VIRGINIA:
IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

NANCY S. MORTON, Executor of the
Estate of STANLEY L. MORTON,
deceased,

Plaintiff,

v. AT LAW NO.
01180-VC

EXXON-MOBIL CORPORATION,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Newport News, Virginia

October 29, 2008

Before: THE HONORABLE TIMOTHY S. FISHER, JUDGE

Appearances:

PATTEN, WORNOM, HATTEN & DIAMONSTEIN
By: ROBERT R. HATTEN, ESQUIRE
WILLIAM W. C. HARTY, ESQUIRE
CONARD METCALF, ESQUIRE
Counsel for the Plaintiff

WILLCOX & SAVAGE
By: BRUCE T. BISHOP, ESQUIRE
ERIC D. COOK, ESQUIRE
and
ARMSTRONG & ASSOCIATES
By: WILLIAM H. ARMSTRONG, ESQUIRE
Counsel for the Defendant

(Whereupon, the reporter was sworn and proceedings commenced at 10:00 a.m.)

THE COURT: Good morning.

MR. HATTEN: Good morning, Your Honor.

MR. COOK: Good morning.

THE COURT: Let's start with each of you just making your appearance on the record.

MR. HATTEN: Yes, sir. I'm Robert R. Hatten with the law firm of Patten, Wornom, Hatten & Diamonstein and I represent the plaintiff, Nancy Morton, widow and executor of the estate of Stanley Leon Morton, plaintiff.

MR. HARTY: I'm William Harty, Patten, Wornom, Hatten & Diamonstein and I represent the estate of Morton as well.

MR. METCALF: Conard Metcalf, Patten, Wornom, Hatten & Diamonstein, and I'm here on behalf of the Mortons.

THE COURT: As opposed to your twin brother Conrad Metcalf?

MR. METCALF: He's better looking.

THE COURT: He appears at most of the depositions.

MR. METCALF: Yes, he does.

MR. COOK: Your Honor, Eric Cook from Willcox & Savage on behalf of Exxon-Mobil Corporation and Sea River Maritime, Inc.

MR. BISHOP: Your Honor, Bruce Bishop from Willcox & Savage on behalf of Exxon-Mobil and Sea River Maritime.

MR. ARMSTRONG: And Bill Armstrong. I'm from Armstrong & Associates in California, pro hac vice. I'm here on behalf of Exxon-Mobil and Sea River.

THE COURT: All right. Well, welcome everybody. I thought we'd have a new system with the law clerks. I've given them cards. One side says grant, the other side says deny. I figured I'd just let them hold them up at the end of the arguments. If it's a tie, I'll break it. Is that all right with you?

Let's do the easy part first. We found a stray file, Stanley Leon Morton versus Metropolitan Life Insurance. Apparently Donald Patten is handling that litigation. Do we know anything about that? Does Mr. Harty want to make a note there or something?

MR. HATTEN: I think we have settled with Met Life, but they're not in this case.

THE COURT: Yeah, it's just kind of

popped up as a stray, so if it needs to go away, we could perhaps help our docket numbers --

MR. HATTEN: Yes, sir.

THE COURT: -- with Met Life.

MR. HATTEN: But I'll double-check that.

THE COURT: That's fine. There's nothing else entered. I don't know if they've been served, frankly.

MR. HATTEN: It is a petition or a separate suit?

THE COURT: Separate suit.

MR. HATTEN: Okay.

THE COURT: Separate suit against Met Life. Anyway, you can leave it over here.

MR. HATTEN: In this action the only defendants we've named are Exxon and Sea River.

THE COURT: They brought that down a week or so ago, and I thought I'd clean that up while we're here at this moment.

As far as the kind of order that we go in, when I ask for the listing, it's really not to be set in stone. It's so that we don't lose track of what we've got.

MR. HATTEN: Yes, sir.

THE COURT: And, hopefully, if we have

some things that we can kind of take care of, if everybody has agreed with it, I guess there's a couple of them that are somewhat moot. I guess there's an objection to Mr. Castleman and you're apparently not even calling him; is that correct?

MR. HATTEN: Correct.

MR. BISHOP: That's correct, Your Honor.

THE COURT: So there might be a few of those we can kind of work our way through.

Now, one came in. There was a notice that came in yesterday, and I know that I had seen the name and then I found the situation. I don't think there's any briefs on this from anybody that Dr. Balzer --

MR. COOK: No briefs, Your Honor.

THE COURT: I didn't think so.

MR. HATTEN: There are no briefs on Dr. Balzer. We're going to talk about Dr. Balzer later on, and they may or may not want to bring him, but I think that -- I think that our --

THE COURT: These always start out this way. This one looks easy. No, it's not.

MR. HATTEN: But I think our evidence, frankly, is pretty much going to take to the end of that second week and I think the timing of his

testimony is probably moot.

MR. BISHOP: In the abundance of caution we wanted to notify the Court of that. And, Bobby, you remember I called you as soon as I figured that out.

MR. HATTEN: Yes. I was confident the case would still be going on on the 24th.

THE COURT: Because I was just kind of looking and it looked like his scheduling was kind of messed up because of the second amended complaint?

MR. COOK: Yes, Your Honor. He had originally been scheduled for the first trial.

THE COURT: Okay. And there didn't seem to be any question about the substance of his testimony, which, of course, may come up later. But at least for this motion what do you want to do with it?

MR. HATTEN: I think it's probably moot, but I don't object to the timing of it because I -- based on the witnesses that we intend to call, it looked to me like we couldn't possibly finish before Thursday of the previous week. And even if we finished on that Thursday, we could use that Friday for instructions. But I assume they'll have witnesses on that Friday, unless he's going to be their only witness, which I don't know.

THE COURT: Are you bringing him in,

because I understand the question is using his deposition. Are you bringing him in person?

MR. BISHOP: No. We're bringing him live, Your Honor.

MR. HATTEN: I cancelled the deposition for reasons that will become obvious.

THE COURT: So he's coming live, so I don't need to worry about this?

MR. COOK: Your Honor, if I could, I think the point of the motion itself was because we were aware of Dr. Balzer having scheduling difficulties if the trial was to conclude prior to November 23rd. It sounds like from plaintiff's counsel they intend to go longer than that, and so that may be moot. We filed this out of an abundance of caution so that the both the Court and counsel was aware of the scheduling difficulty in that and Dr. Balzer simply couldn't be there before the 24th.

MR. HATTEN: The 21st is a Friday and the 24th is a Monday, and so I can't see any --

THE COURT: That's Monday of Thanksgiving week?

MR. HATTEN: Yes, sir. I can't see a scenario where we're going to finish before Thursday the 20th.

THE COURT: Now, my plan, since we've jumped into scheduling at this point, we have two -- we discussed obviously the Veterans Day issue at that point. And, frankly, we may end up just playing that kind of by ear, I suppose. If we get a jury on Monday, then I assume that we probably would start Wednesday because I don't intend to start out making the jury mad at that point.

Now, some of these people frankly may not have that day off, you know, so we could start on Tuesday if we get a jury on Monday, so I don't know. I guess the upshot of what we do about Veterans Day is kind of looking at the jury and see who's there and what's going on.

I assume most people have not planned to be out for a week for Veterans Day, so that's -- I don't think that's a big issue. But obviously that means we can keep the courtroom open and we have deputies here and we do things on a holiday that would not ordinarily be scheduled, so it impacts a lot of people. I don't have any problem doing it. Do you want to plan on trying this case on Veterans Day?

MR. HATTEN: I'm fine with that, but I didn't know whether you could get staff in here that day.

THE COURT: Well, rumor has it that I can, but that poses some issues, obviously. Technically the clerks are not supposed to be in here anyway during civil cases according to our circuit court clerk, but I can have the building open, I can have people here. But some of that I think I might kind of at just look at the jury and where we are and what's going on and who's done what to whom and that type of thing, rather that jump on right at the beginning of the trial.

Then we get to the end of the trial, which is probably going to be around Thanksgiving. Now, the governor has declared for the state -- well, that's Christmas. It's still just a half day Wednesday, I guess, Thursday and Friday.

Now, we run into a problem, obviously, and I assume this may pop up on your questionnaire, of people who may have plans to travel on the Sunday. They may plan to be gone that whole week at that point, so we might be weeding them out, I suppose, in the beginning. But clearly I don't intend to do much on that Wednesday unless it's like an emergency. I think the last one is now being retried. Didn't that one go on Thanksgiving?

MR. HATTEN: I think it went right up to

it.

THE COURT: Right up to it and it came back a hung jury?

MR. HARTY: Yes, Your Honor.

THE COURT: I wonder what impact that had, tomorrow's Thanksgiving. So I would hope not to do that. So I don't know, we may be trying this case in December. I'm not going to panic terribly. Judge West has already agreed to be the settlement judge for Friday if you want to meet with him, but I don't know whether you want to do that.

All right. So Dr. Balzer is not a motion we're going to be dealing with this morning, is that what you're telling me?

MR. HATTEN: Not at this time.

MR. BISHOP: Yes.

THE COURT: I guess we'll put abeyance on that at that point.

In terms of the next issue that did pop up in scheduling, are we kind of making some progress on the questionnaire? Nancy's going to bring the list down.

MR. HATTEN: Judge, we just got 13 more questions handed to us this morning we'd never seen.

THE COURT: Okay.

MR. HATTEN: And I don't know why we can't just use the questionnaire we've got, and they use these additional questionnaires -- they've got some more questions they want to ask. They can do it on voir dire, which they're perfectly free to do.

I think these questions run the questionnaire up to 84 questions from 71, and I think that we've done -- we've used the same one now five times, and I can't believe that 20 percent more questions have to come in, most of which -- all of which could easily be covered in voir dire.

THE COURT: You're going to get -- if you think you're not going to get voir dire just because you have a questionnaire, the questionnaire -- at least the theory of the questionnaire, as I would understand it, is to kind of be the hatchet as to weed out, and also say if everybody hasn't introduced everybody in their law firm and that type of thing, get the big questions out like, you know, is this going to be inconvenient for three weeks and try to flush out the ones that are going to go like in mass.

And then, you know, we -- the last one we did the jury in one day and I think the trial they're doing now, what did it take, two or three days to get a jury?

MR. HATTEN: They got a jury in two days.

THE COURT: Two. So you still get the individual voir dire. We've done them usually in groups of three that come out, so you get the specific voir dire questions anyway. And it's not as limited as you might expect in most state courts and most federal courts. In these cases we kind of let you go. If it gets to be about 3:00 in the afternoon, that's about enough.

But if you're worried about putting specific questions on there, you're still going to get it anyway. We're just looking to get the big cut out for the people that are obviously going to go and just get them out fast.

MR. HATTEN: If you add the subparts to this, it's six questions more because they've got six questions about how do you feel, do you feel strongly, do you disagree, undecided, agree, strongly agree, that kind of touchy-feely question that --

THE COURT: Okay.

MR. HATTEN: So I would ask that we keep the questionnaire we've got. If they want to ask that on an individual voir dire, let them have at it.

THE COURT: Okay. Well, I'm going to eat lunch today, so while I'm eating lunch you-all can

work on that.

Now, let's see. I've got -- what have we got? One proposed schedule and we've got yours, hopefully, if I can find it. I was looking for their proposed schedule. It came in with the notice of pretrial conference and Dr. Balzer's stuff.

MR. HATTEN: I have a copy if you want that.

THE COURT: No, that's fine. I'm sure I have it. It's separate from the -- the others. Oh, well, it will pop. If do you have an extra copy of yours, Mr. Cook?

MR. COOK: Unfortunately, Your Honor, the only extra copy I have is one that has my writing on it.

MR. HATTEN: Here's theirs.

THE COURT: In five minutes it will come up and hit me in the hand. The others I left in the folder, but I took some things home last night, so it got stuck in a different one. Oh, here it is. I was looking for a fax copy and it was an original.

Okay. Now, what we will do, I guess, I have both the schedules and if any of you want to just volunteer some quick ones that have been resolved that I don't know about or anything like that.

MR. BISHOP: I think, Your Honor, the motion in limine to require disclosure of settlements has been resolved. I think that's agreed to.

MR. HARTY: Yeah, I think so.

THE COURT: That's apparently the --

MR. HARTY: Well, I guess a part of that, because your motion actually had two different points to it. You had one to disclose settlements, which we have. The other part was about nonparty entities on the jury verdict.

MR. COOK: Not on this particular motion. That goes with the -- there's a separate motion on this.

MR. HARTY: That's fine.

THE COURT: It appears that's Number 3 on each, Number 3 on each of you.

MR. BISHOP: It is, Your Honor.

THE COURT: So that will be resolved, and I assume that Mr. Harty is volunteering, as usual, to prepare the final order regardless of disposition?

MR. HARTY: Sure, Your Honor, I will be happy to.

THE COURT: Congratulations.

MR. HARTY: I think as you noted earlier, the issue with Castleman has been resolved.

MR. HATTEN: That's just withdrawn.

THE COURT: Withdrawn?

MR. COOK: Correct.

MR. HATTEN: Because he's testified over and over in this Court.

MR. BISHOP: It's withdrawn because you're not going to call him.

MR. COOK: With respect to Number 2 on both lists, Your Honor, motion to strike the assumption of risk, that's moot. We don't intend to raise the assumption of the risk doctrine as a defense in this case.

THE COURT: All right. We'll mark that as withdrawn.

MR. COOK: I think as well, Number 1, production of all power points, videotapes and other demonstrative aids, I think we can agree to do that, provided it applies to both parties.

And then our only potential issue with that, Your Honor, is that Dr. Balzer will actually be flying in on September 23rd prior to September 24th, so if we were to call him on the 24th, we might need to produce his demonstrative aids that evening of the 23rd by a strict 24 hours prior to his testimony.

THE COURT: Can he -- are they capable

to be e-mailed before? I assume he's not making them up on Friday.

MR. HATTEN: Well, Your Honor, there's a lot about Dr. Balzer. Let's just take that as a -- an exception to this, because we're going to have a lot to talk about with Dr. Balzer's exhibits and issues there.

THE COURT: For the moment, agreed except for Dr. Balzer?

MR. COOK: Yes, Your Honor.

THE COURT: But I assume regardless he's probably not using like an overhead projector and little see-through plastic things, is he?

MR. COOK: I don't know the answer to that, Your Honor. Dr. Balzer has been around for some time.

THE COURT: Yeah. I assume most of his stuff is capable of like e-mail or some electronic delivery. Frankly, if it's hard copy it can probably be mailed sooner because I'm guessing he's given this particular testimony before.

MR. HATTEN: No.

MR. COOK: I don't believe he has, Your Honor. It's never been an issue.

THE COURT: He hasn't? Oh, like I said,

Balzer came up because I saw him two or three weeks ago and then I saw this thing this morning. I didn't see that in the stack at this point, so I was getting suspicious.

All right. Anything else that is not terribly controversial?

MR. HATTEN: Some of these are easier than others, and Number 5 is the next one up. The predicate for their motion is that Mr. Morton filed a compensation claim June 22nd, 1979 for asbestosis. He didn't ever file a compensation claim for asbestosis.

The employer filed a notice that the employer thought he had asbestosis, and when this was shown to him at his deposition, he'd never seen it. He didn't ever file a claim for asbestosis, and so there may have been some positive chest x-ray at the clinic that they sent an employer notice over to the Department of Labor, which they're required to do, the shipyard's required to do.

But the testimony of Mr. Morton was that he thought his last exposure was in the '79, '80 time frame. But there's no -- there's no evidence that's going to come into this case about him having asbestosis because he -- he testified he'd never heard of that diagnosis before.

MR. BISHOP: Your Honor, I think the issue remains of what's the relevancy of evidence after the date of his last exposure. His last exposure, I think we all agree, is in the '79 --

MR. HATTEN: It's '79, '80.

MR. BISHOP: -- '80 time frame, Your Honor.

THE COURT: Well, evidence a big word. This one is referring to shipyard activities.

MR. HATTEN: Right.

MR. BISHOP: And I think in their response, Your Honor, they agreed on the issue of exposure and state of the art, evidence after the date of last exposure would be irrelevant.

MR. HATTEN: And we would use 1980. I think that was what he said. He said '79, '80, that's the last time he think he was exposed.

THE COURT: Granted as to anything after 1980?

MR. BISHOP: Well, granted as to anything after 1980 that deals with state of the art or exposure. There are other reasons where they may try to use evidence after 1980. And our position there, Your Honor, is they need to lay a proper foundation about why evidence after the date of last

exposure is relevant to exposures that occurred prior to that date.

THE COURT: Okay.

MR. BISHOP: And I'm not asking Your Honor to rule on those specific things until we find out what it is they want to offer.

MR. HATTEN: Well, state of the art is the only issue that the 1980 date has any relevance to whatsoever.

THE COURT: Right.

MR. HATTEN: After 1980, for instance, they began to have requirements in their contracts about asbestos abatement, which had never existed before that. And so part of our proof is going to be, you know, they never put this in their contracts until 1981. Well, that's a date after 1980, but -- and they have -- they had a procedure after -- in 1981 about that, and could just as easily have been and should have been before that.

So the issue about state of the art is really all we're talking about. And so to the extent that the issue relates solely to the state of the art, I agree, but there are other issues that something after 1980 will be relevant to causation, course of conduct, all kinds of things.

THE COURT: Does that sound about right?
MR. BISHOP: Your Honor, except to this extent, that we don't necessarily agree with Mr. Hatten's argument about why a contract executed after the date after his last exposure --
THE COURT: The question is admissibility of evidence and what happens after it comes in.
MR. HATTEN: Yeah. Relevance I've got to show any time, but I would ask that this ruling be limited to state of the art.
THE COURT: Any objection?
MR. BISHOP: That's fine, Your Honor.
THE COURT: All right. State of the art, and we'll change it to 1980.
Let me dip my toe in here and decide this is a stupid question. The questions regarding the hull exposures --
MR. HATTEN: About the what?
THE COURT: The hull exposures.
MR. HATTEN: The hull exposures not being vessels?
THE COURT: I'm not sure I'm going to grant summary judgment but --
MR. HATTEN: No, we agree they're not

vessels. They -- the HOUSTON, work on the HOUSTON was not a vessel, work on the GALVESTON was not a vessel, we agreed to that. But that doesn't mean that activities or information related to those ships is not relevant to a lot of other issues, but that's not going to be the basis for the negligent exposure of Mr. Morton.

But, for instance, on the HOUSTON, they built it there, they knew exactly what was on the HOUSTON, all the asbestos that was on it, and we have what was on it. And then the HOUSTON comes in for repairs, then it's going to be relevant to, you know, what Exxon knew was on that ship because it was covered with asbestos. And the same for the GALVESTON as to what custom and practice may have been on the GALVESTON as that may relate to the credibility of other testimony in the case.

But -- and that -- exposures on that case, on those two ships are not the basis for the causation and negligence that we're putting together on this case.

MR. HARTY: If I can just clarify that, Your Honor. Exposures while the HOUSTON was under construction and was still a hull, that doesn't necessarily mean if it came back in later for a

repair. And the conversion of the GALVESTON when it was essentially in a quasi-construction mode, we're not claiming exposure for those two.

But as Mr. Hatten said, any other evidence may be relevant and, of course, that would be a determination we'll make at that time.

MR. COOK: Your Honor, if I may respond to this.

THE COURT: Yes, sir.

MR. COOK: I believe we're dealing kind of collectively with respect to the --

THE COURT: On your list it looks like 13, 14, 15.

MR. COOK: As well as 16, Your Honor. I guess essentially the predicate for this, Your Honor --

MR. HARTY: It's 13.

THE COURT: Yeah. Your numbers are a little bit different.

MR. COOK: Well, motion for partial summary judgment on the hull.

THE COURT: Yeah, on this one your two numbers are a little different. Yours for the plaintiff it looks like are 16, 17, 18, 19?

MR. HARTY: Yes, Your Honor.

MR. COOK: Yes.

THE COURT: Okay.

MR. COOK: Your Honor, the point being here that the plaintiffs sued Exxon and Sea River as vessel defendants, and in order to potentially have vessel liability under 33 U.S.C. 905(b), you first have to have a vessel in order for the defendants to actually own and, therefore, potentially give rise to liability in this case.

