 73748-1

No. 73748-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BRAND INSULATIONS, INC.,

Appellant/Cross-Respondent,

v.

ESTATE OF BARBARA BRANDES,

Respondent/Cross-Appellant.

BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. INTRODUCTION

This appeal arises from a jury verdict of $3.5 million for personal injuries suffered by Barbara Brandes in connection with her diagnosis of mesothelioma. Ms. Brandes was secondarily exposed to asbestos insulation negligently sold and installed by Defendant Brand Insulations at the ARCO Cherry Point refinery where Ms. Brandes' husband worked. Brand seeks to overturn the jury's verdict based on Washington's Statute of Repose, absence of a tort duty, and evidentiary error. As set forth in Section V(A) below, Brand's arguments are without merit and ignore the fundamental nature of Plaintiff's claims: that Brand negligently sold a product that proximately caused Ms. Brandes' mesothelioma.

However, Plaintiff contends that the trial court erred in reducing the jury's verdict from $3.5 million to $2.5 million and has filed a cross-appeal. The trial court's remittitur contravenes longstanding Washington authority disfavoring reduction of a jury's assessment of damages absent extraordinary circumstances such as where the record unmistakably indicates that the jury's award was motivated by passion or prejudice. Because the high threshold for remittitur was not satisfied, the Court should reinstate the jury's verdict in its entirety. In all other respects, the Court should affirm.

II. ASSIGNMENT OF ERROR

The trial court erroneously reduced the jury's verdict from $3,500,000 to $2,500,000. CP 5428-31.

III. ISSUES PRESENTED

A. Counterstatement of Issues Presented on Appeal.

1. Did the trial court correctly find an issue of fact as to whether the asbestos insulation Brand installed at the ARCO refinery was integral to the integrity of the structure, a prerequisite to the Statute of Repose defense, which Brand failed to assert at trial?

2. Did the trial court properly permit the jury to determine whether "take home" asbestos exposure fell within the general field of danger that was foreseeable to Brand?

3. Did the trial court properly permit the jury to decide whether Brand's negligence was a proximate cause of Ms. Brandes' death?

4. Did the trial court properly instruct the jury on Plaintiff's negligent sales theory?

5. Did the trial court properly admit, for illustrative purposes only, video simulations of the asbestos work practices and take-home exposure scenarios at issue in the trial?

6. Was the trial court's decision to allocate 20% of Ms. Brandes' pre-trial settlements to future wrongful death claims supported by substantial evidence when the releases executed with each settling defendant included express provisions precluding wrongful death claims by her statutory beneficiaries?

B. Issue Presented on Cross-Appeal.

1. Does the trial record unmistakably indicate that the jury's $3.5 million award was motivated by passion or prejudice, or was the award supported by credible evidence of the illness, pain, and suffering Ms. Brandes sustained up to the time of her death?

IV. STATEMENT OF THE CASE

Barbara Brandes was diagnosed with malignant mesothelioma in June of 2014. CP 219. On August 14, 2014, she filed the present action alleging that she was secondarily exposed to asbestos from thermal insulation sold and installed by Brand at the ARCO Cherry Point refinery where her husband, Raymond Brandes worked during the 1970s. CP 2. She sought compensatory damages from Brand and other defendants based upon her diagnosis with mesothelioma.[1] CP 1-4.

The case proceeded to trial against Brand on April 6, 2015. RP 58. Plaintiff marshalled evidence at trial that Ms. Brandes' husband, Raymond Brandes, had been an employee of ARCO at its petroleum refinery in Cherry Point, Washington from 1971 until July of 1975. RP 271. One of Mr. Brandes' co-workers, Dan Williams, testified that he worked with Mr. Brandes at the ARCO refinery from the time the facility was still under construction until 1975. RP 588. He testified that Mr. Brandes worked as an operator throughout that period, starting in the crude

[1]Raymond Brandes asserted loss of consortium claims in the original Complaint, but died during the pendency of the case, prior to trial.

area and later in the coker area of the refinery. RP 588-91. Mr. Williams described asbestos thermal insulation being installed, removed and repaired in Mr. Brandes' proximity throughout his tenure at the ARCO facility, which exposed him to dust. RP 594-99, 602-04. Nevertheless, Mr. Williams, former Brand insulator Nils Johnson, and ARCO's CR 30(b)(6) witness all testified that no industrial hygiene practices were employed in the 1970s to prevent workers such as Mr. Brandes from transporting workplace toxins to their home environment through contaminated work clothes. *E.g.,* RP 216, 232.

Plaintiff also offered evidence that the asbestos-containing insulation products supplied and installed by Brand were sold in containers bearing warnings, yet Brand installed these products at the refinery without any effort to pass on those warnings to end-users such as Mr. Brandes. RP 612, 1156-77, 1181-83. Nor did Brand insulators utilize any engineering controls to reduce bystander exposure to the asbestos dust generated by Brand's insulation installation activities at the refinery. RP 385-86, 436-39, 612-14.

In support of her claim for non-economic damages, Plaintiff presented evidence of the injuries and disabilities she experienced as a result of her mesothelioma in the form of testimony from Ms. Brandes herself, as well as testimony from Ramona Brandes and David Brandes, two of the Brandes' children. *E.g.*, RP 140-76, 250-85, 354-72. Ms. Brandes and her two children described some of the symptoms of her mesothelioma, which included shortness of breath,

fatigue, weight loss, nausea, and neuropathy. *E.g.*, RP 165-67. Ms. Brandes' treating oncologist, Dr. Sharmila Ahmed, also testified regarding Ms. Brandes' injuries and treatment, including the debilitating side-effects of the many rounds of chemotherapy Ms. Brandes underwent as well as the numerous bouts of pneumonia and septicemia she endured during her treatment. RP 456-81. Dr. Ahmed further testified that Ms. Brandes' mesothelioma was terminal, and that the cancer would eventually claim her life. RP 479-80.

On the eve of the last day of the defense case and closing arguments, Ms. Brandes succumbed to her mesothelioma. CP 5385. Her counsel immediately filed a Notice of Death and Motion for Substitution, requesting that the case go forward despite Ms. Brandes' passing. RP 1370-75; CP 3717. The trial judge then directly asked Brand's counsel for his position in light of Ms. Brandes' passing, to which counsel responded: "I don't think there's any reason not to proceed." RP 1373. The court thereafter granted the motion for substitution and authorized the continuation of the litigation as a survivorship action on behalf of the Estate of Barbara Brandes. *See* RP 1370-76; CP 3717.

Before the proceedings continued, the trial court advised the jury of Ms. Brandes' death and its impact on the procedural posture of the case:

> It is ... my solemn duty to explain to you a slight change in the procedural posture of this case. There is an alteration to the case caption or the case title because Ms. Brandes died over the weekend, yesterday specifically. So the Estate of Barbara Brandes at this point is substituted in as the plaintiff in this case, and it doesn't alter things

> in terms of our ability to proceed with this trial or in terms of your approach to the issues that exist in this case.

RP 1375-76.

