IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

DENNIS EMRICK and LEANN EMRICK, Husband and Wife,

Plaintiffs,

V.

A.J. ZINDA COMPANY, an Oregon Corporation, et. al.,

Defendants.

Case No. 0002-02019

MEMORANDUM OF U.S. MINERAL IN OPPOSITION TO PLAINTIFFS MOTION FOR NEW TRIAL

MEMORANDUM OF POINTS AND AUTHORITIES

A. INTRODUCTION

Plaintiff's motion for new trial based on alleged juror misconduct fails to present a colorably sufficient basis for granting a new trial under Oregon law. The sole "factual" support for the motion is an unsigned and conclusory hearsay declaration of alternate juror Elden Eichler which lacks any evidentiary value.[1] Moreover, even if the affidavit were admissible, the misconduct alleged does not satisfy the "threshold level" of juror misconduct required under Oregon law to warrant a new trial. Absent an evidentiary

[1] As is more fully set forth in the Objection of United States Mineral Products Company To Affidavit of Elden Eichler, Mr. Eichler's affidavit fails to set forth the manner in which or when the facts, if any, which support the conclusory averments in the affidavit came to his attention. The affidavit itself does not set forth a single date, time, witness or improper statement allegedly made by any juror. Hence, it is impossible to determine the underlying facts upon which Mr. Eichler bases his conclusions and the extent to which, if at all, Mr. Eichler has personal knowledge regarding any of the hearsay matters described in his affidavit. Consequently, the affidavit is fatally flawed and inadmissible in the first instance.

threshold showing by the party seeking a new trial, an Oregon trial court is without discretion to order a new trial based upon claimed juror misconduct. See, for example, State v. Miller, 167 Or.App. 72, 75-76, 1 P.3d 1047 (2000).

Plaintiff's flawed argument may fairly be summarized as follows:

> Unauthorized discussions among the jurors regarding evidence admitted during trial, prior to receiving the jury charge and access to all the evidence introduced at trial, in violation of court admonitions not to discuss the case, constitutes extrinsic juror misconduct which is punishable by contempt and requires a new trial. Plaintiff claims that this juror misconduct prejudiced his right to an impartial deliberation by 12 jurors "based on the applicable law and all the evidence." (Plaintiff's motion at pages 2 - 4)

Plaintiff does not cite a single Oregon case in which a new trial was granted due to "premature juror deliberations." (Plaintiff's motion at page 3, line 16) Plaintiff's reliance on the inapposite foreign authorities cited in his motion is totally misplaced[2]

Plaintiff's argument is wholly without merit and his motion must be denied for each of the following reasons:

> (1) The affidavit of Mr. Eichler, even if given full evidentiary weight, does not constitute the type of juror misconduct which may potentially warrant a new trial because, at best, the affidavit constitutes proof of "utterances of jurors during the deliberations or at any other material time [which] cannot warrant the impeachment of a verdict." Carson v. Brauer, 234 Or. 333, 345-46, 382 P.2d 79 (1963), Schmitz v. Yant, 242 Or. 308, 409 P.2d 346 (1965);
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> (2) The Oregon Supreme Court has considered and rejected Plaintiff's argument that juror affidavits describing allegedly improper

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[2] People v. Morgan, 84 Cal.App.4th 929, 101 Cal.Rptr.2d 314 (2000) and U.S. v. Gorham, 523 F.2d 1088 (DC Cir 1975) cited by Plaintiff involve jurors who refused to deliberate and jury nullification issues. Rehearing was granted in Morgan and the decision was vacated. The case may not currently be cited or relied on as proper authority. There is no suggestion that any juror in the present case refused to deliberate or follow legal instructions provided by the court. Mr. Eichler did not participate in post trial jury deliberations according to his declaration. Under Oregon law Mr. Eichler's affidavit is inadmissible to prove oral exchanges of jurors, or the mental processes of jurors in reaching a verdict. Ertsgaard v. Beard, 310 Or. 486, 497, 800 P.2d 759 (1990), State v. Gardner, 230 Or. 569, 575, 371 P.2d 558 (1962), Carson v. Brauer, 234 Or. 333, 382 P.2d 79 (1963)

discussions among jurors occurring outside the context of formal deliberations may be used to impeach a verdict. Carson v. Brauer, 234 Or. 333, 345-46, 382 P.2d 79 (1963), Schmitz v. Yant, 242 Or. 308, 409 P.2d 346 (1965);

