NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION I

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| MICHAEL D. GALIER,<br><br>Plaintiff/Appellee,<br>vs.<br><br>MURCO WALL PRODUCTS, INC., and WELCO MANUFACTURING COMPANY,<br><br>Defendants/Appellants,<br>and<br><br>Red Devil Corporation,<br><br>Defendant. | ) | Case No. 114,175<br>(Cons.w/114,183) |

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE BRYAN C. DIXON, TRIAL JUDGE

AFFIRMED

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Oklahoma City, Oklahoma,
and
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**EXHIBIT A**

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OPINION BY BRIAN JACK GOREE, PRESIDING JUDGE:

¶1 In this consolidated appeal, Defendants/Appellants, Murco Wall Products, Inc. (Murco) and Welco Manufacturing Company (Welco), seek review of the trial court's judgment based on a jury verdict in favor of Plaintiff/Appellee, Michael D. Galier. We find no error in the conduct of the trial, and the jury's verdict is supported by competent evidence. The judgment is affirmed.

I.

Background

¶2 Galier commenced an action against numerous manufacturers of asbestos products, alleging they caused him to contract asbestos-related mesothelioma. He sued under the theories of negligence and manufacturers' products liability. At trial he pursued only three of the defendants: Murco, Welco, and Red Devil Corporation. The jury reached a verdict and nine of its members signed a six-page verdict form. The principal issue before this court is whether the trial court erroneously accepted the written verdict after the foreman asked a question that suggested the verdict did not express the jury's intent.

¶3 The jury found Galier failed to prove his claims against Red Devil but succeeded in proving his claims against Murco and Welco. It found Galier sustained actual damages totaling $6 million, comprising $1.5 million in economic damages and $4.5 million in noneconomic damages. It apportioned 40% of Gailer's damages to Murco and 60% to Welco. Thirteen non-parties were identified on the verdict form and the jury apportioned zero percent liability to each of them.

¶4 Because the jury trial was in a civil action claiming bodily injury, the

verdict form included answers to interrogatories pursuant to 23 O.S. 2011 §61.2. Section 61.2 limits compensation for noneconomic loss to $350,000 unless the finder of fact concludes a defendant's actions met a specified degree of culpability. The jury found Galier proved by clear and convincing evidence that Murco and Welco acted with gross negligence, in reckless disregard of the rights of others, and intentionally and with malice. These findings authorized the trial court to enter judgment for noneconomic compensatory damages in excess of the $350,000 limit. §61.2(E). The same findings also served as the predicate for the jury to consider punitive damages in a second stage of the trial. 23 O.S. 2011 §9.1.[1]

¶5 After the verdict was announced, the jury's foreman asked the judge a question about the damages awarded and the judge polled the jury:

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|---|---|
| Foreman Jacobs: | We understood we had awarded punitive damages and medical damages. Is that not correct? |
| The Court: | Sir, you found by clear and convincing evidence that there was. So, yes, that |

[1] A portion of Instruction No. 24 advised the jury, "If you find that any Defendant or Defendants whom you found liable and responsible for damages acted either with reckless disregard for the rights of others or intentionally and with malice, you have determined that Plaintiff may be entitled to an award of punitive damages. The amount of any award for punitive damages is not presently before you for decision but would be determined in a later stage of the trial if you indicate by your finding that such an award is warranted."

puts you into the punitive damages stage. So we're going to a Stage II.

Foreman Jacobs: Well, maybe it wasn't written up correctly. We intended to award 1.5 million for medical and 4.5 for punitive. Did we not put that down right?

The Court: You cannot award punitive damages at this stage, sir. That's what the jury instructions told you.

Mr. Moore: [Counsel for Welco] Your Honor?

The Court: Maybe we'd better poll the jury.

Mr. Moore: [Counsel for Welco] Yes. My motion, Your Honor.

The judge then summarized the findings as stated on the verdict form and continued:

The Court: So I'm going to ask each and every juror who has signed this if that is your verdict in this case.

Mr. Jacobs, you have signed the verdict as Foreman of the Jury. Is that your verdict in this case?

Foreman Jacobs: Yes, it is, with the exception of the wording we didn't understand correctly.

The Court: Okay. It either is or - -

Foreman Jacobs: How do we correct that?

