

1 VIRGINIA:

2 IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

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4 MICHAEL LITTLE, Executor of the
5 Estate of ZEBULON A. LITTLE, JR.,
6 Deceased,

Plaintiff,

AT LAW NO.
37073V-04

7 v.

8 GARLOCK, INC.,

9 Defendant.

10 -----
11
12 TRANSCRIPT OF PROCEEDINGS

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14
15 Newport News, Virginia
16 September 27, 2004
17

Before: THE HONORABLE H. VINCENT CONWAY, JR., CHIEF JUDGE,
18 AND A JURY

19
20 Appearances:

21 PATTEN, WORNOM, HATTEN & DIAMONSTEIN, L.C.

By: ROBERT R. HATTEN, ESQUIRE

22 HUGH B. McCORMICK, III, ESQUIRE

and

23 GLASSER & GLASSER.

By: RICHARD S. GLASSER, ESQUIRE.

24 and

JONATHAN SMITH-GEORGE, ESQUIRE

25 Counsel for the Plaintiff

1 Appearances:

2 DUANE, HAUCK & GNAPP

 By: CARL R. SCHWERTZ, ESQUIRE

3 and

 SEGAL, McCAMBRIDGE, SINGER & MAHONEY

4 By: ROBERT T. CONNOR, ESQUIRE

 Counsel for the Defendant

I N D E X

ON BEHALF OF THE PLAINTIFF:

WITNESSES:	DIRECT	CROSS	RED.	REC.
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MICHAEL LITTLE	18	--	--	--
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EXHIBITS

ON BEHALF OF THE PLAINTIFF:

NO.	DESCRIPTION	IN EVD.
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9	Framed photo	42
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10	Photo	42
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11	T-shirt	42
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12	Funeral program	42
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13	Workman's comp Board Minutes (denied)	49
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14	Minutes ATI 11/16/44	60
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15	Minutes AHC 11-19-47	60
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16	Minutes ATI 2/12/65	60
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17	Minutes ATI 10/8/65	60
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18	Minutes ATI 2/11/66	60
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19	Minutes Board/ATI 10/6/66	60
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20	Minutes ATI 10/7/66	60
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21	Hemeon report 6/7/47	60
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22	Material safety data sheet	60
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23	Material safety data sheet, NNSB	60
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24	Worker's Comp Claims	60
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25	Garlock gaskets (in case)	60
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EXHIBITS (Cont'd)

NO.	DESCRIPTION	IN EVD.
26	Funeral home expenses	60
27	Medical expenses, Riverside Hospital	60
28	Manual Prep/Warning labels	60
29	Manuals Warning 4th Rev. 1956	60
30	Minutes ATI/AHC 10/6/54	60

1 (Whereupon, the proceedings
2 commenced at 10:02 a.m.)

3
4 THE COURT: Let me bring you up to date. Ms.
5 Langhorne called this morning and - one of our jurors and
6 said that her sister had taken the car away from her this
7 weekend, she could not get here, but if someone would come
8 pick her up and also take her child to daycare, she would
9 be happy to come.

10 So I received that information. Ms. Northway
11 called her back and said, Is this for today only? She
12 said, No, I will need rides the rest of the week and also
13 rides to and from the court during lunch time to confirm
14 daycare.

15 With that information -- and she is the one
16 we talked to last week with her schedule. I excused her
17 from further jury service not thinking the Court could get
18 involved with transporting people back and forth and she
19 was -- she was tearful about it. She is one that has been
20 here all of the time. The bailiff indicates she is taking
21 notes and, obviously, if counsel says, Well, we ought to
22 start some sort of taxi service, but I couldn't ask either
23 party to take her. I just think we are on Monday, this may
24 go long, and I didn't want to set up something I couldn't
25 follow through on. To get her here today is one thing, but

1 to get her here every day -- and I'm not sure the Court
2 should be involved with a juror that way, so I have excused
3 her.

4 This will activate juror number one,
5 alternate one.

6 MR. HATTEN who was that?

7 THE COURT: My clerk has it. She will let
8 you have that information.

9 MR. SCHWERTZ: I think it is Gerst.

10 MR. HATTEN: She is the second woman there.

11 THE COURT: Is she the blond lady in the
12 upper right? That is Ms. Gerst. So she is now active.

13 The clerk had to go by the hospital this
14 morning. She is on her way. She will be here momentarily.
15 She is now in the Wentwood section. But unless you are
16 going to throw all sorts of exhibits at the Court, I don't
17 know that I need the clerk right now.

18 MR. HATTEN: Our plan today, Your Honor, is
19 to put Mike on the stand. We would like to publish to the
20 jury the different documents that we have offered and ones
21 that we --

22 THE COURT: That have already been admitted.

23 MR. HATTEN: That have already been
24 introduced. And then we have a number of others that we
25 are going to offer and ask that they be published. And we

1 can publish them with the machine.

2 I would like to just read the portions of the
3 documents that I think are relevant, which is --

4 THE COURT: Good morning, ma'am.

5 MR. HATTEN: -- which I believe is permitted
6 under the code.

7 And then we do have a deposition of a foreman
8 at the Garlock plant. There is an objection to the
9 deposition and, essentially, if I could just summarize
10 this -- what is the man's name?

11 MR. MCCORMICK: Green.

12 MR. HATTEN: There was a worker at the
13 Garlock factory in New York who can -- where gaskets are
14 made, that contracted malignant mesothelioma, and recently
15 he was awarded benefits for that condition and --

16 THE COURT: Was this in the textile portion
17 of the plant or at the gasket making area?

18 MR. HATTEN: This was in the gasket making
19 area.

20 THE COURT: Gasket making. All right.

21 MR. HATTEN: And he was -- the man who
22 developed the mesothelioma, we are not designating his
23 testimony because, frankly, that was more about him than it
24 was about the plant. But the witness in his workman's
25 compensation case was the foreman of the plant. And the

1 foreman of the plant testified that they never had any
2 control or safety procedures or warnings or things like
3 that at the plant. He is talking about the time period in
4 the '70s and '80s and up -- and '90s. But the point -- I
5 can't remember the exact dates, but the point of the
6 testimony is that even after all of this was recognized in
7 its plant where they say and have always argued that, you
8 know, conditions were worse in the plant, they are still
9 not doing anything. And here is a general foreman of the
10 plaintiff saying that the company did nothing to protect
11 its workers.

12 So when -- when they come in with the
13 argument that, The reason we didn't warn was because of the
14 low levels associated with Garlock gaskets, I think the
15 credibility of that is put at significant challenge by a
16 general foreman at the plant that says they never told
17 their workers either long after -- decades after Mr. Little
18 was exposed. And this goes, I think, to the -- to the
19 credibility of their defense and to their intent.

20 I think all of the tests that are going to be
21 offered into evidence that anyone is going to talk about
22 pertaining to gaskets, that they are going to rely upon for
23 their defense, these are all tests made by experts that
24 they hired for litigation beginning in the '80s and '90s,
25 none of which -- because there were no tests done of the

1 products in the '50s, '60s or '70s. And so our argument
2 is that the only time they are interested in exposure
3 levels is when they are getting sued, and when you hire
4 somebody to -- for litigation and you get a result, the
5 jury needs to understand the context in which this defense
6 is being offered. It is being offered in the context of a
7 company that, according to the general foreman at the
8 Garlock plant, did nothing to protect its own workers. So
9 why would they -- I mean, it is not a matter of what is the
10 level of dust. They are not telling anybody. And so I --
11 you know, if they had complied with the law or done these
12 various things that they were supposed to, then that may or
13 may not have had any relevance. But I think when a company
14 continues a course of conduct decades afterwards and then
15 gives some litigation-based defense, I think that goes to
16 their credibility.

17 So the argument about the deposition is this:
18 The deposition was taken in a workman's compensation
19 proceeding, and the insurer for Garlock was at the
20 deposition not Garlock. And so they argue that makes the
21 deposition inadmissible under the Virginia rules. I think
22 the insurer is Garlock when testimony is being offered
23 against Garlock by a Garlock employee in a workman's
24 compensation matter. And so while -- that is my argument.

25 And so if the rule is that Garlock has to be

1 the named person there as opposed to -- they are the
2 employer and their insurance company is the one, then I
3 guess that is a distinction that I don't think the Virginia
4 rules necessarily require. But the insurance company is,
5 therefore, Garlock, and that is the technical objection to
6 the deposition as to its admissibility. That is the best I
7 can summarize.

8 THE COURT: I think we have talked about this
9 a little bit, haven't we, under Rule 4?

10 MR. SCHWERTZ: Absolutely Judge. You have
11 previously ruled where -- depositions of coworkers where
12 Mr. Hatten was present not representing Mr. Little, we
13 could not use those depositions as evidence in this trial.
14 It is not even a deposition. It is an examination over a
15 phone in a worker's comp hearing where Wausau, who is the
16 worker's compensation carrier for Garlock, completely
17 different standing, completely different reason to
18 cross-examine, they were taking evidence in a worker's
19 compensation claim where this man did not represent Garlock
20 in the same sense that Mr. Connor or I would have
21 represented Garlock in cross-examining this man.

22 Second of all, much of the transcript talks
23 about raw asbestos fibers and balers they were using in the
24 textile plant where the employee Mr. Dieffenderfer -- I'm
25 sure the court reporters are happy about that name -- were

1 walking through -- Mr. Dieffenderfer was walking through
2 the textile plant and exposed to those raw textile fibers.
3 But it truly is our objection that we didn't have the same
4 standing -- just like Mr. Hatten argued he didn't have the
5 same standing to cross-examine the coworkers to be used
6 against him in this particular case.

7 So I would like to make the goose-gander.
8 What is good for the goose is good for the gander. We
9 can't -- I can't see how Mr. Hatten can say, You can't use
10 coworkers against me, but I can use this against you.

11 MR. HATTEN: The distinction is -- and it is
12 a good distinction. It is not an imaginary distinction.
13 It is -- this is a general foreman of Garlock who, as a
14 member of management, is speaking as someone from -- as an
15 employee of Garlock, and he is represented -- you know,
16 Garlock is -- Garlock is represented in the hearing by
17 Wausau as their surrogate.

18 So you have got a Garlock insurer examining a
19 Garlock foreman. Now, that is different than when I
20 represent another plaintiff who is not speaking for Mr.
21 Little who has nothing to do with Mr. Little, and I don't
22 represent Mr. Little. Those are very distinguishable
23 facts.

24 When a foreman of a company testifies under
25 oath, that should be statements against interest of the

1 company, and the company is represented by the insurance
2 carrier. And so I will be frank with you, Judge. I don't
3 know any precedent on it, but if you look at the rule, I
4 think the party is Garlock, because Garlock is the person
5 that the claim is being made against and the witness is
6 Garlock. It is a general foreman of Garlock.

7 THE COURT: This is probably what makes the
8 practice of law fascinating. I mean, we know what the rule
9 is if the party is not present. We know what the rule is
10 if the party is present. My concern looking at the rule is
11 the rule doesn't say that the deposition may be offered
12 against the party or -- if it was present at the deposition
13 or if its agent or insurer was present at the deposition.
14 We know in Virginia there is a distinction. You can't sue
15 the insurer. You sue the party. And whether it is well
16 known that the shipyard has the following insurer, you
17 can't sue, it is a different person.

18 Now, Mr. Hatten says, Well, but their
19 interests were being protected at the deposition by the
20 insurer's counsel. And I think that might -- I mean,
21 obviously, that is a logical statement as far as insurable
22 losses and things like this. And now Mr. Hatten is arguing
23 that this, in effect, is the same thing as Garlock's
24 counsel being there because Wausau's counsel was there on
25 the worker's compensation claim.

1 MR. SCHWERTZ: Your Honor, what we are
2 attempting to do is try the Dieffenderfer case inside the
3 Little case here. The interests were completely different
4 for -- I believe the name was Mr. Bowers counsel for Wausau
5 that was present there. None of these things were noticed
6 in asbestos litigation. It was noticed solely in worker's
7 compensation injuries. So his reason for being there and
8 his reason for cross-examining is completely different than
9 what somebody who was representing Garlock in its asbestos
10 litigation, that person's interest.

11 THE COURT: There is no question that it is
12 relevant. My only question is, it seems to me that the
13 rule is specific that the deposition only be offered
14 against a party who was present. And I don't think I have
15 the liberty to expand that in this case to an insurer's
16 counsel.

17 Now, you know, I don't know whether a door
18 could be opened. We will wait and see that later on,
19 depending on the defense's evidence. But I would say the
20 same thing to the defendant, you could not offer a
21 deposition against Mr. Little if Mr. Little was not present
22 as a party to that proceeding. And even if he had an
23 insurance company who was present on some other type of
24 claim, that would not be the party, the estate of Zebulon
25 Little, represented in capacity by his son, Michael.

1 So I'm going to have to uphold the rule, Mr.
2 Hatten, with your exceptions noted.

3 MR. HATTEN: I understand. I would just like
4 to make my exception for the record, and we will proffer
5 the testimony just for the Court's file.

6 MR. SCHWERTZ: Your Honor, I'm just going to
7 give copies for spellings to the court reporter.

8 THE COURT: Mr. Hatten, you mentioned
9 something about review the exhibits already in evidence and
10 read them again. I mean, you are not talking about going
11 over the exhibits we have already talked about, are you?

12 MR. HATTEN: The exhibits have been offered
13 into evidence.

14 THE COURT: Pictures and things like this.

15 MR. HATTEN: Not pictures, I meant text.

16 THE COURT: The text.

17 MR. HATTEN: The text. Just portions of the
18 text that we would like to draw the attention of the jury
19 to.

20 THE COURT: Is counsel ready to proceed for
21 the plaintiff?

22 MR. CONNOR: Your Honor, I guess for the
23 record, Mr. Hatten has given me other documents. These are
24 documents of The Textile Institute that he intends to offer
25 and publish to the jury, I guess, this morning, I guess --

1 before or after Mr. Little testifies?

2 MR. HATTEN: After Mr. Little.

3 MR. CONNOR: Very little. I know I have been
4 on the record before about this, but I guess I should make
5 it clear for the record, from the documents that he has
6 given to me, he intends to offer the -- I have a general
7 objection to the ATI documents, about their relevance to
8 this particular trial, as I previously had stated. I
9 believe he intends to offer the documents of November 16th,
10 '44, November 19th, '47, which is when we were a member.
11 And I understand Your Honor's ruling. He intends to offer
12 the document from March 7th, '56, which was mentioned in
13 Mr. Houghton's deposition; however, he was a guest at that
14 meeting. And I understand Your Honor's ruling.

15 MR. HATTEN: That is already in.

16 MR. CONNOR: Well, you are going to publish
17 it?

18 MR. HATTEN: Publish it.

19 MR. CONNOR: Documents of December 11th and
20 February 12th of '65, when Garlock was not a member of the
21 organization. And October 8th, 1965, again when Garlock
22 was not a member of the organization. February 11th of
23 '66, when Garlock had rejoined. March -- I'm sorry,
24 October 6th of 1966, when Garlock was a member. And
25 October 7th of 1966.

1 I understand Your Honor's ruling with respect
2 to all of them, but I would like to note again our
3 exception.

4 THE COURT: I think counsel should be clear
5 as to why those documents are coming in before the jury.

6 MR. HATTEN: Yes, sir. The ones that are
7 offered for the time period they are not a member is simply
8 to indicate the state of the art.

9 THE COURT: The state of the art.

10 MR. HATTEN: And that is the only purpose the
11 others are noticed.

12 THE COURT: Otherwise, ready to proceed?

13 MR. HATTEN: Yes, sir.

14 MR. CONNOR: Yes, sir.

15 THE COURT: All right. Let's bring the jury
16 in. The Court will request a poll. I have excused one
17 member.

18 MR. HATTEN: We have a copy of the
19 qualification. Since there was some question about that,
20 I'm going to go ahead and move that into evidence when the
21 time comes.

22 MR. SCHWERTZ: Judge, we have an objection.
23 We know Mr. Little is qualified, so --

24 MR. HATTEN: No objection.

25 MR. SCHWERTZ: No. He is qualified.

1 THE COURT: No objection, proper party.
2 Stand for the jury, please.

3
4 (Whereupon, the jury entered the
5 courtroom.)

6
7 THE BAILIFF: Eight jurors in the box, Your
8 Honor.

9 THE COURT: Good morning, ladies and
10 gentlemen. The Court requests a poll.

11 Let's be seated, please.

12 THE CLERK: Toni Acosta, Ella Hunter, Barbara
13 Ann Davis, George Bonaparte, Mary Zepp, Heidi Bane, and
14 Sheila Gerst.

15 Thank you.

16 THE COURT: Members of the jury, I had to
17 excuse April Langhorne this morning, so the number one
18 alternate is now activated. She was having family problems
19 and transportation problems, so she has been excused.

20 Friday we ended up, the plaintiff was
21 continuing with their case. This morning they shall
22 continue that. And, Mr. Hatten, are you ready to proceed?

23 MR. HATTEN: I am, Your Honor.

24 THE COURT: All right. Call your next
25 witness.

1 MR. HATTEN: Mike Little.

2 THE COURT: Mr. Little, come forward, please.

3 Has Mr. Little been sworn.

4 THE CLERK: Were you sworn the first day?

5 MR. HATTEN: No, he was not.

6

7 (Whereupon, the witness and the reporter
8 were duly sworn.)

9

10 THE COURT: Come up here on my left, Mr.
11 Little. Answer Mr. Hatten, please.

12

13 MICHAEL A. LITTLE, the Plaintiff, having been
14 called as a witness by and on his own behalf, having been
15 previously duly sworn, was examined and testified as
16 follows:

17

18 DIRECT EXAMINATION

19

20 BY MR. HATTEN:

21 Q. Good morning, Mike.

22 A. Good morning.

23 Q. Introduce yourself to the jury.

24 A. My name is Michael Anthony Little.

25 Q. Mike, you are the son of Zeb little; is that

1 right?

2 A. Yes, sir.

3 Q. You are his only son?

4 A. Yes, sir.

5 Q. Mike, what were the two most important things
6 in Zeb Little's life?

7 A. The Marine Corps and me.

8 Q. When you were a child -- tell the ladies and
9 gentlemen of the jury about your relationship with your
10 father when you were just a very young boy.

11 A. My relationship was great. We used to do a
12 lot of things together; build hotrods, go fishing, camping.
13 You know, we were animal lovers. So stuff like that.

14 Q. Now, there came a time in your life where
15 your mother and your dad were divorced; is that right?

16 A. Yes, sir.

17 Q. And how old were you?

18 A. Twelve years old.

19 Q. And did your mother ask for custody of you?

20 A. No, sir.

21 Q. Your dad wanted custody of you?

22 A. Yes, sir.

23 Q. So did you then go live with your father?

24 A. Yes, sir.

25 Q. And you lived with your father through high

1 school?

2 A. Yes, sir.

3 Q. After your parents divorced, did your mother
4 have anything else to do with you?

5 A. No, sir.

6 Q. So your father was essentially your only
7 parent as you grew up?

8 A. All I had. All I had.

9 Q. Now, as you went through high school, did you
10 get in -- well, tell me, as you went through high school,
11 you were living with your dad, and what -- what was the
12 relationship between the two of you while you were growing
13 up and still in high school?

14 A. It was great. We got -- you know, as you get
15 older you get a little bit closer. You know, we always did
16 things together. He would help me with my homework, if I
17 needed it. I played football, and he would come to my
18 games, and so forth.

19 Q. You are not a small fellow right now. Do you
20 work out, Mike?

21 A. Yeah, every other night.

22 Q. And how long have you been trying to be
23 physically active like that?

24 A. Since high school.

25 Q. Okay. Now, were you in any trouble in high

1 school?

2 A. Not while I was in school.

3 Q. And did you graduate from high school on
4 time?

5 A. Yes, sir.

6 Q. After -- well, before that time you said you
7 worked on cars with your dad; is that right?

8 A. Yeah. We built -- he had a '68 Plymouth
9 Road Runner and a '69 Camaro.

10 Q. I don't know a thing about cars. What type
11 of work did you and your dad do together on cars when you
12 were a teenager?

