In the

Supreme Court of Virginia

At Richmond

Record No. 111775

EXXON MOBIL CORPORATION,

Appellant,

– v. –

RUBERT E. MINTON, et ux.,

Appellee.

BRIEF OF THE VIRGINIA TRIAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE APPELLEE

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TABLE OF CONTENTS

Table of Authorities iii

Amicus Statement of Interest 1

Statement of the Case 1

Statement of Facts 1

Argument 1

I. Summary of Argument 2

II. Standard of Review 4

A. Assignment of Error II 4

B. Assignment of Error III 5

III. Exxon's Causation Argument Ignores Controlling Virginia Case Law on Causation in Indivisible Injury Cases and Should be Rejected 6

A. Virginia Applies Contributive Causation in Indivisible Injury Cases 7

B. Mr. Minton's Unrebutted Evidence Establishes That Exxon's Negligence Substantially Contributed to his Mesothelioma 10

IV. The Circuit Court Did Not Abuse Its Discretion in its Rulings Regarding Evidence of the Shipyard's "Knowledge" of Asbestos Hazards 12

A. Exxon Has Not Developed a Factual Foundation for its Shipyard "Knowledge" Argument 12

B. In a Joint and Several Liability System, as Here, the Negligence or Knowledge of Other Potential Tortfeasors is Irrelevant.....15

Conclusion 19

Certificate of Service

Exhibit A – Written Consent Form

TABLE OF AUTHORITIES

Cases

Arminius Chemical Co. v. Landrum,
113 Va. 7 (1912) 3, 9

Atkinson v. Scheer,
256 Va. 448 (1998) 3, 17, 18

Brown v. Parker,
167 Va. 286 (1937) 16, 17

Carolina C. & O. Ry. v. Hill,
119 Va. 416 (1916) 3, 8, 9

Garlock Sealing Techs., LLC v. Little,
270 Va. 381 (2005) 18

John Crane, Inc. v. Hardick,
283 Va. 358, 722 S.E.2d 610 (2012) 6

Kimble v. Carey,
279 Va. 652 (2010) 5, 6

Maroulis v. Elliott,
207 Va. 503 (1966) 10, 16

Murray v. Smithson,
187 Va. 759 (1948) 16

Norfolk v. Hall,
175 Va. 545 (1940) 4

Scott v. Simms,
188 Va. 808 (1949) 5

Spence v. Am. Oil Co.,
171 Va. 62 (1938) 10

Sullivan v. Robertson Drug Co.,
273 Va. 84 (2007) 9, 16

Upper Occoquan Sewage Auth. v. Blake Constr. Co., Inc.,
266 Va. 582 (2003) 4

Von Roy v. Whitescarver,
197 Va. 384 (1955) 18

Wells v. Whitaker,
207 Va. 616 (1966) 2, 8

Yeary v. Holbrook,
171 Va. 266 (1938) 9

Rules, Statutes and Other Authorities

Va. Code § 8.01-443 .....16, 17

Va. Sup. Ct. Rule 5:30 1

***AMICUS* STATEMENT OF INTEREST**[1]

The Virginia Trial Lawyers Association is an organization of over twenty-five hundred Virginia attorneys dedicated to promoting professionalism within the trial bar, enhancing the competence of trial lawyers, protecting and preserving individual liberties and access to justice, and supporting an efficient and constitutionally sound judicial system.

This appeal presents issues that are important to Virginia law and trial practice in Virginia courts. The appeal concerns and implicates not only the rights of the parties to this case, but also the rights of litigants and the nature of trial practice throughout the Commonwealth.

STATEMENT OF THE CASE

VTLA adopts Mr. Minton's statement of the case.

STATEMENT OF FACTS

VTLA adopts Mr. Minton's statement of facts.

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[1] *Amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus*, its members, and its counsel made a monetary contribution to its preparation or submission. The parties to this appeal have consented to the filing of this brief. (*See* Rule 5:30 Written Consent Form, attached as Exhibit A.)

ARGUMENT

I. Summary of Argument

VTLA files this brief *amicus curiae* in support of Appellee Rubert E. Minton on Assignments of Error II and III.[2]

In Assignment of Error II, Exxon improperly seeks to apply "but for" causation principles to a mesothelioma case. Mesothelioma is an indivisible injury that results from multI-source exposure to asbestos over time with an appropriate latency period. (JA1494.) This Court has explicitly stated that "but for" causation does not apply in indivisible injury cases. *Wells v. Whitaker*, 207 Va. 616, 622 n.1 (1966). Also, wholly ignoring controlling Virginia law, Exxon seeks a pass on its negligence just because some other party's negligence—here, the Shipyard's—predates its own and might itself have been sufficient to cause Mr. Minton's mesothelioma. Again, this Court has explicitly stated the contrary position: "either is responsible for the whole injury . . . although, without fault on his part, the same damage would have resulted from the act of another."

