In The

Supreme Court of Virginia

RECORD NO. 111775

EXXON MOBIL CORPORATION,

Appellant,

v.

RUBERT E. MINTON, *et ux.*,

Appellee.

BRIEF OF APPELLANT

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This is an appeal from a $17.5 million judgment entered for Rubert Minton, based on injuries he allegedly suffered as a result of his exposure to asbestos during his employment with the Newport News Shipbuilding & Dry Dock Company (the "Shipyard").[1] That judgment is the product of multiple legal errors concerning the workplace safety duties owed to longshoremen under federal maritime law. That law precludes imposing liability against defendant Exxon Mobil Corporation ("Exxon"), the owner of some of the many ships on which Minton performed maintenance and repair duties as a Shipyard employee, because it is the Shipyard that bears legal responsibility for the workplace safety of Shipyard employees. Shipowners such as Exxon are responsible for the safety of longshoremen only in narrow circumstances not present here.

Misunderstanding that settled principle, the trial court improperly failed to enter judgment for Exxon. It also erred by excluding undisputed evidence that the Shipyard was aware of shipboard asbestos risks to its employees, and even had its own procedures for handling asbestos. The erroneous exclusion of that evidence permitted Minton's counsel to argue the outright falsehood that the Shipyard had no knowledge of asbestos

[1] The Shipyard is currently owned by Huntington Ingalls Industries.

risks to Minton, and thus that Exxon had the sole opportunity and responsibility to protect Minton from those risks. The resulting verdict thus was as predictable as it was wrong.

Minton was employed at the Shipyard from 1956 until 1993. JA-1670, 1799-1800. The Shipyard built, maintained, and repaired numerous vessels for many entities, including Exxon. Like all longshoremen at the time, Minton regularly worked around asbestos on vessels being repaired by the Shipyard. After being diagnosed with mesothelioma in 2009, he filed this action against a number of defendants, including manufacturers of asbestos-containing materials and vessel owners. By trial, however, only Minton's claim against Exxon remained. Minton contends, and the jury found, that when Minton was performing work for the Shipyard aboard Exxon vessels between 1966 and 1977, Exxon breached a duty under the federal Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 905(b), to warn him of, and protect him from, the potential hazards associated with asbestos.

Because vessel owners need to know that their rights and obligations will be the same regardless of where their vessels dock, *see*, *e.g.*, *John Crane, Inc. v. Hardick*, No. 101909 (Va. Mar. 2, 2012), slip op. at 21 (noting the importance of uniformity to maritime law), the LHWCA clearly defines

the respective responsibilities of shipyards and vessel owners in protecting longshoremen. Recognizing that shipyards are in the best position to protect their own employees from the reasonably expected hazards of shipyard work, the LHWCA makes shipyards—rather than their customers, the owners of vessels they repair—legally responsible for ensuring the safety of the workplace and their employees. Thus, vessel owners owe only one *general* duty to the longshoremen who work on their vessels—the "turnover duty"—and that duty is discharged when the owner turns over the vessel to the shipyard in reasonably good condition and warns the shipyard of any hidden dangers of which the expert shipyard would be unaware. *See Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 164-65 (1981). Once that duty is fulfilled, the shipyard takes control of the repair operations and has responsibility for protecting its employees; the vessel owner has no continuing duty to supervise the work or protect longshoremen from the inherent hazards of the vessel. *Id.* at 172.

In fact, to Exxon's knowledge, even though asbestos was pervasively used in large vessels (both commercial and military) in the 1950s, 1960s, and 1970s, prior to this case, no vessel owner in any jurisdiction had ever been held liable under the LHWCA for failing to warn a shipyard employee about asbestos-related hazards—even on facts similar to those here.

Instead, courts have repeatedly recognized that asbestos was not a "hidden danger" to expert shipyards because it was routinely used on both commercial and military vessels at the time, and the shipowners that hired shipyards could expect that the shipyards, as experts, would be aware of asbestos and the associated dangers. *See Bartholomew v. SeaRiver Mar., Inc.*, 123 Cal. Rptr. 3d 171, 184 (Cal. Ct. App. 2011); *Buck v. ACandS, Inc.*, 154 P.3d 750, 757-58 (Or. Ct. App. 2007).

Prior to trial, Minton abandoned any claim that Exxon failed to satisfy the turnover duty when it turned its vessels over to the Shipyard. JA-58-60. In consequence, it should have been presumed that the Shipyard was aware of potential asbestos hazards onboard the vessels and knew how to safely perform the work it was hired to perform, including work that might involve asbestos. In fact, this was true: the Shipyard knew about asbestos—and even had written asbestos control policies in place by 1965—*before* Minton first worked on an Exxon vessel.

Yet Minton told the jury a different story. With the trial court's blessing, Minton was permitted to argue to the jury that the Shipyard was *not* aware of shipboard asbestos risks. *See*, *e.g.*, JA-2136 (Minton's counsel telling the jury that nobody "who was working at the [S]hipyard" knew about asbestos risks). And Exxon was precluded from impeaching

that testimony because the trial court barred Exxon from introducing *any* evidence that the Shipyard had knowledge of asbestos dangers or that it had in place asbestos control practices. *See* JA-101-11, 583-603, 2171-75. The jury was thus led to believe a falsehood: that Exxon had *exclusive* knowledge of asbestos risks and thus a unique ability to protect Minton and all other Shipyard employees.

Because Minton abandoned any claim that Exxon breached the general turnover duty, Minton tried to shoehorn his counterfactual liability theory into two narrow duties that only arise in very limited circumstances after the turnover duty has been discharged. One is the "active control" or "active operations" duty, which arises when the vessel owner asserts active control over the longshoreman's work or the instrumentality that injures him. The other is the "duty to intervene," which arises when the vessel owner acquires actual knowledge that the longshoreman's employer is failing to protect him from danger. Both duties are narrow exceptions to the general rule that the vessel owner can rely on the shipyard to protect its own employees and thus has no responsibility to supervise the shipyard's employees following proper turnover. And to recover for a breach of either duty, a longshoreman must show not only the facts necessary to establish the existence of such a duty, but also that the vessel owner was "negligent"

and that the vessel owner's negligence proximately caused his injuries. It is not enough to show that an injury was caused by an inherent hazard of the vessel that existed before the vessel was properly turned over.

But that is all Minton could show here. In a 10-day jury trial, Minton adduced no evidence establishing that Exxon breached either post-turnover duty, i.e., that Exxon either actively controlled Minton's work or caused his exposure to asbestos, or had actual knowledge that the Shipyard was not protecting him from an obvious danger. Minton instead argued that Exxon did not adequately monitor the Shipyard's asbestos control practices and ensure that he was protected from the inherent danger of shipboard asbestos.

Contending that Minton's theory essentially treated Exxon as if it were Minton's employer, and thus restored the general duty of post-turnover monitoring and supervision rejected in *Scindia*, Exxon moved to strike Minton's evidence at the close of his case and at the close of all evidence. The trial court denied both motions and permitted Minton's claims for both compensatory and punitive damages to proceed to the jury. JA-1974-75, 2122. The jury returned a $25 million verdict—$12.5 million in compensatory damages and $12.5 million in punitive damages. Exxon moved for judgment in its favor, or in the alternative for a new trial or

remittitur. JA-3246-80. On July 7, 2011, the court entered its Final Order, granting Exxon's motion as unopposed to the extent it sought to remit the punitive damages award to the $5 million Minton pled, but otherwise denying the motion without comment and entering judgment.

Exxon petitioned this Court to appeal the $17.5 million judgment, and this Court granted the petition as to the following four assignments of error.

