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IN THE CIRCUIT COURT FOR THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

DENNIS P. EMRICK,  
Plaintiff,  
v.  
A.J. ZINDA CO., et al.,  
Defendants.

No. 0002-02019  
PLAINTIFF'S MOTION  
FOR NEW TRIAL

INTRODUCTION

The jury in this case discussed the evidence and the merits throughout the trial in plain violation of Oregon law and the court's repeated admonishments not to discuss the case until after jury instructions. For this reason, plaintiff is entitled to a new trial against all defendants. In addition, the jury found defendant AC&S's Limpet spray insulation not to be dangerously defective although the evidence was uncontradicted that it is. For this reason, plaintiff is entitled to a new trial against defendant AC&S.

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1           **1.       The Jury Disregarded the Court's Instructions.**

2           The court told the jury at the beginning of the case and dozens of times throughout the trial  
3 not to discuss the case until instructed to begin deliberating. The reason for this instruction is  
4 fundamental and obvious – to discuss the evidence is to deliberate; to deliberate before all the  
5 evidence is in violates a fundamental premise of American judicial fact finding – to decide the case  
6 on all the evidence. The jury in this case repeatedly violated the court's instruction and that  
7 fundamental premise.

8           Plaintiff attaches the affidavit of alternate juror Elden Eichler. As an alternate juror, Mr.  
9 Eichler was dismissed before the jury began its proper deliberations. However, he was with the jurors  
10 throughout the trial, and witnessed discussions that repeatedly and directly violated the court's  
11 admonition not to discuss the case. Specifically, while waiting in the jury room before court and  
12 during breaks in the trial, jurors engaged in discussions in the following areas:

- 13           •       The believability and content of fact witnesses' testimony;
- 14           •       The quality of the presentations by different experts;
- 15           •       The background, impressions and costs of the experts for each side;
- 16           •       The amounts of damages requested by plaintiff;
- 17           •       The conduct, style and persuasiveness of the trial lawyers.

18 Affidavit of Elden Eichler at 2. These discussions amounted to partial, unauthorized deliberations.  
19 They did not necessarily include all the jurors; they occurred throughout the trial, that is, before the  
20 jurors had heard all the witnesses' testimony; and they necessarily occurred before the jurors had  
21 possession of the trial exhibits. Thus, the jurors began shaping each other's impressions of the  
22 physical and testimonial evidence before they knew what it all was. They voiced positions before all  
23 the evidence was in, and their previously open minds began closing prematurely. They began forming  
24 opinions before they had heard the applicable law.

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1 The trial court may, in its discretion,<sup>1</sup> grant a new trial for juror misconduct under ORCP

2 64B(2):

3 A former judgment may be set aside and a new trial granted in an  
4 action where there has been a trial by jury on the motion of the party  
5 aggrieved for any of the following causes materially affecting the  
6 substantial rights of such party:

7 \* \* \*

8 B(2) Misconduct of the jury or prevailing party.

9 ORCP 64B(2). The misconduct of the jury in this case in conducting deliberations before all the  
10 evidence was in materially affected plaintiff's substantial right to an open-minded deliberation by a  
11 jury on all the evidence. The decision of a neutral factfinder based solely on the evidence and the law  
12 is "the cornerstone of our jury system." People v. Morgan, 101 Cal Rptr2d 314, 317 (2000), citing  
13 U.S. v. Gorham, 523 F2d 1088, 1098 (D C Cir 1975).

14 Plaintiff has found no Oregon case addressing premature juror deliberation. It is clear that  
15 a new trial will not be granted based on juror affidavits concerning their own mental processes or  
16 those of other juror during proper deliberations. Carson v. Brauer, 234 Or 333, 345-46, 382 P2d 79  
17 (1963); State v. Gardner, 230 Or 569, 371 P2d 558 (1962) (juror had independent knowledge of  
18 witness). Oregon appellate courts have drawn a clear distinction between probing the jurors'  
19 deliberative mental processes, which the court will not do on a motion for new trial, and examining  
20 misconduct that is "extrinsic to the communications between jurors during the deliberative process,"  
21 which it will:

22 There is a strong policy in Oregon to protect jury verdicts from  
23 attack. Only limited kinds of juror misconduct justify a new trial. The  
24 kind of misconduct that will be considered in an attack on a verdict is  
25 misconduct that is extrinsic to the communications between jurors  
26 during the deliberative process or that amounts to fraud, bribery,  
forcible coercion or any other obstruction of justice that would subject  
the offender to contempt of court or criminal prosecution.

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<sup>1</sup>Ertsgaard v. Beard, 310 Or 489, 496 (1990).

