IN THE

Supreme Court of Virginia

RECORD NO. 111775

EXXON MOBIL CORP.,

Appellant,

v.

RUBERT E. MINTON, ET AL.,

Appellees.

BRIEF OF THE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC AS *AMICUS CURIAE*

Nathan D. Finch, Esq. (VSB# 32490)
MOTLEY RICE, LLC
1000 Potomac Street, N.W.
Suite # 150
Washington, D.C. 20007
(202) 232-5507
(202) 232-5515 (Facsimile)
nfinch@motleyrice.com

Alex R. Straus, Esq.
MOTLEY RICE, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29464
(843) 216-9000
(843) 216-9440 (Facsimile)
astraus@motleyrice.com

Counsel for Amicus Curiae United Steel Workers

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

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BRIEF *AMICI CURIAE* OF THE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC IN SUPPORT OF RESPONDENT RUBERT E. MINTON

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC ("USW"), by counsel and pursuant to the Rules 5:4 and 5:30 of the Supreme Court of Virginia, respectfully submit this brief *amici curiae* and urge this Honorable Court to uphold the decision by the Circuit Court for the City of Newport News in *Minton v. Exxon Mobil Corp.*, No. CL0901505F-15, Va. Cir., Newport News. This Court has awarded an appeal from the judgment rendered by the trial court in regard to assignments of error No. 1, 2, 3 and 6 in the petition for appeal filed by Exxon Mobil Corporation ("Exxon"). USW states as follows in support of its position that all four of the aforementioned assignments of error be denied:

INTERESTS OF AMICI CURIAE

The USW is an international organization representing 1.2 million active and retired steelworkers and other tradesmen and women, including tradesmen and women in the shipbuilding and repair industry. We have more than 1,800 local unions throughout Canada, the United States and

the Caribbean, including a number of locals that represent shipyard workers. The USW has local unions throughout the state of Virginia, including Newport News. Local 8888 in Newport News, VA represents approximately 8,000 hourly shipyard workers at the Huntington Ingalls Newport News shipyard ("Shipyard"). As this Court is aware, this is the same Newport News shipyard at which Rubert E. Minton ("Mr. Minton") was employed when he was exposed to asbestos on Exxon's ships.

The mission of the USW is to improve the wages, benefits and working conditions of our workers; to ensure justice and dignity on the job; and to better the lives of all working people. This mission includes taking part in important litigation, both directly and indirectly as *amici*, that impacts our membership.

In the instant matter, Exxon seeks an unprecedented narrowing of the Longshore and Harbor Workers' Compensation Act's ("LHWCA"), 33 U.S.C. § 905 (b) negligence claim. Exxon's argument, as expressed in its Brief of Appellant and in the brief of its *amici*, the Chamber of Shipping of America, the American Waterways Operators, and the American Petroleum Institute, would virtually immunize vessel owners from any liability under an act that the United States Congress specifically preserved for the benefit of shipyard workers like Mr. Minton and our membership.

Though Mr. Minton's injury is the specific asbestos-related terminal cancer, mesothelioma, Exxon's attempted narrowing of this cause of action would impact all shipyard workers and stevedores who suffer both chronic and acute injuries aboard maritime vessels.

This Honorable Court has awarded an appeal from the judgment rendered by the trial court in regard to assignments of error No. 1, 2, 3 and 6 in the petition for appeal filed by Exxon, which argue as follows:

1. The trial court erred in allowing liability to be imposed on Exxon – a vessel owner – for a longshoreman's asbestos-related workplace injuries without sufficient evidence demonstrating either that Exxon actively controlled Mr. Minton's work or the instrumentality that injured him, or that Exxon failed to intervene to protect Mr. Minton in the face of actual knowledge that his employer was ignoring an obvious risk to his safety.
2. The trial court erred in allowing liability to be imposed on Exxon without sufficient evidence establishing that his mesothelioma was proximately caused by Exxon's breach of a maritime-law duty.
3. 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.

6. The court erred in awarding punitive damages. The court also erred in failing to grant a new trial on punitive damages and in refusing to remit the excessive punitive damages award.

The USW is in support of the trial court's ruling regarding each of the four assignments of error identified above. This brief focuses its argument on assignments of error No. 1, 3 and 6.

BACKGROUND

The respondent, Rubert E. Minton, routinely inhaled asbestos dust and fibers while working aboard vessels owned and controlled by Exxon during repair activities at the Newport News Shipbuilding and Dry Dock Company ("NNS" or "Shipyard"). This exposure to asbestos on Exxon's ships caused Mr. Minton to contract mesothelioma, a permanently disabling and fatal lung disease.

On January 7, 2010, Mr. Minton filed his Amended Complaint in the Circuit Court of Newport News, Virginia.

On March 17, 2011, after a three week trial, the jury returned a verdict in favor of Mr. Minton, finding that Exxon breached the "active control" duty and "active participation" duty (collectively the "active operations duties"), and the "intervention" duty it owed to Mr. Minton.

On April 11, 2011, Exxon filed its Motion to Set Aside the Verdict, For a New Trial, and For Remittitur.

On March 8, 2012, this Honorable Court awarded an appeal from the judgment rendered by the trial court as to assignments of error No. 1, 2, 3 and 6 in the petition for appeal filed by Exxon and refused to award an appeal as to the remaining assignments of error.

On April 17, 2012, Exxon filed its Brief of Appellant. Exxon's argument represents a dramatic misinterpretation of the LHWCA and attempts to convince this Court to reverse the jury's reasonable findings regarding questions of fact.

STANDARD OF REVIEW

This Court has held that the proper function of the jury is "to determine the credibility of the witnesses, weigh the evidence, and resolve all conflicts in the evidence ...." *McGuire v. Hodges,* 273 Va. 199, 205, 639 S.E.2d 284, 288 (Va. 2007). The *McGuire* Court stated unambiguously that "if there is credible evidence in the record which supports the jury's verdict, we **must** reinstate that verdict and enter judgment thereon." *Id.* (quoting *Rogers v. Marrow*, 243 Va. 162, 166, 413 S.E.2d 344, 346 (Va. 1992)) (emphasis added). Put even more

succinctly: The jury's verdict must be accorded "the utmost deference." *Burroughs v. Keffer,* 272 Va. 162, 166, 630 S.E.2d 297, 300 (Va. 2006).

