No. 56257-0-II

101864-9

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JASON BUCKHOLTZ, as Personal Representative
of the Estate of DENNIS G. WOODRUFF,

Petitioner,

v.

ZIDELL EXPLORATIONS, INC.,

Respondent,

and

PORT OF TACOMA,

Defendant.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Jason Buckholtz, the personal representative of the Estate of Dennis G. Woodruff ("Estate"), asks this Court to accept review of the decision designated in Part B.

B. COURT OF APPEALS DECISION

Division II filed its opinion on January 24, 2023, reversing a nearly $9.5 million judgment on the verdict of the jury ($11,216,056 actual verdict, less offsets) because the trial court gave a permissive adverse inference instruction modelled on the criminal pattern instructions for missing witnesses for Zidell's Exploration, Inc.'s ("Zidell") egregious discovery violations. The opinion is in the appendix. Both parties moved for reconsideration. Division II denied both motions. That order is in the appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Did Division II articulate an incorrect test for spoliation of evidence in overturning the trial court's extensive findings and conclusions documenting Zidell's intentional destruction of relevant evidence?

2. Did Division II err in failing to determine that the trial court properly exercised its discretion when it gave a permissive adverse inference instruction for Zidell's willful discovery misconduct, apart from its spoliation of evidence?

3. Did Division II err in intruding upon the trial court's exercise of its wide discretion in selecting the sanction for Zidell's discovery violations?

D. STATEMENT OF THE CASE

The Division II opinion outlines the facts and procedure in this case. Op. 2-14. However, several facts bear supplemental emphasis.

Dennis Woodruff died of mesothelioma, a terminal cancer of the lung lining caused by asbestos exposure. RP 397, 399-40. Dennis's most significant asbestos exposures occurred while working at Zidell Dismantling ("ZD") in Tacoma between 1970 and 1973. RP 400.[1]

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[1] Dennis's medical expert, Andrew Churg, MD, Ph.D. testified that Dennis's work at Zidell was "definitely a contributing cause" to the development of his disease. RP 969. Zidell did not challenge Dr. Churg's medical opinion that Dennis's mesothelioma was caused by his asbestos exposure at Zidell. *See* RP 973 (only four questions on cross).

ZD's Port of Tacoma site was replete with asbestos affecting workers there.[2] Dennis saw white insulation he understood to be asbestos pipe covering. RP 414-15. He described conditions aboard ships as "dusty" and "dirty" such that he could see the dust in the air on occasion. RP 417. Aerial photographs of Zidell's Port of Tacoma site depict "abundant scrap and debris piles from ship dismantling operations" strewn about. Ex. 109.

Environmental studies performed decades later depicted the ubiquity of asbestos at the ZD site. A 1982 Historic Land Use Survey prepared by the Department of Ecology described debris unburied through excavation that included car bodies, tanks, bunker fuel oil, and asbestos. Ex. 128a; RP 645. In 1998, a Pre-Remedial Design Study prepared for the Port of Tacoma in 1998

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[2] Zidell conceded that it knew, as of the early 1970s, that asbestos was hazardous to human health. RP 526–27. Moreover, Zidell certainly knew that asbestos was used on Navy ships, including ships that it purchased. RP 525. Zidell also knew that asbestos insulation materials would be part of the dismantling process and that asbestos was hazardous. RP 526-27.

noted that "[w]aste petroleum, PCBs, and asbestos were generated" from Zidell's activities between 1960 through 1984. Ex. 127a; RP 649. And in 2000, an Engineering Evaluation / Cost Analysis Report found ten soil samples that were all positive for asbestos, with concentrations ranging from .38 to 2.3 percent by weight. Ex. 126a; RP 657–58. Samples taken in the embankment boreholes contained asbestos concentrations as high as 80 percent by volume. Ex. 126a; RP 658.

It is *undisputed* that neither Zidell nor ZD warned Dennis of the hazards of asbestos exposure or the need to take precautions to protect himself against it, such as wearing an appropriate respirator. RP 417-418, 424-25, 454, 527, 673, 833-34, 897; Ex. 121.

Critical to Dennis's case against Zidell was the locale of where he worked at ZD's Port of Tacoma site, i.e., the ships on which he worked *and* who owned them. For example, Dennis recalled working on Liberty ships, Victory ships, and aircraft carriers, including the *USS Philippine Sea*, in particular. RP 401.

Dennis indicated that he spent "maybe five months" working on that ship; it "felt like a long time" to him. RP 425.

ZD scrapped ships at its Port of Tacoma facility, but Zidell purchased and owned at least some of the ships being dismantled, including the *USS Philippine Sea*. A critical exhibit on this issue was the belatedly disclosed document detailing a 1969 ZD board of directors special meeting, wherein its board purported to determine that "the purchase of vessels for dismantling would thereafter be made by ZIDELL DISMANTLING, INC. rather than by ZIDELL EXPLORATIONS, INC." CP 1680; Ex. 304 (emphasis in original). The document confirmed that Zidell owned *all* the vessels dismantled by ZD at least prior to 1969. However, the *USS Philippine Sea* cruise book demonstrated that Zidell continued purchasing vessels for ZD even *after* 1969, stating that the ship was "sold for scrap 23 March 1971 to Zidell Explorations, Inc., of Portland, Oregon." Ex. 303; RP 531. Zidell's corporate representative confirmed that neither ZD nor Zidell had any records regarding the purchase and sale of the

Philippine Sea, or title documents for any ship whatsoever during that time period. RP 528, 532.

Discovery on the identity and ownership of ships dismantled at the Port of Tacoma on or near which Dennis worked was critical.[3] On October 16, 2020, Dennis served his first discovery requests on both Zidell and ZD, requesting "all transactional or corporate documents" between the Zidell companies. Zidell objected, claiming that such documents "have no bearing on this action and would not lead to the discovery of admissible evidence." CP 1533–34, 1578, 1596. Zidell later produced a list of ships dismantled in Tacoma, supplemented on February 10, 2021, with a list of ships dismantled by *both* companies. CP 1533–34, 1593.

On May 3, 2021, Zidell produced the board meeting document *after* Dennis had already deposed Zidell's CR 30(b)(6)

[3] The trial court granted a priority trial setting, pursuant to RCW 4.44.025 based on Dennis' terminal diagnosis. The priority trial date gave Dennis only six months to discover evidence necessary for trial preparation.

representative, William Gobel,[4] and just two hours after Kathryn Silva's deposition where she verified under oath as Zidell's general counsel the accuracy and completeness of its discovery responses. CP 4623–24 (FF 2), CP 1598. Importantly, Gobel had no knowledge of the steps taken to respond to Dennis's discovery requests, despite that being an express topic on the CR 30(b)(6) notice. CP 1630–31, 1648–49. The trial court found that the 1969 board meeting document was responsive to Dennis's discovery requests. CP 4623 (FF 2).

Given Zidell's actions, Dennis filed a CR 37(b) motion for sanctions based upon its willful discovery rules violation, including the failure to conduct a reasonable injury to locate responsive documents, failure to prepare its CR 30(b)(6) designee, and belated disclosure of the board meeting document. CP 1540–43. While the motion was pending, the trial court ordered a second Silva deposition expressly to allow Dennis to "capably explore the

[4] Gobel served as the CR 30(b)(6) representative for *both* ZD and Zidell. CP 1609.

reasons behind the delay of that disclosure" of the board meeting document. CP 4623 (FF 3); RP 11.

During that deposition, Silva acknowledged that she discovered the board meeting document during the week of April 6, 2021; that her responsibility was to help prepare Gobel, as Zidell's CR 30(b)(6) designee, for deposition the following week; and that she did not show the board meeting document to Gobel. CP 4624 (FF 5).

Silva testified that she did not request *any documents* from Zidell's offsite storage facility when she was responding to Dennis's first discovery requests in December 2020, and that she requested just three boxes of documents when responding to subsequent requests in February 2021. CP 4627 (FF 19), CP 1581–83, CP 1598 (Silva's verification of responses). The trial court found that "[t]here has never been any showing in this case that anybody from Zidell ever went to the storage facility and performed any kind of search of the documents in response to Plaintiff's discovery requests. ... [Silva] simply looked at an

index." CP 4627–28 (FF 20); *see also*, CP 1550–51 (detailing questions raised by belated disclosure of board meeting document).

ZD/Zidell co-mingled business records; Silva testified that, at the time of her deposition, she "represent[ed] all of the current Zidell entities," including Zidell, CP 1669, verifying under oath *both* ZD/Zidell's discovery responses as general counsel for both. CP 1589, 1598. Corporate records for all Zidell entities were housed in file cabinets at ZD's office or in boxes at an offsite storage facility. CP 1670. Indeed, Silva stated that a "very limited amount" of business records could still be found at these locations today. CP 1671.

As early as the 1990s, the Zidell companies knew that their dismantling facilities in Tacoma and Portland "were going to be the subject of prolonged environmental cleanup litigation," and in 1997, Zidell filed a lawsuit against its insurer seeking coverage for environmental liability arising out of its ship dismantling facilities. CP 4625 (FF 7, 9). By 2002, the Zidell companies

knew that they faced potential liability in toxic tort actions and that, given the nature of this type of litigation, such actions would go on for a long time. CP 4625–26 (FF 11).

During her deposition, Silva testified on the origin of two documents containing information regarding specific ships dismantled at both ZD in Tacoma and Zidell in Portland, collectively, "the ship lists." CP 4624–25 (FF 6). Outside counsel generated these ship lists for a 1997 Oregon insurance coverage lawsuit Zidell filed regarding environmental liabilities from its ship dismantling facilities. CP 1962, 1987–88. That counsel relied on company records to generate the lists to advance Zidell's litigation objectives; this information could have come *only* from Zidell's business records. CP 1962, 2071–72, 2077–78.

When the ship lists were compiled, Zidell also faced pending asbestos personal injuries lawsuits. CP 1963, 2075. Zidell Valve ("ZV"), a Zidell division, was previously sued in asbestos exposure litigation sometime around 1997. CP 1960,

2036, 2038. Testifying as legal counsel to "all of the current Zidell entities," CP 1669, Silva admitted under oath that Zidell understood it had an obligation to retain documents potentially relevant in future litigation. CP 2012.

Silva admitted that the documents used to create the ship lists no longer exist. CP 1962, 2100–01. CP 1961, 2008. In conjunction with the transfer of its historic ship records to a new storage company in 2017, Zidell ordered the destruction of an unknown quantity of those records, anywhere from 10% or 90% of the company's records. CP 1961–62, 2013–16. Silva herself authorized the destruction of 20 boxes of litigation materials without even reviewing them first. CP 1961, 2019–21. Zidell took no steps to digitize any of the documents before they were destroyed. CP 1961, 2052.

Dennis filed another discovery sanctions motion, supplementing it with additional authority relevant to Zidell's spoliation. CP 1540–43, 1960–64. Dennis asked the trial court to either enter a default judgment or instruct the jury to accept as

true the contested fact at issue: that the ships Dennis worked aboard were owned by Zidell. CP 1532; RP 57. The trial court entered *extensive* findings (*see* Appendix) determining that Zidell's discovery misconduct and spoliation were both willful and substantially prejudiced Dennis's ability to prepare for trial, a prejudice that was "compounded ... by the fact that the plaintiff is dying and urgently wants his day in court." CP 4630 (CL 8, 10), RP 206. The court found an adverse inference instruction to be appropriate, CP 4633 (CL 19), but declined to instruct the jury that it must accept as true that Zidell owned the ships and denied a default judgment. CP 4633 (CL 18); RP 209.

