

NO. 71429-5-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

BETTY ESTENSON, individually and as Personal Representative
of the Estate of EDWIN ESTENSON, deceased,

Respondents,

v.

CATERPILLAR INC.,

Appellant.

BRIEF OF APPELLANT CATERPILLAR INC. - CORRECTED

José E. Gaitán, WSBA No. 7347
Virginia Leeper, WSBA No. 10576
THE GAITÁN GROUP, PLLC
3131 Elliott Avenue, Suite 700
Seattle, Washington 98121
Telephone: (206) 346-6000
Facsimile: (206) 346-6019
Attorneys for Caterpillar Inc.

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A. INTRODUCTION

The Appellant Caterpillar Inc. (hereinafter “Caterpillar”) has brought this appeal because its Motion for Summary Judgment was wrongfully denied and because Caterpillar did not receive a fair trial.

The trial court’s denial of Caterpillar’s Motion for Summary Judgment should be reversed, the case dismissed, and the verdict vacated.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error.

1. The trial court erred in denying Caterpillar’s Motion for Summary Judgment.

2. The trial court erred in denying Caterpillar’s Motion for New Trial.

3. The trial court erred in denying Caterpillar’s Motion to Vacate the Verdict.

4. The trial court erred in denying Caterpillar’s motion to exclude plaintiffs’ confusing and misleading deposition designations.

5. The trial court erred in denying Caterpillar’s request to read to the jury additional deposition testimony of Edwin Estenson to complete the record and clarify plaintiffs’ confusing and misleading deposition designations.

6. The trial court erred in denying Caterpillar’s motion to

limit the scope of Dr. Mark's testimony to exclude questions or opinions regarding Caterpillar brakes.

(2) Issues Pertaining to Assignments of Error.

1. Did the trial court err in denying Caterpillar Inc.'s Motion for Summary Judgment where there was no evidence, nor reasonable inference that could be drawn, that Edwin Estenson inhaled airborne respirable asbestos fibers from a product manufactured, distributed, sold, or designed by Caterpillar Inc. or that Caterpillar Inc. products were a substantial factor in causing Mr. Estenson's disease? (Assignment of Error 1)

2. Did the trial court err in allowing plaintiffs, over objection by Caterpillar, to read to the jury deposition "counter-designations" of Edwin Estenson's discovery deposition testimony, which, as to Caterpillar, were actually untimely, incomplete, misleading direct designations that violated the Case Management Order and KCPSO Rule 9.5? (Assignments of Error 2 and 4)

3. Did the trial court err in denying Caterpillar's CR 32(a)(4) and CR 32(a)(2) requests for permission to clarify and complete the record of Mr. Estenson's deposition testimony relating to Cummins motor gasket removals and his brake and clutch work on a Bucyrus oil well drilling machine? (Assignments of Error 2 and 5)

4. Did the trial court err in allowing plaintiffs' pathologist, Dr. Eugene Mark, to express his opinion that Caterpillar brakes were "significant" in causing Mr. Estenson's mesothelioma when there was no competent evidence in the record that Mr. Estenson had worked with Caterpillar brakes and clutches? (Assignments of Error 2 and 6)

5. Did the trial court err in denying Caterpillar's Motion to Vacate the Verdict where the amount of the non-economic damages awarded were 14 times the amount of economic damages? (Assignment of Error 3)

C. STATEMENT OF THE CASE

This case was brought by Ms. Betty Estenson, individually and as Personal Representative of the estate of her deceased husband Edwin Estenson. (CP 1-5) The Complaint was originally filed in Los Angeles County, California, in 2011, as a personal injury action prior to Mr. Estenson's death. The action was moved to Washington on July 26, 2011, based upon *forum non conveniens*. In the Washington Complaint, the Estensons sued 51 manufacturers of asbestos products (CP 1-5) and alleged inhalation of asbestos fibers from products present during Mr. Estenson's service in the United States Navy, during several years of work in construction, and during his work maintaining heavy equipment and vehicles. (CP 1-5) When Mr. Estenson passed away at the age of 80,

plaintiffs filed an amended complaint for wrongful death. (CP 4287-4291) Caterpillar does not dispute that Mr. Estenson died of complications from mesothelioma cancer.

(1) Summary Judgment Motion.

At summary judgment and trial, Mr. Estenson was the sole product identification witness who gave testimony relating to Caterpillar products he worked with or around. (CP 2447-2480, CP 2482-2724, CP 2726-2947) On December 5, 2012, Caterpillar brought a Motion for Summary Judgment in King County Superior Court. (CP 29-102) In that motion, Caterpillar asserted that there was no evidence that Mr. Estenson had breathed airborne respirable asbestos fibers from a Caterpillar product. (CP 29-43) In response to Caterpillar's Summary Judgment Motion, plaintiffs submitted excerpts taken from 182 pages of Mr. Estenson's deposition testimony.¹ (CP 125-165, CP 4296-4315)²

(a) Plaintiffs Submitted No Evidence Mr. Estenson Worked With Asbestos-Containing Components.

In the excerpts of Mr. Estenson's testimony plaintiffs submitted at

¹ Mr. Estenson was first deposed in the California case by his counsel on June 9, 2011. (CP 2447-2480) The perpetuation deposition was followed by a discovery deposition that lasted seven days. (CP 2482-2724) On October 11, 2011, Mr. Estenson's discovery deposition in the Washington action began. It continued for seven additional days. (CP 2726-2947) In all, Mr. Estenson's perpetuation and discovery deposition testimony constitute 15 volumes of testimony.

² Plaintiffs also submitted excerpts of a deposition taken in a marine diesel engine case of Eugene Sweeney, a former Caterpillar corporate representative, and a Declaration of Dr. Eugene Mark. (CP 103-113, CP 167-176)

summary judgment, he testified that he personally worked on three Caterpillar bulldozers and was a supervisor to others who worked on three Caterpillar bulldozers and a Caterpillar grader. He also testified that he observed someone work on another Caterpillar bulldozer. His testimony is summarized below:

1. **D8 bulldozer at Morrison Knudsen (1955 - Cole, Montana)**

- (a) He helped remove and replace a rod bearing and remove half of a 5" x 8" rod bearing inspection portal gasket. He testified that he inhaled dust emitted from the gasket during its removal, but admitted on cross-examination that he did not know what the gasket he removed was made of. He described the gasket he installed as a "soft cork type material" that was "cut to fit." Plaintiffs submitted no competent testimony that the gasket was asbestos-containing or that Mr. Estenson inhaled asbestos-containing dust during the removal of half of the 5" x 8" gasket. (CP 4301-4305, 103:8-120:18, CP 4305, 119:15-20)
- (b) He adjusted the clutch on the power control unit by changing, tightening and loosening nuts. (CP 4305, 120:11-13) Plaintiffs' submission contained no testimony or other evidence that the power control unit contained asbestos

components, that this work generated dust, or that Mr. Estenson inhaled dust. (CP 4301-4305, 103:8-120:18)

(c) He cleaned the power control unit. Plaintiffs' submission contained no testimony from Mr. Estenson and there was no other evidence submitted that the power control unit contained asbestos components. Although Mr. Estenson testified that he blew out dirt and dust, he did not testify that he inhaled any dust or describe the composition of that dust. (CP 4305, 120:14-18, CP 4301-4305, 103:8-120:18)

2. D8 bulldozer at Robinson Caves (1959-1960 – Great Falls, Montana)

(a) He assisted a mechanic “tear down” the gasoline powered “pony” (starter) motor on the D8 bulldozer and in the process assisted in scraping off part of the starter motor’s head gasket. Plaintiffs did not submit any testimony or other evidence that Mr. Estenson worked with asbestos-containing components, that this work generated dust, or that he inhaled dust while doing this work. (CP 4308, 131:20-132:3; CP 4309, 136:19-137:4; CP 4310, 140:5-7)

(b) He was present part of the time when a mechanic overhauled the carburetor on the “pony” (starter) motor.