13 A. Build the motors from bottom up, take them
14 apart and rebuild them, put stroker kits in them, tunnel
15 rams. You know, just high-performance stuff.

16 Q. You are speaking Greek to me, but you and
17 your dad would do this together?

18 A. Yes, sir.

19 Q. And these are what, like high-performance
20 cars? Is that what you did?

21 A. Hot rods, late '60s.

22 Q. What did you and your dad do on weekends?

23 A. Saturday night -- we mainly went to Langley
24 raceway on Saturday nights.

25 Q. How often did you do that?

1 A. Every Saturday.

2 Q. And what goes on at Langley raceway?

3 A. Racing, hot rods. They have title NASCAR
4 races.

5 Q. And this is the way you and your dad enjoyed
6 each other's company?

7 A. Yes, sir.

8 Q. Now, after high school, I think the jury
9 already knows, but you made a wrong turn; is that right?

10 A. Yes, sir. I got involved with the wrong
11 crowd.

12 Q. And what happened?

13 A. I got involved with some kids. When I got
14 out of high school I didn't have a job right away, and they
15 told me I could make some quick money selling drugs. So,
16 you know, like a young boy, being hard-headed, I did it.

17 Q. And you were convicted?

18 A. Yes, sir.

19 Q. And where did you -- where did you serve your
20 time?

21 A. I spent a year in the city jail, and after
22 three months I was there, upon good behavior I was moved to
23 the kitchen and trustee. And after that year I didn't have
24 long left, I had such good behavior, they sent me to the
25 city farm for the last six months.

1 Q. Now, that was when you were nineteen years
2 old?

3 A. Yes, sir.

4 Q. How old are you now?

5 A. Twenty nine.

6 Q. So over the last ten years have you been in
7 any trouble whatsoever?

8 A. No, sir.

9 Q. And I know it sounds odd, but do you smoke or
10 drink?

11 A. No, sir.

12 Q. Did you ever smoke or drink?

13 A. No, sir.

14 Q. And how did your father -- what influence did
15 your father have on you?

16 A. He liked it because I didn't have no bad
17 habits. He said I would always be in perfect shape.

18 Q. So your father was proud of you for that?

19 A. Yes, sir.

20 Q. Now, as you have gone through the last ten
21 years have you been gainfully employed?

22 A. Yes, sir.

23 Q. And what type of work have you done?

24 A. Landscaping.

25 Q. And I believe you have told me you did the

1 landscaping up at the Canon company?

2 A. Yes. I took care of the grounds.

3 Q. When you drive by that place on Canon
4 Boulevard?

5 A. It is a lot of grass you can't see from the
6 road.

7 Q. And have you done other jobs besides -- has
8 that been the main thing that you have done?

9 A. No. I did that. And I went to basic
10 instructions and started out as a rake man and worked my
11 way all the way up to paving machine operator.

12 Q. And now you have another way that you also
13 make a living. What is that?

14 A. Yeah. It brings good money. It is a home
15 business, but I buy and sell NASCAR collectibles on E-Bay.

16 Q. NASCAR collectibles on E bay. What, do you
17 guy a collection and break it up and sell it piece by
18 piece?

19 A. Right.

20 Q. Continuing your interest in NASCAR?

21 A. Automobiles.

22 Q. Now, when you were in jail, tell me how you
23 and your father bonded through that period of time.

24 A. Well, the good thing is my dad didn't think
25 no less of me. You know, I knew I had let him down and he

1 forgive me for it, and I did what a man would do and I did
2 my time. And my dad would come see me every week, put
3 money on my canteen, brought me underwear, socks, T-shirts,
4 you know, what a father would do.

5 Q. And did he continue to come see you
6 routinely, regularly, throughout the whole time that you
7 were paying for that mistake?

8 A. Yes, sir, he did.

9 Q. And when you got out of jail and you were
10 nineteen years old, where did you go to?

11 A. With my father.

12 Q. And then after you got yourself employed and
13 got yourself on --you were financially able to take care of
14 yourself, from then on you have been taking care of
15 yourself; is that right?

16 A. Yes, sir.

17 Q. Now, from that landscaping business and so
18 forth, what are your hopes for the future? And then we are
19 going to turn to your dad.

20 A. Well, my future -- it was my dad's dream,
21 also -- I want to start my own landscaping business and buy
22 me a good home and settle down and continue to be a good
23 citizen.

24 Q. Now, before your dad become ill -- we have
25 heard the doctors talk about his illness -- tell the ladies

1 and gentlemen of the jury about whether he was a strong man
2 and a hard-working man.

3 A. He was like any other Marine, he wouldn't
4 give up. He was strong-willed. He just, you know, was
5 great at doing everything before he got sick.

6 Q. Now, you mentioned earlier in your testimony
7 that the two most important things were the Marines and
8 you --

9 A. That is right.

10 Q. -- to your dad?

11 Now, can you identify this picture?

12 A. Yes, sir. That is my dad back in 1965, '66.

13 Q. And is -- is this when he was in the Marines?

14 A. Yes, sir.

15 Q. And is this when he was serving our country
16 in Vietnam?

17 A. Yes, it is.

18 MR. HATTEN: I'm going to move that into
19 evidence in a moment.

20

21 BY MR. HATTEN:

22 Q. Now, because he was a Marine before he got
23 sick what were the types of activities that you and your
24 dad liked to do besides those cars?

25 A. Liked to go camping and we fished a lot. He

1 was a real big fisherman.

2 Q. Now, when you went camping with your dad, did
3 you stay in a Holiday Inn?

4 A. No. We stayed in a tent at Jamestown
5 Campground.

6 Q. And so he liked the outdoors?

7 A. Well, he said he was a Marine, he wasn't
8 going to stay in a brick building. He stayed in a tent
9 there, he was going to stay in a tent there.

10 Q. And did he like to go fishing?

11 A. Oh, yeah.

12 Q. And where would he take you fishing?

13 A. While we were camping we would go to the
14 Jamestown Beach, and most of the time we'd go to see Gull
15 Pier in the middle of the Chesapeake Bay Bridge.

16 Q. Even though you had your own job and your own
17 life, you and your dad continued to spend weekends together
18 regularly throughout the time?

19 A. Yes, sir.

20 Q. For the last ten years, weekends you
21 continued to go to the races with him every weekend and
22 that type of thing?

23 A. Yes, sir. We were all we had.

24 Q. Now, your dad worked in construction?

25 A. Yes, various construction.

1 Q. And was he in good health, strong, working
2 regularly?

3 A. Oh, yeah. He could lift some boards.

4 Q. All right. Now, in about 2001, the
5 doctors -- we have heard testimony where he went to the
6 Riverside Hospital.

7 A. Yes.

8 Q. Do you recall that?

9 A. Yeah. His brother took him.

10 Q. And did you see him in the hospital at that
11 time?

12 A. Yes, sir, I did.

13 Q. And were they able to make a diagnosis of
14 anything at that time?

15 A. No. They couldn't tell him nothing at that
16 time, nothing at all.

17 Q. Okay. Now, later on, in April of 2002, what
18 happened?

19 A. In April, 2002, I took him back to the
20 hospital.

21 Q. Which hospital this time?

22 A. It was the VA.

23 Q. And what happened?

24 A. I took him to the VA and he had problems of
25 short of breath. They found out he had lung fluid, and

1 they drained it. And I thought he would be better after
2 that.

3 Q. Did they operate on him at that time?

4 A. Yes. They drained the fluid off of his lung.

5 Q. All right. At that time did you understand
6 anything about this diagnosis of mesothelioma?

7 A. No, sir.

8 Q. Did you understand or did your dad at that
9 time know anything about asbestos having played a role in
10 his illness?

11 A. No, sir.

12 Q. Now, that was in April of 2002. Over the
13 next year, how did your dad do?

14 A. Kind of deteriorated. He got, you know, more
15 short of breath. He lost a lot of weight and he just -- he
16 didn't want to eat and didn't want to be bothered. I knew
17 something was wrong, but, you know, we didn't know.

18 Q. And then what happened? Did you take him
19 back to the VA?

20 A. Yeah, in 2003.

21 Q. And when you took him back, and it had now
22 been over a year since he had that fluid taken off, did
23 they tell you what had really happened in that operation?
24 Did they give you a diagnosis?

25 A. They told him that he had that malignant -- I

1 can't pronounce it.

2 Q. Mesothelioma?

3 A. Mesothelioma. They told him that time two
4 out of three that he had it.

5 Q. And did your -- did your dad understand from
6 that time forward that he was going to die?

7 A. Yes. The doctor let him know that he was
8 going to die.

9 Q. From then on did you participate in helping
10 your dad with his illness?

11 A. Yes, sir. I did everything for him.

12 Q. Tell me the types of things that you took
13 care of.

14 A. I would take him to all of his doctors'
15 appointments. When he needed breathing medicine I would
16 take him to get it. I bought all of his groceries, did his
17 clothes, and paid his bills.

18 Q. Okay. Now, as his condition got worse, tell
19 me what you noticed about the pain that he was in.

20 A. He really wouldn't tell me he was in pain,
21 but I would see his pain because I would see a tear in his
22 eye every now and then. And the one thing that he would do
23 for his pain, he would go out on the front porch and just,
24 you know, Leave me alone. And I come up with the reason he
25 did that because he didn't want to -- he didn't want me to

1 see him hurt.

2 Q. How long would he stay out on that front
3 porch?

4 A. For hours.

5 Q. Now, did the hospital give him anything for
6 pain?

7 A. No, sir, the doctor didn't prescribe him one
8 thing at all.

9 Q. And how did that make you feel?

10 A. Devastated, because, you know, I knew there
11 was nothing that I could do, so -- I mean, I called the
12 hospital and called the hospital, but it didn't do no good.

13 Q. And so did your dad from time to time drink
14 alcohol to try to medicate himself?

15 A. Yes, sir. That is why he drank, to try to
16 keep his mind off of his pain.

17 Q. Now, did he ever say anything to you about
18 what this felt like?

19 A. Yeah. He said that it's -- you don't never
20 want to feel like it. He said, It is the scariest feeling
21 that you will ever feel, not knowing if you are going to
22 wake up in the morning and not knowing if you are going to
23 breath in the minute.

24 Q. Now, did he eventually lose the ability to
25 breathe on his own?

1 A. Yes. Eventually he was put on oxygen all
2 night long while he was sleeping and the nebulizer
3 treatment, which is every few hours. But he did it often
4 more.

5 Q. And how did his inability to breathe affect
6 just the regular activities of daily living?

7 A. He just -- he got to where he didn't want to
8 leave the house. He couldn't take the trash out. He had
9 to be on that machine constantly.

10 Q. I think you mentioned something to me about
11 when he would take a shower?

12 A. Oh, yeah. When he would take a shower he had
13 to take a ice-cold shower. And he hated that, but the
14 steam would affect his breathing.

15 Q. Now, as time went on, did he have to use that
16 breathing machine in the daytime as well as the nighttime?

17 A. Yes, sir.

18 Q. And when he would lose his breath what
19 happened? I mean, how did that --

20 A. When he would lose his breath --

21 Q. When he would lose his breath and not be able
22 to breathe, would that frighten him?

23 A. Yes, he -- being a Marine, you are not really
24 scared of nothing. You know, if you are fighting a war you
25 are not really scared of nothing. But he looked at me, he

1 was scared to death.

2 Q. Now, as time went on he constantly
3 deteriorated?

4 A. Yes, sir, got worse and worse.

5 Q. His breathing got worse, his weight was lost?

6 A. Yeah. He didn't want to eat nothing. I had
7 to force him to eat.

8 Q. Spend most of his time in bed sleeping?

9 A. He would try to sleep a lot, and get rid of
10 the pain, also, but he would end up waking up on his
11 machine.

12 Q. Now, on the day that he died, what happened?

13 A. I knew something was wrong. My dad came up
14 to me. He said, I want you to go to bed early tonight --

15 Q. No, before that, during the day?

16 A. Okay. He told me to get my camera.

17 Q. No, let's go way back. The begriming of that
18 day, the day he died, did you take him to the hospital?

19 A. Oh, he ran out of breathing medicine because
20 the way he got his medicine from the VA hospital is they
21 send it in the mail, you know, by the boxful.

22 Well, he didn't get none. They never sent it
23 on time. I took him to the VA and we spent three hours
24 there without him being able to get on his machine. So he
25 was kind of in rough shape.

1 Q. This is the day that he died?

2 A. Yes, sir.

3 Q. That night then what happened?

4 A. It was about eight or nine o'clock and he
5 came up to me and he says, You got that new digital camera.
6 He said, I want you to take a picture of me just the way I
7 look right now.

8 And at that moment I thought something was
9 wrong because my dad wasn't a picture man. So I took his
10 picture. He said, I want you to go to bed early. And I
11 said, Okay, all right. So I went to bed early. And for
12 some reason I woke up two hours later. I felt something
13 was wrong. And when I went to check on him, the breathing
14 machine was running. You know, I thought everything was
15 all right, but when I really walked up to him he had blue
16 lips and he was gone. There was nothing I could do. It is
17 like the medicine didn't even help him no more.

18 Q. Can you identify this photograph?

19 A. That is the picture I took the night he died.

20 Q. Had he ever asked you to take his picture
21 before?

22 A. No, sir. He wasn't a picture man.

23 Q. Was he angry that he was dying?

24 A. Yeah, very, because he knew he wouldn't be
25 able to see me grow up.

1 Q. This picture looks angry.

2 A. Yeah.

3 Q. Was he angry when this was taken?

4 A. Yeah, very. Angry and scared.

5 Q. Now, when -- before your dad died, in those
6 months before he -- the year or so before he died, did he
7 try to do some things that he knew he might not ever have a
8 chance to do again?

9 A. Yes.

10 Q. You talked about fishing. What did he do to
11 try to do one last time with you?

12 A. About four months before he died we bought a
13 boat together. And it was something he always wanted, but
14 we never had the money. We got in the boat. And I had to
15 rig the boat up, which cost a little bit of money, but it
16 worked. We had to install a cigarette lighter on the boat
17 and we had to get a power inverter to where we could plug
18 the house plug on so we could put his breathing machine on
19 the boat. He was too weak to fish, but he wanted to go and
20 he was happy.

21 Q. So you bought the boat and you hooked up his
22 oxygen machine and you put him in the boat. Could he fish?

23 A. No, he was too weak. He couldn't even reel.

24 Q. But you took him out into the Chesapeake Bay
25 in the boat?

1 A. Yep. We went all the way to the Eastern
2 Shore.

3 Q. And all your life you and your dad wanted a
4 boat and this is the first time he ever went out in it?

5 A. Yep. He only got to enjoy it one time.

6 Q. And did you have a good day?

7 A. It was the best day of my life. I could tell
8 he had a lot of fun.

9 Q. You caught fish and he enjoyed the day?

10 A. Yep.

11 Q. Now, was that the last time that the two of
12 you were able to share a day together and enjoy the
13 camaraderie that you had had all of your life?

14 A. Yes, sir, it was.

15 Q. Now, tell me a little bit about your dad. I
16 understand your dad loved animals; is that right? You are
17 laughing, but he had some weird animals, didn't he? He had
18 an iguana?

19 A. Yeah, we had an iguana. He was about five
20 foot. He would walk around the house like a little dragon.

21 Q. And about a year before your dad died as an
22 indication of his sense of humor did you tell him to get a
23 dog or ask him to get a new dog, that that would be good
24 company for him?

25 A. He said that he wanted a companion to be

1 there with him all of the time, and I said, Well, get you a
2 dog. Well, he comes up with the idea, he says, Well,
3 everybody else has got a dog. So he wanted to get a pig.

4 Q. So he got a little pig?

5 A. Yeah, we went and got a little pig and we put
6 him in the yard.

7 Q. And did that give your dad a lot of pleasure?

8 A. Oh, yeah. He loved it. He had so many
9 people stopping and looking.

10 Q. And what was the pig's name?

11 A. Wilbur, from Charlotte's Web, the little
12 silver color.

13 Q. So your dad -- your dad loved animals?

14 A. Yes, sir.

15 Q. And he loved you. And let me ask you that.
16 Did you ever tell your dad you loved him?

17 A. Yes. And he said that meant the world to
18 him.

19 Q. And what about him? Did he tell you he loved
20 you?

21 A. Yes, he did. He said that, We are all we
22 have. He said that I'm all he had.

23 Q. Okay. Now, when your father died you made up
24 some T-shirts?

25 A. Yeah, I did the different type of funeral.

1 I did it the way I wanted it.

2 Q. And what was that?

3 A. My dad wasn't a suit-and-tie guy. Neither am
4 I, as you can see. I made two T-shirts up. One he wore
5 and one I wore.

6 Q. And what did his say?

7 A. His says, In memory of my father Zeb A.
8 Little, Jr., November 17th, 1941, to August 7th, 2004, and
9 on the bottom of his it said, I'm heaven bound. And as you
10 can see on mine, mine said, He is heaven bound.

11 Q. And was he buried in this T-shirt?

12 A. Yes, sir.

13 Q. And the only difference was his said, I'm
14 heaven bound, and yours says, He's heaven bound?

15 A. Correct.

16 Q. Now, when your father died, he was given
17 honors by the Marine Corps?

18 A. He was given full honors. The Marine Corps
19 called me and said they would like to have him in the wall.

20 Q. The wall where?

21 A. This is where all of the soldiers are that
22 served.

23 Q. This is the Washington --

24 A. Arlington National Cemetery.

25 Q. The national cemetery?

1 A. Yes, sir. He was given full honors,
2 twenty-one-gun salute.

3 Q. And is this a picture you took that day --

4 A. Yes, sir, it is.

5 Q. -- of the riflemen who gave the twenty-
6 one-gun salute?

7 A. Yes, sir.

8 Q. And what is that picture?

9 A. That is them folding the flag up.

10 Q. And let me see if there is another one. And
11 as he was brought to the cemetery -- I have these out of
12 order.

13 A. That is him in the urn, of the officers
14 carrying him in the urn. And the other officers carrying
15 him to the ceremony spot.

16 Q. And on the program that --on the day that he
17 died, can you identify this? Is that the funeral program?

18 A. Yes, sir.

19 Q. And even in his funeral program you wanted
20 him known as a Marine?

21 A. Yes, sir.

22 Q. And the way he looked when he was a Marine?

23 A. Yes, sir.

24 Q. Marines, I'm sure, teach their sons to be
25 strong. And you have tried to be strong?

1 A. Yes, sir, I have tried.

2 Q. What has the loss of your father meant to
3 you? You are a big, strong, young man and he was a tough
4 Marine. What has it meant to you?

5 A. Well, you know, when you lose somebody and
6 it's all you have ever had, it don't matter how strong you
7 are. I'm emotionally lost. I'm devastated. I live at
8 home day by day now not having nobody to help me, nobody to
9 give me wisdom. You know, nobody to tell me, I love you,
10 any more.

11 Q. From the time you were a little boy through
12 the divorce, through your high school, through the tough
13 time that you spent in jail, through your young adulthood,
14 who has been the one person that has stood behind you and
15 was there for you from the very beginning?

16 A. My father.

17 MR. HATTEN: Your witness.

18 THE COURT: Cross-examine?

19 MR. SCHWERTZ: One moment, Your Honor.

20 No cross, Your Honor.

21 THE COURT: No cross. Mr. Little, you may
22 step down. Be careful stepping down. Have a seat at
23 counsel table.

24 Mr. Hatten, next witness?

25 MR. HATTEN: Yes, sir. We have no further

1 witnesses at this time, Your Honor. There are a number of
2 different exhibits and so forth that I would like to move
3 into evidence.

4 THE COURT: Are these the ones previously
5 discussed?

6 MR. CONNOR: I believe so, Your Honor.

7 THE COURT: I will allow those to be admitted
8 for the reasons stated subject to the exceptions stated on
9 the record by the defense.