The court's adverse inference instruction, Instruction 30 (see Appendix), was relevant to Zidell's conduct constituting spoliation and its other discovery violations. RP 1102, 1215. Modeled on the criminal missing witness instruction, WPIC 5.20, the instruction told the jury that it *may* draw an adverse inference only if Dennis established five factual elements. RP 1102, 1152; CP 4592. The jury had to find all five elements:

1. The records were within the control of, and particularly available to, Zidell;

2. The issue on which the records relate was an issue of fundamental importance, rather than one that was trivial or insignificant;

3. As a matter of reasonable probability, it appeared naturally in the interest of Zidell to produce those documents;

4. There was no satisfactory explanation of why Zidell did not keep and produce those documents; and

5. The inference was reasonable in light of all the circumstances.

CP 4952. Division II's opinion did not reference the fact that the jury could not apply an adverse inference unless all five elements had been satisfied. Op. 12–13.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The trial court fashioned the least draconian permissive adverse inference instruction possible as a result of Zidell's discovery misconduct in this expedited case and its inexcusable destruction of business records. Division II overturned a $9.5 million judgment in the Estate's favor due to its misperception of

spoliation principles established by this Court, its failure to honor the trial court's *extensive* findings and conclusions documenting Zidell's repeated discovery violations, apart from its spoliation of evidence, that merited an adverse inference instruction, and its illicit intrusion upon the trial court's *expansive* discretion over the assessment of discovery sanctions. RAP 13.4(b)(1), (2).

(1) Division II Applied an Improper Spoliation Standard

In addressing spoliation, Division II erroneously added a third distinct element to this Court's two-part test for spoliation. Op. 20, 22-24. That was error.

Spoliation is "[t]he intentional destruction of evidence." *Henderson v. Tyrrell*, 80 Wn. App. 592, 605, 910 P.2d 522 (1996) (quoting BLACK'S LAW DICTIONARY 1401 (6th ed. 1990)). Historically, the issue was as an evidentiary matter, with the common remedy being an inference "that the adversary's conduct may be considered generally as tending to corroborate the proponent's case and to discredit that of the adversary." *Id.*; *see also*, *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 385–86, 573

P.2d 2 (1977); *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 381, 972 P.2d 475 (1999) ("To remedy spoliation the court may apply a rebuttable presumption ... .").

In early spoliation cases, courts examined two factors: "(1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party." *Marshall*, 94 Wn. App. at 381. Culpability turned on whether the party acted in bad faith, whether the party had a duty to preserve evidence, and whether the party knew that the evidence was important to pending litigation. *Homeworks Const., Inc. v. Wells*, 133 Wn. App. 892, 900, 138 P.3d 654 (2006); *Marshall*, 94 Wn. App. at 382. Critically, not every factor need be shown to establish culpability. In *Homeworks*, Division II recognized that spoliation could exist even without a finding of bad faith where there was a duty to preserve the evidence. *Id*. at 900. This duty is not a general one to preserve evidence; rather, "the duty can arise from other sources." *J.K. by Wolf v. Bellevue Sch. Dist. No. 405*, 20 Wn. App. 2d 291, 308, 500 P.3d 138 (2021).

In some cases courts have treated the duty to preserve evidence as a third distinct prong of the spoliation test. *Ripley v. Lanzer*, 152 Wn. App. 296, 326–27, 215 P.3d 1020 (2009); *Homeworks*, *supra*; *Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 136, 307 P.3d 811 (2013); *Cook v. Tarbert Logging, Inc.*, 190 Wn. App. 448, 464, 360 P.3d 855 (2015), *review denied*, 185 Wn.2d 1014 (2016).

This Court finally resolved the issue – a two-part test governs spoliation. *Henderson v. Thompson*, 200 Wn.2d 417, 441, 518 P.3d 1011 (2022). But any "duty to retain documents" is an aspect of the culpability analysis, not a distinct element as Division II believed. Thus, the *Henderson* court held that where a party intentionally withholds or destroys evidence, a spoliation instruction is appropriate. *Id.* at 1026. The Court *presumed* that a party has an obligation to provide relevant evidence in discovery and to avoid its destruction. In fact, the Court remanded the case to the trial court to consider even harsher sanctions. *Id.* at 1027-28. Similarly, Division II recently upheld trial court rulings on

spoliation in *Wash. State Dep't of Transportation v. Seattle Tunnel Partners*, 22 Wn. App. 2d 1025, 2022 WL 2132780, *review denied*, 518 P.3d 210 (2022). The Court's opinion did not indicate that for spoliation to apply, the defending party must have a duty to preserve the evidence. Further documenting the split in the divisions of the Court of Appeals, Division I in *Seattle Tunnel Partners v. Great Lake Reinsurance (UK)*, __ Wn. App. 2d __, 2023 WL 2643531 (2023), disregarded its own opinion in *J.K.*, Division II's opinion in its *Seattle Tunnel Partners* decision, and this Court's *Henderson* decision to hold that a duty to preserve requirement was a distinct element of the spoliation analysis. This Court needs to resolve the ambiguity in the spoliation analysis. RAP 13.4(b)(1)-(2).

Regardless, Dennis established the requisite elements of spoliation here. Here, it is *undisputed* that Zidell committed discovery misconduct by its late disclosure of a critical document, op. 6, but after Silva's second deposition, Dennis provided the Court with supplemental facts and authority, this time

encompassing not just Zidell's discovery misconduct but also the destruction of documents amounting to spoliation as well. Op. 7-8; CP 1960–64. Zidell argued to Division II that the trial court abused its discretion in finding spoliation had occurred because it had no pre-litigation duty to preserve records and because no evidence supports the challenged findings. BA 34–52. Zidell is incorrect, and the trial court did not abuse its discretion.

Ship ownership is key to Zidell's liability, particularly where the supplemental evidence—the 1969 board meeting document and the *USS Philippine Sea* cruise book—indicate that Zidell owned the asbestos-laden ships that caused Dennis' injury. The ship list source documents were generated in toxic tort litigation where Zidell's culpability for asbestos contamination was a central feature. Exs. 126a, 127a, 128a. Liability for environmental contamination must logically and reasonably lead to liability for the injuries suffered by individuals exposed to that contamination. *See, e.g., Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wn.2d 618, 621, 881 P.2d 201 (1994)

(describing numerous third-party suits for personal injuries resulting from groundwater contamination due to leaching of waste chemicals).

As for insurance coverage, no insurer would pay for asbestos contamination caused by Zidell ships unless ZD or Zidell owned them. The ship lists include a purchase price for every ship. Ex. 111. A jury could reasonably infer that documents showing purchase price would also show the purchaser. Silva testified the ship lists could *only* have been made using the destroyed business records. CP 1962, 2071-72, 2077-78, 2100-01. Silva testified that Zidell litigated coverage with its own insurers related to environmental liabilities from its dismantling operations and faced pending lawsuits brought by individuals alleging injury from asbestos exposure at the time the ship lists were created, including a specific 1997 action brought against ZV, a Zidell division. CP 1960, 1963, 2036, 2038, 2075.

The trial court properly imputed ZV's knowledge to Zidell. *See, e.g., Doe v. Unocal Corp.*, 248 F.3d 915, 928 (9th Cir. 2001)

(holding that annual report's references to subsidiaries as "divisions of the parent company" do not establish an alter ego relationship); *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 425 (9th Cir. 1977) (holding that a corporation may be "present" in several jurisdictions "by operating 'divisions' there").

Despite this knowledge, as much as 90% of Zidell's historic business records were deliberately destroyed by Zidell without any effort to digitize them or even to review which documents were being destroyed. CP 1961–62, 2013–16, 2019–21, 2052. This destruction specifically included litigation files. CP 1961, 2019–21. Rather than a "paucity of evidence," Silva's testimony that none of the documents used to create the ship list currently exist, as well as the absence of documents showing historic ownership of the vessels, supports the conclusion that such documentation was destroyed during the 2017 purge. CP 1962, 2100–01 (stating that no transactional documents exist showing the transfer of vessels from Zidell to ZD). This evidence supports the trial court's findings 8, 17, and 18, as well as conclusions 5, 12, 13, and 15.

The trial court also found that Zidell exhibited a conscious disregard of its obligation to preserve documents reasonably anticipated to be relevant in future litigation. CP 4632 (CL 16). The source of this obligation was not, as Zidell claims, a "general duty to preserve evidence." BA 36. Rather, the obligation arose from Silva's *admission* under oath that Zidell had a duty to preserve these documents as evidence. CP 4632 (CL 15), 2012. This plain recognition of such an obligation is an "other source" from which a duty to preserve evidence can arise. *See J.K.*, 20 Wn. App. 2d at 308, 310 (defendant "acknowledge[d] that it had a duty to preserve" evidence at issue); *Henderson*, 80 Wn. App. at 611 n.7 (holding that a party can commit spoliation when it is "certainly *aware* that litigation was anticipated" (emphasis in original)). The trial court properly took Silva's admission at face value, and it is appropriate to conclude that the decision by Zidell's corporate counsel to destroy large swaths of historic business records, particularly in view of its prior environmental and asbestos litigation, was both improper and in bad faith. *See* BA 44 n.12.

In sum, Division II's opinion applied the wrong spoliation analysis, and it erred in concluding Zidell did not engage in spoliation when it deliberately destroyed vital documents tying its ship dismantling at the Port of Tacoma to Dennis's asbestos exposure there. Review is merited. RAP 13.4(b)(1).

(2) Division II Ignored Zidell's Other Discovery Violations That Would Support the Imposition of an Adverse Inference Instruction As a Remedy

Division II's opinion is largely silent on Zidell's *many* other discovery violations, apart from its destruction of evidence, that merited sanctions under CR 37(b). CP 4623–24, 4627–28. Those violations are amply documented in the trial court's findings, to which Zidell failed to assign error. *See* RAP 10.3(g).[5]

[5] Unchallenged findings of fact by the trial court are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002). Moreover, the failure to raise an issue before the trial court generally precludes a party from raising it on appeal. *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, 160 P.3d 1089 (2007), *aff'd*, 166 Wn.2d 264, 208 P.3d 1092 (2009). Zidell did not assign error to specific findings in the trial court's sanction order. BA 4, App. A.

This Court has never opined that an adverse inference instruction is an appropriate sanction under CR 37(b) for serious discovery violations, but Division I has done so, concluding in *Carroll v. Akebono Brake Corp.*, 22 Wn. App. 2d 845, 892, 514 P.3d 720 (2022), *review denied*, 200 Wn.2d 1023 (2023) that an adverse inference instruction may be an appropriate CR 37(b) remedy for egregious discovery violations.

When Dennis initially sought relief from the trial court for Zidell's lengthy course of discovery misconduct in this case, including Zidell's failure to conduct a reasonable inquiry to locate responsive documents, failure to produce a prepared CR 30(b)(6) witness, and belated disclosure of the "smoking gun" board meeting document, CP 1530–39, the trial court concluded that such egregious conduct merited an adverse inference instruction. CP 4628–30 (in particular, CL 10) .

"[A] spirit of cooperation and forthrightness" during discovery is essential for modern trials. *Wash. State Phys. Ins. Exch. & Assoc. v. Fisons Corp.*, 122 Wn.2d 299, 342, 858 P.2d

1054 (1993) (citing *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 280, 686 P.2d 1102 (1984), *aff'd*, 104 Wn.2d 613, 707 P.2d 685 (1985)); *see* CP 4632–33 (citing *Fisons*). Liberal discovery makes "trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to fullest practicable extent." *Gammon*, 38 Wn. App. at 280. The *Fisons* court made clear that a party served with discovery must "*fully* answer all interrogatories and all requests for production, unless a specific and clear objection is made." 122 Wn.2d at 353–54 (emphasis in original). Responding parties may determine for themselves what they will produce or answer, once discovery requests are made. *Id*. Misleading and incomplete discovery responses run "contrary to the purposes of discovery" and is "most damaging to the fairness of the litigation process." *Id.* at 346.

