DARLENE NELSON, EXECUTRIX OF THE ESTATE OF JAMES NELSON

Appellee

v.

AIRCO WELDERS SUPPLY, ALLIED SIGNAL (A/K/A ALLIED CORP.), AMERICAN STANDARD, A.W. CHESTERTON, INC., BASIC, INC., BAYER CROPSCIENCE, INC., (F/K/A AVENTIS CROPSCIENCE, USA, INC.) ACHEM PRODUCTS, INC., RHONE POULENC, AG CO. AND BENJAMIN FOSTER COMPANY, BEAZER EAST (A/K/A KOOPERS CO., INC. AND KOOPER), BIRD INC., BOC GROUP, BORG-WARNER CORP., BRAND INSULATIONS, INC., CBS CORPORATION (F/K/A VIACOM, INC. AND WESTINGHOUSE ELECTRIC CORPORATION), CERTAINTEED CORPORATION, CHRYLSER CORP. (A/K/A AMC, NORTHWEAST AUTO RENTAL CO. AND CHRYSLER SERVICE CONTRACT CO.) CRANE CO., DEMMING DIVISION, CRANE PACKING, ESAB WELDING AND CUTTING EQUIPMENT, EJ LAVINO & CO., EUTECTIC CORP., FERRO ENGINEERING, FORD MOTOR CO., FOSECO, INC., FOSTER WHEELER CORPORATION, GARLOCK, INC., GENERAL ELECTRIC COMPANY, GENERAL MOTORS CORP., GEORGE V. HAMILTON, INC., GEORGIA-PACIFIC CORPORATION, GOULD PUMPS, INC., GREEN, TWEED & COMPANY, INC., HAJOCA PLUMBING SUPPLY COMPANY, HARNISCHFEGER CORP., HEDMAN RESOURCES LIMITED (F/K/A HEDMAN MINES LTD.), HOBART BROTHERS CO., HONEYWELL INTERNATIONAL, INC., INGERSOLL RAND CO., JOY GLOBAL,

IN THE SUPERIOR COURT OF PENNSYLVANIA

INC., LINCOLN ELECTRIC CO., LUKENS STEEL CO., MALLINCKRODT GROUP, INC. (F/K/A INTERNATIONAL MINERALS & CHEMICALS CORP.), MELRATH GASKET, INC., MINE SAFETY APPLIANCE (MSA), METROPOLITAN LIFE INSURANCE COMPANY, NOSROCK CORPORATION, OWENS-ILLINOIS, INC., PEP BOYS (A/K/A MANNY, MOE AND JACK), UNION CARBIDE CORP., UNIVERSAL REFRACTORIES DIVISION OF THIEM CORPORATION

Appellants

No. 865 EDA 2011
866 EDA 2011
867 EDA 2011
889 EDA 2011

Appeal from the Judgment Entered February 23, 2011
In the Court of Common Pleas of Philadelphia County
Civil Division at No.: 1335 Dec. Term 2008

BEFORE: SHOGAN, J., WECHT, J., and FITZGERALD, J.[*]

CONCURRING AND DISSENTING MEMORANDUM BY WECHT, J.

FILED SEPTEMBER 05, 2013

I respectfully dissent from the learned majority's resolution of this case to the extent that it finds that the testimony of Daniel DuPont, D.O., was subject to exclusion as a matter of law pursuant to ***Frye v. United States***, 293 F. 1013 (D.C. Cir. 1923), based upon our Supreme Court's

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[*] Former Justice specially assigned to the Superior Court.

recent decision in ***Betz v. Pneumo Abex, LLC***, 44 A.3d 27 (Pa. 2012). I also dissent from the majority's determination that the trial court abused its discretion when it declined to declare a mistrial based upon certain statements made by counsel for Darlene Nelson ("Appellee"[1]) during closing argument.

While my views on these topics are guided by settled law, my opinion also is informed by our deferential standard of review. I believe, respectfully, that the learned majority has substituted its judgment for that of the trial court in determinations properly entrusted to that court's discretion, which are reversible only for an abuse thereof. I detect no abuse of discretion in the trial court's rulings on these issues. I join the majority's resolution of all remaining issues.