10 MR. HATTEN: I need to coordinate these
11 documents with the pretrial document numbers.

12 THE COURT: Let me let the jury take a
13 ten-minute break and see if we can't do that.

14 Stand for the jury, please.

15 THE CLERK: Mr. Hatten, can I go over these
16 exhibits you have placed up here?

17 MR. HATTEN: Yes, ma'am. And I would like to
18 move those documents into evidence if I could.

19 MR. SCHWERTZ: No objection to the ones --

20 THE COURT: To these. Let's just make sure
21 that we all know what numbers we are using.

22 THE CLERK: The framed photo with the metal
23 is plaintiff nine. The photo -- I don't know whether. I'm
24 going to mark this. I don't know whether you want to make
25 a Xerox copy of this.

1 MR. HATTEN: That is on a disk. I can make a
2 new one.

3 MR. SCHWERTZ: We don't have any problem with
4 your photocopying these things and have them go into
5 evidence as opposed to the actual --

6 THE COURT: Let's go ahead and mark the
7 originals, make copies, and release the originals back.

8 MR. HATTEN: Sure. Thanks.

9 THE CLERK: So the photo of Mr. Little will
10 be plaintiff ten. The T-shirt plaintiff eleven. And the
11 funeral program will be plaintiff twelve.

12

13 (Plaintiff's Exhibit Nos. 9 through 12
14 were marked for identification.)

15

16 MR. HATTEN: Now, in addition to these
17 exhibits, Judge, there is a list of workman's compensation
18 claims, just a summary sheet, which is part of their
19 answers to interrogatories, which I think is Exhibit Number
20 59, Garlock Exhibit 59.

21 THE CLERK: Is this the Dieffenderfer?

22 MR. HATTEN: No. This is a list of claims
23 from the --

24 THE COURT: There was a motion heard on that
25 deposition that was denied by the Court, but counsel will

1 proffer that.

2 THE CLERK: It was admitted into evidence on
3 the twenty-third.

4 THE COURT: No, it wasn't.

5 THE CLERK: It was identified.

6 MR. HATTEN: Which one is that?

7 THE CLERK: Houghton deposition.

8 THE COURT: I'm not talking about Houghton.

9 MR. SCHWERTZ: Lloyd Green. That was the one
10 we talked about this morning. Are you talking about that
11 one, Your Honor?

12 MR. HATTEN: Lloyd Green is the transcript.

13 THE COURT: All right. And that will be
14 proffered by plaintiff's counsel and sealed as rejected by
15 the Court.

16 MR. HATTEN: Yes, sir. Have you got that
17 copy we can proffer?

18 MR. MCCORMICK: Yes, sir.

19 MR. HATTEN: We will proffer this at this
20 time.

21 THE COURT: Exceptions as stated on the
22 record.

23 THE CLERK: This is the one that is going to
24 be sealed.

25 MR. HATTEN: Yes, sir.

1 THE COURT: And proffered.

2 Mr. Connor.

3 MR. CONNOR: The plaintiff has shown me a
4 list of worker's compensation claims from Garlock. One
5 that has been talked about in the Houghton deposition, that
6 being Grace Baylord. There is one that predates that, I
7 understand, Vera Clemmons claim. This is a summary sheet
8 we had to answer in accordance with the answers to
9 interrogatories which, as you know, is evidence which is
10 reasonably calculated to lead to discovery of admissible
11 evidence or answers that could lead to that.

12 I would object, Your Honor, to the claims
13 that postdate Mr. Little's exposure, that being from Clara
14 Bacon on, which is the majority of this list.

15 And there is also information on here
16 regarding payments and things of that nature which I don't
17 are part and parcel of this trial or relevant. I know in
18 the last trial that I was here with Judge Curran that we
19 did list the name of the person, the years they worked, or
20 it might have been their years of exposure, and then the
21 date of their claim and the type of claim it was. But we
22 did not get into all of the other information. That was
23 the summary that was permitted before Judge Curran.

24 THE COURT: I assume this is coming in on the
25 notice issue.

1 MR. CONNOR: Yes, Your Honor.

2 THE COURT: It seems to me claims that were
3 previous to Little's work time are relevant. I don't know
4 if the amount are relevant to this. It is more confusing.
5 Is there any way we can redact it or reprint it?

6 MR. SCHWERTZ: Judge, I actually back in my
7 hotel room have the exact summary that was submitted in the
8 consolidation. I know Mr. Hatten wasn't part of that, so
9 he has never seen that, but I will be happy to print that
10 and send it to him and bring it in tomorrow if you would
11 like.

12 MR. HATTEN: I think we have -- as an
13 alternative, we have two or three exhibits in our marked
14 exhibits that are the comp files of the two early cases.
15 They are exhibits five and six and fourteen and
16 twenty-five. We are just going to have those two cases,
17 Garlock exhibits.

18 THE COURT: Is there a cover sheet that can
19 be introduced to at least allow arguments both ways on that
20 without getting into the detail of the claim?

21 MR. SCHWERTZ: Judge, that is what that
22 summary was. It was -- as Mr. Connor suggested, it was the
23 name of the claimant, the years of exposure, the disease
24 process. We would object to the entire comp file claim
25 going in because, certainly, there is lots of irrelevant

1 material.

2 MR. HATTEN: Well, the claim of and medical
3 report supporting the claim are in the exhibits.

4 MR. SCHWERTZ: The summary sheet would say
5 there was a disease diagnosed, and we are not going to
6 dispute what the disease process was.

7 THE COURT: And what was the medical
8 condition in these cases.

9 MR. HATTEN: Severe asbestosis.

10 THE COURT: Asbestosis?

11 MR. HATTEN: Yes.

12 THE COURT: I mean, the Court will be happy
13 to admit the summary sheet, but I don't yet see the basis
14 for going into all of this claim.

15 MR. HATTEN: If I could confer with counsel.
16 We will accept the summary, Your Honor.

17 THE COURT: Is this a very long document?

18 MR. SCHWERTZ: One page.

19 THE COURT: Can I have five, six, fourteen,
20 twenty-five? Can you tell Ms. Northway what to type up?
21 Is it a complicated document?

22 MR. SCHWERTZ: No, Your Honor. It is two or
23 three lines.

24 THE COURT: I think the State can underwrite
25 the expense, if you will get that ready. If you could get

1 that information and put it on the side of the table, we
2 will get her when we get the jury back and see if she can
3 do it until it is acceptable by counsel.

4 Ms. Northway, we need your services. We need
5 you to type up a little -- I know, it is nice to feel
6 needed. We need a little comparative summary chart
7 involving some worker's comp claims where you are to
8 indicate, I believe, the employee -- these are pre-1968,
9 the fact that there was a claim and that there was a
10 diagnosis and no other information. Mr. Schwertz has it
11 back in his hotel room. Apparently, a very simple little
12 thing. And I -- it is probably not up to your skill level,
13 but if you could assist them and find out what they want,
14 and that will allow Mr. Hatten to make sure the jury knows
15 what it is.

16 MR. HATTEN: Do you have the documents that
17 we have offered through Mr. Houghton?

18 THE CLERK: I have plenty here. Which ones
19 would you like?

20 THE COURT: The ones we have given numbers
21 through today.

22 THE CLERK: We have not given any numbers
23 today other than those that I have just shared with you
24 during Mr. Little's testimony. In the past we have had the
25 Houghton depo as plaintiff two, if that will help. I'm not

1 sure exactly what you are looking for.

2 MR. HATTEN: And this memo here, I think, is
3 what we are talking about 1947, number six.

4 MR. SMITH-GEORGE: I have got what I want.

5 MR. HATTEN: That is just the Garlock portion
6 of it.

7 THE COURT: Mr. Schwertz, is that what should
8 be on that table?

9 MR. SCHWERTZ: Well, Mr. Hatten wanted one
10 section to show that we accepted the claim rather than put
11 the amount we paid. I think if it only goes to notice, we
12 have the date the claim -- the date of the claim, that is
13 the purpose for notice.

14 MR. HATTEN: It is not the acceptance, it is
15 that there was a court order -- I don't want there to be
16 any question about whether it was a valid claim or not.
17 The claim was ordered. These are admitted people -- there
18 isn't any controversy about whether or not, in fact, they
19 had the disease.

20 MR. SCHWERTZ: Judge, I don't think we are
21 going to stand up and argue --

22 MR. HATTEN: That is what is in all of the
23 papers we are not putting in, is the Court order.

24 THE COURT: But the reason this is coming in
25 is what, notice?

1 MR. HATTEN: Yes, sir.

2 MR. SCHWERTZ: And we are on notice as soon
3 as they make the claim, and the date of claim is on here.

4 THE COURT: The date of the claim?

5 MR. SCHWERTZ: Yes, sir.

6 THE COURT: And there is no question that the
7 claim was not rejected.

8 MR. HATTEN: Correct.

9 MR. CONNOR: I think what happened, Your
10 Honor, is some were, I guess, in litigation, but they
11 were --

12 MR. HATTEN: There are two of them.

13 MR. CONNOR: Both of them were paid. There
14 was an order by the worker's compensation board because it
15 met the standards for the board of compensation for the
16 State of New York at the time.

17 THE CLERK: Ladies, plaintiff thirteen, which
18 is denied -- has been denied by the Court, is a workman's
19 comp board minutes of December 18th, 2002 and that will be
20 sealed by the Court.

21

22 (Plaintiff's Exhibit No. 13 denied.)

23

24 MR. HATTEN: So you don't object, Your Honor
25 -- we would like the claim was filed and approved -- the

1 following claims were filed and approved. And then you can
2 list the different claims and what the diseases were and so
3 forth.

4 THE COURT: I mean, whether someone approves
5 them or not is not important to the Court. That could be
6 totally wrong. What is important to me from a notice
7 standpoint is that these claims were filed with Garlock.

8 Now, I don't accept -- I mean, I don't know
9 what we mean by approved. You approve things.

10 MR. HATTEN: Court order. There is a court
11 order.

12 THE COURT: Well, court orders are entered
13 for a lot of reasons. I don't know why you need approved.
14 Are you afraid they are going to argue that it doesn't give
15 them notice?

16 MR. HATTEN: If they are not going to argue
17 that. I doubt they are going to argue that.

18 THE COURT: Let's just go ahead and give the
19 date of the claim and you were on notice you had the claim
20 filed.

21 MR. SCHWERTZ: Thank you, Your Honor.

22 THE COURT: All right. The jury has been out
23 fifteen minutes.

24 MR. HATTEN: Can we just give these next
25 numbers? And then we will identify where they are in

1 pretrial at a later time.

2 THE COURT: What Mr. Hatten would like to do,
3 I think, is summarize for the jury the meaning of each of
4 these documents and point out to them why they have been
5 admitted.

6 So I don't know that it is critical right
7 now, as long as defense does not have an objection to it,
8 that we have the eventual numbers. But I don't want to
9 keep this jury waiting for this.

10 THE CLERK: Can you give me your reference
11 numbers, Mr. Hatten, and I will jot those down and then you
12 can be on with it?

13 MR. HATTEN: That is what I'm trying to do.

14 THE CLERK: I'm sorry.

15 MR. HATTEN: When we cut this thing down to a
16 hundred fifty exhibits we didn't put them in chronological
17 order.

18 MR. SMITH-GEORGE: I will identify them by
19 date and then we will fill back in. First is Minutes of
20 the Organizational Meeting of the Asbestos Textile
21 Institute, November 16, 1944.

22 THE CLERK: Okay.

23 MR. SMITH-GEORGE: Second is Minutes and
24 Recommendations of the Air Hygiene --

25 MR. HATTEN: That's -- forty-four is Garlock

1 twenty-two.

2 THE COURT: Why is it we are still talking
3 about exhibits that were put into evidence several days
4 ago?

5 MR. HATTEN: They weren't put in.

6 THE COURT: Are these the same minutes?

7 MR. HATTEN: The same ones. They weren't put
8 in.

9 THE CLERK: Minutes of July 11, '47, Garlock
10 twelve.

11 MR. SMITH-GEORGE: Garlock twenty-three,
12 actually.

13 THE CLERK: It was Garlock twelve.

14 MR. SMITH-GEORGE: They were already
15 admitted.

16 THE CLERK: They were already admitted.
17 Y'all are freaking me out.

18 MR. SMITH-GEORGE: How many of the --

19 THE CLERK: We have minutes dated March 7th,
20 '56, Garlock four. Minutes dated March 13th, '46, Garlock
21 ten. Minutes dated June 19th, '46, Garlock eleven. And a
22 memo dated July 11th of '47, which is Garlock twelve.

23 MR. SMITH-GEORGE: These are additional.

24 THE CLERK: Those things are already in and
25 what you are telling me is additional.

1 MR. CONNOR: Except for that one you may
2 have -- already have it.

3 THE CLERK: Minutes of the AIC dated --

4 MR. SMITH-GEORGE: The Air Hygiene Committee
5 is November 17, 1947.

6 THE CLERK: I'm sorry. That date again?

7 MR. SMITH-GEORGE: November 19, 1947.

8 THE CLERK: Okay.

9 MR. SMITH-GEORGE: The next is Minutes of the
10 General Meeting of the Asbestos Textile Institute, February
11 12, 1965. Minutes of the General Meeting Asbestos Textile
12 Institute, October 8, 1965. Minutes of the General Meeting
13 of the Asbestos Textile Institute, February 11, 1966.

14 THE CLERK: Okay.

15 MR. SMITH-GEORGE: Minutes of the Board of
16 Governor's Meeting from the Textile Institute, October 6,
17 1966. And Minutes of the General Meeting of the Asbestos
18 Textile Institute October 7, 1966.

19 THE CLERK: Okay.

20 MR. SMITH-GEORGE: And then we are going to
21 also offer the Hemeon report. You said that has not been
22 offered yet?

23 MR. HATTEN: No.

24 MR. SMITH-GEORGE: That is Joint Exhibit
25 Number thirty seven.

1 THE CLERK: Okay.

2 MR. SMITH-GEORGE: And it is dated June,
3 1947.

4 THE COURT: Any objection?

5 MR. CONNOR: None of those previously stated.
6 Those were the ones I previously reviewed, Your Honor.

7 MR. HATTEN: Your Honor, while we are out, we
8 also have various material safety data sheets that were
9 identified at the deposition of Jim Thornton, the
10 industrial hygienist at Newport News Shipyard. These are
11 Joint Exhibit forty-three.

12 THE COURT: Any objection?

13 MR. CONNOR: Yes, sir.

14 THE COURT: You do have an objection?

15 MR. CONNOR: Yes, sir.

16 MR. HATTEN: The purpose of these exhibits,
17 Your Honor, even though these postdate the exposure, the
18 contention is by Garlock that their product -- and they
19 even said it the opening that, Even today we don't have to
20 put a warning. It doesn't create any dust. There is no
21 hazard from our product.

22 Well, in the material safety data sheet that
23 they filed with the Newport News Shipyard they tell them,
24 If there is any dust created from this product, from
25 grinding it or cutting it or anything that releases it,

1 that you should treat it as free asbestos fiber, that you
2 should take precautions, wear a respirator, and that this
3 product can cause mesothelioma.

4 Now, their whole defense contradicts that,
5 and so, Your Honor, the purpose is not notice. The purpose
6 is contradicting their argument about causation and that
7 this, in fact, is a dangerous product.

8 THE COURT: What is the date of those
9 documents?

10 MR. HATTEN: These documents are from the
11 '80s. They are submitted to the Newport News Shipyard and
12 they are signed by the company. And they -- and I will be
13 happy to share a copy with them.

14 THE COURT: Let me hear from counsel.

15 MR. CONNOR: Yes. Your Honor, the material
16 safety data sheets came into being, I believe it was in the
17 '70s, but these --

18 THE COURT: Let's get to bottom-line
19 question. We have got the jury waiting.

20 MR. CONNOR: Bottom line, Your Honor, this is
21 a requirement of OSHA. We are required to put on there any
22 component ingredient, and as to each component ingredient
23 we must say what the dangers are. It is not as to product.
24 In other words, this is being offered for the truth of the
25 matter asserted. In other words, for instance, I gave an

1 example in opening, for instance, play sand is silica. You
2 have to talk about silicosis in an MSD issue. Here because
3 it has as component of asbestos we must talk about all that
4 asbestos can do.

5 THE COURT: Did Mr. Thornton reference these
6 in his testimony?

7 MR. CONNOR: He was asked about it by Mr.
8 Hatten as part of his cross-examination of Mr. Thornton.
9 In other words, he said those are the documents the
10 shipyards received because any supplier to the shipyard of
11 any type of product, not just asbestos products, cleaning
12 products, whatever it might be, have to supply a MSD issue.
13 That is just a requirement of the law.

14 THE COURT: What does -- Mr. Hatten, what
15 does the post-incident -- post-exposure correction or
16 notice prove as far as notice or causation?

17 MR. HATTEN: They are arguing that -- and
18 they will argue that there is no hazard associated with
19 their product even today. They are going to say -- their
20 witness says, There is no hazard. Their witness says, You
21 don't have to wear a respirator with this product. This
22 product won't do anything to you whatsoever even today.

23 And that is directly contrary to the fact
24 they say in the material that they provide to the shipyard
25 that this product can cause mesothelioma. That if you

1 create any dust from grinding or cutting this product that
2 you should wear a respirator, and that it is dangerous.
3 And so it is a direct contradiction. If they didn't -- if
4 they didn't say it wasn't dangerous this wouldn't be
5 relevant at all, but they said their product is completely
6 harmless.

7 MR. CONNOR: May I, Your Honor? Another
8 issue, Your Honor, is always in these subsequent remedial
9 measures, If we put a warning on, as Mr. Smith-George said,
10 in 1977, which postdates -- I mean, they haven't put in
11 evidence about that, but they talked about it in opening
12 and I couldn't get up and object, but they are talking --
13 it is a subsequent remedial measure. And even this -- we
14 are required by law to do it. So if we do it, we are stuck
15 then in every -- in other words, it is being offered for
16 that truth now being applied back to the time when Mr.
17 Little was exposed. In other words --

18 THE COURT: What I am going to do is, number
19 one, deny as exhibits. Number two, I want them marked and
20 segregated. And, number three, if in fact you deny the
21 hazardous condition of asbestos fibers, then I'm going to
22 allow the plaintiff at that time to introduce the
23 documents.

24 MR. HATTEN: All right. Thank you. That's
25 fine.

1 MR. CONNOR: For the distinction, Your Honor,
2 I think my position has never to been to deny the potential
3 hazard of asbestos, but my focus has been on the product of
4 gaskets.

5 MR. HATTEN: That is exactly what they say is
6 dangerous. They say the use of this product is dangerous.

7 THE COURT: Seems to me we can't introduce a
8 whole bunch of documents based on anticipation, but if your
9 client says there is no hazard in the past, present or
10 future, I think this goes to weight or impeachment of that
11 testimony.

12 MR. CONNOR: Very well, Your Honor.

13 THE COURT: Let's mark those and reserve them
14 for the Court and we will admit them at a later time if
15 that is appropriate.

16 MR. HATTEN: And I also have -- thank you.
17 We can mark these collectively. These are -- it is really
18 just a group of material safety data sheets from Newport
19 News Ship, and this is an agreed statement of workman's
20 compensation claims. And then the last -- we have some
21 medical bills.

22 Judge, I think we could probably do this:
23 There are a number of additional things, documents. We
24 have medical bills, funeral bills. And then the other
25 thing we have is these samples of Garlock gaskets that are

1 all enclosed, and I will just ask you to take a look.

2 They've got the name right on it.

3 THE COURT: Let me ask you this, though: Why
4 do we need the jury here while we go through this?

5 MR. HATTEN: Because I want to publish the
6 documents before we rest. That is why.

7 THE COURT: But these documents have already
8 been referenced.

9 MR. HATTEN: Well --

10 THE COURT: We have talked about the minutes.
11 We have talked about --

12 MR. HATTEN: They have been referenced, but,
13 Your Honor, there is a code provision that says if we offer
14 a document, we have a right -- I don't have the number off
15 the top of my head, but I know there is -- that we have the
16 right to read to the jury language from an exhibit that we
17 want to draw their attention to. And these minutes are
18 frequently seven or eight pages long, and there is only
19 about two or three paragraphs of it or one page of it that
20 has the information that we want to draw their attention to
21 it.

