

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Jean H. Toal, Acting Circuit Judge

Appellate Case No. 2017-002611

Beverly Dale Jolly and Brenda Rice Jolly, ... Respondents,
v.
General Electric Company, et al., ... Defendants,
Of whom Fisher Controls International LLC and Crosby
Valve, LLC are the..... Petitioner.

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In The Court of Appeals

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SC Court of Appeals

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RECORD ON APPEAL
VOLUME V

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Certificate of Counsel

1 product, taking it out of the package which it got put
2 in at Fisher, right?

3 A There certainly could have been, that's right.

4 Q And you've seen no data to reflect that Fisher or
5 Crosby ever took a single air sample, right?

6 A That's right. I don't know one way or the other.

7 Q Ma'am, I just want to move on and get a little bit
8 more information about who you are. I'm sure there's a
9 few paths left untrodden.

10 How much do you charge an hour?

11 A My hourly rate for consulting work, which is a
12 portion of what I do, is 375 an hour.

13 Q And you bill that?

14 A Yes, I do.

15 Q And as I understand it, you have a position with a
16 company called ChemRisk, which we'll talk about in a
17 moment, for approximately a decade. Earlier this year
18 you left ChemRisk, correct?

19 A That's correct.

20 Q You started your own business, right?

21 A That's right. I'm now independent and focusing on
22 other things.

23 Q Right. So, basically, you've started your own
24 consulting business in the last six months, and that is
25 your formal professional employment right now, correct?

ROA_01926

Appendix_01961

1 A Correct.

2 Q Now, you run that business out of your home?

3 A I do, yes.

4 Q No staff?

5 A Correct. I don't have any employees.

6 Q No lab?

7 A No, I don't have a lab.

8 Q All the money goes to you?

9 A The revenue, certainly. I have an accounting firm
10 that I work with.

11 Q Do you do your work in the basement or back
12 bedroom? Do you wear your pajamas, as most people who
13 work at home are able to do?

14 A Sometimes.

15 Q Last year, you, when you were with ChemRisk, you
16 testified that ChemRisk was only billing your services
17 out up to \$200, between \$140 an hour to \$200 an hour,
18 right?

19 A I don't recall that testimony.

20 Q Okay. Hang on, ma'am. You have testified in
21 court cases before. This is not your first time,
22 correct?

23 A That's correct.

24 MS. FARRISE: I apologize, Your Honor. I'm trying
25 to keep it all straight.

ROA_01927

Appendix_01962

1 Q Anyway, we only have your deposition transcript.
2 They will pull it out and we'll come back to it.

3 A Okay. Sure.

4 Q Whatever this rate is, you said it, correct?

5 A That's right.

6 Q And as you sit here today, I guess it's your
7 testimony that you don't know if you made a conscious
8 decision when you opened your business in what appears
9 to be the last six months to charge nearly double what
10 your former employer was charging for your services,
11 right?

12 A No. That's not correct.

13 Q So how did you determine that your value is \$375
14 an hour?

15 A My rate before leaving ChemRisk was 355 an hour,
16 and now it's \$25 higher.

17 Q I think your testimony has been that in court
18 cases, you typically spend about 100 hours on a case?

19 A Personally, not typically, but I may direct
20 technical staff to do some of that work, so it could
21 be. It's a highly variable number. It really depends
22 on the matter.

23 Q In this case, you have read stuff, you've talked
24 with lawyers, you've come to court, you've prepared two
25 reports, one for each defendant, right?

ROA_01928

Appendix_01963

1 A That's right, I have.

2 Q It's a little cut-and-paste. Whatever you said
3 about Mr. Jolly for the Crosby report, you also cut and
4 paste and put in the Fisher report?

5 A Some of it I did.

6 Q And you had to travel here from Colorado?

7 A I did.

8 Q They do have industrial hygienists in South
9 Carolina and North Carolina, right?

10 A I'm sure they have some excellent ones.

11 Q They have some who have been practicing for a long
12 time and are very well respected, right?

13 A I'm sure that they do.

14 Q Do you charge for your time, like Dr. Crapo, for
15 sitting on an airplane to travel here?

16 A I do not unless -- I should clarify. Unless I can
17 do actual work.

18 Q How many hours will you have in this case?

19 A In this case, I will have about between 20 and
20 30 hours total. It's my best estimate as I sit here
21 today.

22 Q Really, with the trial and everything?

23 A Oh, I'm sorry. Up to trial, yeah. I think with
24 the trial it will probably be another ten to 15 hours.

25 Q So you think 30 to 55 hours on this case alone.

ROA_01929

Appendix_01964

1 and that will be at \$375 rate?

2 A That's about right, yes.

3 Q So whatever it is, it is. You mentioned, and I
4 think there was a slide yesterday, several slides,
5 about your background, and I was having --

6 A I'm so sorry. I just want to correct. It's
7 actually 45, not 55. I apologize.

8 Q The jury already knows math is not my strong
9 point. I'm working on it.

10 But I do want to see if we can clarify a few
11 things, and really my focus, ma'am, is your
12 specialization or expertise, if you will --

13 A Okay.

14 Q -- having to do with asbestos in particular.
15 Okay?

16 A Sure.

17 Q There was a slide about your employment. And one
18 looking at it might get the misimpression that, for
19 instance, when you were at FMC, you were a certified
20 industrial hygienist or at NASA, and that's not true,
21 correct?

22 A Oh, yes. No, I never said that I was certified.
23 In fact, I think I mentioned that it's about a
24 five-year process.

25 Q Yeah.

ROA_01930

Appendix_01965

1 MR. BOUCH: Your Honor, if I may, we never
2 exhibited this slide, and I have no objection to it.

3 THE COURT: Yes, you exhibited this slide.

4 MS. FARRISE: Yes, you did.

5 MR. BOUCH: I have no objection to the slide.

6 THE COURT: Good.

7 BY MS. FARRISE:

8 Q Okay. So I kind of tried to match it up with your
9 résumé, which I think was also displayed. But, anyway,
10 FMC -- well, let's see. You graduated from college in
11 1992, correct?

12 A Yes, that's right.

13 Q When did you graduate from high school?

14 A 1988.

15 Q And when you graduated from high school in 1988
16 and then college in 1992, in terms of your asbestos
17 expertise at this point, it's zero for high school and
18 zero for college because your degree, as you said, was
19 in international relations, right?

20 A Yes, I agree.

21 Q And having graduated with a degree in
22 international relations, it appears, at least from the
23 materials, that you never worked in that field?

24 A Correct, I did not.

25 Q Okay. And then, because I think you said you woke

ROA_01931

Appendix_01966

1 up and decided you really liked science and wanted to
2 be a scientist, you went to college after graduating at
3 the University of Maryland for some courses, right?

4 A Yes, that's correct.

5 Q It doesn't appear you were enrolled in a graduate
6 program there.

7 A That's right, I was not.

8 Q You were just at that point trying to take intro
9 science like Chemistry I, right?

10 A Yes.

11 Q And some other courses. So at this point, maybe
12 we can agree that you are still not an asbestos expert?

13 A I agree.

14 Q Okay. And so you take these introduction to
15 science courses, Chemistry I and the like, and then it
16 looks like to me you apply for a graduate program, and
17 you get accepted at the one at Berkeley, California?

18 A Yes, that's correct.

19 Q And so that's from 1995 to '96. And you do a
20 master's program in public health, right?

21 A Yes, exactly.

22 Q And these jobs, FMC, you have worked at FMC before
23 even going to get your graduate degree in 1995, '96,
24 correct?

25 A No, that's not right.

ROA_01932

Appendix_01967

1 Q Did you do that as an internship while you were
2 getting your graduate degree?

3 A I was an intern there, and then they hired me on
4 after I graduated.

5 Q So you started as an unpaid intern?

6 A I was a paid intern.

7 Q Not yet graduated from the graduate program?

8 A Correct.

9 Q You didn't have to go through an interview process
10 and compete with other people, right?

11 A Oh, certainly, I did.

12 Q Okay.

13 Q You're not yet a CIH. And then it looks like to
14 me -- and, by the way, this master's in public health
15 that you got from Berkeley, you didn't get a degree in
16 math?

17 A It's not a degree in math.

18 Q You didn't get a degree in statistics?

19 A It's not a degree in statistics, although there
20 are certainly statistics courses that are required in
21 that degree.

22 Q I understand that in this period you had to take a
23 couple courses in a couple disciplines, but you don't
24 have a degree in statistics?

25 A That's right.

ROA_01933

Appendix_01968

1 Q Berkeley doesn't have a medical school. You
2 didn't take medical school classes?

3 A I did take classes at the University of
4 San Francisco Medical School which was required as part
5 of our program.

6 Q One or two?

7 A I think that's right, one or two.

8 Q Anatomy?

9 A No. We did not have to take anatomy.

10 Q Then 1996 to 2000, after you graduate, you have
11 your first job with a contractor who has a contract
12 with NASA?

13 A That's right. We were the onsite industrial
14 hygiene group as contractors.

15 Q So you didn't actually work for NASA?

16 A I was not a NASA employee.

17 Q Right. And asbestos was not your speciality,
18 correct?

19 A At that time, I was not what I would consider a
20 specialist in asbestos but certainly did work and
21 learned a lot about asbestos during those four years.

22 Q I understand. You had just gotten your degree in
23 public health, and it's now some actual experience in
24 the field.

25 A That's right.

ROA_01934

Appendix_01969

1 Q But I think you testified yesterday what you
2 really were focused on was noise, semiconductors,
3 things like that, right?

4 A I think I testified there was a wide range of
5 things I looked at and certainly asbestos was one of
6 those.

7 Q To see whether the employees who were working at
8 NASA might have been exposed to asbestos?

9 A Actually, it had more to do with confirming
10 abatement. So it was some of the employees, a little
11 bit of some other things as well.

12 Q But you wouldn't consider yourself an expert in
13 asbestos even by 2000 because you hadn't published a
14 thing on asbestos by then, right?

15 A I had not.

16 Q You had done zero scientific research on asbestos
17 by then, correct?

18 A Correct. I had not done any scientific research.

19 Q Then you went on to be in 2000 -- I'm sorry -- a
20 government employee, right, or was it for a contractor?

21 A I was a government employee, yes.

22 Q Right. I think you said that. With the EPA,
23 right?

24 A Correct.

25 Q And I think you testified that the focus of your

ROA_01935

Appendix_01970

1 work there was pesticides?

2 A No. I was in the Office of Pollution Prevention
3 and Toxics and did a wide range of work on many
4 different chemical contaminants.

5 Q You weren't a specialist in asbestos?

6 A I was not a specialist in asbestos, that's right.

7 Q You didn't author or coauthor any government
8 reports put out by the EPA with your name on it,
9 correct?

10 A Not that I can recall.

11 Q I was going to say having to do with asbestos, but
12 it sounds like there's zero as to any agent or
13 chemical, right?

14 A I don't know if that's correct, but not that I can
15 recall with respect to asbestos.

16 Q And I'm really just trying to focus on asbestos.

17 A Sure. I understand.

18 Q So then you went -- this is '03 to -- no, '00 to
19 '03?

20 A That's right.

21 Q And then that's in the D.C. area. You move across
22 the country and got a job as a government employee with
23 the National Park Service?

24 A That's right.

25 Q And you talked about your work there yesterday

ROA_01936

Appendix_01971

1 doing some evaluation about whether silicose coming
2 from the rock -- I think I read in your testimony you
3 did some stress evaluations because government
4 employees do a lot of hiking and they overstress
5 themselves and things like that, correct?

6 A Those were a couple of examples, that's right.

7 Q I think you may have given one asbestos training
8 like we saw an industrial hygienist earlier in the case
9 to the folks who work at the National Park Service,
10 right?

11 A I have given training to them, as I recall, that's
12 right.

13 Q At this point no sort of focus of your work had
14 anything to do with focusing on asbestos, correct, and
15 asbestos disease?

16 A I don't think that's quite accurate. I would say
17 that at that time I was certainly doing field work with
18 respect to products and materials that contained
19 asbestos, advising the parks on managing those products
20 and sampling for those products. A lot of times the
21 park did their own sampling at that time. And so I
22 certainly was involved with asbestos projects and
23 asbestos work.

24 Q You're not saying to this jury that any major part
25 of your work with the National Park Service, which runs

ROA_01937

Appendix_01972

1 Yosemite and Yellowstone and those kind of parks,
2 involved, in large part, asbestos, are you?

3 A I agree. I wouldn't say it was a major part of
4 the work I did.

5 Q You didn't publish anything; you didn't do any
6 research that had anything to do with asbestos when you
7 were a Park Service employee, correct?

8 A Not in terms of peer-reviewed scientific research,
9 that's right.

10 Q Right. You did internal memos and reports about
11 what you found about your sampling and the things you
12 told us about?

13 A Sure. I was focused on understanding the field
14 work and the nature of the use of the products in the
15 field..

16 Q Okay. So then that takes us to ten years ago,
17 2007, when things change, correct?

18 A Well, in terms of my employer, they changed,
19 that's right.

20 Q Right. You were no longer a government employee.
21 You went to a private company called ChemRisk, right?

22 A ChemRisk and then later Cardno ChemRisk, that's
23 right.

24 Q That's the same company?

25 A They're not the same. Cardno is a very large

ROA_01938

Appendix_01973

1 environmental company that purchased ChemRisk.

2 Q You worked with the same people, Dr. Amy Madl and
3 Dr. Paustenbach, generally speaking, correct?

4 A Generally speaking, that's right.

5 Q So that's where you have intersected in terms of
6 any research with asbestos in the last ten years,
7 correct?

8 A That is where I certainly began to study more
9 specifically research aspects related to asbestos,
10 that's right.

11 Q And that's pointed out in your résumé, right?

12 A Yes.

13 Q And I kind of tried to make heads or tails of
14 that. Ma'am, let me find your résumé. Do you have it
15 there? Why don't you put it up. Do you understand --
16 this is the cover page.

17 A That's my CV.

18 Q We've got something else. Hang on.

19 I apologize, Your Honor. This is not my best
20 morning, I will admit.

21 Here we go.

22 THE COURT: I'll tell you what we're going to do.

23 Ladies and gentlemen of the jury, I'm going to
24 send you to your jury room for a minute.

25 (WHEREUPON, the jury exited open court at

ROA_01939

Appendix_01974

1 10:11 a.m.)

2 THE COURT: Ms. Farrise.

3 MS. FARRISE: Yes, Your Honor.

4 THE COURT: We have been at this examination about
5 her qualifications for 40 minutes now. It's not
6 organized. There's much time being spent fiddling
7 around with papers and going back and forth. I had not
8 understood this to be the main focus of what you were
9 concerned about.

10 You got very concerned yesterday about this big
11 report, so you said you were going to have a lot of
12 questions to ask about that. We have talked about it
13 before, and I have been pretty flexible that this is
14 not some open-ended time period but rather we have
15 limitations on time. This isn't fair to your case, to
16 me, to the other side, and to this jury to conduct it
17 in this way. I'm not trying to be harsh, but trying to
18 take everything down to the last little I and crossing
19 of the T is not necessary.

20 You've got the information out of her about what
21 her experience is and what it isn't, and that can be
22 done in a way that flows without having to fiddle with
23 documents and have these huge gaps in time. I just --
24 I can't do this to the jury, and I really don't think
25 it's effective for you to do it this way.

ROA_01940

Appendix_01975

1 MS. FARRISE: Your Honor, I hear you. I
2 appreciate you taking a break. I did just,
3 unfortunately, run in on the tail end of when y'all
4 were discussing jury instructions. I have a lot of
5 material, and I tried to get ready quickly, and I got a
6 little disorganized so I would like to take this break
7 to get organized. I do understand what you're saying,
8 and I do understand the time limitations, but to us,
9 who she is and from where she comes and how she gets
10 here and the studies that she has authored, is a big
11 part of what we think is important.

12 THE COURT: I don't doubt that, but what I'm
13 saying is there is an effective way to examine this
14 witness in a sequential and organized way that doesn't
15 depend -- you've got this material in your head. It
16 doesn't depend on putting up document after document
17 and spending so much time when you made your point by
18 then ramming it home by pulling up another document.

19 That's not necessary in my humble opinion.

20 MS. FARRISE: Thank you, Your Honor.

21 THE COURT: We're going to take ten minutes.

22 Let's be ready to go by 25 after.

23 (WHEREUPON, a recess was taken from 10:14 a.m. to
24 10:26 a.m.)

25 THE COURT: Bring me the jury.

ROA_01941

Appendix_01976

1 (WHEREUPON, the jury entered open court at
2 10:26 a.m.)

3 THE COURT: Thank you, members of the jury.
4 Please take your seats, and we'll continue with the
5 cross-examination of Ms. Sahmel.

6 Ms. Farrise.

7 MS. FARRISE: Thank you so much, Your Honor.

8 Q Ms. Sahmel, I want to ask you about your work once
9 you went to ChemRisk in so as far as it relates to the
10 projects and things you've been working on. Okay?

11 A Okay. Sure.

12 Q And one of the things you told me and I think we
13 agreed on is that an Amy Madl is one of your coworkers
14 there, correct?

15 A That's right, Dr. Madl was a coworker of mine
16 there.

17 Q Yesterday you put up a slide where you had some
18 gasket studies, and you excluded some, and you selected
19 some, and then you did the calculation at the end of
20 the day; do you recall that?

21 A That's correct.

22 Q And two of the studies that you collected were by
23 your coworker, Dr. Madl, who's no longer there
24 apparently, right?

25 A Two of those studies were by Dr. Madl, that's

ROA_01942

Appendix_01977

1 right.

2 Q Right. So the studies that you chose to include
3 as opposed to exclude, two of the five were someone who
4 is associated with the company that you work for,
5 right?

6 A Correct.

7 Q One of the studies was also by Carl Mangold, or he
8 was an author on there. I think it said Mangold,
9 correct?

10 A Yes. I think it's Dr. Mangold, that's right.

11 Q And Dr. Mangold also is affiliated with the
12 scientists at ChemRisk, and his study was one of the
13 five that you included in your calculation, correct?

14 A I don't know Dr. Mangold's relationship with
15 ChemRisk. I never met him.

16 Q My question is not whether you met him. You do
17 know the papers that your colleagues have published,
18 Dr. Paustenbach, Dr. Madl?

19 A Oh, certainly.

20 Q Yes. And you know, whether you've met him
21 personally, that Dr. Mangold was one of the folks that
22 ChemRisk scientists have published with, right?

23 A Apparently, yes, that's right, according to the
24 articles.

25 Q Right, because you selected the article?

ROA_01943

Appendix_01978

- 1 A That's correct.
- 2 Q So you read it?
- 3 A I did.
- 4 Q And you certainly know whether or not the article
- 5 and the author that you selected has worked with these
- 6 other folks who you work with at ChemRisk?
- 7 A Certainly. I just don't know the nature of that
- 8 relationship.
- 9 Q So when you said you hadn't met him, that just
- 10 means you haven't met him in person?
- 11 A That's right.
- 12 Q Ms. Sahmel, your firm, ChemRisk, is a for-profit
- 13 business?
- 14 A I'm sorry. What was that?
- 15 Q For-profit business?
- 16 A What is it, ChemRisk is?
- 17 Q Yes.
- 18 A Yes, that's my understanding.
- 19 Q It's not a government agency that's doing and
- 20 inquiring into disease and scientific topics to make
- 21 new scientific discoveries?
- 22 A It's not a government agency, that's right.
- 23 Q Right. It has clients?
- 24 A The company had clients, right.
- 25 Q Those clients are corporate clients who are

ROA_01944

Appendix_01979

1 typically being sued in some kind of litigation, right?

2 A The company had a wide range of clients including
3 the government, the CDC, trade associations, certainly
4 corporations and some law firms as well.

5 Q Let's talk about your projects that you list on
6 your résumé. Okay?

7 A Sure.

8 Q You have a section -- you have this section here,
9 which is your educational background, some of which we
10 just went through, but you also have this here on your
11 résumé that in the future you hope to be a Ph.D.?

12 A That's right. This is the estimated completion
13 date of my research.

14 Q And I have some old résumés of yours, and the old
15 estimated completion date was 2016?

16 A Correct.

17 Q Now that's been pushed out to '17?

18 A Yes.

19 Q But you don't actually have this; you just chose
20 to put it down with your credentials, something that
21 you're working towards?

22 A Correct. It's part of my education, that's right.

23 Q Now, in terms of your projects, they appear
24 starting on what looks like 3 of 16. You have this
25 section here "professional experience," right?

ROA_01945

Appendix_01980

1 A Yes, that's right.

2 Q Okay. And then what we have here, though, is
3 these are projects that you have been assigned as an
4 employee in the ten years or that you worked on in the
5 ten years that you have been employed by ChemRisk,
6 correct?

7 A That's right.

8 Q For ChemRisk clients?

9 A Correct.

10 Q And these go on. If you look at the next page,
11 conduct large ongoing risk assessment, blah, blah,
12 blah. Next page, you have more of your assignments
13 from ChemRisk, right?

14 A Correct.

15 Q And then I guess it finally ends before we get
16 back to the National Park Service, correct?

17 A That's right.

18 Q I counted 22 separate assignments that you listed
19 on your résumé that you had at ChemRisk. Does that
20 sound right to you?

21 A The way that I've listed them on my CV is more to
22 demonstrate a representative range of the types of work
23 that I did. That's not the actual number of projects I
24 did.

25 Q Okay. But you list 22 projects?

ROA_01946

Appendix_01981

1 A Yes.

2 Q Only three of which, of the 22, have anything to
3 do with asbestos, correct?

4 A Well, as I mentioned, I listed the nature of the
5 types of work that I did, so it's not representative,
6 that list, of the actual number of projects I did.

7 Q You made the list?

8 A Correct.

9 Q Of the 22, there's only three projects that you
10 chose to list that have anything to do with asbestos?
11 That's all I'm asking.

12 A Those are not projects. That list is not
13 individual projects.

14 Q What is it?

15 A It's types of work that I performed over that
16 time.

17 Q Okay. Well, they look like projects. Let me just
18 ask you. This one here, before we get to the National
19 Park Service, "Evaluated the potential for occupational
20 exposures to boiler water treatments at an industrial
21 facility"?

22 A Correct. That's an example.

23 Q Okay. And you had a corporate -- your client or
24 ChemRisk client was a corporate defendant who was being
25 sued in litigation, correct?

ROA_01947

1 A I don't recall at this time that project. That
2 was very early on, when I started.

3 Q Okay. Well, you have been questioned about these.
4 I'll move on and see if we can -- "evaluated the
5 potential for mercury exposure associated with
6 manometers used in natural gas pipe repair and
7 installation." The client of ChemRisk was a corporate
8 defendant being sued in litigation, correct?

9 A I believe it was in that case, that's right.

10 Q So the client here were lawyers representing a
11 company in a lawsuit, right?

12 A That's my understanding, that's right.

13 Q "Evaluated dermal inhalation exposures to
14 solvent-based paints and coating associated with pipe
15 repair and other industrial applications." The client
16 of ChemRisk was a corporation that was being sued in a
17 lawsuit, and the lawyers hired ChemRisk to help them
18 with the lawsuit, right?

19 A Actually, this was a large evaluation of the data
20 that was at a facility in terms of all of the benzene
21 exposure data they collected, and they asked us to look
22 at that and evaluate the data in its entirety.

23 Q The client of ChemRisk was a corporation being
24 sued in a lawsuit?

25 A The client was a corporation, that's right.

ROA_01948

Appendix_01983

1 Q Being sued in a lawsuit?

2 A I don't know the nature of the details with
3 respect to the lawsuit.

4 Q You have been questioned about this. Let me hand
5 you your sworn testimony in a case called *Joanne*
6 *Schultz vs. The Glidden Company*, October 11, 2011. Let
7 me ask you to turn to Page 38.

8 A Okay.

9 Q Lines 1 through 9 where you were asked about this.

10 MS. FARRISE: Excuse me, Your Honor. I forgot
11 you. I'm sorry.

12 (Transcript handed to judge.)

13 THE WITNESS: Correct. As I say here, I believe I
14 would have been assisting with the exposure assessment
15 piece. And in this case, it was for one or more cases,
16 so I performed the exposure assessment.

17 BY MS. FARRISE:

18 Q This is a litigation project for a lawsuit?

19 A Back in 2011, it was. I recall that it was,
20 that's correct.

21 Q Most of your work has been litigation projects for
22 companies that are facing lawsuits on your list here,
23 correct?

24 A In terms of the work I did at ChemRisk, a lot of
25 the work they asked me to do was related to litigation,

ROA_01949

Appendix_01984

1 that's correct.

2 Q And a lot of the ChemRisk clients, therefore, were
3 lawyers representing companies that were being sued for
4 injury for a variety of toxins -- benzene, mercury,
5 asbestos, chlorine, correct?

6 A Certainly a portion of the work that ChemRisk did
7 was related to those topics, that's right.

8 Q ChemRisk is actually a company that is known for
9 creating litigation science on behalf of corporations,
10 correct?

11 MR. BOUCH: Objection, Your Honor. There's no
12 basis for that.

13 THE COURT: Overruled.

14 Now, wait a minute. A question has been
15 propounded, so if it needs to be repeated, I overruled
16 his objection, let's let her answer.

17 MS. FARRISE: I was waiting for an answer, Your
18 Honor.

19 THE WITNESS: I'm sorry. He talked over the
20 question. Would you mind to repeat it?

21 BY MS. FARRISE:

22 Q Yes. ChemRisk, the company you worked for for ten
23 years, is a company, a for-profit company that is known
24 for creating litigation science to help corporations
25 who are being sued in lawsuits and creating science to

ROA_01950

Appendix_01985

1 change regulations that have been created to protect us
2 all, right?

3 A I can't speak for everybody's intentions at the
4 company. My personal intentions were to perform
5 original research that would be published in the
6 literature.

7 Q Let me hand you what has been marked Plaintiff's
8 Exhibit 448.

9 MS. FARRISE: For the record, it's actually a copy
10 of a textbook which is called *Doubt is Their Product:
11 How Industry's Assault on Science Threatens Your
12 Health.*

13 THE COURT: Have you -- you've handed her this
14 book. Now ask her whatever you want to ask her about
15 it from an identification standpoint.

16 MS. FARRISE: I know. Mr. Bouch's concern was he
17 doesn't have a copy.

18 THE COURT: He's going to need a copy. Let him
19 have mine.

20 BY MS. FARRISE:

21 Q You are familiar with the existence of this book,
22 correct?

23 A I have heard of this book before.

24 Q Right. You have been questioned about it in
25 deposition?

1 A I have.

2 Q You have been asked about it in court?

3 A Yes.

4 Q You see that the author of the book is David
5 Michaels. You know who that is, correct?

6 A I do.

7 Q He's the former head of the United States
8 Occupational Safety and Health Administration, correct?

9 A That's correct.

10 Q And this book details in part the work of ChemRisk
11 in particular and your colleague, Dr. Paustenbach, as
12 creating --

13 THE COURT: Stop there and ask her if it details
14 their work.

15 MS. FARRISE: Sure.

16 Q You're aware of that, right?

17 A Aware of what? I'm sorry.

18 Q That your boss -- is Dr. Paustenbach, was he your
19 boss? He was --

20 A Not when I left ChemRisk. He certainly was part
21 of the management team of the company.

22 Q At some point he was a founder and an owner?

23 A Yes, that's correct.

24 Q And you mentioned yesterday a number of
25 publications -- I think four or five, something like

ROA_01952

Appendix_01987

1 that. He's a coauthor in your publications?

2 A Not all of them. Some of them, certainly.

3 Q Well, how many do you have, seven?

4 A Asbestos-related specifically or all in total?

5 Q Total.

6 A I've published 22 or 23 peer-reviewed
7 publications.

8 Q So there's seven asbestos?

9 A I think it's six.

10 Q Okay. Because you have published on all those
11 other topics -- benzene, chlorine, mercury, all the
12 projects that you worked on, correct?

13 A I publish on a wide range of topics with many
14 different authors from industry, academia, the
15 government.

16 Q Right. As to asbestos, those publications,
17 Dr. Paustenbach is a coauthor in your -- some of your
18 papers, right?

19 A That's right.

20 Q Okay. And the book, *Doubt is Their Product*,
21 accuses Dr. Paustenbach and ChemRisk of creating
22 litigation science or science not for the public good
23 but for the good of companies being sued in litigation,
24 right?

25 A It's my understanding that that's part of what the

ROA_01953

Appendix_01988

1 book is written for.

2 Q Right. In terms of the accusations that the firm
3 that you worked for for ten years and the guy in
4 particular who you've published with, in terms of some
5 of your scientific endeavors, being accused of creating
6 corrupted science for the purpose of litigation and to
7 fool juries, have you investigated that?

8 A Absolutely. Before I went to work for ChemRisk, I
9 talked to a lot of people about it. They have an
10 excellent, sterling publication record. None of the
11 publications that ChemRisk has ever published have ever
12 been retracted in the peer-reviewed literature, and
13 they do excellent work.

14 Q Well, you mention retraction. Dr. Pastenbach's
15 work has been retracted, correct?

16 A That's not accurate.

17 Q There was some concern that some of the data was
18 manipulated, correct?

19 A What are you referring to?

20 Q His work having to do with chromium.

21 A None of Dr. Pastenbach's papers have ever been
22 retracted.

23 Q Okay. I don't want to waste a bunch of time, but
24 we can agree at least that whole books have been
25 written that include accusations that the firm that you

ROA_01954

Appendix_01989

1 work for, the scientists who you publish with, is
2 creating litigation science for the purpose of doubt
3 and to defend lawsuits; you're aware of that, right?

4 A So this book, is my understanding, is not peer
5 reviewed. It's the opinion of the author. I know when
6 the book came out, there were some reviews from editors
7 of well-respected peer-reviewed journals who noted that
8 there was bias in the book.

9 Q Mr. Holder wants to make sure that I make clear on
10 the record that the guy who wrote this non-peer
11 reviewed book was the former head of the United States
12 OSHA, correct?

13 A Oh, sure. I understand that.

14 THE COURT: You have already asked that once.
15 It's in the record.

16 MS. FARRISE: I'm getting help.

17 Q Ma'am, a number of the publications that you have
18 put out there and some of your colleagues has been
19 funded by companies that are accused of making and
20 selling products that hurt people, correct?

21 A That's right. Some, a portion of the work that
22 ChemRisk has published, has been funded by industry
23 sources.

24 Q And I tried to, for expedience sake, go through
25 some of your papers in that regard. So this was --

ROA_01955

Appendix_01990

1 basically, we have already talked about this over here,
2 your ChemRisk profile, correct?

3 A Yes. That looks like my ChemRisk profile from the
4 website.

5 Q And these are some of the folks you have published
6 with, Dr. Paustenbach, right? And there you are?

7 A Yes, that's right.

8 Q Keep going.

9 You say that your work is organizing peer-review
10 or expert consultation, but it is, in large part,
11 litigation support, right?

12 A Some of it was, certainly.

13 Q Let's look at your papers.

14 2009, you are an author with Dr. Paustenbach on
15 this paper having to do with vinyl chloride and other
16 ChemRisk authors, and this is a paper that was based --
17 the original research upon which this study was based
18 was funded by multiple companies involved historically
19 in the production of VC and VC-containing products.
20 One of the authors has served as an expert witness in
21 litigation related to workplace exposures to VC. That
22 was Dr. Paustenbach, right?

23 A That's correct.

24 Q And this was a publication based on the litigation
25 project that ChemRisk did and the data that it

ROA_01956

Appendix_01991

1 collected of its findings, right?

2 A This was a study that we did, actually, to expand
3 upon the literature with respect to the two-zone model.
4 This is an important model for looking at, in this
5 case, increases and decreases in the workplace of
6 personal and bystander exposure.

7 So it had never been published before, and it was
8 an important addition to the modeling literature so,
9 certainly, in addition to the initial work we did that
10 was litigation-related, we expanded upon it and
11 published it in the literature.

12 Q Right. Clairol was being sued for hurting people
13 about this, and that was your client, right?

14 A One of the clients that ChemRisk had that related
15 to the original work was Clairol, that's right.

16 Q And that was a client of ChemRisk who came to
17 ChemRisk and paid ChemRisk --

18 THE COURT: Let's chop these questions up. Let's
19 not compound them.

20 BY MS. FARRISE:

21 Q Clairol was a client of ChemRisk?

22 A That's my understanding, that's right.

23 Q The time people spent gathering, doing whatever
24 research they did, was paid for and a bill was sent to
25 Clairol?

ROA_01957

Appendix_01992

1 A The original research, a portion of the original
2 research, was conducted initially related to work that
3 was litigation-related, and then we expanded upon that
4 and did some novel research and published that.

5 Q And how many hundreds of thousands of dollars did
6 Clairol pay to ChemRisk for that work?

7 A They didn't pay anything for the paper.

8 Q Well, but there was a benefit to ChemRisk, right?

9 A Well, certainly there was an interest in adding to
10 the peer-reviewed literature.

11 Q No, no. There was a monetary benefit, right?

12 A In terms of?

13 Q In terms of in 2009, the paper that we just looked
14 at, the VC paper, is published, right?

15 A Correct.

16 Q Dr. Paustenbach is an expert in litigation, right?

17 A Correct.

18 Q So if Clairol is sued by folks for the injury
19 caused by that exposure, then they can hire
20 Dr. Paustenbach to be an expert witness in lawsuits,
21 and he can come into court and say, "I published this
22 paper, and here are my findings," and the lawyers in
23 the firm that hire him will pay him as an expert
24 witness, right?

25 A Certainly, if they retain him.

ROA_01958

Appendix_01993

1 Q Right. So there can continue to be, even after
2 the initial work, some monetary benefit if the
3 scientists from ChemRisk are hired as expert witnesses
4 to talk about these papers that they're writing?

5 A If they are, certainly. I don't know if he has or
6 not.

7 Q Well, it says, "One of the authors has served as
8 an expert witness in litigation related to workplace
9 exposures to VC."

10 A Right. I just meant I didn't know if he had been
11 hired subsequently by them.

12 Q This science exists today out in the public
13 domain, right?

14 A It's in a peer-reviewed journal.

15 Q I'll get to that. Next, your publications in
16 asbestos. In 2011, you published a review article.
17 Let me stop and talk about that for a moment or ask you
18 some questions.

19 A Sure.

20 Q A review article means you went and read other
21 people's papers and original scientific research; you
22 reviewed it?

23 A Exactly, that's right.

24 Q And then you and these other folks wrote a paper
25 commenting on what these other people have written and

ROA_01959

Appendix_01994

1 published?

2 A Well, we collected all the data and statistically
3 analyzed it so that we had an understanding of the
4 weight of evidence in the literature.

5 Q It wasn't your data. You didn't -- no one from
6 ChemRisk collected it originally, correct?

7 A Actually, that's not accurate.

8 Q Oh, one of the papers had one of the authors like
9 Dr. Madl; is that what you're saying?

10 A Actually, I think several of the papers were
11 original data that ChemRisk, other ChemRisk employees,
12 had collected.

13 Q Right, such as the example with Dr. Madl that we
14 talked earlier. You're here and you have done this
15 calculation, and you have taken data from three of your
16 ChemRisk colleagues or three papers from two of your
17 ChemRisk-associated colleagues, and you have done a
18 calculation for the jury here?

19 A That's right.

20 Q And this paper, the review where you're a middle
21 author with Dr. Paustenbach, was originally done in
22 preparation for litigation and was supported by a
23 number of companies that had been and are involved in
24 asbestos-related litigation. And then it says, "The
25 authors were not compensated for most of the work of

ROA_01960

Appendix_01995

1 compiling the information for this article or for
2 preparing it, but one of the authors, DJP" -- that's
3 Dr. Paustenbach, right?

4 A Right.

5 Q "Has served as an expert in asbestos-related
6 litigation," right?

7 A Correct. That's what it says.

8 Q And now you are serving as an expert in
9 asbestos-related litigation because of the asbestos
10 paper funded in part by companies that have been or are
11 involved in litigation that you have put out into the
12 world, right?

13 A Well, I hope I am retained as an expert because I
14 am actually an expert and am well versed in the
15 research.

16 Q Dr. Paustenbach is very clear that this is
17 litigation for science for profit, and he expects to
18 get paid from the big companies and defendants that
19 hire him, right?

20 A I don't know one way or the other what his
21 opinions are.

22 Q You've seen this letter and been offered this
23 letter before?

24 MR. BOUCH: Your Honor, I think before it's shown
25 to the jury, there ought to be at least some foundation

ROA_01961

Appendix_01996

1 laid instead of just throwing things up that the
2 witness --

3 THE COURT: I think what she's asking about is
4 coauthors with Dr. Sahmel --

5 MR. BOUCH: Perfectly fine.

6 THE COURT: -- that were put up as the foundation
7 data-wise for the particle evidence she gave yesterday.
8 I think that's where this is leading, and she's
9 discussing those coauthors and what connection they may
10 have to one side or another of this discussion.

11 MR. BOUCH: That's not my objection. My objection
12 is throwing something up on the screen. There was a
13 letter from Dr. Paustenbach to Ford Motor Company.
14 Heaven only knows if the witness has seen it. My
15 objection is until the foundation is laid to put the
16 letter in, it should not be shown to the jury. I
17 believe that's improper. That's my objection. She can
18 ask any questions she wants.

19 MS. FARRISE: I'll stick with Dr. Sahmel's
20 published papers.

21 THE COURT: Let's kind of move through this.

22 BY MS. FARRISE:

23 Q Here is another of the papers that you have
24 appeared as an author on with your ChemRisk colleagues,
25 correct?

1 A Yes, that's right.

2 Q And this has to do with another -- anyway, the
3 work here was carried out and funded by ChemRisk. They
4 have provided consulting services to Cameron
5 International Corporation on matters unrelated to the
6 Deepwater Horizon oil spill, and, to your knowledge,
7 ChemRisk has not provided consulting services to any of
8 the companies involved in the Deepwater Horizon oil
9 spill during this time period.

10 Did I read that correctly?

11 A Yes, that's correct.

12 Q Okay. Some company hired ChemRisk folks to look
13 at this issue of injury from the Deepwater Horizon oil
14 spill?

15 A No, that's not right.

16 Q Okay. 2012, here you are again, *Airborne Benzene*
17 *Exposures From Cleaning Metal Surfaces With Small*
18 *Volumes of Petroleum Solvents*, publishing with your
19 colleague at ChemRisk, correct?

20 A Yes, that's right.

21 Q And ChemRisk staff, by this point, 2012, have
22 published over 20 papers on benzene. "Some of the
23 authors have served or may serve as an expert on
24 scientific panels or in litigation involving health
25 effects associated with exposure to benzene." Did I

ROA_01963

Appendix_01998

1 read that correctly?

2 A Yes, you did.

3 Q So this underlying research conducted initially,
4 as you say, without outside support, right?

5 A Correct.

6 Q Allowed ChemRisk folks to come into courts and to
7 be hired as expert witnesses, in part, right?

8 A This research was undertaken by ChemRisk without
9 any funding and performed to understand the nature of
10 the modeling relationship for small uses of benzene on
11 surfaces.

12 Q Here's another of your papers, *Analysis of*
13 *Workplace Exposures to Benzene Over Four Decades at*
14 *Petrochemical Processing and Manufacturing Plants*, and
15 there you are publishing with Dr. Paustenbach and
16 others of your ChemRisk colleagues, correct?

17 A Correct.

18 Q And the funding on this one, "Some of the original
19 data assembly and analysis of this article was funded
20 by a client involved in benzene litigation." Did I
21 read that correctly?

22 A Yes, you did.

23 Q "At least two of the authors have served as expert
24 witnesses on matters relating to industrial hygiene and
25 the toxicology of benzene." Did I read that correctly?

ROA_01964

Appendix_01999

1 A Yes, I believe so.

2 Q That means two of the folks on this paper have
3 come into court, been hired as expert witnesses at
4 whatever they charge per hour to talk to juries about
5 whether or not the benzene causes injury, right?

6 A Absolutely. We want to be very transparent in our
7 acknowledgements for our papers.

8 Q Actually, the scientific standards require that
9 you disclose funding sources, right?

10 A I certainly hope so. It's very important.

11 Q And the original client was a paying client of
12 ChemRisk that hired the folks at ChemRisk to look into
13 this issue of benzene exposure and injury, correct?

14 A That's right. Some of the original research, and
15 then we expanded upon that in an interesting analysis
16 and published it.

17 Q In 2015 you and your colleagues published
18 something having to do with asbestos. I think you
19 might have talked about it on direct examination, some
20 sort of -- anyway. There's Dr. Madl, who is the author
21 of two of the studies of the five that you chose to
22 include in your calculation, correct?

23 A Yes, that's right.

24 Q And the funding for this manuscript at first was
25 provided entirely by Cardno ChemRisk, "a consulting

ROA_01965

Appendix_02000

1 firm that provides scientific advice to the government,
2 corporations, law firms, and various scientific
3 professional organizations. Two of the authors,
4 AKM" -- that would be Amy Madl, correct?

5 A Correct.

6 Q -- "and JS" -- that would be Jennifer Sahmel;
7 that's you, right?

8 A That's right.

9 Q -- "have served as expert witnesses in litigation
10 regarding historical exposures of various tradesmen to
11 asbestos."

12 A Correct.

13 Q And the work, in part, is an analysis of someone
14 else's data, right?

15 A No. Actually, these data we requested through
16 what's called a Freedom of Information Act request from
17 OSHA. Nobody had ever gone and looked at all of their
18 compliance records and their sampling measurements to
19 look at violations of the asbestos standards, and we
20 thought that would be a very informative research
21 project to work on, so we collected that data from OSHA
22 and compiled it, and there's been a lot of interest in
23 it.

24 Q You took OSHA's information and analyzed it?

25 A Correct.

1 Q You didn't conduct and collect any original data
2 yourself, right?

3 A Not for that paper, no.

4 Q 2014, there are you are again, Jennifer Sahmel,
5 *Evaluation of Take-home Exposure and Risk Associated*
6 *With the Handling of Clothing Contaminated With*
7 *Chrysotile Asbestos*, and there's Dr. Paustenbach and
8 Dr. Madl and some of your associates with ChemRisk,
9 right?

10 A Yes, that's right.

11 Q And the funding of this paper, a total of eight of
12 the 12 authors are currently employed by ChemRisk. The
13 other four are with another group, and those four folks
14 usually serve as expert witnesses for companies in
15 asbestos litigation?

16 A I don't know.

17 Q "Financial support for this research and the
18 preparation of this article was provided by Cardno
19 ChemRisk and the R.J. Lee Group. Additional funding
20 was also provided by John Crane, Inc., a manufacturer
21 of sealing system products. This company has been
22 involved in asbestos litigation related to historical
23 asbestos-containing gaskets and packing. This funding
24 source and their counsel did not provide editorial
25 comments or review to the article before the

ROA_01967

Appendix_02002

1 commission. Six of the authors, DJP" -- that's

2 Dr. Paustenbach, right?

3 A Yes..

4 Q -- "JS", -- that's you, Jennifer Sahmel, right?

5 A Correct.

6 Q "Amy Madl," right?

7 A Yes.

8 Q -- "have served as expert witnesses on the topic
9 of asbestos."

10 How much did the lawyers for John Crane pay
11 ChemRisk for this work?

12 A I don't know the total. There were two different
13 studies that they funded initially, and the work was
14 performed, and as it mentions, of course, in complete
15 isolation from the company, and we performed the
16 original research and published the papers.

17 Q Right. And part of the reason this new statement
18 gets added is because Dr. Paustenbach and ChemRisk and
19 some of the other folks who work there have been
20 accused of sending the papers to the lawyers
21 representing the companies before they get published in
22 the public domain, right?

23 A I have never heard of that before.

24 Q Did you read that in Dr. Michaels' book?

25 A I did not.

1 Q Have you read Dr. Michaels' book?

2 A No, not in its entirety.

3 Q Next, 2015, there is another of your publications,
4 *Removal Rates of Chrysotile Asbestos From Air and*
5 *Comparison With Theoretical Estimates Based on*
6 *Gravitational Settling and Dilution Ventilation.* And
7 you published that with Dr. Paustenbach?

8 A Correct.

9 Q Dr. Madl?

10 A Correct.

11 Q Dr. Henshaw, right?

12 A Mr. Henshaw, that's right.

13 Q And other folks with Cardno ChemRisk around the
14 country, and the funding for this paper, "All of the
15 authors are employed by Cardno ChemRisk. The
16 underlying data in this analysis were generated from a
17 study that was partially funded by John Crane, Inc., a
18 manufacturer of sealing devices which historically
19 manufactured or supplied asbestos-containing gaskets
20 and packing. Cardno ChemRisk has been engaged by John
21 Crane, Inc., as well as other corporations to provide
22 general consulting, expert advice, and litigation
23 support on scientific matters involving asbestos. Four
24 of the authors, DJP, JS, AKM, have served as expert
25 witnesses regarding historical exposures of various

ROA_01969

Appendix_02004

1 tradesmen to asbestos." The lawyers for John Crane
2 paid for this paper, right?

3 A No, that's not correct. John Crane directly.

4 Q Oh, John Crane Company, not the law firm --

5 A Correct.

6 Q -- directly paid for this paper?

7 A Well, no, a portion of it, as we say here. And,
8 in fact, in this particular paper, the study itself was
9 not funded at all, but we wanted to disclose -- it's
10 important to be as transparent as possible -- that the
11 original data that we used in the analysis was
12 originally funded by John Crane, but the actual
13 analysis we did in this paper was not funded.

14 Q Okay. So, see if we agree on something. It's
15 your understanding, having worked with John Crane, that
16 at some point they stopped selling asbestos-containing
17 gaskets and packing, right?

18 A I don't know. I've never worked directly with
19 John Crane.

20 Q Okay. Some of the evidence that we have here is
21 that around 1989 or so, the suppliers to Fisher and
22 Crosby went out of the asbestos-containing gasket
23 business and, in part, these companies, therefore, had
24 to, for the first time, find a substitute because they
25 didn't have suppliers that would send the gaskets to

ROA_01970

Appendix_02005

1 them. Do you understand what I mean?

2 A Sure. I don't know the specifics one way or the
3 other, but I understand what you're saying.

4 Q So let me ask you to assume that that occurs
5 somewhere around 1989 or 1990, right after you get out
6 of high school.

7 A Okay.

8 Q And this paper is in 2015, right?

9 A I'm sorry, which -- oh, this one, right. Correct.

10 Q And the work that was done, I'm guessing, would
11 have been -- ChemRisk would have been hired, and the
12 work would have been done sometime 2010 or after,
13 right?

14 A That's right.

15 Q So this work was not undertaken by John Crane to
16 find out anything about its product to protect the
17 lives of workers who were using the product because
18 workers hadn't used the products in 20 years, right?

19 A Well, this study wasn't funded by John Crane at
20 all.

21 Q It says, "The underlying data used in the analysis
22 were generated from a study that was partially funded
23 by John Crane, Inc."

24 A Correct. The underlying data, that's right.

25 Q Right. So indirectly John Crane had a role in

ROA_01971

Appendix_02006

1 funding this study because otherwise you wouldn't have
2 had any data?

3 A Oh, sure, but they didn't know about that. It
4 wasn't something that was arranged with them.

5 Q And the funding came decades after it would have
6 done any good to protect the lives of workers who were
7 working with these products. The paper was published
8 then. It's not protecting anybody today, right?

9 A The funding was provided after 1990, if that's
10 what you're asking, that's right.

11 Q The benefit of this paper today is to help defend
12 lawsuits, right?

13 A The benefit of this paper is to help understand
14 the settling rates of fibers and how far they travel.
15 This was something that had never been published in the
16 peer-reviewed literature. We felt it was a very
17 important topic. We get asked a lot of questions about
18 it, and we wanted to be able to perform an analysis on
19 some available data that we had to benefit the
20 scientific community.

21 Q Right. You get asked a lot of questions about it
22 in courtrooms like this when you show up as an expert
23 witness on behalf of companies that made and sold
24 asbestos products?

25 A Sometimes, sure.

ROA_01972

Appendix_02007

1 Q Because no one, since they stopped selling these
2 products, we hope, today is going to be exposed to a
3 John Crane asbestos-containing gasket, right?

4 A Well, no one had done any of this research at all
5 before we did it. Not the government, not anybody
6 else.

7 Q Next. Let me just stop there. Hold on a second.
8 I wanted to just -- withdrawn.

9 The government hadn't done any testing; is that
10 what you just said?

11 A Specifically related to the questions that we
12 looked at in that study, which had to do with the
13 distance that fibers travel and the settling rates of
14 fibers in terms of measurements using PCME data, which
15 are asbestos-specific.

16 Q Why would the government be testing a product that
17 was made and sold and put on the market and money made
18 by John Crane?

19 A I think that's a different question.

20 Q It is a different question --

21 A And I don't know why they would do that --

22 Q --- what is the answer?

23 A I don't know why they would do that, I agree.

24 Q Well, you mentioned the government hadn't tested
25 it like somehow the government is in the business of

ROA_01973

Appendix_02008

1 testing products that they don't make, that they don't
2 sell, that they don't profit from, right?

3 A No, I was talking about the paper.

4 Q Okay. The government is not responsible to find
5 out the safety issues and the dangers of products that
6 it does not make, it does not sell, and it does not
7 profit from; that's the company's responsibility,
8 right?

9 A That's correct.

10 Q And the first time the company got around to
11 testing, as part of its responsibility to tell us all
12 whether or not it's causing exposure to dangerous
13 asbestos, was 20 years after it stopped selling the
14 product?

15 A I don't know the testing that John Crane did
16 before that. The particular study that we did was
17 related to a specific route of exposure, which was
18 take-home exposure.

19 Q Did you ask John Crane for its data so you could
20 throw it into your analysis?

21 A It wasn't related to take-home. And, no, we were
22 doing a separate individual analysis.

23 Q Next paper, Jennifer Sahmel and these other folks,
24 *Airborne Asbestos Take-home Exposures During the*
25 *Handling of Chrysotile-Contaminated Clothing Following*

ROA_01974

Appendix_02009

1 Simulated Full-shift Workplace Exposures, 2015, with
2 Dr. Paustenbach, Amy Madl, John Henshaw, and a bunch of
3 other folks, right?

4 A Yes, that's right. This is the second part of the
5 study I mentioned earlier.

6 Q So one study, two papers?

7 A Two studies and two papers.

8 Q Next. Funded by, "At the time of the study eight
9 of the 13 authors were employed by Cardno ChemRisk.
10 The other five authors were employed by the R.J. Lee
11 Group, an analytical laboratory and consulting firm. A
12 portion of the funding for the preparation of this
13 article and the underlying research was provided by
14 John Crane, Inc., a manufacturer of sealing devices
15 that historically manufactured or supplied
16 asbestos-containing gaskets and packing. Funding was
17 also provided by Cardno ChemRisk and the R.J. Lee
18 Group." Did I read that correctly?

19 A Yes, you did.

20 Q Okay. So after this paper is published that your
21 company that you work for and the R.J. Lee consulting
22 group participated in, there will be 13 potential
23 litigation experts to go out into the world and work on
24 John Crane's asbestos cases, right?

25 A I don't know. If they're considered to be experts

ROA_01975

Appendix_02010

1 in take-home exposure, maybe.

2 Q Well, some part of qualifying you as an expert is
3 you get to come in here and say, "I have published
4 things on the topic that we're talking about in the
5 scientific literature," right?

6 A Well, generally, publishing is very important, and
7 it's an important part of the research process. It is
8 a huge process. It is not done just through the course
9 of a project that someone is hired for. It takes many,
10 many hours. The peer review process is quite
11 extensive. It's not something that someone would
12 undertake just for the fun of it.

13 Q That's right, because if you hadn't published
14 these papers in the last ten years that you have been
15 with ChemRisk, your experience insofar as it relates to
16 asbestos would be limited to whatever nonspecific thing
17 that you did having worked at the National Park
18 Service, right?

19 A I don't think that's accurate.

20 Q Okay, ma'am.

21 Let me move on, Your Honor, quickly.

22 One of the issues that came up yesterday was
23 whether or not there is, in addition to an OSHA level
24 under the various statutes, a peak exposure level. And
25 there is, right?

ROA_01976

Appendix_02011

1 A It's called an excursion limit. It's a 30-minute
2 limit.

3 Q Well, we'll talk about that. But for the moment,
4 there's two things going on or were two things going on
5 typically with the OSHA asbestos standards starting in
6 1972, correct?

7 A There were -- you said there were two things going
8 on with it?

9 Q Yeah. There's two limits, not just one.

10 A There are, that's right. There is an eight-hour
11 time-weighted average limit and also a short-term
12 limit.

13 Q Right. So yesterday you talked about the
14 eight-hour time-weighted average limit, and in 1972
15 that was five fibers per cc, right?

16 A That's correct.

17 Q But there's also something, as you said, called a
18 short-term -- I don't think it's called that, but for
19 our purposes it's okay. It's an excursion limit,
20 which, forget about this. At no time during the day
21 should a worker be exposed to anything above ten fibers
22 per cc as a short-term exposure, right?

23 A I would need to go back and check the exact
24 language in the 1972 standard. Do you have a copy?

25 Q I do. Let's do that.

ROA_01977

Appendix_02012

1 A Okay. Thanks.

2 Q There's actually one in evidence that the
3 defendants put in some time ago. Let me see if I can
4 find that copy so we don't get sideways on our exhibits
5 even more.

6 Here is what the defendants put in, Crosby
7 Exhibit 152, but I think --

8 A Thank you very much.

9 Q Let me give you what apparently --

10 A This one doesn't have the short-term limits.

11 Q I'm sorry?

12 A This doesn't have the short-term limits in it.

13 Q Can you put this up, Crosby 152. Let me hand you
14 a binder for the moment.

15 A Oh, thank you.

16 Q So this is what the jury was told Crosby 152 is,
17 the 1972 OSHA standard. It's not, right?

18 A It's not what? I'm sorry.

19 Q It's not the 1972 OSHA standard.

20 A I can't tell from here. I'm sorry, I can't read
21 it.

22 Q Right. It's just a little PowerPoint graphic that
23 covers up a large part of the standard including the
24 part we now want to have, but -- right?

25 A I don't know. You're saying that -- I think that

ROA_01978

Appendix_02013

1 is the 1972 standard underneath that callout box that
2 somebody created.

3 Q Okay. But this is what it actually looks like,
4 right?

5 A To the extent that it's this same document, then
6 yes.

7 Q Okay, ma'am. So the 1972 standard for exposure to
8 asbestos dust is -- was published, among other places,
9 in something called the Federal Register, correct?

10 A Yes, that's right.

11 Q And the Federal Register is a daily publication of
12 the United States government that reports on a daily
13 basis what the various agencies of the government are
14 doing, right?

15 A I believe so. I don't know the frequency with
16 which it's published, but I think that's right.

17 Q The idea is if you read the Federal Register every
18 day, you don't have to call up the Department of Labor
19 and say, "Did you do anything today?" You know, you
20 will know from reading the Federal Register because
21 they have to publish that, you know what, there was an
22 emergency standard, as it says here, for asbestos
23 December 7, 1971, and we are amending it now. So this
24 comes from the June 1972 Federal Register. Can we
25 agree on that?

ROA_01979

Appendix_02014

1 A Yes, that's right.

2 Q Not that it matters, but maybe it does. And this
3 comes, as far as you know, from the government printing
4 office?

5 A I don't know. I would certainly accept that if
6 you say that that's what it is.

7 Q It's publicly available?

8 A Sure, absolutely.

9 Q It's not secret?

10 A Correct.

11 Q Any person or any company can look at it and find
12 it and see exactly what it says, right?

13 A Absolutely.

14 Q And so here they give a little history about what
15 happened. On December 7, 1971, an emergency temporary
16 standard concerning exposure to asbestos was published
17 in the Federal Register under the Williams-Steiger
18 Occupational Safety and Health Act of 1970, and a
19 notice of proposed rule-making regarding a permanent
20 standard for exposure to asbestos fibers was published
21 in the Federal Register January 12, 1972. That's your
22 understanding, right?

23 A That's right. That's what I talked about
24 yesterday, correct.

25 Q This part, the Williams-Steiger Occupational

ROA_01980

Appendix_02015

1 Safety and Health Act of 1970, this is a reference to a
2 federal law which got passed in 1970 correct?

3 A Correct, December of 1970.

4 Q And that is the law that birthed, if you will,
5 OSHA?

6 A That's right.

7 Q The Clean Air Act, clean air, clean water?

8 A No. Those came from EPA.

9 Q Before 1970 and the Williams-Steiger Occupational
10 Safety and Health Act, OSHA didn't exist?

11 A That's correct.

12 Q And the new thing, if you will, about OSHA is for
13 the first time, there was a federal agency in the
14 United States looking at the safety and health of
15 people at work that had enforcement power and
16 quasi-police power, if you will, right?

17 A Absolutely. It was a big deal and a big
18 advancement for health and safety.

19 Q Because before this, there were state regulations,
20 right?

21 A In some states, that's right.

22 Q Different parts of the federal government had put
23 out regulations about asbestos like the Public Health
24 Service, correct?

25 A Different parts of the government had. For

ROA_01981

Appendix_02016

1 example, the Walsh-Healey Act is one, correct.

2 Q We'll talk about that in a minute. You said
3 yesterday that in early 1970s was when there was the
4 first comprehensive federal standard?

5 A Yes, that's right.

6 Q And that's what you meant, that there was
7 something that covered the whole nation, every
8 employee, every workplace?

9 A It does cover many employees in many workplaces
10 but not all of them. It is a very widely covered
11 standard.

12 Q Prior to 1970, there were standards in states and
13 parts of the government but nothing that covered it
14 all?

15 A Nothing that encompassed the breadth of OSHA at
16 the time and what it did.

17 Q And before 1970, under those other things, if an
18 inspector showed up at a factory and said, "Hey, I want
19 to do an inspection for asbestos," the property owner
20 could just say no?

21 A I guess it would depend on where they came from.

22 Q "I'm from the Department of Industrial Relations
23 with the State of Pennsylvania. I'd like to evaluate
24 your factory." The owner could just say no?

25 A I don't know.

ROA_01982

Appendix_02017

1 Q Right. The big thing about OSHA was, for the
2 first time, these folks had a right to enter a
3 workplace and do an inspection without notice, et
4 cetera, right?

5 A Under OSHA, certainly.

6 Q One of the problems here, especially as it relates
7 to asbestos, is, being birthed as a brand-new federal
8 agency, it didn't have an existing staff and employees,
9 right?

10 A Correct.

11 Q It didn't have offices, right?

12 A I don't know.

13 Q People hadn't been trained?

14 A That's probably true.

15 Q So the situation was you have this rule and you
16 have enforcement power, but it's like you have speeding
17 laws on the books, but you don't have anybody to
18 enforce whether or not people are speeding, right?

19 A I don't know exactly, you know, how many folks
20 they initially hired and what their backgrounds were,
21 but I would imagine it would take some time to get up
22 to speed.

23 Q But they, from the start, regulate asbestos based
24 on the existing information that is publicly available
25 in the medical and scientific literature, correct?

1 A In 1971, OSHA incorporated by reference a large
2 number of the existing consensus standards, for
3 example, from ACGIH, for many different chemicals, and
4 asbestos was one of them.

5 Q No, no. But they didn't just jump out there and
6 regulate on day one without any medical, science,
7 medical findings and science that said asbestos is
8 harmful, right?

9 A I guess I'm not sure what you're asking because
10 they incorporated many of the existing standards from
11 the consensus agencies.

12 Q We're at the 1972 standard, and they regulate,
13 they come and say every employer in the nation, mostly,
14 has to do a bunch of things to protect workers from
15 asbestos. Are you following me?

16 A Sure. In this particular standard, in '72, that's
17 right.

18 Q And that's costly?

19 A Absolutely.

20 Q To employers?

21 A I would think it would be a cost for everybody,
22 definitely, but well worth it.

23 Q One of the big deals from industry was, Whoa,
24 whoa, whoa, whoa, whoa. This is going to cost a lot of
25 money to comply with this OSHA standard if we have to

ROA_01984

1 put in ventilation, provide air monitoring, give people
2 lockers if they don't have that, engage in wet-down,
3 isolate procedures, medical exams, all kinds of stuff
4 that is costly to business, right?

5 A I'm sure there was a back-and-forth discussion
6 about that.

7 Q Right. It's reflected in here, isn't it?

8 A I believe so.

9 Q Yes. And my question earlier was, this regulation
10 justifying those rules and the cost associated with it
11 was because there had been since 1900 medical and
12 scientific literature about two things: One, exposure
13 to asbestos-containing dust can cause worker disease
14 and death, right?

15 A Certainly. As I talked about yesterday, there
16 were those studies that had been done at very high
17 exposures in mining, milling, and original raw asbestos
18 manufacturing.

19 Q They weren't in that context. They were in
20 industrial processes, right?

21 A I'm aware of two studies of end users that
22 specifically measured exposure prior to the late 1960s.

23 Q Okay. We're going to go over that in a second.
24 But the second thing that the medical and scientific
25 community had been studying for decades that allowed

ROA_01985

Appendix_02020

1 regulation to occur on the first day was prevention,
2 your field, right?

3 A Absolutely.

4 Q So the things that are mentioned here in this OSHA
5 standard -- respirators, wetting down, air sampling,
6 isolation, had been documented about how to protect
7 people all the way back to the 1900s, right?

8 A There certainly are examples of those and
9 rudimentary, you know, ventilation systems and
10 respirators that were developed starting early on,
11 absolutely.

12 Q Let's look at the information that they
13 specifically tell us about what they're doing and why.
14 You mention -- let me take the second -- they go
15 through, because they're a new federal agency and
16 they're trying to make a bunch of people with competing
17 interests happy, an explanation of how they went about
18 doing what they are doing, which is putting out a
19 standard, and what they considered and all that kind of
20 stuff, right?

21 A That's right.

22 Q So they say -- I'll just jump right in here. This
23 is about what the limit should be. Should it be five;
24 should it be ten? What should the limit be? And they
25 say NIOSH -- now, that's the arm of OSHA where the

ROA_01986

Appendix_02021

1 scientists, the medical doctors, the epidemiologists,
2 toxicologists, you name it, that's where they work,
3 right?

4 A That's right. Under the OSHA act, NIOSH was
5 designed to work closely with OSHA to be sort of a
6 research arm of health and safety research.

7 Q Right. They do laboratory; they collect data;
8 they even publish studies, right?

9 A Absolutely.

10 Q NIOSH, in effect, has recommended the five fiber
11 TWA and ten fiber peak concentrations be permitted only
12 for two years -- let me stop there -- because the
13 controversy was NIOSH wanted to jump right in and have
14 it only be two fibers per cc based on the medical and
15 the science, but industry said, whoa, whoa. We need
16 some time to put in ventilation, get a plan, hire some
17 people, whatever it takes to comply, right?

18 A Sure. That's my general understanding of the
19 discussions.

20 Q Thereafter, TWA -- well, it wasn't really
21 discussions. They had public hearings, didn't they?

22 A I believe they did. I don't know the extent and
23 nature of those.

24 Q Well, part of the expertise that I understand you
25 offered yesterday was historical knowledge about the

ROA_01987

Appendix_02022

1 development of knowledge in the field of asbestos,
2 right? That's some part of what you claim now to be
3 your expertise, right?

4 A Certainly.

5 Q Okay. So what's published in the publicly
6 available Federal Register certainly would have been
7 some information that you have reviewed, right?

8 A That's right.

9 Q And so public hearings held by federal agencies
10 are among the things that get reported in the Federal
11 Register. Yesterday we held a big public hearing and a
12 gazillion people came and we only heard ten speakers.
13 Kind of like going to a school board meeting, right?

14 A Yeah, I think so. I don't know.

15 Q Thereafter, the TWA concentration should not be
16 more than two fibers per centimeter of air, and peak
17 concentrations should not exceed ten fibers per
18 centimeter. That's what you referred to as the
19 excursion limit, right?

20 A Correct. And in looking at this standard, it
21 actually was technically called, in this standard --
22 this is what I wanted to check -- the ceiling value.

23 Q It's ten?

24 A That's right.

25 Q And they make a reference to some people want the

ROA_01988

Appendix_02023

1 limit to be higher, right? Some, for example, have
2 recommended a return to the 12 fiber standard of an
3 earlier day, a level adopted under Walsh-Healey
4 contracts in 1969, right?

5 A That's right. That's what it says.

6 Q Others have recommended a two fiber standard to
7 become effective in six months, then a one fiber
8 standard for two years, and finally, a zero fiber
9 standard after three years, right?

10 A That's what it says, that's right.

11 Q And what they relay to the public that they're
12 considering is that no one has disputed that exposure
13 to asbestos of high enough intensity and long enough
14 duration is causally related to asbestosis and cancers.
15 The dispute is as to the determination of a specific
16 level below which exposure is safe. Various studies
17 attempting to establish quantitative relations between
18 specific levels of exposure to asbestos fibers and the
19 appearance of adverse biological manifestations such as
20 asbestosis, lung cancer, and mesothelioma have given
21 rise to controversy as to the validity of measuring
22 techniques. Do you see that?

23 A Yes, I do.

24 Q First of all, this column here, not that it's
25 probably a big deal, that's the column that was

ROA_01989

Appendix_02024

1 actually covered up in Crosby Exhibit 152, the one that
2 mentions mesothelioma, right?

3 A It looks like it, yeah.

4 Q And OSHA's weighing all this, but -- and I'm going
5 to skip and then we'll be done -- they say, however --
6 they write, they publish for everybody to see, "In view
7 of the undisputed grave consequences from exposure to
8 asbestos fibers, it is essential that the exposure be
9 regulated now on the basis of the best available
10 evidence now, even though it may not be as good as
11 scientifically desirable. Did I read that correctly?

12 A Absolutely.

13 Q Because another position was don't regulate now.
14 Let's keep studying it. We need to get more studies to
15 find out exactly how, when, and how many people are
16 going to be hurt by asbestos, and until we do, let's
17 not regulate. That was one position of industry,
18 correct?

19 A That may certainly have been a position of some
20 people.

21 Q And OSHA weighed all that and said this: An
22 asbestos standard can be reevaluated in light of
23 results of ongoing studies and future studies but
24 cannot wait for them. Lives of employees are at stake?

25 A Absolutely, and I completely agree with OSHA on

1 this point.

2 Q And so in 1972, a company or two reading the
3 Federal Register would understand that asbestos hurts
4 people and causes cancer, correct?

5 A They would certainly understand that from reading
6 the standard.

7 Q Failing to protect people is a matter of life and
8 death, right?

9 A Correct, that exposures must be kept below the
10 established limits.

11 Q Because -- well, there's another part where they
12 recognize we know we're not protecting against
13 mesothelioma?

14 A I don't think they said it in those terms. I
15 think they said they didn't know at that time if they
16 were or not and that additional research was necessary,
17 and I absolutely agree with that.

18 MS. FARRISE: Your Honor, just because of the
19 problem with Crosby 152, or the concern, I'm going to
20 offer a full copy of OSHA 1972 into evidence.

21 THE COURT: All right.

22 Any objection?

23 MR. BOUCH: There's no problem with Crosby 152,
24 but I have no objection to it.

25 THE COURT: All right. No objection. It's in.

ROA_01991

Appendix_02026

1 Admitted.

2 (WHEREUPON, Plaintiff's Exhibit Number 155 was
3 admitted into evidence.)

