Supreme Court No. 100893-7
Court of Appeals No. 81918-6-I
King County Superior Court No. 19-2-14878-1 SEA

THE SUPREME COURT OF THE STATE OF WASHINGTON

RAYMOND BUDD

Plaintiff/Respondent,

v.

KAISER GYPSUM COMPANY, INC.

Defendant/Appellant.

PLAINTIFF/RESPONDENT RAYMOND BUDD'S ANSWER TO PETITION FOR REVIEW

Alexandra B. Caggiano, WSBA No. 47862
Brian D. Weinstein, WSBA No. 24497
WEINSTEIN CAGGIANO PLLC
600 University Street, Suite 1620
Seattle, Washington 98101
Phone: (206) 508-7070
Fax: (206) 237-8650

Counsel for Plaintiff/Respondent

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I. INTRODUCTION

This Court should decline to review Division One's decision affirming the jury's verdict against Kaiser Gypsum Company Inc. (Kaiser). Kaiser lost the nine issues raised with Division One, and though it concedes many, Kaiser remains incorrect on the remaining issues maintained in its petition.

Kaiser points to no holding or statement of law by Division One that genuinely conflicts with any other Washington appellate case or constitutional protection. RAP 13.4(b)(1)–(b)(3). Nor does its petition raise any issue of substantial public importance. RAP 13.4(b)(4). Division One's decision follows from prudent application of precedent. Kaiser ignores such analysis and application in its petition and instead misconstrues law to arrive at its own unwarranted conclusions. Kaiser's broad allegations of error do not withstand scrutiny when reviewing the cases and constitutional provision cited.

II. RE-STATEMENT OF THE ISSUES

A. Whether the venire process was within the trial court's discretion and substantially complied with RCW 2.36 *et seq.*?

B. Whether the trial court correctly denied Kaiser's post–trial motion under CR 59 because evidence showed Plaintiff's

mesothelioma was caused by Kaiser's asbestos-containing joint compound?

C. Whether the trial court was within its discretion to allow Plaintiff to argue from the evidence during closing?

D. Whether the trial court abused its discretion by barring highly prejudicial evidence where the door was not opened?

III. COUNTER-STATEMENT OF FACTS

Plaintiff was diagnosed with mesothelioma in February 2019. Plaintiff sued various asbestos manufacturers but went to trial against only Kaiser on August 10, 2020. This trial was the first to resume after Washington courts shut down due to the Covid-19 pandemic.

(A) Jury Selection. On June 18, 2020, this Court issued an Order re: Modification of Jury Trial Proceedings given the pandemic. Recognizing the need to resume jury trials, this Court provided for certain accommodations to court procedures to resume trials in a safe manner.

Because of the newness of the pandemic and the fluidity in reopening the courtrooms, the trial court held several pretrial conferences to update the parties regarding procedures. On August 7, 2020, the court made several statements about the jury

selection process based on its knowledge at the time. On August 10, Kaiser filed an objection based on those August 7 statements, similar to its previous motion for trial continuance. *See* CP 3336–3525.

On September 1, 2020, the trial court clarified several key facts regarding its earlier statements (VRP 2171–77, CP 11337–40): that King County Superior Court mailed summonses to over 1,000 jurors;[1] those jurors were asked to respond via email, telephone, or in person (*id.*); the County emailed a questionnaire to the 183 jurors who responded to the mailed summonses; the County did not have a policy to exclude jury panelists for lack of email addresses (CP 11338–39), rather, any exclusion would have been self-exclusion by not responding to the court's summons (*id.*).

(B)(1) Medical Causation of Plaintiff's Mesothelioma. Consistent with *Lockwood v. AC&S*, 109 Wn.2d 235, 248 (1987), Plaintiff presented considerable evidence relating to his exposure

[1] VRP 2174–77, CP 11337–40. It is unclear whether many or all of those summoned jurors previously deferred ("It was my understanding that many or maybe all of them were people who had been deferred at least once in the past; I don't know any details about that. But they were the ones who responded to this particular call."). VRP 2175:17–21.

to Kaiser's asbestos-containing joint compound working for his family's business, Joe Budd Construction (VRP 1363, 1365).

Starting at age ten, Plaintiff learned the drywall business from his dad, working together from 1962 to 1971. VRP 1361–66, 1376–79, 949–56 (extent of time exposed). ***They only used Kaiser's joint compound during this ten year period***. VRP 1363. Plaintiff poured and mixed joint compound powder with water into a smooth paste; applied the paste over joints and nailheads; sanded it smooth in between coat applications; and swept the joint compound dust and larger "drops" at the end of each day. VRP 1361–66, 1376–79, 949–56 (proximity, frequency, nature of product, how product was used). Plaintiff recalled how his dad had a "white face, white hair, white gloves" from all the dust at the end of each day. VRP 1377–78. He described "a dust cloud" created by sweeping and blowing dust off their clothes using an air hose at the end of the day. VRP 1360–61, 1381.

Plaintiff's occupational medicine expert, Dr. Holstein, testified that joint compound was typically 6–12% asbestos (VRP 950:7–9); the trial exhibits showed Kaiser's joint compound contained 9–12% (Tr. Ex. 96, 98–101) (asbestos

content of product). Dr. Holstein described how the various jobs Plaintiff performed ***for ten years exclusively with Kaiser's asbestos-containing joint compound***—handling and mixing joint compound powder; sanding it; cleaning up joint compound dust and dried "globs" at the end of the day; and re-entrainment from activities like walking through the settled dust—***created considerable amounts of asbestos dust Plaintiff breathed***. VRP 949–56, 1120–27, 1303–06.

Dr. Holstein testified that these cumulative exposures Plaintiff sustained to the dust given off by Kaiser's joint compound was not just a substantial factor in causing his mesothelioma but ***the*** cause of his mesothelioma. VRP 1120–27, 1317–18 (expert testimony on effects of asbestos on Plaintiff).

(B)(2) Plaintiff based his case on the evidence that all types of asbestos, including chrysotile (the type of asbestos fiber used in Kaiser's joint compound products) causes mesothelioma, and more specifically, caused Plaintiff's mesothelioma based on his exposures to Kaiser's products (VRP 949–56). With the lower courts, Kaiser focused its causation point of error on a lack

of drywaller epidemiology and toxicology. CP 11997–99; Opening Br. at 19–20.

Dr. Holstein testified about abundant scientific research to support his opinion that all asbestos, including chrysotile, causes mesothelioma. *E.g.*, VRP 938:13–947:5, 1032:20–38:21, 1093:11–1101:16; *see also* VRP 839:18–40:15 (expert testimony on effects of asbestos in general). The mainstream scientific community who have researched this issue—including epidemiologists and epidemiologic societies—all come to this conclusion. VRP 804:22–05:9, 1035:13–24, 1093:11–1101:16. He concluded that Plaintiff's exposure to large amounts of Kaiser's asbestos-containing joint compound was the only identifiable cause of his mesothelioma. VRP 949–56. Plaintiff's expert Dr. Arnold Brody, who has a Ph.D. in cell biology, testified about the studies he has personally done showing chrysotile fibers cause genetic damage during cell division in the pleura, where mesothelioma originates. VRP 789:5–90:21, 804:21–22:12, 831:7–38:7.