[2] Because Assignments of Error I and IV do not implicate fundamental issues of Virginia law, VTLA takes no position on their resolution. For purposes of this brief, VTLA assumes that Mr. Minton adequately proved a breach of the duty of active control and the duty to intervene, and that the Circuit Court did not err in instructing the jury on either duty.

Carolina C. & O. Ry. v. Hill, 119 Va. 416, 421 (1916) (citing *Arminius Chemical Co. v. Landrum*, 113 Va. 7 (1912)). VTLA urges the Court to reaffirm these longstanding principles of Virginia law and thus reject Exxon's causation argument in Assignment of Error II.

In Assignment of Error III, Exxon improperly seeks leave to point the finger at the Shipyard's "empty chair" by introducing evidence of the Shipyard's "knowledge." But all that matters in this case is what Exxon knew, what Exxon did, and whether Exxon's negligence contributed to Mr. Minton's mesothelioma. Virginia law is clear that the concurring negligence of a joint tortfeasor, like the Shipyard here, is irrelevant. *See, e.g.*, *Atkinson v. Scheer*, 256 Va. 448, 454-55 (1998) (holding that it was error for the trial court to allow evidence regarding the negligence of another doctor with whom the plaintiff had settled because the settling defendant's negligence could only fairly be described as concurring rather than superseding). Maritime law, like Virginia, applies joint and several liability, so the rule against pointing the finger at empty chair joint tortfeasors applies with equal force. VTLA again urges the Court to reaffirm these longstanding principles of Virginia law and reject Exxon's argument in Assignment of Error III.

II. Standard of Review

A. Assignment of Error II

The Court should reject Exxon's causation argument "unless it appears from the evidence that the judgment is plainly wrong or without evidence to support it." *Upper Occoquan Sewage Auth. v. Blake Constr. Co.*, 266 Va. 582, 590 (2003). The Court "review[s] the evidence and all reasonable inferences flowing therefrom in a light most favorable to [Mr. Minton], wh[o] prevailed in the trial court," *id.*, and may "consider[] only so much of the evidence as is favorable to the prevailing party[, Mr. Minton]." *Norfolk v. Hall*, 175 Va. 545, 548 (1940). Accordingly, this Court's review on Assignment of Error II is constrained only to whether Mr. Minton introduced evidence from which a reasonable jury could find causation.

Exxon incorrectly contends that the standard of review for its causation argument is *de novo*. (Exxon Br. at 34.) In its Assignment of Error, Exxon claims that the trial court erred in entering judgment against Exxon "despite the absence of evidence" of proximate causation. (*Id.* at 7 (Assignment of Error II).) This assignment of error can only be construed as a challenge to the sufficiency of the evidence, which is governed by the rules stated above. In support of its position that the Court should apply *de novo* review, Exxon selectively quotes—and glaringly so—from *Scott v.*

Simms, 188 Va. 808 (1949). (Appellant's Br. at 34.) Suffice to say that the entirety of *Scott* shows Exxon's position of proximate causation as a legal question to be the exception, not the rule. Indeed, the *Scott* Court declined to rule on proximate causation as a matter of law and, instead, respected the jury's verdict because there was evidence to support it. *Id.* at 818.

B. Assignment of Error III.

The Court reviews the Circuit Court's evidentiary ruling regarding Shipyard "knowledge" for abuse of discretion. *Kimble v. Carey*, 279 Va. 652, 662 (2010). As it did in its causation argument, Exxon incorrectly contends that the standard of review for Assignment of Error III is *de novo*. This is so, Exxon contends, because "the evidentiary exclusion was premised on errors of law." (Appellant's Br. at 37.) However, Exxon never says exactly what this error of law was. And more to the point, Exxon's Assignment of Error states that the Circuit Court "erred in excluding all evidence that Minton's employer (the Shipyard) knew of the relevant hazard and had asbestos control procedures in place." (*Id.* at 7.) Nothing in this assignment suggests that Exxon is taking issue with the Circuit Court's understanding of the law,[3] only its application. A trial court's

[3] VTLA notes the incongruence between Assignment of Error III and Exxon's argument in support. *See, e.g.*, *John Crane, Inc. v. Hardick*, 283

application of evidentiary rules is reviewed for abuse of discretion. *Kimble*, 279 Va. at 662.