(3) The Oregon Supreme Court has considered and rejected Plaintiff's argument that juror affidavits describing allegedly improper discussions among jurors in violation of a court order not to discuss the case constitutes the type of contemptuous conduct that may be used to impeach a verdict. Schmitz v. Yant, 242 Or. 308, 315 - 316, 409 P.2d 346 (1965); Carson v. Brauer, 234 Or. 333, 345-46, 382 P.2d 79 (1963);

(4) The affidavit of Mr. Eichler, even if given full evidentiary weight, does not constitute the type of juror misconduct which may potentially warrant a new trial because it fails to satisfy the "threshold level" of juror misconduct required under Oregon law before a trial court can even properly consider exercising its discretion to order a new trial See, for example, Ertsgaard v. Beard, 310 Or. 486, 497, 800 P.2d 759 (1990), State v. Miller, 167 Or.App. 72, 75-76, 1 P.3d 1047 (2000);

(5) The affidavit of Mr. Eichler, even if given full evidentiary weight, is inadmissible to impeach the verdict of the jury or to support any inquiry of any juror to prove oral exchanges used by jurors, or the mental processes of jurors in reaching a verdict. Ertsgaard v. Beard, 310 Or. 486, 497, 800 P.2d 759 (1990), State v. Gardner, 230 Or. 569, 575, 371 P.2d 558 (1962); Carson v. Brauer, 234 Or. 333, 382 P.2d 79 (1963);

(6) The affidavit of Mr. Eichler fails to suggest, much less establish, prejudice to Plaintiff resulting from the alleged juror misconduct as required by applicable Oregon law. Ertsgaard v. Beard, 310 Or. 486, 491, 800 P.2d 759 (1990), Carson v. Brauer, 234 Or. 333, 342, 382 P.2d 79 (1963); and

(7) The affidavit of Mr. Eichler, fails to set forth the manner in which or when he became aware of the facts, if any, which support the conclusory averments in his affidavit. The affidavit does not set forth a single date, time, witness or improper statement allegedly made by any juror. Hence, it is impossible to determine the underlying facts upon which Mr. Eichler bases his conclusions and the extent to which, if at all, Mr. Eichler has personal knowledge regarding any of the hearsay matters alluded to in his affidavit. Consequently, the hearsay affidavit completely lacks foundation, is improper lay opinion and is inadmissible for any purpose.

B. JUROR MISCONDUCT IN THE FORM OF STATEMENTS OF JURORS DURING DELIBERATIONS OR AT OTHER MATERIAL TIMES, EVEN IF MADE IN VIOLATION OF AN ORDER OF THE COURT NOT TO DISCUSS THE CASE,

CANNOT WARRANT THE IMPEACHMENT OF A JURY VERDICT

Plaintiff's motion cites the decision of Oregon Supreme Court in Carson v. Brauer, 234 Or. 333, 345-46, 382 P.2d 79 (1963) for the proposition: "It is clear that a new trial will not be granted based upon juror affidavits concerning their own mental processes or those of other (sic) juror during proper deliberations." (Plaintiff's motion at page 3, lines 13 - 17) The Oregon Supreme Court, at the very pages cited by Plaintiff, makes clear the rule prohibiting the use of juror affidavits to impeach a verdict is not limited to allegedly improper juror discussions occurring during "proper deliberations," stating:

> ...The affidavit of a juror concerning utterances of other jurors during the deliberations **or at any other material time** cannot warrant the impeachment of a verdict. The kind of misconduct of a juror that will be considered in an attack upon a verdict by a juror's affidavit within the rule set forth in the Gardner and Imlah cases **is misconduct that amounts to fraud, bribery, forcible coercion or any other obstruction of justice that would subject the offender to a criminal prosecution therefor.** We do not necessarily use the words 'fraud,' 'bribery,' 'forcible coercion,' and 'obstruction of justice' in a purely technical sense, but as words that denote such serious breach of the juror's duties that the trial judge would be justified in citing him for nothing less than a contempt of court.... **Except for the kind of criminal misconduct which we described, the risk of extraneous and improper conversation that may or may not find its way into a jury's deliberation is simply a risk that litigants assume when they submit their disputes for determination by the jury system.** (Emphasis added) Id. at 345 - 346.

