In The

Supreme Court of Virginia

RECORD NO. 111775

EXXON MOBIL CORPORATION,

Appellant,

v.

RUBERT E. MINTON, *et ux.*,

Appellee.

REPLY BRIEF OF APPELLANT

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The response brief of appellee Rubert Minton fundamentally misconstrues the legal framework governing this case. In dropping his claim that Exxon breached its "turnover" duty, Minton abandoned any effort to prove that when Exxon engaged the Shipyard for maintenance and repair, Exxon failed to disclose any hidden shipboard hazards that could cause on-the-job injury to Shipyard employees. And absent proof that Exxon breached its "turnover" duty, the Shipyard was *legally presumed* to be aware of all inherent shipboard hazards to its employees—including, for example, high places, potentially hot boiler surfaces, and asbestos materials. Minton cannot escape that critical legal principle by simply ignoring the turnover duty, because the entire LHWCA's shipowner-liability scheme pivots on it: unless the shipowner violates the "turnover" duty, the shipowner is *entitled as a matter of law* to expect an expert shipyard will protect its workers from dangers inherent in their work. *Scindia Steam Nav. Co. v. De Los Santos*, 451 U.S. 156, 172 (1981).

Minton's failure to prove that Exxon breached a duty to disclose asbestos and other hazards upon turnover infects most of his arguments on appeal. His arguments concerning the two *post*-turnover duties largely rest on the *assumption* that Exxon failed to warn of inherent asbestos risks. But given his failure to prove any breach of the turnover duty, Minton

cannot base his liability arguments on Exxon's supposed failure to disclose risks that should have been disclosed at turnover. Neither can he deny the relevance of evidence directly establishing that the Shipyard did, in fact, have policies concerning the handling of asbestos-containing materials. Minton's abandonment of any turnover duty claim also impacts the punitive damages award, which rests on the improper premise that Exxon should have closely monitored Shipyard employees' work, when only the Shipyard carried that legal duty after the turnover.

ARGUMENT

I. MINTON MISAPPREHENDS THE LHWCA LIABILITY SCHEME

The LHWCA imposes on a shipyard the primary responsibility for providing its employees with a safe work environment, including onboard the ships they are repairing. So long as the shipowner turns over its vessel to the shipyard in safe condition and warns of hidden dangers, the shipowner "has no general duty … of supervision," and the shipyard itself is solely responsible for its workers' safety, except in two narrow circumstances. *Scindia*, 451 U.S. at 172. Minton makes no argument that Exxon breached its turnover duty by failing to warn of hidden dangers, including asbestos. Thus, Minton must establish that his injuries were caused by Exxon's breach of a distinct duty that arose *after* its proper

turnover—either (1) Exxon assumed control of Minton's work or the instrumentality that injured him, or (2) an Exxon employee acquired "actual knowledge" that the Shipyard was exercising "obviously improvident" judgment in failing to protect him. *Id.*[1]

Neither party has identified any case under the LHWCA holding a shipowner liable for an injury resulting from chronic exposure to a shipboard hazard that existed when a proper turnover occurred. Courts have consistently rejected such claims.[2] Because Minton did not even try

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[1] Minton protests that he "never conceded that Exxon fulfilled [the turnover] duty." Br. 34. But the point is that he never tried to prove a breach, so Exxon could be liable only for breach of the narrower duties.

Minton similarly contends that Exxon was liable because it "*never turned over its ships to the shipyard at all*." Br. 33. Minton misconstrues a "turnover" as the complete abandonment of the vessel to the stevedore or shipyard. But as the cases make clear, shipowners commonly maintain some control over their ships when they are being serviced or unloaded—stevedores do not man the bridge while moving cargo below. *See Dow v. Oldendorff Carriers GMBH & Co.*, 387 Fed. App'x. 504, 506-07 (5th Cir. 2010) (shipowner completed proper turnover and did not engage in active control, even though "vessel's captain ... observed cargo operations from the vessel's bridge"). A proper "turnover" means giving the stevedore or shipyard access to the space necessary to do its job, while disclosing to it hazards it would not otherwise be aware of. Minton also misconstrues the record: the jury was not requested or permitted to find liability on the ground that Exxon retained control over parts of its vessels where Minton was *not* working.

