IN THE

Supreme Court of Virginia

RECORD NO. 111775

EXXON MOBIL CORPORATION,

Appellant,

v.

RUBERT E. MINTON, ET AL.,

Appellees.

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STATEMENT OF THE NATURE OF THE CASE

Exxon's Brief of Appellant shows a vast gulf between Exxon's attorneys' arguments and the record in this case. Exxon argues as fact matters that were never in evidence and that were not even proffered, and it ignores the overwhelming volume and substance of testimony and documents that directly support Minton's verdict.

Burt Minton is dying of mesothelioma contracted from asbestos exposure at the Newport News Shipyard ("Shipyard") where he was exposed to uncontrolled asbestos dust from 1956 to 1977. From 1966 to 1977, he was a ship repair coordinator working on commercial ships, including a very large volume of Exxon ships.

During a three week jury trial, Minton presented uncontradicted evidence from himself and three long time shipyard supervisors in the repair department who worked directly with Minton. None of them knew or was warned that asbestos was dangerous, that respirators should be worn, or that any other dust controls were necessary, and none of them had ever seen asbestos controls on any ships at the Shipyard.

Despite the repetitive and frequent presence of Exxon vessels in the Shipyard between 1966 and 1977 and the thousands of workers who helped to repair those ships, Exxon failed to provide any evidence that

anyone on an Exxon ship under repair at the Shipyard was warned about asbestos exposure, wore a respirator, or followed any other asbestos safety controls.

Exxon tried to offer a 1965 Shipyard memo about a variety of "atmospheric problems" to prove that controls were actually in place on Exxon's ships. The court ruled the Plaintiff's medical expert, through whom the document was offered, could not provide the necessary foundation for the document. The trial court invited Exxon to question Minton and the shipyard workers about the document, but Exxon failed to ask a single shipyard worker if they had ever seen the document or if any asbestos controls were ever implemented as a result of the document. Exxon never reoffered the document and without a sufficient foundation for the document, the trial court refused to allow it into evidence. Exxon proffered no other evidence to establish that any controls were ever observed on Exxon vessels prior to the late 1970s.

Minton's uncontradicted evidence from four fact witnesses, Exxon's former medical director, Exxon's witnesses (John Tompkins and James Thornton), and Exxon's own documents, proved that (1) Exxon controlled its ships during repair periods and never turned them over to the shipyard, (2) Exxon controlled the ships' equipment, including asbestos covered

equipment, (3) Exxon controlled the operative details of the repair work, including asbestos work, and (4) that Exxon's crews actively participated in the repair work, including asbestos work, working elbow to elbow with Shipyard workers.

Exposure evidence from seven witnesses, including three Exxon witnesses, Minton's materials expert, Exxon's own repair specifications, and Shipyard construction documents for Exxon's ships supported Minton's regular and frequent exposure to asbestos products on Exxon's ships.

Uncontradicted medical evidence from two experts in mesothelioma causation demonstrated that Minton's exposure to asbestos during the repair of Exxon ships, including his exposure to asbestos work by the crew, was a substantial contributing cause of his terminal disease. Exxon presented no medical defense.

Uncontradicted evidence from Exxon's own documents, its own medical director and its own industrial hygienists showed that during the 1930s through 70s Exxon had actual knowledge of the hazards of asbestos exposure and the controls necessary to prevent disease, including mesothelioma. Contrary to Exxon's insinuation in its Brief, there is no evidence that the Shipyard ever attended the 1964 Selikoff asbestos conference in New York, where Exxon's doctors Weaver and Eckhardt

learned that bystander exposure like Minton's can and does cause mesothelioma.

Throughout the time Minton worked on Exxon's ships, Exxon admitted it observed strict asbestos controls in its refineries and it contended that these controls also applied to its ships. Plaintiff's evidence established that Exxon's failure to implement those controls during repairs at the Shipyard or intervene, for Shipyard workers or even its own crews, was because it wanted to save time and money.

Though 33 U.S.C. § 905(b) says nothing about punitive damages, the trial court instructed the jury on punitive damages because two recent U.S. Supreme Court opinions, including one in which Exxon was a party, allow punitive damages in maritime cases unless expressly negated by statute. Each of the foregoing assertions is supported in Minton's Statement of Facts, below.

STATEMENT OF FACTS

The record demonstrates sufficient evidence to support the jury's verdict on the active operations duty, the duty to intervene, causation and punitive damages, and it supports the court's decisions on the admission of evidence and the availability of punitive damages.

A. Active Operations Evidence.

Though Minton only need to prove one element, Minton's evidence was sufficient to create a jury issue on all four disjunctive elements to trigger the active operations duty.

1. Active Control of the Ships.

The evidence showed that Exxon never turned its ships over to the Shipyard. Lloyd Ware,[1] testified that Exxon "never turn[ed] control over to us -- over to the shipyard. . . . [T]hey maintain[ed] control over all the work that's being done in the yard at all times." JA at 1140. Exxon's witness — Shipyard chief of industrial hygiene, James Thornton — agreed testifying, "when those vessels came into the shipyard they were not our vessels. They were under the control of the shipowner." JA at 1889. Exxon's associate medical director, Dr. Weaver, and industrial hygienist, George Cvejnovich, confirmed that "when Exxon actually owned the ship and employed the crew, they had the sole authority to enforce industrial hygiene practices on the ship." JA at 1412.

Exxon had its own internal ship Construction and Repair Division and Exxon published detailed internal regulations and procedures for the repair of its ships. Exxon's 1950 and 1974 Marine Regulations, 1973 Vessel

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[1] Ware testified both as a fact witness and as an expert on ship repair procedures with regard to specifications and work done at the Shipyard over the course of his 40 years as a ship repair estimator. (JA 1197-98).

Repair Manual, and 1974 Repair Procedures, *see* JA at 2314-2319, 2615-2952, 2953-3226, required Exxon's Repair Inspectors (also called Port Engineers or "owner's rep") to plan, coordinate, control, direct and dictate the scope and methods of repairs to Exxon's ships. Exxon's port engineers were "expert[s] in ship construction techniques." JA at 1176-78; *see also* JA 2407-10. Shipyard pipefitter foreman, Julian Draper, testified that he could not think of "any time ever that [he] went to go see an owner's rep pursuant to [Exxon's] specifications where the owner's rep had no clue what was supposed to be done." JA at 1351. Draper stated, that the owner's rep "was very familiar with all aspects of the ship." *Id.*

Though Exxon's attorneys attempt to minimize it by contending that Minton only recalled 17 specific Exxon ships from forty years ago, Minton and other fact witnesses testified that "Exxon was a tremendous customer for the shipyard. They had ships in and out all the time." JA at 956; JA at 1247 (Draper testifying that Exxon's ships "seemed to have a steady flow in the '70s. Sometimes two would be in at the time. And it was our most popular customer, it seemed like."). A demonstrative exhibit based on shipyard records with the dates of Exxon repairs showed that, from 1966 to 1977, Exxon ships were at the Shipyard for over 1000 repair days. At a rate of 250 work-days a year, this meant Exxon ships were in the Shipyard

every 2.5 days. JA at 641.

Because of this huge volume, the Shipyard dealt with Exxon differently than other shipowners. Exxon's contracts were handled on a labor and material basis rather than the standard bidding used with other shipowners. *See* JA 1143-44. As Ware explained, Exxon's specifications did not ask the Shipyard to provide supervision; they just asked for "labor and materials." JA at 1167. He testified that the Shipyard and Exxon "shared" control of the work on Exxon's ships, "but the ultimate decision of whether or not to do the work is the owner's representative." *Id.*

Minton and three fact witnesses discussed the absolute control the port engineer exercised over the repair work. They testified that a chart admitted in evidence as Exhibit 19 accurately represented this control and the lines of authority on board Exxon ships during repairs. *See* Exhibit 19, attached hereto at Appendix A;[2] *see also* JA at 990, 1145-52, 1694, 1255-58. The chart shows that Exxon's port engineer was the ringleader — the primary authority on the ship with respect to Exxon's crewmembers, the

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[2] Exhibit 19 is a chart demonstrating the lines of authority during repairs on Exxon ships. The oversized chart was not initially forwarded to this Court with the record and only a place holder was contained in the Joint Appendix. *See* JA at 2312. Appellee asked the trial court to forward a photograph of Exhibit 19 to this Court to be included with the record, and Appellee included a copy of the photograph as Appendix A to this brief.

shipyard workers, and outside equipment contractors. Minton testified that the port engineer "was the man on the ship." JA at 1692. Ware agreed that "[i]f there is a boss on the ship" it was the "port [engineer] -- the owner's representative." JA at 1167; *see also* JA at 1692.

