

IN THE

Supreme Court of the State of Delaware

E. I. DU PONT DE NEMOURS & CO.,
INC., and SPORTING GOODS
PROPERTIES, INC., Individually and
as Successor-in-Interest to Remington
Arms Company,

Defendants-
Below/Appellants,

v.

JANET SCHOEPKE, as Independent
Administrator of the Estate of EUGENE
SCHOEPKE on behalf of the Estate of
EUGENE SCHOEPKE; in her capacity
as Special Administrator, on behalf of
the Wrongful Death Claimants GLORIA
WHALEN, ELIZABETH JAMALI,
AMY SCHOEPKE, GREGORY
SCHOEPKE, GARY SCHOEPKE,
RANDY SCHOEPKE, JESSEY
SCHOEPKE, and JEFFREY
SCHOEPKE, the children of EUGENE
SCHOEPKE, and JANET SCHOEPKE,
the widow of EUGENE SCHOEPKE;
and JANET SCHOEPKE, Individually,
for her Consortium Claim,

Plaintiffs-Below/Appellees.

No. 138, 2026

CASE BELOW:

SUPERIOR COURT OF
THE STATE OF DELAWARE
C.A. No. N23C-09-059 ASB

APPELLANTS' OPENING BRIEF

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May 15, 2026

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NATURE OF PROCEEDINGS

From around 1960-1981, Remington Arms Company (n/k/a Sporting Goods Properties, Inc.) (“Remington”) manufactured and sold shotgun shells with a component—called a basewad—containing encapsulated asbestos. E. I. du Pont de Nemours & Co., Inc. (n/k/a EIDP, Inc.) (“DuPont”) was Remington’s majority owner.

Sadly, in February 2022, Illinois farmer Eugene Schoepke was diagnosed with mesothelioma. About a month later, he died at age 84. Mr. Schoepke’s estate and family members filed suit in Superior Court alleging that his mesothelioma was caused by having hunted using Remington shotgun shells with basewads containing encapsulated asbestos, and that defendants’ negligence caused his death.

On July 23, 2025, following trial, the jury returned a verdict in plaintiffs’ favor, awarding damages totaling \$9 million. *See* Exs. A-B.

Both during and after trial, defendants moved for judgment as a matter of law based on legally insufficient evidence of causation under applicable Illinois law. The trial court denied the motions and entered final judgment. Exs. C-D.

This is Remington and DuPont’s appeal.

SUMMARY OF ARGUMENT

1. Plaintiffs did not present evidence at trial sufficient to prove that defendants' conduct was the "legal cause" of Mr. Schoepke's injury, as required by governing Illinois law. The unrebutted evidence at trial established that it was not known or reasonably foreseeable during the relevant period (~1960-1981) that shotgun shells containing basewads with encapsulated asbestos would likely cause mesothelioma in recreational hunters. In *McKinney v. Hobart Bros. Co.*, 127 N.E.3d 176 (Ill. App. Ct. 2018), a case involving welding rods with encapsulated asbestos, the Illinois appellate court reversed the trial court's denial of judgment as a matter of law, overturning the jury verdict for plaintiff, based on a failure of evidence of "legal cause." Because Illinois substantive law applies here, this Court should follow *McKinney* and reverse in favor of granting defendants' motion for judgment as a matter of law.

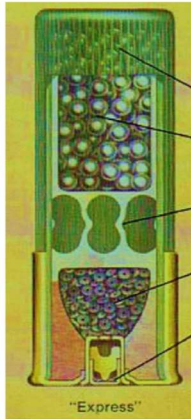
2. The evidence at trial also failed to satisfy plaintiffs' burden, under Illinois law, of proving that defendants' conduct was a "cause in fact" of Mr. Schoepke's injury. Plaintiffs needed to prove that defendants' conduct was a "substantial factor" in causing Mr. Schoepke's injury. But plaintiffs presented no evidence that Mr. Schoepke actually inhaled asbestos from Remington's shells in the outdoor environment in which he hunted. At best, plaintiffs proved no more than that an indoor experiment using decades-old shells detected the release of *de minimis*

amounts of asbestos fibers. Under Illinois law, this failure of evidence provides an additional, independent basis for reversal.

STATEMENT OF FACTS

A. Factual Background

From approximately 1960-1981, Remington manufactured and sold shotgun shells with a basewad that contained encapsulated asbestos. A1865-A1866, A2841.



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The basewad (in the cross-section picture, the tan material in the bottom portion of the shell's interior), was a small disc at the base of a shotgun shell, initially formed under pressure of between 10,000 and 40,000 psi from a mixture of wood, fiber, asbestos, paraffin wax and butyl rubber. *See* A1429-A1430, A2530-A2531, A2674-A2677, A315. It was solid and hard, and the asbestos fibers in it were encapsulated. A1430, A2675. The basewad was permanently inserted and further compressed into the metal cap of the shell under an additional 15,000 psi. A1430, A1433. The basewad was designed to be durable to add integrity to the shell, including increased fire and explosion resistance, and to provide an airtight seal to prevent the escape of gas on firing. A1433-A1434, A2677-A2678, A2703. The basewad remained intact inside the shell and shooters did not come into contact with it. A2678, A2695.

