw any number of other adverse inferences.

Monsanto’s argument (at 167) that it “promised” not to argue to the jury that it should draw inferences from an absence of proof doesn’t eliminate the evidence’s relevance. The jury doesn’t need Monsanto’s permission to draw an inference. That danger exists regardless of Monsanto’s opening and closing arguments. Even when an opposing party stipulates to a fact, actual evidence of that fact may still be admissible to satisfy jurors’ expectations. *Old Chief*, 519 U.S. at 188. The trial court did not abuse its discretion in finding the evidence relevant on this ground either.

None of this is to say that evidence of injuries to others in toxic-tort cases is always admissible. The opposing party may always

argue that this type of evidence, even if relevant, is unfairly prejudicial. Indeed, Monsanto did so (to no avail) below. But Monsanto abandoned its argument under ER 403 on appeal—and the highly probative value of the evidence suggests why.

Instead, Monsanto argues (at 163-64) that evidence of harm to others is *per se* irrelevant because proof of causation in a toxic tort case requires expert testimony. That’s puzzling. This testimony came in through experts, and it was also relied on by the plaintiff’s primary causation expert, Dr. Dahlgren. *See* Tr. 2261-62.

Monsanto’s theory is also wrong. Although expert testimony may be required to prove causation in cases involving “obscure medical factors,” that doesn’t mean that non-expert evidence is *irrelevant*—just that, in some cases, it might not be *sufficient*. *See, e.g., Riggins v. Bechtel Power Corp.*, 44 Wn. App. 244, 254, 722 P.2d 819 (1986) (“Ms. Riggins’ and her medical expert’s testimony, stating she sustained a knee injury requiring surgery, was sufficient for the jury to determine whether an injury occurred. But Ms. Riggins’ testimony as to her hip pain and headaches is, *standing alone*, insufficient.”) (emphases added). The rule ensures that the jury doesn’t rest its verdict solely on “speculation” about matters that, in

the absence of expert guidance, would be outside the jury's knowledge. *Id.* But it does not mean that all other causation evidence is irrelevant. *See, e.g., Bennett v. Dep't of Lab. & Indus.*, 95 Wn.2d 531, 533-35, 627 P.2d 104 (1981) (sustaining verdict based on both expert and "lay testimony" because "if, from the facts and circumstances and the medical testimony given, a reasonable person can infer that the causal connection exists, the evidence is sufficient"); *see also Old Chief*, 519 U.S. at 179 ("evidentiary relevance under Rule 401 [is not] affected by the availability of alternative proofs"). As Tegland explains, "[t]he test for probative value under Rule 401 should not be confused with the sufficiency of the evidence to take the case to the jury." 5 Wash. Prac., Evidence Law and Practice § 401.4 (6th ed. 2021). That is the mistake Monsanto makes here.

Monsanto also asserts (at 164-66) that evidence of harm to others is only admissible on rebuttal if the defendant opens the door by offering evidence that similarly situated people weren't harmed. But Monsanto's sole reported case for this proposition, *Intalco Aluminum Corp. v. Department of Labor and Industries*, 66 Wn. App. 644, 833 P.2d 390 (1992), merely addressed the admissibility of

non-party harms in a case where it came in as rebuttal evidence. It didn't hold that injuries to non-parties are automatically irrelevant during a party's case-in-chief.²⁹ And notably, though the trial court invited Monsanto to request the limiting instruction applied in *Intalco* to avoid any theoretical prejudice, KRP 855, Monsanto never did.

A rebuttal-only rule would yield serious problems, too. It would create perverse incentives by encouraging plaintiffs not to object to defendants' (supposedly) irrelevant evidence of non-party harms so that the plaintiffs could, in turn, get in their own irrelevant evidence. And such a rule would preclude the use of epidemiological evidence in a case-in-chief, which is always based

²⁹ Monsanto also points to *Shoemaker v. Eli Lilly & Co.*, 194 Wn. App. 1026 (2016), an unreported decision that has never been cited, as support for its contorted reading of *Intalco*. But *Shoemaker* involved evidence of harm to only two others. Even if that small number of injuries lacks a tendency to make a fact more likely than not under ER 401, that says nothing about evidence of injuries to over one hundred similarly situated people. And *Shoemaker* is internally inconsistent: It concluded that the two individuals' testimony was irrelevant despite acknowledging that it would "bolster" the expert testimony, *id.* at *5, *i.e.*, that it would have the tendency to make a fact more likely—all that ER 401 requires.

upon injuries to non-parties and routinely admitted. *See, e.g., Kehm*, 724 F.2d at 617.³⁰

Monsanto’s argument—that the substantially similar experience of a teacher exposed to the same environment is irrelevant—is, in short, at odds with the expansive definition of relevance under ER 401, the case law, and common sense. The trial court didn’t abuse its discretion in admitting this evidence.

