

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

- - -
JAMES BACCUS, JR., EXTR. : MARCH TERM, 2007
OF THE ESTATE OF JAMES BACCUS, SR., :
DECEASED, AND SYBLE BACCUS, WIDOW IHOR: :
v. :
BUFFALO PUMPS, INC., ET AL : NO. 1063
:

- - -
FEBRUARY 25 2008
COURTROOM 616
CITY HALL
PHILADELPHIA, PENNSYLVANIA

- - -
MOTIONS and OPENING STATEMENTS OF COUNSEL
- - -
BEFORE: HONORABLE JAMES MURRAY LYNN, J.

- - -
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2	<u>I</u> <u>N</u> <u>D</u> <u>E</u> <u>X</u>	
3		<u>PAGE</u>
4	Motions	3
5	Opening statements of counsel	93
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
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1 Colloquy

2 THE COURT: I understand there are
3 some motions. We can put them on the record.

4 MR. BRUCH: Thank you, Your Honor. I
5 appreciate the splendid opportunity to argue
6 these motions, understanding the Court's
7 ruling.

8 My first motion on behalf of Crane
9 Co. is to sever the punitive damage claim. As
10 you know, the Court has ruled that the
11 substantive law of Kentucky will be applied in
12 the Baccus case.

13 As the Court also knows, both
14 Pennsylvania and Kentucky law permit punitive
15 damages.

16 It is a fundamental principle of
17 conflicts of law that a court use the
18 procedural rules of its own state. So in this
19 situation, the procedural rules of Pennsylvania
20 should be adopted.

21 By procedure, custom, and practice,
22 in Philadelphia County, PA, asbestos cases,
23 punitive damages have always been severed out.
24 Plaintiffs have taken advantage of the
25 Pennsylvania procedural rules of procedure,

1 Colloquy

2 custom, and practice to use reverse bifurcation
3 and consolidation.

4 Furthermore, Your Honor, there has
5 been, to the knowledge of this attorney, which
6 I think is pretty accurate, no punitive damage
7 claim, regardless of the substantive law of the
8 state since 1986, and the issue of limited
9 funds was raised due to the numerous
10 bankruptcies that there is not enough money for
11 plaintiffs to get compensatory damages, not
12 alone punitive damages.

13 I have provided the Court with one
14 opinion to support this position. That
15 opinion; there are other opinions cited in our
16 brief, but the Commonwealth of Pennsylvania v.
17 John Charles Eichenger, on page 13, not to bore
18 the Court, says it is a fundamental principle
19 of conflicts of law that a court use the
20 procedural rules of its own state.

21 Therefore, Your Honor, I feel
22 punitive damages on behalf of Crane Co. should
23 not be permitted in this Baccus trial as a
24 result of the procedure, custom of this forum
25 since 1986.

1 Colloquy

2 THE COURT: Well, you asked for
3 Kentucky law.

4 MR. BRUCH: Your Honor, I asked for
5 Kentucky law substantively. Once you
6 go procedurally, both Pennsylvania and Kentucky
7 have punitive damages.

8 THE COURT: Are damages substantive
9 or procedural?

10 MR. BRUCH: The law for damages is
11 substantive, Your Honor.

12 MR. ADAMS: Do you want us to go by
13 defendant, Your Honor, or by issue? I don't
14 mean to interrupt. Just whatever your
15 preference would be, because I have argument on
16 this issue as well.

17 MS. TYMINSKI: As do I for Yarway,
18 Your Honor.

19 THE COURT: I would say by issue and
20 in order.

21 I don't know if Mr. Bruch is
22 finished.

23 MR. ADAMS: I apologize.

24 MR. BRUCH: Your Honor, I am finished
25 with the exception of one request.

1 Colloquy

2 I respectfully request that due to
3 the severity of the issues in this case and the
4 7 million-dollar verdict, I would respectfully
5 request 15-minute arguments despite what the
6 Court said earlier today.

7 THE COURT: Well, there will be on
8 arguments. It will be opening statements.

9 MR. BRUCH: I mean opening
10 statements, correct. You are right.

11 I have now completed my punitive
12 damage request, if other defendants want to
13 follow-up, Your Honor.

14 THE COURT: Just one second. This is
15 a criminal case, the Eichenger case?

16 MR. BRUCH: It was a criminal case,
17 Your Honor, but it referred to both civil and
18 criminal rulings, and there are other opinions
19 cited in our brief.

20 THE COURT: Are you saying punitive
21 damages should have been argued in phase one?

22 MR. BRUCH: No, Your Honor. I am
23 saying --

24 THE COURT: If you are saying they
25 should be in phase one --

1 Colloquy

2 MR. BRUCH: Well, under Kentucky law,
3 all issues should be raised at once.

4 THE COURT: Well, it is in the same
5 trial.

6 MR. BRUCH: The issue is that all the
7 damages should be presented at the outset.

8 THE COURT: Punitive damages in phase
9 one just dealt with medical issues.

10 MR. BRUCH: Under Kentucky law, all
11 issues of damages have to be presented at once
12 to the jury or the judge if it is a nonjury
13 trial, and there is a statute on that. She has
14 it right here.

15 MS. TYMINSKI: John Crane, I think,
16 will address this issue as well.

17 MR. BRUCH: And I refer to that
18 Kentucky statute in our brief.

19 THE COURT: The same jury will hear
20 all of this evidence; is that right?

21 MR. BRUCH: From the outset and
22 determine it once.

23 THE COURT: As the jury was told, we
24 are in one trial, one trial divided in two
25 phases.

1 Colloquy

2 MR. BRUCH: The thrust of my main
3 argument, Your Honor, is that procedural law of
4 Pennsylvania must be followed regardless of the
5 choice of substantive law, punitive damages
6 under Kentucky law and Pennsylvania. The
7 procedure here elected by the plaintiffs was to
8 go in reverse bifurcation.

9 THE COURT: No. They were ordered by
10 the Court. I don't know the exact history of,
11 you know, from the incipient stages of
12 asbestos, you know, trial procedure, but it
13 seems to me that it was either done by order of
14 court that it be done this way, because the
15 courts wanted it that way, however many years
16 ago that was, or the parties, themselves, in
17 concurrence agreed with this. To say that
18 somebody chose something, which is, in the
19 Baccus case, when it is somehow as if they had
20 a choice, they don't have a choice.

21 MR. BRUCH: As you know, Your
22 Honor --

23 THE COURT: They don't have a choice.
24 This is the practice, the culture, the
25 procedure that has been adopted in this

1 Colloquy

2 jurisdiction in Philadelphia County, and upheld
3 by the appellate courts. So to say that they
4 have an honest choice is overstating the case.

5 MR. BRUCH: Similarly, Your Honor, if
6 you follow the logic of that argument, then
7 punitive damages cannot be used. They have not
8 been allowed since 1986.

9 THE COURT: You are using the issue
10 of Kentucky law for your advantage. You want
11 an advantage.

12 In Pennsylvania, we do not apportion
13 damages in a way that make the plaintiff go
14 chasing people for percentages so that they can
15 be made whole. Pennsylvania doesn't believe in
16 that sort of system. They believe that the
17 plaintiff, once it received -- the people of
18 Pennsylvania have decided a long time ago that
19 once a person has been adjudged harmed, that
20 they are to, by more than one defendant, they
21 have the absolute right to be made completely
22 whole, and whether it be -- and they call it
23 joint and several. Joint means they can
24 contribute together amongst each other to make
25 one plaintiff whole, or if one party is

Colloquy

incompetent or unable to contribute, then the burden falls squarely on the children of that party that does. Now other states have the right to do what they want to do, and apparently Kentucky chooses to do it in a percentage way, which Pennsylvania has rejected. But you have asked for this advantage, all three remaining defendants have asked for this advantage in applying Kentucky law, but yet you don't want the down side of Kentucky law, which is contributing to damages. And I have been trying to forcibly arguing earlier -- well, not forcibly arguing. I would rather see the case tried under Pennsylvania law because this Court is more comfortable and conversant with Pennsylvania law. But since the force of the defense arguments were made plain to the Court that Kentucky law ought to apply, and since it does, the entire Kentucky law, and in terms of damages and liability must apply. No matter in proceeding, how we do it, as long as it is fair and each side has the opportunity to address the same trier of fact, whatever issue it is. But the fact that it is

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Colloquy

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some pro forma thing was written in a certain

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way to maybe help out a state, a procedural

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practice, the way that state wishes to proceed

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in a procedural way in their court systems that

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they know best doesn't necessarily mean we have

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to adopt that here exactly.

8

MR. BRUCH: Your Honor, I understand

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all that.

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THE COURT: Of course, we have a

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different situation here. I am sure there is

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no -- to combine cases from Kentucky probably

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don't even match what this county has in terms

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of litigation, okay. So we have to make

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certain adaptations.

16

My primary concern here is that this

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jury receive fairly instructed on the law,

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whatever law it is going to be, and that each

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side has an opportunity to make their case on

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all aspects of the case.

21

MR. BRUCH: Your Honor, I would just

22

like to finish. Your Honor, the plaintiffs,

23

when you talk about advantage, they elected

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this forum because they knew it was reverse

25

bifurcation and consolidation. They could have

1 Colloquy

2 filed this case in Kentucky. The guy lived
3 there for 50 years. Just for purposes of the
4 record, we are just asking for severance.

5 THE COURT: Well, you have had the
6 opportunity to have -- I am sure you filed
7 motions to change venue or to exclude on
8 jurisdictional grounds, and apparently they
9 have jurisdiction here.

10 MR. BRUCH: I am now complete on that
11 motion, Your Honor.

12 MR. ADAMS: Your Honor, I would just
13 supplement by arguing the plaintiffs did have a
14 choice. They chose to file here, and we have
15 argued prior to phase one, Your Honor, that
16 Kentucky law should apply, and that it should
17 have been in all issues of trial to avoid this
18 exact situation, Your Honor. Plaintiffs did
19 oppose that motion. They opposed it when they
20 filed --

21 THE COURT: Have you ever had an
22 asbestos case where there was another state's
23 law used in the case?

24 MR. ADAMS: Yes, Your Honor.

25 THE COURT: In this state?

1 Colloquy

2 MR. ADAMS: Yes, Your Honor.

3 THE COURT: In this city?

4 MR. ADAMS: Yes. There is one coming
5 to trial. I believe they are trying to get a
6 trial date.

7 THE COURT: And it was reverse
8 bifurcated?

9 MR. ADAMS: Tennessee law. It hasn't
10 been tried yet, Your Honor.

11 THE COURT: In this courthouse, they
12 didn't reverse bifurcate?

13 MR. ADAMS: It hasn't been tried yet,
14 Your Honor.

15 THE COURT: I said have you ever had
16 one? I don't think so.

17 MR. ADAMS: I don't know if our
18 office has.

19 THE COURT: My guess is, my money is
20 going on that you have not had a reverse
21 bifurcated case where you had choice of law
22 issues and the choice of law went to the
23 foreign state.

24 MR. BURNS: Your Honor, what we have
25 not had is a case where they split it; where

1 Colloquy

2 they said it is reverse bifurcated for
3 procedures; however, then we will adopt
4 Kentucky procedure for not severing out
5 punitive damages.

6 Our argument is this; before phase
7 one, we said Kentucky procedure, all issues.
8 The Court said no; we are following the
9 practice of Pennsylvania. Now we are here and
10 saying that means practice of Pennsylvania,
11 sever out punitive damages. Mr. Bruch has
12 provided statutes, he has provided cases that
13 that's clear, and you are saying no, that is
14 not how they do it in Kentucky.

15 THE COURT: It is the way we do it in
16 Philadelphia, is what I said, that is the way
17 we do it in Philadelphia.

18 MR. BURNS: In Philadelphia, you
19 sever the punitive damages out. You are not
20 severing punitive damages out; you are mixing.
21 It is either all Kentucky procedure or all
22 Pennsylvania procedure.

23 THE COURT: Well, you want me to
24 follow Kentucky law or Pennsylvania law?

25 MR. BURNS: Pick; one or the other.

1 Colloquy

2 THE COURT: I have, based on what you
3 have requested.

4 MR. BURNS: The procedure.

5 THE COURT: I understand you are
6 repeating what Bill just said.

7 Anything else, Mr. Adams?

8 MR. ADAMS: Your Honor, the other
9 argument I would have is that in Pennsylvania,
10 Pennsylvania has an interest in applying
11 punitive damages based on the state's interest
12 in punishing an attorney, deterring particular
13 behavior. None of the behavior that has
14 allegedly brought about the need for punitive
15 damages ever arose in Pennsylvania, Your Honor,
16 and I would argue under the Pesco Company,
17 Inc., The Associated Products, 880, A.2d, 700,
18 and the cases that were adopted therein, and
19 the supreme court cases which we handed up to
20 you, Your Honor, State Farm -- it was my only
21 copy, State Farm v. Campbell, 538, U.S., 408,
22 that out-of-state conduct has no relevance and
23 can have no bearing on a punitive damages case
24 inside this state, under U.S. Supreme Court,
25 citing case law, and, therefore, because none

1 Colloquy

2 of the conduct took place here in Pennsylvania,
3 Your Honor, there is no state interest in the
4 Commonwealth of Pennsylvania to argue or to
5 have punitive damages assessed. And, Your
6 Honor, they could have chosen to file in
7 Kentucky; they did not. They chose to file
8 here; that was the plaintiffs' choice. They
9 are now seeking, Your Honor, to use reverse
10 bifurcation which is the reason the Texas
11 lawyers filed here instead of in Kentucky as a
12 sword, obviously, because it is better for them
13 in the phase on damages as we all saw last
14 week. However, now they are seeking to use it
15 as a shield, Your Honor, and it doesn't work
16 that way, and it shouldn't work that way.

17 THE COURT: You are using it as a
18 shield, too, because you want apportionment of
19 damages the way you want it, which is against
20 public policy of Pennsylvania.

21 MR. ADAMS: Your Honor, we asked at
22 the very beginning of the trial to have an
23 all-issues trial, which would have included the
24 punitive damage phase, if that was so --

25 THE COURT: And you still would have

1 Colloquy

2 asked for Kentucky law and you still would have
3 been requesting and arguing for an
4 apportionment of damages which violates
5 Pennsylvania public policy; to wit, percentage
6 of apportionment versus pro rata.

7 MR. BRUCH: Your Honor, by way of
8 history, as I am sure you are probably aware
9 of, when this implementation of reverse
10 bifurcation/consolidation came into being, it
11 was due to the bankruptcies of several
12 defendants, and the court said with more
13 bankruptcies, we will not be able to even
14 protect compensatory damages for future
15 plaintiffs, and you can say that Crane Co. or
16 any of these other defendants are big
17 companies, but, as you know, Fortune 500
18 companies, unfortunately, some that I've
19 represented like Eagle Picture Industries, the
20 ones that you are familiar with like Owens
21 Corning Fiberglas Corporation, went into
22 bankruptcy with lots of coverage; Pittsburgh
23 Coin. There probably have been 40 or 50. The
24 defendants that are fighting here are fighting
25 for compensatory damages, and Mrs. Baccus has a

1 Colloquy

2 substantial compensatory damage; that was the
3 whole reason for this.