In this case, Zidell was obligated to make a reasonable inquiry when responding to discovery requests. CR 26(g). The trial court properly determined that Zidell had failed to make that reasonable inquiry in responding to Dennis's discovery requests

and that sanctions were appropriate for this discovery misconduct. CP 4623–30 (FF 2, 3, 5–7, 9, 11, 19, 20; CL 1–4, 6, 8, 9). Zidell's delay in producing the board meeting document was willful and Dennis was substantially prejudiced in his ability to prepare for trial, a trial that was prioritized due to his ill health. CP 4630 (CL 8, first sentence of 9). The court specifically found that the delay in disclosing those Zidell's board minutes went to "the heart of issues." CP 4629 (CL 4). Zidell did not challenge these findings or conclusions, which together are more than sufficient to support the trial court's exercise of discretion to sanction Zidell with an adverse inference instruction regarding ship ownership. CP 4633 (CL 19); *compare* BA 19 ("The giving of the spoliation instruction was not based on Zidell Explorations' failure to timely produce the board-meeting minutes."), *with* RP 1215 ("It is the remedy that I, in part, set forth for the *discovery violations* of Defendant ... ." (emphasis supplied)).

Review is merited to confirm that a trial court may impose an adverse inference instruction as an appropriate CR 37(b) sanction. RAP 13.4(b)(4).

(3) Division II's Opinion Improperly Intrudes Upon the Trial Court's Expansive Authority to Impose Discovery Sanctions

Division II's opinion fails to honor the trial court's expansive authority on the choice of discovery sanctions. Op. 20-27.

A trial court's imposition of discovery sanctions is reviewed for abuse of discretion. *Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 582-83, 220 P.3d 191, 197 (2009); *Fisons*, 122 Wn.2d at 338. A trial court's finding of willfulness and prejudice in a sanction order is reviewed under a "substantial evidence" standard. *Id.* The Court gives "wide latitude to a trial court in fashioning an appropriate sanction for discovery abuse." *Id.*

A trial court's broad discretion on discovery sanctions will not be disturbed absent its clear abuse. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). Because a trial court is

in the best position to decide an issue, "deference should normally be given to the trial court's decision." *Magaña*, 167 Wn.2d at 583. Consequently, "[a]n appellate court can disturb a trial court's sanction only if it is clearly unsupported by the record." *Id.* Here, the trial court's sanction was supported both by the unrebutted evidence of spoliation and by the *unchallenged* findings and conclusions on Zidell's discovery misconduct.

The trial court analyzed Dennis's request for CR 37 relief under *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), recognizing that lesser sanctions such as a continuance would not suffice given Dennis's terminal disease and statutory right to a priority trial setting. RP 202, 204-206; CP 4630 (FF 10), 4632-33 (CL 17). Having presided over the entire case throughout discovery, motions practice, and trial, the court was optimally situated to determine the nature of prejudice caused by Zidell's discovery misconduct and tailor the sanction to the harm. In so doing, the trial court's modest adverse inference instruction required the Estate to establish five separate elements before the

jury was permitted, but not required, to draw an adverse inference. CP 4952.[6] The court rejected heavier sanctions and did not abuse its discretion by imposing the least severe sanction on Zidell.

The trial court's other findings support an adverse inference instruction even in the absence of a formal spoliation finding. Zidell destroyed records relevant to the case. CP 4626–27 (FF 15, 17), 4632 (CL 15, 16). It failed to produce a properly prepared CR 30(b)(6) witness. CP 4623–24 (FF 2, 5). It hid the 1969 board meeting, producing it at least four months late. CP 4623 (FF 2). Any of these serious discovery violations merited an adverse inference instruction. Review is merited. RAP 13.4(b)(1), (2).

E. CONCLUSION

Division II's opinion on spoliation is contrary to this Court's opinion in *Henderson* and numerous decisions on

[6] Zidell was free to argue the five elements generally and that the missing records were solely in ZD's possession and control, and that even if the documents were wrongfully destroyed, it should not be subject to any adverse inference.

sanctions under CR 37(b) for discovery violations. In the face of the trial court's detailed ruling on Zidell's discovery violations and sanctions, and the adverse impact on the substantial judgment for the Estate, Division II's reversal of the jury's verdict because of the adverse inference instruction is unjustified; review is necessary. RAP 13.4(b).

This document contains 4,924 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 5th day of April, 2023.

Respectfully submitted,

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APPENDIX

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Respondent,

v.

AMERICAN OPTICAL CORPORATION; CROWN CORK & SEAL COMPANY, INC.; METROPOLITAN LIFE INSURANCE COMPANY; NORTH COAST ELECTRIC COMPANY; PFIZER, INC.; UNION CARBIDE CORPORATION; WEYERHAEUSER COMPANY, individually and as successor-in interest to WILLAMETTE INDUSTRIES, INC., R.-W PAPER COMPANY and WESTERN KRAFT; WEYERHAEUSER NR COMPANY; ZIDELL MARINE CORPORATION; ZIDELL DISMANTLING, INC.; PON NORTH AMERICA, INC., individually and as successor to ZIDELL VALVE CORPORATION; GENERAL ELECTRIC COMPANY; GOULDS PUMPS (IPG), LLC; IMO INDUSTRIES, INC., individually and as successor-in interest to DE LAVAL TURBINE, INC.; ITT LLC, as successor-in interest to FOSTER VALVES; VIACOMCBS, INC.; WARREN PUMPS, LLC, individually and as successor-in interest to QUIMBY PUMP COMPANY; and THE PORT OF TACOMA,

Defendants,

ZIDELL EXPLORATIONS, INC.,

Appellant.

No. 56257-0-II

UNPUBLISHED OPINION

MAXA, J. – Zidell Explorations Inc. appeals an $11.2 million judgment in favor of Dennis Woodruff following a jury verdict. Woodruff's lawsuit arose from his exposure to asbestos in the early 1970s while working dismantling ships as an employee of Zidell Dismantling Inc., a related but separate corporation from Zidell Explorations.[1]

Woodruff's liability theory was that Zidell Explorations owed him a general duty of care because it owned at least one and possibly more of the ships that Zidell Dismantling dismantled. Woodruff also claimed that Zidell Explorations was liable because it was the guarantor of Zidell Dismantling's lease with the Port of Tacoma, which required Zidell Dismantling to comply with all safety regulations. Zidell Explorations filed motions for judgment as a matter of law under CR 50(a) and (b), arguing that it owed no duty to Woodruff even if it did own the ships and despite the lease guarantee. The trial court denied the motions. Zidell Explorations appeals the denial of its CR 50 motions.

In 2017, Zidell Dismantling destroyed a number of documents that Woodruff claimed must have included records showing whether Zidell Explorations owned some of the ships that Zidell Dismantling dismantled. The trial court concluded that this destruction of documents constituted spoliation of evidence, and as a sanction instructed the jury that it could infer that the ship-ownership records would have been unfavorable to Zidell Explorations. Zidell Explorations appeals the trial court's conclusion that spoliation occurred and challenges the language of the adverse inference instruction.

We hold that (1) Zidell Explorations owed a duty to Woodruff as an owner of at least one of the ships on which Woodruff worked but not as a guarantor on Zidell Dismantling's lease with

[1] Woodruff passed away while this appeal was pending, and Jason Buckholtz as personal representative of Woodruff's estate has been substituted as the respondent. The opinion will continue to refer to the respondent as Woodruff.

the Port of Tacoma, and (2) the trial court erred in concluding that Zidell Explorations engaged in spoliation of evidence. Accordingly, we remand for the trial court to vacate the judgment entered against Zidell Explorations and for a new trial.

FACTS

Background

Zidell Explorations was formed in 1912. The company's headquarters were in Portland, Oregon. Zidell Explorations began dismantling decommissioned Navy ships in Portland in the 1950s.

Zidell Dismantling was formed in 1960. Zidell Dismantling performed ship dismantling operations in Tacoma. The two companies had common owners and officers, but they were operated and maintained as separate corporations. Emery Zidell was the president and part owner of both companies in the early 1970s. The two companies' operations were very similar, and they coordinated some of their activities. They also placed joint advertisements for selling and buying vessels and their parts.

Zidell Dismantling entered into a lease with the Port of Tacoma, which stated that "Tenant agrees to keep said premises in a clean and safe condition and to comply with all police, sanitary or safety laws and all applicable regulations or ordinances of all governmental bodies having authority over said premises." Ex. 123 at 33. The lease was signed by Emery Zidell. Below the lease signature line was the following provision: "The undersigned here jointly and severally guarantee compliance with all of the provisions of the foregoing Lease and Rental Agreement." Ex. 123 at 34. Emery Zidell signed this guarantee on behalf of Zidell Explorations, as did another entity whose name is illegible.

In 1981, Zidell Dismantling stopped dismantling ships and was renamed Zidell Marine Corporation. For clarity, we will refer to this company as Zidell Dismantling despite the name change. And in 1997, Zidell Explorations was sold and merged into a different company.

Woodruff worked for Zidell Dismantling from May 10, 1970 to July 17, 1973. He first worked as a burner for 14 months. His job was to use large torches to carve up parts of the ships into smaller sections. Part of being a burner included removing asbestos insulation material from pipes and placing it on the pier. But Woodruff never worked aboard the ships as a burner, only on the back lot where the scrap and debris piles ended up. Woodruff then worked as a laborer. Laborers would do any general labor that was needed throughout the job site, including working on the ships being dismantled. Woodruff testified that he was exposed to asbestos during his time at Zidell Dismantling.

One ship that Woodruff worked on as a laborer was the USS Philippine Sea. There was evidence that Zidell Explorations owned this ship, and it was sent to Tacoma to begin the dismantling process. Dismantling began on April 4, 1971, and on July 19, 1971 the ship was moved to Portland for Zidell Explorations to complete the dismantling.

During his years working at Zidell Dismantling, Woodruff was not warned about the hazards of asbestos by anyone at Zidell Dismantling, Zidell Explorations, or the Port of Tacoma. Nor were there any signs on board the ships being dismantled warning workers about asbestos.

In August 2020, Woodruff started experiencing symptoms and was diagnosed with mesothelioma from being exposed to asbestos.

Woodruff Lawsuit

Woodruff subsequently filed a lawsuit against a number of parties, including Zidell Dismantling, Zidell Explorations, and the Port of Tacoma. Woodruff later dismissed Zidell

Dismantling from the lawsuit because he was barred from suing his employer under the Industrial Insurance Act, RCW 51.04.010, and there was no evidence that the case fell within the deliberate injury exception in RCW 51.24.020.

Woodruff eventually settled with all other defendants except Zidell Explorations and the Port of Tacoma.

Discovery and Motion for Sanctions

In response to discovery, Zidell Dismantling produced a list of ships Zidell Dismantling dismantled between 1970 and 1974. Zidell Dismantling supplemented this answer with a list of ships that were worked on by Zidell Explorations in Portland, which included the USS Philippine Sea. The trial court referred to these documents as "the ship lists." Clerk's Papers (CP) at 4624. The ship lists contained specific information regarding each ship, including the ship name and type, purchase price, declared value, arrival date, when work began and ended, and notes. The ship lists did not state which entity owned the ships.