In Schmitz v. Yant, 242 Or. 308, 409 P.2d 346 (1965) the Oregon Supreme Court applied Oregon's well established rule discussed at length in, *inter alia,* Carson v. Brauer, *supra,*[3] that juror affidavits will not be received in evidence to impeach their verdict.

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[3] Oregon appellate courts have long history of vigilantly protecting jury verdicts from attack and excluding the use of juror affidavits to impeach verdicts except in extremely limited circumstances involving juror misconduct which amounts to fraud, bribery, forcible coercion or any other obstruction of justice that would subject the offender to a criminal prosecution. See, for example, Cline v. Broy, 1 Or. 89 (1854), in which Chief Justice Williams, in rejecting a juror's affidavit, said: "Affidavits of jurors will not be received to impeach their verdict."

Significantly, the Supreme Court in Schmitz specifically considered and rejected Plaintiff's arguments that: 1) a juror's failure to abide by a trial court order not to discuss the case with other jurors is the type of jury misconduct that can be used to impeach a verdict, and 2) juror discussions outside formal deliberations may be used to impeach a verdict. In Schmitz improper comments were made by a prospective juror to jurors ultimately selected to deliberate in the case during a recess in the *voir dire* questioning in violation of a court order not to discuss the case. The offending juror told other jurors of his own serious injury and stated that he did not see how there could be any loss of love and affection, no matter how serious the injury, if a man and his wife loved each other. The trial court granted Plaintiff a new trial based on a juror affidavit recounting the misconduct. The Supreme Court reversed stating, in pertinent part:

> The misconduct set forth in the affidavit of the juror is not the kind of misconduct by another juror which will impeach the jury's verdict. **It is argued by plaintiff that the prospective juror could have been cited for contempt because of his disregard of the court's instruction not to discuss the case. This is not the type of contemptuous conduct which is contemplated in Carson. It is not contemptuous conduct in connection with activities of such a serious nature as to be classed with '* * * fraud, bribery, forcible coercion or any other obstruction of justice that would subject the offender to a criminal prosecution therefor.'**
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> **It is also claimed that the facts of Carson do not make the decision applicable. There the statements, which were of a nature and tenor similar to those in the present case, were made by jurors during deliberation. In the present case they were made by a prospective juror who did not subsequently sit on the case and were not made during deliberation. We do not believe the factual distinctions justify non-application of the rule laid down in Carson. The basic philosophy behind Carson is equally applicable here.** (Emphasis added.) Id. at 315 - 316.

C. THE JUROR MISCONDUCT ALLEGED BY PLAINTIFF DOES NOT SATISFY THE "THRESHOLD LEVEL" OF JUROR MISCONDUCT REQUIRED UNDER OREGON LAW FOR A TRIAL COURT TO EVEN CONSIDER ORDERING A NEW TRIAL

A trial court has the discretion to grant a motion for a new trial based on juror

misconduct in very limited circumstances for "[o]nly the clearest kinds of juror misconduct" Ertsgaard v. Beard, 310 Or. 486, 497, 800 P.2d 759 (1990). Absent an evidentiary threshold showing by the party seeking a new trial, an Oregon trial court is without discretion to order a new trial based upon claimed juror misconduct. See, for example, State v. Miller, 167 Or.App. 72, 75-76, 1 P.3d 1047 (2000).

In Ertsgaard v. Beard, *supra*, the Oregon Supreme Court affirmed the reversal of a trial court order granting a new trial despite finding that the conduct of the juror was "inappropriate" and "reprehensible." In Ertsgaard a juror testified on *voir dire* that she had been a patient of the defendant physician for a short time without mentioning in response to general *voir dire* questioning her belief that the defendant had saved the juror's niece's life by diagnosing the niece's cancer. During deliberations, the juror exhibited a bias in favor of the defendant by mentioning the diagnosis of the niece and arguing that a finding of negligence would ruin the defendant's reputation After considering this evidence, the trial court granted a motion for a new trial which the Court of Appeals reversed [Ertsgaard v. Beard, 97 Or.App. 471, 777 P.2d 971 (1989).] The Supreme Court affirmed the decision of the Court of Appeals in Ertsgaard v. Beard, 310 Or. 486, 497, 800 P.2d 759 (1990), holding, *inter alia,* that the juror's alleged bias and reference to the prejudicial effect an adverse verdict would have on the defendant's reputation were not even colorably sufficient to justify a new trial. The Court noted that the posture that a juror takes during deliberations can always be attacked as bias, and that speculation among the jurors about the effect of a verdict, while generally inappropriate, are so commonplace that they cannot support a decision to grant a new trial, stating:

> In the relatively few cases in which this court has either permitted or required a new trial for juror misconduct that occurred during the deliberating process, we have found none

> in which the misconduct consisted solely of juror argument. **All the cases have involved specific acts by jurors designed (and later claimed, either explicitly or implicitly) by the particular offending jurors to give them special knowledge concerning one of the disputed facts in the case then under consideration.** See, e.g., Saunder v. Curry County, 253 Or. 578, 456 P.2d 493 (1969) (unauthorized inspection of premises); Wolfe v. Union Pacific R. Co., *supra* (unauthorized visit to accident scene); Thomas v. Dad's Root Beer, Etc., 225 Or. 166, 356 P.2d 418, 357 P.2d 418 (1960) (view of accident scene and unauthorized experiment); Eckel v. Breeze, 221 Or. 572, 577, 352 P.2d 460 (1960) (view of scene); Schneider v. Moe, 151 Or. 353, 50 P.2d 577 (1935) (view of accident scene). [The juror's] actions were different. She did not obtain new information relating to [defendant's] care for the plaintiff child. She simply disclosed the basis of her pre-existing bias. That is argument, not superior knowledge of a pivotal fact concerning some issue in the case actually being decided by the jury. [4] Id. at 497 -498.

Oregon's appellate courts have scrupulously protected jury verdicts from post trial attacks in the form of motions for new trial predicated on alleged juror misconduct. In State v. Miller, 167 Or.App. 72, 77, 1 P.3d 1047 (2000), for example, the court after carefully reviewing the relevant Oregon authorities, concluded that there was no basis to grant a new trial notwithstanding evidence that the juror in question: 1) "speculated more than a juror should;" 2) "certainly reached the wrong conclusion about gang tattoos;" and 3) "[i]n telling the jury that defendant had violated the terms of his release shortly after leaving prison... gave [the jury] information that the Evidence Code would not have allowed the parties to present and that it should not have had."

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[4] As noted by the court in State v. Miller, 167 Or.App. 72, 77, 1 P.3d 1047 (2000), "[t]he cases that the court cited [in Ertsgaard] all involved unauthorized visits to a relevant location or conducting unauthorized experiments. The juror's actions in Ertsgaard were different: she did not provide new information relating to the defendant's actions but simply disclosed the basis of her pre-existing bias. That was argument, not superior knowledge of a pivotal fact."

In the case at bar, the alleged juror misconduct relied on by Plaintiff did not provide any juror with superior knowledge of any pivotal fact the jury was required to consider in rendering its verdict. To the contrary, the sole allegation in the moving papers involves allegedly premature discussions of evidence properly admitted at trial and the styles of trial counsel

Significantly, the court in Miller noted:

> There is a strong policy in Oregon to protect jury verdicts from attack. **Only limited kinds of juror misconduct justify a new trial.** The kind of misconduct that will be considered in an attack on a verdict is **misconduct that is extrinsic to the communications between jurors 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**... Our system of justice is not a perfect system, because it is administered by imperfect human beings" and concluded that, in the absence of compelling reasons that are extrinsic to the deliberation process, the law has chosen to shelter jurors from examination about their deliberations. State v. Jones, 126 Or.App. 224, 227 - 228, 868 P.2d 18, rev den 318 Or. 583, 873 P.2d 322 (1994).
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> In this case [the juror] used her experience in the corrections system to evaluate defendant's style of dress during the trial and to understand the evidence that the parties presented. In doing so she may have at times speculated more than a juror should; she certainly reached the wrong conclusion about gang tattoos. In telling the jury that defendant had violated the terms of his release shortly after leaving prison, she gave it information that the Evidence Code would not have allowed the parties to present and that it should not have had. However, the facts that led her to that conclusion were all in evidence; she only described their legal effect. **In short, [the juror] based all of her statements on what the jury experienced in the courtroom, using her previous experience and knowledge to interpret them. In that respect, her actions were less questionable than those of the juror in Ertsgaard, who brought in extraneous facts that were entirely irrelevant to the issue that the jury had to consider.** Nothing that [the juror] said during the deliberations could support a decision to grant defendant a new trial. (Emphasis added) Id. at 77 - 78.

