NO. 43941-7-II
(No. 45381-9-II Consolidated)

WASHINGTON STATE COURT OF APPEALS, DIVISION TWO

JACK DON KENNEDY AND SANDRA KENNEDY

Plaintiffs-Appellants

v.

SABERHAGEN HOLDINGS, INC.

Defendant-Respondent

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
(Hon. John R. Hickman)

RESPONDENT'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases **Page(s)**

TABLE OF AUTHORITIES (*cont'd*)

Page(s)

Statutes and Court Rules

Treatises

I. INTRODUCTION

Plaintiffs/Appellants Jack and Sandra Kennedy failed to offer sufficient evidence to show that Mr. Kennedy's mesothelioma was caused by exposure to asbestos-containing products supplied by Tacoma Asbestos, the predecessor to Defendant/Respondent Saberhagen Holdings. Accordingly, on August 3, 2012, the trial court granted summary judgment dismissing the Kennedys' claims against Saberhagen. The Kennedys appealed. Nearly a year later, citing newly discovered evidence, the Kennedys moved to vacate the summary judgment ruling under CR 60(b)(3). The trial court's denial of that motion is the subject of this second appeal by the Kennedys, which has been consolidated with the fully briefed appeal from the grant of summary judgment.

The trial court's denial of the Kennedys' CR 60 motion should be affirmed. The Kennedys' "new evidence", in the form of work journals of a now-deceased former Tacoma Asbestos worker, Gary Yost, changes nothing but simply invites multiple additional layers of inadmissible speculation rather than curing the fundamental shortcomings of their proof at the time of the summary judgment. Indeed, the Yost Journals do not address or change *any aspect* of the trial court's prior summary judgment ruling. The Yost journals do not place anyone's asbestos-containing products at any worksite at any time, much less Tacoma Asbestos's products, at Pier 23, while Mr. Kennedy was there. At most, the new evidence—showing that a Tacoma Asbestos worker (Mr. Yost) was doing something on an "Army Repair Ship," or on a "Victory Ship," or on a

"Port of Tacoma Pier" for the Tacoma Boatbuilding shipyard—begs the same basic questions that plaintiffs faced at the time of summary judgment, questions that *Lockwood v. A.C. & S.*[1] require every asbestos plaintiff to prove with admissible, non-speculative evidence: What was Tacoma Asbestos *doing*? With what *products*? How were those products used? How *close* was Mr. Kennedy? How *frequently*? For how *long*? And what *medical and other expert evidence* is there to *causally connect* any such exposure to Mr. Kennedy's illness?

II. RESTATEMENT OF THE ISSUES

Should this Court affirm the trial court's denial of the Kennedys' motion under CR 60, where their new evidence is cumulative, not material and would not change the result at trial?

III. RESTATEMENT OF THE CASE

A. The Trial Court Dismissed the Kennedys' Claims on Summary Judgment.

The Kennedys sued Saberhagen in January 2012, claiming that Mr. Kennedy was exposed to asbestos-containing insulation products supplied by Saberhagen's alleged predecessor, Tacoma Asbestos. CP 1-5. By the time of summary judgment, the Kennedys claimed Mr. Kennedy's "only *significant* exposure to asbestos occurred when he served in the National Guard at the Tacoma waterfront." CP 137 (emphasis added). The Kennedys advanced two theories of exposure related to Mr. Kennedy's work for the National Guard at Pier 23: first, a *mistaken identity theory*,

[1] *Lockwood v. A.C. & S.*, 109 Wn.2d 235, 245, 744 P.2d 605 (1987).

i.e., that Mr. Kennedy was exposed to asbestos as a bystander to insulation work performed on the FMS-789 at Pier 23, and that workers whom Mr. Kennedy himself identified as Tacoma Boatbuilding ("Tacoma Boat") personnel were *actually* employed by Tacoma Asbestos; and, second, a *hidden supplier theory*, *i.e.*, that Mr. Kennedy was exposed to asbestos on the FMS-6 when he used perhaps a sack and a half of Johns Manville cement that he obtained from a nearby *Tacoma Boat* trailer, but that Tacoma Boat must in turn have obtained those sacks from *Tacoma Asbestos*.[2]

As for the FMS-789 and their *mistaken identity* theory, the Kennedys claimed that it was contractors from Tacoma Asbestos, not Tacoma Boat, that performed the insulation work when Tacoma Boat overhauled the vessel. *See* CP 140-41, 146-49, 154 (opposition to summary judgment). Despite testimony from both Mr. Kennedy and his coworker Richard Elmore that the insulation work on the FMS-789 was performed by *Tacoma Boat* workers, the Kennedys countered that "because there is uncontroverted evidence that Tacoma Asbestos had the exclusive contract to provide insulators to Tacoma Boat and that it always had insulators on site, it is a reasonable inference that the insulation work done on the . . . FMS-789 was by contractors from Tacoma Asbestos." CP

[2] In opposition to summary judgment, the Kennedys claimed that Mr. Kennedy was exposed to asbestos by cleaning up insulation materials on the FS-313. Just as they had earlier abandoned their theories of exposure at Ft. Lewis and at Camp Murray, *see* CP 71, 137, the Kennedys likewise abandoned this theory, acknowledging that their claim as to Saberhagen's involvement with that ship had been based on a mistake by Mr. Kennedy. *See* Brief of Appellants, at 15 n. 7 and CP 226.

