

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,

Respondent,

v.

CATERPILLAR INC.,

Appellant.

APPEAL FROM THE KING COUNTY
SUPERIOR COURT

Cause No. 11-2-25571-9 SEA

RESPONDENT'S BRIEF

Brian P. Barrow, *pro hac vice*
Jessica M. Dean, *pro hac vice*
SIMON GREENSTONE PANATIER BARTLETT PC
301 E. Ocean Boulevard, Suite 1950
Long Beach, California 90802
(562) 590-3400

Thomas J. Owens, WSBA #23868
1001 4th Avenue, Suite 4400
Seattle, Washington 98154-1192
(206) 389-1541

Attorneys for Respondent

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INTRODUCTION

Edwin Estenson made his living for many years as a heavy equipment mechanic and operator. His work on and around Caterpillar equipment included engine repairs, brake and clutch adjustments, and other types of maintenance. After he died of mesothelioma, Estenson's wife (respondent Betty Estenson) alleged that occupational exposure to asbestos gaskets, brakes, and clutches in the Caterpillar equipment contributed to causing his death. The jury heard the evidence, considered it, and held Caterpillar liable. The trial court entered judgment and denied Caterpillar's post-trial motions.

Now, on appeal, Caterpillar does not argue that the evidence at trial was insufficient or that the trial court improperly instructed the jury. Caterpillar instead argues that the trial court erred in denying summary judgment. Caterpillar then argues that the subsequent trial was unfair because the jury heard Dr. Mark's causation opinion and two supposedly "misleading" excerpts from Estenson's deposition testimony. Finally, Caterpillar argues that the jury's noneconomic damages award was too high and the result of "passion and prejudice." None of these arguments have any merit and the trial court, having heard the evidence, properly rejected them. Respondent therefore requests this Court to affirm the judgment.

STATEMENT OF THE CASE

A. Estenson Worked On and Around Caterpillar Equipment For Many Years.

Edwin Estenson operated, repaired, and maintained Caterpillar heavy equipment while working for various construction companies in Montana from 1955 to 1960. (CP 3042-43, 30:2-32:13; 3096-3112, 74:12-166:1)¹ “If you operated them, you'd better know how to work on them, too. It was just kind of the way it went.” (CP 3096, 75:11-17) Additionally, as head of heavy equipment from the early 1960s to 1968 at the former Glasgow Air Force Base in Montana, he was in close proximity to others while they repaired and maintained Caterpillar equipment, often working “right alongside” the mechanics. (CP 3097-98, 78:24-81:24)

Over the years, Estenson encountered different types of Caterpillar equipment, including bulldozers (two D6s, a D7, two D8s, a D9, and an RD7) and a grader. (CP 3096-3112, 74:12-166:01) Some of that equipment required substantial maintenance and repair work. As Estenson stated, “I can't recall all the stuff that was wrong with all the equipment, but there was – seemed like something broke down all the time.” (CP 3098; 81:10-12) The RD7 “was in pretty bad shape” and “had oil leaks and water leaks, and

¹ Citations, where appropriate, are to both the page in the clerk's papers, and then to the specific pages of Estenson's testimony.

had to replace gaskets on the water pump.” (CP 3097, 78:12-17) He also did extensive work on the D8 owned by the Robertson Caves construction company, including rebuilding, with another mechanic, the starter or “pony” engine: “I know we had to tear it apart. Remove it from the tractor and rebuilt it.” (CP 3096, 76:18-24) Similarly, at the Glasgow Air Force Base, “a litany of work” was required on an old D6 and an old D7. (CP 3097, 78:23-79:8)

Gaskets. Estenson’s work included the removal and replacement of gaskets on Caterpillar equipment, including head gaskets, cover plate gaskets, injector pump gaskets, an oil filter mounting bracket gasket, water pump gaskets, an access panel gasket, and “other miscellaneous gaskets.” (CP 3054, 78:21-80:6; 3096-3112, 74:12-166:1) He worked with multiple gaskets when performing carburetor rebuilds, and when rebuilding the pony engine referenced above. (CP 3105-08, 131:20-143:25) He knew that the replacement gaskets came from Caterpillar, because the machinery was specialized and there was a local Caterpillar dealer. (CP 3054, 80:7-12; 3107-08, 142:23-143:25; 3109, 150:9-152:21) When removing gaskets from heavy equipment, Estenson used a putty knife or other tool to remove the old gasket and its residue, which would create visible dust that he breathed. (CP 3054, 79:18-80:6; 3102, 115:21-24)

Friction Products. Estenson's maintenance work also included adjusting brakes and clutches on Caterpillar machines, two of which were bulldozers he specifically recalled (clutches on the D8 at Morrison Knudsen construction company, and clutches and brake on the D9 at Robertson Caves construction company). (CP 3096, 75:18-24; 3103, 119:23-120:18) While adjusting a clutch on the Morrison Knudsen D8, he recalled using compressed air to blow out the dust and dirt. (CP 3103, 119:23-120:18)