This Court gives the party 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,* 273 Va. at 205, 639 S.E.2d at 288 (quoting *Jenkins v. Pyles,* 269 Va. 383, 388, 611 S.E.2d 404, 407 (Va. 2005)*; see also Nationwide Mut. Ins. Co. v. St. John,* 259 Va. 71, 76, 524 S.E.2d 649, 651 (2000).

Thus, this Court's "authority to set aside a jury verdict is limited and should be exercised only if a jury verdict is plainly wrong or without credible evidence to support it." *Id.* at 205, 639 S.E.2d at 287 (quoting *Jenkins,* 269 Va. at 388, 611 S.E.2d at 407). As this Court has observed, if "the evidence adduced at trial is conflicting on a material point, or if reasonable persons may draw different conclusions from the evidence, or if a conclusion is dependent on the weight the fact finder gives to the testimony, a judge may not substitute his or her conclusion for that of the jury merely because he or she would have reached a different result." *Id.*

In other words, this Court must *reject* any and all arguments by Exxon to analyze the evidence in its favor unless there is absolutely no other

countervailing reasonable analysis that may favor the Plaintiff. *Id.* "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." *Pierce v. Ford Motor Co.,* 190 F.2d 910, 913 (4th Cir. 1951).

Lastly, this Court presumes that the jury followed the trial court's instructions. *See Weeks v. Angelone,* 528 U.S. 225, 234 (2000) (citing *Richardson v. Marsh,* 481 U.S. 200, 211 (1987)) (noting a "jury is presumed to follow [the court's] instructions"); *accord Emmett v. Commonwealth*, 264 Va. 364, 371, 569 S.E.2d 39, 44 (2002). This strong presumption stands unless the challenging party clearly demonstrates otherwise. *Id.*

STATEMENT OF FACTS

The USW adopts the Statement of Facts in Appellee's Brief in Opposition to Brief of Appellant.

ARGUMENT

The issue most pertinent to the health and well-being of the USW membership implicated by the instant appeal is whether the United States Congress intended the Longshore and Harbor Workers' Compensation Act

("LHWCA"), as amended in 1972, to implement a dramatic narrowing of the protections afforded longshoremen and their families.

It did not.

Nothing in the legislative history of the 1972 Amendment or the subsequent interpretation of the legislation by the Supreme Court of the United States indicates that Congress intended to alter the long-standing rules governing a maritime negligence suit brought by a longshore worker, such as Mr. Minton, against a shipowner, such as Exxon, by limiting the damages recoverable from the shipowner based on the proportionate fault of the worker's non-party, statutory employer. *See Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 262 (1979).

The Brief of Appellant filed on April 17, 2012 ("Brief of Appellant") and the Brief of the Chamber of Shipping of America, American Waterways Operators, and the American Petroleum Institute as *Amici Curiae* in Support of Appellant ("Brief of Appellant's *Amici*") consistently mischaracterize the duties owed by Exxon and attempt to convince this Court to reverse the jury's reasonable findings regarding questions of fact.

I. EXXON'S AND ITS AMICI'S ATTEMPT TO RELITIGATE THE FACTUAL DETERMINATIONS OF THE JURY IS AN IMPROPER USE OF THE APPELLATE PROCESS.

In regard to Assignment of Error No. 1, Exxon has elicited the support of its *amici* in an attempt to argue that the "record evidence does not support the claim that Exxon assumed and breached the active control duty" or the duty to intervene. Brief of Appellant's *Amici*, p. 24. Despite the efforts of Exxon's *amici*, these factual arguments are misplaced at this juncture of the litigation process. Exxon had its opportunity to convince a jury of the insufficiency of Mr. Minton's evidence regarding these duties. Nothing in the Brief of Appellant or Brief of Appellant's *Amici* suggests that the jury's factual determinations were unreasonable.

As previously stated, this Court has held that it is the jury's duty alone "to determine the credibility of the witnesses, weigh the evidence, and resolve all conflicts in the evidence ...." *McGuire,* 273 Va. at 205, 639 S.E.2d at 288. Consequently, this Court "accord[s] the jury verdict the utmost deference." *Burroughs,* 272 Va. at 166. In the instant matter, Mr. Minton must be given "the benefit of all substantial conflicts in the evidence, as well as the reasonable inferences that may be drawn from the evidence." *McGuire,* 273 Va. at 205, 639 S.E.2d at 288.

As detailed at trial and in Plaintiff's post-trial briefing, Mr. Minton presented evidence sufficient to establish the active operations duties, and intervention duty. *See* Plaintiff's Opposition to Exxon Mobile Corporation's

Motion to Set Aside the Verdict, for a New Trial, and for Remittitur, p. 20-27. The evidence cited in Plaintiff's Opposition to Exxon's Petition for Appeal, adopted herein by reference, was clearly sufficient to satisfy the Motion to Strike threshold on the active operations duties.

Exxon's attempt to relitigate the factual determinations made by the jury at trial is not the proper utilization of the appellate process. As this Court has held, even in those instances in which the "evidence adduced at trial is conflicting on a material point" and the "conclusion is dependent on the weight the fact finder gives to the testimony" this Court is prohibited from upsetting the jury's determination merely because a different result is reasonable based on the evidence presented. *McGuire,* 273 Va. at 205, 639 S.E.2d at 287.

A. Mr. Minton Presented Ample Evidence for a Reasonable Jury to Determine that Exxon Breached its Active Operations Duties.

Even under the misguided arguments presented in the Brief of Appellant and Brief of Appellant's *Amici,* the evidence is sufficient to establish Exxon's breach of the active operations duties. Thus, the only relevant question for this Court becomes whether the jury's factual

determinations were so beyond the pale that no reasonable person would reach the jury's result based on the evidence presented.

The Brief of Appellant's *Amici* states as follows:

> Exxon could become liable for harm caused to Minton if it "substantially controlled or [had] been in charge of (i) the area in which the hazard existed, (ii) the instrumentality which caused the injury, or (iii) the specific activities the [Shipyard] undertook."