In the case at bar the court is presented with an affidavit of an alternate juror suggesting that the jurors may have prematurely discussed certain aspects of the evidence properly admitted during the course of trial and the styles of the various trial counsel for the respective parties. Such conduct is manifestly not "extrinsic to the communications between jurors" and not the type of contemptuous conduct which would warrant a new trial or further inquiry of the jurors who did deliberate under the applicable case law. See, for example, State v. Miller, 167 Or.App. 72, 77, 1 P.3d 1047 (2000),

State v. Jones, 126 Or.App. 224, 227 - 228, 868 P.2d 18, rev den 318 Or. 583, 873 P.2d 322 (1994), Carson v. Brauer, 234 Or. 333, 345-46, 382 P.2d 79 (1963), Schmitz v. Yant, 242 Or. 308, 409 P.2d 346 (1965). Consequently, the instant motion must be denied.

D. PLAINTIFF'S MOTION FAILS TO ESTABLISH PREJUDICE FROM THE ALLEGED JUROR MISCONDUCT REQUIRED UNDER OREGON LAW FOR A TRIAL COURT TO EVEN CONSIDER EXERCISING ITS DISCRETION TO ORDER A NEW TRIAL

There is a total absence of proof that the plaintiff was in any way prejudiced by the juror misconduct alleged in Plaintiff's moving papers. See, Ertsgaard v. Beard, 310 Or. 486, 491, 800 P.2d 759 (1990), Carson v. Brauer, 234 Or. 333, 342, 382 P.2d 79 (1963) Hence, Plaintiff's motion must be denied.

E. THE AFFIDAVIT RELIED ON BY PLAINTIFF IS NOT ADMISSIBLE TO PROVE ORAL EXCHANGES USED BY JURORS DURING DELIBERATIONS, OR MENTAL PROCESSES OF THE JURORS IN REACHING A VERDICT

It is well settled in Oregon that juror affidavits such as Mr. Eichler's are not admissible to prove oral exchanges used by jurors during deliberations, or mental processes of the jurors in reaching a verdict. Ertsgaard v. Beard, 310 Or. 486, 497, 800 P.2d 759 (1990), State v. Gardner, 230 Or. 569, 575, 371 P.2d 558 (1962), Carson v. Brauer, 234 Or. 333, 382 P.2d 79 (1963). The Oregon Supreme Court stated in Ertsgaard:

> We think that receiving affidavits to the effect of those produced in this case was appropriate. It is true that the affidavits could be construed, at least in part, as relating to the oral exchanges used by certain jurors in an attempt to persuade others, or to the mental processes used by jurors in reaching a verdict. To the extent they had this effect, their substance should have been ignored. Id. at 496.

F. THE SOLE EVIDENTIARY AFFIDAVIT RELIED ON BY PLAINTIFF IS NOT ADMISSIBLE FOR ANY PURPOSE

As is more fully set forth in the Objection of United States Mineral Products Company To Affidavit of Elden Eichler concurrently filed with this opposition, Mr. Eichler's affidavit fails to set forth the manner in which or when Mr. Eichler became aware of the facts, if any, which support the conclusory averments in his affidavit alleging juror misconduct. The affidavit itself does not identify a single date, time, witness or improper statement allegedly made by any juror. It is impossible to determine by referencing the affidavit the underlying facts upon which Mr. Eichler bases his conclusions and/or the extent to which, if at all, Mr. Eichler has personal knowledge regarding any of the underlying hearsay matters alluded to in his affidavit. Consequently, the hearsay affidavit completely lacks foundation, constitutes improper lay opinion and is inadmissible for any purpose. In so far as Mr. Eichler's affidavit is the sole evidence proffered by Plaintiff in support of the motion for new trial, the motion must be denied.

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G. CONCLUSION

Based upon all of the authorities and arguments referenced in this opposition, the objections set forth in the Objection of United States Mineral Products Company To Affidavit of Elden Eichler concurrently filed with this opposition, and the authorities and arguments relied on by each of the defendants opposing Plaintiff's motion for a new trial based upon alleged juror misconduct, United States Mineral Products Company respectfully requests that Plaintiff's motion be denied in its entirety.

DATED this 5th day of January, 2001.