The majority holds that the testimony of Dr. DuPont[2] was inadmissible as a matter of law under our Supreme Court's recent decision in ***Betz***. While ***Betz*** is the most recent in a series of opinions circumscribing the range of expert testimony that may be admitted to establish substantial causation in asbestos litigation, I do not believe that it is dispositive of the

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[1] The parties in this case have filed numerous appeals and cross-appeals. However, the issues with which I take exception are both raised by one or more of Crane Co., Hobart Brothers Co., and Lincoln Electric Co. For ease of reference, I refer to these parties collectively as "Appellants."

[2] Although I refer to and cite certain testimony, *infra*, I incorporate by reference herein the majority's lengthy excerpt of Dr. DuPont's testimony for the sake of economy. ***See*** Maj. Mem. at 16-22.

case at bar. Both ***Betz*** and ***Gregg v. V-J Auto Parts, Co.***, 943 A.2d 216 (Pa. 2007), which ***Betz*** was at pains to harmonize, ***see Betz***, 44 A.3d at 56-57, concerned cases in which substantial causation rose or fell solely upon the "every-exposure" theory of causation that is now disfavored in Pennsylvania law. In those cases, plaintiffs had no choice but to rely upon that theory because the exposure at issue in those cases was *de minimis* as to the defendants' products. Thus, the plaintiffs could establish substantial causation only if expert testimony based upon the every exposure theory was admitted.

The case before us, however, is distinguishable. James Nelson ("Decedent") undisputedly was exposed to a great deal of asbestos-containing products over many years of employment, some of them undisputedly manufactured by one or more of Appellants herein. ***See*** Maj. Op. at 3-4 (recounting Decedent's work history and extensive exposure to airborne asbestos fibers). This is reflected and reinforced by a critical factor that the majority relegates to a footnote: Unlike Dr. Maddox in ***Betz***, Dr. DuPont was intimately familiar with Decedent's exposure history. ***See*** Maj. Mem. at 12 n.11; Notes of Testimony DuPont deposition ("N.T. Depo."), 8/11/2010, at 26-27, 34-37, 49, 121-27. Conversely, in ***Betz***, the plaintiff's particular exposure history was immaterial to Dr. Maddox's testimony: Dr. Maddox was called to testify only as to the any-exposure theory to establish substantial causation in that case, and did not testify to the plaintiff's exposure history.

The majority's reading of ***Betz*** transforms expert testimony to the effect that there are "no innocent fibers" of asbestos (and similar language) into a totem that precludes the admission of that expert's testimony as a matter of law, no matter the degree of exposure or other aspects of the expert's full testimony. Maj. Op. at 22-23 (holding that, because "Dr. DuPont's 'each and every breath' opinion testimony was analogous to that of Dr. Maddox[, which the Court] found inadmissible in ***Betz***, the trial court's admission of it is inconsistent with ***Betz***"). The majority's interpretation and application are not unreasonable, given the breadth of the Supreme Court's language and certain significant similarities between the respective testimonies of Dr. Maddox and Dr. DuPont. However, the interpretation and its application in this case are problematic inasmuch as the exposure at issue in ***Betz***, as in ***Gregg***, was *de minimis*, rendering the every exposure testimony indispensable to a finding of substantial causation. ***See Betz***, 44 A.3d at 30 (noting the exposure at issue arose from occasional work with asbestos-containing brake components during Decedent's career as a mechanic); ***Gregg***, 943 A.2d at 217-18 (explaining that the exposure at issue was "focused on Mr. Gregg's personal automotive activities," *i.e.*, exposure arising from his occasional work with asbestos-containing brake components); ***cf. Betz***, 44 A.3d at 58 (concluding that "a complete discounting of the substantiality in exposure would be fundamentally inconsistent with Pennsylvania law"). For this reason, the ***Betz*** litigation was chosen as a "test case" on the question of whether any-exposure

testimony could be sufficient, without more, to establish substantial causation in cases of *de minimis* exposure. ***Betz***, 44 A.3d at 30.[3] In this case, however, the any-exposure theory was not essential to the establishment of substantial causation given the developed record, including Decedent's own testimony, of substantial exposure.

