

No. 73748-1-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

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BRAND INSULATIONS, INC.,

Appellant/Cross-Respondent,

v.

ESTATE OF BARBARA BRANDES,

Respondent/Cross-Appellant.

REPLY OF CROSS-APPELLANT

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I. INTRODUCTION

Brand fundamentally fails to establish the trial court's post-verdict reduction of the jury's damage award was available or appropriate under RCW 4.76.030. First, Brand undeniably failed to preserve any objection regarding the circumstances behind the trial court's remittitur. Second, the jury's award was not "unmistakably" "the result of passion or prejudice" sufficient to overcome the statutory presumption in favor of retaining the jury's valuation of damages. RCW 4.76.030. For either or both of these reasons, this Court should reinstate the jury's award of \$3.5 million for Barbara Brandes' non-economic losses arising out of her mesothelioma.

II. ARGUMENT

A. **Remittitur is Unavailable Because Brand Waived All Objections to the Alleged Errors Forming the Basis for the Trial Court's Remittitur.**

There can be no dispute that, upon learning of Ms. Brandes' death, the trial court explicitly invited Brand to object to continuing with the trial, and that defense counsel replied: "I don't think there's any reason not to proceed." RP 1373. Equally, there is no room for dispute that Brand interposed no objections to Plaintiff's supposedly improper closing argument. Washington law is clear that Brand's failure to object to the submission of the case to the jury the day after Ms. Brandes died or to object at any point during Plaintiff's closing argument deprives

Brand of the ability to seek relief from an adverse verdict on either basis.¹ Nevertheless, both Ms. Brandes' death and Plaintiff's closing argument informed the trial court's decision to grant remittitur as requested by Brand. Because these errors were waived, remittitur was and remains unavailable.

B. Even If Brand Did Not Waive Its Remittitur Argument, Washington Law Does Not Permit Remittitur.

If the Court is inclined to consider the merits of the trial court's remittitur (despite the fact that the issue is waived), the result is the same because the trial court had no discretion to reduce the jury's verdict. Under RCW 4.76.030, "the court of appeals...shall...review *de novo* the action of the trial court in requiring such reduction...and there shall be a presumption that the amount of damages awarded by the verdict of the jury was correct." Applying RCW 4.76.030, Washington courts have repeatedly recognized this statutory presumption that the verdict of the jury was correct.² Moreover, because remittitur inherently constitutes

¹ *Jones v. Hogan*, 56 Wn. 2d 23, 30, 351 P.2d 153 (1960) ("failure to request appropriate relief by the trial court *waived any error* as to" improper closing argument); *Sun Life Assurance Co. of Canada v. Cushman*, 22 Wn. 2d 930, 158 P.2d 101 (1945) ("respondents had a remedy, and it was their duty, if they expected to claim error based upon the alleged misconduct of appellant and the jury, not only to call the matter to the attention of the trial court, but, also, to claim a mistrial"); *Sommer v. Dep't of Soc. & Health Servs.*, 104 Wn. App. 160, 171, 15 P.3d 664 (2001) ("absent an objection to counsel's remarks, the issue of misconduct cannot be raised for the first time in a motion for a new trial unless the misconduct is so flagrant that no instruction could have cured the prejudicial effect."); *Collins v. Clark Cnty. Fire Dist. No. 5*, 155 Wn. App. 48, 96, 231 P.3d 1211, 1236-37 (2010), *as corrected on denial of reconsideration* (Apr. 20, 2010) (because defendants had failed to object or request a curative instruction during allegedly improper closing argument, that argument was not preserved for appeal).