(C)(1) Closing Statements. On August 27, 2020, during its direct examination of its expert Dr. Weill, Kaiser asked

whether any epidemiological studies linked Calidria (one of the three different brands of chrysotile asbestos Kaiser used in its joint compound) to mesothelioma. The transcript stated that Dr. Weill responded "yes". VRP 1819:8–12. Five days later, Kaiser raised the issue to the court that Plaintiff allegedly sought to rely on an "erroneously transcribed" transcription during closing arguments. VRP 2251–55. The court overruled Kaiser's objection and allowed both parties to make their arguments on the issue. *Id.*

After trial, Kaiser filed numerous motions and ultimately requested to correct the transcript under RAP 9.5(c). CP 11988–12016, 12017–32, 13875–79, 13883–98. The trial court denied each of Kaiser's motions to alter or "correct" the transcript. CP 13090–92, 13740–43, 13744–46, 15230–42, Appendix G_006–7. Notably, the trial court determined that discussing Weill's response at issue had no bearing on the jury's decision—the court had instructed the jury to base its verdict on the evidence and that

lawyers' remarks in closing were not evidence. CP 13090–92, 13740–43.[2]

The court held a five hour RAP 9.5(c) evidentiary hearing on May 4, 2021, admitting all of Kaiser's proffered exhibits and listening to the witnesses' testimony. The audio assist backup recording was played repeatedly. CP 15230–42. Afterward, the trial court issued findings of fact and conclusions of law that the transcript was correctly transcribed. CP 15238–41.

Kaiser afterward hired certified court reporter Grace Hitchman to transcribe the audio file of the hearing. May 4, 2021 hearing, VRP 146. Ms. Hitchman (who had no involvement with the trial) listened to and transcribed the question and answer at issue each time the audio assist backup file was played. Ms. Hitchman ***also*** transcribed the response in the affirmative each time.[3]

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[2] Moreover, the response at issue pertained only to Calidria, one of the three asbestos suppliers that Kaiser used. VRP 784:8–85:11, Tr. Ex. 95–96, 98–101. Mr. Budd never attributed his exposures to any one brand name versus another. *See generally*, *e.g.*, VRP 804:21–16:20; 832:9–51:22; 840:6–15; Tr. Ex. 95–96, 98–101. The jury's decision was necessarily based on the premise that all chrysotile is harmful, not just Calidria.

[3] May 4, 2021 hearing, VRP 64:17–65:3, 65:20–8, 107:23–08:9. To date, no certified court reporter heard "no" to the response at issue.

More than four months later, Kaiser filed a motion for relief based upon what it termed "newly discovered evidence." This occurred while Kaiser's first appeal was still pending and Kaiser only mentioned it in its reply, to which Plaintiff could not respond. This "new" evidence consisted of an "expert" forensic audio examiner Kaiser hired who merely listened to a distorted version of the backup recording. Appendix G_007. Ten days after appellate arguments, the trial court held another evidentiary hearing for Kaiser's new motion. It concluded that (1) Kaiser could have obtained the evidence earlier, and (2) even if "newly discovered", Kaiser's "expert's" testimony "is not sufficiently persuasive to justify the court in changing its findings of fact and conclusions of law with respect to the audio backup recording."[4]

(C)(2) Regarding the NIOSH document shown during closing, it had been admitted for illustrative purposes during trial, which Kaiser admits. VRP 2254:8–55:4.

> The Court: 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

[4] *Id.*; Appendix H. Though not in this Court's record, Plaintiff raises these orders pursuant to RAP 10.4(c) to address Kaiser's incomplete narrative. It demonstrates that this issue has been fully exhausted in Plaintiff's favor.

> the portions that happened to have been shown to the jurors during examination.

Id. at 2255:1–10.

(D) Challenged Evidence. Plaintiff first moved in limine to exclude evidence of his sexual battery conviction and the events between 1986–1989 relating to that conviction. CP 709–843. Kaiser's only argument was that the challenged evidence was relevant to Mrs. Budd's loss of consortium claim. CP 844–903. The trial court agreed with Kaiser and denied Plaintiffs' motion. CP 917–21. Plaintiff then dropped Mrs. Budd's loss of consortium claim and any loss of parent–child relationship to avoid opening the door to that highly prejudicial evidence. CP 7800–02.

After dismissing those claims, Plaintiff renewed his motion in limine. CP 947–54. Although not raised before, Kaiser next argued that the challenged evidence was relevant to Plaintiff's loss of enjoyment of life and to rebut what Kaiser characterized as Plaintiff's depiction as a "family man". CP 5080–93. The trial court again denied Plaintiff's motion, taking a "wait-and-see" approach. CP 7804–12. The court also clarified what kind of evidence may "open the door" to allow Kaiser to

raise such prejudicial evidence during trial. CP 7810. Accordingly, Plaintiff amended his deposition designations (and trial strategy) twice in order to ensure that he did not open the door to it. CP 7535–36. Mrs. Budd presented a ***very*** limited portrayal consisting strictly of how mesothelioma has affected Plaintiff and a comparison of the activities he enjoyed before and after his diagnosis.[5] In fact, Plaintiff objected to the sole juror question to Mrs. Budd, "what is your favorite thing to do with your husband," in order to limit the evidence ***only*** to the loss of activities that Plaintiff has experienced due to mesothelioma and to avoid "opening the door" to the relevancy of this evidence. CP 10037, VRP 1509.

Kaiser offered no evidence nor offer of proof to the court that it was necessary to show that Plaintiff was not enjoying his life or the activities with his grandchildren and wife because of his actions from thirty years ago. VRP 1504–1507; CP 709–903, 947–54, 5080–93. Notably, Kaiser had an opportunity to ask Plaintiff about the loss of enjoyment he purportedly feels at a

[5] VRP 1418–19, 1494–1502. Neither she nor Mr. Budd testified about their relationship. *See id.*

second deposition dedicated entirely to that evidence, and did not ask. CP 889–95. Accordingly, Kaiser only speculates in its petition (and at trial) that Plaintiff does not *really* enjoy the activities in his life now because of his actions from decades ago.

IV. ANSWERING ARGUMENT

Although omitted in Kaiser's petition, the standard of review for all of the claimed errors it raises involve questions of whether the trial court abused its discretion.[6]

"A trial court abuses its discretion when its decision is 'manifestly unreasonable or based upon untenable grounds or reasons.'" *Budd v. Kaiser Gypsum Company, Inc.*, 21 Wn. App. 2d 56, 64 (quoting *Salas*, 168 Wn.2d at 668–69). "An 'appellate court cannot hold that a trial court abused its discretion 'simply

[6] As Division One explained in its detailed analysis, the trial court's ruling regarding challenges to the venire process (Section IV.A) and denial of a CR 59 motion are reviewed for abuse of discretion. *Budd*, 21 Wn. App. 2d at 64 (citing *State v. Clark*, 167 Wn. App. 667, 674, *aff'd*, 178 Wn.2d 19 (2013)); *Konicke v. Evergreen Emergency Servs., P.S.*, 16 Wn. App. 2d 131, 147 (2021). Likewise, Kaiser's medical causation (Section IV.B) issue based on the trial court's denial of a CR 59 motion is reviewed for abuse of discretion. *Budd*, 21 Wn. App. 2d at 76 (citing *Konicke*, 16 Wn. App. at 147). The trial court's decisions to admit or exclude evidence in closing statements and the challenged evidence are reviewed for abuse of discretion. *Budd*, 21 Wn. App. 2d at 69, 82 (citing *Salas v. Hi–Tech Erectors*, 168 Wn.2d 664, 668, 671 (2010); *Hollins v. Zbaraschuk*, 200 Wn. App. 578, 582–83 (2017) (reviewing a "classic discretionary decision" for abuse of discretion)).

because it would have decided the case differently.'" *Budd*, 21 Wn. App. 2d at 64 (quoting *Coogan v. Borg-Warner Morse Tec Inc.*, 197 Wn.2d 790, 804–05 (2021)).