154. The trial court found there was "insufficient evidence to show any exposure to an asbestos product that would meet the *Lockwood* factors for the Court's review." CP 951. The trial court also found that there was "a lack of evidence to confirm if and how often Plaintiff went to the boiler room [of the FMS-789], or any other part of the vessel, where he might have been exposed." CP 951. Finally, the trial court found there was no "evidence to show if the Defendant's product was involved beyond speculation by the Court." CP 951.

As for the FMS-6 and their *hidden supplier* theory, the Kennedys argued that Tacoma Asbestos was the exclusive insulation supplier for Tacoma Boat, such that any asbestos insulation materials that Mr. Kennedy obtained from the Tacoma Boat trailer near Pier 23 and applied to the FMS-6 must in turn have come from Tacoma Asbestos. *See* CP 146-49, 153-54 (opposition to summary judgment). But the trial court found there were a number of suppliers of asbestos products on the water front and that there was insufficient evidence that Tacoma Asbestos supplied the asbestos products to Tacoma Boat. CP 951.

The trial court denied the Kennedys' motion for reconsideration. CP 1088-89. The Kennedys appealed from the order granting summary judgment for Saberhagen and the order denying reconsideration, filing their Brief of Appellants on February 20, 2013. That appeal has been fully briefed and was consolidated with this appeal. A more detailed recitation of the relevant underlying facts is set forth in Saberhagen's Brief of Respondents, filed September 11, 2013, at pages 3-14.

B. The Yost Journals.

On July 25, 2013, the Kennedys moved under CR 60(b)(3) for relief from the order granting summary judgment. CP 1126-42. The Kennedys argued that newly discovered work journals kept by a deceased former Tacoma Asbestos insulator in the 1960s show that Tacoma Asbestos insulators worked on an "Army Repair Ship" around the same time that Mr. Kennedy was allegedly exposed to asbestos on the FMS-789, and that the two ships must be one and the same. The Kennedys also argued that the Yost Journals show that Tacoma Asbestos had a job at a "Port of Tacoma Pier" around the same time that Mr. Kennedy used asbestos obtained from Tacoma Boat to repair the FMS-6 at Pier 23, and that the two piers must be one and the same.

While the journals are voluminous, the Kennedys primarily rely on only a few entries. For example, the journals contain an entry referencing work on an "Army Repair Ship, Port of Tacoma Pier" on July 22-23, 1965, and on an "Army Repair Ship" from July 26-30, 1965. CP 1375-76. The journals also refer to work on a "Victory Ship" in February 1966. CP 1406-08. The Yost Journals do not say *what work* Mr. Yost or Tacoma Asbestos performed on any of the listed jobs, *what products* they were using, *how* they were being used, or whether they contained *asbestos.* Indeed, the journals contain no reference to *any* products.

C. Restatement of the Facts.

The Yost Journals do not support an inference that Tacoma Asbestos worked on the FMS-789 at Pier 23. While the FMS-789 could

be characterized as an "Army Repair Ship," the Kennedys did not offer any evidence that the FMS-789 was *the only* "Army Repair Ship" on which an Tacoma Asbestos worker might have been working in July 1965, nor any evidence that Pier 23 was the only possible pier that could be described as a "Port of Tacoma Pier."[3] In fact, Mr. Kennedy testified that the Army had at least ten new or converted FMS-type ships, CP 220, and there are other references in the record to piers in the Port of Tacoma. *See* CP 1510 (Pier 17); CP 1567 (Pier 22); CP 1524 (Piers 24 and 25). The timing of the repairs to the FMS-789 also casts further doubt on whether the work Mr. Yost performed on an "Army Repair Ship" could possibly be the same work on the same ship (the FMS-789) described by Mr. Kennedy at Pier 23. Mr. Yost's work on an "Army Repair Ship" was in July 1965. CP 1375-76. The work that Mr. Kennedy recalled on the FMS-789 was in the Spring of 1965, while Mr. Elmore placed the overhaul in *1966*. CP 238, 407.

The Kennedys also rely on the same arguments and mischaracterization of evidence that they asserted to no avail in the summary judgment proceedings, namely the *mistaken identity* argument that it was Tacoma Asbestos that worked on the FMS-789, not Tacoma

[3] While the Kennedys assert that the FMS-789 was the only "Army Repair Ship" moored at Pier 23 in 1965, the pages they cite, CP 237-38, do not support that proposition. Even if they did, their evidence does not rule out the possibility of other Army Repair Ships moored at other piers in Commencement Bay in 1965. The Kennedys also assert that the National Guard leased Pier 23 from the Port of Tacoma, but the pages they cite, CP 237-38, do not support that proposition either. Further, whether Pier 23 could be described as a "Port of Tacoma" pier does not rule out other piers in Commencement Bay being similarly described.

Boat as both Mr. Kennedy and Mr. Elmore had testified. The Kennedys assert that Mr. Elmore, a coworker of Mr. Kennedy, observed "Tacoma Boat contractors conducting asbestos insulation work on the FMS-789" but on the pages they cite Mr. Elmore does not refer to the Tacoma Boat personnel as Tacoma Boat *contractors*. Supplemental Brief of Appellants, at 7, citing CP 239-40. Instead, Mr. Elmore saw crews *from Tacoma Boat* working on the FMS-789. CP 239. He knew they "were from Tacoma Boat" because they had a Tacoma Boat sign on their trucks. CP 239. "They [Tacoma Boat] came aboard with *their workers*." CP 239 (emphasis added). He knew *Tacoma Boat* had the contract to work on the FMS-789 "[b]ecause the personnel that were there, I can remember the trucks were Tacoma Boat and everything, and I knew the personnel that were working on there." CP 240. *See also* CP 324 (Mr. Elmore testifying that he was "sure" the personnel removing insulation from the FMS-789 were *Tacoma Boat* personnel). Mr. Kennedy similarly understood that the workers working on the FMS-789 were in fact from Tacoma Boat. CP 408.