The Court: - - it is not. Okay.

Foreman Jacobs: Well, that was my vote, yes. But . . .

The Court: Okay.[2]

The judge then proceeded to ask the same question of the other eight jurors who signed the verdict form and each affirmed the verdict as their own without equivocation. The judge then accepted the verdict of Stage I and Defendants objected.[3]

¶6 When the trial reconvened after the weekend, Galier opted to proceed only against Murco in Stage II. After deliberating, the jury found in favor of Murco. Therefore no punitive damages were awarded.

¶7 Defendants contend that when the jury awarded $4.5 million in noneconomic damages, they mistakenly believed they had awarded punitive damages. They propose this conclusion is supported by the jury's award of

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[2] It is impossible to conclude from the transcript whether Foreman Jacobs voluntarily terminated his response or the Court interrupted him.

[3] Counsel for Welco stated: "It's clear to me from the Foreman's comments that though he said that that was his verdict, he understood his verdict was something other than what was recorded on the verdict form . . . I don't think you can receive this verdict. I think it's inconsistent with what the form says if that's the words from the Foreman." The Court responded that the jury was polled and all jurors assented to the verdict. Welco's counsel courteously persisted: "[C]an they at least explain to us what they understood it was to be? I mean, I think we have to do that, at least for an appellate record here." The Court declined the request and accepted the verdict.

zero damages after a brief deliberation in Stage II of the trial. Welco argues that the jury failed to follow instructions, resulting in a defective verdict, and the trial court abused its discretion in attempting to cure the defect by polling the jury. Murco argues the trial court was required to make a meaningful and specific inquiry into the foreman's report and take corrective action. In response, Galier argues that Oklahoma law prohibits inquiry into the jury's intent or understanding in reaching its verdict.

¶8 The questions presented for review reveal a tension between two fundamental legal principles, the confidentiality and independence of a jury's deliberation and a party's right to a just trial.[4]

II.

Validity of the Jury Verdict

¶9 A trial court has broad discretion in conducting a jury trial; we will not reverse based on its conduct unless the trial court abused that discretion. *Stephens v. Draper*, 1960 OK 69, ¶18, 350 P.2d 506, 510. An abused judicial discretion is manifested when discretion is exercised to an end or purpose not

[4] "The right of trial by jury shall be and remain inviolate." Okla. Const., Art. 2, §19. Courts have a duty to secure this right by strictly enforcing the constitutional and statutory provisions that preserve the purity of jury trial. *Fields v. Saunders*, 2012 OK 17, ¶10, 278 P.3d 577, 581. Justice in the courts shall be administered without sale, denial, delay, or prejudice. Okla. Const., Art. 2, §6.

justified by, and clearly against, reason and evidence. It is discretion employed on untenable grounds or for untenable reasons, or a discretionary act which is manifestly unreasonable. *Patel v. OMH Med. Ctr., Inc.*, 1999 OK 33, ¶20, 987 P.2d 1185, 1194.

¶10 A trial court should not accept the jury's verdict if it is defective. *Stephens v. Draper*, 1960 OK 69, ¶12, 350 P.2d 506, 509. If the verdict is incomplete, ambiguous, or contrary to the jury instructions, then the court should direct the jury to retire for further deliberation. *Stephens* at ¶0 (syllabus by the court). In this case, the verdict was facially valid.

¶11 Galier contends it was too late to poll the jury because the verdict was in proper form and the court had already accepted it.[5] We disagree. The decision of a jury does not become a verdict until it is accepted by the court and recorded in the case. *Wiggins v. Dahlgren*, 1965 OK 131, ¶4, 405 P.2d 1001, 1003. Until the verdict is accepted and recorded, the members of the jury are free to change their votes – even to the extent of changing the verdict. *Id.* Although the court initially accepted the Stage I verdict, it was not recorded or filed. Furthermore, the Court acknowledged the Stage I verdict

[5] After the Judge announced the jury's verdict, and before Mr. Jacobs questioned it, the Court asked whether anyone wished the jury to be polled. Counsel for some of the parties responded no. The Court then stated, "That will be the verdict of the jury and the judgment of this Court."

before there was any suggestion that it might not be correct. We hold that the trial court retains authority to inquire of the jury concerning its verdict until the jury is discharged or the verdict has been filed in the case.