And that's why we filed the motions with respect to these, where we feel that the plaintiff should have to prove as to the particular hulls, structures or ships in which they're trying to claim exposure, that they have to first prove that it was in fact a vessel. That pertains to the hull 573 which later became the HOUSTON, the hull that later became the EXXON GALVESTON, as well as any other ship that may not have been sufficient to satisfy the definition of a vessel under 905(b).

And when we look at whether or not evidence of those hulls is in fact admissible, Your Honor, we don't think that it is because of the fact that if we look at the situation there, plaintiffs have agreed they're not claiming liability and they're not claiming damages for that situation. But then they want to try and bring in evidence of what

occurred on ships where they could -- where they admit that there could be no potential duty. And then they're going to try and say, Well, here on these other ships where there could be a potential duty, they did the same thing on a hull, they would have done the same thing on a vessel.

So they're trying to introduce two disparate positions, Your Honor, and trying to kind of muddle the two. It's going to be speculative and it's going to confuse the issues in front of the jury. And, frankly, a curative instruction with respect to that to tell the jury, Well, this happened on a hull and therefore the defendants can't be liable for that, the probative effect of that is going to be substantially outweighed by any -- excuse me, the probative effect is substantially outweighed by the prejudicial effect, Your Honor.

MR. HARTY: Your Honor, I guess first of all by way of clarification, the only -- the only structures -- I'll call them structures -- that I'm aware of that are really at issue here are hull 573, which is the HOUSTON when it was under construction, and then the GALVESTON conversion project, which was a quasi-construction project.

If there are other vessels that they

contend were not vessels, we listed -- in our response to their motion that we show that is a vessel, we listed all the other repair vessels, and I haven't seen a response.

Now, if he's saying that some of those were not vessels and that we have to prove those, I mean, is that encompassed within your motion?

MR. COOK: I think there's a few different prongs to it. First, Your Honor, there's testimony from one of the coworkers in the case that he performed new construction on the ESSO NEW ORLEANS. Now, Mr. Morton wasn't present on that ship and so on that basis alone and the fact that it was a structure, a hull during the time that he performed that work, we think that evidence should be excluded.

THE COURT: It wouldn't be relevant for exposure. He wasn't there.

MR. COOK: Well, right. Mr. Morton wasn't there. It wouldn't be relevant on course of dealing either. Mr. Morton didn't perform new construction on that ship, but we think plaintiffs may attempt to introduce evidence of that structure as well, Your Honor.

THE COURT: In terms of the knowledge requirement they had to do it?

MR. COOK: Your Honor, I'm not quite sure where they're going to go with it. They say it's admissible on course of dealing, so they may try and say, Well, they had an owner's representative and here's what the owner's representative did on a hull, and therefore he did that with respect to a vessel when it came in for repairs.

THE COURT: You're working into the refinery argument now.

MR. COOK: Well, we're not.

THE COURT: Refineries are not vessels.

MR. HARTY: Let me try to clarify a little bit. We are not claiming under the 905(b) negligence claim exposure on ships that were under construction, okay. We don't necessarily agree with all their arguments, but we're not claiming for those ships while they were under construction. Now, the NEW ORLEANS came back in quite a few times for repair, and that's the only part of this that really requires vessel status.

Now, they're going to bring an expert in named Dr. Cushing and he's going to talk about all the custom and practice in the maritime industry, and he did not distinguish between construction projects, which is mainly what he did and mainly what he was

involved in, and repair projects.

And so to the extent that custom and practice in the maritime industry becomes relevant in this case -- we don't think it's tremendously relevant, but to the extent that it does, then we ought to be able to show, just like he's going to talk about his construction practices and his relationship between shipyards and shipbuilders and shipowners, that custom and practice was happening here, too.

And it's a specific practice with Exxon interacting with the Newport News Shipyard, and the fact of the matter is that even during the construction projects, Exxon had a port engineer onboard the ships and he was tremendously involved. And, as a matter of fact, they have a marine design and construction and repair division of Exxon, and their sole job was to design ships, was to provide the blueprints for the ships and to govern and -- and be involved in all aspects of ship construction.

Now, the only thing we're saying is we're not going to try to claim exposure on those hulls. But to the extent that other evidence about interactions and custom and practice and sophistication of the defendant and things of that nature, or even the types of products that may have

been on this hull, installed on this hull that later was repaired by Mr. Morton, we think that is very relevant.

THE COURT: Anything else?

MR. COOK: Your Honor, I would just go back to what I said and I don't want to have to repeat myself again. I think it's just a preliminary matter that the plaintiffs have to prove that it is in fact a vessel in order to give rise to vessel owner liability.

THE COURT: I don't there's any question about that. Now, there's only one motion for summary judgment, the ESSO HOUSTON 573; is that correct?

MR. COOK: That's correct, Your Honor. Since we couldn't use deposition testimony, that's the only one we could file based on the pleadings.

THE COURT: The general assembly is not in session, so I think you can get that fixed between now and then.

MR. COOK: I'll try to.

THE COURT: The motion for summary judgment is denied.

The motions in limine, and these would be referring to the defendants' list as 13, 14, 15, 16, and on the plaintiff's list it looks like 16, 17, 18 and 19?

MR. HATTEN: Yes, 19.

THE COURT: Okay. I think everybody agrees that the liability cannot be based upon exposure involving something that's not a vessel.

MR. HATTEN: Correct.

THE COURT: So the testimony will only be allowed to a relevant issue other than exposure, which the defendants are free to continue to object to as we move along in the trial.

MR. COOK: Yes, Your Honor.

THE COURT: So we'll kind of have to see what it is at that point. So those would be those one, two, three, four motions.

Do we want to defer the include nonparty entities on the verdict form, because that's kind of a verdict form question, or should we answer that now based on what they attempt to prove in their case?

MR. HATTEN: Nonparty entities?

THE COURT: Yeah.

MR. HATTEN: Nonparty entities is well settled by Your Honor.

THE COURT: I'll say no now. Just inadvertently I guess I was looking for some way to kind of do that later.

MR. HATTEN: That has been settled by

Your Honor in the Oney case. That case went to the Supreme Court. They refused to take that issue. It went to the Supreme Court of the United States. They refused to take that issue. Issues that -- this is an issue that's been well argued under the McDermott case and others.

THE COURT: I saw Mr. Souter. You probably don't know who he is, do you?

MR. HATTEN: Who?

THE COURT: William Souter. He's a clerk of the Supreme Court.

MR. HATTEN: No, I don't know Mr. Souter.

THE COURT: He's a retired Air Force colonel JAG.

MR. HATTEN: Your Honor, at this point in time, unless it's some compelling reason why you should reverse your prior rulings which have been adopted by the other judges in this circuit as well, and now no writs and no errors have been granted by two superior courts, I think that issue is well done.

MR. COOK: Your Honor, our position on that, and I'll be brief, it really looks at the underlying rationale of McDermott.

THE COURT: Arch Wallace wanted to put unknown forms of asbestosis, was it?

MR. HARTY: Yes, Your Honor. It was pipe covering.

THE COURT: Collection was going to be difficult.

MR. COOK: Well, Your Honor, we will look to identify the specific entities we want to put on the verdict form, and it's really the entities that were named in this suit and then subsequently nonsuited by the plaintiff, as well as the United States Navy. And first I'll note at the outset that the United States Navy does not have immunity for vessel owner liability. The reason why we made that such a focus of our motion is that plaintiffs had repeatedly represented that Navy was immune, and that's not the case.

So really we can kind of deal with the analysis about the Navy and the nonsuited entities together. And the issue is when we look at McDermott, McDermott said that the rationale was that the plaintiff's potential recovery at trial is limited by the plaintiff's own choices and not by outside forces. It's in that instance that the defendants -- essentially the situation, Your Honor, is when the plaintiff's own recovery is limited by outside forces, then the plaintiff is allowed to recover from the

defendants remaining at trial.

If the plaintiff elects not to proceed against a party or if the plaintiff elects to voluntarily dismiss a party, then that entity should be included on the verdict form. And, Your Honor, I'd point you specifically to -- and we cited this in our brief and I don't believe that other defendants have cited this to the Court before, but Sigler versus Grace Offshore Company, which is a Louisiana Court of Appeals decision, 663 SO.2d 212.

And the Court there stated, For purposes of the allocation of fault under McDermott, we discerned no distinction between settlement and a voluntary dismissal. Both are agreements entered into by the plaintiff which serve to limit his recovery as opposed to the outside forces such as insolvency or statutory immunity discussed in McDermott.

And so McDermott stands for the proposition when the plaintiff is unable to recover due to a situation such as insolvency, then the plaintiff can recover from the defendants remaining at trial. But if the plaintiff limits their own recovery such as in a settlement, then the plaintiff forgoes recovery from that particular entity.

And there's also, Your Honor -- if I

could refer the Court to one other case that we cited in our brief, and that's Calhoun versus Yamaha Motor Corporation, 350 F.3d, which is the Third Circuit, 2003, Your Honor. And there the Court noted that the comparative negligence rule announced in McDermott likely applies to nonparties who are voluntarily dismissed by the plaintiffs.

And that's what we're looking to do here, Your Honor. We're not looking to put any unnamed or unidentified entities on the verdict form. We're looking to identify specific nonsuited parties and the United States Navy because the United States Navy does not have immunity. The plaintiff has elected not to pursue them.

And in particular with the nonsuited parties, Your Honor, I would use John Crane as an example, as we did in our brief, where the plaintiffs have recovered several multi-million dollar verdicts against John Crane in asbestos litigation in the last few years. If they voluntarily elect to nonsuit John Crane and forgo the expense of proceeding to trial against John Crane, then that effectively operates as a zero sum settlement, Your Honor, and in that situation the plaintiff has limited their own recovery. It's nothing that the defendants have done,

and, therefore, the defendants should be allowed to put those nonsuited entities on the verdict form for any entity which the plaintiff elected not to sue.

MR. HARTY: Your Honor, first of all, with Sigler and Calhoun, many defendants have raised those cases in the past. As a matter of fact, both of those cases were in John Crane's petition for a writ of certiorari to the United States Supreme Court. They argued all of those same arguments to the United States Supreme Court, they argued all those same arguments to the Virginia Supreme Court and they argued all those same arguments to this court in the Oney case.

The fact of the matter remains that in each of those cases the defendants are trying to blow the McDermott holding way out of proportion of what McDermott was about. McDermott was a very -- was a fairly narrow case. They said over and over and over again, This applies when there has been a settlement. This is to determine what the maritime setoff regime would be, not to determine whether nonparties can come into a verdict form.

And, ultimately, their rationale that they're trying to stretch when stretched to its logical extreme would mean that, you know, a plaintiff

elects who to name in the first place. But under their rationale as they stretch McDermott, they could bring anybody in the entire country and put them on a verdict form and try to prove a case -- an empty chair case against them because the plaintiff elected not to sue them in the first instance. And so it really is a stretching way beyond the facts and the question presented and the rationale of McDermott.

McDermott, the place where they -- the single sentence that all of these defendants rely on says, In such cases the plaintiff's recovery against the settling defendant has been limited not by outside forces, but by its own agreement to settle. It was a setoff case. It only functions in the context of a settlement when there has been setoff.

And as I pointed out in our brief, if McDermott had gone the other way and decided instead of a proportionate fault approach, we'll do a pro tanto approach like Virginia does, this would never have been an issue because it would have been completely ludicrous to say after the fact, Judge, I know they never sued the party or I know they never settled with this party, but we want a dollar-for-dollar setoff of the nonsettlement. So it's just a ludicrous expansion.

MR. HATTEN: Your Honor, could I?

THE COURT: Sure.

MR. HATTEN: The simple answer is this: If they wanted to sue the United States Navy, cross-claim the United States Navy, they could sue them just as easily as we could. If they wanted to sue these people who were nonsuited, they could have sued them just as easily as we could. That's the exception that the case law allows. If they want them in here, they can bring them in here.

It's joint and several liability, and by definition that means you sue who you want to sue and they're liable for the whole thing, unless that person goes and gets somebody else that they can hold responsible and that they can prove a case against.

MR. COOK: Your Honor, if I could just make two brief points.

THE COURT: Yes, sir.

MR. COOK: First, we can't cross-claim against the Navy because we have to file a separate action against them due to the operation of federal law to proceed against them in a 905(b) action, so that's not an avenue that would be open to us in this case.

In addition, Mr. Harty made the point

that this essentially opens up the universe to go ahead and put anyone on the verdict form. That's simply not the case. We would still bear the burden of proving liability as to these nonsuited parties and the United States Navy in order to place them on the verdict form. If we did not bear that burden in the case, Your Honor, then those parties would not go on the verdict form pursuant to maritime law.

THE COURT: I was going to deny the motion. I just wanted to see Mr. Hatten jump up again.

The motion to include nonparty entities on the verdict form is denied. Since you said the words joint and several liability, Mr. Harty, you want to jump into the application of joint and several liability?

MR. HARTY: It's really, Your Honor, essentially the mirror image motion.

THE COURT: Hence the reason I did it.

MR. HARTY: Right. And I think all of our arguments there apply. And the only thing I would respond to is with regard to the Navy, I did cite this Court to the code section where the Navy agrees to be amenable to lawsuit. It's not only 905(b) actions, it's ship-related actions in general. And they agreed not only to be amenable to suit in the first instance,

but also to interpleader by the defendant. So they could have interpleaded them, they didn't, and it was their choice as much as anybody else's.

THE COURT: That's still on his motion for limine in joint and several liability.

MR. COOK: Our arguments are the same in response to that one, Your Honor, so I won't belabor the Court by repeating them.

THE COURT: All right. That's Number 7 for the defendants, the one we just finished, Number 10 of the -- excuse me. Yeah, Number 10 on the plaintiff's. That will be granted.

I'm just looking at them. Number 9 on the plaintiff's is the smoking issue. That's Number 6 on the defendants' list.

MR. HATTEN: Yes, sir. In every case the defense makes the same argument. This is -- this is an issue where the prejudice obviously outweighs the relevance. The plaintiff doesn't have any intention of putting into evidence the life expectancy table, but the issue of mesothelioma brings into play an eighteen month life expectancy. That's about what Mr. Morton lived. And there's not any evidence, nor has there been one shred of evidence that smoking would have shortened his life expectancy. They've not

disclosed any opinion about that. He quit 23, 23 years before he ever got the mesothelioma.

And so for the reasons that this has been granted in every case and approved by the Supreme Court of Virginia in the Watson case, this is a red herring that I would ask that the Court not permit to be part of this case. Thank you.

THE COURT: Gentlemen?

MR. BISHOP: Briefly, Your Honor, we don't seek to introduce evidence of smoking generally, Your Honor. We understand the Court's ruling on that. However, as the Court has done in prior cases, to the extent life expectancy is an issue in the case, the defendants have been allowed, sometimes outside the presence of the jury, to ask plaintiff's expert whether the smoke -- whether the smoking history would have affected his life expectancy. He smoked two packs a day for 33 years. If we lay a sufficient foundation that it affects life expectancy, then it may well be relevant.

THE COURT: I think the question is life expectancy post diagnosis of mesothelioma. Not that I'm an expert, but it appears to be 12, 18 months. Three years is a miracle. I'm not sure that smoking has ever vindicated -- I'm talking about life

expectancy in general. But once you're diagnosed with mesothelioma, I assume you could probably smoke like a furnace. What difference does it make?

MR. HATTEN: That's right. And any testimony about smoking and the life expectancy is going to be pure speculation. There's no medical evidence about it whatsoever that's been presented in this case by either my doctors or their doctors. It's a wish and a prayer.

THE COURT: Let's put it this way: He stopped smoking about 25 years ago?

MR. BISHOP: Yes, Your Honor.

THE COURT: I suppose in the appropriate case, and I don't know, if you had somebody that was smoking three packs a day up to the time he was sitting in the doctor's office and they say, You've got mesothelioma, then, you know, it might be relevant. I don't know. But the likelihood is that the smoking might kill you before the mesothelioma if you're doing that.

The motion in limine to exclude the smoking is granted.

I'm just picking and choosing as I go along. The defendants' motion to prohibit inflammatory comments by plaintiff's counsel, which

would effectively mean Mr. Hatten can't participate in the case. Granted.

MR. COOK: That's not quite what we're going for, but that's a good point.

THE COURT: What else you got left to say at that point? Okay. I'll grant the EXXON VALDEZ part right now. I don't know that there's any need for those two words to appear.

Now, I don't know what you are going to do on voir dire. Do you plan on kind of going into that anywhere, any of the EXXON VALDEZ?

MR. BISHOP: I need to further think about that, Your Honor.

THE COURT: Yeah. I mean, I don't see how it's relevant at all to Hatten getting up and jumping up and down about the EXXON VALDEZ, but I can see where you-all may want to ask that question somewhere on voir dire. I don't know that it's terribly relevant.

MR. HATTEN: If they bring it up --

THE COURT: Well, yeah, if they bring it up. And I don't think there's any real allegation that Exxon is part of the asbestos industry, however, I don't know how I can keep him from stop saying those two words together. It's going to come out somewhere.

MR. HATTEN: I'm going to say they're as sophisticated as the asbestos industry, that much I will say because I can prove that. But I'm not going to say they are the asbestos industry.

THE COURT: Well, they'll probably say they're much more sophisticated than the asbestos industry.

MR. HATTEN: That's correct.

THE COURT: What's good for the United States is good for Exxon.

MR. HATTEN: But I'm not going to say they're the asbestos industry. Obviously, they're not the asbestos industry, but I think their knowledge being as sophisticated as the asbestos industry is certainly relevant.

THE COURT: I'd have to pull the motion back out, but I remember the VALDEZ, the asbestos industry, asbestos victims, you know. I mean, when you get into the end of this case with argument, there's going to be stuff said at that point.

Anything else other than the EXXON VALDEZ?

MR. BISHOP: No, Your Honor. In the improper or prejudicial comparisons, plaintiffs in their response indicated they don't foresee comparing

the defendants' conduct to cigarettes, Ford Pintos, Firestone tires, EXXON VALDEZ.

MR. HATTEN: No, it's much worse than that. I've got better examples.

THE COURT: Anyway, I'll certainly restrict any comments on the EXXON VALDEZ. I don't think that's relevant, unless the defendants go into it, and I would never have known any of you to be too shy about objecting to things.

MR. BISHOP: That's fine, Your Honor. Thank you.

THE COURT: Lisa O'Donnell had an apportionment medical malpractice case in here a couple of weeks ago and had a defendants' verdict. And I was chatting with her about trying cases with Shuttleworth, and her big comment was when he stood up she just said, Don't do anything to mis-try this case when he started to argue. So I assume Mr. Harty will be whispering that to Mr. Hatten.

MR. METCALF: Again.

THE COURT: Okay. Who had his hand on your coat as you're standing up.

Defendants' motion to preclude late filed motions by the plaintiff. I don't remember exactly what the order was in Oney, but I'll be glad

to do it in the same way. And, of course --

MR. HATTEN: If there's a lengthy motion -- I think the Court said if it's a lengthy motion, I don't want lengthy motions before trial.

THE COURT: We'll just follow the rules. If you've got something that's huge, you run the risk of not having it heard, particularly if it's something that obviously could have been brought up prior to the morning of trial.

MR. HATTEN: Yes, sir, and I will -- I mean, today I'm going to bring up an issue related -- the motions that we have brought up before, before trial that the defendants didn't like --

THE COURT: All the motions.

MR. HATTEN: Well, I know they didn't like them.

-- was to hold the defendants to the four corners of the disclosure statement.

THE COURT: Yes.

MR. HATTEN: And we have a motion, for instance, in this trial, I can make it today, I can make it at trial, but to hold the four corners of Mr. Balzer's testimony to his disclosure statement because every sentence in it says, I may testify about whether it was night or day. And then obviously the

implication is, I may not testify about it. And so everything he says in his disclosure statement is, I may testify about this subject, I may testify about that subject.

I don't think that's a proper disclosure for anybody. I don't think it would take more than five minutes to tell you about that and I'll do it today, but that's the kind of motion that we filed repeatedly in the Jones case that initiated this process where I said to the Court, This disclosure does not disclose opinions and facts as required by the rule, and so I -- I move to strike the disclosure. And I'm going to move to strike the disclosure of Mr. Balzer on that very ground, among others, and so that was one of the reasons I was bringing that up.