Brief of Appellant's *Amici*, p. 23-24 (quoting *Davis,* 16 F.3d at 540). Exxon's *amici* neglect to include that Exxon may also be held liable if its crewmembers actively participated in the repair work, and its *amici* fail to notify this Court that the jury only needed to find that one of the above conditions, or Exxon's active participation prong, was satisfied.

The Brief of Appellant's *Amici* admits that: (1) Exxon had a policy to supervise outside contractors and shipyard workers, (2) Exxon's onboard employees directed the items of repair work performed by the shipyard; (3) Exxon's onboard employees provided specifications for completing the work; (4) Exxon's onboard employees approved the work upon completion; and (5) Exxon's employees worked with asbestos in Mr. Minton's vicinity. *See* Brief of Appellant's Amici, p. 24; Brief of Appellant, p. 28 (the testimony at trial established that "[Exxon] workers would commonly perform minor

work on the vessels, and some of that work might involve materials that might contain asbestos.").

Yet, despite these admissions, Exxon's *amici* argue that the law is "pellucidly clear" that none of this conduct, alone or in combination, could lead any reasonable juror to find that Exxon retained even the concurrent control which has been held sufficient to invoke the active operations duties. *Id.* Such pellucid clarity might be more convincing if Exxon's *amici* chose their common law precedent and ornate adjectives with equal skill.

The law is clear. "The active operations duty does not require Defendant's exclusive control; concurrent control is sufficient to invoke [this] duty of care." *Ross v. United States*, 2012 U.S. Dist. LEXIS 19302 (M.D. Fla. 2012); *see also Lampkin v. Liberia Athene Transport Co.*, 823 F.2d 1497, 1501 (11th Cir. Fla. 1987) ("The distinction between an area controlled by the stevedore and one that is concurrently controlled by the stevedore and the shipowner, is consistent with Congress' amendment of Section 5(b) of the Longshoremen's and Harbor Workers Compensation Act ("LHWCA") (certified at 33 U.S.C. § 905(b)) in 1972.").

The cases cited by Exxon's *amici*, however, fail to support its contention that a reasonable jury could not conclude that Exxon retained at least concurrent control.

The first case cited by Exxon's *amici* is *Fontenot v. McCall's Boat Rentals, Inc.*, 227 Fed. Appx. 397 (5th Cir. La. 2007). In *Fontenot*, the plaintiff did not even attempt to establish the active operations duties through actual conduct of the type Exxon's *amici* has admitted was present in this instant matter. Rather, the plaintiff merely argued that the ship's captain retained control via a "blanket time charter and industry custom". *Fontenot*, 227 Fed. Appx. At 404. This argument has no relevance to any of the arguments made by Mr. Minton.

In the next case cited by Exxon's *amici* in regard to the active operations duties, *Futo v. Lykes Bros. Steamship Co.*, 742 F.2d 209 (5th Cir. La. 1984), the court did not even consider the active operations duties. Instead, the court explicitly stated: "This case involves the scope of the shipowner's duty to intervene as expressed in the Supreme Court's decision in *Scindia* when the owner has knowledge of a dangerous condition." *See Futo*, 742 F.2d at 211.

In *Green v. United States*, 700 F. Supp. 2d 1280 (M.D. Fla. 2010), the next case cited by Exxon's *amici* regarding the active operations duties, the relevant discussion focused on whether the negligent party was acting as the defendant's agent and, upon the court's decision that no agent relationship existed, the court held there was no basis for imposing the

active operations duties on the defendant. *See Green*, 700 F. Supp at 1303. Again, the issues presented to the court in *Green* are so wholly distinguishable from the instant matter as to render the citation meaningless for this discussion.

Lastly, Exxon's *amici* cites *Beckwith v. Sanko Kisen K.K.*, 654 F. Supp. 1217 (D.S.C. 1987). In *Beckwith* the court held that: "The record clearly establishes that no portions of the vessel were under the active control of Sanko during the stevedoring operation." *Beckwith*, 654 F. Supp. at 1220. Even limiting our discussion to the five sources of direct control admitted by Exxon and its *amici* in their post-trial briefings, as detailed above, it is difficult to find any argument for the contention that the factual analysis in the instant matter parallels that in *Beckwith*. In *Beckwith*, a forklift dropped a stack of crates injuring the plaintiff. The undisputed facts established that none of the equipment involved was owned or supplied by the defendant, the defendant did not have active control over any portion of the vessel at the time of the incident, and the defendant did not retain any control over the cargo operation. *See id.* at 1220 ("The record clearly establishes that no portions of the vessel were under the active control of [defendant] during the stevedoring operation. Furthermore, [defendant] did not retain active control over the cargo operation."). Based on the

evidence, the court merely eliminated any consideration of imposing the active operations duties and moved on to the duty to intervene.

Here, Exxon has admitted it had a policy to supervise outside contractors and Shipyard workers, its onboard employees dictated various items of repair work by the Shipyard, Exxon provided specifications for completing the work, and Exxon approved the work upon completion. *See* Brief of Appellant's *Amici*, p. 24. In addition, Exxon has admitted that its employees worked directly with the instrumentalities that injured Mr. Minton. *See id.* The trial evidence also demonstrated that Exxon's crew members worked directly with Shipyard workers on a daily basis and that Exxon's port engineer made rounds on the ship with Mr. Minton for several hours every day supervising the Shipyard's work. There was no comparable evidence of concurrent control or active participation in *Beckwith* and, thus, *Beckwith* cannot be utilized as relevant precedent regarding the factual determinations of the jury at issue in the instant matter.

The instant matter is not the type of case in which no reasonable factfinder could possibly find that Exxon exercised concurrent control over the hazardous work and conditions at issue. The trial court properly recognized that it was not its role to decide this factual matter, and it did not

err by submitting these issues to the jury. The lack of relevant precedent offered by Exxon's *amici* in regard to the active operations duties serves to further illustrate the reasonableness of the trial court's decisions.

B. Mr. Minton Presented Ample Evidence for a Reasonable Jury to Determine that Exxon Breached its Duty to Intervene.

In regard to the duty to intervene, Exxon's *amici* does not cite a single case in any jurisdiction anywhere in the country in support of its contention that no reasonable juror could ever find for Mr. Minton based on the evidence presented.