¶12 Galier also proposes in broad terms that a jury's verdict cannot be impeached. This case is different from those cited by Plaintiff where a jury's verdict could not be challenged after the trial had concluded. Here, the jury was still empaneled when the court conducted its poll. *Cities Service Oil Co. v. Kindt*, 1947 OK 219, ¶18, 190 P.2d 1007,1013 (distinguishing an attack on a jury's verdict when it is returned, from cases involving testimony of jurors after their verdict has been received and filed). In *Willoughby v. City of Oklahoma City*, 1985 OK 64, 706 P.2d 883, 889, the Supreme Court examined the anti-impeachment rule under the Oklahoma Evidence Code, 12 O.S. 2011 §2606(B). This rule limits the scope of permissible testimony to inquiring whether extraneous prejudicial information was improperly brought to the jury's attention. However, §2606(B) applies only to inquiry after the verdict has been reached and recorded. *Weatherly v. State*, 1987 OK CR 28, ¶11, 733 P.2d 1331, 1334. Because the jury in this case had not been discharged, neither the common law nor §2606(B) were impediments to polling the jury.

¶13 We turn next to Welco's argument that the Court abused its discretion in attempting to cure the defective verdict by polling the jury. The procedure for polling the jury is outlined by 12 O.S. 2011 §585. It provides:

> When the jury have agreed upon their verdict they must be conducted into court, their names called by the clerk, and their verdict rendered by their foreman. When the verdict is announced, either party may require the jury to be polled, which is done by the clerk or the court asking each juror if it is his verdict. If any one answers in the negative, the jury must again be sent out, for further deliberation.

In a separate statute, 12 O.S. 2011 §586, the Legislature provided a method for converting the jury's verdict to a written form and correcting any defects resulting from that process:

> The verdict shall be written, signed by the foreman and read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, the jury must be sent out again; but if no disagreement be expressed, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case. If, however, the verdict be defective in form only, the same may, with the assent of the jury, before they are discharged, be corrected by the court.

Juries are now uniformly instructed to complete their verdict on the written verdict forms provided. Although this has likely diminished errors in the deliberative process, it is still possible that a verdict agreed to by a juror is not accurately reflected on the form. The instant case illustrates that point.

¶14 Mr. Jacobs referred to the jury's intent to award $4.5 million for punitive damages and then suggested "maybe it wasn't written up correctly." He questioned, "Did we not put that down right?" Polling a jury can reveal whether the written verdict accurately expresses the jury's deliberative agreement. We hold that the trial court had authority to poll the jury and its decision to do so was a proper exercise of judicial discretion.

¶15 Welco argues that even if polling the jury was within the Court's discretion, doing so did not cure the defective verdict. It must be pointed out that polling a jury is not a curative act, it is a diagnostic device to ascertain whether the verdict is legally acceptable or if further deliberation is necessary. When the court polls the jury, each juror is asked "if it is his verdict." §585. If any juror answers in the negative, the jury must be sent out for further deliberation. *Id.* If all jurors assent that the written verdict is the verdict they agreed to during deliberation, then the court may accept it.[6]

¶16 When asked whether the verdict in this case was his verdict, Mr. Jacobs answered yes. But he also qualified his assent. He communicated an exception concerning his understanding of it and he also asked how it could

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[6] This assumes that the verdict is otherwise free from defects. A verdict that is incomplete, ambiguous, or contrary to jury instructions requires further deliberation regardless of whether the jurors unanimously assented to it.

be corrected. Finally, he agreed it was his verdict because that is how he voted and then he apparently began to qualify his answer again but did not finish.

¶17 Whether a qualified assent is equivalent to a dissent, requiring further deliberation, depends upon the character of the qualification. In *Frick v. Reynolds*, 1898 OK 9, ¶16, 52 P. 391, 394, the Supreme Court decided it was error for the court to receive the verdict instead of directing the jury to deliberate further. The questioned juror conceded he had agreed to the verdict but he was unsatisfied with it. On further examination, the juror explained he had agreed to it only to prevent a hung jury. "An assent must be an assent of the mind to the fact found by the verdict." *Frick*, at ¶18, citing *Rothbauer v. State*, 22 Wis. 468, 470 (1868).