III. Exxon's Causation Argument Ignores Controlling Virginia Case Law on Causation in Indivisible Injury Cases and Should be Rejected.

In Assignment of Error II, Exxon claims:

> The trial court erred in allowing liability to be imposed on Exxon despite the absence of evidence establishing that his mesothelioma was proximately caused by Exxon's breach of a maritime-law duty (even assuming such a breach occurred).

The major premise of Exxon's causation argument is that, because Mr. Minton was likely exposed to sufficient asbestos before his work on Exxon vessels to cause mesothelioma, Exxon should be absolved of its own, later negligence that also resulted in substantial injurious asbestos exposure for Mr. Minton. In making this argument, Exxon relies exclusively on rhetoric. By simply declining to cite any of this Court's cases on causation in indivisible injury cases, Exxon *sub silentio* invites the Court to overturn close to a century of precedent. Exxon's argument also ignores the evidence in the record regarding causation.

Va. 358, 722 S.E.2d 610, 620 (2012) (finding that an error is waived when the Assignment of Error does not match the argument in support).

A. Virginia Applies Contributive Causation in Indivisible Injury Cases.

Exxon cites only to generic definitions of proximate causation, but none of its cases involve an indivisible injury caused by multiple actors. This is so despite the fact that this Court has a robust, controlling body of case law that deals explicitly with causation in indivisible injury cases involving multiple contributing actors. Indeed, reading Exxon's brief, one would come away assuming that this case law simply does not exist. But this body of law is alive and well, and VTLA urges the Court to reject Exxon's attempt to overrule these cases by silence.

Exxon's argument is an homage to "but for" causation. Exxon contends that Mr. Minton should be required to prove that he would not have gotten mesothelioma "but for" Exxon's negligence. The "but for" formulation works in the garden variety *single* tortfeasor case or in a case of multiple actors causing *separate*, distinct injuries. But it does not apply in cases like asbestos cases, where multiple actors combine to cause one, indivisible injury. This is so because it is impossible to discern which cancer cells to attribute to which product or which exposure. Rather, each exposure combines, either as an initiator or promoter or both, to produce one, indivisible cancer. (JA936-37, 1494, 1529-31.)

In such cases, this Court has recognized that "but for" causation is inapplicable: "[t]he 'but for' test is a useful rule of exclusion in all but one situation: where two causes concur to bring about an event *and either alone would have been sufficient to bring about an identical result*." *Wells v. Whitaker*, 207 Va. 616, 622 n.1 (1966) (emphasis added). Standing alone, *Wells* defeats Exxon's argument that because Mr. Minton's pre-Exxon exposures could have caused mesothelioma, he cannot prove causation by Exxon. But the case law neither begins nor ends with *Wells*.

Instead, for close to a century this Court has recognized that, in multiple actor indivisible injury cases, each tortfeasor is liable for the entirety of the plaintiff's damages. And this is so *even if* the injury might have occurred without that actor's negligence so long as the negligence in fact substantially contributed to the ultimate injury. Almost 100 years ago, the Court stated, "where separate and independent acts of negligence of two parties are the direct cause of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, *either is responsible for the whole injury; and this although his act alone might not have caused the entire injury, and although, without fault on his part, the same damage would have resulted from the act of another.*" *Carolina C. & O. Ry. v. Hill*, 119 Va. 416, 421 (1916) (citing *Arminius*

Chemical Co. v. Landrum, 113 Va. 7 (1912)) (emphasis added). So, under the rule stated in *Hill*, it does not matter that Mr. Minton's pre-Exxon exposure could have caused a hypothetical mesothelioma as long as the evidence indicates that Exxon's negligence substantially contributed to his actual mesothelioma.

In a recent indivisible injury case also omitted from Exxon's discussion, this Court stated, "[i]f separate and independent acts of negligence of two parties directly cause a single indivisible injury to a third person, either or both wrongdoers are responsible for the whole injury . . . *irrespective whether one may have contributed in a greater degree to the injury*." *Sullivan v. Robertson Drug Co.*, 273 Va. 84, 92 (2007) (citations omitted, emphasis added). In *Sullivan*, this Court reaffirmed the rule stated in *Hill* that a tortfeasor will be held liable for the entire injury as long as its negligence contributed to the injury. Between *Hill* and *Sullivan*, this Court has repeatedly recognized contributive causation in indivisible injury cases.[4] By contrast, the Court has *never* endorsed the rule proposed by Exxon in indivisible injury cases. It should not do so here.