We can put that at the end of today, you can take that under advisement, we can get to it another another time. But that's the type of motion throughout their disclosures if they're saying, He may testify about this subject matter, and there are no opinions and no facts, that I'm going to make that motion.

And if that's a five-minute motion -- if you consider that a five-minute motion, I'll wait

until the time of trial. If that's something you want to take up in this pretrial conference, I'll be happy to do it today.

THE COURT: Are there more objections other than just Dr. Balzer?

MR. HATTEN: To other --

THE COURT: Yeah. I don't know who else is coming in here testifying.

MR. HATTEN: That's a standing objection that I have to the disclosures of the defense, of their experts.

THE COURT: As I recall last time, there were a couple that were even easier to do in advance because you had taken the deposition and you'd asked, This is what's in your disclosure that says you're A, B, C expert and the expert said, No, I'm not.

MR. HATTEN: Right. In this case with Mr. Balzer, for example, I didn't take it for a number of reasons. First, the disclosure used "may" about subject matters I had no information. Secondly, they listed a hundred documents out of the Newport News Shipyard that relate to the negligence of the shipyard. And, thirdly, they had a 65 page summary of those documents -- of those depositions that they had given Mr. Balzer. He's going to make his opinions on

the basis of not only depositions that are inadmissible, but summaries of depositions that have been prepared by lawyers.

So because I consider everything about his testimony to be inadmissible, I didn't take his deposition to give him an opportunity to cure a problem that I thought was incurable.

THE COURT: All right. Well, we obviously know Dr. Balzer is coming up sooner rather than later, so we'll see where we are this afternoon. What we may do is pick a day next week and come back and chat about Dr. Balzer. If we know about him now, I'd rather do him sooner rather than later at that point.

There are certainly things that pop up with experts that are going to occur during the trial, but if you already know about it now, let's do it now so you don't at least hold the jury up while we're hanging around.

MR. HATTEN: Yes, sir.

THE COURT: Let's see. How about the motion in limine to strike the punitive damages and/or preclude evidence of the argument about the financial conditions?

MR. HATTEN: Your Honor, historically

that has been resolved by the Court saying, We're not going to mention punitive damages during the opening. And at the end of the plaintiff's case, if the plaintiff has survived the motion to strike on the punitive damages aspects of it, the Court will at that time permit evidence about the financial condition of the company. I think that preserves the right of both parties without subjecting either to the potential prejudice along the way.

THE COURT: Any objection to that?

MR. COOK: Your Honor, I agree to that procedure.

THE COURT: Okay. The -- as it was mentioned, we did instruct on punitive damages in Oney. And although I don't know that it was the exact legal basis for it, but I can tell you the exact moment in the trial when I decided that was probably going to happen. It was when the corporate representative was asked, What did you do with all the asbestos you quit using? And he said, We sold it to third world countries.

So there was going to be some more legal issues, but at that moment I was kind of like, Yeah, there's probably going to be some punitive damages, but the jury didn't award it, so I don't know. That

was one of those nice moments in a trial. We're not going to lose any money on it. We sold it to third world countries.

Let's see. Working my way down here, let's do the defendants' motion for summary judgment. It's all based on the interrogatories, I believe.

MR. COOK: Yes, Your Honor.

THE COURT: All right.

MR. HARTY: Is that the duty to intervene?

THE COURT: Yeah, it's 31 on theirs -- on yours and 30 on theirs. See, if I keep moving around then you can't get ready for the next one.

MR. HATTEN: I'm trying to follow you.

MR. COOK: I can't even find which one I'm going to.

THE COURT: I told you the list is not necessarily how we go through. I just wanted to know how many you had. The last one I did of these they settled on Friday with Jonathan Smith-George, and he still had like 15 defendants in the case. We had papers all across the room. I was trying to figure out whose motion was whose. I almost said no when they called in and said, We settled.

It's like law school. You never know who's going to get called on. Go ahead.

MR. COOK: All right. Your Honor, with respect to the motion for summary judgment on the duty to intervene, it's really based on the Scindia duty. And under Scindia the plaintiff has to prove actual knowledge of an obviously improvident failure on the part of the plaintiff's employer to protect him from hazards.

And we sent an interrogatory in this case specifically geared to that, which I believe -- has the Court seen that interrogatory?

THE COURT: Oh, yeah.

MR. COOK: Many times?

THE COURT: Well, let's put it this way: I've read everything. Don't give me a test on it. Multiple choice I might be able to pass.

MR. COOK: The point here, Your Honor, being we asked the question, Do you contend that plaintiff's employer failed to protect -- failed to take or initiate adequate safety precautions or procedures to protect plaintiff against airborne asbestos fibers, and then we had a number of subparts to that.

And the plaintiff came back and said they had identified no documents or witnesses responsive to that interrogatory, no information that

the plaintiff's employer -- Mr. Morton's employer, the shipyard, had failed to take adequate safety precautions to protect him from exposure to asbestos.

And under Scindia, Your Honor, the shipowner has a right to rely on the employer in the first instance, and that's why we sent that interrogatory. Plaintiff's have failed to identify any failure. As such, there can be no obviously improvident failure under Scindia, and, therefore, there can be no potential duty to intervene.

And on this point, Your Honor, I think another case might set it forth as well, and I'm referring to Greenwood versus -- and I'll probably mispronounce the name -- Societe Francaise De. It's 111 F.3d 1239. It's the Fifth Circuit Court of Appeals, 1997. And in that case, Your Honor, the Court referred to the Scindia duty and went through and said, Therefore, it might well be reasonable for the owner to rely on the stevedore's judgment that the condition, though dangerous, was safe enough. The question then is, when should it become obvious to a shipowner that a stevedore's judgment based on its specialized knowledge is obviously improvident or dangerous. It seems to us that consistent with Scindia's basic thrust, in order for the expert

stevedore's judgment to appear obviously improvident, that expert stevedore must use an object with the defective condition that is so hazardous that anyone can tell that it's continued use creates an unreasonable risk of harm, even when the stevedore's expertise is taken into account.

The pinpoint cite for that, Your Honor, is 1249. The point here being that all the cases that have looked at Scindia consistently refer to the fact that the shipowner has the right to rely on the employer in the first instance. And that's because the employer is in the best place to protect its employees. It's not something where all of a sudden the Supreme Court said, Well, now, the vessel owner somehow has this broad encompassing duty to protect everyone that comes on its vessel from any harm. That's not the case.

The shipyard gave instructions to its employees. It established safety procedures. It went in and it told its employees what to do. And if there's no failure on the part of the employer, Your Honor, then as a necessary logical step, there can be no actual knowledge on the part of the vessel owner that there was a failure on the part of the employer and, therefore, there could be no duty to intervene

under Scindia.

MR. HARTY: Your Honor, there's a very big difference here between the turnover duty and what's expected on the turnover duty and the duty to intervene and what's expected on the duty to intervene. In Scindia what the Court was saying is, We're going to look at different circumstances because the overall duty of care is a -- is a reasonable care under the circumstances. We're going to look at three possible circumstances that often come up in stevedoring operations or in maybe ship-repairing operations as well, and we're going to try to parse out these circumstances.

First of all, the Court said, First of all, if the ship maintains active control or actively participates in the operations, whether they're a cargo-loading operation or ship-repair operation, if the ship actively participates or never actually turns over or if it regains control, even not exclusive control, but even partial control of the ship or its compartments, then the shipowner has a duty not only to see obvious things and protect shipowners or shipyard workers, but also it has a duty to inspect, to discover, and that duty is a continuing duty under the active control duty.

And then the Court said, Okay, let's look at the other option, the option where the shipowner turns the ship entirely over to the stevedore on the portions of the ship that the stevedore is working in, turning it over to the stevedore. And the terminology that Scindia and the following circuit court cases have always used is that the shipowner turned exclusive control of that part of the ship or that equipment to the stevedore.

And so when that happened, what Scindia says is, We're not going to say that the shipowner has a continuing duty to inspect and discover hazards. The shipowner has said, Here, Stevedore, we did a preoperation inspection, we did a walk-through and we looked at things and I've told you what I think might be the hazards as a part of the turnover duty, which is not at issue here, and now I'm turning it over to you. Go do what you do best. My hands are off of it, I'm out of it, you know what you're doing, you go do it. And all Scindia was saying is in that circumstance, Shipowner, you don't have to go in there and have a continuing duty to inspect and to discover hazards that might be arising during the course of the stevedore operation.

But the Supreme Court said, We're not

going to go to the -- to the far extent of what the shipowner wanted in Scindia of saying, You are never under a duty to protect. And so what the Supreme Court said is, Look, if you are in the area and if you see a hazard that is obviously improvident to you, Shipowner, then -- and that's the first prong, and then it becomes reasonably apparent to you that the shipyard or the stevedore is going to take no action to resolve that problem, then you do have a duty to intervene because that's an obvious issue.

And in Davis, a federal court case out of the Third Circuit, and that is an obvious -- an active control case and I understand that, but they said these issues of what is obvious are normally issues for the jury. It's normally going to be a decision for the jury to determine whether that was an obvious issue or not.

So, first of all, this is a motion for summary judgment and there is a huge conflict in the evidence over whether Exxon who knew, admits they knew in their answers and admits they knew in their answers to interrogatories about the problems with asbestos as early as 1937, three decades before any of this happened with Mr. Morton, whether Exxon is a very experienced and very sophisticated company, seeing

people work unprotected with asbestos on their ships, that would have been an obvious danger.

We believe the evidence shows that. And the fact of the matter is that all of our answers to interrogatories, up until this one that they want to say "got you" on, said, We never used controls. All the witnesses in this case said, We didn't even know we were supposed to use controls until the late 1970s. Nobody ever used controls. Their own corporate representative, Mr. Tompkins said, I was there between '65 and '68, Newport News Shipyard, on the BOSTON. Nobody was using controls. And so they had -- they had extensive controls in their own refineries and we're going to get to that issue, I'm sure, in a moment.

THE COURT: It's somewhat unavoidable.

MR. HARTY: They had very sophisticated controls in their refineries. Their director of safety, Mr. Hammond, Dr. Hammond, said in 1994 that all of those procedures from their refineries applied to their maritime divisions as well. He says he traveled --

THE COURT: Did you write that letter, by the way?

MR. HARTY: He did write that letter.

THE COURT: No, did you write it.

MR. HARTY: No, he wrote it. It's a nice letter, I'll admit.

MR. HATTEN: Couldn't have written it any better.

THE COURT: I'm sure it will come up.

MR. HARTY: But, anyway, the question here is based on Exxon's knowledge. Was the uncontrolled work with asbestos that they were observing on their ships obviously improvident to Exxon, number one.

And then, number two, we're talking not about a single instance, and that's what happens with a lot of these cases. You've got a single trip and fall on a ship, a single instance, moment in time, never continuing activity or practice. But in this case you've got shipyard workers who are working on Exxon vessels throughout the 1950s, throughout the 1960s, throughout the 1970s never using controls.

Somewhere along that process Exxon had a duty to intervene. If they had intervened in the 1950s when it was prudent, two decades after they had already instituted controls in their own plants, then Mr. Morton may never have been exposed. If they had intervened in the 1960s, they would have reduced his

exposures and the corresponding risk. But the point of the matter is that the duty to intervene is not foreclosed by a single interrogatory answer.

Now, going to that interrogatory answer, our understanding of that interrogatory was, do we have witnesses or exhibits that go to Newport News Shipbuilding's corporate knowledge and negligence. And we told them in our answer to that interrogatory that -- and I'll find that for you. I think I quoted it at length. We said, Without waiving this objection, we listed a number of objections, I understand that my attorneys have not named Newport News Shipbuilding and Drydock Company and its predecessors and successors in my case because these entities are statutorily immune to suit under the Longshore Harbor Worker's Compensation Act and the Virginia Workers' Compensation Act as the decedent's employer. Because of this, my attorneys have not specifically investigated the matters requested in this interrogatory and are not appropriately appraised of which particular entity or entities owned the shipyard during the time frame of the decedent's exposure. My attorneys, however, do not contend -- do not contend that large corporations such as the shipyard, Exxon and Sea River and their predecessors

and successors could not have discovered the hazards of asbestos prior to 1960. Rather, I understand that my attorneys believe that any entity of this size would have known of and would have protected against these hazards. My attorneys, however, are not advised as to these entities' actual procedures in this case or whether they could have implemented such procedures, if any, aboard the defendants' vessels without the defendants' permission.

And then finally, My attorneys advise they have designated no witnesses and no document for this case relating to the particular matters requested by this interrogatory because this information is irrelevant to this case and is inadmissible as a matter of law. And the reason why it's irrelevant and inadmissible, I can't get that word out today, is for the reasons that we stated in our motion to strike their intervening negligence defense and their sophisticated user arguments, and that is that it's at most concurrent negligence.

But that does not go to the duty to intervene. The duty to intervene does not necessarily take into account the shipyard's corporate knowledge going back to whenever it was or the shipyard's formal practices going back to whenever it was, because the

fact of the matter is that the shipyard may well have had knowledge going back to 1900. Who knows? I don't know. And they may have instituted controls of practices that were very sophisticated going back to 1900. Again, I don't know. But if the workers on the ship were ignoring those and it was obviously improvident to the shipowner and it was apparent to the shipowner that the shipyard was doing nothing to correct that danger, then they had the duty to intervene.

So the focus on the duty to intervene is what were the workers on the ship doing, not what was the corporate knowledge going back years and years for the shipyard as a corporate entity. And that's how we understood this interrogatory. All the other interrogatories dealt with the ship worker's knowledge and the shipyard worker's knowledge. We said, They had no knowledge and they used no controls.

MR. HATTEN: And, Judge, could I just make one -- the evidence to this point is that every single witness in the case has testified that there were no controls, there were no safety procedures being observed while Mr. Morton was onboard the ships.

THE COURT: Kind of solves the custom and usage question, doesn't it, because the answer is

no.

MR. HATTEN: Yes, sir.

THE COURT: Not to jump in there, but go ahead.

MR. COOK: Your Honor, if I may, Mr. Harty talked for a long time, so I hope the Court doesn't invoke the 15-minute rule on summary judgment.

THE COURT: We're here all day.

MR. COOK: I'd like to read the interrogatory here because I don't think it states what Mr. Harty thinks it states.

Do you contend the plaintiff's employer failed to take or initiate adequate safety precautions or procedures to protect plaintiff against exposure to airborne asbestos fibers? If so, A, state the safety precaution or procedure that you contend should have been but was not implemented. B, state the date such safety procedure or precaution should have been implemented. And then it goes on to C, D and E to identify the documents and witnesses, the custodian of records, and any witnesses with knowledge related to the answer. And plaintiff's response to that was they have no documents and no witnesses responsive to the interrogatory.

Interrogatory 4, Your Honor, goes

directly to the obviously improvident issue under a duty to intervene. For any safety precaution or procedure identified in response to Interrogatory Number 3 above, do you contend that plaintiff's employer's failure to take or initiate adequate safety precautions was obviously improvident in the maritime industry and trade and/or shipyards. If so, identify the entities, take into procedure the entities, the date they implemented the procedure, the individuals and documents.

There's been a lot of talk about Exxon's knowledge in this case with respect to this as well, Your Honor. And really I think we need to look at the Scindia standard. The Scindia standard is actual knowledge. It's actual knowledge of an obviously improvident failure on the part of the stevedore. And plaintiffs want to kind of approach this in an amorphous fashion and say, Well, Exxon knew because they had this report in 1937. We don't necessarily agree with their characterization of the report in 1937 or the events leading up to it, but the key under Scindia, Your Honor, is really dealing with the owner's representative on the ground. It's an actual knowledge standard such that it gives rise to that port engineer or the owner's representative there in

order to say, I know that this is a failure to protect this particular employee, and that's what gives rise to the duty to intervene.

Plaintiff wants to seem to stretch this duty to intervene so that somehow if someone at Exxon has knowledge, that now we have to have an expert. For each particular area that Exxon has knowledge on its ships, we have one person there. It's a port engineer. He doesn't have industrial hygiene training, he doesn't have medical training, he doesn't have training with respect to any of these particular areas.

The shipyard was required under the Walsh-Healy Act and OSHA in the 1970s to protect its employees from asbestos exposure. And we ask that question, Was there a failure to protect the employees? And they said, We don't have any information on that. And it's just a logical leap, Your Honor, if they don't have documents or witnesses to say that there was in fact a failure on the part of the employer, then there can't be actual knowledge on the part of this port engineer on the ground to say, Well, somehow they didn't comply with these regulations and somehow they did not protect their employees.

And in particular here, Your Honor, the

issue has to go specifically to Mr. Morton. It's not this kind of amorphous, Well, Exxon brought ships in and Exxon did procedures in refineries and somehow should have required another company to implement those same exact procedures. The issue is whether or not the shipyard failed to protect its employees. We don't think that the shipyard failed in that regard.

You know, the plaintiff points to this as a concurring negligence situation. We don't think that that's a correct and accurate representation. We think that the evidence in the case will show that the shipyard acted reasonably with respect to Mr. Morton given the state of the art and the knowledge at the time, and plaintiffs have failed to identify any failure to protect him as they would be required to do under Scindia and, therefore, summary judgment is appropriate.

In addition, Your Honor, just to identify and just to fix a mischaracterization, if you will, of the record, John Tompkins testified that he didn't recall safety procedures. He didn't say there weren't safety procedures being done. And they also have a witness talking about wet-down procedures in the 1960s with respect to asbestos-containing insulation. Another witness contradicted himself and

said he was aware in 1969 of the hazards of asbestos, so there is conflicting evidence in that regard in the case.

But with respect to this interrogatory, plaintiffs have admitted that they have no documents or witnesses responsive to that. I think the Court should rely on plaintiff's interrogatories in the case, and under the plaintiff's interrogatory answers and Scindia, Your Honor, summary judgment is warranted with respect to this issue. Thank you.

THE COURT: Lucky for me this is a procedural question. If we look at TransiLift Equipment Cunningham, that's 234 Virginia 84, 1987 decision of the Supreme Court, this is the antidote to the got-you motions. I'm sure you're familiar with it. If not, you might want to laminate it and keep it in your office.

While not conclusive, depositions and answers to interrogatories are admissible at trial for impeachment purposes and as substantive evidence. Answers to interrogatories not conclusive when introduced into evidence at trial. Moreover, a litigant witness has the right to explain or clarify his testimony, including previously entered deposition statements and interrogatory answers. Resolution of

any inconsistencies and discrepancies is peculiarly within the province of the jury.

So -- and, of course, the other thing as you-all probably know, this particular Supreme Court in Virginia, and our chief justice in general, really, really wants to see the full record when it comes up to them. They don't want to see final decisions on demurrers or summary judgment unless it's -- as I've said before, it has to kind of walk up the aisle of the courtroom and jump up on the bench and slap me.

So the motion for summary judgment is denied. That's the only other motion for summary judgment, I believe, isn't it?

MR. COOK: That's correct, Your Honor.

THE COURT: Not that I was using it as a standard as the only other one.

Let's see here. Another easy one. Plaintiff's motion to limit the number of exhibits and medical authorities. That's Number 15 on the plaintiff's list and Number 12 on the defendants' list.

MR. HATTEN: Yes, sir. Your Honor, can I approach the bench?

THE COURT: Yeah. Well, didn't I get the list of exhibits and the authority already?

MR. HATTEN: Maybe you have, but I just

want you to be able to see what it is we're contending with. We have been given -- you know, this case is a lot like trying to spear squid. You get near them and you just get an ink screen in front of you so that you can't see what it is this case is all about. And so that we don't see what this case is all about, Exxon has listed almost 2000 exhibits. They comprise about 15,000 pages.

Now, we cannot possibly even read all those exhibits in two weeks to, you know, even formulate what our response would be. Judge Conway had this situation come up with Dana. Dana came in with 3,000 documents like this. And he said, No, we're not going to do this. People have got a right to know what you are going to offer at trial and it has to be a reasonable number of exhibits.

