

NO. 71429-5-I

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.

REPLY BRIEF OF APPELLANT CATERPILLAR INC.

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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DIVISION I
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10:00 AM

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A. INTRODUCTION

Edwin Estenson is the sole source of product identification in this case. The facts set out in his depositions regarding his work with Caterpillar equipment are undisputed. Respondent attempts to create the impression that there were issues of fact at summary judgment, but there were not. The trial court's improper denial of Caterpillar's Motion for Summary Judgment was based on an issue of law and is reviewable.

As a result of errors at trial, the jury returned an excessive verdict not supported by the evidence and based on passion or prejudice. That verdict should be vacated.

B. RESPONSE TO RESPONDENT'S STATEMENT OF THE CASE

Respondent claims in her Response Brief that Caterpillar failed to provide the Court with a complete picture of the evidence presented at summary judgment regarding Mr. Estenson's work on Caterpillar equipment. That is incorrect. Caterpillar described in detail, with citations to the record, all of Mr. Estenson's testimony that related to his work on Caterpillar equipment. Respondent's Brief omitted key testimony of Mr. Estenson regarding his work on Caterpillar equipment. Respondent's Brief's citations to the record either omit or ignore highly relevant product identification testimony in order to suggest that Mr.

Estenson inhaled asbestos fibers from Caterpillar products when the evidence clearly shows that he did not.

- (1) Respondent's Brief Incorrectly Suggests Caterpillar Products Contained Asbestos by Presenting Incomplete Citations to the Record Regarding Mr. Estenson's Testimony.

Respondent's Brief fails to answer the absence of crucial evidence set out in Appellant's Brief regarding (1) identification of asbestos-containing Caterpillar components, (2) that Mr. Estenson worked with such components, (3) that such work created dust, and (4) that Mr. Estenson inhaled that dust.

Respondent's Brief states that Mr. Estenson described the access panel gasket on the D8 at Morrison Knudsen as a "fiber" gasket. That is correct. However, there are many types of fiber gaskets such as paper, cotton, graphite, etc. that do not contain asbestos. More importantly, Respondent omits Mr. Estenson's testimony that he did not know the composition of that access panel gasket. (CP 2761, 10-12-11, 116:12-13)

Respondent's Brief states that the pony motor on the D8 at Robinson Caves had never been worked on prior to Mr. Estenson helping to take it apart. Respondent's Brief omits that Mr. Estenson testified that he had no personal knowledge whether any of the parts on the Caterpillar D8 were the original manufacturer's installed equipment and that he had

no knowledge whether any of the parts on the D8 had been replaced prior to him working on it. (CP 69, 10-12-11, 106:8-14) Mr. Estenson also testified that he did not know the maintenance history of the D8. (CP 88, 10-12-11, 141:2-8,10) Respondent's Brief also fails to cite any testimony by Mr. Estenson that gaskets on the pony motor contained asbestos, dust was generated, or Mr. Estenson breathed any dust. Respondent's brief also omits Mr. Estenson's testimony that he did not purchase replacement parts for the pony motor. (CP 89, 10-12-11, 143:7-9)

Respondent states in her Brief that Mr. Estenson made adjustments to the power control unit for the clutches and brake on the D9. Respondent's Brief omits that Mr. Estenson changed his testimony the next day and testified he did not adjust the brakes and clutches on the D9. (CP 2763, 10-12-11, 121:2-8) Mr. Estenson testified the D9 was new and he only performed minor maintenance on it (CP 4305-4307, 121:13-131:19) and that he watched a factory representative repair the fuel injector pump. (CP 4305, 120:25-122:16) Mr. Estenson never testified, and plaintiff did not submit any evidence, that the fuel injector pump contained asbestos components, the replacement of the pump generated dust, or that he inhaled dust. (CP 125-165; 4296-4315)

Respondent's Brief claims that Mr. Estenson was present when the injection pump and water pump gaskets were replaced on the old D6.