The mechanic, after soaking the carburetor in solvent, removed the gasket between the two halves of the carburetor and the gasket between the carburetor and the motor. Plaintiffs submitted no testimony and there was no other evidence that this involved work with asbestos-containing components, that this work generated dust, or that he inhaled dust from the work. (CP 4308 – 4309, 134:17-137:13)

(c) He performed track adjustments. He did not testify and there was no evidence that this work involved asbestos-containing components, that this work generated dust, or that he inhaled dust from this work. (CP 4305, 121:9-12)

3. D9 bulldozer at Robinson Caves (1959-1960 - Great Falls, Montana)

(a) He performed “minor maintenance.” Plaintiffs’ submission contained no testimony and plaintiffs submitted no other evidence that Mr. Estenson worked with asbestos-containing components, that this work generated dust, or that he inhaled dust from this work. (CP 4305-4307, 121:13-131:19)

(b) He watched a factory representative repair the fuel injector

pump. Plaintiffs did not submit any testimony or any other evidence that Mr. Estenson worked with asbestos-containing components, that this work generated dust, or that he inhaled dust from this work. (CP 4305, 120:25-122:16; CP 125-165; 4296-4315)

4. **New D6 bulldozer at Glasgow Air Force Base (1964-1968 - Glasgow, Montana)**

(a) He observed others perform “standard maintenance, i.e., changing oil, etc.” Plaintiffs submitted no testimony from Mr. Estenson or any other evidence that he worked with asbestos-containing components, that this work generated dust, or that he inhaled dust from this work. (CP 4311, 146:5-9).

5. **Old D6 bulldozer at Glasgow Air Force Base (1964-1968 - Glasgow, Montana)**

(a) He observed others replace the injection pump, oil filter gasket, cooling system gaskets, and install a water pump. Plaintiffs, again, submitted no testimony from Mr. Estenson or any other evidence that he worked with asbestos-containing components, that this work generated dust, or that he inhaled dust from this work. (CP 4311-4312,

146:21-147:13; CP 4313, 151:8-10)

6. **D7 bulldozer at Glasgow Air Force Base (1964-1968 - Glasgow, Montana)**

(a) He observed others perform track work. Plaintiffs submitted no testimony or other evidence that Mr. Estenson worked with asbestos-containing components, that the work generated dust, or that he inhaled dust from this work.

(CP 4315, 160:1-16)

7. **D12 grader at Glasgow Air Force Base (1964-1968 - Glasgow, Montana)**

(a) He observed others work on the ball joint, on the steering system, and on the blade operating mechanism. Plaintiffs submitted no testimony or other evidence that he worked with asbestos-containing components, that this work generated dust, or that he inhaled dust from this work. (CP

4315, 160:21-25, 161:11-21, 162:2-11; CP 4313, 153:8-13, 151:22-152:9)

8. **RD7 bulldozer at Farason Construction**

(a) He initially testified he observed someone replace gaskets

on the water pump.³ Plaintiffs submitted no testimony or other evidence that anyone worked with asbestos-containing components, that this work generated dust, or that he inhaled dust from this work. (CP 4297, 78:4-19)

An additional excerpt of Mr. Estenson's testimony submitted by plaintiffs described a visit Mr. Estenson made to the Glasgow, Montana, Caterpillar dealership sometime between 1960 and 1962. (CP 4298, 85:13-15) At the summary judgment hearing, plaintiffs' counsel stated this visit was a "non-issue" and "insignificant." (RP 2/8/13, 7:23-8:2)

In all of Mr. Estenson's testimony submitted by plaintiffs, he identified only one Caterpillar component part which he initially testified that he "understood" contained asbestos. (CP 139, 79:5-14) It was a 5" x 8" gasket for a rod bearing inspection portal panel on a 1945 Caterpillar D8 bulldozer, half of which he helped remove in 1955. (CP 139, 79:9-14) The court had before it at summary judgment Mr. Estenson's subsequent cross-examination in which he admitted that, in fact, he did not know what the 5" x 8" rod bearing inspection portal panel gasket was made of. (CP 4304, 116:12-13) Plaintiffs did not offer any other evidence at summary judgment that the rod bearing inspection portal

³ He later testified that during the two weeks he was there the only work done was general maintenance. That general maintenance included greasing the tracks, fueling the dozer, and checking the oil. (CP 2889, 10-19-11, 530:19-24)

panel gasket was asbestos-containing.

As set out above, plaintiffs also did not submit any testimony or other evidence that the work described by Mr. Estenson on the other six Caterpillar bulldozers and one grader involved asbestos components. (CP 125-165, 4296-4315)

(b) Plaintiffs Submitted No Evidence Any Components Worked On, Removed, or Installed By Anyone Were Manufactured, Supplied, Sold, or Distributed By Caterpillar.

In plaintiffs' excerpts submitted at summary judgment, there was no testimony by Mr. Estenson that he had knowledge of the maintenance history of any Caterpillar equipment on which he or others had worked. (CP 125-165, 4296-4315) There was also no testimony submitted in which Mr. Estenson testified that he knew whether any part that he or others had removed was an original manufacturer-installed part. (CP 4301, 106:11-14; 4307, 130:3-10; 4310, 141:2-5; 4312, 150:4-6; 4315, 161:8-10) Mr. Estenson testified he did not purchase any replacement parts for the Caterpillar bulldozers he worked on or around. (CP 125-165, 4296-4315) Finally, plaintiffs submitted no testimony from Mr. Estenson that he had any personal knowledge of who manufactured any of the replacement parts that were installed. (CP 125-165, 4296-4315)

At summary judgment, plaintiffs also submitted excerpts taken

from a 30(b)(6) deposition of a former Caterpillar corporate representative, Mr. Eugene Sweeney. This deposition was not taken in the Estenson case, but, rather, was taken five years earlier in *Arleen Pellegal v. Northrop Grumman Ship Systems, Inc., et al.*, a case venued in New Orleans, Louisiana. There, Mr. Sweeney was questioned about Caterpillar marine diesel engines in a shipyard asbestos case. He was asked no questions relating to bulldozers, bulldozer motors, or grader motors, nor was he asked any questions about any of the Caterpillar equipment on which Mr. Estenson claimed to have worked. (CP 167-176) Mr. Sweeney offered no testimony that any of the equipment on which Mr. Estenson claimed he had worked had asbestos-containing components.

Despite a record that was totally devoid of competent evidence that Mr. Estenson worked with Caterpillar equipment components that contained asbestos from which he breathed airborne respirable asbestos fibers, the court denied Caterpillar's Motion for Summary Judgment. (CP 200-201)

(2) Trial.

At trial, plaintiffs presented Mr. Estenson's testimony by playing and reading excerpts of his testimony from his perpetuation and discovery depositions. When plaintiffs read excerpts of Mr. Estenson's discovery deposition testimony to the jury, the only defendants remaining at trial

were Caterpillar and CertainTeed. (RP 4/23/13, 14:19-15:4) CertainTeed manufactured asbestos cement siding. (CP 2466, 65:1-7) CertainTeed settled prior to verdict. (RP 5/6/13, 6:22-7:1)

(a) Cummins Gasket Testimony.

At trial, over multiple defendants' objections,⁴ (RP 4/22/13, 9:12-20:12, 21:20-29:16) the Court permitted plaintiffs to read "counter deposition designations"⁵ that were incomplete, misleading, and improperly sequenced excerpts of Mr. Estenson's deposition testimony that appeared to describe Mr. Estenson's removal of **Caterpillar gaskets** that he purportedly removed from the motor of a Caterpillar D8 bulldozer. All of the testimony plaintiffs read was comprised of selected excerpts taken from Mr. Estenson's October 19, 2011, discovery deposition. (CP 1017-1028) In fact, with the exception of the introductory section, wherein a D8 Caterpillar bulldozer at Morrison Knudsen was referenced (CP 1018, 488:7-12), all of Mr. Estenson's testimony related entirely to gasket removals on **Cummins** diesel motors, not **Caterpillar** diesel

⁴ In addition to Caterpillar, defendants Navistar and CertainTeed objected that they were confused as to which of plaintiffs' counter-designations plaintiffs intended to read to the jury in light of defendant Crane Co. settling during opening statement. Defendants contended that since Crane's deposition designations were now withdrawn, plaintiffs' counters to those should be withdrawn as well. (RP 4/22/13, 9:12-20:12, 21:20-29:16)

⁵ Prior to trial, each defendant designated portions of Mr. Estenson's depositions to read to the jury. In response, plaintiffs "counter-designated" additional excerpts of these depositions. In a few instances, plaintiffs improperly counter-designated portions of Mr. Estenson's depositions that defendant Crane Co. had already designated. (CP 554-580, CP 1945-1981)

motors. (See, CP 2878-2883 – October 19, 2011, deposition pages and compare with CP 1018-1019, 488:7-506:10 – deposition excerpts read to the jury.) Cummins had settled with plaintiffs months before trial and was no longer a defendant. (RP 4/15/13, 2:1-18) Plaintiffs read four short excerpts (CP 1018-1019, 494:17-507:16) taken from 18 pages of Mr. Estenson’s testimony (CP 2880-2883) in which he described removal of gaskets from **Cummins** motors, without once disclosing that he was describing work on **Cummins** motors. In fact, plaintiffs **omitted** every single one of the 27 references to “Cummins” in their reading of these four excerpts. The result of which was to suggest that Mr. Estenson was describing work on **Caterpillar** motors, when in fact his testimony was describing work on **Cummins** motors.