The sole evidentiary support provided in the Brief of Appellant's *Amici* regarding the duty to intervene is that "Exxon employees aboard the vessel were working in the same hazardous conditions" as Mr. Minton. Brief of Appellant's *Amici*, p. 27. In other words, according to Exxon's *amici*, all any vessel owner must do to avoid its duty to intervene pursuant to 33 U.S.C. § 905(b) is subject at least one of its own employees to the hazardous condition at issue in an effort to argue that it couldn't possibly have had knowledge of the potential hazard. This is not a valid defense.

As discussed below, Exxon has admitted that it knew of the hazards posed by exposure to the asbestos-containing products aboard its vessels. *See* Exxon Mobile Corporation's Motion to Set Aside the Verdict, For a

New Trial, and For Remittitur, p. 5 ("Of course, Exxon was aware of the public literature about asbestos hazards ...");[1] Brief of Appellant, p. 24 ("... asbestos was a known and inherent hazard in the Shipyard's work ..."). However, even without such admissions, the fact that Exxon exposed its own employees to the dangers of asbestos exposure cannot be held as definitive evidence that the jury's determination regarding Exxon's knowledge of those dangers was unreasonable.

Exxon's *amici* next attempt to argue that "because Exxon satisfied its turnover duty, Exxon and its industrial hygienists were legally entitled to assume the Shipyard (which had safety procedures in place since 1965) did take the necessary steps to protect its employees from all known dangers." Brief of Appellant's *Amici*, p. 27. However, Exxon's *amici* do not support this legal contention with a single case in any jurisdiction throughout the country. This complete omission of legal precedent is understandable in that the statement of law is inaccurate.

As the United States Court of Appeals for the Second Circuit held in *Moore v. M.P. Howlett, Inc.*, 704 F.2d 39 (2nd Cir. N.Y. 1983):

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[1] Exxon attempted to minimize this knowledge at trial by citing to publically available literature. However, the knowledge evidence at trial was based solely on Exxon's internal documents.

> The shipowner is not relieved of liability as a matter of law simply because it relied on the stevedore to correct the condition or because it relied on the stevedore's judgment to proceed with the work in spite of the condition. "In such circumstances the question whether the owner's actions were negligent or not was for the jury to decide."

Moore, 704 F.2d at 42 (quoting *Lieggi v. Maritime Co. of Philippines, etc.*, 667 F.2d 324 (2d Cir. N.Y. 1981)). This is a matter of law which has been adhered to consistently.

> Reliance upon the stevedore to correct the condition or a decision to "[stand] silently by while the stevedore instruct[s] the longshoremen simply to 'keep working' and 'be careful,' will not relieve the shipowner of liability as a matter of law. In these circumstances, whether the owner was negligent is a jury question.

Tragni v. Establissement Maritime Camille, 705 F.2d 92, 94 (2d Cir. N.Y. 1983). The *Tragni* court further held that "if the stevedore and shipowner are both guilty of nonperformance of their duties, they may be concurrently negligent." *Id.* at 93. Such concurring negligence on the part of another putative tortfeasor, however, has never absolved a negligent shipowner. *See Edmonds*, 443 U.S. at 260 (noting that 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").

As illustrated by the Brief of Appellant's *Amici*, which fails to provide any evidence in conflict with the jury's factual determinations regarding Exxon's breach of its duty to intervene, Mr. Minton presented ample evidence to demonstrate that Exxon had actual knowledge of the hazards of asbestos long before Mr. Minton worked on Exxon's ships and that Exxon's negligent failure to intervene was a substantial contributing factor in causing Mr. Minton's mesothelioma. The evidence was sufficient to prove under the duty to intervene that Exxon had actual knowledge that Mr. Minton's employer was obviously improvident in failing to implement or enforce any asbestos controls aboard Exxon's ships and Exxon was, therefore, liable for failing to intervene and warn Mr. Minton.

This was not the type of case in which no reasonable fact-finder could possibly find in Mr. Minton's favor regarding Exxon's duty to intervene. At the very least, there was a substantial conflict in the evidence that required the fact finders' resolution. The trial court properly recognized that it was not its role to resolve this conflict and it did not err by submitting these issues to the jury.

Exxon and its *amici* have failed to come forth with any legal issue related to the breach of Exxon's duties sufficient to warrant the limited authority this Court has to set aside the jury's verdict.

II. THE TRIAL COURT DID NOT ERR IN EXCLUDING IRRELEVANT COLLATERAL EVIDENCE REGARDING THE ALLEGED KNOWLEDGE OF MR. MINTON'S STATUTORILY IMMUNE EMPLOYER.

In regard to Assignment of Error No. 3, Exxon's chief complaint is that the trial court erred by rejecting irrelevant collateral evidence about the alleged knowledge and negligence of the Shipyard, Mr. Minton's statutorily immune employer. Exxon's efforts to place this improper evidence before the jury, however, would have directly contravened the Supreme Court of the United States' decision in *Edmonds v. Compagnie Generale Transatlantique* and also violated established maritime joint and several liability principles. *See Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979).

Exxon concedes it was aware of the hazards presented by exposure to asbestos. See Exxon Mobile Corporation's Motion to Set Aside the Verdict, For a New Trial, and For Remittitur, p. 5 ("Of course, Exxon was aware of the public literature about asbestos hazards ..."); Brief of Appellant, p. 24 ("... asbestos was a known and inherent hazard in the Shipyard's work ..."). Exxon further concedes that it failed to warn Mr. Minton, and those USW members similarly situated, regarding exposure to those asbestos-related hazards which were foreseeable through the normal

course of Mr. Minton's employment. Yet Exxon denies any and all liability for Mr. Minton's injuries based on its argument that Mr. Minton's statutorily immune employer "already knew whatever information Exxon might have provided." *See* Exxon Mobile Corporation's Motion to Set Aside the Verdict, For a New Trial, and For Remittitur*, p 5;* Brief of Appellant, p. 21 ("General knowledge of a workplace hazard—is not sufficient [to create a duty] because [ ] the vessel owner is entitled to rely on the expert shipyard to take the steps necessary to create a safe work environment.").