A. Division One correctly affirmed the trial court's use of discretion in rejecting Kaiser's challenges to jury selection.

Kaiser takes issue with the "randomness" of the jury trial, which is governed not by the Washington or U.S. Constitutions, but rather, by Washington's statutory scheme RCW 2.36 *et seq*.[7] Thus, the real question is whether Division One's decision is inconsistent with any Washington appellate cases to warrant review under RAP 13.4(a)–(b). Yet Kaiser's petition is silent on Division One's analysis of how this situation is consistent with those decisions.

While the jury selection statutes mandate that members of a jury panel be randomly selected (*Budd*, 21 Wn. App. 2d at 64) (citing *Brady v. Fibreboard Corp.*, 71 Wn. App. 280, 282 (1993)), "'the statutory requirements for making up the jury lists are merely directory and need be only substantially complied

[7] *See* Pet. at 17–20. Whether the trial court met the requirements of a statute does not fall within RAP 13.4 to warrant this Court's review.

with.'" *Id.* at 65 (quoting *City of Tukwila v. Garrett*, 165 Wn.2d 152, 159 (2008)); RCW 2.36.065). "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." *City of Tukwila*, 165 Wn.2d at 161 (alteration in original) (citations omitted); *see also W.E. Roche Fruit Co. v. N. Pac. Ry. Co.*, 18 Wn.2d 484, 488 (1943); *State v. Tingdale*, 117 Wn.2d 595, 600 (1991).

> 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.[8]

As Division One correctly determined, the purpose of ensuring a fair and impartial jury inherent to *Roche* was met in this case. *Budd*, 21 Wn. App. at 67. King County Superior Court mailed summonses to over 1,000 jurors. VRP 2174–77, CP 11337–40. Only 183 responded, all of whom were sent a questionnaire to

[8] *Budd*, 21 Wn. App. 2d at 65 (quoting *Roche*, 18 Wn.2d at 487–88) (holding that the inclusion of women who solicited serving on the jury did not violate Washington's selection procedures).

complete. VRP 2174:1–77:5. Of those 183, 89 responded to the questionnaire. *Id.* Every one of those 89 were then placed on the jury list in the random order in which their responses were received.[9] Unlike the circumstances in *Brady* and *Tingdale*, in this case, no prospective juror in the ***panel*** was excluded by the County, clerk, judicial assistant, or even judge. No juror in the panel was excused until the attorneys began voir dire.[10]

The fact that the summoned jurors may have previously deferred service has no bearing on whether Kaiser received an unbiased trial. It stands to reason that anyone who had previously deferred *had* been randomly selected from the Master Jury List detailed in RCW 2.36.055. Moreover, there is no case law or constitutional right that guarantees Kaiser any certain mix of jurors in a jury pool who have or have not deferred jury service. *Budd*, 21 Wn. App. 2d at 67.

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[9] *Id.* Notably, Kaiser offers no evidence that "Hundreds of thousands of otherwise eligible candidates were excluded" by the court. Pet. at 20. Regardless, this is not the test for ensuring randomness and no authority says it could or should be.

[10] Both *Brady* and *Tingdale* involved cases where prospective jurors who already made it onto the jury panel were summarily excluded by people not the trial judge before jury selection began. *Brady*, 171 Wn. App. at 281–82; *Tingdale*, 117 Wn.2d at 597–99.

Such a rule would be untenable in its application. For example, pre-Covid, jury selection commonly involved a certain number of jurors who show up for one trial, and after being dismissed from one venire, these "leftovers" are directed to another. What's more, there is always some number of jurors who do not show up to any given jury pool. The County does not send a sheriff to force everyone's appearance because the whole system would quickly break down. Under Kaiser's theory, both of these examples—which routinely occur in jury selection—materially deviate from the randomness contemplated by *Roche* and RCW 2.36.065. Such a position would have the effect of grinding jury trials to a halt.

Finally, Kaiser does not cite any authority to support its conclusory statements that the procedure materially deviated from Washington's statutes or Supreme Court precedent such as to destroy "randomness" as contemplated by RCW 2.36.065.[11] Kaiser does not make any showing regarding what the King County Superior Court's usual procedure is from which it alleges

[11] Pet. at 18–20. Division One noted Kaiser's lack of authority in its opinion. *Budd*, 21 Wn. App. 2d at 66–67.

the trial court materially deviated. *See id.* Nor does Kaiser even try to point to any prejudice. *See id.* Its unsupported arguments do not warrant review with this Court.

B. Division One's Causation Decision is Entirely Consistent with *Lockwood*.

Division One did cite *Lockwood* in its causation analysis[12] but focused on an argument regarding epidemiological and toxicological evidence because that was ***Kaiser's*** argument to the lower courts.[13] The reason Kaiser focused on epidemiology is because the evidence of the *Lockwood* factors during trial—including proximity, duration, frequency, nature of use, asbestos content, and effects of asbestos in general and on Plaintiff—was so overwhelming it would have been ridiculous for Kaiser to assert the factors had not been evidenced.[14]

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[12] 21 Wn. App. 2d at 76.

[13] Kaiser focused its argument on epidemiology in its motion for directed verdict during trial (VRP 1510–15); motion for dismissal after trial (CP 11988–12016); and opening and reply briefs to Division One, filed June 1, 2021, and September 14, 2021, respectively (Opening brief at 19–20, Reply brief at 17–20). Arguments not raised below generally will not be considered on appeal. *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 853 (2002).

[14] *Lockwood* shows the burden on these factors is quite low. 109 Wn.2d at 240–47. In *Lockwood*, the plaintiff did not testify about even being near the defendant's product. *Id.* Instead, witnesses testified that the defendant's product was used in the shipyard generally, including some vessels where Lockwood worked; and an expert testified that asbestos fibers can drift throughout the shipyard. *Id.* Yet this was sufficient to uphold the jury

Plaintiff used only Kaiser's asbestos-containing joint compound for ten years. VRP 1361–66, 1376–79, 949–56. He discussed the large amounts of dust it created when mixing, sanding, and sweeping it. *Id.* Dr. Holstein testified that these exposures created considerable amounts of dust that Plaintiff breathed and that caused his mesothelioma. VRP 949–56, 1120–27, 1303–06. He opined that these cumulative exposures were not just a substantial factor in causing his mesothelioma but ***the*** cause of his mesothelioma. VRP 1120–27, 1317–18. Understandably then, Kaiser did not raise this lackluster argument about the *Lockwood* factors with the trial court, who had heard this extensive evidence during trial.

