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 REPLY TO DEFENDANTS' RESPONSES TO MOTION FOR NEW TRIAL

Defendants' responses to plaintiff's motion for new trial improperly construe the applicable case law and, in the case of AC&S, the trial record. Plaintiff's motion should be granted.

1. New Trial Should be Granted Because the Jurors Deliberated Before the Evidence was in.

Plaintiff submitted the affidavit of alternate juror Elden Eichler, which established that the jurors repeatedly discussed the credibility and substance of fact witness testimony, the quality of expert testimony, the amounts of damages requested, and the persuasiveness of trial counsel while the jury was together in the jury room before court and during breaks in the trial.[1,2] Defendants offer

[1]Defendants object that Mr. Eichler's affidavit does not demonstrate first-hand knowledge, but the fact is, that during court breaks, the jurors, including alternates, were kept together in the jury

no facts to dispute Mr. Eichler's affidavit or to suggest in any way that the jurors did not discuss the case in violation of the court's instructions as Mr. Eichler describes. Defendants do make various arguments as to why this plain violation of the court's most frequent instruction is unimportant; those contentions should be rejected. Plaintiff's substantial rights have been materially affected because plaintiff has a substantial, indeed a fundamental right to deliberation and a decision limited to 12 jurors, based on all the evidence and the court's instructions. The uncontradicted evidence is that plaintiff did not receive such a deliberation and decision in this case.

a. Premature deliberations are "extrinsic to the communications between jurors during the deliberative process."

Defendant Quimby argues that plaintiff has made no allegation of misconduct "extrinsic to the communications between jurors" because the premature discussions engaged in here were just such communications. Quimby's Opposition at 5. However, the Court of Appeals in State v. Jones said:

> 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.

State v. Jones, 126 Or App 224, 227 (1994) (emphasis added). It is precisely the point of plaintiff's motion that, while the court will not, on motion for new trial, probe the jury's timely deliberative

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room. Thus Mr. Eichler's observations, as one of the alternates, are clearly first hand. Similarly, because the jurors were all kept together during court breaks, the discussions in the jury room must have involved all of the jurors, not just the alternates as defendants speculate. To the extent that the court believes further questions exist concerning the jury's unauthorized discussions, plaintiff believes the court should hold an evidentiary hearing. E.g., State v. Pratt, 316 Or 561, 853 P2d 827 (1993); Moore v. Adams, 273 Or 576, 542 P2d 490 (1975).

[2]Defendants object that Mr. Eichler's affidavit, filed the day after Christmas, was unsigned and unnotarized. That affidavit has been signed, notarized, filed and served on all counsel. The rules allow the filing of motions for new trial within 10 days after the entry of judgment "or such further time as the court may allow." If such additional time is required for Mr. Eichler's affidavit to be considered, plaintiff asks that the court allow it.

process, it will consider misconduct that is outside that proper deliberative process. The prejudice plaintiff suffers is not the impact of a particular juror's statement during deliberations. It is the fact that jurors engaged in deliberations before all the evidence was in and before the instructions were given. That is why the Supreme Court in Ertsgaard v. Beard, 310 Or 486 (1990) referred to

> 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 . . .

310 Or at 497 (emphasis added). The nearly impenetrable barrier the appellate courts have constructed around jury deliberations is intended to protect the sanctity of those deliberations against the threat of later scrutiny. However, that protection has its limits. Oregon courts have always been careful to protect the mental processes of deliberating jurors. While the jury's timely deliberations based on all the evidence and the court's instructions are rarely to be investigated, a jury's commencement of deliberations outside that process is another thing. The jury's premature deliberations in this case are not "communications between jurors during the deliberative process" within the meaning of the protection described in Oregon's appellate cases. Mr. Eichler's affidavit does not in any way invade the mental processes of deliberating jurors; as an alternate, he was not involved in the jury's proper deliberations. Plaintiff does not attack the jury's proper deliberations, but rather its commencement of deliberations during the trial.

b. The jurors' premature deliberations constitute "contempt of court" for purposes of jury misconduct analysis.

Defendants argue that the jury's discussions of the case during the trial in direct violation of the court's instructions are not the kind of serious misconduct that would subject the jurors to contempt of court. On the contrary, direct violation of the court's instructions is contempt of court. In State v. Baldeagle, 154 Or App 234, 961 P2d 264 (1998), a juror discussed the case on which he was sitting with third parties. Of course, the trial court had prohibited such conversation. The Court of Appeals held:

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> In this case, there is little question that [the juror's] disobedience of the court's instructions concerning contact with third parties could constitute contempt of court. [The juror] took an oath to follow the instructions of the judge during the trial. The trial court explicitly instructed all jurors not to contact third persons concerning the trial and that failure to comply with that instruction could constitute contempt of court. [The juror's] violation of that instruction was a violation of his oath and a serious breach of his obligations as a juror.