B. Caterpillar Equipment Used Asbestos-Containing Gaskets, Brakes, and Clutches.

According to its corporate representative, Robert Niemeier, Caterpillar began selling equipment that contained asbestos parts in the late 1920s, and continued to sell asbestos-containing equipment until April 1990. (CP 3137-38, 5:1-8:20) During the time that Caterpillar sold asbestos-containing equipment, there were some 13,000 different Caterpillar part numbers that corresponded with asbestos-containing components. (*Id.*, 3146-47, 51:20-52:08) Caterpillar sold asbestos gaskets, brakes, and clutches as part of its original equipment and as replacement parts. (*Id.*, 3148, 61:16-62:10) According to Caterpillar's own expert, Dr. Michael Graham, its gaskets typically contained "up to 80 percent" asbestos, while the clutches and brakes contained up to "70

or 80 percent” asbestos. (RP 5/8/13, 141:16-22) Respondent’s expert, Dr. Eugene Mark, said that the asbestos content of the gaskets described by Estenson would have varied, but likely would have contained about 50 percent asbestos. (RP 5/2/13, 103:9-104:1)

C. Caterpillar’s Motion for Summary Judgment.

Prior to trial, Caterpillar moved for summary judgment arguing that there were no facts to show that Estenson was exposed to asbestos products supplied by Caterpillar. (CP 29-43) The trial court (Hon. Julie Spector) considered Caterpillar’s arguments, but found there was sufficient evidence to defeat summary judgment: “I think there’s enough evidence. As far as the quality of that evidence, that will be up to the trier-of-fact, obviously. I’m going to deny the motion.” (RP 2/8/13, p. 16) Caterpillar did not seek discretionary review of the trial court’s decision to deny summary judgment.

**D. The Parties’ Designations of Estenson’s Deposition
Testimony For Use At Trial.**

After summary judgment, the case was assigned for trial to Hon. Douglass A. North. Respondent designated portions of Estenson’s videotaped trial preservation deposition to be played for the jury. Respondent and defendants then also designated portions of Estenson’s

discovery deposition taken by defendants, which was not videotaped and consisted of thirteen volumes. Because Caterpillar makes a series of allegations regarding Estenson's discovery deposition excerpts, respondent provides the following timeline surrounding the parties' designation of the testimony and its presentation to the jury:

- March 27:** Respondent serves her amended designation of deposition excerpts for use at trial. (CP 462)
- April 8:** Defendants serve their deposition designations and their objections and counter-designations to respondent's designations. (CP 4168)
- April 12:** Respondent serves her objections and counter-designations to defendants' counter-designations. (CP 1945-81) Respondent also provides defendants with highlighted copies of all transcripts showing the designated and counter-designated testimony. (CP 3035, 3561-62)
- April 17:** The parties select the jury. Defendant Crane Co. withdraws some of its designations. (RP 4/22/13, 16:21 – 17:12)
- April 18:** Respondent's counsel gives her opening statement. Respondent withdraws some counter-designations of testimony based on Crane's withdrawals. *Respondent does not add any new excerpts.* (RP 4/22/13, 10:10–11:22)

April 21: Caterpillar's trial counsel informs respondent's counsel that he was just then going through the designations to ensure they were proper. (CP 3035)

April 22: Respondent intends to present Estenson's deposition testimony to the jury, but Caterpillar and co-defendant Navistar claim confusion regarding what is included in respondent's designations and that they were untimely. (RP 4/22/13, 9:12-20:24) Because respondent served her designations on April 12, and added no new designations since then, the trial court overrules Caterpillar's objections. (*Id.*) Respondent plays Estenson's videotaped deposition excerpts for the jury. Respondent agrees to postpone reading Estenson's discovery deposition excerpts until the next day so Caterpillar has more time to review them. (RP 5/6/13, 50:7-14) After the court day is done, Caterpillar designates additional excerpts from Estenson's discovery deposition. (CP 3571-3572)

April 23: Respondent reads Estenson's discovery deposition excerpts (which have been designated by all parties) to the jury. (CP 964-1028) Afterwards, Caterpillar's counsel says he forgot

to include some additional excerpts. Respondent agrees to those additional excerpts being read to the jury. (CP 3035)

April 25: Caterpillar's new excerpts are read to the jury. (CP 3035)

May 6: Caterpillar asks to read additional deposition excerpts to the jury. Respondent, by this time, has already rested.

Caterpillar's counsel claims, for the first time, that the excerpts previously read to the jury were misleading and wrongly implied work on Caterpillar equipment, and again claims that he was confused about what respondent intended to read. (RP 5/6/13, 48:13-57:18) The trial court denies Caterpillar's request to "re-call" Estenson to read additional excerpts and explains that if Caterpillar thought something was misleading, it could argue that in its closing argument. (RP 5/6/13, 56:18-57:6)

E. Expert Testimony Regarding Estenson's Exposure to Asbestos From Caterpillar Products.

Along with Estenson's deposition testimony, the jury also heard expert opinion from both sides. Dr. Mark, respondent's medical expert, explained to the jury that Estenson experienced both first-hand and bystander exposure to asbestos from his work with Caterpillar equipment.