GRANTED ASSIGNMENTS OF ERROR

I. The trial court erred in allowing liability to be imposed on Exxon—a vessel owner—for a longshoreman's asbestos-related workplace injuries despite the absence of evidence demonstrating either that Exxon actively controlled his work or the instrumentality that injured him, or that Exxon failed to intervene to protect him in the face of actual knowledge that his employer was ignoring an obvious risk to his safety. Preserved at JA-1730-46, 1828, 1974-75, 3227, 3246-59, 3474.

II. 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). Preserved at JA-1746-1750, 1828, 1974-75, 3227, 3260, 3474.

III. 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. Preserved at JA-886, 897-900, 2171-75, 3261, 3276-77.

IV. The court erred in awarding punitive damages, which are not available under § 905(b) and were not supported by the trial evidence. The court also erred in failing to grant a new trial on punitive damages and in refusing to at least remit the excessive punitive damages award. Preserved at JA-1750-52, 1828, 1974-75, 3227, 3269-79, 3474.

STATEMENT OF FACTS

Rubert Minton was employed at the Shipyard from 1956 until 1993. From 1956 to 1960, Minton worked in the construction of new ships as an apprentice shipfitter, "the person that builds the hull of the ship, like the outside of the house, the foundations, all the machinery, and the bulk of the ship." JA-1671. After a two-year stint in the Army Reserves, he returned to the Shipyard as a shipfitter at the beginning of 1962. *Id.* at 1675-76. He eventually became a supervisor of other shipfitters. *Id.* at 1671. In these positions, Minton worked exclusively on the construction of new vessels, and never worked onboard any Exxon vessel.

Minton's work in new construction regularly exposed him to asbestos dust. He was often required to work next to other trades, including insulators who covered steam pipes with asbestos insulation and pipefitters who fabricated gaskets out of asbestos-containing materials. *See* JA-1784-85, 1788-89, 1793-96; *see also id.* at 1784-85, 1789, 1790, 1796. According to Minton, the work of these other trades frequently made the worksite dusty. *Id.* at 1784-85, 1789, 1790, 1796. Indeed, in discussing his work constructing a naval aircraft carrier, Minton testified, "I feel like I breathed [asbestos dust] every day." *Id.* at 1785. In addition, Minton and his coworkers made extensive use of asbestos-containing cloth to protect

themselves when welding and performing other tasks, *id.* at 1787; *see id.* at 1793-94 (testifying that his use of asbestos-containing cloth was "real frequent" during that time), and Minton frequently used asbestos-containing products while working in new construction, *id.* at 1681 ("I touched them. I moved them and all ...."). As noted, Exxon did not own the hulls Minton worked on during this period (i.e., from 1956 through 1966), and Minton does not allege that Exxon is liable for his extensive asbestos exposure during that period.

In 1965, after a large conference held in 1964 on the dangers of asbestos, the Shipyard promulgated written guidelines for controlling asbestos dust. *See id.* at 806-07; *see also id.* at 2610-14. Although Exxon proffered those guidelines into evidence, the trial court excluded them as irrelevant. *Id.* at 897-900, 2171-75. The court also prevented Exxon's counsel from eliciting testimony that Shipyard representatives had attended the conference. *Id.* at 886. The trial court did, however, allow Minton to introduce evidence that Exxon representatives attended the conference. *Id.* at 841. With evidence of the Shipyard's policies excluded, Minton testified falsely—and without fear of impeachment—that the Shipyard "didn't have any [asbestos] controls" in place during his tenure. *Id.* at 1733. Without any contradictory evidence to consider, that testimony compelled

the jury to believe that Exxon knew about asbestos hazards on vessels and the Shipyard did *not*. The excluded evidence would have made clear that the Shipyard did know about those hazards and had even adopted practices designed to protect its employees.

In 1966, the year *after* the Shipyard promulgated its asbestos-control policy, Minton was transferred to ship repair and promoted to the position of ship repair staff supervisor. *Id.* at 1683. In this new capacity, Minton for the first time began supervising the repair of finished vessels that customers, including Exxon, brought to the Shipyard. *See Id.* Minton worked as a ship repair staff supervisor for eleven years—until 1977. *Id.* at 1684-85.

In his new position, Minton supervised and coordinated the repair and maintenance operations on the vessels that came into the Shipyard. *Id.* at 1683-84. Effectively, he was the highest-ranking Shipyard employee aboard the vessels, and he was responsible for overseeing the entire repair and maintenance operation. *Id.* As such, he did not work directly with asbestos-containing products, or even directly supervise the Shipyard employees who were working with such products. Instead, his function was "to coordinate the job." *Id.* at 1335. In addition, because his job required him to move about the vessels to monitor the ongoing ship repair

operation, Minton would rarely stay in one place longer than 15 to 20 minutes. *Id.* at 1343-44. During Minton's eleven years in ship repair, he could specifically remember working on "over 200 different ... ships." *Id.* at 1685.[2] Of those vessels, only 17 were owned by Exxon or one of its predecessors—fewer than 1 out of every 11. *Id.* at 1717.

Central to Minton's theories of Exxon's liability was the fact that certain Exxon employees remained aboard during ship repair and an Exxon employee (the port engineer) was responsible for ordering and inspecting the work and would remain onboard to monitor the progress. *See id.* at 2122-23 (closing argument); *see also id.* at 1695-96. But there is no evidence that any Exxon employee ever told Minton or other Shipyard workers *how* to perform the work. In fact, the testimony is the opposite—vessel owners, including Exxon, did *not* tell Shipyard workers how to do their work. *See id.* at 1696; *see also id.* at 1215. Minton testified that Exxon's practices were standard in the industry: *all* vessel owners left crew

[2] Minton's testimony at trial regarding the number of vessels he had worked aboard was based on a list he compiled when his counsel showed him a list of vessels that had entered the Shipyard during this period. JA-1685-86. Given that Minton performed this task approximately three decades after he stopped working in ship repair, his "over 200" estimate—which includes only the vessels he could remember working aboard—is likely conservative. *See id.* at 1686 (Minton noting lack of recall concerning details about which ships came in when and how often).

members aboard, and Shipyard practices were essentially uniform across *all* vessels, regardless of ownership. *Id.* at 1689-91.

Minton and his witnesses did testify that Exxon employees performed minor work on the vessel. Although no witness testified with any specificity as to what work might have been performed on any specific occasions (*see id.* at 1705), Minton and his witnesses testified generally that such work included minor work on small valves, gaskets, and pumps, and disturbing packing material, some of which may have contained asbestos. *See*, *e.g.*, *id.* at 1319-20, 1702-03. There was no specific evidence of what work was performed near Minton on any given occasion, let alone whether that work involved asbestos-containing materials. Further, Minton's own expert industrial hygienist testified that, as of 1972, there was no reason for any Exxon employee—or anyone else—to suspect that minor work with gaskets or packing materials created any health risks. *Id.* at 908. In addition, by 1971, non-asbestos materials were being used in packing and making gaskets. *See id.* at 945-46. Minton testified that he was unaware of this development; in fact, Minton professed that as late as his retirement in 1993 he did not know that the Shipyard was using non-asbestos insulation. *Id.* at 1802-03. There is no evidence that Minton or other Shipyard workers could tell on sight whether a given piece of material or equipment contained

asbestos. *See id.* at 1074-76. After 1977, Minton left ship repair. There is no evidence he ever boarded an Exxon vessel again. *See id.* at 1801.

SUMMARY OF THE ARGUMENT

I. Under the LHWCA, a vessel owner has only one general duty to the longshoremen that work aboard its vessel: to turn over the vessel in good condition and to warn their employer of latent defects. Minton does not argue that Exxon breached that duty here. After that duty is satisfied, the shipyard takes over the repair operations, and the vessel owner has a right to rely on the shipyard, an expert in its field, to protect its employees from workplace hazards. A shipowner that has satisfied its turnover duty can be held liable in only two limited circumstances: (1) where the vessel owner retains active control over the operational methods and details of the shipyard employees' work, and (2) where the vessel owner gains actual knowledge that the shipyard is exercising obviously improvident judgment and thus failing to protect its employees from a danger. Minton's evidence failed to establish that either of those circumstances existed here, let alone that Exxon acted negligently and that Minton was injured as a result. Exxon is entitled to judgment as a matter of law.