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[4] In chronological order, *see, e.g.*, *Yeary v. Holbrook*, 171 Va. 266, 285-87 (1938) (approving of a contributory negligence instruction that barred recovery if the plaintiff "proximately *contributed* to the accident in any *substantial* degree" because "[t]he clear, unequivocal meaning of the

B. Mr. Minton's Unrebutted Evidence Establishes That Exxon's Negligence Substantially Contributed to his Mesothelioma.

Applying the legal framework set forth above to Mr. Minton's evidence can be done in short order. There was ample evidence from which the jury could conclude that Mr. Minton was exposed to substantial amounts of Exxon asbestos. (*E.g.*, JA814, 823-24, 1022-26, 1697-1715, 1726-29, 1773-74.) Mr. Minton's two medical experts testified, using generally accepted diagnostic principles that Exxon does not challenge, that every exposure to asbestos above background levels and within an appropriate latency period substantially contributes to the ultimate formation of mesothelioma, either as an initiator of a mutation or as a promoter, or both.

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instruction, as given, is that the negligence of the plaintiff must be a *substantial factor in contributing* to the injury before such negligence will bar his recovery.") (emphasis added); *Spence v. Am. Oil Co.*, 171 Va. 62, 76 (1938) (quoting the Restatement (Second) of Tort's use of the "substantial factor" causation standard with approval); *Maroulis v. Elliott*, 207 Va. 503, 510 (1966) ("The prior negligence of a first or original tort-feasor does not relieve a second tort-feasor of liability, if the latter's negligence constitutes, *or contributes to*, the proximate cause of the injuries and damages inflicted. In determining the liability of either of several persons whose concurrent negligence results in injury, the comparative degrees of negligence are not to be considered, each being liable for the whole even though the other was equally culpable, or *contributed* in a greater degree to the injury.") (emphasis added).

(JA1444-45, 1451-53, 1494, 1501, 1529-31 (Dr. Maddox); JA801, 936-37 (Dr. Egilman).) Thus, exposure to Exxon asbestos was a substantial contributing factor in causing Mr. Minton's mesothelioma. (JA824, 1496, 1506.) This evidence was beyond sufficient for a jury to find that Exxon's negligence was a proximate, contributing cause of Mr. Minton's mesothelioma.

Because Exxon did not present its own medical expert, Mr. Minton's causation evidence from two medical doctors went unrebutted. Thus, the sole support for Exxon's argument is Dr. Maddox's statement on cross-examination that the pre-Exxon exposure could have been sufficient to cause mesothelioma. However, the doctor at no point conceded that it *would have* occurred and never wavered from his testimony that Exxon exposure did, in fact, substantially contribute to the injury. So, even with Dr. Maddox's statement, the most Exxon can argue is that Mr. Minton *could* have ended up with mesothelioma absent Exxon's negligence. This is a far cry from saying that Mr. Minton *would* have ended up with mesothelioma absent Exxon's negligence, a proposition for which there is not a shred of evidentiary support in the record.

Because the law unequivocally supports Mr. Minton's causation theory, and because his evidence does so as well, the Court should affirm the trial court on Exxon's Assignment of Error II.

IV. The Circuit Court Did Not Abuse Its Discretion in its Rulings Regarding Evidence of the Shipyard's "Knowledge" of Asbestos Hazards.

In Assignment of Error III, Exxon contends:

> The trial court erred in excluding all evidence that Minton's employer (the Shipyard) knew of the relevant hazard and had asbestos control procedures in place.

This argument fails, both for lack of factual foundation and for lack of legal support.

A. Exxon Has Not Developed a Factual Foundation for its Shipyard "Knowledge" Argument.

The record shows that the factual predicate of Exxon's argument regarding the Shipyard's "knowledge" is not as strong as its brief would suggest. VTLA highlights these points as they set the stage for the legal analysis.