And so Judge Conway put us under terms of 150 exhibits and 100 reliance articles. Now, frankly, that was pretty strict. In a case like this that may not be appropriate, so we've suggested 400 exhibits and 200 reliance articles. But without that, Your Honor, there's no way that we have any idea how they're going to defend this case in reality when they've got 15,000 pages of documents included here.

So, Your Honor, when you have a company

the size of Exxon and they're squirting this much ink into the -- in the water, we can't see what the case is going to be about. And that's just basically unfair. They say this is a violation of due process so that they have some unlimited number of exhibits that nobody's talked about, nobody's identified, all this kind of stuff. That's just ludicrous.

Now, we've got more exhibits than we need, too. I agree with you. And I can get that down to a reasonable number, and the number of exhibits that we listed are exhibits that have been on our standard witness list for a while. And, frankly, it would be very easy for me to get down to 400 exhibits, very easy. But there's got to be some reasonable basis for us to understand what is actually going to go on at trial, because in every one of those cases it ends up being about 100 exhibits, 125 exhibits that actually go to the jury. And to have to look at 2,000 and 15,000 pages, these are in about nine or ten banker boxes, just paper.

And so it's just a common sense rule, Your Honor, that just because Exxon has unlimited money to be able to throw all this ink in the water, they should not be able to use that as a subterfuge to the rules which require a good faith and reasonable

limitation of the evidence that's presented in a trial. Just because it's something that might possibly have some relevance to an issue doesn't mean that you have to list them -- list that document as an exhibit.

They've got hundreds of issues, for instance, of a magazine, asbestos worker magazine. Not anybody in this case has ever been a member of the union. Asbestos worker magazine. And they said, Well, there was a pipe coverer one time at the shipyard named Phelps and he read it. He said so back in 1979. He's seen one in a deposition and so we put them all in here. That's an example of just the -- the ridiculousness of this -- of this exhibit list.

And so I think the Court's entitled to know what the evidence going to be, and so are we. And so I would ask that the Court put us on terms, both sides.

THE COURT: Yes, sir.

MR. BISHOP: Your Honor, the defendant is in a different position than the plaintiff, particularly in a maritime case. We have to anticipate what their evidence is going to be before we can decide what evidence we need to produce. And, secondly, Your Honor, the burden is on us to prove up

those shares for any settling defendant. So by that very nature, the defendant needs to list more exhibits than -- in many instances than the plaintiff has listed.

We have a procedure, Your Honor, that's already agreed to that can handle this already, Your Honor. We filed the exhibit list, they have copies of the exhibits. They likewise have filed their exhibit list, we have copies of their exhibits. We have their reference list, they have our reference list. We have a rule, Your Honor, a 24-hour rule, that if you plan to use an exhibit at trial, no later than 24 hours prior to the time you seek to introduce it, you let the other side know. And we've agreed, in fact, Mr. Hatten called me up and said, Can we have an agreement that we don't file objections to our exhibit list and we'll just raise them as they come up. And I was perfectly happy to agree with that, Your Honor.

I think we've handled this outside the Court. We don't need to have an order limiting it to some specific number so we spend a lot of time and energy paring down these lists. We've got a procedure to handle it, Your Honor. If a party wants to introduce an exhibit, 24 hours before they want to introduce it they advise the other side. If there's

an objection, we'll obviously let Your Honor know. Otherwise, we'll resolve it as to that particular exhibit.

THE COURT: We'll come back to this one after we finish the rulings because the rulings may affect a number of exhibits.

MR. HATTEN: We may as well throw out discovery if all I've got is 24 hours to respond to a document.

THE COURT: We'll come back in a couple of hours and see where we are in terms of the numbers after some rulings.

I had a friend of mine that appeared one time at the West Virginia Supreme Court and stood up at the beginning of his argument and said, We have 15 assignments of error. And one of the justices looked at him and said, Just give us your best one because we're not going to reverse on that one. We're not going to reverse on the other 14.

So at that point what I may do is reach in here and tell you that your number of exhibits on each side are going to be limited to the number of stickers I have, whatever we've got left. Bear in mind we have an economic problem in Virginia, so I probably can't get anymore stickers, so whatever I

got, I got.

So that was one that I thought, you know, I've already got that list. Maybe we solved that problem. Foolish me.

Now, I think I can cut down to the medical authorities. I can just pick a number definitely, because I really can't imagine that you're going to use 2000 at that point or whatever the number is that they've listed or something.

Now, on the other hand, I recall that it took two rows of boxes to hold the exhibits and the authorities the last time we were here, so they get to be big. But we'll see where we are this afternoon when we finish all the rulings here as we go along.

Why don't we take about ten minutes and take a break and go to the rest room or something?

THE SHERIFF: Please rise. The Court stands in recess.

(Whereupon, a recess was taken.)

THE COURT: Okay. So what did we resolve while we took that ten minute break?

MR. BISHOP: They agreed to dismiss the case.

THE COURT: I'm sure you did. Mr. Harty will do the order right now.

Let's see. I think that takes care of all the kind of procedural motions, so we're getting into substantive things, I believe, at the moment. Let's do this while I've got it on the front page. Defendants' motion in limine to restrict the testimony of Mr. Ware.

MR. COOK: Your Honor, I think I can be brief with respect to this motion. Really the issue is that they've identified Mr. Ware to testify with respect to repair specifications and the process of estimating, et cetera, with respect to port engineers in the case. He is not identified as an industrial hygienist or doctor in the case, has no experience in those areas. We would just ask the Court to prohibit him from testifying with respect to industrial hygiene or medical opinions.

In addition, we would ask the Court, and this issue, I think, the Court can hold in abeyance until the trial itself, but Mr. Ware dealt with repair specifications themselves at the -- during the contract process. He wasn't actually in the contract department at the shipyard, he was an estimator with respect to it.

So if he's going to testify with respect to contracts, we just ask the Court to insure that the

plaintiffs establish a sufficient foundation at trial in order for him to have expertise with respect to the contract issues as opposed to specifications and the estimation procedure at the shipyard, Your Honor.

THE COURT: So we agree he's not an expert and not disclosed --

MR. HATTEN: He's not going to testify about industrial hygiene. He's going to testify about what lay observations would be. He knows all the products in the engine room from 32 years as a person to estimate the cost of repairs and what needed to be repaired, so he knows the products. He's not going to testify about the concepts of industrial hygiene, like how many fibers would be in the air or anything like that.

He's going to testify about what -- what his observations were. He's not going to offer any medical opinions, of course not. And he was intimately involved in the entire contract division -- contract process, and he'll testify about that.

THE COURT: So to the extent that he's not designated as an expert, the plaintiffs agree that he'll not be offering any expert testimony and he'll be limited to offering only relevant and material admissible testimony at trial.

MR. HATTEN: That's fair, yes.
THE COURT: How does that sound?
MR. COOK: I think that sums it up, Your Honor.
THE COURT: And you would be objecting to anything outside those parameters?
MR. COOK: I would.
THE COURT: All right. Then you'll probably be sustained.
All right. Let's see. Only because I'm working off the defendants' proposed agenda to increase at least their perception of fairness, let's see, 17 -- I'm going to try and eliminate everything on the page.
Number 17, that's asbestos-containing materials, ACMs. For a minute there I thought we were talking about missiles or something. I hadn't heard what an ACM was.
So 17 and 18, are they kind of related? That's their preclude reference to supplying any asbestos-containing material to the shipyard, prelude any reference to port engineers performing any work on asbestos-containing material.
MR. BISHOP: They're similar, Your Honor. And I think 21, as well --

THE COURT: Okay.
MR. BISHOP: -- references that.
MR. COOK: That's a different number list.
THE COURT: I'm using your numbers at the moment.
MR. COOK: Yeah. It would actually be 17, 18, 19 and 20 on our list.
MR. BISHOP: Okay.
THE COURT: Well, okay. I'll let you do all those if you want.
MR. BISHOP: Well, I think the point we want to emphasize with those, Your Honor, is that there needs to be a sufficient foundation laid that -- using the example of supplying asbestos-containing materials, frankly, we're not aware of any evidence that Exxon-Mobil -- Exxon provided asbestos-containing materials. The only reference that we've seen thus far is the testimony of Mr. Ware that a spare propeller or something like that could be kept at the yard, that all of the shipowners had a place where they could store things like that. It could be a turbine, and Ware -- Mr. Ware said he didn't know whether it was insulated or not. It could have been possibly, but he didn't know. And there's nothing

that ties any asbestos-containing material supplied by Exxon to Mr. Morton and that's obviously the key in the case.

The same thing would be true, Your Honor, with respect to port engineers. We're not aware of any testimony that an Exxon port engineer handled asbestos-containing materials and certainly not in the presence of Mr. Morton.

But the point we want to emphasize, Your Honor, is that before -- there are allegations that have been made in the second amended complaint that before any evidence is adduced on asbestos-containing material allegedly supplied by Exxon or a port engineer that worked with asbestos materials or crew members working with asbestos materials, the only thing that's relevant is if they did it in the presence of Mr. Morton to the extent he was exposed to asbestos as a result of those operations. And without laying that foundation, that evidence is irrelevant and immaterial. We don't think it exists, to begin with, but we understand the Court has to wait and hear the evidence at trial to make that -- make that ruling.

MR. HATTEN: Your Honor, they're supplying a whole ship full of asbestos. Everything

in that engine room is covered with asbestos. And with regard to specific asbestos products for which they may have supplied some new materials that would be used in the repairs, I don't think they asked any of the witnesses about that. The contracts say there are lots of different things that Exxon is going to be providing and that's a matter of proof at trial. But this idea that if they didn't supply a product that contained asbestos to the shipyard, that we can't put on evidence of the plaintiff's exposure to asbestos that was all over their ships, that -- that goes way beyond anything that the Court needs to decide in -- at this stage in the proceeding.

And as to the port engineer, the rules as written by Exxon say that the repair superintendent will oversee the work giving instructions as to how the work is to be done and examining the finished items before they -- they leave. So, you know, our evidence is going to be that the port engineer was intimately responsible and participating in the supervision of every activity in that engine room. And it's irrelevant whether or not he is taking asbestos off of a pipe or not.

And, so, this is an issue that really is inappropriate for a pretrial motion. This is just a

matter of evidence for the Court to determine at the time of trial when we begin to put on our case whether or not the exposure complained of is exposure that's relevant to the case or not.

THE COURT: In terms of -- just for numbers, 17 and 18 on the defendants' list, defendants' motion in limine to preclude reference to supplying any ACMs to the shipyard, defendants' motion in limine to preclude reference to port engineers, those would be 20 and 21 on the plaintiff's list, I'll rule any nonexistent evidence inadmissible, however, I'll deny the two motions in limine. We'll deal with those issues as they come up at trial, if they do. But if they try to admit any nonexistent evidence, let me know. I'll be all over them.

MR. BISHOP: We will, Your Honor.

MR. HARTY: Your Honor --

THE COURT: You just won two in a row, Mr. Harty. You got something you want to say?

MR. HARTY: What I want to say is just to refute one thing that they were saying. That is, if the crew members don't work on asbestos products in Morton's presence, it's irrelevant, and that's not the standard.

THE COURT: We're working our way down

to the next one. It's almost immediately, defendants' motion in limine to preclude reference to crew members. Let's go ahead and do that while we're here. It would be 20 on your list, second page.

MR. HARTY: It's 23 on our list.

THE COURT: So 23 on the plaintiff's list.

MR. BISHOP: It's really the same issue, Your Honor. Mr. Morton was deposed for six days in this case, never mentioned anything about being exposed to asbestos from work by crew members of any of the Esso tankers. And absent a foundation being laid that such testimony -- that such evidence exists that he was exposed to asbestos from activities of the crew, it's irrelevant.

MR. HATTEN: What he forgot to mention was that Mr. Morton was not asked about anything about crew members. Every question they asked him was, What other trades in the shipyard were working around you? And Mr. Ware, our expert, has testified that one of their big problems was crew members are working at the same time as the shipyard workers, they're running into each other, and that was the standard practice at the time. And the contracts themselves set out what work is to be done by crew members and which ones are

to be done by shipyard workers. This is a contested issue of fact for the trial.

THE COURT: That's denied. We'll deal with that at the trial.

Solely because it's sitting right in the middle of all of them here, Number 19, defendants' motion in limine to include evidence of piecework tickets, et cetera, and that's Number 22 on the plaintiff's list.

MR. BISHOP: It's a similar issue, Your Honor. We believe that a sufficient foundation has to be laid that the piecework tickets are relevant to materials that liberated asbestos that Mr. Morton was exposed to. Absent that, it allows simply impermissible speculation to talk about piecework.

Piecework tickets, Your Honor, deal with specific work done aboard the vessel. And so, obviously, the first question is was Mr. Morton aboard the vessel during the time when the particular work was done and was he in the vicinity of where the work was performed. Absent a foundation being laid for those two items, it's inadmissible and purely leads to speculation.

MR. HATTEN: Most of the piecework tickets that we have relate to establishing foundation

for the fact that these asbestos products were installed all over the various ships that later came back for repair.

THE COURT: How many are there? How many are we dealing with?

MR. HATTEN: It's 13, 14 ships.

THE COURT: In terms of actual documents.

MR. HATTEN: Oh, we're talking about a stack of documents that's an inch high showing what asbestos was installed on the HOUSTON.

THE COURT: So we can deal with that at trial.

MR. HATTEN: And another stack on the NEW ORLEANS, and you can deal with that at trial as to whether it's relevant for any purpose at that time.

THE COURT: It's not as confusing as the one I saw in the last case that was some invoice from the 50s or 60s for, I don't know, 500 yards of yarn. And I was sitting there at my house thinking, Why do we care that these people bought yarn? And somebody had to tell me what yarn actually meant. It was whatever version of asbestos it was. I remember looking at that in the motion thinking, What is this? Why has it got anything to do with it?

We'll deny the motion and I will deal with the issue at trial.

And one thing I would anticipate also, if we end up picking a jury and not going on the 11th, we could use the 11th for whatever details we might need to pick up before the trial actually starts.

MR. HATTEN: Yes, Your Honor.

THE COURT: In particular like an exhibit list and things like that. So we could certainly use that time to do some stuff as we pare our way down.

Now, it looks like from the numbers I finished the first page of the defendants' listing, I believe. Was there one other -- we haven't done the -- it looks like 1 through 18 is done on the defendants' list. That's their first page.

MR. COOK: Through 20. He decided crew members as well.

MR. HATTEN: Right.

THE COURT: Yeah, we did the crew members. Let's do the dose reconstruction. That's plaintiff's 24 on their list.

MR. HARTY: Yes, Your Honor. It looks like it's 24 on both. That was an accident.

MR. BISHOP: See, we can agree, Your

Honor.

MR. HARTY: Haphazard agreement.

MR. ARMSTRONG: If you could agree on a number, we'd be gone.

THE COURT: My Exxon stock went up. I still need to recuse myself.

MR. BISHOP: Your Honor, I --

THE COURT: I've got an Exxon credit card. Can I get out?

Are you going to concede this one?

MR. BISHOP: Well, I think there's --

MR. HATTEN: It's our motion.

MR. BISHOP: That's fine. I just was trying to save some argument because given what you've said, at the end if we agree on that -- and I think we may actually be able to reach a meeting of the minds possibly.

MR. HARTY: Well, it sounded like in their response, Your Honor, that they didn't intend to produce -- put on any lifetime dose reconstruction testimony or anything like that. The only thing they seem to be quibbling about was the time-weighted average aspect, but --

MR. HATTEN: What -- what the disclosure of Mr. Balzer is about --

THE COURT: We're back to that again.

MR. HATTEN: -- includes testimony that he's going to try to project as to what the average levels of asbestos may have been for this operation or that operation in the shipyard. It's pure total inadmissible speculation that -- he's never been to the Newport News Shipyard, never done any such testing, never any application of it to this plaintiff, and the Court has not --

THE COURT: Is he the only witness this relates to?

MR. HATTEN: Sir?

THE COURT: Is he the only witness this relates to?

MR. HATTEN: I think so, but he's the primary witness about this. And he -- he studied a shipyard out in California, he studied some other work sites, and so he's going to try to talk about what various dust levels were of bystanders, dust levels were of pipe coverers, dust levels were of electricians perhaps, at -- you know, from different products and so forth.

And that is the very thing that this Court has not permitted, because it's based on assumptions and speculation and transfer of one set of

facts to another set of facts, and simply not admissible. There's been a very uniform rule by all the courts that dose reconstruction in all of its very many forms cannot be applied to an individual's case because it is based upon assumptions and speculation.

Our -- our brief goes into this in quite some detail. Nor can we talk about what the time-weighted average was because time-weighted averages again are based upon issues for which we don't have any data. You have to have a -- a test of the exposure of the plaintiff at a particular time, then know what his exposures were the rest of the day.

What he may want to put into evidence is that he did a test on this product or that product for ten minutes, and then he divides its by 480 minutes in the day, assuming that there was no other exposure to it, the use of the -- to the product in order to get a time-weighted average for that test pushed into a time-weighted average for the plaintiff.

And the reason that this has not been permitted is because it's like talking -- it's like telling the jury, Don't think about a white horse because these time-weighted averages don't apply to the plaintiff. But as soon as they see these numbers,

they can't get rid of those numbers in their head. It's impossible. And that's the whole purpose of putting time-weighted averages up there, is so that the jury will make an assumption by speculating about the plaintiff's exposure.

So the use of time-weighted averages in the absence of a measurement of Mr. Morton's exposure, none of which ever occurred, there was never any time-weighted averages done of his work site or of him or of these things at Newport News Ship or any of the different ships that he worked on, and every ship was different, you know. So the use of this concept the Court has not permitted and I'd ask that the Court continue with that type of restriction on the testimony because it is misleading and it's based upon assumptions and it's prejudicial to the plaintiff.

THE COURT: So is your answer, We agree, or something different?

MR. HATTEN: He agreed to one little piece of it. The little piece of it was he wouldn't try to calculate -- he wouldn't try to calculate the plaintiff's annual exposure or monthly exposure. But when he goes in and he talks about what the average exposures are for a particular trade or for a particular activity and he uses those kind of numbers,

just by the very nature of that he's creating presumptions, assumptions and speculation that the jury is going to try to apply right back to the plaintiff, and that is what is not permitted.

That's why when a ship comes in they've got to have an industrial hygienist there to measure what's going on that day to see whether or not it's in excess of the standard. They can't say, Well, we tested that ship when it came in for repairs last time. Repairs are going to be different, the activities are going to be different, the tools are going to be different, the people are going to be different. But they're trying to homogenize this type of information.

THE COURT: Yes, sir?

MR. BISHOP: Your Honor, the plaintiff's reply brief, Paragraph 19 reads, Finally, the plaintiff is not attempting to preclude evidence of the existence of a TLV MAC, that's M-A-C, maximum allowable level or concentration, or PEL. The numerical value of those limits the underlying basis for those limits, ACGIH, OSHA and NIOSH and other studies explaining or providing the bases for those values, et cetera. Such evidence should be allowed to the extent that it is not precluded by other

evidentiary rules. The motion solely targets the defendants' attempts to reconstruct Morton's exposure through a lifetime dose reconstruction or workday dose reconstruction using tests that occurred long after his exposure and in dissimilar circumstances.

So that's how they narrow it, Your Honor, in their response to this motion. We don't intend to do that, Your Honor. What we intend to do is what has absolutely been admissible in every court in the United States, and that is that the ACGIH adopted threshold limit values for asbestos. They were incorporated into law by Walsh-Healy as early as 1960, applied to shipyards.

The permissible exposure limit was adopted by OSHA in 1972, and as Mr. Hatten knows, because it's come in in every asbestos case, there is evidence generally that the general perception was, and this is reading from Dr. Balzer's own article published in the medical and scientific literature in May, June, 1968, not something that was published for purposes of litigation, May, June, 1968. Sample areas -- some sample areas exceeded -- and he's talking about looking and surveying insulators working in shipyards and in heavy construction in the San Francisco Bay area.