4 THE COURT: Are you interested in
5 this issue?

6 MR. DelBELLO: Yes, Your Honor. We
7 join in these motions with the codefendants,
8 and also with respect to mixing, with the
9 motion to apply Kentucky law having been filed
10 and asked to be ruled upon before phase one; by
11 statute in Kentucky, all issues are tried
12 together, and we believe that by applying
13 Kentucky law to phase two now would unfairly
14 prejudice the defendants and we would use that
15 as an --

16 THE COURT: Then why did you ask for
17 it after phase one concluded?

18 MR. DelBELLO: The motion had been
19 filed before phase one.

20 THE COURT: But you didn't withdraw
21 it after phase one, did you?

22 MR. DelBELLO: No.

23 We would move to have the --

24 THE COURT: You wanted Kentucky law
25 applied to phase two; you asked for it.

1 Colloquy

2 MR. DelBELLO: That's right, but we
3 are now in this --

4 THE COURT: Now after they brought up
5 punitive damages, now you changed your mind.

6 So in phase two, you asked for
7 Kentucky law.

8 MR. ADAMS: We asked for Kentucky law
9 throughout the whole trial.

10 MR. DelBELLO: Throughout the whole
11 trial.

12 THE COURT: And you continued to ask
13 for it in phase two.

14 MR. DelBELLO: Can I just quickly
15 make --

16 THE COURT: If it is different.

17 MR. DelBELLO: It is not.

18 We would just also move the phase one
19 verdict be stricken and a new jury be presented
20 for phase two.

21 THE COURT: Give me a case that says
22 I ought to do that.

23 MR. DelBELLO: I don't have one, Your
24 Honor.

25 THE COURT: I am sure it doesn't

1 Colloquy

2 exist.

3 MR. DeLBELLO: The statute in
4 Kentucky says that all issues should be tried
5 together, under Kentucky law.

6 THE COURT: Your motion is denied.

7 MR. BURNS: We join in that motion
8 for purposes of the record.

9 MR. DeLBELLO: Thank you, Your Honor.

10 MR. ADAMS: Your Honor, may I be
11 heard?

12 THE COURT: For purposes of the
13 record or for purposes of the Court's
14 consideration?

15 MR. BURNS: I assumed we had the
16 Court's consideration. It was for purposes of
17 the record, but if my joining is going to
18 change your decision, by all means.

19 MR. ADAMS: I have cases on that
20 issue briefly, and on the issue of new trial
21 for phase one, Your Honor, we would make a
22 motion based on the prejudicial comments made
23 in the "phase one" closing by Mr. Nemeroff, in
24 which I had objected to certain comments made
25 by and certain motions made by Attorney Shein

1 Colloquy

2 not during his closing, Your Honor. I simply
3 requested it not be made during the other
4 attorneys' closings. Mr. Nemeroff then got up
5 and said, after availing himself of a reverse
6 bifurcated process in a mesothelioma case where
7 defense had no phase one defense, these were
8 his exact words, Your Honor, they kind of chip
9 away at it, kind of nibble away at it, they
10 kind of nag at it, but they don't actually
11 attack it. They don't even have the strength
12 of their conviction to attack this evidence
13 straight on.

14 Your Honor, it is a direct attack in
15 violation of Rule of Professional Conduct 3.4
16 as well as the Code of Civility in
17 Pennsylvania; it prejudiced the jury as can be
18 seen from the verdicts rendered in this case,
19 and we would move for a new phase one trial.

20 THE COURT: No such evidence that the
21 jury was prejudiced. Motion denied.

22 MS. TYMINSKI: Yarway joins in that
23 motion.

24 MR. BUDD: We join in that argument
25 for Crane Co.

1 Colloquy

2 THE COURT: Denied, but actually
3 Mr. Bruch has a better argument now.

4 MR. SHEIN: Are you finished with
5 that argument?

6 THE COURT: Now he has he has a
7 better argument.

8 MR. BRUCH: No. We are finished with
9 the punitive damages argument.

10 THE COURT: I thought you said you
11 had a better argument for that.

12 MR. BUDD: He does with respect to
13 why a new jury should be presented.

14 THE COURT: That's not what I am
15 saying.

16 MR. BRUCH: I do, but Mr. Shein wants
17 to respond to our argument on severing punitive
18 damages.

19 MR. SHEIN: Your Honor, I am not going
20 to have a lot to say. You know the old adage,
21 be careful what you wish for because you might
22 get it, is what happened to you folks for
23 Kentucky law.

24 But just to respond to Mr. Adams'
25 remarks that there is no interest in

1 Colloquy

2 Pennsylvania to protect, there were, indeed,
3 contacts of Mr. Baccus where he was working
4 while serving in the Navy at the Philadelphia
5 Naval Shipyard and some or all of these
6 defendants, all of these defendants do or did
7 business in the Commonwealth of Pennsylvania,
8 some are either incorporated and/or have
9 principle places of business in Pennsylvania.
10 So there definitely is contacts in
11 Pennsylvania.

12 And, Your Honor, you should be aware
13 that no motion for forum nonconvenience was
14 ever filed by the defense in this case, and no
15 motion to transfer the matter to Kentucky was
16 ever filed in this case by any defendants.

17 THE COURT: Thank you.

18 MR. SHEIN: We would obviously oppose
19 all the arguments that the defense has just
20 made on punitive damages.

21 MR. BRUCH: One response, Your Honor,
22 the late, great Judge Takiff said; we should
23 preserve this money for Pennsylvania residents.

24 This is a Kentucky resident.

25 With that argument --

1 Colloquy

2 THE COURT: He was a fine judge and a
3 fine man, but this is a big country, and we are
4 all citizens of it.

5 MR. BRUCH: I think we are all
6 finished with that argument, Judge.

7 THE COURT: I didn't know he was a
8 federalist.

9 MR. ADAMS: I am sorry, Your Honor.
10 Just an issue regarding the video --

11 MR. BUDD: We have other motions.

12 MR. ADAMS: I apologize.

13 THE COURT: You may proceed.

14 MR. BRUCH: Your Honor, I understand
15 the Court's ruling on this. Are you taking it
16 under consideration. May I proceed to the next
17 motion?

18 THE COURT: Yes.

19 MR. BRUCH: Your Honor, the next
20 motion is for a --

21 THE COURT: For the record, I have
22 already considered it, as we have been
23 considering some of these, at least, that I
24 know of for sometime, and the defense motions
25 are denied on the issue of punitive damages.

1 Colloquy

2 MR. BRUCH: Your Honor, the next
3 motion on behalf of Crane Co. is for a new jury
4 for phase two.

5 I understand the Court's ruling, but,
6 as you know, last week, when the Court was
7 working to resolve cases and handle other
8 issues, we were advised that the Waters & Kraus
9 firm that had one witness other than Dr.
10 Maddox, and that was an industrial hygienist.
11 We learned over the weekend, on Friday, I don't
12 know exactly, but they now have a new witness,
13 Captain Burger.

14 This jury is tired. When we had the
15 general voir dire, they were told that this
16 would be a two-week trial.

17 THE COURT: Well, that shouldn't have
18 been because you know they don't take two
19 weeks; they take more than two weeks,
20 especially when there were 43 lawyers
21 requesting jurors. For the lawyers as a group
22 to say to these jurors, prospective jurors,
23 that this is only going to take two weeks, one
24 of those days being a national holiday, is a
25 disservice to the jury.

1 Colloquy

2 MR. BRUCH: As you know, Your Honor,
3 regrettably, when you have all of these cases
4 consolidated, you can't trump 43 lawyers.

5 THE COURT: Well, with common sense,
6 you know how long it is going to take.

7 MR. BRUCH: The additional witness of
8 Captain Burger is going to prolong the case.
9 Some jurors have expressed concerned with day
10 care and their jobs. Between the defense
11 witnesses and the plaintiff's witnesses, this
12 trial could take, and even the Court's
13 instruction of continuous witnesses and other
14 things you have given us, this trial could take
15 another two weeks. The jury is angry.

16 THE COURT: There is no evidence that
17 the jury is angry. Please.

18 MR. BRUCH: There is no evidence, you
19 are right, Your Honor.

20 THE COURT: The jury is jovial. They
21 were just laughing a few moments ago, you could
22 hear through the door. The jury is in good
23 spirits.

24 MR. BRUCH: We would request a new
25 jury, as we feel it is prejudicial at this

1 Colloquy

2 point.

3 THE COURT: Anybody else want to join
4 in that motion?

5 MS. TYMINSKI: Yarway would join in
6 that motion and also --

7 THE COURT: Denied.

8 MS. TYMINSKI: -- for the reason that
9 in voir dire of the jurors on the first day of
10 jury selection, Captain Burger wasn't mentioned
11 by any of the plaintiffs as a potential witness
12 in this case.

13 MR. BURNS: We join in that motion.

14 THE COURT: Denied, denied, denied.
15 Next.

16 MR. BRUCH: Your Honor, with your
17 permission, I would like to argue my last
18 motion in limine on behalf of Crane Co., and
19 this is on the exclusion of plaintiff's expert
20 witnesses for filing generic reports.

21 The common rules here, which I will
22 be glad to give you a copy of, don't
23 specifically refer to specifically courts, but
24 they do require, under Pennsylvania Rule
25 4003.5, you are supposed to submit case

1 Colloquy

2 specific reports, and by operation of practice
3 and procedures, we have been submitting case
4 specific reports. Generic reports are not
5 permitted in Pennsylvania due to the fact that
6 you are not allowed to take the depositions of
7 experts.

8 Crane Co. submitted case specific
9 reports of Drs. Forman --

10 THE COURT: You are answering
11 interrogatories, though, aren't you?

12 MR. BRUCH: The interrogatories have
13 to set forth, they have to be a signed
14 opinion and -- you have to be very specific in
15 interrogatories. You can identify them, but
16 you have to -- just saying -- identifying
17 interrogatories or even a statement is not case
18 specific.

19 We submitted these case specific
20 reports of Drs. Forman --

21 THE COURT: Did you ask for case
22 specific reports and complete interrogatories?

23 MR. BRUCH: Your Honor, I did not ask
24 for case specific reports because if Waters &
25 Kraus wanted to list generic reports, so be it.

1 Colloquy

2 Crane Co. submitted the report of Dr.
3 Forman, Industrial Hygienist Sabringo (ph) and
4 Sergeant, and these are case specific reports.
5 In the Wheeler case, Aaron DeLuca submitted
6 case specific reports, both damages and
7 liability. Mr. Shein has submitted case
8 specific reports. I understand that Mr. Shein
9 has represented to the Court that in some
10 courts he has been able to get Dr. Markowitz on
11 for one of his liability cases for the
12 liability phase.

13 But in this report of Steve Paskal,
14 the industrial hygienist, there is no mention
15 of Crane Co. products. It is vague as to
16 regulations and it is vague as to substitutes,
17 and there is no cite to any publications or
18 anything. It is just a generalized statement
19 that he could use and there is no way we could
20 possibly limit him to the four corners, because
21 it is just a shotgun generic report. This is
22 an abrogation of the system here in
23 Philadelphia County, PA.

24 MR. DelBELLO: Your Honor, Yarway
25 joins in that motion. We also filed a motion

1 Colloquy

2 to strike the experts for not submitting case
3 specific reports.

4 I would also add that there is a case
5 management order that required the reports to
6 be served in October and that also was not
7 kept. The plaintiffs also did not meet the
8 requirements of that order in addition to Rule
9 4003.5, and we also, in the alternative, moved
10 in our papers that Dr. Paskal and Dr. Maddox be
11 limited in what they can testify to the
12 disclosures that were served even though they
13 weren't case specific, and we cited the Walsh
14 and the Wilkes Barre cases in support of that
15 proposition that they should be limited to the
16 disclosures itself.

17 Also, it is a strategic disadvantage
18 for the defendants to do case specific reports
19 and the plaintiffs not to have to, because by
20 doing these general disclosures, they are
21 allowed to pick and choose, and wait and see
22 what nonsettling defendants remain at the
23 actual trial, and then they can conform their
24 strategy through their experts at a later date,
25 where we did follow the order and we did follow

1 Colloquy

2 the report, did follow the rule, and submitted
3 case specific reports where our experts have
4 disclosed the substance of their opinions to
5 the plaintiffs.

6 MR. BURNS: Your Honor, all I would
7 add for the record in terms of only Dr. Paskal,
8 because I understand that due to the volume of
9 litigation, parties on both sides in every
10 trial don't always serve case specific reports.

11 THE COURT: Including John Crane.

12 MR. BURNS: Exactly, but the practice
13 and procedure in Philadelphia has always been
14 that --

15 THE COURT: Except I thought you told
16 me last week you weren't joining in that
17 motion.

18 MR. BURNS: Correct, but I am just
19 adding one thing. Dr. Paskal has never
20 testified in Pennsylvania before, which I think
21 makes it a different situation.

22 THE COURT: Have you cross-examined
23 him yet?

24 MR. BURNS: Never at trial. No one
25 from my entire firm, which represents John

1 Colloquy

2 Crane nationally, has ever cross-examined Dr.
3 Paskal, industrial hygienist, at trial. But we
4 have had depositions with him, but I will
5 represent to the Court I have never had a
6 deposition.

7 But I can state for the record he has
8 never testified against John Crane at trial,
9 and I think it is one thing to say John Crane
10 versus Mr. Shein's firm, I know what their
11 witnesses are going to say, he knows what my
12 witnesses are going to say, and when I told you
13 last week I am not joining in that motion, that
14 was my understanding. But when Dr. Paskal
15 became a witness, that is a different
16 situation, because he is not like some of the
17 people that I would say are essentially a known
18 quantity. If you have Dr. Stoloff or someone
19 like that, I certainly could never stand in
20 front of you and say that I don't know what Dr.
21 Stoloff is going to say about John Crane. He
22 said it hundreds of times and you have heard it
23 and seen me cross him, I could never make that
24 argument.

25 THE COURT: It might be said

1 Colloquy

2 something about his courage, that he is willing
3 to come here and facing you already somewhere
4 around the world.

5 MR. BURNS: Only at deposition, Your
6 Honor, and I would just say that is what makes
7 Dr. Paskal different than the other witnesses.

8 MR. BUDD: Your Honor, if I might
9 briefly add, similar to John Crane, to my
10 knowledge, Kirkpatrick & Lockhart as national
11 counsel for Crane Co. has never had occasion to
12 cross-examine Paskal at trial in any of our
13 cases.