The port engineer and Exxon's crewmembers worked all over the ship in the same spaces as Shipyard workers. They never turned over exclusive control of any space to the Shipyard. Minton testified that the port engineer toured the ship every day with Minton, inspecting every repair task the Shipyard was performing. JA at 1695-97, 1707-10. Shipyard repair coordinator, Walter Satchell, agreed that the port engineer worked with him all over the ship "[m]ost of the time all day long every day that the ship was there during the daytime that I worked." JA at 986-87. Minton, Ware, Satchell and Draper testified that the crew members worked in the ship's spaces alongside the shipyard workers. JA at 1702-05 (Minton testifying "[w]e all worked in there together."); JA at 1155-56, 1191-92, 1200-01 (Ware testifying that it "was normal" for the ship's "chief engineer and officers of any crew [to] assist the port engineer in covering all of the work being done, supervising the work being done . . . by the shipyard"); JA at 988-89 (Satchell testifying that "[w]hen you're in the engine room, with this magnitude of work, you're all together, and so that's why it's

important that you have communications among each other.”). Draper testified that the port engineer “oversaw all the work done on the ship to make sure that everything was done to his satisfaction,” JA at 1254-55, the port engineer was on the ship at least eight hours a day, JA at 1264, the crew lived on board the ship, JA at 1317-18, and the crew worked “elbow to elbow” with the shipyard workers, JA at 1328-29. Exxon’s witness, Tompkins, confirmed that the crew “lived on the ship,” JA at 1910, that “they could go wherever they needed to on the ship to accomplish their duties,” *id.*, that this included the boiler room, the engine room, and the pump rooms, JA at 1910-11, and during repair periods, the “first engineer’s duty station or place of duty during the day would be in the engine room,” JA at 1911. Tomkins testified that he was on the Exxon Boston during a 1968 Shipyard repair period and “there would be people from the crew, and our chief engineer would be walking through” the boiler room while shipyard workers were working. JA at 1920-21. He was in the boiler room and was also “in the engine room area where the controllers are being installed” by shipyard workers and outside contractors. *Id.*

2. Control of the Operative Details Of Repair Work.

Exxon dictated the operative details of the repair work. Exxon’s internal regulations required that “[d]uring major shipyard or voyage

repairs," Exxon's "Repair Inspector will normally be assigned to the vessel to supervise the repairs. The Repair Inspector will provide overall coordination of the repairs and will supervise outside contractors and shipyard workers." JA at 2318 (emphasis added). Exxon's Repair Procedures delegated to Exxon's port engineer "the responsibility of supervising the overhaul. He issues all necessary instructions to the shipyard foremen, inspects the work to see that it is properly done and coordinates the necessary USCG or ABS inspections." JA at 2319 (emphasis added). Exxon told its crew to "supervise the work and see that the necessary safety precautions are observed, regardless of whether or not the work is being done by the ship's crew or shore personnel." JA at 2317 (emphasis added). "During the entire time the vessel is undergoing repairs," Exxon required its crew to "be particularly on the alert to observe any infractions of safety and fire precautions by the vessel's crew and the shipyard workers" and to "report any infractions of good safety practices by shipyard employees to the Repair Inspector for his action." JA at 2316 (emphasis added). Each provision was consistent with Satchell's understanding of Exxon's role during Shipyard repairs. JA at 996-1000.

Exxon's chief engineers, Repair Inspectors, Repair Superintendents, and Repair Coordination Group drafted detailed specifications for repairs

on Exxon's ships. *See, e.g.,* JA at 2978. These instructions dictated to the Shipyard everything from how to dry-dock Exxon's ships, JA at 1162-63 (Exxon even specified "how far apart the blocks should be"), to the "method of repair" of longitudinals, *see, e.g.,* JA at 2368, to the safe use of coated materials and gas-freeing the ship, *see, e.g.,* JA at 2324-25, to even specifying the brands of asbestos packing to use, *see, e.g.,* JA at 2359 (specifying "asbestos teflon packing - Garlock #5876"). As Ware testified:

> Q. So even though you were experts in ship construction, Exxon gave you instructions on just about everything?
>
> A. They wanted it done their way. That is correct.

JA at 1163. After Exxon finalized "the actual repairs [they] propose[d] to undertake," they forwarded the specifications to the Shipyard where a cost estimator, like Ware, retyped the specifications — as submitted by Exxon— and added the costs for the work. JA at 2978; *see also* JA at 991, 1138-39. Draper testified that the Shipyard's estimators merely copied the details that Exxon put in its original specifications. The Shipyard's "estimators and cost engineers would never put a method of repair" in the specifications – "that came from the owner's rep, and the [Shipyard's] ship repair just copied it like they did the rest of the items." JA at 1349. This was because the Shipyard's estimators "weren't necessarily pipefitters . . . [o]r pipe coverers . . . [o]r machinists" so they did not have the expertise to "dictate[]

the method of repair for all those different trades." JA at 1349-50.

Through these repair specifications, Exxon dictated the repairs the Shipyard workers were to perform and how to perform that work. JA at 1138-39, 1189, 1256-58. The plain language of Exxon's specifications included sections titled "Method of Repair" containing detailed instructions from Exxon on how to do repairs. *See* JA at 1263; *see also* JA at 2368. Ware testified, "They designate and tell you how to do the work in many cases. This, again, is the prerogative of a port engineer or an owner's representative to tell you how to do the work." JA at 1189.

Exxon's specifications also told shipyard workers to see the port engineer or the crew to get instructions on how to repair an item. Draper explained "[s]ome of the job orders, you'd run across an item that would say, Install, or, Repair, and then it says, As directed by chief engineer, or, By the port engineer." JA at 1259; *see also* JA at 2524 ("[C]oat the following areas as directed by owner's representative"); JA at 2526 ("Consult vessel's Chief Engineer before making changes."); JA at 2541 ("[M]ake necessary removals and replacements" regarding valves on "Coffin boiler feed pumps as directed"). Draper said that these directions told him "I'd better go to the chief engineer, the port engineer, and find out what it is and how they want to do it." JA at 1259 "[O]n 60, 70 percent of

[the work items] you had to find out -- before you told your workers what to do, you had to contact the chief mate or the chief engineer or the port engineer and find out exactly what they wanted done on that item . . . . So it was daily communication between the trade foremen — the port engineer and the trade foremen, chief mate, and chief engineer." JA at 1257-58.

Shipyard foremen directly interacted with Exxon's port engineers on a daily basis. Draper testified, "[t]he more items, the more time, opportunities, I would have to have to go talk to him about it." JA at 1264. One port engineer, John Ireland, was particularly memorable "[b]ecause I was always kind of intimidated by having to go to him to ask for information, to tell him the situation we were having, because I was afraid I might be wrong." JA at 1265. Draper's fear of Ireland was due to "the wrath, he would use towards other [shipyard] foremen and all when things didn't go right or things went wrong." *Id.* "[I]f a port engineer told you to do a job a certain way . . . that's the way I'd do it." JA at 1266. Some Exxon port engineers also convened and moderated regular status meetings and required the attendance of the ship's chief engineer, chief mate and all Shipyard foremen working on the ship. JA at 1252-53.

In sum, Exxon's port engineers were "the boss," JA at 1815; 1167, and "the authority" aboard the ship, JA at 987. They made all decisions

about how to repair the ship. And Exxon's chief engineers, chief mates, and other officers were tasked with supervising the Shipyard workers, directing their repair work, and monitoring their safety.

3. Control of Equipment.

Exxon's crew controlled the ship's equipment, including its asbestos covered equipment. Minton testified that Exxon's crew had to take the equipment off-line before Shipyard workers could repair it. "That was the crew's – that was the engineer's job. The engineer would take the system off-line and okay it to work on it." JA at 1721. This was because "the crew, the chief engineer, controlled the machinery systems while the ship was in the dock for repairs." *Id.* Draper explained "[i]t's the rule of thumb you never do anything in the engine room until you get the okay from the chief engineer or one of his – one of his engineers under him." JA at 1354. This was because the crew "were the ones that were actually controlling the operation of that equipment" that was to be worked on. *Id.* A shipyard worker did not "want to be opening up a system that's under pressure because they might have a system on line they're using. So it could be dangerous, plus interfere with something they're doing. You always check with the [ship's] engineers to make sure the system is down and been drained or not." Tr. Vol. VI, Mar. 7, 2011, at 167. So anytime a shipyard

worker needed to go into an asbestos-laden boiler, work on an asbestos covered turbine, take asbestos insulation off a pipe, pull asbestos packing, or replace asbestos gaskets, he had to go to the ship's crew to ensure that the system was off line, or ask the crew take the system off line.