I believe that it is a mistake to read ***Betz*** more expansively than its narrow context warrants. In the instant case, the any-exposure theory was not necessary to establish substantial causation in light of the record of ongoing, regular exposure. Interestingly, in the cases relied upon by the trial court and Appellee, in which any-exposure causation was deemed admissible and/or sufficient to create a *prima facie* case requiring submission to a jury, the exposure at issue was not *de minimis*. ***See Smalls v. Pittsburgh Corning Corp.***, 843 A.2d 410 (Pa. Super. 2004); ***Cauthorn v.***

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[3] In ***Betz***, the factual history suggested far more than *de minimis* exposure to all asbestos-containing products combined. However, our Supreme Court rejected the plaintiffs' reference to that aspect of the case by noting that it was submitted as a test case for the any-exposure theory; that "plaintiffs repeatedly advised [the trial court] that there was no need for them to discuss individual exposure histories, so long as they could establish exposure to at least a single fiber from each defendant's product"; and that Dr. Maddox "rendered his opinion without being prepared to discuss the circumstances of any individual's exposure." 44 A.3d at 55. Presumably, this was due to the fact that the only defendants remaining in the litigation when the challenged rulings occurred were those as to which the evidence could establish only *de minimis* exposure. Thus, if *de minimis* exposure could not be established as substantially causative, the plaintiff could not recover.

Owens Corning Fiberglas Corp., 840 A.2d 1028 (Pa. Super. 2004); ***Lonasco v. A-Best Prods. Co.***, 757 A.2d 367 (Pa. Super. 2000). Also to the point, the ***Gregg*** Court quoted the trial court approvingly as follows:

> [The trial] court is mindful that there is no requirement that plaintiff must prove how many asbestos fibers one must inhale necessary to a determination of causation; however, evidence of exposure must demonstrate that the plaintiff worked, on a regular basis, in physical proximity with the product and that his contact with same was of such nature as to raise a reasonable inference that he inhaled asbestos fibers that emanated from it.

Gregg, 943 A.2d at 220. Notably, the ***Betz*** Court, which cited those decisions,[4] did not state that these cases were abrogated by ***Betz***. Similarly, the majority does not do so, although it implies that that is the case by summarily dismissing them. ***See*** Maj. Mem. at 15-16 (rejecting the trial court's application of these three cases, stating only that, "Applying the Supreme Court's decision in ***Betz***, we reverse").

In my view, even a modest extension of the ***Betz*** holding beyond the realm of cases involving *de minimis* exposure threatens to eclipse if not the entirety of asbestos litigation than a predominant proportion of it, given the difficulties confronting plaintiffs in establishing substantial causation decades after the allegedly causative exposure(s). ***See Gregg***, 943 A.2d at 226 ("We appreciate the difficulties facing plaintiffs in this and similar settings,

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[4] ***See Betz***, 44 A.3d at 50 n.26; ***cf. Gregg*** 943 A.2d at 221 (discussing Judge Bowes' citation of ***Lonasco*** in her dissent from the underlying direct appeal).

where they have unquestionably suffered harm on account of a disease having a long latency period and must bear a burden of proving specific causation under prevailing Pennsylvania law which may be insurmountable.”). While courts must engage in a difficult balancing of Pennsylvania’s well-settled law regarding the establishment of specific causation with our desire to ensure the existence of a functional remedy for grave injury, I believe that the majority’s reading of ***Betz*** threatens to upset that balance. Were it precedential, the majority’s ruling essentially would require the exclusion of expert causation testimony any time an expert so much as alludes to the familiar principle that, with regard to “dose responsive” ailments arising from asbestos exposure, there are no “innocent” airborne asbestos fibers. This proposition lies at the very heart of the definition of dose responsiveness, something even the ***Betz*** Court appeared not to dispute. ***See Betz***, 44 A.3d at 33 (crediting the trial court in that case in not challenging the proposition at the heart of the any-exposure theory as a matter of general causation, but finding it problematic when “extrapolated down” to establish substantial causation). Even if the expert is coached by plaintiff’s counsel to avoid such testimony in cases where there is evidence of extensive, continuing occupational exposure to airborne asbestos fibers manufactured by the defendants, defense counsel will have every incentive to elicit such commentary from the witness in an effort to preclude ***Gregg***-compliant expert testimony regarding frequent, regular, and proximal exposure. In my view, this raises the bar higher than

the ***Betz*** Court intended, and implicitly confounds ***Gregg***'s holding that substantial causation may be established by direct or circumstantial evidence that "plaintiff worked, on a regular basis, in physical proximity with the product and that his contact with same was of such nature as to raise a reasonable inference that he inhaled asbestos fibers that emanated from it." ***Gregg***, 943 A.2d at 220.