² *See, e.g., Usher v. Leach*, 3 Wn. App. 344, 347, 474 P.2d 932, 935 (1970); *Green v. McAllister*, 103 Wn. App. 452, 461, 14 P.3d 795, 801 (2000), *as amended on clarification* (Nov. 22, 2000); *Thompson v. Berta Enterprises, Inc.*, 72 Wn. App. 531, 542, 864 P.2d 983, 989 (1994).

an “invasion of the jury realm,” the jury’s verdict must be sustained if it is within the range of the evidence considered in the light most favorable to the plaintiff. *Hendrickson v. Konopaski*, 14 Wn. App. 390, 396, 541 P.2d 1001, 1005 (1975). Washington law is equally clear that “[i]f the evidence supports the verdict and the trial has been conducted without error of sufficient gravity to warrant a reversal, the trial court cannot substitute its views of damages for those of the jury.” *James v. Robeck*, 79 Wn. 2d 864, 869, 490 P.2d 878, 881 (1971). This is so because “[t]o the jury is consigned under the constitution the ultimate power to weigh the evidence and determine the facts—and the amount of damages in a particular case is an ultimate fact.” *Id.*

Applying these legal principles and strong statutory presumptions to the facts at issue in this case, the jury’s award of \$3.5 million in non-economic damages was amply supported by the evidence offered and considered by the jury in rendering its verdict. The evidence demonstrated that Ms. Brandes experienced untold pain and suffering as the mesothelial tumor in the pleural tissue surrounding her lung slowly suffocated and killed her. For Brand to suggest that Ms. Brandes was in “no apparent distress” mere days before her death is impertinent. Reply Brief of Appellant/Cross-Respondent at 34. Indeed, the facts and circumstances Brand cites in attempting to minimize the scope of the record in support of Ms. Brandes’ non-economic damages are precisely the same as those cited by Brand’s counsel when arguing the issue of damages to the jury:

She was diagnosed in June. She passed. She was ill for 10 months. You could see in her deposition that at least at that point she didn't seem to be in any distress. She was certainly here for a day in court. And, frankly, I'm shocked that she passed because I thought that she -- I don't want to say she seemed fine -- but she certainly didn't seem to be on her death bed.

RP 1569-70. The jury considered this argument in light of the evidence presented at trial during its deliberation and nevertheless valued Ms. Brandes' damages non-economic damages at \$3.5 million. Brand's attempt to substitute its own partial perspective on Ms. Brandes' damages for the jury's evaluation of this same evidence and argument should be rejected.

The jury's award of \$3.5 million represents the jurors' case-specific valuation of Ms. Brandes' injuries, pain, suffering, and other intangible losses in light of the evidence adduced during trial, which has been summarized in Plaintiff's prior briefing and reviewed herein. Given the trial court's instruction that "[t]he law has not furnished us with any fixed standards by which to measure noneconomic damages," CP 5138, in conjunction with the evidence offered at trial of Ms. Brandes' symptoms and injuries, it cannot credibly be said that the jury's award grossly overvalued Ms. Brandes' pain, suffering, disability, and other losses. Because the jury's award was exclusively a measure of non-economic damages "for which the law provides no fixed measure" and the jury was instructed to use their judgment in determining the measure, a \$3.5 million award for the suffering experienced by Barbara Brandes is reasonable and supported by the evidence at

trial, which showed that Ms. Brandes' lungs were encased with a tumor that pervaded her pleural tissue surrounding the lung parenchyma and ultimately precipitated her death by suffocation. During the one day she was able to appear in Court, Ms. Brandes was confined to a wheelchair and receiving supplemental oxygen. *E.g.*, RP 169, 172-74.

Brand's sole argument grounded in the trial record points to the following facts as demonstrating that the jury's verdict was excessive and unsupported by the evidence: 1) Ms. Brandes was diagnosed with mesothelioma 11 months before her death; 2) Ms. Brandes experienced "pain controlled by medication," "shortness of breath controlled by chemotherapy," "neuropathy, and a loss of mobility"; and 3) Ms. Brandes was able to appear in court for one day during which time she was "in no apparent distress." Reply Brief of Appellant/Cross-Respondent at 34. Brand's characterization of Ms. Brandes' experience during her illness grossly misrepresents and downplays her suffering for the nearly one-year period over which she deteriorated from a healthy, independent woman to the condition she was in leading up to her death, and is offensive.