Upon the conclusion of the case, the trial court delivered its instructions to the jury, which 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 clearly explained that the jury's award must reflect "the amount of money that will reasonably and fairly compensate the plaintiff," considering the 1) nature and extent of her injuries; 2) disability, inconvenience, and loss of enjoyment of life; and 3) pain and suffering. CP 5138 (Jury Instruction No. 10), RP 1492.

In closing argument, Plaintiff's counsel asked the jury for damages to compensate Ms. Brandes for these injuries, explaining:

> [T]he law has not furnished us with any fixed standards. There's no scale you can go by and say, well, Barbara was 80 years old and she had mesothelioma, so therefore we go over here and that's what the award is. [T]he law doesn't do that.
>
> * * *
>
> Remember at the beginning I said Barbara's not asking you to give her anything. It's not an award. It's to replace her losses and that's all we're asking.
>
> * * *
>
> But you have to do your best to award appropriate damages. And in your common experience, you know there's lots of occasions where a human life is valued at a high amount; that these elements here, the nature and extent of injuries, disability, that considerable amounts are spent so that these things do not occur.
>
> * * *

> Ladies and gentlemen, we know that even prisoners were not permitted to be tortured. But what Dr. Ahmed just told you what Barbara was undergoing her own personal form of torture in her body as she fought this cancer, that's something that can't be put in a neat package and given to you as an amount. But that is an element of damage. That's what pain and suffering is.
>
> * * *
>
> If I said that Brand Insulation made $3 million and you -- and that was in the 1971, '72, in today's dollars that's probably $30 million. If I asked for $30 million you'd probably scoff at me for that too. Let's think of something reasonable. What did Brand make? What did they profit? Twenty percent, typical construction profits; $600,000 back then; today, $6 million. Is it unreasonable for the torture chamber Barbara lived in? Is that unreasonable for their failure to test -- for the failure to speak up at the new safety meetings? Is that unreasonable that they came here and undercut the local companies and got the job because they didn't have any safety regulations because they refused to read the Washington Safety Code? Is that unreasonable, ladies and gentlemen? I don't think so.
>
> But you, in your collective wisdom, discuss it, and decide. You may think my figure is too high. You may think my figure is too low. But the 12 of you together will discuss it and arrive at a number under His Honor's instructions here. And I ask you, whatever number you arrive at, be proud of it.

RP 1530-36. At no time during Plaintiff's argument on damages did Brand's counsel raise any objection whatsoever. RP 1528-37.

After its deliberation, the jury found that Brand was negligent and that Brand's negligence was a proximate cause of Ms. Brandes' injuries. CP 5142-43. The jury awarded Ms. Brandes' Estate non-economic damages in the amount of $3,500,000. CP 5143.

After the conclusion of the trial, Plaintiff sought entry of judgment, while Brand filed a Motion for Judgment Notwithstanding the Verdict, New Trial or, in

the Alternative, Remittitur. CP 5192-5212. The trial court denied the other relief requested by Brand, but granted remittitur, reducing the jury's award from $3,500,000 to $2,500,000. CP 5431. The trial court based its ruling on three grounds: 1) the impact on the jury in receiving the news of Ms. Brandes' death; 2) the trial court's failure to further modify its instructions to the jury—in addition to orally informing the jury that Ms. Brandes' "death had no impact on the decisions they had to make which remained just the same"—to clarify that the jury should only consider Ms. Brandes' "pre-death pain and suffering, etc., and not her death and not the grieving caused to other family members"; and 3) the fact that "Plaintiff's closing argument contained an inappropriate appeal for punitive and exemplary damages." CP 5429. On this third and final point, the trial court observed that, "It is true that by not objecting, the defense may have waived any argument for a new trial on this basis. However, it remains a consideration for the Court in its conclusions regarding how the jury arrived at its damages award." CP 5429-30. The trial court ultimately reached the conclusion that remittitur was appropriate because the jury's verdict was "outside of the range of what would be expected in light of the facts of the case." CP 5430.

V. ARGUMENT

A. Issues on Appeal.

1. The Trial Court's Denial of Brand's Summary Judgment on the Statute of Repose is Not Properly Before this Court, Nor Did The Trial Court Err.

a. The Trial Court's Denial of Brand's Summary Judgment and Reconsideration Motions on the Statute of Repose is Not Properly Before this Court.

Brand assigns error to the trial court's "ruling that Washington's construction Statute of Repose did not bar Mrs. Brandes' claims." Brand's Opening Brief at 1. The Court need not—and should not—address this issue for two separate and independent reasons.

First, appellate review of the trial court's summary judgment ruling is unavailable as a matter of law. In denying Brand's Motion for Summary Judgment and for Reconsideration on the contractor's Statute of Repose, RCW 4.61.300, *et seq*, the trial court explicitly found a fact question as to whether insulation is an "improvement to real property" under the Statute—a necessary predicate to the application of the defense. RP 53. As this Court has explicitly recognized, an appellate court "may not review a denial of summary judgment following a trial if the denial was based upon a determination that material facts were in dispute and had to be resolved by the fact finder." *Washburn v. City of Fed. Way*, 169 Wn. App. 588, 610, 283 P.3d 567 (2012), *aff'd on other grounds*, 178 Wn.2d 732, 310 P.3d 1275 (2013); *see also Kaplan v. Nw. Mut. Life Ins. Co.*, 115 Wn. App. 791,

799, 65 P.3d 16 (2003), *quoting Brothers v. Pub. Sch. Employees of Washington*, 88 Wn. App. 398, 409, 945 P.2d 208 (1997) ("A summary judgment denial cannot be appealed following a trial if the denial was based upon a determination that material facts are disputed and must be resolved by the factfinder."). For this reason alone, Brand's first argument fails.

Second, Brand failed to request a jury instruction sufficient to preserve the issue for appeal. CP 3460-83, RP 1345-64. Indeed, Brand neglected to request *any* instruction pertaining to its Statute of Repose defense, including failing to request an instruction that would have put the question of whether insulation installed by Brand at the Cherry Point facility constituted an improvement to real property. *See* CP 3460-83. Nor did Brand take exception to the trial court's failure to give any such instruction that would have put the Statute of Repose defense before the jury. RP 1345-64. Thus, Brand has not preserved the first assigned error raised in its appeal for this Court's review. *See Ball v. Smith*, 87 Wn.2d 717, 720, 556 P.2d 936 (1976); *Washburn*, 169 Wn. App. at 600. For either or both of these reasons, appellate review of the Statute of Repose issue is foreclosed.

b. If the Court Reaches the Issue, the Trial Court Correctly Found an Issue of Fact as to Whether Insulation Constitutes an Improvement to Real Property Prerequisite to Application of the Repose Defense.

As the trial court reasoned, the applicability of the Statute of Repose to claims based on the defendant's negligent installation turns on whether the

insulation products Brand installed at the Cherry Point refinery constitute an "improvement to real property." RP 51-53; RCW 4.16.300 (Statute of Repose covers claims relating to "any *improvement upon real property*") (emphasis added). Application of the statute to Plaintiff's negligent installation claims thus required a threshold determination of whether thermal insulation products installed by Brand at Cherry Point qualify as an improvement to real property—a determination which other courts have already agreed, as the trial court did here, is a factual one.