Even assuming that *both* Mr. Kennedy and Mr. Elmore were wrong about the true identity of the workers who performed the insulation work on the FMS-789 at Pier 23, and that it was Tacoma Asbestos workers, not Tacoma Boat workers, who did it, the Yost Journals do not help the Kennedys demonstrate whether Mr. Kennedy was actually exposed to or harmed by any such work. Mr. Kennedy testified that the insulation work he saw was in the boiler room, and he never went to that

area of the ship during the work. CP 408. Indeed, he spent very little time on board the ship during the repairs, coming aboard only briefly and infrequently to retrieve a manual. CP 407-08. Although Mr. Elmore testified that Mr. Kennedy also went into the "electrical department" when the *Tacoma Boat* personnel were overhauling the FMS-789, he did not state *what* those Tacoma Boat personnel were *doing* while Mr. Kennedy was aboard, whether Mr. Kennedy ever went anywhere besides the electrical department, how often he went onto the FMS-789 to retrieve electrical equipment during the overhaul, or how long he stayed in the electrical department when he did go aboard. *See* CP 239-40.

As to the FMS-6, Mr. Yost's journals do not provide any new evidence to support plaintiffs' *hidden supplier* theory, *i.e.*, that the few sacks of asbestos cement obtained by Mr. Kennedy from a Tacoma Boat shack, must have been supplied to Tacoma Boat by Tacoma Asbestos, either because Tacoma Asbestos was supposedly working on "Victory Ships" at Pier 23, or because Tacoma Asbestos was Tacoma Boat's sole supplier of insulation materials in any event. There is no evidence that Mr. Yost's work on the "Victory Ships" in February of 1966 took place at Pier 23 because Mr. Yost did not write down *where* the work occurred. *See* CP 1406-08. The Kennedys did not introduce any new evidence that would tend to prove the *only* Victory Ship in Commencement Bay in 1966 was at Pier 23.[4] And even assuming that Mr. Yost's Victory Ship work

[4] To the contrary, Saberhagen submitted evidence showing that Victory Ships were being mobilized in the mid-1960s to support the Vietnam War effort, and that an entire fleet of such ships was stationed in Olympia. *See* CP 1484, 1557-63.

did occur at Pier 23, there is still no evidence that Mr. Yost's employer, Tacoma Asbestos, supplied sacks of asbestos cement to Tacoma Boat there. Indeed, Mr. Yost was not in sales or supply: he was an asbestos worker. CP 1163-64. Nothing in the Yost Journals suggests that any asbestos from Tacoma Asbestos would have made its way into the Tacoma Boat trailer during Tacoma Asbestos' supposed involvement with the Victory Ship overhaul.

Since the Yost Journals do not provide any link between supposed Tacoma Asbestos work on a Victory Ship (as reflected in the Yost Journal) and the asbestos in the Tacoma Boat trailer, the Kennedys instead retreat to the same *hidden supplier* theory that they asserted in the trial court, arguing that the asbestos cement in the Tacoma Boat trailer *must* have come from Tacoma Asbestos. Supplemental Brief of Appellants, at 8, citing Appellants' Reply Brief 9-12. As Saberhagen has previously argued, that evidence, in the form of deposition testimony from four witnesses, does not support the proposition that Tacoma Asbestos was the exclusive asbestos supplier for Tacoma Boat. Respondent's Brief, at 25-31.[5] One of those four witnesses, Dennis Legas was a Tacoma Boat boilermaker who worked on a series of tuna fishing boats at another temporary Tacoma Boat facility located elsewhere in the Port of Tacoma industrial yard from 1966 to 1973. CP 605-06, 633. He never worked on Pier 23 while he was with Tacoma Boat and he did not set foot on that pier

[5] Saberhagen also submitted evidence to show that the exclusive supplier theory was provably false. *See* Respondent's Brief, at 10, 23-24, 38-39.

during the 1960s. CP 628. While Mr. Legas did say that he recalled Tacoma Asbestos trucks making deliveries to the tuna boat site, that does not transform Tacoma Asbestos into a "supplier," since he also testified that Tacoma Asbestos was performing the insulation work on those vessels. Moreover, Mr. Legas did not testify that no other companies made deliveries to the Port Industrial Yard—he just did not know of any others:

> Q: You're not saying that there weren't lots of other deliveries made by other companies; you just didn't know about it?
>
> A: Correct.

CP 639.

Another witness was Dave Hansen, but his testimony is that Tacoma Asbestos was the only company that he could recall doing insulation work at Tacoma Boats' main facility. CP 668. He did not testify about Pier 23 or make any link between insulation *contracting* work and insulation *supply*.

Charles Brands' testimony is not admissible as established in Saberhagen's Respondent's Brief, at pages 35-38. Even if it was, his testimony relates only to Tacoma Asbestos' role as a subcontractor performing work for Tacoma Boat, not as an insulation supplier. CP 677-78.

Similarly, John Anderson's testimony is not admissible for reasons discussed in Saberhagen's Respondent's Brief, at pages 34-35. Regardless, he does not testify that Tacoma Asbestos was the exclusive

asbestos *supplier* to Tacoma Boat. Instead, he testified that Ted Boscovich was a Tacoma Asbestos employee who worked at Tacoma Boat's main shipyard. CP 691-92. Not surprisingly, Ted Boscovich obtained insulation material from his employer, Tacoma Asbestos. CP 691-92. That testimony does not establish any sort of supply relationship between Tacoma Boat and Tacoma Asbestos, and it certainly is not relevant to the source of asbestos in a Tacoma Boat trailer away from where Ted Boscovich worked.