However, Respondent's Brief fails to address the fact that there is no evidence that any gaskets removed on the old D6 contained asbestos nor that they were manufactured, supplied, or sold by Caterpillar. In fact, Mr. Estenson admitted he had no knowledge whether any of the parts on the old D6 were the original manufacturer's installed equipment. (CP 95, 10-12-11, 150:4-6), 10-12-12, 150:1-6) Respondent's brief omits Mr. Estenson's testimony that he would be speculating that the replacement parts came from a Caterpillar dealership. (CP 98, 10-12-11, 153:8-11, 13) Respondent's Brief does not challenge the holding in *Las v. Yellow Front Stores*, 66 Wn. App. 196, 831 P.2d 744 (1992), that "[p]laintiffs may not rely on speculation or inadmissible hearsay in opposing summary judgment."

Respondent's Brief cites Mr. Estenson's testimony that he was present when mechanics rebuilt the starter engine and repaired oil leaks on the D12. Respondent's brief omits Mr. Estenson's later testimony in which he admits that he does not recall any work with gaskets on the D12 grader. (CP 101, 10-12-11, 162:9-12)

Respondent's Brief states that on the RD7, Mr. Estenson testified that gaskets on the water pump were replaced. Respondent's brief omits Mr. Estenson's later testimony in which he stated the only work done on the RD7 was greasing tracks, fueling the dozer, and checking oil (CP

2889, 10-19-11, 530:19-24) and that he did not come in contact with any gaskets on the RD7. (CP 2889, 10-19-11, 530:19-24; CP 2889, 10-19-11, 532:12-16) Even if the gaskets on the water pump had been replaced, Mr. Estenson did not testify, and Respondent has not cited to any evidence, that the parts removed or installed were asbestos containing or were Caterpillar gaskets. Respondent's Brief paints a mistaken picture of the undisputed testimony of Edwin Estenson.

Respondent's reliance on the deposition testimony of Caterpillar's corporate representative, Eugene Sweeney, is misplaced for the following reasons: (1) an unbiased reading of Mr. Sweeney's testimony indicates he was testifying about marine diesel engines (CP 170, 8-28-08, 18:10-13, 50:12-15, 51:10-13); (2) Mr. Estenson testified that the pony motor was gas powered; (3) Mr. Sweeney testified gaskets on gas powered motors were different than diesel powered motors (CP 174, 8-28-08, 186:10-14); and (4) Mr. Sweeney testified that he would expect replacement gaskets for diesel engine manifolds to come from Caterpillar, however, Mr. Estenson never testified to replacing manifold gaskets on diesel engines. (CP 55-102, 126-165) This attempt to stretch Mr. Sweeney's testimony by Respondent borders on desperation.

(2) Caterpillar Correctly Characterized Dr. Mark's Testimony.

Dr. Mark stated in his declaration submitted by Respondent in

response to Caterpillar's Motion for Summary Judgment that:

Based on the foregoing, and for the reasons stated above, it is my opinion with a reasonable degree of medical certainty that Mr. Estenson's diffuse malignant mesothelioma was caused by exposure to asbestos. Mr. Estenson's work history and occupational exposures are consistent with asbestos as the cause of his disease. Mr. Estenson's exposure is noted on page 3 of my 27 June 2011 report. Additionally, 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.

(CP 108:12-19, emphasis added) It is clear that Dr. Mark is referring to Mr. Estenson's lifetime "work history and occupational exposures" to asbestos when he uses the word "aggregate." Dr. Mark, otherwise, would have just said Mr. Estenson's exposure from work with Caterpillar products was a substantial factor in causing his mesothelioma. He does not. Dr. Mark offered no opinion that exposure to Caterpillar products alone was sufficient to cause Mr. Estenson's mesothelioma.

C. ARGUMENT

- (1) Summary Judgment Denial in this Case is Appropriate for Review Because the Denial Was Based on an Issue of Law.