22 THE COURT: How long do we have to keep the
23 jury waiting to get prepared to talk to them?

24 MR. SMITH-GEORGE: Why don't we publish this
25 and then we can send them out.

1 THE COURT: I will be happy to take a lot of
2 other exhibit issues or motions up when we don't
3 inconvenience the jury, but if there is a way to get them
4 out here, show them what we want to, and then let them
5 go --

6 MR. SMITH-GEORGE: We are ready.

7 MR. HATTEN: I think we are ready to do that.
8 We may have clean-up issues.

9 THE CLERK: Now, are y'all going to identify
10 a number of things that have been admitted? I need
11 reference points so I know what to pull out of my book to
12 properly mark. Okay? There are a couple I tried to
13 identify on my own while y'all were chatting; however,
14 there are some that have different numbers that look like
15 they are the identical things. So I don't know whether --

16 MR. SMITH-GEORGE: We will spend some time
17 when the jury is not waiting and I will find the pretrial
18 number for each so you will have the exhibit.

19 THE CLERK: Okay.

20

21 (Plaintiff's Exhibit Nos. 14 through 30
22 were received in evidence.)

23

24 THE COURT: Ready?

25 MR. HATTEN: Yeah, ready.

1 THE COURT: Let's bring the jury in.
2 Let's stand for the jury, please.

3
4 (Whereupon, the jury returned to
5 the courtroom.)

6
7 THE COURT: Let's stand for the jury, please.

8 THE BAILIFF: Eight jurors in the box, Your
9 Honor.

10 THE COURT: Let's be seated. Counsel waive
11 the poll?

12 MR. HATTEN: Waive the poll.

13 THE COURT: Members of the jury, counsel has
14 been discussing certain exhibits that you may be referred
15 to at this time. Mr. Smith-George on behalf of the
16 plaintiff.

17 MR. SMITH-GEORGE: Your Honor, at this time
18 we would like to publish some of the exhibits that have
19 been entered into evidence. First is -- this is from the
20 Asbestos Textile Institute. It is dated November 16, 1944.
21 Listed among those present is Garlock Packing Company,
22 George Abbott.

23 Among the goals of this institute is to
24 develop a more creative selling by the industry's salesmen
25 and to instill among such salesmen an attitude of

1 courageous aggressiveness in combating attacks upon the
2 industry, its members, and its products.

3 The next is minutes from the Air Hygiene
4 Committee meeting held on Wednesday, November 19, 1947. It
5 is the consensus of opinion that a program to reduce dust
6 and improve the diagnostic procedures is imperative.

7 Under engineering. The aim, naturally, is to
8 reduce dust. The Industrial Hygiene Foundation would
9 collect existing factual information from institute members
10 on all systems now being used; prepare bulletins with
11 design sketches and distribute this information to
12 interested member companies. Some additional field
13 observations would be made by the foundation in certain
14 cases.

15 Dust measurements: The aim is to aid each
16 company to get adequate data on dust conditions.

17 Medical aim: To establish a diagnostic
18 procedure. Dr. Walmer of the Industrial Hygiene Foundation
19 to visit each member company and contact the doctors for
20 the purpose of exploring with them possibilities of
21 collaborative effort between physicians of various
22 companies on uniformizing diagnostic procedures.

23 Under D, The committee feels that the
24 inauguration of the program as suggested by the Industrial
25 Hygiene Foundation would provide the following advantages:

1 One, It would provide clear evidence that the institute
2 member companies are taking definite steps to further
3 safeguard the health of their employees.

4 Two, the prestige and authority of the
5 nationally-known Industrial Hygiene Foundation and its
6 medical staff would reflect favorably on our organization.

7 Three, the availability to member companies
8 of nationally-recognized medical authority in the field of
9 air hygiene might be extremely valuable for purposes of
10 testimony on specific cases or in obtaining state or
11 federal approval of desired programs or uniform procedure.

12 The next is the report of a preliminary
13 survey for the Asbestos Textile Institute. This is dated
14 June 4, 1947. It says, An original objective of the most
15 immediate importance was to facilitate the exchange of
16 information between member companies on successful methods
17 of dust control and otherwise to promote a general
18 improvement in that field.

19 Under the heading of Appraisal of Reduced --
20 Appraisal of Reduced Dust Hazard. Having reached the
21 degree of dust control represented by the dust count limit
22 of five million, it is then proper to ask what degree of
23 assurance is afforded by existing knowledge that asbestosis
24 will not, in fact, develop in the future if dustiness is
25 kept below that level? If there are factors at present

1 unknown that will indicate a need for still better dust
2 control, what will that limit be? The information
3 available does not permit complete assurance that five
4 million is thoroughly safe, nor has information been
5 developed permitting a better estimate of safe dustiness.

6 Under Physical Testing, Dust Counts, et
7 cetera. The maximum permissible dustiness for asbestos is
8 commonly taken to be five million particles per cubic foot.
9 This represents good attainment in the dust control
10 program. It is emphasized, however, that dust elimination
11 to this extent does not positively ensure that no
12 asbestosis will develop in some workers after a long
13 working life, greater than twenty to twenty-five years.
14 Scientific evidence is obscure on this point. It is
15 recommended, therefore, that studies need to be initiated
16 aimed to develop another yardstick because it is suggested
17 that when control below five million is obtained, present
18 dust count methods may not properly measure the remaining
19 hazard.

20 The next is -- this is Minutes of the
21 Asbestos Textile Institute Air Hygiene Committee, March 7,
22 1956. Among the guests is Mr. Houghton, Garlock Packing
23 Company, Elmira, New York. The agenda for this meeting was
24 as follows: Asbestos and cancer, a discussion relative to
25 compensation.

1 Dr. Kenneth Smith, medical director of
2 Johns-Manville Corporation, requested to be present at this
3 meeting because of recent developments in the compensation
4 field regarding asbestosis and cancer. Dr. Smith informed
5 us that in his opinion we have an epidemic of lung cancer
6 in the world today.

7 He also advised that the current rate of
8 progress in cancer shows that three out of every one
9 hundred cases is lung cancer. One of his major reasons for
10 asking to address was that there has been a case decided by
11 the Pennsylvania State Corporation -- State Compensation
12 Board, in which there was a decision against the company
13 involved. The finding by the referee in this case was
14 asbestos-cancer. The referee in this case quoted in his
15 decision, Dr. Heuper's writings from the Public Health
16 Monograph No. 36 U.S. Public Health Service. In this
17 publication he ties together asbestos and cancer throughout
18 creating a new word for the medical dictionary such as
19 asbestosis-cancer.

20 Dr. Heuper claims that asbestos-cancer can be
21 found after exposure of six months to forty-two years in
22 ages of people from twenty-five to sixty-five years. He
23 also has a new definition of asbestosis, such as one
24 particle of asbestos with the physical condition
25 surrounding it can be diagnosed as asbestosis. According

1 to him, all workers in this industry are susceptible. He
2 states further that a minimum of a hundred seventy thousand
3 dust particles per cubic litre is recognized for the
4 development of asbestosis-cancer in men. Among his
5 remarks, Dr. Heuper says, That asbestosis is compensable in
6 Germany and notable in England and Wales.

7 Dr. Heuper also infers that asbestosis-cancer
8 may be determined in an autopsy performed on persons living
9 in the area of a plant. He says that any occupational
10 relationship to cancer should be considered in the
11 determination of a cancer case. He also states that
12 outside factors, such as smoking, et cetera, should be
13 considered.

14 Dr. Smith recommends very strongly that this
15 institute begin a study of the relationship of lung cancer
16 to asbestosis in our industry. He recommends that this
17 should be done through the Industrial Hygiene Foundation in
18 Pittsburgh. Dr. Smith indicates that he has no evidence
19 that there is not a relationship between asbestosis and
20 cancer. He advised the Air Hygiene Committee that it would
21 be advisable for the industry if we were to institute such
22 a study or survey within our plants, hospitals, physicians,
23 et cetera. This would be a preliminary fact-finding survey
24 such as now under proposal for the QAMA. Dr. Smith advised
25 that this proposal should be undertaken in conjunction with

1 the QAMA proposal in order that we could procure
2 information which would combat current derogatory
3 literature now being circulated throughout the United
4 States and Canada.

5 Dr. Smith also advised that there is other
6 damaging information being circulated, written by the same
7 Dr. W. C. Heuper, who is chief of the environmental cancer
8 section of the National Cancer Institute, National
9 Institute of Health, Bethesda, Maryland, such as a reprint
10 of an article in the American Journal of Clinical Pathology
11 entitled, Silicosis, Asbestosis and Cancer of the Lung.
12 Reprints of this article may be obtained from the National
13 Cancer Institute, National Institutes of Health, Bethesda,
14 Maryland.

15 Public health monograph number thirty six
16 entitled, A Quest into the Environmental Causes of Cancer
17 of the Lung, can be obtained from the U. S. Department of
18 Health Education and Welfare, Public Health Service,
19 National Institute of Health, Bethesda, fourteen, Maryland.

20 Next is Minutes of the General Meeting of the
21 Asbestos Textile Institute dated February 12th, 1965. And
22 attached with them is minutes of the board of directors
23 meeting, which is February 11th, 1965. Under Old
24 Business --

25 MR. CONNOR: Your Honor, could this be noted

1 it is for state of the art only?

2 MR. SMITH-GEORGE: Yes. This is being
3 offered for state of the art. Garlock is not listed as
4 being present at this particular meeting.

5 MR. CONNOR: Thank you, Your Honor.

6 MR. SMITH-GEORGE: President Brown brought up
7 the unfavorable publicity which has resulted from the
8 conference on Biological Effects of Asbestos held in
9 October, 1964, at the Waldorf-Astoria Hotel under the
10 auspices of the New York Academy of Science.

11 As anticipated at our last meeting, there
12 have been adverse results to our industry, in fact the
13 entire asbestos industry, from this conference. Mr. Brown
14 pointed out that the need for formulating, standardized
15 answers to questions regarding the alleged adverse effects
16 of asbestos to those who handle or fabricate the products
17 of our industry. He suggested that we should enlist the
18 help of Dr. Cralley, U. S. Public Health Service in shaping
19 these answers.

20 Mr. Griffin stated that he had just learned
21 that the major producers of asbestos fiber in Canada had
22 very recently authorized the formation of an organization
23 to check the health of their employees and also to deal
24 with the economies of adverse publicity. Suggested that we
25 should try to work with this new organization, industry

1 sponsorship, and asked if there was any way that we could
2 participate in the Canadian effort. Mr. Brown again
3 stressed that our industry should know what to tell the
4 customers who inquired about the alleged harmful effects of
5 handling asbestos products, and he felt that Dr. Cralley
6 could be most helpful. Mr. Hough agreed that we should ask
7 Dr. Cralley's help.

8 Mr. Peele suggested that we should offer our
9 data and experience to the new Canadian origination for our
10 mutual benefit, tell Dr. Cralley of the newly formed
11 producers organization in Canada and ask for his ideas and
12 suggestions.

13 Mr. Flocken pointed out that the more use we
14 made of the Public Health Service the better. Dr. Cralley
15 was then called into the meeting and a general discussion
16 ensued.

17 This is from Minutes of the General Meeting
18 October 8th, 1965. This is under General Discussion.
19 Review of the committee activities for the past year
20 meeting October 8th, 1964. Public Health Service survey,
21 Dr. Lewis J. Cralley. Dr. Cralley gave us a status report
22 on the in-plant environmental studies. At this time six
23 were completed and the next study was to be made at
24 Raybestos Manhattan, Inc., Manheim, Pennsylvania. The
25 studies have gone well, as reported by Dr. Cralley and

1 participating companies.

2 Number two, Biological Effects of Asbestos,
3 October 19, 20, 21, 1964, NYC. The committee suggested the
4 board of directors of the ATI send a public relations man
5 to this conference, since Dr. Selikoff is using the news
6 media for publications.

7 Under Public Health Survey, Dr. Lewis J.
8 Cralley. Dr. Cralley reported on the status of the studies
9 and told us they will take approximately twenty-five years
10 to acquire meaningful data.

11 Number two, Review Current Publicity on the
12 Effects of Asbestos in Public Health. The following
13 articles were reviewed and discussed: Number one,
14 Dangerous Dust, Scientific American, December, 1964, Volume
15 211.

16 Number two, Cancer Experts Eye Asbestos in
17 Alarm/Cancer Experts Eye Asbestos Perils, by Josephine
18 Robertson. The Plain Dealer, January 12, 1965, Cleveland,
19 Ohio. Review and discussion of these articles keeps
20 members of the committee up to date on the publicity
21 asbestos is receiving relative to public health.

22 This is from the Minutes of the General
23 Meeting Asbestos Textile Institute, February 11th, 1966.
24 In attendance Garlock, Inc., N.L.A. Martucci, and G. E.
25 Houghton. This is a discussion of the environmental health

1 survey. Dr. Cralley stated that within a year they hope to
2 make a report on chemical content of asbestos fiber and its
3 relationship to health hazards. He also related that the
4 QAMA has organized an institute for the study of asbestos
5 and its environmental health effects in order to bring a
6 previous study up-to-date.

7 More and more publicity is being given to
8 health hazards in working with asbestos. The latest a
9 clipping from the National Observer of February 7, 1966,
10 written by John Henderson, M.D., discussed some symptoms of
11 asbestosis and stated that the incidence of asbestosis is
12 rising and that thirty years from now it would be much
13 higher. The article stated that the doctors were mystified
14 by the appearance of a rare tissue tumor, mesothelioma,
15 which is found increasingly in asbestosis victims.

16 The increasing number of articles apparently
17 being written for personal publicity reasons is disturbing
18 to the industry and points up the need for an impartial
19 survey such as is being made by the United States
20 Department of Health Education and Welfare.

21 This is from the Minutes of the Board of
22 Governor's Meeting from October 6th, 1966. In attendance
23 is H. T. Schaefer, Garlock, Inc. Under item number
24 eighteen, Mr. Hough recommended that the board of governors
25 should authorize our legal counsel to draft a letter

1 protesting the Chemical Week article of September 10, 1966,
2 entitled, Asbestos Awaiting Trial, and send the same to the
3 editor of Chemical Week; also to the proper official at
4 McGraw-Hill Publishing Company. Further, that legal
5 counsel should attempt to set up a meeting with McGraw-Hill
6 and/or Chemical Week, at which he, accompanied by three
7 representatives of the ATI, could register a verbal
8 protest. Mr. Flocken agreed to try to set up a meeting as
9 suggested by Mr. Hough and also to draft a letter of
10 protest. A final decision will be made as to how effective
11 or desirable the proposed meeting with McGraw-Hill would be
12 after Mr. Flocken has made preliminary contact.

13 This is from the general minutes -- Minutes
14 of the General Meeting Asbestos Textile Institute, October
15 7, 1966. And this would go to state of the art. Here we
16 go. Under item nine, Mr. Peele, the chairman of the
17 nominating committee, reported to that members of the board
18 of governors would be: And the last one would be J. P.
19 Wiess, Garlock, Inc.

20 This is from the minutes of the Air Hygiene
21 Committee manufacturing committee of the same Chemical Week
22 article. There was a joint discussion with the sales
23 promotion committee on an article printed in the September
24 10 issue of Chemical Week entitled, Asbestos Awaiting
25 Trial. And these are the minutes of the sales promotion

1 committee. A supplementary meeting was held with all
2 interested ATI members concerning recent adverse publicity
3 of asbestos products as written in the Chemical Week
4 magazine. Members of the asbestos fiber committee and the
5 technical committee joined with the sales promotion
6 committee with this discussion. Sitting as committee of
7 the whole, it was felt advisable to register with Chemical
8 Week our concern of their irresponsible article in the
9 September 10, 1966, issue.

10 THE COURT: Mr. Hatten?

11 MR. SMITH-GEORGE: We just wanted to show --

12 THE COURT: Mr. Smith-George?

13 MR. SMITH-GEORGE: These, again, go to
14 notice. And this is worker's compensation claims that were
15 filed against Garlock. Vera Clemmons, date of the claim is
16 November 26, 1946. Date and place of work, 1918 to 1943 in
17 the textile department. And the disease is asbestosis.

18 Grace Baylord, November 14, 1957. Date and
19 place of work, 1923 to 1957 in the textile department. The
20 disease was asbestosis.

21 The next exhibit will be the statement of the
22 funeral home, and it indicates that the total amount was
23 three thousand fifty-nine sixty-seven, and medical
24 expenses, with a grand total of -- from Riverside Hospital
25 of nineteen thousand seven hundred and fifty-eight

1 ninety-two.

2 Until we go any further with our discussions
3 on the exhibits, that is what we have to offer at this
4 point.

5 THE COURT: Any other exhibits from the
6 plaintiff at this time other than those reserved for
7 possible use in impeachment?

8 MR. HATTEN: Yes, sir. We do have a couple
9 that we will go over after the lunch break, if that is
10 okay.

11 THE COURT: And a couple that you may use in
12 closing arguments or otherwise.

13 MR. HATTEN: Yes. And the -- yes, I don't --
14 there were a couple that we didn't have a ruling on. If
15 the Court could adjourn for lunch, by the time the jury
16 comes back, it will probably take ten minutes we will be
17 done.

18 MR. SCHWERTZ: Judge, can we just have a side
19 bar real quick? We may have something to make it a lot
20 quicker.

21 MR. HATTEN: I think a five-minute break
22 would probably be in line.

23 THE COURT: What we are trying to do, ladies
24 and gentlemen, is see if we can resolve this as opposed to
25 you going to lunch and coming back. If we can go ahead and

1 take care of this now and ask you to come back tomorrow,
2 you might be happier and it might be a better use of your
3 time. I know you are anxious to go over to the City Hall
4 Cafeteria. Any way that I can help with that.

5 Would counsel like a short recess to
6 fine-tune everything?

7 MR. SMITH-GEORGE: Yes, sir.

8 MR. HATTEN: Yes, sir, if we could have two
9 or three minutes and I promise we won't be --

10 THE COURT: Two or three minutes.

11 MR. HATTEN: Seriously, two or three minutes.
12 I just want to get it organized.

13 THE COURT: Let me have the jury go out again
14 for about five minutes and let's see if we can conclude
15 this as opposed to going to lunch. Let me let the court
16 reporters have a break and counsel have a break, too, and
17 we will really aim for ten minutes.

18 THE BAILIFF: All rise.

19
20 (Recess)

21
22 MR. HATTEN: Very briefly, Your Honor, we
23 have only four things to take up with the jury. And that
24 is the publication of the sample, publication of one more
25 of the minutes that had been omitted. We have the warning

1 standard document that was identified by Mr. Lauderdale at
2 the time of his testimony.

3 THE COURT: Mr. Connor?

4 MR. CONNOR: Just so the record is clear, the
5 additional ATI document they want to publish, that is not
6 when Garlock was a member. So I guess, according to Your
7 Honor's ruling, it is state of the art only.

8 MR. SMITH-GEORGE: Correct. I will tell the
9 jury that when I publish it.

10 MR. CONNOR: My objection to the Garlock
11 product in the box there going to the jury is solely
12 because it is not the product. I understand it is
13 demonstrative in nature.

14 THE COURT: It makes it real.

15 MR. CONNOR: The other two items I believe
16 are -- they are previously marked numbers fifty-one and
17 seventy-four are -- relate to warnings and issues of
18 warnings. They come from the Manufacturing Chemists
19 Association. I would certainly object to their relevance.
20 I know there has been some discussion with Dr. Lauderdale
21 about the documents. They say they are not going to
22 publish them, they just want to put them in, but, again,
23 note my objection for the record.

24 THE COURT: All right. Exception noted. All
25 right. Let's bring the jury in.

1 MR. HATTEN: Your Honor, I'm just going to
2 put it on the screen. This is the warning standard and
3 offer it.

4 THE COURT: Let's stand for the jury.

5 THE BAILIFF: Eight jurors in the box, Your
6 Honor.

7 THE COURT: All right. Counsel waive the
8 poll?

9 MR. HATTEN: Yes, Your Honor.

10 MR. CONNOR: Yes, Your Honor.

11 THE COURT: Mr. Smith-George.

12 MR. SMITH-GEORGE: We are just about done.

13 At this time we will offer as the next exhibit A Guide for
14 the Preparation of Warning Labels for Hazardous Chemicals,
15 adopted 1945, revised April of 1946, as well as subsequent
16 manual warning labels, A Guide for Preparation of Warning
17 Labels for Hazardous Chemicals, fourth edition, 1956. And
18 we have one more minutes. These are minutes that Garlock
19 was not present at, but they are being offered for the
20 state of the art.

