100893-7
NO. 81918-6-I

SUPREME COURT
OF THE STATE OF WASHINGTON

RAYMOND BUDD, an individual

Respondent,

v.

KAISER GYPSUM COMPANY, INC.,

Petitioner.

APPELLANT KAISER GYPSUM COMPANY, INC.'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner is Kaiser Gypsum Company, Inc. ("Kaiser"), Appellant in the Court of Appeals under Cause No. 81918-6-I and Defendant in the Superior Court for King County, Cause No. 19-2-14878-1.

II. CITATION TO COURT OF APPEALS

Kaiser seeks review of the Division One published opinion *Budd v. Kaiser Gypsum Company, Inc.*, No. 81918-6-I filed February 22, 2022 (Appendix A). Kaiser moved for reconsideration pursuant to RAP 12.4, which Division One denied by Order filed March 30, 2022 (Appendix B).

III. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in denying Kaiser's objection to proceeding with trial when the jury selection process materially deviated from the requirements of RCW 2.36 *et seq.* and constitutional protections (Wash. Const. art. 1, §21).

2. Whether plaintiff failed to prove causation consistent with the decision in *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987).

3. Whether plaintiff's use of a contested transcript trial testimony over Kaiser's objection conflicts with Supreme Court precedent concerning closing argument.

4. Whether plaintiff's use of evidence not previously seen by the jury in closing argument conflicts with Supreme Court precedent concerning closing argument.

5. Whether the trial court's refusal to allow Kaiser to admit relevant evidence historical marital discord and that Mr. Budd had sexually abused his daughter multiple times when she was a teenager to rebut his loss of enjoyment of life claims conflicts with Supreme Court precedent.

IV. STATEMENT OF THE CASE

A. Factual Background

1. The Parties and Claims Asserted

Petitioner Kaiser was a manufacturer of drywall and drywall accessory products, including joint compound—a product used to cover seams between drywall sheets—from

approximately 1954 to 1978 when it ceased operations. During the time frame relevant to this case, joint compound manufactured by Kaiser contained a small amount of Grade 7 chrysotile asbestos fiber as an added ingredient to the product formula.

Respondent Raymond Budd (DOB 1951) claims to have been exposed to Kaiser's joint compound between 1962 and early 1971 while employed at his uncle's construction company at locations in the Moses Lake, WA area. Mr. Budd was diagnosed with mesothelioma in 2019 and filed suit in naming several defendants, including Kaiser. (CP 1-5) He asserted claims sounding in negligence and common law products liability based upon allegations that Mr. Budd developed mesothelioma as a result of exposure to asbestos fibers stemming from the defendants' products and/or activities. *Id.*

2. Trial and Verdict

This action was the first jury trial commenced in King County Superior Court following COVID-19 related shutdowns.

Trial was conducted in a temporary courtroom at the Meydenbauer Center in Bellevue, WA. Voir dire began on August 12, 2020 and closing arguments were presented on September 1, 2020. The jury returned a verdict in favor of plaintiff on all claims on September 3, 2020 and awarded $366,000.00 in economic damages and $13,060,00.00 in non-economic damages. (CP 11189-91)

3. Procurement of Venire

Kaiser challenged the jury selection procedure adopted by King County based on representations made by the trial court. (CP 7813-22; 7823-26) The trial court did not address Kaiser's objection until just before closing argument, which was later memorialized in written form a week later. (VRP 2174-77; CP 11337-40)

The challenge was prompted by statements made by the trial court during a pretrial hearing that occurred on August 7, 2020—three days before the trial date. The trial court informed the parties that over a thousand jury summonses were sent to

jurors that had already been summonsed in the past and were able to negotiate a deferral. (CP 11338) This was done because the trial court hoped that such "group will be more likely to say yes" to serve in an on-going public health emergency. *Id.* Of that group for which summonses were sent, King County had email addresses for only 183 panelists, and as the trial court explained "that effectively is our real group." *Id.* The trial court was under pressure to commence trial, noting "we don't have time, given where we are now, to go out and try to write them another letter and say, send us your email address or something", likely because King County was paying to rent the facility and no prior civil cases had gone to trial in several months. *Id.* Because of this, roughly 900 jurors that had already been pre-screened based on prior deferrals were summarily excluded from the process because King County did not have an email address for them. Of the 183 potential jurors for which King County Superior Court had email addresses, only 77 responded to the court's efforts to

reach them. *Id.* That group of 77 was sent the questionnaire for the case and subsequently participated in voir dire.

However, before voir dire began, Kaiser objected to King County Superior Court's *ad hoc* jury procurement procedure that it employed in order to commence the first jury trial following the COVID-19 shutdowns, informing the court that the procedure described was substantially inconsistent with the statutory requirements listed in RCW 2.36 *et seq.*, (Appendix F) was therefore a material deviation from statutory safeguards, and prejudice to Kaiser's constitutional right to a random and impartial jury is therefore presumed. (CP 7813-22; 7823-26)

Kaiser requested that the trial be continued until King County Superior Court could adhere to statutory safeguards; however the trial court pressed on. The Order is silent as to any investigation by the trial court into exactly how King County Superior Court sourced the venire; this even after a party presented a legitimate challenge based on statements directly from the trial court itself. The trial court admitted that it did not

look into Kaiser's challenge with jury services. (VRP 2174) Instead, the order shows that the trial court relied on assumptions and beliefs that statutory safeguards were followed even though the Court believed that the entire venire consisted of pre-screened jurors that had been deferred from prior service.

4. Evidence Relating to Proximate Cause

The focus of Plaintiff's evidence on causation, and the Court's consideration of the same when affirming the verdict, did not involve proof of a connection between Kaiser's product and Plaintiff's disease, rather, the evidence merely established a potential link between alleged chrysotile exposure generally and the development of mesothelioma. Evidence that mesothelioma has been linked to alleged chrysotile exposure, at some unspecified, level, is insufficient for a determination of liability against a defendant under Washington law; the testimony must establish that the particular *plaintiff* was exposed in a manner to the *defendant's product* to have *caused* the *plaintiff's* disease. Plaintiff produced neither epidemiological evidence nor

toxicological evidence that joint compound or the grade or type of chrysotile used in Kaiser's joint compound was a cause of mesothelioma in humans or animals, let alone in Plaintiff. Plaintiff did not produce the evidence necessary to establish a specific element of his negligence and products liability claims (causation). Therefore, all of his claims fail as a matter of law according to Supreme Court precedent.

5. Irregularities During Closing Argument

a. *Improper use of transcript*

An answer from one of Kaiser's expert witnesses, pulmonologist Dr. David Weill, to a question relating to causation was mistranscribed. Dr. Weill was asked whether there was epidemiological evidence demonstrating that Calidria chrysotile asbestos was associated with an increased risk of mesothelioma. Dr. Weill answered "no," yet the court reporter transcribed a "yes" answer. (VRP 1819) (CP 10974-77) A "yes" response would have been contrary to Kaiser's position at trial, Dr. Weill's prior testimony that very day, Dr. Weill's report, and

Dr. Weill's prior testimony on the same issue in other cases across the country. (CP 12017-32; 12033-175) Kaiser's counsel discovered the discrepancy shortly before closing argument in reviewing plaintiff's closing power point presentation that argued there was "no dispute" between the parties on causation. (VRP 2198-99; 2203) (CP 10913) Kaiser's counsel then raised the mistranscription issue with the court before closing arguments were presented. (VRP 2251-52; 2207)

The court did not limit the use of the incorrect transcript, thereby requiring Kaiser's counsel to implore the jury to rely on their notes and memories as opposed to Plaintiff's counsel's closing arguments and accompanying visual aids which represented a "yes" response that was not properly in the evidentiary record. (VRP 2253-54; 2282-83) In rebuttal closing, Plaintiff used the *actual transcript as a visual aid* and held up the transcript as indisputable evidence in a clear attempt to imply that Kaiser's counsel was trying to deceive jurors and to undermine Kaiser's causation evidence and arguments as well as its

counsel's credibility generally throughout trial. (CP 10948) (VRP 2242-43; 2296) The use of the transcript transformed Plaintiff's closing from argument to an improper evidentiary presentation based upon disputed trial testimony.

The next day, Dr. Weill filed a declaration attesting that he responded "no" to the question in dispute. (CP 11139-41) The parties later learned the court reporter had a back-up audio copy of the testimony and both parties filed motions to obtain it. (CP 11273-79; 11280-82; 11283-309; 11377-85; 11366-11675; 11676-77; 11726-28; 11729-38; 11790-92) All counsel listened to the audio file separately. The audio confirms that the answer was "no" based on Kaiser's counsel's review. (CP 11280-82; 11283-309; 15168-75) Plaintiff's fervor to obtain the file suddenly disappeared, abandoning his motion and opposing Kaiser's. The court granted Kaiser's motion to preserve the audio file, but denied its motion with respect to providing copies to the parties. (CP 11779-83) Kaiser went to great lengths to correct the record, but its efforts were denied by the trial court

multiple times wherein the court chose to rely on Plaintiff's counsel's recollection of the exchange as opposed to the witness's own recollection, Kaiser's recollection, or the audio file itself. (CP 12017-32; 12176-89; 13151-58; 13740–43; 13883-98; 13899-4078; 15023-29; 15030-144; 15147-54; 15168-75; 15178-85; 15188-209; 15230-42) Nonetheless, the trial court allowed plaintiff's counsel to present the transcript to the jury during closing argument and hold it out to be uncontested evidence.

b. *Improper Use of Exhibit*

Kaiser filed a motion in limine seeking exclusion of post-exposure evidence. (CP 3837; 3869; 5557-75) The motion was denied. (CP 7839) Plaintiff presented evidence on causation and state of knowledge of asbestos hazards that post-dated Budd's claimed exposure to Kaiser's product. (Ex. 27, 39, 43, 45, 55) (CP 11151-54) (VRP 1086-88; 1051-52) However, the court allowed a portion of a NIOSH document which the jury had not

previously seen to be shown to the jury in closing argument over Kaiser's objection. (VRP 2252-55) (CP 10907)

The context in which CP 10907 was shown is important. During Kaiser's case in chief, a discussion was had with Dr. Finley regarding a memorandum that Dr. Stokinger, Chief Toxicologist for the US Public Health Service wrote in 1973[1] indicating that the OSHA Permitted Exposure Level ("PEL") for asbestos was not only protective, but also included a safety factor. (VRP 1920-25) (Ex. 1308) Dr. Stokinger's analysis was based on his review of a paper written by a Dr. Enterline. CP 10907 displayed an excerpt from a post-exposure NIOSH publication criticizing Enterline's conclusions. That document had never been shown to any witness or the jury, no foundation was laid for the document, and Kaiser had no opportunity to challenge the hearsay conclusions contained on the slide.

[1] After cessation of Mr. Budd's claimed exposure.

6. Sexual Battery and Marital Discord Evidence

Discovery revealed evidence of marital infidelity and Mr. Budd's conviction of sexual battery involving his own minor daughter. (CP 7804-12) The trial court ruled that Kaiser would not be permitted to introduce evidence of the conviction or evidence of historical marital problems, unless plaintiff "opened the door." *Id.* At trial, Mr. Budd's non-economic damages claim was substantially predicated upon his loss of enjoyment of life that related directly to Budd's claim that he was no longer able to enjoy biking and traveling with his wife and his abused daughter's son, painting an idyllic picture of familial relations.

Despite basing the claim on the anticipated loss of his relationship with his wife and the son of the daughter he abused, Kaiser was again barred at trial from presenting evidence to the jury of the prior conviction and marital issues. (VRP 1504-07). The jury ultimately awarded Mr. Budd $13,060,000.00 in non-economic damages. (CP 11189-91)

B. Court of Appeals Decision

On February 22, 2022, Division I of the Court of Appeals handed down its published decision. *Budd v. Kaiser Gypsum Company, Inc.*, --Wn.2d--, 505 P.2d 120 (2022). (Appendix A) The Court affirmed the verdict.

With regard to Kaiser's challenge to jury selection, the Court impliedly found that the procedure employed by King County deviated from statutory requirements, but that King County "substantially complied with the statute" and therefore Kaiser had the burden to establish prejudice. *Id.* at ¶¶12-19.

With regard to proximate cause, the Court correctly noted that in asbestos-exposure based personal injury actions, the plaintiff bears the burden of establishing a causal connection between the injury, the *product* and the manufacturer of that product. *Id.* at ¶41; *see also Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 245, 744 P.2d 605 (1987). The Court also correctly noted that the locus of Plaintiff's causation evidence (in the form of expert testimony from Dr. Holstein) did not focus on Kaiser's

product or its alleged link to plaintiff's injuries, rather, it concerned asbestos fiber generally: "Budd produced toxicological evidence that chrysotile causes mesothelioma." *Budd* at ¶45. Chrysotile asbestos was not on trial, Kaiser's products were on trial, and Supreme Court precedent requires a causal link to be established between the *product* and the *injury to plaintiff*. Generalities do not carry the burden. No connection was made, and the Court rejected binding Supreme Court precedent in *Lockwood*.

With regard to Plaintiff's counsel use of the disputed transcript in closing argument, the Court found that Budd's use of the transcript during closing did not have a substantial likelihood of affecting the jury's verdict, relying on a conclusion that it was Kaiser's counsel that brought the issue to the jury's attention and that jurors are presumed to follow the court's instructions. *Id.* at ¶31.

With regard to Plaintiff's use of a NIOSH document during closing that had not been previously shown to the jury,

the Court concluded the trial court acted within its discretion, finding because the article had been admitted as an illustrative exhibit. The Court ignored that the purpose for which the undisclosed portions of the NIOSH treatise were shown to the jury were not "illustrative" in nature and constituted an improper evidentiary presentation during closing argument. *Id.* at ¶¶62-63.

