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-Petitioners,

v.

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

PETITION FOR REVIEW

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INTRODUCTION

This petition presents three important, recurring, and unsettled questions of law that will immediately affect dozens of parallel pending cases, comprising the claims of more than two hundred victims of toxic chemical exposure and over $1 billion in verdicts already handed down across eight trials. The legal issues presented—the constitutionality of a harsh statute of repose that extinguishes people's claims before they even arise, the proper choice-of-law analysis for cross-border torts, and the framework for judicial gatekeeping of scientific testimony—are fundamental and cry out for review.

Division One reversed a landmark jury verdict awarding $185 million in damages for injuries caused by exposure at a public school to toxic chemicals known as PCBs, which were made and sold by Monsanto for decades until they were banned worldwide. The plaintiffs proved at trial that Monsanto, from its Missouri headquarters, orchestrated a decades-long scheme to conceal the dangers of PCBs, elevating corporate profits above public health.

The threshold issue on appeal was Monsanto's plea that this egregious Missouri-based conduct is completely immunized under

Washington's twelve-year statute of repose for products-liability cases because the effects of the company's scheme were not felt in Washington until many years later. Division One held that because the Washington Products Liability Act is an "integrated" statute, its repose provision automatically applies—without conducting *any* conflicts-of-law analysis.

If the harsh logic of the Division One's decision is allowed to stand, the claims of injured Washington residents can be extinguished long before they ever arise, long before anyone could conceivably have discovered their cause, and in the case of every child plaintiff involved, long before the victim was even born.

This decision triggers two separate conflicts. First, it is contrary to this Court's decision in *Bennett v. United States*, 2 Wn.3d 430, 539 P.3d 361 (2023)—which struck down an indistinguishable statute of repose under the Washington Constitution's privileges and immunities clause—as well as the decisions of other state supreme courts that have struck down similar products-liability statutes of repose. Second, the decision below conflicts with this Court's decision in *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580, 555 P.2d 997 (1976)—which requires, as a matter of Washington

common law, that choice of law be analyzed on an issue-by-issue basis—as well as the decisions of courts across the country that apply the law of the place of the manufacturer's conduct to the issue of repose. These include cases arising under state products-liability statutes just like this one—cases that Division One failed to acknowledge despite citing no authority for its unprecedented approach.

Over a dissent, the majority also held that the trial court erred by allowing an expert to testify about the PCB levels at the school. In the majority's view, the expert's case-specific deduction based on established techniques and use of simple arithmetic transformed his techniques into "novel" methodologies inadmissible under the *Frye* "general acceptance" standard. That decision implicates all seven other jury verdicts from seven other trials, and it parts ways with the views of six experienced Washington judges—including five trial judges who were specifically selected for their expertise in complex civil litigation. Because this decision is manifestly at odds with the governing framework for scientific evidence in civil cases and usurps the jury's primary role under the Washington Constitution, this Court's guidance is urgently required.

IDENTITY OF PETITIONERS AND COURT OF APPEALS DECISION

Kerry Erickson, Michelle Leahy, Richard Leahy, and Joyce Marquardt petition for review of Division One's published decision issued on May 1, 2024.

ISSUES PRESENTED FOR REVIEW

1. Does a twelve-year statute of repose for products-liability actions, RCW 7.72.060, violate the Washington Constitution?

2. Under what circumstances may a court refuse to conduct the common-law choice-of-law analysis mandated by *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 555 P.2d 997 (1976)?

3. When an expert applies established science to the facts, does the expert's use of basic arithmetic or assumptions about data inputs justify precluding the jury from hearing that expert's testimony?

STATEMENT

A. Factual background. In 2011, Sky Valley Education Center, a public school in Monroe, moved locations to what had once been the local middle school building. Tr. 3087-88. At the time, the plaintiff teachers—all beloved as "hard-working" and

"dedicated"—had been full of energy and in good health. Tr. 2531, 2971; CP16654.