B. The evidence that Monsanto complains was improperly admitted was harmless.

Even if Monsanto were right that the evidence at issue was irrelevant, its admission still wouldn’t warrant reversal. “[E]rror without prejudice is not grounds for reversal.” *Brown v. Spokane Cnty. Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983).

³⁰ None of the remainder of Monsanto’s gripes with the proceedings below provide a basis for reversal. It complains (at 174) that it didn’t have adequate time for discovery but never challenges the trial court’s discovery order. It fleetingly characterizes (at 173) the experts’ testimony as hearsay but declines to ask this court to reverse on that ground, presumably because it didn’t preserve it. And Monsanto asserts—in a footnote with no case law—that Dr. Mahoney’s study isn’t as reliable as peer-reviewed studies. But it hasn’t actually tied this to any argument under *Frye* or ER 702, let alone argued that her opinion should’ve been excluded on that basis.

The supposedly prejudicial effect of the evidence that Monsanto identifies was duplicative of other properly admitted evidence and, therefore, harmless. *See id.*

As Monsanto readily admits (at 168), the jury heard about evidence of injuries to others from sources “to which [Monsanto] did not object.” This included evidence that “over 100 parents, teachers and children have reported illness they associate with the building,” P-2124, and that teachers specifically attributed their “health complaints” to “concern[] about PCBs,” P-1854 at 70; Tr. 3022. The jury further learned that these complaints were sufficiently severe, numerous, and persistent that the resource-constrained school hired a consultant—an unusual and costly endeavor—to investigate the problem. Tr. 3227.

This evidence is fatal to Monsanto’s claim that the admission of additional evidence requires a new trial. The company stakes its claim of prejudice on speculation (at 183) that the jury’s knowledge of non-party harms created a risk of “arous[ing] an emotional response” and “mislead[ing]” the jury into thinking that a significant number of other people were injured by PCB exposure without “supporting evidence.” But even if this risk—which

Monsanto fails to substantiate—were real, the other admitted evidence presented the same purported problem. To see why, consider the comments made at closing argument that Monsanto contends (at 183-84) “seized” on the supposedly prejudicial effect. *See, e.g.*, Tr. 4806 (“Mr. Miller still hasn’t explained how there are so many other people who got sick in this building.”); Tr. 4807 (“And Monsanto still did not explain why all those people were ill.”). These comments could have just as easily referred to the evidence that Monsanto concedes was properly admitted. Thus, “the implication that [Monsanto] asserts caused [it] prejudice was already present through the [admissible] portion[s] of the testimony” and therefore harmless. *State v. King*, 9 Wn. App. 2d 1012, at *1, *3 (2019) (unpublished).³¹

³¹ Nor does it matter that the court admitted lay testimony about teachers and students’ injuries. That evidence is likewise relevant under the “substantially similar circumstances” standard. It is also cumulative. With the other admitted evidence to which Monsanto does not object in the case, there is no conceivable way that this testimony could have tainted the jury’s verdict.

VI. The jury’s punitive-damages awards are fully consistent with the record and the U.S. Constitution.

Monsanto’s final complaint is that the jury acted irrationally in assessing punitive damages. It argues that the punitive-damages awards lack sufficient evidence and must be vacated. And it argues, in the alternative, that the awards exceed the bounds permitted by due process and must be reduced. It is wrong on both points.

A. Monsanto has not shown that the jury’s punitive-damages awards are “completely unsupported by substantial evidence.”

Missouri law allows a jury to assess punitive damages for tortious conduct if it finds by “clear and convincing” proof that “the defendant showed a complete indifference to or conscious disregard for the safety of others.” *Ingham v. Johnson & Johnson*, 608 S.W.3d 663, 714 (Mo. Ct. App. 2020); *Poage v. Crane Co.*, 523 S.W.3d 496, 515 (Mo. Ct. App. 2017); see also *Blanks v. Fluor*, 450 S.W.3d 308, 400-01 (Mo. Ct. App. 2014). The jury here did exactly that.