Finally, with regard to evidence of Budd's past sexual abuse of his daughter and marital infidelity, the Court found that Plaintiff did not open the door to admission of such evidence. *Id.* at ¶¶53-58.

Kaiser moved for reconsideration of the Court's decision on several grounds; a request that was denied by order on March 30, 2022. (Appendix B)

V. ARGUMENT

RAP 13.4(b) provides that a petition for review will be granted by the Washington Supreme Court:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Multiple grounds exist in this case and Kaiser submits that review should be accepted pursuant to its arguments below.

A. Jury Procurement Materially Deviated From Statutory Procedure

A civil litigant's right to a jury trial is inviolate under Article 1, Sec. 21 of Washington's Constitution and is to be "jealously guarded by the courts." *Watkins v. Siler Logging Co.*, 9 Wn.2d 703, 710, 116 P.2d 315 (1941) (Appendix E). "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501, (1959) (*quoting*

Dimick v. Schiedt, 293 U.S. 474, 486, (1935)). Under the Sixth and Fourteenth Amendments of the United States Constitution, the right of trial by jury "necessarily contemplates an impartial jury drawn from a *cross*-section of the community." U.S. Const. Amend. VI & XIV (Appendix C and D); *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946). Washington utilizes RCW 2.36 *et seq.* to meet this end. *See e.g.*, RCW 2.36.065. The statutory scheme places the onus on the trial court to "ensure continued random selection of the master jury list and jury panels…" in order to maintain the randomness and impartiality requirements. *Id.*

King County's procedure materially deviated from statutory requirements, thereby defeating the randomness requirement imposed by the statute. Jury summonses were sent to jurors that had previously negotiated a deferral. This was done because that group was "more likely to say yes". It was clear that King County was under pressure to commence trial. The jurors' "qualifications" for service included a prior deferral and jurors

that had not been summonsed previously or negotiated a prior deferral were summarily disqualified. Not having been called for service before or not negotiating a prior deferral is not a recognized disqualifier from service. RCW 2.36.070.

This source is not random under the definitions of RCW 2.36.010 as service was preconditioned on a past negotiated deferral. RCW 2.36.010(12) states that jurors must be selected from the "master jury list," and the master jury list shall be "randomly selected from the jury source list" which is "**all** registered voters for any county merged with a list of licensed drivers and identicard holders who reside in the county." RCW 2.36.010(10) (emphasis added).

Further, RCW 2.36.055 provides a procedure for an "emergency" if one even existed (Kaiser submits there was no emergency). In an emergency situation, the trial court is still required to use the most recent jury source list. RCW 2.36.055. That procedure was also not followed due to an apparent lack of coordination between jury services and the trial court. There was

no "random selection" from the "jury source list" consistent with the framework's definitions in a normal or emergency situation as the venire source was only a "list" of candidates that had negotiated a prior deferral.

The deviation was material. King County's methods substantially departed from statutory procedure in that the "master jury list" and "jury source list" were ignored and a substitute list manufactured by the County under pressure to commence this trial served as a replacement. Hundreds of thousands of otherwise eligible candidates were excluded based on criteria entirely absent from the statutory framework. When the selection process deviates from Washington statutes, Supreme Court precedent establishes that prejudice need not be shown because it is presumed and a new trial is warranted. *State v. Tingdale*, 117 Wn.2d 595, 603, 817 P.2d 850 (1991). Pursuant to RAP 13.4(b)(1) and (3), review of this issue should be accepted.

B. Affirming the Causation Finding Conflicts with *Lockwood.*

The Court of Appeals decision conflicts with this Court's authoritative decision in *Lockwood v. AC & S, Inc.*, *infra*, and pursuant to RAP 13.4(b)(1) review should be accepted.

Lockwood adheres to the tenet "the plaintiff must establish a reasonable connection between the injury, the product causing the injury, and the manufacturer of that product. In order to have a cause of action, the plaintiff must identify the particular manufacturer of the product that caused the injury." *Lockwood,* 109 Wn.2d at 612. The focus is on the product. The *Lockwood* Court reinforced this truth by providing several factors to examine "when determining if there is sufficient evidence for a jury to find that causation has been established." *Id.* at 248.

The Court's analysis affirming the verdict rejected this central tenet of *Lockwood* in favor of tying causation to chrysotile asbestos generally, in all forms, applications and exposure levels, as opposed to "the product causing injury". The Court failed to take into account the factors articulated by the

Supreme Court, which include proximity, time, the ways such products were handled and used, and the percentage of asbestos the product contained, and the intensity and frequency of exposure. The latter factor carries particular importance here as the evidence presented at trial, and considered by the Court affirming the verdict, centered on chrysotile asbestos generally as a potential cause of mesotheliomas, as opposed to Kaiser's joint compound products. Plaintiff's reliance on expert opinions based on alleged chrysotile exposure in other contexts, violates *Lockwood*. This is a difference with an important distinction; a distinction that the *Lockwood* Court recognized and that numerous other courts have followed for over 30 years.

Further, *Lockwood* requires that the causal tie from exposure must be made to the *plaintiff's* injury, clearly invoking a "cause in fact" causation analysis. *See Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). No tie between Kaiser's product and *plaintiff's* development of mesothelioma was established by the evidence; rather, the Court affirmed the verdict

based on a generality that there was testimony that "chrysotile causes mesothelioma" as opposed to a "cause-in-fact" between Kaiser's product and plaintiff's disease based on the *Lockwood* factors, which includes consideration of time, duration, product type and other considerations.

Under *Lockwood's* clear mandate, the Plaintiff was required to establish that exposure to asbestos emanating from *Kaiser's product* caused *plaintiff's* claimed injuries. As noted by the Court, the evidence presented concerned "chrysotile causes mesothelioma." The Court's affirmation of the verdict does not and could not establish a *prima facie* causal connection under *Lockwood*. Application of *Lockwood* to the specific facts of asbestos cases is an issue of paramount importance in asbestos litigation which warrants review.

C. Irregularities During Closing Argument

Plaintiff's use of the disputed transcript during closing argument constituted attorney misconduct. CR 51(g) requires that closing argument must be based on evidence in the case; and

multiple decisions from this Court conclude that a new trial is warranted when a party is prejudiced by closing argument that is not sustained by the record. *State v. Rose*, 62 Wn.2d 309, 312, 382 P.2d 513 (1963). The transcript shown to the jury in rebuttal was not evidence and was not sustained by the trial record. It was used not only to undermine Kaiser's causation arguments, but to also undermine the integrity of Kaiser's counsel which affected every aspect of Kaiser's trial presentation, thereby rendering the tactic irrevocably prejudicial. The Court's conclusion affirming the verdict conflicts with Supreme Court precedent and review should be accepted.

A closing argument that deviates from the evidence in the case and asks the jury to consider items that are *not evidence*, warrants a new trial when it prejudices the non-offending party. *Carnation Co., Inc. v. Hill*, 115 Wn.2d 184, 186, 796 P.2d 416 (1990), *De Lor v. Symons*, 93 Wn. 231, 232-233, 160 P. 424 (1916). The Court's conclusion that use of the transcript during closing argument did not have a substantial likelihood of

affecting the jury's verdict is unsupportable. While the jury was instructed that the lawyer's comments during closing arguments are not evidence; the transcript and its image was not a "comment" from counsel. The jury was not instructed that the image of the transcript shown to them was not evidence; therefore the presumption that jurors following instructions should have had no bearing on the Court's analysis. Instead, the trial court put Kaiser's counsel in the impossible position of imploring the jury to rely on their memory and notes in the face of a disputed transcript that was held up as evidence and argument that Kaiser's counsel was trying to deceive them. (VRP 2296:21-24) To say that such tact "did not have a substantial likelihood of affecting the jury's verdict" ignores the vivid imagery the transcript engrained in the jurors after hearing Kaiser's counsel's pleas to the jury to rely on evidence in the case. Perceived deception permeated in their minds undoing Kaiser's entire trial presentation with one slide. Pursuant to RAP

13.4(b)(1) under the decisions in *State v. Rose, Carnation Co., Inc. v. Hill, De Lor v. Symons, infra*, review should be accepted.

Second, permitting plaintiff to show a portion of a NIOSH document in closing not previously shown to the jury or discussed with a witness was prejudicial to Kaiser, and constitutes attorney misconduct. CR 51(g); *Carnation Co., Inc. v. Hill, De Lor v. Symons, infra*. In his closing rebuttal argument, counsel was permitted to place before the jury a portion of a NIOSH publication on closing slide CP 10907; a portion that was not shown to the jury prior to closing. The content of CP 10907 had not been admitted for any purpose prior to its use; it had not been previously raised with a witness in order to provide foundation, context and an opportunity for Kaiser's counsel to examine. The Court in affirming the verdict found it was not an abuse of discretion because the article had been admitted *in toto* as an illustrative exhibit even though only a small portion of the document was presented in evidence.

The Court attempted to distinguish binding precedent from *King County v. Farr*, 7 Wn. App. 600, 501 P.2d 612 (1972) on the grounds that *Farr* involved a map and this case involves a medical article. That is no distinction at all. In fact, the admission of a medical article as an illustrative exhibit is governed by ER 803(a)(18), which states specifically that admission is limited to the extent the content is "called to the attention of an expert witness upon cross examination or relied upon by the expert witness in direct examination." The portion of the NIOSH article on CP 10907 was not "called to the attention" of any witness; rendering it outside the record and thereby making it off-limits for closing argument.

Moreover, the purpose for which the undisclosed portions of the NIOSH treatise were not "illustrative" in nature because it did not "illustrate" any prior testimony from a witness. Rather, the previously undisclosed portions were used as *substantive* evidence to attack the opinions elicited from Kaiser's expert Dr. Finley regarding a specific exhibit (Exhibit 1308) and Kaiser's

causation defense. Plaintiff counsel could have used the portion of the NIOSH document in his cross-examination of Dr. Finley, but chose not to provide Kaiser and its witness an opportunity to address the issue. Permitting previously undisclosed evidence to be shown to the jury in closing rebuttal argument is an abuse of discretion warranting a new trial. *Carnation Co., Inc. v. Hill*, 115 Wn.2d 184, 186, 796 P.2d 416 (1990).

D. Sexual Battery and Marital Discord Evidence Should Have Been Admitted.

It was undisputed that Mr. Budd was convicted of sexually abusing his daughter and that marital discord was present. Plaintiff's "loss of enjoyment of life" damages claim was based primarily on inability to travel with his wife and travel, ride bicycles and otherwise interact with his grandson, the son of the daughter he had sexually abused. (VRP 1427-29; 1432-34; 1436; 1494-95; 1500; 1342; 1343-1349, Exhibits 293, 284; CP 10922, 10923, 10939) Kaiser sought leave of court to introduce the "challenged evidence" in response to plaintiff's and his wife's

testimony regarding his relationship with his wife and his grandson, the son of the daughter whom he had abused.

There is a presumption in favor of admitting relevant evidence. *Carson v. Fine*, 123 Wn.2d 206, 225, 867 P.2d 610 (1994); *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-9; 230 P.3d 583 (2010). The danger of unfair prejudice to substantially outweigh the probative force of evidence is "quite slim" where the evidence is undeniably probative of a central issue in the case. *Carson*, 123 Wn.2d at 224.

In this instance, the evidence was highly probative of a central issue in the case, Mr. Budd's claim for non-economic damages. Kaiser was unable to introduce evidence as to how his historical relationships with his wife and daughter may have impacted his "enjoyment of life." Perhaps, his relationship with his grandson was also fraught with feelings of guilt due to his sexual abuse of the grandson's mother. Perhaps he resented his wife's infidelity. Certainly, a jury could conclude, had the evidence been presented, that Mr. and Mrs. Budd's description

of his enjoyment of life was not as portrayed in the testimony. In precluding the evidence, the court permitted plaintiff to present a false narrative in support of his general damages claim. *See e.g.* Plaintiff's Closing Slide Show (CP 10922, 10923, 10939).

An error is harmless if it is "'trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.'" *Mackay v. Acorn Custom Cabinetry, Inc.* 127 Wn.2d 302, 311, 898 P.2d 284, (1995) (emphasis omitted) (quoting *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)). Prejudice is clearly present here. The $13,060,000.00 award was supported in large part by the loss of enjoyment of life testimony which would have been directly rebutted by evidence of the sexual battery and marital discord. This was not harmless error and the Court, in affirming the verdict ignored this Court's precedent. In conflict with the above-cited Supreme Court precedent, the Court affirmed the verdict erroneously finding that

the unfair prejudice outweighed the probative value; the error was not harmless and the Court should accept review.

VI. CONCLUSION

For the reasons set forth herein, Kaiser submits that it is entitled to vacation of the judgment and entry of an order of dismissal, or, in the alternative, vacation of the judgment and remand for a new trial; and the Court's affirmation of the verdict is in direct conflict with constitutional safeguards and this Court's precedent. Review should be accepted.

RESPECTFULLY SUBMITTED this 29th day of April, 2022.