IV. STANDARD OF REVIEW

The standard of review for a trial court's refusal to vacate a judgment under CR 60 is abuse of discretion. *Haller v. Wallis*, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978); *Cotton v. City of Elma*, 100 Wn. App. 685, 690, 998 P.2d 339 (2000) (abuse of discretion standard applies to the review of decisions denying a CR 60 motion to vacate summary judgment dismissal of a case). A court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

V. ARGUMENT

A. CR 60(b)(3) Standards.

A trial court may vacate a decision under CR 60(b)(3) on the basis of newly discovered evidence, which by due diligence, could not have been discovered in time to move for a new trial under CR 59(b). *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003). "A new trial

may be granted on the basis of newly discovered evidence only if the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching." *Go2Net*, 115 Wn. App. at 88.[6] A motion based on newly discovered evidence must be denied if any one of the five factors is not satisfied. *Holaday v. Merceri*, 49 Wn. App. 321, 330, 742 P.2d 127 (1987).

B. Summary Judgment Standards for Proximate Cause in Asbestos Cases.

An asbestos plaintiff "must establish a reasonable connection between the injury, the product causing the injury, and the manufacturer of that product." *See Lockwood*, 109 Wn.2d at 245. "In order to have a cause of action, the plaintiff must identify the particular manufacturer of the product that caused the injury." *Id.*, citing *Martin v. Abbot Labs.*, 102 Wn.2d 581, 590, 689 P.2d 368 (1984). A plaintiff may satisfy that requirement through circumstantial evidence. *Berry v. Crown Cork & Seal Co.*,, 103 Wn. App. 312, 323, 14 P.3d 789 (2000), citing *Lockwood*, 109 Wn.2d at 247 (allowing a plaintiff to rely on the "testimony of witnesses who identify manufacturers of asbestos products which were then present at his workplace."). However, there must be sufficient evidence to allow a reasonable fact finder to infer the plaintiff was exposed to the defendant's product. *Lockwood*, 109 Wn.2d at 247.

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[6] The test for newly discovered evidence under CR 60(b)(3) is the same as the test under CR 59. 4 Karl B. Tegland, WASHINGTON PRACTICE: RULES PRACTICE CR 60, at 612-13 (6th ed. 2013).

There is no special, liberal standard for circumstantial evidence that applies only to asbestos cases. When "reliance is placed upon circumstantial evidence, there must be reasonable inferences to establish the fact to be proved." *Morgan v. Aurora Pump Co.*, 159 Wn. App. 724, 729, 248 P.3d 1052 (2011) (quotation and internal alterations omitted). There is no authority that would support giving greater weight to circumstantial evidence merely because of the passage of time.

"*Lockwood* identified several factors a court must consider when evaluating whether sufficient evidence of causation exists: (1) plaintiff's proximity to the asbestos product when the exposure occurred and the expanse of the work site where asbestos fibers were released; (2) the extent of time the plaintiff was exposed to the product; and (3) the types of asbestos products to which the plaintiff was exposed and the ways in which the products were handled and used." *Berry*, 103 Wn. App. at 323-24, citing *Lockwood*, 109 Wn.2d at 248. "In addition, trial courts must consider the evidence presented as to ***medical causation*** of the plaintiff's particular disease." *Lockwood*, 109 Wn.2d at 248 (emphasis added). Ultimately, "the sufficiency of the evidence of causation will depend on the unique circumstances of each case." *Id.*, at 249.

C. The Kennedys' "New Evidence" Does Not Compel a Different Result.

The Yost Journals do not overcome the Kennedys' failure to offer sufficient evidence to satisfy the *Lockwood* factors. New evidence must create "more than a passing probability that it could change the result of

the trial." *Praytor v. King County*, 69 Wn.2d 637, 640, 419 P.2d 797 (1966). Since the newly discovered evidence must be capable of changing the outcome of the case, a new trial is not warranted if the new evidence affects only one of two separate and independent grounds of decision. *See In re Welfare of Coverdell*, 39 Wn. App. 887, 893, 696 P.2d 1241 (1984) (court's ruling was based on alternative finding of dependency so new evidence on one finding would not change outcome).

The trial court here ruled that the Kennedys presented insufficient admissible evidence to meet the *Lockwood* criteria for proximate cause in asbestos cases, *i.e.*, evidence showing beyond speculation that Mr. Kennedy was actually and significantly exposed to asbestos products supplied by Tacoma Asbestos and that the exposure caused Mr. Kennedy's mesothelioma. *See* CP 950-51, 1088-89. The new evidence does not place Tacoma Asbestos at Pier 23. That is because the Kennedys did not offer any evidence that the FMS-789 was *the only* "Army Repair Ship" on which a Tacoma Asbestos worker could have been working in July 1965, a proposition made even more unlikely by Mr. Kennedy's testimony that the Army had at least ten new or converted FMS-type ships. CP 220. The Kennedys also failed to offer evidence to establish that Pier 23 was the only possible pier Mr. Yost could have described as a "Port of Tacoma Pier." Here, a jury could not conclude without speculation that Pier 23 was *the* "Port of Tacoma Pier" referenced by Mr. Yost in light of the record showing references to other Port of Tacoma

piers. *See* CP 1510 (Pier 17); CP 1567 (Pier 22); CP 1524 (Piers 24 and 25).

