



1 **II. DISCUSSION**

2 Defendants present a plethora of arguments, often summarily, in their motions for a new  
3 trial. Some arguments are raised for the first time, such as juror misconduct and inflammatory  
4 argument by counsel. Several other arguments -- for instance, as to the sufficiency of the  
5 evidence presented, the Court's previous evidentiary rulings, and the proper construction of  
6 Washington tort law -- ask the Court to revisit questions extensively briefed and ruled upon in  
7 previous motions. This Order will focus primarily on the former category of arguments.

8 **A. Allegations of Juror Misconduct**

9 As the Ninth Circuit has noted, United States courts have historically been leery of  
10 investigating the deliberative processes of a jury:

11 "The near-universal and firmly established common law rule in the  
12 United States flatly prohibited the admission of juror testimony to  
13 impeach a verdict." Tanner v. United States, 483 U.S. 107, 107 S.  
14 Ct. 2739, 2745, 97 L.Ed.2d 90 (1987); McDonald v. Pless, 238 U.S.  
15 264, 267, 35 S. Ct. 783, 784, 59 L.Ed. 1300 (1915). Exceptions  
16 were made only where it was alleged that an "extraneous influence"  
17 affected the jury; courts nearly always refused to admit juror  
testimony concerning internal abnormalities absent a  
contemporaneous adjudication or an extremely strong showing of  
juror incompetence. Tanner, 107 S. Ct. at 2746-47; *see* Mattox v.  
United States, 146 U.S. 140, 149, 13 S. Ct. 50, 53, 36 L.Ed. 917  
(1892) (exception for situations involving extraneous influence);  
United States v. Pimentel, 654 F.2d 538, 542 (9th Cir.1981) (juror  
testimony admissible only concerning facts bearing on extraneous  
influence on deliberations).

18 Hard v. Burlington N. R.R., 870 F.2d 1454, 1460-61 (9th Cir. 1989) ("Hard II"). This long-  
19 standing policy discouraging the use of juror testimony to impeach the verdict is embodied in  
20 Fed. R. Evid. 606(b):

21 Upon an inquiry into the validity of a verdict or indictment, a juror  
22 may not testify as to any matter or statement occurring during the  
23 course of the jury's deliberations or to the effect of anything upon  
24 that or any other juror's mind or emotions as influencing the juror to  
25 assent to or dissent from the verdict or indictment or concerning the  
26 juror's mental processes in connection therewith. But a juror may  
testify about (1) whether extraneous prejudicial information was  
improperly brought to the jury's attention, (2) whether any outside

1 influence was improperly brought to bear upon any juror, or (3)  
2 whether there was a mistake in entering the verdict onto the verdict  
3 form. A juror's affidavit or evidence of any statement by the juror  
4 may not be received on a matter about which the juror would be  
5 precluded from testifying.

6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

1. **Juror Declaration**

Voting 10 to 1, the jury found Asten and Scapa liable for causing Mr. Barabin's mesothelioma under both strict liability and negligence theories.<sup>1</sup> Defendants now submit a declaration from the dissenting juror alleging abnormalities in the deliberative process. The declaration alleges that during deliberations (1) a juror revealed that she had been diagnosed with terminal cancer, (2) another juror revealed that she had received a legal settlement for injuries sustained by her and her daughter, (3) another juror revealed he had recently gone through bankruptcy proceedings, and (4) at one point the jury had calculated damages at \$700,007, which led the dissenting juror to believe that several jurors were motivated by a regional bias against Scapa. Defendants contend that the declaration indicates that extraneous prejudicial information was brought to the jury's attention during deliberations so the declaration falls within one of the exceptions for admissible testimony listed in Rule 606(b). They also argue that the declaration indicates deceit on the part of several jurors during *voir dire*, citing Hard v. Burlington N. R.R., 812 F.2d 482, 485 (9th Cir. 1987) ("Hard I").

2. **No Extraneous Information Under Fed. R. Evid. 606(b)**

Defendants argue that the juror declaration may be considered because its subject matter falls within the "extraneous prejudicial information" exception under Fed. R. Evid. 606(b). However, "[t]he type of after-acquired information that potentially taints a jury verdict should be carefully distinguished from the general knowledge, opinions, feelings, and bias that every juror carries into the jury room." Hard II, 870 F.2d at 1461.

---

<sup>1</sup> Upon being informed that there was a 10 to 1 split among the jury after 3 days of deliberation, the parties agreed to abide by a non-unanimous 10 to 1 verdict.

1 The personal experience and knowledge described in the declaration does not constitute  
2 extraneous prejudicial information under Ninth Circuit law analyzing Rule 606(b). It is  
3 undisputed that “[j]urors must rely on their past personal experiences when hearing a  
4 trial and deliberating on a verdict.” Hard I, 812 F.2d at 486. The juror’s personal  
5 knowledge constitutes extraneous prejudicial information where the juror has personal  
6 knowledge regarding the parties or issues involved in the litigation. See id. Because the  
7 juror declaration does not describe any extraneous matter of this type, it is not  
8 admissible as indicative of extraneous prejudicial information.

9 3. **Hard I’s Holding Regarding Statements Tending to Show Deceit**

10 Defendants argue that the declaration is admissible because Hard I held that  
11 “[s]tatements which tend to show deceit during *voir dire* are not barred by [Fed. R. Evid.  
12 606(b)].” 812 F.2d at 485. Although this broad statement appears to hold that any juror  
13 statement tending to show any deceit during *voir dire* is admissible under 606(b), most  
14 courts that have looked at the question, including Hard II, have held otherwise. See  
15 Williams v. Price, 343 F.3d 223, 236 n.5 (3d Cir. 2003) (Alito, J.) (noting Hard I  
16 appears “inconsistent with” Fed. R. Evid. 606(b)). As other courts have noted, it is hard  
17 to reconcile the plain text of 606(b) with such a broad holding. See United States v.  
18 Benally, 546 F.3d 1230, 1236 (10th Cir. 2008):

19 We agree with the government that allowing juror testimony  
20 through the backdoor of a *voir dire* challenge risks swallowing the  
21 rule. A broad question during *voir dire* could then justify the  
22 admission of any number of jury statements that would now be re-  
23 characterized as challenges to *voir dire* rather than challenges to the  
24 verdict. Given the importance that Rule 606(b) places on  
25 protecting jury deliberations from judicial review, we cannot read it  
26 to justify as large a loophole as Mr. Benally requests.