II. Even if Minton had established that either the active control duty or the duty to intervene were breached, Exxon would still be entitled to

judgment as a matter of law because Minton cannot prove that any negligence by Exxon proximately caused his mesothelioma. First, Minton did not prove that he was exposed to any asbestos on an Exxon vessel, let alone that he was exposed as a result of any negligence by Exxon. Second, given Minton's work history, Minton was already exposed to levels of asbestos capable of causing mesothelioma *before* he ever set foot on an Exxon vessel. For this reason, too, Exxon is entitled to judgment as a matter of law.

III. The trial court erroneously excluded evidence that the Shipyard knew about the hazards of working with asbestos and had asbestos control procedures in place. By admitting evidence of Exxon's knowledge but excluding evidence of the Shipyard's knowledge and controls, the trial court left the jury with the false impression that Exxon was the only party that could have protected Minton, even though the Shipyard could have protected him and, in fact, was the party with a statutory obligation to do so. The Shipyard's knowledge was relevant to causation, to determining whether Exxon acted negligently and thus breached the active control duty or the duty to intervene, and to punitive damages. It should also have been admitted to impeach Minton's testimony that the Shipyard did not have

asbestos controls in place. At a minimum, Exxon is entitled to a new trial in which that evidence is admitted.

IV. The punitive damage award was legally erroneous for multiple reasons: punitive damages are not a permissible remedy under § 905(b); punitive damages can only be awarded upon a showing of reckless or willful and wanton conduct; a vessel owner cannot be held vicariously liable for its employees' unauthorized shipboard conduct; the jury was impermissibly allowed to consider harm to non-parties; and the amount of the award was excessive.

STANDARD OF REVIEW, ARGUMENT, AND AUTHORITIES

I. THE JUDGMENT RESTS ON AN ERRONEOUS EXPANSION OF VESSEL OWNER LIABILITY UNDER THE LHWCA

The LHWCA allocates the responsibilities of vessel owners and shipyards (and other contractors) in protecting longshoremen from injury on the job.[3] Under the LHWCA, a vessel owner's primary duty to longshoremen who work aboard its vessel is to turn over the vessel to the longshoremen's employer in reasonably good condition and to warn their employer of any latent defects. Once that duty has been satisfied, the vessel owner is entitled to rely on the shipyard to use its expertise to

[3] Many decisions under the LHWCA concern longshoremen in the stevedoring industry and use the term "stevedore" to refer to the longshoreman's employer. *See*, *e.g.*, *Scindia*, 451 U.S. at 165.

protect its employees from any hazards of the work the shipyard has been hired to perform. Under the LHWCA, an owner has post-turnover duties to shipyard employees only in narrow circumstances not present here. The trial court erred in submitting the case to the jury and in refusing to enter judgment post-trial for Exxon. Because the court's decision was based on a misunderstanding of the LHWCA, the trial court's decision is reviewed *de novo*. *See Davenport v. Little-Bowser*, 269 Va. 546, 552 (2005).[4]

[4] As noted earlier, Exxon preserved its objections to both this error and the error on causation by filing motions to strike and to set aside the verdict. *See supra* at 6-7. In its opposition to Exxon's petition for appeal, Minton argued that Exxon waived these objections by proffering jury instructions on these issues. Although a party cannot object to a specific instruction it submits, *cf. Coppola v. Warden of the Va. State Penitentiary*, 222 Va. 369, 371-72 (1981), submitting instructions does not waive a party's substantive objections to the sufficiency of the evidence. Section 8.01-384(A) of the Virginia Code makes this point clear: "No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal …." This provision makes sense in light of the waiver rule's purpose, which is to "protect the trial court from appeals based upon undisclosed grounds, to prevent the setting of traps on appeal, to enable the trial judge to rule intelligently, and to avoid unnecessary reversals and mistrials." *Jimenez v. Commonwealth*, 241 Va. 244, 248-49 (1991) (quotation omitted). Here, Exxon's motions informed the trial court that Minton had not offered sufficient evidence to support the existence of the active control duty or duty to intervene or to establish causation. Thus, the trial court had an opportunity to intelligently consider the issue. *Id.*; *Scialdone v. Commonwealth*, 279 Va. 422, 437 (2010). Having lost on its motions, Exxon was under no obligation to withhold its view of what would be a proper statement of the law when the court was drafting its instructions to the jury. Were it otherwise, parties would be unable to both preserve a sufficiency argument and proffer jury instructions, particularly where, as here, the pre-trial order required the parties to exchange instructions.

A. Under The LHWCA, A Vessel Owner Owes A Duty Of Care To Longshoremen In Only Three Specific Situations

The LHWCA establishes the exclusive remedial scheme for longshoremen injured on the job. As amended in 1972, the LHWCA recognizes that a longshoreman's employer has the primary responsibility to protect him, and thus provides that, in the usual case, an injured longshoreman's sole remedy is compensation from his employer under a workers' compensation regime. § 905(a); *see*, *e.g.*, *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603, 613 (1st Cir. 1996) (en banc). An injured longshoreman may also bring an action against a vessel owner, but only for "negligence of a vessel," which exists in specific, highly delineated circumstances. § 905(b).

This regime differs substantially from the regime that existed before the LHWCA was amended in 1972. An injured longshoreman previously could recover from a shipowner merely so long as his injury resulted from the ship's "unseaworthiness," a strict liability standard that "required no proof of fault on the part of the shipowner other than an unsafe, injury-causing condition on the vessel." *Scindia*, 451 U.S. at 164-65. If the shipowner was held liable, it could then "recover over against a stevedore for breach of express or implied warranty to handle the cargo in a

reasonably safe manner." *Id.*; *see Ryan Stevedoreing Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

The 1972 amendments abolished both the longshoreman's right to recover for unseaworthiness and the concomitant obligation of the stevedore to indemnify the shipowner if the latter were held liable. *Scindia*, 451 U.S. at 165. And because it would not be as easy to recover from shipowners, "[t]he compensation payments due the longshoreman from the stevedore" under the LHWCA's worker's compensation regime "were substantially increased." *Scindia*, 541 U.S. at 165.

This shift of liability away from shipowners and toward the longshoremen's employers made sense because, as the U.S. Supreme Court explained in *Scindia*, vessel owners hire stevedores and other specialized contractors because they are experts in their fields and much-better positioned to protect their own employees in the course of their work. *See id*. at 164-65; *accord Buck*, 154 P.3d at 755 (the LHWCA "shift[ed] … responsibility for compensating injured employees from the vessel owner to the employer, who is 'in a far better position' to avoid accidents that an employee might suffer in the course of accomplishing his services"). Accordingly, "the shipowner may rely on the [contractor] to avoid exposing

the longshoremen to unreasonable hazards." *Futo v. Lykes Bros. S.S. Co.*, 742 F.2d 209, 213 (5th Cir. 1984) (quotation omitted).