154 Or App at 242, 961 P2d at 268.[3] The Oregon Supreme Court's description of the kinds of conduct that will subject a jury verdict to scrutiny includes either misconduct extrinsic to proper deliberations or conduct that would be subject to contempt of court. State v. Jones, supra. The jury's premature deliberations in this case were both.

c. The jury's misconduct "materially affected the substantial rights" of plaintiff.

Defendants argue plaintiff has failed to show he suffered "prejudice," as if plaintiff were required to demonstrate that the trial would have come out differently had the jury not discussed the case in violation of the court's instructions. That is not what the rule requires. ORCP 64B provides for a new trial for jury misconduct "materially affecting the substantial rights" of the moving party. Plaintiff has no absolute right to a victory at trial. Plaintiff does have a right to deliberation by 12 jurors based on all the evidence and the court's instructions. These are, of course, substantial rights. Further, the affidavit of Mr. Eichler makes it clear that these rights were materially affected; that is, plaintiff was deprived of these rights because the jury, including the alternates, began the deliberative process before hearing all the evidence and before hearing the court's instructions.[4]

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[3]A new trial was denied in Baldeagle because none of the other 11 jurors was aware of the misconduct, and the defendant was convicted by a sufficient margin to make the single juror's misconduct immaterial to the defendant's substantial rights. The verdict in this case was 9-3.

[4]Defendants Asten and Scapa submit a sort of "Brandeis Brief" consisting of Reader's Digest and other periodical excerpts suggesting that juries in some jurisdictions are increasingly allowed to question witnesses and, in the case of Arizona, to discuss the case before all the evidence is in. Of course, none of these "facts" are properly before this court, and the law in Oregon is certainly not the law in Oregon. This court repeatedly instructed the jury not to discuss the case until instructed

It is true that the substantive juror statements evaluated in most of the Oregon cases concerning juror misconduct could be evaluated only for their impact on the trial result. That is, a juror's statement that the defendant doctor had saved the life of one of her relatives[5] or a juror's statements about a criminal defendant's tattoos or release status[6] can affect substantial rights of a party only by affecting the result of the trial. Here, however, the parties lost their right to deliberation by 12 jurors based on all the evidence and the court's instructions. That is how plaintiff's substantial rights were materially affected.

d. The jury's premature deliberations are not an "Utterance . . . at any other time."

Defendants seize on language in Carson v. Brauer, 234 Or 333, 382 P2d 79 (1963) to the effect that juror affidavits concerning "utterances of other jurors during the deliberations or at any other material time" cannot impeach a verdict. 234 Or at 345-46, 382 P2d at 85. Defendants' argument appears to be that the phrase "at any other material time" contradicts and nullifies the Supreme Court's other, more recent statements distinguishing between juror statements during proper deliberations and misconduct "extrinsic to" those deliberations. E.g., Ertsgaard, supra, State v. Jones, supra.

The first thing to say about Carson is that it is 38 years old and has been modified. For example, Carson limits the kind of juror conduct to be considered on a motion for new trial to conduct that would "subject the offender to a criminal prosecution." Id.[7] That is plainly no longer

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to do so. That is the law in Oregon. Defendants' suggestion that the jury's blatant violation of these instructions is of no importance should be rejected.

[5]Ertsgaard, supra.

[6]State v. Jones, supra.

[7]Similarly, in Schmitz v. Yant, 242 Or 308, 409 P2d 346 (1965), the Supreme Court reversed the granting of a new trial where a prospective juror, in the jury room, made a statement concerning his beliefs about the plaintiff's claim for loss of consortium. The Schmitz court said the prospective

the rule. Ertsgaard, supra; State v. Jones, supra; State v. Baldeagle, supra. Id. It is now clear that the finding of misconduct needed to support a motion for new trial includes the basic contempt of court inherent in a juror's disregard of the court's instructions. As the Court of Appeals' decision in State v. Baldeagle, quoted at page 3 above shows, the juror's violation of his oath to follow the court's instructions, in that case by discussing the case with third parties, is the kind of contempt of court that will support granting a new trial. Schmitz and Carson do not control on the facts of this case.

Second, in using the term "utterances," the Carson court clearly focused on the prejudicial effect of substantive statements by jurors. The term has no application to the beginning of deliberations by jurors and alternates before the evidence is in and the instructions given. Again, the courts are reluctant to require a new trial because of an improper substantive comment by an individual juror, often because the other jurors were not affected by it. Here we have misconduct by the jury as a group.