Respondent asserts that this Court cannot review the denial of Caterpillar's motion for summary judgment. This is incorrect. Appellate courts review rulings denying motions for summary judgment after a full

trial, if the summary judgment denial was based on an issue of law. (*Kaplan v. N.W. Mutual Life Ins. Co.*, 115 Wn. App. 791, 799-800, 65 P.3d 16 (2003); *Univ. Vill. Ltd. Partners v. King Co.*, 106 Wn. App. 321, 324, 23 P.3d 1090 (2001)) The trial Court's denial of Caterpillar's Motion for Summary Judgment was based on an issue of law.

The *Kaplan* case involved a dispute over the legal meaning of terms in an insurance policy. The plaintiff argued that a clause used twice in the insurance policy was subject to two conflicting meanings, so the clauses were ambiguous as a matter of law and therefore must be construed strictly in his favor. The trial court denied Mr. Kaplan's summary judgment motion and let the issue go to the jury. The jury decided in favor of the insurance company that there was no breach of the insurance contract by the insurance company. On appeal, the court stated the standard of review: a summary judgment denial after a trial on the merits "is subject to review 'if the parties dispute no issues of fact and the decision on summary judgment turned solely on a substantive issue of law.'" In *Kaplan*, the parties did not dispute the facts. They were printed out in the insurance contract. The dispute was over whether, as a matter of law, the terms were ambiguous or not. In *Kaplan*, even though plaintiff's motion for summary judgment was denied and the jury did not find in his favor, the Court of Appeals reviewed the summary judgment motion *de*

novo and found in favor of the plaintiff. The appellate court found the issue at summary judgment was an issue of law.

In this case, the facts were not in dispute because Mr. Estenson's testimony had been preserved. Just as the facts in *Kaplan* were printed out in the insurance contract, the facts at summary judgment in this case were printed out in Edwin Estenson's deposition transcripts. As a matter of law, as set out in *Celotex*¹ and *Braaten*², Respondent failed to establish the existence of an element essential to her case on which she had the burden of proof at trial. Respondent failed to provide the court with competent evidence that Mr. Estenson removed or installed, or was around others who removed or installed, original or replacement parts manufactured, sold, supplied, or distributed by Caterpillar or that any parts he removed or installed were asbestos containing. Respondent's Brief ignores the holding in *Braaten* that a manufacturer such as Caterpillar has no liability for component parts it did not manufacture, supply, sell or was in the

¹ *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.

² In *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 198 P.3d 493 (2008), the Washington State Supreme Court 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.

chain of distribution. It is undisputed that Edwin Estenson testified that he did not know what the access panel gasket on the D8 at Morrison Knudsen was made of. (CP 2761, 10-12-11, 116:12-13) It is undisputed that Edwin Estenson never testified that any other gaskets he worked with or around on Caterpillar equipment contained asbestos. (CP 55-102, 126-165) It is undisputed that at summary judgment, Respondent did not contend, nor provide any evidence, that Edwin Estenson worked with, or around others who worked with, brakes or clutches on Caterpillar equipment, let alone asbestos-containing brakes or clutches manufactured, supplied, or sold by Caterpillar, or that were in Caterpillar's chain of distribution. (CP 126-165; RP 2/8/13)

The court should grant summary judgment, *as a matter of law*, when the non-moving party fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party has the burden at trial.

In this case, Respondent failed to establish the existence of elements essential to her case and on which she had the burden at trial. Respondent failed to establish at least two essential elements of her case that any gasket on Caterpillar equipment Mr. Estenson testified he removed, or others removed in his presence, (1) contained asbestos, and (2) were manufactured, supplied, or sold by Caterpillar or were in

Caterpillar's chain of distribution. As a matter of law, under the United States Supreme Court's ruling in *Celotex*, the Washington State Supreme Court's ruling in *Braaten*, and under CR 56, Caterpillar's summary judgment should have been granted as a matter of law.