4 BY MS. FARRISE:

5 Q There was a provision in 1972 to put labels on
6 products, correct?

7 A There is a labeling provision in the 1972
8 standard, that's right.

9 Q For products, right?

10 A It's for materials that are used in the workplace.

11 Q Well, let's see what it says. Because OSHA,
12 before we get to that, you talked about EPA and we have
13 thrown that around, but these agencies have different
14 jurisdictions or lines, if you will, right?

15 A That's right.

16 Q Kind of like elementary school is elementary
17 school, and it's not high school, right?

18 A Correct.

19 Q So OSHA's jurisdiction is people at work, right?

20 A That's right.

21 Q And EPA is people anywhere -- at home, at school,
22 at the beach, anywhere?

23 A Correct.

24 Q And both of these federal agencies get involved in
25 regulating asbestos in the early 1970s after their

ROA_01992

Appendix_02027

1 birth, right?

2 A They have both been involved in regulating
3 asbestos, that's right.

4 Q But OSHA also has jurisdiction over people or
5 companies that are employers. They can say, "We can
6 tell employers what to do," right?

7 A Correct. They have jurisdiction over employers.

8 Q And, by the way, can we agree that this
9 jurisdiction and the rules having to do with employees
10 includes whether you have your employees at your
11 factory or in the field at your customer's location?

12 A That's right. If they're your employees, they are
13 your responsibility.

14 Q Right. So if I ask you to assume that Fisher or
15 Crosby, we'll start with, sent its employees down to
16 Duke, service engineers, to supervise, oversee the
17 installation of Crosby valves, then Crosby is
18 responsible for its employees, even though the employee
19 is at the Duke site, right?

20 A If they sent those employees out in the field and
21 they were working in an environment where there was
22 potential for asbestos exposure, then that would be
23 true.

24 Q Right. So these rules that the jury is going to
25 have, these rules under OSHA apply to Crosby and Fisher

ROA_01993

Appendix_02028

1 at their manufacturing plants, right?

2 A That's right. They apply to the employees of an
3 employer.

4 Q Right. And they apply to Fisher and Crosby to
5 provide a safe workplace for their employees who are
6 working in the field away from the factory?

7 A Correct. Just as they would apply to Duke with
8 respect to Mr. Jolly.

9 Q I understand, but there is a fundamental
10 difference between Duke and Crosby and Fisher, don't
11 you think?

12 A What kind of fundamental difference do you mean?

13 Q Duke is a customer of Crosby and Fisher.

14 A Duke requested and specified equipment such as
15 valves from those companies, requested it with very --
16 my understanding is very specific limits and
17 requirements, and those were made to order, it's my
18 understanding, particularly with respect to Fisher, and
19 then were shipped to the Duke sites.

20 Q I'm guessing you got that understanding from the
21 folks who represent Fisher and Crosby?

22 A I can't recall exactly where, but it's most likely
23 that was part of it, and it may have been in the
24 documents. I can't recall.

25 Q Yeah, I know. You have not seen a single

ROA_01994

1 document, even though you're the third person who said
2 that to the jury, not one single document that Duke
3 wrote to these folks and said to these folks, "We
4 demand to have asbestos in our valve." You have not
5 seen a document like that, have you?

6 A What I did do is visit the Fisher manufacturing
7 facility in Iowa and understood the process that they
8 use in working with their clients to develop and build
9 very specialized valves.

10 THE COURT: Ms. Sahmel, she asked you whether you
11 had seen any documents. You were answering about
12 visiting a factory, but go ahead and answer that first
13 question first.

14 THE WITNESS: My apologies. To the extent that I
15 have an understanding of that, I don't recall if it
16 came from a document or not, but I think it was more
17 likely from that visit that I made.

18 BY MS. FARRISE:

19 Q As you sit here today, you cannot identify for
20 this jury a single document from Duke to Fisher or to
21 Crosby created at the time that Mr. Jolly was at the
22 Duke site where Duke said in writing in any fashion to
23 these companies we demand or we want or please sell us
24 asbestos, right?

25 A I haven't seen anything to that effect that I can

ROA_01995

Appendix_02030

1 recall.

2 Q And the visit that you had, I'm guessing, must
3 have been in the last couple years?

4 A It was last -- either early this year or late last
5 year, that's right.

6 Q Because in 1980 when Mr. Jolly worked at the Duke
7 plant, you were ten years old, right?

8 A Yes, I was.

9 Q So I'm guessing when you were ten years old and
10 all the way through when you graduated high school, you
11 didn't visit the Fisher plant; you didn't visit the
12 Crosby plant; you weren't an industrial hygienist, and
13 you couldn't provide any services?

14 MR. BOUCH: I realize cross-examination is broad,
15 but I think we're reaching the end -- the nether
16 reaches of relevancy here.

17 MS. FARRISE: I'll move on.

18 THE COURT: Well, you have already asked that
19 question. I think the answer is pretty self-evident,
20 but let her answer it and then move on. Don't compound
21 the question.

22 MS. FARRISE: I'll withdraw it and move on, spare
23 us all.

24 Q Let's get on to what the OSHA standard in 1972
25 said about product labeling.

1 A Okay. Sure.

2 THE COURT: I didn't hear what you were asking.
3 What it said about what, Ms. Farrise?

4 MS. FARRISE: Product labels, Your Honor. Labels
5 on products.

6 Q There's two types of things going on. They're
7 saying at the facility, as an employer, if you know
8 asbestos is there, then you need to put up a sign on
9 the wall, right?

10 A That's correct, that there's specific locations
11 that need to be marked with hazard.

12 Q Right. I'm just pointing out that there is a
13 difference between caution signs and labels, and then
14 they discuss each one, correct?

15 A They do talk about caution signs and labels,
16 that's right.

17 Q And caution signs is the thing on the wall; we
18 already agreed on that, right? Labeling --

19 THE COURT: Let her answer.

20 MS. FARRISE: I thought she said "yes."

21 THE WITNESS: Yes. It says, "Caution signs shall
22 be provided and displayed at each location where
23 airborne concentrations of asbestos fibers may be in
24 excess of the exposure limits prescribed," in Paragraph
25 D.

ROA_01997

1 BY MS. FARRISE:

2 Q So, "Caution labels shall be affixed to all raw
3 materials, mixtures, scrap, waste, debris and other
4 products containing asbestos fibers or to their
5 containers where asbestos fibers have been modified" --
6 oh, no. Sorry --

7 MR. BOUCH: Your Honor, I think it's selective
8 reading here.

9 THE COURT: We're going to get it right. "Except
10 that no label is required where asbestos fibers have
11 been modified by a bonding agent, coating, binder, or
12 other material so that during any reasonably
13 foreseeable use, handling, storage, disposal,
14 processing, or transportation no airborne
15 concentrations of asbestos fibers in excess of the
16 exposure limits will be released."

17 THE WITNESS: Correct.

18 BY MS. FARRISE:

19 Q And I think we agree that asbestos is microscopic?

20 A It's not visible to the naked eye.

21 Q Right. And so the only way to determine whether
22 or not the asbestos fibers have been modified by a
23 bonding agent, coating, binder, or other material so
24 that during any reasonably foreseeable use, et cetera,
25 the levels of asbestos in the air won't exceed the

ROA_01998

Appendix_02033

1 standard would be to do a test?

2 A That's absolutely correct.

3 Q And without testing products, right? Are you
4 following me?

5 A Without testing products, without the employer
6 testing the use of the products, that's right.

7 Q Without actual product testing? Are you following
8 me?

9 A Testing of those products in the environment in
10 which they're used, that's right.

11 Q I gotcha. Without actual testing, no one can say
12 products didn't require a label because the asbestos
13 was modified and a bonding agent coating, et cetera,
14 such that microscopic, dangerous asbestos fibers would
15 not be released from that product during the
16 foreseeable use, disposal, manipulation, removal, et
17 cetera, right?

18 A The employer is responsible for ensuring that
19 those exposures are below the established exposure
20 limit in the standard.

21 Q And the employer -- because I think what you're
22 saying is Duke should have, the customer, should have
23 tested the asbestos products that Fisher and Crosby
24 sold to it without a label to find out that the
25 product, which they purchased, was dangerous unlabeled.

ROA_01999

Appendix_02034

1 That's really what you're saying, right?

2 A Ultimately, Duke had the responsibility for its
3 employees in that regard.

4 Q Well, if in fact, first of all, Crosby's employees
5 were the ones at the Duke site supervising the
6 installation of valves on the original construction,
7 Crosby should have been there labeling and air
8 monitoring and testing the asbestos products that it
9 sold to Duke as well, right?

10 A I don't know if they were there or not. To the
11 extent that they were there, they should work with the
12 employer, the controlling employer of the site, to
13 manage that evaluation.

14 Q No, no. I think you said OSHA applies to
15 employees, including employees in the field, and that
16 the people who employ them have that responsibility. I
17 thought we cleared that up.

18 A In that work environment, it's critical that that
19 testing and understanding is done, and so Duke is the
20 controlling employer in that environment.

21 Q And it's your testimony to this jury that Duke, as
22 the customer that receives asbestos-containing gaskets
23 with no label about how much asbestos is in there,
24 under what circumstances it can be released, should
25 have tested their product and put a label on it for its

ROA_02000

Appendix_02035

1 employees; is that your testimony?

2 A Well, for example, in here there's many different
3 sites --

4 Q My question is; is that your testimony, ma'am?

5 A The testimony, that's right, is that the employer
6 is responsible for its sites and its employees and the
7 nature of the use of those products at those sites.

8 Q But I think you said yesterday, ma'am, that nobody
9 thought that these products could release asbestos
10 fibers, and, in fact, there was even publication about
11 that, right?

12 A That's right.

13 Q So let me see if I can lay my hands on it quickly.
14 I think I have it here. Let me think about this.

15 There were three studies. I don't have the
16 studies; I just have the slide. So I am displaying,
17 for the record, Slide Number 79.

18 A Okay.

19 Q Which were shown to the jury yesterday. Do you
20 recall that?

21 A Absolutely.

22 Q And what you said is that IARC, the International
23 Agency for Research on Cancer, which, by the way, never
24 made or sold an asbestos-containing gasket or packing
25 or valve or anything for profit, right?

ROA_02001

Appendix_02036

1 A I don't believe so.

2 Q It's just another one of those international
3 government agencies or public agencies seeking to try
4 and understand hazards so that people can be protected,
5 right?

6 A I don't think it's a government agency, that's
7 right.

8 Q But it's not a product maker?

9 A No.

10 Q You said that in 1973, IARC published for all the
11 world to see that there's no conceivable health risk in
12 the use of asbestos-based gaskets?

13 A Absolutely, they did.

14 Q So Duke, as an employer that did not sell these
15 products, undertaking its obligation, going to the
16 library, looking to see if there's any problem with the
17 gaskets, would find this paper that says there's no
18 health risk with this gasket?

19 A That's right. And that's consistent with what
20 exactly what OSHA is saying here, that no label is
21 required because of the binding agent.

22 Q Actually, they're saying a binding agent and
23 you've got to test the product. These folks are simply
24 saying, for whatever reason, there's no conceivable
25 health risk, right?

ROA_02002

Appendix_02037

1 A My reading and review of the literature is it was
2 well understood at that time that exposures would be
3 expected to be below the established current
4 occupational exposure limits at the time, and, indeed,
5 they were and still are today.

6 Q So if a company that was selling these 90-,
7 85-percent asbestos products actually tested it, they
8 would have been able to discover -- maybe this is where
9 we disagree -- that this statement that everyone was
10 just assuming was wrong, right?

11 A There's absolutely no evidence that that statement
12 was wrong.

13 Q Well, I think you've gone too far. Dr. Longo
14 published a comprehensive study that said that people
15 who are exposed to asbestos from the removal of these
16 products are exposed to asbestos at levels of 180
17 fibers per cc. He did publish that, right?

18 A He did, and as I talked about yesterday, I have a
19 number of serious technical concerns about that study.

20 Q I understand. It's evidence of exposure at these
21 extraordinarily high levels. That's what he published,
22 right?

23 A Not if the study is done incorrectly and the
24 methods are not standard.

25 Q You didn't notice on his study that it was funded

ROA_02003

1 by John Crane, did you?

2 A No. In fact, he provided no funding at all in his
3 study.

4 Q He didn't work for ChemRisk, did he?

5 A He did not.

6 Q He has a 20,000-square-foot laboratory, correct?

7 A I don't know.

8 Q He has every type of scientific discipline that
9 works at his company, Materials Analytical Sciences,
10 correct?

11 A I don't know.

12 Q He is actually hired by NASA as a materials
13 scientist to try and figure out what materials should
14 go on the Space Shuttle, correct?

15 A I don't know.

16 Q All right. You just have these criticisms of his
17 lab that you have never been to, right?

18 A I think it's extremely important if he modifies
19 standard methods and did things in his testing that we
20 know to be things that will increase the exposures and
21 are not standard and accepted.

22 Q Next, 80. The next slide you put up was 80, which
23 was an excerpt, I guess, an affidavit of a
24 Dr. Nicholson in 1983?

25 A That's right.

ROA_02004

Appendix_02039

1 Q I'm guessing the affidavit wasn't published in the
2 scientific literature?

3 A Not in this case, I don't believe so.

4 Q It came from litigation?

5 A I think it did.

6 Q It just happened to make its way to you as part of
7 your presentation?

8 A Correct.

9 Q Dr. Nicholson is dead?

10 A I'm sorry?

11 Q Dr. Nicholson is dead?

12 A I don't know.

13 Q Anyway, I think that the point was in 1983, this
14 Dr. Nicholson, in an affidavit that was submitted in a
15 lawsuit, made a statement that, "It is clear that
16 exposures from installation or removal of gaskets would
17 not lead to any discernible disablement for those
18 working directly with gaskets and for by standers."
19 Did I read that correctly?

20 A Yes.

21 Q So a company like Duke, if it somehow happened
22 upon this lawsuit information, would think there's no
23 hazard from gaskets. There's nothing for us to do.
24 We're doing all this stuff with respect to installation
25 and abatement and everything else; we don't need to

ROA_02005

Appendix_02040

1 worry about gaskets?

2 A That's right.

3 Q Right.

4 MR. BOUCH: Your Honor, I know our breaks have
5 been funny today, but can we take a short break if this
6 is convenient to counsel? I have to go to the
7 restroom.

8 MS. FARRISE: It is.

9 THE COURT: I think that's a good suggestion.
10 Ladies and gentlemen of the jury, let's take a
11 break until ten after 12:00.

12 (WHEREUPON, the jury exited open court at
13 11:54 a.m.)

14 THE COURT: You can take a break, too.

15 THE WITNESS: Thank you, Your Honor.

16 THE COURT: I want some definition as to where we
17 stand now.

18 This thing of spending this amount of time on this
19 regulation and repeating things and going about it when
20 direct questions can elicit what needs to be elicited
21 about this is very time consuming, and I am not going
22 to just let this be open-ended. I can tell you that.

23 Now, what else have we got to do here, and how
24 much longer do you anticipate your cross-examination is
25 going to be?

ROA_02006

Appendix_02041

1 MS. FARRISE: So, Your Honor, the two things that
2 we need to cover, number one, are exposure studies
3 briefly. Certainly, I want to talk with her about
4 Dr. Longo's study, and then the state of development of
5 knowledge, given that she has disputed that these
6 concepts of harm and how to protect people were not
7 well known and documented in the literature by 1900,
8 and then I'm done.

9 THE COURT: All right. Well, I don't want these
10 other documents to take this kind of length of time.

11 MS. FARRISE: I don't think they will.

12 THE COURT: We've got a real battle of the experts
13 going from a bunch of people who say that gaskets don't
14 cause any problem and people who say when you grind
15 them up and put the dust in the air, it does cause a
16 problem. And there's some real disconnect between
17 who's relying on what kind of exposure to make those
18 kind of determinations.

19 I think we can focus the jury on that issue
20 without the immense amount of tedious buildup it's
21 taking to get there. That's all I'm saying. I'm not
22 trying to try your case for you, but this is not what I
23 anticipate we need to be doing with this jury.

24 MS. FARRISE: So, those are the two areas I have
25 to cover --

ROA_02007

Appendix_02042

1 THE COURT: The points can be made without
2 stringing it out in this kind of fashion, is what I'm
3 saying.

4 MS. FARRISE: Thank you, Your Honor.

5 THE COURT: We'll be at ease until ten after.

6 (WHEREUPON, a recess was taken from 11:57 a.m. to
7 12:11 p.m.)

8 THE COURT: Bring me the jury.

9 (WHEREUPON, the jury entered open court at
10 12:14 p.m.)

11 THE COURT: Ladies and gentlemen of the jury,
12 please be seated. We'll continue with the
13 cross-examination of Ms. Sahmel.

14 BY MS. FARRISE:

15 Q Ms. Sahmel, do you still have your copy of the
16 1972 OSHA regulation?

17 A Yes, I do.

18 Q And while we're waiting for it to come up, after
19 1972, there were modifications and other amendments as
20 there was more study, correct?

21 A To the OSHA standard for asbestos?

22 Q Yes.

23 A Yes, absolutely.

24 Q And there were the two parts. There was the
25 eight-hour time-weighted average, and then there was

ROA_02008

Appendix_02043

1 also the peak levels. And can you tell the jury what
2 the peak levels changed to over time? We have five in
3 1972 for the time-weighted average and ten fibers at
4 the peak. How about in 1976?

5 A I don't recall what those were. I'd be happy to
6 look at it and tell you.

7 Q Well, do you disagree with me, by 1976, as we just
8 read, it got reduced to two fibers per cc on the
9 eight-hour time-weighted average?

10 A That's correct.

11 Q And there was a reduction, which I actually don't
12 have in mind, as well in the peak level. I think it
13 was down to five, correct?

14 A I don't recall what it was. I know at one point
15 they eliminated the short-term exposure limit and
16 brought it back.

17 Q Right. In 1994, they eliminated it and had one
18 standard, which was .2 or .1, right?

19 A I think it was a little bit before that.

20 Q '86?

21 A I think it might have been '86.

22 Q We won't bog the court down with all the
23 regulations, but the point is there was a continual
24 reduction of both the time-weighted average as well as
25 the peak excursion levels?

ROA_02009

Appendix_02044

1 A Absolutely.

2 MS. FARRISE: Your Honor, we're going to offer in
3 evidence the 1994 OSHA standard, and I think it got
4 marked, maybe. It's a big document. I just was
5 handling it.

6 Let me withdraw that and deal with this right now.

7 Q We were talking about labeling. And the labeling
8 changed as well, as you went through the different
9 regulations, right?

10 A Later on, in 1986, that's right. The language of
11 the labeling exemption, although the exemption remained
12 for bonded materials and encapsulated materials, the
13 language did change.

14 Q But in 1972 OSHA didn't just say label -- and this
15 is important -- OSHA said here is what the label
16 minimally should say, "Caution, contains asbestos
17 fibers. Avoid creating dust. Breathing asbestos dust
18 may cause serious bodily harm." That was the label
19 that was to go on the products whose foreseeable use
20 would liberate asbestos, right?

21 A That's right.

22 Q And let me show you what has been marked as Crosby
23 130 -- it's in evidence -- which is represented to be a
24 depiction of a box of Kaylo insulation made by Owens
25 Corning Fiberglass. And you are familiar, I'm

ROA_02010

Appendix_02045

1 guessing, with that?

2 A I know a little bit about Kaylo, that's right.

3 Q So you know during the time periods prior to when
4 it went asbestos-free, the product maker, in this case
5 Owens Corning Fiberglass, put what was essentially the
6 OSHA language label on the product that it made and
7 sold, correct?

8 A That's what it looks to be, that's right.

9 Q And their Kaylo insulation at one point was a
10 15-percent asbestos-containing product, correct?

11 A I don't recall the precise percentage. I know
12 that it contained both amosite and perhaps also
13 chrysotile.

14 Q But it wasn't a 90-percent asbestos product like
15 these gaskets; it was 15-percent or along that level,
16 right?

17 A It would have been lower, that's right. I don't
18 know the exact percentage. Although, then again, I
19 don't know the percentage of individual gaskets to the
20 extent that they even had asbestos. I think it would
21 depend on the individual gasket and product.

22 Q Really?

23 A Absolutely.

24 Q You haven't seen the Fisher material
25 specifications that say that the material or the fabric

ROA_02011

Appendix_02046

1 that Fisher is going to use in its gasket had 80- to
2 85-percent asbestos in its gaskets?

3 A According to my review of the Fisher corporate rep
4 information, there were some gaskets that contained
5 asbestos and some that did not, to the extent that
6 gaskets were even needed in particular products.

7 Q We heard from Mr. Dumistra. My question, ma'am,
8 is have you seen the actual documents, the Fisher
9 material specifications, that reflect that the fabric
10 that the sheet gasket was cut from was an 80- to
11 85-percent asbestos product?

12 A I'm not sure which document you're talking about.
13 Could you show it to me?

14 Q After we're done talking about what I want to talk
15 about.

16 A Sure.

17 Q Now, Kaylo went asbestos-free by 1972, correct?

18 A I believe that's approximately the right date. I
19 don't recall the exact date.

20 Q Well, do you want me to show you the Federal
21 Register with the information from the asbestos, the
22 disclosure of Owens Corning? Would you like to see
23 that?

24 A No, I don't need to. I agree that they did; I
25 just don't recall the exact date.

ROA_02012

Appendix_02047

1 Q So we don't have any dispute that these kinds of
2 products, Kaylo and other companies that made similar
3 insulation that went on pipe, went to an asbestos-free
4 formulation and sold that asbestos-free formulation of
5 the insulation at or about 1972?

6 A It was in that time frame in that, I think '72 to
7 '76 time frame.

8 Q So for new construction at Duke in the '80s -- let
9 me back up.

10 We have been talking about insulation. When we
11 refer to this insulation, it's -- here's a pipe in two
12 half-sections, two half-moons, and it can be attached
13 to the pipe, and a wire is used to hold it on, correct?

14 A For Kaylo, it was, I believe, manufactured in
15 half-rounds.

16 Q And the insulation, depending on the application,
17 may be covered with an aluminum or stainless steel
18 jacket around the pipe?

19 A It certainly could be, that's right.

20 Q And that is one way of enclosing the insulation on
21 the pipe such that the pipe is insulated, and there's
22 no concern that it's going to be releasing asbestos
23 fibers during the normal operation of the pipe?

24 A Absolutely, until a flange needs to be accessed
25 and then you need to cut into that.

ROA_02013

Appendix_02048

1 Q We've been talking about that.

2 Ma'am, I want to go back to the release, the
3 studies. Let me hand what you we marked as Plaintiff's
4 Exhibit 546.

5 MS. FARRISE: Your Honor, do you have this from
6 yesterday?

7 THE COURT: I do.

8 MR. BOUCH: Can I have a copy?

9 MS. FARRISE: I gave you a copy yesterday.

10 THE COURT: This is 546. It's one of the articles
11 that was listed on Dr. -- I mean on Ms. Sahmel's study,
12 and it's being handed to her now.

13 And, Ms. Farrise, I assume you're going to get her
14 to identify it?

15 MS. FARRISE: Yes. I think -- do you have a copy?

16 THE COURT: Get her to identify it first, and he
17 can say whatever he wants to say about its
18 admissibility.

19 MR. BOUCH: Sure.

20 BY MS. FARRISE:

21 Q Ms. Sahmel, we indicated and counsel indicated
22 that you prepared a written report in this case?

23 A That's correct.

24 Q And as part of that report, starting on Page 62,
25 you had a list of things that you reviewed as part of

ROA_02014

Appendix_02049

1 the reference that you did in the case, correct?

2 A That's right. Those are my references.

3 Q And one of the references that you list is the
4 study which I've now handed to you authored by
5 Dr. William Longo, a Mr. Egland, Richard Hatfield, and
6 Larry Newton from 2002 entitled *Fiber Release During*
7 *the Removal of Asbestos-containing Gaskets: A Work*
8 *Practice Simulation*, published in the peer-reviewed
9 journal *Applied Occupational and Environmental Hygiene*,
10 correct?

11 A That's right.

12 Q And you have read, reviewed, and considered this
13 in formulating your opinions as we've already
14 discussed, correct?

15 A Yes. I did review this in the course of forming
16 my opinions in this case.

17 THE COURT: Now you're moving its admission?

18 MS. FARRISE: Yes, Your Honor.

19 THE COURT: Mr. Bouch.

20 MS. FARRISE: I move its admission.

21 THE COURT: Mr. Bouch.

22 MR. BOUCH: Demonstrative only, I'm okay with it.

23 THE COURT: So far I think that's what she's doing
24 is for demonstrative purposes.

25 MS. FARRISE: Yes, Your Honor.

ROA_02015

Appendix_02050

1 THE COURT: It's admitted.

2 (WHEREUPON, Plaintiff's Exhibit Number 546 was
3 admitted into evidence.)

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

5 BY MS. FARRISE:

6 Q And Ms. Sahmel, this is the cover, correct?

7 A Yes, that's right.

8 Q And we had a little bit of conversation about it
9 yesterday with another expert, so I'm trying to speed
10 us along.

11 First off, and quickly, you know these authors,
12 don't you?

13 A I know of them. I have never met them.

14 Q So you know that Dr. Longo is a doctor, Ph.D.,
15 material scientist, correct?

16 A I believe that's what I've heard before, so that
17 sounds correct to me.

18 Q You know that Richard Hatfield is a certified
19 industrial hygienist, correct?

20 A I don't know one way or the other.

21 Q Or was. As well as Larry Newton; he's also a
22 certified industrial hygienist?

23 A I don't know.

24 Q And they describe, quickly, what they did in
25 pretty lay terms. They say they were conducted to

ROA_02016

Appendix_02051

1 measure -- to measure the -- "work practice studies
2 were conducted involving the removal of
3 asbestos-containing sheet gaskets from steam flanges.
4 These studies were performed to determine potential
5 exposure levels to individuals who have worked with
6 these type of materials in the past and may still work
7 with these products today. The work practices were
8 conducted," and then they go through and talk about
9 their methods, correct?

10 A In the abstract here, they do have a summary of
11 their methods, which is described in more detail later
12 in the paper.

13 Q And I should have asked you. This is the
14 abstract, which is kind of the little summary of what
15 the study is about before you get to the paper,
16 correct?

17 A Articles frequently have an abstract, that's
18 right.

19 Q And these scientists mention that they were doing
20 two things. They were looking at these gaskets, which
21 are 65- to 85-percent asbestos. They measured them
22 using two microscopic techniques, phase contrast
23 microscopy, and also an electron microscopy technique,
24 transmission electron microscopy. And the jury has
25 heard about that, and you know what that is, correct?

1 A That's what they say in the abstract.

2 Q And among your background and training, you might
3 have had a course, but you're not a licensed certified
4 microscopist, correct?

5 A I'm not a licensed certified microscopist, but I
6 certainly have done laboratory analysis of samples.

7 Q And they tell the jury and tell us what they did,
8 that he hand wire brushed the flanges. Looks yellow on
9 mine. And that they found --

10 THE COURT: Ms. Farrise.

11 MS. FARRISE: Yes.

12 THE COURT: Be organized about this.

13 MS. FARRISE: I'm trying to go fast, which I don't
14 do well.

15 THE COURT: Ms. Sahmel.

16 THE WITNESS: Yeah.

17 THE COURT: This summary indicates that the
18 workplace simulations showed substantial asbestos fiber
19 release when using scraping, hand wire brushing, and
20 power wire brushing techniques during the gasket
21 removal process; is that correct?

22 THE WITNESS: Yes, Your Honor. That's what the
23 abstract of the paper says.

24 THE COURT: Right. And it then says the rate of
25 concentration that they report was 2.1 to 31.0 fibers

ROA_02018

Appendix_02053

1 per cc greater than the 5 micrometers when measured by
2 PCM, which is the phase contrast microscopy?

3 THE WITNESS: Yes, Your Honor.

4 THE COURT: That's what they report?

5 THE WITNESS: That's what they report in their
6 abstract.

7 THE COURT: Right.

8 THE WITNESS: That's right. Thank you.

9 THE COURT: All right. Ms. Farrise.

10 BY MS. FARRISE:

11 Q And among the things they also report is they want
12 to assess the hazard because not only were these
13 gaskets used in the past, but their information is that
14 the gaskets are still in place today, so the hazard
15 continues. Someone might go and try to remove a gasket
16 that's been in place for year and still be exposed,
17 correct?

18 A There certainly could be some gaskets that are
19 still in place, that's right, that would need to be
20 removed or could need to be removed.

21 Q And as the court mentioned, they took 15- to
22 30-minute -- well, they looked at the excursion limits,
23 which we just talked about. 15 to 30 minutes was the
24 outer limit of exposure, correct?

25 A Those were the levels there, durations that they

ROA_02019

Appendix_02054

1 reported in their abstract.

2 Q And they report that they also evaluated it on
3 this eight-hour time-weighted average standard,
4 correct? It says, "In these studies, the airborne
5 asbestos level measured -- the airborne asbestos fiber
6 levels measured, in many of the samples, exceeded all
7 current and historical Occupational Safety and Health
8 Administration excursion limits and some previous
9 permissible exposure limits based on the eight-hour
10 time-weighted average, TWA, standards." Do you see
11 where I'm reading?

12 A I do see that, yes.

13 Q So what they report is for this activity, for that
14 second part, the excursion limit, starting with
15 whatever it was in '72 and moving forward, their study
16 and their data revealed that the exposures exceeded
17 those levels whenever they were set?

18 A That's what they reported.

19 Q Yeah. And they go through, given your criticism,
20 what they do in terms of ventilation, et cetera, and
21 their methods, and we'll get to that in a second,
22 correct?

23 A Sure.

24 Q They say that, "The results demonstrated that
25 employees who remove dry asbestos-containing gaskets

1 with no localized ventilation should wear a full-face
2 supplied air respirator with a HEPA escape canister,
3 and the work area should be designated a regulated
4 zone," correct?

5 A That's what they report in their abstract.

6 Q All right. They don't just report it, though,
7 ma'am. They go through and they have a whole section
8 on their materials and their methods, correct?

9 A They do have a section on materials and methods,
10 that's right.

11 Q Right. A number of valve and flange assemblies
12 were collected in 1994 from a paper mill powerhouse in
13 Oregon and stored under some conditions. So this study
14 actually looks at removing asbestos-containing gaskets
15 from flanges that are part of valve assemblies
16 operating in a steam environment, correct?

17 A That's what they represent it to be in the paper,
18 that's right.

19 Q Well, you don't have any different information, do
20 you?

21 A I don't have any way to know one way or the other.

22 Q You keep saying, "This is what they represented it
23 to be." These authors actually went through the
24 trouble of videotaping their study so that if there was
25 any question about it, folks who might question it

ROA_02021

Appendix_02056

1 could go back and look at the videotape and see exactly
2 what they did, right?

3 A I don't know, but that makes sense. Certainly, we
4 videotape our studies as well.

5 Q Well, they say right here that they videotaped the
6 study, right?

7 A They do say that, that's right.

8 Q So if you wanted to actually look at the
9 videotape, have real criticisms, you could possibly
10 write them and say, "I want to look at the videotape"?

11 A I could. I don't need to for my criticisms, but I
12 certainly could do that, yes.

13 Q These authors discuss the fact that there was an
14 attempt to ban these products and that that attempt was
15 met with challenge.

16 MR. BOUCH: Objection, Your Honor. You ruled this
17 out yesterday, questioning a court of appeals decision.
18 I renew my objection.

19 MS. FARRISE: That's on the first page, Your
20 Honor.

21 MR. BOUCH: First full paragraph about halfway
22 down. I think the court is supposed to give the law to
23 the jury, not the lawyers.

24 MS. FARRISE: I'm not giving the law. There
25 shouldn't be a speaking objection, either.

1 THE COURT: Ms. Farrise, Mr. Bouch, let me look at
2 this for a moment.

3 This is just a history of what happened in the
4 course of regulation. I don't know how much you need
5 it, Ms. Farrise. Let's move on from this topic.

6 MS. FARRISE: Okay.

7 Q As it's relayed, Ms. Sahmel, that, because of the
8 ban and the overturn and a loophole, these products are
9 still being sold today, correct?

10 A That's my understanding. To the extent that -- I
11 don't know about a loophole and all of that, but it's
12 my understanding that the ban was not enacted
13 ultimately.

14 Q Right. And so the concern of these authors is,
15 therefore, these products, these particular products,
16 still exist in America and can be bought and sold
17 today, correct?

18 A I don't have the details. I haven't looked at
19 that recently. To the extent that you represent that's
20 true, I'll agree with you.

21 Q All right. Anyway, getting right to what they
22 find, after going through their methods, for instance,
23 they lay out that they took these personal samples,
24 they took the area samples, that's the -- correct?

25 A I'm sorry. Where are you?

ROA_02023

Appendix_02058

1 Q I'm on the second page, left-hand corner at the
2 bottom.

3 A Thank you. Yes, they state here that they
4 collected personal and area air samples.

5 Q Right. And that's the same kind of thing we
6 started with where they put something on the worker,
7 and they measure if asbestos is in the air when this
8 activity is occurring, right?

9 A They state -- yeah. As they state here, they put
10 cassettes on with filters in them on the -- either the
11 individual or wherever the area sample was placed.

12 Q And here they provide the data in kind of a
13 summary form, right? So there's Table 2 which
14 summarizes that as to the PCM measurements on the small
15 flanges, that these were the findings that they had
16 using the light microscopic technique. The worker,
17 during removal of the asbestos-containing gasket using
18 scraping and hand wire brushing, they measured exposure
19 levels to range -- and they took 14 samples -- from 1.5
20 fibers per cc to 10.1 fibers per cc, correct?

21 A That's what they report in this table.

22 Q And that the time-weighted average of the samples,
23 if you were to do it under that methodology, using PCM
24 on a small valve, was 1.5 fibers per cc, correct?

25 A That's what they report.

ROA_02024

Appendix_02059

1 Q And they take the same samples, I think. Let me
2 just see if I have the right table. Yes. Small
3 flanges, hand wire brushing, but they use this other
4 technique of transmission electron microscopy on the
5 same 14 samples, the worker and the assistant, correct?

6 A That's what they report.

7 Q And using the higher-powered microscope, they find
8 that removing from the small flange ranges in these
9 samples from 29.9 fibers per cc to 144.2 fibers per cc
10 for the worker, and for the assistant 2.2 to 29.5
11 fibers per cc, correct?

12 A That's what they report here.

13 Q And you have that formula that you put up for the
14 jury of fiber per cc years. Do you recall that?

15 A Yes, I do.

16 Q Okay. So can you take your formula and
17 utilizing -- let's take the 29 fiber -- 29.5 fiber per
18 cc level for the assistant, and tell the jury if you
19 take that, do the same calculation you did times the
20 four and a half years, what you come up with?

21 A I don't have a way to calculate anything here, so.

22 Q Phone? Nothing?

23 A No.

24 Q Okay. Estimate?

25 A I'm sorry --

ROA_02025

Appendix_02060

1 Q It's 29.5, that's almost 30, times four is 120?

2 A 30 times four is 120.

3 Q Right. It's 29.5 is almost 30, right?

4 A To the extent -- that's right, that you're
5 calculating 29 -- yeah -- .5 times, it would be a
6 little less than 120.

7 Q Right. And so it's 120 fiber per cc years under
8 your formula?

9 A If one were to take this as an accurate
10 representative number and to that calculation, that is
11 correct, that is what one would calculate.

12 Q And if you were calculating using these values for
13 the assistant, not the worker, correct?

14 A That is what they represent to be the assistant,
15 that's correct.

16 Q So if you took the worker and you took the outer
17 range of 144 times four, then you have almost 600,
18 let's say, five-something fiber per cc years from hand
19 wire brushing and hand scraping of a small flange to
20 remove an asbestos-containing gasket, correct?

21 A For the upper end of the fiber concentrations that
22 they report in this study, that is approximately
23 correct. That is what they are saying that the -- for
24 four years would be the equivalent cumulative exposure.

25 Q Then they do --

ROA_02026

Appendix_02061

1 -- quickly, Your Honor --

2 -- in table form, they look at, basically -- well,
3 they perform similar activities but this time on a
4 large flange and, again, with the hand wire brushing
5 and the scraping. And these authors report, for the
6 worker in the ten samples that they took when they were
7 doing the large flange, a range of exposures to
8 asbestos by PCM of 9.3 fibers per cc and to 24; and
9 then for the assistant, 5.2 fibers per cc to 15.7,
10 correct?

11 A Those are the values that they have reported in
12 this Table 4.

13 Q And they report the eight-hour time-weighted
14 average conversion for those as well, correct?

15 A They do report an eight-hour time-weighted average
16 calculation in this table, that's right.

17 Q And under PCM, they arrive at this 3.6 fiber per
18 cc eight-hour time-weighted average level, correct?

19 A That is the value that they have arrived at and
20 reported in this table.

21 Q And under the rules in place by 1976, this would
22 have, if this had been the only exposure a person had
23 all day long, been in violation of the OSHA standard,
24 correct?

25 A If this were a correct value based on appropriate

ROA_02027

Appendix_02062

1 methods and were calculated correctly, then it would
2 be -- it appears to be a violation of the eight-hour
3 time-weighted average exposure value by OSHA at that
4 time, in 1976.

5 Q Three years before Mr. Jolly starts to work there,
6 right?

7 A I believe it's four years.

8 Q The methods that these folks used in terms of the
9 testing and the air sampling and all those, those are
10 not new methods; they were utilized by industrial
11 hygienists in the safety community going back decades,
12 correct?

13 A That's absolutely inaccurate. They were not
14 methods that had been used for a long period of time.
15 They were their own modified methods.

16 Q As to large flanges, the same work looked at by
17 TEM, they analyzed 14 samples again, and the levels
18 that they measured, documented and published in the
19 peer-reviewed scientific literature for other
20 scientists to see were, for the worker, a range of
21 199.6 fibers per cc to 842.7 fibers per cc, and the
22 assistant, 13.6 fibers per cc to 101 fibers per cc,
23 correct?

24 A Those are the values that they report in this
25 table.

1 Q And under your formula, it would be taking the
2 assistant value four times 101 fibers per cc for 400
3 fiber per cc years of exposure from removing a large
4 asbestos-containing gasket -- I mean an
5 asbestos-containing gasket from a large flange,
6 correct?

7 A If one were to take this number at face value in
8 this table and accept it as correct and appropriate and
9 performed that calculation, then that is what one would
10 calculate.

11 Q And they go through -- sorry. Just so the jury
12 can see the rest. They take photomicrographs, and
13 they're hard to see on this copy, but the
14 photomicrographs that they present are of the surface
15 of the gasket, correct?

16 A That's what they state that these photos are.

17 Q Right. And the reason that they put them in there
18 is because they want to show that these gaskets are not
19 encapsulated, that if you look at the surface of the
20 asbestos-containing gasket with a microscope, you can
21 see the free asbestos fibers sticking out and not
22 bonded in any matrix, correct?

23 A I don't see that from this photo, no. To me,
24 because they were visible doesn't mean that they are
25 not encased in a matrix that prevents them from being

1 hand scraped from the surface of the gasket.

2 Q Well, it's a bad black-and-white copy and I
3 apologize, but what they report is scanning electron
4 micrograph of the surface of a new asbestos-containing
5 gasket, both the chrysotile fibers and the polymer
6 matrix are visible at a thousand magnification, right?

7 A Yes, and that's not unexpected.

8 Q And there was one more section about peak exposure
9 levels that these folks put in here that according to
10 their study, et cetera. They measured the
11 concentration of asbestos using a different technique
12 called PLM, polarized light microscopy, correct?

13 A Sorry. You're on Table 1. Just one moment,
14 please. Sorry. Get back there.

15 Q No problem. PLM, we haven't heard much about
16 that. It's a different microscopic technique, right?

17 A That's right. It's called polarized light
18 microscopy. It's used for bulk sample analysis as
19 opposed to air samples.

20 Q They report that they did these analyzes on 15
21 different gaskets. They found the asbestos type in
22 those that they studied to be chrysotile, and the
23 percentages of asbestos to be in the range of 65- to
24 85-percent asbestos, correct?

25 A That's what they report, that's right.

ROA_02030

Appendix_02065

1 Q And they say that the exposures were over the
2 peak, right above that. The worker in the study, one,
3 had a peak exposure level of 10.1 fibers per cc and an
4 eight-hour time-weighted average of 1.5, and we already
5 looked at that by phase contrast, correct?

6 A If one were to take those reported values as
7 correct or at face value, then that is what those
8 values would be saying, that there would be those
9 excesses above the exposure limits.

10 Q And, Ms. Sahmel, going back to the history part
11 quickly, companies that had contracts with the United
12 States government were subject to the Walsh-Healey Act,
13 correct?

14 A That's right. If they had contracts in excess of
15 \$10,000 or more at the time, I believe, that the
16 standard was originally enacted.

17 Q And the Walsh-Healey Act in 1952 recognized
18 asbestos particularly as a toxic dust. Here you go.

19 A Thank you very much.

20 Q Handing you what we've marked as Plaintiff's
21 Exhibit 149.

22 THE COURT: What was the question, Ms. Farrise?
23 You said Walsh-Healey Act 1952.

24 BY MS. FARRISE:

25 Q I said I'm handing you the Walsh-Healey Act of

ROA_02031

Appendix_02066

1 1952. I haven't gotten any further than that.

2 THE COURT: Let's move forward with it.

3 MR. HOLDER: Did you have a binder?

4 THE COURT: No, but don't worry about me.

5 MR. BOUCH: Let me speed this up. I have no
6 objection to it coming in as demonstrative evidence,
7 demonstrative exhibit.

8 MS. FARRISE: Well, I'm sorry. As a statement of
9 the United States government, we would offer it into
10 evidence fully and not just as a demonstrative, but we
11 can take that up at another time. I think it can be
12 judicially noticed.

13 THE COURT: Well, for the present time, we'll
14 admit it as a piece of demonstrative evidence, and
15 we'll discuss whether I will take any judicial notice
16 of it at a later time.

17 (WHEREUPON, Plaintiff's Exhibit Number 149 was
18 admitted into evidence.)

19 BY MS. FARRISE:

20 Q This is, again, a government publication, correct?

21 A Yes, that's my understanding. That's correct,
22 appears to be that document.

23 Q And kind of like the Williams-Steiger occupational
24 act, they named it after Mr. Walsh and Mr. Healey for
25 reasons that we don't know, correct?

1 A I don't know what they are, but that's possible.

2 Q But you understand this to be a regulation of the
3 United States government put out by the United States
4 Department of Labor, correct?

5 A I do understand that, that's right.

6 Q And they -- actually, quickly go through why
7 they're doing it, but, the Walsh-Healey Public
8 Contracts Act requires contracts entered into by any
9 agency of the United States government for the
10 manufacture and equipment, 10,000. "No part of such
11 contract will be performed, nor will any of the
12 materials, supplies, articles, or equipment to be
13 manufactured or furnished under the contract be
14 manufactured or fabricated in any plants, factory,
15 buildings, or surroundings, or under working conditions
16 which are unsanitary or hazardous or dangerous to the
17 health and safety of employees engaged in the
18 performance of the contract." Did I read that
19 correctly?

20 A I believe so, that's right.

21 Q And so this was an example, quickly, of the United
22 States saying, "Hey, we are a big customer, and we care
23 about safety, and so for people who sell us stuff, we
24 are going to impose safety and health regulations on
25 those companies as a way to protect workers"?

ROA_02033

Appendix_02068

1 A Absolutely.

2 MR. BOUCH: Well --

3 BY MS. FARRISE:

4 Q And there is a table of contents about what's in
5 the book, correct?

6 A Yes. I see that here.

7 Q They have a section having to do with pressure
8 vessels, and, in particular, actually, they talk about
9 safety as it relates to valves, right?

10 THE COURT: Page 12.

11 THE WITNESS: Let me just take a look for that,
12 Your Honor.

13 MS. FARRISE: Table of contents.

14 THE COURT: It's Page 12.

15 THE WITNESS: I see that it's on Page 12, yes.
16 Thanks.

17 BY MS. FARRISE:

18 Q And that particular safety that they are talking
19 about on Page 12 is having to do with not having the
20 valve blow up and not hurt somebody, correct?

21 A I don't know. I haven't read that specific
22 section of this, to my recollection. Page 12 of the
23 copy I have is machinery guarding.

24 THE COURT: It's Page 12 of this thing. It's I,
25 valves, 1. Just look at 12 down at the bottom of the

ROA_02034

Appendix_02069

1 page there, the page has machinery guarding after that.

2 See up in the left-hand --

3 THE WITNESS: Oh, thank you. I see it.

4 THE COURT: And that's valves. That's what she's
5 asking about.

6 THE WITNESS: Thank you very much, Your Honor.

7 THE COURT: It's valve, 1, and a regular 1 through
8 -5.

9 THE WITNESS: Thank you very much.

10 BY MS. FARRISE:

11 Q So can we agree, Ms. Sahmel, that a company that's
12 in the business of manufacturing valves, selling to the
13 government, part of the war effort, for more than
14 \$10,000 and being contractually obligated would
15 probably read this document, certainly, because it
16 covers valves, right?

17 A I would imagine that they would, yes, if they had
18 a large enough contract with the government to cause
19 these standards to apply.

20 Q And in addition to valve safety, if you keep
21 going, there is a whole Part 3 that has to do with
22 health requirements and environmental conditions,
23 starting around Page 22, correct?

24 A Yes, that's right.

25 Q And here the safety requirements apply to a number

ROA_02035

Appendix_02070

1 of things, but asbestos is one of them, right?

2 A Yes, it is.

3 Q In 1952?

4 THE COURT: It's on Page 24. It's mineral dust.
5 It's the second one on the list. Substance is alundum,
6 and second substance is asbestos. Do you see it there?

7 THE WITNESS: Yes, I do.

8 THE COURT: Go ahead, Ms. Farrise.

9 BY MS. FARRISE:

10 Q And the requirement is that for those identified
11 mineral dusts, including asbestos, the employees at
12 factories and plants where those contractors carry out
13 their business have to be protected from asbestos and
14 those other mineral dusts and the other things,
15 correct?

16 A That's right.

17 Q And they go through very specifically about how
18 and what to do. Control of atmospheric contaminants,
19 right? The page before 23.

20 A They do cover the control of atmospheric
21 contaminants, that's right.

22 Q At the levels and the values they set, and for
23 asbestos, it's five million particles for cubic foot?

24 A Correct. Consistent with the ACGIH recommended
25 limit that I discussed yesterday, correct.

ROA_02036

Appendix_02071

1 Q And that is a limit that in order to determine
2 whether you're above it or below it needs to have
3 testing of the air done, correct?

4 A In theory, but that is such a high level that, in
5 fact, in this case, for example, what we talked about
6 the Fleishner study yesterday for friable insulation
7 material, friable insulation material is unlikely to
8 exceed that standard in the Fleishner study. There
9 would be no expectation at this time that a use of
10 gaskets and packing, for example, would ever exceed
11 that standard. And, in fact, I'm aware of no evidence
12 that gasket and packing work would ever exceed or has
13 ever been reported to exceed 5 mpcf.

14 Q Can you show the jury in that document where it
15 says, "This does not apply to gaskets and packing"?

16 A It does not say that here.

17 Q Right. It applies to products that contain
18 asbestos and asbestos exposures, correct?

19 A It applies to airborne asbestos.

20 Q And it goes through and tells the folks who are
21 covered by this federal regulation how to control the
22 atmospheric contaminants in very specific detail,
23 correct?

24 A That's true, yes, they do.

25 Q The methods to control include substitution of

ROA_02037

Appendix_02072

1 less toxic materials, correct?

2 A That's correct.

3 Q Exhaust ventilation so that the contaminant is
4 removed from the work room atmosphere, correct?

5 A Yes.

6 Q Isolation of the operation so that the contaminant
7 does not enter the general work room atmosphere,
8 correct?

9 A That's right.

10 Q Enclosure of the operation so that the asbestos
11 doesn't get in the air, right?

12 A Yes.

13 Q And it talks about other things, ventilation
14 increase, et cetera, et cetera, right?

15 A Yes. There are additional things mentioned here
16 as well.

17 Q Can we agree, ma'am, that a company subject to the
18 Walsh-Healey Act of 1952 would be on actual and
19 specific notice that asbestos is a toxic substance?

20 A That it was regulated as a toxic substance, that's
21 right, by the Walsh-Healey Act, and there were
22 recommendations about limiting workplace exposures,
23 absolutely.

24 Q And that asbestos, as a toxic substance, could be
25 worked with under conditions that would significantly

1 reduce or prevent workers from being exposed to that,
2 correct?

3 A To the extent that there were conditions under
4 which those exposures to asbestos under the working
5 activities that were going on, to the extent that those
6 exceeded the established limits in the Walsh-Healey
7 Act, for example, then yes, there are a list of methods
8 that can be used, many of which are still absolutely
9 acceptable today and useful and helpful.

10 Q These methods mirror what became the rule of OSHA
11 20 years later?

12 A Many of them are the same, and that's not
13 surprising because those are also the critical kind of
14 tenets of industrial hygiene in terms of control.

15 Q And as a regulation in 1952, the regulation was
16 made based on the knowledge that was available in the
17 scientific and medical community and by 1952, right?

18 A These regulations certainly reflect the knowledge
19 that was available as of 1952.

20 Q Right, because regulations tell us that the stuff
21 that's out in the medical and scientific literature is
22 being accepted, and it is being acted on, right?

23 A Absolutely. For the levels that were understood
24 to be a hazard at that time, which was five million
25 particles per cubic foot.

ROA_02039

Appendix_02074

1 Q Ma'am, how many Sage valves were there at Oconee,
2 McGuire, and Catawba?

3 A I don't know.

4 Q How many Crosby valves were at any of those
5 plants?

6 A I don't know.

7 Q Fisher valves?

8 A I don't know.

9 Q What were the size of those valves?

10 A I don't know.

11 Q How many flange faces?

12 A I don't know.

13 Q How many bolts on the flange face to hold the
14 gasket in place?

15 A I don't know.

16 Q Thank you.

17 MS. FARRISE: Your Honor, those are all the
18 questions I have.

19 THE COURT: Very good.

20 Redirect?

21 MR. BOUCH: I have about three or four questions,
22 Your Honor. Two, three minutes.

23 REDIRECT EXAMINATION

24 BY MR. BOUCH:

25 Q Ms. Sahmel, you were shown this article by

1 Mr. Longo?

2 MS. FARRISE: It's Dr. Longo.

3 MR. BOUCH: Well, does he identify --

4 THE COURT: Wait a minute. You're questioning
5 your witness about Dr. Longo's article.

6 Ms. Farrise, let's not interrupt Mr. Bouch.

7 How about you take a seat now while he's --

8 MS. FARRISE: I was. I just had tons of paper,
9 Your Honor.

10 THE COURT: I understand all that. Y'all can
11 clean that up later. Hopefully, this is going to be a
12 short redirect, and they can go to lunch.

13 BY MR. BOUCH:

14 Q Does the author of the article identify himself as
15 a doctor?

16 A I don't see that here.

17 Q You -- may I have her Slide Number 19, please.

18 You were asked about the disclosures in your
19 article, several of them, on declaration of interest.
20 Do you know what I mean?

21 A Yes.

22 Q As soon as I can get this up. And what is that,
23 for the jury?

24 A So the declaration of interest is background
25 information on the source of funding that was provided

ROA_02041

Appendix_02076

1 for the research, and that's potentially important
2 because there could be a perception of bias or
3 potential for influence of the research depending on
4 who provides that funding and how the funding is used,
5 so it's very important to provide that information.

6 Q And you have done that in your articles?

7 A Absolutely.

8 Q Is your science for sale?

9 A No, not at all.

10 Q Do people that provide funding, do they control
11 the results?

12 A Certainly not for our studies. We make it very
13 clear that that's a condition of receiving the funding
14 to begin with.

15 Q Do they get to edit the paper before it's
16 published?

17 A Not my papers.

18 Q The part that is not highlighted by the lawyers,
19 starting at this above the bottom highlighting, would
20 you read that?

21 A Sure. Just above the bottom highlighting?

22 Q Right.

23 A "This paper was prepared and written exclusively
24 by the authors without any review or input by John
25 Crane, Inc., employees or legal counsel."

ROA_02042

Appendix_02077

1 Q Did Dr. Longo provide a -- you can take that down,
2 if you want.

3 Did Dr. Longo provide any similar declaration of
4 interest in his paper of who provided his funding?

5 A He did not. And I didn't see any reference to
6 that in the paper.

7 Q Did he disclose that he derives three quarters of
8 his income from plaintiffs' lawyers such as these?

9 A No.

10 MS. FARRISE: I'm going to object that I think
11 it's outside of her -- foundation.

12 THE COURT: All that's being asked is what was
13 disclosed in this paper, and I'm going to allow her to
14 answer that.

15 Go ahead, Mr. Bouch.

16 BY MR. BOUCH:

17 Q Could you answer the question, ma'am?

18 A No.

19 Q Okay. Do you consider the Longo paper -- and we
20 went over it yesterday, so I'm not going to go through
21 1 through 20 -- do you consider it a reliable
22 authority?

23 A I do not.

24 Q Has it ever been duplicated before or since by any
25 scientist anywhere?

ROA_02043

Appendix_02078

1 A Not to my knowledge. And, in fact, it is entirely
2 inconsistent with every other short-term and long-term
3 gasket and packing study that I'm aware of that has
4 been published.

5 Q You were asked about OSHA regulations and gasket
6 and packing being exempted from the labeling
7 requirement, right?

8 A That's right.

9 Q Is that still true?

10 A Yes.

11 Q Do the data and tests done show any release of
12 fibers above any regulated standard?

13 A I'm not aware of any evidence to indicate a
14 release of fibers above the current OSHA eight-hour
15 time-weighted average for asbestos from gasket and
16 packing work.

17 Q One of the folks on several of your articles was a
18 fellow by the name of John Henshaw?

19 A Yes.

20 Q Is he a doctor?

21 A He's not a doctor.

22 Q What was his job before he came to Cardno
23 ChemRisk?

24 A He was the head of OSHA.

25 Q Is it your understanding of the federal

ROA_02044

Appendix_02079

1 regulations that a company such a Fisher or a company
2 such as Crosby has an absolute right to go into a Duke
3 power plant to do any testing?

4 A That's not my understanding. In fact, I would be
5 surprised if any facility would allow that to happen
6 without careful coordination and a working
7 relationship.

8 Q Who is responsible for doing the testing in a Duke
9 power plant?

10 A Well --

11 THE COURT: Lay some foundation for what she knows
12 about that; Mr. Bouch.

13 BY MR. BOUCH:

14 Q Under the OSHA regulations that we've been
15 discussing, who is responsible for doing the testing
16 inside a Duke power plant of asbestos releases in the
17 air?

18 A At the time that Mr. Jolly worked at Duke Power
19 and the regulations that were in place at that time,
20 it's very clear that OSHA was focused on the employer
21 as the responsible party to protect the health and
22 safety of the workers and the employees.

23 Q So the employer, Duke, is responsible for sampling
24 in its own Duke power plants?

25 A That is the way the standard is written that was

ROA_02045

Appendix_02080

1 in place at the time that Mr. Jolly was working at
2 Duke.

3 Q Thank you, ma ma'am.

4 That's all the questions I have.

5 THE COURT: Very good. No questions on
6 redirect --

7 MS. FARRISE: No. May I ask a question, is what I
8 was asking?

9 THE COURT: Yes, ma'am.

10 RECROSS-EXAMINATION

11 BY MS. FARRISE:

12 Q You were just asked about what OSHA was focused on
13 in 1980 to '84 when Mr. Jolly was there?

14 A Based on the standard that was in place at that
15 time.

16 Q And so I take it, ma'am, that when Mr. Jolly was
17 there and when you were 10 to 14 years old, you didn't
18 work at OSHA?

19 A I did not work at OSHA at that time.

20 Q And you've never worked at OSHA?

21 A I have not worked at OSHA.

22 Q And so the only thing you know about OSHA is what
23 you can read in the documents just like us, correct, in
24 terms of what the standard was and what people meant
25 and what their focus was, right?

ROA_02046

Appendix_02081

1 A Not just the standards but also letters of
2 interpretation that have been written over time,
3 talking to my colleagues who work at OSHA, many of whom
4 I've known for many years, and those other types of
5 information are important as well.

6 Q And were your colleagues also ten years old when
7 Mr. Jolly was at Duke or are they older?

8 MR. BOUCH: Your Honor, I object to that.

9 THE COURT: Overruled.

10 THE WITNESS: Not all of them.

11 BY MS. FARRISE:

12 Q You talked about Dr. Longo's work history?

13 A I don't recall talking about that.

14 Q I think counsel asked you if you were aware that
15 at times Dr. Longo testifies on behalf of plaintiffs,
16 and you said you thought it was the case and he didn't
17 disclose it. That was what I think the question was.

18 A I think he asked about a specific statement, if it
19 was disclosed in his paper.

20 Q You understand that Dr. Longo works for companies,
21 whoever asks -- General Electric, Flexitallic, whoever
22 asks him to test their products, he's ready, willing,
23 and able to do it, right?

24 A I don't know about Dr. Longo's work history.

25 Q And as reflected in this paper, the only reason

ROA_02047

Appendix_02082

1 that these products are still allowed to be sold today
2 is because of a loophole having to do with the court
3 case?

4 MR. BOUCH: Objection, Your Honor.

5 BY MS. FARRISE:

6 Q And that's reflected in the paper, right?

7 THE COURT: Just a minute. There is an objection,
8 Ms. Farrise.

9 MS. FARRISE: I wasn't finished with my question
10 before he objected.

11 THE COURT: He's objecting to the part of it
12 you're asking about the loophole being impacted by
13 court decision.

14 Overruled.

15 All right. Now, ask the question.

16 MR. BOUCH: Well, Your Honor, I'd like to put a
17 403 objection and put also an objection --

18 THE COURT: I'm going to let you do that after we
19 finish with this witness. I'm trying very strongly to
20 get the jury complete with this witness, and I'll let
21 you put that on the record a little later.

22 Ms. Farrise, let's wind this up, please, ma'am.

23 BY MS. FARRISE:

24 Q The fact that these products are still being sold
25 today is the result of a legal loophole concerning the

1 ban and the fact that they are imported into the
2 country versus made in the country?

3 A I don't have legal information about that.

4 THE COURT: She says she doesn't know,
5 Ms. Farrise. That's the end of it. I'm not going to
6 allow any further questions about that.

7 MS. FARRISE: Thank you.

8 THE COURT: All right.

9 Anything further, Mr. Bouch?

10 MR. BOUCH: I don't want to ask another question,
11 Your Honor, because it will just generate more.

12 THE COURT: Listen, no need to preach about it.
13 If you're finished with your questions, that's all I
14 need to know.

15 MR. BOUCH: I'm finished.

16 THE COURT: Thank you, sir.

17 Now, ladies and gentlemen of the jury, let's see
18 here. We're at 1:10. We'll try to recommence about
19 2:25, somewhere in that ballpark.

20 (WHEREUPON, the jury exited open court at
21 1:11 p.m.)

22 THE COURT: All right.

23 Ms. Sahmel, thank you very much for your
24 testimony, and you are released.

25 THE WITNESS: Thank you very much.

ROA_02049

Appendix_02084

1 THE COURT: All right. Where do we stand at?
2 Tell me what else is going to happen.

3 MR. BOUCH: We're going to play Dr. Oury's video
4 after lunch. I think it takes 27 minutes, something
5 like that, and we'll rest.

6 And, Your Honor, just to close the loop, my 403
7 objection on those questions had to do with the fact
8 that the legal loophole is not only a term that's not
9 in this article at all as represented, but it's a
10 pejorative comment that we believe unfairly
11 characterizes a decision in the United States Court of
12 Appeals of this circuit, and I think it's
13 inappropriate.

14 THE COURT: All right. My ruling would be this:
15 You're right. That's a pejorative term. I should have
16 told the jury to disregard it. I think there's little
17 harm done since she didn't know what that ruling had to
18 do. If a curative instruction is needed, I'll be happy
19 to do it.

20 MS. FARRISE: Your Honor, we shouldn't have been
21 talking about it at all. If the defense to the jury
22 had not been this product is still being able to be
23 made and sold and, therefore, implicating --

24 THE COURT: Yes, ma'am. We're talking about how
25 it was asked, and he's got a point. It was asked in a

ROA_02050

Appendix_02085

1 pejorative way. I was concentrating on the content of
2 the question and what I was sure was going to be the
3 answer, which was she doesn't know anything about that,
4 and, therefore, I probably glossed over it too quickly
5 in my zeal to get the jury on their lunch break.

6 You can contemplate that, and if you wish me,
7 after contemplation over lunch, to instruct the jury
8 further about the pejorative use of the term "legal
9 loophole," I'll be happy to do so.

10 MR. BOUCH: I don't think it's necessary, Your
11 Honor. I just wanted to put that on the record. That
12 was my objection.

13 MS. FARRISE: Excuse me, Your Honor. I would
14 offer 1292, which I mentioned, which is the 1994 OSHA
15 standard for asbestos that was talked about and moved
16 into evidence.

17 THE COURT: Trying to figure out whether to offer
18 these documents?

19 MS. FARRISE: No. I mentioned with the witness
20 that --

21 THE COURT: Don't reargue that.

22 MS. McVEY: She's talking about admitting the OSHA
23 standard.

24 MS. FARRISE: The 1994 OSHA standard, Your Honor.
25 I'm not rearguing that. I've moved on to something

ROA_02051

Appendix_02086

1 else.

2 THE COURT: Just like the other OSHA standards,
3 I'm going to admit the OSHA standards that the witness
4 has been questioned about, and she's been questioned
5 about 1994. It's coming in, just like the other ones
6 came in for both sides.

7 MR. BOUCH: That's fine, Your Honor. We had
8 previously introduced OSHA standards for demonstrative
9 purposes. If you're going to admit them all, I'd like
10 those admitted also.

11 THE COURT: Very good. And my thinking is I don't
12 know whether we're going to send all of those OSHA
13 regulations back to the jury, but they are in, at least
14 for demonstrative purposes, and we'll talk further
15 about what goes back to the jury. I'm sure we're going
16 to have to take a peek at that in more detail.

17 Let me understand. We have Dr. Oury. And then
18 what are we going to do about these deposition
19 excerpts? What we've got is the potential of Jolly
20 excerpts, if you're still going to play them. What you
21 going to do about that?

22 MR. BOUCH: Your Honor, we'll discuss it over
23 lunch, but I'll tell you, I've been outvoted by two to
24 one, but I'm insisting that, much like a hierarchical
25 church, my one vote counts, and I doubt we'll do it.

ROA_02052

Appendix_02087

1 THE COURT: That's fine. I can wait until after
2 lunch for y'all to tell us about it, and I've already
3 told y'all that if they want to, they can.

4 MS. McVEY: I agree with that, but my concern is
5 you also said we may be able to designate --

6 THE COURT: I know it may be a little ragged, but
7 I'm not going to pin them down. If they are going to
8 come back here and say no, I'm not going to make you do
9 a bunch of designations. If they say yes, we're going
10 to play them, we'll talk about what's to be played with
11 you. And I, frankly, think we can figure that out
12 rather quickly, if it comes to that. That's the way
13 I'm going to handle that.

14 MS. McVEY: I don't want to be foreclosed --

15 THE COURT: I'm not foreclosing anybody, but I
16 think I can do that on the fly.

17 Now, after we do that, you would rest?

18 MR. BOUCH: That's correct.

19 THE COURT: Then plaintiffs --

20 MS. McVEY: We'll make a directed verdict motion
21 on some issues.

22 THE COURT: Right. After that are y'all going to
23 try to put up Jolly again? No is probably the answer
24 to that.

25 MS. McVEY: No.

ROA_02053

Appendix_02088

1 THE COURT: Very good. So then we'll have the
2 directed verdict motions. Then we'll have the charge
3 conference, and I would hope to accomplish that today,
4 even if we have to stay a little late, if that's okay.

5 MR. BOUCH: Of course.

6 THE COURT: And then we'd be fresh as daisies
7 tomorrow to go to the jury with our closing arguments
8 and charges. Does that sound like a plan?

9 MS. McVEY: That sounds wonderful. And if we can
10 figure out the charge conference tonight, we can e-mail
11 around the final version.

12 THE COURT: I am -- as you know, it's me and Josh
13 against the world, so it may be that we will entrust to
14 y'all, after we have this charge conference this
15 afternoon, to try to get me a final version with y'all
16 doing the production. I might -- it might have to come
17 to that.

18 MS. McVEY: That's fine, as long as you tell us
19 what you want where.

20 THE COURT: Exactly. So that's how that might be,
21 and that might be sent out and looked at one more time
22 before counsel projects their closing arguments to the
23 jury so that you will know what's going to be charged
24 before you argue.

25 MS. McVEY: Perfect.

ROA_02054

Appendix_02089

1 THE COURT: Does that seem like a reasonable plan?

2 MR. BOUCH: Okay.

3 THE COURT: Yancey?

4 MR. McLEOD: That's fine, Your Honor.

5 MR. BOUCH: We'll make it work.

6 THE COURT: Thanks very much.

7 MR. BOUCH: What time did you want the jury to
8 come back?

9 THE COURT: I asked the jury to come back about
10 2:25 or somewhere in there, 2:30, something in that
11 ballpark.

12 MR. BOUCH: We'll be done by 3:30, Your Honor, at
13 the very latest.

14 THE COURT: That's why I think, since we'll have a
15 nice little block of time, I think we would be better
16 served to get all this worked out and brought to
17 conclusion and be fresh as daisies in the morning to go
18 to the jury if that suits y'all.

19 MR. BOUCH: That's fine.

20 MS. McVEY: I think that would be wonderful.

21 THE COURT: That's what we'll do.

22 (Lunch recess taken from 1:18 p.m. to 2:31 p.m.)

23 THE COURT: Anything before we bring the jury in?

24 MR. BOUCH: I told Ms. McVey we're going to play
25 this and rest.

ROA_02055

Appendix_02090

1 THE COURT: Very good. That solves all kind of
2 good problems.

3 MR. BOUCH: For the court's information, they tell
4 me the video is right at 30 minutes.

5 THE COURT: Super.

6 MR. McLEOD: We withdrew all parts that were
7 objected to.

8 THE COURT: Wonderful.

9 (WHEREUPON, the jury entered open court at
10 2:32 p.m.)

11 THE COURT: All right. Ladies and gentlemen of
12 the jury, please be seated. We have a final expert
13 that you will hear by means of a read deposition. I
14 don't think it will take any longer than 35 minutes,
15 and we'll see where the defendants go from there, but I
16 think we're near the close of testimony, and then I'll
17 advise you how we will proceed after that.

18 So, Mr. Bouch.

19 MR. BOUCH: Thank you, Your Honor. Crosby Valves
20 and Fisher Controls would call to the stand Dr. Tim
21 Oury by video deposition.