¶18 Unlike the juror in *Frick*, Mr. Jacobs did not say he was unconvinced by the evidence. See *Frick*, ¶15. Mr. Jacobs qualified his assent because he had a misunderstanding about noneconomic damages and punitive damages. It was a misunderstanding related to wording that he apparently believed needed to be corrected.

¶19 The record reflects that Mr. Jacobs believed he had awarded punitive damages. Next, after listening again to the Court review the verdict

preliminary to the poll, he assented to the verdict for noneconomic damages with remarks that he had a misunderstanding.

¶20 Had Mr. Jacobs not intended to award $4.5 million as noneconomic damages, he could have answered that it was not his verdict. But he did not dissent. He acknowledged twice that it was his verdict. We hold that the trial court would have been justified in reasoning that Juror Jacobs misunderstood noneconomic damages to be the legal equivalent of punitive damages. The jury instructions correctly stated the law, Jacobs assented to the verdict, and the possibility that he was mistaken about the law did not change his factual verdict into a dissent.[7] None of the jurors answered the poll in the negative. The trial court did not abuse its discretion in accepting the jury's verdict rather than ordering the jury to recommence deliberation.[8]

¶21 Defendant Murco urges that the Court erred by failing to make a meaningful and specific inquiry into the foreman's response. Galier insists to

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[7] We recognize that a different interpretation of Mr. Jacobs' misunderstanding might also be reasonable, but a court's discretionary act is not reversible merely because an alternative option was available.

[8] The trial court is not bound to accept a verdict that is not in accordance with its instructions. *Stephens* at ¶12. We disagree with Defendant Welco that the jury failed to follow its instructions. Prior to the poll Mr. Jacobs asserted that the jury intended to award punitive damages, an action inconsistent with the instructions. If Jacobs at first believed the jury had awarded punitive damages, he and all the other polled jurors later assented to a verdict to the contrary. The verdict was not inconsistent with the jury instructions.

the contrary, that a court may not inquire into the jury's intent or understanding in reaching its verdict. The question of the court's authority is settled law. "[A] trial court may make such inquiry of jurors as to enable it to understand their will and intention, and their answers to such inquiry will be looked upon as an aid in rendering of proper judgment." *First Nat. Bank & Trust Co., Muskogee v. Exch. Nat. Bank & Trust Co., Ardmore*, 1973 OK CIV APP 7, 517 P.2d 805, 809 (published by order of the Supreme Court). The Court had authority to inquire of the jury beyond the statutory poll.

¶22 Because the trial court declined to ask Mr. Jacobs additional questions, it cannot be determined what precisely he misunderstood about the wording of the verdict form. However, questioning a jury about its verdict introduces risk. *West v. Abney*, 1950 OK 127, ¶11, 219 P.2d 624, 627 (holding that the action of a judge in the correction of verdicts should be taken with great caution). There is a possibility that the judge's questions could accidentally trigger improper comment by jurors concerning their confidential deliberation. A court's questions could also lead to unfair prejudice if the jury is ultimately ordered to return to deliberation. In *West*, the court noted that the trial court was very careful about the method of instructing the jury as to the form of verdict that was acceptable, without intimating as to what that verdict should

be. *West* at ¶13.

¶23 The confidentiality of the jury's deliberation must be preserved and questioning jurors about their verdict beyond conducting a poll is precarious. However, a trial court's pre-discharge questioning, if it is directed toward determining whether the verdict is defective or invalid, is not statutorily impermissible. As we have already determined, the Court did not abuse its discretion by accepting the verdict rather than ordering additional deliberation. We likewise hold that the Court's judgment in declining to inquire further was not a clear abuse of discretion.

III.

Constitutionality of 23 O.S. §61.2(C)

¶24 Welco next contends that the trial court erred in accepting the verdict because 23 O.S. 2011 §61.2(C) is unconstitutional. Section 61.2(C) provides,

> Notwithstanding subsection B of this section, there shall be no limit on the amount of noneconomic damages which the trier of fact may award the plaintiff in a civil action arising from a claimed bodily injury resulting from negligence if the judge and jury finds, by clear and convincing evidence, that the defendant's acts or failures to act were:
>
> 1. In reckless disregard for the rights of others;
> 2. Grossly negligent;
> 3. Fraudulent; or
> 4. Intentional or with malice.