The question for this Court is whether the record contains “substantial evidence or reasonable inferences” to sustain the jury’s finding. *Faust v. Albertson*, 167 Wn.2d 531, 538, 222 P.3d 1208 (2009). Only if the jury’s decision to impose punitive damages “is clearly unsupported by substantial evidence” may this Court step in and

nullify it. *Id.*; see *Paetsch v. Spokane Dermatology Clinic, P.S.*, 182 Wn.2d 842, 848, 348 P.3d 389 (2015) (“[J]udgment as a matter of law requires” that there’s “no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party.”); *Schmidt v. Coogan*, 162 Wn.2d 488, 493, 173 P.3d 273 (2007) (“[G]ranting judgment as a matter of law should be limited to circumstances in which there is no doubt as to the proper verdict.”).

i. As the trial court explained, the evidence supporting the jury’s assessment of punitive damages is not just substantial, but overwhelming. Monsanto “knew from the 1930s forward that PCBs caused systematic toxicity and led to disease and death.” CP 16798. It also learned that “its PCBs were contaminated with ‘furans,’ which could be even more toxic.” CP 16799. Yet Monsanto “did not warn anyone of their presence or develop quality control methods to avoid contamination.” CP 16799. It “never told its customers, the public, or the government” about *any* of the “information it learned about the hazards of PCBs.” CP 16798. It didn’t tell its customers, for example, that the Navy had “determined that PCBs were too toxic to use” in 1959. CP 16799. And “[c]ontrary to industry custom and practice,” Monsanto “chose not to conduct chronic toxicity

testing” because it wanted to “avoid developing data which would confirm what [it] already knew and interfere with its sales.” CP 16798.

Monsanto also repeatedly lied to or misled the public and regulators about the dangers of PCBs. It “told its customers that it had tested PCB products and that PCBs had not demonstrated any toxic effects,” when this was patently false. CP 16798-99. It “lied to its customers about the number and nature of injuries from PCBs it knew about.” CP 16799. It “engaged in a corporate disinformation campaign to undermine evidence of the dangers PCBs presented,” and “opted not to warn the public about the danger of PCBs in their fluorescent light ballasts or to otherwise take action to address the problem.” CP 16799. All the while, it “knowingly pushed PCBs for uses that would come into contact with ordinary consumers.” CP 16798.

That’s not all. Monsanto “knew, after it ceased production of PCBs, that they remained in schools (through caulk and light ballasts) and that the general public was unaware of their presence, or that PCB-containing light ballasts emit PCBs and a leak or rupture could release even more PCBs into the air.” CP 167988. And

it knew that PCBs “remained in electrical equipment in service around the country, with failures occurring every day.” CP 16799. But instead of acting to protect teachers and schoolchildren, Monsanto “specifically sought to undermine the EPA’s efforts to get PCBs out of schools, falsely claiming that the science did not establish any link between exposure to PCBs and cancer or other significant human illness.” CP 16800. “Contrary to the EPA’s warnings to the public, Monsanto put out its own statements that ‘PCBs are not human ‘cancer-causing agents’ and they are not ‘deadly toxins.’” CP 16800. Even today, Monsanto “has not learned its lesson.” CP 16800.

This evidence goes well beyond what is required by Missouri law. Here, Monsanto knew that teachers and children were exposed to toxic substances and yet “continued to release the toxins and hid the dangers and extent of contamination from regulators and the public.” *Blanks*, 450 S.W.3d at 404. “More than that, [it] misled the public.” *Id.* “And [its] reason for doing so was readily apparent”: to reduce “the economic costs” to itself. *Id.* “In short, [Monsanto] placed [its] ability to turn a profit above the well-being of children,” teachers, and the public. *Id.* When that is so, Missouri courts “are

neither offended nor surprised by” a jury’s punitive-damages award, because “[t]he jury could rightly find such actions outrageous.” *Id.*

2. On appeal, Monsanto does not deny that this evidence exists or that this Court is required to credit it. Nevertheless, it argues that punitive damages are precluded as a matter of Missouri law for two reasons, neither of which is correct.