14 More importantly, Your Honor, if this
15 Court is going to allow Paskal to testify, we
16 would ask that he be limited and not be allowed
17 to say anything specific to John Crane or Crane
18 Co. or Yarway because nothing in his report
19 discloses or tells us what he thinks he could
20 say, and I mean this politely, or make up about
21 these particular companies and what basis he
22 would have. We cannot have him offering things
23 on direct about particular defendants in this
24 trial or particular documents that he claims
25 they knew or should have known about when we

1 Colloquy

2 had no occasion to discover that before the
3 jury hears that. So if he is allowed to
4 testify, Your Honor, it should not be in a way
5 where he is allowed to offer any specific
6 testimony about the companies.

7 THE COURT: Have you ever read his
8 testimony? Has he ever testified in a case in
9 any way, shape or form against Crane Co.?

10 MR. BRUCH: Not about this.

11 MR. BUDD: Not about this stuff, Your
12 Honor. To my knowledge, he has never testified
13 in a trial against Crane Co., and I will be
14 happy to double-check that.

15 In depositions, he is not Crane
16 Co.-specific. He talks about gasket and
17 packing studies, Your Honor. He says that
18 gaskets and packing can release levels of
19 asbestos that he believes are harmful, as an
20 industrial hygienist. And for him to offer
21 that in this trial, if the Court is going to
22 allow it, is one thing. But for him to come in
23 without any discovery and deposition on what he
24 thinks he could say about any particular
25 defendant in this trial is a very different

1 Colloquy

2 thing, and it would not be prudent for this
3 Court to allow that pattern.

4 MR. BURNS: That's correct, Your
5 Honor.

6 I would just add that on Friday, I
7 pulled every deposition transcript that exists
8 in the country to my knowledge in the John
9 Crane case and Dr. Paskal, and every report
10 that has been issued across the country, mostly
11 in California, involving John Crane, he has
12 never issued any report that mention the words,
13 John Crane.

14 And when he has been deposed,
15 including by me, he said, I am not
16 differentiating between companies, I am not
17 here to talk about companies; I am here to talk
18 about industrial hygiene in products, in
19 generally, generic products. He's never
20 disclosed to me, and I didn't follow-up on that
21 because why would I open that door? He's never
22 told me that he is aware of a John Crane fiber
23 release, he is not aware of John Crane
24 corporate knowledge.

25 State-of-the-art is going to be an

1 Colloquy

2 issue in this trial because punitive issues are
3 involved. He has never told me what he thinks
4 anyone knew or should have known in terms of
5 John Crane or any other company. That material
6 is truly not disclosed to us. It is not in his
7 report for this case and we will hand up the
8 report if you would like to see it. He talks
9 very generically about hazards and very
10 generically about products, keeps it as vague
11 as possible. And I have never followed up and
12 I assume that is why he has never come to trial
13 because I know we have had him stricken and
14 saying he has not disclosed any opinions about
15 John Crane in any other jurisdictions, and that
16 is where the prejudice lies with Dr. Paskal.

17 I can hand this up if you would like,
18 if you would like to take a moment to review
19 it. It is Mr. Paskal's report. He is an
20 industrial hygienist. That is where the
21 prejudice is, and when I told you last week I
22 wouldn't join in this, it is because I didn't
23 know this was the situation with Dr. Paskal.
24 As you are aware, I have been here all the time
25 and I am never going to say I don't know what

1 Colloquy

2 plaintiff's witnesses are going to testify to,
3 but with Dr. Paskal, it is a different
4 situation.

5 MR. DelBELLO: Your Honor, the
6 situation is the same with Yarway. I am not
7 aware of Dr. Paskal ever testifying at trial
8 against Yarway, and I am aware of --

9 THE COURT: Did you look?

10 MR. DelBELLO: Yes, we did look.

11 MS. TYMINSKI: I looked, Your Honor.

12 MR. DelBELLO: I am aware of one
13 deposition in which he gave no Yarway-specific
14 testimony.

15 THE COURT: Anything else regarding
16 that?

17 MR. BRUCH: No. That completes the
18 motions by me, Your Honor.

19 MR. DelBELLO: We have some others.

20 MR. SHEIN: What is this motion?
21 What motion did you just make, by the way?

22 MR. BURNS: Motion to bar or a motion
23 to limit to the four corners of his report with
24 nothing company-specific.

25 MR. SHEIN: Your Honor, we would

1 Colloquy

2 oppose that.

3 On October 2nd, 2007, pursuant to
4 the master case management order, expert
5 reports and disclosures were served on defense.

6 Mr. Paskal's opinions and conclusions
7 were served by way of an expert witness
8 disclosure, which under Pennsylvania Rules of
9 Civil Procedure is permissible. It was signed
10 by the doctor. In essence, in answers to
11 interrogatories, there were no objections to
12 that report until we came into trial. There
13 was no motion for more specific answers to
14 expert witness interrogatories.

15 What we are really looking at is
16 whether or not -- it is fundamental fairness --
17 whether or not they are on notice of Dr.
18 Paskal's opinions and conclusions, and have an
19 opportunity to cross-examine him. If anything,
20 it goes to the weight to be given to Dr.
21 Paskal's testimony, not the admissibility.

22 They keep mentioning, and they are
23 very careful, we have never cross-examined Dr.
24 Paskal in trial. Okay. Well, what you are not
25 hearing, because they can't stand up and say

1 Colloquy

2 it, is we have cross-examined him in
3 deposition, okay, about gaskets and --

4 THE COURT: Well, Mr. Burns did say
5 that.

6 MR. SHEIN: Right. About gaskets and
7 about packing. And under Pennsylvania rules,
8 he can testify about gaskets and packing, and
9 based on the evidence, he can be given a
10 hypothetical question as to whether or not the
11 exposure of Mr. Baccus would be a substantial
12 contributing factors, right in the disclosure
13 they received on October 2, 2007.

14 MR. BUDD: Your Honor, if I might,
15 very briefly, those points are all well taken
16 and they are taken under the Court's indication
17 that it is going to let Dr. Paskal testify.

18 Those points do not address the fact
19 that Dr. Paskal has not offered in his report,
20 nor have we been offered any chance to see what
21 he thinks he can say about Crane Co.
22 specifically or John Crane specifically or
23 Yarway specifically, and Dr. Paskal, to my
24 knowledge, has not done any Crane Co. valve
25 studies, has not done any particular work or

1 Colloquy

2 have any particular information on Crane Co.
3 So we would ask his testimony be limited,
4 including within the four corners of his
5 designation --

6 THE COURT: You can cross-examine him
7 on that, though, can't you?

8 MR. BUDD: Actually, no, Your Honor,
9 because for us --

10 THE COURT: You can't say to this
11 industrial hygienist that you have never
12 examined a Crane gasket, you can't say that to
13 him, that he is going to say no, and you are
14 not going to then be able to argue to the jury
15 how can he give his opinion, you don't have to
16 believe it because he has said he has never
17 even looked at one of ours, so how can you hold
18 us liable when their own witness says that he
19 has never even seen one of these things.

20 MR. BUDD: Your Honor, long ago,
21 Pennsylvania courts abandoned the rule of
22 ambush.

23 THE COURT: I have heard enough of
24 this.

25 MR. BURNS: Your Honor, even likely

1 Colloquy

2 his cross-examination, I don't disagree with
3 you, but what is ambush is the state-of-the-art
4 testimony which is not in his report, which is
5 not in the four corners of his disclosure. If
6 he wanted to talk about who knew what when,
7 that is true surprise. I am not aware of him
8 ever being deposed on that issue anywhere in
9 the country by me or anyone else. So if he
10 wants to talk about --

11 THE COURT: That will be the first
12 time then. That motion is denied.

13 MR. BRUCH: That is all.

14 THE COURT: Are there any other
15 motions?

16 MR. BUDD: Yes, Your Honor.

17 THE COURT: How many more?

18 MR. BUDD: I believe two or three
19 from Crane Co.

20 THE COURT: Send the jury out to
21 lunch, Ernie, please for one hour.

22 MR. BUDD: Would Your Honor like me
23 to proceed?

24 THE COURT: Yes, I would.

25 MR. BUDD: Thank you, Your Honor.

1 Colloquy

2 Your Honor, we had filed on behalf of
3 Crane Co. a motion to apply a federal maritime
4 law.

5 THE COURT: I denied that motion,
6 didn't I?

7 MR. BUDD: I don't know that it has
8 been formally denied, Your Honor. So I needed
9 to make sure that we had it on the record.

10 I do understand from your comments
11 last week that you indicated you did not think
12 you were going to grant the motion.

13 THE COURT: Right.

14 MR. BUDD: But, Your Honor, under the
15 facts of this case, we have earlier in time
16 exposures of Mr. Baccus to asbestos, heavy
17 asbestos products in his navy ship service.
18 Medically, those are more significant.

19 We have exposures that plaintiff's
20 own experts in prior testimony have admitted in
21 a navy context would be sufficient unto
22 themselves to have caused his mesothelioma.

23 We have his service onboard ship as a
24 navy serviceman. There is no issue here
25 whether he is a seaman or not. There is no

1 Colloquy

2 issue here about whether the Jones Act and its
3 workers comp.-type provisions for people in the
4 ship industry would apply.

5 This is a straight navy case. Based
6 on those exposures and on the cases that we
7 cited in our brief, including the Executive Jet
8 Aviation case and the Rubbert v. Great Lakes
9 Dredge And Dock Company case, there is no
10 question that the record establishes both
11 location and the nexus connection that are the
12 two branches for analyzing whether federal
13 maritime law should apply to the facts of this
14 case. His exposures are onboard a navy ship,
15 his exposures are in navy settings in a navy
16 shipyard; those are even only six months out of
17 all of his years of navy exposures. The nexus
18 with his military service is also established
19 because the things he was doing, what he was
20 doing in the navy were as a navy serviceman,
21 were under direction of the navy officers, were
22 training he got from the navy, were things that
23 he was doing to make sure that the mission of
24 the ships he was serving on were, in fact,
25 going to be carried out, which is the classic

Colloquy

1
2 setting for a maritime law connection to a case
3 or a plaintiff's exposure in many asbestos
4 cases. And, in fact, if you look at what he
5 was doing as, according to his own testimony,
6 he was out at sea doing navy shakedown cruises
7 to make sure the ships were operating properly.
8 He was servicing equipment on ships where he
9 was exposed to asbestos to make sure that those
10 systems were working properly.

11 Both the location and the nexus tests
12 under the federal cases and the U.S. Supreme
13 Court cases for federal maritime law apply
14 here.

15 Moreover, Your Honor, the law under
16 federal maritime law with regard to what he can
17 recover and what types of claims plaintiffs can
18 assert is not dissimilar from Kentucky law. It
19 is not as though the jury would be facing a
20 question of certain maritime law for questions
21 on his federal exposures in the navy and
22 different legal questions or standards for the
23 Kentucky claims that he may claim to have with
24 regard to his work at the American Rubber
25 plant.

1 Colloquy

2 So the two laws actually dove tail in
3 a way that would not create any confusion for
4 the jury.

5 So we would ask the Court apply
6 maritime law certainly with respect to the
7 claims he had of exposure in the navy and
8 Kentucky law with respect to any other claims
9 he asserts.

10 MS. TYMINSKI: Yarway joins in that
11 motion.

12 MR. BURNS: As do we.

13 MS. TYMINSKI: The only
14 jurisdictional nexus between Mr. Baccus's
15 claims and Philadelphia is maritime related and
16 solely maritime related, and that is at the
17 Philadelphia shipyard.

18 MR. BUDD: May I finish my argument
19 on that, Your Honor?

20 THE COURT: Please.

21 MR. SHEIN: Your Honor, in addition
22 to the arguments we had previously made to the
23 Court asking for the application of Kentucky
24 law as opposed to federal maritime law, the
25 Court should note that the first time that the

1 Colloquy

2 application of federal maritime law was raised
3 was after this trial begun, which was February
4 6, 2008. We would also say that they were
5 waived in that argument as well.

6 THE COURT: Thank you.

7 That motion is denied.

8 MR. BUDD: Thank you, Your Honor.

9 Your Honor, I understand from the
10 Court's comments and our trying to move things
11 along for us that the Court will not permit us
12 a Kelly Frye hearing on Dr. Maddox.

13 THE COURT: That's correct.

14 MR. BUDD: Thank you, Your Honor.

15 If I might, for the record, just to
16 make clear the basis for our motion which has
17 been filed already challenging Dr. Maddox is
18 that there is a --

19 THE COURT: Not to interrupt you,
20 Mr. Budd, but I did say you will be able to
21 voir dire Dr. Maddox in the normal manner once
22 he takes the witness stand when he is turned
23 over to you.

24 MR. BUDD: Thank you, Your Honor. I
25 appreciate that. And if I can first explain

1 Colloquy

2 briefly why it is that there are problems with
3 his opinions being offered to the jury in any
4 setting, in any portion of this trial, I can
5 then explain why that solution, although we
6 appreciate it from the Court, actually doesn't
7 get us home. The fact of the matter is, there
8 is a significant analytical gap in Dr. Maddox'
9 testimony.

10 Dr. Maddox comes in and testifies, as
11 he has done in the past, that every exposure
12 above background is a substantial factor in
13 causing a plaintiff's mesothelioma. He, at the
14 same time, in a very contradictory fashion,
15 acknowledges that you and i and everyone in
16 this courtroom is routinely exposed to asbestos
17 in everyday life right here in Philadelphia,
18 everywhere in the country. Yet, none of us,
19 including Dr. Maddox, are wearing respirators.
20 None of us are at risk, according to Dr.
21 Maddox.

22 THE COURT: You should maybe thank
23 your lucky stars.

24 MR. BUDD: Well, Your Honor, the
25 problem is that he is does not have a reliable

1 Colloquy

2 scientific methodology that would support his
3 conclusion that every exposure above background
4 or his alternative statement that there is no
5 safe level of asbestos, he does not have any
6 medical --

7 THE COURT: Mr. Budd, to say that
8 that is -- to say that none of us in this room
9 are going to have to use respirators -- I know
10 a lot of people that have respirators. My
11 father had one. But for you to say that, and I
12 see people walking around the city with
13 respirators. I don't know why, my father
14 didn't have asbestosis, I know that. But he
15 did have a respirator. There are a lot of
16 people walking around without respirators, and
17 I find the use of that, the manner in which you
18 just said that, to be personally offensive. I
19 wish you would change your tactic to a more
20 civil manner.

21 MR. BUDD: Your Honor, I apologize.

22 THE COURT: The words you used were
23 very inflammatory. I didn't like it, I have to
24 tell you that.

25 MR. BUDD: Your Honor, I apologize.

1 Colloquy

2 I did not mean for my words to be taken in any
3 way that you would find --

4 THE COURT: Look at all these young
5 men in this room and young women. Thank God we
6 don't have respirators, you know.