In other words, Exxon and its *amici* admit that Exxon failed to intervene to warn or protect Mr. Minton from foreseeable hazards of which Exxon had actual knowledge but claim that Exxon is not liable for any of the resulting injuries because Minton's statutorily immune employer also failed to warn or protect Mr. Minton from those hazards. As previously discussed, this is an incorrect interpretation of the relevant legal precedent. *See e.g., Tragni*, 705 F.2d at 94 ("Reliance upon the stevedore to correct the condition or a decision to [stand]" silently by while the stevedore instruct[s] the longshoremen simply to 'keep working' and 'be careful' will not relieve the shipowner of liability as a matter of law."); *Moore*, 704 F.2d at 42 ("The shipowner is not relieved of liability as a matter of law simply because it

relied on the stevedore to correct the condition or because it relied on the stevedore's judgment to proceed with the work in spite of the condition.").

Exxon further demands that Mr. Minton's recovery for his negligently caused injuries be restricted to the statutorily limited workers' compensation benefits pursuant to the tort immunity granted the employer to whom Exxon apportions fault.

Fortunately for Mr. Minton, and those USW members similarly situated, the trial court recognized that Exxon and the Supreme Court of the United States have diametrically opposed interpretations of the relevant statute.

While Exxon's position demands that Mr. Minton's statutorily limited workers' compensation benefits serve as the sole recovery for his fatal injuries, the Supreme Court of the United States held in *Edmonds* that "[g]enerally, workers compensation benefits are not intended to compensate for an employee's entire loss." *Edmonds*, 443 U.S. at 261. *Edmonds*, a case in which an injured longshoreman sued the owner of the ship on which he was injured, is factually indistinguishable from the instant matter in regard to the issue of a shipowner's inability to apportion of fault to an immune non-party employer in a maritime negligence suit. Nonetheless, while Exxon demands that its negligence be diminished by

the alleged negligence of Mr. Minton's non-party statutorily immune employer, the Supreme Court of the United States held in *Edmonds* that "nothing in either the statute or its history expressly indicates that Congress intended to modify ... the existing rules governing the longshoreman's maritime negligence suit against the shipowner by diminishing damages recoverable from the latter on the basis of the proportionate fault of" his statutorily immune employer. *Id.* at 162.

The Supreme Court in *Edmonds* explicitly contemplated the alleged injustice that Exxon bemoans. However, the Court's holding is an unmistakable repudiation of Exxon's argument.

> [I]t is true that the ship will be liable for all of the damages found by the judge or jury; yet its negligence may have been only a minor cause of the injury. The stevedore-employer may have been predominantly responsible; yet its liability is limited by the Act, and if it has lien rights on the longshoreman's recovery it may be out-of-pocket even less.

Id. at 269. Despite this alleged injustice, the Court ruled against Exxon's proposed system. "Contribution remedies the unjust enrichment of the concurrent tortfeasor...and while it may sometimes limit the ultimate loss of the tortfeasor chosen by the plaintiff, it does not justify allocating more of the loss to the innocent employee, who was not unjustly enriched." *Id.* at 273, n. 30.

In regard to the several liability mechanism inherent in Exxon's position, the Court held that such a scheme "was never mentioned by Congress during the legislative process" and "does not comport with Congress' intent . . . .'" *Id.* at 270-71 (quoting *Northeast Marine Terminal Corp. v. Caputo*, 432 U.S. 249, 278-79 (1977)).

The Supreme Court's reaffirmation that traditional joint and several liability controls modern 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." *Id.* at 260.

The issue properly presented to the jury in the instant matter was whether Exxon's negligence was a substantial contributing cause of Mr. Minton's injuries. The knowledge of Mr. Minton's employer regarding the hazards of asbestos is wholly irrelevant to this factual determination.

Pursuant to the active operations duties pursued by Mr. Minton, the shipowner is not entitled to rely on the employer's expertise to mitigate its duty to warn those workers foreseeably exposed to known dangers. As the Third Circuit explained in *Davis v. Portline Transportes Maritime Internacional*, 16 F.3d 532 (3rd Cir. 1994) regarding the active operations duties, when hazards occur "due to the vessel's active operations ... it no

longer is proper for the vessel to defer to the [employer's] expertise." *Davis*, 16 F.3d at 541. Similarly, the duty to intervene is implicated when the shipowner does not actively control the repairs but does have actual knowledge of the hazards and knows the employer is not adequately protecting its workers. *See Scindia,* 451 U.S. at 175-76. With regard to this latter point, the question is not whether the employer has knowledge that a particular condition constitutes a hazard to its employees; the question is whether the employer is actually doing anything about the hazard. The jury was instructed that it was required to find that the employer was being "obviously improvident" in failing to address the hazard, and the jury is presumed to follow the instructions of the court. So the jury necessarily must have found that Minton's shipyard employer was acting in an "obviously improvident" manner — whether or not it knew or should have known all about the hazards of asbestos — before it could find for Minton on this duty. As a result, under both the active operations duties and duty to intervene, any alleged knowledge on the part of Mr. Minton's employer was wholly irrelevant to the determinations at issue.

Therefore, the trial court correctly excluded collateral facts related to a non-party's concurring negligence as irrelevant based on the inability of such a showing to shed light upon the issues under investigation.

A. The History of the LHWCA Further Establishes that Joint and Several Liability is Applicable to the Instant Matter.

In truth, Exxon's attempt to hijack Minton's case with volumes of irrelevant and immaterial evidence about shipyard knowledge was nothing more than a veiled attempt to allocate fault against Minton's statutorily immune employer. And this improper goal is precisely what the 1972 Amendments to the LHWCA prohibit. For over 125 years, general maritime law has permitted longshore workers to pursue negligence suits against the owners of the vessels on which they were injured. As the Supreme Court of the United States stated in *The Atlas*, "[n]othing is more clear than the right of a plaintiff, having suffered such a loss, to sue in a common-law action all the wrong-doers, or any one of them, at his election; and it is equally clear, that . . . he is entitled to judgment in either case for the full amount of his loss." *The Atlas*, 93 U.S. 302, 315 (1876); *see also Edmonds*, 443 U.S. at 259 n.7.