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

Plaintiff showed in his motion that the evidence of dangerous defect for Limpet spray insulation was uncontradicted. That evidence showed that Limpet was "unique among fireproofing" in containing 2/3 amphibole asbestos, that it was highly friable and released asbestos to the environment "very easily," that it contaminated workplaces for long periods of time and at high concentrations, that it is a deadly poison, causing an incurable, fatal disease and that it never breaks down in the human body or the environment. Plaintiff's Opening Brief at 4-5. Defendants offer several arguments in response. None is persuasive.

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juror's comments, though violating the court's instructions not to discuss the case, were not the kind of serious contemptuous conduct contemplated in Carson, supra. 242 Or at 315. The court was also influenced by the fact that the single statement in question was made by a prospective juror who did not ultimately sit on the case.

a. A motion for directed verdict is not a required predicate to a motion for new trial.

Defendant argues that plaintiff's motion for a new trial must be denied on the procedural ground that plaintiff filed no motion for directed verdict concerning Limpet spray. However, the cases defendant cites do not stand for that proposition. Defendant's quotation from Edward D. Jones and Company v. Mishler, 161 Or App 544, 565, 983 P2d 1086 (1999) is too short. The Mishler panel discussed a previous Oregon Supreme Court case, saying that

> the court has reaffirmed that a timely motion for a directed verdict is a "necessary predicate" to a subsequent motion testing the sufficiency of the evidence, such as an ORCP 63 motion for entry of a judgment notwithstanding the verdict.

Id. (emphasis added). Defendant omits the underscored language. The fact is that rule 63 explicitly requires that a motion for directed verdict have been made and denied before the court may grant a JNOV.[8] There is no such requirement for a motion for new trial under ORCP 64B(5).

The Jones case and Arena v. Gingrich, 305 Or 1, 748 P2d 547 (1988) stand for the proposition that "a motion for directed verdict is a prerequisite to an appeal challenging the sufficiency of the evidence." Bednarz v. Bay Area Motors, 95 Or App 159, 163, 768 P2d 422 (1989) (emphasis added). There is a difference between moving in the trial court for a new trial and asking an Oregon appellate court to reverse a trial result. Indeed, the denial of a motion for new trial based on insufficiency of the evidence is not assignable as error on appeal. Jones, supra, 161 Or App at 565-66; Bednarz, supra, 95 Or App at 163. The issue here is not whether sufficiency of the evidence can be challenged on appeal. Neither defendants' citations nor anything in the applicable rule requires

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[8] When a motion for directed verdict, made at the close of all the evidence, which should have been granted has been refused and a verdict is rendered against the applicant, the court may, on motion, render a judgment notwithstanding the verdict . . .

ORCP 63A.

a motion for directed verdict in order for plaintiff to move for new trial. Defendant's procedural argument should be rejected.

b. The jury found Limpet not defective.

AC&S argues that the jury may not have found Limpet was not defective, but may have found in favor of AC&S on some other issue. Defendant's argument contradicts the explicit terms of the jury's verdict. The jury found as follows:

> Were the asbestos containing products manufactured, supplied, or sold by one or more of the defendants defective as defined in the jury instructions? (Answer for each defendant.)
>
> AC&S ___ Yes _X_ No

The jury's finding is clear. It is not a finding that AC&S was not in the business of selling Limpet. It is a finding that Limpet was not defective as defined in the court's instructions. It is not a "predicate" to a finding of defective product that defendant have been in the business of selling that product. Defendant's status as a seller is a predicate to liability, but it is not a predicate to a finding of defective condition. Defendant's argument that the jury meant to find it was not a seller should be rejected.

c. The jury could not have concluded that Limpet was not unreasonably dangerous.

Defendant argues that the jury might have found Limpet was not "unreasonably dangerous," as if that finding were somehow different from a finding that Limpet was "dangerously defective." Defendant's premise is wrong. If a product is unreasonably dangerous, it is dangerous to an extent not contemplated by the ordinary consumer or user. The same is true of a product that is "dangerously defective." As shown in plaintiff's opening memorandum, a product consisting of

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friable, easily accessible asbestos, a substance that concededly causes an incurable, fatal disease, is unreasonably dangerous. There was no evidence on which the jury could have found to the contrary.[9]

d. There was no evidence to support a finding that Limpet was not defective.

Defendant responds to plaintiff's motion with three citations to evidence which defendant suggests provide a basis for the jury's finding that Limpet was not defective. None of these citations supports that contention.