Respondent's reliance on *University Village* is misplaced. In *University Village* the Court stated that although it does not ordinarily review an order denying summary judgment after a trial on the merits: "We will review such an order if the parties dispute no issues of fact and the decision on summary judgment turned solely on a substantive issue of law." *University Village*, 106 Wn. App. 321, 324.

In *University Village*, the dispute arose out of whether or not King County's method of assessing the value of University Village's land violated the uniform taxation clause of the Washington State Constitution. The County moved for summary judgment, arguing that University Village had produced no evidence to show that its total assessed value was not uniform. The trial court denied the motion and the case went to a bench trial, which was decided in favor of University Village. After the trial, King County appealed the decision of the court's denial of its motion for summary judgment and the Court of Appeals reversed. The court noted that it reviewed the denial of summary judgment after a trial on the merits because "the parties agree as to all material facts and the summary

judgment was based on a legal conclusion.” *Id.* at 324.

In this case, as in *University Village*, the parties agree as to all material facts, i.e., Mr. Estenson’s preserved product identification testimony relating to work on or around Caterpillar bulldozers and a grader. The issue at summary judgment was whether, *as a matter of law*, product identification evidence showed that Mr. Estenson had inhaled fibers from Caterpillar asbestos-containing parts. Because the undisputed evidence at summary judgment did not reveal that Mr. Estenson used such parts, Respondent failed to establish an element essential of her case, therefore, there were no genuine issues as to any material facts because a complete failure of proof concerning this essential element of Respondent’s case necessarily renders all other facts immaterial. *Celotex, Id.*, required the trial court grant Caterpillar’s summary judgment motion. It is appropriate for this court to review and reverse the trial court’s denial of Caterpillar’s motion because there were no disputed issues of fact.

Whether or not there is a genuine issue of material fact left for trial is a matter of law. In *Rye v. Seattle Times Co.*, 37 Wn. App. 45, 57, 678 P.2d 1282 (Div. I 1984), the Court of Appeals reversed the trial court’s denial of defendants’ motion for summary judgment, holding that “as a matter of law there is no genuine issue as to a material fact within the contemplation of CR 56(c) and that the defendants are entitled to a

judgment of dismissal.” Although the court in the *Rye* case accepted discretionary review of the denial of summary judgment so there was no trial on the merits, the court’s finding in that case is instructive in this case. The court accepted discretionary review in *Rye* on the basis that “the superior court has committed an obvious error which would render further proceedings useless.” *Id.* at 52. Just as in *Rye*, the trial court in this case committed obvious error at summary judgment. There was no material issue of fact. As a matter of law, Caterpillar was entitled to a judgment of dismissal. That error should be reviewed by this court and reversed.

Respondent relies in her Response Brief on the holdings in *Adcox v. Children’s*, 123 Wn.2d 15, 864 P.2d 921 (1993), and *Johnson v. Rothstein*, 52 Wn. App. 303, 305, 759 P.2d 471 (Div. I 1988). Both cases are distinguishable from this case.

The *Adcox* case involved a medical malpractice claim against Children’s Hospital. The relevant issue on appeal was whether the trial court erred when it denied summary judgment holding that whether the plaintiff had met the discovery rule statute of limitations was a **question of fact**, leaving it up to the jury to decide. At trial, the jury found that the plaintiff had filed her case within one year of discovery as required. The hospital appealed the trial court’s denial of its motion for summary judgment. The appellate court stated in a footnote that

When a trial court denies summary judgment **due to factual disputes**, as here, and a trial is subsequently held on the issue, the losing party must appeal from the sufficiency of the evidence presented at trial, not from the denial of summary judgment (citing *Johnson v. Rothstein*).

Id. at 35, fn. 9 (emphasis added)

In *Adcox*, there were disputed issues of fact as to what the plaintiff knew and when she knew it. In this case, Mr. Estenson's product identification testimony was preserved and there is no dispute as to what that testimony stated. The summary judgment here was based on an issue of law. *Adcox* is not applicable to the issues in this case.