7 MR. BUDD: Your Honor, my point is
8 Dr. Maddox does not recommend even for himself
9 the use of a respirator to guard against the
10 risk of asbestos exposures. People may well
11 have respirators for other reasons, Your Honor.
12 My point is not to offend, but to point out the
13 contradiction for him to say --

14 THE COURT: I have heard this
15 testimony before from other experts, but not
16 Dr. Maddox. I have never heard him or met him.
17 But I have heard several of these doctors talk
18 about how asbestos in the air can lie dormant
19 and in certain people. So I mean, I don't
20 know. This is something, this is why we have
21 juries, why we have triers of fact to answer
22 these tough questions.

23 MR. BUDD: Your Honor, with all due
24 respect it goes to the Court's gate keeping
25 function under the Frye test.

1 Colloquy

2 THE COURT: Well, I am opening that
3 gate, because it is fair, because it has been
4 done before. It is not a surprise to you at
5 all, and we are going to proceed. I am not
6 going to reinvent this wheel of how cases are
7 going to be tried or what witnesses are going
8 to be testifying.

9 I know you are running a hearing
10 downstairs or you were last week; Judge
11 Tereshko was running a hearing down there, and
12 this is an issue that is of moment with some
13 people. But thus far, not with me.

14 MR. BUDD: Your Honor, the reason for
15 the hearing downstairs is precisely because,
16 just as has happened with Judge Colville in
17 Pittsburgh, the law has established in that
18 case and perhaps downstairs very soon that when
19 you look at the medical criteria for proving
20 and establishing the reliability of the medical
21 methodology and scientific methodology that is
22 required to make a leap from high level
23 exposures to cause mesothelioma to extrapolate
24 down to any level of exposure to cause
25 mesothelioma, which is exactly what Dr. Maddox

1 Colloquy

2 does, and which is what exactly is not
3 supported by the medicine --

4 THE COURT: I just had a conversation
5 with Judge Colville and his father Thursday
6 night; we talked about some of these things,
7 okay. So I met him in person.

8 MR. BUDD: Great family.

9 THE COURT: Great family, and it was,
10 you know, there is reasonable people can differ
11 about these things and that is why we have
12 appellate courts.

13 Thank you.

14 MR. DelBELLO: Your Honor, Yarway
15 joins in that motion. And just one more point
16 on whether or not it is a legal issue or not.
17 We would just direct Your Honor's attention to
18 the Pennsylvania Supreme Court's decision in
19 the Gregg case that did discuss the single
20 fiber theory and found that that theory was a
21 fiction, and I acknowledge it is not in the
22 context of a Frye hearing except we believe the
23 words of the Pennsylvania Supreme Court in that
24 published opinion, December of 2007, are also
25 instructive and make it not -- arguably, make

1 Colloquy

2 it not an issue for the jury, but a legal
3 issue.

4 THE COURT: Thank you.

5 MR. SHEIN: Your Honor, we would
6 oppose the motion for a Frye hearing on Dr.
7 Maddox.

8 As the Court well knows, whether or
9 not to grant a Frye hearing is completely
10 within the sound discretion of the court. We
11 would urge the Court that there is no reason
12 for a Frye hearing on Dr. Maddox.

13 Additionally, Pennsylvania law allows
14 an expert to testify if that expert has a
15 reasonable pretension within his expertise, and
16 we believe based on Dr. Maddox's report and his
17 qualifications, that the Court will find him,
18 that he has a reasonable pretension within his
19 expertise to so testify.

20 And, finally, to distinguish the
21 Baccus case from the Gregg case, the Gregg case
22 dealt with a three or four break cases,
23 changes, whereas Baccus case deals with many
24 years of navy and industrial exposure. And in
25 the Baccus case, Dr. Maddox is not going to

1 Colloquy

2 give an opinion that the Supreme Court
3 quarreled with in Gregg. He is going to talk
4 about cumulative exposures, whereas the Gregg
5 court talked about each and every fiber.

6 THE COURT: Okay. Anything else?

7 MR. DeLBELLO: Two quick points.

8 This Frye argument also applies to Dr. Paskal;
9 Dr. Paskal also in the disclosure has a
10 reference to either single fiber or cumulative
11 exposure, so that is one point. And also in
12 response, the Pennsylvania Court of Common
13 Pleas in Indiana County, in the Basile case
14 found that cumulative exposure and single fiber
15 exposure is, for practical purposes, the same
16 opinion.

17 Thank you.

18 MR. BURNS: For purposes of the
19 record, we join in this motion solely as it
20 relates to Dr. Paskal.

21 MR. BUDD: Your Honor, that is the
22 other point I wanted to add, that as to Dr.
23 Paskal, if he was going to offer the same type
24 of testimony that there is no safe exposure or
25 that every exposure counts, then the motion

1 Colloquy

2 would be applicable. I understand Your Honor
3 would deny it as to Paskal, but the motion is
4 one we would offer against any of their experts
5 who would say that they are going to offer or
6 attempt to offer those kind of medical
7 opinions.

8 THE COURT: The motions at the
9 pretrial hearing or a separate hearing on the
10 Frye issue testimony of Dr. Maddox is denied.

11 MR. BUDD: Your Honor, there is a
12 second feature to Dr. Maddox.

13 THE COURT: As to Paskal, too?

14 MR. BUDD: In Dr. Maddox's report --

15 THE COURT: This is a another motion?

16 MR. BUDD: It is a second feature as
17 to the issues of Dr. Maddox and what he can
18 testify about at phase two of this trial.
19 Nothing in his report talks specific to any
20 defendant, any defendant's products, any level
21 of release of asbestos from any defendant's
22 products, or that any of the defendant's
23 products would somehow be a substantial factor.
24 There is no way that his report, using the four
25 corners, would allow him to offer --

1 Colloquy

2 THE COURT: Are you saying the same
3 thing?

4 MR. SHEIN: Same motion they made for
5 Paskal, they are now making for Maddox.

6 MR. BUDD: Well, it is different
7 because for Paskal, he has a broader, more
8 generic report. Dr. Maddox actually complied
9 with, plaintiff's counsel complied with local
10 rules, filed the report. Nothing in that
11 report talks about any defendant specifically
12 or any defendant's products specifically. Dr.
13 Maddox should not be allowed to now come and
14 testify at trial about any particular defendant
15 or any defendant's products or release from
16 defendant's products because it would violate
17 the Pennsylvania rules and local rules.

18 MR. SHEIN: Your Honor, our response
19 would be they are on fair notice and we intend
20 to present Dr. Maddox as we do Dr. Paskal based
21 on hypothetical questions.

22 MR. DelBELLO: We would join in that
23 motion.

24 THE COURT: Denied.

25 MR. DelBELLO: For purposes of the

1 Colloquy

2 record, Your Honor, I believe the Crane motion
3 on Maddox requested a Frye hearing.

4 THE COURT: Crane Co.

5 MR. DelBELLO: I understand. The
6 Crane Co. motion requested a Frye hearing and
7 Yarway also filed a motion and the request was
8 to strike any experts that were going to give
9 that opinion. So I understand that motion
10 would also be denied.

11 THE COURT: Denied.

12 Any other motion?

13 MR. BUDD: Yes, Your Honor, and
14 perhaps -- do you have something on that?

15 MR. DelBELLO: No.

16 MR. BUDD: Perhaps Mr. Wolf and I can
17 work this out, but so far he has not been able
18 to come to an agreement with us on the point of
19 whether plaintiffs would somehow argue that we
20 are legally liable for products that we never
21 made, sold or supplied, particularly never
22 made, sold or supplied to Mr. Baccus or any of
23 his work settings.

24 The Court may recall that we spoke
25 briefly last week about the fact that the

1 Colloquy

2 Waters & Kraue firm often in cases tries to
3 suggest that somehow a defendant of equipment
4 would be responsible for an after-applied
5 product that another person, here the navy,
6 decided to go out and buy and put on or near
7 the equipment.

8 On that point, Your Honor, if I might
9 just step over, Crane Co. sells a metal valve,
10 that is all we sell, and that is what the
11 testimony in this record shows. And, in fact,
12 not all valves -- well, not all valves are
13 insulated and not all valves need any -- in
14 fact, let me state it this way, Your Honor; no
15 valve needs insulation to function. The wheel
16 turns. The gate goes up and down. The liquid
17 flows through the valve without any need for
18 insulation on the valve whatsoever.

19 Our point is that this Court should
20 make clear to plaintiff's counsel that they
21 should not be allowed to argue any liability
22 for insulation that they may suggest was on the
23 outside of Crane Co. valves, because under
24 Kentucky law and under all traditional tort
25 law, you are not liable for a product that

1 Colloquy

2 causes an injury unless you made it, sold it or
3 supplied it.

4 THE COURT: But now negligence
5 exceptions are involved in the Kentucky law on
6 who should have known; am I right?

7 MR. BUDD: They are pleading Kentucky
8 law and negligence. However, the Kentucky
9 statute is clear that a product that is altered
10 or reconfigured by someone after it is sold --

11 THE COURT: But there is three --
12 well, I guess at least two theories of
13 liability; one strict liability and I would
14 agree with you on that. But on negligence
15 theory --

16 MR. BUDD: Your Honor, on negligence,
17 whether it is Pennsylvania, Kentucky or
18 anywhere else for the most part, although,
19 admittedly, there have been one or two
20 exceptions, the restatement of torts makes
21 clear that you first analyze whether you have a
22 duty, and then whether, with that duty in
23 place, there is a foreseeable risk. There is
24 no duty of a manufacturer of a piece of metal
25 to insulation that is manufactured, researched,

1 Colloquy

2 sold, profited from by John Manville or any
3 other insulation company. It is not simply a
4 question of foreseeability under the law. It
5 is a question of whether there is any duty for
6 products that you have nothing to do with and
7 that are not required for the operation of your
8 valve.

9 To give you a quick example under
10 Pennsylvania, in the Toth decision where
11 scaffolding and planking were the issue for the
12 plaintiff's injuries, it is the planking and
13 the scaffolding that caused the injury. There
14 is no way the scaffolding could have been
15 useful without the planking for the plaintiff
16 to have stood on the scaffolding. But the
17 court held that the scaffolding manufacturer is
18 not liable for an injury caused by the
19 planking.

20 It has been clear, we would suggest
21 here, because the valve doesn't need any
22 insulation. The valve works perfectly well, it
23 is engineered without any need for insulation.

24 So if the planking and scaffolding
25 case establishes that the scaffolding

1 Colloquy

2 manufacturer is not liable for injuries caused
3 by the planking, which, by definition, were
4 going to be used with the scaffolding, then I
5 offer that a metal valve manufacturer wouldn't
6 be liable for some product that somebody later
7 decides to affix to the valve without any
8 consultation, request, engineering analysis or
9 any discussion with the valve manufacturer.

10 I submit, Your Honor, that unless
11 they could establish, and they should be
12 required to offer, make an offer of proof,
13 unless they can establish that we actually
14 specified or required the insulation on our
15 valves, no duty arises in the first place. So
16 you don't get to question of foreseeability of
17 the risk of harm.

18 In a similar fashion, in Kentucky,
19 there are cases under the component parts
20 doctrine, which are very similar to what
21 (inaudible), and those cases make clear that if
22 you supply a product and it is used in
23 combination with other products by the
24 purchaser, you are not liable for the injury
25 caused by those other products. You supply a

Colloquy

metal valve, the insulation, plaintiff's own medical experts will admit, caused, in part, the injury. There is nothing about Crane Co.'s involvement in that insulation that would, under the law, negligence, strict liability, or any other claim, that would make Crane Co. liable for the component part when it didn't cause the injury when the insulation caused the injury.

I understand, Your Honor, they will argue that the valve itself contributed to the injury. But the point we are trying to make clear so that we don't have, with all due respect to plaintiff's counsel, reversible error in this case, we don't have them arguing to the jury that somehow insulation that the navy went out and bought from John Manville and put on the ships, that somehow Crane Co. has any legal responsibility for that.

MS. TYMINSKI: Your Honor, Yarway joins in that motion. And in addition points out that the Kentucky statute on point that oversees this issue applies in both strict liability and negligence situations.

1 Colloquy

2 THE COURT: Do you have that statute
3 with you?

4 MS. TYMINSKI: I do.

5 MR. BUDD: We do.

6 MS. TYMINSKI: I can read it for Your
7 Honor.

8 THE COURT: I want to see it. Thank
9 you.

10 MS. TYMINSKI: You're welcome.

11 I would also point out, as Mr. Budd
12 did, that Kentucky adopts under the component
13 parts doctrine, section five, valves and steam
14 traps, which is what Yarway is in this case
15 for, are component parts and are typically
16 exculpated from liability for other
17 manufacturer's products that become
18 incorporated into the system.

19 We also ask for an instruction that
20 plaintiff's counsel not be allowed to introduce
21 evidence or argument on our duty to warn other
22 person's products, because particularly with
23 respect to Yarway products and the steam traps
24 at issue, steam traps were not insulated. And
25 so we think it would be confusing to the jury.

1 Colloquy

2 THE COURT: Some were and some were
3 not.

4 MS. TYMINSKI: Well, some steam traps
5 could have been insulated. But we expect the
6 evidence in this case to show that Yarway steam
7 traps were not insulated and, in fact --

8 THE COURT: Some Yarway steam traps
9 have insulation in copper clad asbestos
10 gaskets.

11 MS. TYMINSKI: I think we are
12 confusing the issues here, Your Honor.

13 MR. BURNS: A gasket is not
14 insulation. It is asbestos. It can be
15 asbestos but it is not insulation.

16 THE COURT: No, but in a steam trap,
17 there was metal clad or copper clad asbestos
18 gaskets placed in Yarway steam traps.

19 MR. BURNS: But that is not
20 insulation. Insulation is the white stuff.

21 THE COURT: It is pipe covering.

22 MR. BURNS: You just said for the
23 record that there was insulation in the steam
24 trap.

25 THE COURT: I meant to say asbestos.

1 Colloquy

2 MR. BURNS: Right. That's fine.

3 MS. TYMINSKI: Our motion here is
4 focused on our duty to warn a third party an
5 external insulation or a fixed part onto our
6 product, be it a gasket externally, insulation
7 externally. These are things that under
8 Kentucky law, the equipment manufacturers in
9 this case do not have liability for.

10 With respect to the issue you just
11 mentioned about the copper clad gasket that
12 potentially could have been in a Yarway steam
13 trap at some point in time, we will present
14 evidence those weren't steam traps in issue in
15 this case, but that is not the focus of this
16 motion.

17 MR. BUDD: Your Honor, you had asked
18 when we discussed this late last week for
19 Kentucky law on the point of why an equipment
20 manufacturer would not be liable for products
21 made by others and affixed to the equipment
22 after the equipment left the manufacturer's
23 hands. To make sure we got some Kentucky case
24 law for Your Honor, we put together a very
25 short brief which points out the Kentucky

1 Colloquy

2 statute that you have now been handed, points
3 out the Mullens cases and other cases in
4 Kentucky which are all consistent that an
5 equipment manufacturer is liable for whatever
6 it makes, sells and puts in the stream of
7 commerce, and that is the way it should be,
8 Your Honor. But an equipment manufacturer is
9 not supposed to be going to the ends of
10 spending the money, the research, the time to
11 look at any possible configuration that some
12 customer might, down the road, later do to or
13 use its product with.