21 This is from the Asbestos Textile Institute
22 Air Hygiene Committee report of meeting dated October 6th,
23 1954. Dr. Schepers showed slides of specimens taken
24 during the autopsy of an asbestotic. The slides showed the
25 different findings present in the lung area. These slides

1 were very beneficial to all doctors present as many of them
2 saw lung conditions of an asbestotic, which they had never
3 seen before. Dr. Schepers' demonstration demonstrated when
4 a biopsy is taken the surgeon should cut down low and
5 obtain an area large enough to definitively show whether or
6 not asbestosis was present and what degree, coupled with
7 clinical findings. Afternoon session. The entire
8 afternoon session was spent in listening to the discussion
9 of the relationship of asbestosis to pulmonary cancer by
10 Dr. Schepers. A number of slides containing facts and
11 figures concerning the subject of cancer were shown. At
12 the latter part of his discussion, he made some conclusions
13 concerning the relationship of asbestos to lung cancer.
14 Here are some of the highlights I gleaned from that
15 discussion. Both asbestos and silicosis dust do not
16 necessarily lead to lung cancer. In some cases asbestos
17 will protect the lungs from cancer. The first case of
18 cancer of the lungs due to asbestos was found in England in
19 1932. The West German government in 1951 recognized lung
20 cancer caused by asbestos. In another British survey, it
21 was found that 1.32 percent of six thousand silicosis cases
22 have cancer, while 13.2 percent or ten times more persons
23 out of two hundred sixty-six asbestosis cases were
24 affected. Therefore, the incidence of lung cancer with
25 asbestos is ten times greater than that of silicosis. Dr.

1 Schepers of the Saranac Laboratory suggested that particles
2 of asbestos be inserted into animal lungs in order that
3 research be done on this problem, cancer and asbestosis, so
4 that the facts may be determined to combat unjust
5 compensation claims.

6 And then from the Minutes of the Board of
7 Governors at the same time frame October 6th, 1954, under
8 item four, The final committee report was submitted by Mr.
9 Dr. Holmes, acting chairman of the Air Hygiene Committee,
10 in the absence of Mr. H. M. Jackson. The Air Hygiene
11 Committee met on this date with a group of company
12 representative doctors and Dr. G. W. Schepers, Saranac
13 Laboratories. Very informative and enlightening discussion
14 covering the relationship between asbestosis and diseases
15 of the lung and heart were pursued. The second program
16 proposed for action concerning the establishment of a study
17 designed to determine the relationship between asbestosis
18 and lung cancer. It is proposed that such an investigation
19 be carried out using white rats as the subject for this
20 study.

21 Finally, Your Honor, we offer this sample of
22 the raw gasket material, which has been previously marked,
23 and given the jury an opportunity to look at that.

24 THE COURT: You may publish.

25 MR. HATTEN: This is the different width.

1 This is the finish-type of gasket.

2 MR. CONNOR: Your Honor, I don't know that to
3 be a fact. I know it is being published. It is what it
4 is.

5 THE COURT: Let the jury pass that around
6 just as example of the asbestos product made by Garlock,
7 subject to later comments and arguments of counsel.

8 MR. SMITH-GEORGE: With that, Your Honor, the
9 plaintiffs rest.

10 THE COURT: All right. The plaintiff has
11 rested.

12 MR. SMITH-GEORGE: Yes, sir.

13 MR. HATTEN: Have all of those documents we
14 just mentioned been given a number and admitted?

15 THE CLERK: No. I need his reference points
16 to pull them out of my notes and mark them.

17 MR. SMITH-GEORGE: We will do that.

18 THE COURT: Defense ready to proceed tomorrow
19 morning?

20 MR. SCHWERTZ: Yes, Your Honor.

21 THE COURT: I'm going to excuse the jury now
22 until nine thirty tomorrow morning. Be careful out there
23 and I will see you back tomorrow morning. All right. You
24 may proceed. Mr. Smith-George, there was an inquiry made
25 by one of the jurors concerning the padlock you apparently

1 had on your belt, so they are watching.

2 MR. SMITH-GEORGE: I'm not going to tell them
3 what I'm trying to keep secure.

4 MR. SCHWERTZ: Your Honor, not knowing what
5 the Court's calendar is, I would have a motion pertaining
6 to certain things I know Mr. McCormick and I have talked
7 about -- we have designated some of Mr. Little's discovery
8 deposition we would be reading in our case in chief. There
9 are a couple of objections to that. I think we are done
10 with the exhibits for now.

11 THE COURT: All right. Now, we have one
12 proffered exhibit which the Court did not allow and that
13 will be marked as an exhibit, numbered, but not go to the
14 jury.

15 MR. HATTEN: The other things that we
16 identified we have offered.

17 THE COURT: Those will all get the markings
18 right. And then we have also a group of exhibits which may
19 or may not be admissible depending on the defendant's case.

20 MR. SCHWERTZ: Certainly.

21 THE COURT: You have certain motions.

22 MR. SCHWERTZ: Yes, sir.

23 THE COURT: Is this something you would like
24 to go to lunch and then argue or are you ready to proceed?

25 MR. SCHWERTZ: I certainly am ready to

1 proceed now if the Court wants to indulge. Certain
2 motions -- I have one motion. It is to strike the punitive
3 damage claim.

4 THE COURT: I think we should go ahead and
5 hear the motion if counsel for the plaintiff agrees, unless
6 someone is in dire need of sustenance. If not, let's
7 proceed. Mr. Schwertz?

8 MR. SCHWERTZ: On behalf of the defendant,
9 Your Honor, we would move to strike the claim for punitive
10 damages.

11 At this point in time the plaintiff has put
12 on no evidence as to any actual malice or complete, wanton
13 and reckless indifference to the rights of Mr. Little. The
14 Supreme Court of Virginia has held repeatedly that punitive
15 damage --the standard for punitive damage is -- the
16 evidentiary standard is by clear and convincing evidence.
17 As to Garlock's motivation, the witnesses that plaintiff
18 have proffered are Mr. Houghton, who didn't say anything
19 about Garlock's motivation whatsoever, talked about the
20 conditions in their textile plant, and then repeated
21 documents that have been introduced for the purpose of
22 notice only or state of the art. Neither of those reasons
23 go to any motivation specific to Garlock. And so at this
24 point in time, Your Honor, I don't think there is any
25 evidence that could support a finding of punitive damages

1 against Garlock in this case.

2 THE COURT: Thank you, Mr. Schwertz.

3 Mr. Hatten?

4 MR. HATTEN: Yes, sir. I think the fact that
5 Mr. Houghton had specific notice of the relationship
6 between cancer and asbestos exposure in 1956 is -- and the
7 fact that at no -- and all of these different
8 organizational minutes indicate that this is a well-known
9 concept at the time, the relationship between asbestos and
10 cancer. Garlock, with this information and with the fact
11 that people had died in their plant, the dust control was
12 necessary, and that there was standards for the safety
13 associated with dust from asbestos -- with this knowledge,
14 the standard is, was there a reckless disregard for the
15 safety and health of the public? That is the standard.
16 The standard is not malice. It used to be the standard,
17 but the statutory standard is reckless disregard for the
18 health and safety of the public.

19 I think when some -- when a company has the
20 knowledge that this is a product that can kill you, that
21 this is a product that has to be controlled, that this is a
22 product that requires special testing to determine the
23 danger level which is invisible and, therefore, heightens
24 the danger to the public, and when a company knows that it
25 can cause cancer, which also is deadly, these facts taken

1 together, the jury could certainly infer reasonably that
2 there was a reckless disregard for the health of the
3 consuming public when Garlock never performed the first
4 test to determine whether its product was dangerous. They
5 never put the first warning on a package. They never made
6 any effort whatsoever to communicate information to the
7 public. And I think the obvious answer to that is in the
8 minutes of the ones that they -- and that is they didn't
9 know what to tell the public. And why wouldn't they know
10 what to tell the public? Because the purpose of those
11 organizations was to promote sales and to combat adverse
12 publicity. That was the stated purpose of those
13 organizations, promote sales and combat adverse publicity.

14 I think when a company's goals are to combat
15 adverse publicity about something that they know can kill
16 the consuming public and they have, you know, every reason
17 to know that, then I think the jury is certainly entitled
18 to infer that this company had a reckless disregard for the
19 health and safety of the public. Not only did they, but
20 that they were acting in concert with all of these other
21 companies who, likewise, through these organizations, had
22 this same information and no one is doing it.

23 And so, Your Honor, I think that the reckless
24 disregard is a -- is a course of conduct with a base of
25 knowledge that permits the inference that it is a reckless

1 disregard for the health and safety of the public. So, you
2 know, have I proved the case beyond a reasonable doubt?
3 That is not my burden. I think I have submitted
4 substantial evidence upon which a jury could conclude,
5 giving me the inferences that this was reckless disregard
6 for the health and safety of the public.

7 MR. SCHWERTZ: If I may briefly reply, Your
8 Honor.

9 THE COURT: You may.

10 MR. SCHWERTZ: If the crux of Mr. Hatten's
11 argument is that the jury can infer, then it has to fail as
12 a matter of law because the standard in Virginia for
13 punitive damage is clear and convincing evidence. And if
14 we are asking the jury to infer from these things, then it
15 clearly fails, because there has to be clear and convincing
16 evidence. That was the standard that Judge Curran found in
17 the consolidation basing his decision on the Flipppo vs. CSC
18 Associates case. It is found at 262 Va. 48. It is a 2001
19 case.

20 Beyond that, Mr. Hatten talked about that we
21 had knowledge of people dying in our plants. The evidence
22 before this jury and before this Court, Your Honor, is to
23 asbestotic claims filed against Garlock, not people dying,
24 and they were in the textile plant versus the products Mr.
25 Little was exposed to, which were gaskets. Furthermore,

1 that is the disease process for asbestos, not mesothelioma.

2 Finally, Your Honor, again, if we are being
3 held with the people at the ATI for notice only, he is
4 talking about acting in concert with these people. And
5 there is no evidence that we did anything other than attend
6 the meetings, and there is not even true evidence that we
7 listened to what people talked about. The portions of the
8 documents that were read to this jury were what they wanted
9 the jury to see. They weren't the entire documents.

10 Mr. Hatten talked about the stated purpose of
11 these organizations was to make money and to sell product.
12 That was the part they read. And, again, they are trying
13 to take those documents, portions of the documents, and
14 hang us with that.

15 Again, the worker's comp claims, Your Honor,
16 people died of asbestos, not mesothelioma. Ms. Clemmons
17 was the only one that died.

18 MR. HATTEN: Your Honor, respectfully, in the
19 Hemeon report, which has been admitted, 1947, we are not
20 talking about two cases. Page fifteen of that report, they
21 report the incidents of asbestos in the various plants that
22 were being studied. And this is a report that is given
23 directly to Garlock. And twenty percent of the employees
24 in plant A in the past nine years and in plant J twenty
25 percent of the employees and in plant H five or six cases

1 out of three hundred employees every year.

2 And so, Judge, if you look at this report,
3 the industry knows that lots of people are getting ill and
4 that's why Dr. Hemeon said, This standard is not safe and
5 we need a different standard. And that is a report that
6 they had actual notice of and they never did anything in
7 response to that information. This is one of these reports
8 that they got and they did absolutely nothing with. So,
9 Your Honor, I think that we are not just talking about one
10 or two people getting sick. They have these reports of the
11 doctors giving very comprehensive explanations of just how
12 deadly this product is.

13 In the case that the Supreme Court decided in
14 Watson vs. Owens Corning, this is exactly the nature of the
15 evidence that was before the Court in the Owens Corning
16 matter. They had the notice that this was a deadly
17 product. They had the notice that people were dying of
18 asbestosis. And they did nothing. They didn't test, they
19 didn't warn, and the inference -- I will be frank with you,
20 I did not bring any cases with me about clear and
21 convincing, but I think it is clear and convincing that
22 they, in fact, had the notice that this was deadly. I
23 think it is clear and convincing that they knew all about
24 the standards. I think it is clear and convincing that
25 they didn't do any testing. I think it is clear and

1 convincing that there were no warnings. And I think it is
2 clear and convincing that they knew this was a carcinogen
3 that they were dealing with. And I think it is also clear
4 and convincing that what they were trying to do was combat
5 adverse publicity and assist sales. I think if you look at
6 all of the evidence which is uncontroverted, we have made a
7 prima facie case of reckless disregard for the safety and
8 health of the consumer public.

9 MR. SCHWERTZ: Finally, Your Honor, the
10 Hemeon report that Mr. Hatten represents a number of these
11 plants were a Garlock plant that he talked about. Garlock
12 plant was plant G in that study. As to the Owens Corning
13 in the Watson case that was Owens Corning Fiberglas the
14 Saranac documents that were actual notice of Kaylo, which
15 was the product to which Mr. Watson was exposed.

16 Your Honor, I'm sure you read that case in
17 preparation for this trial or in preparation for other
18 trials. There were lots of other things Owens Corning had
19 done during that litigation and others that went to the
20 punitive damages that there is no evidence of Garlock's
21 specific actions in this case, and that is what you have
22 got to look at.

23 Your Honor, in the pretrial hearing when we
24 talked about punitive damages, you used the words "it has
25 got to rise almost to the level of criminal indifference."

1 And there is nothing in the evidence before this jury at
2 this point in time, and it is not going to get any better,
3 that would rise to that level.

4 THE COURT: Thank you, counsel. I did read
5 that case, and I read the case on Friday because I
6 anticipated this issue. At this stage of the proceeding
7 the light -- everything has to be viewed in the light most
8 favorable to the plaintiff. And although each side, of
9 course, sees this very clearly because of your closeness
10 with the cases, it is not necessarily the clear issue for
11 the Court. What I do not know from the evidence right now,
12 and although I'm not sure it is in your other documents,
13 what I do not know is I do not know what notice, if any,
14 other gasket manufacturers were using in '62, '63 and '66.
15 I do not have any records of any minutes documenting what
16 Garlock was saying or discussing about this very issue. I
17 do know that they were present at various meetings. I do
18 know what was being said at those meetings, but I don't
19 know whether that was conveyed by a proper representative.
20 Whether that person went forward with it, whether they were
21 lazy, whether they were attentive, and whether Garlock ever
22 looked at that information and made a decision on a
23 cost-benefit analysis that, This is too expensive and we
24 are going to keep this bad product.

25 Mr. Hatten says, Well, they didn't test. If

1 they had tested and had a meeting on it and there was
2 something to show that they chose to risk the safety of
3 workers, I think a punitive damage claim survives. What I
4 see from Mr. Hatten's evidence or from the plaintiff's
5 evidence is I see negligence, I see incompetence, I see
6 perhaps failure to be aware. Even allowing a certain
7 length of time, even if I take the '56 report and allow
8 liberally five or six years for that information to get out
9 within the trade, I don't see any action right now on
10 behalf of Garlock except no action with regard to warning.
11 And I'm not sure that any case says that in that vacuum
12 punitive damages should be allowed. The standard for
13 punitive damages, as counsel knows, is, number one, it is
14 not to benefit the plaintiff. It is to punish the
15 defendant so they do not continue that action. And there
16 is no evidence before the Court today that that is relevant
17 to our discussion.

18 The second reason for punitive damage is to
19 give notice to others how the Court will respond to a
20 particular issue. And I have no evidence that that is
21 required today in the public. We know that this is an
22 unsafe product. I do think that there was information in
23 the stream of commerce or stream --state of the art at that
24 time to show that there were not only suspicions, but that
25 people were suffering illnesses and dying from asbestos

1 exposure. And they were doing that in various industries
2 and had different sorts of contact with the material.
3 Judging by those warning labels in the exhibits proposed
4 before, at some point in time I think this became not only
5 extremely well known, but almost mandated, as far as a
6 warning label, because of the purpose behind punitive
7 damage. And because of what I see at best as competence
8 and negligence and really failure to be aware -- there is a
9 difference between a failure to be aware negligently and
10 making an affirmative, reckless decision.

11 In other words, you can't negligently be
12 reckless. There is a sense of risk taking. There is an
13 analysis. There is a chance that you take with someone
14 else's life. And that is what the Court addresses in
15 punitive damages. I think counsel can, as Mr. Hatten has
16 quite well argued, that if you know something is dangerous
17 and you take no action, that that in -- that is a decision
18 -- that inaction can be a decision to risk the lives and
19 health of other people. That that inaction supports
20 punitive damages, supports an inference that the jury can
21 look at that and say, You must -- you had a burden to do
22 something and, in doing nothing, you were reckless.

23 But in the cases that I have reviewed on this
24 subject, the necessity for some sort of action,
25 recklessness and in difference has to be shown. And what I

1 see most clearly is -- what I see is almost a negative.
2 They did nothing and they did nothing -- I don't know what
3 the others were doing then, but I know they did nothing and
4 that is why they are in court today. Not because they gave
5 an improper warning, but they just took no action. One
6 could almost make an argument they acted as if they hadn't
7 heard about all of the information in the minutes.

8 Now, Mr. Hatten, I think, or Mr. Smith-George
9 made the statement earlier, You can't just put your head in
10 the sand and ignore everybody. That is true. And the
11 knowledge that they should have had as a manufacturer was
12 that, as I understand it, of a pretty sophisticated expert.
13 And my only concern is that if they had a duty to act in
14 such a manner, like an expert would be, then when they
15 remain unaware, they violated that duty. In other words,
16 you can't be unaware if you are supposed to be an expert.
17 You can't be unaware if you are a heart surgeon where the
18 heart is. So although I find distasteful people who
19 continue items under discussion when they should decide the
20 matter, at the present time I'm going to take the motion
21 under advisement. I understand the basis for it and the
22 good-faith nature of it, but at a later time either the
23 Court on its own, or I would prefer counsel's input -- I
24 would like to hear the standard of knowledge required of an
25 employer who deals in a product which is known or should be

1 known to be hazardous, what is their specific legal duty?
2 Is it an affirmative duty to acquire knowledge, and if they
3 do not, it is reckless based on their standard, or can the
4 Court say, There is no proof of what these representatives
5 knew or picked up or learned at these meetings? And in
6 order to get to punitive, you must show the defendant
7 should have known, almost did know, and then made a
8 reckless choice to be indifferent.

9 So I may not understand all of the factors
10 impacting on this decision, but I am troubled by this -- by
11 the language in the cases that your awareness should be of
12 a certain type, that of an expert. And when an expert
13 doesn't know something, at what point does that become
14 reckless? And so I think there may be a different standard
15 placed on a manufacturer. There is a different standard
16 placed on an attorney in the use of other people's funds
17 versus your own. And can you use that standard to impose a
18 higher damage which will support punitive damages? If I
19 were secure and can articulate why I cannot impose a
20 greater duty on the manufacturer, I would sustain the
21 motion, but -- I still have some legal questions on that
22 issue. I do promise to resolve it before we finally
23 depart, but I cannot do it at this time.

24 MR. SCHWERTZ: Yes, sir.

25 THE COURT: So the motion will be taken under

1 advisement and considered at the appropriate time. Next
2 motion.

3 MR. HATTEN: Your Honor, I would be happy to
4 try to develop authorities for Your Honor to consider over
5 the coming days.

6 THE COURT: Well, I also would like counsel,
7 since we are talking about this, to try to answer this
8 question. This is 2004. The wrong was in '62, '63 and
9 '68. If one of the standards of punitive damages is to
10 stop the defendant from doing something or to stop others
11 from doing something, and we come forward thirty-five years
12 or so, when the Court is not concerned about stopping the
13 defendant from selling asbestos without warning, when the
14 Court is not concerned as a matter of public policy with
15 letting the world know that this is an unsafe product,
16 should the Court in its current time view this issue of
17 punitive damages and its effect on others, or is the Court
18 required to go back to the date of the wrong? And if
19 punitive damages were due in 1968 as if we had court that
20 day, make the decision then completely unaware that, one,
21 I'm not sure that Garlock continues to make gaskets, but if
22 it does, there is a warning on them, and the rest of the
23 world has been sufficiently warned by Mr. Hatten and others
24 and those in bankruptcy concerning the difficulties in this
25 area, can I use the knowledge today existent when we make

1 this decision? And although you make think that is a silly
2 question, I have thought of it especially on the standards
3 for punitive damages, and I cannot find anything where the
4 books say -- I mean, does it matter that a case is brought
5 to trial within six months versus six years?