(b) Bucyrus Brake and Clutch Testimony.

Also, at trial, and again over objection, (RP 4/22/13, 9:12-20:12, 21:20-29:16) plaintiffs were permitted to read additional incomplete, misleading, and improperly sequenced excerpts of Mr. Estenson’s deposition testimony. These ostensibly related to brake and clutch (friction product) work that he performed on a Caterpillar D8 bulldozer. (CP 984-1005) The testimony was taken from three depositions and sequenced in a manner that obscured that Mr. Estenson was describing daily brake and clutch work he had performed on **Bucyrus** equipment.

The omissions of references to Bucyrus and the sequencing made it appear that Mr. Estenson was referring to Caterpillar equipment. (CP 984-1005) Bucyrus, like Cummins, was a defendant that had settled with plaintiffs before trial. (RP 4/15/13, 2:1-18) Nevertheless, this was inexplicably included in the testimony plaintiffs read to the jury.

The first excerpt plaintiffs presented was on videotape and referenced Mr. Estenson's work on the Caterpillar D8 bulldozer at Morrison Knudsen. This excerpt was taken from Mr. Estenson's June 9, 2011, perpetuation deposition. (CP 130-140) There, Mr. Estenson testified he had worked on a Caterpillar D8 bulldozer while employed at Morrison Knudsen at their Cole, Montana, site. (CP 138-139, 71:14-80:6, CP 147, 14:24-15:5)

Plaintiffs next read an excerpt taken from Mr. Estenson's June 23, 2011, discovery deposition. (CP 984-986) In this excerpt, Mr. Estenson testified that he worked on heavy equipment at the Cole, Montana, site and that all work was done outside. The record is devoid of any indication that plaintiffs informed the jury that plaintiffs were reading from a different deposition, taken at a different time, from the June 9, 2011, Estenson testimony.

Next in sequence, and immediately following the June 23, 2011, excerpt, the plaintiffs read an excerpt taken from Mr. Estenson's

October 11, 2011, deposition testimony. (CP 987-992) There, Mr. Estenson described daily maintenance and cleaning of brake shoes, pads, brake drums, and clutches. Similarly, this testimony was read to the jury without any disclosure (1) it had been taken from a completely different deposition that had been taken months later; (2) that it was describing Mr. Estenson's work on brake shoes, brake pads, brake drums, and clutches on a **Bucyrus** oil well drilling machine and **not** a Caterpillar D8 bulldozer; nor (3) that the machinery Mr. Estenson was describing was not located in Cole, Montana, but in a completely different city: Cut Bank, Montana. (CP 2730, 9:9-11:2)

This excerpt was then immediately followed by excerpts taken from the October 11, 2011 deposition that began with Caterpillar's counsel identifying himself as counsel for Caterpillar, then followed by his questioning regarding Mr. Estenson's work on the Caterpillar D8 bulldozer at Morrison Knudsen at Cole, Montana. (CP 987-988, 74:9-17)⁶ These incomplete, misleadingly sequenced excerpts, presented without disclosure or attribution of who manufactured the equipment being described, created a false and highly prejudicial inference that Mr. Estenson performed daily brake and clutch work on a Caterpillar bulldozer, when in fact he was describing daily brake and clutch work on

⁶ Plaintiffs did not disclose that they had skipped 55 pages of Mr. Estenson's October 11, 2011, testimony between the Bucyrus excerpts and the Caterpillar questioning excerpts.

Bucyrus equipment. Like the Cummins excerpts, they inexplicably omitted references to Bucyrus.

Because of the manner in which these excerpts were identified, Caterpillar's counsel did not immediately realize what had occurred. When he discovered the critical omissions and misleading sequencing, counsel immediately brought it to the attention of plaintiffs' counsel. (CP 2437-2442, CP 4168-4183) The plaintiffs had not rested. (RP 5/13/13, 77:14-17)

He requested in writing that the plaintiffs complete the deposition by reading two additional excerpts which totaled seven pages to make clear that the brake, clutch, and gasket work described in the plaintiffs' excerpts related to Estenson's work on Cummins and Bucyrus equipment, not Caterpillar bulldozers. (CP 2437-2444) Plaintiffs' counsel did not respond to Caterpillar's written request for completion and clarification. (CP 2437-2444)

The next day Caterpillar's counsel asked the court for permission to complete the reading of Mr. Estenson's deposition with the additional seven pages. (RP 5/6/13, 48:13-57:6) Caterpillar's counsel told the court that the Cummins and Bucyrus excerpts that plaintiffs had read to the jury were confusing and that the reading of additional excerpts was necessary for the jury to understand his testimony. Caterpillar's counsel stated that

reading of the seven pages was necessary for context and so that the jury would not be misled and left with a mistaken and prejudicial misimpression that Mr. Estenson had performed brake and clutch (friction product) work on Caterpillar equipment when he had not. (RP 5/6/13, 48:19-49:11)

Plaintiffs' counsel objected to reading additional excerpts of Mr. Estenson's testimony (RP 5/6/13, 50:7-52:23) arguing that the request was unsupported by the law, prejudicial to plaintiffs because it would highlight portions of Mr. Estenson's testimony, and the request was too late. (RP 5/6/13, 50, et seq.) (RP 5/13/13, 77:14-16)

The court denied Caterpillar's request to complete the Estenson deposition testimony. (RP 5/6/13, 56:25-57:6) Because of this ruling, the clarifying testimony was not before the jury and could not be argued. The ruling prevented the jury from learning that those critical excerpts did not relate to Caterpillar equipment.

(c) Opinions of Dr. Eugene Mark.

At trial, prior to the testimony of plaintiffs' pathologist, Dr. Eugene Mark, Caterpillar objected to Dr. Mark expressing his opinion that Mr. Estenson's work with Caterpillar brakes was a cause of his mesothelioma. (RP 5/2/13, 4:5-16) Caterpillar correctly asserted that there was no evidence in the trial record that Mr. Estenson had worked

with Caterpillar brakes and, therefore, there was no foundation for Dr. Mark to express his opinion that Mr. Estenson's work with Caterpillar brakes was a cause of Mr. Estenson's mesothelioma. Plaintiffs' counsel argued that she believed there was testimony in the record that established that Mr. Estenson inhaled asbestos fibers from Caterpillar friction products. (RP 5/2/3, 5:2-25) The court overruled Caterpillar's objection and permitted Dr. Mark to express his opinion that Mr. Estenson's work with Caterpillar friction products was a cause of his mesothelioma. (RP 5/2/13, 4:5-17, 134:17-24)

After a four week trial, despite no substantial evidence that Mr. Estenson inhaled airborne respirable asbestos fibers from a Caterpillar manufactured, supplied, sold, or distributed asbestos-containing component, the jury returned a verdict in favor of the plaintiffs and against Caterpillar in the amount of \$6,031,928.00. (CP 1074-1075) The verdict's non-economic damages were 14 times the alleged economic damages. After trial, Caterpillar brought a motion to vacate the verdict, (CP 2416-2426) alleging that it was both unsupported by the evidence and excessive. The trial court denied Caterpillar's motion. (CP 4187-4188)

D. ARGUMENT

- (1) The Court Erred in Denying Caterpillar’s Motion for Summary Judgment Where the Plaintiffs Failed to Adduce Competent Evidence that a Caterpillar Product Was a Substantial Factor in Causing Edwin Estenson’s Mesothelioma Cancer.