First, defendant says none of plaintiff's experts had tested Limpet at any of plaintiff's work sites. That testimony has nothing to do with whether Limpet spray is defective. It might be relevant to an argument concerning whether Limpet caused plaintiff's mesothelioma, but the jury never reached that question.

Second, defendant argues plaintiff's experts testified that if Limpet were not disturbed there would be no release of asbestos. That evidence is perfectly consistent with the testimony of plaintiff's experts. Limpet spray insulation was unreasonably dangerous because it was extremely friable, its structural bond was very weak, and it would turn to powder on being touched or bumped "just using hand pressure." Plaintiff's Opening Memorandum at 4-5 (citing transcript). Once disturbed, the asbestos released persists in the environment indefinitely, and once inhaled, it remains in the body indefinitely. It makes no difference that there would be no release of asbestos fibers in the unlikely event that the Limpet were left completely undisturbed.

Finally, defendant refers to evidence that Limpet was "at times" applied with a mastic. First, the citations defendant provides do not include any evidence that Limpet was in fact applied with a mastic. Defendant's citations are to cross-examination by counsel in which counsel establishes that

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[9]Defendant makes a third argument that the jury might have found plaintiff "had not met his burden as to either the design prong or the warning prong" of the test for defective product. This adds nothing to defendant's prior argument. It is, of course, the design of Limpet that concerns this motion.

the expert on the stand does not know whether Limpet was applied with a mastic at plaintiff's work sites:

> Q [Mr. Hall]: You don't know if there was a mastic that was put on top of the application in those particular mills, do you?
>
> A [Mr. Cohen]: No.

Transcript Vol. 15-A at 43-44.

> Q [Mr Hall]: Does their analysis take into account whether a mastic may have been put over it?
>
> A [Dr. Longo]: No, sir.
>
> Q: If those things had happened, would that change your analysis in terms of the friability of the product?
>
> A: No. The mastic would just be over the top, and there wouldn't be any support for it. So essentially these materials are–Limpet is identified as a problem material by the Environmental Protection Agency, so a coating over the top, as you described, would not affect the friability.

Transcript Vol. 15-B at 81-82.[10] Thus the "evidence" defendant cites is nothing more than suggestions by counsel on cross-examination. And again, if there were such evidence as defendant describes, it would go to the question of causation, not product defect.

Defendant refers repeatedly to the 11 week trial as if, somewhere in that great expanse of time and effort, there must have been some evidence that Limpet spray insulation was not defective. However, defendant's three attempts to show the court where such evidence might be found fail entirely. There was no evidence to support the jury's finding that Limpet spray insulation was not defective.

It is not surprising that defendant can find nothing in the record to support the jury's finding. The fact is that AC&S made no attempt to prove that Limpet spray insulation was not defective. Plaintiff attaches AC&S's opening statement. The court will note that defendant made no effort at

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[10]In fact, AC&S's counsel described Limpet in his opening statement as a "process, which was a sprayed-on process for insulating . . . odd structures." Vol. 7-B at 51.

all to suggest that it would prove Limpet was not a defective product, or indeed that plaintiff would fail to prove Limpet defective. Plaintiff proved Limpet defective overwhelmingly and without the slightest contradiction.

CONCLUSION

Plaintiff is entitled to a new trial against all defendants because his right to impartial deliberation by 12 selected jurors based on all the evidence and the court's instructions was materially affected by the jury's premature deliberations. Plaintiff is entitled to a new trial against AC&S because there was no evidence at all to support the jury's explicit finding that AC&S's Limpet spray insulation was not defective.

DATED this 11th day of January, 2001.

SWANSON, THOMAS & COON

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

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

DENNIS EMRICK, Plaintiff,

vs. No. 0002-02019

ACandS, ASTEN GROUP, et al., Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME 7-B

BE IT REMEMBERED That the above-entitled Court and Cause came regularly on for hearing before the HONORABLE JOHN A. WITTMAYER, Judge of the Circuit Court of the County of Multnomah, State of Oregon, on Tuesday, September 19, 2000, at the Multnomah County Courthouse, Courtroom 318, Portland, Oregon.

KATIE BRADFORD, CSR No. 90-0148
Official Court Reporter
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(503) 988-3549

APPEARANCES: MR. GILBERT PURCELL,
MS. ELAINE BROWN,
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Attorneys at Law,
Appearing on Behalf of Plaintiff;

MR. RONNIE COLLINS,
MR. FORREST REN WILKES,
MR. JOHN KENNEDY,
Attorneys at Law,
Appearing on Behalf of Defendant Asten Group

MR. RUDY LACHENMEIER,
Attorney at Law,
Appearing on Behalf of Defendant Quimbey Welding Supplies

MR. R. LANE YOUNG,
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Appearing on Behalf of Defendant Scapa Dryer Fabrics

MR. JAMES CASE,
MR. KEVIN J. McNAUGHTON,
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Appearing on Behalf of Defendant ACandS

GENERAL INDEX

Volume 7-B

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(Tuesday, September 19, 2000, 1:35 p.m.)