Kaiser interprets *Lockwood* to require plaintiff to show statistical evidence ***for a particular product*** as the only means to establish causation for a particular plaintiff's disease. Kaiser's interpretation is much more stringent than what this Court held:

> In addition [to the other *Lockwood* factors], trial courts must consider the evidence presented as to medical causation of the plaintiff's particular disease. Such evidence would include expert

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verdict in favor of *Lockwood*. *Id.* at 246–47. Plaintiff's evidence presented here is much stronger. *Supra*, Section III.B(1).

> testimony on the effects of inhalation of asbestos on human health in general and on the plaintiff in particular. It would also include evidence of any other substances that could have contributed to the plaintiff's disease, and expert testimony as to the combined effects of exposure to all possible sources of the disease.

Lockwood, 109 Wn.2d at 248–49. Moreover, Kaiser's reading conflicts with this Court's other decisions: *Reese v. Stroh*, 128 Wn.2d 300, 309 (1995) ("We do not find that lack of statistical support fatal to Dr. Fallat's causation opinion. Such support is required neither by ER 702, 703, nor by our case law."); *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 610 (2011) (same) (citing *Reese*, 128 Wn.2d at 305)).

Division One correctly determined that the trial court did not abuse its direction regarding the medical causation issue. Dr. Holstein testified for three days about the abundant scientific research that supports his opinion that all types of asbestos fibers—including the chrysotile asbestos fibers Kaiser used in its joint compound—cause mesothelioma, and that Plaintiff's exposures to Kaiser's asbestos-containing joint compound caused his mesothelioma. *E.g.*, VRP 804–05, 938–56, 1032–38,

1093–1101, 1289–97. Such a showing is consistent with this Court's decisions in *Lockwood*, *Reese*, and *Anderson*.

C. The Trial Court Did Not Abuse Its Discretion During Closing Statements.

1. No New Evidence was Presented Because the Transcript was Correctly Transcribed.

In its petition, Kaiser argues in effect that the trial court abused its discretion by overruling Kaiser's objections during closing, ignoring most of Division One's extensive analysis. Pet. at 23–28; *cf. Budd*, 21 Wn. App. 2d at 69–72, 85–88. None of the cases that Kaiser cites in its petition conflict with Division One's decision.

Kaiser cites *State v. Rose*, 62 Wn.2d 309, 312 (1963), for the proposition that attorneys cannot make prejudicial statements not sustained by the record. Pet. at 23–24. Kaiser bases this argument on the false premise that the transcript was incorrectly transcribed. The record shows the opposite is true: The trial court entertained several post-trial motions and two extensive evidentiary hearings at Kaiser's request. The court repeatedly

determined that the transcript was ***correctly transcribed***[15]—thus, the closing argument ***was*** sustained by the record. The trial court's decision does not conflict with *Rose*'s holding.

Likewise, *Carnation Co., Inc. v. Hill*, 115 Wn.2d 184, 186 (1990) and *De Lor v. Symons*, 93 Wn. 231, 232–233 (1916) do not conflict with Division One's decision. In *Carnation*, Carnation requested a new trial, claiming, in part, that Hill's counsel improperly argued facts outside the record during closing. 115 Wn.2d at 186. This Court determined that there was no reversible error because the attorney's remark was isolated, the judge gave a curative instruction, and Carnation did not show a substantial likelihood that the remark affected the verdict. *Id.* Similarly in *De Lor*, although the Washington Supreme Court determined that counsel for respondents made statements to the jury outside the record, there was no reversible error because the judge instructed the jury to disregard statements not supported by the evidence and the statements were not of such a character to prejudice the jury against appellants. 93 Wn. at 232–33. As discussed above, the transcript showed in closing has been

[15] CP 13090–92, 13740–43, 13744–46, 15230–42, Appendix G_006–7.

demonstrated ad nauseam to correctly reflect the record, so *Carnation* and *De Lor* are inapplicable as a threshold matter.

Assuming *arguendo* there was misconduct, Division One addressed and rejected Kaiser's argument regarding *Carnation*, noting (1) Kaiser brought the issue to the jury's attention during closing arguments and encouraged the jury to refer to its notes; (2) the judge's instruction that lawyers' comments during closing are not evidence (as was done in *De Lor*); (3) "jurors are presumed to follow the court's instructions"; and (4) other evidence linked Plaintiff's mesothelioma to chrysotile exposure. *Budd*, 21 Wn. App. 2d at 72 (quoting *Coogan*, 197 Wn.2d at 807)). Division One correctly determined that Plaintiff's use of the transcript during closing did not have a substantial likelihood of affecting the jury's verdict. This is consistent with *Rose*, *Carnation* and *De Lor*.

2. The Trial Court Did Not Abuse Its Discretion by Allowing Plaintiff to Show a Previously-Admitted Illustrative Exhibit.

Kaiser has no support for its assertion that the trial court abused its discretion by allowing any part of a previously admitted illustrative exhibit to be used in closing. *State v. Lord*,

117 Wn.2d 829, 855 (1991) holds that a "trial court is given wide latitude in determining whether or not to admit illustrative evidence."

Division One addressed Kaiser's argument that illustrative exhibits must be admitted in connection with the testimony of a witness, citing *King County v. Farr*, 7 Wn. App. 600, 612–13 (1972). *Budd*, 21 Wn. App. 2d at 86. The critical distinction, as Division One noted, is that *Farr* addressed the necessity of testimony to establish ***the accuracy of a map before it could be admitted*** as an illustrative exhibit. *Id.* The exhibit here was a NIOSH document, not a map whose accuracy was questioned. *Id.* The PowerPoint containing the slide in question was previously introduced and admitted with witness testimony. VRP 2254. Dr. Holstein had testified earlier that he relies in part upon NIOSH's recommendations in forming his own opinions and that he considers them to be reliable and authoritative sources. VRP 1077–78.

The *Carnation* and *De Lor* cases that Kaiser again cites for support are likewise inapposite here for the same reasons above. In contrast with *Carnation* and *De Lor*, Plaintiff showed a

portion of a previously-admitted illustrative exhibit, not evidence that the court ruled inadmissible. VRP 2254–55. Division One's decision does not conflict with these cases. Even assuming Division One erred, this issue does not warrant review because Kaiser has not even attempted to show that the alleged misconduct had a substantial likelihood of affecting the jury's verdict. *Carnation*, 115 Wn.2d at 186; *cf.* Pet. at 26–28.