(RP 5/2/13, 98:22-100:12) Dr. Mark assessed the duration of exposure to Caterpillar gaskets to be approximately one year of first-hand work and then additional bystander work where others in his close proximity were repairing and maintaining equipment. (*Id.*, 99:6-11)

Dr. Mark testified to the significance of visible dust and explained that when someone created visible dust, such as by removing an asbestos-containing gasket, the dust contained 5 million particles per cubic foot of air. (RP 5/2/13, 106:22-109:12) Based on Estenson's testimony regarding his work with Caterpillar gaskets and taking into account how often he used them, his proximity to the work, the years at issue, and the product at issue, Dr. Mark opined to a reasonable degree of medical certainty that Estenson's exposure to Caterpillar gaskets, standing alone, was a substantial factor in causing the development of his mesothelioma. (*Id.*, 110:11-111:5)

Dr. Mark also considered Estenson's work with Caterpillar friction material, including when he adjusted brakes and clutches on Caterpillar equipment and used compressed air. (RP 5/2/13, 111:6-119:25) According to Dr. Mark, the amount of asbestos in a friction brake lining varied but generally ranged from 20 to 50 percent, sometimes more. (*Id.*, 113:22-114:3) Documents provided to Dr. Mark showed that Caterpillar equipment had brake linings that were 50 percent

asbestos by weight – an amount Dr. Mark testified was consistent with his understanding. (*Id.*, 113:22-114:9)

Dr. Mark also noted that Estenson spent substantial time “in the seat” of different Caterpillar equipment at various worksites. (RP 5/2/13, 131:1-132:12) Dr. Mark took into account Caterpillar documents showing that normal operation of its equipment resulted in as many as 360 brake applications per hour. (*Id.*, 132:2-12) Based on these and other facts, Dr. Mark opined that Estenson’s exposure to Caterpillar friction products (i.e., brakes and clutches) while operating the equipment was also significant in causing his mesothelioma. (RP 5/2/13, 134:17-24) Dr. Mark’s opinions regarding Estenson were given within a reasonable degree of medical certainty. (*Id.*, 18:20-25)

Caterpillar’s own medical expert, Dr. Michael Graham, acknowledged that Estenson testified to working with brakes and clutches on Caterpillar equipment:

- Q. I want to talk now a little bit about the friction exposure issue. Similar to gaskets you saw there were occasions where he was working with friction, but that you couldn’t quantify [how] many times?
- A. He said he adjusted brakes and clutches.
- Q. And when he talked about adjusting the brakes and clutches on CAT equipment, one of the things he explained, he used compressed air to get out the dust and dirt?
- A. Right. (RP 5/8/13, 140:23-141:8)

Dr. Graham admitted that Caterpillar clutches and brakes contained up to “70 or 80 percent” asbestos and Caterpillar gaskets typically contained “up to 80 percent” asbestos. (RP 5/8/13, 141:16-22) The surface areas of Caterpillar brakes and clutches were “pretty big” and their exact size “would depend on the size of the equipment.” (*Id.*, 141:23-142:1) Caterpillar recommended that these friction components “be checked every 125 hours.” (*Id.*, 144:1-4) Dr. Graham acknowledged that brake linings on Caterpillar equipment could be four or five times longer than the brake lining on a car. (*Id.*, 142:17-23) Caterpillar brakes could be engaged up to 180 times per hour. (*Id.*, 148:9-12) Dr. Graham conceded that fifty-five industrialized countries have banned all forms of asbestos, including chrysotile. (*Id.*, 64:22-65:7)

According to Caterpillar’s documents, it made its braking assembly in one of two ways – as a closed brake assembly system and an open system. (RP 5/8/13, 144:13-145:4) A closed system was one where the different friction lining and brake drums were enclosed, while an open system was one where the friction material was not enclosed and the dust released. (*Id.*) Dr. Graham acknowledged that the EPA tested asbestos exposure from the operation of heavy equipment with a closed brake system, as well as an open system. (*Id.*, 146:4-8) Testing results from the closed brake system showed releases as high as 70 fibers per cc (cubic

centimeter) when the system was cleaned out on an annual basis. (*Id.*, 147:7-14) Testing results for an open system showed that there is a fiber release of 2.09 fibers per cubic centimeter within ten to twelve feet of operating an open brake drum and the brake was operated ten times in ten minutes. (*Id.*, 147:24-148:8)

F. The Jury's Verdict and Entry of Judgment.

After hearing the evidence and arguments, the jury found that Caterpillar was strictly liable for supplying a defective product that caused injury. (CP 4211) The jury also found that Caterpillar's negligence caused injury. (CP 4212) The jury awarded a total of \$6,031,928 in damages, and the trial court thereafter entered judgment for \$4,500,643.50 based on pre-verdict recoveries and settlements. (CP 4210)

G. Caterpillar's Post-Trial Motions.

Caterpillar brought a series of post-trial challenges to the jury's verdict. Caterpillar sought a new trial pursuant to CR 59, moved to vacate the verdict, and made a renewed motion for judgment as a matter of law under CR 50. After extensive briefing and multiple hearings, the trial court denied Caterpillar's post-trial motions. (CP 4213-4218)

ARGUMENT

A. Caterpillar Cannot Appeal From the Denial of Its Motion For Summary Judgment.

Caterpillar's first argument on appeal is that "its motion for summary judgment was wrongfully denied" (App. Br., p. 1.) According to Caterpillar, "the trial court's denial of [the] motion for summary judgment should be reversed, the case dismissed, and the verdict vacated." (*Ibid.*) Caterpillar is wrong, as it cannot now appeal from the trial court's denial of its motion for summary judgment.