I certify, this document contains 4,981 words pursuant to RAP 18.17.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 29th day of April, 2022, I caused a true and correct copy of the this document to be delivered to the following counsel of record via the Court of Appeals Filing Portal to:

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FILED
2/22/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RAYMOND BUDD and VICKIE BUDD, Husband and Wife, Respondents, v. KAISER GYPSUM COMPANY, INC.; Appellant, BORGWARNER MORSE TEC INC.; CERTAINTEED CORPORATION; DAP, INC.; FORD MOTOR COMPANY; HONEYWELL INTERNATIONAL INC., Individually and as successor to Allied Signal, Inc. and The Bendix Corporation; METROPOLITAN LIFE INSURANCE COMPANY; MW CUSTOM PAPERS, LLC; PFIZER INC.; UNION CARBIDE CORPORATION; and WEYERHAEUSER COMPANY, Defendants.	No. 81918-6-I DIVISION ONE PUBLISHED OPINION

CHUN, J. — Raymond Budd developed mesothelioma after working with a drywall product called "joint compound" from 1962 to 1972. He sued Kaiser Gypsum Company, Inc. and others for damages, contending that the company's joint compound caused his illness. A jury returned a verdict in Budd's favor and awarded him nearly $13.5 million. Kaiser appeals, claiming (1) insufficient randomness in the jury-selection process, (2) erroneous transcription of expert testimony, (3) lack of proximate causation, (4) lack of medical causation, (5) an

improper jury instruction on defective design, (6) improper exclusion of sexual battery and marital discord evidence, (7) improper admission of post-exposure evidence, (8) improper exclusion of regulatory provisions, and (9) a failure to link its product to Budd's disease. For the reasons below, we affirm.

I. BACKGROUND

Kaiser manufactured drywall products, including joint compound, from the 1950s to the 1970s. Budd claims he worked with Kaiser's joint compound from 1962 to 1972 when he worked for his father and uncle's drywall business. During that time, Kaiser's joint compound contained Grade 7 chrysotile and Calidria chrysotile. Chrysotile is a type of asbestos. Years later, a doctor diagnosed Budd with mesothelioma.

Budd and his wife sued Kaiser and others in King County Superior Court for negligence and strict liability, advancing failure to warn and defective design theories.

Jury Selection. In early 2020, the COVID-19 pandemic halted jury trials at the court. When they resumed, the court and our Supreme Court allowed for the excusal of potential jurors at higher risk from COVID-19 based on their age or health conditions. In this case, the jury services department of King County Superior Court sent summonses to potential jurors who had deferred service before. Before trial, Kaiser challenged the jury selection process, contending that it was not sufficiently random and excluded people ages 60 and older. The trial court denied Kaiser's challenge.

Evidence of Abuse and Discord. Budd moved in limine to exclude evidence that he had sexually abused his daughter and evidence of marital discord. The trial court denied Budd's motion but said that Kaiser could introduce the evidence only if Budd opened the door.[1] Budd's wife voluntarily dismissed her loss of consortium claim to avoid opening the door. During trial, after Budd's wife testified, Kaiser asked to introduce the challenged evidence. The trial court denied the request, determining that Budd had not opened the door.

Post-Exposure Evidence. Kaiser moved in limine to exclude evidence about asbestos hazards—such as internal Kaiser memoranda—that post-dated Budd's exposure, contending that such evidence was irrelevant to Budd's claims. The trial court denied the motion. During trial, Budd introduced post-exposure evidence about asbestos hazards.

Transcription of Testimony. The day of closing arguments, Budd shared his argument slides with Kaiser. After reviewing the slides, Kaiser told the court that Budd was seeking to rely on a portion of Dr. Davis Weill's testimony that was erroneously transcribed. The transcript said, "Q. And, Doctor, has there been any epidemiological literature published in the peer reviewed literature demonstrating an increased risk of mesothelioma from exposure to Calidria? A. Yes." Kaiser contended the answer was, "No." It moved to preserve the audio recording of the testimony and requested a copy. The trial court granted

[1] "Opening the door" is described as when "[a]n attorney's conduct or questions" renders "otherwise inadmissible evidence or objectionable questions admissible." BLACK'S LAW DICTIONARY, 1314 (11th ed. 2019).

preservation but denied Kaiser's request for a copy. Kaiser then moved twice to correct the record and the court denied both motions.

Jury Instruction. The court instructed the jury on a negligent failure to warn claim and a strict liability failure to warn claim; it also partially instructed the jury on a design defect claim. Kaiser objected to the design defect instruction, contending that the case involved only failure to warn claims. The court gave the instruction.

Verdict. The jury found for Budd and awarded him $13,426,000 in damages.

Posttrial Motion. Kaiser moved for dismissal, new trial, and remittitur under CR 50, CR 59, and RCW 4.76.030 ("Posttrial Motion"). Under CR 50, Kaiser contended that Budd failed to prove he was exposed to a Kaiser product; and proximate causation by showing he would have heeded a warning had one been given. Kaiser said that under CR 59, the jury selection process did not conform to statutory requirements; Budd failed to prove medical causation and proximate causation; and the court erred in admitting post-exposure evidence, excluding evidence of prior asbestos regulation provisions, excluding evidence of Budd's sexual abuse of his daughter and of marital discord, and instructing the jury on the design defect claim. The court denied Kaiser's Posttrial Motion.

Kaiser appeals.

II. ANALYSIS

A. Jury Selection

Kaiser says the trial court erred by failing to ensure the jury pool was

sufficiently random under RCW 2.36 et seq. It also says excluding jurors ages 60 and over was reversible error. Budd disagrees and says Kaiser waived its second claim. We conclude that the court substantially complied with the randomness requirement and did not exclude a cognizable class.

We review a "trial court's ruling regarding challenges to the venire process for abuse of discretion." State v. Clark, 167 Wn. App. 667, 674, 274 P.3d 1058 (2012), aff'd, 178 Wn.2d 19, 308 P.3d 590 (2013). We review a trial court's denial of a CR 59 motion also for abuse of discretion. Konicke v. Evergreen Emergency Servs., P.S., 16 Wn. App. 2d 131, 147, 480 P.3d 424, (2021). "A trial court abuses its discretion when its decision 'is manifestly unreasonable or based upon untenable grounds or reasons.'" Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 668–69, 230 P.3d 583 (2010) (quoting State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). An "appellate court cannot hold that a trial court abused its discretion 'simply because it would have decided the case differently.'" Coogan v. Borg-Warner Morse Tec Inc., 197 Wn.2d 790, 804–05, 490 P.3d 200 (2021) (quoting Gilmore v. Jefferson County Pub. Transp. Benefit Area, 190 Wn.2d 483, 494, 415 P.3d 212 (2018)).

1. Randomness

"The [jury-selection] statutes repeatedly mandate that the members of a jury panel be randomly selected." Brady v. Fibreboard Corp., 71 Wn. App. 280, 282, 857 P.2d 1094 (1993) (citing former RCW 2.36.010(6), (9), (12) (2019);[2]

[2] Defining "Jury panel" and "Master jury list" as consisting of "randomly selected" people.

RCW 2.36.050;[3] .063;[4] .065;[5] .080(1);[6] .130[7]). And the trial court must ensure random selection. Id. But "the statutory requirements for making up the jury lists are merely directory and need be only substantially complied with." City of Tukwila v. Garrett, 165 Wn.2d 152, 159, 196 P.3d 681 (2008); see also RCW 2.36.065 ("Nothing in this chapter shall be construed as requiring uniform equipment or method throughout the state, so long as fair and random selection of the master jury list and jury panels is achieved."). "Prejudice will be presumed only if there is a *material* departure from the statutory requirements. . . . If there is substantial compliance with the statute, then a challenger may claim error only if he or she establishes actual prejudice." Id. at 161 (alteration in original) (citations omitted). Our Supreme Court has said,

> The purpose of all these statutes is to provide a fair and impartial jury, and if that end has been attained and the litigant has had the benefit of such a jury, it ought not to be held that the whole proceeding must be annulled because of some slight irregularity that has had no effect upon the purpose to be effected.

W. E. Roche Fruit Co. v. N. Pac. Ry. Co., 18 Wn.2d 484, 487–88, 139 P.2d 714 (1943).

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[3] Providing for the random selection of juries in courts of limited jurisdiction.

[4] Allowing for the use of an electronic data processing system or device to "compile the master jury list and to randomly select jurors from the master jury list.

[5] Placing the duty of ensuring random selection of jurors on the "judges of the superior court."

[6] Stating that "It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court."

[7] Providing for the random selection of additional jurors as needed.

During a pretrial hearing on August 7, 2020, the trial court explained how its jury services department summoned potential jurors.[8] Kaiser objected and sought a continuance of trial, contending that the summons process violated statutory randomness requirements. The trial court reserved ruling and denied the continuance.

On September 1, the trial court addressed the issue at a hearing and in a written ruling. The court explained that the jury services department mailed summonses to over 1,000 potential jurors; that the potential jurors were those who had had their service deferred before; that each summons requested that the recipient contact the court by e-mail, by phone, or in person; that of those potential jurors, about 183 responded by e-mail; that the jury services department then sent questionnaires to those 183 people by e-mail; that about 77 people responded to the questionnaire; and that those people were placed on the jury list in random order. The court then overruled Kaiser's objection. The court later denied Kaiser's Posttrial Motion, which was based in part on its contention that the jury selection process was improper.

Kaiser first contends that the jury pool was insufficiently random because the jury services department mailed summonses to those who had deferred service before. But there can be numerous reasons why a juror defers service; Kaiser offers no information to suggest that the pool of over 1,000 people was less random than a venire another process would yield nor does it cite authority

[8] Kaiser did not include the transcript from this hearing in the appellate record despite discussing what was apparently said at the hearing in is briefing.

supporting such a contention. Cf. State v. Tingdale, 117 Wn.2d 595, 600, 602, 817 P.2d 850 (1991) (holding that a court clerk's excusal, before voir dire, of three potential jurors based on their answers to questionnaires constituted a material departure from the statutory randomness requirements); Brady, 71 Wn. App. at 281, 283 ("the randomness of the panel was destroyed" when "two judges, neither of whom was the trial judge," eliminated 14 potential jurors based on their answers to questionnaires).

Kaiser next contends that the jury pool was not sufficiently random because the jury services department sent questionnaires only to those for whom it had e-mail addresses. But the court's comments make clear that those were the potential jurors who had responded to the mailed summons, and the record does not suggest that any potential jurors responded through another mode of communication. In other words, the jury services department did not unilaterally decide to contact only potential jurors with e-mail addresses. Kaiser also emphasizes that only a trial court, not the jury services department, has the power to excuse jurors for cause. But the jury services department did not excuse jurors for cause; it sent summonses to potential jurors who had deferred service before and then sent questionnaires to potential jurors who responded to the summons. Kaiser does not cite authority supporting its contention that this rendered the jury selection process insufficiently random. See Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) (holding that appellate courts will not consider arguments unsupported by authority).

The court acted within its discretion in rejecting Kaiser's challenges to the jury selection process as not sufficiently random because it substantially complied with the statute. See W. E. Roche, 18 Wn.2d at 487–88 (holding that courts substantially comply with the statute if it ensured the effectuation of the purpose of the statutory randomness requirement, which is to ensure each party receives an unbiased trial). Kaiser does not show how the court's selection of a jury from those who had deferred service before and those who responded by e-mail to summonses was insufficiently random. And Kaiser does not contend it was prejudiced, it instead contends that prejudice is presumed because the court materially deviated from the statute. But given the trial court's substantial compliance with the statute, Kaiser can prevail on this issue only if it shows actual prejudice. Thus, its arguments on randomness fail.

2. Cognizable class

"The Sixth and Fourteenth Amendments prohibit the systematic exclusion of distinctive groups from jury pools." Clark, 167 Wn. App. at 673. "[E]ven if the source list is not unconstitutionally discriminatory, a selection procedure is still invalid if it systematically excludes a cognizable class of individuals." Id. at 674.

Because of the COVID-19 pandemic, the court suspended jury trials in early 2020. When jury trials resumed, the presiding superior court judge sent a memorandum to bar associations saying that jurors could be excused from jury duty if they are "age 60 or older *and* [] do not wish to report for jury duty." (Emphasis added.) A Supreme Court order about modification of jury trial proceedings similarly stated, "Any process for summoning potential jurors must

include *the ability to defer* jury service by those who are at higher risk from COVID-19 based on their age or existing health conditions." (Emphasis added.) The court continued, "However, no identified group may be per se excused from jury service on this basis." This policy was implemented via the questionnaire the jury services department distributed. Citing this policy change, Kaiser moved to continue the trial, which motion the trial court denied.

Kaiser says the jury selection process was invalid because it constructively excluded a cognizable class of individuals: people ages 60 and older.[9] But to be unconstitutional, the exclusion must be "systematic." Clark, 167 Wn. App. at 673. Kaiser cites no law that "constructive" exclusion is sufficient. The policy allowed for jurors to be excused if they were 60 years or older *and* did not wish to report for duty. This did not automatically exclude every person 60 years and older. The court acted within its discretion in rejecting Kaiser's challenges to the jury selection process.

B. Transcript Error

Kaiser says the trial court erred by denying its request for a copy of an audio recording from its expert's testimony, which it claims was erroneously transcribed. It says the trial court also erred by denying its later motion to correct the record. Finally, Kaiser says Budd's counsel engaged in misconduct by

[9] Budd contends Kaiser implicitly withdrew its objections on this issue by saying it did not want to force potential jurors over the age of 60 who were claiming hardship to appear. But Kaiser also said it was not conceding its challenge. Budd also says Kaiser explicitly withdrew its objections when it stated, "[T]his motion wasn't premised on exclusion of a cognizable class. This is premised on the deviation from the RCW 2.36 series." But that comment was about the randomness issue addressed above. Kaiser preserved its objection to the exclusion of people age 60 and older in a pretrial motion and we address this issue.

referring to evidence outside the record by using the erroneous transcription during closing argument. We conclude that (1) the court acted within its discretion in denying Kaiser's request for a copy of the recording, (2) even if the transcript were incorrectly transcribed, Kaiser is not entitled to a new trial because its RAP 9.5 motion to correct the record post-dated the jury's verdict, and (3) even if there was any misconduct, it was harmless.

The court exercised its discretion in addressing Kaiser's motions and objection related to the transcript. We review this issue for abuse of discretion.[10] See, e.g., Hollins v. Zbaraschuk, 200 Wn. App. 578, 582–83, 402 P.3d 907 (2017) (reviewing a "classic discretionary decision" for abuse of discretion).