William Gobel, the vice president and chief operating officer of Zidell Dismantling, testified as a CR 30(b)(6) designee for both Zidell Dismantling and Zidell Explorations. When testifying on behalf of Zidell Explorations, Gobel testified as follows:

> Q: Is it the testimony of Zidell Explorations that the company does not know whether it paid any portion of the purchase price listed here in Exhibit 11 for the Philippine Sea?
>
> A: The only thing I know is when the work was done in Tacoma it was owned by Zidell Dismantling. Everything that we dismantled in Tacoma was owned by Zidell Dismantling.

CP at 1653-54.

Kathryn Silva, Zidell Dismantling's general counsel, certified both Zidell Dismantling's and Zidell Explorations' discovery responses. Woodruff deposed Silva, and she testified that all

of the discovery responses were accurate and complete. But two hours after Silva's deposition ended, Zidell Explorations sent Woodruff a letter attaching a document regarding a 1969 special meeting of Zidell Dismantling's board of directors. The document stated, "[T]he Directors discussed and determined that purchase of vessels for dismantling would thereafter be made by ZIDELL DISMANTLING, INC. rather than by ZIDELL EXPLORATIONS, INC." CP at 1680. The trial court referred to this document as the "board meeting document." CP at 4623.

Woodruff then filed a motion for CR 37 discovery sanctions primarily based on Zidell Explorations' failure to timely produce the board meeting document. Woodruff argued that this document was evidence that Zidell Explorations owned at least some of the ships that were salvaged at Zidell Dismantling. Woodruff requested as a sanction that the fact that he was exposed to asbestos on ships Zidell Explorations owned be taken as established under CR 37(b)(2)(A).

While the motion was pending, the trial court authorized another deposition of Silva. Silva testified about historical litigation involving Zidell entities. In 1997, Zidell Explorations and other Zidell entities filed a lawsuit in Oregon against its insurers seeking insurance coverage for environmental liability arising over its dismantling activities in Portland. That lawsuit was mostly settled by 2000. In 2002, Zidell Dismantling filed a lawsuit in Washington seeking insurance coverage for environmental liability arising over its dismantling activities in Tacoma. And before 1997, Zidell Valves, a division of Zidell Explorations, had been sued for injuries resulting from asbestos exposure.

Silva also testified that both Zidell Explorations and Zidell Dismantling knew as early as the 1990s that its dismantling sites were going to be the subject of prolonged environmental

cleanup litigation. It took approximately 10 years to reach a consent decree in the Tacoma environmental litigation.

Silva testified about the creation of the ship lists. She stated that they were prepared by outside counsel in the 1997 Oregon insurance coverage litigation. She acknowledged that the information on the ship lists could have been obtained only from company records. Silva did not know if those records showed who purchased the ships being dismantled. In fact, she had no knowledge of what records were used to create the ship lists. And she did not know what happened to those records. However, she did know that whatever records were used to create the ship lists no longer existed.

In 2017, records from the Zidell entities that were kept in a storage facility were moved to a new storage facility. In conjunction with this move, a number of documents were destroyed. Silva could not say how many documents were destroyed, whether it was 10 percent or 90 percent of the documents at the facility. Silva personally authorized the destruction of approximately 20 boxes of "very old" litigation material from the 1970s. The litigation related to Zidell's tube forgings company, some anti-dumping litigation, and company shareholder litigation. Silva did not review these documents before destroying them. And these documents were not digitized before they were destroyed.

Silva provided the following testimony regarding the duty to retain documents:

> Q. Okay. As an attorney, you're aware of the need to retain documents potentially relevant in litigation; correct?
>
> A. Yes.
>
> Q. Okay. And as an attorney, you understand that retention of documents potentially relevant to litigation is a duty that attaches even before said lit -- even before a particular piece of litigation is commenced; correct?
>
> A. Yes.

CP at 2012. She later testified that Zidell Dismantling was obligated to retain documents "if there is any known litigation or potential litigation." CP at 2111. And earlier she had testified there was no litigation or potential litigation in 2017 when the documents were destroyed.

After Silva's deposition, Woodruff raised an issue regarding potential spoliation of documents relating to the ship lists. Woodruff supplemented his sanction motion with excerpts from Silva's second deposition and case authority regarding spoliation. The trial court took the motion for sanctions under advisement and stated that it would issue a ruling at a later time.

Discovery Sanction and Spoliation Ruling

At the beginning of the trial, the trial court ruled that Zidell Explorations had engaged in spoliation of evidence regarding the documents relating to the board meeting document and the ship lists. The court determined that the records destroyed were relevant to a claim or defense, Zidell Exploration was obligated to preserve the records because they were relevant to anticipated litigation, and there was a conscious disregard of discovery violations because the documents were not scanned before they were destroyed. The court decided that an adverse inference instruction was the appropriate remedy.

The trial court later entered an order regarding discovery sanctions, including extensive findings of fact and conclusions of law. The court made a finding of fact that included in the documents destroyed in 2017 "were all of the records upon which the ship lists were based." CP at 4627. The court also made the following findings:

> 16. The Court takes judicial notice of the fact that, as of 2017, the common course of business for most corporations in the country would be to digitize historic business records prior to their destruction. Doing so allows the corporation to keep the records in an electronic fashion and to even convert them into a searchable format.

> 17. When Zidell authorized the destruction of historic business records in 2017, it did not digitize any of the destroyed documents first. It is entirely unexplained why this did not occur, but the Court finds this fact to be especially remarkable, even stunning.

CP at 4627.

The court concluded that Zidell Explorations "consciously disregarded its discovery obligations, and that spoliation has occurred." CP at 4629. The court stated, "[T]he spoliation relates to documents underpinning the ship lists. The ship lists, in turn, go to the weight of Zidell Explorations' defense that the ships dismantled in Tacoma would have been owned by Zidell Dismantling." CP at 4631.

The trial court entered the following conclusion of law:

> Zidell committed spoliation for its destruction of historic business records in 2017 potentially relevant to anticipated future toxic tort litigation. First, there is no doubt that the destroyed documents, which served as the underpinnings of the Board Meeting document and the ship lists, were relevant to a claim or defense. Indeed, it is Zidell's entire defense in this case. Second, by Silva's own admission, Zidell clearly understood that it had a duty to preserve these documents as evidence. Moreover, the Court concludes that Zidell should reasonably have known that the evidence might have been relevant to anticipated litigation. Apart from the environmental litigation, Zidell Valves had been sued for asbestos exposure in the past. Thus, these destroyed documents were highly relevant to litigation that Zidell reasonably should have anticipated would arise in the future.

CP at 4632.

With regard to Zidell Explorations' culpable state of mind, the court also took "judicial notice that most companies scanned all of their historical documents once the technology became available." CP at 4632. The court concluded,

> Because Zidell knew or should have known that it was going to continue to be involved in litigation arising from its ship dismantling operations – including asbestos litigation – yet did not take the very simple step of digitizing those documents before they were destroyed, the Court concludes that there was a culpable state of mind and a conscious disregard of Zidell's legal obligation to preserve documents reasonably anticipated to be relevant in future litigation.

CP at 4632.

As a sanction, the trial court determined that it would "give an adverse inference instruction to ameliorate the prejudice to [Woodruff] resulting from Zidell's authorization of destruction of historic business records regarding ownership of the ships scrapped at Zidell Dismantling facility during Mr. Woodruff's employment there." CP at 4633. The court also ordered Zidell Explorations to pay Woodruff's attorney fees and costs and imposed an additional sanction of $15,000.

Trial Testimony

At trial, evidence was presented regarding the background information recited above regarding Zidell Explorations, Zidell Dismantling, and Woodruff's work for Zidell Dismantling.

Gobel worked for the family of Zidell companies for 61 years. He worked summers for Zidell Explorations in Portland, and started at Zidell Dismantling in Tacoma in 1960 as a laborer. Gobel stated that Zidell Explorations and Zidell Dismantling were separate companies. However, he acknowledged that both companies were a part of the "Zidell organization" and that Emery Zidell was the president of the "organization." Report of Proceedings (RP) at 466. He also acknowledged that the interrogatory answers and trial exhibits showed that Zidell Explorations and Zidell Dismantling had common owners and directors.

Gobel stated that with the exception of one person, all the officers and directors of Zidell Dismantling had their offices at Zidell Explorations' facility in Portland. However, Emery Zidell and other officers occasionally would visit Zidell Dismantling's operations in Tacoma.

Gobel testified that the dismantling process for some ships would begin at Zidell Dismantling and then would finish at Zidell Explorations in Portland. One of the ships for which this occurred was the USS Philippine Sea. Gobel had a personal recollection of this fact.

Regarding the USS Philippine Sea, Gobel was present when the ship was being worked on by Zidell Dismantling. The reason the ship was sent to Tacoma was that it was too tall to fit under the bridges on the way to Zidell Explorations' facility in Portland. Therefore, the ship's tower and offices on the deck were removed in Tacoma. The wood decking on the ship also was removed. Once that work was complete, the ship was towed to Portland because it was now short enough to get under the bridges. The removal of the metal components, insulation, and equipment was done in Portland. Gobel did not know whether he observed anything regarding asbestos on that ship.

Gobel testified that Zidell Explorations had no documents regarding the title of any ships or the purchase of any ships for the time period of 1970 to 1974. But the cruise book from the USS Philippine Sea stated that the USS Philippine Sea was sold to Zidell Explorations in March 1971. Further testimony revealed that the USS Philippine Sea appeared in a July 15, 1971 edition of the Maritime Reporter. Zidell Explorations' logo appeared on the top of the publication, although at the time the USS Philippine Sea was being dismantled in Tacoma. Zidell Explorations was advertising that it was dismantling the USS Philippine Sea and another aircraft carriers. The advertisements showcased various pieces of salvaged material from the USS Philippine Sea.

Woodruff testified that he spent "maybe five months" working on the USS Philippine Sea, and at least it "felt like a long time." RP at 425. However, Zidell Explorations presented evidence that Woodruff started working at Zidell Distributing on May 10, 1970 and worked as a burner for 14 months before working on ships as a laborer. The USS Philippine Sea left Zidell Dismantling on July 19, 1971. Therefore, there was evidence that Woodruff's time as a laborer –

when he worked on the ships – overlapped with the ship's presence at Zidell Dismantling only by approximately nine days.

Gobel testified that Zidell Explorations knew that there was asbestos on the Navy ships that it owned and that asbestos was hazardous to human health. Gobel saw no evidence that Zidell Explorations ever warned Woodruff of this danger.

Environmental studies and surveys performed decades later on the Zidell Dismantling site in Tacoma revealed that asbestos was common throughout the site.

CR 50(a) Motion

At the close of evidence, Zidell Explorations filed a motion for judgment as a matter of law under CR 50(a). Zidell Explorations argued that Woodruff had presented no evidence showing that it owed a duty to him. Specifically, Zidell Explorations argued that even if it owned at least one of the ships on which Woodruff worked, it was not subject to premises liability or jobsite owner liability and there was no other basis for finding a duty.

The trial court denied Zidell Explorations' CR 50(a) motion.

Adverse Inference Instruction

The trial court prepared an adverse inference instruction pursuant to its spoliation ruling, identified as instruction 30. The instruction was based on the missing witness instruction stated in WPIC 5.20.[2] The adverse inference instruction that the trial court gave the jury stated in part:

> You have heard evidence that Zidell Explorations destroyed business records relating to the ownership of Navy ships dismantled by Zidell Dismantling between 1970 through 1973. When business records are destroyed by a party prior to trial, you may infer that the records would have been unfavorable to the party destroying the records.