An appellate court engages in the same inquiry as the trial court and reviews the denial of a summary judgment motion *de novo*. *Van Noy v. State Farm Mutual Automobile Insurance Co.*, 142 Wn.2d 784, 16 P.3d 574 (2001). When reviewing “an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.” RAP 9.12; *Tavai v. Wal-Mart Stores, Inc.*, 176 Wn. App. 122, 307 P.3d 811 (2013).

A party moving for summary judgment can meet its initial burden by pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n.1 (1989), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). A trial court should grant summary judgment when the non-moving party fails to make a sufficient showing “to establish the existence of an element essential of that party’s case, and on which that party will bear the burden at trial.” *Id.* at 225. In *Celotex*, the United States Supreme Court held when a party fails to establish an element essential to their case, “. . . there can be ‘no genuine

issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" *Celotex*, at 322-23.

This court should grant summary judgment in this case because, as is set out below, plaintiffs' summary judgment submissions failed to establish multiple essential elements of their case.

- (a) Missing Essential Element #1: Plaintiffs Failed to Provide the Court at Summary Judgment With Competent Evidence that Mr. Estenson Removed or Installed, or Was Around Others Who Removed or Installed, Original or Replacement Products that were Manufactured, Supplied, Sold, or Distributed by Caterpillar.

In his deposition testimony, Mr. Estenson stated he had worked on three Caterpillar bulldozers⁷ and he was sometimes around others when they worked on four Caterpillar bulldozers⁸ and one Caterpillar grader.⁹ (Please see Section C, Statement of the Case, pages 5-10, *supra*.)

- i. No Competent, Admissible Evidence of Manufacturer of Parts Removed.

Of the three bulldozers Mr. Estenson personally worked on, he testified he did not know if any of the parts removed were the original

⁷ A D8 at Morrison Knudsen in Cole, Montana, and a D8 and D9 at Robinson Caves in Great Falls, Montana.

⁸ Two D6s, and a D7 at Glasgow Air Force Base and a RD7 at Farason Construction, a private dirt moving contractor.

⁹ D12 grader at Glasgow Air Force Base.

manufacturer-installed component parts.¹⁰ Mr. Estenson provided similar testimony for the old D6 (CP 4312, 150:4-6) and the D12 (CP 4315, 161:8-10) at Glasgow Air Force Base. Plaintiffs submitted no evidence regarding the origin of the parts on the new D6, D7, or RD7.

ii. No Competent, Admissible Evidence of Manufacturer of Parts Installed.

Similar to the removals on the bulldozers that Mr. Estenson personally worked on, Mr. Estenson lacked personal knowledge of who manufactured, supplied, sold, or distributed any parts that were installed.

1. **D8 – Morrison Knudsen.** In the materials plaintiffs submitted, Mr. Estenson identified only one part that was installed on this bulldozer – a 5” x 8” rod inspection portal gasket. (CP 103-113, CP 123-176). Plaintiffs submitted no testimony from anyone with firsthand knowledge on who the manufacturer or distributor was for this gasket. (CP 103-113, CP 123-176) The only evidence plaintiffs submitted came

¹⁰ Regarding the D8 at Morrison Knudsen, Mr. Estenson was asked:

Q. Do you have any knowledge as to whether any of the parts in that D8 were original parts.

A. No, I wouldn't know whether they were original or not. (CP 69, lines 11-14)

Regarding the D8 at Robinson Caves, Mr. Estenson testified:

Q. Do you have any personal knowledge that any of the parts of the D8 that you came in contact with were original parts?

A. I wouldn't know that. (CP 88, lines 2-5)

Regarding the D9 at Robinson Caves, Mr. Estenson testified:

Q. Do you have any knowledge as to whether any of the parts on that D9 were original or not?

A. Well, I wouldn't know. (CP 82, lines 8-10)

from an excerpt taken from Mr. Estenson's June 9, 2011, perpetuation deposition.¹¹ Regarding the D8 at Morrison Knudsen, Mr. Estenson testified:

Q. The replacement gasket, did you go purchase that?

A. No. (CP 73, lines 5-7)

* * *

Q. Do you know where the superintendent bought the replacement gasket?

A. No, I -- he had a couple of options. He could have gone into town - - to the Caterpillar [sic] and gotten one or called the office. Normally for parts he would call the office and it was shipped in or brought in. **I really don't know how -- how he obtained it.** (CP 73, lines 8-20)

2. **D8 – Robinson Caves.** The plaintiffs submitted no evidence on the origin of any parts installed on the D8 “pony” (starter) motor. The only evidence plaintiffs offered proved that Mr. Estenson did not get the replacement parts for the D8 motor.

Q. Did you, yourself, go and get replacement parts for the D8 at Robinson Caves?

¹¹ At Mr. Estenson's June 9, 2011, perpetuation deposition, plaintiffs' counsel asked “What is your ‘**understanding**’ (emphasis added) as to where the replacement gasket [referencing the rod bearing inspection portal panel gasket] came from for the Cat D8?” (CP 139, 80:7-8) This question was objected to by Caterpillar's counsel on the grounds that it lacked foundation and was calling for speculation. (CP 139 80:9-10) Mr. Estenson's response was “From the manufacturer, and there was a local Caterpillar dealer.” (CP 139, 80:11-12) On cross-examination he was asked directly if he had any personal knowledge where the replacement gasket was purchased and testified he did not know how it was obtained. (CP 73, lines 14-20)

A. No. (CP 4311, 143:7-9)

3. **D9 – Robinson Caves.** Mr. Estenson offered no testimony that he replaced any parts on the new D9. The only work performed on the D9 was done by a factory representative who repaired the fuel injector pump. (CP 4296-4308, 75:18-76:10, CP 120:19-131:19)

4. **New D6 – Glasgow Air Force Base.** Mr. Estenson offered no evidence that any parts on the new D6 at Glasgow Air Force Base were replaced. (CP 4311, 146:5-12)

5. **Old D6 – Glasgow Air Force Base.** As to the old D6 at Glasgow Air Force Base, Mr. Estenson testified that he would be speculating as to where any replacement parts came from:

Q. So the military brought you the replacement parts for this equipment that you worked on at the air force base, correct?

A. Right

Q. Okay. And you don't know where they got it from, is that right?

A. No.

Q. That's correct?

A. Well, I'm just surmising that they got it from Caterpillar downtown because they had the local purchase powers, so -

Q. Right. Would you be speculating that they got it downtown or do you actually have knowledge that they

got it?

A. I'd be speculating. (CP 4313, 152:21-153:14)

Plaintiffs may not rely on speculation or inadmissible hearsay in opposing summary judgment. *Las v. Yellow Front Stores*, 66 Wn. App. 196, 831 P.2d 744 (1992).

6. **D7 and D12 – Glasgow Air Force Base.** Plaintiffs submitted no evidence that any parts were installed on the D7 or the D12 at Glasgow Air Force Base when Mr. Estenson was present. (CP 4314-4315, 158:25-162:24)

7. **RD7 – Farason Construction.** Finally, plaintiffs submitted no evidence that parts were installed on the RD7. (CP 126-176)

The Washington State Supreme Court has held that a product manufacturer does not have a duty to warn end users of their products of potential health hazards associated with the removal or installation of materials that the equipment manufacturer did not manufacture, supply, or sell, and was not otherwise involved in the chain of distribution. *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 198 P.3d 493 (2008),

In *Braaten*, the plaintiff worked as a pipefitter and performed regular maintenance on pumps and valves onboard navy ships. The plaintiff was unable to identify the manufacturer of the asbestos-containing gaskets and packing he removed and installed in his work.

Based on this, the court granted defendants' motion for summary judgment. Here, as in *Braaten*, the plaintiffs submitted no competent evidence of who manufactured, supplied, sold, or distributed any part removed or installed on any of the Caterpillar equipment that the plaintiffs claimed he or others in his presence had worked with.

Proof of who the manufacturer, seller, supplier, or distributor was is an essential element of plaintiffs' case. *Braaten*, at 398. At summary judgment the plaintiffs failed to submit this essential evidence, and this court should grant Caterpillar's Motion for Summary Judgment.