In 1946, longshoremen such as Mr. Minton were also granted a strict liability cause of action for "unseaworthiness" against vessel owners in addition to the traditional general negligence cause of action. However, due to the contractual indemnity actions brought on behalf of shipowners against the longshore employers, this strict liability cause of action created

a double-recovery against the employer. It was this phenomenon that prompted the 1972 Amendments to the LHWCA.

Prior to 1972, a shipyard worker was able to bring two different claims against a shipowner: (1) a strict liability claim for unseaworthiness, *see Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94 (1946), and (2) a general negligence tort claim, *see Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406 (1953). Indeed, "a longshoreman's maritime tort action against a shipowner was recognized long before the 1972 Amendments" to the LHWCA that codified the action under 33 U.S.C. § 905(b). *Edmonds,* 443 U.S. at 259. In 1972, Congress abrogated the longshore workers' strict liability *Sieracki* unseaworthiness claim, but it expressly preserved their preexisting negligence claim by codifying it at 33 U.S.C. § 905 (b).

As the negligence action had evolved prior to 1972, a shipowner such as Exxon was "responsible to the longshoreman in full" even if the negligence of the shipyard worker's statutory employer contributed to the worker's injuries. *See id.* at 260 (noting that before the 1972 Amendments, "the shipowner would be responsible to the longshoreman in full . . .even if the stevedore's negligence contributed to the injuries").

i. The 1972 Amendments to the LHWCA Represent a Carefully Crafted Congressional Scheme to Maintain

> Injured Longshore Workers' Rights of Redress Against a Shipowner While Eradicating Double-Recoveries Against the Employer.

The United States Congress embarked on the 1972 Amendment to the LHWCA with the clear intention of eliminating the double recovery against longshore workers' statutory employers. It did so by eliminating the shipowners' indemnity action against longshore employers and prohibiting shipowners from seeking a "direct or indirect" allocation of proportionate fault against the longshore workers' statutory employers. But, to even the playing field, Congress also eliminated the strict liability unseaworthiness cause of action against shipowners, which was previously available to longshore workers. Congress, however, left the longshore workers' negligence cause of action against the shipowner untouched. This was a carefully considered *quid pro quo* arrangement that served to realign the rights of the interested parties without diminishing the injured worker's protections or disturbing the statutory immunity afforded to longshore employers under the LHWCA.

As one of the foremost maritime commentators has explained, the 1972 Amendments made three basic changes to the LHWCA regarding third-party actions against vessel owners:

> [T]he longshoreman v. shipowner v. stevedore [employer] indemnity triangle was eliminated, leaving the stevedore [employer] ***absolutely immune from shipowner attempts to seek contribution under any theory of liability***; (2) the Supreme Court's decision in *Sieracki* was overruled, thereby abolishing unseaworthiness as a remedy; however, in its place (3) [the] federal cause of action for negligence was recognized as the basis for third-party actions by longshoremen against shipowners.

1A Benedict on Admiralty, *Historical Development of Workmen's Compensation Law for Longshore and Harbor Workers*, §91 (noting that in cases arising out workmen's injuries, the rule that precludes contribution between joint tortfeasors in admiralty has been consistently applied whenever an attempt to claim contribution based on a joint tort is concerned.).

As Exxon is undoubtedly aware, its improper attempt to allocate fault to Mr. Minton's employer sought to in effect create a several liability regime. Such a transformation of the liability paradigm would irretrievably penalize Mr. Minton and disrupt the *quid pro quo* carefully crafted by Congress. In addition to the unambiguous interpretation of the LHWCA by the Supreme Court of the United States in *Edmonds* discussed above, which affirms the application of joint and several liability to maritime negligence actions, Exxon's legal theory runs counter to established public policy.

By statute, a longshore employer is immune from any liability to its worker beyond that allocated by the workers' compensation system. Section 905(a) of the LHWCA states:

> The liability of an employer prescribed in section 4 [33 USCS § 904] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death ...

33 USCS § 905. As a result, the transformation of the liability paradigm away from a joint and several system would serve to severely narrow the available protections afforded Mr. Minton and those members of the USW similarly situated. Nothing in the legislative history of the 1972 Amendment or in Exxon's or its *amici*'s briefing shows any intention whatsoever on the part of the United States Congress to allow maritime tortfeasors to transfer liability to a statutorily immune employer and thereby restrict the injured longshore worker's recovery to the legally limited workers' compensation benefits.

Consistent with this lack of congressional intent, the Supreme Court of the United States' decision in *Edmonds* condemns Exxon's interpretation. The respondent in *Edmonds* argued, as do Exxon and its *amici* in the instant matter, that Congress intended for shipowners to be

able to point the finger at the employee's statutory employer to directly or indirectly reduce the shipowner's liability. The Supreme Court expressly rejected this argument.

The Court first observed as follows:

> Title 33 U.S.C. § 933 (a), which was unchanged in 1972, states that when a longshoreman "determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive . . . compensation or to recover damages against such third person." Section 905 (b), which was added in 1972, states that the longshoreman "may bring an action against [the shipowner] as a third party in accordance with the provisions of section 933 . . . ."

Id. at 260, n. 6. The Court then noted that the congressional committees considering the 1972 Amendments "repeatedly refer to the refusal to limit the shipowner's liability for negligence, which they felt left the vessel in the same position as a land-based third party whose negligence injures an employee." *Id.* at 267. "Because an employee generally may recover in full from a third-party concurrent tortfeasor, these statements are hardly indicative of an intent to modify" the longstanding tort principle of joint and several liability. *Id.*

This was particularly true in view of the fact that "the 1972 Amendments make quite clear that 'the employer shall not be liable to the vessel for such damages *directly or indirectly,*'" and, accordingly, the Court

held that it "must reject a 'theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts . . . a remedial Act . . . .'" *Id.* at 270-71 (emphasis and ellipses in original).