1 Upon closer scrutiny, the case cited in Hard I for the proposition that juror statements tending  
2 to show deceit are not barred by Fed. R. Evid. 606(b), Maldonado v. Missouri Pacific Ry.  
3 Co., 798 F.2d 764, 770 (5th Cir. 1986), merely holds that statements tending to show deceit  
4 during *voir dire* about objective, extraneous matters may be admissible, but statements alleging  
5 dishonesty about jurors' subjective processes and biases are barred by the rule:

6 Missouri Pacific argues that the jurors should have disclosed their  
7 prejudices in response to defense counsel's *voir dire* questions  
8 concerning the jurors' ability to treat Missouri Pacific like any other  
9 individual. However, defendant's motion did not indicate to the  
10 district court that any juror had concealed information during *voir*  
11 *dire*. Vezenia involved circumstances suggesting that a juror had  
12 failed to disclose important information about an extraneous matter  
13 that could have affected deliberations. In the present case, Missouri  
14 Pacific sought to examine the jurors about their subjective thoughts  
15 during deliberations. Its motion did not indicate that any juror  
16 believed he or she would be unable to treat Missouri Pacific fairly  
17 but concealed that fact during *voir dire*. The testimony sought by  
18 Missouri Pacific clearly concerned matters shielded from inquiry  
19 by Rule 606(b).

20 Maldonado, 798 F.2d at 770. See also United States v. Pimentel, 654 F.2d 538, 542 (9th Cir.  
21 1981) ("Testimony of a juror concerning the motives of individual jurors and conduct during  
22 deliberation is not admissible. Juror testimony is admissible only concerning facts bearing on  
23 extraneous influences on the deliberation, in the sense of overt acts of jury tampering.").

24 Maldonado's distinction between juror bias and extraneous information comports with the facts  
25 and holding of Hard I, where one juror, though specifically asked during *voir dire*, allegedly  
26 failed to disclose that he previously had been employed by the defendant and shared his  
personal knowledge of defendant's settlement practices during deliberations. See Hard I at 486  
("Since Fraser's statements constitute evidence of extraneous influence, testimony as to their  
occurrence should not be barred by Federal Rule of Evidence 606(b)."). Viewing Hard I in  
light of Maldonado, it appears that the proper construction of Hard I's language regarding juror  
statements tending to show deceit is that such statements are admissible under Rule 606(b)

1 insofar as they indicate deceit during *voir dire* about extraneous experience under Fed. R. Evid.  
2 606(b). Indeed, Hard II's reading of Hard I comports with this view. See Hard II, 870 F.2d at  
3 1457 (describing Hard I: "We . . . remanded for an evidentiary hearing on the issue of juror  
4 misconduct, determining that Fraser's statements constituted evidence of extraneous influence  
5 and that testimony as to their occurrence should not have been barred by Federal Rule of  
6 Evidence 606(b)."). Hard II then states the standard by which courts should consider juror  
7 testimony:

8 Where affidavits or juror testimony or other evidence of juror  
9 statements are offered to impeach a verdict, the district court must  
10 examine this material to decide whether it falls within the  
11 categories of admissible juror testimony permitted by Rule 606(b).  
12 Rule 606(b) permits testimony only on the questions of "whether  
13 *extraneous prejudicial information* was improperly brought to the  
14 jury's attention" and "whether any *outside influence* was improperly  
15 brought to bear on any juror." Rule 606(b) (emphasis added).  
16 Jurors may not testify as to how they or other jurors were affected  
17 by the extraneous prejudicial information or outside influence; they  
18 may only testify as to its existence. Abatino v. United States, 750  
19 F.2d 1442, 1446 (9th Cir.1985) ("[J]urors may not be questioned  
20 about the deliberative process or subjective effects of extraneous  
21 information, nor can such information be considered by the trial or  
22 appellate courts.") (quoting United States v. Bagnariol, 665 F.2d  
23 877, 884-85 (9th Cir.1981), *cert. denied*, 456 U.S. 962, 102 S.Ct.  
24 2040, 72 L.Ed.2d 487 (1982)). Rule 606(b) bars not just juror  
25 testimony but evidence of any sort as to a statement by a juror  
26 concerning jury deliberations, so long as a juror would be barred  
from making the same statement in the form of testimony in court.  
D. Louisell & C. Mueller, Federal Evidence § 286 at 119 (1979)  
(1988 Supp.).

Looking only at affidavits and testimony admissible under Rule  
606(b), the court must decide whether an evidentiary hearing is  
required to determine whether a new trial is necessary. An  
evidentiary hearing is justified only when these materials are  
sufficient on their face to require setting aside the verdict. Where a  
losing party in a civil case seeks to impeach a jury verdict, it must

1 be shown by a preponderance of the evidence that the outcome  
2 would have been different. Unless the affidavits on their face  
3 support this conclusion, no evidentiary hearing is required. Unless  
4 such a showing is made at the evidentiary hearing, no new trial is  
5 required.

6 Hard II, 870 F.2d at 1461. After examining the precedent cited in Hard I, the Court is  
7 convinced that Hard II lays out the correct formulation of the law as stated in Fed. R. Evid.  
8 606(b). Because the juror declaration is directed entirely at what occurred during deliberations  
9 and because it does not fall within any of the exceptions enumerated under 606(b), it is  
10 inadmissible under Rule 606(b).