- (b) Missing Essential Element #2: Plaintiffs Failed to Provide the Court at Summary Judgment with Competent Evidence that Mr. Estenson Removed or Installed, or Was Around Others When They Removed or Installed, Asbestos-Containing Components Manufactured by Caterpillar.

A necessary element of plaintiffs' proof was that Mr. Estenson worked with a Caterpillar asbestos-containing component part. Plaintiffs failed to submit any competent evidence of this. Assuming *arguendo*, that plaintiffs submitted evidence that parts either removed or installed were Caterpillar's, which they did not, the court, nevertheless, should have granted summary judgment because plaintiffs submitted no competent evidence that any component parts that Mr. Estenson worked with or around contained asbestos.

The plaintiffs' submissions contain only one instance where plaintiffs suggest a gasket may have contained asbestos (the rod bearing inspection portal panel gasket) and one instance in which counsel argued that another part might have contained asbestos (a "pony" (starter) motor head gasket). There was no competent evidence that work on either involved a Caterpillar asbestos-containing gasket. In addition, Mr. Estenson specifically admitted that he did not know the composition of any gaskets removed from the Caterpillar D8 at Robinson Caves or the old Caterpillar D6 at the Air Force Base. (CP 4311, 145:7-9, CP 4313, 151:11-13 and 154:3-14) The Estenson excerpts plaintiffs submitted did not claim that any other component part on any other Caterpillar equipment that he worked on or around contained asbestos. (CP 125-176, CP 4296-4315)

i. Rod Bearing Inspection Portal Panel Gasket.

In his perpetuation deposition, Mr. Estenson testified that it was his "understanding" that the rod bearing inspection portal panel gasket removed from the D8 at Morisson Knudsen was made of asbestos. In cross-examination, he admitted that, in fact, he did not know what the gasket was made of. (See, CP 139, 79:12-14 and compare with CP 163, 117:5-7.) In fact, Mr. Estenson's testimony strongly suggested this gasket was not asbestos-containing. He described the replacement inspection

portal panel gasket as “soft cork type material”. (CP 4305, 119:15-20) He said it was “not really a high pressure type gasket” but similar to an oil pan gasket. (CP 4304, 116:14-20)

ii. “Pony” (Starter) Motor Head Gasket.

At summary judgment oral argument, plaintiffs’ **counsel** argued that plaintiffs had submitted evidence that Mr. Estenson had helped remove an asbestos-containing head gasket when he assisted in the “tear down” of a “pony” (starter) motor on a D8 bulldozer. (RP 2/8/13, 14:23-15:3) There was no competent evidence to support this contention. (Please see Section C, Statement of the Case, pages 6-7.)

Counsel’s argument relied on a five year old deposition, taken in New Orleans, Louisiana, in a shipyard asbestos case. There, Mr. Sweeny, a former 30(b)(6) witness,¹² was questioned about **marine diesel engines**. He testified that in “some cases,” Caterpillar **marine diesel engines** used asbestos-containing gaskets. (CP 1780, 18:18-21) He further testified that gaskets used on **gasoline motors** were not necessarily the same types of gaskets that were used on **marine diesel engines**. (CP 174, 186:10-14) He was not questioned about the composition of head gaskets used on bulldozer or grader motors. Nor was he questioned about the composition of a head gasket used on a gasoline powered “pony” (starter) motor for a

¹² Please see section C, Statement of the Case, page 12.

D8 bulldozer. Plaintiffs submitted absolutely no evidence that the head gasket on the gasoline powered “pony” (starter) motor for the Caterpillar D8 bulldozer would have contained asbestos.

Further, one cannot logically or reasonably infer from Mr. Sweeny’s testimony that because asbestos-containing head gaskets may be used on **marine diesel engines**, that they would have been used on gasoline starter motors. This is especially true in light of his testimony that **gasoline motors** do not necessarily use the same types of gaskets as **marine diesel engines**. Finally, there was no testimony from Mr. Estenson that his assistance in removing this “pony” (starter) motor head gasket created dust that he inhaled. (CP 83-84, 131:20-132:3; CP 87, 140:5-7; CP 4309, 136:19-137:4)

Plaintiffs failed to establish that Mr. Estenson or others around him worked with a Caterpillar asbestos-containing component. This was an essential element of their case and its absence requires this court grant Caterpillar’s Motion for Summary Judgment.

(c) Missing Essential Element #3: Plaintiffs Submitted No Competent Evidence that Mr. Estenson Inhaled Airborne Respirable Asbestos Fibers From Any Caterpillar Product.

Again, assuming, *arguendo*, that plaintiffs submitted evidence that the parts removed or installed were Caterpillar parts and assuming,

arguendo, plaintiffs submitted evidence that Caterpillar component parts contained asbestos, which they did not, plaintiffs submitted no evidence that Mr. Estenson inhaled airborne respirable asbestos fibers from dust created from any work he or others did on Caterpillar products. (CP 139, 80:5-6) Plaintiffs' submissions contained only two instances in which Mr. Estenson testified the work he did generated dust. The first was his description of the removal of one-half of a 5" x 8" **rod inspection portal panel** gasket on the D8 at Morrison Knudsen. He testified that when he used a putty knife to scrape one-half of the 5" x 8" gasket material, that this generated dust which he inhaled. As stated above, Mr. Estenson testified that he did not know what that gasket was made of, and there was no other evidence submitted that the gasket contained asbestos fibers that could become airborne or respirable. (CP 4311, 144:24-145:9) As to all other work on any other Caterpillar equipment, plaintiffs failed to submit any evidence at summary judgment that: (1) work on Caterpillar equipment generated dust,¹³ (2) Mr. Estenson breathed dust, or (3) that the dust contained airborne respirable asbestos fibers. (CP 125-176, CP 4296-4315) Because plaintiffs failed to submit evidence on this essential element that work on Caterpillar products created dust that contained

¹³ The second instance came from Mr. Estenson's testimony that he blew out dirt and dust from the power control unit on the Caterpillar D8 bulldozer at Morrison Knudsen. Plaintiffs submitted no evidence by Mr. Estenson or anyone else that the power control unit had any asbestos-containing component parts.

airborne respirable asbestos fibers, that Mr. Estenson inhaled, this court should grant Caterpillar's Motion for Summary Judgment.

- (d) Missing Essential Element #4: Plaintiffs Submitted No Competent Evidence at Summary Judgment that Mr. Estenson Inhaled a Dose of Asbestos Fibers from a Caterpillar Product that Was Capable of Causing His Disease.

Assuming, *arguendo*, that Mr. Estenson testified that he had removed or installed Caterpillar manufactured parts, which he did not, and that there was competent proof that they were asbestos-containing, which there was not, and that the work caused the emission of dust that contained airborne respirable asbestos fibers which he inhaled, which he did not, summary judgment still must be granted. This is because the plaintiffs failed to produce any industrial hygiene evidence or toxicological evidence that the dose from this small amount of work was sufficient to cause Mr. Estenson's disease and was a substantial factor in the development of his disease. (CP 123-176, CP 103-113) Plaintiffs failed to calculate or offer any evidence on the dose of asbestos that Mr. Estenson might have had from his work with or around Caterpillar products. This failure to adduce evidence on this essential element, requires granting of Caterpillar's Motion for Summary Judgment.

- (e) Missing Essential Element #5: Plaintiffs' Failure to Establish that Mr. Estenson's Work with Caterpillar Products Was a Substantial Factor in Causing His

Disease Requires Entry of Summary Judgment.