22 THE COURT: Very good.

23 MR. BOUCH: I think we'll probably need the lights
24 dimmed, sir.

25 TIM OURY, M.D.

ROA_02056

Appendix_02091

1 (via video deposition),

2 TESTIFIED AS FOLLOWS:

3 DIRECT EXAMINATION

4 BY MR. BOUCH:

5 Q Dr. Oury, good morning.

6 A Good morning.

7 Q Would you please tell the jury your full name,
8 what do you for a living, where you live.

9 A My name is Tim Oury. I'm a pathologist. I do
10 clinical work in pathology, diagnostic pathology work,
11 as well as basic science research in lung pathology at
12 the University of Pittsburgh and University of
13 Pittsburgh Medical Center, and I live just outside of
14 the city of Pittsburgh, Pennsylvania.

15 Q Doctor, we're here on July 20th in Pittsburgh.
16 The trial is to start in Spartanburg on July 24th. Can
17 you be there in person?

18 A Unfortunately, I cannot.

19 Q Why not?

20 A I am on clinical service, and my work requires me,
21 while I'm on clinical service, to be available at the
22 hospital.

23 Q Okay. And when did you learn you would no longer
24 be available to be at trial?

25 A When our clinical schedule for the year came out.

ROA_02057

Appendix_02092

1 Our year is on an academic year, so it goes July 1st
2 through June 30th, so that was just maybe a month or so
3 ago that I got the schedule. We're towards the end of
4 July now, so we obviously got it right before the --

5 Q July 1st?

6 A -- July 1st.

7 Q Can you give the jury a sense of your education,
8 background, and professional qualification?

9 A Yes. I grew up in the state of Indiana, and I
10 went to a state college called Purdue University and
11 got my Bachelor's degree in biology and biochemistry.
12 And once I graduated, I was accepted to the medical
13 scientist training program, which is an MD Ph.D.
14 program sponsored by the National Institute of Health,
15 and I got accepted into the program at Duke University,
16 so I went to Duke in Durham, North Carolina and started
17 med school, and in the middle of med school, went and
18 did my graduate training with James Crapo in the
19 graduate program of pathology and biochemistry and got
20 my Ph.D. And once I finished my Ph.D., I went back and
21 finished my medical school. And upon graduating from
22 medical school, I stayed at Duke University and did my
23 pathology residency in anatomical pathology, which is
24 the part of pathology where you do tissue-based
25 diagnosis. So if you do a biopsy of any kind of

ROA_02058

Appendix_02093

1 tissue -- skin, lung, et cetera, we will look at that
2 pathology and make a diagnosis for the clinicians
3 treating the patient so they know what it is.

4 During that time, I also did a pulmonary pathology
5 fellowship with Dr. Victor Roggli at Duke. And I
6 forgot, while I was doing that residency as well, I
7 also did a pulmonary research fellowship. So I did a
8 lot of things at Duke University, so the MD, the Ph.D.,
9 a postdoctoral research fellowship in protein
10 biochemistry and pulmonary pathology, the anatomic
11 pathology residency, and the pulmonary pathology
12 fellowship, so there is a lot of things there.

13 Q Okay. Now, after you finished at Duke, where did
14 you go?

15 A Upon finishing at Duke in 1998, I came to the
16 University of Pittsburgh as an assistant professor in
17 the department of pathology and started my research
18 program as well as my diagnostic clinical practice in
19 the department of pathology here. I started as an
20 assistant professor, as I said, and worked myself up
21 through the ranks to associate professor, and now I'm a
22 full professor in the department of pathology.

23 Q Okay. Do you teach in connection with your rank
24 as a professor of pathology at the University of
25 Pittsburgh?

1 A Yes. I teach in many fashions. I teach in the
2 graduate program. I have my own course that I direct
3 on molecular pathobiology, but I also teach in other
4 graduate courses. I, obviously, also train graduate
5 students in my laboratory who are pursuing their own
6 Ph.D., so I mentor many students in my laboratory on
7 their research projects as well as serve on committees
8 of other research -- other graduate students in other
9 laboratories.

10 I also teach medical students, and I do a lot of
11 teaching for residents in pathology, other fellows in
12 pathology, as well as in other departments as well, and
13 occasionally even do some undergraduate teaching.

14 Q Dr. Oury, in connection with your rank as
15 professor of pathology at Pitt, do you engage in
16 research?

17 A Yes, I do.

18 Q Okay. What kind of research, for example, are you
19 currently undertaking?

20 A So the bulk of my research has been on pulmonary
21 fibrosis with a special emphasis on asbestos-induced
22 pulmonary fibrosis. Currently, my research has sort of
23 been driven by the data, actually have been studying
24 more asthma pathogenesis and, hopefully, get into soon
25 having interventions for allergic asthma.

ROA_02060

Appendix_02095

1 Q Okay. Do you act as a clinician in your role as a
2 professor?

3 A Yes. That's my diagnostic work for which I can't
4 come to this trial. I have to do diagnostic work not
5 this week but the next two weeks.

6 Q Okay. And do you also publish?

7 A I do. I publish mainly on my basic research but
8 also occasionally on some of the clinical studies, the
9 findings that we have.

10 Q Okay. Doctor, I've marked as Exhibit 1 a
11 document. Can you tell the jury what that is?

12 A This is my curriculum vitae or CV.

13 Q And is that like a résumé?

14 A It's like a really big résumé, so we list -- you
15 know, on this, it's got all my training, all my
16 publications, all the people I've mentored, all of the
17 lectures I have given, all the abstracts and posters
18 and talks I've presented at national and international
19 meetings, and any other administrative roles that I had
20 to play as well.

21 Q Doctor, we are here involving a litigation matter.
22 Do you devote some of your time to consulting in
23 medical-legal issues for litigation?

24 A I do.

25 Q About how much of your time is spent doing that?

ROA_02061

Appendix_02096

1 A Anywhere between ten and 20 percent. Probably
2 closer to the ten percent.

3 Q Okay. I would offer Dr. Oury as an expert in
4 anatomic pathology with specialities in pulmonary
5 pathology.

6 Do you have any voir dire at this time,
7 Ms. Farrise?

8 MS. FARRISE: No. I'll reserve. Thanks so much.

9 BY MR. BOUCH:

10 Q Dr. Roggli, what's asbestos?

11 A I'm Dr. Oury, but I did train with Dr. Roggli.

12 Q Let me start again.

13 Dr. Oury, what's asbestos?

14 A Asbestos is actually a commercial term for a group
15 of fibers that have different types of heat and
16 resistance and tensile strengths, but basically these
17 fibers are long and thin and all have silica, and then
18 they have different catines in them so different types
19 of metals like magnesium or iron and things like that.
20 They are, in conjunction with the silica, that make up
21 these fibers.

22 Q Are there different types of fibers?

23 A There are many different types of fibers. The
24 main ones that were used commercially are the
25 serpentine asbestos. That was the predominant one used

ROA_02062

Appendix_02097

1 in the United States, and it's called chrysotile. Some
2 pronounce it chrysotile, but it's a long, thin fiber
3 that actually has more of a curve. It not as straight
4 as the amphiboles, which are the other type of
5 asbestos.

6 And so the other two types of asbestos that were
7 used commercially, predominantly used commercially,
8 were crocidolite and amosite. Those were the
9 amphiboles or the long, straight, very, very straight
10 fibers. They don't have the curve of the chrysotile.
11 And those are the main ones used commercially. And in
12 the U.S., most of that commercial amphibole was
13 amosite, although some crocidolite was used as well.

14 Q Doctor, do these different fibers have different
15 chemical structures?

16 A Yes, they do. The crocidolite has sodium,
17 magnesium, and iron. The amosite is magnesium and
18 iron. They all have the silica, so I'm just going to
19 tell you the other components, and the chrysotile has a
20 magnesium.

21 Q Okay. Amosite, what's the difference?

22 A Amosite has a magnesium and an iron, and its
23 crystalline structure makes for a very straight long,
24 long fiber.

25 Q How about crocidolite?

ROA_02063

Appendix_02098

1 A It has the sodium, magnesium, iron, and silica,
2 and it's also a very straight, long fiber.

3 Q Do these differing fibers have different
4 disease-causing potential?

5 A Yes, they do. So most asbestos-related diseases,
6 and in this case we're talking about a mesothelioma for
7 Mr. Jolly, take decades to occur after initial
8 exposure, so decades usually meaning 30, 40, sometimes
9 50, 60 years from exposure to happen. And, notably,
10 those commercial amphiboles, the amosite and
11 crocidolite, will basically stay in your lung once you
12 breathe them for the rest of your life. They have
13 half-lives of decades. So they stick around. They
14 will go down a little bit with time but very little, so
15 they're going to stick around so they can continue to
16 have their disease-causing potential for the life of
17 the individual that breathes them in.

18 Chrysotile, on the other hand, that magnesium
19 silica has half-lives that have been measured anywhere
20 from several days, so it's gone after you breathe it
21 within several days, to at most maybe a month or two.
22 So with time, there is a dramatic decrease in the
23 amount of chrysotile that goes into your lungs. And
24 not surprisingly, based on the fact that it takes
25 several decades from exposure to get disease, it makes

ROA_02064

Appendix_02099

1 sense that the fibers that stick around actually are
2 the ones that are the most potent at causing the
3 disease, so the amosite and crocidolite are the most
4 potent at causing disease, whereas chrysotile is the
5 weakest and in many of these studies have actually
6 suggested it may have even zero potency in causing the
7 disease in humans.

8 Q Does the size of the fiber have anything to do
9 with its toxicity?

10 A Yes.

11 Q What is that?

12 A So the size of the fiber is very important. So
13 most studies suggest that fibers greater than ten or 20
14 microns in length. So the width is very narrow -- but
15 the diameter is very small but the length is quite
16 long. So ten to 20 microns in length has definitely
17 been shown to be the most potent at causing diseases.
18 And, in general, we consider sort of five microns to be
19 the lower limits, and it's probably ten microns that's
20 really the lower limit that causes disease, but we go
21 down to five microns. So clearly fibers less than five
22 microns in length have very reproducible data to
23 suggest that they are not involved in pathogenesis of
24 these diseases.

25 Q Doctor, are you familiar with the disease

ROA_02065

Appendix_02100

1 mesothelioma?

2 A I am.

3 Q What is it?

4 A So mesothelioma is a type of cancer. It's a tumor
5 that occurs, originates from mesothelial cells, and
6 that's why it's called mesothelioma. And the
7 mesothelial cells are the cells that line the outside
8 of your lung.

9 So if this was a lung and this was your -- maybe.
10 I don't know how to do it. If this was your lung over
11 here, the whole outer surface of your lung is lined by
12 mesothelial cells. And your lung, when it expands,
13 rubs against the chest wall, and the chest wall is
14 also -- that lining is also mesothelial cells. So the
15 mesothelial cells on the chest cavity are on the
16 surface of the lung and the surface of the chest wall.
17 You also have mesothelial cells in your abdominal
18 cavity as well lining the surface of all your organs
19 and the abdominal wall there as well.

20 But in Mr. Jolly's case, the tumor, mesothelioma,
21 occurred in the lung, the pleura. So that's important,
22 the mesothelial cells, the ones on the surface of the
23 lung and the chest wall for this case.

24 Q In your experience, Doctor, have you been involved
25 in the study of the cause of and the treating of the

ROA_02066

1 disease mesothelioma?

2 A Mainly in my clinical work, yes. I have not
3 done -- in my research laboratories I study more on the
4 fibrosis, but yes, I have.

5 Q Okay. In connection with your studies, have you
6 accumulated or had access to significant databases of
7 mesothelioma studies in patients throughout the
8 country?

9 A Yes.

10 Q Give us an example.

11 A So probably one of the biggest databases is at
12 Duke University from my mentor, Dr. Roggli.

13 Q Okay?

14 A And I have quite a big database myself.

15 Q Doctor, what were you asked to do in this case?

16 A So in this case, I was asked to look at medical
17 records and pathology materials from Mr. Jolly to
18 determine, first, did Mr. Jolly have a mesothelioma or
19 not. And if he did have a mesothelioma, would I be
20 able to determine if his mesothelioma was a result of
21 prior asbestos exposure or not.

22 Q Okay. And what did you do?

23 A So I originally got some medical records and
24 pathology, and I looked at it, and the original
25 pathology really was just of the tumor and pleura. I

ROA_02067

Appendix_02102

1 Did not get any lymph nodes or lung. But with that
2 material, I was able to confirm the diagnosis of
3 mesothelioma but was not able to objectively determine
4 whether or not there was any role for asbestos in the
5 disease.

6 Q What type of pathology material were you sent?

7 A I was just sent the pleural tumor.

8 Q Okay. Were these slides or blocks or what --

9 A Just slides.

10 Q Just slides. Okay. And, subsequently, did you
11 receive additional pathology material?

12 A Yes. It was actually from the same specimen of
13 the pathology, but I just didn't get all of that
14 specimen the first time. I got the sections from the
15 lymph nodes. Still in lung, but lymph nodes are a very
16 good place to look to determine if there's elevated
17 asbestos bodies or not.

18 Q And what did you see -- what did you find?

19 A I did find that there were asbestos bodies in the
20 lymph nodes, so now I was able to say, yes, Mr. Jolly's
21 mesothelioma was as a result of a prior asbestos
22 exposure.

23 Q What is an asbestos body?

24 A So, an asbestos body, we talked about the fiber a
25 little bit ago. So the fiber is what will get breathed

ROA_02068

Appendix_02103

1 into someone's lung. And once it gets inhaled in the
2 lung, we have many ways to defend ourselves against
3 particulates and fibers. And one of the ways is
4 through the macrophage's ability to recognize
5 particulates, and they try to sort of eat them and
6 digest them and get rid of them.

7 But with the asbestos fiber -- with chrysotile,
8 they succeed. With the amphiboles, they succeed most
9 of the time, but with the chrysotile, not always. But
10 with the amphiboles, they do not succeed, and they end
11 up, instead of being able to digest them or make them
12 go away, they put on a proteinaceous iron coating,
13 which is believed to markedly decrease the toxicity of
14 the fiber.

15 So when they have that proteinaceous iron coating
16 on the fiber, we can see that under the light
17 microscope as an asbestos body, so we call it an
18 asbestos body because it's no longer just a naked
19 fiber; it has that coating that is very recognizable
20 once you have seen one.

21 Q When you received the second set of pathology
22 materials, about when did you receive them?

23 A That was about a month ago, I think.

24 Q Okay. In June. Okay. Did you detect any
25 asbestos bodies?

ROA_02069

Appendix_02104

1 A Yes. And so the slides that I got, I didn't get
2 any blocks; I just got the slides, and they were iron
3 stained. So I told you that the asbestos fiber, when
4 it gets coated to make a body, gets this iron and
5 protein coating. So the iron stain really makes them
6 sort of show up a littler easier in this section.

7 So we had iron stains or I had iron stains to look
8 at, and I looked at the sections, and I found asbestos
9 bodies in the lymph node sections.

10 Q I'm going to hand you two documents that have been
11 marked Defendant's Exhibit 2 and 3. Doctor, what are
12 those?

13 A These are the pictures of the asbestos bodies I
14 took. There's the really long -- the long one. And,
15 unfortunately, on this picture, it's just not as good
16 as the microscope, but with the microscope, you can
17 actually see the fiber running in the body, but with
18 this picture, it's not going to be possible to do that.

19 Q Go ahead, Doctor. What's the second page?

20 A Okay. The second one is also an asbestos body I
21 saw, looking at the pathology from the patient I was
22 asked to review and to determine if it was caused by --
23 the disease was caused by asbestos. And this is a
24 smaller fragment of it, but you can see the end of the
25 asbestos body, and under the microscope, you can see

ROA_02070

Appendix_02105

1 the fiber. But this one got -- unfortunately, got a
2 little bit cut during this section, but this is clearly
3 a body as well. There's many segments of deposit on
4 the fiber, and you can see the fiber under the
5 microscope, and this would be a second asbestos body.

6 Q Where do these come from, Doctor?

7 A Originally? Right now these are on the
8 iron-stained sections of the slides, so Mr. Jolly would
9 have had to have breathed these in during his lifetime,
10 and then they get into lymphatics and they drain to
11 lymph nodes. And so the only way they get into lymph
12 nodes is if Mr. Jolly had breathed them in at some
13 point.

14 Q Who took these pictures?

15 A I did.

16 Q From your microscope?

17 A Yes.

18 Q Dr. Oury, when you come upon asbestos bodies in
19 your work, are you able to determine what kind of fiber
20 are within those asbestos bodies coated with that iron?

21 A So, looking at them on the light microscope like
22 this, I can't tell you exactly what fiber is in the
23 body. I can tell you what it more likely is, what it
24 very, very, very likely is, but I can't tell you
25 absolutely what it is.

ROA_02071

Appendix_02106

1 If we were able to -- we did not get the paraffin
2 blocks in this. I only got the slides. If we got
3 paraffin blocks and had enough time, we could do
4 digestion studies. And the ones on the slides we won't
5 be able to analyze that way, but from the lymph node
6 there should be more. With those kind of studies, you
7 can do the fiber type analysis.

8 Q Doctor, were you provided with or able to obtain
9 those paraffin blocks?

10 A No.

11 Q Dr. Oury, do you consider the research and the
12 published articles supporting that opinion
13 authoritative?

14 A I'd say that they're very reproducible and
15 reliable.

16 Q Okay. There are cited in your book. Do you
17 consider your book to be an authoritative publication?

18 A I -- I would suppose so. I'm not exactly sure
19 what authoritative means, but --

20 Q Okay.

21 A -- but I would say that our book is a very good,
22 reliable source of information on asbestos and
23 asbestos-related diseases.

24 Q So, Doctor, where are we with Mr. Jolly?

25 A So, with Mr. Jolly, I did -- I was able to

ROA_02072

Appendix_02107

1 diagnose that he has a mesothelioma of the right
2 pleura. And after I got the second set of pathology
3 materials that had those slides of lymph nodes that
4 were iron-stained, I found asbestos bodies, so I was
5 able to confirm that Mr. Jolly has an
6 asbestos-associated mesothelioma.

7 And because asbestos bodies, way, way, way, way,
8 way more likely than not contain commercial amphiboles,
9 I can conclude that his mesothelioma was more likely --
10 way more likely than not -- maybe way times ten to the
11 tenth more likely than not a result of prior exposure
12 to commercial amphiboles such as amosite and
13 crocidolite.

14 Q Doctor, thank you very much. All the opinions you
15 have expressed here this morning are to a reasonable
16 degree of medical certainty more likely than not?

17 A Yes.

18 Q Okay. Thank you, sir. Please answer any
19 questions counsel for the plaintiff may have.

20 A Okay.

21 CROSS-EXAMINATION

22 BY MS. FARRISE:

23 Q Dr. Oury, thanks so much for taking the time.

24 May I borrow the textbook?

25 A Certainly.

ROA_02073

Appendix_02108

1 Q Dr. Oury, you said just a moment ago that you
2 considered the information in the textbook, which you
3 held up and which you are an editor of and author of
4 certain chapters, to be reliable, a good, reliable
5 source on asbestos and asbestos disease. Did I get
6 that correct?

7 A Yes.

8 Q Okay. I want to ask you about a certain page in
9 the book. Let me find it. I don't want to write on
10 Mr. Bouch's book, so I'll just put a little tab here,
11 and if you could read the sentence on Page 310 starting
12 right here where I have put that tab out loud. It
13 starts with "crocidolite."

14 A "Crocidolite was rarely, if ever, used in
15 insulating materials in the USA, and this fiber type
16 was primarily imported into the USA for use in asbestos
17 cement pipes and certain speciality gaskets."

18 Q Okay. Thank you. Also in your book at Page --
19 let me make sure I have it correct here -- 3, I think
20 it's Page 3. Give me a moment. I'm going to put a tab
21 on a section. I would also ask you to read out loud to
22 the jury. It's on Page 3, the left-hand column, the
23 sentence that starts with "the high tensile strength."

24 A "The high tensile strength and extreme thermal
25 stability of crocidolite allow its usage as insulation

ROA_02074

Appendix_02109

1 material at very high temperatures as well as packings
2 and gaskets. The so-called noncommercial amphiboles,
3 actinolite, tremolite" -- I'm sorry. Did you want me
4 to keep reading it? I started another sentence, but --

5 Q Sure. So you can stop at, "The high tensile
6 strength and extreme thermal stability of crocidolite
7 allowed its usage as insulation material at very high
8 temperatures as well as packings and gaskets." That's
9 what your book says, correct?

10 A Yes.

11 Q You can have that back.

12 Now, just a couple questions, really. Your
13 deposition that you gave about your opinions was taken
14 on June 27, 2017, correct?

15 A Okay.

16 Q That's what you recall? Do you need to see the
17 transcript?

18 A I just don't recall the date, but I know it was
19 sometime in June, so that date is as good as any.

20 Q And as part of your work you did in this case, you
21 reviewed some of Mr. Jolly's medical records, correct?

22 A Yes.

23 Q And I think you said a moment ago, but to be
24 clear, you agree and it is your expert opinion that
25 Dale Jolly's diagnosis is mesothelioma of the right

ROA_02075

Appendix_02110

1 pleura, correct?

2 A Yes.

3 Q And the pleura is not the lung, correct?

4 A It's the lining of the lung.

5 Q Right. Mr. Jolly does not have lung cancer,

6 correct?

7 A Correct.

8 Q And you -- can we agree that mesothelioma is a

9 fatal cancer?

10 A Most often, yes.

11 Q So can we agree that Dale Jolly will -- strike

12 that.

13 Can we agree that Dale Jolly's mesothelioma will

14 be a cause of his death?

15 A Assuming he dies of mesothelioma, it will be a

16 cause of his death.

17 Q Is it your expectation in your medical opinion

18 that mesothelioma will kill him in the very near

19 future?

20 A It is -- most people with mesotheliomas will die

21 of that disease, yes.

22 Q And in this case, you were hired or retained as an

23 expert witness to act on behalf of Crosby Valve and

24 Fisher Control valves, correct?

25 A Yes.

ROA_02076

Appendix_02111

1 Q Now, among the work that -- strike that.

2 You've not been provided with any product
3 information about the products that were designed and
4 manufactured and sold by Crosby Valve, correct?

5 A Not to my knowledge.

6 Q You have not been provided with any information
7 about the products that were designed and manufactured
8 and sold by Fisher Control, correct?

9 A Correct.

10 Q You have not been provided for any work you've
11 done in this case with any witness statements of the
12 people who actually were at the Duke Energy plants,
13 correct?

14 A I do not think so.

15 Q And you've not read, as I understand, any
16 deposition of any of the people who worked at Duke,
17 including Mr. Jolly, correct?

18 A That's correct.

19 Q You mentioned that you found, upon your review as
20 you've described, asbestos bodies, the asbestos fiber
21 with a coating, correct?

22 A Yes.

23 Q And to clarify, you found potentially at most two
24 asbestos bodies, correct?

25 A Yes. I found two asbestos bodies.

ROA_02077

Appendix_02112

1 Q And so what you showed the photograph of is the
2 totality or that's completely everything you found,
3 correct?

4 A Correct.

5 Q And that tissue where you found those asbestos
6 bodies, it did not come from Mr. Jolly's lung, correct?

7 A It came from the lymph nodes.

8 Q Right. And so the fact that the asbestos bodies,
9 the asbestos fibers with the coatings, were in the
10 samples of the lymph node, tell you that those fibers
11 did leave the lung, correct?

12 A Yes.

13 Q Now, you didn't prepare any kind of a written
14 report in this case, correct?

15 A Correct.

16 Q And as I understand it, you prepare a written
17 report when the lawyers who have hired you ask you to
18 do that, correct?

19 A When I'm asked to do a report, I do a report, yes.

20 Q Okay. Dr. Oury, lastly, we agree that in your
21 medical opinion with a reasonable degree of medical
22 certainty, that in Mr. Jolly's case in particular,
23 asbestos was the cause of his pleural mesothelioma,
24 correct?

25 A Yes. Asbestos, amphibole asbestos, was the cause

ROA_02078

Appendix_02113

1 of his mesothelioma. I agree with you.

2 Q And as I understand it, you do not -- well, let me
3 ask you -- strike that.

4 Let me ask you to turn to Page 30 of your prior
5 deposition. And starting at Line 7 to Line 10, do you
6 see that?

7 A Yes.

8 Q Okay. And the question there was, "And it's your
9 opinion that Mr. Jolly's mesothelioma was caused by
10 asbestos exposure, correct?"

11 Your answer, "This is what it appears to be."

12 Did I read that correctly?

13 A Yes.

14 Q And it's also accurate, Dr. Oury, that you do not
15 know where Mr. Jolly was exposed or the circumstances
16 of his exposure, as you haven't been provided any of
17 that type of information in this case, correct?

18 A Correct.

19 Q Thank you. That's all I have.

20 (Video ended.)

21 MR. BOUCH: Your Honor, that concludes the reading
22 of Dr. Oury. I would move into evidence the things
23 identified in his deposition -- Exhibit 56, his CV;
24 Exhibit 154 and 153, the microphotographs.

25 THE COURT: Admitted without objection.

ROA_02079

1 (WHEREUPON, Defendants' Exhibit Number 56 was
2 admitted into evidence.)

3 (WHEREUPON, Defendants' Exhibit Numbers 153 and
4 154 were admitted into evidence.)

5 MR. BOUCH: Thank you, Your Honor.

6 And with that, Your Honor, Crosby Valve and Fisher
7 Scientific rests.

8 THE COURT: Defendant rests. All right.

9 Plaintiff, any reply?

10 MS. McVEY: No, ma'am.

11 THE COURT: Ladies and gentlemen of the jury, the
12 evidence has been completed in this case. Now, let me
13 explain to you what will now happen.

14 Two things remain to be done in the case. One is
15 for you to hear the closing arguments of each of the
16 attorneys on behalf of their clients. And the
17 plaintiff, having the burden of proof, will begin with
18 a closing statement, and then defendants will present
19 the closing statement. And I would estimate that each
20 of these statements would likely be about one hour
21 apiece sort of framework or less.

22 And then after that, it will be my duty to charge
23 you about the law. As you may recall when you began
24 the case, I explained that you and you alone are the
25 sole judges of the facts in this case. And I have the

ROA_02080

Appendix_02115

1 responsibility and obligation to give you the law and
2 tell you the applicable law. It's going to take a
3 little while for me to meet with the parties here and
4 develop my charge on the law. And it's going to take
5 them about two hours, I would estimate, somewhere in
6 that ballpark, to argue the case to you.

7 And so here is what I'm going to do. Rather than
8 keep you here this afternoon, with the case not coming
9 into your hands until potentially well after 5 o'clock,
10 my concept is to let you go now and let me work with
11 the lawyers to iron out all the things we need to iron
12 out with respect to the charge that I will give, and
13 then we'll start off fresh as a daisy tomorrow morning
14 with the closing arguments of counsel for the two
15 parties and then the law given to you and see if we
16 can't move on forward to your deliberations tomorrow.
17 That would be the general plan for how we're going to
18 operate.

19 So with that having been said, Madam Forelady, any
20 questions that you think you have?

21 JUROR: Just generally what to say whenever the
22 time comes.

23 THE COURT: We'll give you complete instructions
24 about the form of the verdict and how all of that is to
25 be handled by you, and that, of course, will be part of

ROA_02081

Appendix_02116

1 what I explain to you when I explain the law to you so
2 you won't be in there floundering without some
3 instruction on how to proceed.

4 JUROR: Okay. Thank you.

5 THE COURT: I just believe -- some judges like to
6 keep you here as long as it takes into the night, but I
7 believe we'd all take a fresher approach to this thing
8 if we just start out fresh tomorrow morning, and I
9 think we can proceed in a very orderly sort of way to
10 get the case into your hands for you to contemplate and
11 arrive at your verdict.

12 So have a wonderful evening. I continue to just
13 be amazed at the kind of seriousness and attention that
14 you have paid and consideration you have given to both
15 sides and to all parties in this controversy. Thank
16 you so much, and I'll see you tomorrow morning. And I
17 believe I can go with 9:30 tomorrow. That will still
18 give us plenty of time to deliberate this case in a
19 fair and complete sort of way. So I'll see you at 9:30
20 tomorrow.

21 (WHEREUPON, the jury exited open court at
22 3:07 p.m.)

23 THE COURT: All right. Ladies and gentlemen,
24 we've got several things to do. Please have a seat,
25 and let's decide how we're going to move through all

ROA_02082

Appendix_02117

1 this.

2 I've got on my list of things to do, of course,
3 the charges, the form of the verdict, and I want to
4 spend a little bit of time being sure that we've got
5 all the exhibits properly in the hands of the court
6 reporter.

7 So what I would propose we do first -- let me ask
8 you all this. Is exhibits something we can knock out
9 pretty quickly, or how do you feel about that? I don't
10 know what the status of it is.

11 Diane, how are you doing on exhibits? Do you
12 think you have everything?

13 THE REPORTER: I think I do. I just need to go
14 through it one more time to make sure.

15 THE COURT: If she doesn't have any dilemmas, then
16 I would put that at the end of the road and let us go
17 through the things that we all have to do, and then you
18 parties can get with Diane. If there get to be
19 dilemmas about that, of course, I can resolve them.

20 Any thoughts, Tim?

21 MR. BOUCH: Your Honor, the only thing that I
22 happened to notice is one of the exhibits is marked,
23 which is a deposition transcript, and I don't believe
24 deposition transcripts go back.

25 THE COURT: That's correct. You all just filter

ROA_02083

Appendix_02118

1 through there and pull out that kind of stuff. I think
2 we all got in mind of what goes from the standpoint of
3 transcripts. I think we all understand what was in as
4 demonstrative evidence that won't go back. Just be
5 sure we sort through that so we won't have any
6 scrambling when we put the case to the jury so we'll
7 know exactly what we'll be taking back to them.

8 All right. Well, let's get right to it on the
9 charges.

10 MS. McVEY: Your Honor, before we do charges, I
11 need to move for directed verdict on a couple of
12 things.

13 THE COURT: Oh, yes, you certainly do, and so does
14 the defendant. I didn't mean to exclude that at all.

15 Let me say something as you make your motions for
16 directed verdict. Can y'all be at ease for about five
17 minutes before she makes those motions and let me get
18 my notes? Thanks.

19 (Pause in proceedings.)

20 MS. McVEY: Your Honor, we had a directed verdict
21 motion on a couple of affirmative defenses, the first
22 one being the sophisticated user defense.

23 Your Honor, as *Lawing* said, I'm not sure South
24 Carolina actually recognizes sophisticated user
25 defense. But in this case, assuming that it does, the

ROA_02084

Appendix_02119

1 defendants have failed to show that it's applicable
2 under the facts of this case. And just like in *Lawing*,
3 the court held that the question of the adequacy of the
4 labeling on the sodium bromate does not require
5 sophisticated user analysis.

6 And there, as you will recall well, the employer
7 was aware that the sodium bromate was dangerous, but
8 the defendant product supplier had failed to put
9 visible labels on the product indicating that it
10 contained the explosive.

11 The situation in this case is similar in that Duke
12 may have known generally that asbestos was dangerous or
13 hazardous, but neither Duke nor Jolly knew that friable
14 asbestos was released from the defendants' asbestos
15 gaskets and packing because those products contained no
16 warning that it did so.

17 So, Your Honor, I don't think it applies under the
18 facts in this case as it does in *Lawing*. But assume
19 you think that maybe it does, then they have to meet a
20 test under our case law.

21 And the first test is did they, they, being Fisher
22 or Crosby, provide adequate warnings on the product to
23 its immediate purchaser. In other words, did they give
24 a warning to Duke that this product contained asbestos
25 and is hazardous. We know that's true. They never

ROA_02085

Appendix_02120

1 warned in this case.

2 Or did they sell to a sophisticated purchaser that
3 knew or is aware or should be aware of the specific
4 danger. And in this case, they keep saying Duke is
5 sophisticated. And Duke is a big company, and it's
6 sophisticated about making energy and nuclear power,
7 but it's clearly not sophisticated about what came in
8 valves.

9 And, in fact, there's no evidence that Duke was
10 aware about the specific dangers of asbestos gaskets
11 and packing. And we know that, Your Honor, because one
12 of the defendants' exhibits, Crosby Exhibit 136, and
13 it's this chart that we saw over and over again, and it
14 talks about what Duke knew about asbestos.

15 And Duke thought, because it was not warned, that
16 the gaskets and packing were not dangerous because they
17 were bonded. We know that's not true. And they have
18 to think that Duke is going to warn. And Crosby and
19 Fisher have to reasonably rely on Duke to convey the
20 warning to Mr. Jolly. There's been no evidence that
21 they could reasonably rely on Duke to warn Dale Jolly
22 about the hazards of asbestos in the gaskets and
23 packing.

24 What they have shown is that Duke was aware that
25 asbestos insulation was dangerous, and they had taken

ROA_02086

Appendix_02121

1 steps -- Dale Jolly testified to the steps they had
2 taken to warning about the dangers of asbestos
3 insulation, and Dale Jolly heeded those warnings. What
4 Dale nor Duke knew was that the dangers with the
5 asbestos gaskets and packing were real.

6 Your Honor, so they don't meet any of these tests
7 under here. And the biggest point of all this is, to
8 this day, Crosby and Fisher say it didn't need a
9 warning. It's not dangerous. So if they say that, how
10 could they expect Duke to warn. And that's what this
11 defense requires.

12 THE COURT: All right. Mr. McLeod.

13 MR. McLEOD: Your Honor, we strongly disagree that
14 the defense sophisticated user, they are entitled to a
15 directed verdict on sophisticated user.

16 There's no question that Duke was a sophisticated
17 user. Mr. Jolly himself testified to it. Mr. Jolly
18 himself testified he knew the difference between
19 asbestos gaskets and cork gaskets and all the different
20 kinds of gaskets.

21 We know from the records that Duke itself was
22 ordering asbestos gaskets. They listed the
23 requirement. They specifically requested the asbestos
24 gaskets to be in these products, and the evidence has
25 fully demonstrated that, at least by the early 1970s,

1 that Duke had policies in place to keep its employees
2 safe from asbestos. They had policies and procedures
3 in place. They knew about the hazards of asbestos, and
4 that's exactly what the sophisticated user defense is
5 all about. This is the perfect case for a
6 sophisticated user defense.

7 The *Lawing* case, the facts in the *Lawing* case are
8 distinguishable. In that case, as you well know
9 because you authored the opinion, was about the
10 labeling on this case and whether or not the employee
11 knew that the product was dangerous.

12 That's not what we have here. Mr. Jolly testified
13 that he knew about the difference between asbestos
14 gaskets and cork gaskets, and he had testified that
15 there were warnings all over Duke plants. He knew all
16 about the warnings of asbestos. And, more importantly,
17 Duke knew about it. They had a sophisticated program
18 in place.

19 Now, there's going to be a question of fact as to
20 whether or not Duke employed their policies, but as to
21 whether or not they were a sophisticated user that we
22 were entitled to rely on, both of our corporate
23 representatives testified that Duke was, indeed, a
24 sophisticated user who was the customer requesting the
25 asbestos products.

ROA_02088

Appendix_02123

1 Now, I would submit that this is -- if there is a
2 case for a sophisticated user, this is it. I mean,
3 this is a nuclear -- the facts are overwhelmingly that
4 this was a sophisticated user.

5 THE COURT: All right.

6 Ms. McVey, anything in response?

7 MS. McVEY: Just briefly. They have not produced
8 one piece of paper that says that Duke was aware of the
9 specific -- which the case law says -- specific danger
10 associated with the gaskets and packing. That's what
11 it requires.

12 And for the defendant to stand up and say, "They
13 should have known it was dangerous when we don't even
14 think it's dangerous," that makes no sense.

15 MR. McLEOD: I would further say that the gaskets
16 and packing, when we shipped them to Duke, were not
17 necessarily in a dangerous situation. It was Duke that
18 made it that way.

19 THE COURT: I am -- here is what I'm worried
20 about, Mr. McLeod. The claim in this case is not one
21 that can be restricted to the argument Duke made it
22 dangerous.

23 This is a contention that the design of these
24 products from Fisher and Crosby was such that packing
25 and gasketing was required to use these products in any

ROA_02089

Appendix_02124

1 setting, and particularly in Duke's setting, and they
2 were designed in such a way that they could not -- that
3 gasketing had to be used. Some of the gasketing was
4 internal gasketing -- I mean, some of the packing and
5 some of the gasketing was internal and was put into
6 these valves before they left the manufacturer. Many
7 of these gaskets were gaskets that went on the flange
8 of the metal of the valves that were supplied by the
9 two valve manufacturers.

10 The contention with regard to that is that their
11 design, and they knew it, was such that you had to have
12 a gasket, and the gasket had to withstand high
13 temperatures and they, in some cases, supplied with the
14 very first initial installation. And in many, many
15 cases both companies repeatedly supplied, by ordering
16 replacement parts, gasketing materials, and in some
17 cases, packing materials which contained asbestos.

18 Your witnesses contend that that's not dangerous
19 because all the gaskets and all the packing and all the
20 rings and so forth that contained asbestos were sent
21 from the factory in a bonded form or an encapsulated,
22 in some cases, form.

23 What they contend is that you knew, as a part of
24 your design of these gaskets, that they wouldn't last
25 forever and that they would have to be removed and

ROA_02090

Appendix_02125

1 replaced in regular servicing of the valves in this
2 piping, and that you further knew that part of the
3 servicing would include cracking open the flanges and
4 removing the gasketing materials, and that you knew
5 that that process would unencapsulate those flanges and
6 turn them into dust in some cases because you grind
7 them off, and if they contained asbestos, that asbestos
8 would be liberated and put into the atmosphere, as it
9 was, and breathed by the workers and the inspectors, as
10 it was.

11 They contend that you knew all that as part of the
12 design of this equipment and the supply of gasketing
13 and packing materials as replacement parts for this
14 equipment. And that is why they contend that Duke was
15 not a sophisticated user or that that doctrine is
16 simply not applicable here.

17 Engelhard, in the *Lawing vs. Univar* case, well
18 knew that sodium bromate was an explosive. But what
19 the problem was is that the suppliers, the
20 manufacturer, chose to have a supplier over in China
21 who put the labeling over on one side, and depending on
22 how you then stack and shrinkwrap that material, it
23 came directly from the manufacturer with no further
24 inspection by anybody else to Engelhard and then was
25 put into their storage area of their plant and pulled

ROA_02091

Appendix_02126

1 out and bags stacked, and that no labeling or warning
2 had been given to Engelhard, and, therefore, not to its
3 employees, that would prevent the mess-up that occurred
4 when they left stacks of sodium bromate in the
5 production hall. And when they took the plant down,
6 they were welding pipes above it, and a welding flash
7 came off and ignited it.

8 We didn't regard that, the court did not, as a
9 sophisticated user situation but rather a labeling
10 situation, and we did not regard Engelhard's status as
11 a sophisticated company in a sophisticated chemical
12 business as something that required the application of
13 the sophisticated user doctrine because the whole
14 complaint was a failure on the part of the manufacturer
15 and supplier to inform them that this encapsulation, if
16 it was disturbed by grinding and removing the flange
17 gaskets and packing in the way it was done, would put
18 into the ambient air asbestos.

19 Now, y'all don't even today say that that is a
20 dangerous operation, or if it is, you just simply say
21 you're not responsible for it. So that's why I am
22 struggling with what to do about sophisticated user.

23 Help me out there. I don't want to exclude
24 something I ought to include, but I'm troubled by the
25 logic of it.

ROA_02092

Appendix_02127

1 MR. McLEOD: Thank you, Your Honor. There's
2 several distinct differences here.

3 In *Lawing*, the product was combustible as shipped.
4 Okay. In this case, the gaskets were not. Okay. They
5 were not. Duke was in charge of safety at the plant,
6 as the documents well show, that they were in charge of
7 their employees' safety; they are the ones that ordered
8 the asbestos; they're the ones that knew what they were
9 going to be doing with our products. We did not ship
10 those flange gaskets; that is not in the record. Our
11 internal gaskets perhaps, but the evidence --

12 THE COURT: You talking about we meaning, Crosby?

13 MR. McLEOD: The defendants, Crosby and Fisher.

14 THE COURT: Are you saying Crosby and Fisher? If
15 you're saying Crosby and Fisher did not ship those
16 gaskets --

17 MR. McLEOD: The flanges.

18 THE COURT: -- I think there's plenty in the
19 record for me not to buy that argument.

20 MR. McLEOD: As shipped, they were not combustible
21 like the --

22 THE COURT: As shipped, the averment is -- and,
23 again, we have to let the jury see if they agree with
24 this -- but the averment made and at least enough
25 evidence put in to put this question to the jury, the

ROA_02093

Appendix_02128

1 averment is that it is a strict liability defective
2 design to ever make gasketing materials that are going
3 to be subjected to such intense heat on the flanges
4 that you designed to have to have a buffer of a
5 gasketing nature, it is a defective design and
6 unreasonably dangerous in its form as it leaves the
7 plant if it is made out of asbestos because in the use
8 of it, everybody knows that you must at some point
9 replace the gaskets, and the only way to get them off
10 is to chip them off or grind them off, and that puts
11 completely dangerous, unacceptable-to-be-used product,
12 asbestos, into the atmosphere. That's the averment.

13 MR. McLEOD: Which Duke was well aware. This is
14 1979. They were charged with the safety of their
15 employees dating back to 1972. This jury has seen
16 document after document after document that Duke knew
17 and even had policies in place to protect their workers
18 from the hazards of asbestos and regard -- first of
19 all, it sounds like a lot of what we're talking about
20 is questions of fact. The *Lawing* case, the product as
21 shipped was combustible.

22 THE COURT: And this product as shipped contained
23 asbestos, which they contend is something that should
24 never be used in gaskets because it's so inherently
25 dangerous, that when it's used in a product that

ROA_02094

1 everybody knows how it's going to be used, it's
2 something that has to be replaced, it's too dangerous
3 to have in the workplace, and your expert says to this
4 good day she thinks this material is not dangerous.

5 MR. McLEOD: That has to do with the strict
6 liability claim, not whether or not we can rely on Duke
7 Power, who's in charge of the nuclear power plant as a
8 sophisticated user, to use the proper mechanisms when
9 working on the products.

10 We're talking about -- whether or not the jury
11 finds us strictly liable has nothing to do with whether
12 or not we are entitled to rely on Duke Energy to follow
13 through with the policies that they were required to
14 follow through with.

15 MR. REID: Your Honor, may I?

16 THE COURT: Yes, Mr. Reid, please.

17 MR. REID: Thank you. I just want to back up for
18 a moment because certainly, at worst for us, the
19 evidence is disputed; I actually think it's
20 uncontradicted that both companies put in their valves
21 what Duke requested.

22 Mr. Dumistra was very clear on that. Mr. Martin
23 was very clear on that. So I don't think there's
24 any -- one certainly can't characterize this as a case
25 where evidence or that where asbestos was required. It

ROA_02095

Appendix_02130

1 was actually ordered by Duke. Secondly --

2 THE COURT: Well, I will just interrupt you there
3 and say, Mr. Reid, that may be a factual dispute. The
4 evidence may not all be one way, but their evidence is
5 that Duke designs were not something they dreamed up by
6 themselves. They looked at your catalogs, and they
7 made selections of materials based on what you all had
8 to offer, and that asbestos gasketing was the product
9 that was recommended.

10 In the early stages there's no contention by y'all
11 that the recommendation was for the places in which
12 asbestos gasketing was used. "Hey, you've got a
13 choice. You can use asbestos gasketing, or you can use
14 something else," as I understand it. That came to pass
15 at a certain point in time but didn't start out that
16 way.

17 MR. REID: Well, certainly when it's their motion
18 for directed verdict, all the evidence has to be looked
19 at in the light most favorable to us.

20 THE COURT: No question.

21 MR. REID: They had a 1965 catalog. There's no
22 evidence that anything that either company sold -- in
23 fact, it's Fisher's catalog, not Crosby's, but there's
24 no evidence that that 1965 catalog gave rise to
25 anything that was sold by Fisher.

ROA_02096

Appendix_02131

1 Furthermore, I just want to set the record
2 straight because I think it's uncontradicted in this
3 record that we did not provide flange gaskets, had
4 nothing to do with them. For instance, Mr. Martin was
5 clear the valve company's responsibility started at the
6 inlet flange, ended at the outlet flange, did not --

7 THE COURT: What do you do with the ordering of
8 replacement parts? They were ordered directly from
9 Crosby Valve. They were ordered directly from Fisher.

10 MR. REID: Those were all internal parts. There's
11 no evidence that there was any flange gaskets or any
12 external parts ordered from either company.

13 THE COURT: My memory is quite different. My
14 memory is quite different.

15 MR. REID: Well, I'll respectfully disagree with
16 the court.

17 THE COURT: All right.

18 MR. REID: If that's your understanding, I
19 understand.

20 Furthermore, Duke was in charge of its work
21 practices. When these -- and I'll contrast this with
22 the *Lawing* case. In *Lawing*, the products were
23 combustible as shipped. The problem was there was no
24 label. The plaintiffs in that case acknowledged they
25 would have heeded a warning had a label been on the

ROA_02097

Appendix_02132

1 bag, would not have done their work near the bag, and
2 that gave rise to the problem.

3 There's nothing analogous to that in this case.
4 Our valves as shipped were not in a dangerous
5 condition. Duke had practices, when they got the
6 valves, that called for certain methods to be taken
7 such as wetting, such as other -- using tools that were
8 ventilated rather than just having electric brushes
9 that would deposit the material into the air, so I
10 think that's very different, and that is Duke's
11 behavior.

12 I think we satisfy or at least there are disputed
13 facts that allow us to argue that the two elements are
14 in existence here.

15 I'm just going to find the elements in our
16 directed verdict brief, Page 6.

17 To fill one element, we have to identify that we
18 sold to a sophisticated purchaser that is or should be
19 aware of the specific danger. Duke had -- there's no
20 showing on this record that we knew anything that Duke
21 didn't know and that we reasonably relied on the
22 purchaser.

23 Their Exhibits 134 to 137 demonstrate that we
24 could rely on Duke to take proper action. Those
25 documents not only showed the warnings that Duke had,

ROA_02098

Appendix_02133

1 but it also showed the work practices that Duke
2 employed at its own facility to protect its workers.
3 So in those circumstances, I think the sophisticated
4 user or sophisticated intermediary doctrine absolutely
5 applies.

6 We did in our brief, Your Honor, spell out the
7 differences between what we think is in this case and
8 what's in the *Lawing* case. And, again, I just want to
9 emphasize that, you know, that plaintiff in *Lawing* was
10 in a very different circumstance and said he would have
11 heeded a warning had a label been on the package there.

12 THE COURT: Well, I am still having a lot of
13 trouble grasping the notion that you take the position
14 that this material does not require a warning, period,
15 but then you say Duke -- obviously, it contained
16 material that turns out to be very dangerous and caused
17 mesothelioma. And what you say is, "Well, gosh, if
18 that's so, Duke is the one that should have done the
19 warning, not us, even though we're the ones who
20 supplied from others these asbestos-containing
21 materials."

22 MR. REID: The circumstances where they're saying
23 it was dangerous, you should have known, I don't think
24 they're in any position to say that Duke --

25 THE COURT: What I get out of the asbestos

ROA_02099

Appendix_02134

1 document, the safety memo that they projected and that
2 we spent so much time looking at, is a lot of interest
3 in asbestos-containing insulation. And I want to talk
4 about that some more. And that is even what your lady
5 that just left the stand, that's all her thing. It's
6 all asbestos-containing insulation. Nothing bad
7 happened with these gaskets. They're perfectly safe.
8 Asbestos never gets out of them, so forth and so on.

9 That's essentially the case y'all have projected
10 is that all the problems he got must have come from
11 insulation. And, certainly, Duke's warning system
12 certainly included information about asbestos
13 insulation, but we're concentrating on these flange
14 gaskets and these packing materials, and that's where I
15 don't see anybody doing any warning during the time
16 that Mr. Jolly was around this material.

17 MR. REID: Well --

18 MR. McLEOD: That's not because they weren't
19 supposed to, though, Your Honor. As they made --

20 THE COURT: I mean, y'all just disavow any
21 responsibility for the flange gasket. First of all,
22 you take the position that I think is really stretching
23 things, "Oh, we never supplied any of the stuff." You
24 did supply it. They ordered this material from y'all
25 repeatedly. And POs have been put upon the screen that

ROA_02100

Appendix_02135

1 show that. So, you know, there is plenty of proof to
2 go to the jury that you all supplied material that
3 contained asbestos.

4 MR. McLEOD: Your Honor, just one more thing.
5 Your Honor, their entire case, their expert's entire
6 case, their entire case is built upon the fact that
7 there is no difference between asbestos types or
8 anything; asbestos is bad; asbestos is bad. The court
9 cannot then make us have a Hobson's choice that now,
10 all of a sudden, they're only talking about insulation
11 in these manuals.

12 The manuals just say asbestos. And they talk
13 about gaskets. In fact, they say, the 1985 one, in
14 fact, the only asbestos used at Duke now, it has to do
15 with electrical packing and gaskets and packing. And
16 so they can -- you know, their whole case is based on
17 the fact that all asbestos is the same; asbestos is
18 bad; asbestos is bad, and it's inherently unfair, in my
19 opinion, for the court to now turn around and force us
20 into a situation where we're trying to say our products
21 are safe, but then we can't argue that Duke was
22 responsible for asbestos when they have argued to the
23 jury all along that all of these regulations are just
24 about asbestos because that's what the regulations say.

25 THE COURT: I got it, Mr. McLeod. I don't think

ROA_02101

Appendix_02136

1 we need to repeat that.

2 All right. One more time, Ms. McVey.

3 MS. McVEY: I'll be really brief. But the heart
4 of the sophisticated user defense is that we don't have
5 to warn about our dangerous product because the
6 employer, Duke, is going to warn. We have to -- in
7 order to absolve ourselves of that responsibility of
8 warning about our hazardous product, and we have
9 different choices about whether it's hazardous or not,
10 but it is. It contains asbestos packing and gasketing
11 that has to be replaced, that has flanges that have a
12 gasket in it that have to be replaced.

13 In order to take the burden off of me to warn
14 about my inherently dangerous product, I have to know
15 or have evidence that Duke is going to do that. Not
16 about asbestos in general, but about the asbestos in my
17 product, the gaskets and packing, and they have not one
18 shred of evidence that Duke how that.

19 And this exhibit they put up over and over again
20 shows that Duke clearly didn't understand it or know
21 it. That's what the sophisticated user defense
22 requires for them to do, is to show that Duke was going
23 to warn.

24 Now, how they're going to show that, they can't
25 because they say it didn't need a warning. Today,

ROA_02102

Appendix_02137

1 2017, if they were still selling it, they would say it
2 doesn't need a warning.

3 MR. BOUCH: Your Honor, that's what the
4 government's position is, they don't need a warning.

5 MS. McVEY: How do you expect Duke to do it --

6 THE COURT: I'm not going to be triple-teamed
7 here, Mr. Bouch.

8 Here's what I think. First of all, sophisticated
9 user is not going to help with respect to a labeling
10 system. *Univar* teaches us that.

11 Second thing is sophisticated user is a defense to
12 the non-strict liability causes. The strict liability
13 causes are in a different category. The sophisticated
14 user is a defense to the negligence cause, as I
15 understand it.

16 I am torn about whether -- I think there's very
17 little to justify looking at this thing in any other
18 way than as a labeling and warning issue in terms of
19 sophisticated user because sophisticated user is not
20 something that deals with design or other things that
21 go in other products causes of action. It's strictly a
22 question of dealing with the labeling and warning,
23 failure to warn, the negligence causes.

24 And I'm a little influenced by the fact that Gary
25 Hill let the sophisticated user defense -- he charged

ROA_02103

Appendix_02138

1 on it.

2 MS. McVEY: Different case, though, and different
3 facts.

4 THE COURT: Well, it's not all that different from
5 this case.

6 MS. McVEY: But, Judge, it's an affirmative
7 defense. They have to come forth with evidence that
8 Duke knew about the dangers of gaskets and packing.

9 THE COURT: Oh, yeah. I mean, that's the part --

10 MS. McVEY: They don't have any.

11 THE COURT: Well, that's the part I have been
12 discussing with them. They deny that it's dangerous.
13 And they put up witnesses to say in its bonded form,
14 it's not dangerous, and then they also say but if it is
15 dangerous, it's all on Duke, not on us.

16 MS. McVEY: Right.

17 THE COURT: That's essentially what you're saying,
18 Mr. McLeod. It's all on Duke, is really your thing.
19 Duke is a sophisticated user, and when we say
20 sophisticated user and say Duke is a sophisticated
21 user, then all negligence goes out the window. It's
22 completely their responsibility, not ours. That's
23 essentially what you're saying, isn't it?

24 MR. McLEOD: Yeah.

25 THE COURT: I don't think *Univar* says that. The

ROA_02104

Appendix_02139

1 case very specifically says that -- and Justice
2 Kittredge wrote the piece on rehearing. It
3 specifically says that it's an adequacy of labeling
4 piece of negligence. These other negligences have to
5 do with design. These other torts have to do with the
6 design and the inherently dangerous nature of the
7 product as they claim it is. They don't have to do
8 with this labeling issue that you've got and knowledge
9 issue. And, you know I just -- I am torn about the
10 notion that you can say that, even today, it's not
11 dangerous.

12 MR. BOUCH: That's exactly what the expert said.

13 THE COURT: That's fine. If that's your position,
14 then the jury is going to have to decide, is this stuff
15 dangerous or is it not. That's what the jury in *Lawing*
16 had to decide. And if it is and you didn't label it
17 adequately, then --

18 MR. McLEOD: Your Honor.

19 THE COURT: -- bippity boppity boo. I mean, it's
20 not a question of --

21 MS. McVEY: That's right.

22 THE COURT: Things are inherently dangerous for a
23 lot of reasons. One of them is that they blow up. But
24 another is if you use them in the ordinary course of
25 business like they're intended to be used, and that

ROA_02105

Appendix_02140

1 involves changing out the gaskets every now and then,
2 that the stuff will get in the air and cause injury.

3 MR. McLEOD: That's exactly the point. We don't
4 think our products are dangerous the way they're
5 intended to be used; however, there's evidence in this
6 record that Duke allowed its employees to do things to
7 these products that were illegal, and they knew better,
8 they weren't allowed to do it, and that's what makes
9 them a sophisticated user. They knew. They were
10 charged with the responsibility of their employees, to
11 keep them safe.

12 MS. McVEY: Your Honor, Fisher's book does say
13 they can use a wire brush.

14 THE COURT: Here is what the supreme court says
15 about this: "The sophisticated user doctrine is
16 typically applied as a defense to relieve the supplier
17 of liability for failure to warn where it is difficult
18 or even impossible for the supplier to meet its duty to
19 warn the end user of the dangers associated with the
20 use of the product, and the supplier, therefore, relies
21 on the intermediary or the employer to warn of the
22 danger." Here it is not impossible at all to warn.
23 You can stamp it on the products; you can put it on the
24 box they're shipped in. They are all kinds of ways --

25 MS. McVEY: Put it in the manual which our guys

ROA_02106

Appendix_02141

1 testified they used.

2 THE COURT: Yeah. I mean, that's what the --
3 that's what the case says.

4 I mean, are you saying that it was difficult to
5 place -- did it place an impossibility on you to warn,
6 or are you just saying you didn't have to warn?

7 See, sophisticated user entails the notion that
8 there is a product out there that is so dangerous that
9 there has to be a warning attached to it. You say that
10 the product does not have to have any warning because
11 it's not dangerous. That's where I'm having such a
12 trouble.

13 MR. REID: Well, Your Honor, one thing is clear.
14 That is, I mean, there's no evidence that either Crosby
15 or Fisher had any role in the design of Duke's system.
16 As Mr. Martin said, Duke has the best and the
17 brightest. This was a very sophisticated facility. We
18 sold them our valves. Where they put them, what they
19 did with them, what work practices --

20 THE COURT: That's bare metal. We have been over
21 that a million times. That's the contention that you
22 can design a product, and the components that make it
23 work are not your responsibility. And one of the
24 components that makes it work is packing, and another
25 that makes it work is gasketing between the flanges.

ROA_02107

Appendix_02142

1 And it can't be used without those two products being
2 there. And the fuss is about those products containing
3 asbestos.

4 You obtained those products from suppliers to you,
5 and you transmitted those products to Duke, and they
6 ordered those products and designed those products out
7 of catalogs and valve manuals that specified at this
8 time in design that at high temperature, you had
9 asbestos gasketing. Later on you switched over and you
10 started using Teflon and some other things that didn't
11 have asbestos, and you finally went asbestos-free.

12 MR. McLEOD: Teflon was available way before
13 Mr. Garvin -- excuse me, Mr. Jolly was there. Duke
14 specified these products, Your Honor.

15 THE COURT: Well, Duke specified what you said was
16 available for use, but the big thing is this: You
17 supplied the asbestos product.

18 MR. REID: Your Honor, this record permits a jury
19 to conclude that Duke had very sophisticated engineers,
20 that they told us what they wanted. There's no
21 evidence that Duke personnel looked at our catalogs.
22 There is evidence, especially developed by Mr. Martin
23 of Crosby, that there was up to a two-year process of
24 the exchange of drawings --

25 THE COURT: Let me tell you why all that makes no

ROA_02108

Appendix_02143

1 difference. Engelhard knew what it was ordering. It
2 ordered sodium bromate, which is an explosive, from its
3 supplier. That case was -- that Engelhard case was
4 about the supplier failing to label it in such a way
5 that it told not just Engelhard but its employees,
6 "Danger, danger. This is an explosive."

7 And the same situation is here. Sophisticated
8 user assumes that you've got a product that is a
9 dangerous product, and the question is whether it's so
10 hard for you to label it that you pass that along to
11 the sophisticated user or not. You don't answer the
12 question by saying if they're sophisticated, we can
13 send them the most dangerous thing over there in the
14 world, and we don't have to label it at all because
15 they're sophisticated. That's not the sophisticated
16 user defense.

17 Sophisticated user defense is a defense that says,
18 yes, they're using a dangerous product. We are
19 supplying a dangerous product, but it is not possible
20 for us to warn the worker bee that's going to use it.
21 And for that reason the sophisticated user doctrine
22 requires that the employer do the warning or the
23 sophisticated intermediary. That's what this doctrine
24 says.

25 MR. REID: Well, two things, Your Honor -

ROA_02109

Appendix_02144

1 THE COURT: And y'all have yet to address for me
2 why it wouldn't be pretty easy for y'all to label this
3 material.

4 MR. REID: Well, let me, first of all, distinguish
5 *Lawing*. That's a case where, on the receiving end,
6 they simply didn't know what it was because there was
7 no label on it.

8 THE COURT: Hey, you know what? That's not the
9 facts of that case at all. There was a label on one
10 side of it that had the HAZMAT triangle and sodium
11 bromate. Warning, danger, danger. The problem was it
12 wasn't adequately labeled.

13 On the flip side of it, it said "sodium bromate"
14 in some black writing that you really couldn't tell.
15 Nobody told them to either label both sides of the sack
16 or stack it in such a way that the worker would be able
17 to see that. That's the facts in *Lawing*.

18 MR. REID: Well, I guess the difference is this,
19 boiled down. The plaintiff in that case, Mr. Lawing,
20 said that had he seen the label and been able to
21 identify what was there, he would have not performed
22 his work duties in the presence of it. There's nothing
23 analogous here. Nobody at Duke --

24 THE COURT: Mr. Taylor's testimony was, "If I had
25 known," and so was Mr. Jolly's, "If I had known that

ROA_02110

Appendix_02145

1 this could cause mesothelioma or was dangerous in that
2 way, I would have put on a respirator and done
3 something differently. I didn't know." That's what
4 their defense was. Same as *Lawing*.

5 MR. REID: There is no such testimony in this
6 record from Mr. Jolly.

7 THE COURT: What's that?

8 MR. REID: I don't believe there's any such
9 testimony in this case from Mr. Jolly. He simply
10 wasn't asked by counsel what he would have done
11 differently had he had a warning. There's no evidence
12 of that nature in this case.

13 THE COURT: How about Mr. Taylor?

14 MR. REID: I don't remember, but that -- all he
15 could do was talk about himself. He can't tell us what
16 Mr. Jolly would have done.

17 And, furthermore, Your Honor, Mr. McLeod made a
18 good point earlier. They're claiming that there's no
19 distinction between types of asbestos and we had a
20 dangerous product. If you are to accept that notion,
21 then you also have to accept the notion that Duke was
22 fully aware of what we provided them. If you don't
23 accept that notion, then we ought to be entitled to a
24 directed verdict on state of the art.

25 If we -- if they think there's evidence we have

ROA_02111

Appendix_02146

1 knowledge of the danger, we're in no better position
2 than Duke. Duke had an asbestos-containing facility.
3 Duke had policies and procedures, was sophisticated,
4 and if there was a duty to know of a danger here, then
5 Duke was in the same position. And I think Judge Hill
6 has charged this in the past --

7 THE COURT: I think I've heard everything I need
8 to hear about this, and this is my tentative thought
9 about what I'm going to do. The sophisticated user
10 charge that -- this is the charge that -- this might be
11 a pretty good charge.

12 I'm going to charge the sophisticated user
13 defense, but the way I'm going to charge it is to read
14 straight from *Lawing*. I'll craft something, but that
15 it's going -- I'm going to say something to the jury
16 along this line, "Sophisticated user doctrine is
17 typically applied as a defense to relieve the supplier
18 of liability for failure to warn where it is difficult
19 or even impossible for the supplier to meet its duty to
20 warn the end user of the dangers associated with the
21 use of the product, and the supplier, therefore, relies
22 upon the intermediary or employer to warn the end
23 user." That's what I'm going to say or something along
24 those lines.

25 MS. McVEY: I think you have to say something like

1 the defendant has the burden of proof to make sure that
2 it's met.

3 THE COURT: Oh, yes. It's a defense.

4 MS. McVEY: It has to say that in the charge.

5 THE COURT: I'm just kind of telling you that's
6 the heart of what I'm going to say, Ms. McVey. I've
7 got enough sense to put around that what the burden of
8 proving a defense is. I know how to do that.

9 MR. REID: Your Honor, just for ending purposes,
10 your clerk just gave us the page citation.

11 THE COURT: What, for the *Machin* case?

12 LAW CLERK: Yes. 415 S.C. 209 at 226.

13 MR. REID: Thank you very much.

14 LAW CLERK: That's *Lawing v. Univar*, supreme court
15 2015.

16 THE COURT: So I'm denying the directed verdict on
17 sophisticated user.

18 MS. McVEY: Your Honor, we have one more motion
19 for directed verdict, and that would be, assuming they
20 haven't abandoned it, the comparative negligence of
21 Dale Jolly.

22 Number one, there's been zero evidence in this
23 case that Dale Jolly was negligent in any way. In
24 fact, he wasn't the one performing any work on the
25 gaskets. He was an inspector. He was over inspecting

ROA_02113

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1 what other workers were doing, so there is not a piece
2 of evidence that Dale Jolly was negligent in this case,
3 and we would move for a directed verdict on that issue.

4 THE COURT: All right. Mr. McLeod.

5 MR. McLEOD: We haven't abandoned that, Your
6 Honor. Mr. Jolly testified here in court that he was
7 well aware of the dangers of asbestos and did not wear
8 a respirator, which Duke allegedly would have provided.

9 MS. McVEY: He has to be aware of the actual harm
10 in this case, not being insulation but the asbestos
11 gaskets and packing. He needs to be aware of that
12 harm, and there's no testimony that he was, nor that he
13 did anything wrong in doing his job.

14 THE COURT: I'm struggling with, again, the
15 dangers of asbestos as discussed by him and several
16 other witnesses related more to insulation. What did
17 he say specifically on the dangers of asbestos released
18 from the grinding of these flange gaskets and so forth?

19 MR. McLEOD: Your Honor --

20 THE COURT: I don't have the transcript, so don't
21 give me "Your Honor" and just kind of do something
22 general. Tell me specifically what he said in this
23 testimony that demonstrates his knowledge of the
24 dangers in this particular factual setting.

25 MR. McLEOD: I was just going to say I'm not sure

ROA_02114

Appendix_02149

1 that it matters which product he was exposed to when it
2 comes to his comparative negligence. . If he knew about
3 the dangers of any asbestos --

4 THE COURT: Wait a minute. Are we going to
5 start -- we're not comparing his negligence to the
6 negligence of anybody else except the defendants in
7 this case, are we?

8 MR. McLEOD: Your Honor, if he was --

9 THE COURT: If we're going to get into that again,
10 we can get into that again. Who are you comparing his
11 negligence to?

12 MR. McLEOD: Well, I would be comparing it to
13 ours, of course. But we're talking about any
14 negligence, if at all, it's a question of fact for a
15 jury. If the jury could determine that he knew the
16 dangers of asbestos, and there's testimony in the
17 record that there were areas roped off that they
18 weren't supposed to go to and so forth, he knew about
19 the dangers of asbestos, and he testified that he
20 didn't --

21 THE COURT: Mr. McLeod, where is the information
22 about his knowledge of the dangers of the asbestos that
23 was contained in the flanges and the packing of the
24 defendants' products?

25 MR. McLEOD: I don't think there is testimony to

ROA_02115

Appendix_02150

1 that effect, Your Honor.

2 THE COURT: I don't think so either.

3 MR. McLEOD: I don't think that we need to.

4 Again, he knew about the dangers of asbestos and didn't
5 wear a respirator, by his own testimony, and it doesn't
6 matter where the asbestos came that caused this
7 product, it would still be negligent on his part. It
8 doesn't have to be our products. It could be anywhere
9 in the facility, is my understanding. I mean, his
10 negligence, it's all about what caused his disease. He
11 was comparatively negligent in not --

12 THE COURT: His exposure came from these flange
13 gaskets and this packing, right? Are you talking about
14 the other valve manufacturers? Are you talking about
15 insulation?

16 MR. McLEOD: I'm talking about anywhere in the
17 facility, Your Honor. Their own experts over our
18 objection testified that any and every exposure is a
19 substantial cause.

20 THE COURT: What do the two recent cases of *Smith*
21 *vs. Tiffany* and *Machin* teach us about comparing his
22 negligence, if any, to the negligence of non-defendants
23 in this case? Are we supposed to do that?

24 MR. McLEOD: I think that -- I'm not sure I have
25 to -- in order to establish -- to get past a directed

1 verdict on comparative negligence that I have to
2 establish that Mr. Jolly knew about the dangers to my
3 company's product. I don't think that's where we're
4 going here. In my --

5 THE COURT: That's the only way you can compare
6 the negligence, given what was said in *Smith vs.*
7 *Tiffany*. As I understand it, you've got to compare
8 it -- you've got to find the fault and the comparison
9 in the context of the two parties you're dealing with
10 now.

11 MR. McLEOD: Okay. He testified that he knew
12 about the dangers of asbestos. He knew --

13 THE COURT: He didn't testify that he knew about
14 the dangers of the release of asbestos in these flange
15 gaskets. He did not testify that way at all.

16 MR. McLEOD: He testified that he knew they were
17 asbestos gaskets, so, you know, I'm not so sure how far
18 I have to take this to get past a directed verdict on
19 this. He knew about the dangers of asbestos. He
20 testified he knew the difference between an asbestos
21 gasket and a cork gasket and any other kind of gasket,
22 and he testified that respirators were available and he
23 didn't wear one. I think at directed verdict stage
24 that's all we need.