D. The trial court was within its broad discretion to preclude the prejudicial challenged evidence.

Though Kaiser cites the general proposition that "there is a presumption in favor of admitting relevant evidence" (Pet. at 29), Kaiser fails to cite to any Washington appellate decisions with which the *Budd* decision purportedly conflicts pursuant to RAP 13.4. Kaiser has no authority that demonstrates the trial court abused its discretion on this issue such that "***no reasonable person*** would take the view adopted by the trial court." *Coogan*, 197 Wn.2d at 804 (emphasis added). To the contrary, this Court has determined that evidence of prior sexual conduct ***does have***

the potential to be so unduly prejudicial as to warrant exclusion at trial.[16]

Kaiser cited both *Salas* and *Carson* on this argument. Pet. at 29. Division One also cited those cases in rejecting Kaiser's argument. *Budd*, 21 Wn. App. 2d at 82–84. Division One aptly noted that the evidence of sexual battery and marital discord "is 'likely to stimulate an emotional response rather than a rational decision.'" *Id.* at 82 (quoting *Gerlach*, 196 Wn.2d 111, 120 (2000) (quoting *Salas*, 168 Wn.2d at 671)). Plaintiff's evidence focused solely "on what he enjoyed doing before his illness and what he could no longer do." *Budd*, 21 Wn. App. 2d at 83. Plaintiff did not elicit any evidence that Plaintiff's family lost something because of his injury, so it was not probative to that point. Division One correctly determined that the trial court did not abuse its discretion given these circumstances.

Moreover, Kaiser's assignment of error is predicated entirely on its wishful thinking, not on evidence. Throughout the course of this appeal, Kaiser has based its arguments that it

[16] *Kirk v. Washington State University*, 109 Wn.2d 448 (1987) (citing *In re Air Crash Disaster at New Orleans, LA*, 795 F.2d 1230 (5th Cir. 1986)).

should have been allowed to introduce evidence of Plaintiff's prior bad acts because "***perhaps***" it "***may have*** impacted his 'enjoyment of life.'" *E.g.*, Pet. at 29 (emphasis added). Yet Kaiser's argument lacks any evidence that it ***did*** impact Plaintiff's enjoyment of life. Even though Kaiser had the opportunity to depose Plaintiff and ask him questions during a deposition dedicated solely to these issues, it did not. CP 889–95. Instead, Kaiser can only speculate that these decades-old events "may have" affected Plaintiff's enjoyment of life since his mesothelioma diagnosis.

V. CONCLUSION

This Court should deny review.

Respectfully submitted this 7th day of June, 2022.

Alexandra Caggiano, WSBA No. 47862
WEINSTEIN CAGGIANO PLLC
Counsel for Plaintiff/Respondent
This Answer contains 5,000 words, in compliance with RAP 18.17.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 7th of June, 2022, I caused a true and correct copy of this document to be delivered to the following counsel of record, via the Court of Appeals Filing Portal:

Christopher Madeksho, WSBA No. 54763
MADEKSHO LAW FIRM, LP
5950 Canoga Ave, 6th Floor, Suite 600
Woodland, CA 91367
Email: cmadeksho@madeksholaw.com
Email: amadeksho@madeksholaw.com
Attorney for Plaintiff/Respondent

Dana C. Kopij, WSBA No. 31648
David Shaw, WSBA No. 8788
Tyler J. Hermsen, WSBA No. 43665
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101
Telephone: (206) 628-6000
Email: wkgasbestos@williamskastner.com
Attorney for Defendant Kaiser Gypsum Company, Inc./Appellant

DATED at Seattle, Washington, this 7th day of June, 2022.

WEINSTEIN CAGGIANO PLLC

/s/ Vicki Milbrad
Vicki Milbrad
Legal Assistant

Supreme Court No. 100893-7
Court of Appeals No. 81918-6-I
King County Superior Court No. 19-2-14878-1 SEA

THE SUPREME COURT OF THE STATE OF WASHINGTON

RAYMOND BUDD

Plaintiff/Respondent,

v.

KAISER GYPSUM COMPANY, INC.

Defendant/Appellant.

APPENDIX TO PLAINTIFF/RESPONDENT RAYMOND BUDD'S ANSWER TO PETITION FOR REVIEW

Alexandra B. Caggiano, WSBA No. 47862
Brian D. Weinstein, WSBA No. 24497
WEINSTEIN CAGGIANO PLLC
600 University Street, Suite 1620
Seattle, Washington 98101
Phone: (206) 508-7070
Fax: (206) 237-8650
Counsel for Plaintiff/Respondent

APPENDIX

Designation	**Document Description**	**Page No.**
G.	Trial Court's Order Denying Defendant Kaiser Gypsum Company, Inc.'s Motion for Relief from Order Pursuant to CR 60(b)(3)	1–9
H.	Trial Court's Order Granting Plaintiff's Motion for Court to Determine Kaiser Gypsum's Newly Offered Evidence Not "Newly Discovered" Under CR 60(b)(3)	10–17

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

RAYMOND BUDD, Plaintiff, v. KAISER GYPSUM COMPANY, INC., Defendant.	No. 19-2-14878-1 SEA ORDER DENYING DEFENDANT KAISER GYPSUM COMPANY, INC.'S MOTION FOR RELIEF FROM ORDER PURSUANT TO CR 60(b)(3)

On November 19, 2021, the court conducted a hearing by Zoom on Defendant Kaiser Gypsum Company, Inc.'s Motion for Relief from Order Pursuant to CR 60(b)(3) (Dkt. 996) ("**Kaiser's Motion**"); and the Plaintiff's Motion for Court to Determine Kaiser Gypsum's Newly Offered Evidence Not "Newly Discovered" Under CR 60(b)(3) (Dkt. 1006) ("**Plaintiff's Motion**").

This order confirms the court's oral ruling denying Kaiser's Motion.

1. Documents Considered

The court has considered the documents filed to date in this case, and in particular the following documents and their exhibits. The court has considered all documents relating to both parties' current motions because both motions are based upon a common set of facts and both motions address overlapping legal issues.

Pleading	Dkt. No.
Defendant Kaiser Gypsum Company, Inc.'s Motion for Relief from Order Pursuant to CR 60(b)(3)	996
Declaration of Tyler J. Hermsen in Support of Defendant Kaiser Gypsum Company, Inc.'s Motion for Relief from Order Pursuant to CR 60(b)(3)	997
Declaration of David Smith (August 27, 2021) (Ex. 12 to Mr. Hermsen's Declaration (Dkt. 997))	997
Plaintiff's Motion for Court to Determine Kaiser Gypsum's Newly Offered Evidence Not "Newly Discovered" Under CR 60(b)(3)	1006
Declaration of Alexandra B. Caggiano in Support of Plaintiff's Motion for Court to Determine Kaiser Gypsum's Newly Offered Evidence Not "Newly Discovered" Under CR 60(b)(3)	1007
Defendant Kaiser Gypsum Company, Inc.'s Response to Plaintiff's Motion for Court to Determine Kaiser Gypsum's Newly Offered Evidence Not "Newly Discovered" Under CR 60(b)(3)	1012 & 1014
Plaintiff's Opposition to Defendant Kaiser Gypsum Company, Inc.'s Motion for Relief from Order Pursuant to CR 60(b)(3)	1017
Declaration of Alexandra B. Caggiano in Support of Plaintiff's Opposition to Defendant Kaiser Gypsum Company, Inc.'s Motion for Relief from Order Pursuant to CR 60(b)(3)	1018
Defendant Kaiser Gypsum Company, Inc.'s Reply in Support of Its Motion for Relief from Order Pursuant to CR 60(b)(3)	1020 & 1022
Supplemental Declaration of David Smith (November 17, 2021)	1023

2. Procedural Background

On September 24, 2021, Defendant Kaiser Gypsum Company, Inc. ("**Kaiser**") filed its Motion for Relief from Order Pursuant to CR 60(b)(3), requesting the court to consider what it described as "newly discovered evidence," namely, an "expert audiological review of the August 27, 2020 audio [backup recording] file of the trial proceedings." Kaiser's Motion at 9 (Dkt. 996).