14 MR. SHEIN: We haven't had the
15 benefit of reading Mr. Budd's brief. He just
16 dropped it on our table when he handed it up to
17 Your Honor.

18 But, Your Honor, the evidence will
19 show that these defendants either specified and
20 required and/or under a negligence theory knew
21 or should have known that their equipment was
22 going to be externally insulated. And if the
23 evidence is such the jury finds they knew or
24 should have known that this equipment was going
25 to be externally insulated, then they are

1 Colloquy

2 liable.

3 MR. BUDD: I think if Your Honor
4 reads the cases and the statute, you will see
5 that that is not the case.

6 THE COURT: Yes.

7 MS. TYMINSKI: Your Honor, just one
8 further point in response.

9 THE COURT: Have you provided these
10 cases to the plaintiffs?

11 MS. TYMINSKI: We filed a motion
12 setting forth these arguments on January 28,
13 2008. It should outline the arguments that we
14 just discussed. We did not get a response from
15 the plaintiffs, but I am sure they are aware of
16 what our arguments are. In fact, I think we
17 have all personally had these conversations
18 before.

19 MR. BUDD: We also had a previous
20 motion on the Pennsylvania law and we have now
21 provided Kentucky law.

22 MR. SHEIN: Your Honor, may Mr. Wolf
23 be briefly heard on Kentucky law as far as this
24 issue is concerned?

25 MR. WOLF: And we will get you some

1 Colloquy

2 case law on this, this afternoon, Your Honor.

3 Kentucky 402A is a little bit
4 different. It is not just straight 402A.

5 Under Kentucky 402A, they have stated
6 unequivocally that a manufacturer has a
7 nondelegable duty to provide a product
8 reasonably safe for its foreseeable uses, a
9 duty not abrogated by warnings to the immediate
10 purchaser.

11 MS. TYMINSKI: Your Honor, we would
12 argue that is not inconsistent with the
13 Kentucky statute right on point with this
14 particular situation which you have in your
15 hand. If you just read the first two lines of,
16 I think it is Section 411.182, I think.

17 MR. BURNS: 182.

18 MS. TYMINSKI: 182.

19 Before, as Mr. Budd pointed out,
20 before you can even reach the analysis that
21 Mr. Wolf is engaging in with his recitation of
22 the restatement, there has to be a
23 determination of whether a duty even exists,
24 and under that statute no duty exists.

25 MR. BUDD: Your Honor, it is 411.320,

1 Colloquy

2 paragraph one.

3 MS. TYMINSKI: Subsection one, the
4 first two lines.

5 THE COURT: May I have what you have,
6 Mr. Wolf?

7 MR. ZACHAROPOULOS: I can print this
8 out for you right now, Judge.

9 THE COURT: Anything else?

10 MS. TYMINSKI: Not on this issue,
11 Your Honor.

12 THE COURT: Any other issues?

13 MS. TYMINSKI: We do have one more
14 issue. Yarway had filed a motion to have the
15 plaintiffs disclose the parties with whom they
16 have settled in this case or have received
17 settlements. The plaintiffs did oppose this
18 motion saying under Pennsylvania law,
19 disclosure of settlements with other parties
20 are inadmissible. That the fact that they have
21 settled are inadmissible and the amounts are
22 inadmissible.

23 Our purpose in seeking this
24 information is not to get this information
25 before the jury, but it is because under

1 Colloquy

2 Kentucky law, in order to allow the defendants
3 to ascertain which parties or which potential
4 persons from whom settlement monies were
5 received go on the verdict form, we need to
6 know this information.

7 MR. BURNS: The practice in Kentucky
8 has always been, in the six trials I was
9 involved with, they provided at the time of
10 jury selection a list of all the companies from
11 whom they received money and then a total
12 amount. They never said I received \$100,000
13 from company X, \$50 from company Z. But you
14 had the total amount and you had the list of
15 the companies. You needed to do apportionment.
16 I don't know how you can do without it.

17 MS. TYMINSKI: That's right, Your
18 Honor. And the issue here is we need to know
19 and we understand Your Honor's concern. You
20 want this trial to move quickly and we all want
21 to be prepared to put on an efficient a case as
22 possible, and we aim to do that. But we need
23 to know which potential claims are at play
24 here, and just as further basis for the motion,
25 there is a Kentucky statute again right on

Colloquy

point. It is Section 411.182 of Kentucky Revised Statutes, and it allows for disclosure of parties from whom settlement monies were received regardless of whether they were parties in the case. So, for example, if there were prelitigation claims or prelitigation letters sent to a party that were typically involved, involved in litigation, and that party settled before the complaint was filed, we would like to have the disclosure of those parties.

MR. SHEIN: Your Honor, we would oppose that.

If they are effective in pursuing and proving a cross claim, okay, then we would be happy to give that information to them. Just because a plaintiff settled with the defendant doesn't necessarily mean that they can prove or satisfy their burden of proof on the cross claim.

MS. TYMINSKI: Your Honor, with all due respect, this has nothing to do with cross claims and nothing to do with that issue. This is about Kentucky law, Kentucky statute,

1 Colloquy

2 appportionment on the verdict sheet, and what we
3 are entitled to know. And it is pretty
4 clearcut under the law. This has nothing to do
5 with us pursuing a cross claim against anyone.

6 MR. BURNS: As Your Honor said to me
7 earlier, we can't pick and choose Kentucky law.
8 If we wanted Kentucky law, boom, we are stuck
9 with punitives; that is what you ruled. Well,
10 under Kentucky law, this is what they have to
11 disclose to us in every trial in Kentucky for
12 appportionment. It is not a cross claim thing.
13 It is who goes on the verdict sheet for
14 appportionment. If it is a global settlement,
15 if you, say, get a thousand dollars in every
16 meso case filed by the plaintiff, boom, we get
17 to know it. You send them a letter ahead of
18 time, you get to know it. If you took money,
19 you get to know it. Whether or not the jury is
20 going to appportion, that is our burden and for
21 the jury to decide. But we get that
22 information in Kentucky. It is in the statute;
23 it is in their custom; it is in their practice.
24 It is what you get.

25 MR. SHEIN: There is no reason for

1 Colloquy

2 you to get the information until the jury makes
3 a determination as to whether or not the
4 settled party is liable.

5 MR. BURNS: Your Honor, he did it at
6 jury selection because it influences who goes
7 on the verdict form. He argued successfully in
8 the back that, I think it was Bendix, whatever
9 the company was, received summary judgment. We
10 said we would like it on the verdict form. He
11 said absolutely not. They get summary
12 judgment; it has already been decided.

13 THE COURT: Well, Mr. Cottle gave me
14 a case. He told me that if there was dismissed
15 parties, the rule he gave me that I read,
16 someone gave me, it says released party.

17 MR. BURNS: That is not what I am
18 saying.

19 THE COURT: He was wrong about that.

20 MR. BURNS: Exactly. I am saying for
21 the reasons where you can see the confusion --
22 the ones they received money from, there is no
23 confusion. Those are the companies that were
24 allowed to put evidence on without dispute
25 about apportionment.

1 Colloquy

2 THE COURT: Do you have the law on
3 that?

4 MR. BUDD: Yes, Your Honor.

5 THE COURT: Does plaintiff have law
6 on that issue?

7 MR. ZACHAROPOULOS: Yes, Your Honor.

8 I think, in a sense, Tom is not
9 completely incorrect. I think where we do
10 disagree vehemently is the fact that they are
11 not entitled to know the amount of money we
12 settle with, with defendants.

13 THE COURT: But they are entitled to
14 know the entities?

15 MR. ZACHAROPOULOS: If we settle with
16 a defendant under Kentucky law, it is pretty
17 clear that they are entitled to know who we
18 settled with. That doesn't necessarily mean it
19 goes on the verdict form.

20 THE COURT: Then you all work that
21 out.

22 MS. TYMINSKI: One clarification; we
23 are not seeking numbers. What we would like to
24 know --

25 MR. ZACHAROPOULOS: Well, Tom just

1 Colloquy

2 said something about numbers.

3 MR. BURNS: In the practice in
4 Kentucky, we got the numbers. I don't truly
5 care. I am just saying --

6 MS. TYMINSKI: In Kentucky, the
7 number will come into play at the end because
8 there are set offs. But we don't need to know
9 that now. We can fight that another day. The
10 issue here is knowing not the parties, but the
11 entities with whom the plaintiff settled either
12 prelitigation or in the course of litigation.

13 THE COURT: And you agree with that?

14 MR. ZACHAROPOULOS: Yes. I have no
15 problem with that, Judge.

16 MR. SHEIN: Just because we disclose
17 the entities doesn't necessarily mean they go
18 on the verdict sheet.

19 MS. TYMINSKI: That's true.

20 MR. SHEIN: That is why my argument
21 was you are asking for the cart before the
22 horse.

23 MS. TYMINSKI: I am sorry if I
24 misunderstood that. Basically we want to know
25 what case are we putting on here and a lot of

1 Colloquy

2 that depends on --

3 MR. ZACHAROPOULOS: I think, Judge,
4 touching on this issue, I think you brought the
5 issue up in the back. He wants to interject or
6 inject testimony, Mr. Baccus's testimony,
7 regarding joint compound. All joint compound
8 defendants in this case; Bondex, GP, whoever,
9 were out on summary judgment. Under Kentucky
10 law, it is clear in order for the plaintiff to
11 be on a verdict sheet for apportionment
12 purposes the court or the jury has to find
13 fault. In this case, Judge Tereshko clearly
14 indicated there is no fault as to those
15 defendants and, therefore, they do not belong,
16 none of that testimony belongs in this case.
17 So for purposes of any testimony regarding any
18 particular manufacturer, let's say, Gardener is
19 out on summary judgment, that doesn't come in,
20 or any generic testimony regarding joint
21 compound, that doesn't come in.

22 MR. BUDD: Your Honor, I can respond
23 to that.

24 MR. SHEIN: May I, before?

25 MR. BUDD: Yes.

1 Colloquy

2 MR. SHEIN: The judge is now actually
3 forcing us to do what I have reached out to you
4 to do the last week, week and a half, is to say
5 who is in this case and who is out of the case,
6 okay. So now we are being ordered to do that.
7 Maybe we can make some headway.

8 MR. BURNS: Okay.

9 MS. TYMINSKI: With all due respect,
10 we have also tried to engage in that discussion
11 and have never been able to have it.

12 MR. SHEIN: We are being ordered to
13 now.

14 THE COURT: Please address your
15 comments to the Court.

16 Yes, Mr. Budd.

17 MR. BUDD: Thank you, Your Honor.

18 I simply wanted to make sure the
19 background was understood. The plaintiff has
20 testified about 35 separate equipment asbestos
21 products he worked around, he worked on, he
22 breathed dust, and he claimed originally caused
23 his disease.

24 Some of the defendants have gotten
25 out on summary judgment, I agree with that.

1 Colloquy

2 Under Kentucky law, it is a different standard
3 for causation than the Gregg decision. We will
4 go back and look whether the four or five who
5 got out on summary judgment here got out
6 because of the Gregg standard or for some other
7 reason.

8 THE COURT: It says released.
9 Mr. Cottle told me dismissed. That is not what
10 it says. It says -- who handed it to me?
11 Somebody handed it to me. It says released,
12 and released is different than dismissed.
13 There, you are. How in the world -- lets
14 say -- can you have an entity beheld to be a
15 part of apportionment when there is no way the
16 plaintiff, if the plaintiff prevailed and held
17 everyone in, would be able to collect 100
18 percent of what they are owed.

19 MR. BUDD: For two reasons, Your
20 Honor. One is because the way Kentucky law
21 works, it is to create a record that shows a
22 scientifically accurate record of who all
23 contributed to asbestos exposure.

24 THE COURT: So you are saying if
25 there are ten defendants and two are dismissed

1 Colloquy

2 on summary judgment, eight held in, and the
3 verdict was a thousand dollars, the plaintiff
4 would at best collect 800; is that what you are
5 saying?

6 MR. BUDD: No, Your Honor.

7 THE COURT: Are you saying he could
8 collect the whole thousand?

9 MR. BUDD: What I am saying is he can
10 collect according to the percentages that the
11 jurors put on the verdict form, and if they
12 find a hundred percent for one of the eight, he
13 can get all thousand from one. If they find
14 that eight and not the other two are
15 responsible, then he gets it all from the
16 eight. But if they find that, in fact, only
17 some of them are responsible, then the percent
18 the jury has determined is what is collected.

19 THE COURT: No, no. I am trying to
20 make this a little more mathematically simple
21 for me, all right? If the jury comes back and
22 everybody is 10 percent liable, including the
23 two entities where the Court has already ruled
24 is not liable, so how can a jury override a
25 court on the matter of law?

1 Colloquy

2 MR. BUDD: You are absolutely right,
3 Your Honor; the jury couldn't. The only point
4 I was making, Your Honor, is that if, in fact,
5 the people who got summary judgment in this
6 case under the Pennsylvania legal standard,
7 which is different than the Kentucky standard,
8 that is why --

9 THE COURT: Well, we are passed
10 summary judgment, though.

11 MR. BUDD: Your Honor, I will stand
12 down on the point now, and only if it becomes
13 important will I re-raise it.

14 THE COURT: Thank you very much.
15 Are there any other issues?

16 Mr. Budd, anymore from Crane Co.?

17 MR. BUDD: Yes, Your Honor, just some
18 quick housekeeping.

19 THE COURT: I mean on legal issues.

20 MR. BUDD: Not at this point, Your
21 Honor. But there are trial issues. We usually
22 have an agreement that you will know the
23 morning before who is being called the next
24 day.

25 THE COURT: I am not getting to that

1 Colloquy

2 yet.

3 Do you have anymore legal issues?

4 MS. TYMINSKI: No more for Yarway,
5 Your Honor.

6 THE COURT: Any more legal issues for
7 John Crane?

8 MR. ADAMS: Just very briefly, Your
9 Honor, I have heard both off the record and on
10 the record from counsel for plaintiffs
11 substantial contributing factor. That is not
12 the law in Kentucky. It is substantial factor.
13 The word, contributing, does not come into
14 play. It is specifically adopted in two
15 supreme court cases; Crane Co. v. Howard and --

16 THE COURT: You will work that out.
17 That is closing argument and jury charge issue,
18 okay. You will work that out. Either work it
19 out or you will both show me law and tell me --
20 we have factual cause and also I think in our
21 315 charge, it says factual cause. It also
22 talks with about, you know, does it say
23 substantial contributing factor as well, may
24 not be the only -- it may be a substantial
25 contributing factor. I think they are both in

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Colloquy

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there, but I don't know about Kentucky law,
3 that's for sure. That's why I want you all to
4 give it to me.