Brand omits the fact that, when Ms. Brandes appeared in court during trial for one afternoon, she had been discharged that same day from an inpatient rehabilitation facility where she was receiving treatment for pneumonia and a bacterial infection stemming from the chemotherapy port in her chest. RP 172-73. Brand also ignores the reality that, after being in court for a half-day, Ms. Brandes

traveled straight home where she remained until her death several days later. *See* RP 250. In contrast to the vibrant and energetic woman she had been before her diagnosis, on April 7, 2015, when she appeared in court, Ms. Brandes was confined to a wheelchair, dependent upon the help of others for the basic functions of daily living, and also reliant upon the use of supplemental oxygen to breathe. *E.g.*, RP 169, 172-74. The jury had the opportunity to observe and consider in its assessment of damages the striking contrast between Ms. Brandes' profoundly declined physical condition on the day she appeared in court and her condition during her videotaped preservation deposition taken months prior. RP 250.

Additionally, as set forth in Plaintiff's prior briefing, Plaintiff offered at trial substantial evidence of Ms. Brandes' non-economic damages—far in excess of the discrete examples discussed by Brand. Evidence of Ms. Brandes' non-economic damages was presented in the form of testimony from Ms. Brandes herself via her videotaped deposition, Ramona and David Brandes—two of the Brandes' children—and Ms. Brandes' treating oncologist, Dr. Sharmila Ahmed. *E.g.*, RP 140-76, 250-85, 354-72. These witnesses described the symptoms, injuries, and disabilities Ms. Brandes suffered as a result of her mesothelioma over the course of the approximately year-long interval from her diagnosis to death. Those symptoms not only included shortness of breath and neuropathy as Brand acknowledges, but also severe and chronic pain, fatigue, weight loss, protracted nausea, and recurring immune system complications. *E.g.*, RP 165-67.

Ramona Brandes, for example, testified that her mother had endured nine rounds of chemotherapy since being diagnosed with mesothelioma and, during that treatment, had experienced increasing shortness of breath and developed “a really sharp pain in her back, like she was being stabbed with a knife” shortly before learning that her tumor growth, although initially slowed by the chemotherapy, had “resurged very dramatically.” RP 164-65. Furthermore, Ramona Brandes described her mother’s symptoms as follows:

Q. What are your observations of the symptoms your mom was experiencing since her diagnosis?

A. Since her diagnosis. So, initially, she was extremely short of breath and fatigued, and she could not stop coughing. [F]rom June until July, I couldn’t really talk with her, because she coughed nonstop. You couldn’t really even communicate, because she just coughed and coughed and coughed. ...

But the chemo, my mom complained of a lot of nausea. And she had a lot of difficulty with her bowels. They would either be extremely impacted or the opposite where she would have extreme diarrhea and a lot of cramping. So she had a lot of pain and discomfort associated with that. She [] would be fine for about four days after the chemo, but then she would become quite ill for the next 10 days. She complained of a lot of achiness and general -- I think the word is malaise where you just -- you can really sleep. But she couldn’t [] really do anything either. It was just kind of laid around and ached for the 10 days...

I have noticed [] her ability to [] do things with her hands is significantly decreased. And it got worse the more chemo that she got. She used to be a painter. And I noticed like her handwriting has gotten really shaky, like she can’t really hold the pencil anymore. So she doesn't do like those kinds

of arts and crafts things that she used to do, because [] she describes it as being painful. ...

She had a dramatic loss of weight. She used to weigh about 240, 250, and she's lost about 100 pounds. [S]he barely eats. She'll eat a few bites of something now. She has bruising on her arms...from all the blood draws that they have to do. ...

[S]he exhibits signs of extreme fatigue again like she would have -- I would see her struggling to breathe if she tried to walk across the room or step up like one step. ... She's gotten really -- her balance is -- you can see her -- she like totters. She's like wobbly now. And, recently, I visited her in the hospital. And she needed to go to the bathroom, which was just a few steps... And when she came back from the bathroom, she was, for a long time, for like 15 minutes, just sitting there trying to breathe. And she now has to be on oxygen.

RP 165-69. This evidence, too, provides overwhelming support for the jury's damages award.