On October 22, 2021, in response to Kaiser's motion, but prior to filing a formal response to that motion, the Plaintiff filed his current Motion for Court to Determine Kaiser Gypsum's Newly Offered Evidence Not "Newly Discovered" Under CR 60(b)(3). Dkt. 1006.

On November 15, 2021, the Plaintiff filed his formal Opposition to Kaiser's CR 60(b)(3) Motion. Dkt. 1017.

On November 19, 2021, at the commencement of the hearing on Kaiser's Motion, the court stated that it would consider the declaration testimony of David Smith, Kaiser's forensic audio examiner, regardless of whether the testimony qualifies as "newly-discovered evidence" for purposes of CR 60(b)(3).

During the hearing, Kaiser presented no live witness' testimony, but the Plaintiff presented testimony by Yi Tang, Ph.D., a forensic audio examiner, to rebut the declaration testimony of Mr. Smith.

At the end of the hearing, after having considered both parties' new evidence, the court ruled that the opinion testimony of Kaiser's forensic audio examiner, David Smith, does not qualify as "newly discovered evidence" for purposes of Kaiser's CR 60(b)(3) Motion.

Below is a summary and further explanation of the court's oral ruling.

3. The evidence presented by Kaiser at the November 19, 2021 hearing does not qualify as "newly discovered evidence" for purposes of CR 60(b)(3)

In its Motion, Kaiser argues that "[t]he 'newly discovered evidence' at this juncture is the expert audiological review of the August 27, 2020 audio file of the trial proceedings." Motion at 9 (Dkt. 996).

CR 60(b)(3) provides:

> **60(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons:

> (3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b); …

More than a year ago, on September 25, 2020, this court granted, in part, Kaiser's Motion to Preserve Recording of August 27, 2020 A.M. Trial Proceedings, to the extent that it ordered the court reporter "to preserve a copy of the audio backup recording of the August 27, 2020 a.m. trial proceedings, ***pending further order by this court or by an appellate court***." (Emphasis added) Order Granting Kaiser Gypsum's Motion to Preserve Recording at 2 (Dkt. 816).

The court declined to grant Kaiser's motion to the extent that it ordered that "***at this time***, the court will not instruct the court reporter to place the audio backup recording in the court record for this case." (Emphasis added) *Ibid.*

By adding the qualifying phrases highlighted above, this court was signaling that either party could request to obtain the court reporter's personal audio backup recording later.

On February 12, 2021, Kaiser filed a Motion to Amend Verbatim Report of Proceedings Pursuant to RAP 9.5(c) (Dkt. 938). In that motion, Kaiser requested a fact-finding hearing and stated its intent to obtain and play the court reporter's audio backup recording at the hearing. Kaiser stated:

> In conjunction with this hearing Kaiser intends to ***subpoena witnesses to testify, appear, and/or provide materials to the Court. … [T]he audio recording of the August 27, 2020 morning proceedings is vital*** to the RAP 9.5(c) inquiry and if the Court deems his presence is required, Kaiser will issue CR 45(e) and (f) subpoenas for his presence ***and the [audio backup recording] file itself.*** … ***Kaiser requests that this Court consider and listen to the audio recording at the hearing*** and compare the response at issue to other known "yes" and "no" responses. Kaiser also intends to call Dr. Weill to testify at [the] fact-finding hearing. [Emphasis added]

Kaiser's Motion to Amend Verbatim Report of Proceedings Pursuant to RAP 9.5(c) at 13 (Dkt. 938).

Notably, Kaiser did not request the court to take any action with respect to the audio backup recording. Nor did Kaiser state that it wished to retain David Smith or any other expert to conduct a forensic examination of the recording prior to the fact-finding hearing. Nor did Kaiser state that it wished to call Mr. Smith or any other expert to testify at the fact-finding hearing.

Instead, Kaiser merely "request[ed] that this Court consider and ***listen to the audio recording*** at the hearing and compare the response at issue to other known "yes" and "no" responses." (Emphasis added) *Ibid.*

The court granted Kaiser's motion, and scheduled a fact-finding hearing for May 4, 2021. Dkt. 956.

At the May 4, 2021 hearing, Kaiser called as a witness Kevin Moll, the court reporter who had transcribed Dr. David Weill's trial testimony, and examined Mr. Moll regarding his transcription of that testimony. Verbatim Report of Proceedings of May 4, 2021 hearing, at pp. 54-66 (Ex. 6 to Declaration of Alexandra Caggiano (Dkt. 1007)).

Kaiser offered the audio backup recording into evidence and it was admitted into evidence as Exhibit 19, over the Plaintiff's objection. *Id.* at p. 33.

At Kaiser's counsel's direction, Mr. Moll twice played back the relevant portion of the August 27, 2020 audio backup recording. *Id.* at pp. 64-66.[1]

Based upon all of the evidence presented at the May 4, 2021 hearing – including Mr. Moll's two playbacks of excerpts of his audio backup recording – the court made findings of fact and conclusions of law, including:

---

[1] Later, after the May 4, 2021 hearing, the court reporter who transcribed the FTR recording of that hearing transcribed Mr. Moll's ***first*** playback of the audio backup recording of Dr. Weill's August 27, 2020 answer as "yeah." Verbatim Report of Proceedings of May 4, 2021 hearing, at pp. 64-65 (Ex. 6 to Declaration of Alexandra Caggiano (Dkt. 1007)). Likewise, the court reporter transcribed Mr. Moll's ***second*** playback of the audio backup recording of Dr. Weill's August 27, 2020 answer as "yeah." *Id.* at p. 66.

> [Finding of Fact No.] 34. In sum, after having considered all of the testimony and the other evidence presented at the May 4, 2021 evidentiary hearing, the court finds that it is more likely than not that Dr. Weill answered "yes" to Kaiser's counsel's question at line 12 of page 1819 of the Verbatim Report of Proceedings of August 27, 2021 (Hearing Ex. 11), and that the court reporter accurately transcribed Dr. Weill's response.
>
> [Conclusion of Law No.] 9. Kaiser has not met its burden to overcome the legal presumption that the court reporter accurately transcribed Dr. Weill's response to Kaiser's counsel's question at line 12 of page 1819 of the Verbatim Report of Proceedings of August 27, 2021 (Hearing Ex. 11).

Amended Order Denying Kaiser's Motion to Amend Verbatim Report of Proceedings, at 9 and 12, May 6, 2021 (Dkt. 970).

Based upon the procedural chronology summarized above, the court finds and concludes as follows:

(1) Nothing prevented Kaiser from including in its February 2021 motion for a fact-finding hearing (Dkt. 938) a statement that it was necessary or appropriate to retain Mr. Smith or any other expert witness to conduct a forensic examination of Mr. Moll's audio backup recording prior to the fact-finding hearing.

(2) Nothing prevented Kaiser from renewing its request to the court to order Mr. Moll to turn over his audio backup recording to the parties for a forensic examination prior to the fact-finding hearing.