[2] Exxon Br. 4. Minton says those cases involved the turnover duty, Br. 34 n.8, but that is the point: a shipowner is generally not liable for a hazard that exists at turnover, *unless* the plaintiff proves a breach of the turnover duty. Cases holding shipowners liable prove the point a different

to show that Exxon breached any turnover duty, and could not show breach of any post-turnover duty, his claims fail as well.[3]

A. Minton Did Not Prove Breach Of The Active Control Duty

In contending the evidence sufficed to prove a breach of the "active control" duty, Minton first attempts to expand the definition of active control to include general control over ship equipment and even the mere sharing of space between shipowner and shipyard employees. Br. 35. But he is bound by the jury instruction, which he proffered and which stated correctly that the duty is triggered *only* if the shipowner was "in charge of (1) the

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way: all involve either violations of the turnover duty, or episodic accidents caused by conditions or problems that arose post-turnover—none involved sustained exposure to an inherent condition that existed when the turnover duty was fulfilled. *See, e.g.*, *Scindia*, 451 U.S. at 160 (struck by falling cargo); *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55, 60 (2d Cir. 2002) (injured while lifting); *Davis v. Portline Transportes Mar. Internacional*, 16 F.3d 532, 534 (3d Cir. 1994) ("slip-and-fall"); *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 530 (5th Cir. 1986) ("slipped"); *Turner v. Costa Line Cargo Servs., Inc.*, 744 F.2d 505, 506 (5th Cir. 1984) ("slipped"); *Woodruff v. United States*, 710 F.2d 128, 129 (4th Cir. 1983) ("falling"); *Tragni v. Establissement Mar. Camille*, 705 F.2d 92, 93 (2d Cir. 1983) ("slipped"); *Gill v. Hango Ship-Owners/AB*, 682 F.2d 1070, 1071 (4th Cir. 1982) ("struck"); *Harris v. Reederei*, 657 F.2d 53, 53 (4th Cir. 1981) ("injured his hand while loading"); *Sarauw v. Oceanic Nav. Corp.*, 655 F.2d 526, 527 (3d Cir. 1981) (gangway fell); *Rivera v. Arctic Ocean Shipping Ltd.*, 2012 U.S. Dist. LEXIS 40287, at *5 (E.D.N.Y. Mar. 23, 2012) (struck by equipment); *Ross v. United States*, 2012 U.S. Dist. LEXIS 19302, at *14-15 (M.D. Fla. Feb. 15, 2012) (hatch cover closed on hand).

[3] Exxon did not waive these arguments (Br. 35 n.10): "[A]rguments made at trial via written pleading ... shall ... be deemed preserved" "unless expressly withdrawn or waived." Va. Code § 8.01-384(A).

area in which the hazard existed, or (2) the instrumentality which caused the injury, or (3) the specific activities the ship repairer undertook." JA-3233; *see* JA-3430.

To satisfy that exacting standard, Minton emphasizes evidence that, he says, shows that Exxon maintained "control" over its ships during repairs because Exxon supervisors monitored the pace, quality, and satisfactory completion of the repairs and ordered supplemental work when needed. Br. 5-9, 36-37. But this evidence relates only to Exxon's conduct as a customer—like a homeowner watching remodeling work to ensure it is completed to satisfaction. None of the cited evidence shows that Exxon exercised active control over *the manner and means* of the Shipyard employees' work. Exxon Br. 2. Minton himself testified that Exxon would *not* tell Shipyard employees *how* to do their work. JA-1696; *see Massie v. Firmstone*, 134 Va. 450, 462 (1922) (party bound by own testimony). His own chart proves as much: the arrows run only from Exxon to Shipyard supervisors,[4] just as they would in any contractor relationship—no arrow runs directly from Exxon to the Shipyard "Trade Workers."[5]

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[4] As Minton notes, Exxon's requests for additional work always went through the Shipyard's shore-side "cost estimators," who would relay the orders to Shipyard trade workers on the vessels. Br. 10-12.

[5] Minton's brief states that "Exxon's regulations and policies required

The distinction between general supervision over a contractor's work, on the one hand, and direction of the methods and operative details of the work, on the other, is critical to the LHWCA's design. A shipowner *always* has the ultimate authority to determine what work it will pay to have performed on its vessel. But "ultimate authority … is not the equivalent of 'active control.'" *Fontenot v. McCall's Boat Rentals, Inc.*, 227 F. App'x 397, 403 (5th Cir. 2007).[6] If it were, then shipowners would be routinely deemed to be in "active control" of repair operations and thereby made liable for longshoremen's on-the-job injuries, in direct contravention of *Scindia* and the LHWCA. *See* Chamber of Shipping of America, et al., Br. 9-30.