During its direct examination of its expert, Dr. Weill, Kaiser asked whether any epidemiological studies linked Calidria chrysotile to mesothelioma. The transcript says that Dr. Weill responded, "Yes." The day of closing arguments, and before the opening segment of Budd's closing, Budd shared his argument slides with the defense. Based on its review of Budd's slides, Kaiser objected and, at a sidebar, contended that Budd sought to rely on an erroneously transcribed transcription. Apparently, during the sidebar, the trial court did not prohibit Budd from referring to or using the transcript. During the opening segment of Budd's closing argument, he stated that Dr. Weill had said "yes" in response to the question and that it was undisputed that Calidria causes

[10] Budd says the matter is reviewed for substantial evidence, but Kaiser does not assign error to any findings of fact, nor does it discuss any such findings in its analysis. See Merriman v. Cokeley, 168 Wn.2d 627, 631, 230 P.3d 162 (2010) ("An appellate court reviews a trial court's findings of fact for substantial evidence in support of the findings.").

mesothelioma. Kaiser objected again after the opening segment of Budd's closing argument. The court said it could not simply declare the transcript incorrect at that moment and that they would "have to move on." During its closing argument, Kaiser said to the jury that it heard Dr. Weill answer "No" to the question and that the court reporter heard him say "Yes" and that the jury should consult its own notes on the issue. During rebuttal closing argument, Budd showed the jury a slide containing the contested statement in the transcript. The jury then returned its verdict.

Upon learning that an audio file of the testimony existed, on September 9, Kaiser moved to preserve the file and requested a copy for forensic analysis. The court granted the motion to preserve but denied the motion for a copy, saying that it was concerned that doing so would create a troubling precedent for stall tactics. The court also said that the jurors had their own memory of what Dr. Weill said, and that it instructed the jurors that Dr. Weill's testimony was evidence, and what counsel said during closing was not evidence.

On October 19, Kaiser moved to correct the record under RCW 2.32.250. The court denied the motion, saying that it was moot because the jury had issued a verdict and correction would not change the verdict.

While this appeal was pending, in February 2021, Kaiser moved below for a fact-finding hearing and to amend the transcript pursuant to RAP 9.5(c). The court held a hearing during which it heard the recording and testimony from Dr. Weill, Budd's counsel, and Kevin Moll, the court reporter who transcribed the testimony. Dr. Weill testified he remembered saying "No" and he maintained his

answer after hearing the recording. Budd's counsel testified that she heard Dr. Weill say "yeah" and Moll testified that he heard Dr. Weill say "yes." The trial court concluded that the transcript correctly reflected a "Yes" answer and found that Budd's counsel and Moll were more credible than Dr. Weill. The court denied Kaiser's RAP 9.5(c) motion.

First, Kaiser says the trial court abused its discretion by denying its request for a copy of the audio recording for forensic analysis. But Kaiser cites no law suggesting that it was entitled to this. See Norcon, 161 Wn. App. at 486 (holding that appellate courts will not consider arguments unsupported by authority). And though Kaiser contends that the trial court did not explain its decision, the court did explain that it was wary of setting a precedent that may allow for stall tactics. The court did not abuse its discretion by denying Kaiser's request.

Second, Kaiser says the trial court abused its discretion by ignoring the audio recording and Dr. Weill's testimony, and instead relying on Budd's counsel's and Moll's testimonies in finding that the transcript was correctly transcribed. Budd says whether the transcript was properly transcribed has "no bearing on this appeal" because a finding of error on this posttrial motion would not affect the jury's verdict. Budd is correct. Kaiser's motion to preserve the recording, and its two motions to correct the record all post-date the jury's verdict. Even if the court had ruled in Kaiser's favor for those motions, it could

not have changed the jury's verdict. Thus, Kaiser should not obtain the remedy it seeks—a new trial—based on the court's ruling on Kaiser's RAP 9.5 motion.[11]

Third, citing Carnation Company, Inc. v. Hill, Kaiser contends that Budd's counsel committed misconduct by referring to evidence not in the record when they used the transcript in their slides. 115 Wn.2d 184, 186, 796 P.2d 416 (1990) (addressing a claim that an attorney committed misconduct by arguing facts outside the record). But the trial court apparently allowed the conduct: Kaiser objected to the transcript before Budd's closing argument and the court seemingly overruled the objection. Yet even assuming misconduct, "[i]n order to constitute reversible error, moving counsel must show the attorney misconduct had a substantial likelihood of affecting the jury's verdict." Id. Kaiser brought the issue to the jury's attention during its closing argument and encouraged the jury to refer to its notes. And as discussed below in the medical causation section, other evidence linked Budd's mesothelioma to chrysotile exposure. Also, as the trial court noted in its ruling, it had instructed the jury that the lawyers' comments during closing argument are not evidence. And "'jurors are presumed to follow the court's instructions.'" Coogan, 197 Wn.2d at 807 (quoting State v. Emery, 174 Wn.2d 741, 766, 278 P.3d 653 (2012)). Thus, Budd's use of the transcript during closing did not have a substantial likelihood of affecting the jury's verdict.

[11] Kaiser appears to challenge the trial court's denial of its RCW 2.32.250 motion to correct the record in its reply brief. This challenge similarly does not support a new trial. And we do not address arguments raised for the first time in a reply brief. See Samra v. Singh, 15 Wn. App. 2d 823, 834 n.30, 479 P.3d 713 (2020) ("We do not address matters raised for the first time in reply briefs.").

C. Proximate Cause

Kaiser says the trial court erred in denying its Posttrial Motion because Budd failed to prove proximate cause—specifically, cause in fact—for his failure to warn claims. Kaiser says no evidence shows what an adequate warning would have contained and no substantial evidence shows Budd would have heeded a warning had Kaiser given one. Budd responds that, though he did not have to provide evidence about what an adequate warning should have contained, he did provide such testimony. And he says that substantial evidence shows that he would have heeded a warning. We conclude that the trial court did not err.

We review de novo a trial court's decision to deny a CR 50 motion. Paetsch v. Spokane Dermatology Clinic, P.S., 182 Wn.2d 842, 848, 348 P.3d 389 (2015). A judgment as a matter of law is appropriate only when, after viewing the evidence in favor of the nonmoving party, a court can say, "'as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party.'" Id. (quoting Indus. Indem. Co. of Nw. v. Kallevig, 114 Wn.2d 907, 915–16, 792 P.2d 520 (1990)). "The requirement of substantial evidence necessitates that the evidence be such that it would convince 'an unprejudiced, thinking mind.'" Kallevig, at 916 (quoting Hojem v. Kelly, 93 Wn.2d 143, 145, 606 P.2d 275 (1980)).[12]

[12] We review a trial court's denial of a CR 59 motion for abuse of discretion. Konicke, 16 Wn. App. 2d at 147. Because the standard of review for a CR 50 ruling is less deferential, if a trial court did not err in its denial of a CR 50 motion on an issue, it did not abuse its discretion by denying a CR 59 motion on the same issue. See Bellevue Farm Owners Ass'n v. Stevens, No. 79430-2-I, slip op at 7 n.4, (Wash. Ct. App.

For strict liability and negligence claims, a plaintiff must establish proximate cause between the defect or breach and the injury. Lewis v. Scott, 54 Wn.2d 851, 856, 341 P.2d 488 (1959) (negligence); Novak v. Piggly Wiggly Puget Sound Co., 22 Wn. App. 407, 410, 591 P.2d 791 (1979) (strict liability). "To show proximate causation, the plaintiff must show both cause in fact and legal causation." Ayers v. Johnson & Johnson Baby Prod. Co.,117 Wn.2d 747, 753, 818 P.2d 1337 (1991). "'Cause in fact refers to the "but for" consequences of an act—the physical connection between an act and an injury.'" Id. (quoting Hartley v. State, 103 Wn.2d 768, 778, 698 P.2d 77 (1985)). In a failure to warn case, a showing that the plaintiff would have heeded a warning had one been given can establish cause in fact. See id. at 754.

The parties do not dispute that during the time of Budd's exposure, Kaiser's joint compound lacked a warning. During trial, Budd asked his expert, Dr. Edwin Holstein, what an adequate warning would look like for a product containing asbestos. Dr. Holstein replied,

> Well, you'd want to have it in writing on the product prominently, not in small letters, but in big letters. You would want to have it in several languages. And you would want to have a graphic, as well, like a skull and crossbones, kind of logo, that people would recognize that there is a hazard.

Budd testified about how he prepared, applied, and finished joint compound during his drywall work. He also introduced Kaiser documents showing

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Feb. 10, 2020) (unpublished), https://www.courts.wa.gov/opinions/pdf/794302.pdf. ("Because the trial court vacated the sanctions under the more deferential standard, we assume it also would have vacated them had it exercised de novo review."); see GR 14.1(c) ("Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss unpublished opinions in their opinions.").

instructions for using its joint compound, which tracked his testimony. Kaiser introduced Budd's interrogatory answers, which said that he used to smoke cigarettes and that he had read the warnings for those cigarettes.

1. Content of warning

The requirement that a plaintiff show what an adequate warning would have looked like—to which Kaiser refers—comes from the "Washington Product Liability Act" (WPLA). See RCW 7.72.030(b). But the legislature enacted the WPLA in 1981, and the Act does not apply "[w]here the harm results from exposure, and it appears that substantially all of the injury-producing events occurred prior to . . . 1981." Krivanek v. Fibreboard Corp., 72 Wn. App. 632, 635, 865 P.2d 527 (1993). Budd's exposure period ended in 1972 and so the WPLA does not apply.

Moreover, contrary to Kaiser's contention, substantial evidence—through Dr. Holstein's testimony—shows what an adequate warning would have contained. Kaiser says that Dr. Holstein was not qualified to offer such testimony but failed to object on this ground. See Mut. of Enumclaw Ins. Co. v. Day, 197 Wn. App. 753, 769, 393 P.3d 786 (2017) ("'Failure to raise an issue before the trial court generally precludes a party from raising it on appeal.'" (quoting Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983)); RAP 2.5.

2. Heeding the warning

Kaiser says no substantial evidence shows Budd would have heeded a warning had it given one. Budd disagrees, arguing that his testimony about how he used joint compound tracked the product's instructions, which shows that he

would have read and heeded a warning. Kaiser says that Budd's argument fails because it relies on an inference that Budd read the instructions, and an inference that since he read and followed the instructions, he would have similarly heeded a warning.[13] But evidence, when viewed in the light most favorable to the non-moving party, can sustain a jury's verdict based on reasonable inferences from that evidence. Kallevig, 114 Wn.2d at 915–16. The inference that Budd read and followed the joint compound instructions is reasonable based on Budd's use conforming to those instructions. And the inference that Budd would have heeded a warning is also reasonable given the inference that he read and followed the joint compound directions. See Ayers, 117 Wn.2d at 754 (holding that the jury was "entitled to infer" that the plaintiff would have heeded a warning on baby oil, based on testimony that the plaintiff read warnings on other household products and treated them carefully). In Ayers, the court noted that the plaintiff did not know of the risks of aspirating baby oil; here, not only did Kaiser fail to warn buyers about the dangers of asbestos, it did not inform buyers that the product contained asbestos. Id. at 755. The court did not err in denying Kaiser's Posttrial Motion because substantial evidence and reasonable inferences from it support a finding of cause in fact.

[13] Kaiser also contends that the fact that Budd smoked cigarettes despite reading the warning labels on them shows that he would not have heeded a warning on the joint compound. Given the differences between smoking an addictive substance and using a particular product in the course of employment, we reject this contention. See Raney v. Owens-Illinois, Inc., 897 F.2d 94, 96 (2d Cir. 1990) (holding that evidence the plaintiff smoked in a failure to warn asbestos case did "not preclude a finding in plaintiff's favor"). Moreover, this evidence shows that Budd reads warnings. The evidence, viewed in Budd's favor, sustains the jury's verdict.

D. Medical Causation

Kaiser says the trial court erred in denying its Posttrial Motion because Budd failed to prove medical causation. Kaiser claims that to recover, Budd needed to produce epidemiological and toxicological studies establishing causation between Grade 7 chrysotile and Calidria chrysotile—the types of chrysotile Kaiser used in its joint compound—and mesothelioma. Budd responds that he based his lawsuit on the theory that all types of chrysotile can cause mesothelioma and that he provided evidence proving that theory. We conclude the court did not abuse its discretion.

We review a trial court's denial of a CR 59 motion for abuse of discretion. Konicke, 16 Wn. App. at 147.

"[T]he plaintiff in a product liability or negligence action bears the burden to establish a causal connection between the injury, the product and the manufacturer of that product." Morgan v. Aurora Pump Co., 159 Wn. App. 724, 729, 248 P.3d 1052 (2011) (citing Lockwood v. AC & S, Inc., 109 Wn.2d 235, 245, 744 P.2d 605 (1987)).

During trial, Budd's expert, Dr. Arnold Brody, agreed that epidemiological studies combined with toxicological studies are necessary to prove disease causation "for populations." Budd's expert, Dr. Holstein, testified that "if you want to investigate whether drywall work can lead to the development of mesothelioma, epidemiology is the wrong tool," because of the nature of the job. Dr. Holstein said that epidemiologists have studied chrysotile more generally, rather than just among drywall workers, and found that chrysotile is linked to

mesothelioma. Dr. Holstein also testified about "a long list of epidemiological studies that find that chrysotile asbestos can and does cause malignant mesothelioma in human beings" and about a joint statement saying that "all types of asbestos fiber are causally implicated in the development of various diseases and premature death" from sources he found reliable and authoritative. Dr. Brent Finley, Kaiser's expert, testified about three toxicological studies on Grade 7 chrysotile showing that there was no causal link between Grade 7 chrysotile and an increased risk of disease in rats and primates.