Once a trial on the merits occurs, a prior denial of summary judgment is only reviewable if the decision involved a pure issue of law. See, e.g., *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 County*, 106 Wn. App. 321, 324, 23 P.3d 1090 (2001). "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." *Adcox v. Children's Orthopedic Hosp. & Medical Ctr.*, 123 Wn.2d 15, 35 n. 9, 864 P.2d 921 (1993), citing *Johnson v. Rothstein*, 52 Wn. App. 303, 759 P.2d 471 (1988). In *Johnson*, this Division preemptively dismissed an appeal upon holding that "denial of 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 a trier of fact.” *Johnson, supra*, 52 Wn. App. at p. 304. “We conclude that once a trial on the merits is held, neither [RAP 2.2(a)(1) nor 2.2(a)(3)] permits review of a pretrial order denying summary judgment when such a denial is based on a trial court’s determination of the presence of disputed, material facts.” *Id.* at p. 305.

Here, the trial court denied summary judgment upon finding that there were disputed facts. (RP 2/8/13, p. 16.) As the trial court put it, there was “enough evidence” to raise triable issues, and “[a]s far as the quality of that evidence, that will be up to the trier-of-fact, obviously.” (*Ibid.*) Caterpillar therefore cannot now challenge the jury’s verdict based on a contention that the trial court failed to previously grant its motion for summary judgment.

But even if such a challenge were authorized, the trial court correctly denied summary judgment upon finding triable issues of fact. Caterpillar presents an inaccurate interpretation of the summary judgment record. Specifically, Caterpillar’s recitation of the work Estenson performed on specific pieces of Caterpillar equipment was incomplete and omitted a number of important facts. A more complete summary of Estenson’s pertinent testimony is provided here:

D8 bulldozer at Morrison Knudsen. Estenson scraped the old gasket and its residue from the inspection plate using a putty knife or similar tool. He described the gasket he removed as a “fiber” gasket. It disintegrated, causing visible dust that he breathed. The removal of the gasket took about 15-20 minutes. The replacement gasket came from the local Caterpillar dealer. (CP 139, 78:21-80:12; 4302, 108:14-118:21)

D8 bulldozer at Robertson Caves. Estenson and another mechanic overhauled the starter, or “pony” motor. (CP 4308-4311, 131:20-143:25) This was itself a large engine that they removed from the bulldozer with an “A-frame” mounted on a truck. (CP 4308, 132:16-133:20) It had never been worked on before. (CP 4310:140:11-16) Estenson and the other mechanic took it apart together. (CP 4309, 136:19-137:04) They removed and scraped the head gaskets and the top of the engine block itself, the oil pan gasket, the carburetor gaskets, and “other miscellaneous gaskets.” (CP 4309, 136:19-138:11) “I was there for the tear-down and the cleanup of the parts.” (CP 4310, 142:05-11) The gaskets were replaced, and the new gaskets came from the Caterpillar dealer that was “right downtown.” (CP 4310-11, 142:23-143:25) It is specialized equipment and the only place you can get replacement parts. (*Ibid.*)

D9 bulldozer at Robertson Caves. As stated above, in addition to routine maintenance, Estenson made adjustments to the clutches and brake in the power control unit. (CP 4296, 75:18-24)

New D6 bulldozer at Glasgow Air Force Base. Respondent agrees that Estenson only recalled routine maintenance being performed on this machine.

Old D6 bulldozer at Glasgow Air Force Base. Estenson testified that this bulldozer was “old and badly abused” and required a “litany” of work. (CP 4297, 78:23-79:8) He could not recall all of the work that was done to this machine, but recalled the mechanic replacing the injection pump gasket, the oil filter mounting bracket, and water pump gaskets. (CP 4311-4113, 146:13-154:25) While he was not the one doing this work, he was “right there alongside” the mechanic. (CP 4297, 81:22-24; 4312, 147:22-24) The new gaskets came from the local Caterpillar dealer. (CP 4313, 151:16-21)

D7 bulldozer at Glasgow Air Force Base. Respondent agrees that Estenson did not recall gasket, clutch or brake work on this machine.