First, Exxon contends that the Circuit Court excluded "all evidence" of the Shipyard's knowledge. (Appellant's Br. at 7.) But this is not true—the Circuit Court permitted inquiry regarding Shipyard knowledge in at least two ways. Exxon was allowed in its case-in-chief to call James Thornton, the Shipyard's director of industrial hygiene. (JA1880-96.) Dr. Thornton

discussed the Shipyard's knowledge of the hazards of asbestos. Specifically, Dr. Thornton discussed the Shipyard's "S1020" document, though it does not appear that Exxon ever offered the document as evidence or even proffered it for the record. (JA1883.) Further, the Circuit Court permitted Exxon to ask witnesses about the Shipyard's 1965 safety memorandum, the document that Exxon points to as embodying Shipyard "knowledge." (JA896, 898.) Indeed, Exxon did cross-examine Dr. Egilman about the document, but simply declined to do so for other witnesses. So, it is not correct to say that the Circuit Court excluded *all* evidence of the Shipyard's "knowledge."

Second, Exxon bandies about this ethereal concept of the Shipyard's "knowledge" to suggest that it is a sizeable amount of evidence. But the record shows that Exxon was prevented only from introducing two pieces of evidence. The first piece is the 1965 safety memorandum, (JA900), although, as just stated, the court did allow Exxon to use the memorandum on cross examination but Exxon largely declined the offer. The second piece is the fact that someone from the Shipyard attended a conference in 1964, (JA886), though, even then, Exxon offered no witness or evidence that actually would have confirmed this claim. Exxon's brief does not point to any other evidence that was excluded, nor did Exxon proffer what else it

would have offered regarding Shipyard "knowledge" if allowed. So, these two pieces of evidence are the universe of Shipyard "knowledge" at issue for determining whether its exclusion was error and, if so, whether it was prejudicial.

Third, Exxon does not point to anywhere in the record that shows that the Shipyard front office's knowledge of the dangers of asbestos ever made its way down to the workers on the docks and aboard ship, or that any so-called "asbestos controls" were actually enforced by the Shipyard during the relevant time period. Indeed, most of the evidence suggests that the information only made its way downstream long after the Shipyard management was aware of it and that controls were not enforced. (*E.g.*, JA854-55, 1047-48, 1335-38, 1711-14, 1890-95.) Without showing that this Shipyard "knowledge" was actually known by those men working shift on Exxon's boats, it cannot possibly have any relevance to causation or Exxon's duty.

Fourth, and related to the extent that Exxon contends that it should have been able to rely upon the Shipyard's knowledge, Exxon does not show that it ever knew the nature or quantum of Shipyard knowledge until well after the fact. Exxon's assertion that "Exxon knew the Shipyard was aware of these risks and relied upon it to protect its own employees from

them" is unaccompanied by any citation to the record. (Appellant's Br. at 38.) In other words, although it is easy now, decades after the fact, for Exxon to say that it should have been able to rely on the Shipyard, there is no evidence that it actually did.

In light of these failures of factual support, the Court likely need not even reach the admissibility of Shipyard knowledge. But if the Court decides to address the merits, VTLA urges the Court to take heed of and preserve Virginia's rule that the knowledge or actions of other joint tortfeasors are irrelevant in a case against a single tortfeasor.

B. In a Joint and Several Liability System, as Here, the Negligence or Knowledge of Other Potential Tortfeasors is Irrelevant.

Despite its glossy packaging and Exxon's assertions to the contrary, there can be no question but that the purpose—or at least the effect—of Exxon's desire to introduce evidence of the Shipyard's knowledge would have been to put on an "empty chair" defense. Had Exxon been allowed to delve deeply into what the Shipyard knew, the jury may have concluded that, because the statutorily immune Shipyard was as, or more, negligent than Exxon, it should not hold Exxon liable or should reduce its verdict against Exxon proportionate to its fault.

These attempts at diversionary mini-trials of unnamed, absent, or immune joint tortfeasors are common in asbestos cases. Manufacturers or suppliers of asbestos products try to point the finger at the Shipyard or the US Navy. Shipyards try to point the finger at the manufacturers or the US Navy. Here, the case is against a vessel owner, so it seeks to point the finger at the Shipyard.

Virginia trial courts routinely reject these attempts because they are contrary to Virginia law. Virginia applies joint and several liability. Va. Code § 8.01-443. Accordingly, "[i]f separate and independent acts of negligence of two parties directly cause a single indivisible injury to a third person, either or both wrongdoers are responsible for the whole injury." *Sullivan*, 273 Va. at 92 (citing *Maroulis v. Elliott*, 207 Va. 503, 511 (1966) and *Murray v. Smithson*, 187 Va. 759, 764 (1948)).[5] Thus, in this case, even if the Shipyard was negligent in failing to protect Mr. Minton, Exxon is still liable for the entirety of his damages as long as the jury found that Exxon was also negligent and that its negligence substantially contributed to the indivisible injury. The jury did so in this case.