In *Condit v. Lewis Refrigeration*, 101 Wn.2d 106, 676 P.2d 466 (1984), the Supreme Court considered whether the Statute of Repose barred a personal injury lawsuit in a case where the plaintiff was injured by a conveyer belt in a refrigeration unit installed at a food processing plant. The plaintiff brought an action against Lewis, the conveyer belt designer, manufacturer, and installer. *Id.* at 107. Lewis argued that the conveyer belt was "an improvement to real property" and therefore subject to the time bar of the contractor's Statute of Repose. The Supreme Court disagreed, holding that the conveyer belt and refrigeration unit at issue were not improvements to real property, but rather were "accoutrements to the manufacturing process." *Id.* at 112. The Court explained that the Statute of Repose only "protects individuals who work on structural aspects of the building." *Id.* at 111. It does not apply to manufacturers of non-integral systems, reasoning that "[m]echanical fastenings may attach a machine to the building, but they do not

convert production equipment into realty or integrate machines into the building structure, for they are not necessary for the building to function as a building." *Id.*

Condit thus makes plain that, in order for an improvement to property to be subject to the statute of repose, the thing that produces the injury must be "integral" to the structure. *Id.* at 111. *Cf. Highsmith v. J.C. Penney & Company*, 39 Wn. App. 57,691 P.2d 976 (1984) (applying *Condit* to determine that an escalator in a building was integral to that structure). This distinction comports with the legislative intent of the statute of repose—as construed by the Supreme Court—to protect only those individuals who work on structural aspects of a building rather than personal property contained therein. *Condit*, 101 Wn.2d at 111. Thus, the distinction between an improvement to real property and personal property is dispositive and factually dependent, as the trial court correctly ruled in this case.

It is equally clear that the trial court correctly found issues of fact on this dispositive point. The testimony of Raymond Brandes' coworkers as well as other documentary evidence demonstrated that thermal insulation supplied and installed by the defendant at the Cherry Point Refinery was impermanent and non-integral, as it was regularly and foreseeably removed, repaired, and replaced during routine maintenance. *E.g.*, CP 1944-46, 1951-54, 2842-43, 2845-59. On the basis of this and other record evidence, the trial court *correctly* found that there were factual disputes as to whether insulation supplied and installed by Brand constituted an improvement to real property within the purview of RCW 4.16.300. RP 53. Thus, even if the issue

was properly before this Court—which it is not—the trial court did not err in denying Brand's summary judgment motion.

2. Brand Owed a Duty to Ms. Brandes.

a. Washington Law Recognizes a Duty to Family Members of Workers Exposed to Asbestos.

Brand argues in order to impose liability there must be either retained control under *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. 649, 240 P.3d 162 (2010), *rev. denied,* 171 Wn. 2d 1012, 249 P.3d 1029 (2011), or strict liability under *Lunsford v. Saberhagen Holdings,* 125 Wn. App. 784, 106 P.3d 808 (2005). Brand reaches this conclusion by conflating the tort principles of an actor's duty to control the conduct of third parties with the ordinary duty of reasonable care. Contrary to Brand's argument, asbestos product sellers and distributors have a duty to prevent the exposure of a worker's family to asbestos, even where the family members never set foot on the defendant's premises.

In *Lunsford,* this Court held that sellers of asbestos products owe a duty of care to household family members as users of such products when it was reasonably foreseeable that the family members would be exposed to asbestos. 125 Wn. App. at 793. In *Lunsford,* the plaintiff was exposed to asbestos from his father's work clothes during the 1950s and sued the insulation contractor who supplied asbestos-containing products to the father's work site. On review of that decision at the Supreme Court, the defendant argued unsuccessfully that expansion of common law product liability to family members of asbestos workers could not be applied

retroactively. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 208 P.3d 1092 (2009). In reaching this holding, the Supreme Court implicitly approved this Court's determination that family members were product users for purposes of the RESTATEMENT (SECOND) OF TORTS (1965) § 402. Similarly, in *Arnold*, the son of an asbestos insulator asserted take-home asbestos exposure claims against Lockheed shipyard. 157 Wn. App. at 653. The Court of Appeals reversed the trial court's dismissal of his take-home liability claim, recognizing the existence of a common law negligence duty of care by Lockheed to the family members of workers. *Id.* at 668-69, 671.

Applying Washington law on "take home" asbestos exposure claims, the trial court in this case properly denied Brand's motion for summary judgment based on its "no duty" argument and submitted to the jury the question of whether Brand exercised reasonable care to protect Ms. Brandes from foreseeable harm. *See Lockwood,* 109 Wn. 2d 235; *Rikstad v. Holmberg*, 76 Wn. 2d 265, 456 P.2d 355 (1969). The foreseeability of Ms. Brandes' injuries was quintessentially a question for the jury. Having been properly instructed that "[n]egligence is the failure to exercise ordinary care" and that "[o]rdinary care means the care a reasonably careful [] corporation would exercise under the same or similar circumstances as they existed at the time of the conduct in question" (CP 1536 (Jury Instruction No. 8)), the jury appropriately found that Ms. Brandes' injuries were reasonably

foreseeable to Brand at the time of her asbestos exposures in 1971-1975. CP 5142-43.

The jury's finding of negligence, encompassing its finding of the foreseeability of Ms. Brandes' exposure, was thoroughly supported by the evidence at trial. Plaintiff marshalled evidence that Brand was the primary insulation subcontractor who procured the majority of the insulation at the Cherry Point refinery, including asbestos insulation, and sold such insulation products to ARCO pursuant to Brand's subcontract. RP 194-95, 237-39, 244-45, 316-19, 323-24, 432. Plaintiff also presented evidence that Brand installed the thermal insulation for piping and equipment in the two areas of the refinery where Mr. Brandes worked, the crude area and coker, and that Brand insulators took no precautions to minimize the dust generated by their insulation activities. RP 385-86, 436-39, 612-14. The jury heard evidence that at least two of Brand's competitors, J.T. Thorpe Insulation and Plant Insulations, *did* engage in safe industrial hygiene practices concerning asbestos insulation. RP 1302-05.

Mr. Brandes' co-worker, Dan Williams, as well as witnesses Nils Johnson and Leslie Pugh, further testified that visible dust was generated by Brand's on-site insulation work. RP 381-82, 433, 598-99. In conjunction, Plaintiff's expert industrial hygienist John Templin testified that whenever asbestos dust is visible, the concentration of asbestos in the atmosphere would exceed even the higher time-weighted average originally applied by OSHA in the early 1970s. RP 678-80, 708-

09, 722. Furthermore, Plaintiff presented extensive evidence that the medical, scientific, and industry/trade literature in the decades leading up to Ms. Brandes' exposure confirmed the risk of workers' family members developing disease following exposure to toxic substances carried home on contaminated work clothing. *E.g.*, Exs. 35, 41, 50, 343.