That quickly changed. After the move, they experienced an "explosion of symptoms": headaches, brain fog, memory problems, and fatigue—all indicative of neurological injury. Tr. 3131; Op. at 7. They weren't alone. "[O]ver 100 parents, teachers and children … reported illness that they associate[d] with the building." P-2124 at 1.

Eventually, the likely cause became clear: PCBs. The school building was constructed in the 1960s, at a time when 95 percent of fluorescent-light ballasts contained PCBs. Tr. 1716-17, 1726-27. PCBs were also in the caulk. Tr. 1727-28. Although they didn't understand the danger at the time, the teachers had seen brown liquid "leaking out of light fixtures." Tr. 1762-63. And unbeknownst to them, PCBs escaped the lights and caulk in vaporized form, too. Tr. 1755-56.

The danger was real. As far back as the 1930s, Monsanto knew that PCBs caused "systemic toxic effects" and even death. Tr. 1318; D-20081. But with profits on the line, Monsanto repeatedly assured regulators and customers that PCBs were "singularly free of

difficulties." P-212. For example, even though the Navy's testing of PCBs killed all 150 rabbits exposed, P-162, Monsanto told another customer, one month later, that PCBs caused "no serious effects" in rabbits, P-163 at 1.

In 1966, around the time the Sky Valley building was being built, scientists exposed the true threat of PCBs: they escaped into the environment, were found in "children's hair," P-350 at 3, and were "as poisonous as DDT," P-266 at 4. Over the next decade, Monsanto went on the defensive: Its lawyers directed reports to be "burn[ed]," P-653 at 59, while the company tried to "sell the hell out of [PCBs] for as long as we can," CP18889. Even after PCBs were banned, Monsanto refused to acknowledge the problem, telling the public that PCBs were no more toxic than "common table salt." P-956. It did this with full knowledge of the danger to the public in general and to schools in particular. Internally, Monsanto's public relations team repeatedly flagged PCBs in schools as the company's "sleeper issue." P-3561.

B. Procedural background. After discovering that PCBs caused their injuries, over 250 Sky Valley teachers, students, and

family members sued to hold Monsanto accountable. The plaintiffs here were the first to have their day in court.

Trial began in June 2021 on claims for design defect, construction defect, failure to warn at the time of sale, and failure to warn post-sale after Monsanto obtained additional evidence of PCBs' dangers. The jury heard hundreds of hours of testimony from 46 witnesses, including more than a dozen experts, and saw thousands of pages of exhibits. After the seven-week trial, the jury returned a verdict for the plaintiffs on all claims.

Division One reversed. It held that the trial court should have applied Washington's twelve-year statute of repose, should not have permitted the plaintiffs to seek punitive damages on their post-sale failure to warn claim, and—over Judge Dwyer's dissent—should have excluded conclusions of the plaintiffs' PCB-exposure expert.

Following the decision, Monsanto's successor entity, Pharmacia, sought to compel the plaintiffs—public schoolteachers suffering from severe cognitive injuries—to pay nearly $2 million in costs out of their own pockets. The plaintiffs have moved to defer a ruling on costs pending the resolution of this petition.

ARGUMENT

I. Division One's ruling on the constitutionality of the twelve-year repose period warrants review.

A. Division One's decision on the constitutionality of the twelve-year statute of repose in the WPLA, RCW 7.72.060, warrants this Court's review because it raises an important question of Washington constitutional law and conflicts with this Court's decision in *Bennett* and the decisions of other state supreme courts in analogous cases.

In *Bennett*, this Court held that a statute of repose conferring special immunity from tort liability violates the Washington Constitution's privileges and immunities clause if it lacks a sufficient "nexus" to "the legislature's stated purpose" that does not "rest solely on hypothesized facts." 2 Wn. 3d at 449.