First, Monsanto contends (at 218) that the plaintiffs “failed to offer evidence that Monsanto was aware, in the 1960s and 1970s, that use of PCBs in sealed [fluorescent light ballast] capacitors presented an unreasonable risk of injury to building occupants.”

As an initial matter, Monsanto didn’t make this argument below. Because “[f]ailure to raise an issue before the trial court generally precludes a party from raising it on appeal,” the argument is waived. *Wilcox v. Basehore*, 187 Wn.2d 772, 788, 389 P.3d 531 (2017); *accord Blanks*, 450 S.W.3d at 402 (“Defendants did not raise this [punitive-damages] argument below, so “it is not preserved for appeal.”).

More fundamentally, the argument is just wrong. Ample evidence supports the finding that Monsanto knew about the dangers of PCBs in light fixtures in the 1960s and 70s. An internal

memo from this period stated that it was “just as well” that “the general public is not even aware that PCBs are in their [light] fixtures,” because they’d “undoubtedly become very emotional—even panic—if they found out [there] was a ‘cancer-causing’ agent hanging over their heads.” P-2531. By any measure, that is direct evidence of Monsanto’s knowledge.

Other evidence, moreover, indicates that Monsanto had long been aware of these dangers. *See* P-145 at 1 (1955: “We know Aroclors are toxic.”); P-150 at 10 (1956: PCB inhalation is “usually followed by systemic poisoning”); Tr. 890; P-162 (1957: Navy says PCBs are “just too toxic for use” given risk of inhalation after leakage); P-241 at 19 (1966: PCB inhalation is highly toxic and “extreme caution should be exercised”); P-653 at 57 (1969: “real alarming” study showing how “toxic” even “small amounts” of PCBs were); P-360 at 27, 34 (1969: It would “be less than honest” to suggest that the scientific data will be “favorable regarding Aroclor 1242,” and discussing the possibility of a “complete ban[] of these products”); P-307 at 1 (1969: “[I]t only seems a matter of time until the regulatory agencies will be looking down our throats regarding the use of this material.”); P-350 at 7, 25 (1969: PCBs are “moderately”

“toxic to man” and “persistent,” and “the rate of degradation is extremely low.”).

In addition, throughout this period, Monsanto “chose not to conduct chronic toxicity testing” to “avoid developing data which would confirm what [it] already knew.” CP 16798. This evidence provides further proof of Monsanto’s knowledge of the dangers. *See Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011) (“[P]ersons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts.”).

Taken together, this is more than enough evidence to show that Monsanto knew about the dangers of PCBs in light fixtures in the 1960s and 70s. *See Poage*, 523 S.W.3d at 519-20 (finding sufficient evidence based on defendant’s “general knowledge of the dangers of asbestos” and “circumstantial evidence” that it had “knowledge that there was a ‘high probability’ using [its products] would result in injury”); *Ingham*, 608 S.W.3d at 715-19 (finding sufficient evidence because a 1969 memo noted that the product contained asbestos,

which “could be dangerous,” and subsequent evidence confirmed defendants’ knowledge of this “potential safety hazard”).³²

Nor was the jury required to credit Monsanto’s argument (at 221-24) that the dangers of PCBs were outweighed by various supposed benefits. Monsanto’s own cases make clear that Missouri “allow[s] the jury to make the ultimate determination” whether a product is unreasonably dangerous. *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 506 (8th Cir. 1993); see *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 756 (Mo. 2011) (“Under our model of strict tort liability the concept of unreasonable danger” is “presented to the jury as an ultimate issue without further definition.”). Substantial evidence

³² Neither of the two cases on which Monsanto relies (at 220) is to the contrary. They hold only that a manufacturer’s knowledge that a product “poses a danger to a narrow class” is “insufficient” to prove “knowledge of a danger to the much broader class of persons who were merely present in such buildings at other times.” *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 375 (Mo. 1993); see *Sch. Dist. of Indep. v. U.S. Gypsum Co.*, 750 S.W.2d 442, 447 (Mo. Ct. App. 1988). But where, as here, the evidence of knowledge is not so limited, Missouri courts will not vacate a jury’s punitive-damages award on that ground. See *Poage*, 523 S.W.3d at 516-20; *Ingham*, 608 S.W.3d at 714-19. Here, Monsanto knew that PCBs in fluorescent light fixtures were “cancer-causing’ agent[s],” P-2531, and that exposure “usually” caused “systemic poisoning,” P-150 at 10.

supports the jury's determination here. *See* P-248 at 8-10; P-273 at 15; P-836; P-3696 at 31; Tr. 617, 630-31, 666-67.