Eugene Schoepke was born in 1937. A541. Mr. Schoepke was a farmer (A1075, A1078-A1079, A1111-A1113) who also worked various other jobs. As Mr. Schoepke's son testified, in the 1960s and 1970s—a time when “various

asbestos containing products were common”—Mr. Schoepke worked part-time at a construction company, where he “built structures,” “worked on roofs,” and “built new houses, garages.” A1075, A1078-A1079, A1111-A1113, A1140-A1142. Mr. Schoepke also did construction and remodeling projects on the family farm, including installing Celotex insulation. A1114-A1119, A1143-A1144, A1146-A1148. Plaintiffs could not say what materials were used in Mr. Schoepke’s other work, nor could they rule out that some of them contained asbestos, as was common in the 1960s and 1970s. A1140-A1141, A1146-A1148, A1153-A1154, A1370-A1371.

In his free time, Mr. Schoepke enjoyed hunting. *See, e.g.*, A1300 (hunted “[a]t least 8 times a year”). He used a variety of shotgun shells, including Remington and Peters (another Remington brand). *See* A1084-A1085 (Remington, Winchester, Federal, Peters shells; estimating Mr. Schoepke used Remington and Peters shells “75%” of the time); *see also* A1129 (“whatever brands were cheapest at the time”).

On February 22, 2022, Mr. Schoepke was diagnosed with mesothelioma. A2064. On March 27, 2022, Mr. Schoepke died. A2065. He was 84.

B. Procedural History

On September 7, 2023, Mr. Schoepke’s estate and family members filed suit in the Superior Court, alleging that Remington’s and DuPont’s negligence caused Mr. Schoepke’s death. Illinois substantive law applies. A88; *see also* Ex. C at 6.

The case was tried from July 8 to 22, 2025.

1. Trial: Lack of Causation Evidence

A principal issue at trial was causation. Under Illinois law, proving that a defendant in a negligence suit was the “proximate cause” of a plaintiff’s injury requires proof that the defendant was *both* the “legal cause” and the “cause in fact” of the plaintiff’s injury.

Absence of legal cause evidence. “Legal cause” is essentially a question of foreseeability. To constitute the legal cause of Mr. Schoepke’s injury, Illinois law required plaintiffs to prove that, during the relevant period of approximately 1960 through 1981, it was known to or reasonably foreseeable by the defendants that a hunter’s use of Remington shotgun shells in an outdoor environment would likely cause mesothelioma. *See* Point I.C, below (citing authorities).

Plaintiffs’ state-of-the-art expert, Barry Castleman, Sc.D., offered no testimony regarding shotgun shells with asbestos-containing basewads. Nor did he offer any opinion that, during the relevant years, the state-of-the-art suggested that products containing encapsulated asbestos fibers, like the Remington shotgun basewads, posed a risk of mesothelioma to users. *See generally* A690-A788, A2340-A2350.

Plaintiffs’ causation expert, Dr. Arthur Frank, likewise offered no testimony that the state-of-the-art in those years indicated that the Remington shotgun shells

posed an exposure risk or risk of disease to hunters. And Dr. Frank “absolutely” agreed that “asbestos in place”—e.g., “behind the walls”—“doesn’t put you at risk.” A1383-A1384.

By contrast, Defendants’ state-of-the-art expert, John Henshaw, a certified industrial hygienist, testified that—while asbestos had been considered a “miracle fiber” in the 1950s-60s that made its way into “[t]housands of products” before 1982 (A1861-A1862, A1866)—there were and are no “studies of hunters ever being at an increased risk of developing cancer.” A1887. Henshaw further testified that, during the relevant timeframe, unlike “friable material”—“which is material that you can crush with your fingers and produce fibers”—“encapsulated” asbestos—which is a “hard substance” where “[t]he fibers are bound”—was not viewed as something that would “create an exposure that would be of any concern.” A1889-A1890. Henshaw’s testimony was unrebutted at trial.

Defendants’ fact witnesses likewise testified that, during the time period at issue, using shotgun shells containing basewads with encapsulated asbestos was not known to release asbestos fibers, let alone to cause harm:

- Remington engineer and corporate representative Spencer Wildman testified that “the basewad ... doesn’t emit fibers to the air” because “[i]t’s encapsulated in the basewad” which “can be multiple times fired.” A2717.
- Retired DuPont employee and corporate representative Barbara Dawson, a Certified Industrial Hygienist, past president of the American Industrial Hygiene Association, and Certified Safety

Professional (A2954), testified that “the shotgun wads were encapsulated, so there wasn’t the likelihood of fiber release. They were compressed under high pressures, and they were in a fiber [sic] so the fibers would not have been released.” A2807-A2808. Ms. Dawson further testified that, in the 1960s and 1970s, “there was a general belief, not just by DuPont and Remington, that encapsulated materials didn’t pose a risk of fiber release.” A3038.