Draper also testified that the shipyard workers often obtained asbestos products from the ship's crew rather than going off the ship to the Shipyard's material shack. According to Draper, "everybody knew to go to the [Exxon] engineers and get what you'd need because in the end, whatever I've ordered, we're going to give it back to the engineers anyway." JA at 1330. Thus Exxon controlled the equipment on which asbestos was used and supplied actual asbestos products to be used on that equipment.

4. Active Participation.

Exxon's witness, Tompkins, admitted that Exxon's crew actively participated in the repairs on the ship. He wrote a form letter that was sent to Exxon's ships before each repair period mandating that "[d]uring the vessel's repair period at the shipyard, ship's personnel are to <u>actively participate</u> in vessel's repairs," and aid the Repair Superintendent by supervising the Shipyard's work. JA at 3204 (emphasis added); *see also* JA at 1933-34, JA at 2412. Tompkins also admitted that he wrote the 1973 Repair Manual, which delegated to Exxon's captains the duty to supervise

"[a]ll general activity both by shipyard and crew on deck and in tanks," and delegated to Exxon's chief engineers the duty to supervise "[a]ll activity in the engine room both by crew and shipyard; all machinery repairs/testing in the engine room, pump room, and on deck." JA at 1933-34.

"During the course of the overhaul," Exxon's captains and chief engineers were directed "to maintain a detailed list of work actually accomplished by vessel personnel." JA at 2412; *see also* JA at 2417-2432. Crew work lists from the 1975 repair period of the Exxon New Orleans, on which Minton worked, showed that the crew worked on 91 repair items. JA at 2420 (stating that "[d]uring the yard period 1st April thru 2nd May, 1975, all items listed [46 items] were completed, and an additional forty-five items were accomplished"). The 46 items listed at JA 2420 involved renewing and repacking (with asbestos packing)134 valves associated with the steam system, which required a "Dead Boiler," — i.e., an offline boiler. JA at 2420. The other 45 items included rebuilding the "main turbine and turbo-generator gland seal regulator . . . renew[ing] all studs and gaskets," "[r]enew[ing] two joints on main turbine drain line with klingerite [asbestos] gaskets," and repack[ing] a butterworth pump turbine with "John Crane [asbestos] 6AM packing." JA at 2421-22. These were steam or high pressure systems located in the engine room, boiler room, main deck,

pump rooms and other locations. Draper testified "[i]f they were working on the steam system, hot -- fuel oil system, hot and cold water, or any pipe that had insulation on it, you know, they was working on the system that had asbestos in it." JA at 1320. By working on these systems, Exxon's crew necessarily released asbestos dust into the ship's environment.

The Exxon repair jobs were a cooperative effort between the Shipyard workers, Exxon's crew, and the port engineer. JA at 988-1002, 1078, 1147-1206, 1695-1703. Draper testified that "[y]ou definitely want to work together so you could make – accomplish things faster and easier and cheaper and better." JA at 1329. "You'd kind of work together, you know. If we had a five-minute job and [a crew member] was going to be there two hours, you know, we'd ask him, Hey, can we get in there and do so and so? And naturally he'd say, Yeah, go ahead and do it. And we'd do the same thing. You're kind of more or less working together to get the job done, you know." JA at 1328. When asked, "If someone [like Exxon's attorneys] said that the crew didn't participate in the repairs, what would you say," Draper responded that such a person "had never been present when the work was going on." JA at 1329. It was not consistent with Draper's experience. *Id.*

Exxon characterizes the crew's work as "minor," but Ware explained

that the word "minor" did not relate to the amount of work or the scope of the work — "what I call minor," Ware testified, is work "that didn't require a machine shop or heavy equipment to do." JA at 1156. Ware confirmed that crewmembers would rip out asbestos insulation, take down asbestos-covered piping, open up pumps and remove and repack valves covered with asbestos, or do "practically any work" that they could do. JA at 1155-56. After discussing the asbestos work practices involving insulation, gaskets, and packing, Draper said he saw no "difference in the way that the crew worked with those products versus the way that the shipyard" worked with those products. "No. Everybody seemed to work the same method." JA at 1331. As Exxon's trial counsel admitted: "The worked performed by the crew was ***the same work*** . . . as was being performed by the Shipyard" and it "involved asbestos packing, gaskets or insulation." JA at 3257.

B. Actual Knowledge Evidence.

The unrebutted evidence from Exxon's internal documents and its medical director and director of industrial hygiene — both of whom were called in Minton's case-in-chief — demonstrates that sufficient evidence proved that Exxon had actual knowledge that asbestos caused deadly diseases, Exxon knew how to prevent asbestos exposure, and Exxon knew the Shipyard was doing nothing to control asbestos exposure.

Minton played the video deposition of Exxon's associate medical director, Dr. Weaver, who admitted Exxon knew uncontrolled asbestos work could cause deadly diseases as early as the 1930s. *See* JA at 1374-78; *see also* JA at 2227, 2229-30, 2241 (1937 Report by Exxon's Roy Bonsib discussing asbestos, asbestosis, and control measures). He admitted that Exxon implemented asbestos control measures in the 1930s, JA at 1377-79, and Exxon knew in the 1950s that high asbestos exposures occurred in the shipbuilding and repair industry, JA at 1380. When he started working for Exxon in 1951, Exxon had already implemented "preventative measures for industrial — prevention and control of industrial cancer." JA at 1385; *see also* JA at 2295-96 (1959 report of Exxon's Dr. Eckardt on asbestos-induced cancer). Exxon knew that asbestos caused mesothelioma at least as early as 1964 —before Minton started working on Exxon ships. JA at 1380-81; *see also* JA at 2285-2292.

Weaver agreed that Exxon's "marine division [had] similar access and information relating to industrial hygiene and medical services as the refinery division." JA at 1422. By the early 1950s Exxon industrial hygienists "made voyages on tankers," measured asbestos dust, and implemented asbestos controls on Exxon's ships. JA at 1402-10. They were "aboard the ships in dock when repairs were — minor repairs were

being carried out. And it was the Exxon way of doing things that appropriate precautions would be in place." JA at 1401. Reports prepared by these industrial hygienists "would cross [Weaver's] desk always." JA at 1403. They performed asbestos sampling on Exxon's ships "[t]o determine to what extent [crew members] were exposed to asbestos," JA at 1405, and "to help protect crew members from being exposed to asbestos," JA at 1410. The "same physicians" who performed medical monitoring of Exxon's refinery workers also "did the examinations for the employees of the marine division." JA at 1418-19.

Weaver agreed with Cvejnovich, an Exxon industrial hygienist, that Exxon's "industrial hygiene program and standards would apply [on Exxon ships] as well as on the land-based refinery," JA at 1410-12, and Exxon required asbestos controls even minor repairs on its ships, JA. at 1400-01. He agreed with Cvejnovich that "when Exxon actually owned the ship and employed the crew, they had the sole authority to enforce industrial hygiene practices on the ship." JA at 1412. And he testified that "if there would be some basis to think that contractors were conducting work in an unsatisfactory manner to put Exxon employees at some risk, intervention would take place." JA at 1414-15.

Minton also presented the testimony of James Hammond, Exxon's

chief of industrial hygiene. Hammond began working for Exxon in 1947 and testified that Exxon "took the attitude that if there was any dust possibility to generate, respirators were available and would be required to be handling it." JA at 1101. He agreed that by 1934 Exxon knew that "asbestos could cause severe pulmonary injury in humans." JA at 1116. He agreed with Exxon's safety manager, Roy Bonsib, that Exxon knew "that [asbestos] is a dangerous material and shouldn't be inhaled." JA at 1117. By 1943, Exxon also knew asbestos could cause cancer, JA at 1124; *see also* JA at 2262-63 (1948 report to Exxon's Dr. Woody regarding asbestos and cancer).

Hammond knew the dangers of bystander exposure, like Minton's, stating that Exxon "would not let [workers] generate <u>any cloud of dust</u> that would expose themselves <u>as well as anybody else that may be coming about</u>, because those [workers] would be using dust control procedures, such as wetting, and would not have any occasion to generate any dust of any significance." JA at 1103 (emphasis added);[3] JA at 2304-06 (1959 Exxon Accident Prevention Manual requiring dust respirators for "[a]nyone standing or working near other persons" using asbestos). Because of this,

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[3] *See also* JA at 2277 (A 1948 Bonsib report regarding industrial work cloths showed Exxon understood the hazards of bystander exposure from contaminated clothes).

Hammond said Exxon's goal was to have "**zero asbestos dust in the air above the ambient amount.**" JA at 1129.