11 4. **Insufficient Evidence to Justify a New Trial or Hearing**

12 Even assuming the declaration is admissible under a broad reading of Hard I, the Court  
13 finds that an evidentiary hearing is not justified because the declaration is not sufficient on its  
14 face to require setting aside the verdict. Hard II, 870 F.2d at 1461. To obtain a new trial  
15 because of a juror's erroneous answer to *voir dire* questions, a party must: (1) demonstrate that  
16 a juror failed to answer honestly a material question on *voir dire*; and then (2) show that a  
17 correct response would have provided a valid basis for a challenge for cause. McDonough  
18 Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984).

19 Defendants make two allegations of juror dishonesty during *voir dire*: (1) one juror's  
20 failure to disclose her cancer diagnosis; and (2) several jurors' failure to disclose their bias  
21 against Scapa because of Boeing's decision (which received local media coverage during *voir*  
22 *dire*) to locate new manufacturing facilities in Scapa's home state of South Carolina.

23 a. **No Dishonesty as to Cancer Diagnosis**

24 Counsel for Scapa asked the following question during *voir dire*:

25 I need to find out, just like I talked to Ms. Maghie, is there anybody  
26 here that has had any experience with cancer in your life? I am not  
going to go into the details about it, but a close friend, a relative,  
perhaps yourself, has had an experience with cancer that you feel

1 like, when you start hearing about someone suffering from cancer  
2 and getting chemotherapy, and having the symptoms and problems  
3 that go along with that, that you are going to be so overwhelmed,  
4 feeling for the plaintiff, that you are just going to say, I really feel  
like Mr. Barabin should get some money no matter what? Anybody  
have any experience like that?

5 Dkt. #429 at 107. Though several jurors raised their hands to discuss their experiences with  
6 cancer, one juror ultimately selected to hear the case did not raise her hand. The declaration  
7 alleges that this juror revealed to the others during deliberations that she was diagnosed with a  
8 terminal brain tumor. Juror Declaration, ¶6. The declaration further alleges, “She went on to  
9 indicate something to the effect there is no amount of money that makes it easier.” *Id.*

10 Defendants argue that this juror’s silence in response to Scapa’s question constituted a  
11 failure to honestly answer a material question during *voir dire* and that a correct answer would  
12 have provided a basis to challenge for cause, satisfying the first and second prongs of  
13 McDonough. The Court finds, however, that defendants have not made a *prima facie* showing  
14 that the juror failed to answer honestly. Scapa’s compound question to the jury asked the  
15 potential jurors if (1) they had an experience with cancer (2) that would, in their opinion, make  
16 them incapable of being objective. Even assuming the facts in the declaration as true, it is  
17 probable that this juror believed that she could be objective in assessing the liability or non-

18 liability of the defendants and so answered honestly when she did not raise her hand.  
19 Regardless of how defendants would now have their question interpreted, “[w]hen *voir dire*  
20 questions can be logically interpreted to mean something else to a juror, then a literal non-  
21 disclosure on another reading of the question cannot be assumed merely for failure to answer  
22 the question according to its intended meaning.” United States v. Robbins, 500 F.2d 650, 652  
23 n.2 (5th Cir. 1974). As the Ninth Circuit held in Hard II, “We agree with the Eleventh Circuit  
24 that ‘we cannot put upon the jury the duty to respond to questions not posed.’” 870 F.2d at  
25 1460 (citing United States v. Kerr, 778 F.2d 690, 694 (11th Cir. 1985)). Scapa’s question can

1 logically be interpreted to require responses only from those persons who believe their  
2 experiences with cancer would cause them to find for plaintiff “no matter what.”<sup>2</sup>

3 Accordingly, even if the declaration were admitted, its allegations do not justify a new  
4 trial or evidentiary hearing because they do not state a *prima facie* case under McDonough.  
5 Hard II, 870 F.2d at 1461.

6 b. No Evidence of Regional Bias

7 Defendants also argue that several jurors were dishonest about their alleged bias against  
8 Scapa and South Carolina. Counsel for Asten asked this question in *voir dire*:

9 Scapa, a manufacturer of dryer fabrics which are used in paper  
10 mills. They are based in Charleston, South Carolina. I understand  
11 from Mr. Shaw that Charleston, South Carolina has been in the  
12 news of late here in Seattle. I wondered – From looking at your  
13 questionnaires a number of you have ties to Boeing or worked with  
14 Boeing. Is there anything about my client being from Charleston,  
15 and Charleston being in a contest with Seattle to get the new  
16 Boeing Dreamliner that would cause you to say, golly, there is a  
17 defendant from Charleston, we need to teach those Charleston folks  
18 a lesson?

19 Dkt. #429 at 111-12. No potential juror responded to this question. The declaration alleges:

20 The issue of Boeing moving the 787 production line to South  
21 Carolina and that one of the defendants in this case was head-  
22 quartered in South Carolina must have been in the jury’s mind  
23 during deliberations. In fact when the jury was deciding damages at  
24 one point the economic damages were listed as \$700,007. This was  
25 a direct reference to Boeing and its commercial airplane line. One  
26 of the jurors who supported this particular calculation said  
something to the effect of “I wonder if they will get this?”

27 Juror Declaration, ¶7. Defendants contend the \$700,007 figure evinces a “hidden message”  
28 that “members of the jury intended to send, via their verdict.” See Asten Mot. at 6.

29 Juror affidavits alleging juror bias and “message” verdicts have been explicitly excluded  
30 under 606(b). Benally, 546 F.3d at 1241-42. Notwithstanding this law, even if the Court were  
31 to admit the declaration, it finds that there is not enough on the face of declaration to warrant

32 <sup>2</sup> In fact, a review of the transcript of the *voir dire* indicates that this was how the question was  
33 interpreted at the time. See Dkt. #429.

1 an evidentiary hearing. The declaration merely speculates as to the significance of the  
2 \$700,007 figure. Contrast United States v. Henley, 238 F.3d 1111, 1121 (9th Cir. 2001)  
3 (allegations of overtly racist statements made by juror before deliberations which indicated  
4 racial bias). The Court has no doubt that defense counsel extracted the strongest possible  
5 declaration it could from the dissenting juror, yet the most it can allege is what “must have  
6 been in the jury’s mind.” Any further inquiry on this topic would necessarily go only to the  
7 jury’s subjective processes, and this is exactly what Fed. R. Evid. 606(b) prohibits. One juror’s  
8 speculation about bias is not substantial enough evidence to warrant violating the sanctity of  
9 the jury room. Therefore, even after considering the declaration’s allegations of bias for the  
10 sake of argument, the Court is satisfied that it cannot justify either a new trial or an evidentiary  
11 hearing under the standard elucidated in Hard II.