25 MS. McVEY: Your Honor, I disagree. What they're

ROA_02117

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1 talking about with causation, exposure to other stuff,
2 they're free to make that argument, right, it wasn't
3 the gaskets and packing that caused his disease.

4 THE COURT: That's correct.

5 MS. McVEY: They're free to make that. This is a
6 different conversation.

7 What they have to say is that Dale Jolly was
8 negligent for not wearing a respirator when other
9 people were doing gasket and packing work. That's what
10 they have to prove.

11 THE COURT: His contention, his whole case is I
12 got the asbestos from inhaling the gasketing material
13 from your product.

14 MS. McVEY: Right.

15 THE COURT: And your comparative negligence
16 defense is he knew that this asbestos from your product
17 was dangerous, and despite that, he chose not to
18 protect himself from the product. It has nothing to do
19 with the empty chair; it has nothing to do with the
20 comparison with other people. That deals with
21 causation, with fault. But comparative negligence
22 deals with the notion that you were negligent and he
23 was negligent and you compare those two.

24 MS. McVEY: Right.

25 THE COURT: That's what comparative negligence has

ROA_02118

Appendix_02153

1 to do with it. It's a small slice of the case that
2 deals with an instance in which defendants are
3 negligent and plaintiff is negligent, and you have to
4 compare the negligence of the two. That's what we're
5 dealing with, with this.

6 And the bottom line of that is to establish what
7 it is you rely on to show his negligence. And to show
8 his negligence, as it relates to you, is going to be
9 done when you show that he knew about the dangers of
10 your product and deliberately chose not to protect
11 himself from those dangers. That's how you get the
12 comparative negligence defense going.

13 MR. McLEOD: Okay. I understand, Your Honor. I
14 point the court to -- I'm not sure. It's Page 156 of
15 what transcript? Of the trial preservation testimony.

16 It starts, looks like, on 155 and goes into 156,
17 where Mr. Jolly testifies about the safe zones and
18 whether or not he would wear a respirator.

19 MS. McVEY: Is this the deposition or trial
20 transcript?

21 THE COURT: Wait a minute.

22 Is this the testimony --

23 MR. McLEOD: It's the trial deposition.

24 THE COURT: Well, the trial deposition, is that
25 before the jury?

ROA_02119

Appendix_02154

1 MS. McVEY: No.

2 MR. McLEOD: I'm not sure if this was read to the
3 jury or not. Let me just make one more comment, if I
4 will, for the record.

5 There's also evidence in this record, and, in
6 fact, again, I believe by the court's comments, we're
7 back again to this asbestos, asbestos, asbestos. You
8 know, there is testimony that they are relying on that
9 I'm sure they're going to argue to the jury about that
10 I know this court has mentioned about the use of
11 grinders. Well, at the time it was pursuant to law
12 that they could use a grinder, but it had to have a
13 ventilation system on that. Okay. And their using
14 that is their evidence that their exposure to our
15 product was high enough to cause Mr. Jolly's disease.

16 Now, how can we not be allowed to say that he was
17 comparatively negligent because by law you had to use a
18 grinder. Now, he didn't use the grinder. How are we
19 supposed to defend ourselves from a case where he -- it
20 was the law. And the grinder was being used without
21 the proper mechanism.

22 Now, that's Duke's fault as well, but it's also
23 Mr. Jolly's fault. He testified he knew about the
24 dangers of asbestos and continued to do his job. This
25 is 1979.

ROA_02120

Appendix_02155

1 MS. McVEY: So you're saying he should be
2 responsible for other people using a grinder; his fault
3 should be judged by that?

4 MR. McLEOD: I think that there is enough in this
5 record to say maybe he should have gone to his employer
6 and said, "Why aren't you doing what you're supposed
7 to?"

8 THE COURT: Here is what we're struggling with a
9 little bit again. We're in the *Smith vs. Tiffany*
10 world, and we're comparing defendants' negligence, and
11 this is going back to 2011 -- this is *Berberich* against
12 Jack. This is a 2011 decision of our court.

13 MR. McLEOD: Which citation on that *Smith v.*
14 *Tiffany*.

15 THE COURT: I don't know what the citation is.

16 MR. McLEOD: I've got the case. I'm just
17 looking --

18 LAW CLERK: It's just a rule from *Smith*.

19 THE COURT: I'm in that world. And that world is
20 a world in which now it's the defendant against the
21 defendant. It's not people outside that realm. And to
22 buttress that, I'm looking at *Berberich* against Jack.
23 That's another decision of the South Carolina Supreme
24 Court in 2011.

25 And, again, going back to our own *Nelson vs.*

ROA_02121

Appendix_02156

1 Concrete Supply, that was the iconic case in which
2 contributory negligence was abolished and comparative
3 negligence was adopted. And we say again in *Nelson*,
4 "This court stated that under comparative negligence, a
5 plaintiff in a negligence action may recover damages if
6 his or her negligence is not greater than the
7 negligence of defendant."

8 Now, what y'all got going is, oh, it's got to be
9 compared to all these other defendants that had this
10 asbestos in the insulation and all this kind of thing.
11 It's his negligence compared to defendants' negligence.

12 And what is his negligence? The only negligence
13 we could be talking about as it relates to y'all is the
14 respirator and whether he should have known to wear
15 that while he was standing there amidst all this
16 asbestos being grinded, as I understand it.

17 MR. McLEOD: Your Honor, it was 1979. He knew
18 asbestos was dangerous. He knew that these were
19 asbestos gaskets. He knew there was grinding going on.
20 At a directed verdict stage -- I don't think it's
21 proper to grant a directed verdict. There's little
22 question that there's at least enough evidence to go to
23 the jury.

24 MS. McVEY: Your Honor, I agree that at summary
25 judgment stage, this would not be an appropriate motion

1 because we didn't know what was going to come into
2 trial. Right? We're through with the evidence now.
3 We know exactly what came into the trial. There was
4 zero evidence that Dale Jolly was negligent as compared
5 to Fisher and Crosby, zero.

6 MR. REID: Your Honor --

7 THE COURT: Enough. Enough.

8 I am going to deny the motion for a directed
9 verdict on comparative negligence, but I can tell you,
10 I'm going to study mighty hard on how this is going to
11 be charged.

12 That's the end of the directed verdict motions?

13 MS. McVEY: I have one more.

14 THE COURT: Go ahead. You want to get them on the
15 record.

16 MS. McVEY: The other is we would move for a
17 directed verdict on plaintiffs' requirement to show a
18 feasible alternative design with regard to the gaskets
19 and packing in the defendants' product.

20 As you know, under *Branham*, one of the criteria we
21 need to show is there is a feasible alternative design.
22 You heard the corporate representatives come in here
23 and say that there are alternatives to these asbestos
24 gaskets and packing as early as the '50s and '60s that
25 could have been used at Duke easily and well and that

ROA_02123

Appendix_02158

1 would be safe to the user. So, Your Honor, on that
2 point, we would move for a directed verdict on that.

3 THE COURT: In other words, a directed verdict in
4 your favor that you have shown --

5 MS. McVEY: Right.

6 THE COURT: -- a feasible alternative design?

7 MR. McLEOD: Just real simple. I think she's
8 talking about gaskets that could have been used,
9 particularly Teflon gaskets.

10 MS. McVEY: You guys stood up there and said --

11 THE COURT: There's some testimony that you have
12 gone asbestos-free.

13 MR. McLEOD: Your Honor, this was -- during the
14 time period, Teflon had been around a long time.
15 However, two things. Duke specified --

16 THE COURT: Don't use that as an argument I'm not
17 buying that.

18 MR. McLEOD: Here is the reason why they specified
19 it. Teflon is not rated at the temperatures that Duke
20 required in their system. It's not an alternative
21 design. Yes, sure, cork, rubber, there's all different
22 kinds of gaskets, but Teflon is rated, I think,
23 500 degrees, and that's what was testified to. And
24 Duke -- this is why they required asbestos. This is a
25 state-of-the-art issue at the time that we're talking

ROA_02124

Appendix_02159

1 about. They're certainly not entitled to a directed
2 verdict on it.

3 MS. McVEY: Your Honor, Mr. Dumistra, in
4 particular, I remember Mr. Martin did as well, but he
5 stood up here and said, you know what, we had these
6 four different alternatives. I forget what they all
7 were. One was graphite; one was Teflon; one was
8 something like that, and Duke could have chosen those.
9 They would have worked for what they were doing. And
10 they were available. Duke is the one who chose
11 asbestos. That's their defense, right, that Duke chose
12 it.

13 So what they have shown is there is a feasible
14 alternative design that was available when Duke was
15 purchasing these valves and would have protected
16 Mr. Jolly.

17 THE COURT: Well, Mr. McLeod.

18 MR. McLEOD: Yes, ma'am.

19 THE COURT: How about the testimony of Dumistra on
20 this issue?

21 MR. McLEOD: There's no question that there was
22 lots of different types of gaskets.

23 THE COURT: Dumistra was more specific than that.
24 Dumistra, Ms. McVey just made the projection that
25 Dumistra testified that there were four different kinds

1 of materials that could be used, and I remember Teflon
2 and graphite being two of them. Perhaps there were
3 others, and they could have been used for the purposes
4 Duke used asbestos gaskets. And he did say that.

5 MR. McLEOD: I don't remember that. Go ahead.

6 MR. REID: Your Honor, one thing absent from the
7 plaintiffs' case here is that there's no evidence --
8 they submitted no evidence about the specific
9 application of any valve that Fisher or Crosby sold, or
10 whether in that application there could be something
11 other than what Duke specified for from Crosby and
12 Fisher. I think the case law is absolutely clear --

13 THE COURT: I don't understand the first part of
14 that argument with respect, Mr. Reid. I heard
15 testimony that they had down to the gnat's eye every
16 single aspect of the design of these valves. They had
17 cards that went down to the gnat's eye saying what each
18 component part was, what it did. They had extensive
19 materials from the customer. They had all kinds of
20 other materials within their shop. They had a valve
21 control catalog handbook and so forth and so on. They
22 had a huge amount of information about these component
23 parts, how they worked, what they did, and how they
24 operated in specific settings. They tested for that
25 and so forth. I don't understand the argument you're

ROA_02126

Appendix_02161

1 making.

2 MR. REID: What you're referring to, I think,
3 chiefly are the serial cards, and that's true. They
4 listed the specific types of metal, stainless steel,
5 brass, whatever, internal components, the whole nine
6 yards. But my point is that reflects the information
7 Duke dictates to Fisher --

8 THE COURT: That's not how I remember the evidence
9 at all. I think it is an amalgamation of information
10 back and forth between the manufacturer and the
11 purchaser.

12 This thing that it's all Duke specifications, I
13 don't buy that as absolving y'all of the decisions that
14 ya'll made. You made decisions about what would work
15 and wouldn't work on your equipment just like Duke did.

16 MR. REID: Well, I think the record will clearly
17 favor us in that regard, and certainly at the very
18 least there would be a disputed issue of fact.

19 THE COURT: There I might be able to go with you,
20 but this concept that Duke specified everything is just
21 not at all in sync with the very technical description
22 we had about how these valves are designed and made.

23 MR. REID: Well, neither of my clients are
24 consulting or design engineers. They sell what the
25 customer requests. The customer was very specific in

ROA_02127

Appendix_02162

1 this case. After all, it's a nuclear plant. There are
2 specific requirements. That thing is engineered to the
3 nth degree. We aren't informed of the specific
4 application. They tell us what they want. We provide
5 it to them. We --

6 THE COURT: I understand that's the argument
7 you're making. It's just not one that I agree with,
8 with great respect. There is a lot of information
9 about a lot of technical know-how on the part of both
10 parties to this transaction about how to design this
11 nuclear plant and how to design these valves. The idea
12 that ya'll are just innocent babes in the woods, and
13 they tell you what they want and you pick off the shelf
14 and sell it to them is not consistent with what I heard
15 in the testimony.

16 MR. REID: To sum up in one or two sentences, Your
17 Honor, *Branham*, I think, absolutely requires that by
18 employing the risk-utility test that there is a
19 requirement of showing a feasible alternative design.
20 They, I believe, the plaintiffs, were required to get
21 down to a very specific level and show that in our
22 applications, the applications that Duke used our
23 valves in, that there was an alternative feasible
24 design, and I think they have failed to do that.

25 THE COURT: I think they have proved alternative

1 feasible design out of the mouths of your witnesses,
2 but I don't know that it's free from all doubt and
3 whether y'all can offer some kind of information about
4 whether the Teflon product could stand the test of
5 time, et cetera, so I am going to again deny the motion
6 for a directed verdict, but I think there is very, very
7 slim, bare evidence, particularly given the testimony
8 of Mr. Dumistra.

9 MR. McLEOD: Thank you, Your Honor.

10 MR. REID: If that concludes the plaintiffs'
11 directed verdicts, then my next objection, Your Honor,
12 would be to renew those that we made yesterday.

13 I'll keep it short, Your Honor. I know it's been
14 a long day, and we have got a fair amount of work to do
15 today, so I'd incorporate the brief that we filed, the
16 arguments I made yesterday, the arguments we made at
17 the motions in limine on July 18th, I think it was.

18 I did want to address a couple of specific issues.
19 Certainly one of the -- I mean I want to renew all our
20 motions, but one I'd like to address is the negligence
21 claim and the absence of evidence of either what the
22 standard of care was or that our clients breached that.

23 I know the court brought up the *Branham* case
24 yesterday. I'd be happy to try to address any
25 questions from that. But, again, as I mentioned

ROA_02129

Appendix_02164

1 yesterday, there simply wasn't anybody who took the
2 stand and testified what the standard of care was when
3 the valves at issue in this case were placed into the
4 stream of commerce, and from that there, was an absence
5 of any evidence about any breach of that standard of
6 care.

7 THE COURT: All right. Ms. McVey.

8 MS. McVEY: Your Honor, I went back carefully and
9 reread *Branham* in this case, and it says we have to
10 prove three things for strict liability and an
11 additional fourth thing for negligence.

12 THE COURT: For negligence, right.

13 MS. McVEY: So we have to show that the plaintiff
14 was injured by the product. We've shown that.
15 Mr. Jolly developed mesothelioma as a result of his
16 exposure to Fisher and Crosby. That's been testified
17 to by the experts.

18 Two, that the product at the time of the accident
19 was in essentially the same condition when it left the
20 hands of the defendant. Your Honor, we have done that.
21 Came with gaskets and packing, asbestos gaskets and
22 packing. It had a flange on it that the defendant
23 knew, it was foreseeable that in order to use this
24 valve, you had to put a flange gasket on it. And since
25 they were selling asbestos gaskets, it's foreseeable

1 that they would not only since -- or Duke bought the
2 flange gaskets from the defendants that it would be
3 asbestos, and they would replace it with asbestos
4 gaskets.

5 And, in fact, Mr. Taylor testified, when we went
6 to get the replacement parts, we got the ones the
7 manufacturer sent. That's what we testified to.
8 That's criteria number two.

9 Number three is that the injury occurred because
10 the product was in a defective condition and reasonably
11 dangerous to the end user. We know it was because it
12 contained asbestos and it didn't contain a warning.
13 That's what made it defective and unreasonably
14 dangerous.

15 The negligence theory imposes one more burden, and
16 that is demonstrating the defendant, the seller or
17 manufacturer, failed to exercise due care in some
18 respect, and unlike strict liability, the focus on the
19 conduct of the seller or the manufacturer. And
20 liability is determined according to fault.

21 Your Honor, so what didn't they do? Well, the law
22 says a manufacturer has a duty to test their products.
23 They have to test not just the valve itself to make
24 sure that the valve door doesn't fall off, but they
25 have to test their component parts. That's what our

ROA_02131

Appendix_02166

1 law says.

2 It is clear in this record that they never tested
3 their product. And if they had tested it, they would
4 have realized that when a gasket is used as it's
5 intended to be used on their valve, it becomes friable
6 and releases asbestos into the air.

7 Those are the four things we have to show. And if
8 we get there, we have to show a feasible alternative
9 design, which I think we have covered pretty adequately
10 with the court.

11 MR. REID: Your Honor, I would just note that
12 *Branham* says that, apart from the duty to design and
13 manufacture a product that is not defective and
14 unreasonably dangerous, there's no separate failure to
15 test claim. And that's at --

16 THE COURT: I don't think I understand exactly
17 what you're saying.

18 MR. REID: What I've just heard from the
19 plaintiffs is that we had a duty to test. And I
20 believe that's rejected by the *Branham* case. I also
21 don't think there's any law obligating tests to take
22 place apart from those that our clients described that
23 their companies did employ back at the time of the sale
24 of these products. But, moreover, there's simply no
25 evidence that any other valve company warned or tested

1 or did anything different from what Fisher and Crosby
2 did.

3 MS. McVEY: Well, that's clearly not the standard.
4 What other valve companies do is not the standard.

5 LAW CLERK: Do you have a cite for that?

6 MS. McVEY: The case citation for *Branham*?

7 THE COURT: We're asking Mr. Reid whether he has a
8 citation he just made about the *Branham* case.

9 MR. REID: 210.

10 MS. McVEY: Where is it?

11 THE COURT: 210, he says.

12 MR. REID: 390 S.C. 2d or -- South Carolina. I
13 could show you my copy, if that's easier.

14 MS. McVEY: I see it. Do you see it?

15 THE COURT: "In addition, Ford asserts there is no
16 separate failure to test claim apart from the duty to
17 design and manufacture a product that was not defective
18 and unreasonably dangerous. We agree, for if a product
19 is not in a defective condition unreasonably dangerous
20 to the user, an alleged failure to test cannot be the
21 proximate cause of injury." That is that sleeve
22 seatbelt the driver wasn't even wearing in this Bronco
23 rollover thing.

24 MS. McVEY: I think you don't have a duty to test
25 if you don't show the product was in a defective

ROA_02133

Appendix_02168

1 condition at the time. In other words, you can't just
2 say -- you have to show the product was defective and
3 the duty to test is part of it. You see how it says
4 that?

5 "At trial, *Branham* claimed Ford was negligent in
6 failing to adequately test the seatbelt sleeve, but he
7 did not challenge the seatbelt sleeve design." What
8 we're saying is, as designed, this product was
9 defective.

10 Your Honor, I'm sorry, just to go back, that was
11 the first stage. There were two alleged defects in the
12 *Branham* case, the sleeve and the rollover stability
13 issue. And if you look back on Section B, it talks
14 about handling and stability. And it talks about Ford
15 employing two engineering tests. And the reason why I
16 say that's important is because it goes to the
17 negligence underlying which tests they chose to use or
18 not use or perform.

19 In other words, the court said you can go forward
20 with the stability claim because you have shown a
21 design defect. Then you can get into the testing or
22 lack of testing, and that was part of all the evidence.

23 THE COURT: That's just one more reason to say I'm
24 going to deny the motion to dismiss the negligence
25 cause.

1 MS. McVEY: Thank you.

2 THE COURT: Anything further before we go to these
3 charges?

4 MR. REID: Judge, just for the sake of
5 completeness, in addition to the things I mentioned
6 before, the previous arguments incorporating,
7 obviously, we talked about some of these concepts in
8 arguing Ms. McVey's motions, so I incorporate those
9 arguments as well.

10 I guess what I also would have to do is ask the
11 court to rule on all the directed verdict motions. So
12 I don't plan to argue again since we just argued them
13 yesterday, but I suspect I probably need to elicit a
14 ruling from the court on each one.

15 THE COURT: I don't really want to have to go back
16 through all of these if you're not going to make any
17 argument.

18 MS. McVEY: I think you can just say, "I deny them
19 all."

20 THE COURT: If all you're doing is sitting over
21 there with Matt Bogan trying to preserve this record, I
22 don't agree that I have to go through this entire thing
23 all over again. I did it once on directed verdict. I
24 have the same opinions about it at the close of the
25 case, and that's how I'm going to rule.

ROA_02135

Appendix_02170

1 MR. REID: Your Honor, I think that is sufficient.
2 I wasn't asking you to rehash old ground since it was
3 only yesterday.

4 THE COURT: I think the record is specific enough
5 to cover what I did. I'm not required to even say all
6 the things about why I did it, but I think the ruling I
7 make is clear: Denied.

8 MR. REID: Your ruling is you denied them
9 yesterday and are denying them again?

10 THE COURT: You got it.

11 MR. REID: Thank you.

12 THE COURT: Now, let's go to these charges.

13 I feel sorry for, Diane, number one, so we're
14 going to take a little break before we get started with
15 that. Let's break until -- Diane, is 20 minutes long
16 enough?

17 THE REPORTER: That's plenty.

18 THE COURT: We'll come back at 20 minutes after.

19 (WHEREUPON, a recess was taken from 4:33 p.m. to
20 4:45 p.m.)

21 THE COURT: As you may recall, we were looking
22 over these things by using the Fisher jury charge as
23 the vehicle for going through the various objections of
24 the parties.

25 So where I am right now, I had talked about Number

ROA_02136

Appendix_02171

1 13. Here is what I will do with Number 13. Number 13
2 is virtually the same in both the *Garvin* and the Fisher
3 proposals.

4 It says, "In some instances, testimony, exhibits
5 have been admitted for limited purposes." And I'm
6 going to say, "For example, as demonstrative evidence,
7 and not as proof of the truth of what was said in them.
8 In each of those cases, you should consider that
9 evidence only for the limited purpose for which it was
10 admitted, for example, to demonstrate and aid in the
11 testimony of a witness." I just -- because I really do
12 think that's essentially what we're talking about here
13 in this case.

14 MR. McLEOD: That's right.

15 MS. McVEY: Just a quick question. We had a
16 little bit of concern about -- I know you need help
17 producing this ultimately.

18 THE COURT: Yes. I'm going to be relying on
19 y'all.

20 MS. McVEY: But I don't know that we have it
21 right. In other words, I'm wondering if we can't
22 borrow you and Josh to like type it up on the computer
23 as we go because some of this you said I'm going to
24 charge in concept but not that charge. So I just don't
25 want to get it wrong.

ROA_02137

Appendix_02172

1 THE COURT: Let's talk about that when we finish
2 this.

3 Now, then I told you that 14 through 20, my basic
4 comment was this is all covered in the Hill *Garvin*
5 charge, what's the difference. So Number 14, what is
6 the difference between what you're asking for here and
7 what is in the Hill *Garvin* charge, Mr. McLeod? Number
8 14.

9 As I explained to you, a different approach is
10 taken, and I think a sensible one for the jury. It
11 talks about the plaintiffs' claims, and then it starts
12 going into some of these other matters.

13 MR. REID: Your Honor, I'm Mr. Reid not
14 Mr. McLeod, but if you will permit me to --

15 THE COURT: Yes, sir, Mr. Reid, always.

16 MR. REID: I think, at least, I'm going to find
17 the easiest way to do that is to look at what I'll call
18 the *Garvin* charge that was submitted by Ms. McVey.

19 THE COURT: All right.

20 MR. REID: I'm looking at the version that had
21 headings.

22 THE COURT: Yes. Me, too.

23 MR. REID: At Page 6 in carrying on over to 7.

24 THE COURT: Yes, sir.

25 MR. REID: They have, one, strict liability

ROA_02138

Appendix_02173

1 elements. And my primary issue there would be they
2 have the elements at the end, and I think we would have
3 to have the alternative feasible design element added
4 to the list. We have got three, and that's also an
5 element.

6 MS. McVEY: The only issue is that then we're
7 going to have it said three different times. We've got
8 to show it for any one of the theories, right, other
9 than failure to warn?

10 THE COURT: Where is alternative feasible design,
11 Ms. Theile?

12 MS. McVEY: It is -- hold on.

13 THE COURT: I don't see alternative feasible
14 design in here.

15 MR. REID: I think my paralegal did a word search
16 for feasible and didn't find it.

17 THE COURT: Yeah. So where is your alternative
18 feasible design, Mr. Reid?

19 MR. REID: I know it's in here somewhere, Your
20 Honor.

21 THE COURT: I certainly read it in your directed
22 verdict, I read it, but now --

23 MR. McLEOD: Is it 27, plaintiff must prove the
24 existence of a reasonable alternative design?

25 MS. McVEY: Yes.

ROA_02139

Appendix_02174

1 THE COURT: Hang on. I highlighted this they
2 don't have it and I'm going to charge it.

3 MS. McVEY: My only objection would be the second
4 line from the bottom on that charge, including a defect
5 for failure to warn.

6 THE COURT: Well, they are doing failure to warn
7 and design defect together, and that's why they put
8 them together like that. The reasonable alternative
9 design is, they contend -- I think they're right -- a
10 situation, whether it's in strict liability, negligence
11 or failure to warn, a design defect must show the
12 reasonable alternative design. That's what they're
13 saying.

14 MS. McVEY: And my objection to that is in a case
15 where you cannot design a product differently. For
16 example, let's say it was a valve. The only thing that
17 could be used was asbestos for whatever reason. Let's
18 say that's the case, and you couldn't come up with
19 another alternative design, they still have a duty to
20 warn about it. And that's what I object to in this
21 charge.

22 THE COURT: Well, I think it says designing the
23 product in an alternative manner including a defect for
24 failure to warn. I think it's right, Theile.

25 MS. McVEY: I respect your ruling. I don't think

ROA_02140

Appendix_02175

1 so. I think if you had a case where a product could
2 not be redesigned but it was still inherently
3 dangerous, you still have a duty to warn about it. And
4 that's my concern.

5 THE COURT: I mean, the defect would be the
6 failure to put a warning on something that can't be
7 designed differently, and, therefore, you've got to
8 warn about it.

9 If you have got any other language that can be in
10 addition to this to help this out, then propose it, but
11 I think they get to say that with respect to each one
12 of these things.

13 MS. McVEY: Okay. So can we take out "including a
14 defect for failure to warn"? Because you still have
15 the risk utility for design defect for everything else.

16 THE COURT: They have got to have in here that
17 reasonable alternative design is something you've got
18 to show. And if it can't be designed any other way,
19 then to have this defect in it, they are also
20 obligated -- they are still obligated to warn. They're
21 already obligated to warn in all these other
22 situations.

23 MS. McVEY: Right.

24 THE COURT: And in the situation where they can't
25 design it any other way, they're still obligated to

ROA_02141

Appendix_02176

1 warn. That's what I think this thing is saying.

2 MS. McVEY: But what you're saying or what they're
3 saying is that I have to show design defect no matter
4 what theory I'm going under. And what I'm saying is I
5 do for a design defect where they could have used a
6 nonasbestos product, I do, and that applies for strict
7 liability and warranty and negligence. I agree with
8 that, but it is a separate cause of action for failure
9 to warn that makes their product defective as well and
10 that's what my concern is.

11 THE COURT: Propose some alternative --

12 MS. McVey: I'm sorry, I didn't mean to interrupt
13 you, Judge. I'm tired. I'm sorry.

14 The language in the Hill *Garvin* order is what we
15 would talk about.

16 THE COURT: Where?

17 MS. McVEY: Just this general charge about
18 negligence, strict liability, and warranty. And if you
19 want to put in there the risk-utility test for that,
20 then we could also have a separate failure to warn
21 charge without that at the end of it, maybe.

22 THE COURT: Product was not defective for failure
23 to warn of the obvious. "A seller is not required to
24 warn with respect to products when the danger is
25 generally known or recognized. A product cannot be

ROA_02142

Appendix_02177

1 inspected or unreasonably dangerous if the danger
2 associated with the product is one where the product
3 user is generally recognized. A product may, by reason
4 of its nature and use, be unreasonably dangerous unless
5 the proper instruction or warnings are supplied for its
6 intended use. In those cases, a seller or manufacturer
7 must give an appropriate warning," et cetera, et
8 cetera, et cetera.

9 MS. McVEY: That is fine. That charge is great.

10 THE COURT: So what you're wanting to do is say,
11 hey, in addition to that, they have got to do
12 reasonable alternative design, take out?

13 MS. McVEY: Including a defect for failure to
14 warn.

15 THE COURT: I'm getting tired, too. I don't
16 understand what you're asking me to do with this. I've
17 got the *Garvin* charge, and I'm going to give that.

18 In addition, what we were trying to do is also be
19 sure we gave the reasonable alternative design charge,
20 and you're saying that the failure to warn is already
21 covered?

22 MS. McVEY: Right.

23 THE COURT: But the problem is -- we've already
24 talked about reasonable -- no, no. We really haven't.

25 MS. McVEY: Right.

ROA_02143

Appendix_02178

1 MR. McLEOD: Your Honor, maybe I might be able to
2 make this a little --

3 THE COURT: Yeah.

4 MR. McLEOD: I think to just add our Number 27 at
5 the end of where it says, "And, third, the plaintiffs
6 were injured by the product." Just insert --

7 MS. McVEY: Where are you? I'm sorry.

8 THE COURT: On Page 7 at the end of your.

9 MS. McVEY: At the end of strict liability,
10 failure to warn?

11 MR. McLEOD: That was my only objection.

12 MS. McVEY: But then his last sentence says,
13 "Plaintiff cannot recover under any design defect or
14 failure to warn or theory if they don't show reasonable
15 alternative design," and that's not true.

16 MR. McLEOD: My objection to this charge is just
17 what we're talking about, so maybe the best way to
18 handle this would be to insert our design -- alternate
19 design.

20 THE COURT: I'm going to strike "including a
21 defect for failure to warn" and charge 27 otherwise.
22 That's what I'm going to do, and we can put that at the
23 end on Page 7, strict liability elements.

24 MR. McLEOD: Thank you, Your Honor.

25 THE COURT: Number 20 -- all right. Where are we

ROA_02144

Appendix_02179

1 now? We got off track on this duty to warn that got
2 thrown into our discussion when we were still on Items
3 13 through -- all right.

4 We're still on Items 14 through 20. We have
5 resolved 27, so that's dealt with. We are on Items 14
6 through 20, and I'm going to say they're all in and
7 other things unless I'm told otherwise, and I'm going
8 to move on dot-com.

9 MR. REID: So 14 through 20 are in?

10 THE COURT: No, they're out because they're
11 already covered by things that are in the *Garvin* charge
12 unless you tell me differently.

13 MR. McLEOD: Your Honor, I do have one objection
14 to the charge, and I'm not sure where we are.

15 THE COURT: Where you are is in Fisher charges 14
16 through 20, Pages 12 through the top of 20.

17 MR. McLEOD: Yes, Your Honor. I understand that
18 you had said that you weren't going to charge those
19 because you were using the *Garvin* charge.

20 THE COURT: I think all those things, those
21 issues, are covered by the *Garvin* charges.

22 MR. McLEOD: I just wanted to address an objection
23 I had to the *Garvin* charge, understanding your ruling.

24 THE COURT: Okay.

25 MR. McLEOD: I'm not sure what page -- well, the

ROA_02145

Appendix_02180

1 page I have on it because I have written a lot of
2 objections and comments to it, but where Judge Hill
3 started --

4 THE COURT: What page of the *Garvin* charges are
5 you on?

6 MR. McLEOD: I believe --

-7 THE COURT: Or on the McVey modification of the
8 *Garvin* charge. That's what I'm using.

9 MR. McLEOD: It would be -- yeah. At the top of
10 Page 7 where, "Now, before you can hold defendants
11 liable," do you see that part, "the plaintiff must
12 prove the plaintiff's exposure to asbestos and its
13 products were frequent, with such a frequency, regular
14 duration" --

15 THE COURT: Wait a minute.

16 MS. McVEY: He's on Page 6.

17 THE COURT: "Now, before you can hold the
18 defendants liable," okay.

19 MR. McLEOD: Okay. Now, this charge, and I would
20 suggest that this is a pretty major objection on our
21 part, I believe this is a totally incomplete charge on
22 Lohrmann-Henderson standard. We would want the entire
23 standard on substantial causation.

24 THE COURT: Where in your charge do you have a
25 Henderson-Lohrmann charge that you consider to be a

1 good substitute for that?

2 MR. REID: 18 to 19, Your Honor.

3 MR. McLEOD: Yes, Your Honor.

4 THE COURT: Hang on a minute.

5 MS. McVEY: I have objections to theirs.

6 MR. McLEOD: Specifically -- yeah, 18 to 19.

7 THE COURT: 19 is the one that gets closest to the
8 Lohrmann charge. I don't see in 16 -- you were
9 pointing me to --

10 MR. McLEOD: 19 is the most important one there,
11 Your Honor. 18 is a --

12 THE COURT: 16 -- well, let me just say about 16.
13 16 is covered, except that it's got, "There is no duty
14 on a manufacturer to purchase a product that will not
15 wear out." I think that's a comment on the facts.
16 Given the present things, I wouldn't say that. So I
17 want to just clean up my trash as I go along.

18 MR. McLEOD: Okay.

19 THE COURT: So far I'm saying that 14, 15, 16, 17,
20 and 18, I still have heard nothing that shows me what's
21 the difference, therefore, I will charge -- I think
22 they're all covered by the Garvin charge, and I will
23 charge it.

24 Now you're focusing my attention on 19, which is,
25 "For the plaintiff to prove actual exposure to the

ROA_02147

Appendix_02182

1 defendants' product, plaintiff must present evidence of
2 exposure to asbestos from defendants' product on a
3 regular basis or some extended period of time in
4 proximity to where the plaintiff worked. This evidence
5 must be more than casual or minimal contact to asbestos
6 from the defendants' product. Presence by the
7 plaintiff of or in the vicinity of defendants' static
8 asbestos does not constitute actual exposure. Presence
9 by the plaintiff in the vicinity of defendants'
10 products that have no asbestos does not constitute an
11 actionable exposure."

12 What I will do is -- I don't know what static
13 asbestos means. That probably means encapsulated and
14 hadn't been ground yet. I will charge in addition to
15 what is in this causation charge in the *Garvin* charge,
16 I will tack on to that, "For the plaintiff to prove
17 actionable exposure to the defendants' product,
18 plaintiff must present evidence of exposure to asbestos
19 from defendants' product on a regular basis over some
20 extended period of time in proximity to where the
21 plaintiff worked. This evidence must show more than
22 casual or minimal contact to asbestos from the
23 defendants' product." That, in combination with what
24 is already in the causation charge, to me is plenty,
25 and I will charge both those things.

ROA_02148

Appendix_02183

1 MR. REID: Your Honor, just to clarify, so that we
2 have essentially got the first half of Number 19.

3 THE COURT: That's correct. I will not charge --
4 I don't know what "presence by the defendant in the
5 vicinity of defendants' static asbestos." I don't know
6 what static asbestos means. It's a comment on the
7 facts. I'm not going to do that. "Presence in the
8 vicinity of defendant's products that have no asbestos
9 do not constitute actionable exposure." They're not
10 claiming that it does constitute that, so again, I
11 think that's a comment on the facts or could be
12 construed as such, and that's why I'm not charging
13 those two things.

14 MR. REID: Your Honor, as long as we're on
15 causation, I just want to address two things. If you
16 look at Page six of the *Garvin* charge --

17 THE COURT: Yes.

18 MR. REID: -- one of the -- the first heading is
19 "summary of plaintiffs' claims." And I mention this
20 because it somewhat relates to causation. Fourth line
21 down says, "Arising out of the alleged exposure, Dale
22 Jolly, to the defendants' products."

23 THE COURT: Yes.

24 MR. REID: Our concern there, we think the words
25 "asbestos from," so it would say, "Alleged exposure of

ROA_02149

Appendix_02184

1 Dale Jolly to asbestos from the defendants' products."

2 THE COURT: That's fine.

3 MR. REID: Because --

4 THE COURT: You don't need to argue.

5 MS. McVEY: I don't know where you are. I'm so
6 sorry.

7 THE COURT: It's on Page 6. He's jumped the
8 traces and gone into something else that we weren't
9 dealing with, which makes it very difficult for me to
10 keep y'all on track.

11 MS. McVEY: So we're taking "from" instead of
12 "to."

13 THE COURT: I'm saying, "Arising out of the
14 alleged exposure of Dale Jolly to asbestos from the
15 defendants' products." I put that right in there.

16 MS. McVEY: Okay.

17 MR. REID: I think "asbestos in" would probably be
18 the more precise term.

19 THE COURT: Y'all are nitpicking things.

20 MS. McVEY: I think "asbestos from." We have got
21 to move on.

22 THE COURT: I will put "asbestos in."

23 What else?

24 MS. McVEY: Your Honor, just as a good point. The
25 flange gasket is not in their product; it's from their

ROA_02150

Appendix_02185

1 product, so I object to the word "to" or "in."

2 MR. REID: You already won.

3 MS. McVEY: Oh, I did? I missed it. I'm sorry.

4 MR. HOLDER: More for the record.

5 MS. McVEY: So 19, you're going to charge -- we've
6 got 19.

7 THE COURT: We got that.

8 MR. McLEOD: Half of 19.

9 THE COURT: Got anything more to say about that?

10 MR. McLEOD: Just for the record, that language
11 you're keeping out is directly from the cases.

12 THE COURT: I understand all that. Not everything
13 that's in the cases gets charged. It's a comment on
14 facts. I'm fearful about that.

15 MR. McLEOD: There is a lot of evidence in this
16 case, obviously, about --

17 THE COURT: I gotcha. You're protected.
18 Number 20.

19 MR. REID: I'm sorry, Your Honor. On Page 6,
20 there's the -- I have a problem with the *Garvin* charge
21 on causation substantial factor, and it's similar to
22 the one we just addressed.

23 It says, "Now, before you can hold the defendants
24 liable, the plaintiffs must prove the plaintiff's
25 exposure to asbestos and its product was of such

ROA_02151

Appendix_02186

1 frequency."

2 First of all, "to asbestos" could be any asbestos
3 at Duke, and then "and its products." I don't think
4 the jury upon hearing that is going to know what --

5 THE COURT: All right. All right. I'm not going
6 to hear ten arguments about something that can be cured
7 easily.

8 Asbestos from defendants' products. Strike out --

9 MS. McVEY: "And."

10 THE COURT: "And."

11 All right. What else?

12 MR. REID: Well, just for the record, I do think
13 overall our 18 would be a better fit there. Sounds
14 like the court is ruling against me on that.

15 THE COURT: I'm saying I think this other covers
16 it. I'm going to tell you, I'm doing a lot more
17 detailed job than most judges do. They just say, "I've
18 got something that's kind of like that," and you don't
19 know about it until it gets out of there. I'm trying
20 to be a little fairer about that so that we come away
21 from here, with y'all's help, with a complete charge
22 that everybody can look it. I don't know if I'm going
23 to give it to the jury, although some judges do do
24 that. That's what I'm trying for. So, "Hey, I like
25 the other better," is not valid objection, in my view.

ROA_02152

Appendix_02187

1 MR. McLEOD: Thank you, Your Honor.

2 THE COURT: Okay. All right.

3 We got anything else on Page 6?

4 MS. McVEY: I feel like I'm getting whacked from
5 both sides by them because we're going through the
6 defendants charges and also the *Garvin*.

7 THE COURT: I understand what they did. I tried
8 to get them back on track. I'm on Number 20 in
9 Fisher's material.

10 Number 20, again, I say with respect, products
11 liability negligence, what's the difference? This is a
12 very long, long, long, long charge. I don't like long,
13 long, long, long charges. I think it's all covered in
14 the way this other charge is laid out.

15 So, again, as I announced earlier this morning,
16 what's the difference? What's left out? What's the
17 problem?

18 MS. McVEY: Nothing from the plaintiffs'
19 perspective, Your Honor. We believe *Garvin* covers it.

20 MR. REID: Just trying the catch up here.

21 MR. McLEOD: So the *Garvin* -- just to be clear, my
22 *Garvin* charge for negligence starts on Page 11. Is
23 that --

24 MS. McVEY: You've got strict liability on Pages 6
25 and 7 and 8, and then you've got implied breach of

ROA_02153

Appendix_02188

1 warranty on 8; state of the art on 9, and negligence on
2 9.

3 MR. McLEOD: Okay. So negligence starts, "And,
4 finally, in the negligence claim, the plaintiffs must
5 prove."

6 MS. McVEY: The third and final theory of
7 plaintiffs is one of negligence. The focus on
8 negligence is on the conduct of the defendants.

9 MR. REID: Here is -- just to orient everybody,
10 I'm looking at Page 9, the negligence charge. About
11 nine lines down, it says -- I'll back up. "A defendant
12 will owe a plaintiff a duty of care when the defendant
13 knows of the risks of harm. This may be met by showing
14 the defendants were aware of the danger and failed to
15 take reasonable steps to correct it." I think that's
16 at odds with the sophisticated user doctrine. I think
17 that sentence should be omitted, the one that says
18 "this may be met."

19 THE COURT: I disagree, and I will keep it in
20 there.

21 MR. REID: Four lines from the bottom says, "An
22 entire industry may lag behind." I just don't think
23 that's appropriate since there's no evidence about that
24 here.

25 MS. McVEY: Your Honor, that's in the case law,

ROA_02154

Appendix_02189

1 and that's what they have argued here today, and they
2 will make other arguments that nobody was warning; no
3 valve maker was warning; we don't need a warning.
4 That's their argument.

5 THE COURT: Yeah.

6 MS. McVEY: And it's in the case law, Your Honor.
7 That's from cases.

8 MR. McLEOD: It may be in the case law, but I
9 don't recall any evidence of that.

10 MS. McVEY: That none of y'all warned? That's
11 your evidence.

12 MR. McLEOD: That the entire industry may lag
13 behind. I don't recall any evidence about that in this
14 case.

15 THE COURT: This thing starts out, "Although
16 evidence of industry standards may be considered as
17 evidence of the standard of care, an industry cannot
18 set its own unreasonable standards. An entire industry
19 may lag behind in the adoption of new and available
20 products and safety features, and failure to use due
21 care, even if no one in the industry does, does not
22 excuse negligence. It is for you to decide whether the
23 standard of care was proper considering what a
24 reasonable person would have done under similar
25 circumstances."

ROA_02155

Appendix_02190

1 Have we got some case that says that's bad law or
2 shouldn't be charged that way?

3 MR. McLEOD: I'm not aware of any case, Your
4 Honor. I just don't believe there's been any evidence
5 of an entire industry lagging behind.

6 MS. McVEY: Your Honor, aren't they going to argue
7 OSHA?

8 MR. McLEOD: Yes.

9 MS. McVEY: Okay. Isn't that what they're going
10 to kind of use it for, these industry standards --

11 THE COURT: Yes. They're saying we don't have to
12 do anything OSHA didn't tell us that do because they
13 let us get away with five cc's and so forth and so on.
14 You know, that's certainly going to be we did what OSHA
15 told us to do, but if they can show that even OSHA was
16 wrong, then --

17 MS. McVEY: And I agree we don't get to get in and
18 say OSHA says this or the Walsh-Healey Act says this.
19 I agree with that. But I do think this, if that's the
20 argument they're making, is that industry wasn't doing
21 or the prevailing standards were this, this applies to
22 that.

23 THE COURT: I think so, too. I don't see anything
24 wrong with it.

25 MR. McLEOD: I understand your ruling.

ROA_02156

Appendix_02191

1 THE COURT: All right.

2 LAW CLERK: That's 20.

3 THE COURT: All right. 21, I've already said what
4 I'm going to do with that is Anderson 32-19. Anderson
5 32-19, "In an action based on negligence, the plaintiff
6 must prove the product designed was in a defective
7 condition and reasonably dangerous to the user when it
8 left the control of the defendant and the defect caused
9 his injuries. In addition, liability for the
10 negligence requires proof that the manufacturer
11 breached its duty to exercise reasonable care to adopt
12 a safe design. This burden may be met by showing that
13 the manufacturer was aware of the danger and failed to
14 take reasonable steps to correct it. A manufacturer of
15 a product made under a planned design which makes
16 dangerous for the uses for which it is manufactured is
17 subject to liability to others whom he should expect to
18 use the product and being endangered by its proper use
19 of physical harm caused by his failure to exercise
20 reasonable care in the adoption of a safe plan or
21 design."

22 That is what I would charge as opposed to a party
23 does not have the duty with respect in a chain of
24 distribution and all that. I think that is a big-time
25 comment on the facts, so I will charge this from

ROA_02157

Appendix_02192

1 Anderson.

2 MS. McVEY: Where would you put it, in the *Garvin*?

3 THE COURT: Yeah.

4 MS. McVEY: Because you have on Page 9 and 10,
5 there's two paragraphs on duty of product manufacturers
6 and sellers.

7 THE COURT: Lets just put it right after the
8 negligence charge. On 9, next paragraph would be that
9 one, Anderson.

10 MR. REID: Your Honor --

11 THE COURT: 32-19.

12 MR. REID: From your reading of it, it sounded
13 like it may somewhat overlap with what is currently at
14 the top of Page 10, and so my question to the court is
15 whether it should replace that paragraph or that
16 section entitled "duty of product manufacturers and
17 sellers."

18 MS. McVEY: I think it's covered in *Garvin* 32-19.
19 I don't think we need to replace it, but.

20 THE COURT: I agree with you, I'm not going to
21 charge 21. I think the duty of product manufacturers
22 and sellers probably covers what I just read from
23 32-19, so on reflection, I'll charge what's already in
24 here.

25 MS. McVEY: Thank you, Judge.

ROA_02158

Appendix_02193

1 THE COURT: I know that's not going to be good
2 enough. Now we're going to have something else?

3 MR. REID: I think 32-19 might be better because
4 what's in *Garvin* includes discussion about
5 manufacturing defects, which we don't have in this
6 case.

7 MR. McLEOD: We have design defects, not
8 manufacturing.

9 THE COURT: Again, the claim that the gasket and
10 the need for it is part not only of your supply but of
11 your design, so I don't see anything wrong with what's
12 said in the duty of the product manufacturer and
13 seller. I was going to give y'all 32-19 but you didn't
14 like that.

15 MR. REID: I'll take that over what's here.

16 MS. McVEY: Your Honor, I think you have already
17 ruled. Can we move on? It's covered. 32-19 is
18 covered in the *Garvin* charge as is.

19 THE COURT: I mean, what you're asking me to
20 charge as an alternative is the manufacturer breached
21 his duty to adopt a safe design and so forth. Heck,
22 I'm just going to put them both in there, 32-19 in
23 there at the bottom of the other. That means we're
24 going to have a repetitive charge.

25 MS. McVEY: It's fine. We're going to move on,

ROA_02159

Appendix_02194

1 but we object to that. It's repetitive. The charge is
2 long enough.

3 THE COURT: I'm going to do it. Put that in.
4 Theile is taking notes because they're probably going
5 to be the one that produces this.

6 MS. McVEY: I'm not sure I have it right. I don't
7 want to be the one responsible and they get to come --

8 THE COURT: Somebody is going to be responsible
9 for this, and I'll get to that at the end of this, but
10 I'm not going to stop in the middle of this and mediate
11 this kind of dispute.

12 MS. McVEY: What I'm concerned about, Judge, is I
13 don't have your rulings right.

14 THE COURT: We'll go over that one more time. I'm
15 not getting anywhere when I'm interrupted every other
16 minute to say that.

17 MR. REID: We'll take responsibility. We're
18 staying at the same hotel, and if we can find time to
19 work that out tonight, we will.

20 THE COURT: That's great. Done.

21 LAW CLERK: You want to put that at the end of?

22 THE COURT: Duty of product manufacturers and
23 sellers.

24 LAW CLERK: So 32-19 after duty of product
25 manufacturers and sellers.

ROA_02160

Appendix_02195

1 THE COURT: Uh-huh, then another paragraph is that
2 Anderson.

3 Number 22, duty of care. Duty is care is already
4 in here.

5 What's different? Speak.

6 MR. McLEOD: Your Honor, Number 22, I believe you
7 have already stated that it was already in.

8 THE COURT: Already in. That's right.

9 23, products liability strict liability. Again,
10 we've got plenty of information about that. This is a
11 thing that is pretty lengthy and has got a kind of
12 funny ending to it that gave me a little bit of pause
13 because it's not really completely out of the cases or
14 Anderson.

15 Anderson -- it's Anderson modified, I guess you
16 would say. I think what's already in there is fine, so
17 I would use that as opposed to 23.

18 Any discussion?

19 24, product liability strict liability. This
20 contains a kind of cost-benefit analysis that worries
21 me a little bit.

22 MR. REID: And the reason we did that, Your Honor,
23 is it reflects the risk-utility test that's in the case
24 law.

25 THE COURT: Yes, that's true. We do have risk

ROA_02161

Appendix_02196

1 utility now.

2 MS. McVEY: But they have already gotten the
3 risk-utility charge. We've already got that.

4 THE COURT: Where is it?

5 MS. McVEY: The one you just added, their Number
6 27.

7 THE COURT: That's correct.

8 MS. McVEY: So I don't think we need --

9 MR. McLEOD: Well, that was an alternative design.

10 MS. McVEY: Their 27 is risk utility, reasonable
11 alternative design.

12 THE COURT: It's reasonable alternative design.

13 MR. McLEOD: That's a little bit different than
14 risk utility.

15 MR. REID: Your Honor, we would ask for our 24. I
16 think it's from Anderson, and it's a correct statement
17 of the law, and it elaborates it in an appropriate way.

18 MS. McVEY: Anderson didn't have risk utility.

19 MR. McLEOD: Well, it's modified, and there's also
20 the Holland, 407 S.C. 227.

21 THE COURT: All right. The last paragraph of 24
22 is the one that actually talks about the risk-utility
23 test.

24 MR. McLEOD: Okay.

25 THE COURT: Where, Theile, in the *Garvin* charge is

1 risk utility?

2 MS. McVEY: I don't think it's in there.

3 THE COURT: I don't think it is either, and,
4 therefore, what I'm thinking about doing is putting --
5 this is from *Holland*, *Andreal Knox* against *Morbark*. It
6 says, "To prove reasonable alternative design, *Holland*
7 was required to set forth some evidence of an
8 alternative design, which necessarily included the
9 consideration of cost, safety, functionality associated
10 with the alternative design."

11 LAW CLERK: It's just an element of the reasonable
12 alternative design.

13 MS. McVEY: I don't think we have to break out
14 reasonable alternative design that specifically. We
15 have to show a reason alternative design. Do we have
16 to define what that is? I mean, that's my concern is
17 how deep are we getting.

18 THE COURT: I'm going to take this risk-utility
19 paragraph, and I'm going to put it -- and we put it --

20 LAW CLERK: That's where we have to put Number 27.

21 THE COURT: 27 we put -- so we're just going to
22 put this paragraph right next to it, the last
23 paragraph, 24.

24 MS. McVEY: So you're charging last Paragraph 24
25 and you're charging 27?

ROA_02163

Appendix_02198

1 THE COURT: That's correct.

2 MS. McVEY: Are you just putting it in one place
3 or are you putting it three times in this charge?
4 That's my concern. If you're just putting it under
5 strict liability -- I think that only needs to be
6 charged one time if you're giving two different charges
7 on it.

8 THE COURT: Well, I'm putting it there. There are
9 a lot of these other charges I don't propose to give
10 again and again.

11 MS. McVEY: I'm making sure. I thought they
12 wanted it again and again.

13 MR. McLEOD: No, no. We agree with that.

14 MR. REID: When we edit it, I've always been of
15 the philosophy a jury typically gets way more
16 information. I'll try to trim it down and put it in
17 the right place.

18 MS. McVEY: She's telling you where to put it at
19 the end of strict liability.

20 MR. REID: Understood. I've got my marching
21 orders.

22 THE COURT: Okay. Now we're at 25. Isn't this
23 already in?

24 MS. McVEY: Yes, ma'am.

25 THE COURT: I think it is.

ROA_02164

Appendix_02199

1 Any comments?

2 MR. REID: Your Honor, I'm just trying to make
3 sure the element of when it left the control of the
4 manufacturer --

5 THE COURT: I think that's specifically said in
6 there.

7 MR. McLEOD: If it's in there --

8 THE COURT: All right. Now, 26.

9 MS. McVEY: That's an incomplete charge.

10 THE COURT: I don't exactly understand why that
11 charge was included. Is that part of the sophisticated
12 user, Duke is the sophisticated user as a user, then --
13 as written, this charge is confusing to me, and,
14 therefore, I will not charge it.

15 Number 27 we have already dealt with.

16 Number 28. This is the bare metal. This is can't
17 be liable for a defective product it didn't design,
18 manufacture, or place in the stream of commerce; not
19 liable for any injuries caused by a replacement part.
20 Not going to charge that.

21 MR. McLEOD: The entire charge?

22 THE COURT: I'm not going to charge this charge.

23 MR. REID: Just to make a record, Your Honor, we
24 would request that, and I'd also at least ask the court
25 to consider including the first sentence, which I think

ROA_02165

Appendix_02200

1 would apply to all the claims.

2 THE COURT: I don't have any problem with the
3 first sentence. It's the second sentence that I got
4 the problem with, so take the first sentence.

5 MS. McVEY: No. Your Honor, it's in there. It's
6 in the *Garvin* charge.

7 THE COURT: Where is it?

8 MS. McVEY: On Page 10.

9 LAW CLERK: I thought so.

10 MS. McVEY: The section starts on the bottom of
11 Page 9, duty of product manufacturers and sellers, and
12 he talks about latent defects, and then it talks about,
13 "A manufacturer who incorporates a defective component
14 part into a finished product and places the products in
15 the stream of commerce" --

16 THE COURT: I agree.

17 MR. REID: Your Honor, just one observation. The
18 problem is that's isolating it to the negligence claim
19 when, in fact, that would apply no matter what --

20 MS. McVEY: No. It's just talking about duty.
21 That applies to all of them, duty of products
22 manufacturers and sellers.

23 THE COURT: You have got negligence all by itself,
24 then you've got duty of product manufacturers and
25 sellers, and that's where the stream of commerce thing

ROA_02166

Appendix_02201

1 is, isn't it?

2 MS. McVEY: Yes, ma'am.

3 THE COURT: I think it applies to everything.

4 MR. McLEOD: We would agree with that. That one
5 sentence in the *Garvin* charge just really applies to
6 the whole case.

7 THE COURT: That's right.

8 MS. McVEY: So it's in there.

9 THE COURT: So it's in there. This thing, duty of
10 product manufacturers, is not limited to negligence.
11 Negligence is a separate paragraph that we've already
12 covered.

13 MS. McVEY: So that takes care of 28.

14 THE COURT: That's correct.

15 29, duty to warn.

16 MS. McVEY: That's in there lots of times.

17 MR. REID: As long as the post sale duty to warn,
18 the fact we don't have one is in there. I just need
19 to --

20 MS. McVEY: Well, but here's the problem. They're
21 selling replacement parts, so, I mean, we can put
22 something in there, but it's not as if once they sell
23 this valve, their job is done. Every time they sell
24 these replacement parts, they have a duty to warn.

25 MR. REID: You can argue that, but I don't want

ROA_02167

Appendix_02202

1 the jury to think that there's some duty in 2002 to
2 warn.

3 MR. McLEOD: I think the law is pretty clear
4 there's not post sale --

5 THE COURT: With the facts as developed here,
6 they're really going to be asked to look at a very
7 discrete period of time to decide about his exposure.

8 MS. McVEY: Right, but there's continuing to sell
9 products over the time of his exposure. That's what
10 I'm concerned about. It's not as if when they sell the
11 valve, they're done.

12 THE COURT: I'm not arguing with you. I'm
13 agreeing with you.

14 MS. McVEY: I'm so sorry, Chief Justice Toal.

15 THE COURT: That's why I'm not going to charge
16 this charge.

17 MS. McVEY: You are brilliant, and I'm sorry.

18 MR. REID: For the record, Your Honor, our request
19 for 29 is denied by the court?

20 THE COURT: It's denied. All of it's in there
21 except for, "This manufacturer does not have a post
22 sale duty to warn. The duty to warn is not a
23 continuous one." In the facts of this case, they have
24 continued to sell replacement parts, and to me, this
25 limits or has the potential of being confusing and

1 limiting what they can charge as negligent conduct to
2 the original sale of the unit, and I don't think that's
3 right, and, therefore, I think this would be confusing
4 to the jury so, as written, I can't charge it.

5 MR. REID: Would the court consider one that says
6 the manufacturer does not have a post sale duty -- a
7 duty to warn after the sale of its valves or
8 replacement parts?

9 MS. McVEY: I just don't think you need to comment
10 on that, but --

11 THE COURT: I think the duty to warn is covered by
12 what else is in the charge, so I decline to do that.

13 Number 30, this is not evenhanded. This says, "A
14 product is not defective for failure to warn for the
15 obvious. A seller is not required to warn with respect
16 to products when the danger or potentiality of danger
17 is generally known and recognized. A product cannot be
18 deemed either defective or unreasonable if the danger
19 associated with the product is one that product users
20 generally recognize." This is the plaintiffs knew; the
21 defendant didn't know. Or vice versa.

22 MR. McLEOD: I mean, this is open and obvious
23 dangers. Mr. Jolly admitted that he was aware of the
24 dangers of asbestos. This is relevant to this case. I
25 mean, if the court would like to reword it, but

1 certainly this is an accurate statement of the law.

2 MS. McVEY: Your Honor, there's lots of warning
3 charges in there about they only have to warn if the
4 product is inherently dangerous. It covers this. This
5 is not an open and obvious case where you have got the
6 missing bar stool at the bar and somebody sits down on
7 it and you have to warn about that.

8 MR. McLEOD: It absolutely is. He said he knew
9 the difference between asbestos gaskets and the other
10 gaskets.

11 THE COURT: You know, open and obvious is a
12 concept that anybody who ever came upon this product
13 would be able to look at it and know that it's an open
14 and obvious danger. And y'all are conflating notions
15 of when you have to warn with notions of what is open
16 and obvious.

17 I'm not going to charge this charge. I don't
18 think it's applicable to this situation.

19 MR. McLEOD: I understand your ruling.

20 THE COURT: 31, products liability. This is
21 contrary to the Lawing against Univar. A manufacturer
22 has no duty to warn. The plaintiff admitted he knew of
23 the dangers, the use of the product, fully aware of the
24 nature of the products and the dangers. The supplier
25 cannot be held liable for failure to warn users. I

1 understand why you put this in there, so you can have a
2 ruling on it, and the ruling is it's a charge on the
3 facts; it's contrary to *Lawing*; I'm not going to charge
4 it.

5 Number 32.

6 MS. McVEY: I think that's in there.

7 THE COURT: It's already in there.

8 Number 33, adequacy of the label.

9 MS. McVEY: I have 33, sophisticated intermediary.

10 THE COURT: Excuse me, sophisticated intermediary.

11 MR. McLEOD: We're charging *Lawing*?

12 THE COURT: I'm going to charge *Lawing* on that.

13 Let's get that out one more time and tell them.

14 MR. McLEOD: First, if we could just get a
15 citation, we can add it in.

16 THE COURT: Sure. That's what we're going to do
17 right now.

18 MS. McVEY: I've got the *Lawing* case.

19 MR. McLEOD: I do, too. I just want to know what
20 page and line.

21 MS. McVEY: Can I approach so I can see what
22 language I want?

23 THE COURT: '226, Headnote 10.

24 LAW CLERK: 415 S.C. at 226.

25 MR. McLEOD: It starts "suppliers and

ROA_02171

Appendix_02206

1 manufacturers."

2 LAW CLERK: "The sophisticated user doctrine is
3 typically applied."

4 THE COURT: "Suppliers and manufacturers of
5 dangerous products are generally under a duty to warn
6 the ultimate user of the dangers associated with the
7 use of the product. However, the sophisticated user
8 doctrine which arose -- the sophisticated user doctrine
9 recognizes that a supplier may rely on an intermediary
10 to provide warnings to the ultimate user if the
11 reliance is reasonable under the circumstances. The
12 sophisticated user doctrine is typically applied as a
13 defense to relieve the supplier of liability for
14 failure to warn where it is difficult or even
15 impossible for the supplier to meet its duty to warn
16 the end user of the dangers associated with the use of
17 the product and the supplier, therefore, relies on the
18 intermediary or employer, to warn the end user," and
19 then include the language --

20 MS. McVEY: Can we --

21 THE COURT: Just a second. "When a party asserts
22 the affirmative defense -- an affirmative defense such
23 as the defense of sophisticated user, the burden of
24 proof is on the defendant, and this burden" -- well,
25 no. "The burden of proof is on the defendant to prove

ROA_02172

Appendix_02207

1 that" -- go back to *Lawing* -- "the burden is on the
2 defendant to show that it was difficult or even
3 impossible for the defendant to meet its duty to warn
4 the end user of the dangers associated with the
5 product."

6 MS. McVEY: Say it one more time. Defendant to
7 prove that it was difficult or impossible?

8 THE COURT: Just a repeat of what I quoted out of
9 *Lawing*.

10 MS. McVEY: Okay.

11 THE COURT: And it's just an end to the sentence
12 that says --

13 MR. McLEOD: To warn end user.

14 MS. McVEY: For the supplier to meet its duty to
15 warn the end user?

16 THE COURT: When it's applied as a defense, the
17 defense must show that it was difficult or even
18 impossible for the supplier to meet its duty to warn
19 the end users of the dangers associated with the
20 product. That's straight out of *Lawing*, 10. I have
21 already said it once in this charge, and I'm just
22 repeating that to make it clear to them that when you
23 got the burden of making a defense in this particular
24 thing, this is what you've got to show.

25 MS. McVEY: I respect your ruling, and I'll just

ROA_02173

Appendix_02208

1 reincorporate all my arguments from directed verdict to
2 apply to this jury charge.

3 THE COURT: I gotcha, gotcha, gotcha. I think I'm
4 giving them a huge bone by giving them this, and I
5 wondered if I should do it, but I did it.

6 MS. McVEY: Fair enough.

7 THE COURT: Number 31, products liability. We
8 just finished that.

9 Number 32 is already in.

10 MR. McLEOD: I think we're on 34 now, Your Honor.

11 THE COURT: 33, we just did 33. Now we're at 34,
12 intervening cause. That's certainly already in there.

13 MS. McVEY: Real quick. Where do you want to add
14 the sophisticated user charge to go in the *Garvin*
15 charge?

16 MR. McLEOD: That's a good point.

17 MS. McVEY: Just in terms of the way it reads, do
18 you have a preference where it goes? How about after
19 negligence?

20 THE COURT: After negligence and before duty of
21 product manufacturer or after duty of product
22 manufacturer, but it's right in what is Pages 9 or 10
23 in this thing.

24 MR. McLEOD: After duty to warn.

25 MS. McVEY: So after duty --

ROA_02174

Appendix_02209

1 MR. McLEOD: Duty to warn.

2 THE COURT: That's fine.

3 MR. McLEOD: Yeah. That makes more sense.

4 THE COURT: Okay. Now, OSHA intervening cause. I
5 think all these OSHA charges are comments on the facts,
6 and I'm not in love with charging these things. Y'all
7 have talked about OSHA. The OSHA regulations, are they
8 going back to the jury?

9 MS. McVEY: I mean, they're in evidence. They can
10 go back.

11 THE COURT: They're in evidence. They weren't
12 demonstrative. They are going back to the jury.

13 MR. McLEOD: Your Honor, may I make one comment
14 about that?

15 THE COURT: Yes.

16 MR. McLEOD: In the several asbestos cases that
17 I've been in, arguably it's not nearly as much as my
18 boss, the way we typically approach the OSHA, depending
19 on the type of case it is, is the court literally
20 charges word for word the law. And that's what we have
21 done in Number 35. That's an exact quote from 29 CFR
22 910, or excuse me, in Number 36 as well. Those are
23 exact quotes from the law. And I don't think it's a
24 comment on the facts. This is the law.

25 THE COURT: What it's being used for in this

ROA_02175

Appendix_02210

1 particular case is it's a piece of factual evidence
2 about the development of the use of asbestos, its
3 regulation, the state of the art, and that's why I'm so
4 reluctant to charge on it. The rest of what I'm
5 charging is this is the law and you can't deviate from
6 it.

7 OSHA, in the context of this thing, everybody has
8 picked and chosen. And what this would do, if I read
9 it like y'all have got it, is it's a direct comment on
10 Duke. That's what you want, it in there for is to say,
11 "Hey, beyond all the badness we did, Duke is totally
12 responsible because they violated OSHA. We could
13 violate OSHA; everybody could violate OSHA." In fact,
14 you word the charges by using Duke's name.

15 I am very concerned about starting to talk about
16 OSHA in this case when OSHA's regulations were used not
17 as the law, they were put in as a factual component of
18 the case. So, you know, it would be just like me
19 putting in a factual component of any kind of a writing
20 and then saying now I'm going, as the judge, say you've
21 got to believe only one point of view about this
22 particular regulation.

23 MR. McLEOD: I don't think the plaintiffs
24 dispute --

25 MS. McVEY: We absolutely object. Because there's

ROA_02176

Appendix_02211

1 different pieces of it. You picked up on it exactly.
2 There's different pieces that we think apply to
3 different places, product labeling. We also have the
4 Walsh-Healey Act. If we are going to start charging
5 this stuff, we're going to pick out the Walsh-Healey
6 Act and charge it --

7 THE COURT: I'm just not going to do it.

8 MR. McLEOD: This is the law that's applicable to
9 the case.

10 THE COURT: If you're going to do that, so is
11 Walsh-Healey and a whole bunch of other things.

12 MR. McLEOD: They didn't request the charge. We
13 wouldn't object. It's the law of the case.

14 THE COURT: I've got to be balanced about this no
15 matter what they question. I have to do what I think
16 will withstand scrutiny.

17 MR. McLEOD: Of course, Your Honor. Just to make
18 the record, the law is clear at the time that this
19 happened, in fact, eight years after the time that this
20 happened, the employer had a duty to keep its employees
21 safe. It's a three-sentence passage --

22 THE COURT: I understand they have duties, but the
23 way this thing is written, it suggests that that duty
24 trumps any design defect or anything else that you do,
25 and it doesn't. Your duty to design something properly

ROA_02177

Appendix_02212

1 is not trumped by OSHA standards.

2 MR. McLEOD: Well, it certainly would if the jury
3 found it was an intervening cause. So I suggest --

4 THE COURT: It's not set up to be --

5 MR. McLEOD: Let's reword it.

6 MS. McVEY: Your Honor, they have an intervening
7 charge in here. They have an intervening negligence
8 charge in here. If they want to argue that OSHA and
9 Duke are the intervening negligence, they can do that,
10 but you can't comment on the facts, which is what
11 they're asking you to do.

12 THE COURT: That's what I'm worried about. I
13 don't mind charging intervening --

14 MS. McVEY: Which is already in the charge.

15 THE COURT: I don't see anything in the charge in
16 the *Garvin* case that goes into OSHA, and I'm sure they
17 talk about OSHA just like they did here.

18 MR. McLEOD: That's because OSHA wasn't
19 applicable.

20 MS. McVEY: Yes, it was.

21 MR. McLEOD: I don't believe so.

22 MS. McVEY: He was working at a plant when he was
23 exposed to Crane valves. Carolina Eastman.

24 MR. McLEOD: Was it the same time period?

25 MS. McVEY: Yes.

ROA_02178

Appendix_02213

1 MR. McLEOD: I don't remember arguing about OSHA
2 in *Garvin*, Your Honor, but clearly with Duke, it's
3 applicable here, and we would ask the court to at least
4 charge the 29 CFR 910.