In short, "[i]n 1972 Congress aligned the rights and liabilities of stevedores, shipowners, and longshoremen in light of the rules of maritime law **that it chose not to change**." *Id.* at 272 (emphasis added). This alignment of rights and liabilities was a "delicate balance" based heavily on intersection of (1) preexisting maritime joint and several liability principles, (2) preexisting common law negligence principles, (3) statutory workers' compensation immunity, and (4) statutory worker's compensation lien rights. The Supreme Court was careful not to "knock" this balance "out of kilter". *Id.* at 273. The trial court in the instant matter properly followed and reinforced this balance and, in doing so, avoided the unprecedented narrowing of Mr. Minton's protections demanded by Exxon and its *amici*.

The trial court preserved this delicate balance by (1) instructing the jury correctly on the two duties Mr. Minton chose to pursue against Exxon under *Scindia Steam Navigation Co. v. Santos*, 451 U.S. 156 (1981), and *Davis v. Portline Transportes Maritime Internacional*, 16 F.3d 532, 541 (3rd Cir. 1994), and (2) refusing to allow Exxon to hijack Mr. Minton's case by

inundating the jury with irrelevant evidence of the alleged concurring negligence of Mr. Minton's statutorily immune employer — evidence that Exxon clearly intended to reduce its share of liability in direct contravention of *Edmonds'* explicit rejection of a several liability or proportionate share liability scheme. By ruling as it did, the trial court upheld both maritime joint and several liability law, as discussed above, and Virginia evidentiary rules.

As this Court has observed, to be admissible, evidence must be both relevant and material, tending to prove a matter that is properly at issue. *See Burgh v. Jones,* 265 Va. 136, 139, 574 S.E.2d 282, 284 (2003) ("While evidence may be relevant in that it tends to establish the proposition for which it is offered, in order to be admissible, it must also be material, meaning that the evidence tends to prove a matter that is properly at issue in the case."). A longstanding tenet of Virginia evidentiary law is that "evidence must be confined to the point in issue, and hence evidence of collateral facts, from which no fair inferences can be drawn tending to throw light upon the fact under investigation, is excluded, the reason being . . . that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice and mislead them . . . ." *Stottlemyer v. Ghramm*, 268 Va. 7, 12, 597 S.E.2d 191, 193 (2004) (quoting *Moore v.*

Richmond, 85 Va. 538, 539, 8 S.E. 387, 388 (1888)). This longstanding Virginia tenet accords with maritime law.

Evidence of a statutorily immune nonparty's knowledge or negligence is not relevant or material because maritime law does not permit an allocation of fault against those entities even in the usual personal injury case, much less a 33 U.S.C. § 905 (b) case like this one. Rather, such evidence improperly raises a collateral issue that "draw[s] away the minds of the jurors" and is an improper attempt to exonerate a tortfeasor "by urging and showing the negligence" of a nonparty who is not able to defend itself. *Stottlemyer*, 268 Va. at 12, 597 S.E.2d at 193; *Von Roy v. Whitescarver*, 197 Va. 384, 393, 89 S.E.2d 346, 352 (1955) (observing that a defendant who is negligent "cannot be exonerated by urging and showing the negligence of the other").

Exxon's attempt to point its finger at the shipyard would drastically narrow the 33 U.S.C. § 905(b) duties and upset the delicate balance that Congress established with regard to statutory employer liability. This is of critical importance to the membership of USW because this carefully crafted Congressional scheme was intended to maintain the traditional protections of longshore workers such as Mr. Minton.

III. THE TRIAL COURT DID NOT ERR IN AWARDING PUNITIVE DAMAGES WHICH ARE PERMISSIBLE PURSUANT TO MARITIME LAW AND 33 U.S.C.S § 905.

The criteria for determining whether punitive damages are available in the instant matter are not in dispute. Both Exxon and Mr. Minton agree that the trial court's power to uphold the jury's determination regarding punitive damages depends on common law precedent as it relates to maritime law in general and 33 U.S.C.S § 905 specifically.

The Supreme Court of the United States has held that "[h]istorically, punitive damages have been available and awarded in general maritime actions." *Atl. Sounding Co. v. Townsend*, 557 U.S. 404 (2009). This fact should not be in dispute. In regard to 33 U.S.C.S § 905, Exxon concedes the statute does not preclude punitive damages. *See* Brief of Appellant, p. 44 ("... § 905(b) makes no provision for punitive damages.").

As the Supreme Court of the United States has long held, congressional silence on issues such as punitive damages indicates its intention to leave the common law unchanged. *See e.g., Shaw v. R.R. Co.*, 101 U.S. 557 (1880) ("No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express.").

Therefore, as discussed further herein, maritime law has historically permitted punitive damages and 33 U.S.C.S § 905 does nothing to alter that longstanding common law precedent. Thus, no legal support exists to preclude as a matter of law the punitive damages award determined by the jury in the instant matter.

A. Maritime Law Allows for the Award of Punitive Damages.

In the instant matter, Exxon attempts to argue that punitive damages are "unavailable" based on common law precedent. Brief of Appellant, p. 45. This is a curious contention in light of the ample and longstanding judicial pronouncements to the contrary.

In *Atl. Sounding Co. v. Townsend*, 557 U.S. 404 (2009), the Supreme Court of the United States confirmed the availability of punitive damages in maritime cases in no uncertain terms: "The general rule that punitive damages were available at common law extended to claims arising under federal maritime law." The Supreme Court then proceeded to document the line of cases establishing this settled principle. *See e.g., Lake Shore & Michigan Southern R. Co.* v. *Prentice*, 147 U.S. 101 (1893) ("[C]ourts of admiralty ... proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages ... ");*The Amiable Nancy,* 16

U.S. 546 (1818) (noting that in other factual circumstances "it might be proper to ... visit upon [the defendant] in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct."); *McGuire* v. *The Golden Gate*, 16 F. Cas. 141 (C.C.N.D. Cal. 1856) ("In an action against the perpetrator of the wrong, the aggrieved party would be entitled to recover not only actual damages but exemplary, -- such as would vindicate his wrongs, and teach the tort feasor the necessity of reform."); *Ralston* v. *The State Rights*, 20 F. Cas. 201 (E.D. Pa. 1836) ("[I]t is not legally correct ... to say that a court cannot give exemplary damages, in a case like the present, against the owners of a vessel.").