Nor is there is any non-speculative evidence that Mr. Yost's work on the "Victory Ships" in February of 1966 took place at Pier 23—Mr. Yost did not write down *where* the work occurred and the Kennedys failed to offer any evidence from which a jury could reasonably infer that there was only *one* Victory Ship in or near Commencement Bay in 1966. *See* CP 1406-08.

But even assuming that Mr. Yost's journal entries established that Tacoma Asbestos did perform work on the FMS-789 and a Victory Ship at Pier 23, that evidence *still* would not permit the trial court to find that the *Lockwood* factors had been satisfied. Those factors include:

> (1) evidence of plaintiff's proximity to the defendant's asbestos product;
>
> (2) the expanse of the worksite;
>
> (3) the duration of the plaintiff's exposure to the product;
>
> (4) the type of asbestos product involved;
>
> (5) the ways in which the product were handled; and
>
> (6) medical causation of the plaintiff's particular disease, including "expert testimony on the effects of inhalation of asbestos on human health in general and on the plaintiff in particular.

Lockwood, 109 Wn.2d at 248-49.

When the trial court granted summary judgment, it properly found that with respect to the FMS-789, "there is a lack of evidence to confirm if and how often Plaintiff went [in]to the boiler room, or any part of the

vessel, where he might have been exposed." CP 951. The Yost Journals do not add *anything* to the lack of evidence the trial court found on those points. That is because the journals do not show *what* Mr. Yost's work consisted of, *what products* were used, or *how* they were used. The journals also say nothing about *how* Mr. Kennedy was exposed to any asbestos products, *how long* and *how frequently* he was exposed, *or what causal effect, if any, such exposure had in the development of his mesothelioma.*

Even if the Yost Journals had shown (contrary to the testimony of Mr. Elmore and Mr. Kennedy) that workers from Tacoma Asbestos workers (and not Tacoma Boat personnel) worked on the boiler room of the FMS-789, that evidence *still* proves nothing of *Lockwood* significance, because there is no evidence that Mr. Kennedy was exposed to those materials. While the Kennedys rely on previously submitted evidence—deposition testimony from Mr. Elmore and Mr. Kennedy—to argue that Mr. Kennedy would have been exposed to asbestos used on the FMS-789, that testimony does not establish that Tacoma Asbestos workers were performing insulation work on the ship while Mr. Kennedy was aboard the vessel, or in such proximity and for a long enough duration that he would have been exposed to asbestos. The Kennedys failed to mention Mr. Kennedy's *own* testimony that he did not have any personal involvement with the work on the FMS-789, was aboard the vessel only once a week during the overhaul to retrieve a book, and never went into the boiler room, the location where he testified that asbestos repair took place. CP

407-08. Thus, even if the dispositive issue before the trial court had simply been a question of "exposure," the new evidence would still not compel a different result.

Plaintiffs argue they can establish "exposure" by placing Tacoma Asbestos at the relevant jobsite—Pier 23—during the same general time period. Supplemental Brief of Appellants, at 11-18; CP 1594-95 (CR 60 reply motion), citing *Lockwood*, *Allen*, and *Berry*. The Kennedys fail to mention that in all three of those cases, the plaintiff presented expert testimony to establish jobsite exposure under the *Lockwood* factors. *See Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 572-74, 157 P.3d 406 (2007) (plaintiff presented expert testimony that asbestos dust would have drifted throughout workplace based on alleged use of some of the *19,271 pounds* of asbestos cloth sold in that workplace); *Berry*, 103 Wn. App. at 324 (expert testimony allowed inference of exposure); *Lockwood*, 109 Wn.2d at 243-44 (expert testimony about shipyard exposure to asbestos). The Kennedys failed to present any such expert testimony here, meaning that even if the Yost Journals placed Tacoma Asbestos products at the relevant jobsites, the Kennedys would *still* be unable to prove exposure. Thus, the outcome would not be changed.

Moreover, just as they had failed in the summary judgment proceedings, the Kennedys failed to include in their CR 60 submission any expert testimony or other evidence demonstrating *proximate cause, i.e.*, demonstrating that Mr. Kennedy was in fact *harmed by* asbestos-containing products supplied or installed by Tacoma Asbestos. That

glaring deficiency in the Kennedys' causation case provided an independent ground for granting summary judgment, for denying CR 60 relief, and for affirming the trial court rulings—even if the Kennedys had evidence of "exposure" that was not speculative. For that reason alone, the denial of CR 60 relief should be affirmed.

The Kennedys cannot reasonably claim their failure to prove causation, *i.e.,* whether Mr. Kennedy was *harmed* by a Tacoma Asbestos product, was excused by any failure to raise the issue. Indeed, Saberhagen raised that issue during the summary judgment proceedings, the motion for reconsideration proceedings, ***and*** the CR 60 proceedings. The first page of Saberhagen's summary judgment motion, under the "Relief Requested" header, stated:

> Defendant Saberhagen Holdings, Inc. ("Saberhagen") seeks summary judgment dismissal based upon plaintiffs' failure to date to identify sufficient admissible evidence that Jack Kennedy (hereinafter "Mr. Kennedy"), was ever ***actually exposed to or harmed by*** asbestos-containing products supplied by Saberhaegn or its alleged predecessors.

CP 17 (emphasis added). *See also* CP 22 (no evidence that Mr. Kennedy "was *actually* exposed to or **harmed** by such exposure" (bold added)), CP 22 (Mr. Kennedy is unable to offer any admissible evidence showing that exposure to Tacoma Asbestos products "resulted in or contributed to the development of his illness"), CP 24 (plaintiffs "Cannot Establish the Essential Element of Proximate Cause" and to do so must show a "reasonable connection between the injury, the product causing the injury and manufacturer of the product"), CP 26 (plaintiffs have no admissible

evidence showing that "such exposure [to Saberhagen's products] was a substantial factor in *causing* his illness" (emphasis added)).