Under the amended LHWCA, a vessel owner has only one general duty to a shipyard's employees: to turn over the vessel to the shipyard in reasonably good condition and to warn the shipyard of any hidden dangers that an expert shipyard would not expect to encounter during its work (the "turnover duty"). If that general duty is satisfied, then the shipyard assumes control of the repair operations, and the vessel owner is entitled to rely on the shipyard to perform its work professionally, protecting shipyard employees during the discharge of their workplace duties, including from inherent hazards of the vessel. *See Bjaranson v. Botelho Shipping Corp.*, 873 F.2d 1204, 1208 (9th Cir. 1988) ("certain dangers that may be hazardous to unskilled persons need not be remedied [by the vessel owner] if an expert and experienced stevedore could safely work around them"); *see also Bartholomew*, 193 Cal. App. 4th at 699; *Buck*, 154 P.3d at 750. Following a proper turnover, the vessel owner "has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within [vessels] that are assigned to the [shipyard]." *Scindia*, 451 U.S. at 172.

There are only two limited exceptions to the rule that a vessel owner can rely on the shipyard to protect its own workers after proper turnover. First, the owner may assume an "active control" or "active operations" duty if it asserts control over the longshoreman's work or the equipment that injures him. *Id.* at 167; *see*, *e.g.*, *Manuel v. Cameron Offshore Boats, Inc.*, 103 F.3d 31, 33 (5th Cir. 1997). Second, the owner may have a "duty to intervene" if it gains "actual knowledge" that an "obviously improvident" danger to the longshoreman has arisen during the course of the longshoreman's work and that his employer is not protecting him from that hazard. *Scindia*, 451 U.S. at 175-76; *see*, *e.g.*, *Lormand v. Superior Oil Co.*, 845 F.2d 536, 542 (5th Cir. 1987).

Because the shipyard controls the repair operations and the vessel owner is entitled to rely on the shipyard to supervise and protect its employees, the "active control duty" and the "duty to intervene" are tightly constrained, to avoid allowing in through the backdoor the very duty to supervise that Congress tossed out the front. *See Scindia*, 541 U.S. at 172. Courts have thus repeatedly held that the "active control" duty is *not* triggered by the owner's general oversight of the progress of the work. *See*, *e.g.*, *Green v. United States*, 700 F. Supp. 2d 1280, 1298 (M.D. Fla. 2010) (no duty where owner's "employees board the vessel daily 'to ensure

the security of the ship and to check on the'" work's progress); *Gonzalez v. United States*, 588 F. Supp. 2d 747, 761 (S.D. Tex. 2008) (no duty based on inspection and monitoring of work); *Tsotras v. United States*, 1996 WL 652606, at *4 (E.D.N.Y. Nov. 6, 1996) (no duty where owner focused on enforcing schedule). Rather, to trigger the "active control" duty, the ship's employees must exercise "operational control" of the longshoreman's work. *Fontenot v. McCall's Boat Rentals, Inc.*, 227 F. App'x 397, 403-04 (5th Cir. 2007). In other words, the ship's employees must actively control "the methods and operative details" of the longshoremen's work. *Dow v. Oldendorff Carriers GMBH & Co.*, 387 F. App'x 504, 507 (5th Cir. 2010); *see Pledger v. Phil Guilbeau Offshore, Inc.*, 88 F. App'x 690, 692 (5th Cir. 2004).

The "duty to intervene" is similarly constrained. It requires proof that the vessel owner has *actual knowledge* that the longshoreman's employer is not protecting him from an obviously improvident danger. *See Scindia*, 451 U.S. at 178. General knowledge of a workplace hazard—such as the health risks of asbestos—is not sufficient because, as explained above, the vessel owner is entitled to rely on the expert shipyard to take the steps necessary to create a safe work environment. Thus, the duty to intervene arises only when the vessel owner has "actual knowledge" that the

shipyard is failing in those responsibilities. And "actual knowledge" means *actual* knowledge of *both* the risks *and* the shipyard's failure to recognize and protect adequately against them: "The vessel owner must intervene with respect to obvious dangers if it acquires actual knowledge that a condition of the vessel or its equipment poses an unreasonable risk of harm *and* if the vessel owner acquires knowledge that the stevedore is not exercising reasonable care to protect its employees." *Levene v. Pintail Enters., Inc.*, 943 F.2d 528, 533 (5th Cir. 1991) (emphasis in original).

The fact that a vessel owner's employee might know that a given condition would be hazardous to longshoremen does not itself trigger a duty to intervene and prevent the condition from arising. That duty falls in the first instance to the longshoremen's employer (assuming a proper turnover). As the Supreme Court explained in *Scindia*, it is "erroneous" to hold a shipowner liable on the ground that the owner "should have known" of the hazard to the longshoreman when the owner, in fact, did not. 451 U.S. at 178. Were it otherwise, vessel owners would have an ongoing duty to monitor and supervise longshoremen to ensure that their employers were adequately protecting them—precisely the duty rejected in *Scindia*. *Id.* In short, "imposing a duty upon vessels to supervise and inspect [the contractor's] operations for the benefit of longshoremen then on board

would undermine Congress' intent in [§ 905(b)] to terminate the vessel's automatic, faultless responsibility for conditions caused by the negligence or other defaults of the [contractor]." *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92, 101-02 (1994) (quotation omitted).

B. Minton Did Not Establish A Breach Of Any *Scindia* Duty

1. *Prior To Trial, Minton Abandoned The "Turnover" Duty*

Prior to trial, Minton abandoned any claim that Exxon failed to fulfill its "turnover" duty. JA-58-60; *id.* at 605 ("But as for the issue at hand, this isn't about turnover. We're not saying that they have to tell the shipyard in the first instance that there's a hazard. That's the turnover duty, and we dropped that."). Minton thereby abandoned any contention that Exxon failed to turn over the vessels in reasonably safe condition or failed to warn of hidden dangers. He did this for good reason: in the 1940s, 1950s, and 1960s, the maritime industry commonly used asbestos-containing materials. The Coast Guard, in fact, had approved the use of asbestos-containing materials onboard merchant vessels. *See*, *e.g.*, 46 C.F.R. §§ 164.007-4(c)(3), (e), 164.009-2(b) (1970). Shipyards that repaired merchant vessels thus would expect to work with asbestos products. Indeed, the Shipyard built many of the vessels it was servicing, including most of the Exxon vessels involved in this case, and during construction, it

installed asbestos on those vessels. *See*, *e.g.* JA-1674-75, 1808, 2118 (Minton's counsel noting in closing argument that "in these ships the asbestos is everywhere, all over the pipes, and that's what gets worked on when these ships come in for repair"). Thus, the Shipyard necessarily understood that asbestos materials were on the vessels when they returned to the Shipyard for maintenance.

Because shipyards knew they would encounter asbestos-containing materials in the 1960s and 1970s, courts have repeatedly recognized that asbestos was not a "hidden danger." *See Bartholomew*, 123 Cal. Rptr. 3d at 180; *Buck*, 154 P.3d at 755. Accordingly, when Minton abandoned his claim that Exxon breached its duty to turn over a reasonably safe ship and to warn of hidden dangers, he effectively acknowledged that the Shipyard knew—and that Exxon could expect it to know—how to recognize and deal with the hazards posed by asbestos.

2. *Minton Did Not Establish Liability Under Either Of The Secondary Duties*

Given Minton's tacit concession that Exxon did not breach the turnover duty, Minton had the burden to establish more than the presence of asbestos onboard Exxon vessels and that Exxon knew about its presence. As discussed, asbestos was a known and inherent hazard in the Shipyard's work, just like a ship's rigging or its high-pressure boilers.

Accordingly, to establish Exxon's liability under *Scindia*, Minton had to establish some special circumstance that imposed on Exxon either an active control duty or a duty to intervene, and that Exxon breached that duty. Minton made no such showing.

a. Minton Failed To Show That Exxon Ever Exercised "Active Control" Of The Shipyard's Work

As discussed above, to establish that Exxon exercised "active control" over Minton's work, Minton had to show that Exxon did more than maintain general oversight or had procedures governing repair work—he had to show that Exxon employees exercised actual control over the operational methods and details of the Shipyard employees' work or maintained actual control over the part of the vessel on which he worked. *See supra* at 20-21. And to establish liability, he had to prove that his injury was caused by Exxon's negligence in controlling those methods and details. *See Scindia*, 451 U.S. at 167.