In the face of this clear and explicit precedent, Exxon provided no support whatsoever for its contention that punitive damages are "unavailable" as a matter of law because no such support exists.

B. Nothing in the Statute or Legislative History of 33 U.S.C.S § 905 Alters the Historical Availability of Punitive Damages Under Maritime Law.

As previously stated, Exxon concedes that 33 U.S.C.S § 905 does not preclude punitive damages. *See* Brief of Appellant, p. 44 ("... § 905(b) makes no provision for punitive damages."). There is also nothing in the legislative history of the 1972 Amendments to the Act suggesting that

Congress intended to alter the established remedies available since its enactment.

According to the House Report drafted during the 1972 amendment to the LHWCA, a vessel's negligence "can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation -- just as they are in cases involving alleged negligence by land-based third parties." H.R. Rep. 92-1441 (1972). The House Report goes on to state that "nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." *Id.*

Nonetheless, Exxon attempts to argue that punitive damages "are not available under § 905(b)" without providing a single relevant supporting precedent from any jurisdiction throughout the country. Brief of Appellant, p. 44.

Exxon argues that "§ 905(b) expressly displaces any preexisting remedies by providing that its remedy is 'exclusive.'" *Id.* at 45. The sole authorities provided for this contention are *Miller v. Am. President Lines*, 989 F.2d 1450 (6th Cir. 1993) and *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811 (2001).

Exxon states that *Miller* stands for the principle that the "LHWCA thus 'creates a worker's compensation scheme ... which is exclusive of the other remedies and does not provide for punitive damages.'" *Id.* at 44 (quoting *Miller*, 989 F.2d at 1457). However, *Miller* is no longer good law on this point. *Miller* was overruled by *Atl. Sounding Co. v. Townsend* which held that a seaman "is entitled to pursue punitive damages unless Congress has enacted legislation departing from this common-law undertaking." 557 U.S. 404.

In *Garris*, the only other case cited by Exxon, a wrongful death suit was brought under general maritime law on behalf of a non-seaman killed while working on a vessel in navigable waters. The issue was whether the LHWCA precluded a negligence action against the respondent which was neither the injured party's employer nor the vessel owner. The Court held that such a third party action was not precluded. The issue of punitive damages was not addressed by the *Garris* Court in any form.

Despite Exxon's lack of relevant authority, courts have addressed the precise question at issue in the instant matter, which is whether 33 U.S.C.S § 905(b) precludes an award of punitive damages. *See e.g., Kahumoku v. Titan Mar., LLC*, 486 F. Supp. 2d 1144 (D. Haw. 2007) ("... § 905(b) does not preclude an award of punitive damages under any general maritime or

admiralty law theory."); *Wheelings v. Seatrade Groningen, BV*, 516 F. Supp. 2d 488 (E.D. Pa. 2007) ("If Congress meant to limit the damages available under the LHWCA, it would have done so expressly, as it did with respect to the Death on the High Seas Act. Since the LHWCA is silent on the availability of punitive damages, the court follows general maritime law ... "); *Rutherford v. Mallard Bay Drilling*, 2000 U.S. Dist. LEXIS 9053 (E.D. La. 2000) ("any right to punitive damages under this statute emanates from general maritime law, unlimited by statutory constraint.").

Based on the discussion contained herein, maritime law has historically allowed for the award of punitive damages and nothing in 33 U.S.C.S § 905, its legislative history, or the Brief of Appellant indicates the intention of Congress to alter the longstanding remedies available to seamen such as Mr. Minton. Therefore, the trial court was correct in awarding Mr. Minton the punitive damages determined by the jury.

CONCLUSION

WHEREFORE, for the foregoing reason, this Court should uphold the trial court's ruling and DENY all four assignments of error forming the basis of this appeal.

Dated: May 14, 2012

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC

BY: _____

Nathan D. Finch, Esq. (VSB #34290)
Motley Rice, LLC
1000 Potomac Street, N.W.
Suite #150
Washington, D.C. 20007
nfinch@motleyrice.com
(202) 232-5507
(202) 232-5513 (fax)

Alex R. Straus, Esq.
Motley Rice, LLC
28 Bridgeside Boulevard
Mt. Pleasant, SC 29464
astraus@motleyrice.com
(843) 216-9164
(843) 216-9440 (fax)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was emailed and sent via first class mail, postage prepaid, this 14 day of May 2012, to the following counsel:

Counsel for Respondent Rubert Minton
William W.C. Harty, Esq.
Robert R. Hatten, Esq.
PATTEN, WORNOM, HATTEN & DIAMONSTEIN, L.C.
12350 Jefferson Avenue - Suite 300
Newport News, VA 23602
(757)223-4500 Telephone
(757)249-3242 Facsimile

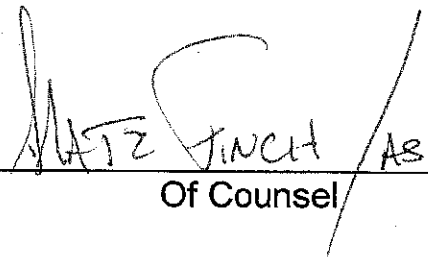
Counsel for Petitioner
Exxon Mobil Corporation
Eric D. Cook, Esq.
WILLCOX & SAVAGE, P.C.
One Commercial Place, Suite 1800
Norfolk, VA 23510
(757) 628-5500
(757)628-5566 Fax

Monica T. Monday, Esq. (VSB No. 33461)
Gentry Locke Rakes & Moore
P.O. Box 40013
Roanoke, Virginia 24022
(540) 983-9300
(540) 983-9400 (fax)
Monday@gentrylocke.com

Jonathan D. Hacker
Scott M. Edson
Brianne J. Gorod
O'MELVENY & MYERS LLP
1625 Eye Street NW
Washington DC 20006

(202) 383-5300
(202) 383-5414 (fax)
jhacker@omm.com
sedson@omm.com
bgorod@omm.com

Counsel for Amici CSA and AWO
William R. Mauck, Jr., Esq.
WILLIAMS MULLEN
Williams Mullen Center
200 South 10th Street
P.O. Box 1320 (23218-1320)
Richmond, VA 23219
(804) 420-6436
(804)420-6507 Fax



Of Counsel