Further, by the time the Kennedys filed their CR 60 motion, they must have known that Saberhagen had moved for, and obtained, summary judgment on the grounds that the Kennedys could not satisfy the *Lockwood* criteria, including its requirement for expert testimony on the effects of asbestos exposure on the particular plaintiff. For example, the trial court's decision on the motion for summary judgment stated that there was "insufficient evidence to show any exposure to an asbestos product that would meet the Lockwood factors . . ." and that there was "no such evidence" to show whether the amount of asbestos used on the FMS-6 was "sufficient to meet the criteria in Lockwood[.]" CP 951. Yet the Kennedys failed to submit any evidence to cure that deficiency with their CR 60 motion.

Saberhagen presented the issue again in the CR 60 proceedings, arguing: "There is no expert testimony or other evidence suggesting that this [exposure to asbestos during the FMS-789 overhaul, even under the counterfactual assumption that Tacoma Asbestos had performed the insulating work] could have caused any significant exposure to Mr. Kennedy." CP 1489. The Kennedys once again failed respond with any expert testimony that Mr. Kennedy would have been exposed to asbestos from Tacoma Asbestos and that such exposure contributed to the development of his disease.

In light of the continued absence of causation evidence, the new evidence from the Yost Journals cannot compel a different result, even if that evidence showed Tacoma Asbestos worked on the FMS-789 and had a presence on Pier 23. The absence of evidence that the alleged exposures contributed to the development of Mr. Kennedy's disease prevents the Kennedys from recovery under *Lockwood*, 109 Wn.2d at 247-48 (expert testimony that the plaintiff would have been exposed to asbestos and that exposure contributed to asbestosis, were among the factors that would allow a reasonable jury to conclude proximate cause had been established); *Berry*, 103 Wn. App. at 324 (experts "provided evidence that the cumulative effect of the asbestos exposure led to" Plaintiff's death); and *Allen*, 138 Wn. App. at 572, 580 (expert testimony on exposure and the medical effect exposure would have had). Whatever other supposed evidentiary value the Yost Journals may provide, they plainly do not supply evidence of proximate causation or stand proxy for expert testimony. Because there is not even a passing probability that the new evidence would change the result at trial, the trial court properly denied the Kennedys' CR 60 motion.

On appeal, the Kennedys' claim that they will be able to present medical causation testimony if the case is remanded.[7] But the time to have

[7] The Kennedys attach a page from Dr. Andrew Churg's July 19, 2012 deposition and an exhibit from that deposition, with a reference to such material in footnote 2 on page 19 of their supplemental brief. That material was not submitted to the trial court as part of the Kennedys' motion for relief from judgment under CR 60, or at any other time. As such, it not part of the clerk's papers or the record on review under RAP 9.1. One of the fundamental rules of appellate procedure is that "cases on appeal are decided only from the record." *Grobe v. Valley Garbage Servs., Inc.*, 87 Wn.2d 217, 228, 551 P.2d 748

offered such evidence was before summary judgment was granted. The Kennedys did not move for additional time to procure such evidence under CR 56(f). While the Kennedys claim they could not have obtained medical causation testimony before exposure was established (an argument belied by the fact that the Yost Journals do not stand for some *new* supposed exposure claimed by the Kennedys, but only serve to corroborate an *earlier* claimed exposure), they claim that the Yost Journals establish exposure and yet they *still* did not offer any evidence from any experts opining on the significance of the new evidence in relation to proximate causation of Mr. Kennedy's mesothelioma.

D. The Kennedys' "New Evidence" Adds Nothing New: It Is Merely Cumulative of Similar Evidence Previously Offered to Show Tacoma Asbestos's Association with Tacoma Boat and Its Presence at Pier 23.

The Yost Journals merely corroborate the Kennedys' theory that Tacoma Asbestos performed insulation subcontracting work for Tacoma Boat. "Cumulative evidence is additional evidence of the same kind to the

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(1976). "If the evidence is not in the record it will not be considered." *State v. Wilson*, 75 Wn.2d 329, 332, 450 P.2d 971 (1969). Accordingly, this Court should not judicially notice the Churg material and should instead strike those improper submissions from the brief. Saberhagen will move for such relief by separate motion.

Without waiving its objection to the Kennedys' improper submission, Saberhagen notes the materials offered are not sufficient to establish medical causation. Dr. Churg does not offer any opinion that Mr. Kennedy's alleged exposure, if any, to asbestos related to Saberhagen on Pier 23 was a substantial contributing factor in causing his mesothelioma. Dr. Churg testified that exposure on the order of .1 fiber of amosite asbestos per cubic centimeter is potentially dangerous, but the Kennedys cannot prove Mr. Kennedy would have been exposed to that level of asbestos fiber as related to any Saberhagen involvement with Pier 23. Without that link, the Kennedys "new evidence" still does not compel a different result.

same point." *State v. Williams*, 96 Wn.2d 215, 223-24, 634 P.2d 868 (1981) (new evidence was cumulative because it served only to corroborate existing testimony which had already been corroborated) (quotation omitted). *See also State v. Fellers*, 37 Wn. App. 613, 617, 683 P.2d 209 (1984) (testimony of new witness which served to corroborate defendant's testimony was merely cumulative of alibi evidence and did not entitled defendant to a new trial); *Kennard v. Kaelin*, 58 Wn.2d 524, 527, 364 P.2d 446 (1961) (new evidence contradicting x-ray interpretation was cumulative where appellant already put forward a witness who "vigorously contested" that interpretation).