Minton also contends that he proved active control because "Exxon's crew had to take the equipment off-line before Shipyard workers could repair it." Br. 14. But crewmembers on *any* ship would shut down

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Exxon's crewmembers and port engineers to assume duties of safety and supervision over shipyard workers." Br. 37. But the cited documents merely describe a duty to observe work to ensure its satisfactory and safe completion, and specifically instruct Exxon employees to report concerns through the normal channels (consistent with Minton's chart). JA-2315-16. They do not tell Exxon employees to insert themselves between Shipyard management and Shipyard trade workers or to assume the Shipyard's responsibilities for its employees' work and safety.

[6] In fact, the jury was properly instructed that "[t]he ship owner's reservation of the right to intervene ..., or to eject the ship repairer …, does not ... trigger the ship owner's active control duty as long as the shipowner does not exercise those reserved rights." JA-2096, 3233.

equipment to permit repairs. Minton's theory, again, would make essentially all ships liable for many, if not most, longshoremen's workplace injuries. The "equipment control" principle is not so broad: it simply means that a shipowner will be liable for causing injuries *while negligently handling the equipment it is actively controlling*—perhaps, for example, by *not* taking a boiler off-line upon request, resulting in a longshoreman's burn injury. Exxon's turning boilers off and on is not what caused Minton's injuries.

Finally, Minton argues that Exxon actively controlled his work because its crewmembers often worked alongside Shipyard workers (other than him) and kicked up asbestos dust. Br. 38. But Minton has not identified any instance in which Exxon crewmembers worked with *asbestos*-containing material near *him* or controlled *his* work. As such, the evidence failed to establish what the jury instructions required (JA-3230-36): that Minton *himself* was exposed to asbestos dust resulting from Exxon's active control of *his* work or from asbestos materials near *him*.

B. Minton Did Not Prove Breach Of The Duty To Intervene

To establish a duty to intervene, which can only arise when the shipyard is in control, Minton had to show that an Exxon employee had "actual knowledge" that the Shipyard was failing to protect him from an "obviously improvident" danger. *Scindia*, 451 U.S. at 175-76.

Minton concedes that this is not a general duty of supervision, Br. 39, but he treats it exactly that way. He says that Exxon, through its industrial hygienists, was uniquely aware of asbestos dangers, and that Exxon's crewmembers therefore should have intervened when it appeared that the Shipyard was not enforcing asbestos-control procedures. Br. 18-25, 39-40. The non sequitur is self-evident: Minton never showed that the industrial hygienists who were generally aware of asbestos risks were also *themselves* aware that the Shipyard was not keeping Minton safe from those risks.[7] His central argument instead was that Exxon's *crewmembers* did not have enough knowledge to monitor Shipyard policies and keep Shipyard employees safe from asbestos risks.[8] But it is not enough to argue that Exxon crewmembers should have had better knowledge and thus should have monitored the Shipyard's procedures. "Actual" knowledge means *actual* knowledge, not imputed or theoretical knowledge,

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[7] None of Minton's evidence showed that Exxon industrial hygienists knew that someone *like Minton*—who neither worked with asbestos-containing material nor stayed in one place for very long—would be at risk. For instance, Minton cites a 1972 letter from Exxon directing that "[p]ersons packing ... cartons" with asbestos material should wear a dust mask, Br. 23 (citing JA-2553), but there is no evidence that Minton ever packed a carton with asbestos material on any Exxon vessel.

[8] Minton's lawyer argued in closing that Exxon "should have trained that port engineer and the crew to recognize the danger and controls" or paid "an industrial hygienist to monitor the [Shipyard's] work." JA-2148.

and *Scindia* squarely precludes imposing liability on Exxon for failing to adequately monitor Minton's work or Shipyard asbestos policies.

II. MINTON DID NOT PROVE CAUSATION

Minton also failed, in two respects, to prove that any hypothesized breach caused his injury.