Respondent also cites the *Johnson v. Rothstein* case. The *Johnson* case appears to be the first case to hold that a denial of a motion for summary judgment cannot be appealed following a trial, **if the denial was based upon a determination that material facts are in dispute** and must be resolved by the trier of fact. Again, that is not the situation in this case. There were no disputed issues of fact. The testimony of Mr. Estenson, the sole product identification witness, is undisputed.

Johnson v. Rothstein was decided in 1988, *University Village* in 2001, and *Kaplan* in 2003. In *University Village* and *Kaplan*, this court reviewed *de novo* the denials of motions for summary judgment after full trials in both cases. The basis for review in both cases was that the summary judgment rulings were based on issues of law, not genuine issues

of fact. As set out above, Judge Spector did not correctly apply the law to the undisputed facts before her at summary judgment in this case. For the same reasons the court reviewed *de novo* denials of motions for summary judgment after full trials in *Kaplan* and *University Village*, it should review *de novo* the denial of Caterpillar's Motion for Summary Judgment in this case.

(2) The Trial Court Erred When It Allowed Respondent to Read Selective, Incomplete and Misleading Excerpts of Edwin Estenson's Testimony.

Caterpillar objected to Respondent reading excerpts of Mr. Estenson's deposition testimony on April 22, 2013, stating they were "confusing" and should not be allowed because they were counter-designations to designations of a party who was no longer in the case. (CP RP 4/22/13, 9:12-20:12) The objection was overruled, but made timely.

Respondent contends in their Response Brief that her counter-designations were not taken out of sequence. Although these designations may have been chronological, the designations omitted critical testimony between excerpts, thereby changing the meaning and implications of the selected testimony that was read. Respondent's designated Mr. Estenson's testimony regarding his work with Cummins gaskets. This testimony, as selected by Respondent and read to the jury, omitted all indications that Mr. Estenson was describing his work on Cummins engines which,

because of the manner in which it was sequenced, strongly suggested he was describing work on Caterpillar engines, when he was not. This testimony was not testimony designated by Caterpillar or a co-defendant. As set out in Caterpillar's Opening Brief, even Respondent's counsel was confused and mistakenly represented to the trial court in response to post-trial motions that this Cummins work was Caterpillar gasket work. (CP 3606-4122) Respondent's Brief does not give this Court any explanation or justification for this highly prejudicial, misleading representation to the trial court.

As to the selective, incomplete, and misleading evidence relating to brake and clutch work on a Bucyrus oil well drilling machine that Respondent read to the jury, Respondent's Brief contends this evidence was not confusing. (Respondent's Brief at 25-26) Respondent argues that it was not confusing because this testimony was read after the video deposition testimony of Mr. Estenson had been played and the video included "the work done on each piece of equipment" and that "the jury could not have been confused or misled into thinking that his testimony about filing brakes and clutches in the discovery deposition was about a Caterpillar bulldozer." (Respondent's Brief at 25-26) Close examination of this argument reveals that it is incorrect. Mr. Estenson's video deposition testimony only described brake and clutch work on the Bucyrus

dragline machine, not the oil well drilling machine that the testimony read to the jury referenced. (CP 2470-2471, 80:13-87:12) Respondent's Brief fails to disclose that Mr. Estenson's video deposition testimony was silent on the topic of his work on the Bucyrus oil well drilling machine. (CP 2447-2480) This is the misleading testimony that was selectively and incompletely read to the jury. The video provided nothing from which the jury could logically conclude that Mr. Estenson was describing work on a Bucyrus oil well drilling machine brakes and clutches and not Caterpillar brakes and clutches