6 Now, you want to say no. The plaintiff would
7 be entitled after six months to the same thing that they
8 would be entitled to after then years. But on the issue of
9 punitive damages, if you keep going back, it is not for the
10 plaintiff. Mr. Hatten and the plaintiff really do not have
11 an investment in punitive damages personally. Their
12 investment would be as to its affect on the defendant and
13 its affect on others. So unlike some cases that are fairly
14 clear, the Court has a number of concerns still ongoing.
15 So at some time I would like to hear from counsel.

16 MR. HATTEN: Just two sort of points of
17 reference that I think are critical for the evaluation.
18 First, I would invite the Court to review the landmark
19 decision of Burrell vs. Fibreboard, 1973, it is a Fifth
20 Circuit decision, and every court that I'm aware of in the
21 United States since that date in asbestos litigation has
22 applied the standard of an expert, which is defined for the
23 first time in that case, in Burrell. And so it really --
24 that is the case that launched a thousand ships. That is
25 the case that began the asbestos litigation and set forth

1 more standards in one opinion than probably any other
2 opinion. But since then, of course, there are a lot of
3 others, and we will be happy to bring you up to date on
4 that.

5 I think that the real gravamen of the conduct
6 here that continues to have a message for the public is
7 that the asbestos industry knew long before Zeb Little was
8 first exposed that there was a thirty-year or forty-year
9 latency associated with the damage that they were doing.
10 And there are lots of products out there in America that
11 have this same sort of latency associated with them. It is
12 one of the reasons why there is such an environmental
13 movement going on in the United States today. We have
14 discovered so many things that are so dangerous to us that
15 have this long, silent period between the time of exposure
16 and the time of illness. And I think on a societal basis,
17 if you allow a company that is aware of this latency to
18 then take advantage of the latency by saying, Well, that
19 was forty years ago and you shouldn't be punishing us now
20 for what we did then, I think the knowledge of latency back
21 then puts all of this in a different perspective. And it
22 sends a message, an important message, to the chemical
23 manufacturing industry in the United States and to many
24 others, that just because your conduct today is not going
25 to cause injury today, if you know that there is this long

1 delay between exposure and the time people get sick and
2 exposure that makes the difficulties of proof a hundred
3 times harder because, just like in this case and every
4 other case, I have got to go back forty years to get my
5 proof in this case, you are putting a burden on the
6 American public to go back forty years to prove cases
7 because you know it is going to take thirty or forty years
8 before people get sick. And by that time, you figure your
9 profits are going to be spent, you are probably going to be
10 dead yourself, you couldn't care less, so that is somebody
11 else's problem way out in the future. Now, if companies
12 know that if they ignore the latent effect of dangerous
13 chemicals and are given the suggestion that there is a
14 different standard of conduct when there is a latency
15 period, then I think that is the wrong message for society,
16 I think it is the wrong message for the Court, and I think
17 it is the wrong message for a civilized judicial system.

18 And so from the point of view of the two
19 issues that Your Honor is struggling with, I think latency
20 and the continued application of that in our world and the
21 -- when you are talking about pure philosophy and the duty
22 of an expert, I will be happy to bring further legal
23 argument to you instead of just Hatten on punitive damages.

24 THE COURT: You know, I was trying to use an
25 analogy, and everyone, of course, is not perfect, but in

1 July of last year the Supreme Court modified the rules to
2 say, If you file a motion to compel you must include a
3 certificate in good faith that you have tried to work it
4 out. Well, no one did that. And so the judges met and we
5 have determined basically that that is the rule. And so
6 when I would ask counsel, Did you all try to work it out,
7 they would say, Well, Judge, we talked on the phone. So I
8 said, Well, you know, the rule doesn't say, Or talk on the
9 phone, or talk during a golf game. It says, You file a
10 certificate. And so I'm not going to grant your motion to
11 compel. And I did that a little while, and I said, Now,
12 get back to practicalities. You are going to go home and
13 file another one. Let me tell you where I'm leading on
14 this. I'm not granting sanctions and I'm not granting
15 attorney's fees. You didn't file a certificate. After a
16 while the enlightened attorneys, it seems -- I don't know
17 how it goes through the air, but most attorneys started
18 filing certificates, and they told me things like, Well,
19 the judges in Norfolk never required them. I said, Well,
20 they may have a different rule book, I don't know.

21 Now, it took -- it is still going on. It is
22 a year or so. Now, attorneys are required to reach a
23 standard and to know what'S it in the rules. Do I think
24 attorneys are recklessly, criminally negligent sitting in
25 their office saying, I'm not going to follow these rules

1 and no one is going to make me? That is not what they are
2 doing. They are busy. They may be negligent, but they are
3 not focusing on this.

4 So, again, I don't want to repeat myself. If
5 the manufacturer had a duty to know what was there and,
6 following, to react to what was there, assuming, as we
7 must, I think, that people are still human, back in the
8 1940s, '50s and '60s there were competent managers and
9 incompetent ones and so-so ones, and among the things --
10 and I haven't heard your evidence, but now we are dealing
11 with counsel's motion. Among the many things they looked
12 at they must have had different priorities. I don't know
13 if they attempted to respond to this in any other way. I
14 don't know really what they did.

15 Mr. Hatten's evidence, the plaintiff's
16 evidence, shows me from his evidence that they did nothing.
17 Assume for a moment that they did nothing. Were they
18 required by the doctrine of the awareness applicable to a
19 manufacturer of what they should have known was a hazardous
20 substance to take action? I mean, I don't get when you put
21 a warning on your textile industry products versus when you
22 reacted to gaskets.

23 The only reason I have not granted your
24 motion, though, is right now it is a troubling thing. And
25 although Mr. Hatten makes a very good point, if a company

1 knows about the latency period and knows that their wrong
2 will not be documented for thirty years, then why do
3 anything at all? Let it come up in thirty years and then
4 come in and argue to the judge, We have changed our policy
5 ten years ago and why assess punitives?

6 So I think there is a public policy which
7 would say that punitive damages must be associated with the
8 time of the incidents and also the knowledge available or
9 should have been available to the expert manager,
10 manufacturer, at that time, in that field. So I wish I
11 could give you a definitive answer because I think it would
12 streamline the further conduct of the case, but I wouldn't
13 be honest doing that, so your motion is under advisement.

14 MR. SCHWERTZ: Thank you, Your Honor.

15 THE COURT: I think it will have to be
16 decided before it goes to the jury as a matter of law, but
17 if the Court cannot decide it as a matter of law then we
18 need a jury instruction on it and let the jury determine
19 not only what the standard of response was but if, in fact,
20 the jury has found evidence -- and I do think the standard
21 is that it must arise to a convincing standard as opposed
22 to preponderance, that you acted in reckless disregard of
23 the safety of eventual users and you failed to warn of a
24 nonobservable danger. So I'm sure you will have plenty of
25 opportunity to educate the Court in the future. And

1 whether it is a factual issue also -- I mean, the Court is
2 sitting here talking about latency. The Court is sitting
3 hear saying, As one mind they did nothing. And the Court
4 is interpreting nothing in one way. When it gets to that
5 issue, is it factual? Is it for the jury to determine
6 whether that nothing is an active nothing deserving of
7 punitive damages or whether it is negligent? I'm giving
8 the benefit of the doubt in the sense of the managers. I'm
9 saying they may be competent or incompetent. The burden is
10 on the plaintiff to show, except the plaintiff in these
11 cases is helped by the standard, it seems to me, which is
12 imposed by the manufacturer. If you have to be an expert,
13 then why aren't you acting like an expert? And if you have
14 to be a caring expert and this was known, why didn't you do
15 something? Those are questions.

16 MR. SCHWERTZ: Yes, sir.

17 THE COURT: And if it were simple -- this
18 Court doesn't hear simple cases, so it must not be simple.
19 So that will be for another day.

20 All right. Next motion.

21 MR. SCHWERTZ: Mr. McCormick, I guess, has
22 objected -- and we have the issues of Mr. Little.

23 MR. SMITH-GEORGE: Yes.

24 MR. SCHWERTZ: There are two -- we have
25 designated Mr. Little's discovery deposition. There have

1 been counter-designations. Mr. McCormick and I have met
2 and conferred.

3 THE COURT: This is Mr. Zebulon Little?

4 MR. SCHWERTZ: Yes. And there are just yet
5 two items we couldn't come to an agreement upon.

6 THE COURT: All right.

7 MR. SCHWERTZ: I will hand you a copy of the
8 transcript. I can either share with Mr. Hatten or --

9 MR. CONNOR: I have got one right here.

10 MR. HATTEN: This is a -- the witness making
11 a bad attempt at a joke. He tries say, No, I'm just
12 kidding and --

13 THE COURT: Which page?

14 MR. HATTEN: Page nineteen. And he is --

15 MR. SMITH-GEORGE: Lines ten through --

16 MR. SCHWERTZ: Sixteen.

17 MR. SMITH-GEORGE: Sixteen, with the
18 offensive part being line eleven.

19 MR. SCHWERTZ: Yes, sir, Your Honor. I asked
20 Mr. Little, Do you see Michael on a regular basis? Michael
21 being Mr. Little here. Michael being his son.

22 And Mr. Little's response was, Whenever he
23 wants some money he comes. No, I see him right often.

24 Question: How often do you see him?

25 Mr. Zeb Little's answer: He doesn't have a

1 driver's license. His wife just left him. So he ain't got
2 no car to ride. So I seen him a couple of weeks ago.

3 THE COURT: So the issue is ten through
4 sixteen?

5 MR. SCHWERTZ: Yes, sir.

6 And I told Mr. McCormick, If the Court ruled
7 the part about Mr. Little joking, whenever he wants some
8 money he comes -- if that were ruled out the whole thing
9 could come out. And I think that is -- the crux of their
10 objection is that.

11 THE COURT: It seems to me that line eleven
12 comes out, But do you see Mike on a regular basis?

13 No. I see him right often.

14 How often do you see him?

15 Well, he doesn't have a license right now.
16 His wife left him.

17 So then he goes back, But I seen him a couple
18 of weeks ago.

19 So I think the attempt at joking, Whenever he
20 wants some money he comes, I think that is not a factual
21 statement and that doesn't -- that is just not true. We
22 all know it is not true. I don't know if there was a lot
23 of money to come get anyway.

24 MR. HATTEN: He didn't have any money.

25 MR. SCHWERTZ: So just take out line eleven

1 then?

2 THE COURT: Take out line eleven.

3 And I saw something last night, a commercial
4 on television. They have these phones that show pictures
5 and a college student phoned his mother at home and you
6 looked at the picture and you see a picture of his wallet
7 sitting there empty. So that doesn't mean that is all he
8 wants from his mother. Let's take out line eleven.

9 MR. SCHWERTZ: Your Honor, in deference to
10 Michael Little, I don't mind the part coming out fourteen,
11 fifteen, Well, he don't have a driver's license and his
12 wife just left him.

13 THE COURT: Seems to me that is more harmful
14 to you than helpful because it makes Michael in a sense
15 more deserving and perhaps more sympathetic than you wish
16 him to be.

17 MR. HATTEN: Weren't you going to drop ten
18 through sixteen?

19 MR. SCHWERTZ: I was going to take ten
20 through sixteen out.

21 THE COURT: Take it all out then.

22 MR. SCHWERTZ: And then, Your Honor, on page
23 one twenty one. It is the entire page beginning on line
24 two. Mr. McCormick's objection was that that was
25 cumulative and asked and answered. I guess the only proper

1 way for you to rule is to have you read the entire
2 deposition to that point in time.

3 THE COURT: This is from two through what?

4 MR. SCHWERTZ: Two through twenty-five.

5 MR. HATTEN: I think that is pretty -- this
6 is pretty important to our case.

7 THE COURT: Is this an objection?

8 MR. SCHWERTZ: Mr. McCormick made the
9 objection.

10 THE COURT: Mr. McCormick says, This
11 shouldn't be in here.

12 MR. SMITH-GEORGE: We will withdraw that
13 objection.

14 MR. HATTEN: We will withdraw an objection to
15 that. I don't know why he objected to it.

16 MR. SCHWERTZ: Having now met an agreement,
17 Your Honor, we ought to stop and go home.

18 THE COURT: Anything else?

19 MR. SCHWERTZ: Nothing. We are good.

20 THE COURT: Now, you talked yesterday or
21 Friday about the defendants had a number of exhibits. Are
22 those going to be lined up so we can move along? I don't
23 want to bring the jury in tomorrow and say, Go out, now we
24 need to talk about documents.

25 MR. SCHWERTZ: They will be lined up ready to

1 go by witness. Make sure the plaintiffs know what is going
2 to happen beforehand if there are any objections. These
3 are every piece of paper they have already seen.

4 MR. HATTEN: What is it?

5 MR. SCHWERTZ: They are photographs of
6 products that have been identified by the coworkers and
7 there are some Thornton documents.

8 MR. CONNOR: Some of the documents in the
9 Thornton series.

10 MR. HATTEN: He said he had two banker boxes
11 and five thousand pieces of paper.

12 MR. CONNOR: We are talking about maybe a
13 handful.

14 MR. HATTEN: They are not on your witness
15 list.

16 MR. SCHWERTZ: Yes, they are. One
17 forty-seven, all exhibits ever introduced in any
18 deposition.

19 MR. HATTEN: Oh, Judge.

20 THE COURT: I mean, I think exhibits were
21 introduced on your manufacturers' things that I have said,
22 No. Just because it is on a deposition that doesn't get it
23 in.

24 MR. SCHWERTZ: I think what Mr. Hatten is
25 objecting to, he says he is going to be surprised by any of

1 these things. Mr. Hatten has looked at every one of these
2 things.

3 MR. HATTEN: It is not a matter of surprise.

4 THE COURT: You have to have a foundation.
5 You have to have some basis for thinking it is relevant and
6 admissible material.

7 MR. HATTEN: I identified my material safety
8 data sheets as a joint exhibit and I gave it a number, and
9 that was no -- he has some catch-all on his witness list
10 that says any deposition -- I mean, any exhibit attached to
11 any deposition.

12 Well, Judge, Mr. Thornton came with two
13 banker boxes, I think it was about three thousand pages of
14 documents that were attached to his deposition, and we just
15 made a CD of the thousands of documents because they were
16 too voluminous. Are you just --

17 MR. HATTEN: What are you talking about?

18 MR. SCHWERTZ: It is the ambient air studies
19 done in the shipyard under Mr. Thornton.

20 Judge, what your concerns are about relevance
21 and authenticity, we have agreed as to the authenticity so
22 we don't need to bring Mr. Thornton here to identify --

23 MR. HATTEN: I don't disagree to the
24 authenticity. I know what documents he is referring to.
25 What I object to is having -- what is the purpose of having

1 a list of a hundred and fifty exhibits if you have one
2 little clinker in there?

3 THE COURT: Let me ask you this: Are these
4 on your hundred and fifty?

5 MR. SCHWERTZ: They are in a grouping that
6 says that the exhibits that were introduced in expert
7 depositions and witness depositions. And to be perfectly
8 blunt, did I take every one? No, because they are bankers'
9 boxes. I'm not sure which once will be introduced.

10 THE COURT: Well, that is not fair. That
11 doesn't really give notice if I say, Any document that we
12 have talked about in this case to date.

13 MR. SCHWERTZ: Nor is it fair that I get
14 handed documents Wednesday of last week with, Carl, you
15 don't mind if this comes into evidence? I know you have
16 never seen it, I just got it yesterday.

17 I'm trying to go back and forth here and Mr.
18 Hatten -- every time if it breaks well for Mr. Hatten,
19 Thank you, we will be happy to help you out. Any time I
20 suggest there is a document we are going to be introducing
21 now we are going to raise an objection.

22 THE COURT: We are going to try to keep it
23 fair, but I guess I need to know a little bit more about
24 what you are going to do.

25 MR. SCHWERTZ: I understand that.

1 THE COURT: Can you-all talk about that? Do
2 you know where you disagree already?

3 MR. SCHWERTZ: I think he just doesn't know
4 which ones. We are happy to chat with him and show him
5 which ones.

6 THE COURT: What is the total number of your
7 anticipated written documents?

8 MR. SCHWERTZ: Less than fifty --

9 MR. CONNOR: It is probably less than twenty.
10 These are shipyard documents where I know that they have
11 talked about certain things with respect to the shipyard
12 and now in order to use with my witness or witnesses --

13 THE COURT: Would these be studies or
14 samples?

15 MR. CONNOR: These are recorded air samples
16 at the shipyard.

17 THE COURT: Done by some recognized --

18 MR. CONNOR: By the industrial hygiene
19 department at the shipyard. That is why Mr. Thornton was
20 on the witness list, just to authenticate them, but he
21 authenticated them at his deposition.

22 MR. HATTEN: In his deposition these studies
23 he said were not representative of what would have happened
24 in the '60s or '70s. He says, In the '80s -- he said,
25 These may represent what the air was in the '80s, but it

1 wouldn't represent -- and it was the air in the shipyard in
2 the '80s. He says, I think it would have been much less at
3 any time before that. That is what he said.

4 THE COURT: Is that what he said?

5 MR. HATTEN: That is what he said. I will
6 vouch the record. That is what he said.

7 THE COURT: Which you may want him to say
8 from the defendant's point of view, correct?

9 MR. HATTEN: No. They want -- what they want
10 is to show that the air samples -- the background in the
11 shipyard --

12 THE COURT: Oh, the background level.

13 MR. HATTEN: The background level in the
14 shipyard is high, okay. And the background level that we
15 have been talking about is the background level in
16 communities, okay, across the country. And we put in with
17 our expert, they looked at forty-seven different cities all
18 over the United States and the background level was .000 --
19 three zeros and a number. And it was either one to five at
20 the end of that, the fourth digit past the decimal. And
21 Mr. Thornton has some air samples done at the shipyard that
22 are .003, okay? So his -- his samples taken in the mid
23 1980s are an indication of what the background level was in
24 the shipyard in the 1980s.

25 Well, I asked him, Does this have any

1 relationship to what it would have been sooner? And he
2 said, No, because in the '80s we did a lot of repair work
3 and ripping out asbestos in overhauls and things. He said,
4 It would have been much less sooner than that.

5 And so Mr. Thornton is not here, and this is
6 another reason why -- if I'm not given any notice as to
7 what exhibits out of two banker boxes he is going to use at
8 trial I don't even know how -- until I heard it I didn't
9 know what exhibits he was going to be using, much less
10 which depositions he was going to be using. We took about
11 twenty depositions.

12 MR. CONNOR: There are three depositions. He
13 took three days of depositions.

14 MR. HATTEN: Three days of depositions with
15 Mr. Thornton. I'm talking about depositions of all of the
16 other people, which is all you said was the catch-all
17 exhibits to any deposition.

18 MR. CONNOR: And, Your Honor, the issue has
19 arisen here during plaintiff's trial, plaintiff's evidence,
20 where they offered every single witness, putting up
21 --because they know our defense. They want to put up what
22 the ambient air numbers are. And they use numbers -- I
23 mean, Dr. Longo talked about sticking his hand out the
24 window of a hotel in San Francisco or something and getting
25 zero a year or two ago. That is not the issue. Okay?

1 We are going back over time because just like
2 people have exposure in the shipyard or in a work site they
3 have also had exposure in the community, and their doctors
4 have admitted that that people have thousands of fibers in
5 their lungs or millions of fibers even if they are not
6 occupationally exposed. And our contention is that that
7 level does not cause disease, never has, never will, okay?
8 And they have put on evidence about what the ambient air
9 levels are zero zero zero, whatever they go to.

10 Well, this is in direct contravention. Not
11 only do we have an expert that will testify about a study
12 that was done -- they testified about a study done -- at
13 the last trial here in Newport News, about a study done in
14 the 1980s that he relies upon about an average of 0.01 to
15 0.02, okay?