Some sample areas exceeded the present threshold limit value recommended by the ACGIH, however, these samples were not for extended periods of time. Although we attempted to sample the dustiest operations, the time-weighted averages for dust samples containing asbestos would probably not exceed the TLV in most situations, even on ships. This conforms to the findings by Fleischer, et al., which is the study in 1946 that every expert has talked about in these asbestos cases, by Marr, William Marr, that was a study of Naval shipyards in 1960 -- it was published in 1964, that's been talked about by experts in every asbestos trial, and Sanderson and to recently reported findings by Ferris, who was at Harvard University and reported on shipyards in the New England area, and following up actually on Fleischer Drinker, some of the same yards, who last year reported studies in the same shipyards earlier appraised by Fleischer.

And so, Your Honor, what Mr. Hatten now is trying to do, unlike what he put in the motion, is to say, No, we can't even come in and say that the general -- the general understanding of a scientific community was that insulators in general -- we know about the threshold limit value and we had a

perception that insulators in general -- we can't talk about any particular insulator or Mr. -- Mr. Morton, a particular plaintiff, but in general the perception was that those exposures were within the threshold limit value. And, ultimately, as part, as a reason, one of the reasons being Dr. Balzer's article in 1968, they came to the realization that the threshold limit value was too high and they needed to reduce the permissible exposure level, and they did reduce it over time in 1972, and reduced again in 1976.

That's absolutely relevant, Your Honor, to the jury's considering whether there was any duty on the part of the port engineer in this case. Under Scindia we can rely on the expertise of the shipyard, but if we see something that is obviously improvident and creating an obviously improvident hazard to the plaintiff in this case, then and only then do we have a duty to intervene.

And what they're trying to do now is say, You can't even provide evidence that the general perception in the industrial hygiene community and the medical community was that the insulators, the people who had the direct exposure to these asbestos-containing thermal and pipe covering and block was thought to be on average in general below

the threshold limit value, they ultimately decided it was too high; and that, secondly, the industrial hygiene principle that everyone accepts, that indirect exposures are reduced depending how far you are away from where the direct exposure occurs. And so it's well accepted in the industrial hygiene community that bystander trades who worked in shipyards had less exposure than the insulators. The insulators had the most exposure in shipyards.

We're not trying to say that that means that Mr. Morton has this precise exposure. We're not going to say that we can tell exactly what his exposure is. But courts have not limited defendants from putting on state of the art evidence that relates to industrial hygiene, to ACGIH values, Walsh-Healy, OSHA and what the perception was in the industrial hygiene community that those exposures were generally thought to be within the threshold limit value.

That's the purpose, Your Honor, for us offering the evidence, not to use a test, which is what is mentioned in their brief, done after his exposure to say that that means that Mr. Morton's precise exposure was X. We don't intend to do that, Your Honor.

So we would ask Your Honor simply

maintain the same ruling as to dose reconstruction, but let's see what Dr. Balzer or any other witness says about threshold limit values and perceptions in the industrial hygiene community and Your Honor can rule then whether it's admissible. We think it will be admissible and we'll be able to lay a proper foundation.

MR. HATTEN: I think Mr. Bishop has just made my case. First he says, We want the jury to know what the levels were on average and in general. That's exactly what the Virginia Supreme Court says is not relevant, on average or in general.

This is the rest of the story in that article that Mr. Balzer wrote, and I will quote directly from that 1968 article. To obtain classical time-weighted exposure for this trade, the pipe coverers, for every one of the conditions is impossible. In contrast to other occupational groups who generally stay in the same working environment, the insulator is in a continuously changing environment, the work locations, materials, position, humidity, temperature, ventilation, noise levels and other variables are in a state of flux.

So the person who they're bringing on here says it's impossible to use time-weighted

averages where the work changes from place to place like it does in a shipyard. That was exactly what they said in the Fleischer Drinker report in 1946. They said, It's impossible to set a threshold in shipyards because of all these different things that are going on.

And with Mr. Marr, here's what Mr. Marr just said in the same article he quoted there. He says, Asbestos exposure during shipboard insulation differs from exposure in mining and manufacturing processes. In these industries, employees usually continue at one job with the same material and their exposure is relatively constant. This is not true for shipyards where the pipe coverer's and the insulator's work location, work position and material constantly change. Under these conditions it's impossible to determine the exposure of the employee without spending hours of observation and sampling. That's what Mr. Balzer said the limitations were of even his own study. That's what Fleischer said were the limitations in '46. That's what Marr said were the limitations in '64.

But Exxon and the defendants love to talk about the historical studies about it because they want to put the averages from studies taken in

other circumstances before the jury so that they will transfer those averages to the plaintiff. That is what the assumptions are that's improper about this.

Now, it he's also wrong about the rulings of this Court. Judge Tench and Judge Pugh most recently have held no time-weighted averages -- information about time-weighted averages. It's not to say that there wasn't a standard. Yes, there was. That was a standard for the workplace that if an employer or Exxon as a shipowner wanted to determine if the exposure at a job was above or below a particular standard, he could use that as the measurement, and that was the yardstick. But it's a difference between saying there was a yardstick in 1938, there was a yardstick adopted by the Navy in 1956, there was a yardstick -- and this was a yardstick for asbestosis, there was a yardstick, and saying that the measurement of dust at the shipyard fell here or here or here on that yardstick because that's just a pure guess. Nobody knows what was going on there in terms of applying the yardstick to what went on with Mr. Morton or the Newport News Shipyard.

Now, what is also not important about this TLV in terms of this case? The director of safety for Exxon, Dr. Hammond, you mentioned that 1994

letter that Dr. Hammond sent. Dr. Hammond said, Exxon didn't pay any attention to the TLV. We had a better standard than that. In his letter as the director of safety for the largest corporation in America he says, If there was any visible dust, we considered it dangerous and we instituted immediate controls because that's what you should do because you can't always measure the dust. If you see visible dust, you've got to take safety precautions. So the TLV's an interesting historical fact. It's a yardstick that applied only to asbestosis. It's a yardstick that had nothing to do with mesothelioma ever.

But the only basis of which it could be relevant is that there was a historical understanding that this was the yardstick. But unless the yardstick was used, it's irrelevant. It's like saying there was a speed limit out on 64, but nobody had any -- any speedometers. And so somebody -- some day somebody went out there and tested how fast people were going. And they said, Well, the average speed out here on this highway is 55, so that's under what the yardstick is. Well, it's no more -- it's no more scientific than to say the limit at the shipyard was 5,000,000 particles per cubic foot, but nobody ever measured, so how do we know.

So the issue of the time-weighted average is an issue that is just chock full of assumptions that they want to create from things that don't apply to this circumstance. There's lots of testimony about what visible dust means. Industrial hygienists are going to come in here and and say if there was visible dust, that means there was high exposure. We don't know whether it was 20, 30 or 40,000,000 million particles or any other level. But Exxon itself used that as the basis for determining whether or not safety procedures should be applied on a ship, and that's what we're talking about here.

And so as a historical reference, sure, talk about the fact that that was done -- that was done -- that TLV was done in a textile plant down in North Carolina where everybody is standing around doing the same job every day and they're measuring it for each job, because that's easy to do, and they're saying, Well, the people in this job are getting sick and this job are not. That isn't what we have here. That was a recommendation that we don't have any evidence at all about what the numbers were at Newport News Ship.

So that's why we don't want Mr. Balzer coming in here and saying -- making the suggestion

that his averages, his study has got anything to do with Newport News Ship. And that's why, you know, when you -- when -- that's why we don't want any kind of speculation to the jury about what the plaintiff's exposure may have been. One day he might be right next to the pipe coverer. The next day he might be over here. And, you know, there might be four pipe coverers here one day. There might be only one the next. There might be ventilation one day and not the next.

The use of this kind of voodoo numbers is just that. It's -- it's funny math that -- that gets into the jury's head and prejudices the plaintiff's case with assumptions and speculation.

THE COURT: Okay. Anything else?

MR. BISHOP: Nothing, Your Honor, except to emphasize that again we have not, nor do we intend to offer any dose reconstruction that's specific to the plaintiff.

THE COURT: Now, let me ask you this: Is this basically Dr. Balzer's testimony that we're talking about? Is there anybody else going to be testifying about this other than him?

MR. COOK: Your Honor, if I may, actually some of these articles that we referenced,

the plaintiff's experts rely on those, as well, published by Dr. Balzer.

THE COURT: But obviously nobody took Dr. Balzer's discovery deposition, so we don't know exactly what he's going to plan on saying at trial. And it appears we're going to come back to Dr. Balzer at some point.

I'm going to grant the motion. Now, having said that, if you want to submit to the Court and to them what Dr. Balzer is going to say, what you think complies with the ruling, then fine at this point, because if we had his deposition we could look at it and say, Here's the question, here's the answer. We could do that at this point.

So I'm going to grant the motion. Again -- well, probably not today. We'll let everybody go away and come back. Are you-all busy on election day in the afternoon?

MR. HATTEN: I can be here.

THE COURT: Let's kind of pencil that in for maybe 2:00, and we might have to come back and talk about Dr. Balzer because Mr. Hatten said he's going to object, and you're probably going to flesh out the objections so we kind of know what we're going to talk about on Tuesday.

If you want to submit any things that you think Dr. Balzer is going to say, this is what we're going to talk about, and we can kind of pin down what we're dealing with. I assume the objection relates to his disclosure?

MR. HATTEN: Yes, sir.

THE COURT: Are there any other disclosures that you want to object to? We might want to kind of put those on the schedule because I haven't seen any of those, I don't think, in any of the motions.

MR. COOK: There were no motions filed by the plaintiff.

MR. HATTEN: The others provided reports, and I think we'll have the reports. I mean, obviously we're going to want to hold them to their reports or their disclosures, and that will come up, I guess, if they go beyond that.

THE COURT: If you have some that you know right now, you know, this is not going to work, then I'd like to kind of take those up sooner rather than later.

MR. HATTEN: As I stand here I don't.

THE COURT: Okay.

MR. HATTEN: At lunchtime if I look at

the -- I've got their witness list here and I'll take a look at that again. As I stand here I don't remember any other glaring issues. I do remember -- I'm prepared to argue the Balzer one.

THE COURT: Now, I keep Jones versus John Crane over on this side and Ford Motor Company versus Benitez on this side, and we just kind of keep copies and refer to them as we go along depending on which side is making the objection.

MR. HATTEN: I understand.

THE COURT: All right. Let's get into the deposition issues. The 21, 22, Venable is a real specific request. So 21, 22 on the defendants' list, which is the indirect or direct use and also the CP 77-1, and on the plaintiff's that's 6 and 7 on yours.

MR. HARTY: Yes, Your Honor.

MR. HATTEN: Your Honor, this issue is one that the Court has visited repeatedly, and that is whether or not a deposition may be offered against anyone who was not a party at the time that the deposition was taken. It first came up when we got into these cases good with -- beginning with trials again with Judge Tench and then with Judge Little -- I mean, Judge Conway in the Little case. And that -- in that case counsel kept saying that Rule 4:7 is not a

rule of evidence, and they -- they probably want to make that argument.

And he was reading the standing order, Judge Conway was, and he said, This clearly states to me it is available -- the depositions are available subject to the rules of evidence. I just told you 4:7 keeps it out. So you keep on telling me that CP 77-1 requires something to be done in this proceeding. It doesn't. It says they are available for use as taken in the cases subject to the rules of evidence. Now, the rules of evidence will not let it in because it is unfair to Mr. Little. It would be unfair if all of a sudden the plaintiff wants to use some deposition that they found if Dana was not represented.

And Your Honor, there probably have been 5,000, at least, depositions taken since 1978, '77 when these cases first started to be prosecuted in the federal courts. And Exxon was not at probably all 5,000 of them, including Exxon was not at any of these CP 77-1 ones. Now, if I wanted to turn around and use this deposition against Exxon, no way. First thing they're going to say is, I wasn't there. You can't use it against me. And, in fact, every time that this has ever come up, every defendant says, You can't use a deposition where I wasn't present.

In this case, Mr. Venable, they have an objection to a deposition that we submitted and they said, Well, we weren't there. And we checked, and they're correct, and this is -- what's sauce for the goose is sauce for the gander.

THE COURT: So 23 is granted?

MR. HATTEN: Absolutely.

THE COURT: Venable.

MR. HATTEN: Yes.

THE COURT: Granted?

MR. HARTY: The only thing we said, Your Honor, was we even said we weren't going to use them because of that. But if this Court rules that their CP 77-1 ones are admissible, then we would say that Venable ought to come in as well.

THE COURT: Okay. Granted. We'll give you leave to revisit in ten minutes.

MR. HATTEN: But the reason I said -- the issue is no different. Critically important here, in addition to the fact that it's not admissible because they weren't a party, is that having the same lawyer does not create privity. None of those cases were 905(b) cases, not one single one of those depositions was a 905(b). Every one of those cases were product liability cases.

So even in a jurisdiction that might say there was some privity, there's no privity with me, otherwise, the plaintiff would be prejudiced by hiring me as a lawyer, when just because I have the experience back in the federal court as opposed to a new lawyer that wouldn't be burdened with the fact that he happened to participate in those depositions. So there's no privity because the privity relates to the party, not the attorney. Privity is not created by the fact that there may be some similar issues. That also is not privity.

Here's a critical fact they forgot to mention in all their briefs, is that in every single case in CP 77-1, every one of these depositions was ruled inadmissible, inadmissible for the same reason that we've talked about so often, that the negligence of the Newport News Shipyard is irrelevant to the cases because it is concurring negligence only. They are immune, so they are not part of the jury verdict form. They are not somebody that liability is to be determined against.

In these cases it would be incredibly unfair for me to have depositions of hundreds of people that I can't use against them when they can have these -- a dozen depositions that they want to

use against me. What these depositions show is that the Newport News Shipyard had a number of procedures about asbestos, procedures that were written at various times for different people, procedures that were not enforced, but procedures that according to Mr. Gray, who was the one what wrote many of them and was in charge of enforcing them, said, We wrote these to, quote, unquote -- and I'm quoting, Your Honor. I'm not being disrespectful to the Court. We wrote these to cover our ass in case somebody would come along and say, Do you have a procedure for asbestos.

THE COURT: You're civil lawyers. You should have been here yesterday for the sexually violent predator cases.

MR. HATTEN: So the -- as Mr. Gray said, If we had told these workers about what we knew about the dangers of asbestos, we couldn't have gotten a crew to work on the ship. But that --

THE COURT: I like that. If they say you're going to die tomorrow, are you going to come to work?

MR. HATTEN: But the point is regardless of whether it's inflammatory to that extent or whether it is evidence that they had procedures or didn't have procedures, the conduct of the Newport News Shipyard

through these depositions is not relevant to the -- to the proceeding.

The issue here is whether or not Exxon has got any liability, and this is an old trick but it's a trick that everybody recognizes because it states what the law is.

THE COURT: Have we moved off of depositions?

MR. HATTEN: We're off that for just a second, and that is because it's all tied up. A, the depositions don't come in because we weren't parties. And 4:7, we stand on it, we rise or fall on it. The -- the standing order does not change it. The standing order has been interpreted by Your Honor and everybody else.

But the liability of Exxon -- if the liability in the case is this piece of paper, all I need is this, and Exxon is liable. It doesn't matter whether most of the liability is over here from other people or the shipyard or anybody else. This a joint and several case, and that's all I'm -- that's all that needs to be proven in this case, was Exxon's conduct a substantial contributing cause.

And so both because of relevance, as well as just the technical reason that these

depositions are taken in other proceedings where the plaintiff was not a party and it's just basically unfair and prohibited by the Virginia rules, that's why these depositions should not be used.

Even more grossly, they're not only have trying to get the depositions in, Willcox & Savage sends this document that's 63 pages long called The Analysis of the Testimony of Scruggs, Betz, Burris, about 15 people. Analysis of their testimony by Willcox & Savage. It says on here, Attorney/client work product, but they give it to their expert and they excerpt from all those depositions quotes that they give to their expert to testify.

So this is -- this is just wrong. You don't try cases with depositions that weren't taken when you had an opportunity with your 905(b) motions and your lawyers having an opportunity to cross-examine these people. A lot of these people are still alive and still subject to subpoena. About half of them are dead, and some of them we don't know where they are.

But the deposition -- the depositions absolutely are verboten under the rules. And whether a federal court someplace else has admitted it, under admiralty rules, Virginia's laws, Virginia rules

determine admissibility of evidence, not some other state. And this is an issue that has been ruled on consistently by every judge in the Circuit Court of Newport News. And just because we have Exxon, they don't have any greater standing than any other defendant to come here and change that very clearly established precedent.

MR. COOK: Your Honor, I realize the Court has ruled on this motion a number of times in the past over the last several decades.

THE COURT: I may not have.

MR. COOK: I believe you have.

THE COURT: I could be wrong.

MR. HARTY: Oney.

THE COURT: Oney, that's right. I take it certiorari is not the same thing as being affirmed, is it?

MR. HARTY: Not quite.

MR. COOK: The issue here, Your Honor, is plaintiffs point to the fact that these depositions were taken back in the 1970s, and that's true. They were taken in product liability cases. They were not taken in 905(b). This is the first 905(b) asbestos case to appear before the Court, and that is one of the reasons, in fact, Your Honor, why it should be

admitted and I'll go through the reasons why.

Specifically I'll start with Rule 4:7. Today Mr. Hatten takes the position that Rule 4:7 supersedes anything. And we looked at this issue, and this is in our opposition to the plaintiff's motion in limine in this case. Mr. Hatten stated in a prior hearing, Your Honor, It's just pure and simple. We have this pretrial order, this has to mean something. The Court said, Yes. And the Court went on, And you stand by the standing order? Mr. Hatten, Yes, sir. The Court, And defendants' counsel stands by Rule 4:7(a). The Court, Well, if the parties agree on the standing order, I mean, the standing order supersedes anything at that point. Mr. Hatten, Yes, sir. And the Court went on, And I believe the standing order -- my ruling would be the standing order supersedes Rule 4:7(a).

And under the standing order these depositions should be allowed and permitted before the Court, Your Honor. We've given a number of reasons in our briefs. First, with respect to Rule 4:7, Rule 4:7 is really an issue of procedural process in the case and it deals with the admissibility with respect to whether or not a party was present, but in and of itself, it is in, fact, a rule of procedure. It is

not a rule of evidence and should not be incorporated into the standing order as such.

Now, Mr. Hatten points out that prior cases have excluded the negligence of the shipyard. That's not what we're trying to prove with this, Your Honor. In products cases defendants have attempted to prove negligence of the shipyard in order to prove, for example, the sophisticated user defense, which this Court will hear more about later on this afternoon, in order to say that they did not have a duty to warn.

That's not the instance in this case, Your Honor. This is a 905(b) action and, as such, the plaintiff has to prove an obviously improvident failure on the part of the employer, the shipyard in this instance, and that the defendants had actual knowledge of that failure to protect the plaintiff from a hazard.

And when we look at the testimony that we're trying to introduce in this case, Your Honor, we're looking at individuals that do, in fact, or did stand in privy with the plaintiff in this case. We've got medical directors, safety directors and tradesmen at the shipyard that had a contractual relationship with the shipyard and they stood in the same position

as the plaintiff in the case because Mr. Morton was an employee at the shipyard during the same time periods we're looking at.

We've got this testimony that cannot be replaced. These individuals, the great majority of them are deceased, Your Honor. The medical director, the safety director, a number of these key insulators that were involved in the safety procedures which plaintiffs now claim were not taken, these individuals were deposed and that's the best evidence that can be put before the Court. And if we're precluded from entering that evidence and admitting that evidence in front of the jury, Your Honor, that's essentially a hole in our case that we cannot recreate because they're gone.

These individuals -- they're simply deceased. And Exxon or Sea River were never put on notice back in the 1970s that this would become an issue, that they needed to go ahead and notice up these depositions of individuals that were going to be, 40 years later when the defendants were sued, deceased. And so there's -- there is actually a due process consideration here, Your Honor, in that we didn't receive any notice of the suit in time to take these key depositions in this case. And, so, if the

plaintiff's ruling is correct, we're essentially precluded from admitting the best evidence in front of the Court because these individuals have passed on. I think that goes contrary to the purpose of the rules, Your Honor, and it goes contrary to the very heart of the matter, whether or not the jury should hear the issues and decide the issues in front of them to make the best determination in the case.

Furthermore, Your Honor, when we look at 804(b), and I'm drawing the analogy to the federal rules, of course, and the mode of means and opportunity, we don't intend to introduce this on control issues or anything of that sort which would be relevant to the 905(b) action.