The "nexus" here is far weaker than in *Bennett*. Division One identified a single legislative purpose in support of the statute of repose: "'that retail businesses located primarily in the state of Washington be protected from the substantially increasing product liability insurance costs.'" Laws of 1981, ch. 27, § 1. But the legislature failed to identify any real-world basis for the notion that claims older than twelve years had any impact on liability insurance

rates. To the contrary, the Senate itself acknowledged that the evidence showed "that the concern about older products may be exaggerated," refuting "the need and effectiveness of a statute of repose." 1981 Senate J., Vol. 1 at 621, 625-26. In fact, only three percent of "product-related incidents occurred" more than *six* years after a product was purchased. *Id.* at 632.

Worse, because the WPLA's twelve-year cutoff can be rebutted and is subject to exceptions, it has the potential to affect only a small fraction of those three percent of claims. That connection is far "too attenuated" to liability insurance rates to survive under *Bennett*. *See DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 149, 960 P.2d 919 (1998) (statute of repose covering "less than one percent" of claims was "too attenuated to survive" even rational basis scrutiny).

Other supreme courts have struck down products-liability statutes of repose enacted around the same time because the available evidence showed that these "individual state tort reforms" were unlikely to "stabilize product liability insurance rates," *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996, 1002 (Ala. 1982), and were thus "incapable of achieving the avowed purpose,"

Berry By & Through Berry v. Beech Aircraft Corp., 717 P.2d 670, 681 (Utah 1985); *see also Dickie v. Farmers Union Oil Co. of LaMoure*, 611 N.W.2d 168 (N.D. 2000); *Kennedy v. Cumberland Eng'g Co.*, 471 A.2d 195, 201 (R.I. 1984); *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288, 293 (N.H. 1983); *Bolick v. Am. Barmag Corp.*, 284 S.E.2d 188, 191-92 (N.C. Ct. App. 1981), *modified*, 293 S.E.2d 415 (N.C. 1982). Although the plaintiffs cited these decisions below, Division One ignored them.

B. Division One didn't dispute the evidence that older claims have no effect on insurance rates. Instead, it relied on a single sentence from a committee report (not the statute) hypothesizing that "an insurer's *perception* of potential claims … very likely is reflected in rates"—regardless of whether that perception is "substantiated or not." Op. 26 (emphasis added) (quoting S. Select Comm. on Tort & Product Liability Reform, Final Report at 19 (Wash. Jan. 1981)).

Bennett's "exacting" standard demands more. *Bennett* held that a legislative finding that a statute "will tend" to reduce premiums wasn't enough to survive scrutiny. 2 Wn. 3d at 448. The WPLA doesn't even go that far. At best, it merely postulates the problem

(high insurance rates) the legislature sought to address. But it doesn't show what *Bennett* requires: that the statute of repose "in fact serves the legislature's stated goal" by reducing those premiums. *Id.* In fact, the evidence shows the opposite. The federal task force report on which the committee relied found that state-by-state solutions would be unlikely to affect premiums, which are set on a nationwide basis. *See* 44 Fed. Reg. 62,714 (Oct. 31, 1979). That alone shows that the statute of repose would not "in fact" serve its goal.

Nor does the statute even address what insurers claimed was their real concern: the need for "certainty." 1981 Senate J., Vol. 1 at 625 (insurers sought a clear line and "profess[ed] less concern regarding the actual time period selected"). The statute of repose—with its rebuttable twelve-year cutoff and many exceptions—could hardly be less certain. *See Olsen v. J.A. Freeman Co.*, 791 P.2d 1285, 1295 (Idaho 1990). It's no wonder that senators debating this statute concluded that repose would need to be resolved by a jury. 1981 Senate J., Vol. 1 at 614-15. That is precisely the opposite of what insurers claimed was needed to reduce insurance premiums.

* * *

Until now, no Washington case has applied the statute of repose to extinguish a victim's claim before she was born. No one should face this extreme rule before this Court addresses the serious constitutional objections that have carried the day in other courts.