At summary judgment, plaintiffs submitted the declaration of pathologist Dr. Eugene Mark. (CP 103-113) In that declaration, Dr. Mark opined that:

Mr. Estenson's exposure to asbestos includes his work with asbestos-containing Caterpillar products. In my opinion, again with a reasonable degree of medical certainty, these exposures in **aggregate** were a substantial factor in causing Mr. Estenson's diffuse malignant mesothelioma. (Emphasis added)

(CP 108:16-19) For the reasons set out below, Dr. Mark's opinion was legally insufficient to establish that any work by Mr. Estenson with or around Caterpillar products was a substantial factor in causing his mesothelioma.

a. No Factual Basis for Opinion. As pointed out above, there was no factual basis for Dr. Mark's conclusion that Mr. Estenson worked with asbestos-containing Caterpillar products. See, section C, Statement of the Case, pages 5-10. There was no evidence that he removed or installed original Caterpillar products or that they were asbestos-containing. Nor was there any evidence that his work with any products created dust that he inhaled or, even if one assumes that the products were asbestos, that any inhalation was in sufficient dose to cause his disease. For these reasons alone, his opinion may not be relied upon for the

purpose of establishing causation. Dr. Mark's declaration could not cure these deficiencies. Purported product identification by expert witnesses based on review of declarations and depositions, not their personal knowledge, is admissible for the limited purpose of explaining the basis of the expert's opinion, but it is not admissible to create product identification itself. *Allen v. Asbestos Corp.*, 137 Wn. App 233, 246, 157 P.3d 406, 413 (2007).

b. No Admissible Evidence of Substantial Factor. When one reads Dr. Mark's declaration, it is apparent that the plaintiffs have failed to submit evidence that Mr. Estenson's work with or around Caterpillar products was a substantial factor in causing his mesothelioma.

In *Mavroudis*, the Court of Appeals held that a "substantial factor" instruction is appropriate in an asbestos case. The specific language of the instruction in *Mavroudis* read:

If you find that two or more causes have combined to bring about an injury and any one of them operating alone would have been sufficient to cause the injury, each cause is considered to be a proximate cause of the injury if it is a substantial factor in bringing it about, even though the result would have occurred without it. A substantial factor is an important or material factor and not one that is insignificant. (Emphasis added)

In asbestos cases where there are multiple suppliers, the plaintiffs must show that exposure to a particular defendant's product was a substantial factor in bringing about the injury. *Mavroudis v. Pittsburg*

Corning Corp., 86 Wn. App. 22, 935 P.2d 684 (1997). A close reading of Dr. Mark's declaration reveals that he premised his causation opinion on Mr. Estenson's lifetime exposure to asbestos from all work that he performed and that he did not state that plaintiffs' work with and around Caterpillar products alone was a substantial factor in causing his mesothelioma. Instead, he opined that all of his asbestos exposures in the "aggregate" were a substantial factor in Mr. Estenson's disease. There were 51 defendants sued in this action. (CP 1-5) It is impossible to determine from Dr. Mark's declaration whether airborne respirable asbestos fibers were released from any work with Caterpillar products, what the dose may or may not have been, and whether they were a substantial factor in causing Mr. Estenson's disease. Dr. Mark's declaration was legally deficient and did not meet the substantial factor causation standard.

Dr. Mark's conclusory and unsupported statements were insufficient as a matter of law to defeat summary judgment. *Grimwood v. University of Puget Sound*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

The plaintiffs failed to establish the essential element that Mr. Estenson's work with Caterpillar products was a substantial factor in causing his disease. The absence of proof of this essential element also requires this court to grant summary judgment.

- (2) The Court Erred When it Allowed Plaintiffs To Read Incomplete Deposition Designations that Violated King County Style Rule 9.5 and Were Sequenced in a Manner that Was Misleading to the Jury.

The standard of review on whether to exclude evidence is abuse of discretion. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997); *Sales v. Hi-Tech Erectors*, 168 Wn.2d 664, 230 P.3d 583 (2010). A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn. App. 125, 896 P.2d 66(1995).

The trial court abused its discretion in this case when it allowed plaintiffs, over timely objection, to read incomplete, untimely, and misleading excerpts from Mr. Estenson's depositions that had been submitted as counter-designations to a settled co-defendant's submissions, not Caterpillar's.¹⁴ (RP 4/22/13, 20:3-12)

¹⁴The events that lead up to plaintiffs' presentation of Mr. Estenson's deposition testimony are troubling. The Case Scheduling Order required the parties to designate deposition testimony they intended to offer by April 8, 2013. (CP 4316-4317) The only deposition testimony of Edwin Estenson that plaintiffs timely designated regarding Caterpillar equipment came from his June 9, 2011, video perpetuation deposition. (CP 386-461) That testimony was limited to four pages describing the single removal of the 5" x 8" rod inspection portal panel gasket on the ten year old D8 dozer at Morrison Knudsen in 1955. (CP 2447-2480) No other pieces of Caterpillar equipment were identified. (CP 2447-2480) Caterpillar filed deposition designations regarding Mr. Estenson installing sheetrock, Mr. Estenson's exposure to asbestos in the Navy, from pipe insulation all over the air force base, and Mr. Estenson's testimony regarding his lack of knowledge as to whether parts removed from the D8 dozer were original equipment and what the gasket was made of. (CP 4168) Plaintiffs' counter-designations as to Caterpillar were required to be limited to these topics.

Co-defendant Crane Co. filed deposition designations describing all of Edwin Estenson's testimony relating to alleged exposures to asbestos from products other than

On the morning of April 22, 2013, plaintiffs produced notebooks with highlighted excerpts of Mr. Estenson's deposition designations plaintiffs intended to read to the jury that day. Caterpillar's counsel and other defense counsel timely objected to these excerpts being read because they were (1) late, (2) in violation of King County Asbestos Pretrial Style Order ("KCPSO") Rule 9.5, (3) confusing, and (4) misleading. Judge North overruled defendants' objections and plaintiffs played the video to the jury of Mr. Estenson's perpetuation deposition that day and read the

Crane Co.'s products, including Bucyrus' and Cummins' equipment (CP 554-580).

Plaintiffs then filed counter-designations without identifying which specific defendant's designations they were countering. This designation violated Rule 9.5(a)(5) of the King County Asbestos Cases Revised Consolidated Pretrial Style Order (hereinafter "KCPSO") filed under cause number 89-2-184455-9. Rule 9.5(a)(5) states a party shall identify "the specific plaintiffs(s) or defendant(s) against which each identified part of a deposition will be offered." At least two of plaintiffs' counter-designations were duplicative of portions of designations made by Crane Co. They were not true counter-designations. (Please see Declaration of Scott Wood with detailed summary of confusion regarding plaintiffs' counter-designations. CP 4168-4170)

Crane's designations were withdrawn. (RP 4/22/13, 9:12-20:12) Plaintiffs' "counter-designations" were really untimely new designations and not counter-designations because, as to Caterpillar, these counter-designations identified additional Caterpillar equipment. (CP 386-461, 2447-2480) Plaintiffs' "counter-designations", for the first time contained Mr. Estenson's testimony regarding work on six additional Caterpillar bulldozers and one Caterpillar grader and a description of Mr. Estenson's visit to a Caterpillar dealership repair area. (RP 4/22/13, 21:20-29:16) KCPSO Rule 9.5(c) provides that "a party may amend its disclosure of trial testimony by deposition after the applicable cut-off date only upon a motion and upon good cause shown." Plaintiffs did not to file a motion or show good cause why plaintiffs' "counter-designations" to Crane's designations submitted after the April 8, 2013, deadline (CP 4168-4170) should be read to the jury. (RP 4/22/13, 21:20-29:16)

On the morning of April 22, 2013, after Crane Co. settled, plaintiffs produced notebooks with the Estenson deposition designations plaintiffs intended to read that day to the jury. Caterpillar's counsel and other defendants' counsel objected to the reading of the deposition designations because transcripts were provided late, were in violations of KCPSO Rule 9.5(a)(5), were not true counter-designations, and there was confusion as to what was being read against which defendant because of Crane Co. settling during plaintiffs' opening statement. (CP 4172, CP 4168) (RP 4/22/13, 9:12-20:12)

new deposition designations the next day.

As set out in greater detail in footnote 14 below, the Amended Order Setting Case Schedule set April 8, 2013, as the deadline for filing and serving deposition designations. Caterpillar and other defendants filed their deposition designations on April 8, 2013. On April 12, 2013, three days before trial, in violation of the court's Case Management Order and KCPSO Rule 9.5, plaintiffs served new deposition designations which identified Mr. Estenson's work on or around six additional Caterpillar bulldozers and one Caterpillar grader. Plaintiffs did not seek permission from the court or set forth good cause for these late designations, as required by KCPSO Rule 9.5(c). Plaintiffs also violated the rule when they failed to identify the specific defendant against which each of these new designations would be offered. This created confusion and made it difficult to discern which designations were being offered against Caterpillar, violated the Case Management Order, and violated KCPSO Rule 9.5(a)(5).