11 **B. Evidentiary Rulings**

12 Defendants next move for a new trial on the basis of many of the Court’s evidentiary  
13 rulings. “The trial court may grant a new trial, even though the verdict is supported by  
14 substantial evidence, if the verdict is contrary to the clear weight of the evidence, or is based  
15 upon evidence which is false, or to prevent, in the sound discretion of the trial court, a  
16 miscarriage of justice.” United States v. 4.0 Acres of Land, 175 F.3d 1133, 1139 (9th Cir.  
17 1999) (internal quotations omitted). “While the trial court may weigh the evidence and  
18 credibility of the witnesses, the court is not justified in granting a new trial merely because it  
19 might have come to a different result from that reached by the jury.” Roy v. Volkswagen of  
20 Am., Inc., 896 F.2d 1174, 1176 (9th Cir. 1990) (internal quotations omitted). It is not “the  
21 courts’ place to substitute our evaluations for those of the jurors.” Union Oil Co. v. Terrible  
22 Herbst, Inc., 331 F.3d 735, 743 (9th Cir. 2003) (reversing district court’s grant of a new trial  
23 where the “case was an eight-day jury trial and involved several different environmental  
24  
25

1 pollutants and conflicting testimony.”). For the reasons that follow, the Court finds no basis to  
2 order a new trial.

3 1. **Plaintiffs’ Experts**

4 Defendants again challenge the admissibility of the testimony of almost every expert  
5 presented by plaintiffs. Because these issues were briefed and decided previously through  
6 motions *in limine*, the Court will only briefly address them here.

7 Rule 702 of the Federal Rules of Evidence provides for the admissibility of expert  
8 testimony if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the  
9 product of reliable principles and methods, and (3) the witness has applied the principles and  
10 methods reliably to the facts of the case. “Faced with a proffer of expert scientific testimony,  
11 the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is  
12 proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand  
13 or determine a fact in issue.” Daubert v. Merrel Dow Pharm., Inc., 509 U.S. 579, 592 (1993).  
14 This process requires the Court to make a “preliminary assessment of whether the reasoning or  
15 methodology underlying the testimony is scientifically valid and of whether that reasoning or  
16 methodology properly can be applied to the facts in issue.” Id.

16 Before trial, the Court scrutinized the credentials and proposed testimony of each of  
17 plaintiffs’ experts and found that their testimony qualified as scientific, technical, or specialized  
18 knowledge which would help the jury to better understand the evidence and to determine facts  
19 at issue. The Court had initially excluded the testimony of industrial hygienist Kenneth Cohen  
20 because plaintiffs did not present sufficient evidence and argument to prove Mr. Cohen’s  
21 expertise and the relevance of his testimony. Upon further motion (Dkt. #267), wherein  
22 plaintiffs presented, *inter alia*, Mr. Cohen’s extensive experience and qualifications as an  
23 industrial hygienist and further noted that Mr. Cohen’s testimony had been recently admitted  
24 under the more restrictive Frye standard in a case against the same defendants in Washington  
25 State court, the Court reconsidered its preliminary ruling and found Mr. Cohen’s testimony

1 admissible under Fed. R. Evid. 702. See Coulter v. AC & S, Inc. et al., King County Superior  
2 Court Cause No. 01-2-34675-0SEA. See also Emrick v. AC & S, Asten Group., Inc. et al.,  
3 Multnomah County (OR) Circuit Court Case No. 0002-02019 (Mr. Cohen testifying in similar  
4 dryer felt asbestos matter). Agreeing with the sound reasoning of Judge Armstrong in Coulter,  
5 the Court placed certain limits on plaintiffs' experts' testimony, which they did not exceed.  
6 Defense counsel vigorously cross-examined plaintiffs' experts and presented their own experts  
7 to the jury. The jury weighed the evidence presented and ultimately found for plaintiffs. There  
8 is no basis for a new trial here.

9 2. **Asbestos Textile Institute Documents and Defendants' Corporate  
10 Documents Were Properly Admitted**

11 Defendants argue that certain corporate documents indicating defendants' knowledge of  
12 the dangers of asbestos should not have been admitted in support of plaintiffs' negligence  
13 claim. In a negligence claim against a product manufacturer, the manufacturer's knowledge of  
14 the product, its dangerousness, and the hazards involved in reasonably foreseeable uses of the  
15 product are all relevant in determining its culpability. See Lockwood v. AC & S, Inc., 109  
16 Wn.2d 235, 252 (1987). To this end, plaintiffs submitted evidence from the Asbestos Textile  
17 Institute ("ATI") in relation to their negligence claim against Asten. Similarly, plaintiffs  
18 submitted certain corporate documents from Asten and Scapa, which, plaintiffs argue, indicate  
19 that defendants were aware of the dangers of exposure to asbestos. The Court admitted only a  
20 portion of the documents plaintiffs sought to introduce so that they would not be cumulative or  
21 overly prejudicial. As Scapa was not a member of ATI, the jury was specifically instructed to  
22 consider the ATI documents only as to Asten's alleged negligence and to consider the  
23 corporate documents only as to the negligence claims against each defendant. Such documents  
24 are routinely admitted into evidence in asbestos product liability negligence actions and there  
25 was no error admitting them here. See Lockwood, 109 Wn.2d at 264.

26 Even assuming error, any error here would be harmless as the jury found both

1 defendants guilty on both strict liability and negligence theories:

2 We reverse only where an error is prejudicial, however. Here, the  
3 error was harmless because the jury rendered a single monetary  
4 verdict on both the strict liability product-warning claim and the  
5 negligent failure-to-warn claim. Because we affirm the judgment  
6 with respect to the strict liability product-warning claim, a reversal  
7 of the negligent failure-to-warn claim would not affect the  
8 judgment.