Plaintiff's state-of-the-art expert, Barry Castleman, Ph.D., testified to this body of knowledge and its availability to companies like Brand engaged in the insulation contracting business. RP 824-67. The jury was thus presented with ample evidence to find that Brand could have foreseen harm to family members of workers exposed to asbestos from Brand's insulation activities at Cherry Point. *See King v. City of Seattle,* 84 Wn.2d 239, 248, 525 P.2d 228 (1974) ("[l]iability is not predicated upon the ability to foresee the exact manner in which the injury may be sustained.").[2] There is no basis to vacate that finding or the trial court's corresponding analysis.

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[2] A risk is foreseeable if it merely falls within the "general field of danger which should have been anticipated" by the defendant. *Rikstad v. Holmberg*, 76 Wn.2d 265, 269, 456 P.2d 355 (1969). That the particular mode, method, or cause of harm was not foreseeable does not relieve a tortfeasor from liability so long as the *general* nature of the harm was foreseeable. *King*, 84 Wn.2d at 248. Moreover, the foreseeability inquiry cannot be made in a vacuum, and depends in part on the defendant's circumstances and position, as well as the defendant's actual knowledge. *Id. See also N.K. v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints,* 175 Wn. App. 517, 530-31, 307 P.3d 730, 737 (2013).

b. A "Special Relationship" is Only Required When Harm Results from the Conduct of a Third Party.

Brand claims that it owed no duty of care to Ms. Brandes absent a "special relationship" between the parties. This argument misperceives the nature of Plaintiff's general negligence claim.

Common law negligence requires an actor to exercise ordinary care to protect the plaintiff from harm. However, the duty does not extend to protecting the plaintiff from harms caused by third persons absent a "special relationship" between the defendant and a third person, or between the defendant and the plaintiff. *See* 16 WASH. PRAC., TORT LAW AND PRACTICE § 2:8 (4th ed.). Here, Ms. Brandes' negligence claims were based on Brand's sale and installation of asbestos products at the Cherry Point refinery, not on the actions of third parties. Brand's argument that "the parties were legal strangers" (Brand's Opening Brief at 19) therefore fails easily. *Webstad v. Stortini*, 83 Wn. App. 857, 924 P.2d 940 1996).

Brand owed an independent duty to exercise reasonable care in its sale and installation of asbestos products at the Cherry Point site. Plaintiff offered evidence at trial that Brand failed to take precautions to control the release of asbestos fibers resulting from its insulation activities at the refinery. RP 385-86, 436-39, 612-14. Plaintiff further presented evidence that Brand made no efforts to warn bystanders or otherwise implement engineering controls to reduce the exposure of ARCO employees, such as Ms. Brandes' husband, to the friable asbestos released by

Brand's activities at the Cherry Point site. *E.g.*, RP 612. Based on this evidence, the jury concluded that Brand failed to exercise ordinary care in its sale and installation of asbestos products at the ARCO refinery. Because this finding was based on Brand's own misconduct, not the acts or omissions of third parties, no "special relationship" was required to impose liability under Washington negligence law.

c. Recognition of a Duty Owed by Brand Does Not Pose a Risk of Limitless Liability.

Brand also argues in the alternative that liability should not be imposed because "If Brand had a duty to Mrs. Brandes, there is no logical way to deny such a duty to all persons who had ever set foot in her home..." Brand's Opening Brief at 24. Brand's policy argument based on reasoning of *reductio ad absurdum* ignores the facts of this case. The relationship between Brand and Raymond Brandes' family was not one of complete legal strangers. Rather, Brand was a contractor working at the jobsite of Mr. Brandes' employer, ARCO, with a duty to exercise reasonable care in the protection of persons exposed to the products Brand was selling and installing at the jobsite. Thus, Brand's "slippery slope" argument that unlimited liability will ensue if the Court affirms the recognition of a duty owed to Ms. Brandes is completely unfounded.

3. The Jury's Causation Finding is Supported by the Evidence.

Brand argues that the jury's verdict should be overturned because there was not a legally sufficient basis to support its finding that Brand's negligence was a proximate cause of Ms. Brandes' mesothelioma.

Although denial of a CR 50(a) and (b) motion is reviewed *de novo*, the standard for granting such relief is both demanding and deferential. Judgment as a matter of law under CR 50 is only appropriate where there is "no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue." CR 50(a)(1). In adjudicating a request for directing or overturning a jury verdict,

> [t]he trial court has no discretion and may grant the motion only where there is *no competent evidence nor reasonable inference* which would sustain a jury verdict in favor of the nonmoving party. If there is any justifiable evidence upon which reasonable minds might reach conclusions that sustain the verdict, the question is for the jury.

Levy v. N. Am. Co. for Life & Health Ins., 90 Wn. 2d 846, 851, 586 P.2d 845 (1978) (emphasis supplied). *See also Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997).

Likewise, in reviewing a trial court's denial of a motion for judgment as a matter of law, the appellate court considers all evidence in the light most favorable to the non-moving party, together with all favorable inferences. *Roth v. Havens, Inc.*, 56 Wn.2d 393, 394, 353 P.2d 159 (1960). Ultimately, there is no proper basis

to grant such a motion "unless the court can say, as a matter of law, that there is neither evidence nor reasonable inference from evidence sufficient to sustain the verdict." *Day v. Frazer*, 59 Wn.2d 659, 661, 369 P.2d 859 (1962).

During the course of the trial, Plaintiff offered uncontroverted evidence that Ms. Brandes suffered from mesothelioma and that her mesothelioma was caused by asbestos exposure. RP 254-55, 553-54. Specifically, Plaintiff offered the testimony of Dr. Sharmila Ahmed, Ms. Brandes' treating oncologist, who testified that Ms. Brandes had a significant social history of asbestos exposure, and that asbestos exposure was one of the few known causes of mesothelioma. RP 463-68. Furthermore, Plaintiff's expert pathologist Dr. Andrew Churg, a renowned expert on mesothelioma diagnosis and causation, testified and confirmed Ms. Brandes' diagnosis and its asbestos exposure origin. RP 553-54. In response to specific questioning, Dr. Churg testified that Ms. Brandes' mesothelioma was caused by her exposure to asbestos sustained while laundering her husband's clothing from ARCO. RP 553.

Contrary to Brand's portrayal, Dr. Churg testified that Ms. Brandes' asbestos exposure attributable to her husband's work at the ARCO refinery was a substantial factor in bringing about her mesothelioma:

> Q: [I]n your opinion, to a reasonable degree of medical certainty, as a pathologist, as an expert in mesothelioma, as a consultant to doctors around the world in this disease and its causation, was Mrs. Brandes' mesothelioma caused,

substantially contributed to, by the asbestos exposure she had at the ARCO refinery?

A: Yes, it was.