- Questioned by plaintiffs as to whether the “general belief” applied to encapsulated materials supposedly “subject to a massive explosion inside a shotgun shell,” Ms. Dawson responded, “But the basewad stayed inside the shotgun shell” and “I don’t think there was any concern about fiber release because it ... stayed intact in the shell.” A3038.

The testimony of these witnesses was unrebutted.

Absence of cause-in-fact evidence. Illinois law required plaintiffs to establish the defendants’ conduct was the “cause in fact” of Mr. Schoepke’s injury under either the “but for” test or the “substantial factor” test. *Thacker v. UNR Indus., Inc.*, 603 N.E.2d 449, 455 (Ill. 1992). Plaintiffs elected the “substantial factor” test. A3047; Ex. C at 19.

Under Illinois law, to establish that the defendant’s product was a “substantial factor” in causing the plaintiff’s injury, the plaintiff must prove more than minimal contact with asbestos fibers from the defendant’s product. *See* Point II.C, below (citing authorities). Further, evidence that a product is “*capable* of releasing respirable asbestos fibers,” without other evidence regarding “under what circumstances [the defendant]’s products released respirable asbestos fibers such that they could be ‘*actually inhaled*’ by decedent,” is insufficient as a matter of law

to prove causation. *Krumwiede v. Tremco, Inc.*, 148 N.E.3d 764, 780-81 (Ill. App. Ct. 2020) (citation omitted; second emphasis added).

In seeking to satisfy the “substantial factor” test, plaintiffs relied on Steven Compton, a microscopist and material scientist. Compton “designed and built” a “negative air chamber” located in “the basement of a rural farmhouse.” A895-A896; A1015-A1016. Compton’s chamber was “around 14 by 15 feet and about eight feet tall.” A895-A896. He acknowledged that, due to carbon monoxide concerns, one could not safely run a lawn mower in the chamber. A1029. Compton conducted an experiment in which 40-60 year old Remington shells were fired inside the chamber and air samples collected for laboratory analysis. A902-A903, A944. Compton’s indoor chamber experiment detected release of between 0.04 to 0.08 asbestos fibers per cubic centimeter (“fibers/cc” or “f/cc”). A1378; A3135.

Plaintiffs offered no evidence as to what, if anything, Mr. Schoepke would have actually inhaled as a result of using Remington shells while hunting outdoors. Compton admitted that he was providing no opinion as to “what’s inhaled” or whether Mr. Schoepke ever “actually inhaled” asbestos fibers:

- Q. Okay. And I want to make sure the jury is clear here. You’re not testifying on causation in this case, meaning that asbestos caused the Plaintiff’s disease, correct?
- A. I’m not providing any medical opinions.
- Q. Okay. Or any increased risk from exposures. That’s not something you’re talking about?

A. Correct. I know that exposure itself is a component of risk, but, no, *I'm not providing any risk opinions.*

Q. Or that any particular shooter would have breathed in the actual fibers shown in your chamber. You're not here to testify about that?

A. Well, absolutely the data that we're showing shows concentrations of fibers that would be available for a shooter to breath in. *But in terms of what's inhaled* and what happens inside the human body, *that's not my area of expertise.*

Q. Okay. So what's **actually inhaled** by Mr. Schoepke, that would be somebody else? That's not you?

A. Correct. Beyond what's present in the air, anything beyond that would be outside my area.

Q. And when you say "present in the air," you mean *present in the air inside your chamber*?

A. That's correct.

A960-A961 (emphasis added).

Plaintiffs asserted that Compton's indoor fiber-release results were representative of outdoor activity, but did not offer evidence as to what, if anything, a shooter would have actually inhaled when firing shotgun shells outdoors. Plaintiffs also offered no industrial hygienist to testify qualitatively or quantitatively about Mr. Schoepke's alleged exposure or dose.

Dr. Frank acknowledged that Compton's indoor study showed only the potential of exposure based on fiber release, testifying: "[w]hat I know is that he shot shotgun shells with asbestos and there was asbestos that **could have** entered Mr. Schoepke's breathing zone." A1349-A1351 (emphasis added); *see also* A1362-

A1363 (“What I have is information that in shooting those shells, it releases asbestos that *can* get into somebody’s breathing zone.” (emphasis added)).

Nevertheless—and despite Compton’s admissions regarding the testimony he was *not* providing—Dr. Frank testified that he was relying on Compton’s testimony as “qualitative evidence” of Mr. Schoepke’s actual exposure. *See, e.g.*, A1294-A1295 (“Q. And how, if at all, do [sic] rely upon Dr. Compton’s study? A. To document that Mr. Schoepke and his use of shotgun shells that contained asbestos *was actually exposed* in his breathing zone.” (emphasis added)); A1345-A1346 (“I didn’t do any calculations of any kind. *I relied on the calculations that he [Compton] did that documented higher levels of exposure* than Mr. Schoepke would have had, had he not fired those shotgun shells.” (emphasis added)); A1347-A1348 (“Q. Okay. As far as Compton’s study goes, do you know if it was based on Mr. Schoepke’s shooting experience, how often Compton shot the intervals at which he shot his shotgun in his chamber? Do you know any of those? A. I don’t know any of those details.”).