D12 grader at Glasgow Air Force Base. This machine was fairly old and well-used, and Estenson could not recall all the work that was done on it. (CP 4297-4298, 79:09-81:24) What he did recall was

work on the ball joints and control arms, rebuilding the starting engine, and repairing oil leaks. (*Ibid.*)

RD7 bulldozer at Farason Construction. Estenson testified that this machine was in pretty bad shape and required a lot of maintenance. (CP 154, 78:11-19) It had oil and water leaks, and they had to replace gaskets on the water pump. (*Ibid.*)

In addition, respondent submitted the deposition testimony of Caterpillar's former test engineer, Eugene Sweeney, who admitted that Caterpillar diesel engine gaskets in high temperature or pressure applications would have contained asbestos until they were phased out in the mid-1980s. (CP 171-173, 41:5-42:16, 51:20-52:18) He gave, as examples, head, exhaust, and cooling system gaskets. (*Id.*) Estenson recalled replacing head and cooling system gaskets among the many types of Caterpillar gaskets he worked with. (CP 3097, 3106-07) Caterpillar argues that Sweeney's testimony was restricted to marine diesel engines, but it was not so limited. (See, e.g., CP 171-72, 41:5-42:16) Sweeney also testified that he would "definitely expect" that replacement gaskets for Caterpillar diesel engines would have come from Caterpillar. (CP 172, 44:23-45:6) In addition, respondent submitted a declaration from Dr. Mark supporting medical causation. (CP 103-108) Caterpillar

mischaracterizes Dr. Mark's declaration as well, contending that his reference to "these exposures in aggregate," which immediately followed a reference to Estenson's work with Caterpillar products, referred to all exposures to asbestos in his life, which is illogical and not what Dr. Mark was stating.

Ultimately, Caterpillar did not seek discretionary review of the order denying summary judgment, and a trial on the merits occurred. Under well-established case law, Caterpillar cannot appeal the denial of its motion for summary judgment. If Caterpillar sought to challenge the sufficiency of the evidence, it needed to focus on what was presented at trial rather than during the summary judgment proceedings.

B. Caterpillar Does Not Challenge the Sufficiency of the Evidence Supporting the Jury's Verdict.

Caterpillar's statement of facts is incomplete in that it does not fully recite the evidence presented during trial. It instead focuses on the evidence submitted during the summary judgment proceedings. Such an incomplete statement of facts does not matter, however, as Caterpillar fails to argue that the evidence presented at trial was insufficient to support the jury's verdict. More specifically, Caterpillar assigns no error to the

sufficiency of the evidence at trial as required by RAP 10.3 (a)(4), (g). It therefore waives such a challenge.

Regardless, the trial record is replete with substantial evidence to support the jury's verdict. The jury heard evidence that Estenson was exposed to asbestos while working on and around Caterpillar equipment, that Caterpillar supplied the asbestos parts that Estenson was exposed to, and that exposure to Caterpillar's asbestos parts was a substantial factor in causing his mesothelioma. At this point, for purposes of appeal, Caterpillar has no basis to contend that the jury's findings were not supported by substantial evidence.

**C. The Trial Court Did Not Abuse Its Discretion With
Regard to Estenson's Deposition Testimony.**

Caterpillar next asserts that the trial court abused its discretion regarding the presentation of Estenson's deposition testimony to the jury. Caterpillar contends that "[t]he trial court abused its discretion . . . when it allowed respondents, over timely objection, to read incomplete, untimely, and misleading excerpts from Mr. Estenson's depositions that had been submitted as counter-designations to a settled co-defendant's submissions, not Caterpillar's." (App. Br., p. 35.) As will be explained, the excerpts from Estenson's depositions were not untimely, incomplete, or

misleading. Moreover, Caterpillar's objections, which it did not raise until April 22, the day Estenson's testimony was to be presented to the jury, were limited to claims that respondent's designations were somehow untimely, and that Caterpillar was "confused" over what respondent had designated. Caterpillar did not, at that time, claim that any such testimony was "misleading," nor did it assert objections to the reading of any particular testimony, and has now waived any such objections on appeal.

1. Respondent Served Her Designations Eleven Days Before Presentation and Did Not Later Add Any Other Testimony.

Caterpillar asserts that the case scheduling order required all parties to designate the deposition testimony they intended to offer at trial no later than April 8, 2013. (App. Br., p. 35 fn. 14.) As shown by the timeline above, respondent served her initial designations by March 27. (CP 462) Caterpillar and the other defendants did not serve their designations and counter-designations until April 8. (CP 4168) Respondent then served her counter-designations on April 12. While Caterpillar apparently contends that respondent's counter-designations were late, it would have been impossible to serve them by the scheduling order due date because of the defendants' delay in serving their own

designations. By serving their counter-designations by April 12, respondent nevertheless gave the defendants eleven days to review them, object to them, or counter-designate further excerpts before they were to be read to the jury. (CP 1945-81, 3035) Also on April 12, respondent—without obligation to do so—provided Caterpillar with highlighted copies of all deposition transcripts showing the designated and counter-designated testimony. (CP 3035, 3561) If Caterpillar’s counsel was confused as to what excerpts respondent planned to present to the jury, it was his own fault; he admitted to respondent’s counsel on April 21, the day before they were to be presented, that he was just then going through the designations to make sure they were proper. (CP 3035)

Caterpillar cites no instance in the record showing that respondent designated any testimony after April 12. All of respondent’s designations and counter-designations were provided before trial and well in advance of when they were read to the jury. Indeed, the trial court never found that respondent was remiss in her obligations under the scheduling order, that any designations or counter-designations were untimely, or that any testimony should be withheld from the jury.