1 State v. Miller, 167 Or App 72, 77 (2000), quoting State v. Jones, 126 Or App 224, 227, rev den 318  
2 Or 583 (1994). It is one thing to guard jealously the sanctity of the jurors' deliberations. However,  
3 misconduct extrinsic to those deliberations is another matter. As above, the kind of juror misconduct  
4 that justifies granting a new trial is the kind of conduct that would subject a juror to contempt of  
5 court. Id. at 77. Because jurors take an oath to follow the court's instructions, violation of those  
6 instructions can constitute contempt of court. State v. Baldeagle, 154 Or App 234, 242, 961 P2d  
7 264, 268 (1998). The court's instruction to the jurors not to discuss the case until the end of the trial  
8 is the most frequently given instruction during any trial. Its importance cannot be overemphasized.  
9 The prejudice to plaintiff arises not because the verdict went against him when it demonstrably would  
10 have gone otherwise. The prejudice to plaintiff – and it is uncontradicted – is that plaintiff lost his  
11 right to an impartial deliberation by all 12 jurors based on the applicable law and all the evidence.<sup>2</sup>  
12 The court should grant plaintiff's motion for new trial based on juror misconduct.

13

14 **2. There was No Evidence to Support the Jury's Finding that AC&S's Limpet  
15 Spray Insulation was not Dangerously Defective.**

16 AC&S's Limpet spray insulation (Limpet) was dangerously defective as a matter of law. The  
17 evidence concerning Limpet was uncontradicted:

18 Richard Hatfield testified that Limpet was "unique among fireproofing" in that it contained  
19 65% amphibole<sup>3</sup> asbestos and 33% Portland cement. Hatfield Transcript at 112-13. Mr. Hatfield  
20 testified that, because of its unusual composition, Limpet was highly friable and therefore releases  
21 asbestos to the environment "very easily." Id. at 113. Because of this, Limpet contaminates work  
22 places for long periods of time at high concentrations. Id. at 114, 116.

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24 <sup>2</sup>Should the trial court find it necessary to inquire into the effect of the jurors' unauthorized  
25 deliberations on the result in this case, plaintiff asks that the court inquire of the jurors on this point.  
26 However, plaintiff believes unauthorized deliberation is prejudicial *per se* as above and that such  
inquiry is therefore unnecessary.

<sup>3</sup>Amphibole asbestos is amosite and crocidolite.

1 William Longo testified Limpet is “very friable” and is 65% amosite. Longo Transcript at 38.  
2 He testified that the structural bond in Limpet is “very weak” because it contains so much asbestos,  
3 that Limpet “powders very easily and is released” and that it can be released when touched or  
4 bumped. Id. at 39-40.

5 James Millett testified that amosite fibers are on the surface of spray-applied Limpet and that  
6 Limpet is “considered friable, meaning that you could cause a powder just using hand pressure.”  
7 Millett Transcript at 76, 78. The asbestos on the surface of spray-applied Limpet is raw and  
8 uncoated. Id. at 80. The evidence regarding AC&S installed pipe and boiler insulation tracks the  
9 evidence concerning Limpet. Amosite asbestos from these AC&S products was also extremely  
10 available and persistent in the environment and just as deadly as the amosite from Limpet.

11 John Craighead testified that plaintiff’s mesothelioma was caused by amosite and that amosite,  
12 because of its rod-like structure, never breaks down in the human body or in the environment.  
13 Craighead Transcript at 76ff.

14 The above testimony is entirely uncontradicted in the trial record. In summary, it means that  
15 two-thirds of defendant’s product is a deadly poison that causes an incurable, fatal disease. It means  
16 that this deadly poison is quite easily released into the environment when touched or bumped, to say  
17 nothing of when it is intentionally removed. It means that once released, this deadly poison remains  
18 in the environment for long periods at high concentrations. It means defendant’s deadly poison  
19 caused plaintiff’s incurable, fatal disease. This is not a matter of interpretation; it is simply the  
20 uncontradicted evidence. Contemplating this evidence, no reasonable jury could find that Limpet is  
21 not dangerously defective. Nevertheless, against all the evidence, that is what this jury found.

22 A new trial may be granted on account of

23 Insufficiency of the evidence to justify the verdict or other decision,  
24 or that it is against law.

25 ORCP 64B(5). To argue that a verdict is “against law” is to raise an evidentiary challenge. A verdict  
26 is “against law” if there is “no evidence to support the jury’s finding.” Bednarz v. Bay Area Motors,

1 Inc., 95 Or App 159, 164 (1989) quoting Hightover v. Paulson Truck Lines, 277 Or 65, 70 (1977).  
2 AC&S can point to no evidence to support the proposition that Limpet is not dangerously defective.