16 MR. HATTEN: Which was done right down here
17 at that time shipyard.

18 MR. CONNOR: The shipyard studies confirm
19 that. That is our contention. It is for our -- related to
20 our case because they are saying there is no safe level no
21 matter what it is. Well, we show that not just at the
22 shipyard, but in other areas, whether it is not the
23 shipyard proper but out by the gate, that there are --
24 there can be recorded levels.

25 THE COURT: Yeah, but what I don't understand

1 about that sort of line of approach is if, in fact, this
2 disease, say, is created when you have a hundred straws --
3 and as I understand the evidence, no one straw can be
4 picked out and either called unharmful or what caused it.
5 It is a cumulative effect. If that is so, then when you
6 have a person who is exposed to, say, moderate or high
7 background, it seems to me that when they do become exposed
8 under kind of the eggshell theory in law school, we have a
9 person who perhaps is more susceptible to the disease
10 because of extensive exposure to background than we would,
11 perhaps, have someone who'd in the middle of Arizona.

12 So to say that there is an acceptable level,
13 you and I could both pick out people who have -- if we
14 picked out someone in Newport News who lived here in the
15 '60s and '70s, whatever the background was, if you would
16 agree with me, it is higher than someone in Tempe, Arizona.
17 I would say that the local person would suffer more risk by
18 being exposed to asbestos because it would be added to the
19 background than the person in Arizona.

20 MR. CONNOR: Judge, you are accepting all of
21 their arguments.

22 THE COURT: I'm accepting what I have heard
23 today.

24 MR. CONNOR: Correct. And our evidence will
25 be there is no increased risk. There is no increased risk

1 from a base-line exposure to asbestos to people who are not
2 occupationally exposed. People walking around in Newport
3 News in the '60s and '70s didn't have to wear respirators
4 and didn't contract disease. Their evidence is there is no
5 safe level. We are saying, Listen, just like any exposure
6 to a lot of different things, including asbestos, there is
7 a certain level that does no harm. The risk levels they
8 put forth with Dr. Maddox are all based upon mathematical
9 extrapolations from larger numbers. There is no study to
10 show that zero or .1 or whatever causes disease. And that
11 is our contention, is that the levels here are low and that
12 they do not cause disease at that level.

13 We agree here, and I think both sides agree,
14 that the massive exposures that Mr. Little received to
15 thermal insulation can cause it.

16 THE COURT: You are attacking the causation.

17 MR. CONNOR: Absolutely. Two prongs, yes.

18 MR. HATTEN: But, Judge, if the test of
19 background level is done at the shipyard gate in 1982 as to
20 what the background level is, then and you don't -- and the
21 person that did it says that has no relationship to what
22 went on before, you -- you know, and I don't agree with his
23 premise there is no epidemiological study of how many
24 people in this community get it from background levels.
25 There hasn't been any study of that.

1 He is making a huge leap that at that level
2 people haven't gotten sick. We have got housewives that
3 with minimal exposure there are three dozen of them that
4 have gotten it that walk around in this city and, like you
5 say, are probably exposed to higher levels here than maybe
6 someplace else. But he is comparing apples and oranges
7 here. He is trying to compare a background level made
8 right outside the shipyard gate, which is obviously
9 polluted from all of those ships and would vary from time
10 to time with what is the real background level that they
11 are talking about when they set -- when they determine
12 whether or not something is a risk. This -- by his own
13 numbers at that shipyard gate it is a hundred times or more
14 higher than they measure everywhere else.

15 Now, what would be the obvious reason for
16 that? Because they got -- they have all of these ships
17 there. And if it is taken in the '80s, I mean, I don't
18 understand what possible relevance this could be. We had
19 no notice of these particular exhibits. And it opens up a
20 whole side show about what is the ambient air in Newport
21 News.

22 MR. CONNOR: Your Honor, if I may. During
23 the deposition of Dr. Fiel, who has testified, he did ask
24 -- even Mr. Hatten asked Dr. Fiel about his familiarity
25 with certain studies. And one of them was related because

1 he testified about it in the '02 trial before Judge Curran
2 about the study about Newport News area in the '80s showing
3 levels of up to .02.

4 MR. HATTEN: So anything they would have on
5 top of that would be that much more.

6 MR. CONNOR: But you came directly during
7 your case in chief saying, That number is not right. Our
8 numbers are point zero zero whatever the number is.

9 MR. HATTEN: It is not our numbers. It is
10 the World Health Organization's and everybody who has ever
11 studied it.

12 MR. CONNOR: Don't say everybody who has ever
13 studied it because they studied it here in Newport News.
14 They are showing outside the shipyard gate they are getting
15 levels, whatever that level may be it, is up to .02. There
16 are some lower. Admittedly, it fluctuates. And that is
17 what these show.

18 THE COURT: Let me say this: I think you are
19 entitled to present your theory of the case,
20 notwithstanding what the plaintiff wants. They have put
21 their case on. Now, it is something which I guess could be
22 supportive of some sort of argument, although it doesn't
23 quite seem to make sense to say, In the 1985s we did a
24 study -- and I'm talking about causation -- and it shows
25 this. If the defendant can get up and your own experts and

1 say, It doesn't have anything to do with the 1960s, then it
2 seems to me that is handing the plaintiff a bat to beat you
3 over the head with that all of this nonsense is really
4 irrelevant. That all you have shown is something about
5 background, that we have higher background. So all you
6 have shown is that people like you and similar
7 manufacturers have put the people in this city at risk.

8 I mean, it seems to me that unless you can
9 tie it in to something logical and reasonable with the
10 1960s to raise the ambient air -- not the ambient air, but
11 the background noise -- background air issue --

12 MR. CONNOR: Judge, this is the point. You
13 are talking about risks. Okay? I have made this point.
14 Risk. Risk is not disease. Okay? There is a difference.
15 You have a risk every day of walking across the street to
16 get your car or wherever it may be, and there is a risk of
17 getting hit by a car. What is that risk? There is a
18 question.

19 Same thing here. Ambient air. Even if there
20 is a risk, what is that risk? It is an extremely -- if
21 there is a risk it is extremely low. So low we say that it
22 does not cause disease. There is a difference between risk
23 and disease. Where the numbers are for disease shown with
24 asbestos are much higher, they extrapolate down from that
25 higher number to say --

1 THE COURT: Assuming that it is supportive of
2 your case to say that the background level will not harm
3 you.

4 MR. CONNOR: Right.

5 THE COURT: Are the documents that you are
6 using, they were produced when, during the deposition of
7 Mr. Thornton?

8 MR. CONNOR: Yes, sir.

9 THE COURT: And did you -- did you set these
10 forth as part of your hundred and fifty, other than in the
11 catch-all?

12 MR. CONNOR: Obviously, I was not here.
13 Mr. Schwertz did. But I understood there was an agreement
14 between -- there may be some other things I can't
15 specifically address.

16 MR. SCHWERTZ: They are listed as a
17 catch-all, Judge. I can't say we took these particular
18 documents and said, These are the ones. I will not
19 represent to the Court any differently than that.

20 THE COURT: These are three studies that Mr.
21 Thornton referred to.

22 MR. CONNOR: I believe he had three days of
23 deposition taken by Mr. Hatten. They came up I guess
24 during the course they were -- in other words, Mr. Hatten
25 served a request for production.

1 THE COURT: Right.

2 MR. CONNOR: When Mr. Thornton from the
3 shipyard showed up for the first deposition I guess there
4 was a voluminous amount of documents. They had to go back
5 and do some other requests. These were all produced and he
6 was subsequently deposed another two days.

7 But Mr. Hatten is right, there were a lot of
8 documents because he had a lot of requests in his request
9 for production. And over the three days they went over
10 these series of documents.

11 But, anyway, they were produced as part of
12 Mr. Hatten's request for production and for the deposition.

13 MR. HATTEN: Here is the way they have
14 identified it.

15 THE COURT: Did Mr. Hatten in using certain
16 deposition exhibits set them forth separately or indicate
17 he reserved the right to use any exhibits produced in
18 depositions?

19 MR. SCHWERTZ: We agreed at the beginning of
20 Mr. Thornton's deposition that these were shipyard
21 documents and they could be used -- they have been used.
22 They have been shown to all of the witnesses. Dr. Longo
23 has seen them. John Spencer, our industrial hygienist, has
24 seen them. I know Jerry Lauderdale has seen them. There
25 other industrial hygienists. They have been seen by all of

1 the experts.

2 MR. HATTEN: The authenticity of the
3 documents has not been the subject of any controversy. The
4 issue is not -- that kitchen-sink identification is so
5 broad you can drive an eighteen-wheeler through it.

6 THE COURT: And that is what is covered under
7 this plaintiff's answer to interrogatories and exhibits
8 thereto?

9 MR. HATTEN: No. It is up further. Any --

10 MR. SCHWERTZ: I believe it is one
11 forty-seven, Your Honor.

12 THE COURT: Any and all exhibits listed by
13 other parties or otherwise identified during the course of
14 proceedings in this case.

15 MR. HATTEN: Which at the time that was
16 written included three thousand Dana exhibits and hundreds
17 of other things.

18 THE COURT: The whole thing was to reduce
19 this to a hundred and fifty designated exhibits as opposed
20 to saying all exhibits in this case or otherwise identified
21 in this case would, in fact, go back to the prior list of
22 three thousand something.

23 MR. SCHWERTZ: Your Honor, that was my final
24 exhibit list. And Mr. Hatten never objected to anything on
25 there until just now.

1 MR. HATTEN: This is the first opportunity
2 that I have had --

3 MR. SCHWERTZ: That is not true.

4 MR. HATTEN: You didn't tell me anything you
5 were going to offer. That is why I asked when you bought
6 it up.

7 THE COURT: Has the plaintiff introduced any
8 exhibits which were not set forth in the hundred and fifty?

9 MR. SCHWERTZ: Yes.

10 THE COURT: What would that be?

11 MR. SCHWERTZ: The funeral bill.

12 MR. HATTEN: It is right on the joint exhibit
13 list.

14 MR. SCHWERTZ: Your Honor, it may have been
15 there, but it was never shown to me until last week.

16 THE COURT: Okay.

17 MR. SCHWERTZ: I have never seen it.

18 THE COURT: Did they pull out anything from a
19 general reference, like any and all exhibits, and use that?

20 MR. SCHWERTZ: Not that I know of.

21 THE COURT: Okay.

22 MR. SCHWERTZ: Mr. Connor reminded me
23 Dr. Lauderdale did refer to one of the Thornton exhibits.
24 Was it introduced into evidence? No.

25 THE COURT: It was not? Do you know what

1 that was?

2 MR. SCHWERTZ: It was one of the test of -- I
3 think it was gasket products.

4 MR. CONNOR: It was one of the tests where
5 they said, Even with controls, Dr. Lauderdale, didn't they
6 show something? And he put a high number up. And that is
7 when I had to cross-examine about what he had testified to
8 previously. But they -- in other words, if what you are
9 saying, Your Honor, is that you can -- like they gave the
10 documents to Dr. Lauderdale and he can look at them and
11 then talk about them. And I have already given these
12 exhibits to Mr. Spencer because all of the foreign stuff
13 was given to Dr. Longo, Dr. Lauderdale, Mr. Spencer, my
14 witness, so they all can look at them and talk about them.
15 But I think all we are asking then is that if there is the
16 background paper to go with it -- and I'm not talking about
17 using the three thousand or however many exhibits there
18 were at the Thornton deposition. He is right. There were
19 banker boxes. Matter of fact, they reduced them to CD-ROM.

20 THE COURT: What is wrong with putting your
21 witness on the stand and having him -- asking him if he is
22 aware of studies that were due the ambient -- whatever it
23 is, the air at the shipyard? What would be wrong with
24 that? And he said, Yes, I am, I'm aware of those. I mean,
25 don't you have your argument there anyway? And Mr. Hatten

1 can say, That is irrelevant to this case. And we can face
2 that now. Why do you need the studies?

3 MR. CONNOR: Well, I agree with that. I
4 think I'm permitted to do that. But these are the
5 underlying documents that he is referencing. Have you
6 reviewed the studies? Are these the ones? Yes. They are
7 authentic. They have agreed they are shipyard documents.
8 It is simply, obviously more, evidence and I think I'm
9 entitled to do that.

10 THE COURT: All right. This is what we are
11 going to do. Number one, I'm going to deny the exhibits
12 because I think this -- we are trying to limit things to a
13 hundred and fifty. These all-inclusive statements are not
14 going to cut it. All right?

15 Now, I think your witness has the right to
16 demonstrate his knowledge about this, make whatever point
17 he wants to, subject to relevancy arguments then. All
18 right?

19 Now, if Mr. Hatten goes after your witness
20 for any reason and says, I think you made all of that stuff
21 up, at some point on some sort of redirect these documents
22 may be admissible in response to something surprising that
23 comes up. But certainly he can give out his information if
24 it is relevant. And I think we'd better wait until it
25 comes in to see how it comes in.

1 I mean, if he is talking about the background
2 noise generally and his awareness of it in a study, whether
3 or not it is helpful to you there may be an issue as far as
4 relevancy to the 1960s, and we will deal with that.

5 MR. CONNOR: Very well, Your Honor.

6 THE COURT: It seems to me the plaintiff did
7 have a number of exhibits which in my mind have to do with
8 weight. I mean, we know kind of what was going on in the
9 1980s. I think I do, as far as causation. We know what
10 was being said in the 1940s, '50s. I happen to think we
11 were more sophisticated in our specific knowledge of this
12 disease in the later years than we were in 1946 when we are
13 talking about general asbestos diseases versus this
14 particular disease. We will look at that when it comes up.

15 MR. CONNOR: Very well, Your Honor.

16 THE COURT: But keep the documents themselves
17 out and allow him to give his information. This is
18 Mr. Spencer?

19 MR. CONNOR: Yes, Your Honor. He is
20 certified.

21 THE COURT: Any other documents which you
22 think are included underneath this catch-all?

23 MR. SCHWERTZ: Photos of products from
24 coworkers.

25 MR. HATTEN: Photos of products that the

1 plaintiff identified because he identified a number of
2 photos in his deposition. I think they are already in.

3 MR. SCHWERTZ: Coworkers identified, products
4 too, in their depositions as well.

5 MR. HATTEN: I object.

6 MR. SCHWERTZ: They were the ones --

7 MR. HATTEN: Same thing.

8 THE COURT: What is one forty- eight?
9 Product samples including photographs. Are you talking
10 about product samples?

11 MR. SCHWERTZ: Photographs of products.

12 MR. CONNOR: Your Honor, if I may. We have
13 two things. And I think it is to enlighten the jury as I
14 did try to do during the opening because plaintiff, as I
15 think we said, would like this as a gasket case. Here we
16 are saying thermal insulation is responsible. And there
17 will be witnesses who talk about thermal insulation. And I
18 think we are entitled to show photographs to the jury
19 demonstratively of what these products look like. I intend
20 to have my certified industrial hygienist to come into
21 court to show samples of products.

22 THE COURT: Just as demonstrative aids as to
23 what the witnesses are saying?

24 MR. CONNOR: Absolutely. What is -- we have
25 a sample of pipe covering. We have a real pipe covering.

1 We have some real cement. Things of that nature.

2 THE COURT: Mr. Hatten, I think they can use
3 demonstrative aids.

4 MR. HATTEN: I agree, but it doesn't go to
5 the jury.

6 THE COURT: No, it doesn't go as an exhibit.
7 But if the man says, There is a difference between Garlock
8 gasket and asbestos insulation, it seems to me you say, Can
9 you identify this? He says, Yes, that is the difference
10 between the two. I think the jury can see it. But it is
11 really not an exhibit.

12 MR. CONNOR: It is a demonstrative exhibit.
13 Whether it goes to the jury I understand, and that is what
14 objection has been before, because my demonstratives just
15 like plaintiff's demonstratives shouldn't go to the jury.

16 THE COURT: There are different types of
17 demonstrative exhibits. I mean, something identified by
18 the plaintiff specifically or the plaintiff's decedent,
19 something that will give them some idea of a product, that
20 is fine. But lists of expenses or diagrams prepared by
21 counsel or something like that certainly wouldn't go back.
22 I don't -- you have pictures of products?

23 MR. CONNOR: Yes, blow-ups, things of that
24 nature. With witnesses, when they talk about -- let me
25 finish, please. When they talk about pipe covering or when

1 they talk about cement, we show them demonstratives. Is
2 this what you are talking about? Because these jurors, I
3 don't know their level of sophistication regarding
4 asbestos-containing products. We make assumptions, but I
5 don't know. And that is why it is to educate this jury
6 about the nature of the exposure and the differences of the
7 products. And that is critical to our case and our
8 defense.

9 THE COURT: Everything that has gone in to
10 date, though, seems to me to be related to the product that
11 Mr. Little was using and it is what he did. To start
12 introducing -- you know, I would imagine some scientist
13 could say, you know, There must be, what, billions of other
14 products in the universe. To introduce all of those to the
15 jury at some point becomes silly.

16 I will allow you to use them as a
17 demonstrative aid to do the witness's testimony, but they
18 won't be exhibits.

19 MR. CONNOR: Okay.

20 THE COURT: No. Wait a minute. They won't
21 be exhibits that go to the jury.

22 MR. CONNOR: Right. They are not in
23 evidence.

24 THE COURT: Yes. That is correct. But there
25 is a difference between counsel using an aid in his final

1 argument and saying it goes to jury.

2 MR. CONNOR: Agreed.

3 MR. HATTEN: I have --as I stand here, I have
4 no idea what samples, what photographs. They have not
5 shown me anything. I still don't know. And I'm supposed
6 to cross-examine this person. So if they are going to be
7 using --

8 THE COURT: I'm not sure what one forty-eight
9 means here. Product samples including photographs, valves,
10 packing and gaskets.

11 MR. SCHWERTZ: Mr. Conner used those in his
12 opening statement, Your Honor. Mr. Hatten -- I hesitate
13 state to use this word because a judge told me if I used it
14 I was calling somebody disingenuous. These are photographs
15 Mr. Hatten's office showed to people prior to their
16 deposition so they could identify the products in their
17 deposition. To say he has never seen them --

18 MR. HATTEN: All I want to know is which
19 ones. We have a whole notebook of photographs.

20 THE COURT: Why don't you go ahead because it
21 may be it is not identified enough -- and I don't know how
22 counsel prepares. If you don't know what they are going to
23 talk about --

24 MR. SCHWERTZ: No problem, Judge.

25 MR. HATTEN: What else? What other

1 demonstrative aids? No videos?

2 MR. CONNOR: Yeah. We have -- as part of
3 Mr. Spencer's defense, like he did in the last trial to
4 confront the issue with the issue with the Tindal lighting,
5 we have a demonstrative aid regarding split-screen video of
6 Dr. Longo's video versus Mr. Spencer has a video which
7 shows a bare flange with a wire wheel brush just like Mr.
8 -- Dr. Longo did and showed a difference.

9 MR. HATTEN: Your Honor, I really object to
10 this. I have never seen this video.

11 THE COURT: Come on, Mr. Hatten. No one is
12 asking you to say anything yet.

13 MR. HATTEN: I'm sorry.

14 THE COURT: What does Mr. Spencer do?

15 MR. CONNOR: He's a certified industrial
16 hygienist.

17 THE COURT: He has a picture of what?

18 MR. CONNOR: Sure. As part of his testimony
19 -- plaintiffs have offered testimony which the Tindal light
20 -- the theatrical light which we objected to --

21 THE COURT: I was here.

22 MR. CONNOR: -- that you can see all of this
23 dust. We have done it. We did it in the last trial. Mr.
24 Hatten has the transcript. He has read it. He knows what
25 we do. Dr. Longo knows what we do. We come in and we do a

1 split-screen video. One side is Dr. Longo's experiment.

2 THE COURT: Right.

3 MR. CONNOR: On the other side is
4 Mr. Spencer. And what he will testify to is, he has taken
5 a bare flange, there is no gasket on it, and he will go
6 with it -- go to it with a wire wheel brush just like Mr.
7 -- Dr. Longo did.

