

**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, 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

APPELLEES' ANSWERING BRIEF CORRECTED

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NATURE OF PROCEEDINGS

This is an asbestos wrongful death case brought by Eugene Schoepke's widow, their 8 children and his Estate against Defendants Remington Arms Company (n/k/a Sporting Goods Properties, Inc.) ("Remington") and E. I. du Pont de Nemours & Company (n/k/a EIDP, Inc.) ("DuPont"). Plaintiffs alleged that Defendants jointly manufactured and marketed Remington and Peters brand shotgun shells. From 1960 through the early 1980s, Remington and Peters shotgun shells contained asbestos in what Defendants called a "dry mold basewad". Defendants did not provide any warning to consumers that the shotgun shells contained asbestos. Eugene Schoepke, an avid hunter, regularly used Defendants' asbestos-containing shotgun shells. He was diagnosed with malignant mesothelioma in 2022, at the age of 84, and died one month later.

Plaintiffs alleged that each of the Defendants were negligent for their role in manufacturing and marketing the asbestos shotgun shells, and that they were negligent in failing to warn Mr. Schoepke that the shells contained asbestos. Plaintiffs alleged that Eugene Schoepke was regularly exposed to asbestos through his use of Defendants' shotgun shells from the 1960s through the 1980s, and that such exposures were a proximate cause of his mesothelioma and death. The parties agreed that this case is governed by Illinois law. B2542-B2561.

On July 23, 2025, a Delaware jury returned a unanimous verdict for the Plaintiffs. The jury assigned responsibility in the amount of 40% to Remington and 60% to DuPont. Defendants subsequently filed for Judgment as a Matter of Law, arguing that Plaintiffs had failed to present facts sufficient to establish legal cause and cause-in-fact. Defendants also argued that Plaintiffs had failed to establish DuPont's liability. On February 27, 2026, the trial court denied Defendants' motions in their entirety, finding Plaintiffs' trial evidence sufficient to support a jury finding of causation and to hold DuPont independently liable. B2562-B2596.

Defendants now ask this Court to reverse the trial court on the sole basis that the evidence presented at trial was insufficient under Illinois law to establish legal cause and cause-in-fact.

SUMMARY OF ARGUMENT

1. Plaintiffs deny that their trial evidence was insufficient to establish “legal cause” under Illinois law. Illinois law is clear that where a product possesses dangerous properties and there is unequal knowledge regarding the risk of harm, a product manufacturer has a duty to warn. At trial, Plaintiffs presented evidence of Defendants’ direct knowledge of the hazards of asbestos during the years they manufactured and marketed asbestos-containing shotgun shells. Defendants knew that their asbestos shotgun shells released dust, and they should have known that the dust contained asbestos. This evidence is sufficient to establish a duty to warn under Illinois law and support a finding of legal cause.

2. Plaintiffs deny that their trial evidence was insufficient to establish “cause in fact” under Illinois law. At trial, the jury found that Eugene Schoepke’s mesothelioma was caused by exposure to asbestos and that he was exposed to asbestos from his use of Defendants’ shotgun shells. Plaintiffs presented evidence that Defendants’ shotgun shells release respirable airborne asbestos when fired, and in concentrations that are “orders of magnitude” above background. Plaintiffs presented evidence that Eugene Schoepke used Defendants’ shotgun shells on a frequent and regular basis from the 1960s through the 1980s, and that the shells were ejected from the side of his gun within his breathing zone. This evidence is sufficient for a reasonable jury to find that he actually inhaled asbestos from Defendants’

shotgun shells and that Defendants' negligent failure to warn was a substantial factor in causing his mesothelioma and death.

STATEMENT OF FACTS

A. DuPont's Management and Control of Remington

Defendants' opening brief dismisses DuPont's role as simply being a "majority owner". App. Op. Br. 1. However, as summarized in the trial court's order denying Defendants' Motion for Judgment as a Matter of Law, the record is replete with evidence of DuPont's management and control of Remington and its involvement in the development and marketing of Remington's asbestos shotgun shells. B2583-B2586¹.

As noted by the trial court, DuPont acquired a controlling interest in Remington in 1933 and maintained a position of "management and control" through the 1980's. It supplied gun powder and plastics for use in Remington's shotgun shells and stationed "resource officers" at Remington's manufacturing plant in Bridgeport, Connecticut, where DuPont's trademark "Oval" hung above the entryway. DuPont's Oval was also placed on Remington's sales and marketing materials, including on every box of their asbestos shotgun shells, which were advertised in DuPont Magazine and listed in DuPont's Annual Products Book. *Id.*

¹ Moreover, DuPont did not appeal this holding.