Second, Monsanto claims (at 224) that punitive damages are improper because it “took steps to mitigate or eliminate potential product risks through warnings or design changes.” But again, the jury was not required to agree.

Monsanto's cases (at 225 n.41) are all easily distinguishable. The courts in those cases “did not find that merely attempting to provide additional warnings was sufficient to negate a claim for punitive damages” notwithstanding other record evidence. *Siems v. Bumbo Int'l Trust*, 2014 WL 4954068, *5 (W.D. Mo. Oct. 2, 2014) (discussing *Drabik*). Instead, they carefully reviewed the evidence to determine whether it could support a finding that the defendant acted in conscious disregard of, or complete indifference to, the safety of others. The court in *Drabik*, for example, “found that punitive damages were not warranted because the manufacturer immediately made design changes, was complying with industry custom and standards[,] and added explicit warnings to the product at issue.” *Id.*; *see also id.* (distinguishing *Bhagvandoss v. Beiersdorf, Inc.*, 723 S.W.2d 392 (Mo. 1987), because “there was no other

evidence presented to warrant a punitive damages award” besides “an inadequate warning”). Monsanto did nothing of the sort.

B. The jury’s punitive-damages awards do not violate due process.

Monsanto’s final contention is that the Due Process Clause of the U.S. Constitution requires reduction of the punitive damages. In making this argument, Monsanto faces a high hurdle. “Punitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996). An award goes too far “[o]nly when [it] can fairly be categorized as ‘grossly excessive,’” *id.*, such that it “furthers no legitimate purpose and constitutes an arbitrary deprivation of property,” *State Farm Mut. Aut. Ins. v. Campbell*, 538 U.S. 408, 417 (2003).

The U.S. Supreme Court has found this standard met only in cases involving awards that were orders of magnitude greater than any actual or potential harm. *See id.* at 426 (145:1 ratio where defendant caused “only minor economic injuries” and “no physical injuries”); *Gore*, 517 U.S. at 582 (500:1 ratio where defendant

inflicted “purely economic harm” and “evinced no indifference to or reckless disregard for the health and safety of other”).

By contrast, the Court has consistently rejected challenges to awards that were “not more than 10” times greater than the “actual and potential damages.” *Gore*, 517 U.S. at 581-82 (discussing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460-62 (1993), and *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991)). Awards of this size fit comfortably within a long historical tradition “dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish.” *Campbell*, 538 U.S. at 425.

Despite this precedent, Monsanto claims that the aggregate punitive-damages award here—less than three times the aggregate actual damages—is unconstitutional. Monsanto bases its claim on two main arguments, one factual and one legal. Factually, it says (at 232) that “[t]he record establishes a low degree of reprehensibility.” Legally, it says (at 236-40) that “a 1:1 ratio is the presumptive limit of what federal due process allows” given the “substantial” harm that Monsanto caused. The first argument was rejected by both the jury and trial court, while the second is illogical, ahistorical, contradicts

Supreme Court precedent, and would require the invalidation of countless state and federal statutes. Under a proper analysis of the relevant guideposts, the jury's award must be upheld.

Reprehensibility. As Monsanto notes (at 231), reprehensibility is the “most important guidepost” in evaluating punitive damages. Monsanto claims (at 232) that this guidepost cuts in its favor because it acted with only “a low degree of reprehensibility.” But both the jury and trial court found otherwise. The jury found that Monsanto “clearly” acted with “complete indifference to or conscious disregard for the safety of others.” CP 16549-50. It also found that the awards were necessary “to punish [Monsanto] and to deter [it] and others from like conduct.” CP 16549-50.

The trial court found the same. It reviewed the evidence and concluded that Monsanto acted with “significant reprehensibility.” CP 16807. It found that each plaintiff “suffered physical pain and neurological injury,” “has substantially reduced enjoyment of life,” and “faces an increased risk of cancer and dementia.” CP 16807. It found that Monsanto’s “conduct evinced a ‘complete indifference to or conscious disregard for the safety of others.’” CP 16807. It also found that this “wrongful conduct occurred over many years and

involved continuous commitment to its harmful course of conduct.” CP 16807. In particular, the court found that Monsanto: “knew that PCBs caused systemic toxicity as early as the 1930s,” and yet “refused to conduct appropriate testing or warn others”; “knew what that testing would likely show and decided not to make a record of PCBs’ dangers”; and “then pushed PCBs for use in goods that would reach ordinary consumers, without warning its customers or the ultimate users of the dangers”—an “approach that continued for decades.” CP 16807.