Hammond emphasized the worker education on asbestos hazards and preventive measures. "I cannot overemphasize the educational part of it, to get to the — to get the employees to understand what to do and how to do it and why you're asking them to do it." JA at 1110. In a 1994 letter, Hammond wrote that Exxon "implemented the [asbestos control] program … in the Company's maritime operations" and that "[o]ur maritime workers … were given physicals at least annually, monitored closely for potential exposures, and regularly trained in safety meetings." JA at 2275; *see also* JA at 2264-2276.

Exxon knew that low level exposures could cause mesothelioma. Dr. Eckhardt, an Exxon medical doctor, attended the 1964 Selikoff asbestos conference with Dr. Weaver and wrote a detailed summary. JA at 2285-2292. He stated that low exposures are dangerous to bystanders, like Minton. "[T]he man actually working with asbestos may develop asbestosis and die from this before he has an opportunity to develop a mesothelial tumor, whereas the foreman [a bystander] whose exposure is presumably quite light does not develop asbestosis but may in subsequent years go on to develop mesothelioma." JA at 2290.

Hammond testified that it is "really impossible to know how much asbestos dust you had in the air at the plant unless you did the monitoring and dust studies" because asbestos dust is invisible until it reaches high concentrations. JA at 1133. Thus, Exxon knew that (1) low levels of invisible asbestos exposure cause deadly diseases, and (2) bystanders like Minton had potentially more risk of developing mesothelioma than workers actually using the asbestos products.

Because of the deadliness of even low exposures, Exxon's head port engineer, McTaggart, sent a letter to Exxon's captains and chief engineers requiring labels on boxes of asbestos materials stating that anyone even opening the box must wear a mask. JA at 2553. McTaggart's letter (1) is evidence of communication within Exxon regarding asbestos hazards, contradicting Exxon's attorneys' claim that Exxon's crew did not know the dangers of asbestos; and (2) refutes Exxon's attorneys' argument that the crew did not know that low exposure levels were dangerous and the mere handling of asbestos products could cause disease. Here, every Exxon captain and chief engineer in Exxon's fleet was told that asbestos could not even be removed from a box without a respirator.

Exxon knew the Shipyard was not enforcing asbestos controls during Minton's exposure period. Exxon's witness, Tompkins, testified that he saw

no asbestos controls in place while present during Shipyard repairs on the Exxon Boston in 1968. JA at 1945-46. Exxon's witness, Thornton — the Shipyard's industrial hygienist — said he knew of no Shipyard "procedure other than 1020-A which was in effect regarding the use and handling of asbestos," JA at 1890, and this policy was not circulated to Shipyard foremen until the end of 1976 — not 1965 as Exxon's attorneys claim, JA at 1886-87, 1892. As of 1979 neither Thornton nor anyone else to his knowledge had told Shipyard workers that asbestos causes asbestosis, cancer or mesothelioma. JA at 1893-1894.

Minton testified that he never saw any asbestos controls implemented on ships at the Shipyard during the 1960s and 70s. JA at 1773-78. He testified that, if Exxon told him of the risk, he would have stopped work and told the shipyard workers to get off the ship. JA at 1779-80. Exxon routinely wrote safety requirements into their specifications, but he never saw any specifications requiring asbestos controls, and Exxon did not warn him or the other Shipyard workers in any other way. JA at 1768-73. Draper, Satchell and Ware — a foreman, a repair coordinator, and a senior cost estimator, respectively — corroborated Minton's testimony, stating they never saw asbestos control measures on Exxon ships, they did not know asbestos was dangerous until the late 1970s, and nobody from

Exxon warned them that uncontrolled asbestos work was hazardous. *See* JA at 1335-38, 1047-48, 1178-82. Ware testified that when the Shipyard finally implemented controls in 1978, it was billed to Exxon as a cost item. JA at 1182-84. Ware stated that after this, the Shipyard's repair business "went down the tubes. There are foreign countries that do not enforce asbestos removal processes." JA at 1183-84.

Dr. Egilman testified that the danger of uncontrolled asbestos work would be obvious to the point of recklessness to a company with Exxon's extensive asbestos knowledge. "[I]t would be the same as being in a crowded theater and having – seeing smoke and seeing fire and not saying anything. It would be reckless." JA at 877. But repair after repair, year after year, for over a decade Exxon never enforced its own asbestos controls or intervened to protect Shipyard workers or its own crews.

C. Causation Evidence.

The Exxon ships Minton worked on were built in the 1950s and 60s. The Exxon New Orleans, the newest Exxon ship Minton worked on, was built in1965. Minton's Exhibit 40 contained 184 Shipyard construction "piece-work" tickets for the Exxon New Orleans showing it contained thousands of feet of asbestos pipecovering and block insulation (labeled 85% magnesia, Super-Temp, and Unibestos), and tons of asbestos cloth,

asbestos plaster (Eagle-Picher), and asbestos (amosite) blankets. *See* JA at 2433-2447.[4] Exxon's attorneys speculate that this asbestos may have been replaced on Exxon's ships by the mid-1970s, but both Plaintiff's and Exxon's fact witnesses agreed that asbestos was still used on Exxon's ships as late as 1977. Minton reviewed Exxon's specifications for the Exxon San Francisco, which he worked on in late 1975, and put an "A" next to each item that required asbestos and an "E" next to each engine room item. *See* JA at 1698-1700; *see also* JA at 1773-1776, 2495-2549. Of 162 repair items, 70 required asbestos and 75 were in the engine room, which was filled with asbestos. JA 1698-1700. Ware — who added the costs of materials and labor to Exxon's specifications — testified that Exxon's ships still used asbestos products through the mid-1970s. JA at 1186-88; *see also* JA at 1188-92, 1229-31. Other fact witnesses agreed that asbestos was extensively present on Exxon's ships throughout the 1960s and 1970s. *See* JA at 1268-80, 1281-83, 1289-1315, 1348. Even Exxon's witness, Tompkins, agreed that "as of '77 you would expect most of the stuff would be asbestos," Tr. Vol. XI, March 14, 2011, at 111-12, and Exxon's witness, Gray, admitted the Shipyard was still buying "thousands of yards" of

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[4] *Sample Piece-Work Ticket and Index* (the actual piece work tickets are in the record).

asbestos cloth and large quantities of asbestos insulation in the 1970s, JA at 1897. Exxon's witness, Thornton, agreed that the Shipyard still used asbestos insulation when he arrived in 1976. JA at 1882. And Satchell, Draper and Ware testified Exxon's repair specifications directed them to "replace disturbed insulation as original," JA at 1036; *see also* 1021, 1039, 1187, 1288, which meant "whatever we removed put back new. So we would put back new asbestos material and taking the old off." JA at 1036; *see also* 1187, 1288. A 1981 Exxon memorandum — 5 years after Minton left ship repair—warned that "[a]ll insulation on old vessels must be treated as asbestos unless it is certain the material" is not asbestos. JA at 2607. And a 1987 internal survey —10 years after Minton left ship repair— still found asbestos insulation on the Exxon New Orleans. JA at 2585-2588.

Asbestos work on Exxon ships was a visibly dusty process.[5] Ware testified that ripping out old asbestos insulation in engine rooms created "a lot of dust in the air. It was something that was a daily occurrence . . . it was generally a pretty dusty area in the engine room during a repair

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[5] Exxon claims "that all Minton could show here" was that his "injury was caused by an inherent hazard of the vessel that existed before the vessel" entered the shipyard. *Exxon's Brief,* at 6. But the hazard was not the mere presence of asbestos on the ships when they came in to the yard; it was the workers' and crews' uncontrolled work with the asbestos throughout the repair periods, which liberated billions of respirable asbestos fibers.

period." JA at 1190; *see also* JA at 968-69. Minton said he spent hours a day in the engine room of Exxon's ships because "most of the work was done in the engine room. And we had a lot of people in the engine room." JA at 1697. Draper corroborated that "the engine room is holding about 50 or 60 percent of [Minton's] total work," JA at 1332, and described excessive dust from work with asbestos products on Exxon ships. JA at 1301, 1305, 1309.

Dr. Longo tested virtually every asbestos product used on Exxon's ships in the 1960s and 70s. He testified that these products released high levels of asbestos when manipulated with the work methods used by the Shipyard workers and Exxon's crews. JA at 1616-1660. Dr. Maddox and Dr. Longo testified that the accepted ambient level of asbestos in the air ranges from 0.0003 to 0.0005 fibers per cubic centimeter (f/cc). JA at 1488, JA at 1662-63. Dr. Longo's test involving the installing new asbestos Unibestos insulation showed levels up to 51 f/cc in the worker's breathing zone, JA at 2465 — 100,000 times a background level of 0.0005 f/cc. Just being around the work resulted in levels up to 37 f/cc — 74,000 times ambient background. *Id.* Exxon's own internal test of ripping out old asbestos insulation — as was routinely done by the crew and Shipyard workers on Exxon ships — showed levels up to 255 f/cc <u>after only three</u>

minutes. JA at 2293.[6] This is 510,000 times the normal ambient amount. Remember that Exxon's industrial hygiene chief, Hammond, said Exxon's goal was to have "zero asbestos dust in the air above the ambient amount." JA at 1129 (emphasis added). Thus these exposures were hundreds of thousands of times higher than Exxon's target exposure level.