By contrast, defendants’ industrial hygiene expert John Spencer calculated Mr. Schoepke’s hypothetical exposure to asbestos in an outdoor environment from firing shotgun shells using the fiber-release level detected by Compton inside of his chamber (0.08 fibers/cc) and conservative, worst-case assumptions based on the deposition testimony of Mr. Schoepke’s son regarding the frequency of

Mr. Schoepke's use of Remington shells while hunting (20 years of firing; 90% Remington shotgun shells compared to other brands; 10 times hunting per year). A1500-A1502, A1504-A1505. Spencer further assumed the chamber-derived fiber-release levels for the entire duration of hunting outings (i.e., hours at a time) even though Mr. Schoepke only fired his shotgun a few times per outing and any shotgun discharge would disperse within seconds, not hours, outdoors. *See* A1448, A1500-A1505, A1644. Even using these highly conservative assumptions, Spencer testified that his dose calculation for Mr. Schoepke was 0.035 f/cc-years. A1501.

Plaintiffs did not challenge Mr. Spencer's calculation. As Spencer testified at trial, 0.035 f/cc-year is *lower* than levels of asbestos present in background urban air levels. A1506-A1508; *see also* A334. Dr. Frank admitted that it is "unprovable" that background levels of asbestos cause disease. A1214-A1215.

Dr. Frank described the results of Compton's fiber-release experiment (up to 0.08 fibers/cc) as "bursts" supposedly capable of "overwhelm[ing]" the body's defenses. A1337, A1342-A1346. But Dr. Frank's "burst" testimony, advanced for the first time at trial, cannot be reconciled with his other testimony. For example, Dr. Frank admitted that the so-called "burst" concentration Compton reported in his indoor chamber (0.08 fibers/cc) was lower than the current OSHA permissible exposure limit of 0.1 fibers/cc, which is intended to protect employees potentially exposed to that average amount of asbestos concentration for an eight-hour workday

for a 40-year working lifetime. A1341-A1343; *see also* A302 (Frank affidavit stating that “[a] single day of exposure at the current OSHA legal limit of exposure results in hundreds of thousands of fibers being inhaled in a single eight hour day”).

At the close of plaintiffs’ evidence on causation, defendants moved for judgment as a matter of law on the “cause in fact” issue under Superior Court Civil Rule 50(a), arguing that plaintiffs presented insufficient evidence for the jury to reasonably find that defendants’ conduct caused Mr. Schoepke’s injury. *See* A2765-A2780. The trial court denied the motion, stating that “Plaintiffs have presented sufficient evidence to justify submission of the case to the Jury.” A3043-A3051.

2. Jury Verdict and Post-Trial Proceedings

On July 23, 2025, the jury returned a special verdict finding that Mr. Schoepke’s mesothelioma was caused by exposure to asbestos from use of Remington shotgun shells; that Remington and DuPont were negligent; and that Remington should be 40% responsible and DuPont 60% responsible. The jury awarded \$1.5 million in damages to the Estate and \$7.5 million for damages sustained by Janet Schoepke and Mr. and Mrs. Schoepke’s surviving children. The jury also found that Remington and DuPont had not engaged in “willful and wanton” conduct.

On August 15, 2025, defendants filed a renewed motion for judgment as a matter of law under Rule 50(b), or, in the alternative, for a new trial (the “JMOL

Motion”). A3293-A3331. In the JMOL Motion, defendants argued, among other things, that: (1) plaintiffs did not offer evidence at trial sufficient to prove that either defendant’s conduct was the “legal cause” of Mr. Schoepke’s injury under Illinois law, while defendants presented un rebutted testimony from a state-of-the-art expert indicating that it was not known or reasonably foreseeable during the relevant time period (~1960-1981) that shotgun shells with a component containing encapsulated asbestos fibers posed a health risk; and (2) plaintiffs did not satisfy the burden of proving that defendants’ conduct was a “cause in fact” under Illinois law of Mr. Schoepke’s injury. In the alternative, the JMOL Motion also sought a new trial on multiple grounds.

On February 27, 2026, the Superior Court denied the JMOL Motion. Ex. C. Regarding “legal cause,” the trial court held “[w]hile Defendants might not have known that their shells could release asbestos, they *should have known*” (*id.* at 17); that “it is not surprising that this designed explosion [firing a shotgun] released asbestos to be breathed by a shooter” (*id.*); and that Illinois law regarding causation in asbestos cases does not permit defendants to “disregard readily foreseeable risks” (*id.*). Regarding “cause in fact,” the trial court held that Dr. Frank’s testimony provided a legally sufficient evidentiary basis for a reasonable jury to find for plaintiffs. *Id.* at 18-22.

This appeal followed.