Respondent also argues that the jury would have known that the unidentified equipment on which brake and clutch work was being described was not the Caterpillar D8. Respondent contends the jury would have known that because the video perpetuation deposition previously shown to them only described work by Mr. Estenson on the Caterpillar D8 as removing the access panel gasket. This argument is faulty because Mr. Estenson's video deposition never described the work he did on the Bucyrus oil well drilling machine. (CR 2447-2480) There was no way from the video deposition for the jury to know that it was a Bucyrus oil well drilling machine that Mr. Estenson was testifying about when describing brake and clutch work at Morrison Knudsen. When the jury heard the unidentified designation describing daily brake and clutch work,

the jury knew Mr. Estenson was not talking about the Bucyrus dragline, because in the excerpt the questioner states: “let me move on to this drag line that you worked with with Morrison Knudsen.” (CP 987, 10-11-11. 16:22-17:4, 78:9-11) Then almost immediately following this statement by the questioner, are questions by Caterpillar’s counsel about the Caterpillar D8 bulldozer. The logical conclusion for the jury was that the unidentified description of the brake and clutch work at Morrison Knudsen must have been on the D8 bulldozer. At that point in the trial when the Bucyrus testimony was read, Caterpillar was the only equipment defendant. (RP 4/23/13, 3:3-8, 14:19-25)

Respondent’s reliance on *Buck Mountain Owners Ass’n. v. Prestwich*, 174 Wn. App. 702, 308 P.3d 644 (2013), for the proposition that Caterpillar waived any challenges to the substance of Mr. Estenson’s deposition designations is misplaced. *Buck Mountain Owners Ass’n* can be distinguished because (1) it was a bench trial, and (2) it invoked the equity powers of the court. In that case the appellate court found that the trial court relied on the deposition testimony of a developer that the easement included a covenant obligating the owners to pay road assessments to the Association. Defendants did not object to the admission of this deposition testimony at trial, so waived that claim. The *Buck Mountain Owners Ass’n* case is not on point because (1) the

Estenson case does not involve the equity powers of the court; and more importantly (2) Caterpillar **did** object to the reading of plaintiff's counter deposition designations prior to them being read to the jury for the reasons set out in Caterpillar's Opening Brief, including that the designations were "confusing." Although Caterpillar at that time did not use the word "misleading," it did argue that the designations were "confusing" and a proper objection was before the court. The court erred when it overruled the objection and allowed Respondent's selective, incomplete, and misleading designations to be read. (RP 4/22/13, 9:12-20:12)

Respondent also relies on *Estate of Stalkup v. Vancouver Clinic, Inc.*, 145 Wn. App. 572, 187 P.3d 291 (2008). This case can also be distinguished. *Estate of Stalkup* did not involve deposition testimony read to the jury. The ruling that failure to object to lack of foundation for witnesses' testimony at trial waives the objection, was based on a doctor in this medical malpractice case not offering opinions to a reasonable medical certainty. The plaintiff in that case did not object at trial that the opinions offered were not to a reasonable medical certainty, so waived that objection on appeal. That was not the issue in the this case. Caterpillar did timely object to Respondent's Crane Co. counter-designations prior to any testimony being read or shown to the jury. (RP 4/22/13, 9:12-20:12)

Respondent also relies on *Symes v. Teagle*, 67 Wn.2d 867, 410

P.2d 594 (1966). That case actually supports Caterpillar's argument. *Symes* cites CR 26(d)(4) that states: "if only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts." This is exactly what Caterpillar requested at trial regarding additional excerpts of Estenson's deposition, which the trial court improperly denied. (RP 5/6/13, 56:25-57:6)

Caterpillar's assignment of error is not limited to the admissibility of Estenson's deposition testimony, it also encompasses the misleading nature of how the testimony was read to the jury and that Respondent's additional, initial deposition designations were untimely. Respondent failed to explain why she omitted the true manufacturer of the equipment on which Mr. Estenson described his brake, clutch, and gasket work. The only reason to read product identification testimony relating to Mr. Estenson's brake, clutch, and gasket work on Cummins and Bucyrus equipment was to create the incorrect and improper inference that he had performed such work on Caterpillar equipment.

(3) Caterpillar's Appellant Brief Challenged the Sufficiency of the Evidence at Trial.