5 MS. McVEY: We object, Your Honor.

6 MR. McLEOD: If the court wants to take out any
7 references to Duke, that's fine. They have argued that
8 we were -- they are, too, so it's clearly a part of
9 this case. They have used OSHA just as much as we
10 have. In fact, Jen Sahmel's cross was all today all
11 about OSHA, so I think it's improper to not charge the
12 jury on the OSHA law. It's a federal law.

13 THE COURT: Just silencio for a minute.

14 Where is intervening cause on this thing? It's on
15 Page 11?

16 MS. McVEY: Yes.

17 THE COURT: Here is what I'm wrestling with.
18 These charges about OSHA assume that the only
19 application of OSHA is to Duke. But OSHA standards
20 apply to everybody.

21 MR. McLEOD: Sure.

22 THE COURT: Including manufacturers.

23 MR. McLEOD: Sure.

24 THE COURT: And that is what I don't like about
25 this charge. It suggests that if the OSHA standards

ROA_02179

Appendix_02214

1 are there, and Duke has violated them, that's an
2 intervening cause.

3 MS. McVEY: Right.

4 THE COURT: That is too one-sided a charge, and
5 that is what has got me bothered about it.

6 MS. McVEY: Your Honor, I really believe strongly
7 that this intervening charge, this intervening cause
8 charge, covers what they need it to cover.

9 THE COURT: I think it does, too, and I think it
10 gives them the complete platform to argue it if they
11 want to argue that Duke didn't provide a safe workplace
12 and they violated OSHA rules and so forth, but these
13 charges as set up take one side of the equation and one
14 side only, and that's Duke's duty to OSHA and not
15 Crosby or Fisher's duty to OSHA standards, and to
16 rework it to do both of that is going to compound the
17 problem of charging on the facts. We have got an
18 intervening cause charge. I think it covers them. I'm
19 going to decline to charge 35 different, because I've
20 got two 35s in mine, and 36. And now we're at 37.

21 All right. Replacement parts.

22 MS. McVEY: I think that's covered.

23 THE COURT: I think the duty of manufacturers
24 covers it, but also we have got a misleading piece of
25 this thing which is, "If a purchaser of a product

ROA_02180

Appendix_02215

1 replaces components of the product with parts made by a
2 different manufacturer, the manufacturer of the
3 original product is not liable for any injury caused by
4 the replacement part." That makes a suggestion that's
5 not going to line up with the evidence at all. The
6 evidence is all replacement parts were ordered through
7 the manufacturers that are the defendants in this suit,
8 so I'm not going to charge 37.

9 MR. REID: Your Honor, just for the record, we
10 would request that. I understand the court has denied
11 37.

12 THE COURT: 38, no duty to recall. I don't know
13 of any recall issue that is present --

14 MS. McVEY: We're not alleging that, so I don't
15 think it needs to be charged.

16 THE COURT: I don't think it's applicable.

17 39, products liability, industry standards, and
18 state of the art. We've already got a complete charge
19 on that. Again, I'm worried about this one in terms of
20 its potential commentary on the facts.

21 MS. McVEY: With OSHA.

22 THE COURT: "Compliance with government safety
23 regulations such as OSHA constitutes strong and
24 substantial evidence that it's not defective." I don't
25 think that's the law at all, so I will not charge 39.

ROA_02181

Appendix_02216

1 MR. REID: Your Honor, I'm trying to find where
2 that is in the *Garvin* charge.

3 MS. McVEY: State of the art.

4 LAW CLERK: Page 9.

5 MS. McVEY: Top of the page.

6 MR. REID: Thank you.

7 THE COURT: State of the art.

8 MS. McVEY: I think that would cover Number 40 as
9 well.

10 THE COURT: That's correct.

11 41, post distribution evidence. "Post
12 distribution evidence is evidence of facts neither
13 known nor available at the time of distribution" --
14 that's not necessarily true in this case. "When
15 assessing a product liability claim against the
16 manufacturer, the judgment and ultimate design of the
17 manufacturer must be evaluated on the basis of what was
18 reasonably known, reasonably attainable at the time of
19 manufacture. The use of post distribution evidence to
20 evaluate product design through the lens of hindsight
21 is improper."

22 In this case, both sides have used post
23 distribution information extensively in their experts'
24 testimony, and so this doesn't line up with the way
25 this case has been tried. And the first sentence is a

ROA_02182

Appendix_02217

1 potential comment on the facts, so I'm not going to
2 charge it.

3 42, apportionment of fault. Here is what I will
4 do with this. This thing is, as it's currently
5 written, says, "Under South Carolina law, defendant is
6 entitled to assert that other persons or entities,
7 whether or not parties in the case, contributed to the
8 alleged injury or damages," and then it says, "and are
9 liable for any or all the damages."

10 I would strike that. The matter of the others'
11 alleged fault in causing the plaintiff's injury has
12 been raised by the defendants. It's proper for you to
13 consider the actions of others but only -- here is what
14 I would say, striking the term causation -- but only
15 insofar as you assess whether the plaintiff has met his
16 burden of proof.

17 MS. McVEY: Your Honor, I don't think you need
18 that in this charge. Number one, they have got the
19 *Manchin* charge. We're going to get to the *Manchin*
20 charge on the employer. So, I mean, I think if you
21 want to work in the employer charge into this, but this
22 is commenting -- we still have to meet our burden of
23 proof as to these defendants. That's already in this
24 charge. It's like arguing again we have to meet our
25 burden of proof with regard to these defendants. They

ROA_02183

Appendix_02218

1 can argue other people are at fault, clearly.

2 THE COURT: Here is what I'm going to do. Look at
3 42 for a moment. Here is how much I'm going to do with
4 42. I'm trying to meld in 42 and 43.

5 So 42 is going to start out -- I mean, the charge,
6 and this is just going to be an addition, is going to
7 start out in this way, "Under South Carolina law, a
8 defendant is entitled to assert that other persons or
9 entities, whether or not parties in the case,
10 contributed to the alleged injury or damages," period.

11 "The matter of others" -- here we go. Here is how
12 we're going. "Under South Carolina law, a defendant is
13 entitled to assert that other persons or entities
14 contributed to the alleged injury or damages," period.
15 "The matter of others' alleged fault in causing the
16 plaintiff's injury has been raised by the defendants,
17 and it's proper for you to consider the action of
18 others but only insofar as you assess whether plaintiff
19 has met his burden of proof." And then, "The plaintiff
20 is prohibited from suing his employer in this court.
21 At the time of the incident, the plaintiff was
22 employed, and the incident" -- well --

23 MR. REID: Events, perhaps.

24 MS. McVEY: This is governed --

25 THE COURT: I want something besides "incident."

ROA_02184

Appendix_02219

1 MS. McVEY: Exposure.

2 THE COURT: Exposure or injury.

3 MR. McLEOD: Well, if it's exposure, it has to say
4 "alleged exposures."

5 MR. REID: How about events, Your Honor. It's a
6 nice neutral word.

7 MS. McVEY: Activities.

8 THE COURT: Injuries.

9 MR. McLEOD: No, that's too --

10 MS. McVEY: At the time of the exposure.

11 THE COURT: At the time of the alleged --

12 MS. McVEY: Exposure.

13 THE COURT: -- exposures, the plaintiff was
14 employed and the exposures or injuries -- I think it
15 ought to say injuries because that's really what you've
16 got to prove.

17 MR. HOLDER: Technically in a latent case, the
18 injury doesn't occur until --

19 THE COURT: All right. "The plaintiff is
20 prohibited from suing his employers in this court. At
21 the time of the alleged injuries, the plaintiff was
22 employed, and the injuries allegedly occurred during
23 the course of his employment. This issue is governed
24 by workers' compensation laws, and an employer's
25 responsibility, if any, for an employees' injuries will

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Appendix_02220

1 be determined or has been determined in another forum.
2 A workers' compensation claim is not before you, and
3 you shall not give any consideration -- it any
4 consideration in reaching a verdict in this case."

5 "However, the matter of the employer's alleged
6 fault in causing injury has been raised by the
7 defendant, and it is proper for you to consider the
8 employer's actions but only in so far as you assess and
9 determine whether the plaintiff has met his burden of
10 proving the elements of the claim necessary to recover
11 against the defendants." That's what I'm going to say
12 about other empty chairs and about the employers.

13 MS. McVEY: Okay.

14 THE COURT: Are we clear?

15 MR. McLEOD: Your Honor, if you could --

16 MS. McVEY: I've got it. For real.

17 MR. McLEOD: Good. Thanks.

18 MS. McVEY: So we're going to add in Number 42 as
19 tweaked by you in addition to the *Machin* charge.

20 THE COURT: And the *Machin* charge, and it's kind
21 of a little repetitive, but that's the only way I can
22 think of to fold both of those in, empty chair and
23 specific information about the defendants.

24 LAW CLERK: Where are we putting it, after
25 defendants?

1 THE COURT: After defendants, on Page 6. You see
2 Page 6 there, after defendants, you're going to put
3 both these things.

4 MS. McVEY: All right.

5 THE COURT: What started out as apportionment of
6 fault but has morphed into something a little bit
7 different, and then the paragraph which is the *Machin*
8 *vs. Carus* charge on the employer. The next charge --

9 MS. McVEY: That doesn't need to come in.

10 THE COURT: -- I'm not going to charge.

11 MS. McVEY: Thank you.

12 MR. REID: That's 44.

13 THE COURT: Yes. We've already said they can't
14 consider the comp. I'm not going to recharge that.

15 MR. REID: Your Honor, I would submit that those
16 are appropriate under the empty chair defense permitted
17 by *Smith vs. Tiffany*.

18 THE COURT: I already covered the empty chair, in
19 my view, of what I've already projected I'm going to
20 charge.

21 MS. McVEY: Right, with number 42.

22 THE COURT: Right. And the *Machin* charge added to
23 it, so I'm not charging 43.

24 MR. REID: 44.

25 THE COURT: And I'm not charging 44. Or 45.

ROA_02187

Appendix_02222

1 46. Where have we got comparative negligence in
2 there?

3 MS. McVEY: It's not in there because there was no
4 comparative negligence for Mr. Garvin like there's not,
5 in our view, in this case.

6 THE COURT: Why do we need comparative -- what
7 should we be doing about comparative negligence in this
8 case in your view?

9 MS. McVEY: We should not be charging it because
10 there's zero evidence that he was comparatively
11 negligent. They have to have some evidence, and
12 there's none.

13 THE COURT: They are contending that he knew about
14 how dangerous asbestos was, and he should have, all by
15 himself, picked up a respirator and started using it.
16 That's their contention.

17 MS. McVEY: And it's more than that, right,
18 because he wasn't actually doing the gasket work and
19 grinding. So what they're saying is by showing up to
20 work at Duke, he was comparatively negligent.

21 THE COURT: By not using -- no. They're saying
22 something different. They're saying if he knew that it
23 was unsafe, he should have put on a respirator. I
24 think that's at least --

25 MS. McVEY: Knew what was unsafe? The gaskets and

1 packing because that's what we're comparing it to. We
2 can compare it to their negligence, which is the
3 gaskets and packing.

4 MS. FARRISE: It seems like if you find they are
5 negligent, then you need to consider whether Mr. Jolly
6 was also negligent.

7 MR. McLEOD: No. That's not the way, not at all,
8 the law.

9 THE COURT: What they're asking for is a charge
10 that says even if you find the defendants were
11 negligent, you must first consider the plaintiff, Dale
12 Jolly's, conduct before you may find for the plaintiff.
13 The law recognizes in certain circumstances that even
14 if the defendant is negligent, if a plaintiff was
15 comparatively negligent, you may not find for the
16 plaintiff. Every person having capacity to exercise
17 ordinary care for his own safety, blah, blah, blah.

18 MS. McVEY: That's contributory negligence, not
19 comparative.

20 THE COURT: That's obviously not right.

21 MS. McVEY: There's no evidence that he was
22 negligent.

23 THE COURT: Ms. McVey, I hear you. All right.

24 LAW CLERK: We're going to add the language from
25 *Berberich*.

ROA_02189

Appendix_02224

1 THE COURT: Here's what we're going to do.

2 MR. McLEOD: 47 is a --

3 THE COURT: Here is what we're going to do. I am
4 not charging 46, so understand that. 47, I don't know
5 why it's got "the decedent" all the way through it, but
6 we don't have a dead person, but we were going to
7 say -- look on Page 39 up at the top of the page.

8 What we were going to say is we were going to
9 start with a quote from *Berberich vs. Jack* footnote --
10 I mean Headnote 8 at Page 286. That's 392 S.C. 286.
11 This is B-e-r-b-e-r-i-c-h against Jack.

12 We were going to say in this charge -- here is
13 what I want you to look at on Page 8. We were going to
14 say, "A plaintiff in a negligence action may recover
15 damages if his or her negligence is not greater than
16 that of the defendant."

17 And then we were going to say, "To find that the
18 plaintiff was comparatively negligent to a degree
19 greater than that of any of the defendants such that
20 the plaintiff is barred from recovery, you're not
21 limited to considering the plaintiff's subjective or
22 actual appreciation of the danger; rather, you may
23 determine whether or not the conduct conformed to an
24 objective standard. That objective standard is such
25 care as an ordinarily prudent person would exercise

ROA_02190

Appendix_02225

1 under the same or similar circumstances to avoid
2 injury."

3 Now, that is what I would propose to charge.

4 MS. McVEY: Your Honor, in addition to just our
5 objection, could we say, "A plaintiff in a negligence
6 action may recover damages if his or her negligence, if
7 any."

8 THE COURT: Where are you going?

9 MS. McVEY: And then go on to the rest of your
10 sentence.

11 THE COURT: "A plaintiff in a negligence action
12 may recover damages if his or her negligence, if any,
13 is not greater than that of the defendant." I accept
14 that.

15 And then, you know, they had two ways of -- they
16 said this twice. Once they said, "If you find the
17 decedent was actually aware," blah, blah, blah, blah,
18 blah. All right. And then said, "In other words."
19 And I'm doing the "in other words part," except I'm
20 just saying, "To find that plaintiff was comparatively
21 negligent to a degree greater than that of any of the
22 defendants such that the plaintiff is barred from
23 recovery, you're not limited to considering the
24 subjective or actual appreciation of the danger;
25 rather, you may determine whether such conduct

1 conformed to an objective standard. That objective
2 standard is such care as an ordinarily prudent person
3 would exercise in the same or similar circumstances to
4 avoid injury."

5 MS. McVEY: And you have the burden of proof with
6 that as well.'

7 THE COURT: Started off with the *Berberich* quote,
8 but I'm tweaking one more time. "A plaintiff in a
9 negligence action may recover damages if his or her
10 negligence, if any, is not greater than that of the
11 defendant. The defendant has the burden to prove the
12 negligence of the plaintiff." And then, "To find that
13 the plaintiff was comparatively negligent to a degree
14 greater than that of the defendants such that the
15 plaintiff is barred from recovery, you're not limited
16 to considering the plaintiffs," et cetera. Okay?

17 MS. McVEY: I think we can work it out.

18 MR. McLEOD: One more time, Jose, the cite.

19 LAW CLERK: 392 S.C. 286.

20 MS. McVEY: Just for the record, we object to any
21 comparative negligence charge.

22 THE COURT: Understood.

23 Finally, loss of consortium.

24 MS. McVEY: It's in there.

25 THE COURT: We have got a loss of consortium

1 charge in here, which is shorter than yours and more
2 succinct.

3 MR. REID: Your Honor, we accept the one in
4 *Garvin*. I think there should be one tweak. The last
5 phrase is, "And for any reasonable expenses reasonably
6 incurred." That's already in the general damage one,
7 and I would -- it creates a risk of a double recovery,
8 in other words, the jury awarding the same medical
9 damages --

10 MS. McVEY: Your Honor, the only thing I would say
11 about that is Ms. Jolly testified she had a heart
12 attack as a result of the care of her husband.

13 THE COURT: I was saying, "For any medical
14 expenses she reasonably incurred."

15 MS. McVEY: Thank you, Your Honor.

16 MR. REID: But I think it would take expert
17 testimony to say that that heart attack was caused by
18 something related to --

19 THE COURT: I don't think it takes expert
20 testimony. Y'all -- that goes to the weight of what
21 she says. The jury may conclude that they haven't got
22 any information upon which to make such a thing, but
23 she testified she had a heart attack, and her daughter
24 testified that she believed that the mama was under
25 tremendous stress. They can make the determination as

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Appendix_02228

1 to whether or not that heart attack was caused -- don't
2 look at me like that, Mr. McLeod. Come on, now.

3 MR. McLEOD: I'm just surprised.

4 MS. McVEY: Y'all got the comparative charge.
5 Maybe we can move on.

6 MR. REID: You ruled. I accept that. Just to
7 make my record clear, I just would say there's no
8 evidence of medical bills nor any expertise.

9 THE COURT: And that goes to the weight of what
10 can be done.

11 MS. McVEY: We'll take it out. Take it out.
12 We'll take it out. I'm ready to be --

13 THE COURT: Hold it. I know everybody is ready to
14 go, but I got to be sure I'm understanding.

15 MS. McVEY: I didn't mean that towards you at all,
16 Your Honor.

17 THE COURT: Plaintiff is entitled --
18 Let me see what their charge says.

19 "And for any expenses for the care and treatment
20 of her spouse and any medical expenses she reasonably
21 incurred." What are we doing?

22 MS. McVEY: Any reasonable medical expenses she
23 reasonably incurred.

24 THE COURT: Take those out and just say, "For any
25 medical expenses reasonably incurred," or just strike

1 it all out?

2 MS. McVEY: The part before was about her husband.
3 That stays in. So what she's talking about is just the
4 ones she incurred.

5 THE COURT: "Expenses for the care and treatment
6 of her spouse," period. Right?

7 MS. McVEY: Right.

8 THE COURT: Okay. That's that.

9 MR. McLEOD: Thank you, Theile.

10 THE COURT: Now where are we?

11 MR. REID: Just, there are a few tweaks in the
12 Garvin charge that we didn't cover. Just to walk
13 through those, I'll do it as quickly as I can.

14 THE COURT: All right.

15 MR. REID: Second or third page, second paragraph
16 of the burden of proof section, I would -- it's not a
17 big deal, but I prefer that we just take that out. I
18 think it makes these --

19 THE COURT: Every civil judge I know in South
20 Carolina does that because people are so imbued with
21 the notion of beyond a reasonable doubt so I'll keep it
22 in.

23 MR. REID: All right. The evidence paragraph has
24 some language about stipulations. I don't know that we
25 have any stipulated facts. I would rather take that

1 out.

2 THE COURT: I'll take out "and the stipulations."
3 "The witness testimony and the stipulations." I see it
4 there. I'm taking it out.

5 MR. REID: Page 6, summary of plaintiffs' claims.

6 MS. McVEY: We've already done that, asbestos
7 firm.

8 MR. REID: Yes, but one more. In the middle it
9 says, "Plaintiffs' claims in this case are based on
10 three theories and" -- maybe it's a misspelling. Maybe
11 it's supposed to be "they are alternative theories."

12 THE COURT: I think it's "they are."

13 MS. McVEY: I don't even see it, but I'm sure it's
14 a misspelling. It's, "On three theories, and they are
15 alternative" --

16 LAW CLERK: No. I think it's "their
17 alternatives."

18 THE COURT: The theories and the theories'
19 alternatives? "The first theory is negligence. The
20 second is strict liability. The third is called breach
21 of implied warranty. Plaintiffs are not required to
22 prove all of these theories to recover. Proof of a
23 claim of any of these theories would enable" --

24 LAW CLERK: I would just take out "and their
25 alternative theories." It's based on three theories.

1 MR. REID: I'm fine with that.

2 THE COURT: Right. No. It's right to say and
3 they are -- no. They could find liability on all
4 three. Strike out all of that.

5 MS. McVEY: Strike out which one?

6 THE COURT: Three theories, period. And strike
7 out "and their alternative theories." They are
8 whatever that was going to say. There are three
9 theories. That's it.

10 MR. REID: The defendants' paragraph. I presume
11 that last sentence should read, "And they must prove"
12 all these things.

13 THE COURT: Yes. I agree.

14 MR. REID: Just a little earlier in that sentence,
15 can we put "product" instead of "conduct" so it says
16 "defendant's product"?

17 THE COURT: Caused by the defendants' --

18 MS. McVEY: It's the valves and the --

19 MR. REID: Products. I don't care.

20 THE COURT: Keep conduct?

21 MS. McVEY: I think you can keep conduct.

22 THE COURT: Product. All right. Product.

23 LAW CLERK: Products.

24 THE COURT: Got it.

25 What else?

ROA_02197

Appendix_02232

1 MR. REID: Page 11, Your Honor.

2 THE COURT: All right.

3 MR. REID: Four lines from the bottom -- I'll
4 start five lines from the bottom, says, "Actual
5 damages, actual loss and expenses the plaintiffs have,"
6 I would like to have it read "have incurred," period.
7 The phrase "suffered because of the defendants' wrongs"
8 sounds like the court is making a judgment and
9 informing the jury of that.

10 MS. McVEY: Your Honor, I think that's fine.

11 THE COURT: "Incurred" is all right?

12 MR. REID: Are you okay with the change?

13 MS. McVEY: I don't know where you are.

14 THE COURT: It's four lines from the bottom of
15 Page 11. See where it says, "Plaintiffs have suffered
16 because the defendants' wrong incurred."

17 MS. McVEY: We're going to take out "suffered"?

18 THE COURT: Yeah, and put "incurred."

19 MS. McVEY: We object. We already have "incurred"
20 on top of that like five lines up, "Plaintiffs may
21 recover amounts incurred for past and future medical
22 care including hospital, physician, nursing care
23 costs."

24 THE COURT: We're just going to use that same
25 terminology against. Actual damages would be the

1 actual losses plaintiffs have incurred because of
2 defendants' wrong.

3 MR. REID: Just the third line of the damages
4 paragraph says "defendants' conduct or product." I
5 think it's one or the other.

6 MS. McVEY: I think it's both.

7 THE COURT: I'm going to say conduct and products.

8 MR. REID: Conduct and products?

9 THE COURT: Yes. You designed it, and you put it
10 in the stream of commerce.

11 MS. McVEY: Conduct or products, right. Not and,
12 or.

13 MR. REID: Well, it has to be and.

14 MS. McVEY: No.

15 THE COURT: I'm going to violate all grammatical
16 things and put and/or. We are picking the nits pretty
17 good here.

18 MR. REID: Just a couple more to pick. Page 12,
19 very top, word "misconduct." Can we just say
20 "conduct"?

21 MS. McVEY: No.

22 MR. REID: It's a neutral word as opposed to
23 misconduct.

24 THE COURT: Well, you're not going to like the way
25 the whole sentence is, but in the context of the whole

1 sentence, I think it makes sense. "A person who
2 suffers personal injuries because of the misconduct of
3 another is entitled to recover the reasonable value of
4 medical care and expenses." I'm going to leave it just
5 like it is.

6 MR. REID: Lastly, Your Honor, Page 13, last
7 sentence of the punitive damage paragraph. Maybe I
8 didn't see authority on that point, but I just don't
9 know that there's authority for that last sentence.

10 THE COURT: "Clear and convincing proof
11 establishes in your mind not only that a fact is
12 probable but that it is highly probable." What's wrong
13 with that?

14 MR. REID: If the court thinks that's appropriate,
15 that's fine.

16 THE COURT: Well, you have got to do something to
17 distinguish clear and convincing from the normal
18 standard of proof. What you're trying to do is you're
19 trying to talk about the normal standard of proof, the
20 beyond a reasonable doubt; you've got greater weight of
21 the evidence; you've got clear and convincing, and that
22 highly probable is language from one of Justice
23 Littlejohn's cases. I can't remember which one right
24 now. It might have been the one where he invented the
25 tort of outrage, *Ford vs. Hudson*, but that's some

1 language I remember from a case, so I'm going to keep
2 it just like it is. He's established a clear and
3 convincing standard, a higher standard proof, proof of
4 outrage where you don't have any physical injury, as
5 you may recall. That's *Ford vs. Hudson*. And then he
6 tried to say what clear and convincing was, and I think
7 that's what he says. So, anyway, I'm going to keep it
8 in. My tribute to my Spartanburg buddy.

9 MS. McVEY: Is that it for the jury charge?

10 THE COURT: Yancey?

11 MR. McLEOD: Yes, ma'am.

12 THE COURT: I'm not going to let you go until you
13 feel like you've got everything that you're supposed to
14 have now.

15 MR. McLEOD: Your Honor, you know, I think we're
16 good.

17 THE COURT: Are we through everything we need to?
18 Mr. Reid.

19 MR. REID: Well, we haven't discussed the verdict
20 form yet.

21 THE COURT: Yes. We've got to do that. We've got
22 to do that.

23 Now, Theile, didn't you give us a verdict form?

24 MS. McVEY: I did. I can hand it up.

25 THE COURT: Come on up here, y'all.

ROA_02201

Appendix_02236

1 MR. McLEOD: I didn't realize you had already
2 given her one.

3 MS. McVEY: I didn't.

4 THE COURT: She said she might, but then she
5 didn't.

6 MR. McLEOD: We had already just a second ago
7 exchanged --

8 THE COURT: Let me just look at it for a minute.

9 MS. McVEY: That would be if they came back with
10 recklessness.

11 MR. McLEOD: I looked at it, and ours is not that
12 much different except that we need a little more
13 specificity. Let the jury decide on each cause of
14 action rather than just, you know, the plaintiffs.

15 So mine is very similar. "We, the jury, find
16 for" -- it's just we need more specificity as to what
17 they're finding us guilty of. We have got the causes
18 of action listed out.

19 MR. REID: I can elaborate when the court has a
20 moment.

21 THE COURT: Well, this is a combination of a
22 verdict form. In the first verdict form, "We, the
23 jury, find for Fisher Controls; we the jury find for
24 Defendant Crosby Valve. Answer, yes; stop your
25 deliberation. If you answered no to one or two, go on

1 to negligence. We, the jury, find that the Defendant
2 Fisher Controls was negligent and its negligence was a
3 proximate cause of the injury and damages. And this is
4 just an overall general verdict.

5 MS. McVEY: Seems to me, with this one, you don't
6 need the first two questions because if you're going to
7 break it out --

8 THE COURT: That's just what I was about to say.

9 MS. McVEY: Assuming we're going to break it out.
10 So we get the first one was negligence. I do
11 agree with this in that the comparative, assuming
12 they're really going with that -- I have a big problem
13 with this, "the" proximate cause. It needs to be "a"
14 proximate cause.

15 MR. McLEOD: I think Mr. Reid has some comments.

16 MS. McVEY: But the law is you can have more than
17 one proximate cause.

18 MR. REID: I don't have a dispute with proximate
19 cause.

20 MS. McVEY: Because the comparative will only go
21 to the strict liability, right?

22 THE COURT: Uh-huh. Comparative will only go as
23 to negligence, that's correct.

24 MR. McLEOD: Yes, ma'am. I wasn't sure how the
25 court wanted to deal with it. I just put it in there

ROA_02203

Appendix_02238

1 because --

2 LAW CLERK: That's part of the reason why you
3 can't go with everything.

4 MS. McVEY: Yeah.

5 LAW CLERK: Somebody prepared this thinking she
6 was going to win.

7 MS. McVEY: That's true.

8 MR. McLEOD: You know, in my years of clerking, I
9 struggled, struggled, struggled trying to coming up
10 with the perfect verdict form.

11 LAW CLERK: There aren't any.

12 MS. McVEY: I can't remember what the jury charge
13 said, but in terms of punitive, I think it needs to
14 mimic -- there's different kind of language for
15 punitives, and I think we have on here --

16 MR. REID: Your Honor, what we tried to do there,
17 punitives can only be awarded based on conduct that has
18 caused damage, so that is why we put the additional
19 phrase.

20 MS. McVEY: But they have already found damages.

21 THE COURT: They have already found damages.
22 They're not going to find -- this isn't in an abstract.
23 They would have found damages because otherwise you
24 don't have a verdict for actual upon which the
25 punitives can be mounted.

ROA_02204

Appendix_02239

1 MR. REID: I agree with that, but this would focus
2 them in to award punitive.

3 THE COURT: What was that case we had where we had
4 zero damages?

5 LAW CLERK: Dikema (phonetic).

6 THE COURT: I think I wrote that one. You've got
7 to have at least one dollar in damages in order to have
8 punitive damages, so damages would have already been
9 found.

10 MR. REID: Just for the record, my position would
11 be that by having that phrase in linking it to damage,
12 they would only be awarding punitives based on that
13 conduct and not something else in the case that didn't
14 cause damage.

15 THE COURT: Well, it's the conduct, and then you
16 evaluate whether it was proved by clear, convincing
17 evidence; willful, wanton, or reckless.

18 MS. McVEY: I think this is an appropriate
19 language for the punitive piece.

20 THE COURT: What the punitive ought to say is,
21 "We, the jury, by unanimous -- by a unanimous vote,
22 find by clear and convincing evidence that the
23 following defendant or defendants was or were willful,
24 wanton, or reckless." And I would say, "The conduct of
25 the following defendant or defendants was or were

ROA_02205

Appendix_02240

1 willful, wanton, and reckless: Crosby Valve, Fisher
2 Controls." That's what punitives are going to be.

3 Now, let's go back to actuals. I think something
4 along these lines --

5 MS. McVEY: Can we take out these first two?

6 THE COURT: Yes. I will take out those two
7 because --

8 MR. McLEOD: That's too short -- if they rule in
9 our favor, they don't have to go any further.

10 MS. McVEY: They have to rule on each one of
11 them --

12 THE COURT: You're doing a general for you here,
13 and then, really, you have to have a specific one for
14 each one. You have got to find for -- you've got to
15 find for Defendant Fisher Controls as to negligence, as
16 to strict liability, as to implied warranty. The way
17 that's set up, you make one finding, and that would be
18 it. I don't even know if you would want that.

19 MR. McLEOD: Well, they have been charged with --

20 LAW CLERK: You're setting the jury up to come
21 back with a messed-up verdict form.

22 THE COURT: I'm not going to do it that way. I'm
23 going to do it with these other ones.

24 MR. REID: So we will have a series of questions
25 for each theory of liability?

ROA_02206

Appendix_02241

1 THE COURT: Just like you have here. I'm just
2 going to strike this out because you have got, "We, the
3 jury, find Defendant Fisher Controls is negligent. Its
4 negligence was" --

5 MS. McVEY: And a proximate cause.

6 THE COURT: A proximate cause. And then, "We, the
7 jury, find they were negligent. We, the jury, find
8 they were negligent," and then if you want to put on
9 there, "We, the jury, find for Defendant Fisher
10 Controls," or, "We, the jury, find for Defendant Crosby
11 Valve," on each of this, you can do it, but you can't
12 do it up here as one overall general thing.

13 MS. McVEY: You already have it here. You don't
14 need to do it separately, break it out.

15 THE COURT: "We, the jury, find the defendant was
16 negligent."

17 MS. McVEY: Fisher Controls.

18 THE COURT: If you say yes --

19 MS. McVEY: Then you move on.

20 THE COURT: If you say no --

21 MS. McVEY: You still move on.

22 THE COURT: If you find all these as nos -- you've
23 got it the right way because if you answer yes to any
24 of these, then you find damages.

25 MS. McVEY: The only thing I would like to change

ROA_02207

Appendix_02242

1 is for damage, it needs to say Dale Jolly's damages on
2 actual damages and Brenda Jolly's so they know what
3 they're awarding.

4 THE COURT: That's correct.

5 MS. McVEY: Wait a second. We have to add up the
6 percentage of fault. Because you've got -- it's got to
7 add up to a hundred percent.

8 MR. HOLDER: Right. This is the second phase.

9 LAW CLERK: If they come back.

10 THE COURT: The court has spoken very clearly in
11 *Smith vs. Tiffany* that you've got to come up to a
12 hundred percent. You've got to say percentage of
13 plaintiffs' fault, then you've got to put percentage,
14 Crosby, and percentage, Fisher.

15 MR. McLEOD: If any.

16 THE COURT: And you would put -- well, you could
17 put "if any." And then put down at the end, "The sum
18 of these should be one hundred percent." Okay? Have
19 we got it now?

20 MR. REID: Your Honor, there is one last request
21 I'd make, and this is because we've got these issues,
22 which I think won't be clear to the jury about whether
23 they're to consider insulation or flange gaskets or
24 internal gaskets and packing. So what I would propose
25 is a series of questions along these lines --

1 THE COURT: I'm not going to interrogatory the
2 jury in that way. The court has fussed about that in
3 many, many cases. I'm not going to get into
4 interrogatorying them on the facts'. I'm not going to
5 do that.

6 MR. REID: I accept that ruling. Can I read what
7 I would propose, for the record?

8 THE COURT: All right.

9 MR. REID: I'll be quick. One, was plaintiff
10 exposed to asbestos gaskets and packing contained
11 within Fisher's valves. If yes, were the asbestos
12 gaskets and packing materials contained within those
13 valves sold or supplied by Fisher? Three, was
14 plaintiff exposed to asbestos insulation used on or
15 around Fisher's valves? Four, should Fisher have
16 anticipated that asbestos insulation would be used on
17 or around its valves to which plaintiff would be
18 exposed? Five, was plaintiff exposed to asbestos
19 flange gaskets used with Fisher's valves? Six, should
20 Fisher have anticipated that asbestos flange gaskets
21 would be used with Fisher's valves to which plaintiff
22 would be exposed? Then I would propose a similar
23 series of questions for Crosby.

24 THE COURT: You've got them?

25 MR. REID: Yes.

ROA_02209

Appendix_02244

1 THE COURT: Now --

2 MS. McVEY: So I think Mr. Reid and Yancey are
3 finally going to try to tweak the jury charges as best
4 they can, and I'll come be helpful however I can with
5 that.

6 THE COURT: Then the bottom line is y'all will
7 e-mail Josh and myself.

8 MS. McVEY: Yes, the jury charge.

9 THE COURT: And verdict form.

10 MS. McVEY: Marcia is making a verdict form as
11 tweaked. I'll give you a copy of it, too.

12 MR. REID: We've got a lot to throw in, and there
13 certainly could be room for an error, and I just
14 wondered if it would make sense to meet at 8:30 just in
15 case we need to iron something out.

16 THE COURT: Josh and I need to meet together
17 before that. He and I need to meet before we meet with
18 y'all. Let's meet at 8:30 to make sure all the charges
19 are copacetic.

20 LAW CLERK: Y'all are going to e-mail the jury
21 form and the jury charge?

22 THE COURT: To Josh and me.

23 MR. McLEOD: There is a punitive damages statute,
24 and I just want to make sure, and I admit --

25 THE COURT: Do this.

ROA_02210

Appendix_02245

1 MR. McLEOD: I want to make sure --

2 THE COURT: Check out the statute, and we'll talk
3 about it tomorrow. I don't know I'm aware of the
4 statute, and I don't know that there's anything in
5 there that is inconsistent, but check it out and we'll
6 see..

7 MR. McLEOD: Okay. Thank you, Your Honor.

8 MR. REID: Is it custom for the instructions to be
9 handed to the jury.

10 THE COURT: It is not our custom. When I did my
11 training sitting, I sat with Billy Keysley, and he is
12 the only circuit court judge -- I sat with several,
13 Tommy Cooper and others, but Billy is the only one I
14 know that hands his instructions to the jury. I think
15 I would be way above my pay grade if I did that. I'm
16 not intending to do that as a first-line move.

17 MR. McLEOD: One more thing. I know we already
18 addressed this. The posttrial motions. In the
19 event --

20 THE COURT: I talked with Josh about posttrial
21 motions, so listen up about posttrial motions. There
22 is a lot of debate going on in appellate circles now
23 about posttrial motions and what constitutes
24 sufficiency.

25 Rule 59 says ten days after the verdict is

ROA_02211

Appendix_02246

1 rendered. And I think to be on the safe side, what you
2 need to do is file a -- whoever is the party that seeks
3 relief, you need to file a Rule 59 motion that
4 specifies the grounds you intend to rely on. It does
5 not have to be a big legal memorandum. It can throw in
6 more stuff than the kitchen sink. It might be more
7 than you really intend to do.

8 But I was always much more flexible about that,
9 but now the court of appeals is starting to look more
10 carefully and start counting these days, and there is
11 at least one case that has been thrown out because the
12 parties, the judge told them, "Hey, you can have
13 15 days," or something like that, and they didn't file
14 anything within ten days, so I just think I don't want
15 y'all to have any problems.

16 MR. McLEOD: We're okay with the ten days. I
17 wanted to make sure the court was not going to make us
18 do it tomorrow.

19 THE COURT: No. And we're not going to hear it in
20 ten days. All you're going to do is file it, and
21 you're going to have your leisure to file memoranda and
22 for me to set a date for a hearing, and that's probably
23 going to give you at least until September because I
24 don't plan on hearing it in August.

25 MS. McVEY: So we can file something skeleton in

ROA_02212

Appendix_02247

1 ten days.

2 MR. McLEOD: Thank you, Your Honor. I wanted to
3 make sure I didn't need to be prepared.

4 THE COURT: Ladies and gentlemen, this has been an
5 awfully difficult day. Let me apologize if I have been
6 antsy, hard to get along with, interrupting you, or
7 doing all those things that judges sometimes do when
8 they get tired. I have total and complete respect for
9 your honor and your decency and your high degree of
10 professionalism. And I mean that not as some kind of
11 platitude but something coming straight from my heart,
12 so please don't take unkindly any snippy activity on my
13 part at the end of the long day.

14 MS. McVEY: Thank you to the court staff for
15 staying so late.

16 THE COURT: Court staff, ya'll are the best in the
17 world and the bailiffs.

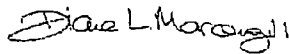
18 (WHEREUPON, proceedings adjourned at 6:43 p.m.)
19
20
21
22
23
24
25

Certificate of Reporter

I, Diane L. Marcengill, Official Court Reporter
for the Tenth Judicial Circuit of the State of South
Carolina; do hereby certify that the foregoing is a
true, accurate, and complete transcript of record of a
portion of the proceedings had and evidence introduced
in the trial of the captioned case, relative to appeal,
in the Circuit Court for Spartanburg County, South
Carolina, on the 2nd day of August 2017.

This transcript may contain quoted material. Such
material is reproduced as read by the speaker.
I do further certify that I am neither of kin, counsel,
nor interest to any party hereto.

November 4, 2017



Diane L. Marcengill, RPR, CRR
Circuit Court Reporter

1 State of South Carolina
2 County of Spartanburg
3
4 Beverly Dale Jolly and)
5 Brenda Rice Jolly,)
6 Plaintiffs,) 2016-CP-42-1593
7 -vs-) August 3, 2017
8 Crosby Valve, LLC and)
9 Fisher Controls)
10 International, LLC,)
11 Defendants.) Volume 9 of 9
12) Pages 1996 - 2224
13)
14) Transcript of Record
15)
16)
17)
18)
19)
20)
21)
22)
23)
24)
25)

13 B E F O R E:

14 The Honorable Jean Hoefer Toal, Judge;
15 and a jury.

16 A P P E A R A N C E S:

17 Theile McVey, Esquire
18 Kassel McVey
19 Jonathan M. Holder, Esquire
20 Dean Omar Branham
21 Simona A. Farrise, Esquire
22 Farrise Law Firm
23 Attorneys for Plaintiffs

21 Timothy W. Bouch, Esquire
22 Yancey A. McLeod, Esquire
23 Leath, Bouch & Seekings
24 Philip C. Reid, Esquire
25 Von Briesen & Roper
Attorneys for Defendants

Diane L. Marcengill, RPR, CRR
Circuit Court Reporter

ROA_02215

Appendix_02250

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Closing Argument By the Defense	2067
Reply Argument By the Plaintiffs	2090
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Jury Charge	2112
Verdict	2218

E x h i b i t s

For the Plaintiffs:

Marked	Description	I.D.	Admitted
	None offered.		

For the Defendants:

Marked	Description	I.D.	Admitted
	None offered.		

1 (WHEREUPON, court convened with all parties
2 present and the following proceedings were had
3 commencing at 8:32 a.m.)

4 WHEREUPON, an off-the-record discussion regarding
5 the verdict form and jury charges was held.)

6 THE COURT: I think we can hold that. Because
7 they're going to come out, I'm going to instruct them
8 to come out and publish the verdict on Number 1. I'm
9 not going to send Phase 2 back.

10 MR. McLEOD: Your Honor, I'm just now -- this
11 Question Number 10 really ought to start with, "If you
12 answered yes to the negligence questions 1 and 2,"
13 because I don't want the jury to think that the
14 punitive applies to -- punitive is a negligence.
15 That's a real simple change.

16 MS. McVEY: I know punitives don't apply to strict
17 liability, but they do apply to breach of implied
18 warranty.

19 MR. McLEOD: Just negligence. So Number 10, "If
20 you answered yes to Questions 1 and 2" -- I'm sorry,
21 but that would be misleading.

22 MS. McVEY: I need to have this form. You have
23 your own.

24 MR. McLEOD: I don't, actually.

25 MS. McVEY: Well --

ROA_02217

1 THE COURT: I am not going to put up with this.
2 Now, let's please not start off with bickering back and
3 forth. I'm sitting here trying to study what I've been
4 asked to do, which is the thing that you asked me to
5 put on there, so let's not get into further colloquy
6 with Theile.

7 Right now I'm trying to figure out how to respond
8 to what you just said, so let's be peaceful for a
9 minute.

10 It's going to start off, "If you answered yes to 1
11 and 2, answer Number 10, we, the jury, by unanimous
12 verdict."

13 MS. McVEY: Same thing for 9, "If you answered
14 no."

15 THE COURT: Yes.. If you answer no, skip this, to
16 Number 3. All right. Y'all going to --

17 MS. McVEY: I'm going to make this change.

18 THE COURT: Yes, ma'am. All right.

19 Have we got anything else on this verdict form?

20 MR. REID: Nothing you haven't ruled already.

21 THE COURT: I'm going to study some more how in
22 the world this crazy thing -- it's not your fault.

23 MR. McLEOD: And the thing that I wanted to put on
24 the record yesterday, I believe I know the court's
25 ruling, is that Fisher and Crosby would like to have

1 all of the named defendants in the lawsuit on the
2 verdict form.

3 THE COURT: I have ruled on that so many times
4 that you don't need to preserve that further.

5 Diane, are you taking all this down?

6 THE REPORTER: Yes. Not the very beginning of
7 this whole thing.

8 THE COURT: Mr. McLeod has once more asked for an
9 inclusion in the instructions of charges related to the
10 inclusion in the verdict form of other former
11 defendants or other non-defendants, and the court has
12 declined to do that consistently since the beginning on
13 the strength of *Smith vs. Tiffany* and *Machin vs. Carus*
14 *Corporation*, and I continue to do that. So you're
15 protected, Yancey.

16 MR. McLEOD: Thank you, Your Honor.

17 THE COURT: Okay. All right. Now --

18 MR. HOLDER: The only other thing --

19 THE COURT: Don't say that because there's going
20 to be plenty of other things.

21 MR. HOLDER: Madam Court Reporter let me know and
22 I've let Yancey know that she was missing some pages
23 out of one of the exhibits that have been on the stand
24 and I believe have been used at a later time in
25 examination. She let me know it was from the Dumistra

ROA_02219

Appendix_02254

1 binder. 2006 was the name of the exhibit. .

2 And we had put on the record or Mr. Bouch had put
3 on the record yesterday that that was for demonstrative
4 purposes only. Well, as to the transcript at the
5 beginning of the notebook, yes, because that was if we
6 needed it for impeachment, but every exhibit called out
7 during that examination was 2006.001 or 2016.762 or
8 something.

9 THE COURT: Right.

10 MR. HOLDER: And those were all in that notebook
11 that had been admitted.

12 THE COURT: Those exhibits were admitted into
13 evidence, period, end of conversation. They're going
14 to the jury. They're not demonstrative. The
15 demonstrative part of it was that transcript.

16 MR. HOLDER: Right. And I have brought a full
17 copy of the 2006 starting at 2016.001 all the way to
18 the end. I allowed defense counsel to see it, and then
19 I believe hand it to the court reporter and allow her
20 to pull the exhibits that she believes were missing
21 from the notebook.

22 THE COURT: That's fine.

23 MR. HOLDER: Thank you, Your Honor.

24 THE COURT: Okay. Now, we've got a lot of
25 notations we made because I went through last night,

Jolly v. Crosby Valve, LLC & Fisher Controls, LLC 2016-CP-42-1593

1 and we went through early this morning what we have
2 gotten. Now, we have got a whole other set of jury
3 charges.

4 LAW CLERK: I'm getting a couple printed.

5 MS. McVEY: We might be able to shortchange some
6 of them. We had some agreement.

7 THE COURT: That's good.

8 MS. McVEY: So that is good. There's a couple of
9 things --

10 THE COURT: Let's get a printout first.

11 MR. REID: Yeah, we had a very productive session.

12 THE COURT: That's great. Y'all just hold on for
13 a minute.

14 MR. McLEOD: Marcia, did you see my e-mail?

15 You might have seen the notice. I did file a copy
16 of our proposed jury charges.

17 THE COURT: Yes, I saw that.

18 (Pause in proceedings.)

19 THE COURT: Philip, you go ahead.

20 MR. REID: I think we have a list of ten things
21 that need to be addressed.

22 THE COURT: Now, I had gone over some things based
23 on what Theile sent last night. Is it productive to go
24 over those?

25 MS. McVEY: We have agreed to a vast majority of

ROA_02221

Appendix_02256

1 those.

2 THE COURT: I'll put this to the side.

3 MS. McVEY: Some of this, Your Honor, we
4 apologize. We just didn't take great notes between the
5 two of us.

6 THE COURT: Understood. It was a crazy session.
7 Y'all did a really good job, so no problem.

8 MR. REID: So I think the first one for the
9 court's attention is Page 6, at least the copy I'm
10 looking at, Defendants' 19. And the question there
11 is --

12 THE COURT: This is for the plaintiff to prove
13 actionable exposure?

14 MR. REID: Right. It has to do with the last
15 sentence. We had a difference of opinion about whether
16 the court included or did not include that last
17 sentence. Defendants want it; the plaintiff does not.

18 THE COURT: Which number was that number?

19 MS. McVEY: That was Number 19.

20 THE COURT: I had included, "This evidence must
21 show more than casual or minimal contact to asbestos
22 from the defendants' product," and that would stay.

23 MS. McVEY: Okay. I had it marked out.

24 MR. REID: Second one is the next page under
25 defendants 24.

1 THE COURT: All right. That's the evidence of
2 industry custom is relevant to ordinary users'
3 expectations?

4 MS. McVEY: Right.

5 THE COURT: We have looked quite carefully, and I
6 cite you to 701 S.E. 2d. 14 in *Branham, Branham vs.*
7 *Ford Motor Company*. This thing was footnoted to
8 *Branham* and to *Ralph King Anderson*. And *Branham* is
9 very firm that consumer expectations is out and utility
10 risk is in.

11 And *Branham* makes a distinction between those two.
12 It says, "While the consumer expectations test fits
13 well in the manufacturing defect cases, we do agree
14 with Ford the test is ill suited in design defect
15 cases. We hold today that the exclusive test in a
16 products liability design case is risk-utility test
17 with its requirement of showing a feasible alternative
18 design. In doing so, we recognize our legislature's
19 presence in the area of strict liability for
20 products -- strict liability for products liability."
21 So I am striking evidence of the industry custom.

22 There is -- there are other charges that deal with
23 standards of care and so forth, but I'm afraid that I
24 run the risk of having the supreme court say, "Hey, we
25 told you in *Branham* that consumer expectations are

ROA_02223

Appendix_02258

1 out," and this carries a little sniff of that in there,
2 so I'm going -- I'm knocking that out.

3 MR. REID: Next I have, Your Honor, is at Page 9.
4 It's the state of the art paragraph.

5 THE COURT: Hang on. What was it in your old one?

6 MR. REID: We're agreeable on the language. It's
7 just we thought it ought to be moved because it applies
8 to all claims, and what I would suggest is to move it
9 to Page 12 right before intervening cause.

10 MS. McVEY: And I don't know that I care all that
11 much, but it is in there, and it's clear it applies to
12 all causes of action, but whatever the court wants.

13 THE COURT: And if you moved it to Page 12, would
14 it be before intervening cause?

15 MR. REID: Yes.

16 THE COURT: That's where it will go. Put state of
17 the art before intervening cause.

18 MR. REID: I guess -- Josh, will you be making the
19 change at this point?

20 LAW CLERK: Do you want me to do this, Chief?
21 I'll take it.

22 MR. REID: That helps.

23 THE COURT: All right.

24 What else?

25 MR. REID: Your Honor, on Page 10, the negligence

1 paragraph.

2 THE COURT: Uh-huh. Just a second. All right.

3 MR. REID: There is a sentence in the middle, and
4 it starts with the words "where a product is." That
5 sounds like a relabeling issue where Company A makes
6 something and Company B puts its label on. I thought
7 that should come out. I know Ms. McVey disagrees.

8 MS. McVEY: One of their big issues is we enclose
9 these component parts from other manufacturers, the
10 asbestos gasketing and packing. So I think this
11 applies a hundred percent where a product is actually
12 designed and manufactured by another company, i.e., the
13 gasket and packing manufacturers.

14 MR. REID: That's a point well-taken. I'm fine
15 with keeping that in.

16 THE COURT: I think it ought to stay in, too.

17 MR. REID: Sorry to interrupt.

18 THE COURT: Tell me what is happening at the
19 bottom of 32-19.

20 MS. McVEY: That was the one you wanted to add.
21 They had given a piece of it from Judge Anderson's
22 charge book. And you want to charge all of that. I
23 had that book yesterday --

24 LAW CLERK: We want to charge all of it.

25 THE COURT: We have got it. We'll get that in.

ROA_02225

Appendix_02260

1 MR. REID: That's all that note is. None of us
2 had it to add.

3 THE COURT: All right. What's next?

4 MS. McVEY: Causation, I think.

5 THE COURT: Page 11.

6 MR. REID: And, Theile, you can't see this, but
7 Theile and I, Ms. McVey and I, discussed this morning
8 the causation charge at Page 11. About six lines from
9 the bottom it says "and that is proven by." I
10 understand that what's here is modified, the usual
11 instruction, and tell me if I'm wrong, but I think the
12 usual instruction and what we have included in red line
13 in the updated one I have sent to your clerk would
14 read, "And that is proven by showing the injury would
15 not have occurred but for the defendants' negligence."

16 So our objection there is to add the but for
17 causation language that I think is standard.

18 MS. McVEY: Your Honor, just so you know, in the
19 Garvin charge I proposed, that part you could see it
20 clearly. We put in substantial factor, but we had a
21 note out to the side what was there before was but for.

22 And our point is in an asbestos case like this,
23 under *Henderson*, the standard for causation is a
24 substantial factor that overrides the but for
25 causation.

1 So in this case what you have actually already
2 charged is *Henderson* substantial factor, then you go
3 back and charge but for, and we think that's a
4 misstatement of the law.

5 THE COURT: Just a second.

6 MR. McLEOD: Your Honor, it's --

7 MS. McVEY: I can show you my old one.

8 LAW CLERK: Well, we had notes.

9 MR. McLEOD: I sent an e-mail this morning.

10 THE COURT: Right. We put it on some of our
11 notes.

12 MR. McLEOD: But for was Number 18 in our charges.

13 LAW CLERK: It wasn't included.

14 MR. McLEOD: It wasn't included because we were
15 under the impression it was included in *Garvin*, which
16 it was.

17 THE COURT: Where do you say the but for language
18 comes from, *Henderson* or *Lohrmann*?

19 MR. McLEOD: We're not saying it comes from
20 *Henderson* or *Lohrmann*. But for causation is the
21 negligence law in South Carolina, and we cite to *Small*
22 *v. Pioneer Machinery, Inc.* Judge Hill charged but for
23 causation in every asbestos trial; Judge Patterson did
24 as well.

25 THE COURT: You know, where I -- here is what's

1 running through my mind. *Henderson* concentrates on the
2 substantial nature and the continuing nature of the
3 exposure. *Lohrmann* gets into this but for business by
4 going into the restatement. And I considered that
5 confusing in terms of what the focus was in what.
6 *Henderson* said ought to be the focus.

7 And *Henderson* deals with the focus of causation in
8 this way, substantial and so forth and so on. The but
9 for thing has the potential to confuse the substantial
10 exposure. Defendant gets -- this was a
11 for-the-defendant kind of case, *Henderson* was. It was
12 an affirmation of a dismissal of causes of action
13 against some of the defendants, and they formulated a
14 test in these asbestos cases that talked about
15 substantial exposure, and that's where I want to lay my
16 head to rest is on what they told me to do in an
17 asbestos case. And I don't know that but for does
18 anything but confuse what the court said it wanted,
19 which was substantial, continuing over a period of
20 time, so I'm not --

21 MR. McLEOD: Your Honor, I understand your ruling.
22 Just for the record, yesterday --

23 THE COURT: I mean, a but-for test is a test that
24 is very one-incident focused. This thing is a focus
25 over -- a course of conduct over a period of time that

ROA_02228

Appendix_02263

1 is said to either be negligent or worse. And the
2 actors -- this is what constitutes legal cause. This
3 is *Lohrmann*. "The actor's negligent conduct is the
4 legal cause to another whose conduct is a substantial
5 factor in bringing about the harm, and there is no rule
6 of law relieving the actor from liability because of
7 the manner in which his negligence has resulted in
8 harm," then the comment from the restatement. "The
9 word 'substantial' is used to denote the fact that the
10 defendant's conduct has such an effect in producing
11 harm as to lead reasonable men to regard it as cause,
12 using that word in the popular sense in which there
13 always lurks the idea of responsibility, which includes
14 every one of a great number of events without which any
15 happening would not occur." That's about as much as
16 you stretch in getting but for.

17 But our court did not choose to say it that way.
18 Our court said substantial factor. This is a
19 restatement comment that our court from 4-31 that our
20 court did not use. I'm inclined to just leave it at
21 the substantial like it was.

22 MS. McVEY: Thank you, Your Honor.

23 MR. McLEOD: Your Honor, just a couple of
24 things --

25 THE COURT: Because -- well, the restatement

1 excludes it. It says, "The word 'substantial' is used
2 to" -- I'm looking at *Lohrmann* at Page 1156. All
3 right. It's quoting the restatement 431(a). "The word
4 'substantial' is used to denote the fact that the
5 defendant's conduct has such an effect in producing
6 harm as to leave responsible men to regard it as a
7 cause, using that word in the popular sense in which
8 there always lurks the idea of responsibility rather
9 than in the so-called philosophic sense which includes
10 every one of a great number of events without which any
11 happening would not have occurred." The restatement
12 excludes the normal but for and talks about it in terms
13 of substantial. And that makes a lot of sense because
14 what they're saying is we're going to say -- we're
15 going to talk about how much exposure you've got to
16 have before it becomes something that is causative and
17 substantial and not transitory, is the way they choose
18 to characterize it.

19 MR. McLEOD: That's fine. I understand your
20 ruling. The next step would then be to charge the full
21 substantial causation charge, which includes that de
22 minimis exposures are not enough. This court adopted
23 *Lohrmann* --

24 THE COURT: I'm not going to do that. I'm going
25 to do what I said I'm going to do. I'm going to do

1 what I said I'm going to do.

2 MR. McLEOD: Just for the record --

3 THE COURT: You except to it. You just put that
4 on the record.

5 MR. McLEOD: Just for the record, we do not
6 believe that the substantial causation charge in here
7 is a full charge on that law.

8 THE COURT: I understand what you're saying. And
9 relying on what I just read, I say that that's plenty.

10 LAW CLERK: We're going to take that out.

11 THE COURT: What he's arguing for is not even but
12 for. You're arguing for de minimis, and de minimis is
13 already embraced in the charge that I'm already going
14 to give which says it has to be substantial, so I don't
15 buy that at all. You can argue it if you want to.

16 It's on the record, but I don't think it's correct.

17 I have already -- if all you're trying to do is
18 get de minimis exposure is not enough, that's already
19 in this charge. What you really want is a but for
20 charge, and I think the *Lohrmann* quote I just read and
21 the restatement rejects that and says no, what we're
22 doing is substantial.

23 MR. McLEOD: Can I please place something on the
24 record, Your Honor, and it's in line with your ruling?
25 I think court's ruling is that the substantial

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1 causation test in *Lohrmann* has supplanted the but for
2 causation. Our position --

3 THE COURT: No, sir. I'm simply saying that I'm
4 going to do what I think the court instructed that we
5 do in *Henderson*, and I'm trying to use the *Lohrmann*
6 case which influenced the court to interpret what the
7 court said in *Henderson*. I'm not embracing anything
8 else you're saying.

9 MR. McLEOD: And we'd also ask the court to charge
10 that the presence of the defendants' product in the
11 vicinity does not --

12 THE COURT: That's something you haven't asked for
13 before, and I'm not getting into that now.

14 MR. McLEOD: I'm asking for the full substantial
15 charge.

16 THE COURT: No, sir. I'm not going to do that.
17 You haven't asked for that before. I turned you down
18 on but for --

19 MR. McLEOD: I --

20 THE COURT: Mr. McLeod, I have turned you down on
21 but for. You're now scrambling to get it in through
22 every side door you can. That's what I regard that
23 request as. I'm not going to do it.

24 MR. McLEOD: Our requested charge.

25 MS. McVEY: Then on Page 11 --

1 THE COURT: I don't even know what the requested
2 charge is. I haven't seen it. You're simply kind of
3 reciting kind of what you want. I'm not going to let
4 this go on forever, no, sir. You put on the record
5 what you want; I have said no to it; that's the end of
6 it, and we're going to move on.

7 MR. McLEOD: Yes, Your Honor.

8 MS. McVEY: So then, Josh, on Page 11, they have
9 in there "would not have occurred but for the
10 defendants' negligence," so we need to change it.

11 MR. REID: I think we kept theirs but added ours.
12 So with the court's ruling, then take out our proposed
13 change.

14 THE COURT: "Would not have occurred but for the
15 negligence" is out.

16 MS. McVEY: Right.

17 MR. REID: Judge -- well, let me know what you're
18 ready.

19 THE COURT: All right.

20 MR. REID: Actually, I think the next one is the
21 33, about *Lawing*.

22 THE COURT: I am still quite conflicted about
23 this.

24 MR. REID: My only point this morning is, as we
25 drafted it, it was a little repetitive, so at the very

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1 least, the court will have to do a little wordsmithing.

2 THE COURT: It's still so confusing that I don't
3 think it hits the target at all about what needs to be
4 charged about sophisticated user. We tried to rework
5 defendants' 33 a little bit this morning, and we're
6 going to have to look at that again. I'm not satisfied
7 with sophisticated user yet.

8 MR. REID: I cut and pasted from whatever the case
9 was. In fact, there's still a page number in there,
10 226.

11 MS. McVEY: As you know, we object to that charge
12 going back, but we're happy to look at your wording
13 when you get it ready.

14 THE COURT: Right. Okay.

15 MR. REID: Then Defendants' 43, which is at the
16 bottom of Page 12.

17 And, Yancey, I'll need your help here.

18 I think we agreed to their Manchin charge.

19 MR. McLEOD: Yes.

20 MR. REID: So the only issue is whether we have
21 got it in there correctly, so if we can confirm before
22 it's finalized.

23 THE COURT: Here is how it's going to read.

24 "Furthermore, a plaintiff" --

25 LAW CLERK: That's 47. Go back to 43.

1 THE COURT: Wait a minute. Hang on.

2 LAW CLERK: We made some changes to that.

3 THE COURT: Yes, we did. Here's what 43 is going
4 to read like. "The plaintiff, Beverly Dale Jolly, is
5 prohibited from suing his employer in this court."
6 That's the first sentence. You strike out "Duke Power
7 Company."

8 "At the time of the injuries in question,
9 plaintiff was employed, and the injuries" -- I'm going
10 to use -- yeah. "Plaintiff was employed and the
11 injuries occurred during the course and scope of his
12 employment. As to the employer, this is governed by
13 workers' compensation laws, and an employer's
14 responsibility, if any, for an employee's injuries will
15 be determined or has been determined in another forum.
16 A workers' compensation claim is not before you. You
17 shall not give it any consideration in reaching a
18 verdict in this case. However, the matter of the
19 employer's alleged fault in causing the injury has been
20 raised by the defendants, and it is proper for you to
21 consider the employee's actions," period.

22 MS. McVEY: Employer's actions.

23 LAW CLERK: Yes.

24 MS. McVEY: Okay.

25 THE COURT: And I'm striking out the rest of it.

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1 So that's how it would read.

2 MS. McVEY: Okay.

3 THE COURT: I've already -- this is kind of a
4 first cousin to what we just talked about at length
5 with the causation charge. All the rest of that
6 material is contained -- I've got a charge that talks
7 about fault and causation, and I don't need to repeat
8 that here, and it has the possibility of confusing them
9 when you start talking about returning a verdict for
10 the defendants with what they're supposed to do with Duke.
11 So I prefer to have the causation where it is now, and
12 I'm not going to put it in here.

13 MS. McVEY: Okay.

14 THE COURT: Okay? Everybody understand?

15 MS. McVEY: Yes, ma'am.

16 MR. McLEOD: I understand your ruling, Your Honor.

17 THE COURT: By the way, for the previous lengthy
18 discussion that we had, that is another reason why I'm
19 not putting but for in. I've got the causation and
20 proof in another area of this charge, and I'm not going
21 to confuse that charge by putting that in.

22 Now we go to --

23 MS. McVEY: 47, the comparative.

24 MR. REID: So I think Josh tweaked that last
25 night.

1 THE COURT: And we did some more tweaking this
2 morning, so listen up.

3 MR. REID: We put "plaintiff" in for "decedent,"
4 and I'm letting Ms. McVey read it.

5 THE COURT: Y'all tweaked again.

6 "Furthermore" -- I don't know if I need
7 "furthermore," but, "A plaintiff, in a negligence
8 action, may recover damages if his or her negligence,
9 if any, is not greater than that of the defendants. If
10 you find that the plaintiff was comparatively negligent
11 to a degree greater than that of all of the defendants,
12 plaintiffs are barred from recovery," and I would
13 strike the rest of that. We've already got prudence
14 discussed elsewhere, so I would strike all the rest of
15 that and end up with, "The defendant has the burden of
16 proving the plaintiff's negligence."

17 MR. McLEOD: Thank you, Your Honor.

18 MS. McVEY: The only -- I'm not going to argue
19 with this, Your Honor. My only concern is that are we
20 giving them any tools to determine how they determine a
21 plaintiff's negligence?

22 THE COURT: I've got a whole charge on that,
23 Ms. McVey. That's why I took it out of here.

24 MS. McVEY: Okay. That works.

25 MR. REID: Then, Your Honor, the last one I have

1 is the verdict form question, and all I've got to say
2 about it -- I'm happy to leave it to the court to
3 rework that just so it reflects whatever the final
4 verdict form is.

5 THE COURT: We've reworked the final verdict form.

6 MS. McVEY: He's talking about the charge piece of
7 it, however you read about what the verdict form does.

8 THE COURT: I don't have a specific charge in here
9 on it.

10 MS. McVEY: It's just on Page 15.

11 LAW CLERK: It asks you what the first question is
12 and what the second question is, so we'll put the same
13 language from the verdict form into that charge.

14 THE COURT: Yeah. You'll just rework that to
15 reflect what we agreed to about the verdict form.

16 MS. McVEY: That's right. And I think I have the
17 verdict form.

18 LAW CLERK: Jonathan sent a copy.

19 MS. McVEY: I think that's it, Your Honor, for the
20 charge.

21 THE COURT: All right.

22 Any other things to put upon the record?

23 Mr. McLeod?

24 MR. McLEOD: No, Your Honor. Thank you for your
25 patience with us. And the only other thing is if in

1 the next several hours, and we can assist with this,
2 obviously, it would be great if we can have a copy of
3 the jury charge. One of the --

4 THE COURT: Well, what I've got to do is sit here
5 in this courtroom and deal with the jury and closing
6 arguments, and I will try to the best of my ability and
7 Josh will, too, to also be working on finalizing these
8 charges just as y'all have to sit here and try the
9 case. So, obviously, the moment I get it, I'm not
10 going to hide it from you.

11 MR. McLEOD: I understand that. And the only
12 other thing that I would add is we have run into this
13 problem before. I think you mentioned yesterday
14 something about whether or not you were going to give
15 the charge to the jury or not.

16 THE COURT: I'm not. I told you yesterday some
17 judges do that. I think it's above my pay grade to
18 make that kind of change in what is normal operating
19 procedure. I understand that the supreme court has
20 discussed in the past and may still have a discussion
21 of concepts of whether to formally address that and
22 allow it or not allow it, so I'm going to do as most
23 do, and I'm not going to send it back with them.

24 MR. McLEOD: Thank you, Your Honor.

25 THE COURT: Now, let me just tell you a few other

1 housekeeping things about how we're going to proceed.

2 Josh and I are going to retire for a moment, see
3 how we're going to make all this happen about the
4 charges. We'll bring the jury in. They'll hear the
5 closing arguments. That's the next thing to be done.

6 MS. McVEY: Yes, ma'am.

7 THE COURT: I don't know how long they're going to
8 take. Ideally, and I think we can make this happen
9 because we're right at 9:30 now, ideally we would have
10 the closing arguments and my charge before they eat
11 lunch, and then we would send them to lunch. And what
12 we would do if we do it that way, we would send them to
13 lunch. Of course the alternates will eat lunch
14 separately. They will no longer be a part of the
15 deliberative process unless their services are needed
16 midway through deliberations.

17 If, on the other hand, we have closing arguments
18 and it's so close to lunchtime, we will have them hear
19 the closing arguments; they will then eat together, and
20 I have already made arrangements through Marcia to feed
21 them, and the alternates will be in there with them.
22 They will all be together because they will be very
23 strongly told that they can't -- this isn't the end;
24 they can't deliberate until they hear the charge. You
25 don't take the alternates out until the case goes to

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1 the jury, and I will tell them it's not in their hands
2 yet. So that is just to let you know in case there's
3 any concerns one way or another, that is how we propose
4 to handle that.

5 MS. McVEY: That's fine, Your Honor.

6 THE COURT: Quite honestly, Marcia, I think that
7 you can go on at 10:00 or thereabouts and order. And
8 if you would like to take the orders from them or have
9 the bailiffs take the orders from the jury now.

10 THE CLERK: They have already been taken.

11 THE COURT: Okay. So, I mean, it's cold food, so
12 I would go ahead and order it now and have them deliver
13 it like about 12:30, or have it available so we can
14 distribute it to them at 12:30, if that means deliver
15 it a little earlier to y'all. But that's how I would
16 handle that.

17 THE CLERK: I'll let Carrie know to go ahead and
18 fax it in and have it here by 12:00.

19 THE COURT: That sounds good.

20 Anything else we need on housekeeping, Josh?

21 LAW CLERK: I don't think so.

22 THE COURT: Give us just a few minutes to cogitate
23 with each other about how to get these charges done.

24 Let me look at this jury form one minute.

25 This looks good. I'm going to give this -- I'm

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1 going to ask that you e-mail -- Josh is going to e-mail
2 the jury form to you, Marcia, and what I want you to
3 do, when you've got a jury form that's kind of
4 complicated like this and I'm going to explain it, I
5 want each member of the jury to have a copy of the jury
6 form.