The court further found that, “after the harmful effects of PCBs became more widely known and PCBs were banned across the world, [Monsanto] enacted a plan over many decades to minimize the perception of the potential harm from PCBs and prevent any mandatory recall or clean up.” CP 16807. And it found, finally, that “there was substantial evidence that the harm to the Plaintiffs was a direct result of [Monsanto’s] efforts to deceive regulators and the public regarding the health effects of PCBs. If [Monsanto] had come clean and participated in efforts to clean up PCBs, especially in schools, rather than interfere with these efforts,

the Plaintiffs likely would not have been exposed to PCBs.” CP 16807.

This Court is required to “defer to the [trial court’s] findings of fact unless they are clearly erroneous”—a standard Monsanto doesn’t even try to meet. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 440 n.14 (2001). Nor may this Court “disregard [the] jury[’s] findings.” *Id.* at 439 n.12. So while “determining the ‘degree of reprehensibility’ ultimately involves a legal conclusion, [this Court] must accept the underlying facts as found by the jury and [trial] court.” *Leatherman Tool Grp., Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146, 1150 (9th Cir. 2002).

Accepting the facts as found, every relevant factor supports the conclusion that Monsanto acted reprehensibly. The “harm [it] caused was physical as opposed to economic.” *Campbell*, 538 U.S. at 419. It “was the result of intentional malice, trickery, or deceit,” not “mere accident.” *Id.*; see *Gore*, 517 U.S. at 560 (“deliberate false statements” or “acts of affirmative misconduct” are reprehensible). The “conduct evinced an indifference to or a reckless disregard of the health or safety of others.” *Campbell*, 538 U.S. at 419. It “posed a substantial risk of harm” not only to the plaintiffs but also children

and “the general public, so it was particularly reprehensible.” *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007). The “conduct involved repeated actions” and was not “an isolated incident.” *Campbell*, 538 U.S. at 419. And the actions were “taken or omitted in order to augment profit,” which “represents an enhanced degree of punishable culpability.” *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 494 (2008).³³

Ratio. The next guidepost evaluates “the ratio between harm, or potential harm, to the plaintiff and the punitive damages award,” keeping in mind the 700-year history “providing for sanctions of double, treble, or quadruple damages to deter and punish.” *Campbell*, 538 U.S. at 425; *see also Haslip*, 499 U.S. at 17-18 (consulting history in due-process inquiry).

³³ Monsanto claims that its actions were not reprehensible because it didn’t know that PCBs could cause the specific injuries suffered by the plaintiffs. But the jury found that it knew that PCBs were toxic and could cause injury, which is what happened. Even so, uncertainty as to “the risk of releasing a possible [toxin] into the environment, even when, or perhaps especially when, the possibility is not well defined, counsels for the adoption of extraordinary precautions.” *Action Marine, Inc. v. Cont’l Carbon Inc.*, 481 F.3d 1302, 1319 n.20 (11th Cir. 2007). That Monsanto “consciously ignored” those risks “justifies extraordinary penalties.” *Id.*

Monsanto takes the position (at 236-39) that the Fourteenth Amendment caps the damages at “a 1:1 ratio” because its conduct (1) was not “particularly egregious” and (2) caused “substantial” harm. But as just discussed, Monsanto’s conduct *was* particularly egregious. That alone is enough to reject Monsanto’s argument.

At any rate, a 1:1 ratio is not the “presumptive limit” for any case involving “substantial” harm. Br. 236. If it were, the many statutes that have provided for multiple damages for “over 700 years” would all be presumptively unconstitutional as applied to any conduct causing substantial harm. *Campbell*, 538 U.S. at 425. Put differently, they are constitutional only as applied to conduct causing *insubstantial* harm. That includes not just those historical laws, but also all current state and “federal law [that] allows or mandates imposition of multiple damages for a wide assortment of offenses, including violations of the antitrust laws,” RICO, “trademark laws,” and “patent laws.” *Gore*, 517 U.S. at 581 & n.33. No court has embraced that bizarre and radical view.