Dr. Maddox and Dr. Longo also testified about fiber drift and re-entrainment of settled dust. They explained that asbestos fibers remain airborne for extended periods of time, saturate a room, and travel to other areas on air currents. JA at 1525-28, 1586-88. A 1971 study of asbestos insulation removal on ships showed that, though asbestos insulation work was occurring on the 7th deck of the ship, levels up to 30 f/cc were measured two decks away on 5th deck. JA at 2458. Even if some of the dust settles, it is easily stirred up (re-entrained) with activity. JA at 1601-07. Minton and his fact witnesses described regular re-entrainment of dust by fans, brooms, and compressed air. JA at 1189-90, 1292, 1715. Based on this, Longo and Maddox testified that even if Minton was not present when the asbestos work was performed, he still would be exposed.

Minton's medical experts, Dr. Egilman and Dr. Maddox, testified that

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[6] At this rate, Dr. Longo testified that Minton may breathe up to 6 million asbestos fibers in just three minutes of work. JA at 1659-60.

Minton's exposure on Exxon's vessels was a substantial contributing factor in causing his mesothelioma. They testified that mesothelioma is an indivisible disease, JA at 1494, 1506-07, and it is caused by the cumulative exposures a person suffers, JA at 798-801, 936, 1509. All exposures contribute by either being an initiator of the cancer, triggering a cell to mutate, or a promoter of the cancer, causing "the body to produce a chemical called a cytokine, and cumulatively that cytokine production promotes the cancer growth," or both. JA at 936-37, 1529-31. Both doctors testified that the disease is very dependent on the victim's individual susceptibility; an amount that might hypothetically cause one person's mesothelioma may not cause another person to develop mesothelioma, JA 799-801, 1497-1500, 1512-13,[7] so it is impossible to separate out a portion of Minton's exposure and claim that it, alone, was the sole cause of his disease, JA at 798-801, 1494, 1509-10. Based on the evidence and the science, Dr. Egilman and Dr. Maddox concluded that every exposure Minton suffered more than 10 years before his diagnosis in 2009 — including his exposure on Exxon's ships and his exposure to the crews' work—was a substantial contributing cause of his mesothelioma. JA at

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[7] This is why the cross-examination hypothetical Exxon relies upon at page 35 of its Brief (that his pre-Exxon exposure level *could* cause someone else's mesothelioma) is both misleading and irrelevant.

823-24, 1496-97, 1505-07. Exxon did not bring a medical expert, so Dr. Egilman's and Dr. Maddox's testimony was completely unrebutted.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

This Court should affirm the trial court on all four assignments of error. Sufficient evidence supported the jury's verdict on the active operations duty, duty to intervene, causation and punitive damages. The court properly refused irrelevant evidence about alleged Shipyard knowledge that could not be tied to Minton or shown to have been implemented on Exxon's ships. Finally, the trial court properly allowed punitive damages under the law and the facts of this case, the punitive damages were not excessive, and the trial court has already remitted the punitive damages to conform to Plaintiff's *ad damnum.*

STANDARD OF REVIEW

A "party who comes before" this Court "with a jury verdict approved by the trial court 'occupies the most favored position known to the law.'" *Atrium Unit Owners Ass'n v. King*, 266 Va. 288, 293, 585 S.E.2d 545, 547 (2003). Even on *de novo* review, "the trial court's judgment is presumed to be correct and stands until error has been pointed out." *Ainslie v. Inman*, 265 Va. 347, 353, 577 S.E.2d 246, 249 (2003).

This Court gives a plaintiff who receives a jury verdict "'the benefit of

all substantial conflicts in the evidence, as well as the reasonable inferences that may be drawn from the evidence.'" *McGuire v. Hodges,* 273 Va. 199, 205, 639 S.E.2d 284, 288 (2007). So if the evidence supports a reasonable inference in favor of the Plaintiff, this Court credits that inference even if there is an equally reasonable inference in favor of Exxon. "The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body." *Va. & M. R. Co. v. White*, 228 Va. 140, 145, 319 S.E.2d 755, 758 (1984). "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Id.*

Exxon's Assignments of Error 1, 2 and part of 4 challenge the sufficiency of the evidence. On such matters, this Court views the evidence in the light most favorable to the plaintiff, resolves all reasonable doubt in his favor, and reverses a court's verdict only if "it is conclusively apparent that plaintiff has proven no cause of action against defendant …" *Banks v. Mario Indus*, 274 Va. 438, 454-55, 650 S.E.2d 687, 696 (2007).

Exxon's Assignment of Error 3 and the part of 4 relating to remittitur present issues resting in the sound discretion of the trial court. *See Dean*

v. Bd. of Super., 281 Va. 536, 540, 708 S.E.2d 830, 832 (2011) (admission of evidence is reviewed under abuse of discretion standard); *Va. Elec. & Pwr. Co. v. Dungee*, 258 Va. 235, 261-62, 520 S.E.2d 164, 180 (1999) (decisions relating to remittitur are reviewed under abuse of discretion standard). This Court should not reverse the court's rulings absent a finding that the trial judge clearly abused his discretion.

The only issue involving a *de novo* standard of review is the part of Assignment of Error 4 relating to the availability of punitive damages under 33 U.S.C. § 905(b). The law is clear that such damages are available.

I. SUFFICIENT EVIDENCE SUPPORTS THE VERDICT ON THE ACTIVE OPERATIONS DUTY AND THE DUTY TO INTERVENE.

Minton offered sufficient evidence to create a jury issue on both the active operations duty and the duty to intervene. Minton's main theory was that Exxon never turned over its ships to the shipyard at all. Minton's alternate theory was, assuming Exxon initially turned over its ships, it either (1) reasserted active operations and negated any turnover, or (2) at the least was under a duty to intervene to protect the shipyard workers. Minton explained these theories to the jury during opening statements, and consistently argued these theories before, during and after trial. *See* JA at 77-78, 294-95 (pretrial briefing); Tr. Vol. III, March 2, 2011, at 23-24, 39-44, 49-55 (opening statement); JA at 2105-06, 2121-23 (closing argument).

The turnover duty never had anything to do with this case, and Minton never conceded that Exxon fulfilled that duty.[8]

A. Sufficient Evidence Supports the Jury's Verdict on the Active Operations Duty.

The active operations duty arises when the shipowner fails to turn over exclusive control to the Shipyard, or the shipowner reasserts control, shares control, or actively participates in the repair operations. *See Davis v. Portline Transportes Maritime Internacional,* 16 F.3d 532, 541 (3rd Cir. 1994).[9] Once the active operations duty is triggered, the shipowner is under a duty similar to that owed to a premises invitee, except maritime law does not allow an assumption of the risk defense and the plaintiff's negligence, if any, does not bar the plaintiff's action. *Davis,* 16 F.3d at 541-46 (noting that a Shipyard worker is an invitee for purposes of land-based distinctions, and assumption to risk and pure contributory negligence are not available to the shipowner).

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[8] For this reason, Exxon's reliance on *Howlett v. Birkdale Shipping Co.,* 512 U.S. 92 (1994), *Buck v. ACandS, Inc.*, 154 P.3d 750, 755 (Ore. App. 2007), and *Bartholomew v. SeaRiver Maritime, Inc.*, 193 Cal. App. 4th 699, 711 (Cal. App. 2011), and other turnover duty cases is misplaced.

[9] Contrary to Exxon's arguments, the active operations duty is a general duty, not a limited duty. *See Davis*, 16 F.3d at 542 n. 9 (discussing the "vessel's 'general duty' – with respect to areas over which it shares control.") (quoting *Sarauw v. Oceanic Nav. Corp.*, 655 F.2d 526, 528 (3d Cir. 1981) (*Sarauw II*)).