7 What you will do to begin with, this phase two we
8 won't give them to begin with. Make enough copies for
9 them, but what they will get to begin with is this
10 first one, which is the nonpunitive section of the
11 case. So copy enough copies for everybody here
12 including the jury members, and when we, after my
13 charge and we submit the case to them, then we'll give
14 them copies while I'm charging them on how this setup
15 works.

16 THE CLERK: So they can look at it.

17 THE COURT: That's right. And what I'll do is
18 I'll pause then, and I'll have you give them copies,
19 and I will tell them, "The clerk is now giving you
20 copies so you can follow my charge on the form of the
21 verdict."

22 MR. McLEOD: Your Honor, I misunderstood. Are you
23 suggesting that each juror is going to fill out the
24 form?

25 THE COURT: No. I'm just wanting to explain to

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1 them -- I'll explain to them the forelady fills it out
2 absolutely, but I want to explain to them how it works
3 and what they're all going to be asked to decide by
4 unanimous vote, and that's what's on here so everybody
5 is looking at something to follow along. No, the
6 forelady is the only one that fills out the verdict.

7 MR. REID: Your Honor, in the first stage, I
8 presume the punitive damages instruction will not be
9 read to them and the part of the verdict form with the
10 dollar amount for punitives does not go back.

11 THE COURT: That's correct.

12 MS. McVEY: Well, the punitive damage part will be
13 read to them about what clear and convincing evidence
14 is, right, but not the money portion of it?

15 THE COURT: Yes.

16 MR. REID: Right.

17 THE COURT: But they won't be asked to do anything
18 with dollars and all that kind of thing unless we get
19 to that stage.

20 They will make a finding, Mr. Reid, just so you
21 understand, they will make a finding. That last
22 question will be answered by them in the first phase.

23 MR. REID: Right.

24 THE COURT: And that would be what would trigger
25 phase two, and then, you know, we do whatever we need

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1 to do there.

2 MR. BOUCH: Your Honor, insofar as closing, the
3 rule is the plaintiff has to open in full including
4 damages?

5 THE COURT: Yes. That's generally the way we do
6 it.

7 MR. BOUCH: I just wanted to make sure I didn't
8 get bunched.

9 THE COURT: I think she'll open in full.

10 Okay. All right. Be at ease for about five
11 minutes, and we'll get this train underway.

12 (WHEREUPON, a recess was taken from 9:34 a.m. to
13 9:47 a.m.)

14 MR. McLEOD: I'm not sure it would be appropriate
15 for her to use the Phase 2 form during her closing.

16 THE COURT: She just wants to know what's in it.
17 She's not going to use it in front of the jury, I'm
18 quite sure. That's for me to tell the jury how to
19 render a verdict.

20 Ms. Farrise, that's for your information only.

21 People, can we bring the jury in?

22 MS. FARRISE: I'm just grabbing some exhibits, but
23 other than that, sure.

24 THE COURT: I don't want you to have any false
25 starts, Ms. Farrise.

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1 MS. FARRISE: Let me get these exhibits. In case
2 our technology doesn't work, I'll have Plan B ready to
3 go.

4 THE COURT: I got one more thing with these
5 charges. Look at Page 7 of what we were working off
6 of. All right. This is the strict liability charge.
7 Right at the top of 7, this is the last sentence, "To
8 recover on strict liability, the plaintiffs must prove
9 four things by the greater weight of the evidence," and
10 then fourth, there isn't any fourth.

11 MS. McVEY: I'm sorry. May I approach and see
12 what you're talking about?

13 THE COURT: Yes.

14 Okay. All right.

15 LAW CLERK: Probably what I'll do is just put,
16 "Fourth, a reasonable alternative design," and then we
17 go and explain what reasonable alternative design is.

18 THE COURT: That's correct.

19 MS. McVEY: And just for the record, we object as
20 this is a failure to warn case.

21 THE COURT: I gotcha.

22 All right. Ladies and gentlemen, Ms. Farrise, are
23 you completely ready? I don't want you to have any
24 hiccups about going back and forth with papers.

25 MS. FARRISE: In that case, I'll take three

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1 minutes.

2 (Pause in proceedings.)

3 MS. FARRISE: I'm ready.

4 THE COURT: Let's get everything set up like we
5 want it.

6 MS. FARRISE: I'm ready.

7 THE COURT: Bring me the jury.

8 (WHEREUPON, the jury entered open court at
9 9:59 a.m.)

10 THE COURT: Good morning, ladies and gentlemen of
11 the jury. Please be seated.

12 We are at a very important moment in the trial, of
13 course, when these very able attorneys will present
14 their closing arguments, and I have explained to you
15 before and will probably explain to you again that what
16 the lawyers say is not evidence, not their questions,
17 not their closing arguments, but they're certainly a
18 helpful outline by each side as to the points they
19 think are important for your consideration as you begin
20 to deliberate the case.

21 The way we will proceed today is this: Closing
22 arguments will be given by both sides. The plaintiff
23 will begin, then the defendant will present, and then
24 the plaintiff will reply, and then you will have the
25 closing arguments. And I'll monitor time quite

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1 carefully to see how close we are to the lunch hour.

2 If I think we've still got some time to also give
3 you the charge, then I'll send you on a break, and then
4 you will come back, and I'll give you the charge on the
5 law. If we are too close to the dinner hour, I'll
6 simply let you hear the closing arguments; we'll all
7 eat lunch and come back and hear the charge of the law,
8 and then the case will be completely yours.

9 For our alternates, of course, we need you to the
10 very end, but your role changes after the case is
11 submitted to the jury. As long as it's just that you
12 heard the arguments of the parties, you still can't
13 deliberate because I haven't submitted the case to you
14 yet. That has to wait until the charges on the law are
15 made.

16 So if we just have heard the closing arguments,
17 then all of you will eat together and be together as
18 you have been throughout the trial. After the case is
19 submitted, the alternates will retire to another place,
20 and you will begin to deliberate. It sometimes becomes
21 necessary to use an alternate during the course of
22 deliberation. We hope that isn't necessary, but we
23 picked them because they're a very important part of
24 the integrity of this trial.

25 So that's the way we will handle it, and, of

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1 course, I'll have more to explain to you about the form
2 of the verdict and how that works when I give my
3 charge.

4 So now it's time to hear the closing arguments of
5 the parties.

6 Mr. Bouch.

7 MR. BOUCH: May I ask the plaintiff to disclose
8 the amount of time for reply that is being reserved?

9 THE COURT: What I think we talked about was no
10 more than an hour each side for your presentation in
11 chief, and since she's got the burden of proof, the
12 Jollys have the burden of proof, she would be allowed
13 up to a half an hour in reply, and that is how I set
14 the time. I'm hoping that neither side will be using
15 all the time they have been allotted.

16 MR. BOUCH: I can assure you, I will not.

17 THE COURT: Ms. Farrise, for the plaintiff,
18 closing arguments.

19 MS. FARRISE: Thank you, Your Honor.

20 First, I would like to thank the court staff, and
21 we have been a difficult group. The court reporter as
22 well.

23 Ladies and gentlemen, I want to thank you as well.
24 This has been a very substantive case. It's been a
25 very long case, technical, scientific, medical, and

1 your patience is very much appreciated, really by us
2 all, but also by Mr. Jolly. We're going to need your
3 patience, and we're going to need your focus longer,
4 today and maybe tomorrow.

5 I'm sure you're thinking, what could lawyers tell
6 us? We've heard all this stuff. I'm going to go back
7 to the beginning.

8 The beginning, when I was able to give you an
9 opening statement, I said to you it's like throwing out
10 puzzle pieces, and we're trying to tell you what the
11 picture is going to look like at the end.

12 Now, we're going to go back or I'm going to go
13 back and tell you here's how you put the puzzle pieces
14 together. Some, of course, will be obvious. Some, I
15 bet, will not be as obvious because the fine details in
16 this case sometimes are hard to appreciate when it's
17 just going rapid fashion.

18 The judge is going to tell you in a moment that
19 the job of you folks is to talk with one another,
20 deliberate, listen to one another and try and come up
21 with the best decision of your community. And that is
22 what juries do. They are decision-makers for the
23 particular community, even though we are talking about
24 a case. And in this case, you will be asked a number
25 of questions, but what you are asked to decide, to

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1 think about, is what will you accept as community
2 members in terms of safety, in terms of product
3 labeling, in terms of warning about things that can put
4 the lives of people in your community at stake.
5 That's, in general, what this case is about.

6 The judge is going to give you some charges, some
7 instructions, and I'm not sure where it's going to end
8 up, but she'll let you know.

9 We, the plaintiff, the Jollys, believe that you
10 should answer every question yes except one. There's
11 going to be a question that seeks to blame Dale Jolly,
12 that seeks to say Mr. Jolly did something wrong. So as
13 to that question, which may be around Number 3, the
14 answer is no, he did nothing wrong.

15 Now, the judge is going to tell you the rules, but
16 this is how we lawyers talk about something called the
17 burden of proof.

18 The scales of justice. And people hear that all
19 the time, but the question is, what does that mean. On
20 this question of whether Mr. Jolly did something wrong,
21 the defendants are making that claim, and they,
22 therefore, have to prove to you by a
23 more-likely-than-not standard that he did, and they
24 haven't.

25 But part of the reason I set them up here is

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1 because all evidence is not the same. What you all are
2 doing is all about weight. If there was witnesses
3 whose testimony you did not believe, it has no weight.
4 It does not go on the scale at all. You get to decide
5 whether or not it's believable and whether there's any
6 weight. And I think it's probably clear that as to
7 certain of defense experts, their testimony had no
8 weight.

9 But I'm going to explain to you why. I wasn't
10 just trying to expose some of the weaknesses in their
11 qualifications.

12 So all testimony, all evidence is not the same.
13 One boring document can be enough weight to tip the
14 scales of justice. We hope. And that's what you're
15 looking for. Does that make sense? Okay.

16 Now, even though I put the paper clip on there and
17 nothing happened, which was interesting, in terms of
18 the initial burden of proof, whoever has it needs to
19 prove to you after you weigh things on one side and the
20 other, that they have tipped the scales ever so
21 slightly, the weight of an asbestos bundle.

22 They don't have to tip it like this. If you had
23 an election and you had a hundred people, 51 votes, if
24 you will, is what the standard is. So that's the job
25 that you all are doing, and that's the burden of proof.

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1 I do want to apologize. I'm not a mathematician,
2 as you found out, but I am a lawyer. And so, as a
3 lawyer, my role here is to be the mouthpiece for
4 Mr. Jolly and to be the mouthpiece for Mrs. Jolly. And
5 at times I know my mouth has been a little bit more
6 aggressive than we might otherwise like for it to be.
7 But that's my role, to say and to draw and to push and
8 to press and to expose. So if I have done anything in
9 that role to offend you, after this trial, out in the
10 hall you can come up to me and say, "Ms. Farrise, I
11 didn't like it when you did this. I didn't like it
12 when you did that. You shouldn't have said that. You
13 were way too hard on Ms. Sahmel," whatever it happens
14 to be, but do not hold it against Dale Jolly because
15 that is what this case is about.

16 Okay. We're back where we started. This case is
17 about that man. And the case is about how we have
18 proven that he has been robbed of his good health. He
19 has been robbed of time with his family, and he
20 ultimately will absolutely pay the ultimate price and
21 be robbed of his life. And we have proven that these
22 folks, Fisher and Crosby, had a role, a big role, a
23 substantial role and a legally consequential role.

24 Now, one of the things that the judge is going to
25 tell you, probably point out a couple things, is,

1 although it's not true outside of the court, in this
2 court and in these rules that we have, corporations are
3 treated like people. And you need to treat them
4 exactly like you treat an individual, which is
5 Mr. Jolly. And some people have a hard time with that,
6 and that's one of those things she's going to say, even
7 if you disagree with the law, you have to apply it.

8 But, if we look at what kind of person the folks
9 are, and you've heard from many witnesses -- it's not a
10 popularity contest -- but this is how you decide how
11 much weight to give to the various pieces of evidence.

12 What kind of a person is Crosby? Is the evidence
13 that they have brought forth believable? Is it
14 credible? What kind of a person is Fisher? Is the
15 evidence that they brought forward believable and
16 credible? And I would argue to you that Fisher and
17 Crosby are not good people.

18 Number one, it is without dispute that Fisher and
19 Crosby, as companies, individuals treated under the
20 law, are law breakers. Exhibit Number 149 tells you
21 that. This is the Walsh-Healey Act. There is no
22 dispute that the companies had a legal duty under
23 federal regulation by 1952 to protect its own workers
24 specifically from asbestos. They were told through
25 this document, and the testimony of Arthur Frank told

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1 you, through other means, being part of the National
2 Safety Council, what have you, that asbestos is
3 dangerous. It can kill people. And by 1952 -- I know
4 they want to talk about OSHA, but as to these two
5 companies, by 1952, the book is finished. It said
6 asbestos is toxic. It said you can protect people from
7 toxic exposures by wetting down, by labeling, by
8 isolating, by doing all of these things.

9 So when we are talking about these law breakers,
10 we are not even talking about OSHA because they agreed
11 when they took the money from the United States
12 government in contracts more than \$10,000 that these
13 are the rules that they would abide by.

14 So you say, Ms. Farrise, how does this have to
15 do -- because this has to do with their own workers --
16 with putting labels and warnings and doing the right
17 thing as it relates to asbestos that they sell to
18 customers? This is notice. This is not you even got
19 to go to the library. This is you know that asbestos
20 is harmful and you know how to protect people, and you
21 know that asbestos is leaving your door and making you
22 millions of dollars. That's what's in the Fisher
23 125-year story. And you know because you make a valve
24 that has a flange that it's not going to operate just
25 by itself, sitting right there on the floor. It has no

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1 purpose. It is going to be connected to a piping
2 system with a gasket. You know that gasket is going to
3 be asbestos. How do you know that? Because your other
4 business is to sell the replacement parts. It's to
5 sell the asbestos to the customers.

6 So by 1952, ladies and gentlemen, these companies
7 were armed with everything they needed to know,
8 everything that was knowable, and there was nothing new
9 in 1971.

10 And that is where we get into this difference
11 between company knowledge and public knowledge. And
12 government knowledge. The government didn't make
13 asbestos-containing valves and sell asbestos-containing
14 replacement parts. The public was not making those.
15 Folks like Mr. Jolly. He was just a worker. And so,
16 in part, there's been this sort of, "Hey, look over
17 here. Look at what the government is doing." Why
18 would we need to look at what the government is doing?
19 This is your product. You designed it with your
20 engineers to make money. You made the selection to put
21 asbestos in it. Not the government. So you, the judge
22 will tell you, have a responsibility to make it as safe
23 as you can once it leaves.

24 And there are hazardous products. It's not a
25 question of whether they should have sold it. There

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1 are hazardous products all around us. Bleach at home.
2 The issue is hidden dangers, the law says and the judge
3 will tell you, need to be revealed so that people can
4 make a choice about whether or not to protect
5 themselves. Their employers can have a choice about
6 whether or not to protect themselves.

7 And if we're going to take the next step, when
8 cancer came along, we understand why, if you're a
9 company, who is a person under the law, you don't want
10 to put a label on it because who's going to buy your
11 cancer product? Who? That might actually have an
12 impact on sales.

13 But in this particular case, it may not. But it
14 would have given the people whose lives were actually
15 on the line the choice. It would have given Duke an
16 opportunity to protect. And by everything you have
17 seen in this case, Duke Energy, as to hazards related
18 to asbestos that it knew about, it protected its
19 employees.

20 And you heard from Ms. Sahmel yesterday, that was
21 no cheap undertaking to put in ventilation. One of the
22 exhibits is an instruction manual for teachers to train
23 workers, to train them on how to protect themselves.
24 And Mr. Jolly, I think the contention is, was never
25 told because they have this 1977 document, Duke Energy

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1 did, about asbestos.

2 Well, Mr. Jolly, first of all, as you know, was
3 not at Duke by 1977. He didn't arrive until the latter
4 part of 1979. But as to this contention, which is the
5 defendants' position, where is the evidence that there
6 was any asbestos in the insulation to protect him from?
7 Because the evidence, the undisputed evidence, is that
8 the Kaylo and the pipe insulation, despite all those
9 pictures, those products were not made with asbestos
10 after 1972.

11 So by the time Mr. Jolly comes along, the
12 insulation on the pipes does not have any asbestos, and
13 there's nothing to protect him from other than the
14 hidden dangers locked within these valves that look --
15 we saw a couple pictures, and then I guess y'all had a
16 chance to hold some modern-day versions. Does this
17 look like it could hurt you? No. And that is really
18 the problem. It looks like it's okay. But it is
19 actually poison. Nearly 90 percent of it, when it was
20 made with asbestos, is poison. And so to sit here and
21 offer to you, "Look at our product. It's safe," but
22 Mr. Jolly should have known and Duke should have known
23 is simply not believable as a defense. You should
24 reject it, and it is, in modern language, kind of
25 talking out of both sides of your mouth. This side is

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1 saying our product is safe, and there's nothing that
2 you need to warn about, and this side is saying, well,
3 Duke should have warned them and Mr. Jolly should have
4 known.

5 Duke did not make this product to make money on it
6 and build a company; Mr. Jolly did not make this
7 product and make money on it and build a company; these
8 folks did. And what they had the audacity to come in
9 here and tell you, which is not believable, is that,
10 "We just launched this poison into the world, and we
11 never tested it in the field. We never tested it at
12 our plant. We don't know what it was made out of," and
13 other false statements.

14 And the way we know that that's a false statement
15 is because we have evidence, ladies and gentlemen, in
16 the form of Fisher 133, a whole book of material
17 specifications, a whole book of asbestos-containing
18 material specifications, that say even though it looks
19 like rubber, it's asbestos. That's the first one. A
20 rubber asbestos specification, a metal asbestos
21 specification, a graphite asbestos specification, a
22 Teflon asbestos specification. And it comes in all
23 kind of forms, and that's what Fisher 133 is all about.

24 And what's also interesting about Fisher 133 is,
25 if you look at it, it says not only do we want

1 asbestos, we will approve products and fabric that are
2 80-percent to 85-percent asbestos. Duke didn't make
3 that decision. When you look in here, you will see the
4 word "approved, approved, approved" on Fisher material
5 specifications that Fisher approved to be used in
6 Fisher products, not Duke.

7 And you might recall that you had the joyous
8 experience -- I do apologize again but it was
9 absolutely necessary -- of hearing those
10 interrogatories read to you. Sometimes in a trial like
11 this, the most boring evidence can be the most
12 important because one of the things that Fisher said --
13 that Crosby said is, "We don't know how much asbestos
14 was in our product." And so you look at these very
15 specific specifications that approve a material,
16 approve a specific asbestos percentage, even go through
17 and as you see the changes, approve who you can
18 purchase it from, what vendors are approved, and
19 approve the particular product of the vendor that can
20 be used, and then you consider, now that you all
21 understand what interrogatories are, that a company
22 would come to the legal system, but come to court and
23 say to you, "We don't know what the percentage of
24 asbestos was in our product." That's what they have
25 said, and it's not believable because if you didn't

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1 know what the percentage of asbestos was in your
2 product, then you wouldn't know if your valve was going
3 to work in the field under certain conditions. Then
4 you wouldn't know if the gasket that's internal is the
5 right one. Then you wouldn't know if, in fact, what
6 you're selling to Duke as a safety valve is going to be
7 safe.

8 And what did one of the corporate witnesses say to
9 you? "If this valve doesn't work, the whole plant
10 blows up." So it's not believable that they did not
11 know every screw, every nut, every gasket, the metal it
12 was made out of, the asbestos it was made out of, where
13 they bought it from, how it should be replaced, and on
14 and on and on. That's the evidence that you have seen.

15 And so the question then becomes, if that's true,
16 why lie? Because they did lie. And the thing about
17 interrogatories, as boring as they are, is it's not
18 like being on the hot seat of the witness stand.
19 You're not sitting here having to like think, "Oh,
20 think, think, think. What do I want to say?" They are
21 in writing. You've got all the time in the world to
22 consider every word that Webster's dictionary has to
23 offer you. The lawyers check it out. They sign off.
24 The corporate designees sign it. So every word in here
25 is done under calm circumstances. So when they calmly

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1 say and then swear under penalty of perjury that we
2 don't know what the -- the percentage of
3 asbestos-containing in our gaskets and all these other
4 things, it is a lie.

5 Now, corporate representatives have come and
6 spoken with you. And I want to say that I feel bad for
7 Mr. Dumistra. He got put in a tough spot. He has
8 never worked anywhere other than Fisher. Fisher is the
9 only company that has put food on his table. And I'm
10 saying that not to -- he just got put in a tough spot
11 because he cannot really come in here and say, "Yes, we
12 know exactly how much asbestos was in our gaskets.
13 Yes, in fact, we designed the flange understanding
14 perfectly well that they were going to have asbestos
15 gaskets removed and installed and that process was
16 going to continue for decades." Because if he did,
17 that would really be bad job performance.

18 And, so, but he seemed like a very nice man. And
19 he was walking a very fine line, a very difficult line.
20 But I say that because his testimony was not meant to
21 be about him. It was meant to be about the company and
22 the lawyers for that company that picked him.

23 It's like this. When we send Olympians -- Fisher,
24 Crosby -- when we send Olympians to the Olympics, we
25 give them our jersey, and they compete on our behalf.

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1 And this process is actually very similar. You can
2 pick anybody you want, as you saw. You can pick
3 someone who has been working for the company for years
4 or decades, or you can pick someone who hasn't stepped
5 foot in the company in the case of Fisher or Crosby for
6 ten years. We'll just call him in to serve from
7 Southport, North Carolina.

8 And so the type of -- and then who was picked and
9 who were you offered? Salesmen, ladies and gentlemen.
10 Salesmen. But Dr. Dumistra's position is a little bit
11 more dicey for him. His degree is in engineering, and
12 he wasn't doing engineering work here, but it was what
13 his company, what his team called on him to do, and he
14 did do, I think, his best, but some of the things he
15 said was not believable.

16 In the case of Mr. Crosby -- it's really
17 Mr. Martin, but it's Mr. Crosby -- it's a good
18 retirement gig if you can get it. \$300 an hour, come
19 down here, answer some questions, look at some
20 interrogatories. But you get to ask, why didn't they
21 pick somebody who actually works at the company?

22 Remember how Mr. Martin said, "I called up
23 Mr. Lombardi, and he's the one who actually has the
24 specifications, and he's the one who's actually at
25 Crosby, and he's the one who has the documents, and

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1 he's the one who probably has the company-wide phone
2 list and knows all the current departments and can call
3 on whatever department is needed to get the
4 information"? Why didn't he call -- why was
5 Mr. Lombardi not here? It certainly would have been
6 cheaper than \$300 an hour if, "Mr. Lombardi, we need
7 you to take two days off on company time, come on down
8 to South Carolina, tell the jury about the documents
9 that you are in charge of, the specifications for the
10 valves and the parts and everything else, what they say
11 and help us prove to this jury with real, believable
12 evidence that we did nothing wrong." But Mr. Lombardi
13 didn't come. Mr. Martin came.

14 And Mr. Martin said to you -- and I don't know if
15 I have my hands on it, but you can check your notes, or
16 when you get stuck -- and the court reporter is not
17 going to be happy with me -- you can go back to the
18 evidence. This lady has been taking it down not just
19 so we can know later what we said. Her main job is
20 taking it down so if you have questions about some tiny
21 little things, she can read back to you exactly what
22 was said in this court.

23 So when your oath, and I know you will follow it,
24 was we will decide this case on the evidence that we
25 heard in this court. And if you don't remember what it

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1 is or if it went by and at the time it wasn't connected
2 to something else and so you didn't understand it was
3 important and now it's super important, just ask her.
4 She'll read it back. And that is what you need to do
5 when you get into trouble or are unclear.

6 These are in evidence. We haven't talked about
7 them much, but I want to show them to you. Pictures of
8 the plants. And they are important because these
9 companies would have you believe that they sold
10 products -- valves with asbestos, replacement parts
11 with asbestos -- to a nuclear power plant and they
12 don't even know what they sold. The evidence is that
13 that's not believable. Mr. Martin told you that
14 because it is a nuclear plant, everything has to be
15 documented and documents kept.

16 You heard from three groups of witnesses.
17 Quickly. I just talked about one. Group one, the
18 corporate voices. There is one missing because there
19 were really three corporate voices. There was Fisher,
20 there's Crosby, and then there was Duke. No one from
21 Duke came and actually took the witness stand and
22 talked, but there is evidence in the form of these
23 procedures and instruction manuals and the like about
24 what Duke said at the time in 1977 and what Duke did
25 about this problem of asbestos. And I think I probably

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Appendix_02299

1 pointed out way too much for some people, that only
2 these folks made and sold the products. Duke was the
3 customer. So part of the defense here is blame the
4 customer. And after they blame the customer, if that
5 doesn't work, blame the user, Mr. Jolly; blame anybody
6 but the people who made and sold the product.

7 The second group of witnesses are expert
8 witnesses. Here is the deal with experts. You have to
9 decide whether to believe them. It's not about whether
10 they were nice or not nice. The question is, are they
11 actually qualified experts in the particular field or
12 not.

13 And one of the ways to look at that, which is why
14 we go through their qualifications and background and
15 if they published on asbestos, which is what this case
16 is about, is because then we know, regular jurors and
17 regular lawyers, that yeah, you are actually, outside
18 of court, an expert. Outside of court. Because if you
19 come in here and say, "I published this and I published
20 that and here's fancy math," we really are kind of not
21 in the best position to judge. It all looks the same
22 in here.

23 So when you go through their qualifications and
24 you consider, for instance, Dr. Frank who has been
25 working on researching, publishing his research for

ROA_02265

Appendix_02300

1 other scientists to see since 1968, that the majority
2 of what he has written on and lectured on and asked to
3 go all around the world and talk about is asbestos,
4 there is absolutely no question that he is a
5 world-renowned expert in asbestos.

6 The same is true, of course, for Dr. Brody. He's
7 not off writing about hair spray and face creams. His
8 life's work has been asbestos and answering the
9 question how exactly; like when an asbestos fiber goes
10 down your nose and gets in the throat, how does it
11 actually go out to your pleura and cause disease. And
12 he has published his work for other scientists to see.

13 And that's so important because we can't really
14 figure it out. But if you publish out in the world for
15 people who have your same background and your same
16 qualifications something that is completely ridiculous,
17 then you will stop being funded, your work, your
18 research, with grants from the United States
19 government, an independent source, because you are
20 furthering science. No. The government will be like,
21 "You're a quacko. I'm not going to give you a dime."
22 Right? It's not going to happen.

23 So that was really who they are, and you heard
24 that the defendants were even willing to stipulate to
25 their expertise because they can't challenge that.

ROA_02266

Appendix_02301

1 They know these folks are the real deal.

2 One of the things Dr. Brody told you he was most
3 proud of is that his work as a scientist has been
4 continuously funded since -- for 40 years. And at the
5 time it was like, well, that seems kind of
6 braggadocios, to tell you the truth, but he said that
7 because the government -- the National Institutes of
8 Health only fund research that is answering questions
9 we don't know the answer to. They only spend our money
10 that they take from us in taxes to fund scientists who
11 are moving the ball forward. They are not funding
12 scientists who are doing nothing but creating science
13 that can come into courts and fool juries. They ain't
14 got nothing to do with that.

15 So that why I went through with Ms. Sahmel who is
16 funding you? What is it used for? Is it real science?
17 And the answer is it is not. And it is dangerous
18 science, actually, because it does exist out there in
19 the public domain. And despite everything you have
20 heard from Dr. Frank and Dr. Brody and the papers of
21 Dr. Longo, asbestos released from gaskets is very
22 dangerous.

23 And if a company like Duke that's really trying to
24 do the right thing -- protect its workers -- comes
25 across her litigation science, they are going to think

ROA_02267

Appendix_02302

1 it's the real deal or they might think that. And they
2 might think, we don't have to do anything to protect
3 our workers. So not only did this company put lives at
4 stake back then, they continue to put lives at stake
5 today by funding this litigation science.

6 It's just like Dr. Brody said, you got a messed up
7 cell with DNA errors sitting there looking like another
8 cell until another asbestos fiber comes along. That's
9 what this science is, sitting there, looking like real
10 science. And unless you read that tiny print that I
11 pointed out to you, you wouldn't realize this is
12 company-funded science. And customers like Duke and
13 other workplaces may try and do the right thing, go to
14 the medical library and come across this, and they will
15 think they do not need to do anything to protect their
16 workers and it will cause people to be exposed to
17 dangerous asbestos today. It's dangerous and harmful,
18 but for your purposes it is absolutely not believable.

19 Dr. Crapo is an expert in smoking and in
20 emphysema. And he is not now or for the last 25 years
21 outside of court having been an expert having to do
22 with asbestos. He's not. And that's what \$10 million
23 is all about. And it may be what was heard to be
24 insulting, and I don't mean to insult him, but that's
25 what you get to look at, the real facts here, not the

ROA_02268

Appendix_02303

1 nice ones, not the -- you get to have that discussion.
2 Why would Fisher and why would Crosby need to call
3 somebody in from Colorado who hasn't done any work in
4 this field, who hasn't published, who hasn't done any
5 research in 25 years when there's perfectly good
6 people, respectable people he told you, right here in
7 South Carolina and North Carolina who have actually
8 been devoting their time to that?

9 And what was really telling about Dr. Crapo, he
10 said, "I've not published." I've not actually put this
11 nonsense that I'm trying to tell y'all, ladies and
12 gentlemen of the jury, out into the scientific domain
13 so other scientists can evaluate it and say, "Oh, is
14 that what Dr. Crapo thinks?" He hasn't done that.
15 And, of course, if he did do that, other scientists
16 would pile on and say, "What are you talking about?"

17 So an opinion that is limited to only juries can
18 hear -- remember the question I asked him -- or they
19 could call me up. You can read it in the transcript or
20 somebody can call me up. Really? That's not science.
21 That's litigation science, and it was, along with
22 Ms. Sahmel, bought and paid for to try and fool you
23 into believing that this dangerous, dangerous poison
24 somehow is safe. It's not.

25 Now, after we get past the experts, we finally

ROA_02269

Appendix_02304

1 start cooking with grease because here are the
2 important witnesses. The eyewitnesses. Mr. Taylor and
3 Mr. Jolly. The eyewitnesses who were actually there at
4 the scene when the thing went down, when the asbestos
5 was used, to tell you about who else was there, and in
6 Mr. Taylor's case, he confirmed for you, "Oh, yeah,
7 Fisher was there," and, "Oh, yeah, Crosby was there,
8 and they had hundreds of valves." And Mr. Jolly, when
9 he came here literally almost with the last breath of
10 his life, told you that as well. And there's not
11 really one person other than these company
12 representatives wearing the company jersey waving the
13 company flag that told you any differently, and there
14 are no documents that tell you any differently.

15 In fact, the documentary evidence supports that.
16 But Mr. Taylor, and it went by quickly, told you this
17 is what the gasket looked like when we broke the
18 flange. And like a barbecue grill, some of it came off
19 and some of it was baked on, and we had to scrape it,
20 and some of it was caked on, and we had to use the
21 grinder. But this is what it looked like.

22 And despite that, you have companies who have come
23 to court and said the asbestos, the 90-percent asbestos
24 that we selected, it was encapsulated, as in a capsule.
25 Now, I don't have a microscope in my eye, but this does

ROA_02270

Appendix_02305

1 not like it's encapsulated to me because it is not.

2 The studies that we went over yesterday about the
3 measurements and things that Dr. Longo did that had
4 these enormous levels of asbestos are liberated because
5 this is what it actually looks like. And what
6 Dr. Frank told you, as interesting as that is, it's
7 actually the fibers that you can't see -- or maybe
8 Dr. Brody -- that you inhale are the ones that kill
9 you.

10 Couple little things that seem innocent enough,
11 but when put with the whole picture, may not. Mr. --
12 we read -- Mr. Fisher said, and I read it to
13 Mr. Dumistra when he was here, "We did not do any air
14 sampling at our plants." That's what he said. The
15 evidence suggests otherwise, and I'll tell you in a
16 minute why it's important. "Until the mid 1980s."
17 That's what they said. "Mid 1980s, that's when we
18 started."

19 He also said, "We did not use asbestos gaskets.
20 We did not handle them at our plants, ever." But we
21 know that's not true because the documents that you saw
22 yesterday, starting with Exhibit 1008.670, and I can
23 put it down here, revealed that that's just not true.

24 They had this guy Paul Adams, who is in the
25 facilities and equipment engineering department,

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Appendix_02306

1 sending air sampling to the lab. So if they're not
2 using any asbestos at their plants, why would they be
3 putting the gizmo on workers to see if the workers are
4 being exposed to asbestos? That sounds like a big
5 waste of money. But it's not.

6 The workers at the Fisher Controls plant did, in
7 fact, take in the asbestos-containing material, handle
8 it, manipulate it, had a risk of being exposed to
9 asbestos, and that is why they were doing air sampling,
10 by the way, in 1980. The sworn discovery response was,
11 "We didn't start until mid 1985."

12 But it's bigger than that. Next page, please.

13 This is the single one? Hang on.

14 So, this one, which seems like this little, bitty
15 document that came in -- I think it was one of our last
16 pieces of evidence that came in -- tells you that the
17 spiral-wound gaskets from the plant -- because they're
18 taking air samples of people who are doing things at
19 the plant -- were the blue crocidolite asbestos.

20 And so it's not the situation where they just have
21 a material specification for the blue asbestos -- and
22 they do have one. It is the situation where they had a
23 material specification for material that they approved
24 and it was used.

25 Now, do you have the next document? It's Crosby

1 74. But we had a document in that same series. Here
2 we go. It's Exhibit Number 100.10665. It's also in as
3 Fisher, part of it anyway, 74.

4 The air sampling in 1980 from the workers in the
5 plant reveals that one of the workers had, number
6 three, an air sample taken of the air he was breathing,
7 and the result was .05. And, actually, I'm looking at
8 it as Fisher 74, if you need it, which says the .05,
9 but hang on.

10 This document tells us what that goes with. It's
11 Sample Number 3 taken on July 7, 1980, and it tells us
12 what the Fisher plant worker was doing. Asbestos
13 gaskets were being weigh counted, something we can't
14 read. This to me looks like boxes. Gaskets were the
15 flat asbestos sheet type. I think the parts that we
16 do -- can read tell us that this man or woman, Sample
17 Number 3, where there was a positive asbestos finding
18 of .05 fibers per cc, was being exposed to asbestos
19 merely weighing the asbestos gasket out of the package
20 at the plant.

21 Those are the kind of things and why I'm talking
22 to you in closing argument that it's hard to put
23 together with this bale of hay of evidence. So now,
24 with little time, we're going to try and put a couple
25 more of those together quickly, and I will see how it

ROA_02273

Appendix_02308

1 goes.

2 Can I have Exhibit 1012.6? One of the first
3 pieces of evidence that we put up is this one. And at
4 the time, way back when -- it seems like we have been
5 together much longer -- it is a purchase order from
6 Duke Power to Fisher Controls in 1991. And this
7 purchase order calls for asbestos gaskets at Item
8 Number 10. Asbestos. And it's for a flanged fitting.
9 It is, we learn, the spiral-wound variety.

10 Recall we just saw a result that the bulk sample
11 confirmed was the blue asbestos from the bulk sampling
12 that Fisher did in its plants in 1980. That gasket was
13 the spiral-wound variety. So some of the evidence that
14 we've heard has been a little confusing, and it seems
15 like we all agree that they stopped selling asbestos in
16 1989 in the case of Crosby, which is what Mr. Martin
17 said, and maybe 1988 in the case of Fisher.

18 We don't agree at all. You have seen no evidence
19 here that tells you here was a full product line of
20 what we sold; here were the material specifications of
21 those products, and we can account for each and every
22 one of them and tell you the date that we took the
23 asbestos out. You have not seen that. And I contend
24 you have not seen it because, as you heard in opening
25 statements, it's still legal to sell them today. You

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Appendix_02309

1 can make them in some other country -- Mexico,
2 Brazil -- and import them in and sell them to customers
3 today, and there's nothing illegal about that.

4 We have seen no real believable evidence that
5 these products as a whole product line -- yes, some of
6 them here and there have gone asbestos-free. So the
7 claim was, well, Duke did this; Duke called our product
8 asbestos and it really wasn't asbestos. Well, that's
9 not entirely true.

10 There is a little document -- let me find it --
11 that we put into evidence where Duke tried to order the
12 wrong thing and Fisher rejected it. And I can just
13 quickly tell you this is 6364.07, and what it is, is a
14 Fisher Controls letter of 1980 to Mill Power Supply
15 that purchased for Duke Power. And it says, "Dear
16 Mr. Lail, as per our recent telephone conversation, we
17 indicated that the factory is reworking gasket sets
18 available, particularly for high temperature, and as a
19 result, we have eliminated Items 132, 33, and 143 on
20 your above order. These particular gaskets are no
21 longer available. To supply correct packing sets to
22 replace these items, we would need to know the valve
23 model and serial numbers for which these parts are
24 desired."

25 So what does this say? This says if Duke is

ROA_02275

Appendix_02310

1 trying to order something that Fisher no longer sells,
2 it will kick it back and say no, no. We're not selling
3 that anymore. It says that Fisher is looking at these
4 purchase orders, and they see that it says asbestos,
5 and according to them, I guess, they just keep their
6 mouth shut. I don't think so. I think what it says is
7 in 1991 and 1992 and -3, which is what some of the
8 evidence is, they continued to sell to Duke Power, in
9 the time Mr. Jolly goes back to ultrasonics,
10 asbestos-containing products.

11 And those exhibits, just quickly. Here is an
12 invoice of 1993, Exhibit 1012.3. And Item Number 9, I
13 think one of the first ones we put up, there is that
14 gasket, flange fitting, type spiral-wound material,
15 316, with asbestos, sold for a replacement part for the
16 Ocone plant.

17 There is another invoice which, of course, I can't
18 lay my hands on. Here we go. Exhibit Number 1012.4,
19 May 1993, Fisher Controls, selling for Ocone Item
20 Number 8, gasket, fitting type, spiral-wound, material
21 316 with asbestos, size -- and this is kind of
22 important for people who don't know what they sold --
23 selling a gasket the size 3 inches 9/16ths of an inch
24 by 4 inches 5/16th of an inch by .125 thickness. That
25 would be some very specific information for someone who

ROA_02276

Appendix_02311

1 doesn't know what they're selling.

2 But what we also have here -- and I know you have
3 a lot of information -- this one tells us that it's a
4 Fisher V-ball valve gasket that has -- and it's ten
5 inches. Remember you had these pictures, like here is
6 the little, bitty thing we saw. But -- and I can't
7 probably make it work -- ten inches is a little bigger
8 in terms of a diameter from here to here of that pipe.

9 You will see in these documents 16-inch valves,
10 24-inch butterfly valves. And you will, when you look
11 at what is the size of the gasket, then you will
12 understand what Mr. Jolly was saying. He said the
13 Crosby valves were so big, you, Ms. Farrise, could fall
14 into them. And they brought you these tiny little
15 valves so you would think, oh, that's what it was. It
16 wasn't that.

17 Mr. Jolly's testimony -- if you have no other
18 testimony read back to you, have Mr. Jolly's testimony
19 read back to you because he was an eyewitness. And
20 because when he was here, he was so ill that I, for
21 one, was focused on him. Is he going to be okay? And
22 the tiny little details of what he said were not
23 necessarily as important. I went back and read it
24 back.

25 Number one, he said, "I actually inspected the

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1 gaskets or was there when they opened up the valve."
2 So this whole thing about him not having any exposure
3 to the flange gasket, his testimony is, "I had to do
4 special training; I had to understand; the valves are
5 very particular; if I didn't have the right one, I went
6 to jail; some part of my job like the Brinks truck guy
7 was to have the gasket that went with the safety valve,
8 and if I didn't have the right one and make sure it was
9 the right one, I went to jail." And his testimony was
10 those were the gaskets, number one, that were inside of
11 the Crosby Valve.

12 And how do we know they were Crosby valves?
13 Again, this is where you've got to put a little bit of
14 evidence together. We had the sheet that I talked
15 about with Mr. Martin, the green book of what was at
16 each particular plant. And if you look at what is
17 Exhibit 6359.0013 and 14, it talks about what is at
18 McGuire Number 1.

19 McGuire Number 1 had six reheater turbine valves.
20 And the style is this JPV of which, by the way, they
21 admit in the interrogatory was asbestos-containing, but
22 Mr. Jolly's testimony said -- I asked him about McGuire
23 Number 1, did you work when they were doing maintenance
24 and repair on the reheater turbine valves in particular
25 at McGuire Number 1, and that is what his whole

1 testimony is about. "Yes, I did. Those were the big
2 valves. They might not have had 66 screws, but I think
3 they had 49 screws." Remember all that? They opened
4 them up. All of that pertains to this. So we know he
5 was around major removal of asbestos gaskets having to
6 do with Crosby.

7 We also know Mr. Jolly was around major work
8 having to do with those Sage valves. The Sage valves
9 Mr. Martin forgot about until the end. I said, "Did
10 your 85 percent include the Sage valves?" He was like,
11 "No, I didn't include the Sage valves."

12 And part of the reason that you will see in the
13 evidence, we think, of the mystery Sage valves of which
14 he finally said there were hundreds and we didn't count
15 them is because on these invoices, purchase orders,
16 there are gaskets and other replacement parts for tons
17 of Sage valves. And it may seem as though, well, what
18 does that have to do with it because Mr. -- I have it
19 in my binder. Probably not good to break your neck
20 during closing, ladies and gentlemen.

21 The Sage valves Mr. Martin told you, on behalf of
22 Crosby, did not contain -- did not have the name Crosby
23 on there. But that is in conflict with those boring,
24 boring written interrogatories that we read to you
25 because in those interrogatories -- let me find them --

1 here is my chart. I'll put it up for now. And I've
2 colored the two that are really at issue in this case,
3 which was the Number 5 entry and Number 6.

4 Number 5 was the Crosby JPV Series, and that's
5 what we just saw on the green book that I just showed
6 you from McGuire Number 1. Number 6 is the Sage
7 valves. And the first question was, what was the name
8 on the actual valve? How was it known by? And the
9 discovery, the interrogatory, the sworn written
10 information, which you may have to have that read back
11 to you, was it was known by Crosby and Sage.

12 And that may seem like it's not a big deal, but,
13 of course, it is because when Mr. Jolly and Mr. Taylor,
14 the eyewitnesses, say we saw hundreds of Crosby valves,
15 if the Sage model -- Crosby Sage models actually say
16 "Crosby," which they do -- that's what the evidence
17 supports -- then they were correct and honest and
18 truthful and believable.

19 But let me, just because it's so -- I can tell you
20 what it is. You can send a note out saying, "We would
21 like to have some evidence." It doesn't have to be as
22 particular as a number. You can say, "Can you send us
23 the purchase orders and the invoices between Crosby and
24 Duke?" And in there, you will see multiple, multiple,
25 multiple descriptions of the Crosby Sage 600 models and

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1 Crosby Sage 400 models, and what these interrogatories
2 that we read to you tell you is that as to those, they
3 did not become asbestos-free until 1989.

4 I put in the JPV model, even though they say they
5 removed the asbestos in 1970 for a product that went on
6 the market in 1968 because what it demonstrates is this
7 product goes on the market in '68, and two years later
8 they find a way to take the asbestos out. If that's
9 true, then we're really not having a dispute about
10 whether or not they had to use asbestos, whether or not
11 they had a substitute. And what's interesting about
12 this valve is it's still in production.

13 Now, I've got lots of stuff I could talk to you
14 about. I'm going to get to talk to you after Crosby's
15 and Fisher's lawyers talk to you, but one of the things
16 you have to do is decide what amount of damages, is
17 what the law calls it, is appropriate.

18 And I would tell you to think about what Mr. Jolly
19 has lost. First of all, as I mentioned earlier, he's
20 lost choice because he was never warned. And that's
21 kind of a big deal. We talked about what's weighing on
22 his mind. Taking from someone by not warning them that
23 they are putting their lives on the line takes from
24 them their dignity.

25 The physical stuff is pretty clear. Dr. Frank

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1 told you, and it was completely uncontested, that it's
2 going to take more than a million dollars to care for
3 him. Mr. Jolly told you that he stopped working in a
4 job he loved. So there's economic loss there. But
5 that's just the tip of the iceberg.

6 Mr. Jolly and every human being is worth in terms
7 of what they go through as they march towards the end
8 of their life because other folks made the choice for
9 him that he should put his life on the line, he is
10 worth more than his paycheck in terms of what he has
11 been through. And what he has been through is worth
12 far more than the bills that the hospital and the
13 doctors and the radiologists and the oncologists and
14 the surgeon and the narcotic company and all of those
15 folks are going to send to treat him.

16 The other thing you have to do -- and this is a
17 little different -- you have to face that evidence and
18 put it on the scale. You have to face the evidence of
19 having the surgery that he had where they took out his
20 rib. Took out a rib. I don't think most people need
21 to argue that that is painful. Took his life. And
22 it's been going on for a long time. As you heard, he
23 was diagnosed in January of 2016.

24 And then you have to figure out what the
25 counterbalance amount of money is to do what the law

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1 says, which is make him whole. And you get to look at
2 his physical suffering, his mental distress, everything
3 he's been through. And when you find an amount of
4 money that Mr. Jolly would say, oh, yeah, to go through
5 all that I've gone through on the march to my death, to
6 give my life away, that is an amount of money that
7 equals what I would take to go through all of this,
8 then you have arrived at the right amount.

9 But it is much more than the million dollars that
10 it is going to take to treat him. That's another thing
11 that you, as a community, say. And it's going to be a
12 big amount of money. Some people are going to be like,
13 well, it's a big amount of money. It is, but that is
14 what the law says to do when you find that a company
15 sold a product that puts somebody's life on the line.
16 They have to suffer all of the consequences.

17 If it were a priceless work of art that somebody
18 came in here and said was worth \$50 million, you would
19 be like, oh, it's worth \$50 million. If it was a
20 baseball contract or football contract for people to
21 get paid to do something they love, it would be no big
22 deal.

23 The fact that it may be a big amount of money and
24 it should be is not the test. And if someone raises
25 that, as jurors you have to say, that's not the test.

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1 We have to do the job on the evidence, and wherever the
2 consequences go, the consequences go.

3 You also, therefore, need to consider Mrs. Jolly.
4 She was here. You've heard -- I'm not going to go
5 through that. Ms. Tracy was here. The strain and the
6 stress. She had a heart attack herself. What I would
7 like you to look at when you think about Mrs. Jolly is
8 what she has lost as it relates to the relationship.

9 Nowadays folks get married; they get divorced, and
10 it seems like it's not necessarily -- and maybe it is;
11 I don't know -- as valuable as it has been. But here
12 we have -- here we have this relationship, what is the
13 most valuable. Met in elementary school. Have built a
14 life together. It exemplifies what we mean when we
15 talk about the fabric of a marriage. And fabrics go
16 this way and they go this way. And when you take away
17 one in the sense of the illness that Mr. Jolly has that
18 has robbed him of his life, you just have string.

19 So you have to look at how has she been impacted
20 in terms of the relationship that she used to have, was
21 able to have that was not filled with when is the next
22 doctor's appointment? Did I get your prescription
23 filled? When do we have to go to the oncologist? When
24 is your next PET scan? They had a life. They had a
25 life together. So whatever you decide for Mr. Jolly,

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1 you should decide at least half of that for Mrs. Jolly.

2 Ladies and gentlemen, that's all the time I have
3 right now. I'm sorry to say I'm going to talk to you
4 again because I know you have heard enough talking.
5 Thank you so much. You have been patient. Please
6 continue on and see this thing over the finish line.
7 Thank you.

8 THE COURT: All right, Ms. Farrise.

9 How are we doing jury? Good?

10 THE COURT: All right. Mr. Bouch, for the
11 defendant, will make his closing argument.

12 MR. BOUCH: Kind of dodgey to do it with all the
13 stuff there, but I'll do the best I can.

14 THE COURT: If you want to take a second to clear
15 anything off, you can.

16 MS. FARRISE: I'm happy to do that.

17 MR. HOLDER: I thought I heard a juror ask for a
18 break.

19 JUROR: I was asking to see if they needed one.

20 MR. HOLDER: My apologies.

21 THE COURT: I think everyone is peaceful. They
22 know how to tell the forelady and me if they're not. I
23 think they're fine at this time.

24 MR. HOLDER: Thank you, Your Honor. Sorry.

25 THE COURT: Good. Very good. All right.

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1 Mr. Bouch.

2 MR. BOUCH: Thank you, Your Honor.

3 It's been a long nine days, hasn't it? Those of
4 you who may want your children to become lawyers, it's
5 not always like this.

6 I want to start by thanking you. Jury service is
7 the highest form of public service. It really is. I
8 mean, you're not getting paid for it. You may get
9 lunch and parking, but it goes way, way beyond what any
10 of us do, and I want to thank you for it because it is
11 important.

12 As the judge told you when we started a week ago
13 Monday, we do have the greatest justice system in the
14 world, and this is why. If somebody has a dispute,
15 doesn't matter what kind, in a case, if somebody ran
16 the red light, somebody got a roof that leaked, the air
17 conditioner didn't work, we solve it here. And if it's
18 something you say, you're right. I ran the red light;
19 the roof leaked but not quite as bad as you thought;
20 the air conditioner didn't work, whatever kind of case,
21 and those get resolved.

22 But when you're accused of something like we are
23 accused here, you say no. We don't believe we did
24 anything wrong. We want a jury, a jury from
25 Spartanburg County, to hear the evidence, make the best

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1 decision they can. And that's why our system is great.

2 Now, I'm going to start where I started last week.

3 Mr. Jolly has cancer. Asbestos caused his cancer. One
4 in three Americans will be touched by cancer. It's a
5 tough disease. Nobody questions that. It's all of --
6 we all have a loved one or friend or acquaintance, and
7 whether they're a patient at Mary Black or St. Francis
8 or even over at Duke, we all are sympathetic to those
9 who suffer. This case is about Mr. Jolly, what caused
10 his cancer.

11 This caused his cancer, the insulation on the
12 pipes at the Duke power plants -- Oconee, McGuire,
13 Catawba, Lee, Allen, Riverside, Cliffside, and the
14 rest. That's what caused his cancer. This is what
15 caused his cancer, the amosite found in his lung by
16 Dr. Oury.

17 MS. FARRISE: Your Honor, I'm going to object.
18 There's no evidence of that, and you do have to argue
19 on the evidence, not just make up things at this stage.

20 MR. BOUCH: It's Exhibit 153, Your Honor, in
21 evidence and Exhibit 148.

22 THE COURT: Wait a minute. It's not necessary to
23 have a lot of argument about this. The jury has heard
24 the evidence from Dr. Oury. Dr. Oury examined certain
25 slides. Dr. Oury did not examine Mr. Jolly, and they

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1 will weigh what Dr. Oury could say and what he could
2 not say about what kind of asbestos caused the injury,
3 so that's all I'll say about that.

4 MR. BOUCH: Thank you, Your Honor.

5 The asbestos on the pipes that Mr. Jolly, his job
6 was to inspect on the boilers and the turbines and the
7 pipes in the Duke plants, that's what caused his
8 cancer. Gaskets don't cause disease. Gaskets and
9 packing do not cause cancer.

10 Now, Mr. Jolly admitted freely he did not work on
11 gaskets and he did not work on valves. And when we
12 started, we were relying on Mr. Jolly's word in the
13 deposition his lawyers took where he was asked and he
14 told us all he remembered about all --

15 MS. FARRISE: I'm sorry, Your Honor. I'm going to
16 have to object that he's not arguing the evidence.
17 There was no deposition testimony offered to this jury.

18 THE COURT: Overruled.

19 MR. BOUCH: And he told us all he remembered about
20 the equipment at Duke. He never mentioned Crosby, not
21 one time. He never mentioned Fisher, not once. He
22 didn't even mention Sage. And his lawyers brought him
23 here to testify, and Mr. Jolly remembered hundreds of
24 Crosby and Fisher valves; said he could walk through a
25 Crosby Valve. Crosby sold no such valve to Duke Power

1 that had 65 bolts around it.

2 This is the Crosby Valve that was sold to Duke.

3 It never had insulation on it. It never had packing.

4 And you'll go through records, and I'm sure you will

5 see there are three or four, five, maybe six gaskets.

6 That gasket right there. This gasket never made, never

7 sold, never required, never specified by Crosby. Any

8 gasket, Mr. Martin would say, could work. Cork,

9 rubber, graphite, any of them. This is what we built,

10 and this is what we sold; not stuff we didn't put -- I

11 think you'll hear the term stream of commerce. Never

12 did that.

13 Let's stop and talk about the Crosby gate valves

14 that were sold to the U.S. Navy, which generated this

15 Walsh-Healey Act discussion. What a false issue, as

16 the testimony -- and let me back up. Lawyers call this

17 a closing argument, final argument. I prefer the more

18 classic statement, this is a summation of the case. So,

19 what you heard and you remember is important. And I

20 want you to believe that.

21 Crosby made gate valves one time, 1933. Put them

22 on four Navy ships. Two of them were sunk at

23 Guadalcanal and two scrapped in 1957. This

24 Walsh-Healey Act is a rabbit down a trail. Because if

25 Crosby violated the Walsh-Healey Act, where is the

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1 violation? There's no notice of violation. Where is
2 the fine? Where is the consequence? Not hard to find.
3 It isn't here because there wasn't any. They didn't
4 violate any Walsh-Healey Act.

5 What Duke bought from both Crosby and Fisher for
6 their nuclear plants had to conform to what they call
7 the ASME code, approved by the Nuclear Regulatory
8 Commission, tested and specified by Duke. That's the
9 way it worked. As long as -- Duke had to clear every
10 one of these purchases with the NRC. That was the
11 testimony. And they were selected and purchased by
12 Duke. I think Mr. Martin referred to them as the best
13 and the brightest.

14 You have seen these pictures. That is what --
15 this is a Fisher valve. And this is what Fisher sold
16 to Duke. I would have brought one of these in for
17 Fisher, but as you heard, they're about 1,100 pounds,
18 and I don't think Marcia would like me to bring in a
19 Crane and see what it is.

20 So this is what they do. It's almost never
21 insulated. This part can't be insulated. Maybe the
22 bottom can. Doesn't have to be. Works perfectly fine.
23 But think about it. If you want to repair this valve,
24 say something breaks, they have to check the parts.
25 How do you repair it? You go in through the top. Take

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Appendix_02325

1 this part off. If this needs repair, you repair it.
2 If you need to do this, you do this. You don't take
3 these bolts out and get in a crane to lift an
4 1,100-pound valve when you have to go through the top
5 to fix it anyway. That's not the best and brightest.
6 That's not creating dust. Anybody with a ten-pound
7 sack of flour on the kitchen counter knows you don't
8 make a mess unless you have to. Anybody knows better
9 than that.

10 One thing about juries that's great is they say
11 leave your cell phones at home, but bring your common
12 sense. And that's what this case is about. What
13 happened to Mr. Jolly in these Duke plants.

14 Mr. Dumistra told you about packing, how different
15 valves require different kind of packing. Big thing
16 about these handbooks. I think it's Page 28 in this
17 handbook. There's several kinds, and they all work up
18 to a certain temperatures.

19 / Ones that go up to 1,100 degrees they talk about
20 don't have asbestos. Laminated and filament graphite.
21 The asbestos ones flame out at about 450. But even
22 then, the packing, in and of itself, we haven't heard
23 much about that.

24 Crosby never had packing. Fisher, may have been a
25 piece of packing here. Of course, you have got to go

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1 in from the top. And most of the time, if they could,
2 they would use Teflon..

3 Why would they use Teflon? It's smoother. It's
4 slipperier. You cycle the valve. This is a nuclear
5 plant after all. You need things to be precise, and
6 that's exactly what it is, asbestos gaskets.

7 Now, you will go through. There is a notebook
8 full of things. You will find some asbestos gaskets.
9 I told you a week ago Monday. We had valves there; we
10 had gaskets there. You will see a lot of references to
11 nonasbestos gaskets. You will see a lot of references
12 to nonasbestos packing. But you will see some.

13 The gaskets and packing don't cause disease. The
14 lawyers would argue, well, put on a warning. Let me
15 see if I can do this. There is a piece of asbestos
16 warning that began in 1967. Mr. Jolly said he never
17 saw that. And I don't doubt it. How could he? You
18 know who saw that warning? The fellow that was putting
19 it on.

20 The picture of -- I'll find it here in a minute.
21 I thought I had it. Folks that were putting this on.
22 That's who saw that warning. And when Mr. Jolly came
23 along two years, three years, ten years later, would
24 that warning have helped him? No. And what if you put
25 a warning on this gasket? In five years, ten years

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1 later it comes along, Mr. Jolly isn't going to see that
2 warning. Maybe that's why all of the regulations, all
3 of the work practice studies, they say, you know, the
4 employer who knows what its factory does or its power
5 plant does and the work conditions, the employer is in
6 the best position to tell the workers where there is a
7 hazard and not. Not somebody who can't go into their
8 plant. Somebody who's in their plant.

9 In 1967, Owens Corning put that warning on its
10 Kaylo product. And that is why all the regulations say
11 the employer is the best person to do that. Why, you
12 might ask, is it suggested here? Your Honor said this
13 is not a Hollywood TV ad. You know, you have all seen
14 them. "Been hurt in an accident? Call 1-800-MONEY,"
15 whatever it is. This is not this. This is
16 Spartanburg. This is real. What were the reasonable
17 conditions under which somebody worked in a power
18 plant? But it's argued. That's the only way to make a
19 case.

20 I'll tell you about these products. These are
21 single-use products. They can only be used for one
22 thing, and they're ordered specifically. You can't go
23 to a supply store, a hardware store and buy these.
24 They're not off the shelf. We don't have a warehouse
25 full of them.

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1 A customer such as Duke calls us up and says, this
2 is what we want; this is how big, how heavy, what kind
3 of steel, what the parts are, and what the parts are
4 made of. And you can buy asbestos gaskets, cork
5 gaskets, rubber gaskets, paper gaskets, vegetable
6 gaskets. You pick, Duke, because you know; you are the
7 experts in your process in your power plant, and you
8 know what kind of stresses and performance you want.
9 So you tell us, and we'll put it in there, and that's
10 the way it was, and it's uncontested, and that's for
11 both Crosby and Fisher.

12 1972, we've talked about OSHA. You have seen this
13 guide 15 times. Okay. Provide for work -- safe work
14 practices. 1976, they even said the tools, the tools
15 had to have exhaust on them. And, of course, Duke knew
16 all about it.

17 You have seen the instructions. 1977, 1982, 1984,
18 1985. Wet it down. And what did they say in '84?
19 I'll paraphrase it because I know you don't like us to
20 fumble around with these documents. It says we still
21 use gaskets here, but they're in packing -- or
22 asbestos, but they're in packing and gaskets and
23 they're bonded and they don't cause dust. And they
24 don't.

25 And years ago we did use a lot of insulation. And

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1 the regulations -- and you will have them -- say keep
2 it in place until it needs to be taken apart, torn out.
3 And you heard Mr. Jolly. They tore it out all the time
4 and threw it on the floor. Threw it on the floor.
5 That was Mr. Jolly.

6 I think the central theme here is what could
7 Fisher, what could Crosby have told Duke that Duke did
8 not already know. They knew about this. They knew
9 they were ordering asbestos. Every receipt they have,
10 it says asbestos. Nobody is trying to hide it. They
11 knew exactly what it was.

12 They knew the regulations, and they knew if it
13 caused dust, they had to take precautions, and gaskets
14 and packing don't cause dust. They're not a risk in
15 any exposure, at all, is well below any limit.

16 How can I say to you our products didn't cause his
17 cancer? And how can I say that when I admit Crosby and
18 Fisher did have some valves, it did have some packing
19 and gaskets in that plant? Well, I'll tell you why.

20 Let's start with proof. And even if the lawyers
21 can show Mr. Jolly was in the vicinity of a Fisher or
22 Crosby valve, which we've got a lot of evidence he
23 wasn't, but let's say he was. And what if he was near
24 when Fisher and Crosby valves were being worked on.
25 And he may have been. There's very little testimony to

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1 that. And that these internal gaskets were being
2 changed, and there's no testimony of that, and that
3 they were hard to remove, and we've got a lot of
4 general testimony. But think about it. You saw this
5 training film that was, I think, post '94 of Fisher
6 where they were taking gaskets off. It was different
7 in post '94 than it may have been in 1980.

8 Every now and then at home I decide I'm going to
9 cook. And all of you know, probably in your own home,
10 when the husband says he's going to cook, the wives'
11 eyes roll into their head, "Oh, Lord, what have we got
12 now?" And so I proceed to dirty every pot in the
13 kitchen. I probably burn the eggs, overcook the
14 cheese. I guess the usual answer, "You made it; you
15 clean it." Do I get out and get a power drill out of
16 my toolbox and grind that cooked-on egg and cheese off
17 that skillet in the kitchen? Of course not. Take a
18 wet rag and soak it in some soapy water. You may have
19 to use a little brillo brush. That's how you clean
20 that skillet. That's how you remove gaskets.

21 Oh, some of them are. Some of them are. They
22 say, oh, yeah. But you don't do that unless you have
23 to. Why? Because if you take something that scars
24 this, you're really in trouble because then it won't
25 seal up again when you try to do it. You have to be

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1 careful about that because then you really do have to
2 bring in the crane and take it to a machine shop and
3 mill this space smooth. So that doesn't happen. Not
4 regular. Not frequent. And it's not enough to cause
5 disease. And how do we know that? It's the science.
6 And it's the data.

7 Now, let's start with Dr. Frank. Dr. Frank, very
8 jovial fellow. Said he's known me for years. He
9 admitted Mr. Jolly was exposed to insulation at the
10 plant. 'I showed him the correspondence with the
11 insulation folks who said they were putting Johns
12 Manville and Kaylo in the plant, and he agreed that's
13 the insulation that contains amosite, the amosite
14 that's in Dr. Oury's picture to a ten times to ten
15 times degree certainty, is what he said. And he agreed
16 the insulation contained amosite, and his meso came
17 from that insulation. He agreed with me on that.

18 And what else did he agree? He agreed that no
19 studies showed any increased risk from exposure to just
20 white or chrysotile asbestos. He said that. When you
21 just study that, there is no increase. And he told us
22 he studied with Dr. Selikoff. You've heard about
23 Dr. Selikoff. He passed away about 25 years ago, but
24 he was one of the pioneers in this area. I asked him
25 was he a very careful researcher, and he said yes, he

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1 was. And he was not a man that would call something
2 safe if he didn't truly believe it.

3 And I showed him Dr. Selikoff's book. It's a 1978
4 book. What does Dr. Selikoff say about packing and
5 gaskets? No health hazard. Page 467, if anybody keeps
6 up with that. Did not cause it.

7 We brought Dr. Crapo to court. Now, Dr. Crapo has
8 an incredible résumé. He had -- he ran the Duke
9 Hospital pulmonary service pathology areas for years,
10 ten years. He was in charge of the National Jewish
11 Hospital pulmonary program, largest hospital in the
12 United States, for 15 years.

13 What did Dr. Crapo tell us? Our lungs are made to
14 protect us, which is why all of us aren't sick. And
15 low-dose chrysotile does not create mesothelioma, and
16 meso can be caused by the brown or amphibole exposure
17 that everybody agrees -- Dr. Brody, Dr. Frank,
18 everybody agrees Mr. Jolly was exposed to.

19 Now, when they criticize experts -- and y'all rely
20 on your memory. If they criticize the expert because,
21 "Well, Doctor, we don't like your science. The study
22 you picked was incorrect because some people were
23 misdiagnosed or shouldn't have been included in this
24 study," fair enough.

25 What are the only criticisms they have of

1 Dr. Crapo and Dr. Oury and Ms. Sahmel? Well, you paid
2 too much. Well, you used to work for somebody who
3 testifies. They never ever talked about the science.
4 Not one criticism of the science.

5 Dr. Crapo told us about our lung mechanisms and
6 how, when you breathe something in, 99 percent of the
7 time you breathe it right back out. And he told you
8 about, and you probably saw this from every witness,
9 the different types of asbestos -- white, blue, brown,
10 and how chrysotile, the way it's structured, it's a
11 rolled-up tube, and it breaks off into pieces, and it
12 gets out of your lung within days or weeks.

13 And he told you about amphibole asbestos like this
14 pen. It does not break up into pieces and stays in
15 your lung for decades. And that's what they believe.
16 And he cited a study where 12 studies implicated this
17 pen, this amosite, for the cause. And their results,
18 this pen, this amosite, is a thousand times more
19 potent. And the study said that chrysotile had zero --
20 zero potency toward the induction of mesothelioma.

21 Dr. Crapo didn't stop there. He went to 62
22 studies, and you did not get a single question about
23 any of these 62 from Mr. Jolly's lawyers. And he gave
24 you the summary. And he said, this is Mr. Jolly. This
25 is where he fits. Yes, there is an increased risk.

ROA_02299

Appendix_02334

1 And this is where, when you get gaskets and packing,
2 you're over there. There isn't any risk.

3 Dr. Oury came. He spent 15 years at Duke. Now
4 he's at Pittsburgh. And you saw his video deposition
5 yesterday. And he looked at Mr. Jolly's tissue. And
6 he testified as to what he found. And this is what he
7 found and said he was sure to a ten times ten power
8 that this was amosite. This is what you find --

9 MS. FARRISE: Your Honor, I'm going to object that
10 there was no evidence, it's an improper closing
11 argument, and I don't want to waive that argument
12 because --

13 THE COURT: I note your objection, and you can
14 certainly argue that there wasn't any, and the jury can
15 make the determination. Overruled.

16 MR. BOUCH: And Dr. Oury told us to a reasonable
17 degree of medical certainty that amosite caused the
18 mesothelioma. Caused the cancer.

19 We brought Ms. Sahmel to you Tuesday and
20 Wednesday. And both Dr. Frank and Dr. Brody admitted
21 that they could not answer many of the questions I
22 asked because that calls for an industrial hygienist,
23 and they are not an industrial hygienist and don't
24 pretend to be one.

25 So we brought you Ms. Sahmel, an industrial

1 hygienist, for you to hear some of her testimony.

2 Mr. Jolly's lawyers didn't bring you an IH or
3 industrial hygienist.

4 What did Ms. Sahmel have to say -- I'll finish
5 with Dr. Crapo's model. Proving on all the studies he
6 saw, there is no risk from chrysotile only.

7 What did Ms. Sahmel say? This is how an
8 industrial hygienist looks at a problem. You identify
9 hazards, you assess the risks, you apply controls. And
10 that's what the industrial hygiene science does.

11 Did they criticize her science? No. They said,
12 "Well, you're paid too much. You work with somebody
13 who testifies a lot. Industry has funded some of your
14 studies," which isn't secret. It's in every paper.

15 Yes, they did. No, they didn't get access to it.
16 No, they had to take the answers for what they were,
17 and there was no criticism of the science. They just
18 didn't like the answer.