First, Minton could not link his injuries to exposure on Exxon vessels, as he indisputably received massive asbestos exposure *before* boarding any Exxon vessel. Exxon Br. 8-9, 34. Minton concedes that "it is impossible to separate out a portion of Minton's exposure and claim that it, alone, was the sole cause of his disease." Br. 30. To address that problem, Minton simply defines it away: where no particular exposure source can be identified, he says, "every exposure" is a legal cause. *Id.* But as Minton acknowledges, his burden was to prove that exposure from Exxon ships was a "*substantial* contributing factor," *id.* (emphasis added; quotation omitted)—not "one contributing factor of completely unknown significance given many prior years of massive exposure." It is not "a viable solution to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation." *Gregg v. V-J Auto Parts Co.*, 943 A.2d 216, 226-27 (Pa. 2007); *see Betz v. Pneumo Abex*

LLC, __ A.3d __, slip op. 50 (Pa. May 23, 2012) (rejecting Dr. Maddox's "every exposure" opinion as "fundamentally inconsistent with … the governing standard for legal causation"). Thus, while one of a handful of asbestos manufacturers may be liable where exposure from each one is shown to be a substantial factor, Br. 40, an "every exposure" theory cannot itself establish substantial-factor causation where, as here, there are *countless* additional sources of earlier and much greater exposure.

Second, Minton did not show that any asbestos he inhaled on Exxon ships was inhaled *as a result* of Exxon's breach of a duty. Minton simply assumes that all exposure he received aboard Exxon vessels was Exxon's responsibility; he makes no attempt to link exposure back to the breach of any duty by Exxon. In fact, any asbestos to which Minton was exposed onboard an Exxon vessel would have resulted from work performed by Shipyard workers, who Minton himself was supervising.

III. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE THAT THE SHIPYARD KNEW ABOUT ASBESTOS HAZARDS

The trial court improperly excluded all evidence of the Shipyard's knowledge of asbestos-related hazards and its asbestos control policies. Exxon Br. 36-44.[9] Defense Exhibit 1—a 1965 Shipyard memorandum—

[9] As at trial, Minton uses the evidence's exclusion to insist it did not even *exist*. Br. 3 ("there is no evidence that the Shipyard … attended the

conclusively showed that the Shipyard knew about the dangers of asbestos and had a written control policy by 1965. JA-2610-14. As already shown, that and other related evidence was relevant for five independent reasons. Exxon Br. 40-44. Minton and his amici ignore all of them completely. The arguments he does make are meritless.

Minton first tries to explain away his counsel's unambiguously false statement in closing—facilitated by the exclusion of Exxon's proffered evidence—that nobody "who was working at the shipyard" knew about asbestos risks. JA-2136. Minton says the statement was specific to *trade workers*, as opposed to Shipyard management. Br. 43-44. But it plainly was not so limited—counsel *repeatedly* asserted that Exxon was the *only* party with knowledge to protect Shipyard employees from asbestos risks.[10] The excluded evidence would have refuted that falsehood.

Minton next complains that Exxon proffered only the 1965 Memorandum. Br. 44. This is both wrong and irrelevant. Exxon's counsel

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1964 … asbestos conference"). The evidence is absent only because Exxon was barred from eliciting testimony on the subject. JA-886.

[10] *See*, *e.g.*, JA-2106-07 ("when someone has superior knowledge and the danger is hidden the law imposes duties to warn"); *id.* at 2108 ("[T]he only evidence that you heard for the last two weeks was the evidence about [Exxon's] knowledge"); *id.* at 2116 ("that's another example of why the knowledge of Exxon is so important to workers, because somebody's got to tell them or the worker is never going to figure this out").

made a substantial, unchallenged proffer summarizing the kind of evidence Exxon would offer if permitted. JA-1852-53. The court excluded all of it. JA-62, 171, 601, 606, 1846. In any event, the 1965 Memorandum alone established that the Shipyard knew of asbestos risks and promulgated control policies accordingly. Minton says the Memorandum did not mention the word "asbestos" frequently enough, Br. 44, but the warning was unambiguous: asbestos can have a "cumulative poisoning effect," JA-2611, so respirators must be used for "[e]xposure to dusts, fumes or vapors containing cumulative poisons such as … asbestos," JA-2613.

Minton also proposes the new theory that Exxon did not lay a proper foundation for the Memorandum's admission, because the sponsoring witness at trial could not say that Minton himself saw it or that the Shipyard implemented its policies on Exxon ships. Br. 44. But the trial court did not exclude the evidence on that basis—indeed it was first excluded *pre*trial. The argument also misses the point. Exxon has identified multiple reasons this evidence was important; none turns on whether Minton ever saw the Memorandum. And the Memorandum *itself* is evidence that its policies *were* implemented on Exxon ships—although that, too, was not essential to show its relevance. The only "foundation" arguably needed was the witness's familiarity with the document, which was established. JA-899.