What we intend to introduce this on, Your Honor, is simply with respect to the procedures and the actions that were taken by the shipyard in the 1960s and the 1970s, to prove that the shipyard acted reasonably, that what the shipyard did was not an obviously improvident failure such that the defendant had actual knowledge of that, that the port engineers on the ground did not look at that and go, I need to step in here and I need to do something.

And that's really the purpose, Your Honor, and it's a contrary situation to any of the

prior cases that have been presented before the Court because it's really a situation where we as defendants in this case never had the opportunity, never once had the opportunity to depose the individuals whose depositions we are attempting to introduce with respect to the actions of this case because they are now deceased.

MR. HATTEN: Well, I think if you'd have checked the computer, looked up whether they were deceased, he wouldn't have said something so foolish. Dr. Stallard lives over in Hidenwood. Mr. Stubblefield lives down in North Carolina, and about half of these people are still alive. So getting up here and saying things he hadn't checked is -- you know, it -- they're not unavailable, a lot of these people, they're not dead.

But what if I stood up here and said to you, Your Honor, I want to introduce this deposition of Dr. Stallard, who by the way became the medical director for Exxon, and he said in that deposition back there that Exxon taught him everything he knew about asbestos, and he was just amazed at how much they knew and shocked that they had been on these ships and had never told any of the shipyard workers and I went to introduce that. Now, what do you think

that Exxon would say? Just what I'm saying. It ain't fair, it ain't right, it isn't legal, it isn't admissible.

THE COURT: It's always interesting to try to identify Virginia Rules of Evidence. It's hard finding that book. I think we have -- actually, I think I had one that has the Virginia Rules of Evidence up here, but I'm not sure it's the actual rules. It's just a guide to evidence.

I don't have any terrible disagreement with the prior rulings as far as that goes. Now, in the beginning there was Mr. Hatten, but it wasn't me, but I'm guessing that the original rules involved all the same people, parties, they're all taking the depositions of the same people all the time and that was probably part of the purpose for that rule, so you don't have to go back and everybody take the deposition again.

MR. HATTEN: Yes, sir, exactly.

THE COURT: Now, which obviously is even covered by Rule 4:7. The other interesting part of this is then we get into, oh, okay, Jones versus John Crane, where we get into the discovery parts, which actually the fact that you've taken the deposition of this guy 25, 30 times, doesn't relieve you of the

obligation to make a disclosure, which I'm not terribly sure I agree with, but nobody asked my opinion.

From a practical matter, I mean, for some of these guys you can say, Say what you said the last 12 trials. We've been talking to this guy for 30 years and he's saying the same thing. So I'm somewhat sympathetic to Mr. Wallace's position in that case, which is, you know, Here's the disclosure. Doctor so and so, is there something else you need to know? You've deposed him 25 times, he's testified 50 times.

So the motion in limine to prohibit the direct or indirect use of depositions is granted. The motion to admit the CP 77-1 depositions is denied. Any particular reason we need to go back and talk about Mr. Venable now?

MR. HARTY: No, Your Honor.

MR. COOK: Your Honor, if I could, with specific regard to this ruling, you mentioned the indirect use. And I think that goes to a couple of motions that are going to be heard later on with respect to Dr. Balzer, in that Dr. Balzer has been given these depositions and this is aside from the issue of the defendants attempting to substantively introduce these depositions before the jury, which I

understand the Court has denied.

THE COURT: Yes.

MR. COOK: But with regard to the indirect use, I think that's more properly addressed with respect to the subsequent motions on the intervening negligence, et cetera.

MR. HATTEN: Your Honor, the ruling -- indirect use is the same thing. It's evidence we can't cross-examine, it's evidence that we can't subject to the usual rules, admissible evidence, and that's why it isn't admissible in the first place. It's not admissible. It can't be used.

And Judge Conway in that same case, they said, Well, we want to give these depositions to our expert. He said, No, you can't do indirectly what I'm not letting you do directly. You can't just go around the rule in order to just wink at it. The rules are there because the evidence is inadmissible.

THE COURT: Well, the motion is granted. We'll work our way down to the others. At this point I would tend to agree with the last recitation.

MR. HATTEN: Thank you.

THE COURT: Now, having said that, it looks like -- let's see, from the plaintiff's agenda

listing on the first page was 1 through 17. I think we've covered them all now. On the defendants' listing, their first page, was 1 through 18, and I believe we covered all those.

MR. HARTY: Yes, Your Honor.

THE COURT: Okay. Second page, the plaintiff's -- it looks like the only ones left -- there's no reason to address the brief. You-all were very kind in sending me the information.

MR. HARTY: Right, Your Honor. There's really no request for relief in there.

THE COURT: So 26 -- other than you'd like me to believe that that's the law?

MR. HARTY: What's that, Your Honor?

THE COURT: You'd like me to believe that's the law?

MR. HARTY: Well, it is the law, Your Honor. We just want to make sure you're up to date.

THE COURT: I have books. But, anyway, you know, when I went to law school at West Virginia University, you don't think we covered admiralty and maritime law?

So 26, 27, 28 and 29 on the plaintiff's sheet, and I believe that it looks like 26, 27, 28, and 29 on the defendants' sheet, second page. That's

all we have left for right this minute; is that correct?

MR. COOK: Correct, Your Honor.

MR. HARTY: I believe so, Your Honor.

THE COURT: And those are what we might call intertwined?

MR. HATTEN: Yes, Your Honor.

THE COURT: So I take it the plaintiff has three of those, so why don't you just go first and we'll try to kind of deal with them as best we can all together. How does that sound?

MR. HARTY: Sure, Your Honor.

THE COURT: I guess they are somewhat related.

MR. HARTY: They are, Your Honor, and I can start off with this. As you've probably already picked up on and as has been indicated many times by Exxon's counsel even during this hearing, their -- their defense in this case is that the shipyard wasn't negligent, that it was acting in a reasonable manner based on the evidence that the shipyard had. They would have preferred to be able to put on all kinds of evidence about what the Navy did so that they can show that the Navy was acting what they would consider to be reasonably based on the information that the Navy

had.

Their expert, Dr. Cushing, is going to come into this case and he wants to be able to say, This was the custom and practice at this time, and this all ultimately revolves around this issue, custom and practice. And really what they're trying to do is they're trying to resurrect -- as I mentioned in the custom and practice brief, they're trying to resurrect a hundred year told test that no longer exists that the Virginia Supreme Court has completely rejected and Scindia and every other maritime case has rejected. I don't think they ever had the test to begin with, but they certainly don't apply that test, and that is that custom and practice is the state of the art, it is the standard of care, it is the unbending test of negligence. Robinson rejected that in the Virginia Supreme Court. The standard in maritime law is a due-care-under-the-circumstances approach. That is not the standard.

What they want to do is they want to come in and they want to put on -- and it's become very apparent to me. Honestly, I thought they wanted evidence of the shipyard's negligence up until today. Now it's become very clear to me that what they want to do is they want to show that the shipyard was not

negligent so that they can say, Therefore, Exxon was not negligent.

Well, the problem is we're dealing with Exxon in this case. Exxon is the defendant, not the shipyard. Exxon is the tort feasor that we have to prove our claim against, not the shipyard. And whatever the shipyard knew or didn't know in terms of custom and practice cannot be the standard of care for what Exxon did, because Exxon knew more. Their own director of safety says, We have had superior procedures in 1937, and even their biggest contractor, Brown & Root, even though they had a fully integrated industrial hygiene department and safety department and even though they were implementing all of the same sorts of control, Brown & Root deferred to us because we had superior knowledge of asbestos.

So this is not an issue of whether the shipyard was negligent or wasn't negligent. It's not an issue of whether the Navy was or wasn't. It's an issue of was Exxon negligent. And all of the evidence gearing towards that comes down to the simple issue of what did they know and did they act as a prudent business, a prudent shipowner given what they knew. And so all of these different issues of the duty to intervene and the actual control test, all those come

into what does the shipowner know.

They want to confuse issues. They pointed out rightly that we are not alleging the turnover duty in this case. The turnover duty says that the shipowner is entitled to rely upon the expertise and knowledge of a skillful stevedore in determining what to warn that stevedore about when the shipowner turns the ship over to him.

But that's not the standard when you get into the actual control test and into the duty to intervene. As Exxon themselves have said in their responsive brief, I believe it was to our bench brief that we submitted to you to digest all the books that you have up there --

THE COURT: Lots of them.

MR. HARTY: As Exxon itself said, the duty to intervene has two prongs. Number one, did Exxon have actual knowledge of the dangerous condition. Has nothing to do with shipyard knowledge. Does Exxon have actual knowledge of the dangerous condition. Number two, does Exxon have reason to believe that the shipyard will not correct the condition. Both of them hinge totally on Exxon's knowledge. Neither of them deal with what the practice in the industry was. Neither of them deal

with whether the shipyard had implemented procedures or policies that it wasn't enforcing or was enforcing. The fact is the duty to intervene focuses only on that -- that narrow view of what is happening in this instance on this ship, what are the shipyard's workers doing, what does Exxon observe, and does Exxon have reason to believe that the shipyard is going to fix it.

And so that's really what this all comes down to. Under the defendants' plan, under their defense with this custom and practice they want to be able to say to, Look, the Navy didn't know and didn't enforce any controls. The shipyard didn't know or did know and didn't force any controls. Nobody else enforced any controls. No other shipowner intervened in circumstances like this, therefore, regardless of what Exxon's knowledge was, regardless of the circumstances of this particular case, regardless of the evidence that has come in through the witness stand or through documents, Exxon did not have a duty, did not breach its duty because it acted in the standard of care because that was the custom and practice.

Alternatively they come in and say, Look, everybody was negligent. The shipyard knew

about it and didn't warn. The Navy knew about it and didn't warn. All the shipowners knew about it and didn't warn. Nobody intervened, therefore, we get to retreat to this whole herd mentality of custom and practice and say, Therefore, nobody did it, so we shouldn't have had to do it. But it's that whole process of erecting custom and practice as the standard of care and that's improper in this case.

The only reason why the shipyard's negligence or lack of negligence would be relevant in this case is if they could prove, as they kind of started to indicate in their brief which got me off on the wrong track originally, that they can prove alternate causation. But the only way they can prove alternate causation is if it's an entirely superseding cause. And every court has ruled that there are not -- that the intervening negligence of a shipyard is not a superseding cause. Even in 905(b) cases they said it's entirely possible that the shipowner and the shipyard are both concurrently negligent, but it's only concurring negligence. And so that's the basis, that's really the gravamen of our intervening negligence brief of our response to their custom and practice brief.

The superior knowledge brief, the basis

for that, and I regret that I didn't phrase that in maybe a clearer way, but it is the fact that under the duty to intervene and the active control duty, they don't have the right to rely upon the expert and knowledgeable stevedore standard. They can't say, Well, we were relying on that when they were seeing the practice -- the dangerous practice happening in front of them and they knew that the shipyard wasn't going to intervene. That's a different standard. Active control is a different standard. Active control standard is basically what would could call the invitee standard for premises liability in Virginia. They have a duty -- they have a continued duty to inspect under the active control duty and to warn and protect.

And so that's really the gravamen of all of our arguments. They can't be raising this control and this custom and practice up to a level of a standard of care, and that none of this evidence about the shipyard, none of this evidence about the Navy is relevant apart from that.

MR. COOK: Your Honor, if I may, I believe Mr. Bishop has some points on this as well, but if I could start.

THE COURT: Sure.

MR. COOK: Mr. Harty's arguments really go to the weight and not the admissibility of the evidence here. If we look at alternative causation, we are entitled to fully argue that during the 30 plus years -- excuse me, 20 years of alleged exposure at Newport News Shipyard, that there was an alternative cause for his disease other than his exposure or potential exposure aboard defendants' vessels. No court has ever excluded evidence of alternative causation. In particular, plaintiff's counsel even agreed just a few weeks ago, Your Honor, when we were before you on the plea in bar, that Mr. Morton only worked on our vessels on occasion, so we're entitled to raise that argument with respect to the jury.

Now, dealing with the duty to intervene and the active control issues, Your Honor, I think plaintiff's counsel mischaracterizes the actual standard under a duty to intervene. A vessel owner is entitled to rely on the stevedore's expertise in the first instance in the duty to intervene. That's what Scindia said, Your Honor, and the Fourth Circuit actually reversed a federal district court opinion because they did not give that jury instruction at trial.

When we look at the duty to intervene,

the plaintiff has to prove actual knowledge on the part of the owner's representative on the ground in the shipyard of an obviously improvident failure on the part of the shipyard to protect the plaintiff in this instance, Your Honor. And under that, what the shipyard knew and didn't know, and what precautions they took or didn't take with respect to asbestos are directly relevant to their cause of action.

Essentially what they're trying to do, Your Honor, is they're trying to exclude any evidence of what the shipyard knew and what the shipyard did in order to later on point to an absence of that evidence and say, Look, no precautions were taken. The shipyard didn't do anything. And in this instance that's entirely incorrect, Your Honor.

Furthermore, under the active control duty, and this applies to both the duty to intervene and the active control, when we point to the custom and practice, we are not pointing to the unbending test of custom and practice, which previously held if you establish this as a custom and practice, that's dispositive of the case. That's not what we're attempting to do, Your Honor.

Due care can be determined and we can certainly argue that in front of the jury, that due

care is based upon what others in that industry did and what was done in similar circumstances. What the Navy knew, what their knowledge -- what the Navy knew and what precautions they took with respect to asbestos, what the -- what the shipyard knew and what the shipyard did with respect to protecting their workers with respect to asbestos is directly relevant to whether or not defendants had a duty in this case, and it's also directly relevant to whether or not there was any potential breach of that duty, Your Honor.

So, once again, I think they've kind of mischaracterized the issue of one of intervening negligence on the part of the shipyard. That's not the case, one of the sophisticated user defense, which they're trying to apply products liability law, which once again doesn't apply here, and I forget the third very intertwined issue, Your Honor. But under any analysis of the duty to intervene under Scindia and the active control duty under Scindia, Your Honor, we are entitled to put this evidence in front of the jury.

MR. BISHOP: Your Honor, briefly following up on that, if we go back to the Scindia decision, Justice Powell and Justice Rehnquist in their concurring opinion, Your Honor, said, I join the

Court's opinion because I agree with its basic thrust placing the primary burden on the stevedore for avoiding injuries caused by obvious hazards.

Now, that's very different, Your Honor, than the products liability context, the sophisticated purchaser context in which the Court in Newport News has addressed this issue previously with regard to a product manufacturer who has a nondelegable duty to warn. In this instance the Supreme Court says, The primary burden is on the stevedore, in this case obviously the shipyard. Under the Court opinion, the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore.

So for purposes of the duty to intervene, if we could substitute Newport News for that, we'd understand in their repair activities we didn't have a general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions to develop within those repair -- those repair activities.

Justice Rehnquist and Justice Powell go on to state that in describing why they had difficulty

and as did the majority of the Court with the general reasonability standard that had been enunciated by the circuit court below they said, But when, in a suit by a longshoreman, a jury is presented with a single question, whether it was reasonable for the shipowner to fail to take action concerning a particular obvious hazard, the jury will quite likely find liability. If such an outcome was to become the norm, negligent stevedores would be receiving windfall recoveries in the form of reimbursement for the statutory benefit payments made to the injured longshoreman. This would decrease significantly the incentives toward the safety of the party in the best position to prevent injuries and undercut the primary responsibility of that party for insuring safety.

And the Supreme Court in its majority opinion, Your Honor, said, We are of the view that absent contract provisions, positive law or custom to the contrary, none of which has been cited to us in this case, the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore.

And as plaintiff's counsel pointed out

to the Court in the prior hearing, Your Honor, on October 9th, the shipyard's work is construction and repair of vessels. That's their sole line of business. Exxon's work is the production of oil, the marketing of oil, the transportation of oil. The repair of ships and the maintenance of ships is incidental to that, but it's not their line of work.

And what the plaintiffs wants to institute here is to say, Well, if anybody in Exxon knows anything -- knows something about asbestos anywhere in the system -- you know how many hazards there are at a shipyard, Your Honor, that the shipyard is the -- is the person who has the expertise in that. That's why companies like Exxon bring their ships to Newport News which had the reputation as the best commercial shipyard in the world, certainly in the United States, if not in the world.

THE COURT: Are you saying it doesn't now?

MR. BISHOP: I think it does, Your Honor. I think it does now for Navy ships.

MR. ARMSTRONG: We agreed not to talk about after 1980.

THE COURT: Okay.

MR. BISHOP: In this instance, Your

Honor --

THE COURT: I recall I was involved in some suit over some Exxon ships. I think I need to recuse myself. There was a design defect. Some sailor fell and got hurt. I had forgotten about that. I think that may have prejudiced me.

MR. BISHOP: This instance, Your Honor, the nexus to Exxon is a single port engineer who's responsible for trying to make sure that the vessel comes in, that it gets all these repairs done. He signs off on the repairs so the vessel can get out of the yard.

And what plaintiffs want to be able to say is, No, we can't put in evidence about what the actual workplace practices were of the shipyard that give rise to the consideration of whether we, the port engineer at site, had actual knowledge that there was an improvident work practice that gave rise to a hazard that created the injury in this case to the plaintiff. No, you shouldn't be able to put in evidence of that. You shouldn't be able to put in evidence to understand what the shipyard knew and what they were doing to consider whether in this limited instance Exxon would have a responsibility because it was an improvident work practice, obviously, that's an

obviously improvident work practice known to the port engineer that gave rise to the injury of the plaintiff in this case.

The duty to intervene, Your Honor -- what they're trying to say is that the custom and practice of the largest shipowner in the world, the United States Navy, that brought ships on a regular basis to Newport News, they didn't have one port engineer there, Your Honor, they had 300. The supervisor of shipbuilding for the United States Navy had 300 people at Newport News Shipbuilding and Drydock Company, and not one of them ever intervened to stop the repair practices of Newport News ship.

THE COURT: Here's one thing I'd like to quote I discovered when I was reading something for no apparent reason. A custom shown to be a negligent custom is not admissible to show due care. How's that sound?

MR. COOK: Your Honor, my problem with that is that it assumes that the custom is negligent.

THE COURT: Well, we're not -- trust me, when I was going through all this, I'm looking at this. And, of course, I'm not real sure how you-all don't get into something with the shipyard with the duty to intervene.

Now, the actual operations appears, and I hate to quote your own cases, Mr. Harty, but can I here? Davis, the Court held that under the active operations duties a longshore worker was not held to be an experienced expert longshore worker as a matter of law regardless of his or her actual qualifications.

We agree with that?

MR. HARTY: Right.

THE COURT: So on the actual operations we don't care what the longshoreman did or didn't know or what the shipyard did or didn't know.

Now, the problem I've got on the duty to intervene is you've got the actual knowledge, but there appears to be still some vestigial issues here.

Let's see, The rule relieving vessels from this general duty to intervene rests upon the justifiable expectations of the vessel that the stevedore would perform with reasonable competence and see to the safety of the cargo operation, which requires the stevedore, as a longshoreman's employer, to provide a reasonably safe place to work and take safeguards necessary to avoid injuries. That's Howlett. Now, absent actual knowledge of the hazard, obviously the duty to warn may attach only if you've got to exercise reasonable care to place a shipowner

upon obligation to inspect or discover the hazard's existence.

So I think I agree with the active operation, it doesn't make any difference what the shipyard knew or didn't know. But if you're talking about the duty to intervene, don't you have to show you knew about it? I mean, they had actual knowledge, but they also knew that the shipyard wouldn't do anything.

MR. HARTY: Your Honor, I think can respond to that in two ways. First of all, all these cases they have read and all these passages of cases that they read about duty to intervene, the onus is upon the shipyard in the first instance. That is already taken into account by the fact that under the duty to intervene the shipowner had to have actual knowledge.

THE COURT: Right.

MR. HARTY: The first instance that the Court was talking about was that we're not going to impose a continuing duty to inspect on the shipowner during stevedoring operation. That's the first instance. They're saying, Shipowner, you don't have a continuing duty to inspect once the ship repair has started. Now, assuming that the --

THE COURT: In the turnover?