II. Division One's unprecedented choice-of-law analysis warrants review.

Division One's decision also warrants review because its refusal to conduct a separate common-law choice-of-law analysis conflicts with the framework set forth by this Court and with the decisions of every other court to reach the question. Indeed, the court cited no precedent to support its novel approach.

1. In *Johnson v. Spider Staging*, this Court adopted, as a matter of Washington common law, 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 at 580. "Each issue"—not each claim—under this test "receive[s] separate consideration." Restatement (Second) of Conflict of Laws § 145 cmt. d. Thus, under Washington's common law, "different issues … may be decided according to the

substantive law of different states"—a rule referred to as depeçage. Op. 10.

Under this common-law issue-by-issue test, courts choose the law governing "defenses to the plaintiff's claim" by determining which state has the "most significant relationship" to *that issue*. *Id.* § 161. A statute of repose, "which exempts the actor from liability for harmful conduct," is a separate issue "entitled to the same consideration in the choice-of-law process as is a rule which imposes liability." *Id.* § 145 cmt. c. This Court in *Rice v. Dow Chemical,* 124 Wn.2d 205, 210, 213, 875 P.2d 1213 (1994), thus held that the WPLA's statute of repose is "subject to conflict of laws methodology" and applied *Spider Staging* to "determine which state's law applies" to repose.

In conflict with both *Spider Staging* and *Rice*, Division One held that applying the Second Restatement's issue-by-issue analysis to the issue of repose was not "appropriate." Op. 12. The court reasoned that, because "the legislature integrated the statute of repose's limitation on liability into WPLA," the limitation is "mandatory to the existence of a WPLA claim." *Id.* at 18.

That was wrong. Repose is *not* an element of a WPLA claim but an *affirmative defense* on which the defendant bears the burden of proof. RCW 7.72.060(1)(a). The plaintiff can establish liability without even mentioning the date a product was first sold.

Contrary to Division One's novel approach, ordinary choice-of-law principles control. Choice of law is "part of the common law" and thus "as definitely a part of the law as any other branch of the state's law." Restatement (Second) of Conflict of Laws § 5 cmt. a, c. For a statute to abrogate such common-law rules, "there must be *clear evidence* of the legislature's intent." *Dearinger v. Eli Lilly & Co.*, 199 Wn.2d 569, 575, 510 P.3d 326 (2022) (emphasis added). As this Court recently noted, the "WPLA itself recognizes this principle, stating, 'The previous existing applicable law of this state on product liability is modified only to the extent set forth in this chapter.'" *Id.* (quoting RCW 7.72.020(1)). That "previous existing applicable law" includes *Spider Staging*'s adoption of depeçage. The court's holding that an "integrated" statute is immune from choice-of-law analysis wrecks that common-law test. The decision allows not just the WPLA, but any statute to impliedly abrogate the common law.

The legislature could have directed choice of law on repose, but it didn't. The WPLA's language doesn't speak to the relevant question: whether the statute is "directed to choice of law"—that is, whether it "provide[s] 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. Such laws are rare. "Legislatures usually legislate … only with the local situation in mind" and "rarely give thought" to whether laws "should apply to out-of-state facts." Restatement (Second) of Conflict of Laws § 6 cmt. c.

If anything, the WPLA's statute of repose, far from requiring application to Missouri conduct, says the opposite. Its preamble says that the "intent of the legislature [was] that retail businesses located primarily *in the state of Washington* be protected from the substantially increasing product liability insurance costs." RCW 7.72.010 (emphasis added). The legislature's "intention to protect local businesses and manufacturers is not furthered by applying [Washington] law to immunize" Monsanto. *Martin v. Goodyear Tire & Rubber Co.*, 114 Wn. App. 823, 834-35, 61 P.3d 1196 (2003).

2. Division One's decision conflicts with every other court that has addressed whether to conduct a separate choice-of-law analysis for statutes of repose in products-liability statutes.