Caterpillar also argues that respondent did not comply with section 9.5 of the King County Revised Consolidated Pretrial Style Order because: (1) respondent did not specifically identify, when she served her

designations of Estenson's deposition, which defendant each designation was to be used against; and, (2) did not file a motion for leave to serve counter-designations after the April 8 due date under the scheduling order. The trial court, however, considered these objections and overruled them in light of the fact that respondent had provided all designations and counter-designations well before they were to be presented to the jury. (RP 4/22/13, 9:12-20:24) Moreover, Caterpillar's counsel was given an additional day (until April 23) to review the designations of Estenson's discovery deposition, and then permitted to read (two days later) additional excerpts that he "forgot" to include on April 23.

2. Estenson's Testimony Was Not Presented Out of Sequence.

Caterpillar next argues that respondent presented Estenson's discovery deposition testimony in a manner that was improperly sequenced. (App. Br., p. 36.) This is incorrect. All the excerpts read to the jury on April 23 were designated (by respondent *and* defendants) from the 13 volumes of Estenson's discovery deposition, and were read in chronological and page order from the first designated page of the first volume through to the last page of the final volume. Caterpillar identifies no excerpt that was taken out of sequence or otherwise not presented in

proper order. The testimony was presented as it occurred and was transcribed. Caterpillar makes no showing that respondent altered any sequencing, or that the jury was in any way misled or confused by its temporal flow.

Caterpillar argues that respondent included portions of Estenson's discovery deposition from three volumes of the transcript and that "[t]he record is devoid of any indication that plaintiffs informed the jury that plaintiff was reading from a different deposition, taken at a different time" (App. Br., p. 15.) This argument ignores that the excerpts read to the jury were not created solely by respondent, but were the combined designations of respondent and defendants, including Caterpillar. Caterpillar thus had its own responsibility to ensure clarity when designating excerpts from the discovery deposition. Indeed, the trial court recognized this when Caterpillar raised these issues in its motion for new trial. Specifically, the trial court found that the excerpts at issue were not misleading in light of the entirety of Estenson's testimony, there was no improper conduct on the part of respondent's counsel in designating them, and the record showed that the excerpts were the result of a collaborative effort among respondent's and Caterpillar's counsel. (RP 12/12/13, 36:12-38:13)

3. Estenson's Cummins Gasket Testimony Was Not Misleading.

Caterpillar argues that the inclusion of excerpts from Estenson's discovery deposition relating to the removal of Cummins gaskets (CP 1017-1018) was improper because it "appeared to describe Mr. Estenson's removal of Caterpillar gaskets that he purportedly removed from the motor of a Caterpillar D8 bulldozer." (App. Br., p. 13.) This argument is incorrect for several reasons. First, as stated above, respondent designated her page and line excerpts from Estenson's discovery deposition eleven days before they were presented to the jury, and Caterpillar had ample opportunity to object to this particular excerpt or to counter-designate its own testimony if it considered it misleading.

Second, the testimony is not misleading; it does not make any reference to Caterpillar, and the preceding testimony refers to work on Euclid (Cummins) trucks, a dragline, a D8 Caterpillar, and other machinery. (CP 1018, 487:18-488:12) And the testimony only describes the method of removing a gasket, which is the same as it would be with a Caterpillar gasket. Third, this testimony occurred after Estenson already testified at length about his extensive work with Caterpillar gaskets (CP 988-1005); thus, even if the jury somehow believed he was referring to Caterpillar gaskets, it would have been redundant.

**4. Estenson's Bucyrus Testimony Was Not
Misleading.**

Caterpillar next argues that an excerpt from Estenson's discovery deposition concerning Bucyrus brake and clutch work (CP 986-987) was improperly presented to the jury. Caterpillar argues that this excerpt was "ostensibly related to brake and clutch (friction product) work that [Estenson] performed on a Caterpillar D8 bulldozer." (App. Br., p. 14.) The argument should be rejected for many of the same reasons as its arguments regarding the Cummins gasket work excerpt.

While there is a reference to Estenson's work at Morrison Knudsen at the beginning of the excerpt, it makes no reference to a D8 or to any other piece of Caterpillar equipment. In fact, this excerpt could not have been understood to relate to Caterpillar equipment; it was part of Estenson's discovery deposition that respondent read to the jury the day *after* she played his videotaped direct testimony. In his videotaped testimony, Estenson described the work he performed at Morrison Knudsen on various pieces of equipment, including a Bucyrus dragline (which including filing brakes and clutches), and a Caterpillar D8 bulldozer (on which he only described changing a gasket). Because the jury had already heard Estenson's direct testimony regarding his work at Morrison Knudsen, including the work he had done on each piece of

equipment, 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.

Caterpillar argues that Estenson's testimony in the discovery deposition excerpt was actually about another piece of Bucyrus equipment, an oil well drilling machine, that he worked on in Cut Bank, Montana, and not the dragline owned by Morrison Knudsen. This point, however, has no significance. As Estenson also testified in the excerpt, the work he performed on the oil well drilling machine (filing the brakes and clutches) was the same as he performed on the Bucyrus dragline. (CP 987, 16:22-17:4) Whether Estenson was testifying about the Bucyrus oil well drilling machine or the Bucyrus dragline, the work he performed was the same, filing the brakes and clutches, and was not the gasket work he performed on the Morrison Knudsen-owned Caterpillar D8.