Respondent further contends that Caterpillar's Appellant Brief failed to challenge the sufficiency of the evidence at trial. (Respondent's

Brief at 18-19) This is incorrect. Caterpillar challenged the sufficiency of the evidence in its Appellant Brief on page 47 when it stated for the reasons previously set out, “there was no substantial evidence that Mr. Estenson inhaled asbestos respirable fibers from a Caterpillar product. (CP 7-22)”

- (4) The Trial Court Erred When, Over Objection, it Permitted Dr. Mark to Offer the Opinion, Without Any Evidence Mr. Estenson Inhaled Asbestos Fibers from a Caterpillar Product, that Caterpillar Equipment was a Cause of Mr. Estenson’s Mesothelioma.

Mr. Estenson was the sole source of evidence on what he did with or around Caterpillar equipment. Mr. Estenson never testified that he adjusted brakes and clutches on Caterpillar equipment. Respondent failed to cite to anything in the record in which Mr. Estenson testified that he adjusted friction components, i.e.; brakes and clutches, on Caterpillar equipment. (See Respondent’s Brief)

Respondent asserts that there was evidence that Mr. Estenson worked on friction components, citing Mr. Estenson’s testimony relating to adjusting the power control units for the brake and clutches on the D9. Respondent, however, failed to submit to this court Mr. Estenson’s later testimony in which he corrected that statement, testifying that he did **not** adjust brakes and clutches on the D9. (CP 2763, 10-12-11, 121:2-8)

Respondent next asserts that Mr. Estenson’s testimony that he once

used compressed air to blow out the **power control unit** for the clutch on the ten year old D8 at Morrison Knudsen and that it created dust provided a sufficient foundation for Dr. Mark's opinion. Respondent ignores that at trial Respondent presented no evidence that the power control unit contained asbestos, that the dust he blew out contained asbestos, nor that Mr. Estenson inhaled that dust. Further, there was absolutely no evidence that the power control unit, or its components, were manufactured, supplied, sold, or distributed Caterpillar. Respondent also failed to provide this court with any citations to the record that demonstrate Mr. Estenson removed or installed asbestos-containing friction components that were manufactured, supplied, sold, or distributed by Caterpillar from which he inhaled asbestos fibers.

Nevertheless, Dr. Mark was permitted, over objection, to offer his opinion that Mr. Estenson inhaled asbestos fibers from Caterpillar friction components which were a cause of his mesothelioma. This is error because there was no factual basis for that opinion.

(5) Respondent Cannot Establish Evidence of the Presence of Asbestos in Caterpillar Products Mr. Estenson Worked With Through Experts Who Have No Personal Knowledge.

Neither Dr. Mark nor Dr. Graham were competent to offer product identification testimony. The court stated in *Allen v. Asbestos Corp.*, 137 Wn. App. 233, 246 (2007), that 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. **“The admission of these facts, however, is not proof of them,”** *Id.* (emphasis added).

Dr. Graham had no first-hand knowledge of Mr. Estenson's work. He was totally reliant on his incorrect recollection of Mr. Estenson's voluminous deposition testimony. Dr. Graham's mistaken recollection of that testimony that Mr. Estenson had worked on brakes on Caterpillar products does not prove that Mr. Estenson ever did so. Dr. Graham's acknowledgement that some Caterpillar brakes contained 70% to 80% asbestos is not relevant nor helpful because there was no evidence presented at trial that Mr. Estenson ever worked with, or inhaled airborne asbestos respirable fibers from, brakes on Caterpillar equipment.