ARGUMENT

I. PLAINTIFFS' LEGAL CAUSE EVIDENCE WAS INSUFFICIENT.

A. Question Presented

Did plaintiffs offer evidence at trial sufficient, under Illinois law, to prove that defendants' conduct was the "legal cause" of Mr. Schoepke's injury? Defendants preserved this issue at A3304-A3309.

B. Standard Of Review

This Court "review[s] *de novo* the denial of a motion for judgment as a matter of law." *Glaxo Grp. Ltd. v. DRIT LP*, 248 A.3d 911, 918 (Del. 2021). In conducting this *de novo* review, the standard is "whether under any reasonable view of the evidence, the jury could have justifiably found for the non-moving party." *Bell Sports, Inc. v. Yarusso*, 759 A.2d 582, 587 (Del. 2000).

C. Merits Of The Argument

Illinois law requires the plaintiff in a negligence suit to prove that the defendant's breach of a duty to the plaintiff "was the proximate cause of the plaintiff's injuries." *First Springfield Bank & Tr. v. Galman*, 720 N.E.2d 1068, 1071 (Ill. 1999). "[T]he term 'proximate cause' describes two distinct requirements: cause in fact and legal cause." *Id.* at 1072.

"Cause in fact exists where there is a reasonable certainty that a defendant's acts caused the injury or damage." *Id.* "Legal cause,' by contrast, is essentially a

question of foreseeability. ... The relevant inquiry here is whether the injury is of a type that a reasonable person would see as a likely result of his or her conduct.” *Id.*

Thus, under Illinois law, to establish that defendants’ conduct was the “legal cause” of Mr. Schoepke’s injury, plaintiffs were required to prove that it was known or reasonably foreseeable to defendants, during the relevant period, that a hunter’s use of Remington shotgun shells outdoors would likely cause mesothelioma. *See Lee v. Chi. Transit Auth.*, 605 N.E.2d 493, 503 (Ill. 1992).

1. Legal cause in the asbestos context

McKinney v. Hobart Bros. Co., 127 N.E.3d 176 (Ill. App. Ct. 2018), was a negligence action brought by McKinney, who developed mesothelioma, against Hobart Brothers. McKinney sued Hobart Brothers “for failing to warn him of the dangerousness of asbestos-containing welding rods that defendant had manufactured and to which plaintiff came in close proximity for eight months in the early 1960s” when he worked as a welder. *Id.* at 178, 181. Specifically, McKinney came into contact with “used welding rods—the stubs” containing asbestos, including a “floor littered with stubs” in a “dirty” workplace. *Id.* at 181.

The relevant inquiry was based on whether Hobart Brothers “knew or should have known” of the danger presented by the use of their asbestos-containing welding rods. *Id.* at 187. Seeking to prove this element, the plaintiff relied on the same expert as in this case, Dr. Frank, who in turn relied on a study regarding asbestos in

welding rods by the same Dr. Compton who provided expert testimony in this case. *Id.* at 180.

The Illinois appellate court agreed that “[i]t is commonly known that mesothelioma is caused by the inhalation of asbestos fibers” (*id.* at 182), and that Hobart Brothers was not correct that “the record lacked *any* competent evidence that [its] welding rods were capable of releasing asbestos” (*id.* at 186). But the Illinois appellate court still held that the trial court’s failure to grant judgment notwithstanding the verdict (JNOV) required reversal. The appellate court noted that “the asbestos fibers were encapsulated,” i.e., “chemically bound to, and completely covered by, the sodium silicate in the [welding rod] flux.” *Id.* at 179.

In conducting its analysis, the Illinois court was careful to explain that expert evidence that “‘knowledge existed in the industry of the dangerous propensity of’ raw asbestos ... is not evidence that, in 1962 or 1963, ‘knowledge existed in the industry’ that defendant’s *product*—the Hobart 6010 welding rod—was harmful.” *Id.* at 190 (internal citations omitted). The court emphasized that “defendant’s product was not asbestos but welding rods, in which asbestos was encapsulated.” *Id.* As the appellate court explained, “[t]he record appears to contain no evidence of contemporaneous knowledge in the industry that welding rods with asbestos encapsulated in the flux were hazardous” and thus Hobart Brothers “could not have owed plaintiff a duty to warn plaintiff of a hazard that, at that time, was unknown to

the industry.” *Id.* Accordingly, the Illinois appellate court reversed the trial court’s denial of Hobart Brothers’ JNOV motion.

2. The evidence negating legal cause was un rebutted.

Here, the un rebutted trial evidence established that it was not known or reasonably foreseeable during the relevant period (~1960-1981) that shotgun shells with basewads containing encapsulated asbestos would likely cause the injury at issue, mesothelioma. *See, e.g.*, A1887 (no studies of hunters ever being at an increased risk of developing cancer); A1921-A1922 (“Q. And before 1982 was there any scientific literature indicating that bonded or encapsulated consumer products were known to increase the risk of cancer? A. No, sir.”). Plaintiffs presented no state-of-the-art expert testimony to the contrary. Indeed, plaintiffs’ expert conceded that there was no such evidence. *See* A1330, A1339-A1340, A1344, A1349-A1350, A1383-A1384.