Minton did not establish that Exxon ever exercised this sort of active control on any occasion, not to mention that Minton was ever exposed to asbestos dust as a result of such control. Instead, Minton offered essentially three different explanations for why the active control duty was triggered. None has merit.

First, Minton asserted that Exxon was always in active control of him—and every other Shipyard worker that boarded its vessels—because it had general procedures permitting its employees to oversee the progress and quality of the work. Such general regulations, however, are insufficient to establish an "active control" duty. *See Fontenot*, 227 F. App'x at 403 ("ultimate authority to make decisions about the operation of the vessel … is not the equivalent of 'active control'"). A shipowner *always* has theoretical authority to restrict activities on its own property—the question is whether the shipowner *exercised* that authority and in fact exerted "actual control" over the longshoremen working aboard its vessel. Were it otherwise, the narrow "actual control duty" exception would swallow the rule that shipowners generally are not liable for injuries to longshoremen that occur during ship repair. There is no such evidence of actual control here: Minton himself testified that Exxon employees did *not* tell Shipyard workers how to do their jobs. JA-1696. Indeed, there is no evidence that *any* Exxon employee ever told *any* Shipyard employee how to do his job.

Second, Minton argued that Exxon assumed an active control duty because its onboard employees would order work, provide specifications, monitor progress, and approve results. *See id.* at 2120-23, 2127-31. But, as every other court to consider the issue has concluded, a vessel owner's

general oversight of the *contractor's* work does not constitute active control over the *contractor's employees*—an owner who simply acts as an assertive customer does not interfere with the contractor's control over its own employees' work. *See supra* at 20-21. And even if Exxon did exercise active control over some aspect of Shipyard employees' work, Minton would still need to show that *Exxon's negligence in exercising that control*—rather than a preexisting hazard on the vessel—is what caused his injury. *See*, *e.g.*, *Davis v. Portline Transportes Mar. Internacional*, 16 F.3d 532, 541 (3d Cir. 1994) (active control duty triggered where vessel owner's crew was "responsible for maintaining the deck," and plaintiff slipped because of substances the crew used to maintain it); *England v. Reinauer Transp. Cos.*, 194 F.3d 265, 273 (1st Cir. 1999) (evidence sufficient to establish breach of active control duty where defendant "retained operational control over the mooring lines" and the "mooring line parted on the day of the accident"). Here, Minton did not even *attempt* to make that showing.

Third, Minton attempted to establish the "active control" duty by contending that Exxon employees worked with asbestos in his vicinity. But, again, Minton offered no specific evidence to support this theory. Rather, the testimony regarding the work of Exxon crew members was entirely

vague: the workers would commonly perform minor work on the vessels, and some of that work *might* involve materials that *might* contain asbestos. *See supra* at 12. Neither Minton nor any other witness was able to identify a single occasion where Exxon crewmembers worked with *asbestos*-containing material in *Minton's* vicinity—much less that crewmembers failed to exercise due care in handling asbestos, or that their failure to exercise due care caused him to inhale asbestos fibers he would not have otherwise inhaled. *Scindia*, 451 U.S. at 167. The jury instructions framed the legal issues to require such proof, JA-3230-36, but there was none. In fact, prior to 1972, it would not have been unreasonable for Exxon crewmembers to perform minor work on gaskets and valves without using asbestos controls because, as Minton's own expert explained, *no one* during that period thought that that kind of minor work created sufficient exposure to asbestos to be dangerous. *See id.* at 908 ("I don't have any evidence that there were any Exxon documents or other documents that indicate that that would have been a recognized hazard.").

Moreover, by the time experts started to appreciate that even very minor exposure to asbestos could pose health risks, Minton could not have been sure that any work performed near him involved asbestos at all. At least as early as 1971, manufacturers started using non-asbestos

substitutes in products that had previously been made with asbestos. *Id.* at 945-46. Although Minton testified that Exxon crewmembers worked in his vicinity with materials that he *thought* contained asbestos without the use of proper asbestos controls, other evidence showed that Minton could not, in fact, know whether those materials contained asbestos—and thus whether asbestos controls were actually necessary. *See id.* at 1074-76, 1802-03. Thus, Minton could offer only conjecture that Exxon crewmembers ever worked with asbestos products in his vicinity without the use of proper controls. *See*, *e.g.*, *Doe v. Terry*, 273 Va. 3, 9 (2007) (plaintiff's case cannot rest on "'conjecture, guess, or random judgment'").

In sum, Minton did not—and could not—offer evidence sufficient to establish an active control theory of liability.

b. Exxon Had No Duty To Intervene

Minton likewise failed to offer evidence sufficient to establish the existence of a "duty to intervene." Under *Scindia*, a "duty to intervene" exists only if the vessel owner gains "actual knowledge" that during the course of the longshoreman's work a danger has arisen and his employer is exercising "obviously improvident" judgment in failing to protect him from that danger. *Scindia*, 156 U.S. at 175, 178; *Levene*, 943 F.2d at 533. This duty "is narrow and requires a showing that the condition is so hazardous

that *anyone* can tell that its continued use creates an unreasonable risk of harm—even when the stevedore's expertise is taken into account." *Dow*, 387 F. App'x at 508 (emphasis added; quotation omitted). As the Fifth Circuit has observed, "[t]here is a distinction between knowledge of a condition and knowledge of the dangerousness of that condition." *Randolph v. F. Laeisz*, 896 F.2d 964, 971 (5th Cir. 1990). Thus, the question here was not whether Exxon knew that the vessel contained asbestos, but whether it actually knew that asbestos was being handled in a dangerous manner—i.e., without the proper safety controls.

Even accepting Minton's testimony that he was working around asbestos without the required controls, Minton adduced no evidence that any Exxon employee *actually knew* that Minton was working under conditions that were so "obviously" dangerous that "anyone" would have understood the danger—especially "when the [Shipyard's] expertise is taken into account." *See Dow*, 387 F. App'x at 508. While on Exxon's vessels, Minton neither worked directly with asbestos-containing products nor directly supervised workers who were working with such products. JA-1335. It thus would not have been generally apparent that Minton was working under dangerous conditions. Indeed, Minton could not identify a single Exxon employee on an Exxon vessel who actually noticed a risk to

him, and he admitted that Exxon employees with whom he was working—including Exxon's port engineer (*id.* at 1695)—must *not* have perceived any risk because they were personally working in the exact same environment. *Id.* at 1814-15; *see also id.* at 2144 (closing argument: "The [Exxon] crew, apparently, is clueless."). Thus, there was no evidence specific to Minton and his experiences on Exxon vessels at the Shipyard establishing that Exxon employees had "actual knowledge" that the Shipyard was failing to protect Minton (or anyone else) from an obviously improvident danger.[5]

Nonetheless, with the trial court's blessing, Minton argued that Exxon possessed "actual knowledge" that the Shipyard's "obviously improvident" judgment was exposing Minton to a hazard because some Exxon industrial hygienists kept abreast of publically available information concerning potential hazards of asbestos and the need for safe handling procedures. *See id.* at 2108-09. But even assuming those industrial hygienists would have thought a hypothetical person in Minton's position would be at risk if

[5] Indeed, the fact that the Shipyard knew about asbestos and had asbestos control policies in place helps make clear why Exxon would have reasonably believed that when Shipyard employees were not using asbestos controls, those controls simply were not necessary. As explained below, the trial court erroneously barred Exxon from introducing evidence which would have conclusively shown that the Shipyard had asbestos control policies in place, even after Minton told the jury that the exact opposite was true. *See infra* at 36-43.

his fellow Shipyard employees were not using asbestos controls,[6] those hygienists knew *nothing* about Minton's work environment or whether the Shipyard had adequate controls in place because they were never on the vessels at the Shipyard. Indeed, because the "turnover duty" had been satisfied, Exxon and its industrial hygienists were legally entitled to expect that the Shipyard (which had safety procedures in place in 1965 and access to the same publicly available information concerning asbestos as Exxon) *did* take the steps necessary to protect its employees from all known hazards. Minton adduced no evidence establishing that *any* Exxon employee actually knew to the contrary, *viz.*, that the Shipyard was failing to adequately protect its employees.