[2] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS CRIMINAL: 5.20 (4th ed. 2016).

CP at 4592. Zidell objected to the language of this instruction.

Closing Argument

In closing argument, Woodruff emphasized the adverse inference instruction in arguing that Zidell Explorations owned all the ships that Zidell Dismantling salvaged in Tacoma.

> [Y]ou may infer, if those documents were destroyed by Kathryn Silva in 2017, that on the issue of ship ownership, that it would be unfavorable to Zidell Explorations, meaning that it would confirm what the documents we do have show. That Zidell Explorations owned the ships that were being dismantled in Tacoma, Washington, when Dennis Woodruff worked there.

RP at 1251.

On rebuttal, Woodruff stated,

> And Zidell Explorations absolutely owned those ships. Why? We are accused of only bringing documents for the Philippine Sea because Zidell Explorations threw away all the other documents, not because of the passage of time, but because of a deliberate decision that they made in 2017. Facing environmental litigation regarding asbestos and knowing about asbestos claims, they threw those documents away. So it's reasonable for you to infer that those ships that were at the shipyard -- and not just the Philippine Sea -- were owned by Zidell Explorations. That is a fact.

RP at 1355.

> Zidell Explorations owned the asbestos-containing ships, not just the Philippine Sea, but the other ships that were coming up here to Tacoma to be dismantled. And how can you conclude that? Based on the inference that you can draw from the documents we do have and the fact that Zidell Explorations threw the documents away in 2017.

RP at 1361.

Jury Verdict and CR 50(b) Motion

The jury found that both Zidell Explorations and the Port of Tacoma were negligent, but found that only Zidell Explorations' negligence was a substantial factor in causing Woodruff's injuries. The jury also found that Woodruff was not contributorily negligent. The jury awarded Woodruff $216,056 in agreed past medical expenses and $11 million in noneconomic damages.

The trial court entered judgment against Zidell in the amount of $9,448,556, reflecting a reduction for the prior settlements.

Zidell Explorations subsequently filed a motion for judgment as a matter of law under CR 50(b), or in the alternative for a new trial or remittitur. Zidell Explorations again argued that Woodruff had failed to establish that it owed him a duty and noted that its guarantee of Zidell Dismantling's lease did not create a duty. The trial court denied Zidell Explorations' CR 50(a) motion.

Zidell Explorations appeals the trial court's denial of its CR 50 motions and the trial court's sanction based on spoliation of evidence.

ANALYSIS

A. EXISTENCE OF A DUTY

Zidell Explorations argues that the trial court erred in denying its CR 50(a) and (b) motions for judgment as a matter of law because Woodruff did not establish that Zidell Explorations owed him a duty. Zidell Explorations claims that it owed no duty to Woodruff as the owner of the worksite on which Woodruff worked and that it did not assume a duty by guaranteeing Zidell Dismantling's lease. We conclude that Zidell Explorations owed Woodruff a duty of ordinary care as the owner of ship or ships on which Woodruff worked, but not as a lease guarantor.

1. Standard of Review

Under CR 50(a)(1), a court may grant judgment as a matter of law on an issue if "there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for [the nonmoving] party with respect to that issue." This motion may be filed "any time before

submission of the case to the jury." CR 50(a)(2). Under CR 50(b), a party may renew the motion for judgment as a matter of law after judgment has been entered.

A CR 50 motion can be granted " 'only when, after viewing the evidence in the light most favorable to the nonmoving party, there is no substantial evidence or reasonable inferences therefrom to support a verdict for the nonmoving party.' " *Mancini v. City of Tacoma*, 196 Wn.2d 864, 877, 479 P.3d 656 (2021) (quoting *H.B.H. v. State*, 192 Wn.2d 154, 162, 429 P.3d 484 (2018)). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that the declared premise is true. *Id.* We review a trial court's CR 50 decision de novo. *Id.*

2. Legal Principles

The threshold determination in a negligence claim is the existence of a duty – whether the defendant owed the plaintiff a duty. *Turner v. Dep't of Soc. & Health Servs.*, 198 Wn.2d 273, 284, 493 P.3d 117 (2021). The existence of a duty is a question of law that we review de novo. *Id.*

In general, a duty is an obligation of one person to conform to a particular standard of conduct toward another person. *Mita v. Guardsmark, LLC*, 182 Wn. App. 76, 83, 328 P.3d 96 (2014). Whether a legal duty exists depends on " 'considerations of logic, common sense, justice, policy, and precedent.' " *Volk v. DeMeerleer*, 187 Wn.2d 241, 266, 386 P.3d 254 (2016) (quoting *Affil. FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 449, 243 P.3d 521 (2010) (plurality opinion)). " 'The concept of duty is a reflection of all those considerations of public policy which lead the law to conclude that a plaintiff's interests are entitled to legal protection against the defendant's conduct.' " *Volk*, 187 Wn.2d at 266 (quoting *Affil. FM*, 170 Wn.2d at 450).

The issue here is whether the owner of a decommissioned ship that contains asbestos owes a duty to exercise ordinary care to warn or protect the employee of a company that is dismantling the ship.

3. Jobsite Owner Duty

Zidell argues that it owed Woodruff no common law or statutory duty as the owner of the ship[s] on which Woodruff was working. We disagree.

a. Legal Principles

A worksite owner's duty is determined with reference to a general contractor's duty. "Under the common law, a general contractor owes a duty to all employees on a jobsite to provide a safe place to work in all areas under its supervision." *Vargas v. Inland Wash., LLC,* 194 Wn.2d 720, 731, 452 P.3d 1205 (2019). Despite this rule, a general contractor on a worksite who hires an independent contractor to perform certain work generally is not liable for injuries to the employees of that independent contractor. *Id.* But if a general contractor hires a subcontractor and retains control over the work performed, the general contractor has a duty within the scope of control to provide a safe work place. *Id.*

For purposes of this rule, " '[t]he test of control is not the actual interference with the work of the subcontractor, but the right to exercise such control.' " *Id.* (quoting *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 330-31,582 P.2d 500 (1978)). Stated differently, "the proper inquiry becomes whether there is a retention of the right to direct the manner in which the work is performed, not simply whether there is an actual exercise of control over the manner in which the work is performed." *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 123, 125, 52 P.3d 472 (2002).

In addition to the common law duty, a general contractor may have a statutory duty to provide a safe work place.[3] *Vargas*, 194 Wn.2d at 735. This statutory duty applies regardless of whether the general contractor retains control over the worksite. *Id.* at 736.

There is no suggestion in the record that Zidell Explorations acted as a general contractor here. But to the extent that Zidell Explorations owned the USS Philippine Sea and possibly other ships that Zidell Dismantling dismantled, Zidell Explorations was the owner of the worksite where Woodruff worked and was exposed to asbestos. This ownership potentially gives rise to a duty of care to workers at the worksite:

> Under some circumstances, jobsite owners may have a duty of care analogous to that of an employer or general contractor. . . . A jobsite owner or general contractor will have this duty only if it maintains a sufficient degree of control over the work. . . . If the general contractor – or by extension, jobsite owner – *has the right to exercise control*, it also "has a duty, within the scope of that control, to provide a safe place of work."

Afoa v. Port of Seattle, 191 Wn.2d 110, 121, 421 P.3d 903 (2018) (emphasis added) (quoting *Kelley*, 90 Wn.2d at 330).

b. Duty Analysis

There is no evidence here that Zidell Explorations actually exercised control over how Zidell Dismantling performed work on the USS Philippine Sea and possibly other ships that Zidell Explorations owned. The issue is retained control – whether Zidell Explorations retained the *right* to exercise control. *Afoa*, 191 Wn.2d at 121.

Here, the nature of the relationship between the two companies shows that Zidell Explorations had the right to control Zidell Dismantling's work on the ships that Zidell

[3] Currently, the Washington Industrial Safety and Health Act of 1973 (WISHA), ch. 49.17 RCW creates this statutory duty. *Vargas*, 194 Wn.2d at 735. Woodruff was employed at Zidell Dismantling until July 17, 1973, and WISHA took effect on March 9, 1973.

Explorations owned. Zidell Explorations and Zidell Dismantling had common owners and directors, and Emery Zidell was the president of both companies. Both companies were part of the "Zidell organization," headed by Emery Zidell. In addition, Zidell Explorations clearly was the dominant company in the Zidell organization. All the common directors and officers but one had offices at Zidell Explorations' facility in Portland. This relationship compels the conclusion that Zidell Explorations had the ability to direct the manner in which Zidell Dismantling worked on the ships Zidell Explorations owned if Zidell Explorations had chosen to do so.

In addition, at least for the USS Philippine Sea, Zidell Explorations specifically directed what work Zidell Dismantling was to perform. Gobel testified that Zidell Explorations sent that ship to Tacoma because it was too tall to reach the Portland facility. Zidell Dismantling was not free to do whatever it wanted with the ship. Instead, Zidell Explorations directed that only the tower and offices on the main deck would be removed before the ship was sent to Portland. This fact creates an inference that Zidell Explorations retained the right to control the manner in which Zidell Distributing performed the work.

Under the unique facts of this case, we hold that Zidell Explorations owed a duty to Woodruff as the owner of one or more ships on which Woodruff worked.

4. Assumption of Duty – Lease Guarantee

Zidell argues that it did not assume a duty to comply with all safety regulations by guaranteeing Zidell Dismantling's lease with the Port of Tacoma. We agree.

The lease that Zidell Dismantling signed stated that "Tenant agrees to keep said premises in a clean and safe condition and to comply with all police, sanitary or safety laws and all applicable regulations or ordinances of all governmental bodies having authority over said

premises." Ex. 123 at 33. Zidell Explorations guaranteed compliance with all of the provisions the lease, jointly and severally with another entity.

"A guaranty 'arises when one assumes an obligation to pay the debt of another.' " *Serpanok Constr., Inc. v. Point Ruston, LLC*, 19 Wn. App. 2d 237, 495 P.3d 27 (2021) (quoting *Tr. of Strand v. Wel-Co Grp., Inc.*, 120 Wn. App. 828, 836, 86 P.3d 818 (2004)). A guarantee creates a contractual obligation between the guarantor and the obligee on the contract that is separate from the principal obligation. *Freestone Cap. Partners L.P. v. MKA Real Est. Opportunity Fund I, LLC*, 155 Wn. App. 643, 660-61, 230 P.3d 625 (2010). If the obligor fails to perform, the guarantor promises the obligee that it will fulfill the obligor's performance under the contract. *Century 21 Products, Inc. v. Glacier Sales*, 129 Wn.2d 406, 414, 918 P.2d 168 (1996).

Here, there is no indication that the Port of Tacoma ever invoked the guarantee and required Zidell Explorations to assume Zidell Dismantling's obligations under the lease. In addition, Woodruff cites no authority for the proposition that a guarantor can be liable *to the obligor's employee* for the obligor's failure to comply with a lease provision.

Woodruff suggests that the guarantee meant that Zidell Explorations and Zidell Dismantling had a joint obligation to comply with the lease provisions. Woodruff apparently relies on the guarantee language that "[t]he undersigned here *jointly and severally* guarantee compliance with all of the provisions of the foregoing Lease and Rental Agreement." Ex. 123 at 34 (emphasis added). However, this clause merely states that Zidell Explorations *and the other co-guarantor* had a joint obligation, not that Zidell Explorations had a joint obligation with Zidell Dismantling.