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[5] *See also Brown v. Parker*, 167 Va. 286, 291 (1937) ("When the negligence of two or more persons concurs in producing a single indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design, or concert of action.")

Furthermore, in Virginia a plaintiff may, in his discretion, sue one, more than one, or all tortfeasors who contributed to his injury. Va. Code § 8.01-443. As this Court stated in *Brown v. Parker*, 167 Va. 286 (1937),

> Since Lee and Brown were both negligent and since the negligence of each was a proximate cause of an injury single and indivisible . . ., they were both liable. This liability was joint and several. *Plaintiff's action might have been against both of them, but that was not necessary. He could, at his election, sue them jointly or severally.*

Id. at 291 (emphasis added). It follows, then, that if a plaintiff sues only one of several tortfeasors, whether by choice or by necessity, the trial should focus solely on the actions of the named defendant. Stated differently, a plaintiff should not be punished for exercising his prerogative to seek redress from only one of many joint tortfeasors by having to defend against an empty chair blame shifting defense.

This Court held as much in *Atkinson v. Scheer*, 256 Va. 448, 454-55 (1998). *Atkinson* was a medical malpractice case against one doctor. There was evidence to suggest that another doctor had also violated the standard of care, but that doctor had settled with the plaintiff and was not a defendant at trial. *Id.* at 451-52. On cross-examination of the plaintiff's standard of care expert, the defense asked, over plaintiff's objection, whether the other, absent doctor had also breached the standard of care. *Id.* at 452. The expert answered in the affirmative, and the jury returned a

defense verdict. *Id.* at 450. On appeal, this Court reversed. Specifically, the Court held that the absent doctor's negligence was not a superseding or intervening cause of the plaintiff's injuries and, instead, was merely a concurring cause.[6] *Id.* at 455. It was thus error for the trial court to allow evidence of the other doctor's negligence. *Id.*

As the cases cited in *Atkinson* demonstrate, this rule is of an old and robust vintage. As just one example, in *Von Roy v. Whitescarver*, 197 Va. 384 (1955), this Court stated that a negligent defendant "can not be exonerated by urging and showing the negligence of the other." *Id.* at 393 (citations omitted). The teaching of these cases plainly shows that Exxon's argument would not pass muster under Virginia law. It would not matter one bit whether the Shipyard was also negligent, because the fact remains that Exxon's negligence substantially contributed to Mr. Minton's injury.

There is no compelling reason to conclude differently under maritime law. Maritime law also applies joint and several liability. *Garlock Sealing Techs., LLC v. Little*, 270 Va. 381, 388 n.* (2005). And both of the duties at issue here—the active control duty and the duty to intervene—naturally focus solely on the knowledge and conduct of the vessel owner. Indeed,

[6] Exxon makes no claim that the Shipyard's negligence was a superseding or intervening cause of Mr. Minton's injury, nor would such an argument have any force.

the duty to intervene seems to assume, or at least make room for, the fact that the stevedore, *i.e.* the Shipyard, is also negligent. Thus, the Shipyard's knowledge and negligence is irrelevant to Exxon's liability, and the Circuit Court's evidentiary rulings were not an abuse of discretion.

CONCLUSION

For the reasons set forth above, VTLA urges the Court to reaffirm and apply Virginia's longstanding doctrines on contributive causation in indivisible injury cases, joint and several liability, and the irrelevance of the negligence of concurring tortfeasors and, in light of this doctrine, affirm the Circuit Court's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2012, fifteen copies of the above Brief of *Amicus Curiae* have been hand-delivered to the clerk's office. This same date, three copies of the same have been sent via third-party commercial carrier to the following counsel:

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Rule 5:30 Written Consent of the Parties

Exxon Mobil Corporation v. Rubert Minton, et ux.,
Supreme Court of Virginia
Record No. 111775

Under Rule 5:30 of the Rules of the Supreme Court of Virginia, the parties, by counsel, consent to the filing of any briefs amici curiae in this case.

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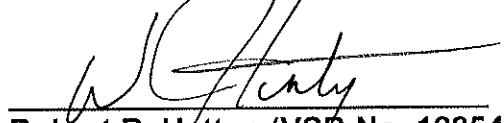
Rubert Minton, et ux.



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