9 Mavroudis v. Pittsburgh-Corning Corp., 86 Wn. App. 22, 36 (1997).

### 10 3. Collateral Source Income Evidence

11 Defendants argue that, though normally excluded by the collateral source rule, evidence  
12 of Mr. Barabin’s medical insurance compensation and settlements from other defendants  
13 should have been presented to the jury because Mrs. Barabin “opened the door” to collateral  
14 source income evidence in testifying that she did not want “to be left destitute” as a result of  
15 her husband’s illness. Dkt. #432 at 17. Though defendants failed to object to Mrs. Barabin’s  
16 testimony at the time, they now argue that this testimony prejudiced the jury by implying that  
17 the Barabins had no other source of income. They argue that the Court should order a new trial  
18 on this basis.

19 Generally, evidence of collateral source income is excluded under Washington law:

20 This Court has long held that “payments, the origin of which is  
21 independent of the tort-feasor, received by a plaintiff because of  
22 injuries will not be considered to reduce the damages otherwise  
23 recoverable.” Ciminski v. SCI Corp., 90 Wash.2d 802, 804, 585  
24 P.2d 1182 (1978). See also Johnson v. Weyerhaeuser Co., 134  
25 Wash.2d 795, 798, 953 P.2d 800 (1998). Thus, courts generally  
26 exclude evidence that the plaintiff has received compensation from  
a third party for an injury for which the defendant has liability.  
Johnson, 134 Wash.2d at 798, 953 P.2d 800. The “rule is designed  
to prevent the wrongdoer from benefitting from third-party  
payments.” Cox v. Lewiston Grain Growers, Inc., 86 Wash.App.  
357, 375, 936 P.2d 1191 (1997). Accordingly, “as between an  
injured plaintiff and a defendant-wrongdoer, the plaintiff is the  
appropriate one to receive the windfall.” Xieng v. Peoples Nat’l

1                   Bank, 120 Wash.2d 512, 523, 844 P.2d 389 (1993) (citing  
2                   Ciminski, 90 Wash.2d at 804, 585 P.2d 1182).

3                   Cox v. Spangler, 141 Wn.2d 431, 439-40 (2000). Defendants cite no case in any jurisdiction  
4 where the trial court granted a new trial on this basis. Nor do they cite a case where an  
5 appellate court reversed a trial court’s determination not to allow the introduction of collateral  
6 source income. The Washington cases cited in defendants’ memoranda on this point are  
7 inapposite to the facts here. See Johnson v Weyerhaeuser Co., 134 Wn.2d 795, 804 (1998)  
8 (remanding for new trial and noting collateral source income would be admissible only if  
9 plaintiff opens the door); Marler v. Dep’t of Ret. Sys., 100 Wn. App. 494, 505 (2000) (plaintiff  
10 repeatedly testified that he had been granted a pension). Further, defendants’ failure to timely  
11 object to Mrs. Barabin’s testimony negates the basis of their motion. “[A]n objection to the  
12 introduction of testimony must be timely or it will be held to have been waived.” United States  
13 v. Carney, 468 F.2d 354, 357 (8th Cir. 1972). Defendants cannot argue now that Mrs.  
14 Barabin’s testimony warrants a new trial when they did not move to strike that testimony at  
15 trial.

16                   Defendants’ further argument that settlements received by plaintiffs should have been  
17 presented to the jury has even less basis under the law, as under Washington law any award  
18 owed by defendants will be offset by those settlements. Defendants cite no law to support this  
19 argument.

20                   4.           **Plaintiffs Were Properly Allowed to Present Their Causation Theory**  
21                   **to the Jury**

22                   Defendants argue, somewhat vaguely, that plaintiffs should not have been permitted to  
23 argue their “every fiber/total dose” theory of liability. This characterization appears misleading  
24 as the Court cannot recall any testimony from plaintiffs that “every fiber” of asbestos is  
25 causative. Nor did there appear to be significant disagreement among both parties’ experts that  
26 the total dose of asbestos exposure is relevant in determining the cause of a case of asbestos-

1 related cancer. Indeed, defendants' own expert, Dr. Samuel Hammar, perhaps the preeminent  
2 expert in his field, appeared to testify to plaintiffs' theory on cross examination:

3 Q: Is the concept of total dose response in mesothelioma causation  
4 a controversy?

5 A: I don't think that's too much of a controversy. The controversy, I  
6 think, would be potencies of different types of asbestos fibers, that  
7 Chrysotile is significantly lower than, say, Amosite or Crocidolite. I  
8 don't think that's of any significant controversy. There probably  
9 would be some controversy with respect to the significance of  
10 finding different types of fibers in the pleural tissue, and if that has  
11 any significance one way or the other. I think those are some areas  
12 of controversy that still haven't been worked out. . . . Basically, [ ]  
13 most of the exposures that a person has to asbestos contribute as a  
14 whole to cause their mesothelioma.

15 Q: And what does it mean, subsection I right here? What's the point  
16 there?

17 A: It says it's not valid to point to one exposure among the others  
18 and incriminate it as the sole cause of a mesothelioma, with  
19 exoneration of the other exposures.

20 Q: Do you agree with that?

21 A: Sure. . . . Yeah. It's not valid to point to one exposure among the  
22 others and exonerate it from a causative role in the development of  
23 a mesothelioma, and to incriminate all of the others. And that's just  
24 basically saying that if the person has multiple exposures, you just  
25 can't, say, throw one out and say that wasn't important. There is no  
26 way that you could say it was or was not important. You have to  
potentially include that, if a person actually did have that exposure.

Dkt. #438 at 59-60. Dr. Hammar similarly agreed with the proposition that "if someone is  
exposed to a level of asbestos that they can breathe in, that exposure is, regardless of the source  
of the fiber, significant and substantial in causing mesothelioma in someone with

1 mesothelioma.” Id. at 55. Thus, it appears to the Court that defendants’ causation expert  
2 testified to the same theory they seek to exclude.