Q: If I ask you to assume, sir, that the major supplier of asbestos-type insulation containing amosite at the ARCO refinery was Brand Insulation Company, do you have an opinion to a reasonable degree of medical certainty, sir, as to whether or not the Brand insulation that Mr. Brandes was exposed to was a substantial contributing factor to his wife's mesothelioma?

A: Yes, it was.

Q: [W]hy do you say that, sir?

A: Well, again, in a sense it doesn't matter who supplied the asbestos. If it's there and it's amosite, as we have gone through, amosite brought home on work clothes produces a risk of mesothelioma. If Brand supplied the amosite, then that's the substantial contributing cause.

RP 553-54. The above testimony is alone dispositive of Brand's request to overturn the jury's verdict on the basis of insufficient evidence of causation.

Moreover, under Washington law, it is unnecessary for a plaintiff to offer defendant-specific causation evidence, or to offer a dose reconstruction, so long as evidence was presented capable of supporting the jury's finding that the substantial factor causation standard was satisfied. *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 268, 744 P.2d 605 (1987) (articulating and approving the substantial factor causation standard applicable to asbestos cases "because of the peculiar nature of asbestos products and the development of disease due to exposure to such

products," which makes it "extremely difficult to determine if exposure to a particular defendant's asbestos product actually caused the plaintiff's injury").[3] Yet, exceeding the requirements for proof of causation under Washington law, Dr. Churg offered specific testimony, quoted above, that, assuming Brand was the primary insulation contractor at the Cherry Point site (as Brand conceded), then Ms. Brandes' asbestos exposures resulting from Brand's insulation activities would be a substantial factor in causing her mesothelioma. RP 554.

Brand's attempted cross-examination of Dr. Churg on his prior testimony on a "stated causation threshold," was rebuked by Dr. Churg when he explicitly stated his opinion *in this case* that Ms. Brandes' asbestos exposure arising out of the ARCO site was a substantial factor in causing her mesothelioma. RP 553, 576-79. Furthermore, Dr. Churg's report—which was received into evidence at trial and regarding which Dr. Churg testified—reflected his conclusion that Ms. Brandes' "epithelial malignant mesothelioma of the pleura" was "caused by washing her husband's asbestos-contaminated workclothes," relying upon Mr. Brandes' occupational history of asbestos exposure at the ARCO refinery working in the "immediate vicinity of insulators installing asbestos insulation." RP 557 (admission of Plaintiff's Trial Ex. 16). Again, Brand offered no contrary evidence through documents or witnesses.

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[3] *See also Sharbono v. Universal Underwriters Ins., Co.*, 139 Wn. App. 383, 421, 161 P. 3d 406 (2007); *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 25, 935 P.2d 684, 686 (1997).

Brand failed to call a single medical witness to controvert Ms. Brandes' diagnosis or its cause. Nevertheless, Brand emphasizes the opinion of its industrial hygiene expert, Mr. Holtshouser; however, this differing opinion testimony is inapposite in light of Dr. Churg's unequivocal testimony that Ms. Brandes' asbestos exposure was a substantial factor in bringing about her mesothelioma. Argument of the relative weight of contradictory expert opinion testimony is utterly irrelevant in adjudicating a motion under CR 50. *See Faust v. Albertson*, 167 Wn.2d 531, 538, 222 P.3d 1208 (2009), *as amended* (Aug. 6, 2009) (in deciding motion for judgment as a matter of law, court "must defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence"). Applying the applicable standard of review, Dr. Churg's testimony—not that of Mr. Holtshouser—is dispositive here. For this reason too, Brand's causation argument fails.

4. The Jury Instructions Given in the Case Adequately Articulated the Governing Negligence Standard and Permitted the Parties to Argue their Theories of the Case.

Jury instructions are sufficient if "(1) they permit the party to argue his or her theory of the case; (2) they are not misleading; and (3) when read as a whole they properly inform the trier of the fact on the applicable law." *Levea v. G.A. Gray Corp.*, 17 Wn. App. 214, 225, 562 P.2d 1276 (1977). *Accord State v. Easterlin*, 159 Wn.2d 203, 149 P.3d 366 (2006). The jury instructions given by the trial court in this case comply with these requirements in all respects.

Brand takes exception to the trial court's jury instruction on Plaintiff's negligent sales theory as well as to the court's decision not to give a jury instruction that a contractor's compliance with contract specifications operates as a defense to negligence. Brand persists in arguing that it owed no duty to protect Ms. Brandes from exposure to asbestos generated by its insulation activities at the ARCO refinery and that the trial court erred in submitting a "negligent sale" theory of Brand's negligence to the jury. Again, Brand's assignment of error misperceives the evidence presented at trial as well as the law of negligence, which was accurately captured in the trial court's Instruction No. 8, articulating the duty of ordinary care. CP 5136. Brand's procurement, sale, and use of asbestos materials in its work at the Cherry Point refinery were all appropriately considered by the jury in assessing Brand's negligence.

Moreover, Brand's insistence that it was not a "seller" of insulation products ignores the evidence presented that Brand in fact sold insulation to ARCO pursuant to its subcontract with the general contractor for the construction of the Cherry Point project. Trial Exhibit 210, for example, consists of invoices for asbestos insulation Brand sold at the ARCO refinery. Moreover, Trial Exhibit 78 was an invoice by Brand for the left-over asbestos insulation it sold to ARCO when the contract was complete.

In support of its negligent sale claim, Plaintiff offered evidence of the dangerous, cancer-causing nature of asbestos as well as evidence that the asbestos-

containing insulation products supplied and installed by Brand were sold in containers bearing manufacturers' warnings regarding the hazards of asbestos, but Brand insulators removed those products from their packaging and installed them without any attempt to pass on the manufacturers' warnings to end-users like Mr. or Ms. Brandes. RP 612, 1156-77, 1181-83.

Basic principles of negligence confirm that Brand owed a duty to exercise reasonable care in warning foreseeable users of the hazards of the asbestos insulation products it sold and installed at the Cherry Point refinery. *See Sys. Tank Lines v. Dixon*, 47 Wn.2d 147, 151, 286 P.2d 704 (1955). *See also Zamora v. Mobil Corp.*, 104 Wn.2d 199, 204, 704 P.2d 584 (1985) (seller or supplier of a product has a common law duty to warn about the hazards attendant to use of such product when the seller/supplier knows, or has reason to know, the product is likely to be dangerous when used in a foreseeable manner). Importantly, Plaintiff's negligence claims against Brand were based on Brand's conduct and knowledge in selling *and installing* asbestos-containing insulation products, and were therefore distinguishable from product liability claims based on the safety of the products themselves, evaluated under the consumer expectation standard, which the trial court dismissed on summary judgment.

Contrary to Brand's characterization, as set forth *supra*, Washington law maintains that asbestos product sellers and distributors have a duty to prevent the exposure of a worker's family to asbestos, even where the family members never

set foot on the defendant's premises. The trial court in this case therefore properly submitted to the jury the question of whether Brand exercised reasonable care to protect Ms. Brandes from foreseeable harm. *See Lockwood,* 109 Wn. 2d 235; *Rikstad v. Holmberg*, 76 Wn.2d 265, 456 P.2d 355 (1969). The foreseeability of Ms. Brandes' injuries was, again, quintessentially a question for the jury.