The purpose of KCPSO Rule 9.5 is to provide for the orderly presentation of testimony at trial and prevent confusion and surprise. Plaintiffs' failure to follow the rule resulted in surprise and confusion to defendants, disruption of the trial, and ultimately led to an unjustifiable \$6 million verdict against Caterpillar. (CP Verdict, 1074-1075; 4168-4170;

2437-2442) The trial court abused its discretion when it overruled defendants' objections, and failed to require plaintiffs to comply with the Case Management Order and KCPSO 9.5. Not only were these new designations late and in violation of KCPSO Rule 9.5, they omitted critical evidence and were sequenced in a manner that masked the omissions. As is set out in detail in section C, Statement of Case, pages 13-14, plaintiffs first read an excerpt of Mr. Estenson's October 19, 2011, deposition that ended with the word "D8", a Caterpillar bulldozer at Morrison Knudsen. Plaintiffs then read four deposition excerpts from Mr. Estenson's October 19, 2011, deposition that described gasket work Mr. Estenson performed on a Cummins motor. That gasket work was taken from 18 pages of deposition in which the word "Cummins" appeared 27 times. Plaintiffs' excerpts omitted every mention of the word "Cummins." The result of these critical omissions and this sequencing was that it produced highly misleading testimony for the jury. As structured and read, one had to conclude that Mr. Estenson was describing his work removing gaskets on Caterpillar motors. In fact, that was untrue. Because of the omissions and sequence of these excerpts, it was not readily apparent to anyone what had occurred.

Of course, any testimony as to removal of Cummins gaskets was totally irrelevant to the case: Cummins had settled long before trial.

There was no justification for the plaintiffs to present this evidence.

Post-trial, in plaintiffs' Supplemental Response to Caterpillar's Motion for New Trial, plaintiffs continued to argue to the court that there was evidence that Mr. Estenson had removed Caterpillar motor gaskets and submitted the above excerpts in support of their argument. (CP 3606-4122) At the hearing, using the original transcript, Caterpillar showed the court how the testimony had been sequenced and that the plaintiffs had omitted each of the 27 references to Cummins in their excerpts. In response, plaintiffs' counsel then claimed for the first time that the omissions had been a "scrivener's error." (RP 12/12/13, 24:7-9) It is hard to imagine how a scrivener could accidentally omit 27 separate references to the same word: "Cummins" in these designations. This is especially so because Caterpillar's counsel had previously pointed out the confusion with this testimony when plaintiffs "counter-designated" and asked the court for permission to read the additional testimony to complete and clarify. It is very difficult to imagine how plaintiffs' counsel could later claim that this was Caterpillar product testimony. (CP 2437-2444) The reading of the excerpts with critical omissions in this highly irregular sequence of evidence relating to a defendant that had long since settled, and questionable sequencing which related to a company that has long since settled, deprived Caterpillar of a fair trial and due process of law

under Section 1 of the 14th Amendment to the United States Constitution¹⁵ and Section 3 of the Washington State Constitution.¹⁶

If counsel's misrepresentation to the court was not intentional, it is strong evidence that the sequencing of the excerpts from Mr. Estenson's many volumes of deposition was so confusing even plaintiffs' counsel was confused. If plaintiffs' own counsel was confused and thought Estenson's Cummins gasket work described work done on Caterpillar equipment, then how could a jury not be similarly confused?

Caterpillar was further deprived of a fair trial and due process of law when plaintiffs read additional excerpts of Mr. Estenson's deposition testimony that ostensibly related to brake and clutch work he performed on a Caterpillar D8 bulldozer, but in fact was sequenced in a manner that obscured that it actually described daily brake and clutch work he had performed on Bucyrus equipment. (Please see Section C, Statement of the Case, pages 14-19, *supra*.) Again, without disclosure, explanation, or justification, the plaintiffs sandwiched Mr. Estenson's testimony relating to work on a Bucyrus oil well drilling machine between references to a

¹⁵ Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

¹⁶ SECTION 3. PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

Caterpillar D8 bulldozer at Morrison Knudsen in Cole, Montana. As with the Cummins testimony, Bucyrus had settled prior to trial. There was no legitimate reason for this testimony to be read to the jury. This evidence was taken from three separate volumes of Mr. Estenson's depositions: June 9, 2011, June 23, 2011 and October 11, 2011. The Bucyrus testimony related to work he performed on equipment in Cut Bank, Montana, not Cole, Montana where the Caterpillar D8 bulldozer was located. It was again, highly irregular and extremely misleading to the jury. To date, plaintiffs have offered no explanation why references to Bucyrus were omitted from the portions of Mr. Estenson's testimony plaintiffs read to the jury.

Had the court required plaintiffs to comply with KCPSO Rule 9.5 by seeking permission of the court to serve the new designations and second, identifying the defendants against which the excerpts were offered, it is highly unlikely this incomplete, misleading, and highly prejudicial evidence would have been presented to the jury. As with the Cummins excerpts, these carefully selected, incomplete excerpts created incorrect, highly misleading, and prejudicial testimony which deprived Caterpillar of a fair trial and due process of law under the 14th Amendment to the United States Constitution and Section 3 of the Washington State Constitution.

As set out in the section C, Statement of the Case, on pages 5-10 *supra*, there was no testimony from Edwin Estenson, or any other evidence, that Mr. Estenson inhaled airborne respirable asbestos fibers from a product that was manufactured, supplied, sold, or distributed by Caterpillar or in their chain of distribution. The only way a jury could have reached a different conclusion was if they believed that work done on Cummins and Bucyrus equipment was performed on Caterpillar equipment.

The trial court's overruling of Caterpillar's objections was manifestly unreasonable because it admitted false and misleading evidence that deprived Caterpillar of a fair trial, violated Caterpillar's right of due process under the 14th Amendment to the United States Constitution and Section 3 of the Washington State Constitution. (Please see Section D (3), *infra*.)

As set out in section C, Statement of the Case, page 17, *supra*, Caterpillar's counsel requested in writing that the plaintiffs read two additional excerpts (which totaled seven pages of transcript) to complete the deposition testimony and make clear that the brake, clutch, and gasket work described in the plaintiffs' excerpts related to Estenson's work on Cummins and Bucyrus equipment, **not** Caterpillar bulldozers. (CP 2437-2444) Plaintiffs' counsel did not respond to Caterpillar's written request

for completion and clarification. (CP 2437-2444) The next day Caterpillar's counsel asked the court for permission to complete the reading of Mr. Estenson's deposition with the additional two excerpts. (RP 5/6/13, 48:13-57:6)

(3) The Trial Court Erred When it Denied Caterpillar's Request to Complete the Deposition Testimony of Mr. Estenson.

As is set out in section C, Statement of the Case, pages 17-18, Caterpillar requested leave to complete Mr. Estenson's deposition testimony by reading two additional excerpts: a total of seven pages of additional testimony that would have taken less than 15 minutes to read. (RP 5/6/13, 48:13-56:24) Caterpillar's counsel told the court that he was concerned that the plaintiffs' excerpts were confusing and could mislead the jury into believing that Mr. Estenson was describing daily work on Caterpillar's equipment when he was not. (RP 5/16/13, 48:13-56:24) Plaintiffs had not rested. Plaintiffs' counsel objected to the proposed completion arguing it was unsupported by the law, prejudicial, and too late. (RP 5/6/13 48:13-56:24)

The court denied Caterpillar's request to complete the evidence, both in plaintiffs' case and in Caterpillar's case-in-chief. This ruling was manifestly unreasonable and an abuse of discretion. First, CR 32(a)(4) provides: "If only part of a deposition is offered in evidence by a party, an

adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.” Clearly, fairness required that Caterpillar should have been allowed to complete Mr. Estenson’s testimony so as to make clear that he was describing work on Cummins motors and Bucyrus oil well drilling machines, not a Caterpillar bulldozer. Fairness demands this even more so because of the plaintiffs’ highly selective readings, their misleading sequencing and their omission of key Estenson deposition testimony regarding the manufacturer of the equipment being described, the location of the equipment, and the date the depositions were taken. Second, CR 43(f)(1)¹⁷ and RCW 12.16.060¹⁸ allow a party to call an adverse party as a witness. Caterpillar, at a minimum, should have been allowed to read Mr. Estenson’s testimony in its case-in-chief. Third, by denying Caterpillar the opportunity to call Mr. Estenson as a witness at trial by way of deposition, the court wrongfully excluded Mr. Estenson as a defense witness without conducting a *Burnett* inquiry. *Jones v. City of Seattle*, 179 Wn.2d 322, 314 P.3d 380 (2013). Fourth, CR 32(a)(3) permits any party to use the deposition of any person who is deceased for

¹⁷ CR 43(f)(1) Party or Managing Agent as an Adverse Witness. A party . . . may be examined at the instance of any adverse party. . . .