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CASE & DUSTERHOFF, LLP

James D. Case, OSB# 73058
Of Attorneys for U.S. Mineral Products Co.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing MEMORANDUM OF UNITED STATES MINERAL PRODUCTS COMPANY IN OPPOSITION TO PLAINTIFF'S MOTION FOR NEW TRIAL *and* OBJECTION OF UNITED STATES MINERAL PRODUCTS COMPANY TO AFFIDAVIT OF ELDON EICHLER on:

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by the following indicated method:

by **FAXING** a full, true and correct copy thereof to James S. Coon and Elaine J. Brown at the fax numbers shown above, which are the last-known numbers for the attorneys' offices, the receiving fax machines operating at the time of service,on the date set forth below; **and**

by **MAILING** full, true, and correct copies thereof in sealed, first-class, postage-prepaid envelopes to the other attorneys as shown above, to the last-known office addresses of the attorneys, and deposited with the U.S. Postal Service at Beaverton, Oregon, on the date set forth below.

DATED this FIFTH DAY OF JANUARY, 2001

James D. Case, OSB No. 73058
Of Attorneys for Defendant
United States Mineral Products Company

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

DENNIS EMRICK,

Plaintiff,

v.

A.J. ZINDA CO., an Oregon corporation, et al.,

Defendants.

No. 0002-02019

DEFENDANT ACANDS, INC.'S RESPONSE TO PLAINTIFF'S MOTION FOR NEW TRIAL

I. INTRODUCTION.

Defendant ACandS, Inc. ("ACandS") joins in the responses filed by the other defendants regarding the first basis for plaintiff's motion – alleged juror misconduct.[1] ACandS submits this response to the second basis for plaintiff's motion – that the evidence was "uncontradicted" that Limpet was defectively dangerous and, thus, plaintiff is entitled to a new trial as to ACandS. As discussed below, plaintiff's motion on that basis should be denied, on both procedural and substantive grounds.

II. ARGUMENT.

A. Plaintiff's Failure to Move for a Directed Verdict on the Issue of the Sufficiency of the Evidence Regarding Limpet Precludes Him from Now Moving for a New Trial on that Basis.

Plaintiff brings his motion for new trial pursuant to ORCP 64 B(5), which challenges the sufficiency of evidence to support the jury's verdict. He argues that based on the evidence presented, a reasonable jury could not have concluded that Limpet was not a dangerously defective

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[1] ACandS submits that (1) the Affidavit of Elden Eichler was untimely, and cannot be considered; (2) plaintiff cannot use a juror affidavit to impeach the jury's verdict; (3) there was no juror misconduct; (4) any irregular juror conduct does not warrant a new trial; and (5) there is no evidence that any preliminary juror deliberations caused prejudice to plaintiff.

product. Although there was ample evidence to support the jury's conclusion, this Court need not reach that question, because plaintiff did not move for a directed verdict on that question.

As a matter of law, a "timely motion for directed verdict is a 'necessary predicate' to a subsequent motion testing the sufficiency of the evidence." Edward D. Jones & Co. v. Mishler, 161 Or App 544, 565, 983 P2d 1086 (1999) (discussing affirmance of principle in Arena v. Gingrich, 305 Or 1, 7-8, n 1, 748 P2d 547 (1988). In Jones, a case involving a dispute as to who should bear the loss regarding certain checks returned for insufficient funds, plaintiff moved for a new trial on the grounds that there was no evidence that the defendant had been harmed by plaintiff's failure to give timely notice of dishonor, and thus defendant could not prevail on its counterclaim. Plaintiff, however, had never moved to dismiss the counterclaim at trial. On appeal plaintiff argued that such a motion was not necessary. The Court of Appeals specifically rejected this argument, quoting the Arena case for the holding that "a motion for a directed verdict has long been a prerequisite for an appeal assigning lack of evidence, with or without a [subsequent] motion for a new trial." 161 Or App at 565.

There is no dispute that plaintiff did not move for a directed verdict on the sufficiency of the evidence regarding Limpet. That failure precludes plaintiff from now moving for a new trial on that basis. Plaintiff's motion should be denied on this basis alone.

B. The Jury May Have Resolved Predicate Issues in ACandS' Favor.

Plaintiff's motion ignores the instructions given by the Court, because it suggests that there were no issues for the jury to reach other than whether Limpet was a defective product. In fact, the jury had to resolve a number of other issues. There is no reason to believe the jury did not resolve any or all of those issues in ACandS' favor.