The New Jersey Supreme Court in *Gantes v. Kason Corp.*, for example, held that the plaintiffs' claims under Georgia's comprehensive products-liability statute were not subject to the statute's repose period and instead applied the law of the site of the tortious conduct to the issue of repose. 679 A.2d 106, 109 (N.J. 1996). Similarly, in *Marchesani v. Pellerin-Milnor Corp.*, the claims were governed by "the comprehensive Tennessee Products Liability Act," "of which the ten-year statute of repose is a component." 269 F.3d 481, 489 (5th Cir. 2001). Like Monsanto, the defendant claimed Tennessee's repose period was an "inseparable part of its substantive product liability law" and that depeçage "would destroy a deliberate and completely integrated statutory scheme." 2000 WL 33982512, at *28-33. The Fifth Circuit disagreed, applying the law of the manufacturer's home state because that state's interests "would be more adversely affected, if its law were not applied." *Marchesani*, 269 F.3d at 489.

Every other court to decide the issue has reached the same conclusion. *See, e.g.*, *Bruce v. Haworth*, 2014 WL 834184, at *3 n.2 (W.D. Mich. 2014) (Michigan products-liability act doesn't bar Georgia law on repose); *Ehrenfelt v. Janssen Pharms., Inc.*, 2016 WL 7335922, at *7 (W.D. Tenn. 2016) (Tennessee products-liability act doesn't bar Kansas repose statute); *Sico v. Willis*, 2009 WL 3365856 (Tex. App. 2009) (declining to apply Texas repose statute); *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242 (5th Cir. 1990) (similar for North Carolina statute); *Mahne v. Ford*, 900 F.2d 83 (6th Cir. 1990) (similar for Florida statute).

Division One didn't address any of these on-point decisions, which were cited below. Nor did it cite a single decision—by any court—adopting its contrary approach. Its only authority was a tentative draft of the in-progress Third Restatement, which it read to require that the same state's law govern both liability and repose. But the first page of the relevant chapter says the opposite: "Like the Restatement of the Law Second, Conflict of Laws, this Restatement analyzes and resolves choice-of-law problems in terms of individual issues." Restatement (Third) of Conflict of Laws, Tentative Draft 4, Ch. 6, Introductory Note (2023). This means that

"different issues in a single case or claim"—including repose—may "be governed by different states' laws." *Id.*; *see also id.* § 6.11 cmt. h (recognizing repose as a separate issue for issue-by-issue analysis). Regardless, neither this nor any other court has adopted the Third Restatement, which is still in draft form. *Spider Staging* remains the law of this State until this Court holds otherwise.

This Court should grant review to bring this case back in line with Washington law and the national consensus.

3. Unlike the issue of repose, Division One recognized that punitive damages in this case are governed by the law of Missouri, the "state of most significant relationship with respect to the issue of damages." Restatement (Second) of Conflict of Laws § 171 cmt. b. As this Court has explained, "a Washington court can award punitive damages under the law" of a state with a stronger interest in the issue. *Kammerer v. W. Gear Corp.*, 96 Wn.2d 416, 423, 635 P.2d 708 (1981).

The court of appeals, however, declined to apply Missouri law to allow punitive damages on one of the plaintiffs' claims—that Monsanto violated a post-sale duty to warn of the danger posed by PCBs. Without citing any Missouri statutory or judicial authority,

the court asserted, without analysis or explanation, that Missouri "cannot be said to have an interest" in the issue because it "lacks a cause of action for post-sale failure to warn." Op. 35.

In doing so, the court failed to engage in the careful "consideration of the interests and public policies" of each state required by *Spider Staging*. 87 Wn.2d at 582. As the plaintiffs explained below, 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.*, 26 S.W.3d 151, 156 (Mo. 2000) (recognizing continuing duty to warn under Missouri law); *Stanger v. Smith & Nephew, Inc.*, 401 F. Supp. 2d 974, 982 (E.D. Mo. 2005) (recognizing a claim under Missouri law for post-sale duty to warn).