Defendants’ state-of-the-art expert, John Henshaw, on the other hand, opined that it was not known or suspected at the time that firing such shotgun shells outdoors would cause mesothelioma in hunters, and Remington and DuPont fact witnesses confirmed this. And even the *de minimis* level of asbestos release found by Compton’s indoor chamber, fiber-release experiment would not have been considered a mesothelioma risk by the scientific and regulatory communities from 1960 to 1981. Dr. Frank admitted that there was no “epidemiological study” or

“medical literature” stating that exposure at very low levels was known to cause mesothelioma before 1981. A1344, A1349-A1350. Indeed, the asbestos level detected in Compton’s indoor chamber, fiber-release study was lower even than OSHA’s permissible workplace exposure limit today. A1341-A1343.

Defendants’ fact witnesses likewise testified that, during the time period at issue, using shotgun shells containing basewads with encapsulated asbestos was not known to release asbestos fibers, let alone to cause harm. *See* pp. 7-8, above.

The un rebutted evidence of Remington and DuPont personnel’s contemporaneous understanding that shotgun shells containing basewads with encapsulated asbestos did not present a risk of harm is all the more notable given the evidence that DuPont personnel *were* concerned at the time regarding *friable* asbestos in an entirely different and experimental projectile that never went to market. *See* A2602-A2606, A2679-A2683 (testimony regarding 1971 letter from DuPont’s Haskell Laboratory discussing an experimental “rim fire” projectile, which never went to market, containing “friable” asbestos and recommending seeking a “suitable substitute” in the potential product).

Similarly, that a 1978 third-party review of numerous products containing asbestos commissioned by the Consumer Product Safety Commission included shotgun shells containing basewads with encapsulated asbestos (*see* A1901-A1904, A2001-A2009) does not evidence contemporaneous knowledge that the basewads

caused harm. On the contrary, the “purpose” of the 1978 third-party review was “to provide the CPSC with basic information regarding the broad range of products which use[d] asbestos,” “gather basic information to further study” and “identify materials that need[ed] further study.” A2005, A2007-A2008. Significantly, the CPSC’s subsequent final rule identifying products that it would investigate further did not include shotgun shell basewads. A1902-A1903.

The following chart compares *McKinney* and this case:

	<i>McKinney</i>	<i>Schoepke</i>
Asbestos-containing product	Welding rod	Shotgun shell basewad
Asbestos encapsulated?	Yes	Yes
Contents friable?	No	No
Time period at issue	“early 1960s”	~1960-1981
Location	Indoors; “dirty” workplace	Outdoors
Frequency	Daily (occupational)	Sporadically; “[a]t least 8 times a year” (recreational)
Record evidence of knowledge product caused mesothelioma	No record evidence of 1960s knowledge	Unrebutted defense testimony of no knowledge
Plaintiffs’ experts	Dr. Frank (citing Compton)	Dr. Frank Dr. Compton Dr. Castleman

The similarities are striking. And the differences—for example, the sporadic and outdoor nature of recreational shotgun shell use versus daily indoor contact with

welding rods in a “dirty” workplace—make *McKinney*’s holding more applicable here, not less.

Regarding “legal cause,” the trial court denied defendants’ motion for judgment as a matter of law based on the court’s conclusions that “[w]hile Defendants might not have known that their shells could release asbestos, they *should have known*” (Ex. C at 17); that “it is not surprising that this designed explosion [firing a shotgun] released asbestos to be breathed by a shooter” (*id.*); and that defendants cannot “disregard readily foreseeable risks” (*id.*).

Like the reversed trial court in *McKinney*, the trial court’s analysis here effectively substitutes hindsight a generation or more later and the fact that asbestos is widely known to cause mesothelioma for contemporaneous knowledge that the specific product at issue would cause mesothelioma. As in *McKinney*, Remington’s product was not asbestos, but shotgun shells containing an internal basewad with encapsulated asbestos. As to *that* product—not asbestos generally—the trial court’s conclusion cannot be reconciled with the un rebutted trial record, including the absence of evidence that before 1981 anyone knew or had reason to know that shotgun shell use could cause mesothelioma. Nor can it be reconciled with Illinois law as expressed in *McKinney*.

3. Plaintiffs' cases are distinguishable.

The cases plaintiffs will likely cite in response are distinguishable. For example, in the proceedings below, plaintiffs cited *Daniels v. ArvinMeritor, Inc.*, 146 N.E.3d 655 (Ill. App. Ct. 2019), which affirmed a verdict against a manufacturer of asbestos-containing gaskets and packing. But the defendant in *Daniels* did not argue insufficiency of evidence on appeal. Rather, the defendant took issue with the trial court's admission of expert testimony (*id.* at 666-69) and with the court's jury instructions regarding causation (*id.* at 669-77). Admissibility and jury instructions have no bearing on *McKinney*'s holding regarding the insufficiency of causation evidence—or the insufficiency of the trial evidence here.