Finally, Caterpillar contends that the trial court committed further error when it denied Caterpillar's counsel's belated request on May 6 to read further excerpts from Estenson's deposition. The trial court ruled that it was too late to "re-call" Estenson as a witness, after he had already been thoroughly examined. (RP 5/6/13, 56:18-24) Such a ruling was well within the trial court's discretion. *State v. Johnson*, 64 Wn.2d 613, 615, 393 P.2d 284 (1964). As Caterpillar now puts it, "[b]ecause of this ruling,

the clarifying testimony was not before the jury and could not be argued.” (App. Br., p. 18.) Again, however, Caterpillar is wrong. The trial court invited Caterpillar’s counsel to argue in his closing that the deposition excerpt at issue, which did not identify any particular piece of equipment, matched Estenson’s direct testimony describing work he did on Bucyrus equipment, and that such testimony was not describing work on Caterpillar equipment. But for whatever reason, Caterpillar’s counsel chose not to do so.

5. Caterpillar Waived Any Challenges To the Substance of Estenson’s Deposition Testimony.

The failure to object at trial to the admission of deposition testimony waives the objection. *Buck Mountain Owners Ass’n v. Prestwich*, 174 Wn. App. 702, 723, 308 P.3d 644 (2013); see also *Estate of Stalkup v. Vancouver Clinic, Inc.*, 145 Wn. App. 572, 584, 187 P.3d 291 (2008) (failure to object to lack of foundation for witness’s testimony at trial waives the objection); *Symes v. Teagle*, 67 Wn.2d 867, 873, 410 P.2d 594 (1966) (appellate court will not consider objections to the evidence unless they have been brought to the attention of the trial court, and that court given an opportunity to rule thereon; nor will it consider grounds not presented to the trial court).

Caterpillar never asserted any objections to the admissibility of Estenson's discovery deposition testimony. Caterpillar nevertheless argues that it (and other defendants) lodged timely objections to presentation of the Cummins and Bucyrus deposition excerpts. (App. Br., p. 13.) But rather than stating a formal objection based on evidentiary grounds, counsel for Caterpillar (and another defendant, Navistar) only stated they were "confused" as to what was included in the designations, and that such designations were somehow "untimely." (RP 4/22/13, 9:4-29:9) Caterpillar thus argued about the meaning or weight of the excerpts, and raised a possible procedural issue, but never objected to their actual admissibility.

Moreover, it was not until May 6, nearly two weeks after the deposition excerpts were read, that Caterpillar claimed for the first time that these excerpts were "misleading" and requested, yet again, to have additional excerpts from the deposition read to the jury. (RP 5/6/13, 48:13-57:6) Caterpillar still did not raise an objection based on evidentiary grounds, but instead only argued that the substance of the testimony was misleading or confusing. Again, this was merely a contention as to the meaning or probative value of the testimony, and not an issue of admissibility. Caterpillar's remedy at that point, which the trial court actually suggested, was to argue to the jury that the excerpts were

not about Caterpillar equipment and did not support respondent's position. Again, however, Caterpillar chose not to make such arguments and, in doing so, further waived its ability to now complain about the excerpts that were read to the jury. Caterpillar cannot show that the trial court committed reversible error by allowing the deposition testimony to be read, and regardless, it waived any such challenge by failing to raise it below.

D. The Trial Court Did Not Err In Permitting Dr. Mark To Opine That Exposure To Caterpillar Brakes and Clutches Was a Cause of Estenson's Mesothelioma.

Dr. Mark opined at trial that Estenson's exposures to asbestos from Caterpillar gaskets, brakes, and clutches all contributed to cause Estenson's mesothelioma. Caterpillar now argues that the trial court erred when it allowed Dr. Mark to opine "that Caterpillar brakes and clutches were 'significant in causing the development of [Estenson's] mesothelioma.'" (App. Br., pp. 46-47.) At the outset, it is important to note that Caterpillar does not assign error to admission of Dr. Mark's gasket-related causation testimony, in which he opined that Estenson's exposure to Caterpillar gaskets alone was sufficient to cause his disease.

Rather, Caterpillar only argues there was no evidence that Estenson was exposed to asbestos from Caterpillar brakes and clutches. (App. Br., p. 46.) Therefore, according to Caterpillar, the trial court should not have allowed Dr. Mark to give an opinion that such brake and clutch exposure was a cause of his mesothelioma. (*Ibid.*) Caterpillar is incorrect, however, as the jury heard substantial evidence that Estenson worked with its brakes and clutches, as well as exposure that would have occurred while operating Caterpillar equipment.