PROCEEDINGS

(Whereupon, the following proceedings were held in open court, out of the presence of the jury at

MR. HALL: I would like to introduce Ron Peterson. Ron Peterson is the Portland office for ACandS.

THE COURT: Welcome to the trial. I am sure your thrilled to be here.

And hello, Mr. Groce.

MR. GROCE: Hello, Judge.

THE COURT: Are we ready to roll, folks? Is there an issue that we need to take up about the disclosure of witnesses?

MR. WILKES: Your Honor, Mr. Purcell and I have conferred. I'll let Mr. Purcell speak for himself.

THE COURT: Good move.

MR. PURCELL: I think we can deal with it in the morning. I need to meet with the defendants one more time and maybe we can still work it out and take it up first thing in the morning if we haven't.

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caught here than this javelin-like fiber that can go straight down.

That is basically -- the doctors will explain it to you much better, but these are much more likely to be able to get through here and out to the lining of the lungs. And then Mr. Purcell told you about the macrophages. I call them pac men. But you are going to hear from all the doctors that the pack men can eat this chrysotile serpentine softer asbestos much easier than they can eat this amphibole amosite harder spear-like asbestos.

And thus amosite is much more likely than chrysotile to get through the defense mechanisms and get out here to the lining of the lungs where you have mesothelioma. That is a very simplistic explanation of that, and you'll hear a much better one from the doctors.

But ladies and gentlemen of the jury, the only thing that was used in dryer felts, as you've heard, is chrysotile and this is one of the main reasons that chrysotile doesn't cause mesothelioma. And more importantly perhaps in this case is when the doctors looked as Mr. Emrick's lungs, they found amosite asbestos

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in his tissue, this amosite javelin-like amphibole that was never used in a dryer felt.

And Dr. Craighead will tell you the normal latency period -- I think Mr. Purcell said from, like, 7 or 8 years to 35 years -- but we believe Dr. Craighead will tell you the normal latency period for mesothelioma is 30 years.

And remember that Mr. Emrick worked in all those automobile plants in Detroit from 1965 to 1973. And ladies and gentlemen of the jury, if you take half way between that you get 1969. And Dr. Craighead will tell you that amosite exposure almost exactly 30 years before his diagnosis in 1999 caused his mesothelioma, not anything that may have happened to him years and years later in a paper mill.

I am getting tired, I know you all are tired, so ladies and gentlemen of the jury, we believe that the evidence will be that nothing from a Scapa dryer felt was a substantial contributing factor in Mr. Emrick's disease. The amosite 30 years ago was or at the very least asbestos from the products of the numbers and numbers of people sued here that you'll hear about later.

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I am going to ask you the same thing that all the other defense lawyers will. I told you in voir dire, it's going to be a long time before you hear any of this. Hang there with us, wait and listen to our evidence. We believe it will be good and credible evidence.

On behalf of my client, Scapa, I cannot tell you how much I appreciate you all doing this. There is no other way to resolve this dispute when companies come in to defend themselves and say, "We didn't do it." Thank you for your attention, and at the end of the case, it will not shock you to know that I am going to ask you to return a verdict for Scapa and award Mr. Emrick no money against my client. Thank you.

THE COURT: Mr. Hall.

MR. HALL: Your Honor, may I have a minute to set up?

THE COURT: Just a minute or so? We'll just wait. Is that what you had in mind?

MR. HALL: Yes, Your Honor.

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OPENING STATEMENT

BY MR. HALL:

May it please the Court, counsel, good afternoon, ladies and gentlemen. My name is Terry Hall and it's a privilege to be here today on behalf of ACandS. You may recall, I am the lawyer from Seattle, and with me today, and I want to introduce a couple people to you.

First, you may recall Mr. Groce, Barry Groce. He is a lawyer here in Portland. He will be working and helping me here with this case. You may not see him every day, but you shouldn't read anything into that. We've divided up the responsibilities and so to maximize efforts, as I say, he may not be here every day.

The other person I'd like to introduce to you is Ron Peterson. Ron is -- actually, Ron is the Portland office of ACandS.

Thank you Ron.

Again, you may not see Ron here every day, but Ron wanted to be here because this is an important case for ACandS. It's an important case for Mr. and Mrs. Emrick. It's an important

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case for all the defendants here, including my client, ACandS.