Moreover, the *Daniels* opinion itself distinguishes the facts presented in *McKinney* on the issue of legal causation. As *Daniels* explains, the *McKinney* court “determined that the plaintiff did not establish that the industry knew in 1962 or 1963 that the defendant’s products—welding rods consisting of encapsulated asbestos—posed a danger” and “[t]he defendant’s direct knowledge was not at issue.” *Id.* at 677. In *Daniels*, by “contrast, there was testimony relating to [the defendant’s] knowledge of the dangers of its products by the time [the plaintiff] was exposed.” *Id.* No such evidence was presented in *McKinney* or in this case.

Johnson v. Edward Orton, Jr. Ceramic Foundation, 71 F.4th 601 (7th Cir. 2023), on which plaintiffs also will likely rely, is similarly distinguishable.

Johnson concerned whether the record would support a conclusion that the defendant manufacturer “knew, or should have known” that vermiculite packaging in which it shipped its products was “contaminated with asbestos.” *Id.* at 610-11. In reversing the district court’s grant of summary judgment for the defendant, the Court of Appeals in *Johnson* cited articles “not[ing] the presence of amphibole asbestos” at the site where the vermiculite was mined; a “Montana Bureau of Mines and Geology” bulletin “not[ing] the presence of both vermiculite and asbestos at the site;” and “[a]ir monitoring” at the vermiculite processing plant in 1971 that “showed levels of airborne asbestos fibers as high as 10.6 fibers per cubic centimeter.” *Id.* at 615. Significantly, *Johnson* does not address encapsulated asbestos. And, unlike in *Johnson*, here there was no evidence that Remington or DuPont were aware of the potential that outdoor shotgun shell use could cause mesothelioma. If anything, *Johnson* demonstrates the kind of evidence that would have been necessary for plaintiffs to meet their burden of proving legal cause—and which is absent from the trial record here.

II. PLAINTIFFS' CAUSE-IN-FACT EVIDENCE WAS INSUFFICIENT.

A. Question Presented

Did plaintiffs offer evidence at trial sufficient, under Illinois law, to prove that defendants' conduct was a "cause in fact" of Mr. Schoepke's injury? Defendants preserved this issue at A2770-A2779 and A3310-A3320.

B. Standard Of Review

This Court reviews denials of a motion for judgment as a matter of law *de novo*. See Point I.B, above.

C. Merits Of The Argument

Under Illinois law, plaintiffs were also required to establish that defendants' conduct was a "cause in fact" of Mr. Schoepke's injury. *Thacker v. UNR Indus., Inc.*, 603 N.E.2d 449, 455 (Ill. 1992). "Cause in fact exists where there is a reasonable certainty that a defendant's acts caused the injury or damage." *First Springfield Bank*, 720 N.E.2d at 1072.

"Cause in fact" may be established under either the "but for" test or the "substantial factor" test. *Thacker*, 603 N.E.2d at 455. To meet the "substantial factor" test in asbestos cases, the Illinois Supreme Court has adopted a "frequency, regularity, and proximity" test "by which an asbestos plaintiff can prove more than minimum contact [with asbestos fibers] to establish that a specific defendant's product was a substantial factor in being a cause in fact of plaintiff's injury." *Krumwiede v. Temco, Inc.*, 148 N.E.3d 764, 780 (Ill. App. Ct. 2020).

To meet the “frequency, regularity, and proximity” test, it is not enough for a plaintiff to present evidence that a product is “capable of releasing respirable asbestos fibers” and that the decedent used the defendant’s “products on a regular and frequent basis.” *Id.* at 780-81. Instead, a plaintiff must present evidence (1) that the fibers were “actually inhaled,” and (2) “that the products released asbestos fibers in such amounts that [the plaintiff] had more than *de minimis*, casual, or ‘minimum’ contact with asbestos from [the defendant]’s products.” *Id.* at 781-82.

Regarding whether the shotgun shells at issue were a “cause in fact” of Mr. Schoepke’s mesothelioma, the trial court held that Dr. Frank’s testimony provided a legally sufficient evidentiary basis for a reasonable jury to find for plaintiffs. Ex. C at 18-22. But Dr. Frank relied on Compton (A1345-A1346), who had expressly disclaimed any opinion on what was “actually inhaled” by Mr. Schoepke (A960-A961). Without any of their experts opining regarding *any* level of fibers that Mr. Schoepke “actually inhaled,” plaintiffs could not satisfy Illinois’s “frequency, regularity, and proximity” test.

At best, plaintiffs’ case was built on expert testimony that Mr. Schoepke, in the outdoor environment in which he actually used Remington shells, had potentially been exposed to a *de minimis* amount of asbestos. *See, e.g.*, A1345-A1346, A1375 (Dr. Frank testifying that he did not do any calculations of a dose from shotgun shell use: “Q: ... you don’t have that dose? A: That is correct.”). Plaintiffs’ case was

built entirely on Compton's indoor chamber, fiber-release experiment to establish that shooting Remington shells was "capable" of releasing asbestos. That is not enough to meet plaintiffs' burden under Illinois's "substantial factor" test because, among other things, plaintiffs did not establish that Mr. Schoepke "actually inhaled" more than a *de minimis* amount of asbestos fibers from his use of Remington shells while hunting outdoors.