To trigger the active operations duty, Minton was required to offer sufficient evidence to create a jury question on <u>any one</u> of the following four elements: (1) Exxon shared substantial control of physical areas on the ship, (2) Exxon controlled the ship's equipment, (3) Exxon controlled the operative details of the repairs, **or** (4) Exxon actively participated in the repairs. *Davis*, 16 F.3d at 540; *see also Scindia v. De Los Santos,* 451 U.S. 156, 167 (1981); *O'Hara v. Weeks Marine*, Inc., 294 F.3d 55, 66 (2d Cir. 2002); *Theriot v. Bay Drilling Corp.,* 783 F.2d 527, 535 (5th Cir. 1986); *Moore v. M.P. Howlett, Inc.*, 704 F.2d 39, 43 (2d Cir. 1983); *Tragni v. Establissement Maritime Camille*, 705 F.2d 92, 93 (2d Cir. 1983); *Ross v. U.S.*, 2012 U.S. Dist. LEXIS 19302 (M.D. Fla. Feb. 15, 2012) *Rivera v. Arctic Ocean Shipping Ltd.*, 2012 U.S. Dist. LEXIS 40287, at *20 (E.D.N.Y. Mar. 23, 2012).[10] Though Minton only had to prove one of these four

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[10] Plaintiff contends Exxon waived its assignments of error 1 and 2 by offering its own instructions on the active operations duty, the duty to intervene, and causation and by agreeing to Plaintiff's proposed instructions. "Where both plaintiff and defendant have asked for and have induced the court to give an instruction upon a given theory of the law, neither will be permitted after a verdict to question that theory." *Spitzli v. Minson,* 231 Va. 12, 18, 341 S.E.2d 170, 174 (1986). "[W]hen an issue has been submitted to a jury under instructions given without objection, such assent constitutes a waiver of any contention that the trial court erred in failing to rule as a matter of law on the issue." *Holles v. Sunrise Terrace, Inc.*, 257 Va. 131, 137-38, 509 S.E.2d 494, 499 (1999). Exxon agreed to Plaintiff's proposed instruction 13. JA at 1984. Exxon offered its own instruction on the active operations duty, JA at 616, and never withdrew it.

elements, the evidence was sufficient to create a jury issue on all four.

"A jury may find that the vessel exercised control or took charge over an area either because it never turned exclusive control of the area over to the stevedore . . . or because the vessel substantially interfered, by invitation or otherwise, with the stevedore's exercise of exclusive control." *Davis,* 16 F.3d at 541. "The active operations duty does not require Defendant's exclusive control; concurrent control is sufficient to invoke [this] duty of care." *Id.*; *see also Theriot,* 783 F.2d at 535 (since the crew used the keyway deck, the ship actively controlled it under *Davis*, thus "retaining the obligation to clean the keyway deck"). Both Minton's and Exxon's witnesses demonstrated that (1) Exxon never turned over its ships, or any of their spaces, to the Shipyard, (2) Exxon retained substantial control over every part of its ships throughout shipyard repair periods, (3) Exxon's port engineer worked with Minton day in and day out on all parts of the ships, (4) Exxon's crew worked "elbow to elbow" with shipyard workers,

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Exxon then agreed, without qualification, to Plaintiff's instruction 14 on the active operations duty. JA at 1986-87. Exxon offered its own instructions on the duty to intervene, and worked with Plaintiff to draft a new instruction that the Court accepted. JA at 2010. Exxon also offered its own causation instruction, did not withdraw it, and never objected to instructing the jury on causation during the charge conference. JA at 2040-41. Finally, Exxon's proposed verdict form, if accepted by the trial court, would have charged the jury on the active operations duty, the duty to intervene and causation if granted. JA at 619.

(5) the licensed officers of Exxon's ships stood watch in all of the spaces in which work was taking place, and (6) Exxon's regulations and policies required Exxon's crewmembers and port engineers to assume duties of safety and supervision over shipyard workers. *See* Statement of Facts, *supra*, at 5-9. Thus Exxon triggered the active operations duty with this element alone. *Davis*, 16 F.3d at 541.

Sufficient evidence proved that Exxon controlled the ship's equipment. A shipowner may be liable "if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter . . . from equipment, under the active control of the vessel." *Scindia*, 451 U.S. at 167; *see also Ross*, 2012 U.S. Dist. LEXIS 19302, at *21. Exxon's crewmembers (1) controlled the ship's equipment so shipyard workers had to ask crewmembers to take equipment off-line before they could work on it, and (2) supplied repair parts, including asbestos products, to shipyard workers to be used on that equipment. *See* Statement of Facts, *supra*, at 14-15. Thus Exxon controlled instrumentalities that caused Minton's disease. This evidence was unrebutted. Accordingly, sufficient evidence supported triggering the active operations duty on this element alone.

Next, sufficient evidence proved Exxon controlled the operative details of the repair work. *See* Statement of Facts, *supra*, at 9-14. The

evidence proved that (1) Exxon's repair inspector was "the boss," and "the authority" aboard the ship, (2) Exxon's 1973 Repair Manual required its masters and chief engineers to supervise all activity by the shipyard workers, (3) shipyard foremen interacted directly with the port engineer, and (4) Exxon's specifications directed shipyard workers to consult with Exxon's chief engineers and port engineers for the methods and details of repair. Proof of this element, alone, triggered the active operations duty.

Finally, the evidence proved that (1) Exxon's 1973 Manual and pre-repair letters to its ships' officers required its crews to "actively participate" in the repairs, (2) Tompkins admitted that crews were required to "actively participate" in the repairs, and (3) Exxon's crews, in fact, routinely worked with the shipyard workers, elbow to elbow, doing the same work, including asbestos work, which exposed Minton to respirable asbestos dust and fibers. *See* Statement of Facts, *supra*, at 15-18. Thus by actively involving itself in ***the same work*** work, Exxon contributed to cause Minton's mesothelioma and triggered the active operations duty on this element alone. *See Scindia*, 451 U.S. at 167.

In sum, Minton only had to prove one of the four elements to trigger the active operations duty, but sufficient evidence proved all four. This Court should affirm the trial court on this issue.

B. Sufficient Evidence Supports the Jury's Verdict on the Duty to Intervene.

The duty to intervene arises only if the shipowner turns over exclusive control of the ship to the Shipyard and does not actively involve itself in the repairs at all. Since the shipowner is not in control or participating in the repairs, *Scindia* held that a shipowner under this duty, alone, is entitled to rely upon the shipyard in the first instance to protect its workers. But a shipowner "has a duty to prevent harm that may result from an 'obviously improvident' failure of the stevedore to take proper precautions in the face of an obvious and unreasonably dangerous defect, if the owner knows of the defect and of the stevedore's failure to rectify the defect." *Gill v. Hango Ship-Owners/AB*, 682 F.2d 1070, 1074 (4th Cir. 1982); *see also Scindia*, 451 U.S. at 175-76; *Turner v. Costa Line Cargo Serv., Inc.*, 744 F.2d 505, 510 (5th Cir.1984); *Woodruff v. U.S.*, 710 F.2d 128, 131 (4th Cir. 1983); *Harris v. Reederei*, 657 F.2d 53, 55 (4th Cir. 1981).

Minton proved that (1) Exxon had actual knowledge that *any* uncontrolled asbestos worked was hazardous and created a risk of deadly injury, and (2) Exxon knew the Shipyard was not acting to protect its workers. *See* Statement of Facts, *supra*, at pages 18-25. All of this evidence is completely unrebutted in the record. Not one witness disputed that Exxon had actual knowledge of the hazards of uncontrolled asbestos

work. In fact, most of Minton's evidence on this issue came directly from Weaver and Hammond — Exxon's medical director and director of industrial hygiene. Additionally, Exxon did not proffer any evidence that any asbestos controls were actually implemented on Exxon's ships by anyone during Minton's exposure. Even Tompkins admitted he saw no controls as a crewmember during the 1968 Exxon Boston repairs. Thus sufficient evidence supported both elements of the duty to intervene.

II. UNREBUTTED EVIDENCE SUPPORTED CAUSATION.

Maritime law "allows an injured party to sue a tortfeasor for the full amount of damages for an indivisible injury that the tortfeasor's negligence was a substantial factor in causing, even if the concurrent negligence of others contributed to the incident." *Edmonds v. Comp. Gen. Trans.,* 443 U.S. 256, 260 (1979). Sufficient evidence proved Exxon's negligence was a substantial factor in causing Minton's mesothelioma. *See* Statement of Facts, *supra,* at 25-31.