Specifically, the jury heard Estenson's testimony that he adjusted brakes and clutches on Caterpillar equipment and used compressed air to "get the dust and dirt out of there." Indeed, Caterpillar's own medical expert, Dr. Graham, acknowledged that Estenson performed such work. (RP 5/8/13, 140:23-141:8) Dr. Graham also acknowledged that Caterpillar brakes contained up to "70 to 80 percent" asbestos, had surface areas that were four or five times larger than those on a car, and could be engaged up to 180 times per hour. (RP 5/8/13, 141:16-22, 142:17-23, 148:9-12)

Dr. Mark, in turn, explained that he considered Estenson's testimony, as well as Caterpillar's concessions, when forming his opinion that exposure to Caterpillar brakes and clutches contributed to causing Estenson's mesothelioma. (RP 5/2/13, 134:17-24) Dr. Mark also

considered Caterpillar documents showing that it used brake linings that were 50 percent asbestos by weight. (RP 5/2/13, 113:22-114:9)

Under ER 702, “[a]n expert’s opinion is admissible if the witness is properly qualified, relies on generally accepted theories, and the expert’s testimony is helpful to the trier of fact.” *Phillipides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). Here, Caterpillar makes no challenge to Dr. Mark’s qualifications, does not assert that he relied on any unaccepted theories, and has no basis to assert that his testimony was not helpful to the jury. Caterpillar instead makes an inaccurate claim with regard to Estenson’s exposure, ignoring that even its own medical expert acknowledged Estenson was exposed to dust and dirt while using compressed air in the brake and clutch adjustment process. Such facts, combined with the evidence of asbestos content and sales of replacement parts, was more than sufficient for the jury to find that Estenson was exposed to asbestos while working on Caterpillar brakes and clutches, and operating Caterpillar equipment. Caterpillar’s underlying factual assertion in support of excluding Dr. Mark’s causation opinions is thus faulty.

E. The Jury’s Noneconomic Damages Award Was Neither Excessive Nor Fueled By “Passion and Prejudice.”

Caterpillar contends that the jury’s \$6 million non-economic damages award “shocks the conscience, and was not based on the damages suffered by the plaintiffs.” (App. Br., p. 48.) From this, Caterpillar argues that the trial court abused its discretion when it denied its motion to vacate the verdict.

Caterpillar does not dispute, however, that the jury heard credible evidence of emotional distress, mental anguish, and pain and suffering of the Estenson family. Although Caterpillar argues the jury awarded too much due to Estenson’s age when he died, it effectively concedes that the evidence supported *some* award of noneconomic damages. Without any authority, Caterpillar seems to suggest that family members somehow suffer less noneconomic damages, regardless of the surrounding circumstances, when their loved one dies at an advanced age. There is no support for such a novel position, or that a decedent’s age when he or she dies has any effect—or imposes any limitations—on a jury’s ability to determine a noneconomic damages award. Overall, the trial court, which was in a better position to determine the reasonableness of the award, was not offended by the jury’s determination and found no basis to reduce the award. The trial court, according to authority cited by Caterpillar, “is to

be accorded room for the exercise of its sound discretion.” *Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 140, 856 P.2d 746 (1993).

Caterpillar cites *Hill* for the proposition that any noneconomic damage award more than 10 times economic damages is automatically “suspect” as a product of passion and prejudice. App. Br., p. 48. In *Hill*, however, the court of appeals did not engage in such a ratio-based analysis, but instead explained that the underlying evidence did not support the jury’s awards of *any* damages. It noted the trial court’s finding that “there was no credible evidence of emotional distress, mental anguish, pain and suffering, or humiliation so sever [sic] as to justify an award of \$410,000 for noneconomic damages.” *Id.* at p. 140. Based on the “meager evidence” at trial, the court of appeals affirmed the trial court’s finding of passion and prejudice and reduction of the award. The *Hill* court’s rationale, contrary to Caterpillar’s argument, had nothing to do with any ratio of noneconomic to economic damages.

In this case, unlike the defendant in *Hill*, Caterpillar never persuaded the trial court that the evidence of damages was insufficient. The trial court never found that the evidence of noneconomic damages was “meager,” or that the award was a product of passion and prejudice. This is because there was more than ample evidence to support the award and nothing to show that the jury was ever prejudiced or incited by

passion against Caterpillar. This Court should therefore adhere to the general rule that jury damage awards may only be overturned in the most “extraordinary of circumstances.” *Miller v. Yates*, 67 Wn. App. 120, 124, 834 P.2d 36 (1992). “Neither the trial court nor any appellate court should substitute its judgment for that of the jury as to the amount of damages.” *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 531, 554 P.2d 1041 (1976).

CONCLUSION

Caterpillar does not identify any valid reason to reverse the judgment in this case. Extensive evidence supports the verdict, and the trial court found no basis to overturn the jury’s determinations. Respondent therefore requests this Court to affirm the judgment.

Dated: July 16, 2014

SIMON GREENSTONE PANATIER BARTLETT PC



Brian P. Barrow, *pro hac vice*
Attorney for Respondent

DECLARATION OF SERVICE

Thomas J. Owens states and declares as follows:

1. I am over the age of eighteen, competent to testify, and make this declaration based on my own personal knowledge.

2. On July 16, 2014, I caused to be served the foregoing

Respondent's Brief as follows:

The original and one copy to the Court of Appeals, Division I, of the State of Washington, by hand delivery; and

A copy to Jose Gaitan and Virginia Leeper, attorneys for Caterpillar Inc., by hand delivery and by electronic mail.


Thomas J. Owens

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DIVISION I
STATE OF WASHINGTON