Kaiser contends that Budd's expert, Dr. Brody, testified that proof of disease causation through exposure to a specific substance requires epidemiological studies showing an increased risk of disease plus toxicological studies showing an increased risk of disease. Kaiser says that by not producing such studies about Grade 7 chrysotile and Calidria chrysotile, or drywall workers, Budd has not proved causation. This misconstrues Dr. Brody's testimony. Dr. Brody made it clear that this was the case for assessing *populations* as whole. Dr. Brody did not say that this was the case for individuals, nor did he say the studies must be specific to a type of chrysotile rather than chrysotile as a whole.

Kaiser contends that Dr. Holstein's testimony—that there were no epidemiological studies assessing an increased risk of disease among drywall workers using chrysotile joint compound—combined with Dr. Brody's testimony, is fatal to Budd's claims. Kaiser emphasizes a study that notes that asbestos exposure and type differ between professions and that all workers cannot be

referred to broadly as "asbestos workers." But again, Kaiser misconstrues Dr. Brody's testimony about whether such studies would be required to prove causation in this case. And Dr. Holstein also explained the lack of epidemiological studies of drywall workers: he noted the difficulty of conducting such studies given the rarity of the disease, the latency period, and the fact that it is harder to document exposure from drywall work since it is often done sporadically or alongside other jobs. Budd thus offered evidence explaining the lack of epidemiological studies assessing an increased risk of disease among drywall workers using chrysotile joint compound. Budd also offered evidence that epidemiological studies show that chrysotile causes mesothelioma.

Kaiser also says that no expert identified a toxicological study showing increased risk of mesothelioma from Grade 7 chrysotile or Calidria chrysotile. It emphasizes that its expert, Dr. Finley, testified that toxicological studies have shown that Grade 7 chrysotile does not lead to an increased risk of mesothelioma in rats and primates. But Dr. Finley's testimony it only addresses Grade 7 chrysotile, not Calidria chrysotile. Budd produced toxicological evidence that chrysotile causes mesothelioma. Looking at the evidence as a whole, the trial court's decision is not "'manifestly unreasonable or based upon untenable grounds or reasons.'" Salas, 168 Wn.2d at 668–69 (quoting Stenson, 132 Wn.2d at 701).

E. Jury Instructions

Kaiser says the trial court erred by giving the jury a design defect instruction because the joint statement of the case provides that the claims at

issue were negligent failure to warn and strict liability failure to warn. Budd responds that the joint statement of the case did not so limit his claims, and that even if it did, a design defect claim was implicitly agreed to by the parties during trial. We conclude that the joint statement here did not exclude Budd's design defect claim and the trial court did not commit reversible error.

We review de novo claimed errors of law in jury instructions. Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160, 151 Wn.2d 203, 210, 87 P.3d 757 (2004). "Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." Id. When a trial court gives an erroneous instruction "'on behalf of the party in whose favor the verdict was returned,'" we presume prejudice unless the error affirmatively appears harmless. State v. Barry, 183 Wn.2d 297, 303, 352 P.3d 161 (2015) (quoting State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)). "'A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.'" Nguyen v. City of Seattle, 179 Wn. App. 155, 159 n.2, 317 P.3d 518 (2014) (quoting Wanrow, 88 Wn.2d at 237).

Under pre-WPLA law, a defendant is liable under a design defect theory if their product, when manufactured as designed, is not reasonably safe, meaning the product is "unsafe to an extent beyond that which would be reasonably contemplated by the ordinary consumer." Seattle-First Nat'l Bank v. Tabert, 86 Wn.2d 145, 154, 542 P.2d 774 (1975). A defendant is liable under strict liability

failure to warn when their failure to warn renders their product unreasonably dangerous. Little v. PPG Indus., Inc., 19 Wn. App. 812, 818, 579 P.2d 940 (1978).

> The joint statement says
>
> > Plaintiff alleges that Kaiser Gypsum was negligent in failing to warn and that its *joint compound products were unreasonably dangerous or defective insofar as they lacked adequate warnings* on use and how to protect Raymond Budd.
> >
> > . . .
> >
> > Kaiser Gypsum denies that it was negligent in failing to warn and *denies that its products were unreasonably dangerous or defective*.

(Emphasis added.) Jury instruction 12 says,

> The Plaintiff brings this action on the basis of two separate and distinct legal claims:
>
> A. Products Liability and
>
> B. Negligence
>
> . . .
>
> With respect to the Plaintiff's product liability claims, Plaintiff claims that Defendant Kaiser Gypsum Company, Inc. manufactured, distributed, or supplied products that were not reasonably safe for use because:
>
> 1. These products contained asbestos, which is not reasonably safe to human life and health, and
> 2. These products did not contain adequate warnings of the dangers involved with the product's use.

Kaiser objected to Instruction 12, saying that it encompassed more than the two failure to warn claims at issue in the case. Other instructions address the elements of a strict liability failure to warn claim and a negligent failure to warn claim and define key terms for the two claims. But no other instructions addressed the elements of a strict liability design defect claim. The verdict form included three claims: strict liability failure to warn, strict liability design defect,

and negligent failure to warn. Kaiser objected to the inclusion of a design defect claim on the verdict form. The court gave the jury instruction 12 and the verdict form over Kaiser's objections. The jury returned a verdict in Budd's favor on all three claims.

Kaiser cites no law supporting its contention that a joint statement can limit a party's claims. See Norcon, 161 Wn. App. at 486 (holding that appellate courts will not consider arguments unsupported by authority). But even if that were the case, the language of the joint statement could fairly be interpreted to include a design defect claim.[14]

The trial court may have failed to "properly inform the jury of the applicable law" by providing only partial instructions on the design defect claim but still including the claim on the verdict form. Blaney, 151 Wn.2d at 210. But Kaiser did not object on this basis. And so we need not address the issue. See Day, 197 Wn. App. at 769 ("'Failure to raise an issue before the trial court generally precludes a party from raising it on appeal.'" (quoting Smith, 100 Wn.2d at 37)); RAP 2.5. Nor need we address it because Kaiser raises for the first time in their reply brief on appeal. Samra v. Singh, 15 Wn. App. 2d 823, 834 n.30, 479 P.3d 713 (2020) ("We do not address matters raised for the first time in reply briefs.").

And even if Kaiser had preserved the issue, any error was harmless. See Nguyen, 179 Wn. App. at 159 n.2 ("'A harmless error is an error which is trivial,

[14] "Plaintiff alleges that Kaiser Gypsum . . . joint compound products were *unreasonably dangerous* or defective insofar as they lacked adequate warnings on use and how to protect Raymond Budd. . . . Kaiser Gypsum . . . denies that its products were *unreasonably dangerous* or defective." (Emphasis added.)

or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.'" (quoting Wanrow, 88 Wn.2d at 237)). The jury returned a verdict in Budd's favor on all three claims. The jury's award of damages does not turn on its design defect decision. Instead, the jury based its award on Budd's injuries, which relate to all three claims. See Mavroudis v. Pittsburgh-Corning Corp., 86 Wn. App. 22, 36, 935 P.2d 684 (1997) (affirming despite instructional error where "the error was harmless because the jury rendered a single monetary verdict on both the strict liability product-warning claim and the negligent failure-to-warn claim"). It is clear the jury concluded that Budd's injuries were caused by the failure to warn as well as a design defect. Kaiser contends any instructional error was prejudicial because a finding of product defect likely made the jury believe a warning was thus required. But the court fully instructed the jury on the law for the failure to warn claims. And the jury is presumed to have followed the instructions. Coogan, 197 Wn.2d at 807 ("jurors are presumed to follow the court's instructions." (quoting Emery, 174 Wn.2d at 766)).

F. Sexual Battery and Marital Discord Evidence

Kaiser says the trial court erred by excluding evidence of Budd's past sexual abuse of his daughter, marital infidelity, and since-rescinded petitions for divorce. It contends that such evidence is relevant to rebut Budd's loss of enjoyment of life claim because it shows strained familial relationships. Budd responds that the court acted within its discretion because he did not open the door to the admission of such evidence. We agree with Budd.

"We review a trial court's decision to admit or exclude evidence for an abuse of discretion." Salas, 168 Wn.2d at 668.

"All relevant evidence is admissible unless its admissibility is otherwise limited." Id. at 669; ER 402. Even if relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. Trial courts have "'wide discretion'" in weighing the probative value of evidence against its potentially prejudicial impact. Gerlach v. Cove Apartments, LLC, 196 Wn.2d 111, 120, 471 P.3d 181 (2020) (quoting Salas, 168 Wn.2d at 671). "'When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists.'" Id. (quoting Salas, 168 Wn.2d at 671). "Though rare, the danger of unfair prejudice can exist even when the evidence at issue 'is undeniably probative of a central issue in the case.'" Id. (quoting Carson v. Fine, 123 Wn.2d 206, 224, 867 P.2d 610 (1994)).

Budd moved in limine under ER 403 to exclude evidence that he was convicted of sexual battery against his daughter and evidence of marital issues, including his wife's infidelity after the abuse, and since-rescinded petitions for divorce. The trial court denied his motion. But the court explained that it would not admit the challenged evidence unless Budd opened the door. The court wrote,

> By way of example, if the Plaintiff testifies or presents other evidence that he formerly enjoyed being with his family members (including his grandchildren), and that his current illness prevents him from interacting with his family members (including his grandchildren) as he once did. . . . such evidence may not be a basis for Kaiser to offer the Challenged Evidence in rebuttal.

> But if the Plaintiff goes further and presents substantial additional evidence (from other witnesses, or otherwise) focusing on a theme that Mr. Budd is a quintessential "family man" and that he and his wife have an ideal marriage (with the implication that its termination at his death should justify an award of noneconomic damages), or that his wife, children, or grandchildren have lost or will lose things that could be described as being consistent with "care, maintenance, services, support, advice, counsel, therapy and consortium which [they] would have received before his illness and disability caused by his exposure to asbestos" . . . , then that may justify Kaiser in arguing . . . that Kaiser . . . should be permitted to rebut such evidence by presenting the Challenged Evidence.

Budd's wife voluntarily dismissed her loss of consortium claim to avoid opening the door for the challenged evidence.

During trial, Budd testified that he used to ride bicycles with his grandson, travel with his wife and grandchildren, and do woodwork, and that because of his illness he could no longer do those things. He introduced photos of himself riding a bicycle and at an amusement park with his grandson. Budd's wife testified similarly about those activities and how Budd could no longer do them. After Budd's wife's testimony, Kaiser sought to cross-examine her about the challenged evidence, claiming Budd had opened the door. The trial court denied Kaiser's request, determining that Budd had not opened the door.

As the court noted, the evidence Budd presented focused on what he enjoyed doing before his illness and what he could no longer do. The challenged evidence may be probative to rebut a claim that his family members have lost something because of his injury, but he did not offer such evidence. Kaiser likens this case to State v. Crenshaw, 98 Wn.2d 789, 806, 659 P.2d 488 (1983), in which the court affirmed the trial court's holding that gruesome photographs of a murder victim's body were so highly probative to the central issues of the

case—such as the extent to which the defendant tried to hide the corpse—that they were admissible despite risk of prejudice. The evidence here does not approach this level of probative value. Even assuming the challenged evidence is probative to the issue of loss of enjoyment of life, evidence that Budd sexually abused his daughter and experienced marital discord is "likely to stimulate an emotional response rather than a rational decision." Gerlach, 196 Wn.2d at 120 (quoting Salas, 168 Wn.2d at 671). We conclude that the trial court acted within its discretion.

G. Post-Exposure Evidence and Illustrative Exhibit

Kaiser says the trial court erred by admitting post-exposure evidence about asbestos hazards. It also says that the court erred in allowing the jury to see part of an illustrative exhibit for the first time during closing argument. We conclude the court acted within its discretion on both.

1. Post-exposure evidence

Kaiser moved in limine to exclude any post-exposure evidence. The court denied the motion. During trial, Kaiser claimed that its "asbestos-containing joint compound" was a safe product and would be a safe product if still sold today. Budd presented a variety of post-exposure evidence about knowledge of asbestos hazards and causation. The trial court later explained that it denied Kaiser's motion because "Kaiser is contending in this case, . . . that its compound, in fact, was not and never was toxic" and that by so contending, "Kaiser has put directly at issue whether chrysotile is toxic or not, and that opens up the door to all the evidence on that subject post '71."

Kaiser suggests that the only basis for admitting the post-exposure evidence is to support a continuing duty to warn claim, which claim Kaiser says is unsupported. But as the trial court explained, it admitted such evidence because Kaiser put the safety of its asbestos-containing joint compound at issue. In a strict liability negligent failure to warn case, "[s]trict liability may be established if a product, though faultlessly manufactured, is unreasonably dangerous when placed in the hands of the ultimate user by a manufacturer without giving adequate warnings concerning the manner in which to safely use it." Novak, 22 Wn. App. at 412. And in a strict liability design defect case, a plaintiff may recover "if the jury determines that the product is dangerous to an extent beyond that which is contemplated by the ordinary consumer." Lenhardt v. Ford Motor Co., 102 Wn.2d 208, 211–12, 683 P.2d 1097 (1984). Kaiser's position at trial was not simply that it thought the product was safe when it sold it; it asserted that the product, even if sold today, is safe. Thus, Kaiser opened the door to evidence to the contrary. The court acted within its discretion by admitting the post-exposure evidence and denying Kaiser's Posttrial Motion on that basis.