B. Defendants' Knowledge of the Hazards of Asbestos (1930s-1960s)

That exposure to asbestos dust can cause lung disease was known long before the Defendants began putting it into their shotgun shells. By 1933, it was established that asbestos exposure could cause asbestosis, a potentially fatal scarring of the lungs. B194. Reports of cancer in asbestos exposed workers began appearing shortly after. *Id.* In 1936, doctors at DuPont's newly formed Haskell Lab for Industrial Toxicology expressed concern with the handling of magnesium silicates like asbestos in DuPont manufacturing plants. B2248-B2252. In 1941, the Director of the Haskell Lab wrote to DuPont's Medical Director that exposure to asbestos is “*disabling and causes death*”, and that asbestos dust inhalation must be prevented by use of ventilation and suitable dust masks if DuPont is to defend itself against compensation claims made by its workers. B2253-B2258 (emphasis added). In 1942, a former toxicologist at DuPont's Haskell Lab, Dr. Wilhelm Hueper, published a medical text citing asbestos as a cause of occupational cancer. B156-B157, B198.

Pleural mesothelioma, an extraordinarily rare form of cancer, was first identified as an “asbestos cancer” in 1943. B203-B204. By 1960, the association between asbestos and mesothelioma was beyond dispute. B207-B208. That was the year the British Journal of Industrial Medicine (BJIM) published a study by Dr. Wagner on a series of 33 mesothelioma cases in a village in South Africa, half of whom were exposed occupationally, and half of whom were exposed

environmentally. B204-B205. That was also the year that a group of DuPont doctors co-authored a large medical textbook titled *Modern Occupational Medicine*, acknowledging asbestos exposure as a cause of both pulmonary carcinoma and pleural mesothelioma. B200-B203, B2262-B2264.

In November 1964, an international “Conference on the Biological Effects of Asbestos” was convened in New York City (B208-B209) and Haskell Lab sent Dr. Gordon Stopps to attend. Reporting on the conference to DuPont’s Corporate Medical Director, Dr. C.A. D’Alonzo, Stopps wrote that:

It would appear from the consensus at this meeting that the risk of persons not normally thought of as engaged in work with asbestos, and certainly not thought of as being in the asbestos industry, is greater than was originally thought. This fact should be borne in mind and embraces not only the person’s occupation but also his hobbies... It is whether or not asbestos fiber penetrates through the respiratory passages that matters and not the classification of the man’s occupation.

B2604-B2605² (emphasis added), B2280-B2286. D’Alonzo distributed Stopps’ memo to All Plant Physicians within DuPont (B2606³), a distribution list that would prove to include Remington’s Medical Director, Dr. Eugene Marks. B2280-B2281, B2309-B2311.

In 1966, Dr. Stopps, again, described “renewed concern” over the hazards of asbestos given the “association between cancer and asbestos”, the long “incubation

² Admitted as evidence (B2373-B2274)

³ Admitted as evidence (B2373-B2374)

period” between asbestos exposure and disease, and evidence that “*short exposures to apparently small amounts of asbestos fiber may produce cancer many years later.*” B2614⁴ (emphasis added), B2288-B2290. As Stopps noted, “At this time our knowledge is insufficient to answer the question ‘what is the smallest amount of dust and the shortest exposure that might produce cancer’.” *Id.*

Later that year, Dr. D’Alonzo wrote to Dr. Stopps that they must determine “what, if any, problems we have with asbestos in the DuPont Company.” B2620⁵, B2291-B2293. Two years later in 1968, D’Alonzo sent a memo to All Plant Physicians requesting “a list of all employees in your specific plants who are exposed, by the nature of their work, to asbestos.” B2621-B2622⁶, B2309-B2310. Remington’s Dr. Marks responded with a list of four employees he described as “working with asbestos directly.” B2623⁷, B2309-B2310.