Instead, Minton essentially argued that, even if Exxon did not actually know Minton was at risk, it *should* have known—that is, Exxon should have made sure that an employee on its vessels had industrial hygiene expertise in order to monitor Minton's work and ensure that the Shipyard was adequately protecting him. *See id.* at 2116 (Minton's counsel arguing that Exxon was required to inform Minton and other Shipyard workers of

[6] There is reason to doubt that they did. Minton introduced no evidence that *anyone* at the time would have appreciated the risk to someone whose indirect contact with asbestos was as minimal as Minton's. Indeed, Minton emphasized Exxon's knowledge that individuals working *directly* with asbestos *insulation* needed asbestos controls, *see*, *e.g.*, JA-2113, but Minton did *not* work directly with insulation.

asbestos-related risk). But the Supreme Court has specifically rejected the suggestion that this duty exists in cases where the vessel owner "should have known" about the danger, or that it imposes a "duty to inspect the stevedore's cargohandling operation." *Scindia*, 156 U.S. at 175, 178; *see Randolph*, 896 F.2d at 971 ("The trial court utilized an incorrect standard when it determined that the vessel 'knew or should have known' that the condition presented an unreasonable risk of harm.").

Under the correct standard—*actual* knowledge of an *obviously* improvident hazard—Minton did not establish a duty to intervene.

II. MINTON FAILED TO PROVE CAUSATION

Even assuming the jury could permissibly conclude that Exxon breached a maritime-law duty, Minton still had to show that, as a result of that breach, (1) he breathed asbestos fibers he would not have otherwise breathed, and (2) those fibers were the proximate cause of his mesothelioma. Minton proved neither point.

"The proximate cause of an event is that act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred." *Howell v. Sobhan*, 278 Va. 278, 283-84 (2009). A plaintiff who alleges negligence must "show why and how" his injury occurred; "if that is

left to conjecture, guess or random judgment, he cannot recover." *Terry*, 273 Va. at 9 (quotation omitted). The "question of proximate cause" is a question of law—and review is de novo—when "the evidence is such that there can be no difference in the judgment of reasonable men as to the inferences to be drawn from it." *Scott v. Simms*, 188 Va. 808, 816 (1949).

Minton could not establish that Exxon was the cause of his injury given the extensive exposure he experienced for almost a decade before setting foot on an Exxon vessel. As noted above, during this period, Minton was regularly exposed to asbestos dust. He was often required to work next to other trades, including insulators who covered steam pipes with asbestos insulation and pipefitters who fabricated gaskets out of asbestos-containing materials, and the work of these other trades frequently made the worksite dusty. *See supra* at 8-9. Indeed, in discussing his work constructing a naval aircraft carrier, Minton testified, "I feel like I breathed [asbestos dust] every day." JA-1785. In addition, Minton and his coworkers made extensive use of asbestos-containing cloth and other products to protect themselves when welding and performing other tasks. *See supra* at 8-9. None of his experts could rule out that substantial exposure as the cause of his mesothelioma, or say that Minton would not have sustained the same injury had his asbestos exposure ceased entirely

in 1965. To the contrary, his own experts testified that mesothelioma can begin within *days* or even *hours* of exposure. JA-798-801, 843, 1500, 1515. They also agreed that the exposure he experienced before boarding any Exxon vessel could be sufficient to cause mesothelioma. *Id.* at 929-31, 1521-22. And they offered no scientific basis for concluding that his mesothelioma was not already irreversibly underway when he first boarded an Exxon vessel.[7]

Moreover, the jury's conclusion that Minton's mesothelioma was caused by asbestos fibers Minton breathed on Exxon vessels as a result of Exxon's breach of a duty could only be based on layer upon layer of conjecture—conjecture that Exxon crewmembers handled asbestos-containing materials near him, that they handled these materials negligently, that Minton breathed in asbestos fibers because of their negligence, and that his inhalation of those particular fibers proximately caused his mesothelioma. As noted, although Minton and his witnesses

[7] Although Minton's experts testified in conclusory fashion that the asbestos exposure Minton received while working in ship repair was a substantial contributing cause of his mesothelioma, JA-1506-07, they acknowledged that his earlier exposure "contributed" to his mesothelioma, *id.* at 1504, and he might not have developed mesothelioma but for those earlier exposures, *id.* at 1503-04. Moreover, there was no evidentiary basis for Minton's experts' conclusions, given that there was no evidence that established with specificity when Minton was exposed to asbestos during his work in ship repair, or how much exposure he received, or that such exposure ever occurred on an Exxon vessel. *See supra* at 12-13.

testified that Exxon employees performed minor work on the vessel, there was no specific evidence of what work was performed near Minton on any given occasion, let alone whether that work involved asbestos-containing materials. Nor was there specific evidence that Exxon employees acted negligently on any specific occasion. Thus, Minton and his witnesses could not connect any specific breach of a duty by Exxon to Minton's exposure to asbestos; nor could they connect any specific asbestos exposure he might have received to his subsequent development of mesothelioma. All the jury was left with was conjecture, which is plainly insufficient to prove liability. *Terry*, 273 Va. at 9.

Minton's failure to prove that Exxon caused his injury is sufficient by itself to entitle Exxon to judgment in its favor.

III. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE THAT THE SHIPYARD KNEW ABOUT THE ASBESTOS-RELATED HAZARDS AND HAD ASBESTOS CONTROLS IN PLACE

The trial court improperly excluded all evidence related to the Shipyard's knowledge of asbestos-related hazards, including evidence that the Shipyard itself promulgated an asbestos-control policy the year before Minton began working in ship repair. That error requires a new trial. Although this Court usually reviews a trial court's evidentiary rulings for

abuse of discretion, review here is de novo because the evidentiary exclusion was premised on errors of law. *See Davenport*, 269 Va. at 552.

The five key premises of Minton's case were that (1) asbestos was a "hidden danger"; (2) Exxon knew of this danger; (3) the Shipyard was not aware of it; (4) Exxon failed to warn Minton of the danger; and (5) asbestos controls were not known or used in the Shipyard during the time Minton worked in ship repair. Minton's counsel began both his opening statement and his summation by arguing that Exxon failed to warn of a "hidden" danger. JA-638-39, 2105-06. And in summation, he went so far as to argue that nobody "who was working at the shipyard" had any clue about asbestos risks. *Id.* at 2134-36. Minton himself testified directly that the Shipyard "didn't have any [asbestos] controls" in place. *Id.* at 1773. Thus, Minton's testimony and his counsel's argument left the jury with the impression that the Shipyard knew nothing about the hazards of asbestos, and that only Exxon—with its purportedly unique knowledge—could protect Minton.

That impression was false. The Shipyard *was* aware of asbestos risks and had asbestos controls in place *before* Minton ever boarded an Exxon vessel. But when Exxon tried to introduce evidence that would have established those facts, the trial court excluded the evidence as

irrelevant—and even rejected Exxon's effort to reopen the evidence after Minton argued in summation that *no one* at the Shipyard knew about asbestos risks. *Id.* at 2171-72, 2175.[8] Thus, the jury was precluded from learning that the Shipyard was aware of these risks and, just as significantly, that Exxon knew the Shipyard was aware of these risks and relied upon it to protect its own employees from them.