Having been properly instructed that "[n]egligence is the failure to exercise ordinary care," and that "[o]rdinary care means the care a reasonably careful [] corporation would exercise under the same or similar circumstances as they existed at the time of the conduct in question" (CP 5136 (Instruction No. 8)), the jury found that Ms. Brandes' injuries were reasonably foreseeable to Brand at the time of her asbestos exposures in 1971-1975.

Brand's requested instruction that a contractor is not negligent for following specifications prepared by a design professional was not only unnecessary, but also risked improperly implying to the jury that compliance with contract specifications would be determinative of negligence when that is not the law, which instead simply dictates ordinary care. *See* RESTATEMENT (SECOND) OF TORTS § 295A *and* cmt. c; RESTATEMENT (SECOND) OF TORTS § 288C; *Texas & Pacific Railway Company v. Behymer*, 189 U.S. 468, 23 S.Ct. 622 (1903) ("what ought to be done is fixed by a standard of reasonable prudence"); *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 971 P.2d 500 (1999) (compliance with regulatory standards is relevant to the question of negligence but not determinative).

The trial court's Instruction No. 8 (CP 5136) was more than sufficient to instruct the jury as to Brand's duty under the law. Moreover, the trial court's Instructions Nos. 1, 2, and 7, provided sufficient contextual information for how the jury was to consider *all* of the proffered evidence. CP 5127-30, 5135. Building on those instructions, Plaintiff offered evidence at trial that Brand knew of the risks posed by its sale and installation of asbestos products to foreseeable users like Ms. Brandes.

Nothing in the trial court's instructions to the jury prevented Brand from arguing its theory of the case as reflected in the requested instruction. Indeed, Brand argued in its closing statement that it was not negligent in selling and installing asbestos insulation at the Cherry Point refinery because the ARCO contract specifications called for asbestos-containing brands of thermal insulation products. RP 1564.[4] Read as a whole, the trial court's instructions clearly and properly instructed the jury on the negligence standard and permitted both parties to argue their respective case theories and therefore were not in error. *Levea*, 17 Wn. App. at 225. Brand also largely ignores the fact that the trial court permitted both a negligent sales *and* negligent installation claim to go to the jury, such that

[4] Brand's counsel argued during closing: "Parsons specified that all insulation would be covered by lagging and we were, we were the primary insulation contractor and obligated to follow the specifications prepared by Parsons, including, I think I heard Mr. Hart say or Ms. Wright say Brand chose the insulation. We didn't choose the insulation. We chose among those that Parsons identified in the specifications. They said we could use Unibestos, Kaylo, Thermobestos, Super Caltemp from Pabco. There is the specification." RP 1564.

any theoretical error in permitting a negligent sales claim to go to the jury was inarguably harmless.

The trial court denied Brand's request for a contractor's defense instruction for the stated reason that the simple negligence instructions permitted both parties to argue their theories of the case, including permitting Brand to nevertheless argue that the it was not negligent because it was simply fulfilling contract specifications by installing asbestos insulation. This very concept is embraced by the authority Brand cites for the proposition that application of the defense is inconsistent with strict liability policies. *E.g.*, *Dorse v. Armstrong World Indus.*, 513 So. 2d 1265, 1267 (Fla. 1987) ("contract specification defense is not, strictly speaking, a defense at all but an aspect of the negligence elements of foreseeability and duty of care"). Indeed, Brand actually furthered this argument during its closing remarks. RP 1564.[5]

In sum, it is fundamentally inaccurate to state that it was undisputed that Brand did not participate in the selection of materials used when Plaintiff presented evidence that Brand requested reversion to the use of asbestos insulation after an asbestos-free alternative had inferior performance qualities. *E.g.*, RP 245, 309-12,

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[5] Nor does Brand's alleged compliance with insufficient standards set forth in contract specifications excuse negligent conduct. *See Helling v. Carey*, 83 Wn.2d 514, 519 P.2d 981 (1974) (finding negligence *as a matter of law* even though the defendant ophthalmologist had acted in compliance with the applicable industry standard); *State of Oregon v. Tug Go-Getter*, 468 F.2d 1270, 1275 (9th Cir. 1972) (confronted with evidence that 40-50% of the barge traffic under a particular bridge was accomplished with a single tug, the court held that this evidence "seems only to suggest that 40 to 50 percent of the vessels navigating the river were guilty of negligence").

315-19. The trial court did not commit instructional error on this point, and the evidence amply supports the jury's verdict. Brand's contrary arguments should be rejected.

5. Admission of the Work Practice Simulation Videos was Not an Abuse of Discretion.

Brand correctly points out that the standard of review applicable to its evidentiary challenge is abuse of discretion. Brand's Opening Brief at 45. Given the deferential standard of review for Brand's evidentiary challenge, there is no conceivable basis on which it can be concluded that admission of a demonstrative aid, for which a full foundation was laid and which was helpful to the jury, was an abuse of the trial court's discretion.

Brand claims that a new trial is warranted because the jury may have treated the MAS videos as direct evidence of the conditions attending Brand's work at the ARCO facility during Mr. Brandes' employment. Brand's Opening Brief at 46. There is no evidence that this occurred. *See generally State v. Stein,* 144 Wn.2d 236, 248, 27 P.3d 184 (2001) (holding that courts presume that juries follow all instructions given). To the contrary, after the trial court's ruling that the MAS videos could be displayed to the jury, Plaintiff's industrial hygiene expert John Templin, CIH laid a foundation for the demonstrative nature of the videos in depicting conditions caused by cutting products similar to what co-worker witnesses had described occurring at the refinery during the early 1970s. RP 683-

84, 686-87, 724-37. Moreover, the video was edited to show only a brief one or two minute portion to the jury. RP 733. Brand's conclusory assertions of the irrelevance and prejudice of the MAS videos were insufficient to justify their exclusion *in limine* and are equally insufficient to justify retrial of this case.

6. The Trial Court's Allocation Between Personal Injury and Wrongful Death Claims Was Supported by Substantial Evidence.

Ms. Brandes settled her personal injury claims against ARCO, Metalclad, and Metropolitan Life prior to trial. CP 5518-19. As discussed below, those settlements necessarily included amounts for future wrongful death claims on behalf of Ms. Brandes' statutory beneficiaries. It was therefore necessary to offset those amounts from Plaintiff's wrongful death recovery from Brand. The trial court did so: it allocated 20% of Ms. Brandes' pre-trial settlements to future wrongful death claims by her statutory beneficiaries, and offset judgment by 80% of Plaintiff's prior settlements. CP 5426-31. Brand now challenges that allocation. This Court reviews the trial court's allocation ruling to determine "whether substantial evidence supports the findings and whether those findings, in turn, support its legal conclusions." *Scott's Excavating, LLC v. Winlock Props., LLC*, 176 Wn. App. 335, 341, 308 P.3d 791 (2013). The *Scott's* court added: "This is a deferential standard, which views reasonable inferences in the light most favorable to the prevailing party." *Id.* at 342.

a. The Wrongful Death Claims of Ms. Brandes' Statutory Beneficiaries Were Not Extinguished by the Trial Verdict in her Personal Injury Case.