3 Defendant may argue that, because plaintiff has the burden of proof, the jury was free simply  
4 to disbelieve and therefore disregard the overwhelming, uncontradicted evidence of product defect  
5 from both plaintiff's and defendant's witnesses in this case. However, that is not the law in Oregon.

6 In the directed verdict context,

7 the jury is given a wide leeway in deciding whether the conduct in  
8 question falls above or below the standard of reasonable conduct  
9 deemed to have been set by the community. The court intervenes only  
when it can say the actor's conduct clearly meets the standard or  
clearly falls below it.

10 Thomas v. Inman, 282 Or 279, 286-87 (1978) (emphasis added). The Oregon Supreme Court in  
11 Rickard v. Ellis, 230 Or 46, 368 P2d 396 (1962) put it this way:

12 There is considerable confusion in the adjudicated cases on the  
13 question of the respective functions of the court and jury where the  
14 testimony in support of an issue of fact is wholly uncontradicted. In  
15 some of the cases it is stated without qualification that the jury must  
accept the uncontradicted testimony of a party or his witnesses. At  
the other extreme is the occasional judicial pronouncement that the  
credibility of a witness is always for the jury.

16 Neither of these is a correct statement of the rule relating to the  
17 effect of uncontradicted testimony. In some cases an issue upon  
18 which there is uncontradicted testimony is properly submitted to the  
19 jury; on the other hand in some cases the question of the credibility of  
20 a witness is properly withheld from the jury. The correct principle is  
21 stated in Ferdinand v. Agricultural Insurance Co., 22 N J 482, 126  
22 A2d 323, 62 ALR2d 1179 (1956), which was adopted and applied in  
23 Wiebe v. Seely, Administrator, 215 Or 331, 343-344, 335 P2d 379  
24 (1958):

25 " \* \* \* Where men of reason and fairness may  
26 entertain differing views as to the truth of testimony,  
whether it be uncontradicted, uncontroverted or even  
undisputed, evidence of such a character is for the  
jury. \* \* \* [Citing cases]. But when the testimony of  
witnesses, interested in the event or otherwise, is clear  
and convincing, not incredible in the light of general  
knowledge and common experience, not  
extraordinary, not contradicted in any way by  
witnesses or circumstances, and so plain and complete  
that disbelief of the story could not reasonably arise in

1 the rational process of an ordinary intelligent mind,  
2 then a question has been presented for the court to  
decide and not the jury. \* \* \* [Citing cases].”

3 It is evident from the foregoing statement of the principle that  
4 whether uncontradicted testimony is such as to preclude the jury's  
5 function in testing the credibility of the witness or witnesses who gave  
6 it will depend upon the nature of the issue in the particular case which  
7 the testimony purports to resolve. Two important factors in  
8 determining whether the jury should be permitted to disbelieve the  
9 witness and draw an inference contrary to the uncontradicted  
10 testimony given are (1) the availability of evidence to contradict the  
11 witness's statement, and (2) the likelihood that the witness's interest  
12 in the litigation may tempt him to testify falsely.

13 230 Or at 51-52. The testimony concerning the amount of asbestos in Limpet, the ease with which  
14 it would be released into the environment, the long duration of its persistence in the environment and  
15 its deadly effects on plaintiff came from expert witnesses produced by both sides in this case. Those  
16 witnesses are knowledgeable and experienced, and had their testimony been susceptible to  
17 contradiction, in this trial it certainly would have been contradicted. Addressing the “two important  
18 factors” mentioned in Rickard, there was plainly no evidence available to contradict any of this  
19 testimony, and none of these witnesses had a direct personal interest in the outcome of the litigation.  
20 This testimony was not controversial at the trial because it was “clear and convincing, not incredible  
21 in the light of general knowledge and common experience, not extraordinary” in the language quoted  
22 by the Rickard court. Plaintiff very much doubts that defendant will be able to articulate, much less  
23 support, any “rational process of an ordinary intelligent mind” that could arrive at the conclusion,  
24 based on this evidence, that Limpet was not an unreasonably dangerous product. Plaintiff's motion  
25 for new trial should therefore be granted under ORCP 64B(5).  
26

### 22 CONCLUSION

23 The jury's unauthorized deliberations deprived plaintiff of his fundamental right to an impartial  
24 verdict based on all the evidence in this case. Plaintiff should be granted a new trial against all  
25 defendants. Plaintiff's case for defective product against AC&S was uncontradicted, and the jury's  
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1 verdict for AC&S on product defect was unsupported by the evidence and against the law. Plaintiff  
2 should be granted a new trial against defendant AC&S.

3 DATED this 26th day of December, 2000.

4 SWANSON, THOMAS & COON

5 

6 James S. Coon, OSB# 77145  
7 Of Attorneys for Plaintiff

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