Documentary evidence proved Exxon's ships contained thousands of feet of asbestos insulation and tons of asbestos cloth, blankets, gaskets and cement. JA at 2433-2447. Minton's witnesses testified without hesitation that all of Exxon's ships were filled with asbestos that was routinely repaired and replaced during the ship's repairs. Exxon's witness,

Tompkins, admitted that even as late as of 1977, the insulation on Exxon's ships was still asbestos. Exxon's 1981 memorandum instructed Exxon's crews to presume the insulation on Exxon's ships was asbestos unless proven otherwise. And Exxon's 1987 survey of the Exxon New Orleans still found asbestos insulation on that ship.[11]

Exxon's safety director, Bonsib, and industrial hygienists, Hammond and Venable, stated that asbestos work like that described by Minton's witnesses would cause high asbestos exposures and controls were necessary. Venable showed asbestos insulation rip out levels up to 255 f/cc — 510,000 times the ambient background levels that Exxon's Hammond said were Exxon's goal. And Exxon's crewmembers performed "the ***same work*** *. . .* as was being performed by the Shipyard" including work with asbestos products and insulation rip-out. S*ee, e.g.,* JA at 1079, 1155, 1190, 1206 3257. The evidence showed that Minton was directly exposed to uncontrolled asbestos work on Exxon's ships, especially in their machinery spaces, for hours each day and that Minton was indirectly

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[11] Exxon cites Satchell's cross-examination testimony that "just by looking at it" he couldn't tell asbestos from non-asbestos insulation. *Exxon's Brief* at 12-13. But all of Plaintiff's fact witnesses steadfastly testified that they knew the insulation on Exxon's ships was asbestos because it (1) was required on the ship's systems, (2) was in the original construction documents, and (3) was specified by Exxon. Exxon's witnesses agreed.

exposed to asbestos from fiber drift and reentrainment. Dr. Egilman and Dr. Maddox testified that Minton's exposure on Exxon's ships, including Exxon's crews' work, was a substantial contributing cause of his terminal disease.[12] And Exxon presented no medical defense. Thus, sufficient, unrebutted, evidence supports the jury's causation verdict.[13]

III. THE TRIAL COURT CORRECTLY PROHIBITED EXXON FROM OFFERING IRRELEVANT AND UNFOUNDED EVIDENCE.

Exxon claims that, by "exclud[e] undisputed evidence that the Shipyard was aware of shipboard asbestos risks," Minton's counsel was able "to argue the outright falsehood that the Shipyard had no knowledge of asbestos risks to Minton . . . ." Exxon's Brief, at 1-2. This claim is flatly untrue and mischaracterizes the trial court's decision. Plaintiff told the jury

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[12] Exxon claims that Minton's causation evidence fails because Maddox agreed that *a hypothetical person's* mesothelioma may be caused by the amount of exposure Minton had before he went to work on Exxon ships. But Maddox and Egilman unswervingly testified that *Minton's* mesothelioma was caused by his total, cumulative exposure, including his exposure on Exxon's ships and from Exxon's crew's work. Because individual susceptibility is such a key etiological factor, it is sheer speculation to claim that *Minton* could have developed mesothelioma on anything less than his total dose.

[13] Exxon also speculates that, even if warned, the Shipyard would have made Minton return to work. But a "shipowner may not defend on the ground that [Minton] should have refused to continue working in face of a [hazard], which his employer . . . was continuing to use . . . since the defense of assumption of risk is unavailable in § 905 (b) litigation." *Scindia*, 451 U.S. at 176 n. 22; *accord Davis*, 16 F.3d at 543-44.

during opening statement that the Shipyard was negligent, stating, "Did they [the Shipyard] warn Mr. Minton and their own workers? No. That's why – that's why the duty was on Exxon to intervene, because nothing was being done." JA at 664. And the jury was instructed that it had to find the Shipyard "obviously improvident" on the duty to intervene.

The court's ruling excluded only general knowledge that could not be linked to actual conduct on the ship or to Minton. Even so, in an exercise of its discretion, the court allowed extensive testimony by Exxon's witness, Thornton, about the Shipyard's first asbestos policy, S-1020-A, which he said was not circulated to trade foremen until at least the end of 1976. JA 1882-83, 1886-87.[14] Thornton admitted that as of 1979 he had never told any Shipyard worker that asbestos causes asbestosis, cancer or mesothelioma, and he had no "personal knowledge that any employee was ever so instructed." JA at 1894. This is important because Exxon accuses Minton's counsel of fraud on the court based on an out-of-context snippet of Plaintiff's closing argument, claiming "Minton's counsel [told] the jury that nobody 'who was working at the [S]hipyard' knew about asbestos risks." *See* Exxon's Brief, at 4. In context, Plaintiff's counsel was discussing

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[14] He also confirmed that under "the shipyard procedure-writing protocol, the original of the procedure is specified as Revision A. Even though it is stated as a revision, it was the original issue of S-1020." JA 1896.

whether Minton had ever learned that asbestos could cause asbestosis or cancer and whether the trade workers at the shipyard had been told. JA at 2135-36. Thus Thornton's testimony, as well as Ware, Satchell, and Draper, directly supported Plaintiff's closing argument on this matter.

Though the trial court allowed Thornton to talk about S-1020A, Exxon still failed to offer, or even proffer, the actual S-1020A policy. In fact Exxon failed to proffer any evidence at all except for a single 1965 Safety Meeting memorandum that generically addresses many different "atmospheric problems," only mentions the word asbestos three times in passing, never states what diseases are associated with asbestos, and never formulates or propounds a particular asbestos control policy. Moreover, Exxon attempted to offer this document through one of Minton's medical experts, who could not provide the necessary foundation of whether Minton ever saw it or whether it was ever implemented on any Exxon ship. JA at 889-894. And, contrary to Exxon's arguments, the court told Exxon it could cross examine Minton with this document, stating "I think at the pretrial my ruling was, yes, you can certainly ask Mr. Minton all these questions: Did he know? Did he ever go to these meetings? Has he seen this memo?" JA at 894. Exxon's counsel, however, never attempted to show the memo to Minton, or any shipyard worker. Exxon also never attempted to offer it

through its own witnesses, Thornton or Gray — who was a pipecovering foreman at the Shipyard. In short, Exxon never so much as provided this Court with an evidentiary proffer sufficient to establish that anyone other than upper management at the Shipyard had ever heard of the 1965 memo, ever saw the 1965 memo, ever implemented the 1965 memo, or ever enforced the 1965 memo.

Exxon's sole reason for offering this evidence was to point the finger at the empty chair of a statutorily immune employer. Both Congress and the Supreme Court have stated that no attribution may be made directly or indirectly against a longshoreman's statutory employer in a 33 USC § 905(b) case. *See Edmonds,* 443 U.S. at 263.[15] Exxon's attempt to reduce its own liability by arguing the Shipyard's empty chair "would be a prohibited *indirect* attribution of liability to the statutory employer" and would be flatly improper. *See id.* at 270 & n. 28.

Also, this evidence was irrelevant to the active operations duty and was presumed under the duty to intervene.[16] Under the active operations

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[15] *See also Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 412 (1953) ("reduction of [the shipowner's] liability at the expense of [the employer] would be the substantial equivalent of contribution" and is not allowed)

[16] Exxon also claims that Plaintiff's changed positions by stating that the Shipyard's negligence was presumed. *Exxon's Brief* at 38 n.8. But this is not true either. Plaintiff's pretrial motions informed the trial court that it

duty, Exxon is not permitted to rely on the Shipyard. This rule "lies in stark contrast to the rule applicable when the vessel does not actively involve itself in [the repairs], in which event the vessel may rely and depend on the experience and expertise of the [Shipyard]." *Davis,* 16 F.3d at 537. And "[t]he fact that neither plaintiff nor the [Shipyard] took any precautions in the face of this hazard does not relieve [Exxon] of responsibility, for it is fundamental that there may be more than one proximate cause of an injury." *Moore*, 704 F.2d at 43; *Tragni*, 705 F.2d at 93.

This evidence was irrelevant under the duty to intervene, too.[17] This duty required Minton to prove that the Shipyard was "obviously improvident." The word "improvident" is a synonym for "negligent." *See, e.g.,* The New Am. Roget's College Thesaurus 532 (3rd ed. 2002). Every fact witness, including Exxon's own corporate representative, stated that no

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must be assumed that "his employer negligently failed to warn or protect him." JA at 76. Plaintiff argued at the pretrial hearing that the Shipyard "can be negligent all they want. The key is did — was it [asbestos controls] happening on the ship." Tr. 2/16/2011, at 207. And Plaintiff told the jury the shipyard was negligent. *See* text, *supra*, at 42-43.

[17]The *Scindia* Court did not care whether the workers' employer knew that a defective winch could potentially be dangerous. And it made no difference that the workers using the winch also should have known that a defective winch could be dangerous. All that mattered was that the shipowner had (1) actual knowledge that the winch created a hazard and (2) knew that the workers' employer was being obviously improvident (i.e.,

asbestos control procedures were being enforced on Exxon's ships during Minton's period of exposure. Not one witness refuted this point —not even Exxon's witnesses. So, whether the Shipyard knew the hazards of asbestos and negligently failed to implement them, or whether the Shipyard negligently failed to investigate the hazards, the result was the same — the Shipyard failed to protect Minton. But this is precisely when the duty to intervene is triggered. Because Exxon knew the Shipyard's conduct was "obviously improvident" and because Exxon did nothing, Exxon breached its duty to intervene.