Minton also argues that the evidence was properly excluded because it was offered only to attribute "indirect liability" to the Shipyard, which is statutorily immune. Br. 45. No—evidence of the Shipyard's knowledge had nothing to do with the Shipyard's liability. The Shipyard's immunity means it cannot be held liable for a shipowner's negligence, either directly as supervisor or indirectly through contribution or contractual indemnification. *See Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 263, 270 & n.28 (1979). But that immunity does not prohibit a shipowner from citing the Shipyard's knowledge to defend its *own* conduct, because under the LHWCA, defeating a shipowner's negligence cannot affect shipyard liability, which is limited to worker's compensation.

Finally, Minton argues that the Shipyard's knowledge was not relevant to the active control duty or the duty to intervene. But it was relevant to *breach* of the active control duty: jurors could have compared Exxon's procedures to those of the expert Shipyard in deciding whether Exxon was negligent. And it was especially relevant to the duty to intervene, given Minton's key argument that Exxon had the obligation to intervene because of its supposedly unique knowledge of asbestos risks.

IV. THE PUNITIVE DAMAGES AWARD IS LEGALLY ERRONEOUS

Punitive damages are not available under § 905(b). Minton relies on

Atlantic Sounding Co. v. Townsend, 129 S. Ct. 2561 (2009), but that case involved a *non*exclusive statutory remedy (the Jones Act) and a common law history of allowing punitive damages for maintenance and cure actions. *Id.* at 2571. By contrast, § 905(b) is the exclusive remedy, and its predecessor did not permit longshoremen to recover punitive damages against vessel owners. Exxon Br. 44-45.[11]

Moreover, despite his pleadings and his counsel's argument, Minton's proofs showed, at most, simple negligence, i.e., Exxon's shore-side employees negligently failed to train crewmembers to monitor Shipyard workers to ensure they adhered to proper asbestos handling practices while on Exxon vessels. Minton speculates that Exxon sought to avoid the implementation of asbestos controls to save money, but his only support is a *Shipyard* employee's assertion that repair work—from *all* clients—"went down the tubes" as asbestos controls became more aggressive. Br. 48. That solitary, generic observation provides no basis for concluding that Exxon itself willfully refused to provide training it knew was necessary to protect longshoremen being neglected by their own employers.[12]

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[11] Contrary to Minton's suggestion, Br. 48 n.18, whatever impact *Atlantic Sounding* had on *Miller v. American President Lines*, 989 F.2d 1450 (6th Cir. 1993), it did not address *Miller*'s discussion of the LHWCA.

[12] Minton seeks to rely on evidence of Exxon's actions long after his

The fact that Minton "sued Exxon itself" does not remove the maritime-law bar to punitive damages in vicarious liability cases. Br. 49. Exxon is being held liable here only because of what its shipboard employees did or did not do. There is no evidence of a corporate policy to hide safety information. The only testimony was the opposite. JA-1559-60.

Minton also argues that no *Philip Morris* instruction was required because he did not invite the jury to consider "every person who died as a result of … Exxon's negligence." Br. 49. But there obviously was a significant *risk* that the jury would punish for harms to non-parties, which is the relevant inquiry: the jury was expressly asked to punish Exxon for asbestos exposure on *non*-Exxon vessels, for exposure during *shore-side* operations, and for injuries to "wives and children." Exxon Br. 48-49.

Minton closes with a naked plea for this Court to ignore these errors because of Exxon's resources. Br. 49-50. A defendant's wealth, however, cannot justify an otherwise unconstitutional punitive damages award. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427 (2003).

CONCLUSION

The Court should reverse and remand for entry of judgment in Exxon's favor. At minimum, it should remand for a new trial.

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exposure. That Exxon took greater precautions later—based on better knowledge—cannot establish earlier motives. *See* Va. Code § 8.01-418.1.

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CERTIFICATE

In compliance with Rule 5:26(h), I certify that fifteen bound copies of this Reply Brief of Appellant and one electronic copy on CD have been hand-filed with the Clerk of the Supreme Court of Virginia on this 25th day of May, 2012. On this same day, three bound copies of the Reply Brief of Appellant and one electronic copy on CD have been served, via UPS Ground Transportation, to counsel for Appellee:

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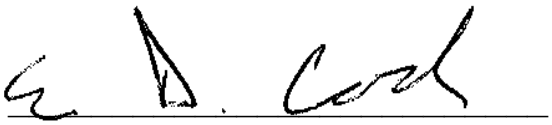

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