Welco argues that §61.2(C) violates due process because (1) it allows the jury to assess punitive damages in the guise of noneconomic damages, but without the procedural safeguards applicable to punitive damages, and (2) the statutory scheme of §61.2(C) and §9.1 impermissibly exposes defendants to the threat of double recovery of punitive damages. In response, Galier argues that noneconomic compensatory damages are distinct from punitive damages, and they serve different purposes.

¶25 The purpose of an award of noneconomic damages is to compensate the plaintiff for subjective injuries. *Edwards v. Chandler*, 1957 OK 45, ¶5, 308 P.2d 295, 297. Its purpose is not to punish the defendant. That the Legislature decided to place a limit on the amount of noneconomic damages, and specified an exception to the limit, does not transform the nature of the damages when the limit is removed. Noneconomic damages are not subject to the same substantive and procedural due process limitations as punitive damages. Title 23 O.S. 2011 §61.2(C) is not unconstitutional under the due process clause.

## IV.

## Admissibility of Evidence

¶26 The defendants propose that the trial court erred by improperly

admitting evidence. Error may not be predicated upon an evidentiary ruling unless a substantial right of a party is affected and a timely objection or offer of proof was made. 12 O.S.2001 §2104(A)(1) and (2). The trial court stands as a gatekeeper in admitting or excluding evidence based on an assessment of its relevance and reliability, and we will not disturb its ruling absent a clear abuse of discretion. *Myers v. Missouri Pacific R. Co.*, 2002 OK 60, ¶36, 52 P.3d 1014, 1033.

A.

¶27 Welco contends it is entitled to a new trial because the trial court abused its discretion in admitting prejudicial evidence regarding Welco of Texas. Welco asserts the Texas company was a separate entity yet Galier relied on its conduct in establishing the standards imposing punitive damages or removing the limit on noneconomic damages.

¶28 The record shows that Welco's former president was one of three owners of Welco and one of four owners of the Texas company. The jury was entitled to draw legitimate inferences from these facts. *Grogan v. KOKH, LLC*, 2011 OK CIV APP 34, ¶18, 256 P.3d 1021, 1030. That the former president and part owner of both companies would have had familiarity with regulatory issues affecting the companies' common business is a legitimate

inference. Welco had the opportunity to put on evidence controverting the inference, and the jury was entitled to decide which evidence to believe. *Id.* The trial court did not abuse its discretion in admitting the evidence.

B.

¶29 Murco contends the trial court erred in admitting the written materials distributed at an Asbestos Symposium attended by Murco's founder, the current owner's father.

¶30 The parties agree the document was authenticated. The trial court admitted it as a business record. The subject matter of the conference was the carcinogenic action of asbestos. As discussed above, the jury was entitled to draw a legitimate inference that Murco's founder, as an attendee at the conference, heard at least some of the matters presented and therefore was aware that asbestos had adverse health effects. The current president of Murco was the daughter of the past president. She testified that her father would have done anything that he knew to do to act reasonably and safely in making and selling products. The conference materials were relevant to contradict her testimony. The trial court did not abuse its discretion in admitting them.

C.

¶31 Murco also contends the trial court erred in admitting evidence of a ban by the Consumer Product Safety Commission on the use of asbestos in joint compound effective January 15, 1978 because the ban was not during a relevant time period.

¶32 Galier's older brother testified that their father was selling lots in developments from 1970 to 1979. He said he and his brother accompanied their father to construction sites and cleaned up dust left after the joint compound was sanded. In addition, he said they made a game of throwing dried blobs of joint compound at each other and the clumps would break apart upon impact. This evidence supports the relevance of the 1978 ban. The trial court did not abuse its discretion in admitting evidence of the ban.

V.

Sufficiency of Evidence

¶33 Defendants assert the verdict is not supported by competent evidence. In an action at law, the jury's verdict is conclusive as to questions of fact. *Florafax Int'l, Inc. v. GTE Mkt. Res., Inc.*, 1997 OK 7, ¶3, 933 P.2d 282, 287. If there is any competent evidence reasonably tending to support the verdict, we will not disturb the verdict or the trial court's judgment based on the

verdict. *Id.* The jury acts as the exclusive arbiter of the credibility of the witnesses and the weight of the evidence. *Id.* We will determine the sufficiency of the evidence in light of the evidence tending to support it, together with every reasonable inference that may be drawn therefrom, rejecting all conflicting evidence. *Id.*

A.