5

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9

MR. ADAMS: The word contributing is
not located anywhere in the statute for the
case law and I don't think it should be
addressed to the jury that way, that is my only
point.

10

11

12

THE COURT: There is no more legal
issues? Are there any other issues that need
to be brought up in the next 20 minutes?

13

14

MR. BUDD: Yes, Your Honor, and I
appreciate the Court's patience and indulgence.

15

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First of all, we would like to have
an agreement that the parties the morning of
each day would tell the other side who they are
calling. We believe they are calling Captain
Burger tomorrow. We don't know who they are
calling on Wednesday. I can tell them right
now that we have Admiral Sergeant lined up for
Thursday and Dr. Forman lined up for Friday.
So we would like to make sure we have --

24

25

THE COURT: What do you have today?

MR. WOLF: Well, of course, opening

1 Colloquy

2 and then we are going to play Mr. Baccus's
3 videotaped deposition.

4 THE COURT: Who do you have tomorrow?

5 MR. WOLF: Captain Burger.

6 THE COURT: Then what?

7 MR. WOLF: Then Dr. Maddox.

8 THE COURT: You only have one witness
9 tomorrow?

10 MR. WOLF: Yes.

11 THE COURT: Well, Burger better last
12 until 5:00 o'clock.

13 MR. WOLF: We have some other
14 documents, Your Honor.

15 THE COURT: Documents?

16 MR. WOLF: Yes.

17 THE COURT: What do you mean by that?

18 MR. WOLF: Documents against the
19 defendants.

20 THE COURT: You are going to read
21 documents in?

22 MR. WOLF: Yes.

23 THE COURT: It is going to take you
24 four hours to do that?

25 MR. WOLF: Not four hours.

1 Colloquy

2 MR. BUDD: Can they tell us what they
3 are today so I can look at our objections
4 tonight?

5 THE COURT: I am serious about lining
6 up your witnesses.

7 MR. WOLF: I have Dr. Maddox coming
8 in testifying on Thursday.

9 THE COURT: Wait awhile. No gaps,
10 Troyce. I mean, they are not going to stand
11 there and do a dance for me for four hours,
12 okay?

13 MR. SHEIN: Judge, we will work on
14 the scheduling at the luncheon recess.

15 THE COURT: You will inform the other
16 side as well.

17 MR. BUDD: Your Honor, can that
18 include the documents. I think they can read
19 those so we can get those resolved.

20 THE COURT: Yes, yes.

21 MR. BUDD: For the record, I fully
22 understand that the Court has ordered 15
23 minutes for plaintiffs and 15 minutes
24 collectively for defendants. I would simply
25 note that plaintiffs feel that we are somehow

1 Colloquy

2 responsible for some or a large part of the
3 7 million-dollar verdict, and I would ask that
4 defendants be allowed 15 minutes each at a
5 minimum.

6 THE COURT: No.

7 MR. BUDD: Would you grant longer
8 than 15 minutes each?

9 THE COURT: No. It is 15 minutes a
10 side, just like it is in a murder case. Both
11 sides get the same. A little more important,
12 but --

13 MR. BUDD: Your Honor, in a murder
14 case --

15 THE COURT: Ever try one?

16 MR. BUDD: No.

17 THE COURT: I have tried 16. So you
18 tell me about murder cases after this case, as
19 the lawyer not a judge.

20 Anything else?

21 MS. TYMINSKI: One quick point of
22 follow-up with respect to disclosing which
23 witnesses are coming which day and also which
24 documents intend to be read in, we would like
25 to know what exhibits the plaintiffs are

1 Colloquy

2 planning to use. There is a pretty good list
3 of exhibits.

4 THE COURT: I am sure you can work
5 that out in the next 15 minutes.

6 MR. WOLF: Judge, one last thing. On
7 opening argument, the one side I had, we agreed
8 to everything and I cut out basically
9 90 percent of my slides. But the one slide
10 which is gross negligence, and it is the
11 definition of gross negligence under Kentucky
12 law, may I be allowed to use that?

13 THE COURT: Yes, I have decided that
14 is what we are going to do unless there is some
15 case that says I can't. Is there a case in
16 Kentucky that says I can't?

17 MR. BURNS: We handed you the statute
18 and we handed you the cases, and I told you my
19 personal experience if they couldn't. I don't
20 expect that to carry the day, but --

21 THE COURT: No. It is important to
22 me.

23 MR. BURNS: I don't have them in
24 front of me because I handed my only copies to
25 His Honor. I handed you that stuff when we

1 Colloquy

2 were in the back.

3 THE COURT: You handed them to me
4 when we were in the back?

5 MR. BURNS: Can Mr. Adams step up and
6 help me?

7 THE COURT: Yes.

8 MR. ADAMS: Yes, Your Honor.

9 MR. BURNS: Your Honor, we handed up
10 Section 411.184, about punitive damages and the
11 proofs necessary, and I handed Your Honor two
12 cases.

13 THE COURT: And malice is in there;
14 right?

15 MR. BURNS: Yes. We handed Your
16 Honor two cases which talked about how this is
17 applied, and I told you what my experience is
18 in six trials down in Kentucky, and that it's
19 not right for opening that during the trial
20 they place their evidence on and at a certain
21 point they approach Your Honor and say now you
22 have heard the evidence, our punitives are in
23 the games, essentially. You, as the gate
24 keeper, say I think what you put on against
25 John Crane or Crane Co. or Yarway or all three

1 Colloquy

2 shows malice, shows the standard, you are in.
3 If it is in, they close on it. You instruct on
4 it. If it is out, the jury never hears about
5 it. Because that is why you don't say it in
6 opening, because you are essentially deferring
7 your gatekeeping function until you hear the
8 evidence. Because punitive damages are so
9 important and so prejudicial to a defendant
10 because by their very nature they are
11 punishing, you defer until the last minute when
12 the jury hears about, which is after the
13 evidence is in.

14 THE COURT: But the elements that go
15 into whatever punitive damages have to be
16 proven to the jury. They have to prove gross
17 negligence.

18 MR. BURNS: Correct.

19 THE COURT: Isn't it fair to tell the
20 jury that there is gross negligence? They
21 don't necessarily connote that with punitive
22 damages, do they?

23 MR. BURNS: Our position is it is not
24 and our position is that the plaintiffs have
25 shown you nothing, that this is what can be

1 Colloquy

2 done in Kentucky. We have handed you the
3 statute and I have told you my experience.

4 THE COURT: Hold on a second. I
5 looked at this and I think I wrote a little
6 check mark beside malice.

7 MR. BURNS: Why would the attorneys
8 be telling me in opening statements, which are
9 the purpose of opening statements -- you told
10 us in the back and you struck some of
11 Mr. Wolf's slides because you said they were
12 argument and that the purpose of opening
13 arguments is to state what your evidence is.

14 A legal standard of malice, which may
15 or may not come before the jury for their
16 consideration at the end, with all due respect,
17 is not a statement of what the case is going to
18 show, because there is very real chance in this
19 case that Your Honor might rule, boom, you
20 didn't put enough on for it to go to the jury,
21 you didn't show malice so I'm denying that they
22 be allowed to consider it.

23 THE COURT: Then you will argue later
24 when they didn't argue it to the jury that they
25 went beyond their opening statement or

1 Colloquy

2 something like that.

3 MR. BURNS: I just think the
4 prejudice of putting that out in front of the
5 jury; concepts of malice, concepts of willful
6 behavior, concepts of punitive damages taints
7 the jury pool by their very being said, which
8 is the practice in Kentucky, which is why they
9 are not said until closing arguments, and that
10 is the argument.

11 THE COURT: In malice, it says here
12 it is intended, specifically intended by
13 the defendant to cause tangible or intangible
14 injury to the plaintiff or conduct that is
15 carried out by defendant both with the flagrant
16 indifference to the rights of the plaintiff and
17 with a subjective awareness that such conduct
18 will result in human death or bodily harm,
19 which is gross negligence.

20 MR. BURNS: I don't disagree, but
21 what is the point of having the plaintiff state
22 that?

23 THE COURT: Because they have to
24 prove it. I am allowing it.

25 MS. TYMINSKI: Yarway joins in that

1 Colloquy

2 objection.

3 MR. ZACHAROPOULOS: One other thing
4 that has to be addressed now because it is on
5 the video sheet.

6 MR. BUDD: We join in that objection.

7 MR. ZACHAROPOULOS: We have tried to
8 come in -- can I approach and show you?

9 THE COURT: Yes, you may.

10 Off the record.

11 (Discussion off the record.)

12 THE COURT: There are three
13 objections.

14 MR. ADAMS: Your Honor, we had asked
15 to have certain portions of the testimony
16 stricken as cumulative; page 185, line 11; page
17 185, line 18; and line 25, and page 186, line
18 six, we feel is cumulative because it asks the
19 same warning question twice. The very last
20 question deals with how, the very last question
21 from page 189, line 17 through page 189 line
22 25, I would just object to as, first of all, it
23 states facts not in of evidence. It is
24 irrelevant, it is argumentative, and the
25 prejudicial effect outweighs the probative

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Colloquy

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value. It asks how Mr. Baccus would feel if he were offered information, and it is prejudicial at this phase of the case where we are just dealing with liability and not damages.

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MR. ZACHAROPOULOS: As for the first two questions Mr. Adams referenced, they are not cumulative. If you look at the language of the question, one question asks whether or not he was warned about products causing lung disease.

The second question pertained to warnings as it pertained to mesothelioma, whether or not he was warned that these products can cause mesothelioma. They are not cumulative. They are distinct in nature.

As to the last question, it is our position that Mr. Baccus is entitled to tell the ladies and gentlemen of the jury how he would have felt or how he felt based on the fact that he wasn't told about these warnings.

MR. ADAMS: In phase one. Not in phase two.

THE COURT: I understand the arguments. The objections are overruled.

1 Colloquy

2 MR. ADAMS: Thank you, Your Honor.

3 (At this point a luncheon recess was
4 taken.)

5 (At this point the jury entered the
6 room.)

7 THE COURT: Good afternoon, Members
8 of the Jury.

9 We are now beginning phase two of
10 this trial, which I explained to you before; we
11 call it reverse bifurcation.

12 We are now in what is known as the
13 liability phase of the trial, and the rules
14 that I gave you during phase one with respect
15 to your role are exactly the same. You are the
16 judges of the facts. I am the judge of the
17 law.

18 What will happen in phase two, in the
19 liability phase, is that there will be opening
20 statements made by the plaintiffs and also by
21 the defendants in the case.

22 Now I made a ruling on time
23 limitations to each side; that is, the
24 plaintiff's side and the defense side will have
25 strict time limits to present their opening

1 Colloquy

2 statements, which are not arguments. They are
3 merely statements that tell you what the issues
4 are in the case and how they intend to prove or
5 what they intend to prove. Of course, the
6 defense doesn't have to give an opening
7 statement at this time. They can waive it
8 until a later time because they do not have the
9 burden of proof.

10 Again, the plaintiffs will present
11 their evidence on liability first and the
12 defendants may also present liability evidence.
13 Both sides may present rebuttal evidence. The
14 side calling the witness conducts the direct
15 examination and the opposing side cross
16 examines.

17 Again, I may ask questions to clarify
18 certain facts. However, I may do that or I may
19 not, but if I do, don't consider my questions
20 any more or less important than the lawyers'
21 questions.

22 After testimony counsel will present
23 closing arguments, and while you should
24 consider these arguments carefully, please
25 remember they are not evidence and, similarly,

1 Colloquy

2 counsel's questions are not evidence. Only the
3 answers you hear from the witnesses are
4 evidence.

5 You should not speculate a fact is
6 true because counsel assumes or suggests that
7 it is true. Only trial testimony, exhibits are
8 evidence, and you may consider them only. You
9 may only consider them in deliberations.

10 Evidentiary matters are governed by
11 legal rules and, therefore, counsel will
12 sometimes object, and I will rule on those
13 objections, and you must not consider testimony
14 or exhibits where I sustain the objection or
15 which I strike from the record. However, you
16 should not assume rulings indicate opinions
17 because you are the sole fact finders, not the
18 Court.

19 Counsel and I may be required to take
20 up certain matters, as you well know, outside
21 of your hearing. Again, we may use the
22 courtroom or my chambers or over at sidebar.
23 You alone, Members of the Jury, must determine
24 a witness's credibility. Look to see whether
25 witnesses have any interest in your verdict,

1 Colloquy

2 friendship, animosity, demeanor, bias,
3 prejudice, accurate or inaccurate memory or
4 ability to acquire evidence, consistency or
5 inconsistency in their testimony as well as the
6 reasonableness or not of their testimony
7 considering all the other evidence.

8 Both parties, I believe, will call
9 expert witnesses or all parties will call
10 expert witnesses, I believe. Expert witnesses
11 have special knowledge, skill, experience,
12 training or education in a particular science,
13 profession or occupation. Experts may testify
14 on anything in which they are skilled, and you
15 will hear other types of experts than you heard
16 already. You heard medical experts before.
17 But now you will hear, for example, not to
18 exclude anyone, but you will hear an industrial
19 hygienist, you will hear more medical evidence.
20 You may hear, I believe, some of the parties
21 are going to call witnesses that can talk to
22 you about aspects of the occupations that
23 people were involved in; if I am not correct,
24 for example, there will be people who know
25 about navy activities from both sides. And

1 Colloquy

2 they will be expert witnesses.

3 In judging an expert's opinion, you
4 should consider their qualifications,
5 reliability in reaching an opinion, but you are
6 not bound by the expert's opinion merely
7 because they are experts. You may accept or
8 reject them as you would any other witness and
9 do what you think is appropriate.

10 There will be videotaped testimony,
11 video depositions that were taken under oath.
12 They are entitled to the same consideration you
13 give live testimony, where you judge it, weigh
14 it equally. This part, phase two, as in phase
15 one, plaintiffs have the burden of proving the
16 contentions which entitle them to relief and
17 defendants are not required to offer evidence
18 on their own behalf.

19 When parties have the burden of
20 proof, their contentions must be proved by a
21 fair preponderance of the evidence. A fair
22 preponderance of the evidence means you are
23 persuaded a contention is more probably
24 accurate and true than not true. Think, if you
25 will, of an ordinary balance scale with a pan

Colloquy

on each side. On one side place all the evidence favorable to the plaintiff. On the other place all the evidence favorable to the defendants. If, after considering the comparable weight of the evidence, the scales tip ever so slightly or to the slightest degree in favor of plaintiffs, your verdict must be for the plaintiffs. If the scales tip ever so slightly or in the slightest degree in favor of the defendants, or if the scales are balanced, your verdict must be for the defendants.

Jurors, don't discuss this case until you hear the evidence, receive your legal instructions, and begin deliberations. Do not allow others to approach you, especially counsel, parties or witnesses. Please understand that we may not even say hello. We must avoid all appearances of impropriety.