3 **C. Jury Instructions and Verdict Form**

4 1. **The Pattern Instruction on Cause was Correct**

5 Defendants argue that the jury was improperly instructed on what is a “substantial  
6 factor” under Washington law. However, the language the defendants complain of was taken  
7 verbatim from the most recent edition of the Washington Pattern Jury Instructions: “The term  
8 “proximate cause” means a cause that was a substantial factor in bringing about the [*injury*]  
9 [*event*] even if the result would have occurred without it.” 6 Wn. Prac., Wn. Pattern Jury Instr.  
10 Civ. WPI 15.02.

11 As the Court has noted in its previous orders, the Washington Supreme Court has not  
12 established how the substantial factor causation standard is to be applied in asbestos-injury  
13 cases. In Mavroudis v. Pittsburgh-Corning Corp., 86 Wn. App. 22 (1997), the Court of  
14 Appeals analyzed Hue v. Farmboy Spray Co., Inc., 127 Wn.2d 67 (1995), a pesticide case in  
15 which the Washington Supreme Court found that “the plaintiff only needed to show that a  
16 portion of a defendant’s pesticide became part of the total cloud of pesticide that caused the  
17 damage.” 86 Wn. App. at 30. “[T]he Hue court certainly implied that asbestos-injury plaintiffs  
18 need not prove or apportion individual causal responsibility but need only show that the  
19 defendant’s asbestos products were among those in the plaintiff’s work environment when the  
20 injurious exposure occurred.” Id. However, the Mavroudis court did not reach the issue since  
21 it found that the plaintiff had shown that exposure to the defendant’s product, “standing alone,  
22 would have been sufficient to cause Mr. Mavroudis’s injury.” Id. at 31. The court based its  
23 determination on the fact that the defendant’s product was one of only three asbestos-  
24 containing products during the time of exposure, that the defendant’s product gave off very  
25 substantial amounts of asbestos when cut, and that as little as ten percent of the asbestos  
26 exposure the plaintiff received would have been sufficient to cause his mesothelioma. Id.

1           There is no question that under Washington law that it was plaintiffs’ burden of proof at  
2 trial to demonstrate that each defendant’s asbestos-containing product was “an important or  
3 material factor and not one that is insignificant.” Mavroudis, 86 Wn. App. at 28. Plaintiffs had  
4 the burden to prove that Mr. Barabin was exposed to defendant’s product and that the product  
5 was a substantial factor in bringing about the asbestos-related disease. They did not need to  
6 meet some quantitative threshold in order to establish causation. Nor did they need to establish  
7 that defendants’ products were the sole cause of plaintiff’s mesothelioma or could alone have  
8 caused the disease. Whether a defendant’s product was a substantial factor depends on a  
9 number of factors, which were explored at trial. It was the jury’s place to ultimately decide  
10 whether the defendants’ asbestos-containing products were a substantial factor in causing Mr.  
11 Barabin’s disease.

12           The Court believes that this articulation of the standard comports with the Washington  
13 Supreme Court’s analysis in Lockwood, 109 Wn.2d at 247. The Lockwood court found that  
14 the evidence presented by plaintiff created a reasonable inference that he was exposed to  
15 defendant’s product. “When this is combined with the expert testimony that all exposure to  
16 asbestos has a cumulative effect in contributing to the contraction of asbestosis, it would be  
17 reasonable for a jury to conclude that [the plaintiff’s] exposure to [the defendant’s] product was  
18 a proximate cause of his injury.” Id. at 247-48. The Lockwood court did not require the  
19 plaintiff to establish that the defendant’s product alone would have caused the plaintiff’s  
20 injury.<sup>3</sup> Nor did it hold that there is no such thing as a *de minimis* contribution. Rather, it noted  
21 “a number of factors” a jury may consider in determining whether causation has been  
22 established. Id. at 248.

---

23 <sup>3</sup> See Mavroudis, 86 Wn. App. at 29 n.3 (“Lockwood was a challenge to the sufficiency-of-the-  
24 evidence case and not an instructional-error case. However, the court’s ruling that where the evidence  
25 showed exposure to the defendant’s product and an expert testified that all exposure to asbestos has a  
26 cumulative effect in contributing to the contraction of asbestosis, the jury could reasonably find that  
exposure to the defendant’s product was a proximate cause is consistent with the giving of the  
substantial factor instruction.”) (citing Lockwood, 109 Wn.2d at 247).

1 The standard articulated by the Court and reflected in the jury instructions permitted  
2 each party to make its case regarding what the jury should consider “substantial.” Despite the  
3 defendants’ disagreement with existing law, it was not error for the Court to instruct the jury  
4 using the pattern instruction published for that purpose. The jury instructions given were  
5 sufficient if they permitted the defendants to argue their theory of the case. Brewer v. City of  
6 Napa, 210 F.3d 1093, 1097 (9th Cir. 2000). Here, the defendants were free to argue their  
7 theories of exposure and its relation to liability based on the instructions given.

8 2. **The Court Properly Did Not Include a “State of the Art” Component**  
9 **in Its Strict Liability Instruction**

10 Without supporting argument, defendants assert that the Court erred in not including a  
11 “state of the art” instruction in its jury instructions regarding strict liability. As noted in the  
12 Court’s order on motions *in limine*, evidence of industry custom and technological feasibility is  
13 generally inadmissible in strict liability claims, while permissible as a defense to negligence  
14 claims. Lenhardt v. Ford Motor Co., 102 Wn.2d 208, 212-14 (1984); Koker v. Armstrong  
15 Cork, Inc., 60 Wn. App. 466, 476 (1991). The jury instructions properly reflect this law.

16 3. **The Continuing Duty to Warn Instruction Was Correct**

17 Defendants argue the jury was erroneously instructed regarding plaintiffs’ negligence  
18 claims on defendants’ continuing duty to warn, yet cite no law to support the argument. This  
19 argument appears to be foreclosed by Lockwood, which held that if a person’s susceptibility to  
20 the danger caused by a product continues after that person’s direct exposure to the product has  
21 ended, the manufacturer has a duty after exposure to exercise reasonable care to warn the  
22 person of known dangers, if the warning could help to prevent or lessen the harm.