2. Illustrative exhibit

During the opening segment of his closing argument, Budd included a page of a National Institute for Occupational Safety & Health (NIOSH) document in his slides. The court had previously admitted the NIOSH document as a whole as an illustrative exhibit,[15] but the jury had not seen that specific page. The

[15] The parties do not identify where in the record the court made such a ruling, but they do not dispute that this occurred.

specific page was also in a PowerPoint document, which the court admitted as an illustrative exhibit, though the specific page was apparently not shown to the jury at that time. Kaiser objected to the use of that page in Budd's closing argument.[16] The court overruled the objection, stating, "My ruling was that if it was admitted for illustrative purposes, I was going to allow both parties to use the illustrative exhibits during closing arguments. All of the illustrative exhibits, not just the portions that happened to have been shown to the jurors during examination."

The court acted within its discretion by allowing Budd to show an unseen portion of a NIOSH document—which document the court had admitted before as an illustrative exhibit—to the jury during closing argument. Kaiser contends that showing the unseen portion of the NIOSH document was attorney error because it asked the jury to consider items not in evidence. But the court had admitted the whole document as an illustrative exhibit. And Kaiser does not contend that the court's admission of the whole document as an illustrative exhibit was in error nor does it cite law to suggest that a jury may not see a portion of an otherwise admitted illustrative exhibit for the first time during closing argument. Kaiser contends, citing King County v. Farr, 7 Wn. App. 600, 612–13, 501 P.2d 612 (1972), that illustrative exhibits must be admitted in connection with the testimony of a witness. But the court in Farr addressed the necessity of

[16] Budd also contends that Kaiser waived its argument about the inclusion of the NIOSH document in Budd's closing slides by waiting to bring it up until after Budd finished with his closing argument. But Kaiser did raise the issue in a sidebar before Budd's closing argument and reiterated its objection on the record after, so Budd's waiver argument lacks merit.

testimony to establish the accuracy of a map before it could be admitted as an illustrative exhibit. Id. at 613. The exhibit here was a NIOSH document, not a map. Moreover, the PowerPoint slide containing the pertinent page of the NIOSH document was introduced with witness testimony. The court's decision was not unreasonable or based on untenable grounds or reasons.

H. WAC Provisions

Kaiser says the trial court erred by excluding evidence of regulatory standards in effect at the time of Budd's alleged exposure. Budd responds that the court acted within its discretion in excluding the evidence, particularly because Budd did not know Kaiser would introduce the evidence through its expert's testimony until the evening before. We conclude that the trial court acted within its discretion, and even if it did not, any error was harmless.

Kaiser sought to have its expert industrial hygienist, Brooke Simmons, testify about WAC provisions from the time of Budd's exposure that regulated dust concentrations at worksites. The provisions specifically provided that asbestos dust concentrations must be kept below five million particles per cubic feet. Budd objected to the admission of the WAC provisions, arguing they were irrelevant and prejudicial and emphasizing that he was not notified of their use until the night before Simmons was set to testify. Budd said the provisions would confuse the jury about the governing law. Budd also said that when he deposed Simmons before trial and asked her about the basis of her opinions, she did not list the WAC provisions as something she relied on. The court expressed concern that the WAC provisions referred to statutory provisions not in the record

and that the provisions were thus being presented in a vacuum. The court excluded the evidence saying, "[T]o the extent [Simmons] didn't rely on it until tonight or this morning, that's not fair to plaintiffs."

Citing Chen v. City of Seattle, Kaiser contends that the WAC provisions are relevant because it shows the standard of care applicable to it at the time of the exposure. 153 Wn. App. 890, 908, 223 P.3d 1230 (2009) ("'Liability for negligence does not require a direct statutory violation, though a statute, regulation, or other positive enactment may help define the scope of a duty or the standard of care.'" (quoting Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005)). But the WAC provisions at issue governed how employers run their worksites, they did not regulate Kaiser's actions at issue—namely its failure to provide warnings on a product it manufactured and sold.

Citing Falk v. Keene Corporation, Kaiser says the provisions are also relevant to the strict liability claim. 113 Wn.2d 645, 655, 782 P.2d 974 (1989) ("Under the particular facts of a given case, for example, it may be unreasonable for a consumer to expect product design to depart from legislative or administrative regulatory standards, even if to do so would result in a safer product."). But again, the WAC provisions do not govern Kaiser's actions here, and thus are not relevant to the inquiry of the reasonable expectation of a consumer.

Even assuming the WAC provisions are relevant, the court did not abuse its discretion by excluding them based on the unfairness to Budd given the late

disclosure of the provisions as Simmons's reliance material. See Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 50–51, 738 P.2d 665 (1987) (upholding trial court's decision to exclude testimony in part because the defendant failed to report the contents of the testimony "until long after discovery cutoff, several weeks into trial and more than a month after Boeing had deposed the engineer"). Kaiser points out that it listed the WAC provisions in its trial exhibit list. But the list had over 300 proposed exhibits, and Simmons did not suggest that she would testify about the WAC provisions until the evening before her testimony.

Even if the court abused its discretion in excluding the evidence, any error was harmless. See State v. Gunderson, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014) (The non-constitutional harmless error test asks whether "'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" (quoting State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012))). Throughout the trial, Kaiser was able to, and did, discuss "regulatory standards" in place during Budd's exposure that imposed a threshold limit value of five million particles per cubic foot.

I. Exposure to a Kaiser Product

Kaiser says that the trial court erred in denying its Posttrial Motion because Budd failed to prove he was exposed to a Kaiser product. Budd responds that sufficient evidence supports the jury's verdict, particularly given Washington courts' approach to asbestos cases. We agree with Budd.

We review de novo a trial court's decision to deny a CR 50 motion. Paetsch, 182 Wn.2d at 848.

"Generally, under traditional product liability theory, the plaintiff must establish a reasonable connection between the injury, the product causing the injury, and the manufacturer of that product." Lockwood, 109 Wn.2d at 245. "In order to have a cause of action, the plaintiff must identify the particular manufacturer of the product that caused the injury." Id. Liability cannot turn on conjecture. Marshall v. Bally's Pacwest, Inc., 94 Wn. App. 372, 379, 972 P.2d 475 (1999). And courts apply a "more lenient standard[] of proof" to asbestos cases because "the long latency period of asbestosis" means that "the plaintiff's ability to recall specific brands by the time [they bring] an action will be seriously impaired." Montaney v. J-M Mfg. Co., 178 Wn. App. 541, 545, 314 P.3d 1144 (2013) (quoting Lockwood, 109 Wn.2d at 246–47).

At trial, Budd testified, via videotaped deposition, that the manufacturer of the joint compound he worked with was "Kaiser Gypsum." He said that it was the only joint compound product he worked with between 1962 and 1972.[17] Kaiser read into the record Budd's deposition testimony in which he stated that the joint compound he worked with came in white bags with a blue stripe and red lettering that said, "Kaiser." Mary Wright, Kaiser corporate representative, testified at trial about a September 1969 inter-office memorandum, which announced that the joint compound packaging was being changed from its previous design of a white

[17] This testimony conflicted with one of his interrogatory responses in which he said he "remembers using joint compound manufactured by Kaiser Gypsum, Georgia Pacific, and U.S. Gypsum." But this shows that Budd has consistently identified Kaiser as a manufacturer of joint compound he used at work. See In re Det. of Stout, 159 Wn.2d 357, 382, 150 P.3d 86 (2007) ("Fact finders are in the best position to resolve issues of credibility and determine how much weight to give evidence because they see and hear the witnesses").

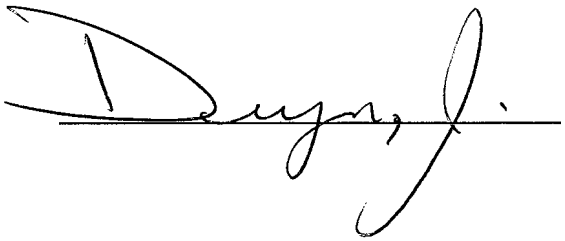
paper bag with black letters and red trim to a kraft bag with black print and red trim. But she acknowledged that the memorandum did not specify how long before September 1969 that had been the design of the packaging. She also testified about a 1953 inter-office memorandum about planned applications for trademarking product packaging designs, which involved dots in specific designs. She acknowledged that she had never seen a photo of Kaiser joint compound packaging from the pertinent time. She said that, during the pertinent time, Kaiser supplied joint compound in Moses Lake, which is where Budd worked.

The evidence sufficed to sustain the jury's verdict. Budd testified that Kaiser manufactured the joint compound he used. Many years have passed, but he claimed to have worked with the product for about 10 years. His description of the packaging differs from the 1969 inter-office memorandum description. But the jury reasonably rejected that as a basis for questioning Budd's credibility. The memorandum does not say how long Kaiser used the prior version of the packaging. And as for the 1953 trademark memorandum, it does not specify how prominent the dot designs were or that the design remained in use during the time of Budd's exposure. And Budd's description of the packaging does not necessarily conflict with or exclude the possibility of a dot design on the packaging. And Kaiser confirmed that its joint compound was sold where Budd worked during the pertinent time. Budd clearly and consistently identified the product he used as Kaiser's. Viewing the evidence in the light most favorable to Budd and considering the lenient standard in asbestos cases, which reflect

mesothelioma's long latency period, we conclude the evidence sufficed to sustain the jury's verdict.

We affirm.

WE CONCUR:



FILED
3/30/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

RAYMOND BUDD and VICKIE BUDD, Husband and Wife, Respondents, v. KAISER GYPSUM COMPANY, INC.; Appellant, BORGWARNER MORSE TEC INC.; CERTAINTEED CORPORATION; DAP, INC.; FORD MOTOR COMPANY; HONEYWELL INTERNATIONAL INC., Individually and as successor to Allied Signal, Inc. and The Bendix Corporation; METROPOLITAN LIFE INSURANCE COMPANY; MW CUSTOM PAPERS, LLC; PFIZER INC.; UNION CARBIDE CORPORATION; and WEYERHAEUSER COMPANY, Defendants.	No. 81918-6-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Kaiser Gypsum Company, Inc., has moved for reconsideration of the opinion filed on February 22, 2022. The panel has considered the motion pursuant to RAP 12.4 and has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Chun, J.
Judge

APPENDIX C

United States Code Annotated
Constitution of the United States
Annotated
Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

U.S.C.A. Const. Amend. VI-Jury Trials

Amendment VI. Jury trials for crimes, and procedural rights [Text & Notes of Decisions subdivisions I to XXII]

Currentness

<Notes of Decisions for this amendment are displayed in multiple documents.>

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Notes of Decisions (6041)

U.S.C.A. Const. Amend. VI-Jury Trials, USCA CONST Amend. VI-Jury Trials
Current through P.L. 117-102. Some statute sections may be more current, see credits for details.

End of Document

APPENDIX D

United States Code Annotated
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

U.S.C.A. Const. Amend. XIV, USCA CONST Amend. XIV
Current through P.L. 117-102. Some statute sections may be more current, see credits for details.

End of Document

CONSTITUTION OF THE STATE OF WASHINGTON

This Constitution was framed by a convention of seventy-five delegates, chosen by the people of the Territory of Washington at an election held May 14, 1889, under section 3 of the Enabling Act. The convention met at Olympia on the fourth day of July, 1889, and adjourned on the twenty-second day of August, 1889. The Constitution was ratified by the people at an election held on October 1, 1889, and on November 11, 1889, in accordance with section 8 of the Enabling Act, the president of the United States proclaimed the admission of the State of Washington into the Union.

TABLE OF CONTENTS

In part (A), for convenience of the reader, the latest constitutional amendments have been integrated with the currently effective original sections of the Constitution with the result that the Constitution is herein presented in its currently amended form.

All current sections, whether original sections or constitutional amendments, are carried in Article and section order and are printed in regular type.

Following each section which has been amended, the original section and intervening amendments (if any) are printed in italics.

Appended to each amendatory section is a history note stating the amendment number and date of its approval as well as the citation to the session law wherein may be found the legislative measure proposing the amendment; e.g. **"[AMENDMENT 27,** 1951 House Joint Resolution No. 8, p 961. Approved November 4, 1952.]"

In part (B), the constitutional amendments are also printed separately, in order of their adoption.

(A) Constitution of the State of Washington

PREAMBLE

Article I — DECLARATION OF RIGHTS

Sections

Article II — LEGISLATIVE DEPARTMENT

Sections

Article III — THE EXECUTIVE

Sections

Article IV — THE JUDICIARY

Sections

Article V — IMPEACHMENT

Sections

Article VI — ELECTIONS AND ELECTIVE RIGHTS

Sections

Article VII — REVENUE AND TAXATION

Sections

Article VIII — STATE, COUNTY, AND MUNICIPAL INDEBTEDNESS

Sections

Article IX — EDUCATION

Article XIII — STATE INSTITUTIONS

Sections

Article XIV — SEAT OF GOVERNMENT

Sections

Article XV — HARBORS AND TIDE WATERS

Sections

Article XVI — SCHOOL AND GRANTED LANDS

Sections

PREAMBLE

We, the people of the State of Washington, grateful to the Supreme Ruler of the universe for our liberties, do ordain this constitution.

ARTICLE I
DECLARATION OF RIGHTS

SECTION 1 POLITICAL POWER. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

SECTION 2 SUPREME LAW OF THE LAND. The Constitution of the United States is the supreme law of the land.

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

SECTION 4 RIGHT OF PETITION AND ASSEMBLAGE. The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

SECTION 5 FREEDOM OF SPEECH. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

SECTION 6 OATHS - MODE OF ADMINISTERING. The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered.

SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons, subject to such limitations as shall be determined by the legislature. [**AMENDMENT 104,** 2010 Engrossed Substitute House Joint Resolution No. 4220, p 3129. Approved November 2, 2010.]