Brand argues that Plaintiff's wrongful death claims are valueless under *Deggs v. Asbestos Corp. Ltd.,* 188 Wn. App. 495, 354 P.3d 1 (2015), *review granted*, 184 Wn.2d 1018, 361 P.3d 746 (2015), and its progeny. However, *Deggs* is wholly distinguishable from the case at bar. *Deggs* addressed the narrow issue of "whether the expiration of the Statute of Limitations for an individual's personal injury claims *during his lifetime* can preempt the accrual of his personal representative's wrongful death claim." 188 Wn. App. at 500 (emphasis added). Unlike the scenario addressed in *Deggs,* Ms. Brandes expired before a verdict was rendered in her personal injury case and, at the time of her death, the case was converted into a survivorship action, which rendered wrongful death claims no longer inchoate.

Because Ms. Brandes died before her personal injury claims were submitted to the jury, she unequivocally still had a subsisting cause of action at the time of her death. Furthermore, Brand has conceded that there is no question that the Statute of Limitations has not expired in this case. CP 5433 (Brand's Motion for Amendment of Final Judgment at 2). There is equally no dispute on the point that Barbara Brandes passed away *before* her personal injury claims were submitted to the jury, nor is there any dispute that such claims survived her death. *Deggs*

therefore has no bearing on this case and cannot be applied to negate the value of the wrongful death claims of Ms. Brandes' beneficiaries.

b. The Trial Court's Allocation Between Personal Injury and Wrongful Death was Supported by Substantial Evidence.

In asbestos litigation in Washington and throughout the United States, defendants unvaryingly demand inclusion of future wrongful death claims on behalf of wrongful death beneficiaries as a condition of settlement. This is because, in cases involving plaintiffs suffering from mesothelioma, the parties acknowledge the reality that the plaintiff's condition is invariably terminal, such that each defendant's potential liability for the plaintiff's injuries denotes an inevitable wrongful death claim upon the plaintiff's eventual, yet certain, death. Resolution of mesothelioma cases would not be feasible if both parties to the negotiation did not agree to the exchange of consideration for the release of future wrongful death claims. Absent bargaining for the release of future inevitable wrongful death claims, there would be no finality attained by the execution of the parties' settlement agreement.

The fact that Ms. Brandes had eight children qualifying as statutory beneficiaries under Washington's wrongful death statute was considered by the parties in reaching resolution of Plaintiff's claims. Indeed, the releases executed with all the settling defendants in this case explicitly included language precluding future wrongful death claims by Ms. Brandes' statutory beneficiaries. CP 5367-69. Preclusion of future wrongful death claims by Ms. Brandes' statutory beneficiaries,

who were not parties to the pending personal injury action, was an integral part of the consideration furnished in exchange for monetary payments by the settling defendants.[6]

Insofar as Ms. Brandes' pre-trial settlements curtailed the rights of her statutory beneficiaries to pursue wrongful death claims against the settling defendants, it was appropriate for the trial court to allocate a portion of these settlements to future wrongful death actions. The trial court's allocation of 20% of Ms. Brandes' pre-trial settlements to future wrongful death claims by her statutory beneficiaries was supported by substantial evidence including the following:

- Evidence that the settlement agreements executed with ARCO, Metalclad, and Metropolitan Life included language releasing and precluding future wrongful death claims (CP 5518-21)
- Evidence of the existence of eight living wrongful death statutory beneficiaries (RP 251)
- Testimony of Barbara Brandes regarding her relationship with her children (RP 251, 266-85)

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[6] Indeed, a settlement agreement is a contract, defined by the exchange of valuable consideration. *Riley Pleas, Inc. v. State*, 88 Wn.2d 933, 937-38, 568 P.2d 780, 783 (1977); *Wise v. City of Chelan*, 133 Wn. App. 167, 173, 135 P.3d 951, 954 (Div. III 2006) ("the essential elements of a valid executory contract are competent parties, legal subject matter, and valuable consideration."). It should therefore be self-evident that the exchange of consideration on behalf of the parties to the settlement agreements in this case consisted of the release of valuable legal claims, including claims for wrongful death, on the Plaintiff's side in exchange for monetary compensation paid by each settling defendant.

- Testimony of Ramona and David Brandes regarding their relationships with their mother as well as their siblings' relationships with their mother (RP 141-75, 355-72)

On this record, there is ample evidence to support the trial court's ruling allocating 20% of Ms. Brandes' pre-trial settlements to future wrongful death claims by her statutory beneficiaries and subtracting 80% of those amounts from the jury's verdict when it entered judgment in this case.

B. Issue on Cross-Appeal.

Plaintiff asserts a single issue on cross-appeal, which is whether the trial court erred in reducing the jury's verdict by $1 million—from $3.5 million to $2.5 million. That issue is governed by RCW 4.76.030, which provides as follows:

> If the trial court shall, upon a motion for new trial, find the damages awarded by a jury to be so excessive or inadequate as *unmistakably to indicate that the amount thereof must have been the result of passion or prejudice*, the trial court may order a new trial or may enter an order providing for a new trial unless the party adversely affected shall consent to a reduction or increase of such verdict . . . *[T]here shall be a presumption that the amount of damages awarded by the verdict of the jury was correct and such amount shall prevail*, unless the court of appeals or the supreme court shall find from the record that the damages awarded in such verdict by the jury were so excessive or so inadequate as *unmistakably* to indicate that the amount of the verdict must have been *the result of passion or prejudice*.

(emphasis supplied).

The jury's role in determining the appropriate amount of damages has been recognized as a Constitutionally protected element of the right to trial by jury. *See*

Sofie v. Fibreboard Corp., 112 Wn.2d 636, 646, 771 P.2d 711, *amended*, 780 P.2d 260 (1989) (overturning statutory cap on non-economic damages). As the Supreme Court has observed, "Washington has consistently looked to the jury to determine damages as a factual issue, especially in the area of noneconomic damages." *Id.* at 648.

With the gravity and sanctity of a jury's evaluation of damages in mind, the threshold for remittitur is exceptionally high. Remittitur is inappropriate unless the record obviously indicates that the jury was prejudiced against a party, or its reasoning was overcome by passion. *Jacobs v. Calvary Cemetery & Mausoleum*, 53 Wn. App. 45, 765 P.2d 334 (1988). A trial court has no discretion to reduce a verdict if the verdict is within the range of the credible evidence. *Green v. McAllister*, 103 Wn. App. 452, 14 P.3d 795 (2000), *as amended on clarification*, (Nov. 22, 2000) (grant of remittitur where evidence supported damages in breach of contract verdict was error and breached right to jury trial).