What the evidence is going to show in this case is that as to ACandS, it did not cause or contribute to Mr. Emrick's mesothelioma. Now before I talk to you a little bit about what the plaintiff's claims are as to ACandS, and what I believe the evidence is going to show, I want to tell you a little bit about ACandS.

First, its name, and you're going to see it, and this is the way it is. I hope you all can see that. Let me hold it up for you. It is written as one word, but it is not pronounced ACandS. It is pronounced ACandS.

It's had that name since July of 1969. ACandS came into existence in November of 1957, and at that time it was known as the Armstrong Contracting & Supply Company. And as you might suspect, what happened in 1969 when they changed their name, they took these letters and that became the name it is today: ACandS.

During the course of this case you may hear references either to ACandS or Armstrong Contracting, so you need to keep that in mind. There is another thing that you need to keep in

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mind, when ACandS -- excuse me, when Armstrong Contracting was formed in November of 1957, at that time it was an independent subsidiary of another company called the Armstrong Cork Company.

The Armstrong Cork Company is a company that's not here today. It's important for you to keep in mind that Armstrong Contracting is a different company from Armstrong Cork. You may recall from voir dire that I was the lawyer that was asking you a lot of questions about contracting and insulation contracting, and that's because that is what my client is. My client is an insulation contractor.

Now, before I talk to you a little bit about what an insulation contractor does, let me tell you what it doesn't do and what it has never done, and Mr. Purcell told you that, told you this yesterday. It never manufactured anything. It never owned a factory. It never mined asbestos. It never milled asbestos. It never purchased raw asbestos to make into a product. It never had a research facility or a laboratory.

And the reason for that was that ACandS

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or Armstrong Contracting was not in the business of developing products. I want to talk to you a little bit more about what insulation contractors do, but before I do that I want to tell you a little bit about the history of the company. I sort of alluded it to you when I showed you these charts.

ACandS started in November of 1957 and it was a subsidiary of Armstrong Cork and it was an insulation contracting company. It's located, its headquarters are in Lancaster, Pennsylvania. For those of you who are familiar with that part of the country, if you are familiar with the Pennsylvania Dutch country, that's where Lancaster is.

This is a picture of its headquarters. It's hard to see, but right there is ACandS. It is actually an old school house, at least this part of their office is. It has branches around the country. One of its offices is here in Portland.

Actually, it's in the process of moving. It used to be -- as of Friday it was on Northwest Wilson. As of today, I think it's on Northwest 57th. Ron was telling me that they're

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in the process of moving their office, or his office, I should say.

Now, in 1969, as I told you, the employees of Armstrong Contracting decided to buy the company from Armstrong Cork. It was a subsidiary. It was owned by Armstrong Cork. They were independent, but the employees, the management of Armstrong Contracting, bought the company from Armstrong Cork and changed its name to ACandS.

Now, let me talk to you for a few moments about insulation contracting and what I think the evidence will show in this trial. And Mr. Purcell alluded to that a little bit when he talked about putting pipe covering on pipe and things along those lines.

What an insulation contractor does is similar to what other contractors do. It will bid a job. And what it will do is it will bid jobs on the basis of going out looking at blueprints, maybe visiting a site.

And it will do the insulation part of that, whether it be the refrigeration system, whether it be the heating system, whether it be some sort of ventilation system, whatever needs

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insulation. Now, ACandS focused on commercial and industrial applications, not homes but buildings schools, hospitals, office buildings industrial cites, refineries, for example, and in this case, paper mills.

And I am going to be talking a little bit about that in a moment. Now, in its business as an insulation contractor it had used all sorts of products, and I think it is important for you to keep that in mind. We've used rubber insulation, cork, foam, glass, polyurethane, mineral wool, fiberglass, polystyrene, felt, spun wool, all of these products, none of which contained asbestos are used in insulation.

Now, at times particularly back in the late '50s and the 1960s, ACandS would bid a high temperature job the specifications for those jobs either the owner of the property or the general contractor, whoever ACandS was biding the job to, those specifications would call for the use of asbestos-containing materials.

And for a period of time in the late '50s and the '60s and the early '70s, ACandS, when it was called for by the specifications, would use and install asbestos-containing products. It

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was never by any stretch of the imagination the largest part of what it was doing, but it did use asbestos-containing products in its insulation contracting work.

And we would use those products because that is what the specifications would call for and that is what was available to an insulation contractor. Where do we get the products? As I told you, we didn't manufacture the products. We bought the products from the manufacturers, included them in the costs in our bids, and provided them along with the labor to install it as part of the contract that we performed in installing insulation for any particular project.