(3) The court did not prevent Kaiser from subpoenaing the court reporter to bring his backup audio recording to the May 4, 2021 hearing.

(4) The court allowed Kaiser to place the backup audio recording in the record as an exhibit and play it in open court at the May 4, 2021 hearing.

(5) Kaiser did not believe that it was necessary for the court to hear Mr. Smith's opinions or any other expert's opinions about the recording at the May 4, 2021 fact-finding hearing.

(6) Thus, the newly-offered post-hearing opinion testimony of Mr. Smith, Kaiser's forensic audio examiner, does not qualify as "newly discovered evidence" for purposes of Kaiser's CR 60(b)(3) Motion.

4. Kaiser's expert witness' testimony provides an insufficient basis for the court to change its findings of fact and conclusions of law with respect to the audio backup recording

Even assuming, *arguendo,* that Kaiser's expert witness' declaration testimony were to qualify as "newly discovered evidence" for purposes of Kaiser's CR 60(b)(3) Motion, his testimony is not sufficiently persuasive to justify the court in changing its findings of fact and conclusions of law with respect to the audio backup recording.

The court finds that the expert testimony by the Plaintiff's forensic audio examiner, Yi Tang, Ph.D, is more credible and persuasive than the declaration testimony by Kaiser's expert, Dr. Smith. In particular, the court finds credible and persuasive Dr. Tang's testimony that the software that Kaiser's expert utilized in examining the audio backup recording likely could have distorted the words spoken in the recording, resulting in an inaccurate rendering of Dr. Weill's testimony.

5. Order

For the reasons explained above, and for the reasons stated by the court at the November 19, 2021 hearing, which are incorporated herein, the court **denies** Defendant Kaiser Gypsum Company, Inc.'s Motion for Relief from Order Pursuant to CR 60(b)(3) (Dkt. 996).

Date: November 29, 2021.

/s/ John R. Ruhl
John R. Ruhl, Judge

At the hearing, the Defendant presented no testimony by any live witness. The Plaintiff presented live testimony by Dr. Yi Tang.

King County Superior Court
Judicial Electronic Signature Page

Case Number:	19-2-14878-1
Case Title:	BUDD vs KAISER GYPSUM COMPANY, INC ET AL
Document Title:	ORDER RE -ORD DENY'G DS CR 60 MOTION
Signed By:	John Ruhl
Date:	November 29, 2021

Judge: John Ruhl

This document is signed in accordance with the provisions in GR 30.

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

RAYMOND BUDD, Plaintiff, v. KAISER GYPSUM COMPANY, INC., Defendant.	No. 19-2-14878-1 SEA ORDER GRANTING PLAINTIFF'S MOTION FOR COURT TO DETERMINE KAISER GYPSUM'S NEWLY OFFERED EVIDENCE NOT "NEWLY DISCOVERED" UNDER CR 60(b)(3)

On November 19, 2021, this matter came before the court for a hearing on the Plaintiff's Motion for Court to Determine Kaiser Gypsum's Newly Offered Evidence Not "Newly Discovered" Under CR 60(b)(3) (Dkt. 1006) ("**Plaintiff's Motion**"); and Defendant Kaiser Gypsum Company, Inc.'s Motion for Relief from Order Pursuant to CR 60(b)(3) (Dkt. 996) ("**Kaiser's Motion**").

1. Documents Considered

The court has considered the documents filed to date in this case, and in particular the following documents and their exhibits. The court has considered all documents relating to both parties' current motions because both motions are based upon a common set of facts and both motions address overlapping legal issues.

Pleading	Dkt. No.
Defendant Kaiser Gypsum Company, Inc.'s Motion for Relief from Order Pursuant to CR 60(b)(3)	996
Declaration of Tyler J. Hermsen in Support of Defendant Kaiser Gypsum Company, Inc.'s Motion for Relief from Order Pursuant to CR 60(b)(3)	997
Declaration of David Smith (August 27, 2021) (Ex. 12 to Mr. Hermsen's Declaration (Dkt. 997))	997
Plaintiff's Motion for Court to Determine Kaiser Gypsum's Newly Offered Evidence Not "Newly Discovered" Under CR 60(b)(3)	1006
Declaration of Alexandra B. Caggiano in Support of Plaintiff's Motion for Court to Determine Kaiser Gypsum's Newly Offered Evidence Not "Newly Discovered" Under CR 60(b)(3)	1007
Defendant Kaiser Gypsum Company, Inc.'s Response to Plaintiff's Motion for Court to Determine Kaiser Gypsum's Newly Offered Evidence Not "Newly Discovered" Under CR 60(b)(3)	1012 & 1014
Plaintiff's Opposition to Defendant Kaiser Gypsum Company, Inc.'s Motion for Relief from Order Pursuant to CR 60(b)(3)	1017
Declaration of Alexandra B. Caggiano in Support of Plaintiff's Opposition to Defendant Kaiser Gypsum Company, Inc.'s Motion for Relief from Order Pursuant to CR 60(b)(3)	1018
Defendant Kaiser Gypsum Company, Inc.'s Reply in Support of Its Motion for Relief from Order Pursuant to CR 60(b)(3)	1020 & 1022
Supplemental Declaration of David Smith (November 17, 2021)	1023

2. Background

On September 24, 2021, Defendant Kaiser Gypsum Company, Inc. ("**Kaiser**") filed its Motion for Relief from Order Pursuant to CR 60(b)(3), requesting the court to consider what it described as "newly discovered evidence," namely, an "expert audiological review of the August 27, 2020 audio [backup recording] file of the trial proceedings." Kaiser's Motion at 9 (Dkt. 996).

On October 22, 2021, in response to Kaiser's motion, but prior to filing a formal response to that motion, the Plaintiff filed his current Motion for Court to Determine Kaiser Gypsum's Newly Offered Evidence Not "Newly Discovered" Under CR 60(b)(3). Dkt. 1006.

On November 15, 2021, the Plaintiff filed his formal Opposition to Kaiser's CR 60(b)(3) Motion. Dkt. 1017.

On November 19, 2021, at the commencement of the hearing on Kaiser's Motion, the court stated that it would consider the declaration testimony of David Smith, Kaiser's forensic audio examiner, regardless of whether the testimony qualifies as "newly-discovered evidence" for purposes of CR 60(b)(3).

During the hearing, Kaiser presented no live witness' testimony, but the Plaintiff presented testimony by Yi Tang, Ph.D., a forensic audio examiner, to rebut the declaration testimony of Mr. Smith.

At the end of the hearing, after having considered both parties' new evidence, the court ruled that the opinion testimony of Kaiser's forensic audio examiner, David Smith, does not qualify as "newly discovered evidence" for purposes of Kaiser's CR 60(b)(3) Motion.

The court has included a summary with a further explanation of its reasons for that ruling in a separate Order Denying Kaiser Gypsum Company, Inc.'s Motion for Relief from Order Pursuant to CR 60(b)(3). That summary is repeated below.

3. The evidence presented by Kaiser at the November 19, 2021 hearing does not qualify as "newly discovered evidence" for purposes of CR 60(b)(3)

In its Motion, Kaiser argues that "[t]he 'newly discovered evidence' at this juncture is the expert audiological review of the August 27, 2020 audio file of the trial proceedings." Motion at 9 (Dkt. 996).