¶34 Welco contends the jury's conclusion that only Welco and Murco caused Galier's alleged injury is not supported by the evidence. The verdict form listed not only the Defendants but also thirteen named non-parties, and asked the jury to apportion liability among them. The jury found each of the non-parties zero percent liable.

¶35 The jury should consider the negligence of tortfeasors not parties to the lawsuit in order to properly apportion the negligence of those tortfeasors who are parties. *Paul v. N. L. Indus., Inc.*, 1980 OK 127, ¶5, 624 P.2d 68, 69. However, in order to apportion liability to a nonparty, there must be proof of negligence on the part of the nonparty. *Gowens v. Barstow*, 2015 OK 85, ¶32, 364 P.3d 644, 654-55 (testimony of a dangerous intersection did not require the judge to apportion the liability of the city in absence of evidence that the city was negligent). It is the jury's role to determine whether any

particular defendant or named non-party is liable for negligence. A judgment is not reversible merely because the evidence might have supported a verdict different from that rendered by the jury.

B.

¶36 Murco contends the evidence was insufficient to prove that Galier was significantly and regularly exposed to Murco's asbestos compound over an extended period or that the wet-based product caused him to contract mesothelioma. Murco argues the parties agreed to the jury instruction on direct cause stating, "There must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the Plaintiff was present."

¶37 Murco's president testified that Murco manufactured asbestos joint compound from 1971 to 1978, and introduced an asbestos-free compound in 1975, but most of its sales continued to be of the asbestos compound. Galier testified that he had regular exposure between 1971 and 1975, when he accompanied his father to hundreds of job sites. He said he was on the work sites three to four times per month for a few hours at a time. He testified there was dust in the air, and he was present while drywallers sanded the dried compound. He said he scraped blobs of joint compound off the floor

and swept up construction debris, including joint compound dust. He denied he was only exposed to residual debris after someone else had cleaned up. He said he saw the name Murco on boxes at the sites over the years. Murco's joint compound was a pre-mixed wet product that came in boxes with a liner.

¶38 This record presents competent evidence to support the jury's finding of a significant probability that Galier was regularly and significantly exposed to Murco's asbestos-containing product. We will not disturb its verdict.

C.

¶39 Murco also contends the evidence was insufficient to support the amounts awarded as either economic or noneconomic damages, or to support the requisite finding of misconduct to remove the statutory limit on noneconomic damages.

¶40 The measure of damages for a tort claim is "the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not." 23 O.S. 2011 §61. In a civil action arising from a claimed bodily injury, the amount of compensation which the trier of fact may award a plaintiff for economic loss is not subject to any limitation. §61.2(A). There is no limit on noneconomic damages if the fact-finder finds,

by clear and convincing evidence, that the defendant acted in reckless disregard for the rights of others, with gross negligence, fraudulently, intentionally, or with malice. §61.2(C). If the injury is subjective and such that laypersons cannot with reasonable certainty know whether or not there will be future pain and suffering, then expert testimony is required. *Reed v. Scott*, 1991 OK 113, ¶9, 820 P.2d 445, 449. Proof of future medical expenses and permanent injury or disability also requires expert testimony. *Godfrey v. Meyer*, 1996 OK CIV APP 124, ¶7, 933 P.2d 942, 943.

¶41 Galier's evidence of economic damages was future medical treatment. Given that he was asymptomatic, not receiving medical treatment, and his injury was a diagnosis some years earlier, expert testimony was necessary to constitute competent evidence of his subjective injuries. Plaintiff's expert testified that the cost of mesothelioma treatment could exceed $1 million. As for non-economic damages, the expert testimony established that the progression of the disease is very painful, symptoms will likely begin within ten years, and Galier likely will not survive long after he becomes symptomatic.

¶42 As evidence of misconduct, Galier points to evidence that Murco opposed the 1978 ban on asbestos, continued manufacturing asbestos

products until the day the ban took effect, and continued buying asbestos and selling asbestos products after the ban.

¶43 This record supports the jury's award of economic and non-economic damages, as well as its finding of clear and convincing evidence of culpable misconduct.

VI.