19 And she told you how to measure asbestos exposure.
20 And what one fiber per cc or a tenth of a fiber per cc
21 is in the standards today, and she discussed
22 time-weighted averages and how, when you measure this,
23 you do it over the course of a working day so you can
24 see is there any real hazard to somebody working with
25 this.

ROA_02301

Appendix_02336

1 And she talked to you about the way the standards
2 have come down through the years, but even today, none
3 of the studies that are reliable, that could be
4 duplicated or replicated, that scientists rely on, none
5 of the studies show gaskets and packing cause disease.

6 Well, you heard about Dr. Longo. Dr. Longo didn't
7 come. He lives in Suwanee, Georgia, a couple of hours
8 from here, this side of Atlanta. Every doctor that was
9 asked about Dr. Longo said, this is not reliable. And
10 Ms. Sahmel told you why. Told you why that scientists
11 don't rely on him. Dr. Crapo told you the same thing.

12 Ms. Sahmel went through the OSHA regulations, and
13 I won't go through them, and then she says, here. An
14 industrial hygienist takes the exposure, the duration,
15 and the cumulative dose. She identifies the hazard,
16 the dose response. Everybody remembers what dose
17 response is. Two aspirin are good for you; two bottles
18 will put you in the hospital. How long, how often, at
19 what level. That's what they do.

20 And she goes back to Dr. Selikoff. Gaskets and
21 packing, they're locked in. They don't cause disease.
22 They go to the International Agency for Research on
23 Cancer. No conceivable health risk from the use of
24 asbestos-based gasket material. And even Dr. Nicholson
25 at Mount Sinai with Dr. Selikoff, exposures from the

ROA_02302

Appendix_02337

1 installation or removal of gaskets does not lead to any
2 discernible risk for disease.

3 And Duke said the same thing. Duke said the same
4 thing. It's Exhibit 136. It's a training manual.
5 Asbestos in these jobs are bonded, and it creates no
6 dust. And Ms. Sahmel said, "I went through and I
7 selected studies. And, yes, some of these people work
8 for me, but I looked at the science; I looked at the
9 data; I looked at the measurements, and every one of
10 them are below the testimony."

11 I'm almost finished. And she calculated
12 Mr. Jolly's exposure. And she said for a lifetime, it
13 was .28 fiber cc years. Well, you know what we're all
14 exposed to over a 70-year lifetime, 24 hours a day?
15 4.5 fiber years. Probably about two hundred times
16 greater. It's what we all have in our lungs. For
17 70 years plus. There is no exposure.

18 Mr. Jolly's -- and the key thing about this,
19 Ms. Sahmel didn't say, "Well, I just thought I'd do a
20 percentage," because Mr. Jolly identified, oh, lord, 15
21 other valves. She included them all. Every one of
22 them. Assuming you took one hundred percent of his
23 work directly with valves, Fisher and Crosby, directly
24 hands-on, I'm the one ripping this thing out, that's
25 his lifetime exposure.

ROA_02303

Appendix_02338

1 All the science with data proves the fiber in
2 Fisher and Crosby gaskets, if he was exposed, does not
3 cause disease. All of the science proves that that
4 causes disease. All of it.

5 I mentioned Hollywood and television and TV ads a
6 while back, and I'll tell you why. Let's look at this
7 case that Mr. Jolly's lawyers brought to you. Now, if
8 you have a case, say, "Well, I got hurt in a car
9 wreck." How would you prove that case?

10 Well, first thing I'd do is I'd probably bring in
11 people on the corner that saw the accident, maybe a
12 passenger in the car, here to tell you about the
13 accident. And we heard and we were told that
14 Mr. Simpson, Mr. Freeman, Mr. Rogers were going to
15 come, but they didn't. Maybe because they didn't know
16 Mr. Jolly.

17 Mr. Taylor came. He didn't meet Mr. Jolly until
18 '86 and never worked with him. Mr. Jolly told us he
19 continued to work because he loved the people and he
20 loved his job, and I don't doubt him at that, but where
21 were they? Why didn't they come? Why didn't they come
22 and tell you, "This is what it was like."

23 Well, maybe they were going to be like Mr. Jolly.
24 They had signs all over the place. "They had signs,
25 but I didn't think it was that bad so I didn't pay

ROA_02304

Appendix_02339

1 attention to it," Maybe that's why they didn't come.

2 If I was going to prove to you I was hurt in an
3 automobile accident, what else would I do?

4 MS. FARRISE: Your Honor, I do just have to place
5 an objection of improper argument on the record.

6 THE COURT: All right. Thank you, ma'am. I think
7 you're getting close, Mr. Bouch, but I know you will
8 stay within the bounds of the rules.

9 MR. BOUCH: Of course, Your Honor.

10 Maybe you would bring the doctor that you chose to
11 treat you, the doctor or the nurse or the physical
12 therapist.

13 What do we have here? No doctor that was chosen
14 by Mr. Jolly and his family ever came. Not the doctor
15 from Boiling Springs 15 miles away that diagnosed him.
16 No doctor from Duke came, even though Dr. Brody was
17 from Raleigh, five miles away. You have to wonder why,
18 why no doctor, particularly from Duke, came to testify
19 in support of what they're arguing.

20 I submit the doctors from Duke didn't come because
21 they would have agreed with Dr. Crapo, who ran the Duke
22 pulmonary program for 15 years, and Dr. Oury, who spent
23 15 years in the pathology department there, they would
24 have agreed with those other Duke doctors that we did
25 bring.

ROA_02305

Appendix_02340

1 You were told, well, the Duke engineers didn't
2 come. Why didn't they bring them if they were going to
3 say that, "We did something Duke didn't order, didn't
4 specify, and didn't want"? Maybe it's because the Duke
5 engineers would say exactly what we said.

6 There are a couple of things that I think might
7 trouble you. If there was a traffic accident and you
8 want to prove to a jury you were hurt, you would put in
9 your medical bills, your medical records. There are no
10 medical records. There are no medical bills.

11 I asked Dr. Frank, I said, "Are these state
12 secrets?" "No." "Have you seen them?" "Well, I saw
13 some, about a hundred thousand dollars." Remember I
14 asked him, "Is that a New York price or a Spartanburg
15 price?" and we both laughed about that. There are no
16 bills. They're not hard to get. Anybody that goes to
17 a doctor gets a bill.

18 How about a medical record? There's not a single
19 one. There's not one from the surgeon, the oncologist,
20 the pharmaceutical company, the therapist, none. You
21 have to wonder why.

22 There was a wonderful judge years ago who used to
23 look at lawyers like me and say, "That's just lawyer
24 talk. Where is your proof?" And I submit to you,
25 where is the proof?

ROA_02306

Appendix_02341

1 They spent a lot, and there are documents all over
2 about what Crosby and Fisher did in 1952 and 1933 and
3 1977, but there's precious little -- none -- about
4 Mr. Jolly, who this case is about, and their lawyer is
5 asking you for an awful lot a money. And they're
6 accusing Mr. Martin and Mr. Dumistra and their
7 employers of some pretty serious things.

8 And Mr. Dumistra came in all good faith, and so
9 did Mr. Martin, and they're nice people. And they're
10 like most people. They go to work every day; they draw
11 a salary; they do the best they can; they educate their
12 children, and they want a better life for their
13 children. They didn't sit in Marshalltown, Iowa and
14 say, "How are we going to do in Mr. Jolly?" That's
15 lawyer talk. There is no proof of that.

16 What is the proof? Gaskets and packing don't
17 cause the disease. It's the wrong fiber; it's the
18 wrong dose, and it's the wrong size.

19 Fisher and Crosby never required, recommended,
20 specified asbestos. They offered it, sure. But the
21 initial contact was from Duke. And the likely cause of
22 his cancer was this, which was found in Mr. Jolly.

23 Now, I lost a friend a few months ago. He was a
24 pretty important lawyer for years, and he used to give
25 a speech, and he used to say, "It's a great time to be

ROA_02307

Appendix_02342

1 a lawyer in America, and I'm proud to be one." And I
2 am, too. And lawyers don't need to call people liars
3 or law breakers or relying on loopholes. That's TV.
4 That's your television. That's not Spartanburg.

5 I want to thank you again. I particularly want to
6 thank Diane and Marcia and Alexandria. They have been
7 very patient with short-tempered lawyers for the last
8 eight or nine days. It's been a privilege to be in
9 your court, Your Honor, but I thank you.

10 THE COURT: Thank you, Mr. Bouch.

11 Ms. Farrise, any reply?

12 MS. FARRISE: Yes, Your Honor.

13 THE COURT: We still good?

14 JURY FORELADY: Can we have a ten-minute break?

15 THE COURT: Ten-minute break? Very good. All
16 right. We'll take a ten-minute break.

17 (WHEREUPON, the jury exited open court at
18 11:52 a.m.)

19 (WHEREUPON, a recess was taken from 11:52 a.m. to
20 12:06 p.m.)

21 (WHEREUPON, the jury entered open court at
22 12:06 p.m.)

23 THE COURT: All right. Ladies and gentlemen, you
24 may be seated.

25 And where we are is this. We'll hear the

ROA_02308

Appendix_02343

1 concluding argument from the plaintiff, who has the
2 burden of proof, and then what I'm going to do is let
3 you go eat, which I'd like to do, too. Then after we
4 have our lunch break, and we'll figure out a time after
5 this closing argument for Ms. Farrise takes place, then
6 I'll charge you.

7 Just to know the plans, the alternates will
8 continue to be with you as you enjoy your lunch. You
9 will continue not to discuss the case, and then when we
10 come back, if there's no more current need for the
11 alternates, we'll simply place them in another place
12 but hold on to them in case, for some unexpected
13 reason, their services become necessary. So that's how
14 we will work things.

15 Very good. Ms. Farrise.

16 MS. FARRISE: Thank you, Your Honor.

17 Thank you, ladies and gentlemen. You understand a
18 lot about this process, and what I'm getting ready to
19 do is respond to some, but not all -- maybe not all.
20 We'll see how the time goes -- of what you just heard.
21 So I'm going to pick them off as I can.

22 You just heard that these gaskets are safe because
23 they allegedly only expose people to some level that's
24 right there in the background level that we all have.
25 And I point this out because Mr. Jolly is also part of

ROA_02309

Appendix_02344

1 the "we."

2 So to the extent, even if what they say is
3 accurate, you must still find for Mr. Jolly because he
4 had what we all have in his life, plus what he was
5 exposed to from Fisher and Crosby. It didn't go away.
6 So we know there's no safe level, and whatever
7 Mr. Jolly had, even if -- and it wasn't -- it was at
8 that level, what he had from the product here was on
9 top of that.

10 Now, some of what you just heard may -- well, let
11 me add this. The judge is going to give you the law.
12 The rules here. And be very careful. We have talked a
13 lot about OSHA in this trial. OSHA is not the law
14 here. Let me say it again. Think of me jumping up and
15 down whenever someone mentions OSHA. It is not the law
16 here.

17 The judge will charge you, and she will not say to
18 you, "We are trying to figure out whether or not Crosby
19 or Fisher should have gotten an OSHA citation." And
20 the interplay, as you will hear, the judge will tell
21 you that a product maker, which is only these two
22 folks, and a manufacturer, which is only these two
23 companies, under the law that actually applies here,
24 they are held to the skill of an expert.

25 And you will hear the judge talk about duty. You

ROA_02310

Appendix_02345

1 all have a duty under law, which is to decide the case
2 on the evidence, but what you will hear the judge say
3 to you is that they had a legal duty, obligation, and
4 requirement to not sell a product that would hurt
5 people. And they had a duty under law that if the
6 product was harmful, to put a warning on it.

7 This is not about whether they had an OSHA
8 violation, and the interplay is again -- well, a great
9 example of that is if someone standing on the corner
10 and selling illegal drugs, and they don't get arrested,
11 does that mean they're not a drug dealer? It means
12 they didn't get caught.

13 And so this whole trial in part is Crosby and
14 Fisher saying, "Catch us if you can," so the invitation
15 to where is the citations, that's just distracting.
16 The judge will not instruct you that the law here, that
17 the decision, that the tools that you are to use is if
18 they didn't get a citation, therefore, they are not
19 responsible for what they are accused of.

20 The other thing is in terms of duty, your duty is
21 to decide the case on the evidence here. I know I have
22 said that a number of times. Because when you hear
23 someone say to you, a company, consider evidence --
24 consider something that wasn't evidence. Consider what
25 Mr. Jolly I'm telling you may have said at his

ROA_02311

Appendix_02346

1 deposition but no testimony or evidence came in this
2 court, then it is an invitation and encouragement to
3 you that you should break the law.

4 These people who are law breakers are saying to
5 you, "Don't decide the case on the evidence, which is
6 your duty; decide it on your memory test, on your
7 memory. What did you remember, ladies and gentlemen?"
8 Jury service, one of the highest services, is not a
9 memory test. And in order to carry out the duty that
10 you raised your hand and swore to do, you have to
11 decide this case on the evidence. And I'm sorry,
12 because it's time, but if you don't remember what that
13 evidence is, you have to go back and ask the court
14 reporter to read it back, and that is the only way to
15 carry out your duty. It's not a memory test.

16 Dr. Frank, you just heard, agreed with the
17 defendants. I think not. The evidence -- and if you
18 need to have it read back, please do -- was yes, if the
19 insulation where Mr. Jolly was was asbestos-containing,
20 then, of course, that, too, would have contributed in a
21 substantial way to his dose. As was pointed out,
22 Dr. Frank didn't take an air sample. Dr. Frank had
23 zero information that the insulation at the Duke plants
24 in the time frame that Mr. Jolly was there was
25 asbestos-containing.

ROA_02312

Appendix_02347

1 Then we had this theory but if somehow someone
2 stockpiled it, and if somehow the rules and the
3 procedures Duke put in place which was to encapsulate
4 it, to rope off the area and to do all those things
5 were not followed, if a bunch of things happened, and
6 if that led to asbestos insulation exposing Mr. Jolly,
7 Dr. Frank said, yes, then you have to count it because,
8 obviously, as you heard from Dr. Brody about how
9 asbestos causes cancer, it would be another lightning
10 strike, an assault on a cellular level that would hurt
11 Mr. Jolly's cells. But this is what the defendants
12 have to prove, and there is not a document, there's not
13 an air sample, there's not a person from Duke. And the
14 circumstantial evidence is to the contrary.

15 Dr. Frank says Kaylo went asbestos-free in 1972.
16 Dr. Crapo even agreed with that, and Ms. Sahmel did not
17 disagree with that. And while Ms. Sahmel is an
18 industrial hygienist, when the judge gives you the law,
19 listen closely. You will not hear that anybody needs
20 to bring an industrial hygienist. That's not part of
21 what the rules require.

22 The rules say you have to prove with medical
23 expertise that he has the disease and that it was
24 caused by asbestos. So the fact that we didn't bring a
25 podiatrist, the law doesn't require that either. This

ROA_02313

Appendix_02348

1 business about where are the medical bills? That's
2 just sort of flame throw. We don't have a dispute
3 about whether or not Mr. Jolly has undergone
4 significant medical treatment and that it is very
5 costly. There is no dispute whatsoever. So why would
6 we bring in here and dump on you a bunch of paper when
7 we have had evidence? Because I think what the
8 suggestion was is that what people say here, their
9 testimony is not evidence. This is evidence.
10 Documents are evidence. And whatever inferences, which
11 is a word, a big, fancy word I never learned until I
12 went to law school, whatever inferences you all draw
13 from that is appropriate.

14 And what that means is if you put two and two
15 together, for instance, Dr. Frank is an expert. He
16 spent his career; he treats patients; he does all those
17 things; he's looked at the medical bills, and it is his
18 expert opinion that Mr. Jolly's medical treatment is at
19 least, easily I think he said, a million dollars.

20 Dr. Crapo, who was here, did not disagree. We
21 didn't talk about the dollar amount, but Dr. Crapo said
22 this is a horrible way to die. And then, yes, there's
23 going to be hospitalizations, all of those things. All
24 of that is evidence. So to point out to you that there
25 wasn't a document about something we don't have a

ROA_02314

Appendix_02349

1 dispute about makes no sense. It's really just.
2 distracting.

3 You have three tools. You have the law here, not
4 OSHA, and listen to what the judge tells you. You have
5 the evidence, documents, testimony, and then, yes, you
6 do have your common sense. Those are the three tools
7 that you take to the jury room. And your patience.

8 This idea that anyone outside of this environment
9 of sort of Alice in the Courtroom, like Alice in
10 Wonderland, believes that there's any safety about any
11 type or flavor of asbestos, we know is really not true.
12 And while Fisher, at least, brought expert witnesses to
13 court, we heard from Fisher outside of court when
14 Fisher had the obligation to do the right thing as it
15 relates to its own employees. Remember Mr. Watt? Can
16 we hear what Mr. Watt had to say outside of court about
17 the hazards of asbestos from the type of products that
18 the Fisher servicemen were working with and the valves.

19 (Excerpt of video played as follows:

20 It's a disease almost exclusively associated
21 with asbestos, cancer of the lung, and stomach
22 lining unique to asbestos exposure. Disease is
23 the primary reason that no safe level of asbestos
24 exposure is known.

25 Fortunately, in our case, since we are handling

ROA_02315

Appendix_02350

1 primarily chrysotile, the development of
2 mesothelioma is not related to exposure to
3 chrysotile, primarily to crocidolite.)

4 MS. FARRISE: Mr. Watt said an interesting word.
5 Primarily. Primarily does not equal entirely. What
6 does that mean, Ms. Farrise? It means that Mr. Watt,
7 who, by the way, was, and may still be, Fisher's
8 certified corporate industrial hygiene manager. He had
9 exactly the same qualifications and more of Ms. Sahmel,
10 who was a certified industrial hygienist, said we
11 primarily work with chrysotile. And that is different
12 than we entirely work with chrysotile because Mr. Watt,
13 the corporate industrial hygienist, knows that the
14 gaskets are both chrysotile and crocidolite. And you
15 know it, of course, from the tests I talked about
16 earlier.

17 But there was also a statement that we didn't talk
18 with these folks about the science. Go back to your
19 notes and recall that one of the things -- I think the
20 last thing I spoke with Dr. Crapo about was the
21 difference between rejected and not adopted. The
22 scientific position that he was saying that he had with
23 those other authors, Berman and Crump, and sitting on
24 that panel, the last discussion I had with him is the
25 EPA did not adopt that. They rejected the scientific

ROA_02316

Appendix_02351

1 position that you were trying to put forward, you and
2 these other folks. And then he said, "Well, I wouldn't
3 say they rejected it; they just didn't adopt it."

4 So, we know -- we did talk with him about what the
5 consensus of the scientific community is. Go back to
6 your notes. I said all of these agencies who regulate
7 based on science and medicine and protect us -- OSHA, I
8 said; IARC, the International Agency for the Research
9 of Cancer; WHO, the World Health Organization, and EPA,
10 none of those agencies agree with what you have said.
11 And he said, "Yes, that's true. Nobody agrees with
12 me." So it's not accurate that they were not
13 challenged on the science, and we discussed it, so it
14 seems like it's appropriate to just address that.

15 This notion of something about temperature and
16 didn't have to use asbestos. Exhibit 947 is Fisher's
17 control valve handbook. And you're going to have it in
18 paper form, but on Page 33 is one of those early things
19 we talked about. And, actually, it's a very simple
20 chart. And here's what it shows us, that the
21 typical -- which is Fisher's word -- construction
22 materials for these valves have a lot of choices.

23 Up here, the valve body, for instance, can be cast
24 iron or carbon steel, stainless steel. Just like pots.
25 You can get a cast iron pot or a stainless steel pot to

ROA_02317

Appendix_02352

1 cook with. But what they say about the gasket,
2 however, across the board is it's asbestos, asbestos,
3 asbestos, asbestos within more asbestos, asbestos, and
4 more asbestos. Asbestos, as it relates to the body
5 gasket of valves, whether that's a globe valve or
6 anything else, was typically chosen. And the body, you
7 recall, of a valve is the part that has the flange.

8 So do not accept the invitation to fail on your
9 duty. Go back to the evidence. That is the duty and
10 that is the oath that you have taken.

11 Mr. Jolly's testimony. The most important
12 testimony that you heard. I'm not going to read it --
13 well, I could read it, but I don't have time.

14 Exhibit 6359, as I pointed out, is McGuire Unit 1.
15 Crosby had six valves on the reheater turbine.
16 Mr. Jolly -- this is a transcript -- went through to
17 the extent his health allowed what he recalled about in
18 particular that valve. And if there's any question in
19 that jury room, have his testimony read back.

20 There was an offer to give Crosby and Fisher the
21 benefit of the doubt. If we had warned him, how would
22 we have warned him? Nothing would happen. Really?
23 You didn't give him the benefit of the doubt. We are
24 here, and you are responsible because you did not give
25 him the benefit of the doubt. If I'm driving a car and

1 I run over a child, I don't get to say -- and I'm
2 speeding, I don't get to say, "Well, even if I wasn't
3 speeding, it wouldn't have mattered because the child
4 still would have been run over." I did something
5 wrong. And this goes back to kindergarten. The law,
6 the judge will tell you, when you do something wrong
7 and you hurt somebody, don't try and lie and cover it
8 up. Don't try and avoid it. Don't try to hire the
9 best experts money can buy to come into court and
10 mislead. Say, "I did something wrong and I'm sorry."

11 In this particular case, here's what the evidence
12 shows about this how they could have warned Mr. Jolly
13 in particular. It's not a question of it wouldn't have
14 gotten to him because when you listen to his testimony,
15 he said, I had the responsibility to make sure it was
16 the right gasket, and I carried out my duty by looking
17 at the manufacturers' instruction manual for the valve.
18 And if, in the manufacturers' instruction manual for
19 the valve, there had been a red box that said,
20 "Warning: When this new gasket is installed and old
21 gasket is going to be taken out and people can be
22 protected with a 50-cent spray water bottle," and he
23 read that over and over again, I'm guessing he would
24 have said, I tell you what, I'm going to get a 50-cent
25 spray water bottle. Duke is going to find out whatever

ROA_02319

1 it happens to be.

2 We also know about these gaskets that they have to
3 be cut in the white room so that not a fleck of dust
4 gets on them before they get to the site. Therefore we
5 know, and we have had testimony, that there is a
6 packaging cover on them. And because we don't want a
7 fleck of dust to get on them, the packaging, I'm
8 guessing the evidence infers, is not taken off until
9 the gasket is ready to be used. And if, in fact, the
10 packaging had a big warning label on it, this is
11 poison. If you don't use the water or a respirator or
12 a picture of that, which is how you warn people, in an
13 orange or yellow safety color, folks would have seen
14 that.

15 So, Fisher and Crosby, you don't get the benefit
16 of the doubt of putting people's lives on the line and
17 not giving them a choice by flippantly saying they
18 wouldn't have seen it anyway.

19 The law says, and that is what the judge is going
20 to tell you, that they are duty-bound to do the right
21 thing before it hurts someone, not try and get the
22 benefit of the doubt after it hurts someone.

23 Dr. Oury did not say that Mr. Jolly's asbestos
24 bodies, the two, were amosite. He didn't say that.
25 And I objected, and I'm sorry. I hate to interrupt

1 people. We have some rules. If you don't object, you
2 basically waive it for all time. But what it showed is
3 this is not a game. It's not about winning or losing,
4 and you cannot stand up here and absolutely, when all
5 else fails, just lie about the evidence.

6 MR. BOUCH: Your Honor, I object to that. That's
7 a personal aspersion against the lawyer, and that's
8 improper.

9 THE COURT: All right. Objection is noted.
10 I construed the remark to be one about the
11 defendants, but, Ms. Farrise, let's not accuse the
12 lawyers of anything in that ballpark, please, ma'am.

13 MS. FARRISE: Clearly, it was Fisher's and
14 Crosby's position, and the evidence does not support
15 it.

16 If there is any doubt that Dr. Oury never said
17 that Mr. Jolly's tissue was amosite, have it read back.
18 Again, it's not a mystery. It doesn't really matter.
19 It's a red herring here. Dr. Frank told you all it
20 tells you is that at some point Mr. Jolly inhaled
21 asbestos fibers, and this coating occurred, and he
22 could have inhaled it two weeks ago or two months ago
23 or 20 years ago, and we don't know. So, while
24 interesting, it's just this red herring. I don't even
25 know why we're talking about it.

1 But if we're going to talk about it, I guess what
2 Dr. Oury said is the amphiboles -- which sounds like
3 amosite -- the amphiboles, which is amosite and
4 crocidolite, the blue stuff that was in the gaskets --
5 caused, in the lung, these asbestos bodies. But
6 Mr. Jolly's tissue specimen came from his lymph nodes.
7 So whatever they know and deduce about asbestos bodies
8 in your lung, it doesn't even apply here. This
9 asbestos fiber, whatever it is, escaped the lung and
10 was found in the lymph node, and Dr. Frank told you
11 it's actually, therefore, more likely to be chrysotile
12 because it escaped the lung and was in the lymph node.
13 But it's a red herring, ladies and gentlemen.

14 There was a discussion about why would somebody
15 not use a clean rag and try to make it all shiny and
16 all that. There is an exhibit that is the Fisher
17 maintenance book, and I talked with Mr. Dumistra about
18 it -- and I did have it. But in the Fisher instruction
19 book, it says to use a wire brush. It says whenever
20 you disassemble a valve, change the gasket, use a soft
21 wire brush. Follow the manufacturers' instructions.
22 Don't use generic parts because they might look the
23 same, but they won't work the same. Use only
24 factory-authorized parts. So Mr. Jolly and the other
25 folks at Duke did it Fisher's way. And they used the

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1 wire brush.

2 Then there was an argument to you about, well, why
3 would they not do it in such a clean way? Recall that
4 Mr. Jolly and Mr. Taylor said, "We were doing this work
5 in the context of an outage of the plant or the unit
6 and a shutdown of the unit," and that means, like a
7 car, it's out of service. It's not making any energy.
8 It's not producing any power. And so we would plan and
9 vendors would come and workers would come. There would
10 be 2,000 people on site trying to get it turned over as
11 quickly as possible so the unit could go back online
12 and produce power. This was not an exercise in
13 cleanliness. You can clean up later. He also said we
14 had folks whose job it was just to keep cleaning up.
15 So to argue that to you, really what it was, was to say
16 Mr. Jolly did something wrong.

17 When you get that verdict form, you are going to
18 see that these companies are blaming that man. They
19 want you to find he did something wrong. So this
20 argument that he didn't wipe it nicely, and why was it
21 so dirty, that's all meant for you to say he should
22 have been cleaner. In the context of an outage or
23 shutdown of a power plant, he did everything right.
24 And this is where you get to judging credibility. He
25 was here.

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1 And remember when he corrected me? Could have
2 been 66 bolts. No, I'm not saying that exactly. It
3 might have only been 49 bolts. And I'm saying that
4 because what Mr. Jolly's testimony tells you is he
5 followed the rules to a T. He followed the rules to
6 the T. And had he been warned in any proper way with a
7 label, which is what the judge is going to tell you the
8 law says the manufacturers and sellers of products, not
9 purchasers and customers of products and users have the
10 duty to do, which is to warn, he would have, to the T,
11 followed the instructions that they told him. You need
12 a respirator. And maybe you need a spray bottle. I
13 think that -- can I have the Elmo, please?

14 This idea, which I think is what's being offered
15 to you, that these were small valves -- I've learned a
16 lot about valves in the last year. You have in
17 evidence this, *The Fisher Story: 125 years*. And I
18 think it's actually part of this because we talked
19 about it when Mr. Dumistra was here, or is it a
20 stand-alone? What's the number?

21 MR. HOLDER: 966.

22 MS. FARRISE: 966. So out of court, we learn a
23 lot about what it means to be an eight-inch valve
24 because I didn't really have that in mind, and maybe
25 you don't either. They say here that this -- the

1 president of the company, Neal Chadderdon, poses with
2 an eight-inch Type 57T valve that weighs two and a half
3 tons. 5,000 pounds. So this whole discussion and sort
4 of language of these are small valves, this is an
5 eight-inch valve. They have a picture in here of a
6 16-inch valve. I don't know how much it weighs, but
7 certainly as to Crosby and the drawings that you have
8 in evidence, we know that on that list Crosby was
9 selling to Duke valves that were 1,150 pounds, at least
10 for the records that we have.

11 So to put up here a little, bitty valve that I
12 could carry in my car and say this is what Crosby sold,
13 when you have Exhibit 6359 -- that's the pack of
14 documents -- and in there is a pretty boring document.
15 I'm trying to get the exact page so you don't have to
16 do the work.

17 On the Crosby drawing, ladies and gentlemen, it
18 says we didn't have, we didn't sell to Duke those
19 little, bitty valves. We sold valves, as I think it
20 was Mr. Martin said, that had to come in large crates.
21 It's misleading because if you think it was a small,
22 little valve with a small, little gasket, then you will
23 think maybe it wasn't the tremendous exposure that it
24 was. Go back to the evidence.

25 Lastly, Fisher and Crosby mentioned that I'm

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1 asking you for a lot of money. I'm not asking you for
2 a lot of money like just give Mr. Jolly money. I am
3 asking you to do the duty of a juror. And, yes, folks
4 have all lost people who have died of cancer, and the
5 invitation there is -- just put it out there -- they
6 don't have a lawsuit and there's no money. And
7 that's -- I don't know what to say about that. We've
8 all lost people to cancer.

9 But in this case that's not the question. In this
10 case the question is, are these companies responsible,
11 and they are for a part, a large part, of what happened
12 to him. And since they are, under law, the duty of a
13 juror is to say, what has this loss been? And that is
14 going to be, the harm to him and Mrs. Jolly, a lot of
15 money. Decide on the evidence. Thank you.

16 THE COURT: Thank you very much.

17 Now, ladies and gentlemen of the jury, we'll take
18 our lunch break. Now, let's look here. Let's try to
19 be back here at 2:15, 2:30, in that ballpark. I'm
20 going to be working with these lawyers on charges, but
21 that's kind of the ballpark that I'll be looking to get
22 you back in the jury room -- back in the courtroom.

23 So have a nice lunch, and we'll see you in a
24 little bit.

25 MR. McLEOD: Your Honor --

1 THE COURT: Let the jury retire first, Mr. McLeod.
2 (WHEREUPON, the jury exited open court at
3 12:41 p.m.)

4 THE COURT: Bring the jury back. I'm so sorry.
5 This is probably what Yancey was telling me to do. I'm
6 so sorry. My fault.

7 (WHEREUPON, the jury entered open court at
8 12:42 p.m.)

9 THE COURT: I know you've paid good attention to
10 what I've said and to the instructions I gave you about
11 how we would proceed, but because it's important to
12 always again emphasize to you, please don't deliberate
13 the case yet. You won't deliberate it until you
14 receive the charge from me after you come back from
15 lunch. Now you're still all together, but please don't
16 deliberate the case. Thank you so much.

17 MR. BOUCH: Your Honor, would it be more
18 appropriate, since lunch is brought in, to come back at
19 2 o'clock instead of 2:30? I'm afraid if your charge
20 goes a long time, that, you know.

21 THE COURT: Well, I think 2:15 is going to still
22 give us plenty of time to do the charge and have them
23 deliberate the case.

24 MR. BOUCH: Thank you, Your Honor.

25 (WHEREUPON, the jury exited open court at

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1 12:43 p.m.)

2 THE COURT: All right. Josh has redone the
3 charges. Josh, where are we now?

4 LAW CLERK: We have that one issue.

5 THE COURT: Josh has -- Josh and I have tried to
6 make some grammatical changes and some other things and
7 get this thing in a form we can give it to you, but we
8 have got one thing that we are still uncertain about
9 what is meant in this typed version.

10 Go to jury deliberations on Page 19.

11 LAW CLERK: Y'all aren't going to have the page
12 numbers.

13 THE COURT: Go to the top at jury deliberations.
14 It starts, "Now I am through with my instruction on the
15 law."

16 MR. REID: Let me just catch up with the court,
17 please.

18 MS. McVEY: It's right after damages.

19 THE COURT: And right before verdict form.

20 All right. I'm looking at the paragraph that
21 says, "Now, you should know that the record is now
22 closed." And if you look on down, you have got a
23 sentence that says, "So keep in mind that the record is
24 closed, and you have to make a decision on the exhibits
25 you have and your memory of the evidence." I would

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1 strike "they call them."

2 "A jury, if you look up the word in a dictionary,
3 would be defined as a company of people sworn to render
4 a true" -- what is that word? It's not -- couldn't be
5 "end." What is it? "And that's what you have been
6 called upon to do, to determine the true facts of this
7 case."

8 MS. McVEY: Oh, I can see him saying it.

9 MR. McLEOD: Let me read it. I may be able to
10 remember it.

11 MS. McVEY: It's like a Latin phrase.

12 THE COURT: Well, veredicto is perhaps what he's
13 talking about.

14 LAW CLERK: That doesn't sound like "end."

15 MS. McVEY: Let's see. Could we tweak it?

16 THE COURT: Well, I'm just going to say, "A
17 company of people sworn to render a verdict that speaks
18 the truth."

19 MS. McVEY: Perfect.

20 MR. REID: Works for me.

21 LAW CLERK: We don't think that violates our
22 search for the truth.

23 THE COURT: That's what I don't want to do is a
24 search for the truth.

25 MS. McVEY: I think what you have proposed is

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1 fine.

2 THE COURT: "A company of people sworn to render a
3 true verdict, a verdict which speaks the truth."

4 LAW CLERK: So, "A jury, if you look up the word
5 in a dictionary, it would be defined as a company of
6 people."

7 THE COURT: "Sworn to render a true verdict, and
8 that's what you have been called upon to do, to
9 determine the true facts of this case. And, ladies and
10 gentlemen" -- let's do it that way.

11 Can you print that out or e-mail it to them all
12 now?

13 MS. McVEY: That would be great. We can print it
14 out so it's done.

15 THE COURT: And then what I want y'all to do is
16 take about -- till about --

17 LAW CLERK: Let me make sure I have got
18 everybody's e-mail on here. Ms. McVey, Holder,
19 Farrise, Mr. Bouch, Mr. McLeod. Where are you Mr.
20 Reid? There we go.

21 THE COURT: If Bogan is going to be helping him,
22 put him on there, too.

23 Then how long will it take y'all to review it?
24 Can we be back here, what, somewhere between 1:15 and
25 1:30? What do you want? 1:30, is that enough time?

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1 MS. McVEY: To just review it?

2 THE COURT: Well, review it, make a final decision
3 on it, and we'll print it.

4 MS. McVEY: I think we can do that at 1:15, don't
5 you think? I have it memorized pretty much.

6 THE COURT: So we'll be back here, assemble back
7 here at 1:15. We'll go over this thing and get it in
8 final form.

9 (WHEREUPON, lunch recess was taken from 12:48 p.m.
10 to 2:11 p.m.)

11 THE COURT: Bring me the jury, Maxey.

12 (WHEREUPON, the jury entered open court at
13 2:13 p.m.).

14 THE COURT: Ladies and gentlemen of the jury, you
15 may be seated. Ladies and gentlemen, I'm now going to
16 charge you on the law that applies to the case and the
17 law that applies to the facts of case.

18 It's your duty to find the facts from the
19 evidence, and to those facts you must apply the law as
20 I give it to you, and you must decide this case based
21 on the evidence and the law. You should not be
22 concerned with what the law should be, but with what it
23 is. And you must not be influenced in this case by any
24 personal likes or dislikes or any undue sympathy or
25 prejudice. And that means that you must decide this

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1 case solely on the evidence before you according to the
2 law. You took an oath to do just that when we began
3 this trial, and you certainly lived up to your oath so
4 far.

5 So following my instructions, you must follow all
6 of them, not single out some and ignore others because
7 they're all equally important. Please don't read into
8 these instructions or into anything I may have said or
9 done during this trial as any indication of what I
10 think the facts are or what I think your verdict should
11 be because under our system of justice, you, the jury,
12 and you alone are the sole and exclusive judge of the
13 facts, and I'm certainly not going to intrude on your
14 constitutionally guaranteed right to determine the
15 facts, just as I know you're not going to intrude on my
16 responsibility to give you the law.

17 Now, ladies and gentlemen, how you decide what the
18 facts are, you do so by evaluating or weighing the
19 evidence you've heard during the trial. And there's no
20 way for you to weigh in a literal sense, of course.
21 I'm not going to give you a set of scales to go back
22 and conduct experiments. That's not what I'm talking
23 about.

24 You weigh and evaluate the evidence simply by
25 using your good common sense, your sense of logic, and

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1 the reason and your life experiences that you bring to
2 this duty today. Once you do that, you will be able to
3 determine the true facts of the case. And once you
4 have done that, you'll be able to take the law as I
5 give it to you and apply it to those facts, and you'll
6 be able to reach a decision or verdict.

7 In deciding the facts of this case, of course,
8 you're not swayed by bias or prejudice in favor of any
9 party. Our system of law does not permit jurors or
10 myself to be governed by prejudice or sympathy or
11 public opinion. This case should be considered and
12 decided by you as an action between persons who are of
13 equal standing and worth.

14 And what I mean by that is that a corporation is
15 entitled to the same fair trial at your hands as a
16 private individual. All persons, including
17 corporations, stand equal before the law and are to be
18 dealt with as equals in the court of justice.

19 You must not consider as evidence any statements
20 of counsel made during the trial. Statements of
21 counsel don't constitute evidence, but the counsel is
22 articulating a position and a contention of his or her
23 client. This rule applies to opening and closing
24 statements as well as the questions that were asked.

25 Attorneys are officers of the court. They have

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1 the absolute right and duty to bring matters to the
2 attention of the court by way of objection. Don't
3 inferentially or any other way become upset, or
4 disturbed by the fact that counsel has to rise at times
5 and interpose an objection. Our trial procedure
6 includes the objection process as a means of
7 controlling the evidence, that is, deciding what is
8 proper evidence and discarding improper evidence. So
9 counsel, by objecting, are simply performing their role
10 in the trial of this case.

11 Once the court makes a ruling on the objection,
12 the jury is bound by that ruling. If the objection is
13 sustained, the question is improper. If the objection
14 is overruled, the question is proper. In that regard,
15 the jury must not under any circumstances derive any
16 inferences from the rulings made by the court on an
17 objection as to any opinion the court may have had
18 about the case. The judge doesn't have an opinion
19 about the evidence and is not entitled to an opinion in
20 that way. In making rulings, the judge is performing
21 her role in the trial of the case. As to any questions
22 where an objection was sustained, don't speculate as to
23 what the answer to the question might have been.

24 The burden of proof. I told you at the beginning
25 that the plaintiffs have the burden of proving their

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1 case. The burden of proof in a civil case is by the
2 greater weight of the evidence. That means the
3 plaintiff, in order to obtain a verdict, must produce
4 evidence which, considered in the light of all the
5 facts, leads you to believe that what they're claiming
6 is more likely true than not true. The better way to
7 visualize it, perhaps, is to envision that set of
8 scales, and if you would put the plaintiff and the
9 defendant's evidence on the opposite sides of the
10 scales, in order to reach a verdict, the plaintiff
11 would have to tip those scales in their favor. And if
12 those scales tip in favor of the plaintiff even
13 slightly, even by the most minute proportion, then the
14 plaintiff would be entitled to a verdict because then
15 the greater weight of the evidence would be on the side
16 of the plaintiffs.

17 However, if, after your review of the evidence,
18 the scales remain evenly balanced, no greater weight
19 either side, then the scales -- or -- wait a minute.
20 If the scales tip to the plaintiffs' favor ever so
21 slightly, then the plaintiff is entitled to a verdict
22 because then the greater weight of the evidence would
23 be on their side.

24 However, if, after your review of the evidence,
25 the scales remain evenly balanced and there's no

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1 greater weight on either side, or the scales are tipped
2 in the defendant's favor, then the defendant would be
3 entitled to a verdict. So what you must do is mentally
4 weigh that evidence and place it on the scales and see
5 which side's evidence has the greater weight in your
6 mind.

7 And I will also remind you that we have two
8 different defendants in this case, and you must engage
9 in that weighing process as to each defendant
10 separately and individually and not let your decision
11 on one defendant influence your decision on the other
12 because they're each entitled to a separate and
13 individual consideration.

14 Some of you may be familiar with the burden of
15 proof in a criminal case. In a criminal case, before
16 the State can convict someone of a crime, they must
17 prove each element of that crime beyond a reasonable
18 doubt. But this is not a criminal case, obviously so.
19 That phrase, beyond a reasonable doubt, which is one of
20 the highest standards of proof the law knows, has no
21 place in this civil trial. The standard of proof that
22 you must use and the yardstick you must apply is the
23 burden, one of the greater weight of the evidence. And
24 that's the sole standard of proof in this case as to
25 the plaintiffs' claim and their claim for actual

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1 damages.

2 Evidence. As I told you, you must decide the
3 facts from the evidence. The evidence consists of the
4 sworn witness testimony and the exhibits. Nothing else
5 is evidence. We have excellent lawyers in this case,
6 and they zealously advocated for their clients, but
7 they're not the witnesses so what they say is not
8 evidence.

9 If you remember something differently from the way
10 the lawyers remember it, your memory controls. And
11 what they have said and argued in this case is very
12 important for you to listen to because they're trying
13 to help you understand the evidence. But do keep in
14 mind, what they say is not evidence itself.

15 Direct and circumstantial evidence. Ladies and
16 gentlemen, in any type of case, there are two different
17 types of evidence. And what I'm talking about now is
18 direct and circumstantial evidence. Direct evidence is
19 the testimony of a witness who claims to have actual,
20 direct knowledge of the facts such as an eyewitness.
21 It is evidence that, if believed, immediately
22 establishes a fact.

23 Another type of evidence is circumstantial
24 evidence. And I'm sure you have heard that term
25 before. Circumstantial evidence is indirect evidence.

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1 So put another way, circumstantial evidence is proof of
2 a chain of facts and circumstances from which you could
3 find that another fact exists even though it has not
4 been proven to you directly. In the modern parlance, I
5 suppose the young people call that connecting the dots.
6 But the law makes no distinction between the weight or
7 value that's given to direct or circumstantial
8 evidence. You may consider both types of evidence in
9 this case.

10 One way to think about and understand direct and
11 circumstantial evidence is to think about common things
12 that happened.

13 Several years back, I was down at the beach with
14 my family, and I had my granddaughter, who was three at
15 the time. And we had several meals, and she didn't
16 seem to be eating anything. Not much of an appetite.
17 And her parents, my daughter and son-in-law, never
18 could quite figure out why she wasn't eating at meals.
19 And, finally, one evening she came up to my daughter
20 right before we ate and said something, and my daughter
21 said, "Is that cake I smell on your breath?" And she
22 had little brown streak running in the corner of her
23 mouth, and my daughter got up and went to the pantry
24 where, on a low shelf, there was a big chocolate cake,
25 and there were lot of three-year-old-size finger marks

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1 and gouges out of the side of that cake. So she
2 discovered that my granddaughter had been eating cake,
3 and that's why she lost her appetite.

4 Now, no one saw her eat the cake, and there was
5 certainly limited direct evidence that she had eaten
6 cake, but there certainly was circumstantial evidence
7 that she had eaten cake. So that's an explanation of
8 the difference between direct and circumstantial
9 evidence.

10 Evaluating witness testimony in evidence. Ladies
11 and gentlemen, you must consider all the evidence in
12 deciding what the facts are. And if there has been
13 evidence that has been stricken from the record, and
14 that's happened maybe once or twice, then, of course,
15 I've told you to disregard it. It's no longer part of
16 the record.

17 You are the judge of the credibility -- you are
18 the judges of the facts by necessity, and you've got to
19 determine the credibility of all the evidence. As I
20 told you in the beginning, for every witness who
21 testifies and every exhibit that's admitted, you'll
22 have to determine whether those things are worthy of
23 belief.

24 How do you do that? In the case of a witness that
25 testifies, I can give you some general guidelines and

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1 this isn't in any order of importance. You can
2 consider whether the witness has some interest in the
3 outcome of the case or whether they have some bias or
4 prejudice towards someone or some issue in the case or
5 whether they have something to gain by their testimony.
6 You may consider what opportunity they had to observe
7 the things they were here to tell you about in court.
8 You may consider how their evidence or their testimony
9 stacks up against other evidence in the case. Is it
10 consistent or inconsistent? You may consider their
11 demeanor on the stand. Were they hesitant or
12 forthright? You may certainly use as well whatever you
13 use in your day-to-day life to determine whether
14 someone is telling you the truth because you didn't
15 surrender your common sense when you came into this
16 courthouse a week and a half ago.

17 And I may also tell you that you may believe
18 everything a witness says, or you may believe nothing
19 that a particular witness says, or you may believe part
20 of a witness' testimony and disbelieve other parts.
21 You may believe one witness over several witnesses or
22 the several over the one, but you certainly decide this
23 matter of credibility and decide it not by counting up
24 the witnesses on one side or the other because your
25 sole object, ladies and gentlemen, is to determine the

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1 truth in this case, and it doesn't matter whether that
2 truth comes from a witness for the plaintiff or for the
3 defendants.

4 Expert testimony. And we have had several
5 experts, and you have heard the testimony from people
6 who are described and qualified as experts, and they
7 were qualified as experts because they, by their
8 education, training, or experience, achieved some
9 expertise in their given fields, and they can,
10 therefore, state their opinion on matters in their
11 field, and then they state their reasons for their
12 opinion.

13 But expert testimony, as I told you when we had
14 that first expert witness qualified, must be judged by
15 you just like any other testimony in this important
16 respect, and that is you, the jury, are the sole judges
17 of credibility. So the fact that an expert is an
18 expert doesn't diminish your ability to decide whether
19 that expert has credibility as far as you are
20 concerned. You may believe a witness' testimony and
21 accept it, or you may reject it. You can, in other
22 words, give it any weight you think it deserves.

23 Deposition testimony. You've heard testimony
24 presented through depositions, and I just want to
25 remind you that that testimony is entitled to the same

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1 weight as if the witness had presented from this
2 witness stand.

3 Taking notes. Now, some of you have been taking
4 notes during the trial, and I just want to remind you
5 also that those are for your own personal use, and they
6 don't trump or overcome another's independent
7 recollection of the testimony, and, of course, your
8 memory is always the best guide.

9 Expert witnesses and causation. Now, when someone
10 relies on expert testimony to show a causal connection
11 between an injury and a subsequent condition, the
12 testimony must meet the most probably rule. It's not
13 sufficient that the condition in question possibly or
14 could have or might have resulted from injury. The
15 expert must go further and testify that, taking into
16 consideration all the facts, it is his or her
17 professional opinion that the resulting question most
18 probably came from the cause that is alleged.

19 Evidence admitted for a limited purpose. In some
20 instances, testimony and exhibits have been admitted
21 for a limited purpose in this trial. Mostly our
22 limited purpose here has been demonstrative evidence.
23 It demonstrates and can be used, but that evidence will
24 not go back to the jury room with you. What will go
25 back in the jury room with you is the evidence that's

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1 been admitted for all purposes.

2 Now, I want to summarize the plaintiffs' claims in
3 this case. This is a claim for damages stemming from a
4 personal injury that has been alleged, and I want to go
5 over with you the various claims that are being made in
6 this case.

7 The plaintiffs, Dale Jolly and Brenda Jolly, are
8 seeking to recover damages for personal injury and loss
9 of consortium arising out of the alleged exposure of
10 Dale Jolly to asbestos from the defendants' products.
11 The mere fact of an injury occurring or an accident
12 happening standing alone does not permit you to draw a
13 conclusion or inference that such an injury or accident
14 has been caused by anyone's negligence or fault.

15 Plaintiffs' claims in this case are based on three
16 theories. The first theory is negligence. The second
17 is called strict liability. And third is called breach
18 of implied warranty. The plaintiffs are not required
19 to prove all of these theories to recover. Proof of a
20 claim required to prove all of these -- proof of a
21 claim under any of these theories would enable you to
22 meet the plaintiffs -- let me repeat that.

23 The plaintiffs are not required to prove all of
24 these theories to recover. Proof of a claim under any
25 of these theories would enable you to find the

ROA_02343

Appendix_02378

1 plaintiffs are entitled to a verdict, but the
2 plaintiffs must meet their burden of proof as to at
3 least one of these theories in order to recover. If
4 you find they have not met their burden, then the
5 defendants would be entitled to a verdict.

6 Defendants. I told you that each defendant has to
7 be considered separately and individually in terms of
8 determining whether the plaintiffs have met their
9 burden of proof as to each defendant. I also want to
10 tell you that each of the defendants is a corporation,
11 and corporations are treated the same as individuals in
12 the eyes of the law. They can operate, of course, only
13 through individuals as their agents, and the law makes
14 no distinction between corporations and individuals for
15 the purpose of civil liability. The plaintiffs must
16 also prove damages and that their damages were
17 proximately caused by the defendants' products under
18 each of their theories, and they must prove all these
19 things by the greater weight of the evidence.

20 Now, let's talk about causation for a moment.
21 Before you can hold the defendants liable, the
22 plaintiff must prove that the plaintiff's exposure to
23 that defendant's asbestos product was of such a
24 frequency and regularity and duration that it was a
25 substantial factor in bringing about the disease or

ROA_02344

Appendix_02379

1 injury.

2 The mere fact that the injury or accident occurred
3 standing alone does not permit you to draw a conclusion
4 that the injury or accident was caused by anyone's
5 negligence or breach of warranty or strict liability.
6 For the plaintiff to prove actionable exposure to
7 defendants' product, plaintiffs must present evidence
8 of exposure to asbestos from defendants' product on a
9 regular basis over some extended period of time in
10 proximity to where plaintiff worked. This evidence
11 must show more than just a casual or minimal contact to
12 asbestos from the defendants' products.

13 Strict liability, the second theory and its
14 elements. Strict liability. Plaintiffs' claims are
15 that Crosby Valve and Fisher Controls International
16 should be held strictly liable for the plaintiffs'
17 injuries. Strict liability means liability without
18 fault.

19 Under the law, the theory of strict liability says
20 that even if a plaintiff used due care, the defendants
21 may still be responsible for the plaintiffs' injuries.
22 In other words, it does not matter whether the
23 defendants were negligent or not negligent. If the
24 products were defective and unreasonably dangerous when
25 they left the defendants' hands, the defendants are

ROA_02345

Appendix_02380

1 liable, even if all reasonable care was used in making
2 and selling the product and even after the plaintiff
3 did not buy the product from any of the defendants or
4 enter into any contract with the defendants.

5 Because the plaintiffs do not have to show
6 negligence under the theory of strict liability, a
7 plaintiff must only prove the product was defective and
8 unreasonably dangerous when placed in the stream of
9 commerce. Your focus should be on the product itself
10 and not on the conduct of the defendants. The
11 defect -- the defective product itself -- the defect
12 must exist at the time it leaves the defendants'
13 control.

14 When liability is sought to be imposed, the
15 existence of a defect is crucial because a manufacturer
16 is not an insurer against all risk of injury associated
17 with the product. In a products liability case against
18 a manufacturer, the plaintiffs have a burden of proving
19 that the product in question was defective at the time
20 when the defendants had possession or control of it or
21 when the product was delivered or purchased. There is
22 no duty on the manufacturer to furnish a product that
23 will not wear out. A party who sells a product in a
24 defective condition, unreasonably dangerous, is subject
25 to liability for physical harm caused to the user if

ROA_02346

Appendix_02381

1 the manufacturer is engaged in the business of
2 producing or selling a product, and it is expected to
3 reach and reaches the consumer without substantial
4 change in the condition.

5 To recover under strict liability, the plaintiff
6 must prove four things by the greater weight of the
7 evidence. First, that the product was in a defective
8 condition unreasonably dangerous to the plaintiff.
9 Second, that at the time of the injury, the product was
10 essentially in the same condition as when it left the
11 defendants' hands. Third, plaintiffs were injured by
12 the product, and, four, that there was a reasonable
13 alternate design.

14 In any products liability claim -- whether for
15 strict liability or negligence, failure to warn, or a
16 design defect -- the plaintiff must prove the existence
17 of a reasonable alternative design. If the plaintiff
18 does not show that the defendant could have designed
19 the product in an alternative manner that would have
20 eliminated any defect, the plaintiff cannot recover
21 under any design defect or failure to warn theory.

22 In this state, we balance the utility of the risk
23 inherent in the design of a product with the magnitude
24 of that risk to determine the reasonableness of the
25 manufacturer's action in designing the product. This

ROA_02347

Appendix_02382

1 balancing act is also relevant to the determination
2 that the product, as designed, is unreasonably
3 dangerous in its failure to conform to an ordinary
4 user's expectations in the overall balance of risk and
5 utility of the product.

6 Now, strict liability-design defect. Let's talk
7 about that concept for a moment. As to defective
8 condition, the plaintiff must prove -- must first prove
9 that the defendant sold the product, and at the time of
10 sale, it was unreasonably dangerous to the user. A
11 defect does not have to be a manufacturing error. With
12 a design defect, there's nothing wrong with the
13 manufacturing process, and the product is made in
14 accordance with its design; however, there is a flaw in
15 the product's design.

16 The plaintiff must prove that the product, as
17 designed, was in a defective condition, unreasonably
18 dangerous, and the test is not whether the product
19 could have been made safer but whether its design was
20 unreasonably dangerous.

21 Strict liability-failure to warn, another issue in
22 this case. The product may also be defective if the
23 defendants failed to warn or failed to provide adequate
24 instructions to the user. A product is not defective
25 for failure to warn of the obvious. A seller is not

ROA_02348

Appendix_02383

1 required to warn with respect to products when the
2 danger or potential danger is generally known and
3 recognized.

4 A product cannot be deemed either defective or
5 unreasonably dangerous if the danger associated with
6 the product is one that users generally recognize. A
7 product may, by reason of its nature and use, be
8 unreasonably dangerous unless proper instructions and
9 warnings are supplied for its intended use. In those
10 cases, a seller or manufacturer must give an
11 appropriate warning of any dangerous condition likely
12 to be encountered. The warning must be one that would
13 cause a reasonable person to use caution proportionate
14 to the potential danger.

15 In deciding whether the warning was adequate, you
16 should consider the likelihood of an accident taking
17 place and the seriousness of the consequences. There
18 is a particular need for sufficient warning when there
19 is a representation that the product in question is not
20 dangerous. A product may be found defective if the
21 product is unreasonably dangerous in the hands of the
22 user without a suitable warning.

23 A manufacturer or seller is not required to warn
24 about defects in a product unless the manufacturer knew
25 or should have known about the defects when the product

ROA_02349

Appendix_02384

1 was sold. Where a warning is given, the defendants may
2 reasonably assume that it will be read and followed. A
3 product that bears a warning that makes a product safe
4 for use if followed is not defective or unreasonably
5 dangerous.

6 Now, strict liability-defective and unreasonably
7 dangerous product. What does that mean? If you find
8 it was probable that a user would be injured by the
9 product, and if the injury was not reasonably
10 perceivable to the user, the product is defective.

11 You cannot find the product is defective if it
12 were only possible that such injury would occur. Just
13 possibility is not enough. In deciding whether a
14 product is unreasonably dangerous and defective, you
15 should consider the dangers that would be reasonably
16 anticipated by typical user of a product of this kind.
17 Then you should decide whether the particular product
18 involved in this case had a tendency for causing danger
19 beyond what an ordinary user with common knowledge of
20 the product's characteristic would anticipate.

21 You should also consider whether the dangers
22 associated with the product outweigh the usefulness of
23 the product, the cost involved for adding the safety,
24 the likelihood and the seriousness of the injury, and
25 the obviousness of the danger.

ROA_02350

Appendix_02385

1 Now, many products cannot be made completely safe
2 for their intended use. If products are useful and
3 desirable and properly packaged and manufactured and
4 packaged and accompanied with adequate warnings and
5 instructions, they cannot be said to be defective. The
6 fact that a product can be made safer alone does not
7 make the product unreasonably dangerous.

8 In order for the defendants to be held
9 responsible, the product must have been in a condition
10 not contemplated by the ultimate user which would be
11 unreasonably dangerous to the user when the product was
12 used in a foreseeable manner, including any intended
13 use of the product at the time it left defendants'
14 hands.

15 Now, implied breach of warranty is another claim
16 that is made by the plaintiff. The plaintiffs' claim
17 for implied warranty of merchantability. In order to
18 recover under this theory, the plaintiff must prove by
19 the greater weight of the evidence the same factors I
20 have explained to you for strict liability. That is,
21 the defendants manufactured or sold a product which, at
22 the time of the sale, was in a defective condition,
23 unreasonably dangerous to the user, and that that
24 product was expected to and did reach the ultimate user
25 without substantial change in condition in which the

ROA_02351

Appendix_02386

1 defendant sold it, and that the plaintiffs' injuries
2 were proximately caused by the defective product.

3 A warranty is a pledge by the seller that a
4 product is as it's represented to be. An implied
5 warranty is one that the law presumes to have been made
6 in every sale of goods, whether it was actually stated
7 by the seller or not. The sale of a product always
8 carries with it an implied warranty that that product
9 is fit for the original purpose for which the product
10 is normally used, and this is called the implied
11 warranty of merchantability. This warranty is based on
12 the buyer's reasonable expectation that goods purchased
13 from a merchant who sells goods of that kind will be
14 free of significant defects and will perform in the way
15 goods of that kind should perform.

16 In deciding whether a product is safe for its
17 intended use, the person who makes the warranty must
18 foresee the conditions under which the product will be
19 used and is presumed to know about the normal
20 environment the product will be used in -- is presumed
21 to know about the normal environment the product will
22 be used in, the reasonable foreseeable risk that
23 accompanies such use.

24 A warranty that the goods shall be merchantable is
25 implied under the contract of their sale, and if a

ROA_02352

Appendix_02387

1 seller is a merchant with respect to goods of that
2 kind, to be merchantable, the goods must at least pass
3 without objection in the trade or in the contract
4 description.

5 In order to recover for a breach of implied
6 warranty of merchantability, the plaintiff must prove
7 that the merchant sold their goods, the goods were not
8 merchantable at the time of sale, and their injuries
9 were proximately caused by the defective nature of the
10 goods.

11 Now, the third and final theory of the plaintiffs
12 is one of negligence. The focus on the negligence is
13 on the conduct of defendants. So in order to prevail
14 in this claim, the plaintiff must prove by the greater
15 weight of the evidence that the defendants failed to
16 exercise due care in some respect.

17 If you are having a hard time with the phrase
18 "negligence," you can substitute the word "careless"
19 because it means the same thing. It means that failure
20 to act as a reasonably prudent person would under the
21 same or similar circumstances or doing something that a
22 reasonable person would not do under the same or
23 similar circumstances.

24 But you must first determine if the defendants
25 owed the plaintiff a duty of care. A defendant will

ROA_02353

Appendix_02388

1 owe the plaintiff a duty of care when the defendant
2 knows of the risks of harm. This may be met by showing
3 that the defendants were aware of the danger and failed
4 to take reasonable steps to correct it. Where a
5 product is actually designed and manufactured by
6 another company, the seller assumes the duty of the
7 manufacturer and labels and sells the product as its
8 own. A manufacturer is held to the skill of the expert
9 in the field and is charged with the expert's knowledge
10 of materials and processes used in the industry.

11 A manufacturer has a duty to stay aware of current
12 standards and scientific knowledge in the industry,
13 and, therefore, since the seller assumes the duties of
14 the manufacturer, a seller is held to the skill of an
15 expert in the field as well as -- as well and has the
16 duty to stay aware of current standards and scientific
17 knowledge in its industry.

18 Although evidence of industry standards may be
19 considered as evidence of the standard of care, an
20 industry can't set up its own unreasonable standards.
21 An entire industry may lag behind in the adoption of
22 new and available products and safety features, and the
23 failure to use due care, even though no one in the
24 industry uses due care, does not excuse negligence. It
25 is for you to decide whether the standard of care was

ROA_02354

Appendix_02389

1 proper considering what a reasonable person would have
2 done in similar circumstances.

3 Now, duty of product manufacturers and sellers.
4 Now, a manufacturer owes a duty of care in the
5 manufacture of its product proportionate to the dangers
6 involved in the product's use. A manufacturer of a
7 product may under a plan or design that makes it
8 dangerous for the user for which it is made owes a duty
9 to use reasonable care in the adoption of a safe plan
10 or design to those -- to those manufacturers you would
11 expect to use the product or -- wait a minute. Hold
12 it.

13 A manufacturer owes a duty of care in the
14 manufacture of its product in proportion to the dangers
15 involved in the product's use. A manufacturer of a
16 product may, under a plan or design that makes it
17 dangerous for the user for which it is made, owes a
18 duty to use reasonable care in the adoption of a safe
19 plan or design to those manufacturers you would expect
20 to use the product.

21 A seller owes the duty to conduct adequate tests
22 and inspections of its product to discover latent
23 defects or defects that are not visible or apparent on
24 reasonable inspection. If the seller has the reason to
25 know that the product was likely to be dangerous or

ROA_02355

Appendix_02390

1 defective, the seller has the duty to exercise and use
2 reasonable care, inspecting and testing the product
3 before selling it if a reasonable inspection of a test
4 would have disclosed a defect.

5 A manufacturer who incorporates a defective
6 component part into its finished product and places the
7 finished product in the stream of commerce is liable
8 for injuries caused by the defects in the component
9 part. A defendant cannot, however, be liable for an
10 allegedly defective product it did not design,
11 recommended, specify, require, manufacture, sell, or
12 place in the stream of commerce.

13 In deciding whether the defendant has the duty to
14 test a product, you should consider the defendants'
15 ability to conduct tests at the time the product was
16 sold. A seller of a defective product has a duty to
17 warn users of the product and any dangers created by
18 its product which the manufacturer is or should be
19 aware at the time the products are sold.

20 The supplier of a product who knew or should have
21 known that the product is or might be dangerous during
22 its perceivable use and has reason to believe that the
23 ultimate user would not appreciate the dangers has a
24 duty to clearly and understandably warn the ultimate
25 user of that danger.

ROA_02356

Appendix_02391

1 A seller is required only to warn about dangers
2 that are unreasonable or which are dangerous beyond the
3 expectation and general knowledge of the ordinary
4 person who buys the product with the ordinary common
5 knowledge about the product's characteristics. In
6 other words, there is a duty to warn not when
7 scientific certainty is established, but when a
8 reasonable person would want to be informed of the
9 risks in deciding whether the directions or
10 instructions or warranties are adequate, and you should
11 consider the location, language, and size of any
12 warnings given.

13 Products liability-design defect and negligence.
14 In an action based on negligence, the plaintiff must
15 prove the product as designed was in a defective
16 condition, unreasonably dangerous to the user when it
17 left the control of the defendant, and the defect
18 caused his injury.

19 In addition, liability for negligence requires
20 proof that the manufacturer breached its duty to
21 exercise reasonable care to adopt a safe design. This
22 burden may be met by showing that the manufacturer was
23 aware of the danger and failed to take reasonable steps
24 to correct it.

25 A manufacturer of a product made under a plan or

ROA_02357

1 design which makes it dangerous for uses for which it
2 is manufactured is subject to liability to others whom
3 he should expect to use their product or be in danger
4 by its probable use for physical harm caused by his
5 failure to exercise reasonable care in the adoption of
6 a safe plan or design.

7 Breach of duty. I've told you about the duty of ,
8 care, and the next thing the plaintiffs must prove by
9 the greater weight of the evidence is that the
10 defendant, if you find they owe a duty to the
11 plaintiff, a duty of care, the next element would be
12 for you to find in your negligence analysis, would be
13 whether the defendant breached their duty of care by
14 negligent acts or omission. So you find a duty of care
15 and then its breach.

16 In deciding whether the defendant has breached the
17 duty of care, you should consider whether the
18 defendants have followed the normal and customary
19 practices and procedures of the industry as well as the
20 defendants' expertise and ability to see and appreciate
21 the problem and its cause.

22 If the defendants failed to exercise reasonable
23 care fulfilling any of the duties, the defendants would
24 be responsible for injuries to any person the
25 defendants should expect to use the product, assuming

ROA_02358

Appendix_02393

1 they had -- the injuries had been proven to have been
2 proximately caused.

3 Now, causation. Finally, in a negligence claim,
4 the plaintiff must prove by the greater weight of the
5 evidence that the defendants' negligence proximately
6 caused injury to the plaintiffs and that the damages
7 suffered were proximately caused by the defendants'
8 breach of their duty of care. Proximate cause is
9 conduct that produces a natural chain of events, and in
10 the end, brings about an injury. It is the direct
11 cause of the injury.

12 To prove a defendant's negligence proximately
13 caused the plaintiffs' injury, the plaintiff must first
14 prove something called causation in fact, and that is
15 proved by showing the defendants' negligence was a
16 substantial factor in causing the injury.

17 The plaintiff must also prove something called
18 legal cause, and that means that the injury occurred as
19 a natural and probable consequence of the defendants'
20 negligence. The plaintiff must prove that some injury
21 from the defendants' negligence was foreseeable, but
22 they do not have to prove that the particular injury
23 that occurred was foreseeable; however, a defendant
24 cannot be held responsible for something that could not
25 be expected to happen.

ROA_02359

Appendix_02394

1 Now, there can be more than one cause. Proximate
2 cause does not mean the only cause. The defendants'
3 actions can be a proximate cause of the plaintiffs'
4 injury if there was, at least, one of the direct
5 occurring causes of the injury. Where two or more
6 causes combine to produce injury, a person is not
7 relieved from responsibility for negligence because he
8 is responsible for only one of the causes. It is
9 sufficient that his negligence is the proximate cause
10 without which the injury would not have resulted to a
11 greater extent.

12 Consequently, if a person's negligence is the
13 proximate cause of injury to another, the fact that the
14 negligence of a third party occurred and concurred with
15 his own negligence to produce harm does not relieve him
16 of liability. In such cases, each wrongdoing is in
17 breach of the duty of care over the plaintiffs, and
18 because the negligence of each concurred to produce the
19 injury, all of them can be liable.

20 Suppliers and manufacturers of dangerous products
21 are generally under a duty to warn the ultimate user of
22 the dangers associated with the use of the product.
23 However, a supplier may rely on a learned intermediary
24 or sophisticated user to provide warnings to the
25 ultimate user if reliance is reasonable under the

1 circumstances.

2 The sophisticated user doctrine is typically
3 applied as a defense to relieve the supplier of
4 liability for failure to warn where it is difficult or
5 even impossible for the supplier to meet its duty to
6 warn the end users of the dangers associated with the
7 use of the product, and the supplier therefore relies
8 on a sophisticated or learned intermediary to warn the
9 end user.

10 When a party asserts an affirmative defense such
11 as sophisticated user, the burden of proof is on the
12 defendant to show that it was reasonable to rely on a
13 sophisticated user or learned intermediary to notify
14 the end user of dangers associated with the product,
15 and it was difficult or even impossible for the
16 defendant to warn the end user of the danger.

17 State of the art. Something that you must
18 consider in assessing the defendants' product and the
19 defendants' conduct is state of the art at the time the
20 product left the defendants' hands. The issue of due
21 care, as well as breach of any warranty, must be
22 assessed in the light of circumstances existing at the
23 time of sale.