IV. THE TRIAL COURT PROPERLY ALLOWED PUNITIVE DAMAGES AND UPHELD THE JURY'S PUNITIVE DAMAGES VERDICT.

"The general rule that punitive damages were available at common law extended to claims arising under federal maritime law." *Atl. Sounding Co. v. Townsend,* 129 S. Ct. 2561, 2567 (2009). A general maritime rule continues to exist "unless Congress has enacted legislation departing from this common-law understanding." *Id.* at 2569. Nothing in 33 U.S.C. § 905 departs from the preexisting availability of punitive damages.[18] In fact, Exxon admits 33 U.S.C. § 905 does not address damages at all. *Exxon's*

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negligent) by doing nothing, after three days, to remedy the hazard. Exxon had over ten years to attempt to remedy the hazard in this case.

Brief, at 44.

Minton's "theory" of this case was not solely simple negligence. Minton alleged gross negligence and offered significant evidence that Exxon acted in reckless disregard of Minton's rights and safety. The evidence showed that Exxon's overriding concern was minimizing down time and reducing costs. JA at 1181-85, 1194, 2412. When the Shipyard finally began using asbestos controls in the late 1970s, it passed the cost of these controls to Exxon. *Id.* As a result, Exxon soon moved its ship repair business overseas to unregulated yards and the Shipyard's repair work "went down the tubes." *Id.* Given this evidence and Exxon's extensive asbestos knowledge, it was reasonable to infer that, to keep its repair costs down, Exxon deliberately failed to insist on asbestos controls for Minton's safety. Also, the jury was entitled to attribute reckless indifference to Exxon, who admitted it knew about asbestos hazards and necessary controls in the 1930s, but failed to implement any controls on its ships in the 1960s and 70s and still had asbestos on its ships in 1987. JA at 2584-88. Dr. Egilman, a public health expert, characterized Exxon's failure to warn in the face of over thirty years of asbestos disease knowledge as

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[18] Exxon relies on *Miller v. Am. Pres. Lines*, 989 F.2d 1450 (6th Cir. 1993), but *Townsend* overruled *Miller* on this point.

"reckless" and equated it to leaving a burning movie theater without alerting anyone else in the theater that there was a fire. JA at 877.

Minton did not allege or argue vicarious liability or harm to other parties. Unlike *Exxon Shipping Co. v. Baker,* 554 U.S. 471, 483 (2008), Plaintiff sued Exxon itself, not Exxon as a vicariously liable employer of an errant employee. No evidence showed that Exxon's liability was the result of an "unauthorized act" of an employee; Exxon's liability was due to its own callous focus on repair costs, and its reckless indifference to worker safety over the course of more than a decade. And unlike *Philip Morris U.S.A. v. Williams*, 549 U.S. 346 (2007), Plaintiff's counsel never suggested that the jury think about every person who died as a result of asbestos exposure due to Exxon's negligence. Indeed Exxon's argument that the punitive verdict was based on conduct unrelated to Minton is directly refuted by the 1:1 ratio of punitive to compensatory damages <u>before the remitter</u>— not 100:1 as in *Philip Morris.* This clearly indicates that the jury was punishing Exxon only with regard to Minton.

Finally, the purpose of punitive damages is to further the "legitimate interests in punishing unlawful conduct and deterring its repetition." *Philip Morris*, 549 U.S. at 352. Exxon is the world's third largest company. Its net earnings for the first quarter of 2011 were $10.6 Billion. *See* JA at 3456.

Exxon earned the entire amount of the punitive damages awarded in this case, before remittitur, in less than 3 hours — less time that it took Minton to testify. The jury determined that Exxon deserved punitive damages at the 1:1 ratio specifically approved by *Exxon Shipping Company,* 554 U.S. at 513, and the jury was not unreasonable in doing so. Even so, the trial court, with Minton's agreement, has already remitted the punitive damages verdict to $5 million, the amount Minton requested. In short, this Court should affirm the trial court on Exxon's fourth assignment of error.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court on each assignment of error asserted.

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CERTIFICATE

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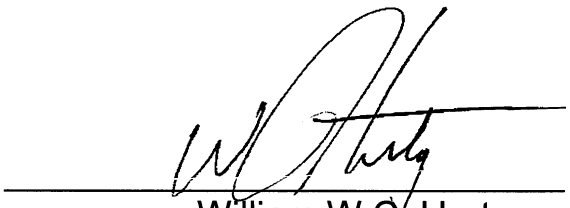
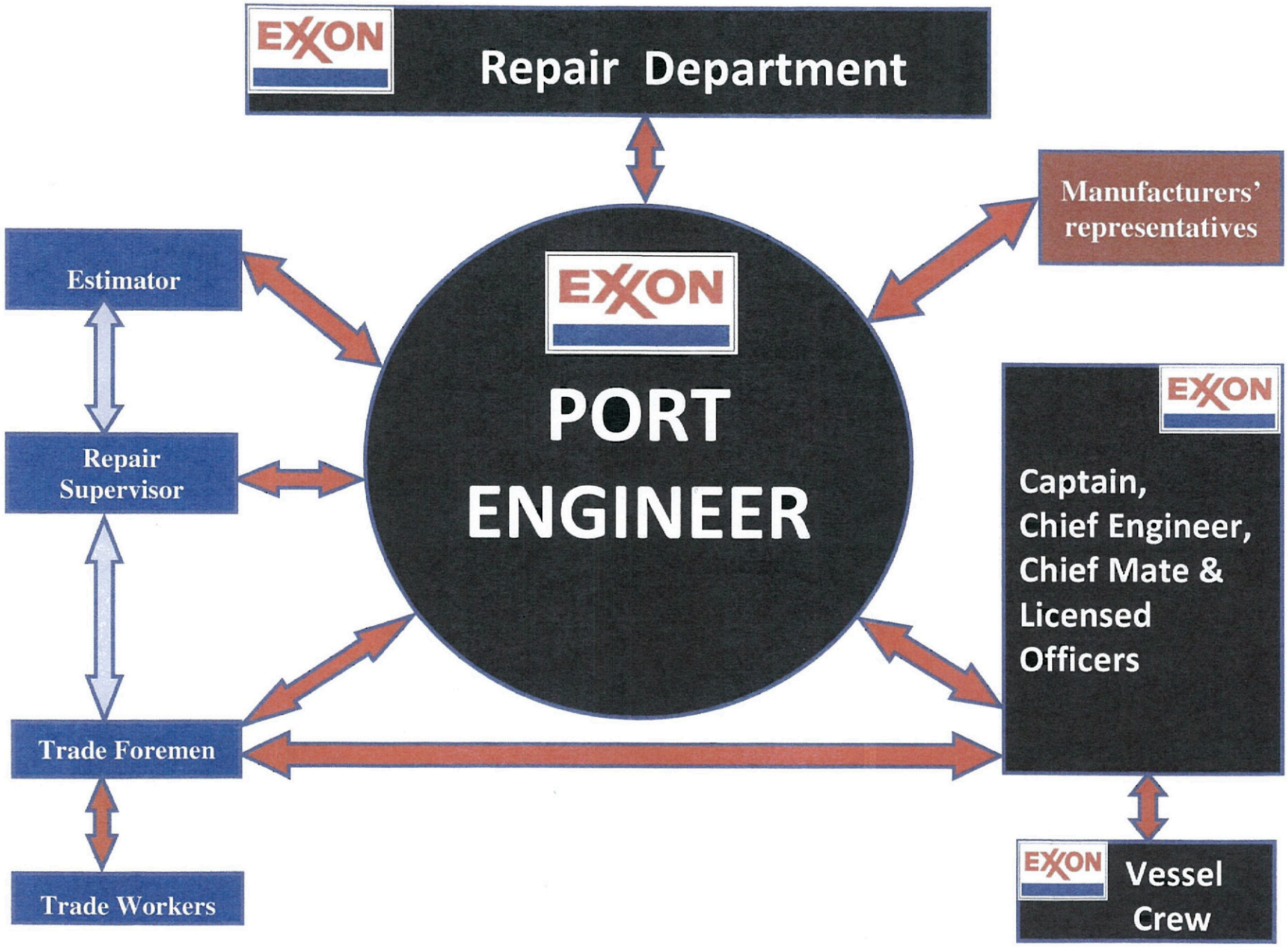


William W.O. Harty

APPENDIX A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Estimator
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Captain, Chief Engineer, Chief Mate & Licensed Officers
Trade Foremen
EXXON
Vessel Crew
Trade Workers