CR 60(b)(3) provides:

> **60(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> > (3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b); …

More than a year ago, on September 25, 2020, this court granted, in part, Kaiser's Motion to Preserve Recording of August 27, 2020 A.M. Trial Proceedings, to the extent that it ordered the court reporter "to preserve a copy of the audio backup recording of the August 27, 2020 a.m. trial proceedings, ***pending further order by this court or by an appellate court***." (Emphasis added) Order Granting Kaiser Gypsum's Motion to Preserve Recording at 2 (Dkt. 816).

The court declined to grant Kaiser's motion to the extent that it ordered that "***at this time***, the court will not instruct the court reporter to place the audio backup recording in the court record for this case." (Emphasis added) *Ibid.*

By adding the qualifying phrases highlighted above, this court was signaling that either party could request to obtain the court reporter's personal audio backup recording later.

On February 12, 2021, Kaiser filed a Motion to Amend Verbatim Report of Proceedings Pursuant to RAP 9.5(c) (Dkt. 938). In that motion, Kaiser requested a fact-finding hearing and stated its intent to obtain and play the court reporter's audio backup recording at the hearing. Kaiser stated:

> In conjunction with this hearing Kaiser intends to ***subpoena witnesses to testify, appear, and/or provide materials to the Court. … [T]he audio recording of the August 27, 2020 morning proceedings is vital*** to the RAP 9.5(c) inquiry and if the Court deems his presence is required, Kaiser will issue CR 45(e) and (f) subpoenas for his presence ***and the [audio backup recording] file itself.*** … ***Kaiser requests that this Court consider and listen to the audio recording at the hearing*** and compare the response at issue to other known "yes" and "no" responses. Kaiser also intends to call Dr. Weill to testify at [the] fact-finding hearing. [Emphasis added]

Kaiser's Motion to Amend Verbatim Report of Proceedings Pursuant to RAP 9.5(c) at 13 (Dkt. 938).

Notably, Kaiser did not request the court to take any action with respect to the audio backup recording. Nor did Kaiser state that it wished to retain David Smith or any other expert to conduct a forensic examination of the recording prior to the fact-finding hearing. Nor did Kaiser state that it wished to call Mr. Smith or any other expert to testify at the fact-finding hearing.

Instead, Kaiser merely "request[ed] that this Court consider and ***listen to the audio recording*** at the hearing and compare the response at issue to other known "yes" and "no" responses." (Emphasis added) *Ibid.*

The court granted Kaiser's motion, and scheduled a fact-finding hearing for May 4, 2021. Dkt. 956.

At the May 4, 2021 hearing, Kaiser called as a witness Kevin Moll, the court reporter who had transcribed Dr. David Weill's trial testimony, and examined Mr. Moll regarding his transcription of that testimony. Verbatim Report of Proceedings of May 4, 2021 hearing, at pp. 54-66 (Ex. 6 to Declaration of Alexandra Caggiano (Dkt. 1007)).

Kaiser offered the audio backup recording into evidence and it was admitted into evidence as Exhibit 19, over the Plaintiff's objection. *Id.* at p. 33.

At Kaiser's counsel's direction, Mr. Moll twice played back the relevant portion of the August 27, 2020 audio backup recording. *Id.* at pp. 64-66.[1]

---

[1] Later, after the May 4, 2021 hearing, the court reporter who transcribed the FTR recording of that hearing transcribed Mr. Moll's ***first*** playback of the audio backup recording of Dr. Weill's August 27, 2020 answer as "yeah." Verbatim Report of Proceedings of May 4, 2021 hearing, at pp. 64-65 (Ex. 6 to Declaration of Alexandra Caggiano (Dkt. 1007)). Likewise, the court reporter transcribed Mr. Moll's ***second*** playback of the audio backup recording of Dr. Weill's August 27, 2020 answer as "yeah." *Id.* at p. 66.

Based upon all of the evidence presented at the May 4, 2021 hearing – including Mr. Moll's two playbacks of excerpts of his audio backup recording – the court made findings of fact and conclusions of law, including:

> [Finding of Fact No.] 34. In sum, after having considered all of the testimony and the other evidence presented at the May 4, 2021 evidentiary hearing, the court finds that it is more likely than not that Dr. Weill answered "yes" to Kaiser's counsel's question at line 12 of page 1819 of the Verbatim Report of Proceedings of August 27, 2021 (Hearing Ex. 11), and that the court reporter accurately transcribed Dr. Weill's response.
>
> [Conclusion of Law No.] 9. Kaiser has not met its burden to overcome the legal presumption that the court reporter accurately transcribed Dr. Weill's response to Kaiser's counsel's question at line 12 of page 1819 of the Verbatim Report of Proceedings of August 27, 2021 (Hearing Ex. 11).

Amended Order Denying Kaiser's Motion to Amend Verbatim Report of Proceedings, at 9 and 12, May 6, 2021 (Dkt. 970).

Based upon the procedural chronology summarized above, the court finds and concludes as follows:

(1) Nothing prevented Kaiser from including in its February 2021 motion for a fact-finding hearing (Dkt. 938) a statement that it was necessary or appropriate to retain Mr. Smith or any other expert witness to conduct a forensic examination of Mr. Moll's audio backup recording prior to the fact-finding hearing.

(2) Nothing prevented Kaiser from renewing its request to the court to order Mr. Moll to turn over his audio backup recording to the parties for a forensic examination prior to the fact-finding hearing.

(3) The court did not prevent Kaiser from subpoenaing the court reporter to bring his backup audio recording to the May 4, 2021 hearing.

(4) The court allowed Kaiser to place the backup audio recording in the record as an exhibit and play it in open court at the May 4, 2021 hearing.

(5) Kaiser did not believe that it was necessary for the court to hear Mr. Smith's opinions or any other expert's opinions about the recording at the May 4, 2021 fact-finding hearing.

(6) Thus, the newly-offered post-hearing opinion testimony of Mr. Smith, Kaiser's forensic audio examiner, does not qualify as "newly discovered evidence" for purposes of Kaiser's CR 60(b)(3) Motion.

4. Order

For the reasons explained above, the court **grants** the Plaintiff's Motion for Court to Determine Kaiser Gypsum's Newly Offered Evidence Not "Newly Discovered" Under CR 60(b)(3) (Dkt. 1006). *See State v. Michielli,* 132 Wn.2d 229, 241-242, 937 P.2d 587, 71 A.L.R.5th 705 (1997).

Date: November 29, 2021.

/s/ John R. Ruhl
John R. Ruhl, Judge

King County Superior Court
Judicial Electronic Signature Page

Case Number:	19-2-14878-1
Case Title:	BUDD vs KAISER GYPSUM COMPANY, INC ET AL
Document Title:	ORDER RE -ORD GRANTING PS MOT RE NEW EVID
Signed By:	John Ruhl
Date:	November 29, 2021

Judge: John Ruhl

This document is signed in accordance with the provisions in GR 30.

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WEINSTEIN CAGGIANO PLLC

June 07, 2022 - 1:37 PM

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Appellate Court Case Number:	100,893-7
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