We hold that Zidell Explorations did not assume a duty to Woodruff by guaranteeing Zidell Dismantling's lease.

B. DISCOVERY SANCTION ORDER – SPOLIATION

Zidell Explorations argues that the trial court erred in concluding that it committed spoliation of evidence. We agree.[4]

1. Legal Principles

We review for abuse of discretion the trial court's order of sanctions based on spoliation of evidence. *Cook v. Tarbert Logging, Inc.*, 190 Wn. App. 448, 461, 360 P.3d 855 (2015). An abuse of discretion occurs when the trial court was manifestly unreasonable in exercising its discretion or exercised its discretion based on untenable grounds or reasons. *Id.* An error of law is an untenable reason. *Id.* However, whether an actor has a duty to preserve evidence is a question of law that we review de novo. *Id.*

The traditional definition of spoliation is the intentional destruction of evidence. *Henderson v. Thompson*, 200 Wn.2d 417, 441, 518 P.3d 1011 (2022). However, whether a party has engaged in spoliation of evidence depends on an analysis of several factors. *See Cook*, 190 Wn. App. at 461-64.

First, the person engaging in the destruction of evidence must have a duty to preserve the evidence. *See Carroll v. Akebono Brake Corp.*, 22 Wn. App. 2d 845, 875-76, 514 P.3d 720 (2022); *Cook*, 190 Wn. App. at 462-63. There is no general duty in Washington to preserve evidence. *J.K. by Wolf v. Bellevue Sch. Dist. No. 405*, 20 Wn. App. 2d 291, 308, 500 P.3d 138

[4] Zidell Explorations in the alternative challenges the language of the trial court's adverse inference instruction, and specifically the fact that the first sentence was a comment on the evidence. Because we hold that the trial court erred in finding spoliation, we do not address this issue.

(2021); *Cook*, 190 Wn. App. at 463-64, 470. More specifically, the cases support the argument that a potential litigant has no general duty to preserve evidence even when a person has been injured and a lawsuit is a possibility. *See Carroll*, 22 Wn. App. 2d at 876; *Cook*, 190 Wn. App. at 463.

Second, the destruction of evidence must be connected to the party subject to the sanction. *Henderson*, 200 Wn.2d at 441-42; *Cook*, 190 Wn. App. at 462. The destruction must be done by a person over whom the party had some control. *Cook*, 190 Wn. App. at 462. "We do not agree that this duty [to preserve evidence] extends to evidence over which a party has no control." *Homeworks Const., Inc. v. Wells*, 133 Wn. App. 892, 901, 138 P.3d 654 (2006).

Third, the evidence destroyed must have potential importance or relevance to the case. *Henderson*, 200 Wn.2d at 441; *J.K. by Wolf*, 20 Wn. App. 2d at 304. This factor depends upon the particular facts and circumstances of the case. *J.K. by Wolf*, 20 Wn. App. 2d at 304.

Fourth, the party destroying the evidence must have culpability – acted in bad faith or with a conscious disregard of the significance of the evidence as opposed to having an innocent explanation for the destruction. *Carroll*, 22 Wn. App. 2d at 875. Significantly, " 'a party's negligent failure to preserve evidence relevant to foreseeable litigation is not sanctionable spoliation.' " *Id.* (quoting *Cook*, 190 Wn. App. at 464).

When spoliation occurs, the trial court may issue an adverse infe rence instruction that the missing evidence would have been unfavorable to the party at fault. *Henderson*, 200 Wn.2d at 441.

Here, Zidell Explorations challenges only a few of the trial court's findings of fact regarding spoliation. We review findings of fact to determine if substantial evidence supports them. *Real Carriage Door Co., Inc. ex rel. Rees v. Rees*, 17 Wn. App. 2d 449, 457, 486 P.3d

955, *review denied*, 198 Wn.2d 1025 (2021). Unchallenged findings of fact are verities on appeal. *Id.*

2. Duty to Preserve Evidence

Zidell Explorations argues that it had no duty to preserve the documents at issue here even though, as the trial court found, the Zidell companies knew by 2002 "that they faced potential liabilities in toxic tort actions." CP at4625. We agree.

Prior spoliation cases do not provide much guidance regarding the scope of the duty to preserve evidence other than stating that there is no general duty to preserve evidence. *J.K. by Wolf*, 20 Wn. App. 2d at 308; *Cook*, 190 Wn. App. at 463-64, 470. Certainly, an entity may have a duty to "preserve evidence on the eve of litigation." *Homeworks*, 133 Wn. App. at 901. And despite language in *Cook* suggesting a contrary rule, we can assume without deciding that an entity has a duty to preserve evidence relevant to anticipated litigation involving a specific party.[5] Finally, we can assume without deciding that an entity has a duty *under certain circumstances* to preserve evidence relevant to anticipated litigation of the same specific type as the lawsuit in which a spoliation issue arises.

The facts of this case clearly do not fall into either of the first two categories. Zidell Explorations did not destroy the documents on the eve of any litigation and no lawsuit involving Woodruff was anticipated in 2017. Woodruff was not even diagnosed with mesothelioma until August 2020. The question here is whether Zidell Explorations reasonably anticipated in 2017 that it would be sued by a person exposed to asbestos while dismantling a ship.

[5] The court in *Cook* relied on two earlier cases in stating that "no duty to preserve evidence arises where a person has been injured by an arguably negligent act and a lawsuit is a possibility." 190 Wn. App. at 463. Although this statement may be true under certain circumstances, we disagree with the statement as a general proposition.

The trial court apparently found a duty based on this third category, suggesting that Zidell Explorations committed spoliation because the documents destroyed in 2017 were "potentially relevant to anticipated future toxic tort litigation." CP at 4632. This conclusion was based on the unchallenged finding of fact that "[b]y 2002, it stood to reason that the Zidell companies knew that they faced potential liabilities in toxic tort actions, and that, given the nature of this type of litigation, that that was going to go on for a long time." CP at 4625-26. The trial court also stated in a conclusion of law that "Zidell knew or should have known that it was going to continue to be involved in litigation arising from its ship dismantling operations – including asbestos litigation." CP at 4632. Zidell Explorations assigned error to that statement.

However, substantial evidence does not support a finding that Zidell Explorations *in 2017* anticipated future litigation by persons exposed to asbestos while dismantling ships at Zidell Dismantling's Tacoma site. Regardless of what Zidell Explorations anticipated in 2002, 15 years had passed by the time the documents were destroyed. During that time, there is no evidence that Zidell Explorations, Zidell Dismantling, or any Zidell entity had been sued or even subject to a workers' compensation claim for asbestos personal injury. And the only asbestos personal injury lawsuit ever filed against any Zidell entity occurred over 20 years before the documents were destroyed. Finally, Silva testified that she was not aware of any litigation or potential litigation at the time the documents were destroyed in 2017.

In 2017, Zidell Explorations at best knew that there was a vague possibility that some lawsuit involving asbestos personal injury might be filed at some unknown time in the future – even though no such lawsuit had been filed in the more than 40 years since Woodruff stopped working at Zidell Dismantling. Woodruff points to no authority suggesting that an entity has a duty to preserve documents under these circumstances. No Washington cases even suggest that

such a duty exists. And adopting a duty in this situation would conflict with the settled rule that there is no general duty to preserve evidence. *J.K. by Wolf*, 20 Wn. App. 2d at 308.

This case is completely different from a situation in which the entity destroying documents has been sued repeatedly regarding certain activities and anticipates that additional lawsuits will be filed in the future. In that situation, the entity would have a duty to preserve relevant documents.

Woodruff relies on the trial court's conclusion that Zidell Explorations "clearly understood that it had a duty to preserve these documents as evidence," relying on Silva's testimony. CP at 4632. Woodruff claims that Silva's testimony is the source of a duty to preserve the documents.

But Silva never testified that Zidell Explorations had a duty to preserve "these documents" – the documents that were destroyed in 2017. She merely testified that she understood that "retention of documents potentially relevant to litigation is a duty that attaches . . . even before a particular piece of litigation is commenced." CP at 2012. Silva did not admit that an entity has a duty to preserve documents simply because they might be relevant to some vaguely possible future litigation. Instead, this testimony is consistent with a potential duty to preserve evidence relating to a specific type of anticipated litigation. But again, Silva testified that there was no litigation or potential litigation at that time.

We conclude on de novo review that Zidell had no duty to preserve the documents destroyed in 2017, and therefore hold that the trial court erred in concluding that Zidell Explorations engaged in spoliation of evidence.

3. Culpability – Conscious Disregard

Zidell Explorations argues that even if it had a duty to preserve the destroyed documents, the trial court erred in concluding that destroying the documents in 2017 involved a culpable state of mind and a conscious disregard of the obligation to preserve the documents. We agree.

The trial court made the following conclusion of law:

> Because Zidell knew or should have known that it was going to continue to be involved in litigation arising from its ship dismantling operations – including asbestos litigation – yet did not take the very simple step of digitizing those documents before they were destroyed, the Court concludes that there was a culpable state of mind and a *conscious disregard of Zidell's legal obligation to preserve documents* reasonably anticipated to be relevant in future litigation.

CP at 4632 (emphasis added). As noted above, culpability in the spoliation context involves acting in bad faith or with a conscious disregard of the *significance of the evidence* as opposed to having an innocent explanation for the destruction. *Carroll*, 22 Wn. App. 2d at 875. And the rule is that " 'a party's negligent failure to preserve evidence relevant to foreseeable litigation is not sanctionable spoliation.' " *Id.* (quoting *Cook*, 190 Wn. App. at 464).

Even if records containing ship ownership information were included in the destroyed documents,[6] the same facts discussed above regarding duty show that Zidell Explorations acted negligently as opposed to in bad faith or with a conscious disregard of the significance of the evidence. There is no indication that Zidell Explorations destroyed the documents in order to avoid future liability or to strengthen its position in future litigation. Zidell Explorations had never been sued regarding asbestos exposure at Zidell Dismantling's facility (or its facility), and the only asbestos-related lawsuit involving a Zidell entity had been filed over 20 years earlier.

[6] Zidell Explorations argues that there is no evidence that ship ownership information was contained in the destroyed documents, and therefore there is no indication that the destroyed documents were important or relevant in this case. Because we reverse on other grounds, we do not address this argument.

Although the trial court found that there was a potential for toxic tort lawsuits in the future, there was only a vague possibility of such lawsuits. And Silva testified that there was no litigation or potential litigation when the documents were destroyed. At worst, the destruction of the documents was negligent.

In *Cook*, Division Three of this court reversed a finding of spoliation when the plaintiff destroyed significant evidence even though litigation was anticipated. 190 Wn. App. at 470. In that case, the plaintiff was badly injured in a vehicle accident and retained a lawyer to explore the possibility of a lawsuit. *Id.* at 452-53. The plaintiff's lawyer and an expert examined the vehicle the plaintiff was driving. *Id.* at 453. The plaintiff then parted out and sold the vehicle without removing the event data recorder, which could have provided information about the vehicle's speed at the time of the accident. *Id.* at 452, 454. The trial court concluded that the plaintiff had breached a duty to retain the vehicle, and as a sanction excluded the expert who had examined the vehicle from testifying about speed. *Id.* at 455-56. Division Three reversed, holding that there was no spoliation because the plaintiff's destruction of the vehicle was "merely negligent." *Id.* at 470.

The facts of this case are even more supportive of a finding of mere negligence. In *Cook*, specific litigation clearly was anticipated by the party destroying the evidence – the plaintiff had retained a lawyer and an expert. Here, there was only a vague possibility of some future, unknown lawsuit.