While you must follow my legal instructions, you, Members of the Jury, are the sole fact finders. Your recollection and not mine and not counsel's controls. You must decide all questions of credibility, weight and fact, including inferences to be drawn from

1 Colloquy

2 those facts.

3 You may continue to take notes during
4 the testimony in phase two.

5 I will give you other instructions in
6 addition to these in my final charge. You
7 should consider all the instructions a
8 connected series, because taken together they
9 constitute the law.

10 We have for the plaintiff, Mr. Wolf.

11 Are you ready to open?

12 MR. WOLF: Yes, Your Honor. May I
13 proceed?

14 THE COURT: Yes.

15 MR. WOLF: Thank you, Your Honor.

16 Good afternoon, ladies and gentlemen.

17 THE JURY: Good afternoon.

18 MR. WOLF: Before I begin, again, I
19 want to thank you for your time and patience.
20 I don't want to repeat myself as I did in phase
21 one, but I am the first one to recognize that
22 this is a great sacrifice on your part; time
23 away from your jobs, your family. I certainly
24 appreciate it and I know the Baccuses do, too,
25 and I just want to thank you again.

1 Colloquy

2 Phase two is obviously a little bit
3 different than phase one. And I want to talk
4 to you about that real quick. In phase two, I
5 think you are going to find that as the
6 evidence comes in, it is basically a relatively
7 simple case. But there a couple things I think
8 you need to focus on.

9 Number one is the defendants'
10 products and were they unreasonably dangerous.
11 Okay? That part of the evidence, you will hear
12 through phase one, focuses on the product,
13 okay; that is the product you need to focus on.
14 Was it unreasonably dangerous as it was put
15 into the stream of commerce?

16 Secondly, were the defendants
17 negligent? We are claiming both. That, you
18 focus on, ladies and gentlemen, is the conduct
19 or lack thereof, okay?

20 So we are talking about the
21 defendants' products were unreasonably
22 dangerous. You need to listen to the evidence
23 and focus on the product itself and see if it
24 was unreasonably dangerous as they were put
25 into the stream of commerce.

1 Colloquy

2 Secondly, you need to listen to the
3 evidence and see if the defendants were
4 negligent. In other words, did they do
5 something that an ordinary and reasonably
6 prudent person would have done under the same
7 or similar circumstances or didn't they do
8 something they should have done, okay?

9 So that is why the first one focuses
10 on products, the second one focuses on conduct.

11 Next down in that third paragraph, we
12 will prove with evidence that the defendants'
13 products were a substantial factor in causing
14 Jim Baccus's mesothelioma. Then I have got in
15 parentheses they do not have to be the sole
16 cause. I think at the end of the case, you
17 will be instructed by the judge that there can
18 be more than one cause of the mesothelioma. I
19 only have to prove that these three defendants'
20 products were a substantial factor in causing
21 the mesothelioma that took Mr. Baccus's life.

22 You are going to hear quite a bit
23 about history. And why that is important, what
24 was known back years ago? You are going to
25 hear a lot about that.

1 Colloquy

2 The evidence will show that Crane
3 Co., Yarway and John Crane either knew or
4 should have known that their asbestos products
5 were dangerous. And if you look at that in
6 white, there are two parts to that; either that
7 they actually knew or that they should have
8 known. In other words, had they bothered to
9 take the time to look and see the dangers of
10 asbestos. It is a two-part test; knew or
11 should have known, and we will bring you
12 evidence of that.

13 Evidence of what was known. Very
14 briefly, I am going to give you a synopsis of
15 some of the general, more important articles
16 and studies that were out there. All the way
17 back in 1930, there was a landmark study over
18 in England, Merriweather and Price. It was
19 kind of the equivalent of the surgeon general
20 that we have today. They had a big study.
21 They had a lot of asbestos products being made
22 back then in England, and Merriweather and
23 Price found that asbestos can cause death,
24 asbestos products can pose a hazard. Asbestos
25 diseases are latent diseases. You heard about

1 Colloquy

2 that in phase one. In other words, you don't
3 breathe asbestos in and get sick the next day.
4 It takes many years for the person to start
5 having symptoms and problems. And they also
6 said if you can control the dust, you can
7 control the disease. In other words, all the
8 way back in 1930, they realized it was the
9 asbestos dust that was causing the disease and
10 death in workers working with asbestos
11 products.

12 In the last part they said, and I
13 think this is important, they said education of
14 the worker is key. All the way back in 1930,
15 they said you have got to educate the worker.
16 You have got to apprise the worker of the
17 danger so that the worker can protect himself
18 or herself. Okay.

19 Going on down through history, 1935,
20 another big study was out, published, asbestos
21 linked to lung cancer, all the way back to
22 1935. 1949, JAMA, Journal of the American
23 Medical Association, which you will hear is
24 probably the most widely read journal of all
25 medical doctors in the United States. They all

1 Colloquy

2 have it in their office. They had an article
3 in JAMA all the way back in 1949 that says
4 asbestos causes cancer, and that is the most
5 widely read journal of medical professionals in
6 this country today and it was back then.

7 Another big study in 1955, asbestos
8 causes cancer proven beyond doubt; that is
9 1955.

10 Moving on up, in 1960, there was a
11 study by Wagner; he said asbestos causes not
12 only various forms of cancer, but a very
13 particular type of cancer which is
14 mesothelioma, which you heard a great deal
15 about in phase one.

16 Then I just threw in for us 1951 to
17 1955, that was when Jim was in the navy and
18 exposed to asbestos while working in the navy.

19 And then 1957 to 1977, 20 years after
20 that, he worked at American Synthetic Rubber,
21 where he was exposed to asbestos while at work.

22 We will bring you evidence that there
23 was no warnings on any of these defendants'
24 products at those work sites.

25 The defendants will claim, number

1 Colloquy

2 one, our asbestos products are safe. They are
3 also going to claim anything but chrysotile,
4 and I am going to talk more about that in a
5 second, and they are going to say it was the
6 other asbestos products that caused Jim's
7 mesothelioma. And I want you to pay particular
8 attention to these claims. I told you at the
9 beginning of this trial that you were judges
10 without robes, that you were to judge the
11 evidence, test the evidence. I ask you to
12 judge my evidence and test my evidence. But I
13 also ask you to judge and test the evidence
14 that these defendants are going to put on in
15 that respect, and test it and see if it is
16 credible or has any weight at all.

17 You are going to see John Maddox, who
18 you saw by video deposition in phase one. He
19 is actually going to testify live in the
20 courtroom and talk about a number of things
21 that he did not discuss in phase one, and in
22 particular the different types of asbestos
23 fibers. And it is kind of hard to see. If you
24 can read up there, the first one is chrysotile,
25 the second is amosite, and the third one is

1 Colloquy

2 crocidolite. He is going to talk about the
3 properties in asbestos.

4 If you can kind of look over to the
5 left, that is a picture of some onions. You
6 are probably wondering why is there a picture
7 of onions up there. Well, here is why.
8 Asbestos fibers are invisible to the naked eye.
9 It takes a very powerful microscope to see a
10 single fiber. They are odorless. They have no
11 smell. They are tasteless. They do not in any
12 way warn the body that they are toxic, okay?

13 A good example of something that is
14 ammonia, if you smell ammonia, if you get a big
15 whiff of ammonia, it will burn your nose, your
16 eye. You will draw back and know you shouldn't
17 be breathing that. If you breath too much
18 ammonia, it will kill you. Asbestos is not
19 like that. It doesn't have any of those
20 properties to warn the human body. Why is that
21 important? Because without a warning there is
22 no way for a person to know they are inhaling
23 these invisible, tasteless, odorless fibers
24 that can give them a terminal cancer many years
25 later.

1 Colloquy

2 You are going to here the difference
3 between chrysotile, amosite and crocidolite
4 quite a bit. The evidence is going to be,
5 though, that with regard to chrysotile, that if
6 all the asbestos used in this country in the
7 United States starting back in the 1920s and
8 '30s, all the way up through the '70s,
9 95 percent of that asbestos was chrysotile
10 asbestos; in other words, the overwhelming
11 majority. Only five percent was the amosite
12 and a little bit was crocidolite. Chrysotile,
13 that is the one that 95 percent of all the
14 asbestos products were made from in the United
15 States.

16 Dr. Maddox is going to testify that
17 it is generally accepted in this country and
18 around the world by experts that chrysotile
19 asbestos products are a major cause of
20 mesothelioma.

21 You will hear some evidence that
22 these other two types; amosite and crocidolite,
23 also cause mesothelioma, and I am not disputing
24 that. And it may take less of those types of
25 asbestos to cause mesothelioma, but all three

1 Colloquy

2 types cause mesothelioma, and the fact that
3 chrysotile was by far the most common asbestos
4 used in this country speaks volumes.

5 Dr. Maddox will also testify that the
6 repeated and long-term exposure to the asbestos
7 from the products from John Crane, Yarway and
8 Crane Co.'s products were each a substantial
9 factor in causing the mesothelioma that killed
10 Jim Baccus. Okay. That is why he is coming
11 back in phase two.

12 You have to pay some attention, you
13 will hear Jim's testimony again this afternoon.
14 You may be saying, well, why, Mr. Wolf, are you
15 bringing and making us endure that videotaped
16 deposition again. Well, there were certain
17 portions of that that you were not allowed to
18 hear in phase one. Those have been edited back
19 in of his testimony in phase two and that is
20 why you are going to hear his deposition
21 testimony again that has been altered, and you
22 will hear him talk about the products from
23 Crane Co., Yarway and John Crane, how he used
24 those products not only in the navy, for those
25 four years, but during the 20-year period that

1 Colloquy

2 he worked at American Synthetic Rubber, and how
3 when he used those products he had to
4 manipulate asbestos products to do the work as
5 a machinist and that those released fibers and
6 he breathed those fibers repeatedly, not on one
7 occasion, not on two occasions, but on many,
8 many occasions.

9 You are also going to hear from
10 Captain Francis Burger. I won't go through
11 that in great detail. Captain Burger is going
12 to talk to you about the navy and the products
13 on navy ships. He has a bachelor of science in
14 marine electrical engineering from
15 Massachusetts Maritime Academy. He was
16 actually in the United States Navy. He was an
17 engineer officer aboard numerous ships for
18 several years, and you will hear what he did
19 and how he supervised people; that last ship
20 where he was a first lieutenant, the USS
21 Sacramento. There were 6,000 sailors aboard
22 that vessel alone, very large vessel, lots and
23 lots of equipment on there. You will hear him
24 talk about the products from Yarway, Crane Co.
25 and John Crane, and how they were used in the

1 Colloquy

2 navy, and how a machinist such as Jim would
3 have to work on those products on a regular
4 basis and how asbestos would be released in the
5 normal routine practice of working on the
6 product and where they were on the ships. He
7 was also a program manager for Lockheed
8 Shipbuilding; project engineer for Eagle
9 Shipbuilding, and he was a professional
10 engineer for naval architecture and marine
11 engineering for the naval ships system here and
12 close by in Washington, D.C. He will come live
13 and you will hear from him.

14 You are also going to hear from
15 industrial hygienist, Steven Paskal. He is
16 also an attorney. He is probably smarter than
17 some of us and decided to do something else
18 instead of going into the practice of law. He
19 got his J.D. from Georgetown. He also has his
20 master of science in industrial hygiene from
21 close by in Pittsburgh, Pennsylvania. He has a
22 bachelor of science in chemistry. He also
23 worked for NASA as an industrial hygienist. He
24 worked for the Pentagon as an industrial
25 hygienist; for the State of California, for the

1 Colloquy

2 U.S. Navy at Long Beach Naval Shipyard, and
3 also at some other places. Steven Paskal is
4 going to talk to you about industrial hygiene.
5 It is kind of an odd thing you probably haven't
6 heard much about. It is basically just the
7 science of keeping factories or workplaces
8 clean so that people that are working in those
9 places do not get disease; it is as simple as
10 that in a nutshell. What is he going to say?
11 Mr. Paskal is going to come in and say asbestos
12 packing and asbestos gaskets when removed by a
13 wire scraper and brush in the same manner Jim
14 talked about, not only how he did it in the
15 navy, but during his 20 years at American
16 Synthetic Rubber, it releases large amounts of
17 asbestos into the breathing zone of the worker
18 and such exposures are at dangerous level that
19 put people like Jim Baccus at a much greater
20 risk for the development of mesothelioma.

21 Lastly, ladies and gentlemen, gross
22 negligence. We talked about, at the very
23 beginning, the product and whether or not the
24 product that these defendants made was
25 unreasonably dangerous as it was put into the

1 Colloquy

2 stream of commerce with asbestos or asbestos
3 containing parts without a warning and also
4 whether they were negligent in doing what an
5 ordinarily prudent person would have done or
6 would not have done, but also you are going to
7 have this issue, gross negligence, which means
8 a wanton or reckless disregard for the lives of
9 and safety of other persons, including the
10 plaintiff, or a willful or malicious act. And
11 I think what you need to do as you listen to
12 the evidence as we proceed in phase two is ask
13 yourself as the evidence comes in, number one,
14 was the product unreasonably dangerous.

15 THE COURT: Forty-five seconds.

16 MR. WOLF: Thank you, Your Honor.

17 Were the defendants negligent in
18 failing to do what an ordinary prudent person
19 should have done based on what they knew or
20 what they should have known, and, lastly, did
21 they have a reckless disregard for the lives
22 and safety of other persons such as Jim Baccus?

23 I think, ladies and gentlemen, when
24 you hear all the evidence, you will find that
25 the evidence supports a yes to all three of

1 Colloquy

2 those.

3 Thank you.

4 THE COURT: Thank you, Mr. Wolf.

5 Mr. Cottle.

6 MR. COTTLE: Your Honor, may I

7 approach the jury?

8 THE COURT: Yes, you may.

9 MR. COTTLE: May it please the Court.

10 Good afternoon, counsel.

11 Good afternoon, Baccus family.

12 Good afternoon, ladies and gentlemen.

13 And, now it is my pleasure again to
14 talk to you. I haven't had an opportunity to
15 speak with you since about a couple weeks ago.
16 So I want to introduce myself again and who I
17 represent.

18 My name is Eric Cottle, and together
19 with my partner, Terry Budd, who wasn't here to
20 assist me during the first phase of the case,
21 we represent the ladies and gentlemen of Crane
22 Co.

23 And like Mr. Wolf, we do thank you
24 and appreciate the time and attention you have
25 given all the attorneys in the courtroom, the

1 Colloquy

2 lawyers, and the issues and the family during
3 the first phase of the case.

4 We are very excited to now get to the
5 second phase of the case. You may recall there
6 were two sides to the story we talk about
7 before, and what I want you to do in the time I
8 have to open and introduce myself and my client
9 to you is just to walk you through the other
10 side of the story.