Original text — Art. 1 Section 20 BAIL, WHEN AUTHORIZED — *All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great.*

SECTION 21 TRIAL BY JURY. The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

SECTION 22 RIGHTS OF THE ACCUSED. In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided,* The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed. [**AMENDMENT 10,** 1921 p 79 Section 1. Approved November, 1922.]

Original text — Art. 1 Section 22 RIGHTS OF ACCUSED PERSONS — *In criminal prosecution, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and, in no instance, shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.*

SECTION 23 BILL OF ATTAINDER, EX POST FACTO LAW, ETC. No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.

APPENDIX F

Chapter Listing | RCW Dispositions

Chapter 2.36 RCW

JURIES

Sections

NOTES:

Grand juries—Criminal investigations: Chapter 10.27 RCW.

Juries
crimes relating to: Chapter 9.51 RCW.
in eminent domain proceedings: Title 8 RCW.

Jury trial, civil cases, challenging, procedure, etc.: Chapter 4.44 RCW.

RCW 2.36.010

Definitions. *(Effective until January 1, 2022.)*

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) A jury is a body of persons temporarily selected from the qualified inhabitants of a particular district, and invested with power—

(a) To present or indict a person for a public offense.

(b) To try a question of fact.

(2) "Court" when used without further qualification means any superior court or court of limited jurisdiction in the state of Washington.

(3) "Judge" means every judicial officer authorized to hold or preside over a court. For purposes of this chapter "judge" does not include court commissioners or referees.

(4) "Juror" means any person summoned for service on a petit jury, grand jury, or jury of inquest as defined in this chapter.

(5) "Grand jury" means those twelve persons impaneled by a superior court to hear, examine, and investigate evidence concerning criminal activity and corruption.

(6) "Petit jury" means a body of persons twelve or less in number in the superior court and six in number in courts of limited jurisdiction, drawn by lot from the jurors in attendance upon the court at a particular session, and sworn to try and determine a question of fact.

(7) "Jury of inquest" means a body of persons six or fewer in number, but not fewer than four persons, summoned before the coroner or other ministerial officer, to inquire of particular facts.

(8) "Jury source list" means the list of all registered voters for any county, merged with a list of licensed drivers and identicard holders who reside in the county. The list shall specify each person's name and residence address and conform to the methodology and standards set pursuant to the provisions of RCW **2.36.054** or by supreme court rule. The list shall be filed with the superior court by the county auditor.

(9) "Master jury list" means the list of prospective jurors from which jurors summoned to serve will be randomly selected. The master jury list shall be either randomly selected from the jury source list or may be an exact duplicate of the jury source list.

(10) "Jury term" means a period of time of one or more days, not exceeding two weeks for counties with a jury source list that has at least seventy thousand names and one month for counties with a jury source list of less than seventy thousand names, during which summoned jurors must be available to report for juror service.

(11) "Juror service" means the period of time a juror is required to be present at the court facility. This period of time may not extend beyond the end of the jury term, and may not exceed one week for counties with a jury source list that has at least seventy thousand names, and two weeks for counties with a jury source list of less than seventy thousand names, except to complete a trial to which the juror was assigned during the service period.

(12) "Jury panel" means those persons randomly selected for jury service for a particular jury term.

(13) "Civil rights restored" means a person's right to vote has been provisionally or permanently restored prior to reporting for jury service.

[**2019 c 41 § 1**; **2015 c 7 § 1**; **1993 c 408 § 4**; **1992 c 93 § 1**; **1988 c 188 § 2**; **1891 c 48 § 1**; RRS § 89.]

NOTES:

Severability—Effective dates—1993 c 408: See notes following RCW 2.36.054.

Legislative findings—1988 c 188: "The legislature recognizes the vital and unique role of the jury system in enhancing our system of justice. The purpose of this chapter is the promotion of efficient jury administration and the opportunity for widespread citizen participation in the jury system. To accomplish this purpose the legislature intends that all courts and juries of inquest in the state of Washington select, summon, and compensate jurors uniformly." [1988 c 188 § 1.]

Severability—1988 c 188: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1988 c 188 § 23.]

Effective date—1988 c 188: "Except for section 19, this act shall take effect January 1, 1989. Section 19 of this act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately [March 22, 1988]." [1988 c 188 § 24.]

RCW 2.36.010

Definitions. *(Effective January 1, 2022.)*

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Civil rights restored" means a person's right to vote has been automatically restored prior to reporting for jury service.

(2) "Court" when used without further qualification means any superior court or court of limited jurisdiction in the state of Washington.

(3) "Grand jury" means those twelve persons impaneled by a superior court to hear, examine, and investigate evidence concerning criminal activity and corruption.

(4) "Judge" means every judicial officer authorized to hold or preside over a court. For purposes of this chapter "judge" does not include court commissioners or referees.

(5) "Juror" means any person summoned for service on a petit jury, grand jury, or jury of inquest as defined in this chapter.

(6) "Juror service" means the period of time a juror is required to be present at the court facility. This period of time may not extend beyond the end of the jury term, and may not exceed one week for counties with a jury source list that has at least seventy thousand names, and two weeks for counties with a jury source list of less than seventy thousand names, except to complete a trial to which the juror was assigned during the service period.

(7) A jury is a body of persons temporarily selected from the qualified inhabitants of a particular district, and invested with power—

(a) To present or indict a person for a public offense.

(b) To try a question of fact.

(8) "Jury of inquest" means a body of persons six or fewer in number, but not fewer than four persons, summoned before the coroner or other ministerial officer, to inquire of particular facts.

(9) "Jury panel" means those persons randomly selected for jury service for a particular jury term.

(10) "Jury source list" means the list of all registered voters for any county, merged with a list of licensed drivers and identicard holders who reside in the county. The list shall specify each person's name and residence address and conform to the methodology and standards set pursuant to the provisions of RCW 2.36.054 or by supreme court rule. The list shall be filed with the superior court by the county auditor.

(11) "Jury term" means a period of time of one or more days, not exceeding two weeks for counties with a jury source list that has at least seventy thousand names and one month for counties

with a jury source list of less than seventy thousand names, during which summoned jurors must be available to report for juror service.

(12) "Master jury list" means the list of prospective jurors from which jurors summoned to serve will be randomly selected. The master jury list shall be either randomly selected from the jury source list or may be an exact duplicate of the jury source list.

(13) "Petit jury" means a body of persons twelve or less in number in the superior court and six in number in courts of limited jurisdiction, drawn by lot from the jurors in attendance upon the court at a particular session, and sworn to try and determine a question of fact.

[**2021 c 10 § 6**; **2019 c 41 § 1**; **2015 c 7 § 1**; **1993 c 408 § 4**; **1992 c 93 § 1**; **1988 c 188 § 2**; **1891 c 48 § 1**; RRS § 89.]

NOTES:

Reviser's note: The definitions in this section have been alphabetized pursuant to RCW **1.08.015**(2)(k).

Effective date—2021 c 10: See note following RCW **29A.08.520**.

Severability—Effective dates—1993 c 408: See notes following RCW **2.36.054**.

Legislative findings—1988 c 188: "The legislature recognizes the vital and unique role of the jury system in enhancing our system of justice. The purpose of this chapter is the promotion of efficient jury administration and the opportunity for widespread citizen participation in the jury system. To accomplish this purpose the legislature intends that all courts and juries of inquest in the state of Washington select, summon, and compensate jurors uniformly." [**1988 c 188 § 1**.]

Severability—1988 c 188: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1988 c 188 § 23**.]

Effective date—1988 c 188: "Except for section 19, this act shall take effect January 1, 1989. Section 19 of this act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately [March 22, 1988]." [**1988 c 188 § 24**.]

RCW 2.36.020

Kinds of juries.

There shall be three kinds of juries—

(1) A grand jury.

(2) A petit jury.

(3) A jury of inquest.

[**1891 c 48 § 2**; RRS § 90.]

RCW 2.36.050

Juries in courts of limited jurisdiction.

In courts of limited jurisdiction, juries shall be selected and impaneled in the same manner as in the superior courts, except that a court of limited jurisdiction shall use the master jury list developed by the superior court to select a jury panel. Jurors for the jury panel may be selected at random from the population of the area served by the court.

[**1988 c 188 § 3**; **1980 c 162 § 6**; **1972 ex.s. c 57 § 1**; **1891 c 48 § 4**; RRS § 92.]

NOTES:

Legislative findings—Severability—Effective date—1988 c 188: See notes following RCW **2.36.010**.

Severability—1980 c 162: See note following RCW **3.02.010**.

*Courts of limited jurisdiction: Chapter **3.02** RCW.*

RCW 2.36.052

Courts of limited jurisdiction—Performance of jury management activities by superior court authorized.

Pursuant to an agreement between the judge or judges of each superior court and the judge or judges of each court of limited jurisdiction, jury management activities may be performed by the superior court for any county or judicial district as provided by statute.

[**1988 c 188 § 20**.]

NOTES:

Legislative findings—Severability—Effective date—1988 c 188: See notes following RCW **2.36.010**.

RCW 2.36.054

Jury source list—Master jury list—Creation.

Unless otherwise specified by rule of the supreme court, the jury source list and master jury list for each county shall be created as provided by this section.

(1) The superior court of each county, after consultation with the county clerk and county auditor of that jurisdiction, shall annually notify the consolidated technology services agency not later than March 1st of each year of its election to use either a jury source list that is merged by the county or a jury

source list that is merged by the consolidated technology services agency. The consolidated technology services agency shall annually furnish at no charge to the superior court of each county a separate list of the registered voters residing in that county as supplied annually by the secretary of state and a separate list of driver's license and identicard holders residing in that county as supplied annually by the department of licensing, or a merged list of all such persons residing in that county, in accordance with the annual notification required by this subsection. The lists provided by the consolidated technology services agency shall be in an electronic format mutually agreed upon by the superior court requesting it and the consolidated technology services agency. The annual merger of the list of registered voters residing in each county with the list of licensed drivers and identicard holders residing in each county to form a jury source list for each county shall be in accordance with the standards and methodology established in this chapter or by superseding court rule whether the merger is accomplished by the consolidated technology services agency or by a county.

(2) Persons on the lists of registered voters and driver's license and identicard holders shall be identified by a minimum of last name, first name, middle initial where available, date of birth, gender, and county of residence. Identifying information shall be used when merging the lists to ensure to the extent reasonably possible that persons are only listed once on the merged list. Conflicts in addresses are to be resolved by using the most recent record by date of last vote in a general election, date of driver's license or identicard address change or date of voter registration.

(3) The consolidated technology services agency shall provide counties that elect to receive a jury source list merged by the consolidated technology services agency with a list of names which are possible duplicates that cannot be resolved based on the identifying information required under subsection (2) of this section. If a possible duplication cannot subsequently be resolved satisfactorily through reasonable efforts by the county receiving the merged list, the possible duplicate name shall be stricken from the jury source list until the next annual jury source list is prepared.

[**2015 c 225 § 1**; **2011 1st sp.s. c 43 § 812**; **1993 c 408 § 3**.]

NOTES:

Effective date—Purpose—2011 1st sp.s. c 43: See notes following RCW **43.19.003**.

Severability—1993 c 408: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1993 c 408 § 14**.]

Effective dates—1993 c 408: "(1) Sections 1, 2, 3, 6, 8, and 13 of this act are necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1993.

(2) Sections 10 and 12 of this act shall take effect March 1, 1994.

(3) The remainder of this act shall take effect September 1, 1994." [**1993 c 408 § 15**.]

RCW 2.36.055

Jury source list—Jury assignment areas—Master jury list—Compilation.

The superior court at least annually shall cause a jury source list to be compiled from a list of all registered voters and a list of licensed drivers and identicard holders residing in the county.

In a county with more than one superior court facility and a separate case assignment area for each court facility, the jury source list may be divided into jury assignment areas that consist of registered voters and licensed drivers and identicard holders residing in each jury assignment area. Jury assignment area boundaries may be designated and adjusted by the administrative office of the courts based on the most current United States census data at the request of the majority of the judges of the superior court when required for the efficient and fair administration of justice.

The superior court upon receipt of the jury source list shall compile a master jury list. The master jury list shall be certified by the superior court and filed with the county clerk. All previous jury source lists and master jury lists shall be superseded. In the event that, for any reason, a county's jury source list is not timely created and available for use at least annually, the most recent previously compiled jury source list for that county shall be used by the courts of that county on an emergency basis only for the shortest period of time until a current jury source list is created and available for use.

Upon receipt of amendments to the list of registered voters and licensed drivers and identicard holders residing in the county the superior court may update the jury source list and master jury list as maintained by the county clerk accordingly.

[**2005 c 199 § 2**; **1993 c 408 § 5**; **1988 c 188 § 4**.]

NOTES:

Findings—Intent—2005 c 199: "The legislature finds that superior courts with more than one superior court facility are asking some jurors to travel excessively long distances to attend court proceedings. In these cases, the legislature further finds that consideration of a juror's proximity to a particular courthouse can be accommodated while continuing to provide proportionate jury source list representation from distinctive groups within the community. The legislature intends to lessen the burdens borne by jurors fulfilling their civic duties by providing a mechanism that narrows the geographic area from which the jurors are drawn while maintaining a random and proportionate jury pool." [**2005 c 199 § 1**.]

Severability—Effective dates—1993 c 408: See notes following RCW **2.36.054**.

Legislative findings—Severability—Effective date—1988 c 188: See notes following RCW **2.36.010**.

RCW 2.36.057

Expanded jury source list—Court rules.

The supreme court is requested to adopt court rules regarding methodology and standards for merging the list of registered voters in Washington state with the list of licensed drivers and identicard holders in Washington state for purposes of creating an expanded jury source list. The rules should specify the standard electronic format or formats in which the lists will be provided to requesting superior courts by the consolidated technology services agency. In the interim, and until such court rules become effective, the methodology and standards provided in RCW **2.36.054** shall apply. An expanded jury source list shall be available to the courts for use by September 1, 1994.