The proposition that any individual fiber may be harmful in the general sense appears to be the consensus view, even given the persistent dispute as to whether it is scientifically valid to label any one fiber emitted by one product substantially causative of asbestos-related disease when the plaintiff was exposed to far more asbestos from other sources. I find no case law that requires exclusion solely because an expert who testifies to causation in connection with a plaintiff's extensive occupational exposure to asbestos also acknowledges a defining attribute of dose-responsive toxicity: That, independently of **substantial** causation, every fiber contributes to the accretion of harmful fibers that, in sufficient quantities, cause the affliction(s) in question.[5] There certainly is a distinction between causation

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[5] ***See Betz***, 44 A.3d at 53 & n.33 (endorsing the trial court's "desire to probe how Dr. Maddox could simultaneously maintain that mesothelioma is dose-responsive and that each and every fiber among millions is **substantially** causative," but quoting ***Indus. Union Dep't, AFL-CIO***, 448 U.S. 607, 632 n.33 (1980), to the effect that with dose-responsive ailments, "[g]enerally, exposure to higher levels carries with it a higher risk, and exposure to lower levels is accompanied by a reduced risk"). Notably, Dr. DuPont, while implicitly acknowledging a degree of dose-responsiveness

(Footnote Continued Next Page)

testimony regarding that phenomenon – even when, as here, the expert uses the word "substantial" and "causation"[6] – and testimony designed to establish substantial causation based **solely** upon that phenomenon. Only the latter was at issue in ***Gregg*** and ***Betz***. ***Cf. Summers v. Certainteed Corp.***, 997 A.2d 1152 (Pa. 2010) (Saylor, J., concurring) ("Notably, in [***Gregg***], this Court recently credited the opinion announcing the judgment of the Superior Court in the present case . . . to the degree that it rejected the 'any breath' theory as establishing a jury issue **in cases in which the plaintiffs' exposure to a defendant's asbestos-containing product is *de minimus*** [*sic*]." (emphasis added)).

Our legislature has had decades to impose a bright-line rule precluding any testimony that espouses an any-exposure theory of general causation in asbestos litigation, but it has declined to do so. Our Supreme Court, too,

(Footnote Continued)

in malignant mesothelioma, testified that the necessary exposure to cause malignant mesothelioma was diminished relative to other asbestos-related diseases such as pleural thickening and asbestosis. Specifically, he indicated that "[m]alignant mesothelioma occurs with significant asbestos exposure, but it does not require the dose or duration or intensity of exposure that other diseases do." N.T. Depo. at 31-32. Dr. DuPont's reference to "significant asbestos exposure" also illustrates that his testimony regarding causation was not contingent upon the validity of an any-exposure theory of substantial causation.

[6] ***See, e.g.***, Maj. Mem. at 21 (quoting Dr. DuPont as follows: "The inhalation of fibers above the negligible amount already contained in the environment is the type of exposure that causes this disease, and that all of the fibers involved . . . above the negligible amount should be considered substantial in their causation. And furthermore, no fibers can be considered innocent or not involved" (emphasis omitted)).

has not yet imposed such a bright-line rule, despite its opportunity to do so in ***Gregg***, ***Betz***, and other asbestos cases. Were the majority opinion in this case to become binding law in Pennsylvania, I fear this Court would act in lieu of both the legislature and our Supreme Court. Each body, in its own sphere, is more qualified than this Court to embark upon change of such sweeping consequence.

Moreover, even if I allow that this is a case closer to ***Betz*** than I believe it to be, I encounter a second problem with the majority's ruling. It is beyond cavil that a trial court's decisions regarding the admissibility of evidence, including expert testimony, lie in that court's discretion. We will overturn such decisions only when that discretion is abused. ***See Grady v. Frito-Lay, Inc.***, 839 A.2d 1038, 1046 (Pa. 2003). "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires . . . manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous." ***Id.*** Notably, in both ***Gregg*** and ***Betz***, our Supreme Court affirmed a trial court's decision to exclude certain expert testimony; it did not determine that either trial court ruling constituted an abuse of discretion or reverse the trial court's ruling on that basis.