Notably, Exxon had the legal right to rely on the Shipyard to act responsibly in light of those known risks. Indeed, that right is at the core of the § 905 statutory scheme. Once Exxon satisfied its turnover duty, Exxon was legally entitled to rely on the Shipyard to handle shipboard safety hazards encountered by Shipyard employees. By precluding Exxon from arguing that Exxon had no duty to Minton because the Shipyard was already aware of the risks of asbestos, the trial court turned the § 905

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[8] Minton's position on appeal regarding the Shipyard's knowledge is plainly inconsistent with the position he took at trial. His assertion in his first filing in this Court that "the shipyard's knowledge was presumed" (Resp.'s Opp'n to Mot. for Leave to File as *Amici Curiae* at 5) flatly contradicts his argument and testimony at trial that the Shipyard did not know about asbestos and its risks. Minton's thirteenth-hour concession that the Shipyard's knowledge *was* relevant confirms that the trial court reversibly erred in excluding Exxon's evidence proving that knowledge, and that Minton's evidence and argument about the Shipyard's ignorance misled the jury. This Court should not permit this gamesmanship. *Commonwealth Transp. Comm'r v. Target Corp.*, 274 Va. 341, 351-52 (2006) (litigants may not take inconsistent positions at different stages of the litigation).

scheme on its head. "[T]he legal duties placed on the [contractor] and the vessel's justifiable expectations that those duties will be performed are relevant in determining whether the shipowner has breached its duty. The trial court, and where appropriate the jury, should thus be made aware of the scope of the [contractor's] duty under the positive law." *Scindia*, 451 U.S. at 176. Precluding such key, relevant evidence effectively stripped Exxon of its fundamental due process right to defend against Minton's case. *See Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense."); *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). That evidentiary and due process error warrants a new trial.

The error was also prejudicial. A substantial error is presumed to be prejudicial unless it plainly appears that it could not have affected the result. *Caplan v. Bogard*, 264 Va. 219, 228 (2002) (reversing for a new trial because a mistake of the court is presumed to have affected the jury); *Clohessy v. Weiler*, 250 Va. 249, 253-54 (1995). This Court cannot state as a matter of law that the error did not affect the result, particularly given the general verdict form that Minton demanded, which by definition does not disclose the basis of the jury's verdict.

There are five specific ways in which Exxon's defense was prejudiced by the exclusion of evidence about the Shipyard's knowledge and policies concerning asbestos. First, the evidence was directly relevant to causation. Even assuming that Exxon breached a duty to warn Minton of asbestos risks, Minton was still required to establish that an adequate warning from Exxon would have avoided his injury. *See Dugroo v. Garrett*, 203 Va. 918, 920 (1962) ("The failure to perform a duty establishes the proximate cause of an injury only where the doing of the omitted act would have prevented the injury."). Evidence that the Shipyard already knew about asbestos risks would have suggested that a redundant warning by Exxon would not have changed Minton's conduct or prevented his injury. Critically, Minton testified that if Exxon had advised him of the risks of asbestos, he would have simply consulted with *Shipyard management* and gone back to work if told to do so. JA-1811-12. The excluded evidence showing that Shipyard management was, in fact, already aware of asbestos risks would have strongly suggested that an Exxon warning would have made no difference: Minton would have gone to his superiors, who would have confirmed that the Shipyard was aware of the hazard and then sent him back to work. By excluding evidence of the Shipyard's own knowledge, the trial court foreclosed that critical causation argument.

Second, the Shipyard's knowledge concerning asbestos was relevant to determining whether Exxon breached any "active control" duty that may have arisen. As noted above, to establish liability under an active control theory, Minton had to show, *inter alia*, that Exxon breached a duty of care in asserting control over his work or asbestos material in his vicinity. Thus, assuming the "active control" duty was triggered, Minton also had to show that Exxon exercised such control in a negligent way. In deciding whether Exxon acted negligently with respect to asbestos-handling procedures, the jury certainly could have considered how Exxon's procedures compared to the Shipyard's own procedures—procedures implemented by a company with significant expertise in building and repairing asbestos-laden ships and protecting its employees from asbestos-related harm. Evidence of the Shipyard's polices—just like evidence of any other expert company's policies—would have helped jurors determine whether Exxon's own actions were reasonable under the circumstances, as Jury Instruction No. 14 required them to consider. JA-3231. In other words, even though a vessel owner who maintains active control of a vessel cannot rely on the shipyard's expertise to categorically escape liability for injuries arising from the owner's own exercise of active control, the shipyard's expert policies

and practices are still highly probative evidence of whether the owner's own conduct was negligent. But the jury here was denied that vital information.

Third, the Shipyard's knowledge and policies concerning asbestos were also directly relevant to the "duty to intervene," which required Minton to prove (at a minimum) that Exxon had actual knowledge that the Shipyard was failing to protect Minton from asbestos exposure. *See supra* at 29-30. At the very least, allowing the jury to hear evidence that the Shipyard was aware of asbestos hazards and had asbestos control policies in place would have allowed the jury to conclude that Exxon employees acted reasonably in assuming that the Shipyard was adequately protecting Minton from asbestos exposure. After all, as Minton told the jury, asbestos dust is essentially invisible,[9] and it is difficult (if not impossible) to tell by visual observation whether particular work creates a dangerous exposure to asbestos dust that would require the use of asbestos controls. That the Shipyard was aware of the asbestos risks, and had procedures in place to address them, would support a jury conclusion that Exxon employees reasonably believed that when Shipyard employees were not using

[9] *See*, *e.g.*, JA-2106 ("[A]nd you'll remember that we explained to you that asbestos is an invisible fiber, it has those things called—that we called onion properties. You can't smell it. You can't taste it. This is what makes it such an insidious, dangerous product, because there could be millions of fibers in the air right now between us, you can't see it unless it gets to be very high levels, you can't smell it, you can't taste it, you can't feel it.").

asbestos controls, those controls were simply not necessary, either because the asbestos exposure was minimal, or because the work did not involve asbestos at all. Evidence of the Shipyard's knowledge thus would have supported Exxon's argument that it lacked "actual knowledge" that the Shipyard was failing to protect its employees. The jury instead was left with the demonstrably false view that the Shipyard was ignorant of asbestos risks and incapable of protecting its workers, and that it should have been obvious to Exxon that the Shipyard was neglecting its responsibilities.

Fourth, exclusion of this evidence also prevented Exxon from cross-examining Minton and his witnesses, who testified that the Shipyard did not know about the risks of asbestos and had no procedures in place to control them. *See supra* at 9, 37. Even if this evidence were not otherwise admissible (which again it plainly was), Minton's introduction of affirmative evidence that there were no asbestos controls at the Shipyard put the Shipyard's knowledge of asbestos and its asbestos control policies squarely at issue in the case.

Fifth, the Shipyard's knowledge and policies concerning asbestos were directly relevant to Exxon's punitive damages defense (discussed below, *infra* at 44-50) because it would have shown that the Shipyard was already aware of asbestos risks, thereby undermining any conclusion that

Exxon was willful or reckless in not protecting Minton itself.

IV. THE PUNITIVE DAMAGES AWARD IS LEGALLY ERRONEOUS

The punitive damages award is predicated on multiple errors of law, which are reviewed de novo. *See Davenport*, 269 Va. at 552.

A. Punitive Damages Are Not Available Under § 905(b)

As an initial matter, § 905(b) makes no provision for punitive damages. It expressly states that the remedy it does provide—for "negligence of a vessel"—is "exclusive of all other remedies against the vessel." § 905(b). The LHWCA thus "creates a worker's compensation scheme … which is exclusive of other remedies and does not provide for punitive damages." *Miller v. Am. President Lines*, 989 F.2d 1450, 1457 (6th Cir. 1993). Because courts cannot supplement remedies provided by a statute, *see*, *e.g.*, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 31 (1990) ("in an area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries" (quotation omitted)), this limitation forecloses an award of punitive damages on Minton's § 905(b) claim.