In *McKinney*, the Illinois appellate court found that "the lack of any evidence of substantial causation ... entitled defendant to a judgment notwithstanding the verdict." 127 N.E.3d at 193. The court held that, where there was no evidence that the amount of asbestos released "was more than minimal," and "[f]or all that appears in the record, the amount of asbestos fibers released from defendant's welding rods ... was no more than the amount one would have encountered in a natural environment," it would be "conjectural" to find that the welding rods were a "substantial factor" in causing plaintiffs' mesothelioma. *Id.*

Notably, Compton disclaimed any opinion on what was "actually inhaled" by Mr. Schoepke (A960-A961), while Dr. Frank inconsistently claimed to rely on Compton as showing the level of asbestos to which Mr. Schoepke "was actually exposed in his breathing zone." A1295 (Dr. Frank asserting that he "rel[ied] on Dr. Compton's study" to "document that Mr. Schoepke ... was actually exposed in his breathing zone ... in levels above background levels"); *see also* A1345-A1346.

In *Nemeth v. Brenntag North America*, 194 N.E.3d 266 (N.Y. 2022), applying New York law, New York’s highest court reached a result similar to *McKinney*. There, the plaintiff alleged that his wife developed mesothelioma proximately caused by her use of the defendant’s Desert Flower talcum powder contaminated with asbestos, which she “applied daily from 1960 until 1971 ... applying the product while inside small unventilated bathrooms.” *Id.* at 269. The plaintiff’s expert agitated “a vintage sample of Desert Flower within a small, sealed plexiglass chamber to simulate decedent’s use of the talc and to capture the released asbestos fibers” with “strategically placed filters ... to simulate ‘breathing zones.’” *Id.* The expert concluded that the asbestos fibers in Desert Flower talcum powder were “significantly releasable” and that the decedent “must have been exposed to ‘thousands to millions of fibers, billions and trillions when you add it up through repeated use,’” compared to “what ‘an average person living in an urban area breathes in,’ of 60,000 fibers per day.” *Id.* The jury found for the plaintiff and awarded \$16.5 million in damages. *Id.* The defendant moved for judgment notwithstanding the verdict, “arguing that it was not supported by legally sufficient evidence as to causation.” *Id.* The trial court denied the motion. *Id.*

On appeal, the New York Court of Appeals reversed. The court concluded that “plaintiff here failed to prove that exposure to asbestos in defendant’s product was a proximate cause of decedent’s illness.” *Id.* at 271. The court observed that

studies vaguely identifying “an association between ‘low level’ exposure to asbestos and ... mesothelioma” or “an association between ‘significant’ asbestos exposure and ... mesothelioma” were insufficient, and that none of the articles discussed by the plaintiff’s expert “sets forth an estimate of the minimum level of exposure to respirable asbestos ... that would suffice to cause ... mesothelioma.” *Id.* at 272. Emphasizing that “we have repeatedly rejected as insufficient to prove causation expert testimony that exposure to a toxin is ‘excessive’ or ‘far more’ than others” (*id.* at 271), the court held that the plaintiff’s expert “failed to provide any foundational basis for her opinion that exposure to asbestos at a level analogous to [plaintiff’s] was shown to be a substantial factor in causing mesothelioma” (*id.* at 272).

So too here. Plaintiffs failed to present foundational evidence for Dr. Frank’s opinion that the *de minimis* amounts of asbestos fibers detected by Compton’s indoor chamber, fiber-release study could have caused Mr. Schoepke’s mesothelioma. As in *Nemeth*, an “industrial hygienist[] *could have* estimated [Mr. Schoepke’s] inhalation levels.” *Id.* at 273 (emphasis added). But despite having access to an industrial hygienist (A1347), plaintiffs chose not to present such expert evidence at trial. Like *Nemeth*, “[t]he fault here is not in [the] standard, but in plaintiff’s proof.” *Nemeth*, 194 N.E. at 274

Plaintiffs may cite *Zickuhr v. Ericsson, Inc.*, 962 N.E.2d 974 (Ill. App. Ct. 2011), for the point that quantification of the exact number of fibers released by a product is not necessary for a finding of liability under Illinois law. But *Zickuhr* involved shredding of asbestos-containing wires in an enclosed space, which created dust so severe that the plaintiff “couldn’t breathe.” *Id.* at 987. The facts of *Zickuhr* are nothing like Mr. Schoepke’s occasional outdoor shooting and the minimal level of asbestos at issue even according to Compton’s indoor chamber, fiber-release experiment.

Applying Illinois law, plaintiffs failed to present sufficient evidence to prove that defendants’ conduct was a “cause in fact” of Mr. Schoepke’s injury. This provides an additional, independent ground to reverse.

CONCLUSION

For the foregoing reasons, Remington and DuPont respectfully request that this Court reverse and remand with directions to enter judgment for defendants.

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