23 Lockwood, 109 Wn.2d at 260.

24 In any case, as discussed previously, an error in the negligence instructions would be  
25 harmless here as the jury found both defendants liable on both strict liability and negligence  
26 theories. Mavroudis, 86 Wn. App. at 36.

1                   4.       **It Was Not Error to Refuse the Defendants’ Request for an**  
2                                   **“Exposure” Question on the Verdict Form**

3                   Defendants contend that a question specifically asking if Mr. Barabin was exposed to  
4 asbestos from defendants’ products should have been included in the special verdict form.  
5 However, they cite no law to support their argument. After three weeks of testimony, much of  
6 which was focused on the question of exposure, it is indisputable that the jury understood that  
7 in order to find defendants liable for causing Mr. Barabin’s injuries, they necessarily had to  
8 find that Mr. Barabin was exposed to asbestos from their products.

9                   D.       **Improper and Inflammatory Argument by Plaintiffs’ Counsel**

10                  Defendants move for a new trial on the basis of plaintiffs’ counsel’s improper and  
11 inflammatory statement during closing.

12                  MR. NEVIN: . . . . They are part of the many people that these  
13 defendants have been hurting and killing over the years, and they  
14 are no different.

15                  MR. YOUNG: Your Honor, I don't think that is a proper argument.

16                  THE COURT: The objection is sustained to the form of the  
17 argument.

18                  MR. YOUNG: We move to strike, your Honor.

19                  THE COURT: The jury should consider the law as I read it to you  
20 and the facts here. It is not fair to compare them to -- in the manner  
21 that Mr. Nevin just did, and you should disregard that argument.

22                  Dkt. #441 at 62-63. The Court agrees that counsel’s statement was an improper appeal  
23 to the jury’s passions.<sup>4</sup> However, defendants objected to the statement at the time it  
24

25  
26  

---

<sup>4</sup> The Court does not condone this and other aspects of plaintiff’s counsel’s closing argument where he compared the defendants to drunk drivers, unfaithful politicians and child abductors. Dkt. #441 at 177 (no objection made). The Court notes that the jurors themselves rebuffed counsel with one of them (not the dissenting juror who differed with the other 10) taking the extraordinary step of interrupting counsel’s closing argument to ask him to “make his point without yelling at us.” Dkt. #441 at 179. It is much more likely the jury was swayed by testimony and evidence than anything plaintiff’s counsel said during closing argument.

1 was made. The objection was promptly sustained and the jury was instructed to  
2 disregard the improper argument.

3 To warrant reversal of the jury's verdict on grounds of attorney misconduct, however,  
4 "the flavor of misconduct must sufficiently permeate an entire proceeding to provide  
5 conviction that the jury was influenced by passion and prejudice in reaching its verdict." Kehr  
6 v. Smith Barney, Harris Upham & Co., Inc., 736 F.2d 1283, 1286 (9th Cir. 1984) ("We have no  
7 trouble concluding that Lauchengco's remarks were improper. The only question before us,  
8 therefore, is whether the instances of misconduct so permeated the trial that the jury was  
9 necessarily prejudiced."). Here, the statement complained of was made in closing argument  
10 and did not permeate the proceedings so as to warrant a new trial. Id. at 1286 (upholding  
11 denial of motion for new trial because "the offending remarks occurred principally during  
12 opening statement and closing argument, rather than throughout the course of the trial. They  
13 were isolated, rather than persistent.").

14 **E. Sufficient Evidence to Support the Verdict**

15 Defendants argue that there was insufficient evidence to support the verdict. As  
16 explained in more detail in its order denying judgment as a matter of law, the Court finds that  
17 there was sufficient evidence to support a finding of liability in this case. "Circumstantial  
18 evidence may establish the entire basis for recovery under either negligence or strict products  
19 liability." Lockwood v. AC & S, Inc., 44 Wn. App. 330, 354 (1986). It was not unreasonable  
20 for the jury to conclude that defendants' products were a substantial factor in causing Mr.  
21 Barabin's mesothelioma after defendants stipulated to supplying asbestos-containing dryer felts  
22 to the Camas Mill during the time Mr. Barabin was regularly handling dryer felts at the Camas  
23 Mill and in light of plaintiffs' expert causation testimony.

1           **F.       Constitutionality of Washington State Tort Law**

2           Defendants note that under RCW 4.22.070, they are subject to joint and several liability,  
3 unlike many categories of tortfeasors who are entitled to an apportionment of damages.

4 Defendants contend that because they were precluded from seeking apportionment and treated  
5 differently under the law, they were deprived of their constitutional rights to equal protection  
6 and due process.<sup>5</sup>

7           Before the Court reaches the substance of the constitutional challenges, it must address  
8 plaintiffs' contention that defendants waived the issue by failing to raise it in connection with  
9 the jury instructions and the special verdict form. Defendants' motion is the first time they  
10 have raised the constitutional issues. Moreover, defendants could have anticipated the issues  
11 and challenged the constitutionality of joint and several liability prior to the verdict. Scapa  
12 counters that any constitutional challenge to joint and several liability before or during trial  
13 would have been premature. At that point, because no finding of liability had been imposed,  
14 any consideration of the propriety of joint and several liability would have been hypothetical.  
15 Courts "will not 'anticipate a question of constitutional law in advance of the necessity of  
16 deciding it.'" Stoner v. Presbyterian Univ. Hosp., 609 F.2d 109, 111 (3d Cir. 1979) (quoting  
Ashwander v. TVA, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring)).

17           Defendants' argument shows, at most, that a *decision* on the merits of the constitutional  
18 issues before the jury rendered its verdict may have been unnecessary. However, it does not  
19 address the issue of whether defendants should have raised the issue sooner. The jury  
20 determined fault and the extent of damages. Accordingly, under defendants' theory, the jury  
21 should have been allowed to apportion fault between the defendants, and perhaps among other  
22 parties too. Practically, the only way the jury could have done so was through the verdict form  
and a related jury instruction. Nevertheless, defendants failed to object to the Court's jury

---

23           <sup>5</sup> The Washington state Attorney General was given an opportunity to address the challenge  
24 to the constitutionality of the statute, but declined to intervene or otherwise respond to the  
25 issue. Dkt. #467.