[**2015 3rd sp.s. c 1 § 401**; **2015 c 225 § 2**; **1993 c 408 § 1**.]

NOTES:

Effective date—2015 3rd sp.s. c 1 §§ 401-405, 409, 411, and 412: "Sections 401 through 405, 409, 411, and 412 of this act are necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and take effect July 24, 2015." [**2015 3rd sp.s. c 1 § 603**.]

Severability—Effective dates—1993 c 408: See notes following RCW **2.36.054**.

RCW 2.36.0571

Jury source list—Master jury list—Adoption of rules for implementation of methodology and standards by agencies.

The secretary of state, the department of licensing, and the consolidated technology services agency shall adopt administrative rules as necessary to provide for the implementation of the methodology and standards established pursuant to RCW **2.36.057** and **2.36.054** or by supreme court rule.

[**2015 3rd sp.s. c 1 § 402**; **2015 c 225 § 3**; **1993 c 408 § 2**.]

NOTES:

Effective date—2015 3rd sp.s. c 1 §§ 401-405, 409, 411, and 412: See note following RCW **2.36.057**.

Severability—Effective dates—1993 c 408: See notes following RCW **2.36.054**.

RCW 2.36.063

Compilation of jury source list, master jury list, and selection of jurors by electronic data processing.

The judge or judges of the superior court of any county may employ a properly programmed electronic data processing system or device to compile the jury source list, and to compile the master jury list and to randomly select jurors from the master jury list.

[**1993 c 408 § 6**; **1988 c 188 § 5**; **1973 2nd ex.s. c 13 § 1**.]

NOTES:

Severability—Effective dates—1993 c 408: See notes following RCW **2.36.054**.

Legislative findings—Severability—Effective date—1988 c 188: See notes following RCW **2.36.010**.

RCW 2.36.065

Judges to ensure random selection—Description of process.

It shall be the duty of the judges of the superior court to ensure continued random selection of the master jury list and jury panels, which shall be done without regard to whether a person's name originally appeared on the list of registered voters, or on the list of licensed drivers and identicard holders, or both. The judges shall review the process from time to time and shall cause to be kept on file with the county clerk a description of the jury selection process. Any person who desires may inspect this description in said office.

Nothing in this chapter shall be construed as requiring uniform equipment or method throughout the state, so long as fair and random selection of the master jury list and jury panels is achieved.

[**1993 c 408 § 7**; **1988 c 188 § 6**.]

NOTES:

Severability—Effective dates—1993 c 408: See notes following RCW **2.36.054**.

Legislative findings—Severability—Effective date—1988 c 188: See notes following RCW **2.36.010**.

RCW 2.36.070

Qualification of juror.

A person shall be competent to serve as a juror in the state of Washington unless that person:
(1) Is less than eighteen years of age;
(2) Is not a citizen of the United States;
(3) Is not a resident of the county in which he or she has been summoned to serve;
(4) Is not able to communicate in the English language; or
(5) Has been convicted of a felony and has not had his or her civil rights restored.

[**1988 c 188 § 7**; **1975 1st ex.s. c 203 § 1**; **1971 ex.s. c 292 § 3**; **1911 c 57 § 1**; RRS § 94. Prior: **1909 c 73 § 1**.]

NOTES:

Legislative findings—Severability—Effective date—1988 c 188: See notes following RCW **2.36.010**.

Severability—1971 ex.s. c 292: See note following RCW **26.28.010**.

RCW 2.36.072

Determination of juror qualification—Written or electronic declaration.

(1) Each court shall establish a means to preliminarily determine by a written or electronic declaration signed under penalty of perjury by the person summoned, the qualifications set forth in RCW **2.36.070** of each person summoned for jury duty prior to their appearance at the court to which they are summoned to serve.

(2) An electronic signature may be used in lieu of a written signature.

(3) "Electronic signature" means an electric sound, symbol, or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document.

(4) Upon receipt by the summoning court of a written declaration stating that a declarant does not meet the qualifications set forth in RCW **2.36.070**, that declarant shall be excused from appearing in response to the summons. If a person summoned to appear for jury duty fails to sign and return a declaration of his or her qualifications to serve as a juror prior to appearing in response to a summons and is later determined to be unqualified for one of the reasons set forth in RCW **2.36.070**, that person shall not be entitled to any compensation as provided in RCW **2.36.150**. Information provided to the court for preliminary determination of statutory qualification for jury duty may only be used for the term such person is summoned and may not be used for any other purpose, except that the court, or designee, may report a change of address or nondelivery of summons of persons summoned for jury duty to the county auditor.

[**2009 c 330 § 1**; **1993 c 408 § 9**.]

NOTES:

Severability—Effective dates—1993 c 408: See notes following RCW **2.36.054**.

RCW 2.36.080

Selection of jurors—State policy—Exclusion on account of membership in a protected class or economic status prohibited.

(1) It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with chapter 135, Laws of 1979 ex. sess. to be considered for jury service in this state and have an obligation to serve as jurors when summoned for that purpose.

(2) It is the policy of this state to maximize the availability of residents of the state for jury service. It also is the policy of this state to minimize the burden on the prospective jurors, their families, and employers resulting from jury service. The jury term and jury service should be set at as brief an interval as is practical given the size of the jury source list for the judicial district. The optimal jury term is one week or less. Optimal juror service is one day or one trial, whichever is longer.

(3) A citizen shall not be excluded from jury service in this state on account of membership in a protected class recognized in RCW **49.60.030**, or on account of economic status.

(4) This section does not affect the right to peremptory challenges under RCW **4.44.130**, the right to general causes of challenge under RCW **4.44.160**, the right to particular causes of challenge under RCW **4.44.170**, or a judge's duty to excuse a juror under RCW **2.36.110**.

[**2018 c 23 § 1**; **2015 c 7 § 3**; **1992 c 93 § 2**; **1979 ex.s. c 135 § 2**; **1967 c 39 § 1**; **1911 c 57 § 2**; RRS § 95. Prior: **1909 c 73 § 2**.]

NOTES:

Severability—1979 ex.s. c 135: "If any provision of this amendatory act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1979 ex.s. c 135 § 12**.]

RCW 2.36.093

Selection of jurors—Length and number of terms—Time of service.

(1) At such time as the judge or judges of any court of any county shall deem that the public business requires a jury term to be held, the judge or judges shall direct that a jury panel be selected and summoned to serve for the ensuing jury term or terms.

(2) The court shall establish the length and number of jury terms in a consecutive twelve-month period, and shall establish the time of juror service consistent with the provisions of RCW **2.36.010**.

[**1992 c 93 § 3**; **1988 c 188 § 8**; **1973 2nd ex.s. c 13 § 2**.]

NOTES:

Legislative findings—Severability—Effective date—1988 c 188: See notes following RCW **2.36.010**.

RCW 2.36.095

Summons to persons selected.

(1) Persons selected to serve on a petit jury, grand jury, or jury of inquest shall be summoned by mail or personal service. The county clerk shall issue summons and thereby notify persons selected for jury duty. The clerk may issue summons for any jury term, in any consecutive twelve-month period, at any time thirty days or more before the beginning of the jury term for which the summons are issued. However, when applicable, the provisions of RCW **2.36.130** apply.

(2) In courts of limited jurisdiction summons shall be issued by the court. Upon the agreement of the courts, the county clerk may summon jurors for any and all courts in the county or judicial district.

[**2013 c 246 § 1**; **1993 c 408 § 8**; **1992 c 93 § 4**; **1990 c 140 § 1**; **1988 c 188 § 9**.]

NOTES:

Severability—Effective dates—1993 c 408: See notes following RCW **2.36.054**.

Legislative findings—Severability—Effective date—1988 c 188: See notes following RCW **2.36.010**.

RCW 2.36.100

Excuse from service—Reasons—Assignment to another term—Summons for additional service—Certification of prior service.

(1) Except for a person who is not qualified for jury service under RCW **2.36.070**, no person may be excused from jury service by the court except upon a showing of undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court for a period of time the court deems necessary.

(2) At the discretion of the court's designee, after a request by a prospective juror to be excused, a prospective juror excused from juror service for a particular time may be assigned to another jury term within the twelve-month period. If the assignment to another jury term is made at the time a juror is excused from the jury term for which he or she was summoned, a second summons under RCW **2.36.095** need not be issued.

(3) When the jury source list has been fully summoned within a consecutive twelve-month period and additional jurors are needed, jurors who have already served during the consecutive twelve-month period may be summoned again for service. A juror who has previously served may only be excused if he or she served at least one week of juror service within the preceding twelve months. An excuse for prior service shall be granted only upon the written request of the prospective juror, which request shall certify the terms of prior service. Prior jury service may include service in superior court, in a court of limited jurisdiction, in the United States District Court, or on a jury of inquest.

[**2015 c 7 § 2**; **1992 c 93 § 5**; **1988 c 188 § 10**; **1983 c 181 § 1**; **1979 ex.s. c 135 § 3**; **1911 c 57 § 7**; RRS § 100. Prior: **1909 c 73 § 7**.]

NOTES:

Legislative findings—Severability—Effective date—1988 c 188: See notes following RCW **2.36.010**.

Severability—1979 ex.s. c 135: See note following RCW **2.36.080**.

RCW 2.36.110

Judge must excuse unfit person.

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or

any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

[**1988 c 188 § 11**; **1925 ex.s. c 191 § 3**; RRS § 97-1.]

NOTES:

Legislative findings—Severability—Effective date—1988 c 188: See notes following RCW **2.36.010**.

RCW 2.36.130

Additional names.

If for any reason the jurors drawn for service upon a jury for any term shall not be sufficient to dispose of the pending jury business, or where no jury is in regular attendance and the business of the court may require the attendance of a jury before a regular term, the judge or judges of any court may direct the random selection and summoning from the master jury list such additional names as they may consider necessary.

[**1988 c 188 § 12**; **1911 c 57 § 6**; RRS § 99.]

NOTES:

Legislative findings—Severability—Effective date—1988 c 188: See notes following RCW **2.36.010**.

RCW 2.36.150

Juror expense payments—Reimbursement by state—Pilot projects.

Jurors shall receive for each day's attendance, besides mileage at the rate determined under RCW **43.03.060**, the following expense payments:

(1) Grand jurors may receive up to twenty-five dollars but in no case less than ten dollars;

(2) Petit jurors may receive up to twenty-five dollars but in no case less than ten dollars;

(3) Coroner's jurors may receive up to twenty-five dollars but in no case less than ten dollars;

(4) District court jurors may receive up to twenty-five dollars but in no case less than ten dollars: PROVIDED, That a person excused from jury service at his or her own request shall be allowed not more than a per diem and such mileage, if any, as to the court shall seem just and equitable under all circumstances: PROVIDED FURTHER, That the state shall fully reimburse the county in which trial is held for all jury fees and witness fees related to criminal cases which result from incidents occurring within an adult or juvenile correctional institution: PROVIDED FURTHER, That the expense payments paid to jurors shall be determined by the county legislative authority and shall be uniformly applied within the county.

For the fiscal year ending June 30, 2007, jurors participating in pilot projects in superior, district, and municipal courts may receive juror fees of up to sixty-two dollars for each day of attendance in addition to mileage reimbursement at the rate determined under RCW **43.03.060**.

[**2006 c 372 § 903**; **2004 c 127 § 1**; **1987 c 202 § 105**; **1979 ex.s. c 135 § 7**; **1975 1st ex.s. c 76 § 1**; **1959 c 73 § 1**; **1951 c 51 § 2**; **1943 c 188 § 1**; **1933 c 52 § 1**; **1927 c 171 § 1**; 1907 c 56 § 1, part; Rem. Supp. 1943 § 4229. Prior: 1903 c 151 § 1, part; 1893 p 421 § 1, part; Code 1881 § 2086, part.]

NOTES:

Severability—Effective date—2006 c 372: See notes following RCW **73.04.135**.

Intent—1987 c 202: See note following RCW **2.04.190**.

Severability—1979 ex.s. c 135: See note following RCW **2.36.080**.

*Travel expense in lieu of mileage in certain cases: RCW **2.40.030**.*

RCW 2.36.165

Leave of absence from employment to be provided—Denial of promotional opportunities prohibited—Penalty—Civil action.

(1) An employer shall provide an employee with a sufficient leave of absence from employment to serve as a juror when that employee is summoned pursuant to chapter **2.36** RCW.

(2) An employer shall not deprive an employee of employment or threaten, coerce, or harass an employee, or deny an employee promotional opportunities because the employee receives a summons, responds to the summons, serves as a juror, or attends court for prospective jury service.

(3) An employer who intentionally violates subsection (1) or (2) of this section shall be guilty of a misdemeanor.

(4) If an employer commits an act in violation of subsection (2) of this section the employee may bring a civil action for damages as a result of the violation and for an order requiring the reinstatement of the employee. If the employee prevails, the employee shall be allowed a reasonable attorney's fee as determined by the court.

(5) For purposes of this section employer means any person, association, partnership, or private or public corporation who employs or exercises control over wages, hours, or working conditions of one or more employees.

[**1988 c 188 § 13**.]

NOTES:

Legislative findings—Severability—Effective date—1988 c 188: See notes following RCW **2.36.010**.

RCW 2.36.170

Failure of juror to appear—Penalty.

A person summoned for jury service who intentionally fails to appear as directed shall be guilty of a misdemeanor.

[1988 c 188 § 14.]

NOTES:

Legislative findings—Severability—Effective date—1988 c 188: See notes following RCW 2.36.010.

WILLIAMS KASTNER & GIBBS

April 29, 2022 - 2:29 PM

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