11 Will you dim the lights? I am going
12 to step over here.

13 MR. BUDD: Your Honor, if I might, it
14 is five minutes for each?

15 THE COURT: Five minutes for each;
16 fifteen minutes a side, plaintiffs and
17 defendants.

18 MR. BUDD: Thank you, Your Honor.

19 MR. COTTLE: Thank you.

20 THE COURT: We have three, 45 left.

21 MR. COTTLE: Crane Co. made a number
22 of different values, but let me get to this
23 case here and tell you what this case is all
24 about. This case is about the plaintiff,
25 Mr. Baccus, who worked, while working for the

1 Colloquy

2 navy, was exposed on a daily basis to a
3 significant amount of thermal insulation.

4 The navy specified the use of all
5 equipment that is onboard the ships, failed to
6 provide the employees on the ships adequate
7 protection from that product.

8 Now what does that mean and why is it
9 important? It is because Crane Co. did not
10 manufacture or supply any of the insulation
11 used on any of the two ships that Mr. Baccus
12 worked on.

13 Now we are going to get into valves
14 in a little while, but if Crane Co. had valves
15 on the ship, not just had valves, but some of
16 the valves may or may not have contained
17 asbestos, and that is very important for you to
18 know.

19 Of course, Crane Co. valves were
20 safe, and during the relevant time period,
21 people thought those valves were safe, and
22 Crane Co. at all times exercised reasonable
23 care and brought their designs and
24 manufacturing precisely to the level of care
25 that was known and understood during the

1 Colloquy

2 relevant time period.

3 Crane Co. briefly, it is a
4 150-year-old company founded by two brothers
5 out of Chicago.

6 We talked about valves in the first
7 phase of the case, but what is important for
8 you to understand at this time is that Crane
9 Co. did not mine asbestos, did not manufacture
10 asbestos-making products, and it did not mill
11 asbestos, as that term is understood.

12 If I can have the lights for one
13 second, Ernie, I just want to go briefly go
14 over the valves.

15 I say that the valves were safe then
16 and are safe now, and I think it is very
17 important for you to understand some of the
18 basic mechanics and part of the valves. This
19 is a Crane Co. valve made out of metal, as you
20 can see. This is sort of how it was shipped at
21 the time in the navy. It basically has a top
22 part called a bonnet. It has the wheel here
23 that you turn, and it has stem in the middle
24 which is a little screw device that you can't
25 see. Inside this area here would be a gasket

1 Colloquy

2 and also inside the casing of the valves would
3 be packing. You heard the testimony before
4 that is to prevent fluids or hot gases from
5 leaking or injuring workers.

6 Now as you can see, we are talking
7 about a very small amount of material, whether
8 the gasket or packing even contained asbestos
9 that is --

10 THE COURT: One minute.

11 MR. COTTLE: -- that is contained
12 within the small body of this valve. So all
13 the asbestos we are talking about is contained
14 within the valve.

15 You can turn the lights back on.

16 The valves on these ships were built
17 to very precise navy specifications, and you
18 will learn the systems were engineered by the
19 navy. There are many different types of valves
20 and not all the valves contained packing or
21 asbestos. Mr. Baccus testified, it is very
22 important, that in the navy he used other types
23 of packing and gaskets, which were paper and
24 also rubber.

25 We will get into the science a little

1 Colloquy

2 bit later, but not all asbestos is harmful, and
3 we talked about chrysotile versus amosite
4 asbestos. Asbestos is a naturally occurring
5 mineral, but the gaskets and packing, the
6 evidence will show, released a very small
7 amount of chrysotile asbestos, which is not
8 harmful.

9 Also, the evidence will show the navy
10 had complete control over what it did on the
11 shipyards.

12 THE COURT: Mr. Cottle, that is your
13 five minutes.

14 Next, Mr. Burns.

15 MR. COTTLE: Thank you.

16 MR. BURNS: Can I have the lights,
17 please.

18 Good afternoon. I have not had a
19 chance to talk to you yet.

20 My name is Thomas Burns, along with
21 Bill Adams, and Dan Griffin who was here for
22 phase one but isn't here today. We are
23 representing John Crane, and here is what we
24 are here to talk to you about. First of all,
25 we are not here to defend asbestos. I am not

1 Colloquy

2 here to tell you asbestos doesn't cause
3 disease. I am not here to tell you that
4 asbestos is safe. I am not here to tell you
5 asbestos is good.

6 I am here to talk to you about
7 packing and gaskets. They are the only product
8 in this case that John Crane manufactured, sold
9 or distributed, and, indeed, the only asbestos
10 containing products that John Crane ever made.

11 As Mr. Cottle was just talking about,
12 he used these in steam systems. If you ran a
13 pipe into this valve, you wouldn't want to have
14 metal to metal. It would leak. You'd cut to
15 fit a piece of gasketing material. You take
16 this packing; it is covered in graphite on the
17 outside so it is slippery. You put that
18 inside. That is what gasket you are packing.

19 You will hear because of the way
20 these products are made, you are going to hear
21 because of the way these products are made, it
22 is important that they remain whole. The
23 asbestos that is put inside is mixed together
24 with rubbers, lubricants, oils and other things
25 that bind it together. Because the purpose for

1 Colloquy

2 this was so that it could take heat. If all
3 the asbestos was here or here or here, if the
4 heat hit another place, you would have a steam
5 blow, and that would kill human beings. That
6 is the way the products are made. You are
7 going to hear why that is important.

8 Now I only have five minutes so there
9 are only two other areas I want to touch on.
10 One is what is called the state-of-the-art and
11 you saw some of that in plaintiff's opening.
12 That is essentially what was known or should
13 have been known.

14 Two things to know about the
15 state-of-the-art when we started out; the
16 Merriweather and Price article they had up from
17 the 1930s made an exception for gaskets and
18 packing. Merriweather and Price talked about
19 who could get worker's compensation in London
20 in the '30s for asbestos-related disease. They
21 specifically excluded gaskets and packing
22 because they said there was not enough dust
23 released to get you sick.

24 In 1972, the United States government
25 came out with OSHA, and said if you have an

1 Colloquy

2 asbestos-containing product, you must put a
3 warning label on it, but there was an exception
4 for products. Gaskets and packing were
5 excepted. From the beginning of the
6 state-of-the-art the in '30s until 1977, when
7 Mr. Baccus stopped working with gaskets and
8 packing, John Crane was excepted, gaskets and
9 packing were excepted from having to warn. It
10 was not required because of the dose, and the
11 reason for that is -- I jog. I jog on the
12 streets of Philadelphia when I am here at the
13 Marriott. Cars drive beside me. I inhale
14 carbon monoxide. It doesn't kill me. I don't
15 inhale enough of it to get me sick. There is
16 not a strong enough dose. It is the same with
17 asbestos. Asbestos is in the air we all
18 breathe. The evidence is going to show if I
19 were to drop dead right now and you performed
20 an autopsy on me, you would find asbestos in my
21 lungs. No medical doctor is going to testify
22 to you that that can get you sick. It is not a
23 strong enough dose.

24 The dose of asbestos released from
25 John Crane's chrysotile gaskets and packing is

1 Colloquy

2 below the dose that is in the ambient air that
3 we all breathe; that will be what the evidence
4 shows in this case. To put on that evidence we
5 are going to call an industrial hygienist named
6 Dr. Francis Toca. He has his Ph.D. in
7 toxicology in preventative medicine. He was
8 voted one of the ten most influential
9 industrial hygienists of the 20th century.
10 He is the former president of the American
11 Industrial Hygiene Association, the largest
12 such organization in the world, and the former
13 head of Industrial Hygiene and Safety at U.S.
14 Steel, where he is in charge --

15 THE COURT: Fifty seconds.

16 MR. BURNS: -- of 300,000 workers.

17 We will also have Dr. Michael
18 Madison, a Ph.D. chemist, who performed tests
19 on John Crane products to see what is released
20 from them.

21 They will call no such witness. They
22 will show you the low level. Dr. Toca will
23 talk about it. Then either Dr. Crapo or Dr.
24 Barrett will tell you that dose does not get
25 human beings sick.

1 Colloquy

2 Thank you.

3 MR. DelBELLO: May I open, Your

4 Honor?

5 THE COURT: You may.

6 MR. DelBELLO: Members of the Jury,

7 hello.

8 THE JURY: Hello.

9 MR. DelBELLO: My name is Jim

10 DelBello and I represent Yarway Corporation.

11 As you heard, the defendants have
12 been excited to get to phase two of the trial
13 so we can tell you what we believe the case is
14 about, and we agree that this case is about
15 Mr. Baccus's exposure to asbestos while he was
16 at work.

17 The first thing I want to talk about
18 is his first job where he was exposed to
19 asbestos, and that was in the United States
20 navy. About of 60 years ago, Mr. Baccus joined
21 the navy, and the United States was at war in
22 Korea, and America was fighting the spread of
23 Communism at that time and we had just finished
24 with the largest war, the largest modern war,
25 World War II, a few years before.

1 Colloquy

2 In World War II, America was
3 attacked. Over 400,000 Americans lost their
4 lives in fighting that war overseas. In the
5 Korean War, over 50,000 Americans lost their
6 lives fighting in Korea. Thousands of
7 Americans were prisoners of war. They were
8 captured; many of them were tortured and
9 killed. And there was a draft at this time
10 where many young men were being called up by
11 the government and forced to fight in the war,
12 in the Korean War.

13 Mr. Baccus joined the navy at that
14 time and he joined up and he was in the navy
15 for four years and you will hear he served on
16 two ships. He served on one called the Block
17 Island. And one this one here is called the
18 USS Wasp. It is an aircraft carrier.

19 So you may be wondering, what was
20 life like in the navy. And I think everybody
21 probably knows that once you are in the armed
22 forces or the military, Uncle Sam has got you,
23 and you give up a lot of your freedom and a lot
24 of the control of your life; that was the case
25 and we will hear about this from Mr. Baccus for

1 Colloquy

2 those four years when he served aboard these
3 ships. The navy tells you pretty much
4 everything to do. It tells you when to sleep,
5 it tells you where to sleep. It tells you when
6 you eat, what you eat. It tells you where to
7 work, when you have to work, how to do your
8 job. I mean, every last detail is scripted by
9 the U.S. Navy and by the government when you
10 are in the armed forces, and there is a good
11 reason for that. The country is at war and
12 tens of thousands or hundreds of thousands of
13 people are dying in these wars. So the navy is
14 very, very serious and very specific about what
15 they tell you to do.

16 So you may be wondering about these
17 ships. Here, this is the Wasp; that is an
18 aircraft carrier, and that is an enormous,
19 enormous vessel. I was trying to figure out
20 how to describe it, and I think that the best
21 way is if you were to take the Wasp out of the
22 water and put it on Market Street and turn it
23 upside down, there would only be a couple
24 buildings in Philadelphia that would be roughly
25 that size; like Liberty Place at 17th and

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Colloquy

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Market is basically the size of the Wasp. The Block Island wasn't small, either. If you turn the Block Island upside down, it is basically the size of City Hall. So when you for lunch one day, take a look at the skyline and take a look at the buildings, that is what the Wasp looked like. It weighed over

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54 million-pounds. It was an aircraft carrier

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and it could carry up to 100 airplanes on it.

11

These ships are described as like moving war

12

machines or moving cities because there would

13

be three or 4,000 men would live on these ships

14

for months. So these ships had everything.

15

They had hospitals, they had to provide food,

16

they provided your clothes for you. If you are

17

in the navy, you don't decide what to wear.

18

They tell you what to wear but they do your

19

laundry. They tell you how to cut your hair,

20

but they cut your hair. They do all this

21

stuff, and all those options are available on

22

the ships themselves.

23

So you may be wondering, you know,

24

how is the navy able to do all this at once?

25

Well, you probably won't be surprised to hear

1 Colloquy

2 that the navy is also specific about the design
3 of these ships. They design every square inch
4 of those ships with specific specifications and
5 they tell manufacturers of products exactly how
6 to build things.

7 Yarway built valves and steam traps
8 for the navy, and the navy specified how that
9 was to be done.

10 Another important thing used by the
11 navy was asbestos insulation, and they needed
12 it because these ships are driven by steam
13 power, and there are miles and miles and miles
14 of pipe, and huge boilers like hot water
15 heaters that get hundreds and hundreds of
16 degrees and they boil steam through this thing
17 and let the that huge sky scraper in the sky
18 fight a war in the ocean.

19 Asbestos was used and specified by
20 the navy to insulate those miles of pipes and
21 they literally used tens of thousands of pounds
22 of asbestos insulation to insulate the pipes
23 because asbestos has a property that holds its
24 shape.

25 Thank you very much.

1 Colloquy

2 THE COURT: Thank you.

3 MR. DelBELLO: And one more quick
4 point.

5 THE COURT: Thank you, Mr. DelBello.

6 MR. WOLF: Your Honor, at this time
7 plaintiffs would like to play the videotaped
8 deposition of Jim Baccus.

9 THE COURT: All right.

10 (At this point the above-mentioned
11 videotape was viewed by the jury.)

12 MR. BURNS: This is Thomas Burns.

13 Earlier today when we were making
14 pretrial motions concerning Dr. Paskal, I
15 indicated that Dr. Paskal, to the best of my
16 knowledge as national counsel for John Crane,
17 had never testified at trial in a case
18 concerning John Crane. My office doesn't
19 handle the cases in California for a variety of
20 reasons.

21 I talked to California counsel on
22 Friday. They had indicated he never testified
23 at such a trial.

24 At 2:03 p.m., I received an email
25 from a paralegal from my California counsel

1 Colloquy

2 with an attached transcript that apparently Dr.
3 or Mr. Paskal had been a witness at a
4 California trial involving John Crane last
5 year.

6 I haven't read the transcript. I
7 don't know what testimony he gave, but to the
8 extent that I might have misrepresented
9 something to either this Court or to anyone in
10 the future reading this transcript, that has
11 both, I would like to clear that up for the
12 record because it was not my intention and,
13 obviously, again, as I stated this morning, if
14 his testimony had been disclosed to me in
15 California, I am bound by that and I certainly
16 don't argue that it was not disclosed.

17 THE COURT: Thank you, Mr. Burns, for
18 the update and your candor to the Court.

19 MR. WOLF: Your Honor, I am glad to
20 report Mr. Paskal will be here first thing in
21 the morning to go on and then we will follow
22 immediately with his exam and cross, with
23 Captain Burger. So I have got two experts
24 lined up for tomorrow.

25 MR. DelBELLO: Paskal first.

1 Colloquy

2 MR. WOLF: Paskal first and then
3 Burger.

4 THE COURT: Shall we start at 9:30
5 tomorrow?

6 MR. WOLF: They are coming in this
7 evening.

8 THE COURT: Then we will start at
9 9:30.

10 MR. WOLF: And Dr. Maddox will be in
11 tomorrow night.

12 THE COURT: I will see you first
13 thing in the morning.

14 (At this point this matter was
15 recessed.)

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