Dr. Ahmed likewise testified to the debilitating side-effects of the chemotherapy Barbara Brandes underwent, including nerve damage that created "a sensation of numbness and tingling in the fingertips and the toe tips, which make it difficult for a person to walk or maintain their balance," and which "can be painful and uncomfortable." RP 472-73. Dr. Ahmed further described that Ms. Brandes experienced "severe fatigue," "fevers, chills," "exhaustion and significant pain at the side of her chest." RP 479. Dr. Ahmed explained that Ms. Brandes had battled pneumonia and septicemia, a potentially life-threatening condition which precipitated her hospitalization, as a consequence of her immune system being

compromised by the chemotherapy treatment. RP 478. Ultimately, Dr. Ahmed confirmed for the jury that Ms. Brandes' mesothelioma was terminal, and that the cancer would eventually affect her other vital organs and would claim her life, as eventually occurred. RP 479-80.

While it is true—as Brand notes—that the trial court told the jury that Ms. Brandes had passed away and immediately thereafter delivered the jury instructions, that is not a valid reason to grant remittitur because the court explicitly limited the jury's evaluation of damages to solely non-economic losses experienced up to the time of Ms. Brandes' death. CP 5138, RP 1492. The trial court's instructions to the jury as to the measure of damages also unequivocally acknowledged that the determination of non-economic loss was an inherently idiosyncratic one, for which the law provides no real guidance, as the jury was instructed:

If your verdict is for the plaintiff, then you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by the negligence of the defendant.

If you find for the plaintiff in making a damage award, you should consider the following elements of noneconomic damages: 1) the nature and extent of the injuries; 2) the disability and [in]convenience and loss of enjoyment of life experienced by Barbara Brandes; and 3) the pain and suffering, both mental and physical, experienced by Barbara Brandes. ...

Your award must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to measure noneconomic damages; with

reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

CP 5138 (Jury Instruction No. 10), RP 1492. Thus, the jury was instructed that each juror's "own judgment," along with the evidence presented at trial, were the exclusive factors permitted to inform their discussion, evaluation, and award of the non-economic damages exclusively sought in this case. The jury, of course, is presumed to follow that instruction. *See State v. Barry*, 183 Wn.2d 297, 306, 352 P.3d 161 (2015) ("A jury is presumed to follow the court's instructions...").

Finally, Brand's contention that the Court should disregard Plaintiff's discussion of other trial verdicts in evaluating the remittitur imposed here is without merit. The purpose of referencing other comparable verdicts is to demonstrate the relationship between the type of evidence of pain and suffering developed in the case at bar and the non-economic damages awarded on the basis of such evidence in analogous cases. While certainly not an absolute benchmark against which any court could measure the reasonableness of a damage award, this information is relevant to the Court's consideration of the validity of the trial court's observation that remittitur was appropriate because the jury's verdict of \$3.5 million for non-economic damages was "outside of the range of what would be expected in light of the facts of the case." CP 5430. The jury verdicts discussed in Plaintiff's prior briefing were all cases involving terminally-ill or severely injured plaintiffs, both in asbestos and non-asbestos cases. Those verdicts, ranging from \$900,000 to

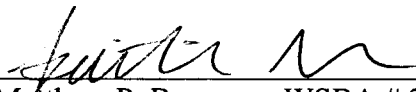
\$15,000,000 in their valuation of non-economic damages, CP 5287-311, simply serve to confirm that juries' awards of compensation for non-economic damages, including pain and suffering, in such cases often far exceed the jury's award in the present case.

III. CONCLUSION

The trial court's remittitur of the jury's verdict from \$3.5 to \$2.5 million does not comport with the statutory requirements of RCW 4.76.030. The trial court erred in reducing the jury's verdict awarding non-economic damages for Ms. Brandes' pain, suffering, and other intangible losses when the exceedingly stringent threshold for remittitur was not met. Consequently, the Court should reinstate the jury's verdict. In all other respects, the Court should affirm.

RESPECTFULLY SUBMITTED this 13th day of June, 2016.

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CERTIFICATE OF SERVICE

I certify that on June 13, 2016, I caused to be served a true and correct copy of the foregoing document upon:

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