This case arises in the opposite context. Here, the trial court, following a detailed and careful inquiry into the qualifications and opinions of Dr. DuPont, determined that he should be permitted to testify. And although ***Frye*** requires trial courts not to admit testimony built upon a

foundation not recognized as reliable by the relevant scientific community, Pennsylvania courts long have characterized our standard for the admissibility of expert testimony as "liberal." ***See, e.g., Flanagan v. Labe***, 666 A.2d 333, 335 (Pa. Super. 1995) ("Pursuant to Pennsylvania's liberal standard, witnesses may testify as experts if they possess knowledge outside the ordinary reach and offer testimony that could assist the trier of fact."). Unlike in ***Betz***, where our Supreme Court focused upon Dr. Maddox's selective reliance upon epidemiological evidence, his avoidance of further development of the topic, and his lack of qualifications regarding same in his career as a pathologist, in the instant case Dr. DuPont testified to his extensive experience as a clinical pulmonologist in an industrial area treating patients with asbestos-related ailments, his responsibility as such to remain familiar with what he repeatedly qualified as controversial topics in the literature, his reliance on peer-reviewed epidemiological materials as well as authoritative texts, and other relevant matters scrupulously avoided by Dr. Maddox. ***See, e.g.***, N.T. Depo. at 28-29, 31-33. I do not believe that the trial court made a "manifestly unreasonable" ruling; or one animated by partiality, prejudice, bias, or ill will; or one so lacking in support, relative to ***Gregg***, ***Betz***, or any other binding precedent, that it could fairly be characterized as "clearly erroneous." Consequently, I believe that the trial court's discretionary ruling should be affirmed.

The majority stops once it determines that the trial court erred in admitting Dr. DuPont's testimony. Because I disagree with that ruling, I also

would take up Appellants' related challenge to the sufficiency of Dr. DuPont's testimony to establish substantial causation. In this case, we have deposition testimony of the Decedent regarding every aspect of the ***Gregg*** inquiry, establishing a basis upon which a jury, crediting Decedent's testimony, could conclude that Decedent was frequently, regularly, and proximately exposed to airborne asbestos released from products manufactured by one or more of the Appellants during many years of Decedent's employment. We ruled in ***Donoughe v. Lincoln Electric Co.***, 936 A.2d 52 (Pa. Super. 2007), that such evidence, without more, creates a jury question. ***See also Gregg***, *supra*. I am aware of no relevant basis upon which to distinguish this controlling precedent.[7] Moreover, Pennsylvania case law is clear that questions of proximate causation almost always must be left to a jury. ***Summers***, 997 A.2d at 1163-64. Finding, as I would, that Dr. DuPont's testimony was admissible, I submit that his case-specific causation testimony as a pulmonologist familiar with, and reliant upon, the epidemiological literature regarding causation, taken in tandem

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[7] Appellants challenge what they argue was the trial court's reliance on ***Donoughe*** to support the admission of Dr. DuPont's any-exposure testimony. However, I read the trial court as citing ***Donoughe*** for the proposition that direct plaintiff testimony of exposure to identifiable asbestos-releasing products is sufficient to create a jury question regarding causation, presumably **in tandem with** sufficient expert testimony. ***See*** T.C.O. at 12 (quoting ***Donoughe***, 936 A.2d at 64). Moreover, in ***Donoughe***, the exposure at issue was analogous to that in this case, as opposed to the *de minimis* exposure at issue in ***Gregg*** and ***Betz***.

with Decedent's testimony regarding his extensive occupational exposure to Appellants' products, of which Dr. DuPont was aware, was sufficient to create a jury question. Thus, I would hold that the trial court did not err or abuse its discretion in submitting the liability case to the jury.

Finally, I also disagree with the majority's determination that certain comments made by Appellee's counsel's during closing argument so prejudiced the jury that a new trial was required. "[I]t is well-settled that whether to declare a mistrial is yet another decision within the discretion of the trial court, whose vantage point enables it to evaluate the climate of the courtroom and the effect on the jury of closing arguments." ***Clark***, 693 A.2d at 206; ***see Narciso v. Mauch Chunk Twp.***, 87 A.2d 233, 234-35 (Pa. 1952) (noting that the determination of whether the trial court abused its discretion in denying a mistrial for an allegedly improper comment in a closing argument "is determined by an examination of the remark made, the circumstances under which it was made and the precautions taken by court and counsel to remove its prejudicial effects").