To the contrary, the U.S. Supreme Court has twice upheld awards far exceeding the 1:1 cap urged by Monsanto. In one case, the Court upheld a \$10 million award where the “relevant ratio” was

as high as “10 to 1.” *Gore*, 517 U.S. at 581 (discussing *TXO*); *see TXO*, 509 U.S. at 462 (holding that a ratio of \$10 million to \$1 million “does not, in our view, jar one’s constitutional sensibilities”). Because \$1 million is “substantial” under *Campbell*, 538 U.S. at 426, that case would be wrongly decided if Monsanto’s view were the law. In another case, the Court held that an award of “more than 4 times the amount of compensatory damages” did not “cross the line into the area of constitutional impropriety.” *Haslip*, 499 U.S. at 23-24. Monsanto simply ignores these cases.

Monsanto also ignores two recent Missouri products-liability cases allowing ratios of more than twice the ratio here, even though the actual damages were substantial. *See Ingham*, 608 S.W.3d at 721-24 (upholding 6:1 ratio where actual damages were \$25 million per plaintiff); *Poage*, 523 S.W.3d at 523-24 (upholding 7:1 ratio where actual damages were \$1.5 million).

Instead of grappling with any of these decisions, Monsanto relies on a single sentence from *Campbell* musing that, “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” 538 U.S. at 425. Monsanto reads this

sentence (at 236) as installing a rigid “1:1 ratio [as] the presumptive limit” for “substantial” compensatory damages.

But as the U.S. Solicitor General recently explained: “That conclusion oversimplifies the relevant portion of *Campbell*. The fact that a particular compensatory award is ‘substantial’ is not dispositive standing alone. It would be illogical to suggest that the *more* harm a defendant inflicts, the *less* susceptible he is to punitive damages.” U.S. Br. in *Epic Sys. Corp. v. Tata Consultancy Servs. Ltd.*, No. 20-1426 (U.S.), at 13-14. Such a reading would also have far-reaching ramifications—overruling multiple prior Supreme Court decisions, casting aside centuries of precedent, and invalidating key provisions of landmark laws in their most important applications.

Rather than take such a radical step, *Campbell* made clear that “there are no rigid benchmarks that a punitive damages award may not surpass,” and that the inquiry is context specific. 538 U.S. at 425. Especially given the reprehensibility of Monsanto’s conduct, a ratio of under 3:1 in this case is well within constitutional limits.³⁴

³⁴ Monsanto says that the relevant ratio is around 2.7:1. But as the trial court concluded, that “does not include the potential harm PCBs could cause these Plaintiffs in the future which, according to the Supreme Court, should also be considered.” CP 16808; *see also*

Civil penalties. The third guidepost looks to “civil penalties authorized or imposed in comparable cases.” *Gore*, 517 U.S. at 575. Because “violations of common law tort duties often do not lend themselves to a comparison with statutory penalties,” this factor “is accorded less weight in the reasonableness analysis.” *Ingham*, 608 S.W.3d at 723-24. But it is still relevant because it allows courts to “compare damages awarded in similar civil cases.” *Ondrisek v. Hoffman*, 698 F.3d 1020, 1030 (8th Cir. 2012).

Here, the most analogous Missouri case is *Ingham*. In that case—a products-liability case involving conduct that occurred around the same time as the conduct here—Missouri courts sustained a \$716 million punitive-damages award against Johnson & Johnson. 608 S.W.3d at 722-24, *cert. denied*, 141 S. Ct. 2716 (2021). They did so even though the plaintiffs had received “\$125 million in actual damages”—\$25 million per plaintiff. *Id.* at 722. The U.S. Supreme Court then allowed the awards to take effect.

TXO, 509 U.S. at 453, 460 (instructing courts “to consider the magnitude of the *potential harm*” to the plaintiff and upholding “a \$10 million punitive damages award” that was “526 times greater than the actual damages awarded” because of the potential harm).

Ingham only confirms what the other guideposts make clear:
The jury here did not run afoul of due process in assessing punitive
damages to punish and deter decades of egregious misconduct.

CONCLUSION

The judgment of the superior court should be affirmed.

I certify under RAP 18.17 that this brief contains no more than
32,901 words, excluding the parts of the document exempted from
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Respectfully submitted,

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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.

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