The Kennedys offered the Yost Journals to show that at least one Tacoma Asbestos insulator (Mr. Yost) worked on several occasions for Tacoma Boat in the 1960s, including one occasion in July 1965 on an "Army Repair Ship" at a "Port of Tacoma Pier," and another occasion in February 1966 on a "Victory Ship." Supplemental Brief of Appellants, 12-16, CP 1131-32, 1134-35 (CR 60 motion). That is not a new argument. In the summary judgment proceedings, the Kennedys offered other evidence to prove the same contention, *i.e.*, that Tacoma Asbestos was supposedly the only insulation subcontractor that Tacoma Boat used on its jobs, and since, according to the Kennedys, Tacoma Boat worked on the FMS-789 and on Victory Ships at Pier 23, therefore Tacoma Asbestos did too. *See* CP 146-49, 153-54. For example, the Kennedys alleged that the "evidence in this case is that Tacoma Boat obtained all of its asbestos-containing insulation products and *its insulation contractors* from Tacoma

Asbestos." CP 146 (emphasis added). The Kennedys cited the testimony of former Tacoma Boat employee, Dennis Legas, for that proposition, albeit incorrectly. *See* CP 146, citing CP 637. The Kennedys also cited to the deposition testimony of David Hansen for the proposition that Tacoma Asbestos frequently performed insulation services at Tacoma Boat and that Tacoma Asbestos was the only insulation contractor he recalled doing work at Tacoma Boat. CP 147, citing CP 668. The Kennedys further argued that evidence from Charles Brands, a former Tacoma Asbestos insulator like Mr. Yost, shows that Tacoma Asbestos did all the insulating work for Tacoma Boat. CP 147, citing CP 676-78. The Kennedys have made that same assertion again here. *See* Supplemental Brief of Appellants, at 14; CP 1139 (CR 60 motion) ("This evidence substantiates plaintiff's prior argument that Tacoma Asbestos was the exclusive supplier of asbestos and contractors to Tacoma Boat"). With respect to the FMS-6 and small tug, it was the Kennedys' theory all along that Tacoma Asbestos was the "exclusive supplier of insulation to Tacoma Boat" and therefore must have supplied the asbestos that Mr. Kennedy obtained from the Tacoma Boat trailer. *See* CP 154 (Kennedys' opposition to summary judgment).

Thus, the Yost Journals are not offered to prove anything new; rather they are offered simply to *corroborate* their previously offered evidence and representations. The Kennedys admitted as much in the CR 60 motion, arguing that that Yost Journals were material because that evidence "*substantiates* plaintiffs' prior representations to the Court that

Tacoma Boat obtained all of its asbestos-containing insulation products and insulation contractors from Tacoma Asbestos." *See* CP 1130 (CR 60 Motion) (emphasis added). The Kennedys repeated that characterization of the Yost evidence when replying in support of their CR 60 motion, agreeing that the evidence was "***corroborative*** with plaintiff's prior argument" while wrongly asserting that did not mean the evidence was cumulative. *See* CP 1591 (CR 60 reply motion) (emphasis added).

The Yost Journals, however, did not provide the evidence the trial court found lacking when it granted summary judgment to Saberhagen. As for the FMS-789, the trial court granted summary judgment because the Kennedys did not have sufficient evidence to satisfy the *Lockwood* factors. That is true whether or not Tacoma Asbestos in fact performed insulation work on the FMS-789, because (1) there is no evidence of exposure, and (2) no evidence that exposure, if any, was a substantial factor in causing Mr. Kennedy's mesothelioma.

Likewise, with respect to the FMS-6 and the small tug, the trial court found, among other things, that "[t]he agreement that Tacoma Boat always used Tacoma Asbestos products, and, thus, Defendants' product was the sole supplier of these various work orders *is not sufficient*." CP 951 (emphasis added). The reason that evidence was not sufficient is apparent from the preceding statement in the trial court's decision: there were a number of suppliers of asbestos products along the waterfront. CP

951.[8] The Yost Journals do not prove there were not a number of asbestos suppliers along the waterfront, and instead simply provide evidence that a Tacoma Asbestos insulator worked on a Victory Ship at a Port of Tacoma Pier.

Instead of providing new, direct evidence on an important but previously missing element of proof, the Yost Journals are merely cumulative. The Kennedys previously presented evidence in the summary judgment proceedings to show that Tacoma Boat supposedly used Tacoma Asbestos as its insulation subcontractor on all of its jobs. Even if the Yost Journals show that Mr. Yost worked for Tacoma Asbestos on Tacoma Boat jobs on Pier 23, the Kennedys admitted that the "new evidence" simply serves to "substantiate plaintiffs' prior representations," making it "additional evidence of the same kind to the same point." *See Williams*, 96 Wn.2d at 223-24.

E. The Kennedys' "New Evidence" Is Not Material.

The supposed materiality that plaintiffs attribute to the Yost Journals is entirely the result of faulty syllogisms:

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[8] For example, Ralph Woolstenhulme testified that E.J. Bartells was an authorized Johns-Manville distributor during the time he worked there. CP 896. He sold material to Tacoma Boat after 1957 and 1979. CP 897-98. That testimony alone negates Plaintiff's exclusive supplier theory.