24 In order for plaintiffs to prove their case in a
25 products liability action, they must show that the

ROA_02361

Appendix_02396

1 product was in a defective condition at the time it
2 left the hands of a particular seller. The product
3 must be measured against the standards existing at the
4 time of sale. State of the art includes all reasonably
5 available scientific knowledge on the subject at a
6 given time. This includes scientific, medical,
7 engineering, and other knowledge that may be available.
8 State of the art includes the element of time, what is
9 known when this knowledge was available. If the
10 product was nondefective under standards existing at
11 the time of manufacture, the manufacturer does not have
12 a post sale duty to warn. You should return a verdict
13 in favor of the plaintiffs only if, in considering the
14 state of the art existing at the time, defendants'
15 product was defective.

16 Intervening cause. The chain of the causation
17 between the defendants' negligence and the injury may
18 be broken by independent intervening acts or omissions
19 of another person over whom the defendant has no
20 control.

21 In order to decide whether an intervening act
22 breaks the chain of causation, you must determine
23 whether the intervening act or omission was reasonably
24 perceivable by the defendant. If the intervening act
25 or omission was a probable consequence of defendant's

ROA_02362

Appendix_02397

1 negligence, the defendant is responsible for the
2 plaintiffs injury.

3 If, however, you find the intervening act or
4 omission was not foreseeable, then the defendant is not
5 liable unless his actions alone would have caused the
6 plaintiff injury even without the intervening act or
7 omission.

8 Under South Carolina law, a defendant is entitled
9 to assert that other persons or entities contributed to
10 the alleged injury or damages. The matter of others'
11 alleged fault in causing the plaintiffs' injury has
12 been raised by the defendants, and it's proper for you
13 to consider the actions of others but only insofar as
14 plaintiffs have met their burden of proof.

15 The plaintiff, Beverly Dale Jolly, is prohibited
16 from suing his employer in this court. At the time of
17 the injuries in question, plaintiff was employed, and
18 the injuries occurred during the course and scope of
19 his employment. As the employer -- as to the employer,
20 this issue is governed by workers' compensation laws,
21 and an employer's responsibility, if any, for the
22 employee's injury will have been determined or has
23 already been determined in another forum. A workers'
24 compensation claim is not before you, and you shall not
25 give it any consideration in reaching a verdict in this

ROA_02363

Appendix_02398

1 case. However, the matter of the employer's alleged
2 fault in causing the injury has been raised by the
3 defendants, and it's proper for you to consider the
4 employer's actions.

5 Furthermore, if a plaintiff -- furthermore, a
6 plaintiff in a negligence action may recover damages if
7 his or her negligence, if any, is not greater than that
8 of the defendants. If you find that the plaintiff was
9 comparatively negligent and that negligence was to a
10 degree greater than that of all the defendants, the
11 plaintiff would be barred from recovery. The defendant
12 has the burden of proving the plaintiff's negligence.

13 Damage-compensatory damages. If you find
14 plaintiffs have met their burden of proof at least as
15 to one of these theories -- strict liability, implied
16 warranty of merchantability, or negligence -- by the
17 greater weight of the evidence and that their damages
18 were proximately caused by the defendants' conduct
19 and/or product, then you would move on to assess any
20 damages and how much money the defendants should be
21 required to pay.

22 Actual damages are designed to compensate a party
23 for their loss and to make that party whole, as near as
24 money can do, and to put him or her in the same
25 position as they were in before the accident or

ROA_02364

Appendix_02399

1 incident occurred.

2 Actual damages would be actual losses and expenses
3 the plaintiff has incurred. Actual damages include
4 several areas recognized by the law. In personal
5 injury actions, a plaintiff may recover for the
6 necessary and reasonable expenses caused by the injury
7 such amounts necessarily incurred for medical
8 treatment.

9 A person who suffers personal injuries because of
10 the misconduct of another is entitled to recover the
11 reasonable value of medical care and expenses incurred
12 for treatment of injuries at the time of trial as well
13 as those reasonably certain to be incurred in the
14 future.

15 Accordingly, a plaintiff may recover amounts
16 incurred for past and future medical care including
17 hospital, physician, nursing care costs, medicine,
18 other out-of-pocket expenses such as vocational,
19 physical, or rehabilitation efforts.

20 Pain and suffering is also recognized as an
21 element of damages properly considered under the law.
22 Pain and suffering compensates the plaintiff for
23 physical discomfort and emotional response to the
24 sensation of pain caused by the injury.

25 There's no definite standard I can give you to

ROA_02365

Appendix_02400

1 determine the amount of damages you, the jury, will
2 have to use your calm and reasonable judgment to
3 determine them in the light of your own experiences and
4 in the light of the testimony and evidence presented in
5 this case.

6 Another form of damages is loss of enjoyment of
7 life. And this compensates the plaintiff for
8 limitations on the ability to participate in and derive
9 pleasure from the normal activities of daily life.

10 Another category is mental suffering. That is
11 compensation for shock, fright, anxiety, emotional
12 upset. Actual damages for the plaintiff who has been
13 physically injured include pain and suffering, both
14 past and future as well as mental anguish. Mental
15 anguish is more than mere disappointment or anger or
16 worry or embarrassment or resentment. Although it may
17 include all of those, it also includes mental sensation
18 of pain resulting from painful emotions such as grief,
19 wounded pride, shame, and humiliation. It may also be
20 composed of fright, nervousness, grief and anxiety and
21 worry for an ordeal.

22 Damages-future damages. Now, in determining the
23 amount of compensation for someone personally injured
24 by another's misconduct, it's proper to consider past,
25 present, and future aspects of the injury. The injured

ROA_02366

Appendix_02401

1 party may recover for those future damages that are
2 reasonably certain to result. The principal underlying
3 compensation is that only one action can be brought
4 and, therefore, only one recovery had. So it may be,
5 depending on your view of the evidence, proper to
6 include the estimate of future damages, future medical
7 expenses, and pain and suffering that will with
8 reasonable certainty result.

9 The plaintiff is never entitled to recover
10 speculative damages, that is, damages you arrive at by
11 guesswork. The plaintiff has the burden of proving the
12 existence and the causation and the amount of damages
13 which he does not have to prove to a mathematical
14 certainty. Instead, the plaintiff must present
15 evidence that's sufficient to allow you to make a
16 reasonable approximation of damages, and the plaintiff
17 must prove their damages to a reasonable degree of
18 certainty.

19 Any future damages you may award must be
20 reasonably calculated to a result of the -- reasonably
21 calculated to be the result of an alleged injury or
22 damage sustained, and they must be reduced to their
23 present cash value.

24 I will charge you that in this case Mr. Jolly is a
25 73-year-old male with a life expectancy, according to

ROA_02367

Appendix_02402

1 the South Carolina Code, of 11.39 years. This is a
2 factor you may consider along with any other facts and
3 circumstances that may bear on his health, longevity,
4 and occupations and habits of life.

5 Damages-loss of consortium. Now, the plaintiff,
6 Brenda Jolly, also claims loss of consortium because of
7 the injuries received by her husband, Dale Jolly. The
8 companionship or society of a spouse are not articles
9 of commerce that can be weighed or measured or bought
10 and sold. No expert is competent to testify as to
11 their value, and there's no way we can go out in the
12 marketplace to determine their market price, of course.
13 And the consideration on which they're based is not
14 monetary, but the plaintiff is entitled to compensation
15 and money for their loss.

16 Loss of consortium includes afforded services
17 provided by the other spouse, love, companionship,
18 affection, society, sexual relations, comfort, solace,
19 guidance. Plaintiff is entitled to recover the value
20 of those services of her spouse which were lost
21 including the loss of her spouse's society and
22 companionship in her home and for any expenses for the
23 care and treatment of her spouse.

24 Jury deliberations. I am now through with my
25 instruction on the law, and I just want to give you

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Appendix_02403

1 some final instructions on your deliberations. And
2 before we do that, I, of course, remind you that you
3 were chosen in this case not to be partisans or
4 advocates for either the Jollys or for Crosby Valve or
5 Fisher Controls. You were chosen because all of them
6 believe, as I do, that you can be fair and reasonable
7 and that you can be the kind of jurors to decide this
8 case without any bias, prejudice, or partisanship.

9 So you are the judges, the judges of the facts.
10 Your sole interest is to determine the true facts from
11 the evidence in this case and take the law as I just
12 gave it to you and apply it to the facts, and you will
13 ultimately be able to reach a verdict.

14 Now, you should know that the record is closed.
15 There's not going to be any more witnesses. There's
16 not going to be any more exhibits. So if something was
17 referred to during the trial, and you don't have it
18 back there with you, I can't give it to you. So keep
19 in mind that the record is closed, and you have to make
20 the decision based on the exhibits you do have and your
21 memory of the evidence.

22 A jury, if you look that word up in the
23 dictionary, would be defined as a company of people
24 sworn to render a true verdict. And that's what you
25 have been called upon to do, to determine the true

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Appendix_02404

1 facts of this case.

2 And, ladies and gentlemen, you each have a vote in
3 this case. And your vote is exactly that, it's your
4 vote and no one else's. So don't be afraid to change
5 your mind if the discussion that you're going to have
6 persuades you that you should because that's what
7 deliberations are all about. But don't surrender an
8 honestly held and conscientiously held belief to get
9 this case over with or to reach a unanimous verdict
10 because the parties have waited a long time and this is
11 their day in court.

12 I know that each of you recognize the importance
13 to them of what we're doing now, and we appreciate the
14 seriousness and respect you have given everyone in this
15 case, and most of all, your patience with all of us,
16 including me.

17 Now, at this time, our clerk, Marcia Long, will
18 hand each one of you --

19 MS. McVEY: Your Honor, can we approach briefly?
20 I'm so sorry. I think we need to before you do the
21 next part.

22 THE COURT: All right.

23 (WHEREUPON, a bench conference was held off the
24 record in the presence of the jury, but out of the
25 hearing of the jury.)

ROA_02370

Appendix_02405

1 THE COURT: Before I hand the verdict form out to
2 you, let me just give you one more piece of information
3 about something you will see on the verdict form when I
4 give it to you.

5 We are asking you on this verdict form for a
6 separate determination, and it's one of the questions
7 that's on the jury form. You will see it in just a
8 minute.

9 We're asking you to determine whether the conduct
10 of a defendant has been something more than mere
11 negligence. The evidence must clearly and convincingly
12 establish that the defendant was actually reckless or
13 willful or wanton, meaning that there was a conscious
14 failure to exercise due care or conscious indifference
15 to the rights and safety of others or reckless
16 disregard for the rights and safety of others in order
17 for you to find that the defendant's conduct was
18 willful, wanton, or reckless. And we need for you to
19 make that determination in this phase of the trial.
20 And I think that's all I need to say about that
21 determination.

22 So, now, if the clerk will hand out the verdict
23 forms, I'll go over the verdict form now. I'm giving
24 each member of the jury a copy of the verdict form
25 because I'm explaining it to all of you, and it would

ROA_02371

Appendix_02406

1 be better if each of you has a copy of the verdict form
2 so you will be able to follow along with me.

3 When you actually fill out the verdict form, you
4 will get the forelady of the jury to actually write
5 down the verdict on it, but it's the verdict of each of
6 you, and, therefore, I want each of you to take a look
7 at the verdict form.

8 ALTERNATE JUROR: Do the alternates get one, too?

9 THE COURT: Yes, they do, and I'm going to explain
10 in a minute what happens with the alternates. They
11 cannot go back to the jury room and deliberate with
12 you, but we keep them in a separate place because if
13 anything were to happen to you, we have to keep the
14 alternate --

15 ALTERNATE JUROR: I'm an alternate.

16 THE COURT: -- until the verdict is rendered.

17 And, Alternates, let me explain to you this. You
18 will be kept in a separate place while your colleagues
19 are deliberating. And when they reach a verdict, the
20 bailiffs will come and tell you that, and if you want
21 to see the verdict announced, they will bring you into
22 the courtroom with the rest of the witnesses because
23 your services will no longer be needed as an alternate,
24 but you have been here through this entire trial. You
25 may want to see what the verdict, so you are very

ROA_02372

Appendix_02407

1 welcome, and the bailiffs will lead you into the
2 courtroom before the verdict is announced.

3 Now, has everyone got a copy of the verdict form,
4 this piece of paper here?

5 You will see the caption of the case is the two
6 Jollys as plaintiffs, and the defendants -- we using a
7 little shorthand, but the full name of the defendants
8 is Fisher Controls, International, LLC, and Crosby
9 Valve, LLC.

10 Now, let's go over the verdict form. This is the
11 verdict form. I'm going over it with you briefly, but
12 you're only authorized the sign this verdict if it's
13 unanimous. But what it does, first of all, is to ask
14 you about the claims against Fisher Controls and asks
15 you whether you find that Defendant Fisher Controls
16 International, LLC, was negligent and its negligence
17 was the proximate cause of the plaintiffs' injury and
18 damages. Don't attach any significance to the fact
19 that I'm putting Fisher first. That's of no
20 significance.

21 Then the second question that's on that very first
22 page that says negligence, it also asks the same
23 question about Crosby Valve. Then the third question
24 on that page asks whether the plaintiff was negligent
25 and whether that negligence was the proximate cause of

ROA_02373

Appendix_02408

1 his injuries. Now -- and it's a proximate cause of his
2 injuries.

3 Then the next page, you have got strict liability.
4 Remember me talking to you about that one? And
5 Question 4 and 5 asks if Fisher Controls and if Crosby
6 Valve are strictly liable for selling products that
7 proximately caused injury to the plaintiff.

8 Now, then you get to implied warranty. That's
9 Questions 6 and 7. And those two questions ask if
10 Fisher Controls and Crosby Valve breached an implied
11 warranty in selling its products and that its breach
12 was the proximate cause of plaintiffs' injury.

13 Now, then you will see down at the bottom of the
14 page the notation on Question Number 8. Question
15 Number 8 says, "If you answered yes to any of Questions
16 1, 2, 4, 5, 6, or 7, then you will be awarding actual
17 damages that have been proved by the greater weight of
18 the evidence," and you would put a figure in for Dale
19 Jolly's damages and a figure in for Brenda Jolly's loss
20 of consortium damages.

21 Now, then turn over to the last page. Question 9
22 is dependent on how you answer Question Number 3 that
23 dealt with whether Plaintiff Dale Jolly was negligent
24 and his negligence was a proximate cause of his injury
25 and damages. If you answer Question Number 3 no, then

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Appendix_02409

1 you don't need to do anything with Question Number 9.
2 Just pass over it. If you answer that question yes,
3 you must state the percentage of fault of each party,
4 and the total of those percentages of fault must add up
5 to 100.

6 Now, finally, Number 10, "If you answered yes to
7 Questions 1 or 2," and that's the questions about
8 negligence, the negligence cause of action, then I ask
9 you to answer the question as to whether, "We, the
10 jury, by unanimous vote find by clear and convincing
11 evidence that the conduct of the following defendant or
12 defendants was willful, wanton, or reckless." You may
13 recall I just came back and gave that you added charge
14 about what willful, wanton, and reckless is.

15 All right. Now, ladies and gentlemen, it's now
16 time for you to retire to your jury room, and what will
17 happen is that after I finish giving this final
18 instruction to you, the bailiffs will take the three
19 alternates to a separate place and send the rest of you
20 to the jury room. And, of course, with much thanks
21 from me for your patience. This is a part of the
22 process that's an absolute must, but it is quite an
23 intense and detailed process, and I appreciate your
24 attention to the charging of the law.

25 But don't start deliberating this case. I have

ROA_02375

Appendix_02410

1 one more thing that I must do. And believe it or not,
2 as long as I've been talking, I have to give the
3 parties the chance to see if I left something out. And
4 we've already found I left out one thing they wanted me
5 to mention, so I have to check with them one more time.

6 So if the alternates will go to their room and if
7 the jurors will be escorted to the jury room and just
8 hold for a moment, and then I'll send you word. When
9 you get the exhibits -- when the exhibits are brought
10 back to the jury room, that's the sign that you may
11 begin to deliberate the case. Thank you very much.

12 (WHEREUPON, the jury exited open court at
13 3:20 p.m.)

14 THE COURT: All right. I did not want to be over
15 an hour, but that's just how it goes. It takes that
16 long to do this charge.

17 All right. Tell me anything that -- you don't
18 need to repeat all the exceptions that have already
19 been put upon the record about the charge as we
20 developed it, but anything else?

21 MS. McVEY: I just have one, Your Honor. We, of
22 course, reiterate all our objections we made previously
23 at the charge conference.

24 THE COURT: Of course. They are fully preserved.

25 MS. McVEY: Page 12, duty of product manufacturers

ROA_02376

1 and sellers, six lines down. Says "those
2 manufacturers." I think it's supposed to say
3 "consumers."

4 MR. McLEOD: Yeah.

5 THE COURT: All right.

6 LAW CLERK: "Those consumers you would expect to
7 use a product."

8 THE COURT: I've got that.

9 That it for you?

10 MS. McVEY: That's it.

11 THE COURT: Defendants?

12 MR. REID: Judge, just when addressing the last
13 question on the verdict, I just don't remember. Maybe
14 we can check with the reporter. I can't remember if
15 you read the definition of clear and convincing
16 evidence.

17 THE COURT: Where are you talking about? When we
18 got into this balagan about what to do about punitive
19 damages?

20 (WHEREUPON, off-record discussion with reporter.)

21 (WHEREUPON, the record was read.)

22 THE COURT: There's what I said, clear and
23 convincing surely is in there.

24 MR. REID: That's good enough. I wouldn't want to
25 call them back and re-emphasize something.

ROA_02377

Appendix_02412

1 THE COURT: I think I've covered it. It's just
2 the best I could do without getting into the punitive
3 damages.

4 Now, so what I hear the plaintiffs asking me to do
5 is call them back to read them, "Now, a manufacturer
6 owes a duty of care, and the manufacturer of its -- in
7 the manufacture of its product proportional to the
8 dangers involved in the product's use. A manufacturer
9 of a product may, under a plan or design that makes it
10 dangerous for the user for which it is made" -- this
11 thing was so screwed up that I probably did compound it
12 with factual, but it doesn't make any sense the way it
13 reads now. How is it supposed to read? "A
14 manufacturer of a product may" --

15 LAW CLERK: Comma.

16 THE COURT: "Under a plan or design that makes it
17 dangerous for the user for which it was made, comma,
18 owed a duty to use reasonable care in the adoption of a
19 safe plan or design to those consumers you would expect
20 to use the product."

21 MS. McVEY: Actually, probably it would be users.

22 THE COURT: "Users whom you would expect to use
23 the product." And then the rest of this, "or an a
24 danger by its probable use." That doesn't make any
25 sense.

ROA_02378

Appendix_02413

1 So what I'm going to do is to read out to them the
2 first two sentences as I have changed them. All right?

3 MS. McVEY: Okay.

4 THE COURT: Any dilemma?

5 MR. REID: Just so I understand, if the court
6 could just direct me --

7 THE COURT: It's on Page 12. It's duty of product
8 manufacturers and sellers. It starts out, "Now, a
9 manufacturer owes a duty of care in" -- the "and" is
10 wrong -- "in the manufacture of its product
11 proportionate to the dangers involved in the product's
12 use. A manufacturer of a product may, comma, under a
13 plan or design that makes it dangerous for the user for
14 which it is made, comma, owe a duty to use reasonable
15 care in the adoption of a safe plan or design to those
16 users you would expect to use the product."

17 MR. HOLDER: A manufacturer would owe.
18 Manufacturers would be owes. Manufacturers would be
19 owe.

20 LAW CLERK: So it's owes; it's not owe. That's
21 correct.

22 MR. McLEOD: Your Honor, our only suggestion is if
23 we're going to bring the jury all the way back here, we
24 would ask the whole thing -- just that column.

25 THE COURT: I'm cool with that. You don't need to

ROA_02379

Appendix_02414

1 get into a big uproar. Of course I'll read the whole
2 thing.

3 MR. McLEOD: Yes, ma'am. If it's going to be read
4 back, the whole thing.

5 THE COURT: That, you mean to tell me you want me
6 to read everything that is on that, 12 and the top of
7 13, all of that again?

8 MR. McLEOD: Sure.

9 THE COURT: I think it's way more than I need to
10 read, but I'll do it.

11 THE BAILIFF: Do you want the alternates back,
12 too?

13 THE COURT: Yes.

14 No further thoughts because I ain't going to do
15 anything else after I do this. Speak now.

16 Is everybody good with these exhibits? I think
17 they are because Diane has had people crawling all over
18 her.

19 I took out, I think I was a Dumistra exhibit. I
20 took out two different -- two depositions, one in the
21 back and one in the front, and I just took the exhibit
22 part of it, period. That's it.

23 MS. McVEY: Perfect.

24 (WHEREUPON, the jury entered open court at
25 3:32 p.m.)

ROA_02380

Appendix_02415

1 THE COURT: All right. Please be seated for a
2 moment, ladies and gentlemen of the jury. I want to
3 recharge one charge that I've already charged you, and
4 it was a little bit -- there were a couple of glitches
5 in it as it was typed, so in the super abundance of
6 caution, I want to charge it to you as we have
7 corrected it.

8 This is the duty of product manufacturers and
9 sellers. Now, a manufacturer owes a duty of care in
10 the manufacture of its product proportionate to the
11 dangers involved in the product's use. A manufacturer
12 of a product may, under a plan or design that makes it
13 dangerous for the user for which it is made, owe a duty
14 to use reasonable care in the adoption of a safe plan
15 or design to those users you would expect to use the
16 product.

17 A seller owes a duty to conduct adequate tests and
18 inspections of its product, to discover latent defect
19 or defects that are not visible or apparent on a
20 reasonable inspection. If a seller had reason to know
21 the product was likely to be dangerous or defective,
22 the seller has a duty to exercise and use reasonable
23 care inspecting and testing the product before selling
24 it if a reasonable inspection or test would have
25 disclosed a defect.

ROA_02381

Appendix_02416

1 A manufacturer who incorporates a defective
2 component part in its finished product and places the
3 finished product in the stream of commerce is liable
4 for injuries caused by defect in the component part. A
5 defendant cannot, however, be liable for an allegedly
6 defective product if it did not design, recommend,
7 specify, require, manufacture, sell, or place it in the
8 stream of commerce.

9 In deciding whether the defendant had a duty to
10 test the product, you should consider the defendants'
11 ability to conduct tests at the time the product was
12 sold. A seller of a defective product has a duty to
13 warn users of the product and any dangers created by
14 its product with which the manufacturer is or should be
15 aware at the time the product is sold. The supplier of
16 a product who knew or should have known that the
17 product is or might be dangerous during its perceivable
18 use and had reason to believe that the ultimate user
19 would not appreciate the dangers has a duty to clearly
20 and understandably warn the ultimate user of the
21 danger.

22 A seller is required only to warn about dangers
23 that are unreasonable or which are dangerous beyond the
24 expectation and general knowledge of the ordinary
25 person who buys the product with the ordinary common

ROA_02382

Appendix_02417

1 knowledge about the product's characteristics. In
2 other words, there is a duty to warn not when
3 scientific certainty is established but when a
4 reasonable person would want to be informed of the
5 risks.

6 In deciding whether the directions or instructions
7 or warranties are adequate, you should consider their
8 location, language, and size.

9 That is all I need to do by way of any further
10 corrections, so now you may go to your alternates
11 location; you may go to your jury room. The exhibits
12 will be brought in as soon as you are seated, and you
13 may commence your deliberations. Thank you so much.

14 (WHEREUPON, the jury exited open court at
15 3:36 p.m.)

16 (Court in recess, pending verdict, from 3:36 p.m.
17 until 3:46 p.m.)

18 THE COURT: The jury wants the entire charge. And
19 certainly they are sometimes given the entire charge,
20 and since they have asked for it, I will be prepared to
21 give it to them, but that's going to take some doing
22 because I'm going to have to take out --

23 LAW CLERK: Some of that punitive damages.

24 MS. McVEY: And we have to tweak that paragraph we
25 just read...

1 LAW CLERK: I fixed that.

2 THE COURT: Get me a clean copy of the charges.

3 You tell them they will have to begin to
4 deliberate. I will send them -- this is not easy for
5 us to do because we're going to have to produce it.
6 Tell them to begin their deliberations, and when I can
7 do it, I'll get it to them.

8 Why don't you get over there with Diane and get a
9 copy of it, what I said, and then I will give you the
10 other changes I made.

11 (WHEREUPON, a recess was taken from 3:46 p.m. to
12 4:02 p.m.)

13 MR. REID: Your Honor, I have one more thing I
14 wanted to add. I would respectfully request, when we
15 send them back the charge, we add the last couple
16 sentences of the punitive damage instruction. I just
17 want them to be informed about the fact that the burden
18 there is more than greater weight of the evidence.

19 THE COURT: I had clear and convincing in the
20 charge I gave, Mr. Reid. The charge I gave says,
21 "Before I hand the verdict form out to you, let me just
22 give you one more piece of information about something
23 you will see on the jury room form when I give it to
24 you. We are asking you on this jury form for a
25 separate determination, and it's one of the questions

ROA_02384

Appendix_02419

1 that's on the jury form, and you will see it in just a
2 minute. We're asking you to determine whether the
3 conduct of the defendant has been something more than
4 mere negligence. The evidence must be clearly -- must
5 clearly and convincingly establish that the defendant
6 was actually reckless or willful or wanton, meaning
7 that there was a conscious failure to exercise due care
8 or conscious indifference to the rights and safety of
9 others or reckless disregard for the rights and safety
10 of others. For you to find the defendants' conduct was
11 willful, wanton, or reckless, and we need for you to
12 make that determination at this phase of the trial. I
13 don't think I need to say anything more." The rest of
14 it is a repetition of just what I said, right there.

15 MR. REID: I accept that ruling.

16 THE COURT: I'd like to know what it is more,
17 other than repeating it, that is different from what I
18 said.

19 MR. REID: Your Honor, I just think, in looking at
20 Page 19 --

21 THE COURT: I'm looking right straight dead at it.

22 MR. REID: Second line starts with the words,
23 "Plaintiff must prove by clear and convincing evidence
24 that the conduct complained of was a consciousness of
25 wrongdoing at the time it occurred." Clear and

ROA_02385

Appendix_02420

1 convincing, something more than simply by the greater
2 weight of the evidence; something less than beyond a
3 reasonable doubt and through the end of that.

4 THE COURT: I don't think I need to do that. I'm
5 asking them to find something on a jury form, and
6 that's what it says on the jury form and it doesn't say
7 all that other stuff, so I'm not going to ask them to
8 do that.

9 (WHEREUPON, court in recess, pending verdict, from
10 4:04 p.m. until 6:05 p.m.)

11 THE COURT: I'd like to have Bailiff Ruth tell me
12 exactly what the jury asked.

13 THE BAILIFF: From what I'm understanding, they
14 wanted to hear Mr. Jolly's testimony again.

15 THE COURT: Very good. The jury has requested to
16 hear Mr. Jolly's testimony. There are several ways to
17 do that. Mr. Jolly's testimony consists of his
18 testimony upon the stand. And then what I want to know
19 is did we end up reading any of Mr. Jolly's testimony
20 so it's only the testimony upon the stand that we would
21 be --

22 MS. McVEY: Yes, ma'am. And we have got a
23 transcript.

24 THE COURT: We have got a transcript, which is
25 they way I would handle it, rather than have Diane read

ROA_02386

Appendix_02421

1 it; she has produced this transcript.

2 THE COURT REPORTER: But it's not certified. It's
3 a rough draft.

4 THE COURT: I understand all that. That's a
5 transcript that you produced. They got their dailies
6 from the official court reporter, and that's all I need
7 to know at the present time.

8 So what I would propose we do is have someone play
9 Mr. Jolly, and then the lawyers that examined Mr. Jolly
10 can read their part and that we publish that to the
11 jury again. I think it takes about 30 minutes or maybe
12 45; is that right?

13 MS. McVEY: It's not long.

14 THE COURT: It's not very long.

15 Now, what I would like to have is you got a
16 transcript that you can let somebody read from. Is
17 there more than one transcript available? I would like
18 to have one here to look at. Or you could e-mail it to
19 me.

20 First I need to know, are there any objections to
21 reading Mr. Jolly's testimony, plaintiff?

22 MS. McVEY: No, ma'am.

23 THE COURT: Defendant?

24 MR. BOUCH: I don't think so, Your Honor.

25 THE COURT: Say again.

ROA_02387

Appendix_02422

1 MR. BOUCH: I don't think so, Your Honor.

2 THE COURT: All right. No objection either side.

3 So what we're going to do is read, as I have
4 suggested. The only thing we're waiting on right now
5 is to get me a copy of the transcript.

6 MS. McVEY: What we would not read, I guess, is
7 the comments of counsel when we went on break.

8 THE COURT: That's correct.

9 Now, let me refresh my memory. Who presented
10 Mr. Jolly?

11 MS. FARRISE: I did.

12 THE COURT: And who cross-examined?

13 MS. McVEY: Mr. Reid.

14 THE COURT: All right.

15 MR. BOUCH: I only do the mean people.

16 THE COURT: So the two readers will be Ms. Farrise
17 and Mr. Reid. Who's going to play Mr. Jolly,
18 Mr. Holder?

19 MR. HOLDER: I will, yes, ma'am.

20 (Pause in proceedings from 6:08 p.m. to 6:14 p.m.)

21 THE COURT: Ladies and gentlemen, I am going to
22 send back a communication to the jury that they need to
23 specify what it is they want read. We've got 120 pages
24 of testimony. That is lengthy. I didn't read nearly
25 that many pages of a jury charge and it took me a

ROA_02388

Appendix_02423

1 little over an hour to read those jury charges going
2 mighty fast. That's way too long. That testimony,
3 obviously, took longer than what you remember, and I'm
4 not going to halt this deliberation for an hour's worth
5 of reading. It's not going to happen.

6 That's one thing I almost had a fit myself about
7 this invitation to the jury to play back all this
8 stuff. You may do that in California but we don't do
9 that here.

10 MS. FARRISE: Your Honor, might I just suggest,
11 there is testimony about his health, and there's
12 testimony about his work. So they don't need all of
13 that. They clearly only want one or the other, that
14 kind of guidance.

15 THE COURT: Well, I don't know what they want, and
16 I'm not going to speculate on what they want. So I'm
17 going to send back to the jury and explain to them that
18 we have 120 pages roughly of testimony, and I would
19 like some clarification as to what they want read, and
20 then we'll make a decision as to whether we will do
21 that.

22 (Pause in proceedings.)

23 THE BAILIFF: They want a job description of
24 Mr. Jolly and whatever happened with the valves.
25 That's basically what they said, job description.

1 THE COURT: That doesn't give me much help at all.

2 THE BAILIFF: I explained to them that we had 120
3 pages. They said job description and his relationship
4 with the valves.

5 (Court reading the testimony of Mr. Jolly.)

6 MR. BOUCH: Your Honor, I suggest -- Your Honor, I
7 believe the instruction should be their notes --

8 THE COURT: Thank you. I am trying to concentrate
9 on what I will do.

10 Quite honestly, there is very little testimony in
11 this testimony that is not linked to the valve part of
12 his job. There is some little small discussion of the
13 ultrasonics and the teaching, but the vast majority of
14 the testimony, both on direct examination and on
15 cross-examination, is testimony about his work with the
16 valves and on the valves and that kind of thing, and
17 the cross-examination is the same way. So I can't
18 respond to their desire to hear the testimony about
19 valves and what he did with them. That's what I
20 perceive they're asking, without reading this entire
21 transcript.

22 Now, Mr. Bouch takes the position that I ought to
23 just tell them to use their best recollection. I'm not
24 going to do that. I just learned a valuable lesson.
25 I'm not going to let counsel invite that kind of thing

ROA_02390

Appendix_02425

1 again when I try these cases, but I should have
2 corrected Ms. Farrise on the record about that at the
3 time, or I should have told counsel beforehand what my
4 limitations would be, so I don't think I have any
5 choice but to read -- have the testimony of Jolly read,
6 so that is what is going to be done.

7 Now, Mr. Bouch objects to that, and that's on the
8 record, and you can say whatever you would like about
9 the objection.

10 MR. BOUCH: Your Honor, it was just a suggestion.
11 If the court wants to read it, we'll read it. I
12 just --

13 THE COURT: I'm very, very unhappy about having to
14 do it, Mr. Bouch, but my problem is I'm in a bind. The
15 jury has asked for something that they have been led to
16 believe they could ask for, and I did not correct
17 plaintiff in that regard, and I should have. But I
18 didn't, and I think the cat is kind out of the box now.

19 MR. BOUCH: I understand.

20 (Off-record discussion.)

21 (WHEREUPON, the jury entered open court at
22 6:31 p.m.)

23 THE COURT: Alternates, they can't deliberate, but
24 if one of them has to sub in, what should I do about
25 that? What's ya'll's position? Let them hear the

ROA_02391

Appendix_02426

1 reread?

2 Bring the alternates in for the reread. I'll
3 explain to them as well what's going on.

4 And, Madam Forelady, why don't you move over one,
5 and the alternates will put up in here. Y'all be
6 seated, please. We're waiting for the alternates, so
7 just be peaceful for a minute and then I'll explain to
8 you what's going on here.

9 (WHEREUPON, the alternate jurors entered the
10 courtroom.)

11 THE COURT: Ladies and gentlemen of the jury,
12 y'all have asked that Mr. Jolly's testimony be read. I
13 then asked the chief bailiff to find out from you
14 exactly what you wanted to hear, and I examined the
15 transcript, and I don't know of any way of complying
16 with the request that you have made other than to have
17 the entire testimony of Mr. Jolly read, and that's what
18 we're going to do.

19 I do that with some concern because it's going to
20 take a while to do that, but that's the request y'all
21 have made, and I am going to honor that request. I
22 brought the alternates in here to listen to the
23 testimony reread in case they have to become
24 functioning members of the jury. So that is what is
25 happening right now, and Ms. Farrise will begin. And

ROA_02392

Appendix_02427

1 what will happen is, the two lawyers that examined
2 Mr. Jolly will read their questions, and Mr. Holder
3 will read the answers. And then when cross-examination
4 comes, Mr. Reid will read his questions, and Mr. Holder
5 will read the answers, and that's how we're going to
6 proceed.

7 (WHEREUPON, the trial testimony of Mr. Jolly was
8 read to the jury as follows:

9 BY MS. FARRISE:

10 Q Good morning, Mr. Jolly.

11 A Good morning.

12 Q Can you hear me okay?

13 A Yes, ma'am.

14 Q Okay. First off, are you having any trouble with
15 your hearing?

16 A Yes, ma'am.

17 Q And why is that, as you understand it?

18 A Because of the strong chemo I had a year ago.

19 Chemotherapy, yes, ma'am.

20 Q Has impacted your hearing?

21 A Yes, ma'am.

22 Q So I'm going to stand a little closer, Your Honor,
23 if that's okay.

24 A Yes, ma'am, yes.

25 Q Why don't you tell the ladies and gentlemen of the

ROA_02393

Appendix_02428

1 jury how old are you.
2 A I'm 73.
3 Q Okay. And did you retire from working?
4 A I did.
5 Q When was that?
6 A 2002.
7 Q Okay. And then did you go back to work?
8 A Yes, as a vendor.
9 Q As a vendor?
10 A Yep, at the same job, URS, yes.
11 Q And for how long did you work after you went back
12 to work or continued to work?
13 A 2015.
14 Q And what happened in 2015 that caused to you stop
15 working? Did you retire?
16 A Yes, ma'am, I had to. I was down -- it was
17 December, and I got to where I couldn't breathe at
18 Catawba, couldn't climb the stairs.
19 Q Let me turn this microphone this way.
20 A And my right lung, it filled up with blood, and I
21 didn't know it. And I went to Dr. Clary December 28th,
22 and that's when x-ray -- they had to draw blood out.
23 That's when they found the cancer. I had mesothelioma,
24 yes.
25 Q So, Mr. Jolly, just to be clear, did you stop

ROA_02394

1 working because you were ill or because you retired or
2 some combination of both?

3 A I was ill. I was ill, and I guess would say it
4 was a combination of both. But I was still healthy,
5 you know, at the time.

6 Q What was your job then in 2015 December when all
7 of this started and you had to stop working?

8 A Ultrasound. I did ultrasound with Duke Power
9 Company, ultrasonics.

10 Q Okay.

11 A Yes.

12 Q So you were still working at Duke Power plants?

13 A Yes, ma'am. Yes, ma'am, at the three plants, yes,
14 ma'am.

15 Q Mr. Jolly, have you lost any weight because of
16 your illness?

17 A Yes, ma'am. I lost about 45 pounds.

18 Q Okay. And how are you doing right now, like
19 literally sitting in this chair, what's happening with
20 you?

21 A Pretty good right now. I have a little trouble
22 breathing, and that's to be expected with what I got,
23 you know.

24 Q So we're going to ask you to take your time, and
25 if you need a break --

ROA_02395

Appendix_02430

1 A Thank you.

2 Q -- I'm sure we can accommodate you. Is that okay?

3 A Yes.

4 Q Mr. Jolly, can you tell the jury if you're a
5 college graduate and what you studied and your work
6 after college?

7 A Yes, ma'am. I graduated from Limestone College in
8 1971, and I was a school teacher. I became a school
9 teacher. You know, back then, school teachers didn't
10 make much money. I was working all the time. I taught
11 night school, the GED, and I was -- my dad said he had
12 been working with Duke Power Company since 1946 or -7.
13 He was at the OG. He said, "Why don't you come to work
14 with Duke?" I already had experience as a pipe
15 tightener, so I went to work with Duke as a pipefitter
16 then.

17 Q And when was that?

18 A 1979, yes, ma'am.

19 Q And how long were you a pipefitter?

20 A Not long.

21 Q How long?

22 A Well, because in February -- in February, I think,
23 I went in February of '79. And that fall I went to
24 school with Duke as an inspector, you know. You had to
25 pass certain math tests, and I passed all the math, and

ROA_02396

Appendix_02431

1 I became a mechanical inspector then.

2 Q That was going to be my next question. What was
3 your next job after the six months when you had --

4 A Mechanical. I worked in mechanical, yes.

5 Q And that was about six months after you started?

6 A Yeah. Well, I'll tell you --

7 Q Uh-huh.

8 A They were shutting down the Cherokee plant then.

9 Q Uh-huh.

10 A And they shut it down. And, luckily, I got
11 transferred to McGuire as a mechanical. I already had
12 my certs. I had most of my certs, and I got
13 transferred to McGuire, yes, yes.

14 Q In terms of when did you -- strike that. McGuire
15 refers to a particular power plant, correct?

16 A It's in Huntersville, yes. There's two nuclear
17 reactors.

18 Q That was going to be my next question. I know you
19 want to jump ahead, but hang on.

20 A I'm sorry.

21 Q I'll try and keep up if I can. When did you go to
22 McGuire approximately?

23 A In early spring of 1980, like in January or last
24 of January or something like that, you know.

25 Q And you said, was it a new plant or an old plant

ROA_02397

Appendix_02432

1 that had been operating?

2 A It was new, under construction at the time.

3 Q So it was brand-new?

4 A Yes. It was under construction, and they were
5 building.

6 Q And when you went to McGuire, just so I have it
7 straight, your job was as a mechanical inspector?

8 A Right.

9 Q And how long did you stay being a mechanical
10 inspector before your job changed again?

11 A It was about four years.

12 Q 1984?

13 A Yes.

14 Q And what was your next job?

15 A I became an inspector.

16 Q What kind of inspector?

17 A Well, we did DOT training, Department of
18 Transportation training, and various soft skill
19 training, safety and some of the chemicals. A lot of
20 them were used, Pentalene and stuff like that, which
21 was very dangerous. And we could burn the Pentalene at
22 one of the plants, I mean one of the coal-fired plants
23 and just stuff like that. Anything they wanted me to
24 teach, I could teach it.

25 Q Because you got to be a teacher again at Duke

1 Power?

2 A Yes.

3 Q How long did you remain a teacher?

4 A In '94, it was like July -- I remember that day.

5 It was July 7th or something that I went -- I went into
6 ultrasonics, yes.

7 Q Of 1994?

8 A Yes, ma'am.

9 Q I'm going to ask you briefly about these, but I
10 just want to get the broad time periods, okay. And how
11 long did you remain in ultrasonics after July 7, 1994?

12 A From then until 2015. That's when I got
13 mesothelioma, yes, ma'am.

14 Q And you mentioned a little while ago that you
15 retired in 2002. So help us understand how you can say
16 you were in ultrasonics from '94 to 2015 if you retired
17 in 2002.

18 A Well, I retired, and I stayed retired about two
19 months. And the vendor people called me and said, "We
20 need you back to work on the same crew." I went back
21 with the same crew. I went back, you know. I had to
22 pass their test. They had a different set of tests for
23 ultrasonic tests, so I had to pass their tests. And I
24 went back to work, and I stayed with that group until
25 2015, yes.

ROA_02399

Appendix_02434

1 Q Did you like your job, Mr. Jolly?

2 A I loved it.

3 Q What did you like about it?

4 A I liked the people.

5 Q Mr. Jolly, when you -- during this period, 1980 to
6 '84, was your work as a mechanical inspector within
7 power plants?

8 A Yes, ma'am.

9 Q That type of location?

10 A Yes, ma'am.

11 Q And how about when you went to be a teacher of
12 other workers about certain issues including chemical
13 safety, 1984 to '94, did you work within the power
14 plant?

15 A Yes. We'd go around and instruct at all the
16 plants, yes.

17 Q And can you describe for the jury where in the
18 plants you would do your instruction work? Was it on
19 the floor of the operations or where?

20 A Most of the time, they would be in conference
21 rooms.

22 Q Conference rooms?

23 A Yes, ma'am.

24 Q Like a classroom?

25 A Yes, yes.

1 Q And then ultrasonic work starting in 1994,
2 July 7th to be specific --

3 A Yes, it did.

4 Q -- did you work in the power plant in terms of
5 where you actually worked, or were you in the --

6 A I was in the power plants.

7 Q And could you just tell the jury, why did you
8 change from being an instructor to going to work that
9 took you back into the power plant? What happened?

10 A Well, they were cutting down on the instructors.
11 You know, they were going to reduce them. They figured
12 they didn't need that many of them at that time in the
13 history of Duke Power Company, and I decided it was
14 time to get out because there was going to be -- they
15 were going to lay off a bunch of people that fall. And
16 I had a person that come to me and said, "Dale, we
17 don't have room for you in mechanical, but we do in
18 ultrasonics," which is like a twin job to mechanical,
19 and I went to work with ultrasonics, yes.

20 Q Now, I want to ask you mostly about the first job
21 that you had or, really, the second, as a mechanical
22 inspector through 1984. This part right here. Okay?

23 A Yes.

24 Q This time period.

25 A Yes, yes, yes.

ROA_02401

Appendix_02436

1 Q Well, let me back up. Well, are you okay?

2 A Yes, ma'am.

3 Q Okay. Did all of your work in terms of the work
4 that was within a power plant occur at McGuire, or did
5 you go to other power plants during this approximately
6 four-year period?

7 A I went to all three.

8 Q Okay. Tell us what those were, where you were at
9 McGuire?

10 A McGuire, which is in Huntersville, Catawba, which
11 is in Rock Hill, and Oconee, which is in Seneca. You
12 know, it's located -- that's the address of it. It's
13 in Seneca, yes, ma'am.

14 Q And are all of these nuclear power plants?

15 A Yes, ma'am.

16 Q And we talked about McGuire being new.

17 A Yeah.

18 Q How about Catawba, was that an older plant, or was
19 that something --

20 A Okay. It was still under construction also, yes,
21 ma'am.

22 Q Okay. So it was new?

23 A Yes, yes.

24 Q It was going to be new?

25 A It was going to be new. It was in the process of

ROA_02402

Appendix_02437

1 becoming the way it is.

2 Q And how about Ocone and Seneca?

3 A It was --

4 Q Wait. Sorry. When had that been built, if you
5 know?

6 A It was built in like '68 to '73 or -4, something
7 like that. It was finished by the time I became
8 mechanical, yes, ma'am.

9 Q And what's your understanding of when it was
10 finished and became operational such that it could
11 create energy that people could buy from Duke Power?

12 A I would think -- I don't know the exact date.

13 Q Generally speaking, like I know you knew July 7th.
14 I'm not asking for the exact date, Mr. Jolly.

15 A I'd say around '73 or something like that. The
16 last unit -- there's three units there. That was going
17 to be -- I think that's --

18 Q That was going to be my next question, which is
19 how many units, if you know, were at each of these
20 power stations.

21 A Okay.

22 Q How many at McGuire?

23 A Two.

24 Q And are they just called Unit 1 and Unit 2?

25 A Yes, ma'am.

ROA_02403

Appendix_02438

1 Q How many at Catawba?

2 A Two, yes, ma'am.

3 Q And are they also called Catawba Units 1 and Unit

4 2?

5 A Exactly, yes.

6 Q How about Ocone?

7 A Three.

8 Q Now, can you generally tell the ladies and

9 gentlemen of the jury what a unit is?

10 A Well, it's a self-contained unit. Oh, I'm sorry.

11 It's got its own turbine. It's got its own auxiliary

12 building, turbine, and it's own reactor. It's totally

13 separate. Some of them are kind of combined together,

14 but it's really totally separate from the other units,

15 you know. It's a separate entity within itself, yes,

16 ma'am.

17 Q Do you need some water?

18 A No, I'm fine.

19 Q Mr. Jolly, how big are these units?

20 A Big. Very big.

21 Q As big as this courtroom?

22 A Oh.

23 Q Smaller?

24 A I couldn't -- it's hard to describe.

25 Q If you were trying to describe it in terms of a

ROA_02404

Appendix_02439

1 commercial building in stories, how many stories high
2 might it be?

3 A From the basement, I'm thinking about from the
4 basement -- I don't even know how many steps. It is
5 high. I'd say six stories. Six or seven or maybe even
6 more, you know. Because you're looking at a basement,
7 underground, a lot of the public don't see. It goes
8 underground maybe 150 feet, you know. You don't see
9 that.

10 Q I want to jump right into valves. Are you okay
11 with that?

12 A Yes, ma'am.

13 Q What is a valve? What does it do in the context
14 of a power plant?

15 A Well, it can open up the flow or shut off the flow
16 of a unit or a line or a system, yes, ma'am.

17 Q And --

18 A You can open and close it. The control room
19 normally does that.

20 Q And --

21 A On the big valves.

22 Q How in the world would a control room impact the
23 flow of fluid in a valve away from the control room?

24 A Well, it's hooked up to the valve. They had the
25 control, and I was -- I don't know exactly how they

ROA_02405

Appendix_02440

1 done it, but they wouldn't let you in the control room
2 unless you had a real -- you had to have a real good
3 reason. Special permission. And they couldn't push a
4 button and open and close that -- and they could push a
5 button and open and close that valve. Push a button to
6 open -- push a button to open; push another button and
7 it would close it. That's what it did.

8 Q Okay. And did they also throughout these units
9 have gauges for the various valves that would --

10 A Yes, ma'am. They knew the pressure going through
11 the line, yes.

12 Q Mr. Jolly, you had your deposition taken about a
13 year ago. Do you remember that?

14 A Yes, ma'am.

15 Q Over several days?

16 A Yes, ma'am.

17 Q And you were asked questions, correct?

18 A Yes, ma'am.

19 Q Mr. Jolly, was the deposition a situation where
20 you just show up and volunteer information and tell
21 people what you know, or do you answer the questions
22 that people ask you?

23 A You answer the questions.

24 Q Okay. Do you recall being asked over multiple
25 days of deposition the simple question, "Are you

ROA_02406

Appendix_02441

1 familiar with Crosby valves"?

2 A No.

3 Q Nobody asked you?

4 A No.

5 Q Were you asked over many days of deposition the
6 simple question, "Mr. Jolly, during your work history,
7 do you remember working with Fisher Control valves and
8 equipment?"

9 A No.

10 Q Okay. So let us ask you now. Mr. Jolly, when you
11 worked, and I'm going to limit it right now to your
12 work as a mechanical inspector in the '80 to '84 time
13 frame, did you work around valves manufactured by
14 Crosby?

15 A Yes, ma'am.

16 Q At McGuire. Let's go there.

17 A Yes, ma'am.

18 Q Both units?

19 A Yes.

20 Q Catawba?

21 A Yes.

22 Q Both units?

23 A Yes.

24 Q Did you have Crosby valves that you worked around
25 at Oconee?

ROA_02407

Appendix_02442

1 A Yes, ma'am.

2 Q All three units?

3 A Yes, ma'am.

4 Q How about Fisher --

5 A Yes, ma'am.

6 Q Wait for me. I'm going to ask it in three just to
7 spare your energy. When you worked at both units at
8 McGuire, and we're going to talk about the work in a
9 minute at Catawba and Oconee, did you work around
10 Fisher valves?

11 A Yes, ma'am.

12 Q Are you okay? We can take a break.

13 A Yes, ma'am. I'm fine.

14 Q Mr. Jolly what's an outage or a shutdown?

15 A Well, when they bring a unit down to change the
16 uranium -- uranium lasts so long. Back then it didn't
17 last that long. Now it lasts a long time. They got
18 better uranium.

19 And they bring it down. And when they were
20 changing out the uranium core, they would work on all
21 the other sector-related systems required by the NRC.
22 They required them to split up everything into ten-year
23 segments. The NRC had them to do it. And you would
24 work on a tenth of the safety-related system that year
25 during the outage. One outage or two outages, you

ROA_02408

Appendix_02443

1 still work on a tenth, a tenth of safety-related
2 valves.

3 Q Okay.

4 A Yes. And on the other valves. I mean not on the
5 safety related, you know, for the shutdowns, yes.

6 Q So, is a shutdown, also known as an outage, a time
7 where the plant is not operational? The unit is not
8 operational?

9 A Yes, ma'am.

10 Q Mr. Jolly, do you know what a flange is?

11 A Yes.

12 Q What is it?

13 A You can join two pipes together with it. You put
14 bolts in it and a gasket goes between it, yes, yes.

15 Q Did Crosby and Fisher valves at these units have
16 flange faces?

17 A Yes, they did, yes.

18 Q Are you okay?

19 A (Nodding.)

20 Q Can you just describe to the jury what your work
21 was as a mechanical inspector -- I'm sorry. I put
22 instructor -- mechanical inspector from 1980 to 1984 at
23 these plants?

24 A My job as a mechanical inspector on safety-related
25 systems and some of the other systems, the maintenance

ROA_02409

Appendix_02444

1 crew would call us down and we had to sign off. I was
2 an inspector authorized by the NRC.

3 Q I'm sorry. What is the NRC?

4 A Nuclear Regulatory Commission.

5 Q Okay. Because we talked about the fact that these
6 are nuclear plants.

7 A Yes, ma'am.

8 Q And they are highly regulated by the NRC?

9 A Oh, yes.

10 Q Okay.

11 A Yes, ma'am.

12 Q Go ahead.

13 A When they would take one of these valves apart, we
14 had to verify the gasket that went back in it. Whether
15 it was rubber, asbestos, whatever, we had to verify the
16 number on it by the manufacturer's manual. And we were
17 trained in the manufacturer's manual. And we had to
18 document that because we were liable. We could go to
19 jail if we documented something that caused an accident
20 and killed somebody later. And we had to be on the
21 ball. We had to -- when we signed it off, that was it,
22 you know, that we had verified that gasket went with
23 that valve or that flange. And that's the way we did,
24 yes, ma'am.

25 And then when you went to put it back together,

ROA_02410

Appendix_02445

1 before, when they took out the gasket a lot of times
2 they would call us. And we'd get there before they
3 even took out the gasket. And they would be cleaning
4 with a wire -- I know you have seen these little wire
5 brushes, air operated, b-z-z-z, you know. You had to
6 wear goggles. And we had to stand back a little bit,
7 but not much, and we wore safety glasses with eye
8 shields. And they would be grinding, and the dust
9 would be everywhere. And they had to clean that flange
10 off because they couldn't put the new gasket in because
11 it wouldn't torque up, you know, a hundred percent.

12 And I don't know if you know what torquing is, but
13 torque, we had to be there for the torquing of that
14 gasket to go in. We had to look at the gasket and say
15 this is the right number. And then they had to torque
16 that thing back in in a certain pattern. You know,
17 they go one two, three, four, in between, according to
18 how many. And we had a certain torque pattern for like
19 a 12-inch valve or 16 that was in our book, in our
20 paper that we carried around. And we would have to
21 watch them torque it up completely, whether it be
22 600 pounds -- some of them nuts even had 600-pound
23 torques on them. But they would torque that thing down
24 slowly and squeeze it together. If they didn't, some
25 of the pressure was like over 1,200 pounds per square

ROA_02411

Appendix_02446

1 inch. In some lines it was even 10,000 pounds. It
2 could kill you. So we had to verify that, the gaskets
3 and the torquing back, and sometimes the cleaning, yes,
4 ma'am.

5 Q So, Mr. Jolly, it sounds like this business of
6 removing a gasket from a flange surface on a valve, the
7 process of removal --

8 A Yes, ma'am.

9 Q -- identifying the replacement gasket --

10 A Yes, ma'am.

11 Q -- and the reinstallation through this torquing
12 process --

13 A Yes, ma'am.

14 Q -- that's pretty serious business?

15 A It's very, very serious.

16 Q Now, let me ask you, Mr. Jolly. Could you or
17 anyone else at Duke simply choose on a valve to use any
18 kind of gasket that you wanted?

19 A Absolutely not.

20 Q Why not?

21 A It would break -- it would break the NRC's rule.
22 We couldn't do that. We could go to jail, you know.
23 We couldn't do it. And it might leak. And if you had
24 12,000 -- 1,200 pounds of steam shooting out a valve,
25 it can cut off somebody's arm or leg if they walked by

ROA_02412

Appendix_02447

1 it. So it had to be the correct, per the
2 manufacturer's manual for that valve, whether it be --
3 whatever kind of valve it was, whether it be a Crosby
4 or Fisher or any other kind of valve, it had to be per
5 that valve, that size of the valve, the size. The head
6 gasket and, you know, the flange gasket had to be for
7 that size and that type of flange.

8 Q I don't want to cut you off. Something tells me
9 even though this water is sitting here, it's not in a
10 cup so you won't drink it.

11 A Thank you, ma'am.

12 Q I'll put it back. Mr. Jolly, you -- excuse me.

13 Mr. Jolly, you referred to a manufacturer's manual
14 for the valves?

15 A Yes, ma'am.

16 Q Were there manuals for Crosby valves and Fisher
17 valves, the specific valves which were at these units?

18 A Yes, ma'am, exactly.

19 Q And what were they used for?

20 A They were used -- they told you which gasket to
21 use for a certain flange, you know, or valve, yeah.
22 They were very detailed. And they were good books, you
23 know.

24 Q So could you, Dale Jolly, go to the Crosby Valve
25 manual for a particular valve and it call for a 316 SS

ROA_02413

1 asbestos gasket --

2 A Yes, ma'am.

3 Q Hang on.

4 A Yes, ma'am.

5 Q Was it that specific?

6 A Well, yes. I would say so, yes. It was specific,
7 yes.

8 Q But could you just look at it and say, you know
9 what, we don't really have those gaskets in stock.
10 We're just going to use vegetable gaskets or rubber
11 gaskets or cork gaskets. We're just going to freewheel
12 it and do our own thing.

13 Could you do that, Mr. Jolly?

14 A No, we couldn't do that.

15 Q I want to get a little specific just about one of
16 the units while we have you here. Okay?

17 A Okay.

18 Q The jury has seen a document that you have not
19 seen, but I'll put it up, Exhibit 6359. And it's a
20 photograph or a copy.

21 Hang on. I'm going to move this.

22 A It's okay.

23 Q I don't want to have you bending over here.

24 It's a black-and-white copy of a three-ring kind
25 of folder. Can you see that?

ROA_02414

Appendix_02449

1 A Yes, ma'am, I see it. It is from a three-ring
2 folder.

3 Q And this refers to Crosby safety valves installed
4 at Duke Power, McGuire Unit Number 1?

5 A Yes, ma'am.

6 Q Okay. Did you see these kind of documents and
7 things during your work?

8 A Yes, ma'am.

9 Q The second page identifies that it is Crosby
10 valves, McGuire Station, Unit Number 1?

11 A Yes, ma'am.

12 Q And the valve location?

13 A Yes, ma'am.

14 Q Can you see that far?

15 A Yes, ma'am, I can. Yes.

16 Q Okay. And here we have, for instance, six Crosby
17 valves at the reheater turbine?

18 A Yes -- oh, okay.

19 Q Of McGuire Number 1?

20 A Yes, ma'am. That's where it is.

21 Q Does that make any sense to you?

22 A Yes, ma'am.

23 Q Can you tell the jury what that means?

24 Let me ask a smaller question, Mr. Jolly.

25 A Yes, ma'am.

ROA_02415

Appendix_02450

1 Q Do you know what kind of valve they're talking
2 about when they refer to a reheater turbine valve at
3 Unit Number 1 at McGuire? Is that a kind of valve that
4 you understand what kind of equipment that is?

5 A Yes.

6 Q Okay. And, for instance, there's also a reference
7 to a valve -- 20 valves, actually, by Crosby at McGuire
8 Number 1 on the main steam. Do you see that?

9 A Yes, ma'am.

10 Q Does that make any sense to you?

11 A Yes, ma'am.

12 Q You know what a main steam valve is?

13 A Yes, ma'am.

14 Q Okay. Can you -- I took the document down because
15 I think it's --

16 A The documents, I was going to say --

17 Q We're not giving you an eye test.

18 A We got it and it would either say reheater valve
19 or main steam valve. We wouldn't go up to it on our
20 own, but we had a specific location that they would
21 send us to the main steam or the reheater turbine
22 valve. They'd send us to that specific location, you
23 know. We just didn't malingering off and go to it on our
24 own, you know.

25 Q I understand. My question, I think for

ROA_02416

Appendix_02451

1 clarification, though, Mr. Jolly, is when you were
2 doing your work, they didn't say, "Go to the Crosby
3 Valve." They said, "Go to the valves on the Number
4 1 --

5 A That's right, exactly.

6 Q -- reheater turbine"?

7 A Yes, ma'am.

8 Q How big of valves are we talking about in terms of
9 size that we were just talking about?

10 A Some of them are very big.

11 Q What does that mean for us who only have --

12 A Some of them are big. Some of the main steam
13 valves, steam sump valves, you could fall off in it and
14 get hurt. I mean, it is this wide across.

15 Q Could I walk through the flange opening? Is it
16 taller than me?

17 A Well, you could. You wouldn't want to, though,
18 because it goes down like this and you would break your
19 neck. But, anyway, a lot of times we would -- when
20 they put the gaskets back on, there were maybe 65 bolts
21 around these things. They were big. I mean big. Yes,
22 main steam sump valves, yes.

23 Q So when you say 65 volts -- bolts, sorry.

24 A I mean -- yes.

25 Q I know, bolts.

ROA_02417

Appendix_02452

- 1 A A lot. I mean, I'm not saying specifically 65.
- 2 Q I understand.
- 3 A Might have been 49 or 52. But it looks like that
- 4 because if you fell off into that valve, you could get
- 5 hurt.
- 6 Q Right. So if I'm standing there and I'm looking
- 7 at the Crosby valve on the main steam line of Unit
- 8 Number 1 at McGuire --
- 9 A Yes.
- 10 Q -- it would be a big, round opening?
- 11 A Yes. Some of them are big.
- 12 Q That would take like 60 and 70 bolts around to
- 13 connect it to the pipe?
- 14 A Yes, ma'am.
- 15 Q Would there be a gasket?
- 16 A Oh, yes, ma'am.
- 17 Q What kind?
- 18 A The kind specified by the manufacturer, yes,
- 19 ma'am.
- 20 Q Does the application of the line and the valve
- 21 make a difference like if it's a high -- if it's a high
- 22 temperature steam line, if it's a high pressure line?
- 23 A Yes, ma'am.
- 24 Q Mr. Jolly, you had to have a little schooling
- 25 about pipefitting and things like that, correct?

ROA_02418

Appendix_02453

1 A Yes, ma'am.

2 Q What kind of training and background did you have
3 about how to join a pipe to a valve and those sorts of
4 things?

5 A It was fairly extensive. It was in a classroom
6 setup with actual models. We had to demonstrate that
7 we could do it to an instructor, the right torque
8 pattern, and using our manuals and verifying the
9 correct gasket and gasket number. It was fairly
10 strict. Yes, it was strict.

11 Q And as part of that general training, did you also
12 get some training on the type of gaskets that could be
13 used in certain type of settings like temperature
14 settings and things like that in a general way?

15 A Basically, yes, yes, yes.

16 Q Could you use, Mr. Jolly, a rubber gasket in a
17 line that was 1,200 degrees?

18 A No, ma'am.

19 Q Why not?

20 A It would melt. I mean, you know, it would leak,
21 yes.

22 Q Did you learn and were you trained to distinguish
23 a rubber gasket from a cork gasket from a fibrous
24 asbestos gasket?

25 A Yes, ma'am. Yes, ma'am.

ROA_02419

Appendix_02454

1 Q Mr. Jolly, when you worked at -- let's just take
2 McGuire, Unit Number 1, did you see people, as part of
3 the outages that came after it went online, removing
4 gaskets from the main steam line on that unit?

5 A Would you repeat that again?

6 Q Sure. It was a long question. McGuire Number 1?

7 A Yes.

8 Q Did you ever work there when there was an outage?

9 A Definitely, yes.

10 Q Okay. And during the outage, did the flange to
11 the main steam line and the turbine reheater, those
12 valves --

13 A Yes.

14 Q -- did those flanges get broken?

15 A Yes, ma'am.

16 Q Okay. Why?

17 A Because mostly during an outage, any nuclear
18 safety-related equipment, and it's nuclear
19 safety-related deemed by the NRC, they have to do it.
20 They have to check them, put new gaskets on, you know.
21 Yes, ma'am.

22 Q And were you in the area when these gaskets on
23 these flange faces that were, in some cases many bolts,
24 removed?

25 A Yes.

ROA_02420

Appendix_02455

1 Q And can you describe the process of removal of
2 these gaskets?

3 A Yes. They would break the flanges and either take
4 the top off and clean it using wire brushes or brass
5 brushes. Back then they could clean them with just
6 about anything. I think they changed their cleaning
7 techniques years later. It wasn't as abrasive, but
8 they could still clean it. And they would use little
9 90 grinders to clean off all around the bolts. And the
10 bolts had to be cleaned too. And the nuts had to be
11 looked at for defects. You know, any burr on them or
12 anything, you reject it, you reject the bolt or the
13 nut, anything that you saw, you were trained to look
14 at, you could reject that on your own. Nobody else
15 could tell you as an inspector what to do. I mean, you
16 had complete control over that job --

17 THE COURT: Line 2.

18 A I'm sorry.

19 Anything that you saw, you were trained to look
20 at, you could reject that on your own. Nobody else
21 could tell you, as an inspector, what to do. I mean,
22 you had complete control over that job until you saw
23 the last bolt being torqued and the gasket being put
24 in, yes.

25 Q And did the process of removing the old gaskets

ROA_02421

Appendix_02456

1 with the grinders that you just described at McGuire,
2 let's say Unit Number 1 main steam line --

3 A Yes, ma'am.

4 Q -- did that create dust?

5 A Oh, definitely, yes. Dust is particles in the air
6 that you couldn't see because -- you know, particles
7 that you couldn't even see. You could tell. That's
8 why we had to wear ear plugs. It would just whine. It
9 was so loud. You know, that little 90 grinder was loud
10 so it would affect your hearing too. So we wore
11 earplugs or ear muffs to deflect the sound.

12 Q And did you breathe that dust, Mr. Jolly?

13 A Yes, ma'am. Yes, ma'am.

14 Q But you weren't working with the -- you weren't
15 removing the gasket yourself, so how did you breathe
16 the dust?

17 A Yeah. It was in the air. We was standing right
18 there.

19 Q Okay. And this process of removing the gasket
20 from the main steam line, Unit Number 1 at McGuire, for
21 instance, does that happen in a couple seconds, the
22 gasket removal?

23 A No.

24 Q How long does it take?

25 A It takes a while. I mean, you know, the work

ROA_02422

Appendix_02457

1 crew, they can't just go ahead and -- they can tear up
2 something. They have to take their time. They have to
3 untorque, untorque the flanges or the valves, and most
4 of them would take their time and break the flanges
5 apart, take out the old gaskets, take their 90 grinders
6 or brushes or whatever they clean and clean the face of
7 those flanges. They had to be clean because when it
8 was squeezed back together, the smallest particle in
9 there could cause a leak to come through that gasket.
10 So they couldn't leave anything in there. Had to be
11 completely clean. We had to make sure it was clean.

12 Q Your job was to inspect and make sure, after the
13 removal, there was no little particles?

14 A Yeah. We carry flashlights and mirrors with us to
15 make sure all the time, all the time.

16 Q And, Mr. Jolly, the challenge to that was also to
17 clean off the gasket from the flange face and not mess
18 up the metal as well, right?

19 A Oh, very much so. Or get anything down in that
20 valve. I mean, that was of immediate concern. Foreign
21 material, you know, they didn't want to get anything
22 into that system.

23 Q So talking about this system, what was this system
24 connected to, since you have it in mind? Like where
25 does it fit in the power production, the main steam

ROA_02423

Appendix_02458

1 valve, the reheater valves at McGuire Number 1, where
2 do they fit into the power production system?

3 A The main steam line?

4 Q Uh-huh.

5 A Well, in the auxiliary building, like at Oconee,
6 they've got three main turbines. One for Unit 1, 2,
7 and 3. And they drive the turbines. The steam drives
8 these turbines. And when all three -- and steam is
9 coming through all three of these. All these main
10 lines hooked up to a turbine to drive and make the
11 power for the public. And the same at Unit 2. There's
12 two units at Catawba and two at McGuire. It's the same
13 process. It's coming from the steam generator to the
14 turbines through those lines, yes.

15 Q And with your training and your work, do you have
16 an estimate of the temperature ranges of the steam
17 that's going to be coming through these main steam
18 lines?

19 A I know it's over a thousand degrees. I mean, you
20 know, it's maybe 1,200 PSI or -- and the pressure on it
21 is amazing. It's amazing. It's amazing.

22 About 20 years ago, one of the steam lines broke
23 at Oconee in the basement and broke the skin off of two
24 or three people. And one guy was blinded by the steam.
25 And instead of starting to crawl away from it, he

ROA_02424

Appendix_02459

1 crawled back towards it. And that actually happened.

2 And they had to retire all three of those guys. I

3 mean, I think there's one lady and two men, you know.

4 That's how it can hit you.

5 Q McGuire Number 1 main steam line and the valve and

6 the flanges that go with the reheater turbine, did they

7 have these high temperatures that you just described in

8 the 1,000 degrees, 1,200-degree range?

9 A Yes, ma'am, yes, ma'am.

10 Q And so the gaskets that would have been used on

11 those lines, would that have been rubber?

12 A No, ma'am.

13 Q Cork?

14 A No, ma'am.

15 Q Vegetable fibers?

16 A No.

17 Q What kind of gaskets?

18 A Asbestos.

19 Q Because of the application was used --

20 A Asbestos gaskets. It was actually one of the best

21 gaskets.

22 Q Performance-wise?

23 A Performance-wise, yes, ma'am. Not health-wise but

24 performance-wise, yes.

25 Q Mr. Jolly, we looked at the various plants, and we

ROA_02425

Appendix_02460