1 instructions and verdict form, which did not allow for apportionment. In fact, defendants' own  
2 proposed verdict form did not include any opportunity for the jury to apportion damages. Dkt.  
3 #319 at 69-71. Additionally, defendants considered the controlling law and proposed an  
4 instruction that did not seek apportionment. See Dkt. #319 at 53 ("Proposed verdict forms and  
5 special interrogatories proposed by Defendants reflect traditional joint and several liability  
6 principles and do not seek to have the jury apportion fault."). By failing to object to the jury  
7 instructions and verdict form, and by considering and rejecting an instruction on  
8 apportionment, defendants waived the argument that fault should have been apportioned. See  
9 Affordable Housing Dev. Corp. v. City of Fresno, 433 F.3d 1182, 1196 (9th Cir. 2006) (failure  
10 to object to instruction waives right to review); United States v. Perez, 116 F.3d 840, 845-46 &  
11 n.7 (9th Cir. 1997) (en banc) (defendant's error is waived where defendant has both invited the  
12 error and relinquished a known right). See also Fed. R. Civ. P. 51.

13 Rather than accepting the allegedly flawed instructions and verdict form, defendants  
14 could have sought a verdict form that reflected apportionment, as the parties did in Coulter v.  
15 Asten Group, Inc., 135 Wn. App. 613 (2006). In that case, the appellate court noted that  
16 counsel sought the use of a verdict form with lines for apportionment of fault "to prevent the  
17 necessity of a new trial if an appellate court were to agree with [defendant's] position."  
18 Coulter, 135 Wn. App. at 621 (finding that no waiver occurred). In contrast, by failing to raise  
19 the issue in this case in a timely manner, defendants left the Court and parties with no option  
20 other than a new trial on the apportionment of damages if their constitutional argument were  
21 accepted. Under those circumstances, the Court finds that a waiver occurred. Accordingly,  
22 defendants' constitutional arguments do not support vacating the verdict.

### 23 **G. Excessive Damages and Remittitur**

24 On a motion for new trial or remittitur, if the Court, after viewing the evidence  
25 concerning damages in the light most favorable to the prevailing party, determines that the  
26 damages award is excessive, it has two alternatives: It may grant defendant's motion for a new

1 trial or deny the motion conditional upon the prevailing party accepting a remittitur. Fenner v.  
2 Dependable Trucking Co., Inc., 716 F.2d 598, 603 (9th Cir. 1983). “Generally, a jury's award  
3 of damages is entitled to great deference, and should be upheld unless it is clearly not  
4 supported by the evidence or only based on speculation or guesswork.” In re First Alliance  
5 Mortg. Co., 471 F.3d 977, 1001, 1003 (9th Cir. 2006) (internal quotations omitted) (finding  
6 remittitur proper where the damages calculation was based on a legally incorrect theory of  
7 damages under the applicable California law). The proper amount of a remittitur is the  
8 maximum amount sustainable by the evidence. D & S Redi-Mix v. Sierra Redi-Mix and  
9 Contracting Co., 692 F.2d 1245, 1249 (9th Cir. 1982).

10 Instead of arguing why the damage award is not supported by the evidence, defendants  
11 argue that the award should be reduced because it far exceeds other asbestos injury awards in  
12 Washington State. Plaintiffs counter by citing awards in other jurisdictions which match or  
13 exceed the award here. After reviewing the damages award, the evidence submitted to the jury,  
14 and applicable law, the Court finds that though the damages awarded by the jury in this case  
15 certainly exceed what the Court would have awarded, the Court cannot conclude that the award  
16 is unsustainable under the law after viewing the evidence concerning damages in a light most  
17 favorable to the plaintiffs. The jury properly awarded economic damages of \$700,000, taking  
18 into consideration plaintiffs’ witnesses’ largely uncontroverted expert testimony that economic  
19 damages in this case amounted to \$771,200. As to non-economic damages, the jury was  
20 instructed, pursuant to model jury instruction WPI 30.01.01, to exercise their judgment:

21 Your award must be based upon evidence and not upon  
22 speculation, guess, or conjecture. The law has not furnished us  
23 with any fixed standards by which to measure noneconomic  
24 damages. With reference to these matters you must be governed by  
25 your own judgment, by the evidence in the case, and by these  
26 instructions.

27 Dkt. # 350 at 27. Quantifying the measure of non-economic damages is always difficult and  
28 the Court will respect the jury’s determination.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12

### III. CONCLUSION

For all of the foregoing reasons, the Court DENIES defendants' motions for a new trial, or in the alternative, remittitur (Dkt. ## 386, 396), and motion for evidentiary hearing (Dkt. #497). The Clerk of Court is directed to enter judgment in favor of plaintiffs Henry and Geraldine Barabin and against defendants AstenJohnson, Inc. and Scapa Dryer Fabrics, Inc. in the amount of \$9,373,152.12, which reflects the \$10.2 million jury verdict, less the offset in reasonable settlements of \$836,114.61 (Dkt. #539), with interest under 28 U.S.C. § 1961 at the rate of 0.28 percent per annum, plus \$9,266.73 in costs, which will accrue interest at the rate of 0.28 percent per annum as of February 2, 2010 (Dkt. #452). The judgment shall be entered *nunc pro tunc* as of November 20, 2009, the date of the initial judgment. The Court urges the parties to resolve the issues raised in defendants' motion for continuance of temporary stay under Rule 62(d) (Dkt. #540) and motion to apportion the supersedeas bond (Dkt. #541). This Order supersedes the Court's prior Order entered on September 13, 2010. Dkt. #539.

13 DATED this 10<sup>th</sup> day of December, 2010.

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

  
Robert S. Lasnik  
United States District Judge