Jones v. Hogan, 56 Wn.2d 23, 30, 351 P.2d 153 (1960), is especially instructive here. In *Jones*, the Supreme Court found no error in counsel's closing argument on damages, which suggested a per diem award for pain and suffering, by reasoning that the damages argument could arguably be used only for "illustrative purposes," in which case "an admonition that the suggestions of counsel are not to be taken as evidence but are merely the thoughts of counsel as to what would be proper damages" is a sufficient safeguard. *Id.* at 32. In so holding, the court emphasized:

> Counsel is allowed a rather wide latitude in jury argument, which is wisely left in the hands of the trial judge... [W]hether improper argument requires reversal depends upon whether prejudice has been engendered which prevents a fair trial. *Argument is not evidence, and we cannot attribute to any jury in this state a lack of sufficient mentality to distinguish between the two.* This is especially true after the court has instructed that any remark of counsel not sustained by the evidence should be disregarded.

Id. at 31-32 (internal citations omitted) (emphasis added). The *Jones* court further observed that, even accepting the contentions regarding the prejudicial nature of arguments made by counsel, the "failure to request appropriate relief by the trial court *waived any error* as to" improper argument. *Id.* at 27.

The Supreme Court in *Jones* relied on its previous holding in *Sun Life Assurance Co. of Canada v. Cushman*, 22 Wn.2d 930, 158 P.2d 101 (1945), which is also instructive here. The Court in *Sun Life* stated:

> It may be admitted that, in a case such as now before us, no admonition that could be given by the trial court could correct the situation, if actual misconduct had occurred, but 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* and ask that the jury be discharged and, upon the refusal of the trial court so to do, to take exception to such ruling, and not to wait, as did respondents in this case, until an adverse verdict had been rendered, and then, for the first time, claim error based upon such alleged misconduct.

Id. (emphasis added). Substantial case law confirms these bedrock legal principles.[7]

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[7] In *Sommer v. Dep't of Soc. & Health Servs.*, 104 Wn. App. 160, 171, 15 P.3d 664 (2001), the court similarly stated that, "absent an objection to counsel's remarks, the issue of misconduct cannot be

Applying these legal principles here, the trial court erred in granting remittitur for two separate and independent reasons. First, Brand waived any assignment of error to the ostensible prejudice resulting from the death of Ms. Brandes and to Plaintiff's counsel's supposed improper argument during closing, both of which formed the basis for the trial court's grant of remittitur. During trial, "[i]f misconduct occurs, the trial court must be promptly asked to correct it. Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." *Jones*, 56 Wn.2d at 27. In the context of improper closing argument, "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." *Sommer v. Dep't of Soc. & Health Servs.*, 104 Wn. App. 160, 171, 15 P.3d 664 (2001). *See also Collins v. Clark Cnty. Fire Dist. No. 5*, 155 Wn. App. 48, 96, 231 P.3d 1211 (2010), *as corrected on denial of reconsideration* (Apr. 20, 2010).

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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." *See also 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). In the *Collins* case, the defendants argued that the plaintiff had "attempted to 'send a message' to the jury to direct the outcome of the case by appealing to the jury's 'sympathy, passion, and prejudice'" in asking the jury to "respect the harm incurred by [Plaintiffs] because to do otherwise would embolden other employers and supervisors, to act without regard to consequence." *Id.* The Court, however, held that because defendants had failed to object or request a curative instruction, "they did not preserve this argument for appeal." *Id.* (*citing* RAP 2.5(a)).

Here, Brand made no objections of any kind to the closing argument for damages offered by Plaintiff. Because Brand failed to object to any of counsel's argument, Brand waived its objection to such argument as a basis for post-verdict relief, including remittitur. Even if counsel's remarks in closing were excessive, it can scarcely be said that his remarks were so flagrantly improper that no curative instruction could have mitigated the prejudice where, as here, ample evidence supported the jury's valuation of Ms. Brandes' suffering and injuries resulting from her mesothelioma. Moreover, as in *Jones*, the jury was instructed here that argument presented in closing was not evidence, and that argument not supported by evidence should not be considered. RP 1486-87. The jury is presumed to have followed this admonishment, particularly where no objection whatsoever to counsel's argument was interposed. *See, e.g., State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001) (*citing Degroot v. Berkley Constr., Inc.*, 83 Wn. App. 125, 131, 920 P.2d 619 (1996) (*citing State v. Lord*, 117 Wn.2d 829, 861, 822 P.2d 177 (1991), *cert. denied,* 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992)).

Second, the jury's verdict was not "unmistakably" the "result of passion or prejudice" under RCW 4.76.030. Rather the jury's award reflects its inherently case-specific valuation of Ms. Brandes' injuries, pain, suffering, and other intangible losses as the trial court instructed. Even if Plaintiff's argument regarding damages during closing was improper, it cannot *unmistakably* show that the verdict was the result of passion or prejudice sufficient to rebut the presumption in favor

of preserving the jury's verdict. 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, it can hardly be said that the jury's award grossly overvalued Ms. Brandes' pain and suffering, disability, and injuries.

Indeed, far from being inflamed by prejudice, the jury's verdict is well within the range of reasonable damages for pain and suffering in similar cases. Consideration of other jury verdicts in cases involving terminally ill or severely injured plaintiffs, including both in and outside the asbestos context, demonstrates that juries' awards for non-economic damages, including pain and suffering, often far exceed the jury's award in this case. Verdict summaries for personal injury cases recently tried in Washington, including both asbestos and non-asbestos cases, reveal non-economic damages awards ranging from $900,000 to $15,000,000. CP 5287-311. For example, a 2009 case brought by a plaintiff suffering from mesothelioma resulted in an award of $10,200,000—$8,000,000 of which valued the plaintiff's non-economic damages only. CP 5287-89.

Likewise, non-asbestos personal injury cases for medical malpractice and other types of negligence often result in comparable verdicts with respect to non-economic damages, seeking to measure the plaintiff's pain and suffering. For example, in *Pettijohn v. Group Health*, No. 99-2-11482-5 SEA, the jury awarded $3,250,000 in non-economic damages to a plaintiff suffering from prostate cancer in a case alleging untimely diagnosis, misinterpretation of testing results, and other

deviations from the standard of care. CP 5306. And in *Rufer v. Abbott Laboratories*, No. 99-2-27090-8 SEA, which was tried to a jury in 2001, the jury awarded $15,000,000 *exclusively* for pain and suffering experienced by the plaintiff who alleged she lost the ability to have children after unnecessary medical treatment resulting from misdiagnosis. CP 5303. Based on these and other similar verdicts, the trial court's remittitur of the jury's verdict here cannot be condoned on the basis that the award was excessive, when it was well within the range of non-economic damages awards reached by juries in other comparable cases.

V. CONCLUSION

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. Accordingly, the Court should reinstate the jury's verdict. In all other respects, the Court should affirm.

RESPECTFULLY SUBMITTED this 19th day of February, 2016.

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CERTIFICATE OF SERVICE

I certify that on February 19, 2016, I caused to be served a true and correct copy of the foregoing document upon:

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