I want to talk for a moment about a product that Mr. Purcell mentioned call Limpet. Limpet is a spray-applied product, and in the mid-1960s for about a five-year period, the end of 1962 to the beginning of 1967, Armstrong Contracting had a license to use the process for applying that product.

And what I just told you, I used the words carefully because it's important for you to understand what ACandS had -- again, it was

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at that time, Armstrong Contracting. They had a license. It is not unlike the license that you get when you buy a software program. You don't own that program. You have a license to use it.

And the license that ACandS had was to use the Limpet process, which was a sprayed-on process for insulating, oh, odd structures. As you might imagine if you had a tank, for example, it might make more sense to spray the product on to insulate that product.

Armstrong Contracting didn't manufacturer that product. The license they had was from a company owned by Turner & Newall. Turner & Newall is an English company and Turner & Newall is a company that is not here today. Again, it is important for you to understand what Armstrong Contracting had, though, was a license to use it.

Now, the evidence in this case will be that in 1964 and 1965, crews of Armstrong Contracting applied Limpet in two mills. Publishers Paper, which has gone through a number of name changes out in Oregon City and Crown Zellerbach in Camas.

Well, you may be thinking then, well, the

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claim here must be that Mr. Emrick was in the vicinity of these crews when they were applying these products. But as you may recall, and if you heard when Armstrong Contracting was installing this product, Mr. Emrick was in Michigan, 2,000 miles away.

So the claim is not here that he was around the product when it was being applied. Why is ACandS here then? Well, that is a good question, and I hope it's one that you'll keep in mind throughout this trial. Mr. Purcell alluded to it earlier today. I believe that there were situations where Mr. Emrick went into a work site a couple years after a product had been installed.

Well, with respect to ACandS, we're talking product more than a couple of years. We're talking at least 15 years. Because there will be no dispute in this case that Mr. Emrick did not go into a paper mill prior to 1983.

Well, again, you may be asking yourself, well, how can that be after such a long period of time? Again, that is another good question for you to keep in mind. And you will hear evidence, and Mr. Collins talked about it,

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Mr. Young talked about it, Mr. Purcell talked about it a little bit. You are going to be hearing evidence throughout the course of this trial on issues of the conditions in the paper mills in the early 1980s or actually the mid-1980s because we know Mr. Emrick wasn't there until 1983.

You will hear Mr. Emrick talk about that. You will hear others, perhaps you'll hear experts talking about what those conditions were. It is very, very important, I think, that you listen very, very carefully to that evidence because it is a central issue to this case, not just to ACandS, but to all of the defendants in this case.

And what I think that evidence is going to show is that by the early 1980s, well before Mr. Emrick was in a paper mill, the mills themselves were well aware of the risks regarding asbestos and were taking steps to deal with that issue.

Indeed, Mr. Emrick himself will testify, I believe, consistently with how he has testified earlier that he himself by 1980 was aware of the risk and was taking precautions

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about it. I urge you to listen carefully to that testimony. There is going to be a lot of it from lay witnesses, from expert witnesses.

Listen to that evidence which witnesses seem more believable, whose credentials ring true with you. As you are listening to the plaintiff's evidence, keep in mind that there may be another side to this story. And as you are listening to that evidence, don't be afraid to apply your common sense to it.

As I mentioned, and as you've heard, there is going to be a lot of testimony about paper mills. Mr. Emrick was in more than the two that I believe the evidence will show that ACandS may have done or Armstrong Contracting may have done some work way back from the '60s. Mr. Young told you that these paper mills are huge and you are going to see pictures of them. I brought you a couple of pictures.

How well can you all see that? We'll have a better picture of this, but I wanted to give you some idea. This is the Publisher's Paper Mill. In 1982 – and this is before Mr. Emrick worked in the facility – it's Publisher's Paper as it was called then in

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Oregon City.

This is the Willamette River. It was then changed the name for Smurfit and recently it has become Blue Heron. You'll hear people refer to it as Publisher's Paper because it was named that for the longest time.

I've outlined in yellow the size of this mill, and you can compare it to city blocks: One, two, three, four, five, six. It's six city blocks. There are numerous buildings throughout it. So when – as you're listening to the evidence and people are talking about the mill, we're not talking a room this size. We're talking about very, very, very large places.

And you'll hear witnesses talking about them in terms of the number of football fields or city blocks or miles. Whether it be quarter miles or half miles, these are very big. Now, Mr. Collins mentioned to you a theory called reentrainment, and the idea is that, as I understand it – you, of course, will be the ones to judge the evidence on this – that asbestos basically stays around forever.