Similarly, where there is no foundation in the record, Dr. Mark's testimony cannot be used to create substantive proof that Mr. Estenson worked with brakes and clutches on Caterpillar equipment, what's more, that they were Caterpillar products. Mr. Estenson is the only product identification witness and he did not testify that he worked with brakes and clutches on Caterpillar equipment. Dr. Mark should not have been allowed to testify that Mr. Estenson inhaled asbestos fibers from brakes and clutches when there is no evidence Mr. Estenson ever performed such work. The only testimony by Mr. Estenson regarding inhaling dust in

connection with work on Caterpillar equipment was when he removed the access panel gasket on the D8 at Morrison Knudsen. As discussed above, Mr. Estenson testified that he did not know what that gasket was made of. (CP 2761, 10-12-11, 116:12-13) He did not know the maintenance history of that ten year old D8 bulldozer so he had no personal knowledge whether it was even a Caterpillar gasket that was removed. (CP 69, 10-11-11, 106:8-14, CP 88, 10-12-11, 141:2-8, 10)

Respondent's argument that Mr. Estenson spent substantial time "in the seat" of different pieces of Caterpillar equipment misses the mark because there is no evidence Mr. Estenson inhaled asbestos fibers from just sitting in the seat of a Caterpillar bulldozer. There is no evidence the pieces of equipment he worked on had asbestos-containing components, and if they did, that they emitted airborne respirable fibers that were capable of being inhaled by someone sitting in the seat of the equipment. Even if such evidence had been presented, there was no evidence of the manufacturer of any component parts, of the dose of such inhalation, and whether that dose would be capable of causing disease.

Although Respondent, through Dr. Mark and Dr. Graham, put forth general information to the jury that some Caterpillar component parts contained asbestos, and that Caterpillar brakes can be engaged several times an hour, Respondent failed to put forth any evidence that Mr.

Estenson worked with any Caterpillar asbestos-containing components or how often Mr. Estenson would engage the brakes on the four pieces of Caterpillar equipment he testified he personally operated.

(6) The Verdict Was Excessive and Should Be Vacated.

The court in *Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 856 P.2d 746 (1993), found that non-economic damages “must be proportional to the injury suffered.” In this case, the non-economic damages awarded were not in proportion to the damages suffered. The *Hill* court also found that the excessive award in that case was ample evidence of passion or prejudice or an attempt to award punitive damages. That is the same as we have here.

Respondent relies in her Response Brief on the holding in *Miller v. Yates*, 67 Wn. App. 120, 834 P.2d 36 (1992), in which the appellate court overturned the trial court’s order for a new trial. The *Miller* appellate court, however, also cited case law stating

If, on motion for a new trial, the court finds the damages awarded by a jury so excessive as to indicate that it must have been the result of passion or prejudice, the court may order a new trial or make an order for a new trial unless the party adversely affected consents to a reduction of the verdict. *Id.*, at 124.

That is exactly what is required under the facts of this case.

Respondent also relies on *Rasor v. Retail Credit Co.*, 87 Wn.2d

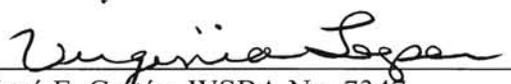
516, 554 P.2d 1041 (1976). In that case, the Washington State Supreme Court stated that “This court will not disturb an award of damages made by a jury **unless it is outside the range of substantial evidence in the record or shocks our conscience, or appears to have been arrived at as the result of passion or prejudice.**” *Id.* at 531 (emphasis added). The verdict in the *Estenson* case shocks the conscience and appears to be the result of passion or prejudice. That verdict should be vacated.

D. CONCLUSION

Nothing set forth in Respondent’s Response Brief should dissuade this Court from reversing the trial court’s denial of Caterpillar’s summary judgment. The trial court erred as a matter of law. Alternatively, this court should reverse the trial court’s decision denying a new trial and denying Caterpillar’s motion to vacate the excessive verdict.

RESPECTFULLY SUBMITTED, this 15th day of August, 2014.

THE GAITÁN GROUP, PLLC

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

DECLARATION OF SERVICE

GEORGE AUSLANDER DECLARES:

That on the 15th day of August, 2014, I caused to be served via ABC Legal Messenger a copy of Reply Brief of Appellant Caterpillar Inc. 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 15th day of August, 2014, at Seattle, Washington.


George Auslander