The Supreme Court's decision in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 129 S. Ct. 2561 (2009), is not to the contrary. There, the

Court held that punitive damages were available under the Jones Act because (1) punitive damages were generally available for "claim[s] for maintenance and cure" and (2) the Jones Act "did not eliminate pre-existing remedies available to seamen for the ... common-law cause of action based on a seaman's right to maintenance and cure." 129 S. Ct. at 2569-70. Here, § 905(b) expressly displaces any preexisting remedies by providing that its remedy is "exclusive." *See Norfolk Shipbldg. & Drydock Corp. v. Garris*, 532 U.S. 811, 818 (2001) (LHWCA provides a negligence claim against the vessel and "expressly pre-empts all other claims").

Moreover, even if § 905(b) did not displace preexisting remedies, punitive damages would still be unavailable because maritime law has *never* allowed longshoremen to recover punitive damages in cases brought against vessel owners for negligence. Indeed, in the very few cases allowing *any* recovery by a longshoreman against a vessel owner for negligence prior to the LHWCA's amendments in 1972, the Supreme Court specifically limited damages to pecuniary losses. *See The Max Morris*, 137 U.S. 1, 14 (1890) (awarding "actual pecuniary loss sustained by the libellant"); *Leathers v. Blessing*, 105 U.S. 626 (1882) (only pecuniary damages awarded for invitee's claim against vessel for personal injury).

Minton's claim to punitive damages fails for this reason alone.

B. Punitive Damages Are Not Permissible For Ordinary Negligence

Minton's punitive damages claim also fails because Minton's basic liability theory was simple negligence, which by definition cannot support punitive damages. When punitive damages are available under maritime law, "more than simple negligence is required" to award them. *Miles v. Melrose*, 882 F.2d 976, 989 (5th Cir. 1989), *aff'd*, 498 U.S. 19 (1990); *see Muratore v. M/S Scotia Prince*, 845 F.2d 347, 354 (1st Cir. 1988). The plaintiff must establish "'willful' or 'wanton' or 'reckless' behavior," *Furka v. Great Lakes Dredge & Dock Co.*, 755 F.2d 1085, 1091 (4th Cir. 1985) (Wilkinson, J.), which means proving that the defendant *knew* of the risks and chose to disregard them with willful indifference to the consequences.

Minton introduced absolutely no evidence that Exxon was aware that Minton (or anyone else) was working in dangerous conditions without adequate protections: the uncontested evidence was that Exxon's shipboard employees did *not* perceive any danger to Minton (or anyone else). *Supra* at 30-31.[10] Indeed, Exxon's employees worked under the

[10] Minton attempted to address this problem by having an expert testify (over Exxon's objection) that "[i]t would be reckless" for an industrial hygiene expert to see Minton's working conditions and not intervene. *See* JA-877. But that testimony was irrelevant because no Exxon industrial hygiene expert ever saw Minton's working conditions.

exact same conditions as Minton, which makes plain that they did not think those conditions were dangerous. *See supra* at 30-31.

Thus, Minton's trial theory was quintessentially an ordinary negligence theory: that Exxon's on-board personnel *should* have been aware that Minton's personal working conditions were exposing him to unreasonable asbestos-related risks. That theory is an insufficient basis for an award of punitive damages.

C. A Vessel Owner Cannot Be Vicariously Punished For Unauthorized Shipboard Conduct Of Its Employees

Punitive damages were also inappropriate because, under federal maritime law, shipowners cannot be punished vicariously for unauthorized acts of shipboard personnel. *See The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558-59 (1818) (recognizing that vessel owners "are not bound to the extent of vindictive damages" for acts of shipboard employees); *State of Missouri*, 76 F. 376, 380 (7th Cir. 1896) ("Undoubtedly the damages to be awarded must be compensatory, and not exemplary, where recovery is sought against the master for the unauthorized tort of the servant ....").[11] Here, there was no evidence that Exxon management or its established procedures instructed shipboard employees to avoid sharing safety

[11] The U.S. Supreme Court divided evenly on this issue in *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 484 (2008).

information with Minton, which means that the only possible basis for liability would be such an unauthorized act. Thus, punitive damages are plainly impermissible.

D. The Jury Was Impermissibly Allowed To Consider Harm To Non-Parties

The U.S. Constitution's Due Process Clause prohibits courts from imposing punitive damages based on conduct unrelated to the plaintiff or on harms allegedly sustained by non-parties. *See Philip Morris U.S.A. v. Williams*, 549 U.S. 346, 349 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003). Where the risk that the jury will punish for such harm "is a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—a court, upon request, *must* protect against that risk." *Williams*, 549 U.S. at 357.

Exxon asked the court to instruct the jury that it could "not award punitive damages for the purpose of punishing Exxon's negligence to persons other than Rubert Minton." JA-2064. That instruction was necessary given Minton's repeated trial argument that Exxon was responsible for asbestos exposure both on other companies' vessels and during the Shipyard's shore-side operations, *see id.* at 664-65, 2147-48, and further that Exxon's conduct injured "wives and children," *id.* at 651;

see also, *e.g.*, *id.* at 1439 (discussing other patients with "shipyard asbestos exposure"); *id.* at 2111 (in closing argument, Minton's counsel stated that "[p]eople are getting [mesothelioma] who live in the neighborhood. People who are getting this disease are wives and children of people that use asbestos products. People that get this disease are people that are just intermittently exposed, just casually exposed").[12] The court's failure to give Exxon's proposed instruction permitted the jury to punish Exxon for conduct unrelated to Minton, which explains the extraordinary punitive damages verdict.

E. The Punitive Damages Award Should Be Remitted

The $5 million punitive damage award is excessive and should be remitted. The $12.5 million compensatory damage award was more than adequate to punish and deter Exxon, especially given the absence of willful or reckless conduct. A significant compensatory damages award justifies a lower punitive award, given the deterrent effects of a large compensatory award, especially where—as here—only non-malicious conduct was

[12] In direct violation of a pretrial order, Minton volunteered during his direct examination that his wife died of lung cancer. JA-1677 ("I took her to the hospital. And three or four days later they decided she had cancer, lung cancer. I talked to Dr. Foreman about it, and he said, [']Yes, she's got lung cancer. In fact, she's full of cancer.[']").

involved. *See Baker*, 554 U.S. at 494; *BMW of N. Am. v. Gore*, 517 U.S. 559, 582 (1996).[13]

CONCLUSION

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

Respectfully submitted,

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[13] The appropriateness of a punitive damage award must be measured by what is necessary to punish and deter the defendant for the unlawful conduct. A defendant's wealth "cannot justify an otherwise unconstitutional punitive damages award." *State Farm*, 538 U.S. at 427.

* Admitted to appear pro hac vice.

CERTIFICATE

In compliance with Rule 5:26(h), I certify that fifteen bound copies of this Brief of Appellant and ten bound copies of the Joint Appendix, with ten electronic copies on CDs of both, have been hand-filed with the Clerk of the Supreme Court of Virginia on this 17th day of April, 2012. On this same day, three bound copies of the Brief of Appellant with one bound copy of the Joint Appendix and one electronic copy on CD of both, have been served, via UPS Ground Transportation to counsel for Appellee:

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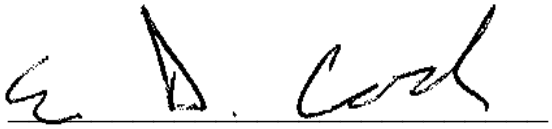

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