That is the theory. I think if you listen to the evidence very carefully and you

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keep in mind the size of these paper mills that you will conclude that that evidence is not there.

This is the Camas mill. I want to make sure I get it right. And if you are familiar with Camas, this is the road that goes by the entrance to the mill. And you then you go along this road and you head on back into Portland. This is the mill here. And you can see there are numerous buildings, some big, some small.

Again, as you listen to that evidence, don't be afraid to apply your common sense to it. I want to talk for a moment about the kind of company that ACandS is – and you'll hear more about this during the course of the trial – as an insulation contractor.

And what I believe you'll hear is that ACandS always has been a safety conscious company where safety was an important part – and it wasn't just a local matter, it was from the headquarters to the district manager to the superintendents on the job site.

Again, the people working for Armstrong Contracting and ACandS, they are out there every day. They're out there visiting the work sites.

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They're out there back in the '60s when these asbestos-containing products are being used. The superintendents of management are there on the job sites with the people that are using it.

Indeed, many of the people who are in ACandS management are people like Ron who started out in the trade as an insulator and now is working estimating jobs and bidding jobs. Keep in mind that ACandS never manufactured anything. It purchased from manufacturers.

You heard Mr. Purcell mention this morning a Dr. Selikoff. You are going to hear a lot of evidence, I think, about Dr. Selikoff during the course of this trial. Dr. Selikoff was out of New York, Mt. Sinai Hospital, and he did a lot of work and research into asbestos-related diseases.

And what I believe the evidence will show as to Dr. Selikoff is that Dr. Selikoff himself had a growing awareness over time, and that his awareness of the hazards changed over time. And a company like Armstrong Contracting, with no research facilities, no labs, not developing products, the evidence will show that it's understanding grew over time.

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And the evidence will also show that by 1973, it had adopted a policy to stop using asbestos-containing products. During voir dire, we all asked you, myself included, if you could put aside your sympathy and judge the case on the evidence, and you all indicated you could do that.

And Mr. Thomas yesterday he told you that Mr. and Mrs. Emrick doesn't want your sympathy, and I believe them. But we should have no illusions about how hard it will be for you all to do that. Mr. Collins – I think Mr. Collins was saying, "You have the hardest job in the courtroom. No question about it."

You'll get no dispute from anybody in hear, I don't think, about that, because no one should have to go through what Mr. and Mrs. Emrick have had to go through. What I ask that you do is that you listen to the evidence carefully. I ask that you keep an open mind.

I ask that you apply your common sense to the evidence that you hear. And if you do that, I believe that you'll agree with me that ACandS does not bear responsibility for Mr. Emrick's mesothelioma.

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Thank you.

THE COURT: Mr. Lachenmeier.

OPENING STATEMENT

BY MR. LACHENMEIER:

May it please the Court, counsel, ladies and gentlemen of the jury, Mr. and Mrs. Emrick: We have been sitting a long time. You have been listening a very long time. I will try not to repeat what others have said. Again, my name is Rudy Lachenmeier and I represent the Quimby Corporation, also known as Quimby Welding Supply, Inc.

Wayne Quimby is in the corner of the room. He is the president and sole stockholder of Quimby. Before I get started, I want to echo the last comments about it is in many ways a very difficult case because certainly there is a lot of sympathy involved.

The main issues to be resolved are any of the defendants that are in this courtroom, including mine, responsible in a -- to have caused a – substantially caused the disease process.

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And the Court will instruct you on what a substantial cause is at the end of the case. What I want to tell you about, first of all, and fairly quickly is who Quimby is. First of all, Quimby Corporation, Quimby Welding Supply, Inc., was started in 1959 by Wayne Quimby's father.

And it was and always has been primarily a welding supply business. They do not manufacture anything. They never manufactured anything. And 99.9 percent of what they have always sold are things like welding gases, oxygen, acetylene, tools of the trade for forms, leather gloves, welding, various kinds of welding torches and welding devices.

That's the vast majority of what they ever did. Wayne Quimby himself is 49. And he graduated from Beaverton High School and Lewis and Clark College here in Portland. And in 1973 came to work for his father. That is an important date. And it's important when I was little, I used to make fun of my mom because she would relate everyone to when somebody – one was born or when something else happened when you'd ask them how old it is.

And now, I understand that '73 was when

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSES TO MOTION FOR NEW TRIAL** to the following parties via facsimile transmission and by depositing and mailing in the U.S. Mail in Portland, Oregon in a sealed envelope, first class postage prepaid, addressed to each party at his or her regular mailing address, as shown below, on January 11, 2001:

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