¹⁸ RCW 12.16.060 A party to an action may be examined as a witness, at the instance of the adverse party, and for that purpose may be compelled in the same manner, and subject to the same rules of examination, as any other witness, to testify at the trial, or appear and have his or her deposition taken.

any purpose. Fifth, CR 32(a)(2) permits “The deposition of a party . . . may be used by an adverse party for any purpose.” At the time Mr. Estenson’s deposition was taken he was an adverse party and his Estate continued to be an adverse party. Had Mr. Estenson still been alive and testified at the trial, under CR 32(a)(2), Caterpillar could have used his deposition for any purpose, subject to ER 403’s considerations of undue delay, waste of time, and cumulative evidence. The reading of seven pages for 15 minutes cannot be said to constitute undue delay, waste of time, or cumulative under these circumstances.

The trial court’s denial of Caterpillar’s request to complete was a violation of CR 32(a). The court’s ruling resulted in highly misleading and incomplete deposition testimony to be presented to the jury without correction. The court also erred when it failed to conduct a *Burnett* inquiry before denying Caterpillar’s request to complete Mr. Estenson’s testimony or, in the alternative, call Mr. Estenson in its case-in-chief. We respectfully submit that the court’s ruling was manifestly unreasonable and an abuse of discretion that deprived Caterpillar of a fair trial and due process of law.

- (4) The Trial Court Erred When at Trial It Allowed Dr. Eugene Mark to Express an Opinion that Mr. Estenson’s Work with Caterpillar Brakes Was a Cause of His Mesothelioma.

At trial, with the exception of the Estenson false excerpts described

above, there was no evidence that Mr. Estenson worked with Caterpillar brakes. *Please see*, section C, Statement of Facts, pages 5-19, *supra*. (CP 2447-2480, 964-1028) It was for that reason Caterpillar objected to Dr. Mark expressing an opinion that Estenson's work with Caterpillar brakes caused his mesothelioma. (RP 5/2/13, 4:5-16).

Hearsay evidence and inadmissible facts may be admissible for the limited purpose of explaining the basis of an expert's opinion, but they are not substantive evidence. *Allen, supra*, at 246. "The admission of these facts, however, is not proof of them." *Id.*

Prior to trial, in response to Caterpillar's Motion for Summary Judgment, plaintiffs submitted no evidence nor did they argue that Mr. Estenson worked with Caterpillar brakes or clutches. (CP 103-176, 4292-4315) Similarly, post-trial, in plaintiffs' response to Caterpillar's Motion for New Trial, plaintiffs did not offer a single citation to the record where Mr. Estenson stated he removed or installed a brake or a clutch on a bulldozer or grader. (CP 3007-3018, 3606-3625)

As set out in section C, Statement of Facts, pages 5-21, there was no evidence that any Caterpillar equipment had original Caterpillar brakes or clutches or that the brakes or clutches were asbestos-containing. The trial court erred when it allowed, over objection, Dr. Mark to express his opinion that Caterpillar brakes and clutches were "significant in causing the

development of his mesothelioma.” Caterpillar failed to receive a fair trial and because of this, the verdict should be vacated. (RP 5/2/13, 134:17-24, RP 5/2/13, 4:5-16)

(5) The Trial Court Erred in Denying Caterpillar Inc.’s Motion to Vacate the Verdict Because the Verdict Was Excessive and Not Based on Substantial Evidence, But Rather on Passion and Prejudice.

The standard of review of a denial of a motion to vacate a verdict is abuse of discretion. *Grigg v. Averbek Realty, Inc.*, 92 Wn.2d 576, 599 P.2d 1289 (1979).

In *Bingaman v. Grays Harbor Community Hospital*, 103 Wn.2d 831, 835-36, 699 P.2d 1230 (1985), the Washington Supreme Court stated that a jury’s verdict must be based on substantial evidence in the record. In this case, for the reasons set out at pages 23-51, above, there was no substantial evidence that Mr. Estenson inhaled airborne respirable asbestos fibers from a Caterpillar product. (CP 7-22)

Where passion and prejudice inhere in the verdict in which liability evidence is “tenuous,” justice requires a new trial. *Myers v. Smith*, 51 Wn.2d 700, 706, 321 P.2d 551 (1958). If “tenuous evidence” requires a new trial, then the complete absence of evidence in this case requires Caterpillar receive a new trial.

The excessive size of the verdict is evidence that it was based on

passion and prejudice. Mr. Estenson was 80 years old when he died. The jury returned a verdict for over \$6,000,000. A measure of whether an award of non-economic damages “shocks the conscience” is the award’s relationship to economic damages. *Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 856 P.2d 746 (1993). In *Hill*, the court found when one has non-economic damages that are 10 times the amount of the economic damages, it is appropriate to suspect that the award was based upon passion and prejudice. The *Hill* court upheld a reduction of the verdict, finding the amount of economic damages did not support such a high award. In this case, the verdict’s non-economic damages awarded were over 14 times the amount of the economic loss awarded. This award shocks the conscience and was not based on the damages suffered by the plaintiffs. We respectfully submit that the trial court abused its discretion when it denied Caterpillar’s Motion to Vacate the Verdict and for a New Trial.

E. CONCLUSION

Caterpillar’s Motion for Summary Judgment should have been granted. The plaintiffs failed to submit competent evidence that Mr. Estenson or others he worked around removed or installed component parts that had been manufactured, supplied, sold, or distributed by Caterpillar. The record is devoid of any competent evidence that a

Caterpillar part he or others he worked around contained asbestos, emitted airborne respirable asbestos fibers or that he inhaled any such fiber in sufficient quantity to have been a substantial factor in his mesothelioma. The court's ruling should be reversed and Caterpillar's Motion for Summary Judgment should be granted.

In the alternative, Caterpillar asks the court order a new trial because the trial court abused its discretion when it overruled Caterpillar's and other defendants' objections to the reading of the incomplete, misleading, and unfairly prejudicial excerpts of Mr. Estenson's testimony and denied Caterpillar's CR 32(a)(4) request to complete the deposition testimony of Mr. Estenson. Because the court lacked a reasonable or tenable ground in these decisions, these constituted an abuse of discretion and reversible error.

The trial court compounded this error when it allowed Dr. Eugene Mark to express his opinion that inhalation of airborne respirable asbestos fibers from Caterpillar friction products caused Mr. Estenson's mesothelioma when the record was devoid of any evidence that Mr. Estenson had worked with Caterpillar brakes.

Finally, based upon the above, Caterpillar respectfully submits that the trial court abused its discretion when it denied Caterpillar's Motion to Vacate the Verdict when there was no substantial evidence in the record

that Mr. Estenson had inhaled respirable asbestos fibers from a Caterpillar product and when the verdict was clearly excessive and based on passion and prejudice

For the reasons set out above, Caterpillar asks this court to grant its Motion for Summary Judgment or, in the alternative, to vacate the verdict and grant Caterpillar a new trial.

RESPECTFULLY SUBMITTED, this 18th day of June, 2014.

THE GAITÁN GROUP, PLLC

By Virginia Leeper
José E. Gaitán, WSBA No. 7347
Virginia Leeper, WSBA No. 10576
Attorneys for Caterpillar, Inc.

DECLARATION OF SERVICE

GEORGE AUSLANDER DECLARES:

That on the 18th day of June, 2014, I caused to be served via ABC Legal Messenger a copy of Brief of Appellant Caterpillar Inc. – Corrected upon the following:

Tom Owens
1001 Fourth Avenue, Suite 4400
Seattle, Washington 98154
(206) 389-1541
Attorneys for Appellant

I SWEAR UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 18th day of June, 2014, at Seattle, Washington.


George Auslander

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