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As a bedrock matter, when a general verdict[2] is entered, it "establishes every reasonable inference deductible from the pleadings and responsive to the issues." Clark v. Strain, 212 Or 357, 364, 319 P2d 940 (1958). In Saum v. Bonar, 258 Or 532, 543, 484 P2d 294 (1971), Justice Holman (in concurrence) applied the principle as meaning that a jury made all the reasonable findings necessary to support the verdict. In the present case, the verdict in favor of ACandS must be construed as meaning that the jury concluded that (1) ACandS was not in the business of manufacturing or selling, (2) Limpet was not unreasonably dangerous, and (3) Limpet was not defective in design or in the inclusion of adequate warnings or instructions.

1. The Jury May Have Concluded That ACandS Was Not in the Business of Selling and Thus Would Not Have Reached the Issue as to Whether Limpet Was a Defective Product.

In order for the jury to have even reached the question of a defective product, the jury necessarily had to first find that ACandS was in the "business of selling." As the Court will recall, The Court's instruction provided in part:

> I will now instruct you on the law of strict liability for a defective product.
>
> A defendant is liable for harm caused by a product if:
>
> (1) The defendant was engaged in the business of manufacturing or selling the product;
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> . . .

A copy of this instruction is attached as Exhibit A to the Affidavit of Howard (Terry) Hall in Support of Defendant ACandS, Inc.'s Response to Plaintiff's Motion for a New Trial ("Hall Aff.") which accompanies this Response. Thus, a predicate to finding that plaintiff even had a

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[2] A "general verdict" is any verdict where the jury's verdict incorporates the jury's findings of fact with its application of those facts to the law, as instructed. ORCP 61 A. It is distinguished from a "special verdict," where the jury makes only findings of fact. ORCP 61 B. In the present case, the jury's verdict was a general verdict with special interrogatories, ORCP 61 C, which should nonetheless be treated as a general verdict for purposes of construing all reasonable inferences in favor of ACandS.

product liability claim against ACandS was that the jury concluded that the plaintiff had met his burden on showing that ACandS was in the "business of selling" asbestos-containing products.

As the Court will also recall, counsel for ACandS was allowed to argue in closing and in fact did argue that ACandS was *not* in the "business of selling" asbestos-containing products. See November 20, 2000 Transcript, Vol. 47-A, pp. 105-106; attached as Ex. B, Hall Aff. The jury may well have concluded that plaintiff had not met his burden on this issue. If the jury so concluded, it would have necessarily answered "No" to the first question on the jury verdict form for the product liability claim. The jury would then have had no reason to even consider the issue as to whether Limpet was a defective product.

2. The Jury May Have Concluded that Limpet Was Not Unreasonably Dangerous.

The Court gave the following instruction on "defective condition":

> By defective condition, it is meant that at the same time the product left the hands of the manufacturer or seller, it was in a condition that was not contemplated by the ultimate user and was unreasonably dangerous to the ultimate user.
>
> A product may be in a defective condition in the following ways:
> 1) By design of the product itself; or
> 2) By the absence of adequate warnings or instructions.

Court's Instructions, p. 28; attached as Ex. C, Hall Aff.

The Court also instructed on the meaning of "unreasonably dangerous":

> A product is unreasonably dangerous when it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases the product with the ordinary knowledge common to the community as to its characteristics.

Court's Instructions, p. 29; attached as Ex. D, Hall Aff.

Thus, the jury had to find that a product was unreasonably dangerous as that term is defined in the instructions in order to find that a product was defective. Again, there is no reason to believe the did not resolve this issue in ACandS' favor.

3. The Jury May Have Concluded That Limpet Was Not Defective in Either of the Ways Set Forth in the Instructions.

In addition to finding the product unreasonably dangerous, the jury could only find for plaintiff if it concluded that plaintiff had met his burden of proof that a product was defective in one of two ways. Court's Instructions, p. 28; attached as Ex. C, Hall Aff. The jury may have concluded that the plaintiff had not met his burden as to either the design prong or the warning prong.

C. There Was Substantial Evidence Allowing the Jury to Find that Limpet Was Not a Defective Product.

In arguing that the evidence was "uncontradicted" as to Limpet, plaintiff is, to be charitable, selective in the evidence he cites. *See* Plaintiff's Motion, pp. 4-5. Based on the Court having presided over this trial for 11 weeks, the Court will recall the following evidence that was presented:

- None of plaintiffs' experts had tested Limpet at any of plaintiff's worksites (October 4, 2000 Trial Transcript, Vol. 18-A, pp.75-80; Ex. E; Hall Aff.; September 29, 2000, Vol. 15-A, p. 43-44, Ex. F, Hall Aff.)