In Personam Jurisdiction

¶44 Murco contends that the trial court erroneously denied its motion to dismiss for lack of in personam jurisdiction. We review this proposition de novo as a challenge to the validity of the judgment. In personam jurisdiction requires sufficient minimum contacts with the State of Oklahoma so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. *Guffey v. Ostonakulov*, 2014 OK 6, ¶14, 321 P.3d 971, 975. The question is whether the totality of the contacts makes an exercise of jurisdiction proper. *Id.* at ¶19. The focus is on whether there is some act by which the defendant purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Id.* at ¶16.

¶45 Murco is a Texas corporation and its place of business is Fort Worth,

Texas. Murco's president agreed that Murco's documents showed tens of thousands of sales in a two-year period directed to Oklahoma, beginning in 1972. In the 1970's, Murco employed a salesperson who had a sales territory of a 300-mile radius from Fort Worth, Texas, with eight purchasers in Lawton, Oklahoma City, Stonewall, and Duncan. Murco also entered into an agreement with Flintkote Company in Oklahoma City whereby Murco would apply a Flintkote label onto its Murco product for resale by Flintkote.

¶46 We conclude that the State of Oklahoma had in personam jurisdiction over Murco. The totality of circumstances convinces us that Murco purposefully availed itself of the privilege of conducting activities within Oklahoma. The judgment against Murco is not void for lack of personal jurisdiction.

## VII.

## Jury Instructions

¶47 In reviewing jury instructions on appeal, we must consider the instructions as a whole. *Dutsch v. Sea Ray Boats, Inc.*, 1992 OK 155, ¶7, 845 P.2d 187, 189. The instructions need not be ideal but must reflect Oklahoma law regarding the subject at issue. *Id.* The test for error in instructions is whether the jurors were probably misled regarding the legal

standards they should apply to the evidence. *Id.* We will not reverse a judgment based on misdirection of the jury unless we conclude that the error probably resulted in a miscarriage of justice. 20 O.S. 2011 §3001.1.

A.

¶48 Murco contends the trial court erred in refusing a limiting instruction on post-1975 laws and events because the evidence showed that Galier was not regularly exposed to asbestos-containing products at home sites after 1975. It argues that the trial court conditionally admitted the evidence, based on the representation that subsequent testimony would show that Galier was exposed to Murco's joint compound during that period. The trial court refused the requested instruction on the ground a jury question was presented. The proposed instruction stated:

LIMITING INSTRUCTION

> Testimony was offered into evidence of Michael Galier's alleged exposure to Defendants' asbestos containing products from 1976 to 1979. Such evidence of alleged exposure to Defendants' asbestos containing products from 1976 to 1979 was received conditioned upon evidence substantiating exposure to Defendants' asbestos containing products from 1976 to 1979.
>
> You are now instructed that you must not consider any evidence or testimony regarding any alleged exposure to Defendants' asbestos containing product subsequent to 1976. You are further instructed that you must not consider any testimony or evidence as to Murco's Wall Products, Inc.'s Welco Manufacturing

> Company's, or Red Devil Inc.'s alleged knowledge of asbestos, alleged use of asbestos or asbestos containing products, or any alleged ban on the use of asbestos in joint compound or caulk subsequent to 1976.

¶49 First, we note that the instruction is confusing and internally inconsistent. It acknowledges there was evidence of post-1975 exposure, but instructs the jury to ignore evidence of post-1975 exposure and events because there was not evidence substantiating post-1975 exposure. Second, Murco offers no precedential authority in support of its limiting instruction. The trial court did not err in refusing to submit the limiting instruction to the jury.

B.

¶50 Murco contends the trial court erred by refusing a failure-to-mitigate instruction because Galier decided to decline further medical testing. "The duty to mitigate damages in a personal injury action merely requires the use of ordinary care to secure timely medical treatment after an injury." *James v. Midkiff*, 1994 OK CIV APP 165, ¶4, 888 P.2d 5, 6. Galier's decision to forego testing could have no effect on his damages because there was no evidence that he could have benefitted from any treatment while he was asymptomatic. The trial court did not err in refusing the instruction.

¶51 For the foregoing reasons, the trial court's judgment is AFFIRMED.

BELL, J., and SWINTON, J. (sitting by designation), concur.