In their Reply Brief the Kennedys implied there was an issue of fact concerning whether Mr. Woolstenhulme worked for E.J. Bartells, and referenced that implication in their Supplemental Brief. *See* Kennedys' Reply Brief at 11; *see also* Kennedy's Supplemental Brief at 8 (citing to, *inter alia*, page 11 of the Reply Brief). The Kennedys did not raise an issue about Mr. Woolstenhulme's employment by E.J. Bartells before the trial court. Saberhagen will move under RAP 9.11 to supplement the record with additional portions of Mr. Woolstenhulme's deposition addressing his employment by E.J. Bartells.

SYLLOGISM #1

1. *Mr. Yost worked for Tacoma Asbestos on an Army Repair Ship in 1965;*
2. *Mr. Kennedy and Mr. Elmore saw Tacoma Boat workers on an Army Repair Ship (the FMS-789) sometime in either 1965 or 1966;*

   THEREFORE,
3. *Mr. Yost, Mr. Kennedy and Mr. Elmore must all have been describing the same Army Repair Ship and the same repair work, and the Tacoma Boat workers seen by Mr. Kennedy and Mr. Elmore were actually Tacoma Asbestos workers.*

Supplemental Brief of Appellants, at 6-7, 12; CP 1126, 1130-33 (CR 60 motion). Missing, of course, is any evidence either that the FMS-789 was the *only* "Army Repair Ship" that Mr. Yost could possibly have been referring to,[9] or that the FMS-789 was only worked on *once*, rather than on many occasions, at different Port of Tacoma piers and shipyards, by different companies, contractors, subcontractors and workers.[10]

[9] Mr. Kennedy himself testified that the Army had at least *ten* new or converted FMS-type repair ships. *See* CP 220. There is simply no telling what type of "Army Repair Ship" Mr. Yost was referring to in his journal, or even whether he considered a Floating Machine Shop to be an "Army Repair Ship," or how many other ships in Commencement Bay during that time period would have fit Mr. Yost's description of an Army Repair Ship.

[10] Neither Mr. Kennedy nor Mr. Elmore remembered work taking place on the FMS-789 during the same year or same season that Mr. Yost recorded working on the "Army Repair Ship" in his journals. *Compare* CP 1375-76 (Summer 1965) *with* CP 407 (Mr. Kennedy recalled work on the FMS-789 in the Spring of 1965) *and* CP 238 (Mr. Elmore placed the overhaul in *1966*).

Moreover, counsel's suggestion that *Tacoma Asbestos* workers were doing the FMS-789 rehab work that Mr. Kennedy and Mr. Elmore recalled flies in the face of their own firm and uncontradicted testimony that those workers (including those doing the insulation work) were *Tacoma Boat* workers.[11]

Similarly:

SYLLOGISM #2

1. *Mr. Yost worked for Tacoma Asbestos on a Victory Ship in February 1966;*
2. *Once, while performing work on the FMS-6 sometime in the mid-1960s, Mr. Kennedy recalled obtaining a sack of asbestos cement from a nearby office of Tacoma Boat, which was performing work on a Victory Ship at Pier 23 at the time;*

   THEREFORE,
3. *The Victory Ship referenced in Mr. Yost's journal must have been the same Victory Ship that Mr. Kennedy recalled being worked on by Tacoma Boat at Pier 23, and*

   THEREFORE,

[11] Both Mr. Kennedy and Mr. Elmore remembered that *Tacoma Boat* personnel performed the overhaul on the FMS-789. CP 239-40, 324, 407-08.

4. *The asbestos cement Mr. Kennedy obtained from Tacoma Boat must have been supplied by Tacoma Asbestos.*

See Supplemental Brief, at 7-9, 14-15; CP 1126, 1134-36 (CR 60 motion). Once again, the Kennedys' conclusions are not based on reasonable inference. They fail to offer any evidence from which a jury could conclude that there were not likely to be any other Victory Ships in the vicinity in the mid-1960s.

Similarly:

SYLLOGISM #3

1. *Mr. Yost worked for Tacoma Asbestos at a "Port of Tacoma Pier";*
2. *Pier 23 was a pier in the Port of Tacoma;*

THEREFORE,

3. *Mr. Yost worked for Tacoma Asbestos at Pier 23.*

Of course, Pier 23 is not the *only* pier that could be described as a "Port of Tacoma Pier," making it sheer conjecture to assume that the pier at which Mr. Yost worked was Pier 23.[12]

VI. CONCLUSION

This Court should affirm the trial court's denial of the Kennedys' CR 60 motion because the Kennedys' "new evidence" adds nothing new—it is merely cumulative of similar evidence previously offered to

[12] *See* CP 1510 (Pier 17); CP 1567 (Pier 22); CP 1524 (Piers 24 and 25).

show Tacoma Asbestos's association with Tacoma Boat and its presence at Pier 23. The Kennedys' "new evidence" does not compel a different result since the Kennedys fail to satisfy the *Lockwood* test, even with the Yost Journals. Finally, the new evidence is not material without the addition of multiple additional layers of inadmissible speculation.

RESPECTFULLY SUBMITTED this 11th day of December, 2013.

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NO. 43941-7-II
(No. 45381-9-II Consolidated)

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JACK DON KENNEDY and SANDRA KENNEDY, Appellants, vs. SABERHAGEN HOLDINGS, INC., Respondent.	DECLARATION OF SERVICE

I certify that on the date set forth below I served a copy of *Respondent's Supplemental Brief* and *Declaration of Service* on the following counsel:

Glenn S. Draper BERGMAN DRAPER LADENBURG 614 First Avenue – 4th Flr. Seattle, WA 98104	X U.S. Mail, postage prepaid X Email
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 11th day of December.

Patti Saiden
Patti Saiden

CARNEY BADLEY SPELLMAN

December 11, 2013 - 4:08 PM

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