- Plaintiffs' experts testified that if Limpet were not disturbed, there would be no release of asbestos (October 4, 2000 Trial Transcript, Vol. 18-A, pp.78-80; Ex. E; Hall Aff.; September 29, 2000, Vol. 15-A, p. 46-48, Ex. F, Hall Aff.)

- Limpet at times was applied with a mastic (September 29, 2000, Vol. 15-A, p. 43-44, Ex. F, Hall Aff.; September 29, 2000, Vol. 15-B, pp. 80-83 , Ex. F, Hall Aff.)

From this evidence the jury may well have concluded that Limpet, as applied at plaintiff's work sites, was not defective. Plaintiff no doubt disagrees and has a different view of the evidence. The fact that plaintiff does not agree with the jury's verdict, however, is not grounds for a new trial.

Plaintiff includes as part of its argument the following paragraph:

> The above testimony is entirely uncontradicted in the trial record. In summary, it means that two-thirds of defendant's product is a deadly poison that causes an incurable, fatal disease. It means that this

> deadly poison is quite easily released into the environment when touched or bumped, to say nothing of when it is intentionally removed. It means that once released, this deadly poison caused plaintiff's incurable, fatal disease. This is not a matter of interpretation; it is simply the uncontradicted evidence. Contemplating this evidence, no reasonable jury could find that Limpet is not dangerously defective. Nevertheless, against all the evidence, that is what this jury found.

Plaintiff's Motion, p. 5.

ACandS is hard pressed to understand how plaintiff's counsel can make such an argument with a straight face. The Court will recall that all of these issues were hotly disputed and the subject of extensive testimony from multiple witnesses. Again, plaintiff may not like the jury's verdict; that does not entitle him to a new trial.

D. The Jury Was Free to Disbelieve Plaintiff's Version of the Facts.

Plaintiff cites Thomas v. Inman, 282 Or 279, 286-87, 578 P2d 399 (1978) and Rickard v. Ellis, 230 Or 46, 368 P2d 396 (1962) for the proposition that a jury is not free to disregard "overwhelming, uncontradicted evidence." Plaintiff's Motion, p. 6. As noted above, the evidence as to Limpet was not uncontradicted. Plaintiff's reading of these cases, when applied to the facts of this case, would deprive the jury of any ability to disregard testimony. Neither Thomas nor Rickard can be construed to take away the jury's right to disbelieve witnesses.

Plaintiff's quotation from Rickard includes the following statement:

> Where men of reason and fairness may 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.

230 Or at 51, *quoting* Ferdinand v. Agricultural Insurance Co., 22 NJ 482, 126 A2d 323, 62 ALR 2d 1179 (1956). In essence, plaintiff argues that no reasonable jury, given the evidence presented during an 11 week trial, could view the evidence in any way other than the way plaintiff does. Neither Thomas nor Rickard supports such a position.

The jury was free to accept or reject some or all of the testimony of any of the witnesses. As discussed above, the jury could have resolved the products liability claim as to ACandS in any

of a number of different ways. The jury's verdict is consistent with the instructions and the evidence and should not be upset.

III. CONCLUSION.

Throughout the trial, counsel and the Court observed on numerous occasions the conscientiousness of the jurors. After 11 weeks of testimony, the jury deliberated and returned its verdict. Plaintiff is of course disappointed in that verdict and no doubt disagrees with it. However, the jury's verdict is supported by the evidence and consistent with the Court's instructions. Plaintiff is not entitled to a new trial against ACandS, and plaintiff's motion should be denied.

DATED this 5th day of January, 2001.

McEWEN, GISVOLD, RANKIN, CARTER & STREINZ, LLP
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **RESPONSE OF DEFENDANT ACANDS, INC. TO PLAINTIFF'S MOTION FOR NEW TRIAL AND AFFIDAVIT OF HOWARD (TERRY) HALL IN SUPPORT THEREOF** on the following attorneys for the parties on January 5, 2001, by facsimile (where indicated) and by mailing to each of them a true copy thereof, postage prepaid, addressed to them at the addresses set forth below their names:

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