By holding that Missouri lacks an interest without actually analyzing Missouri law, interests, or policies, Division One functionally skipped the balancing of interests mandated by *Spider*

Staging. This Court should grant review and require application of the proper test.

III. The majority's decision to exclude opinions of the plaintiffs' exposure expert warrants review.

Finally, the majority's conclusion that the trial court erred in admitting opinions of Kevin Coghlan, an industrial hygienist with 30 years of experience, presents issues of substantial public interest and conflicts with this Court's test for evaluating experts' methodology. By the time Coghlan began work on this case, Sky Valley had remediated PCB levels in the school, and enough time had passed that PCBs in the plaintiffs' blood had dissipated. Tr. 1339-41, 1704-05, 1781-85, 2481. Coghlan therefore offered three independent estimates designed to "reconstruct the historical levels of PCBs in the air." Dissent 5. Although Monsanto conceded that Coghlan's opinions were based on generally accepted peer-reviewed studies, the majority held that two of the estimates failed *Frye* because he used simple arithmetic and made basic assumptions about data inputs.

That holding starkly conflicts with this Court's precedents on when and how *Frye* applies. And it brings about exactly what this Court has warned against: "Requiring general acceptance of each

discrete and ever more specific part of an expert opinion would place virtually all opinions based upon scientific data into some part of the scientific twilight zone." *L.M. by & through Dussault v. Hamilton*, 193 Wn.2d 113, 130, 436 P.3d 803 (2019). That error itself warrants this Court's review. But this Court's oversight is especially important here, where the decision implicates verdicts in the eight cases in which Coghlan has testified, impacts scores of other plaintiffs, and parts ways with the views of six experienced judges.

A. *Frye* "requires experts to base their conclusions on generally accepted science." *Id.* at 128. This precludes opinions based on "novel" theories or methodologies not yet approved by the scientific community. *Id.* The premise is that "judges do not have the expertise required to decide whether a challenged scientific theory is correct" and so "defer this judgment to scientists." *State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996).

But that is the extent of *Frye*'s reach. *Frye* itself explained that "courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery." *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). Consistent with that design, this Court has ensured that courts do "not require every

deduction drawn from generally accepted theories to be generally accepted." *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn. 2d 593, 611, 260 P.3d 857 (2011). "Other evidentiary requirements"—and the central role of the jury in weighing evidence—prevent "deductions that are mere speculation." *Id.*; Dissent 4. By the same token, "concerns about [the] implementation" of a generally accepted methodology do not implicate *Frye*. *State v. Russell*, 125 Wn.2d 24, 55, 882 P.2d 747 (1994). Claims of "laboratory error," "cross contamination," "lack of controls," and even outright data manipulation—all of which a jury, aided by cross-examination, is well equipped to assess—go to "weight, not admissibility." *Copeland*, 130 Wn.2d at 275-76.

B. The majority's first error was to hold that Coghlan's two now-excluded opinions failed *Frye* because they relied on deductions supported by the application of math that, though rudimentary, had not been blessed by the scientific community.

1. Coghlan's first estimate used a methodology taken from a peer-reviewed EPA study (the "Guo study"). Op. 47. Guo exposed various materials, including carpets, to PCBs in a controlled environment. He then took several measurements of PCBs over

time and calculated a "partition coefficient"— "a ratio of how much [of a toxin] is in the air versus" in a given material. Tr. 1791-92. In other words, Guo took two knowns (PCBs in the air and PCBs in carpet over time) and, with measurements and application of a formula, calculated an unknown. Monsanto has not disputed that Guo's methods and findings are generally accepted.

Coghlan simply rearranged Guo's formula to solve for a different unknown. Whereas Guo took (a) levels of PCBs in the air and (b) levels of PCBs in the tested carpet to solve for (c) the partition coefficient, Coghlan used (b) the levels of PCBs in carpet that a Sky Valley teacher had preserved before remediation and (c) the partition coefficient to solve for (a)—the PCB-levels in the air at Sky Valley.