8 THE COURT: And?

9 MR. CONNOR: And show the comparison to the
10 jury. That -- that video that plaintiffs played doesn't
11 really tell us anything. It is to demonstrate that.
12 Because you will see dust in the air just like you will see
13 dust in the air --

14 THE COURT: You mean when he take's a wire
15 brush to a bare flange?

16 MR. CONNOR: Yes.

17 THE COURT: There is dust in the air then?

18 MR. CONNOR: You will see it under Tindal
19 lighting. When you use the theatrical Tindal lighting you
20 will also see dust.

21 You remember with Dr. Longo that seventy
22 percent of that dust you are seeing is asbestos. Well, we
23 are going to show that if you take all of this dust you see
24 from a bare flange with no asbestos there is not seventy
25 percent there.

1 THE COURT: Where is that on here, the
2 hundred and fifty?

3 MR. HATTEN: Your Honor, it is not on there.
4 And I have never seen the video in my life. I have never
5 been provided it. They asked me for my exhibits and I gave
6 them the CD the DVD and they had it four months ago.

7 MR. CONNOR: That is not correct.

8 MR. HATTEN: In answers to interrogatories
9 they have never provided me with any of this information.
10 In their exhibit list --

11 THE COURT: Let me ask you this: Are you
12 sure you have never seen it? I thought Mr. Connor said in
13 the last trial --

14 MR. HATTEN: No, not my trial.

15 MR. CONNOR: Mr. Smith-George has seen this
16 video.

17 MR. HATTEN: We were not counsel in that
18 case.

19 MR. SMITH-GEORGE: I have never seen the
20 videotape he is referring to with Mr. Spencer.

21 MR. CONNOR: He has seen the transcript.

22 THE COURT: We only have two court reporters
23 -- I assume one court reporter, but we have got four people
24 talking.

25 MR. HATTEN: I'm sorry, Your Honor.

1 The 2002 trial was with Ron Motleys law firm
2 in South Carolina and an attorney Peter Nicholls. I didn't
3 attend the trial. I haven't seen the videotape. I haven't
4 ever received a copy of the videotape. And I was given no
5 notice that that videotape was going to be used.

6 THE COURT: If Mr. Hatten and the plaintiff
7 have not seen the videotape before today then it can't be
8 used.

9 MR. CONNOR: Your Honor, if I may, that is
10 just not right. They know our defense and they know we
11 have done this before, okay? They have the transcript from
12 the prior trial.

13 THE COURT: I'm not saying it is right or
14 wrong. I'm saying you have to disclose and reveal to
15 counsel the exhibits. We had a list of a hundred and fifty
16 we worked down to that counsel has been before me on a
17 number of times two or three weeks ahead of time. No one
18 has ever said, What we want to do is we just have a new
19 video exhibit and we would like to introduce it.

20 So it is not a question of right or wrong, I
21 think it might be interesting to see. But that is not the
22 issue whether or not it might be interesting.

23 MR. CONNOR: Your Honor, again, it is another
24 demonstrative aid. It is not going to the jury. And there
25 are two things here, okay?

1 First of all, if you go back to the Court's
2 schedule, there was an issue with the McLean case and the
3 Little case. McLean was going to go forward until the
4 Little case -- until McLean was postponed due to an illness
5 of counsel. Mr. Hatten and I had arranged for the
6 deposition of Mr. Spencer and Mr. Fiel the week prior to
7 the trial. He told me that, If the McLean case goes
8 forward I don't need to take your depositions. If it does,
9 I need to take your depositions.

10 As part of that he had the opportunity to
11 take Mr. Spencer's deposition, which he did, okay? But he
12 hung up the phone on him. He didn't -- he got frustrated
13 and hung up the phone. He didn't ask for anything. He
14 didn't get to the point where he asked about what he was
15 going to bring because this has been done before.

16 THE COURT: Did Mr. Spencer in response to
17 anything from plaintiff's counsel in interrogatory or
18 request for production ever indicate that, As a matter of
19 fact, I have a video film that I would like to use to show
20 that the Tindal lighting effect is not what it appears to
21 be? Anything like that?

22 MR. CONNOR: Your Honor, he never asked him
23 because he hung up the phone. He cut short the deposition
24 on his own.

25 THE COURT: It was a deposition on the phone?

1 MR. CONNOR: Yeah. Because -- Your Honor,
2 what happened here, the McLean case was doing to go
3 forward. Mr. Hatten and I had an agreement. We scheduled
4 Dr. Fiel's and Spencer's deposition via phone because the
5 McLean case was going to go forward, but he wanted a
6 fall-back position. But when McLean didn't go forward,
7 Little was. So then he wanted the depositions, but we had
8 already agreed that if McLean went forward he didn't want
9 to take their depositions. He didn't want to do to the
10 expense, the waste, whatever.

11 He took Dr. Fiel's deposition by phone. Then
12 he was going to take Mr. Spencer's deposition by phone.
13 During a portion of the testimony -- he had taken a portion
14 of the testimony and he decided to discontinue it on his
15 own. He hung up the phone. I don't know why, but that is
16 what happened. But he never asked about it.

17 I just think, Your Honor, they have the prior
18 transcript. They know we do this all of the time to
19 confront Dr. Longo. Even Mr. Boelter, our other expert,
20 has this videotape. It is not being put into evidence,
21 Your Honor.

22 And let me just tell you about the Longo
23 stuff. The Longo stuff they didn't produce to me at Mr.
24 Longo's deposition. They didn't produce it. I already had
25 it from a prior trial and they knew -- they knew about it

1 because I asked them about it.

2 THE COURT: It seems to me -- one of the
3 things the Court tries to encourage is that we look at all
4 of the exhibits we had and reduced it to one fifty. Now we
5 are even going beyond that because you are saying that it
6 is going to be an exhibit whether it is demonstrative or
7 otherwise, and counsel for the plaintiff says they haven't
8 seen. So it can't be used until counsel for the plaintiff
9 has a chance to look at it, if he wants to inspect it and
10 respond to it. I mean, they didn't introduce anything
11 against you that you didn't have time to think about it and
12 respond to it.

13 Now, this is not only -- not in your one
14 fifty. As I understand it, it was never in any of your
15 exhibits until sometime last week. And I -- it may -- I
16 don't think I can rule that somehow a plaintiff is estopped
17 from objecting to it because of what happened at the
18 deposition.

19 I mean, I'm wondering why it wasn't listed
20 here as a possible exhibit, number one. And, number two,
21 if there was a way to estop the plaintiff from objecting
22 because they had some notice or time, I mean, that's one
23 thing. But -- and I don't know why you thought they had
24 seen this before unless you were confused about plaintiff's
25 counsel in some other trial. But I take it from Mr. Hatten

1 and Mr. Smith-George, they haven't seen this film before.

2 MR. CONNOR: Well, Your Honor, I know Mr.
3 Smith-George is very experienced in litigation. I know he
4 has, I think, tried cases down in Texas, I believe, perhaps
5 with Mr. Boelter, who is another one of our experts, who
6 has a similar video, okay? And to say he doesn't have the
7 Spencer video which purports to be the same one or similar
8 -- maybe it is not the exact same one, but the point is to
9 confront the allegation regarding Tindal lighting.

10 THE COURT: But the point is, you were to
11 disclose that as an exhibit. And it is not up to the Court
12 to say -- I think counsel has experience and are very
13 competent; therefore, you shouldn't be surprised, you ought
14 to be able to react on your feet, and, therefore, I would
15 admit any exhibit. I can't do that.

16 MR. HATTEN: I have been asking for this --
17 any demonstrative aids, I have been asking for their
18 exhibits, I have been asking for the things their experts
19 will rely upon for six months, and they have never
20 responded at all that this was going to be referenced.
21 They never responded to my interrogatories, period, about
22 what Spencer was going to say.

23 MR. SCHWERTZ: Judge, that is inappropriate.

24 MR. HATTEN: Well, it happens to be true.
25 There have been no disclosures other than the witness

1 summary disclosure that they said when they filed the
2 witness list is going to testify.

3 THE COURT: Was there any reference that he
4 would use a film to demonstrate anything about the Tindal
5 lighting?

6 MR. HATTEN: No, sir.

7 MR. CONNOR: Your Honor, I think it is
8 covered by our demonstrative exhibit issue. Number two, he
9 had the opportunity. He took his deposition. He should
10 have asked him everything. I asked Dr. Longo -- and all of
11 the witnesses they had went through everything they were
12 going to bring with them -- what he expected to rely upon.

13 You know, he didn't think he was going to go
14 forward with this trial. He was given the deposition. He
15 had the opportunity to ask him, but then when he cuts
16 himself short after hanging up the phone --after I don't
17 know what it was, thirty minutes, he got frustrated and
18 hung up the phone. So I think by his own saying, I'm not
19 going to do anything, his hands-off policy --

20 THE COURT: That's why each counsel had the
21 responsibility to disclose what they intended to use.

22 MR. SCHWERTZ: We did, Judge. We said all
23 demonstrative exhibits to be shown prior to trial we are
24 happy to show him.

25 THE COURT: All what?

1 MR. SCHWERTZ: In our disclosure at the end
2 we further designate the following exhibits.

3 THE COURT: This is one what --

4 MR. SCHWERTZ: It is an attachment to the
5 exhibit list.

6 THE COURT: An attachment to your proposed
7 exhibit list?

8 MR. SCHWERTZ: Yes, sir, in paragraph four.

9 THE COURT: What is this?

10 MR. SCHWERTZ: An attachment to the exhibit
11 list.

12 THE COURT: And this says?

13 MR. SCHWERTZ: It talks about demonstrative
14 aids.

15 THE COURT: Well, this reserves the right to
16 use demonstrative exhibits, including all slides,
17 photographs, everything else, portions of them, which need
18 not be identified on this list pursuant to the Court's
19 ruling on September 13th, and all demonstrative exhibits
20 shall be made available to the plaintiff prior to their use
21 at trial.

22 MR. SCHWERTZ: You made a specific ruling
23 that demonstrative aids did not need to be --

24 THE COURT: Normally demonstrative to the
25 extent it is supportive or explanatory of a witness's

1 testimony, we don't think about those as being exhibits to
2 the jury.

3 MR. SCHWERTZ: Again, it is not going to go
4 back to the jury room. It is only going to be used to
5 explain Mr. Spencer's testimony which talks about --

6 THE COURT: But a film now, a film.

7 MR. SCHWERTZ: Isn't that what Dr. Longo's
8 film was?

9 MR. HATTEN: We showed you the film.

10 THE COURT: The reason you provide that ahead
11 of time is so it can be examined and tested.

12 MR. HATTEN: Right.

13 THE COURT: I know counsel is good-faith
14 arguing this, but I don't know whether it is accurate,
15 whether it is based on reality. I assume that it is, but
16 that is the reason we disclose these things. Because if
17 there is something wrong, we like to know it before we get
18 out in front of the jury.

19 MR. SCHWERTZ: I appreciate that, Your Honor,
20 and I think -- you know, I think what Mr. Connor was
21 talking about, Mr. Hatten had the transcript of
22 Mr. Spencer's testimony at the consolidation. Mr. Hatten
23 was not the lawyer there. I understand that. And I'm not
24 arguing that. I imagine the reason why we didn't say, By
25 the way, you got John Spencer's video, don't you, because

1 this is not a surprise video, it has been around for a
2 while, it was referenced in that transcript. So to make
3 sure you have seen it, right?

4 THE COURT: Mr. Spencer was referenced or the
5 video?

6 MR. SCHWERTZ: It was Mr. Spencer's testimony
7 in that transcript Mr. Hatten had when he cross-examined
8 Mr. Spencer in his deposition about three weeks ago.

9 THE COURT: But they never talked about --

10 MR. HATTEN: Not for this case.

11 MR. SCHWERTZ: I'm not suggesting -- Your
12 Honor, I'm not suggesting --

13 MR. HATTEN: There are a lot of trials and
14 Mr. Spencer has testified all over the country, and what he
15 uses in one place may be different from what he uses in
16 another place. I asked for what he was going to use here,
17 I never got it, and so I'm not prepared to cross-examine
18 him here.

19 THE COURT: The Court is getting --we need to
20 watch our language here. The Court is getting sloppy. A
21 demonstrative aid is something to help the witness explain
22 the testimony. So I'm trying to explain to you, if I hop
23 off of the stand and I go over to the board and I draw
24 something or I tell you how an accident happened but I'm
25 getting confused so I'm going to draw a diagram, that is a

1 demonstrative exhibit. Now, when the witness says, I would
2 like to show you a film, that is not a demonstrative film.
3 It is explaining what my opinion is. But it seems to me it
4 is another type of exhibit. It is the introduction of some
5 other work product which needs to be tested, i.e.,
6 cross-examined, before it means anything. And then the
7 third class would be something that goes to the jury.

8 For me to stand up here and say, I have an
9 opinion and I would like to show you the following five
10 films, that is technically not demonstrative. Someone else
11 did that. That is really a reference or resource for me to
12 use. So I'm -- if you are going to use the film, you let
13 counsel know or have the opportunity to inspect it and
14 then, if he does it, you use it. Then you can't run around
15 talking about it is not a proper film or it is confusing or
16 whatever it is, but at least he prepares a
17 cross-examination so it is a fair discussion of what it
18 represents.

19 And I'm just surprised -- I mean, we have
20 been here now a week, I guess, and one day. If you really
21 thought -- I mean, when did you decide to use this? From
22 the very beginning?

23 MR. SCHWERTZ: When Mr. Spencer was going to
24 testify, Your Honor.

25 THE COURT: And you thought that it was not

1 really a disclosure matter because what?

2 MR. SCHWERTZ: I expected Mr. Hatten to
3 already know about it.

4 THE COURT: You thought Mr. Hatten would know
5 about it?

6 MR. SCHWERTZ: And to be perfectly blunt, I'm
7 shocked that he doesn't, Your Honor.

8 THE COURT: Anything else on this? We have
9 been shocked. And anything else on this?

10 MR. SCHWERTZ: I can't think of any more
11 adjectives, Your Honor, or adverbs. This is a rebuttal to
12 Dr. Longo's titillating video he showed and talked about
13 clouds and dust.

14 THE COURT: It is your case in chief, right?

15 MR. SCHWERTZ: Everything the defendant does
16 to a certain extent rebuts what the plaintiff's evidence
17 is. We don't technically have an opportunity for rebuttal.

18 THE COURT: You are not arguing you were
19 surprised by plaintiff and have to run out and get an
20 exhibit to fairly --

21 MR. SCHWERTZ: I'm not making that argument,
22 nor am I making the argument that Mr. Hatten is surprised
23 by this videotape. I am surprised that he is surprised.

24 MR. CONNOR: If I may, Your Honor, as you are
25 aware, it is a very mature litigation, okay?

1 THE COURT: Mature.

2 MR. SCHWERTZ: Not necessarily the
3 participants.

4 THE COURT: You mean kind of old and stale or
5 what you are saying?

6 MR. CONNOR: The litigation itself has
7 developed. And Dr. Longo, obviously, has been developed in
8 contravention to Garlock and has produced what he showed
9 were his videos. And, obviously, during the course of this
10 litigation because he testified in 2002 here and other
11 places, I have become acquainted with that video, okay?
12 And so that was not produced -- when I went through
13 everything, that was not produced at his deposition. But
14 did I ask about it? Yes. I asked about it because I knew
15 about it because the litigation has matured, okay?

16 As a matter of fact, the other day it was
17 plaintiff's counsel who didn't bring the videos. I gave
18 him my DVDs to play. He didn't even bring them. It was a
19 courtesy and I extended it to them. And for them to say
20 here that in the context of this litigation -- and Mr.
21 Hatten being very familiar with Mr. Spencer, he has deposed
22 him previously, okay? And then to have had the opportunity
23 to depose him the other day, almost two weeks ago, to hang
24 up the phone, to shut his eyes and close his ears, to say,
25 I'm not aware of this, despite having the transcript from

1 2002 -- no one has denied they have his testimony from 2002
2 where he testified and showed the video to the jury. To
3 say he is not aware of it I think is just not right.

4 We have all worked in this litigation. He is
5 very experienced. I will admit I'm experienced. And we
6 know the players.

7 THE COURT: Unfortunately, Mr. Connor was not
8 present on September the 13th. I think Mr. Connor -- I
9 first met you when you came up for trial.

10 MR. CONNOR: Yes, sir.

11 THE COURT: It is not a question of what Mr.
12 Hatten knows. The question is one of disclosure. And the
13 Court said, Let everyone know your hundred and fifty we
14 agreed on exhibits. Now, unless a film is part of the one
15 fifty then it can't be used. The film has to be disclosed.
16 With exceptions noted.

17 All right. Next item.

18 MR. SMITH-GEORGE: Your Honor, I just want to
19 tell you I have given a list to the clerk that has our
20 corresponding pretrial numbers on the ATI minutes that were
21 read to the jury so she can mark them.

22 MR. HATTEN: I need to continue this. Is
23 there anything else that you intend to use with your
24 witnesses?

25 THE COURT: Anything else as part of the one

1 fifty?

2 MR. HATTEN: Anything else? Any other
3 exhibits other than -- that are not specifically named on
4 the one fifty?

5 MR. CONNOR: I mean, other than we have
6 talked about the photographs.

7 MR. HATTEN: I understand photographs.

8 MR. CONNOR: We talked about the things the
9 witness can refer to that he was given as part of his
10 deposition.

11 THE COURT: And aids to explain different
12 products.

13 MR. CONNOR: Correct.

14 THE COURT: Demonstrative aids.

15 MR. HATTEN: All right.

16 MR. CONNOR: The only other thing was the
17 video. Can I have -- Your Honor?

18 THE COURT: Certainly.

19 THE CLERK: There is a date you have written
20 down here for me, March 7, '56, reference Garlock four,
21 that was already admitted on the twenty-third.

22 MR. SMITH-GEORGE: Right. That is why I
23 didn't put a number on there.

24 THE CLERK: It is already in.

25 My next question is, do you want the medical

1 bills of Riverside Hospital in? In your list you have
2 medical records of Riverside Hospital and then you have a
3 separate entry for medical bills.

4 MR. HATTEN: That is it.

5 THE CLERK: That is the one you want, which
6 is referenced JT three, joint three.

7 MR. SCHWERTZ: Didn't you just put the
8 summary in?

9 MR. HATTEN: Just the summary page in. I
10 didn't put all of the details of the bills. Just the
11 summary.

12 THE CLERK: Okay.

13 MR. HATTEN: I think that is it.

14 THE COURT: Anything else from counsel?

15 MR. SCHWERTZ: No, Your Honor.

16 MR. HATTEN: Thank you.

17 THE COURT: All right, gentleman. Be careful
18 out there. We will meet tomorrow again.

19 MR. SMITH-GEORGE: One other -- just so I
20 understand what we are doing tomorrow. We are going to
21 read -- you are going to read excerpts from Mr. Little's
22 discovery deposition that we have just got through. And do
23 you know which live witnesses you have tomorrow?

24 MR. SCHWERTZ: Ferguson, Ishmael and Maddox.

25 MR. CONNOR: And Fiel is tomorrow night.

1 MR. SMITH-GEORGE: But for tomorrow daytime
2 you have those three witnesses.

3 MR. SCHWERTZ: And the deposition of Mr.
4 Little.

5 MR. SMITH-GEORGE: And the deposition of Mr.
6 Little.

7 MR. SCHWERTZ: We don't anticipate being that
8 long.

9 THE COURT: Court will be in recess until
10 tomorrow.

11 THE BAILIFF: All rise.

12

13 (Whereupon, the proceedings adjourned
14 at 1:45 p.m. to reconvene at 10:00 a.m.,
15 September 28th, 2004.)

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1 CERTIFICATE OF COURT REPORTER

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3 I, Kelly A. Williams, RPR, CCR, certify that
4 I recorded verbatim by Stenotype the proceedings in
5 captioned cause before the Honorable W. Vincent Conway,
6 Jr., Chief Judge, and a jury, in Newport News, Virginia, on
7 September 27, 2004.

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

11 Given under my hand this 27th day of
12 September, 2004, at Virginia Beach, Virginia.

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17 _____
18 Kelly A. Williams
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