MR. HATTEN: Turnover.

MR. HARTY: Assuming that there was one and that the active operation doesn't happen, then we're not arguing that they had a continuing duty to inspect if that is what the duty turns out to be, the duty to intervene. What we are saying is that the hazard was open and obvious to them apart from the continuing duty to inspect.

THE COURT: Right.

MR. HARTY: It was apparent to them. So once it became apparent to them, then they have to know whether -- they have to act if the shipyard is not acting to correct this.

THE COURT: That's like if you have the open hatch, it's obviously an open hatch. You know it's an open hatch. Now, can you not rely on the shipyard to have people to know not to step into an open hatch?

MR. HARTY: You can.

THE COURT: I mean, do they have to put up little yellow wet deck signs?

MR. HARTY: Sure.

THE COURT: Just wondering, can you not assume that these guys are not going to step into an

open deck?

MR. HARTY: You can assume it up to the point that you know that they're not going to.

THE COURT: That's my point. Don't you have to show that they would know -- like, for instance, you'd have to show that the shipyard doesn't use respirators or doesn't use any safety procedures.

MR. HARTY: Which we will show that.

THE COURT: That's kind of --

MR. HARTY: The way we show that, though, isn't whether the shipyard had a policy of respirator use or whether the shipyard knew in 1934 about the hazards of asbestos. That's not how you show it. You show it by all the witnesses in this courtroom saying, Nobody was using it and it was apparent to the shipowner and everybody else who happened to step onto that ship that there was no cordoning off, and Tompkins did say he saw no cordoning off of any spaces, there were no wet methods being used, there were no respirators being used and there were no other asbestos control procedures. And that's actual work practices on the ship and it's not just a single port engineer, it is Exxon. Exxon knew.

Exxon knew this was wrong, and their medical department knew it was wrong, and their safety

department knew it was wrong, and their director of safety said it was -- that all of those provisions and all of those rules and all of these controls that applied to the refineries applied to their marine operations as well. Their contracting department knew and their marine construction and repair division knew. And so it's not a single port engineer, it is Exxon knew.

And Exxon saw, not on a single occasion, not with a single port engineer, Exxon saw on many occasions over the course of two decades from the 1960s to at least 1978, according to the testimony in this case, many different port engineers on different ships at different times of ships that Morton was on, no controls, never, never any controls. And so at some point along that way -- and we're not even talking about the 1950s when the shipyard was working on Exxon ships before Morton came on the scene.

And so, Your Honor, you're right in the sense that you do have to look at what the shipyard was doing, but it's not a matter of what corporate shipyard was doing as a corporate entity or what its knowledge was, it's a matter of was the shipyard correcting this problem in this instance on this ship, and that's why the shipyard's negligence as a

corporate entity is totally irrelevant. That doesn't matter to the duty to intervene.

In this instance, the Davis case, a guy goes out, crew member goes out and sprays the deck in subfreezing temperatures and ices up the deck. I know that's an active operation case.

THE COURT: Yeah.

MR. HARTY: But it's for a hypothetical here. It doesn't matter if the shipowner or the shipyard, either one of them, had a policy not to spray down the deck in subfreezing temperatures, what matters is that he did and that nobody marked the deck, nobody threw any cement or dust or sawdust or whatever to --

THE COURT: No sign in Spanish or anything?

MR. HARTY: Right, exactly. Piso mojado. No piso mojado sign.

But the issue is what did the shipyard do in this instance on this ship. And they can't show -- they can bring in testimony, they're certainly welcome to bring in their port engineers to say, Wait, wait, wait, wait, wait. We did see all this. They're certainly welcome to bring in a witness to say, Look, I'm a port engineer and I didn't know anything about

this and you can't show that I knew anything about this, but they're not bringing a port engineer. They're certainly welcome to bring someone in to contest their own negligence.

What they're trying to do is cloud the issue by bringing in all of this other extraneous stuff without the shipyard custom or practice, which really is not relevant to this issue.

MR. HATTEN: Can I supplement?

THE COURT: Jump up any time you want.

MR. HATTEN: Every one of these ships has got a crew, every one of these ships has got a master. Members of the crew stay onboard and perform work. The port engineer is there. And so these ships, 14 of them, lots of crew, lots of officers, port engineers, Exxon has not come up with one witness, not one witness who said that he saw any safety procedures ever going on at the Newport News Shipyard on any of these ships. They have not come up with a single person at the shipyard who is going to -- who has offered any testimony that all this was in place on these ships and that Mr. Morton is wrong, that the estimators are wrong, that the other coworkers are wrong, that when Mr. Morton was on these ships there was safety procedures on these ships. We have a

uniform set of testimony by the witnesses for Exxon, the witnesses for the shipyard that this was not happening when Mr. Morton was on the ship. No one has come in and contradicted that.

So the fact that there may have been negligence by the Newport News Shipyard in enforcing its own procedures and regulations, because surely if that was happening somebody would come forward and say that this -- this was happening. There's no witness that has said that. So if -- if their own people are saying they don't see it, never saw it, then -- and we have up until 1967, Judge, before this -- the hint of any procedure for anybody at the shipyard, and he's working there on Exxon ships up before 1967 and two of these big jobs he worked on, the BOSTON and the BALTIMORE are before '67, before there's ever even a piece of paper in the file that says there's a procedure, much less whether the procedure is being enforced or not. But whether it's '67, '73, '74, no one has come forward with any testimony that any -- any protection was being provided to the workers on these ships.

This is not alternate causation. That's a very different thing. The defense -- the asbestos manufacturers talk about alternate causation because

they'll say it was product X, not product Y that caused the issue. No, it's the same asbestos. This is Exxon's asbestos. This is Exxon's asbestos turbines, Exxon's asbestos pipes, Exxon's asbestos covered equipment that is being repaired and the asbestos is being set free in the environment.

THE COURT: I didn't see it, but I assume every exposure counts?

MR. HATTEN: Yes, sir, every exposure.

THE COURT: I didn't see any motions on that.

MR. HATTEN: No, they've given up on that.

So it's not alternate causation. What this is is dual responsibility. And dual responsibility on the active control on a daily ongoing basis, and dual responsibility, backup responsibility when the -- when the procedures are not being taken.

I told Will yesterday, and I think this applies, this duty to intervene is not really dissimilar from the last clear chance doctrine in an automobile case. You know, you've got negligence right here that all these witnesses are saying nobody is doing anything. And so then the evidence is that

Exxon had all this sophistication and then didn't respond either. And, in fact, they didn't even tell their port engineers. This is really not even a case about the port engineer knowing about it. Their port engineer has already testified nobody told him either.

THE COURT: Let me ask you, are you-all planning on having to prove actual knowledge in this case?

MR. HATTEN: We are going to prove actual knowledge.

THE COURT: Not should-have knowledge?

MR. HATTEN: We're going to prove actual knowledge and should have known. We're going to prove actual knowledge on the defendant, on the defendant Exxon.

THE COURT: Yeah.

MR. HATTEN: And because of their actual knowledge, they should have trained their port engineers and their crews and so forth.

But, as a matter of fact, in this conflict, Mr. Hammond said --

THE COURT: Well, I may be getting ahead of myself, but I was thinking that basically are you telling me that if you don't prove actual knowledge, you lose?

MR. HATTEN: I'm going to prove actual knowledge on Exxon. I'm not going to rely just on should have known for Exxon. According to their safety person, if there was any visible dust on ships or anyplace else at all, all these procedures should have been taken.

THE COURT: Well, the reason I ask is we've got two or three different blades on that particular question. But if the case is actual knowledge then, you know, what the shipyard's practices were, period, doesn't make a whole lot of difference at that point. I mean, that's -- you cannot be the one who knows more than everybody else and we know it's dangerous but we're not going to tell anybody at that point.

But that poses a problem. Clearly you can't then come in and say, Well, this is what everybody was doing at the time. And if they can prove that out of all the world you're the one --

MR. HATTEN: That's our case.

THE COURT: Well, good. I've been reading for the last week and a half and I missed it.

MR. HATTEN: We don't think you have to go to the literature or anything else to show the knowledge of Exxon. Their person -- their head of

safety said that all this control about asbestos applied to ships as well as to their refinery, and so we are really making an actual knowledge case.

THE COURT: Isn't this a refinery motion?

MR. HATTEN: We haven't gotten there yet.

MR. COOK: We jumped ahead to that one, Your Honor.

THE COURT: Yeah.

MR. HATTEN: We are making an actual knowledge case, yes, sir.

MR. HARTY: The refinery motion, Your Honor, is combined into their custom and practice motion, and if I can say one other thing.

THE COURT: Sure. Well, exclude as to --

MR. HARTY: Right. That's folded into the custom and practice.

If I can say one other thing. When Mr. Cook was arguing he said -- he said something that really I think shows where they're going with this, and that is he said due care is determined by what others did, and that's resurrecting the unbending test of negligence. That's custom and practice.

THE COURT: Just from the Virginia case that I read to you, it's Lynchburg Gas versus James

Sale. Actually, I don't know if it was in your brief.

MR. HARTY: I don't think I did.

THE COURT: How'd you miss that one? Well, I tell you, a judicial secret as to what I was looking for, which is there's a difference between whether the evidence is successful or whether it's admissible. And, you know, the admissible part from a judge's perspective makes this trial last another week. So not that that's my goal, but, you know.

But this one, it's a gas company case. I think at that point the -- it is 160 Virginia 783. It's the same line of cases with the unbending rule. They struck the evidence of the defendant in the case relating to the custom pertaining to the City of Lynchburg. The reason was that no custom could excuse the defendant under the facts stated from not having made an inspection when it permitted the gas to be introduced under the circumstances set forth.

Obviously, as you might guess, somebody got blown up here.

No error was committed by the Court in striking out the evidence. A custom so fraught with danger was of itself sufficient to have put the defendant upon notice and cast upon it at least the observance of ordinary care. The custom shown to be a

negligent custom is not admissible to show due care.

MR. HATTEN: Your Honor, we actually thought that this evidence was being offered to try to show -- he's kind of arguing it both ways. He's saying this is alternate causation, the negligence of the shipyard. We were going to come in here and stipulate the shipyard was negligent.

THE COURT: I was waiting for you to offer some argument from your law firm that says it was not.

MR. HATTEN: I'm not saying they weren't negligent. No, I think the shipyard was negligent. That's my personal belief and I'd be happy to enter into a stipulation that the shipyard was negligent.

But the shipyard's negligence is concurring negligence. That's why it has never been permitted and that's why alternate causation doesn't work because the shipyard is not doing exactly the same thing that we are blaming on Exxon. They're not warning, they're not protecting, and they're not providing the plaintiff with information to avoid breathing something that's going to end up killing him.

So, you know, to the extent that that helps the Court, I'm happy to make that stipulation.

But based upon what I hear, that doesn't satisfy them, that the shipyard was negligent.

THE COURT: Well, not their point.

MR. HATTEN: So that apparently is not their point. But this is not intervening negligence, it's just concurring negligence, but it's also not alternate causation. That's just a misnomer as to what this is.

And the testimony of the witnesses at Newport News Ship is that their port engineer has got total control of that ship from beginning to end, and that if he ain't happy, ain't nobody happy, and that's the person that they've got to please every day.

MR. ARMSTRONG: Your Honor, if I might offer a remark.

THE COURT: Yes, sir. Come on up.

MR. ARMSTRONG: I think plaintiffs wish naturally to rely on the testimony of Mr. Hammond and use that, if you will, as the unbending test. But I think in any assessment, that testimony, if it's admissible, might be relevant, but not conclusive. And other evidence about what other people in the industry at the time were doing in reaction to knowledge about asbestos hazards from what was available at any particular point in time would be

relevant for the jury's assessment of whether any particular custom and practice was negligent or appropriate. And there's going to be testimony, obviously, from the experts about what the state of the art might have been in the 1960s and 1970s as knowledge expanded.

Mr. Hammond -- I don't think there's going to be any evidence Mr. Hammond was ever on any of these ships at Newport News, ever had any observation of what happened when Mr. Morton was on any of these ships. And so what they wish to do is to impute Mr. Hammond's knowledge and assume what he might have concluded had he seen something.

But actual knowledge, I believe, in this context is what is the actual knowledge on the part of the port engineer or other representative of the shipowner who happens to be there. And I just offered two possible scenarios in a 905(b) context. One is the typical one where you have a port engineer whose primary job is to make sure that they don't put the propeller on backwards and other engineering kinds of issues. He is not an industrial hygienist typically. And I don't think there's any case under this line of authority that says the shipowner's representative for the purposes of duty to intervene now has to be

globally knowledgeable about everything that every nook and cranty of the corporation might know.

Another scenario, you don't have a mechanical guy, but for whatever reason they send the industrial hygienist to go down to see what's going on. And that industrial hygienist has no clue about the fact that if you're working a particular winch with a hawser you need to have two or three men on the line. But some mate who works for the company but who isn't present might know about that work practice. Actual knowledge has to be measured by the knowledge of the individual who happens to be there.

Now, I think on the admissibility issue, which you're really being asked to decide here, the question ought to be whether the evidence about what others in the business at the time having presumably the knowledge about what was in the medical literature germane to these and others hazards, what was their response to that, because it's relevant to what a port engineer who's not a certified industrial hygienist, that's not his trade or profession, what would that individual regard as obviously improvident. And, you know, I think there's going to be evidence on various sides of that.

But that's the question this jury is

going to have to in the end address. What would a reasonable individual, not necessarily having all the knowledge of the Library of Congress, but would a reasonable individual regard as obviously improvident, whether it's an open hatch or a cloud of dust or an exposed wire or whatever it might be. And on that issue in this context, the evidence of what other responsible people in the business were doing, what their take on those kinds of circumstances was is at least relevant to the question the jury has to address. Mr. Hammond's testimony by itself is not the end of it.

MR. HATTEN: Your Honor, we're not talking about an individual. We're talking about the director of safety, Mr. Hammond, and he says this applies to ships. When asked by his corporate superiors to write a summary about what they had been doing and should have been doing he says, We knew it, we knew it should apply on ships. And he didn't tell any port engineers and no port engineer is going to come in this courtroom and say he was ever told anything. That's because Exxon never actually implemented the knowledge of Exxon -- Mr. Hammond and the safety department. They never had the first procedures for their ships, for their crews, for their--

for anybody until the mid 1980s, 15 years after -- after OSHA.

So what you have is a corporation that has a duty to train its people and to have its people knowledgeable on these ships. And so it's not the individual knowledge of that port engineer. He's dead. We can't take his deposition. What we do know is that corporate knowledge of the company, what we do know is what the corporate head of safety says that everybody was supposed to do that never got to -- to the port engineer, never got to Mr. Morton.

And so, you know, here we have a whole shipload of people being exposed to asbestos. The shipyard is not doing what they're supposed to be doing, Exxon's not doing what they're supposed to be doing. Mr. Morton is in there putting in lights and putting on heater bars and doing what he's supposed to do as an electrician. And they've got two people, responsible people, the owner of the ship, got control of the ship, and which their own director says has total control of all the repairs in every activity and is responsible for safety, and their own manual says the port engineer is responsible for safety of the shipyard workers, in their own manuals. The head of safety says what they should be doing and they're not

doing it.

So this is a case about actual knowledge of Exxon, and actual knowledge trumps custom and practice. It just trumps it. You can't go in and say, I knew that this was dangerous, I knew I should have warned them, but nobody else was doing it so I figured nobody would ever blame me because -- just because I knew more than anybody else. Well, when you know more than anybody else, you've got a duty to open your mouth, you've got a duty to say what you know, and that is what the case is all about.

This isn't a case of state of the art. It has nothing do with the state of the art. This is a case about actual knowledge not being transferred to a port engineer. It's a case about Newport News Shipyard not enforcing its own procedures, and how long they knew it doesn't make any difference. What procedures they had in the drawer don't make any difference. What procedures might have applied on a Navy ship doesn't make any difference.

The issue is what was going on in on these ships where Mr. Morton was. And there isn't anybody that testified that there were any procedures that affected him on the Navy ships, there were no procedures on the commercial ships, the other

commercial ships, there were no procedures on the Exxon ships.

And so because I don't have to prove the whole liability, I just have to prove a corner of that piece of paper or that liability, the issue should concentrate here about what did Exxon know. If they knew it, then they can't rely on these other people when it's not being done. And so we can impugn that to the port engineer. And I -- and it's not the knowledge of an individual, it's corporate knowledge. We're not suing John Ireland. We're suing the people that failed to train him, so he would see this is obvious.

When the people in this courtroom come in here and say, We're ripping off asbestos with knives and hammers and saws and you couldn't see across the room and their safety person has a memo right in the file that says it applies to ships and if there's any visible dust at all you've got to do all this, this is an actual knowledge case. I'm not going to the literature to find out whether a warning should have been done. I'm going right to Exxon's files, and that's why Newport News Ship's knowledge is not important.

THE COURT: Yes, sir.

MR. ARMSTRONG: Your Honor, two brief points, if I may. First, Mr. Hatten has asserted that Exxon as a corporation had a duty to educate its port engineers in these matters of industrial hygiene. I'm not aware of anything under 905(b) that imposes a duty of education.

It -- there are many possible scenarios under which a shipowner might have a crew member left onboard. That crew member could be an able-bodied seaman, that crew member could be the chief engineer, whoever. I think the test under 905(b) might be analogous to the last clear chance. It's the knowledge that individual happens to have when he or she observes some conditions.

THE COURT: Let me ask you a question. Does 905(b) impose liability on the master of the vessel or the owner?

MR. ARMSTRONG: It's on the vessel, which the definition of vessel includes the shipowner. But I think it's -- the reality of the world, of course, is that the shipowner is a corporation. It has to act through individuals. And so it's the knowledge of those individuals that matters.

And I don't think there's any learning --

and I've looked at the cases on this, and I am not aware of anything that says if the shipowner has someone onboard, that individual has to be educated in all the possible safety issues that might be arising.

THE COURT: Well, aren't we going back and revisit the EXXON VALDEZ prohibition I just made, that it wasn't really Exxon's fault, it was the alcoholic captain? The only thing I can say, and I have no idea where we're going to go with that, but I can see an argument to the jury that it's not Exxon's fault because the master or the port engineer didn't know something, and that's kind of back to that Mr. Springs moment I had in the other trial. Go ahead.

MR. ARMSTRONG: I think that's the point I'm making, Your Honor, is that the corporation -- maybe it's an issue that needs further exploration here. But I don't think we can let it pass without notice. I don't think there is an obligation on the part of the shipowner to educate whoever of its crew or other representatives who are left aboard or send aboard because the primary responsibility of course is on the shipyard.

And so the idea, I think, under the law is if the shipowner sends a representative, let's just say they've got an issue with the propulsion system

and they send out some fellow who's just a genius on bull gears and propellers, doesn't know a thing about electrical. But the idea that, therefore, that individual -- now, before you go, you've got to take a class in electrical safety issues and industrial hygiene, I don't think that's the law.

I think the law is that if the shipowner has someone around and if that individual sees something that that individual perceives as obviously improvident, you know, your open hatch example might be --

THE COURT: I only used it because it happens a lot.

MR. ARMSTRONG: Right, and then that would come up. But where you have something that's technical in the sense that this is, what would a reasonable person with, you know, whatever his or her background and knowledge be if they observed someone beating away at asbestos insulation, I think that's an open question. And you can't answer that question just by saying, well, never mind about the person who was actually there. Let's talk about what might have been the case if this other fellow, Jim Hammond, had been there. That's constructive knowledge, that's not actual knowledge.

But I think I have indicated the point. I don't think that the case law indicates that there is on the corporate shipowner's part an obligation to educate the people it happens to leave aboard or send aboard from all of the possible hazards that might arise during a particular ship repair. It's more of a you take -- you take the individual you get.

The second point I wanted to make, Your Honor, is there is a distinction between what a company might have as its own work practices and what might be regarded as a reasonable standard. I would cite as an example all of the oil refineries that I have visited have a speed limit of 15 miles an hour. Now, does that mean that if someone who has a familiarity with that goes to, let's say, the Newport News yard where there might be a speed limit -- I don't know what it is. Let's just say it's 20 or 25 miles an hour. I don't think you can make the kind of logical argument that Mr. Hatten is drawing here to say, Well, you know perfectly well that on the refineries you have a 15 mile an hour speed limit, therefore, you would have to know that it's improvident to have a 20 mile per hour speed limit. That's not necessarily the case.