The trial court here also based its culpability conclusion on the fact that Zidell Explorations did not digitize the documents before destroying them. The court took judicial notice of the fact that in 2017 "the common course of business for most corporations in the country would be to digitize historic business records prior to their destructions." CP at 4627.

Zidell Explorations argues that the trial court erred in taking judicial notice of this fact. Although we are skeptical that this fact is the proper subject of judicial notice, we need not address this issue. For the reasons stated above, there is no indication that the failure to digitize the documents involved an attempt to avoid future liability as opposed to mere negligence.

We conclude that there is no evidence that Zidell Explorations' destruction of the documents in 2017 involved bad faith or conscious disregard of the significance of the evidence. Therefore, even under an abuse of discretion standard, we hold that the trial court erred in concluding that Zidell Explorations acted with culpability and that Zidell Explorations engaged in spoliation of evidence.

CONCLUSION

We remand for the trial court to vacate the judgment entered against Zidell Explorations and for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Maxa, J.

MAXA, J.

We concur:

Glasgow, CJ

GLASGOW, C.J.

Cruser, J.

CRUSER, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JASON BUCKHOLTZ as Personal Representative for the Estate of DENNIS G. WOODRUFF,

Respondent,

v.

AMERICAN OPTICAL CORPORATION; CROWN CORK & SEAL COMPANY, INC.; METROPOLITAN LIFE INSURANCE COMPANY; NORTH COAST ELECTRIC COMPANY; PFIZER, INC.; UNION CARBIDE CORPORATION; WEYERHAEUSER COMPANY, individually and as successor-in interest to WILLAMETTE INDUSTRIES, INC., R.-W PAPER COMPANY and WESTERN KRAFT; WEYERHAEUSER NR COMPANY; ZIDELL MARINE CORPORATION; ZIDELL DISMANTLING, INC.; PON NORTH AMERICA, INC., individually and as successor to ZIDELL VALVE CORPORATION; GENERAL ELECTRIC COMPANY; GOULDS PUMPS (IPG), LLC; IMO INDUSTRIES, INC., individually and as successor-in interest to DE LAVAL TURBINE, INC.; ITT LLC, as successor-in interest to FOSTER VALVES; VIACOMCBS, INC.; WARREN PUMPS, LLC, individually and as successor-in interest to QUIMBY PUMP COMPANY; and THE PORT OF TACOMA,

Defendants,

ZIDELL EXPLORATIONS, INC.,

Appellant.

No. 56257-0-II

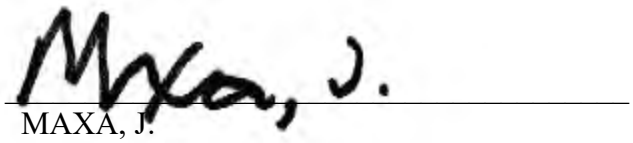
ORDER DENYING MOTIONS FOR RECONSIDERATION

Both appellant and respondent have moved for reconsideration of the court's January 24, 2023 opinion. Upon consideration, the court denies both motions. Accordingly, it is

SO ORDERED.

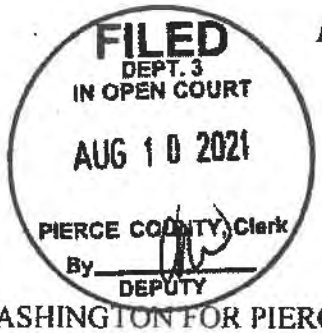
PANEL: Jj. Maxa, Glasgow, Cruser

FOR THE COURT:



MAXA, J.

HONORABLE MICHAEL E. SCHWARTZ
Trial Date: June 10, 2021
Hearing Date: May 21, 2021
Hearing Time: 9:00 a.m.



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

DENNIS G. WOODRUFF, Plaintiff, v. AMERICAN OPTICAL CORPORATION, et al., Defendants.	NO. 20-2-08044-1 ORDER GRANTING PLAINTIFF'S MOTION FOR DISCOVERY SANCTIONS UNDER CR 37

THIS MATTER comes before the Court on Plaintiff's Motion for Discovery Sanctions Under CR 37. In adjudicating this Motion.and making the following Findings of Fact and Conclusions of Law, the Court has considered the following:

1. Plaintiff's Motion for Discovery Sanctions Under CR 37 and for Leave to File Overlength Brief;
2. Declaration of Justin Olson in Support of Plaintiff's Motion for Discovery Sanctions Under CR 37 and for Leave to File Overlength Brief, and the exhibits attached thereto;
3. Defendant Zidell Explorations, Inc.s' Opposition to Plaintiff's Motion for Sanctions;
4. Declaration of Kevin J. Craig in Support of Defendant Zidell Explorations, Inc.s' Opposition to Plaintiff's Motion for Sanctions, and the exhibits attached;
5. Declaration of Kathryn Silva;
6. Plaintiff's Reply in Support of Plaintiff's Motion Discovery Sanctions Under CR 37 and for Leave to File Overlength Brief; and

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7. Declaration of Matthew P. Bergman in Support of Plaintiff's Reply in Support of Plaintiff's Motion Discovery Sanctions Under CR 37 and for Leave to File Overlength Brief, and the exhibit attached thereto.

8. Plaintiff's Memorandum of Supplemental Authority in Support of Motion for Sanctions;

9. Transcript of the Deposition of Kathryn Silva taken May 20, 2011, in this case;

10. Defendant Zidell Explorations, Inc.'s Response to Plaintiff's Memorandum of Supplemental Authority in Support of Motion for Sanctions;

11. Supplemental Declaration of Kevin J. Craig in Support of Zidell Explorations, Inc.'s Response to Plaintiff's Memorandum of Supplemental Authority in Support of Motion for Sanctions; and

12. The oral argument of the parties.

FINDINGS OF FACT

1. Plaintiff originally filed his Motion for Sanctions on May 12, 2021. In that motion, Plaintiff brought to the Court's attention what Plaintiff described as a belated disclosure of what Plaintiff termed a "smoking gun" document, which detailed a Special Meeting of the Board of Directors for Zidell Dismantling, Inc., dated April 2, 1969. The document is bates stamped ZIDELL_EXPLORATIONS_000001 and shall hereafter be referred to as "the Board Meeting document."

2. The Board Meeting document was responsive to Plaintiff's requests for production of documents, which were served on Zidell Explorations, Inc., at its latest, January of 2021. Indeed, the Board Meeting document goes to the heart of Zidell Explorations' defense. Plaintiff alleges that Zidell Explorations owned at least some of the ships that were dismantled by Dennis Woodruff at Zidell Dismantling in Tacoma, including the *USS Philippine Sea*. The Board Meeting document was produced to Plaintiff on May 3, 2021, after Plaintiff had deposed Zidell's Rule 30(b)(6) designee and just two hours after the deposition of Kathryn Silva, who serves as general counsel for Zidell Marine Corporation, f/k/a Zidell Dismantling, Inc. and verified under oath the

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accuracy and completeness of Zidell Explorations, Inc.'s discovery responses.

3. Following disclosure of the Board Meeting document, the Court authorized further depositions in this instance so that the plaintiff could capably explore the reasons behind the delay of that disclosure. As a result, Plaintiff again deposed Kathryn Silva on May 20, 2021, and that deposition was provided to the Court. The Court undertook its review of that transcript as well as the declarations that were provided by Counsel.

4. Ms. Silva has served as general counsel to Zidell Marine Corporation since approximately 2002. She is an attorney admitted to the Oregon bar since 1994. Her responsibilities for Zidell Marine Corporation include coordinating with outside counsel and managing litigation and potential litigation. She acknowledged that she is familiar with document requests similar to the requests made by Plaintiff in this litigation.

5. When asked about the Board Meeting document specifically, Ms. Silva testified that she obtained the document sometime the week of April 6, 2021. At that time, she was aware that Zidell Explorations' CR 30(b)(6) designee, William Gobel, was scheduled to be deposed the following week. One of Ms. Silva's responsibilities in this case was to help prepare Mr. Gobel to testify in deposition Ms. Silva did not show the Board Meeting document to Mr. Gobel prior to his deposition as Zidell Explorations' CR 30(b)(6) designee, even though Ms. Silva indicated she had reviewed the contents of the Board Meeting document prior to the time that she sat for a deposition on May 4, 2021.

6. Following Ms. Silva's deposition, Plaintiff brought to the Court's attention an issue of potential spoliation of documents relating to the Zidell ship lists, documents produced by Zidell that contain information regarding specific ships dismantled at both Zidell Dismantling in Tacoma and Zidell Explorations in Portland during the relevant time period of this litigation. These ship

lists are bates stamped ZMC000074 through ZMC000079 and shall hereafter be collectively referred to as "the ship lists."

7. In 1997, Zidell Explorations filed a lawsuit in the Multnomah County Superior Court against its insurer, seeking coverage for environmental liability arising out of its ship dismantling facilities. Zidell Marine Corporation was informed by the Environmental Protection Agency that the company was potentially going to be a defendant in litigation in the Western District of Washington. This is a matter of public record and included numerous defendants who were essentially being sued by the United States government, the Department of the Interior, the Washington State Department of Ecology, the Puyallup Tribe of Indians, and the Muckleshoot Tribe. Zidell Marine Corporation and the other defendants entered into a consent decree agreement.

8. Sometime around 1997, Zidell Valves, then a division of Zidell Explorations, was sued for injuries arising from asbestos exposure.

9. As early as the 1990s, Zidell Marine Corporation and Zidell Explorations knew that their dismantling facilities in Tacoma and Portland were going to be the subject of prolonged environmental cleanup litigation. It took approximately ten years to reach a consent decree in the Tacoma litigation.

10. In 2002, Zidell Marine Corporation, which is the current name for Zidell Dismantling, filed a lawsuit in the United States District Court in Tacoma seeking insurance coverage for environmental liabilities arising out of the Zidell Dismantling facility in Tacoma, Washington where Plaintiff Dennis Woodruff worked in the early 1970s.

11. By 2002, it stood to reason that the Zidell companies knew that they faced potential liabilities in toxic tort actions, and that, given the nature of this type of litigation, that that was

going to go on for a long time. Based on the public record in the United States District Court, these toxic torts were for all kinds of toxins that got into the waterway, that got into the dirt, including toxins from asbestos dust that was found in the soil.

12. Ms. Silva testified that she had reviewed pleadings and discussed strategy with counsel that was hired by Zidell in both the Multnomah County action as well as the District Court action and that, in both cases, documents were produced. Ms. Silva testified that the ship lists were prepared by Zidell Dismantling's counsel in the Multnomah County insurance coverage litigation, and that counsel in that case relied on company records in compiling the ship list information. Ms. Silva acknowledged that the information in the ship lists could only have been obtained through company records.

13. Although the documents used to create the ship list existed at one time, those documents no longer exist. At the time the list of ships was compiled, Zidell was facing pending lawsuits brought by individuals alleging injury from asbestos. As an attorney, Ms. Silva acknowledged that Zidell has a duty to retain documents potentially relevant to present or future litigation.

14. Prior to 2017. Zidell paid for a document storage facility at Iron Mountain in Portland, Oregon. In 2017, those historic business records were transferred from Iron Mountain to a facility called BRC. In conjunction with that transfer, historic business records and documents belonging to Zidell were destroyed.

15. Ms. Silva testified that the storage facility did not destroy historic business records inadvertently and that the Iron Mountain facility would not have destroyed documents unless they were authorized to do so by Zidell. Ms. Silva testified that she personally authorized the destruction of approximately 20 boxes of litigation materials. She is not aware of what other

departments within Zidell authorized, and she did not review the litigation files before telling Zidell's office administrator to have those documents destroyed.