In this case, the issue is Appellee's counsel's ambiguous comments to the general effect that the noneconomic damages in this case should be assessed at a level greater than the $1 million award for economic damages to which the parties stipulated. It certainly is true that attorneys may not propose that a jury award an amount certain in non-economic damages. ***See*** Maj. Mem. at 34 (citing ***Joyce v. Smith***, 112 A. 549, 551 (Pa. 1921)). However, despite this well-established limitation on award-related remarks,

counsel retains a great deal of latitude to argue his case zealously and dramatically, latitude that courts do not intrude upon lightly. ***Millen v. Miller***, 308 A.2d 115, 117 (Pa. Super. 1973).

Appellants and the majority analogize this case to one in which counsel specifically urges a jury to award an amount certain in damages. I cannot subscribe to that analogy. To the contrary, as did the trial court, I find this case to be on all fours with our opinion in ***Clark v. Philadelphia College of Osteopathic Medicine***, 693 A.2d 202 (Pa. Super. 1997), which the majority attempts to distinguish. ***See*** Maj. Mem. at 35-39. There, as here, the attorney in question referred to economic damages – there, symbolically, in the form of a horizontally transected triangle; in this case, by reference to the $1 million in economic damages stipulated by the parties. ***Clark***, 693 A.2d at 206. There, as here, the attorney in question suggested that the jury should award noneconomic damages well in excess of economic damages – there, symbolically, by suggesting that noneconomic damages should be akin to the wider portion of the triangle, with economic damages being only "the tip of the iceberg," ***id.***; in this case, by counsel's mathematically hyperbolic comments that he believed non-economic damages were worth "infinitely more" than the stipulated economic damages. ***See*** Maj. Mem. at 30-31.

At the sidebar prompted by Appellants' objections, Appellee's counsel admitted that he was precluded from proposing a specific damage award as to any category of non-economic damages. ***See*** Notes of Testimony

("N.T."), 3/8/2010 vol. 2, at 84-87 ("[Appellee's counsel]: The law provides that I am not allowed to suggest a monetary amount."). Moreover, counsel for Crane acknowledged that Appellee's counsel "absolutely" could "say to [the jury that] you can start at a million dollars[, the stipulated economic damages,] **and this other stuff is even more valuable than that**." ***Id.*** at 86 (emphasis added). As well, counsel for Appellee made quite clear to the jury that calculating a just award of non-economic damages was the jury's task and no one else's. ***See id.*** at 78 ("It's up to you folks. Use your common sense. You have a sense of what these things are worth. . . . I'm not permitted by law to give you a number. I can't tell you a damage award, that I would be happy with and say I think that's great, I think that's fair. * * * It's up to you folks to do that.").

The majority seems to conflate counsel's references to the stipulated economic damages with the complained-of comments. Specifically, the majority quotes Appellee's counsel as suggesting to the jury that it "start at $1 million, and I believe that each of those elements of damages starting at physical pain are worth infinitely more than that $1 million figure. Now you add a million plus whatever other numbers you assign for these." Maj. Mem. at 38 (quoting N.T. at 80-81). The majority then indicates that counsel "suggested a value of at least $1 million for each of the twelve [categories] of [noneconomic] damages." ***Id.*** It is not clear in context that counsel directed the jury to start at $1 million as to each of twelve factors. To the contrary, it appears to me that counsel returned to that $1 million figure to

hammer home to the jury that it had no discretion to assess fewer than $1 million in stipulated economic damages. ***See, e.g.***, N.T. at 80 ("I need somebody to remember you must start at $1 million."). But, in effect, in urging noneconomic damages in excess of the economic damages, counsel did nothing more objectionable than what counsel did in ***Clark***, albeit in words rather than a pictorial representation. In ***Clark***, we held that the trial court did not abuse its discretion in declining to award a mistrial. I believe that the same is true in this case. Consequently, on this issue, too, I would affirm the trial court's refusal to grant a mistrial.

For the foregoing reasons, despite the majority's thorough, thoughtful memorandum, I cannot join the majority's reasoning or conclusions as to the issues discussed above. Thus, on those issues, I respectfully dissent. I join the majority's memorandum on the remaining issues addressed therein.