On the other hand, if you say, Well, I

saw some guy tearing around, you know, in a car going way too fast, whatever that might be, 20 miles an hour or 50 miles an hour, that might be a different set of facts. But here we have a situation where the point -- again, getting back to the evidentiary issue at hand, I'm not even sure that Mr. Hammond's testimony is relevant to the question of what that port engineer knew.

But assuming for the sake of discussion that Mr. Hammond's testimony is relevant, it is equally relevant to have the testimony of what the custom and practice about dealing with these asbestos hazards might have been among those who are knowledgeable, and then both sides can have their arguments and the jury is going to have all the pertinent information from which to draw the conclusion that it's being asked to draw.

THE COURT: I do remember now I had an Exxon case once. It apparently was some hatch thing that was supposed to open up, and somebody stepped on it and it opened down and there was water below, the ocean. There was some design defect thing.

You want to talk about the refinery people while we're here? We'll give Mr. Hatten a chance to sit down again, but I missed that part about

excluding the practices and procedures at the refineries.

MR. COOK: Your Honor, it really goes to what Mr. Armstrong was already talking about. Really the issue here is the knowledge, the custom and practices at the shipyard and whether that would be obviously improvident. I think it's really been addressed in fair part though so far.

I do have some other issues with what the plaintiffs have said.

THE COURT: Go ahead.

MR. COOK: Essentially I guess my problem with what Mr. Hatten -- his position on this case is that it really is a double standard that he's trying to impose. He's trying to point to corporate knowledge of Exxon and at the same time he's trying to completely ignore any of the policy issues that were made by the shipyard and the practices and procedures that were implemented by the shipyard.

So really with respect to the duty to intervene, Mr. Hatten is not trying to address in the ship context as far as what a port engineer on that ship would do. He's trying to address it at the corporate level saying Exxon had this knowledge and therefore Exxon brought ships into the shipyard and would have to intervene. By that token, if that's

what he's attempting to do, then the knowledge of the shipyard is directly relevant to those allegations, because that indicates that the shipyard was taking precautions at that global level upon which the shipowner has a right to rely in the first instance, Your Honor.

Furthermore, and referring specifically to what Mr. Armstrong had said earlier with respect to the fact that it is the port engineer on the ground that has to have the knowledge, Your Honor, I think in the case of Greenwood, which I mentioned earlier, it's a Fifth Circuit case, 111 F.3d 1239, that states that the definition of obviously improvident is obvious to anyone. And it really is a situation that -- you know, Mr. Hatten uses the example of the last clear chance doctrine. You have to have someone in that position who has that knowledge to recognize it in order to step in on a last clear chance doctrine.

I think the Fifth Circuit decision in Greenwood is directly on point with that issue, Your Honor, that the actual knowledge standard is actual knowledge of an obviously improvident standard or obviously improvident failure on the part of the ship -- shipyard in this instance and that obviously improvident is in fact obvious to anyone.

Now, Mr. Hatten also pointed to supervision workers. And I would refer the Court specifically to the hearing of October 9th where Mr. Hatten stated, In the testimony by Mr. Morton he testified that -- did you ever receive any supervision from anyone other than Newport News personnel while working on the Exxon vessels. No, I didn't. I don't recall. So the testimony of the plaintiff is that he's getting his day-to-day supervision from Newport News Shipyard supervisors.

That was Mr. Hatten's position last week. I agree with that position. Mr. Morton was supervised by Newport News Shipyard employees on daily basis. And as we go through this, Your Honor, the custom and practices of those supervisors is directly relevant to a reasonable standard in particular under the duty to intervene where the defendant has a right to rely on the shipyard in the first instance.

Plaintiff's counsel also referred to Mr. Tompkins and Mr. Tompkins says that he was unaware of any cordoning off. There was no testimony with respect to any other precautions, Your Honor, such as respirators, ventilators, et cetera. And in particular when we look at plaintiff's expert witness, Mr. Ware, Mr. Ware testified that there was

ventilation used in the engine rooms aboard the Esso and Exxon vessels throughout the 1960s and 1970s. I believe he testified it was a Coast Guard requirement, but I would have to go back to that, Your Honor, and he was unaware of any time when that requirement would have been violated.

Furthermore, plaintiff's witness Mr. Scruggs testified that there were wet-down procedures used with respect to insulation in the 1960s.

There's also a reference to crew members. There's no evidence in this case, Your Honor, that there were any crew members present in the same area as Mr. Morton. Never testified once during his deposition on that, and there are no witnesses in this case that can place Mr. Morton in the same place or the same area of any ship as any crew members of defendants.

And I don't want to go back over ground that's already been covered, Your Honor.

THE COURT: All right.

MR. HATTEN: Your Honor, there's not one shred of evidence that Exxon knew anything about what Newport News knew or what Newport News was doing. In fact, the opposite is true. If Exxon had known what was going on on their ships, the presumption is Mr.

Hammond would have flipped over and sent somebody in here to do something about it. So there's no evidence whatsoever that Exxon relied on or ever knew what Newport News knew.

Now, why is that important? Because it goes back to that similar issue about why you can't have a sophisticated user defense in a product liability case, the Willis case. Mr. Bishop remembers that case because he represented Celotex in that case. And they went up and they said, We should be able to show what the Newport News Shipyard knew. And the Fourth Circuit said, No, you can't show what Newport News Shipyard knew, unless you can show the defendant relied on that.

There's no evidence whatsoever that Exxon relied on any knowledge of the Newport News Ship or they ever even knew it. There were OSHA regulations in place as of 1971 that Exxon was responsible for and that the shipyard was responsible for. They -- they knew that procedures had to be followed when asbestos was being used, but they had known it since the 40s. We're going back way beyond that.

And whether or not the port engineer who is the person in charge of the whole ship -- you know,

this example about whether or not a -- a propeller engineer is supposed to know what an electrician does, that might be fine and good. But the ship repair inspector, he's responsible for the whole ship. He can't come in here and say, They didn't teach me about nitroglycerin. He can't come in here and say, They didn't teach me about explosive gas. You've got a carcinogen that is considered by everybody to be an ultra hazardous material that the company knew all about and the company has a responsibility here.

And as to the crew, since the shipyard didn't have -- since Exxon didn't have any regulations until the 1970s, despite what they knew they didn't have any regulations for their crew until the 1980s, what do you think a Newport News Shipyard worker is going to think when they see on a regular basis the crew of the Exxon ships using asbestos, working with asbestos and they're not taking any precautions to avoid asbestos exposure. The shipyard workers that they're working next to are not using any precautions to avoid asbestos exposure.

So it goes back to this same thing we're talking about. Who says that? Mr. Ware says that. Mr. Ware says, you know, These people were being exposed just like our people. And they weren't being

protected by their port engineer or their master or anybody else. It goes back to this simple thing. Nobody is protecting the workers. Shipyards failed, but that's not the point. Exxon is the last resort. They own the ship and by virtue of their ownership of the ship, they are the protector of the last resort. That's why when it doesn't get done and it's obvious that it's not being done and everybody on the ship saw it was obvious, but nobody on the ship knew it was dangerous, why didn't they know it was dangerous? Newport News didn't tell the Newport News people, Exxon didn't their tell people. Exxon's got a responsibility there.

But it's not an issue about -- about Newport News' knowledge. It's the issue about what was going on in those ships, and they still haven't answered the question about -- they said Mr. Scruggs was aware that there were -- there was this procedure or that procedure. Mr. Scruggs didn't testify anything about what -- about Mr. Morton or any circumstances under which Mr. Morton was exposed on an Exxon slip. So that's the only issue that's important here, not whether -- not whether Newport News knew or didn't know.

MR. HARTY: Your Honor, can I just --

THE COURT: I was going to say anything else and look at them.

MR. HARTY: I had a couple of comments here. First of all, we're not just relying on Hammond, although he's the popular target today. Their doctor -- or Mr. Bonsib wrote a huge report on asbestos and asbestos control measures in 1937. They admit it in their answers, they admit it in their answers to interrogatories.

THE COURT: Let me ask you a question here. Now, the conduct of the shipyard is going to come in in your evidence, isn't it?

MR. HARTY: The conduct of the shipyard workers.

THE COURT: Well, it's a broad word.

MR. HATTEN: The absence of conduct by the shipyard.

THE COURT: Well, I mean, somebody's going to say, We went on a ship and did this.

MR. HARTY: Right. And so it comes down to -- and that was their issue on the equal knowledge thing. They said, We've got to be able to bring in all this stuff, the knowledge of the shipyard to contradict Ware's testimony of what the shipyard knew. And we said, Ware won't testify about that.

Ware will only testify about his own personal knowledge because that's all that's relevant here.

And I think they themselves are proving our case on this intervening negligence and the sophisticated user element because, if you notice, all of the arguments they've been putting forth for probably the last 25 minutes have related to, well, it's about Mr. Ireland and what Mr. Ireland knew, and not about what Exxon knew. But the whole thing is focused on Exxon or its employees knowledge and that's what we're saying. That's the focus. It's not the shipyard. It's the focus on Exxon.

If they want to bring in all this evidence about what they themselves knew, that's one thing. But it's not what the shipyard knew, and it's not custom and practice of the shipyard. And so that's a big difference. The speed limit issue, okay, 15 miles an hour versus 20 miles an hour, maybe there's an issue of judgment there. But 15 miles an hour versus 70 miles an hour in the shipyard is totally different and that's what we have here, no controls whatsoever.

And then this issue -- and I know we keep beating Hammond to death, but he's a popular target today. He says, Our maritime workers like our

refinery and chemical plant workers were given physicals at least annually, monitored closely for potential exposures and regularly trained in safety meetings about the hazards of asbestos.

And so we're not just talking about port engineers, we're talking about their maritime workers as a body were trained. They say that they were trained, and that's an issue that comes before the -- so all this stuff about maybe he wasn't an electrician or maybe he didn't know how to use a winch or stuff like that, their guy, their director of safety is saying that their maritime workers were trained in that.

Now, they want to come in here and offer contradictory evidence about what Mr. Ireland actually knew. I don't think that's the issue anyway, because when you go back to the Scindia case and the Court is discussing this duty to intervene, and it's on Page 175 through 176 of the Scindia case, the Court doesn't talk about the individual crew members on the ship. The Court doesn't talk about the stevedore foreman on the ship.

It says, Yet it is quite possible it seems to us that Seattle's judgment, Seattle being the corporate shipowner, in this respect was -- I'm sorry,

that Seattle's judgment was so obviously improvident that Scindia -- and so we're talking about the corporation, we're talking about Exxon. And then when you look at Footnote 22, they come down to what the ship -- what the individual shipyard worker, this individual stevedore employee knew versus what the corporation of the shipowner knew. And as Your Honor brought up, this is a shipowner lawsuit under 905(b).

THE COURT: I think you caught the Springs reference. I'm not sure they did because they weren't there. If they want to defend on the basis that our employee didn't know --

MR. HARTY: Right.

THE COURT: Anyway, yes, that's Footnote 22. We agree with the Court of Appeals that the shipowner may not defend on the ground that Santos should have refused to continue working in the face of an obviously dangerous winch, which his employer, Seattle, was continuing to use. The district court erred in ruling otherwise, since the defense of assumption of risk is unavailable.

He's correct as to what the other part of it is. Up above at that point when we're talking about concurring opinions, Powell and Rehnquist -- actually Brennan, Marshall and Blackmun had one above

them in the concurring opinions. If the shipowner has actual knowledge that equipment in the control of the stevedore is in an unsafe condition and a reasonable belief that the stevedore will not remedy that condition, the shipowner has a duty either to halt the stevedoring operation to make the stevedore eliminate the unsafe condition or to eliminate the unsafe condition itself.

Now, the motion to exclude the procedures and practices of the refineries is denied.

The motion to -- let's see. The motion on intervening negligence, prohibit defendants' expert to testify to knowledge, and I use the word -- now, we've got a problem here because conduct of the shipyard is coming in somewhere somehow. So knowledge and negligence is not what he's testifying about. You-all are going to talk about conduct in your case.

Now, I hate to do this in a case like this, but I'm going to grant the motions, but this may be one that depending on what you-all do, they get to bring in some evidence.

Now, as far as apply maritime industry's custom and practice, you know, that's really not the standard to imply that custom and practice. Now, I'm going to grant -- I'm going to deny your motion to

apply the maritime industry's custom and practice. But depending on what they do in their case, some of this may come into play. The actual operations doesn't appear to come into play at all with knowledge one way or the other.

Now, if they don't prove actual knowledge, then I'm not sure it's even should have known at that level. I'm going to have to think about that. You may get an instruction on should have known toward the end of the case somewhere, but as far as excluding their evidence, it may have to be an actual knowledge scenario.

And I obviously looked at some of this stuff and I'm sure you think that some of those things -- and Dr. Hammond's letter was pretty interesting. But, you know, some of those things absolutely show actual knowledge anyway. And if the actual knowledge is shown, then the custom and practice is simply not relevant in any way, shape or form.

Now, I don't see the Navy at all. Any conduct we're going to talk about is going to be from the shipyard depending on the evidence of the plaintiff. If you show actual knowledge, that Exxon knows, for instance, and show what they knew the shipyard was going to do, which I kind of joked about

in the beginning, but the custom and practice appeared to be back then nothing. I mean, in terms of like what to do with asbestos, it was just go remove it. It may have been a custom and practice to use a screwdriver instead of a hammer. I don't recall. There may be other evidence in the case, but I don't recall anything in here that suggested that there was anything that they do, other than just go remove it at that point. So presumably Exxon would know that, but what would they do? Nothing.

Now, in terms of the other -- I had another footnote I was going to read because, not to be completely pessimistic to Exxon, excuse me, Sea River Maritime, in this case you-all managed to keep Exxon out of it. The vessel owner has a variety of duties that, when breached, give rise to a negligence action, and they refer to U.S. Code 905. Since the duties were first described by Scindia, they consistently have been described as the turnover duty dealing with the condition of the ship when the owner turns it over to shoreside workers. The active control duty, dealing with the owner's liability if it actively involves itself in activities taking place, any intervention duty dealing with the owner's supervisory role after turnover. Not the port

engineer, not the master of the vessel, the owner.

Having said that, you-all won that one. Were you in Oregon for this one?

MR. ARMSTRONG: No, sir.

THE COURT: 2007. I'm sure you have that one in your file. But it was turned over. Summary judgment was granted on that one at that point. But I'm not sure about defending on the basis of what your guy at the scene allegedly knew or didn't know, because I can hear the argument that that's fine, the company knew this was dangerous and they decided not to tell their employees at that point. And I think that issue's come up over the years once or twice as far as that goes.

Now, I'm granting the motions of the plaintiff. I'm denying the motion of the defendant on those four issues. Now, conduct is a problem because obviously in this case there's going to be some discussion of conduct one way or the other, but it doesn't mean that I think that the custom and usage issue is going to rear its ugly head in the middle of their case. But I will leave that particular door open because I think this is a slightly different case than suing a manufacturer, obviously. It's got some different issues, at least, on the duty to intervene,

not on the actual operations. I that will be slightly different.

I think that covers all the numbers on my paper. Have we got anything left on the papers?

MR. HATTEN: Well, we have the deposition of the plaintiff, Morton, and the -- they took this deposition over seven days, five days of discovery deposition and then there was two days of the de bene esse trial testimony. Not every day was a whole day because he was not capable of testifying a whole day, but -- but there were four or five hours each day. We've designated them, the different testimonies and cross-designated, and we have objections. And I have a color-coded copy with, you know, my designation in yellow, theirs in another color, separate colors for the objections and so forth. And I can -- we do need to make a videotape from that testimony, and so there would be a need for the Court to address the various issues. I -- I would say to you that --

THE COURT: Do you want to do it today?

MR. HATTEN: I'm happy to do it today.

THE COURT: Is that a yes or no?

MR. COOK: We didn't it bring it. It wasn't on the agenda.

THE COURT: It wasn't.

MR. HATTEN: I have a color-coded copy we could sit by each other and do it. And I've got all those objections in a box. I've got copies of it, if the Court's willing to take that time.

THE COURT: We've got to do it sometime.

MR. HATTEN: I think that's important to get done. I do have a -- I have two full color-coded copies.

THE COURT: Let me ask you a question. Are you-all like on irreconcilable differences on this or can you look at it for a few minutes?

MR. COOK: I mean, we can probably look at it, Your Honor, and try to come to a resolution with some of them.

MR. HATTEN: Some of them we could. There are large portions of Mr. Morton's testimony in the discovery deposition that I object to on the basis of that of relevance, and that -- there's some fundamental rulings that you'll probably make early on on that, and that will determine whether or not we've another got 12 hours of videotape or maybe only 3.

THE COURT: Well, you want to take about a half an hour or 20 minutes right now and look at it?

MR. COOK: Sure.

THE COURT: I have -- if you need stuff, the file is around the corner on my official Craftsmen cart, so -- and I think -- I saw the designations, obviously, but nobody seemed to notice them for today, so I didn't worry about it. But they're either up here in the file or out there if you need papers.

The other thing is for Tuesday, assuming we have pieces of things left over, obviously the stuff about Dr. Balzer or whatever his name is, and what I'd like to see Tuesday is if we could pare down the list of exhibits to like, yes, I really am going to use this. Otherwise, Tuesday I'll probably pick a number definitely. So if you kind of work on that as far as what the exhibits are and what we really are going to use as opposed to the I'd-like-for-you-to-worry-about-this-and-I'm-never-going-to-use-it exhibit. Let's get down to the brass tacks Tuesday.

And then we have, obviously, Mr. Morton's deposition from a technological point of view. If you can do that today, fine. If you need some more time, I can do it tomorrow, I can do it Friday. It will be later tomorrow, and certainly a little later on Friday. I've got criminal docket tomorrow and I've got something from 11:00 to 1:00 on Friday, but usually by 2:00 we're done with criminals. So I can

do it today, 2:00 tomorrow, or 2:00 Friday. I assume you'd like to work on it over the weekend or during the week. Mr. Harty has no life, so it doesn't make any difference when he does it.

MR. HARTY: I have no life, Your Honor.

MR. COOK: I'd think it would be either best to look at it tomorrow or Friday.

THE COURT: That's fine, whatever you want to do.

MR. BISHOP: We can meet in the interim.

THE COURT: You can sit right here if you want.

MR. HATTEN: I'd be happy to sit with him or go over it with him on the phone after he gets back to his office and he has his transcript.

THE COURT: Whatever you want to do.

MR. HATTEN: What do you prefer? Just call me after lunch and we'll go over it this afternoon?

MR. COOK: Yeah, that's fine.

THE COURT: Most afternoons I'm available.

MR. HATTEN: Tomorrow afternoon then, is that --

THE COURT: Call, do what you want to do. We'll figure it out. I have a -- Monday I have a

jury. Monday is kind of a problem. And we may still have a piece of a jury, although Tuesday is election day, and there some pesky constitutional thing that says I can't make jurors come in. It's really a matter of whether or not I tell them that day. I don't know. The jury's in a criminal case. I don't know what's going on.

Mr. Harty's got all the numbers, I take it, so we're done except for Dr. Balzer and Mr. Morton's video and maybe some exhibits and whatever else pops up.

MR. HATTEN: Thank you.

THE COURT: It's been lovely. I certainly had a lot of fun. I know you-all did.

MR. HARTY: Thank you, Your Honor.

MR. COOK: Thank you, Your Honor.

MR. HATTEN: Thank you, Judge.

(Whereupon, the proceedings were concluded at 2:10 p.m.)

CERTIFICATE OF COURT REPORTER

I, Donna R. Tanner, Shorthand Reporter, certify that I recorded verbatim by Stenotype the proceedings in captioned cause before the Honorable Timothy S. Fisher, Judge, in Newport News, Virginia, on October 29, 2008.

I further certify that to the best of my knowledge and belief the foregoing transcript constitutes a full, accurate and complete transcript of said proceedings.

Given under my hand this 30th day of October, 2008, at Virginia Beach, Virginia.

_____

Donna R. Tanner