16. The Court takes judicial notice of the fact that, as of 2017, the common course of business for most corporations in the country would be to digitize historic business records prior to their destruction. Doing so allows the corporation to keep the records in an electronic fashion and to even convert them into a searchable format.

17. When Zidell authorized the destruction of historic business records in 2017, it did not digitize any of the destroyed documents first. It is entirely unexplained why this did not occur, but the Court finds this fact to be especially remarkable, even stunning.

18. Ms. Silva was not able to testify about how many documents were destroyed in 2017 and whether they amounted to anywhere between 10 percent or 90 percent of the documents previously stored at the Iron Mountain facility. Included in these destroyed documents were all of the records upon which the ship lists were based. Also included in these destroyed documents was an index of the historic documents. Ms. Silva testified that the index was also destroyed because the list would no longer be relevant to anything.

19. Regarding the specific discovery served by Plaintiff in this case, Ms. Silva testified that she did not request any documents from the offsite storage facility when she was responding to Plaintiff's first discovery requests in December, 2020. While responding to Plaintiff's additional discovery requests in February, 2021, Ms. Silva requested three boxes of documents from the offsite storage facility, but the basis of her doing so was a review of an indexing system.

20. There has never been any showing in this case that anybody from Zidell ever went to the storage facility and performed any kind of search of the documents in response to Plaintiff's discovery requests. Besides looking at the index for the current document storage, Ms. Silva did

not speak to anyone, such as outside counsel, to see if they had these documents. She did not perform any independent research through public records or anything of the sort. She simply looked at an index.

CONCLUSIONS OF LAW

1. The leading cases in Washington with regard to discovery violations and sanctions is *Wash. State Phys. Ins. Exch. & Assoc. v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993). Under Washington's discovery rules, a party must fully respond to all interrogatories and all requests for production or seek a protective order under CR 26(c). *Id.* at 353-54. If a party does not seek a protective order, it cannot simply ignore or fail to respond to the request. *Id.* In fact, an evasive or misleading answer is to be treated as a failure to answer. CR 37(d).

2. On its face, CR 26(g) requires an attorney signing a discovery response to certify that the attorney has read the response and that, after reasonable inquiry, believes it is: (i) consistent with the discovery rules and warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; (ii) not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation; and (iii) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

3. Whether an attorney has made a reasonable inquiry is to be judged by an objective standard. *Fisons*, 122 Wn.2d at 343. Subjective belief or good faith alone no longer shield an attorney from sanctions under the rules. In other words, inadvertence is not a defense. Even an inadvertent error in failing to disclose evidence may be deemed willful, as a willful violation

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includes a violation without reasonable excuse. *See Hampson v. Ramer*, 47 Wn. App. 806, 812, 737 P.2d 298 (1987) ("A violation of the discovery rules is wilful if done without a reasonable excuse."). In determining whether an attorney has complied with CR 26(g), the trial court should consider all the surrounding circumstances, the importance of the evidence to its proponent, and the ability of the opposing party to formulate a response or to comply with the request. *Fisons*, 122 Wn.2d at 343.

4. Dennis Woodruff has alleged that he suffers from mesothelioma, a terminal disease, as a result of exposure to asbestos. Zidell does not contest this point. Both the parties and the Court understand that Plaintiff is going to die from his disease; indeed, it is for that reason cases like this one are routinely given an expedited trial schedule. Washington law expressly gives such plaintiffs the right to have their day in court. RCW 4.44.025. Thus, in cases such as this, it is incredibly important not to delay in disclosing any type of discovery, especially discovery as important as the Board Meeting minutes, which goes to the heart of the issues in this case as to Zidell Explorations.

5. The Court concludes that Zidell Explorations, Inc., consciously disregarded its discovery obligations, and that spoliation has occurred. Consequently, the Court concludes that sanctions are appropriate.

6. Civil Rule 37 empowers the Court with broad discretion to craft appropriate sanctions for discovery misconduct. *Fisons*, 122 Wn.2d at 355. "The purposes of sanctions orders are to deter, to punish, to compensate and to educate." *Id.* at 356. The sanctions should ensure that the wrongdoer does not profit from the wrong. *Id.*

7. Before the Court imposes one of the harsher remedies under CR 37(b), the record must clearly show the following: (i) one party willfully or deliberately violated the discovery rules

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and orders; (ii) the opposing party was substantially prejudice in its ability to prepare for trial; and (iii) the trial court explicitly considered whether a lesser sanction would suffice. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

8. Based on the foregoing, there is substantial evidence in the record that Zidell's delay in producing the Board Meeting document was willful. From an objective standard, the Court can only conclude that the failure to do so or the delay in doing so was willful.

9. Plaintiff has been substantially prejudiced in his ability to prepare for trial because of the discovery violation and spoliation. First, Plaintiff's discovery requests came to Zidell in, at the latest, January of 2021. Zidell plans to argue at trial that it did not own any of the ships Mr. Woodruff worked on at Zidell Dismantling in Tacoma. Rather, Zidell will argue that it sold the ships to Zidell Dismantling, Mr. Woodruff's employer, which is immune from liability under Washington's Industrial Insurance Act. Documents demonstrating ownership of the ships that Mr. Woodruff worked on at Zidell Dismantling goes to the heart of Plaintiff's case and the destruction of such documents resulted in manifest prejudice. Any sanction levied by the Court must be designed to remedy this specific prejudice that Plaintiff sustained.

10. Zidell's delay in producing the Board Meeting document prevented Plaintiff from capably formulating evidence to rebut Zidell's argument at trial, such as the time needed to search Zidell's litigation files here and in other jurisdictions, make requests for historical documents from the National Archives or the Naval Institute, or retain a professional marine consulting firm that specializes in the research of the history of Navy ships. Such firms are routinely used by defendants in these types of cases. The prejudice to Plaintiff is compounded here by the fact that Mr. Woodruff is dying and urgently wants his day in court, which Washington law provides him.

11. Spoliation is the destruction or significant alteration of evidence or the failure to

preserve property for another's use as evidence in both pending and future litigation. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 381, 972 P.2d 475 (1999). Courts possess inherent authority to impose sanctions against a party in response to the party's spoliation of evidence. *See id.* ("To remedy spoliation the court may apply a rebuttable presumption, which shifts the burden of proof to a party who destroys or alters important evidence."); *Henderson v. Tyrrell*, 80 Wn. App. 592, 605, 910 P.2d 522 (1996) ("The problem [of spoliation] historically has been treated as an evidentiary matter; the common remedy is an inference 'that the adversary's conduct may be considered generally as tending to corroborate the proponent's case and to discredit that of the adversary.'").

12. Spoliation does not occur in a vacuum. A finding of spoliation requires that the evidence being destroyed or altered assist in proving a claim or a defense. *See Marshall*, 94 Wn. App. at 381. In this case, the spoliation relates to documents underpinning the ship lists. The ship lists, in turn, go to the weight of Zidell Explorations' defense that the ships dismantled in Tacoma would have been owned by Zidell Dismantling.

13. Plaintiff has submitted substantial evidence to support the conclusion that the records destroyed by Zidell would include those transactional documents showing ownership of the ships. These documents would have been relevant to the elements of both Plaintiff's claims and Zidell Explorations' defense. In short, the records were not incidental to this case.

14. The party alleging spoliation of evidence must demonstrate: (i) that the evidence was relevant to a claim or defense; (ii) the party having control over the evidence was obligated to preserve it at the time it was destroyed; and (iii) the records were destroyed with, at least under the federal evidentiary standard, a culpable state of mind or a conscious disregard of discovery obligations.

15. The Court finds as a matter of law that Zidell committed spoliation for its destruction of historic business records in 2017 potentially relevant to anticipated future toxic tort litigation. First, there is no doubt that the destroyed documents, which served as the underpinnings of the Board Meeting document and the ship lists, were relevant to a claim or defense. Indeed, it is Zidell's entire defense in this case. Second, by Ms. Silva's own admission, Zidell clearly understood that it had a duty to preserve these documents as evidence. Moreover, the Court concludes that Zidell should reasonably have known that the evidence might have been relevant to anticipated litigation. Apart from the environmental litigation, Zidell Valves had even been sued for asbestos exposure in the past. Thus, these destroyed documents were highly relevant to litigation that Zidell reasonably should have anticipated would arise in the future.

16. With regard to Zidell's culpable state of mind, the Court has taken judicial notice that most companies scanned all of their historical documents once the technology became available. Doing so saved on the cost of storage and allowed the documents to become readily searchable. It is routine in both state and federal court that, in complex, document-rich cases, the Court will even appoint a discovery master in complex, document-rich cases to do just that. Because Zidell knew or should have known that it was going to continue to be involved in litigation arising from its ship dismantling operations—including asbestos litigation—yet did not take the very simple step of digitizing those documents before they were destroyed, the Court concludes that there was a culpable state of mind and a conscious disregard of Zidell's legal obligation to preserve documents reasonability anticipated to be relevant in future litigation.

17. When spoliation has occurred, the Court may impose a variety of sanctions, including: (i) exclusion of evidence; (ii) admitting evidence of the circumstances of the destruction or spoliation; (iii) instructing the jury that it may infer that the lost evidence would have been

unfavorable to the party accused of destroying it; or (iv) entering judgment against the responsible party, either in the form of dismissal or of default judgment. These remedies closely resemble the remedies enumerated under CR 37. Additionally, the Court is not limited to just one remedy. *See Fisons*, 122 Wn.2d at 355-56.

18. Default judgment is obviously the harshest of the available remedies. The Court is discarding that as a potential remedy in this case.

19. The Court concludes that the following sanctions are appropriate:

(i) The Court will give an adverse inference instruction to ameliorate the prejudice to Plaintiff resulting from Zidell's authorization of destruction of historic business records regarding ownership of the ships scrapped at Zidell Dismantling facility during Mr. Woodruff's employment there.

(ii) Zidell Explorations is ordered to pay the attorney's fees and costs necessary for bringing this motion and for the additional discovery that was required to gather all the facts.

(iii) Zidell Explorations is sanctioned an additional $15,000.

20. The Court has expressly considered lesser sanctions for both the discovery misconduct and the spoliation and has concluded that no lesser sanction would suffice.

DATED this 10th day of August 2021.

HONORABLE MICHAEL E. SCHWARTZ
PIERCE COUNTY SUPERIOR COURT JUDGE

FILED
DEPT. 3
IN OPEN COURT
AUG 10 2021
PIERCE COUNTY, Clerk
BY DEPUTY

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INSTRUCTION NO. 30

You have heard evidence that Zidell Explorations destroyed business records relating to the ownership of Navy ships dismantled by Zidell Dismantling between 1970 through 1973. When business records are destroyed by a party prior to trial, you may infer that the records would have been unfavorable to the party destroying the records. You may draw this inference only if you find:

1. The records were within the control of, and particularly available to, that party;
2. The issue on which the records relate is an issue of fundamental importance, rather than one that is trivial or insignificant;
3. As a matter of reasonable probability, it appears naturally in the interest of the party to produce those documents;
4. There is no satisfactory explanation of why the party did not keep and produce those documents; and
5. The inference is reasonable in light of all the circumstances.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division II Cause No. 56257-0-II to the following parties:

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Original E-filed with:
Court of Appeals, Division II
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 5, 2023 at Seattle, Washington.

/s/ Brad Roberts
Brad Roberts, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

April 05, 2023 - 2:00 PM

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