Division One faulted Coghlan for "develop[ing] a novel equation to 'work backward.'" Op. 53. But Coghlan only made a deduction through the application of basic algebra: that equations work in reverse. That is not a *Frye* issue.

The court of appeals relied on a single case in concluding otherwise: *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168, 313 P.3d 408 (2013). But despite

superficial similarity (both cases involved a "back calculation" and a "formula"), *Lake Chelan* is nothing like this case. The expert in *Lake Chelan* used a brand-new formula and admitted he "d[id]n't know" of anything done to verify it—not, as here, an accepted formula that was merely reversed. *Id.* at 177.

2. The majority made the same mistake in excluding a second of Coghlan's opinions. Coghlan based this independent opinion on another EPA-published study—whose general acceptance Monsanto again did not question—concerning PCB levels in New York schools. Coghlan used division to determine how PCB levels decreased in the schools after remediation (the "remediation factor"). So, a drop from 1,000 ng/m^3 to 100 ng/m^3 yielded a "remediation factor" of 10. Op. 56 n. 28. Relying on "remarkable" similarities between the New York schools and Sky Valley—both in remediation and in design and construction—Coghlan then multiplied post-remediation air samples taken from Sky Valley by the remediation factor to estimate pre-remediation levels. CP7456; Tr. 1785-90.

The majority held that this presented a *Frye* issue because the study "did not purport to make any similar calculations." Op. 56.

But, again, Coghlan made only a simple deduction—similar remediation techniques will have similar effects in similar schools—using simple math. *Cf. Acord v. Pettit*, 174 Wn. App. 95, 111, 302 P.3d 1265 (2013) (expert's "method of comparing tree stumps on the disputed area with a comparable region" to back-calculate when logging began didn't implicate *Frye*). That the original study didn't apply the same calculations is irrelevant under *Frye*. Here again, Division One's rule departs from other courts. *See In re Marriage of Alexander*, 368 Ill. App. 3d 192, 201 (2006) ("basic math" doesn't trigger *Frye*); *S. Energy Homes, Inc. v. Washington*, 774 So.2d 505, 518 (Ala. 2000) (same for "elementary mathematics").

C. The majority made a second category error squarely in conflict with this Court's precedent: It confused alleged errors in application of a methodology with a new methodology. For the "back calculation," the majority criticized Coghlan for employing a controlled experiment (where Guo knew that all PCBs came from the air) in a real-world setting where Coghlan allegedly couldn't guarantee that all PCBs came from the air and instead "assumed" it to be true, Op. 50-53. For the "remediation factor" analysis, the majority accepted the critique of Monsanto's expert that Coghlan

wrongly "assume[d]" that remediation in different schools "was exactly the same" and that Coghlan selectively chose air samples from Sky Valley. Op. 57

But these complaints are precisely what this Court has said present a jury issue, not a new methodology. Indeed, *State v. Copeland* rejected a similar argument against "transfer of DNA technology from medical diagnostic use to forensic use." 130 Wn.2d at 273-74. The types of problems about which Monsanto now complains ("lack of controls," "degradation," "cross contamination, etc.") go to weight, "not admissibility under *Frye*." *Id.* The majority, by failing to recognize that, supplanted the jury's role in evaluating expert testimony.

D. *Frye* is designed to protect juries from genuinely novel science that a trial judge isn't equipped to evaluate. Here, however, the court misapplied it to deprive juries of expert opinions grounded in EPA-published, peer-reviewed studies because an expert employed basic arithmetic and made basic assumptions about data inputs. If that is enough to trigger *Frye*, courts will get bogged down in litigation over each discrete step in an expert's work, and juries will be stripped of their primacy in trials. This

Court should step in to correct the majority's flawed approach and restore the jury's central role under the state constitution.

CONCLUSION

This Court should grant the petition.

I certify under RAP 18.17 that this petition contains 4,996 words, excluding the parts of the document exempted from the word count by RAP 18.17(c).

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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

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