C. Defendants’ Development of Asbestos Shotgun Shells

In 1960, Remington and DuPont announced a new line of “premium type shells” made with steel heads and polyethylene bodies and “*a new exclusive basewad.*” B2626⁸ (emphasis added). The “weatherproof” plastic shells were

⁴ Admitted as evidence (B2373-B2374)

⁵ Admitted as evidence (B2373-B2374)

⁶ Admitted as evidence (B2373-B2374)

⁷ Admitted as evidence (B2373-B2374)

⁸ Admitted as evidence (B2373-B2374)

guaranteed to “keep factory fresh power, ballistic and dimensional stability in all kinds of weather.” B2654⁹. Remington credited its “exclusive new fibre wad” with “facilitating the new, amazing combination of steel and polyethylene.” *Id.* Both the plastic and the gunpowder used in the shells were supplied by DuPont. B2266-B2267.

The Shells Contained DuPont Plastic and Cheap, Toxic Asbestos

Remington’s efforts to develop a molded basewad for use in its plastic shotgun shells are documented in a patent application filed in April 1965, a continuation of a previous patent application filed by Remington in July 1962. B2664¹⁰. The stated object of the invention was to provide a basewad which was “*practical and economical to produce*”, and one having “fire and explosion resisting characteristics.” *Id.* (emphasis added). The basewad was designed to be pressed down into the boiler room of the shell, where a battery cup containing a volatile priming mixture ignites a charge of gun powder, creating combusive gases that propel lead shot at a speed of over 1000 feet per second towards a target. B875-B876.

Before settling on asbestos, Remington experimented with a variety of low-cost fibrous materials for use in its basewad. B2664. Remington found that

⁹ Admitted as evidence (B2373-B2374)

¹⁰ Admitted as evidence (B2373-B2374)

“asbestos, not previously used in basewads construction, had the necessary characteristics”, including that it “has good strength qualities, is a natural binder, is *cheap and available,* and is stable in heat, moisture, or corrosive atmospheres...Asbestos dust, when added to wood dust, retards explosion and burning.” *Id.* (emphasis added). Remington’s patent described a preferred composition containing approximately 40% asbestos fiber, 60% wood fiber, and 8% by weight of a microcrystalline wax to bind the fibrous materials. *Id.* Testing performed by Remington engineer and documented in Remington lab notebooks, however, demonstrated that this “preferred composition” was actually the weakest of those that Remington tested (“lowest breaking force”). B1988-B1989.

Remington’s “dry mold basewads” were manufactured by mixing the asbestos and wood dust and then spraying the mixture with molten wax, which was used as a binder. B2664-B2665, B2017-B2019. After the mixture cooled, it was sent to a tableting press which molded wads to shape so they could be assembled into the base of the shotgun shells. B2665, B1144-B1145. Each batch of basewad mix contained 400 pounds of asbestos, 600 pounds of wood fiber, and 81 pounds of microcrystalline wax, resulting in finished basewads with 35% asbestos, 52% wood flour, 8% wax, and 5% water by weight. B1973, B2018.

The Asbestos Basewads Released Dust During Use

Experiments performed by Remington engineers in 1963 and 1964 demonstrate that during use its asbestos basewads released dust. In evidence is a lab notebook documenting extensive “Dusting Tests” performed during test firing of shotgun shells with asbestos basewads. B2781-B2788, B2837-B2842, B2847-B2859, B2861-B2866¹¹. Remington found that the addition of calcium resinate to the basewad mix would permit the use of a higher percentage of wax binder (15-20%) without sacrificing the strength and obturating (gas sealing) characteristics of the basewad, which would be useful *“to cut down on the amount of ‘dusting’ which occurs when basewads made according to the original process are used.”* B2665 (emphasis added). However, both Remington’s manufacturing records and its corporate witness Spencer Wildman confirm that it did not employ calcium resinate or any other “modified process” to control the dust released during firing of its asbestos basewads. B1995.

Remington Redesigned Asbestos-Containing Target Shells (not its Field Shells)

In 1963, recognizing the inability of its shotgun shells to withstand the stress of repeated firing due to *“breakdown of the basewad itself”*, Remington engineers redesigned and reinforced the asbestos basewad used in Remington’s *target shells*

¹¹ Full copy of PTX 40,182 admitted as evidence (B1997-B1999, B2008-B2009)

by covering it in plastic. B2870¹² (emphasis added), B1982-B1984, B2025. Remington described its new target shells as containing a “new, durably constructed basewad”. B2882¹³. Covering the asbestos basewad with plastic helped ensure that “no wad debris will be encountered in firing these shells” and that “no fibrous material will be exposed to the blast of the exploding primer.” B2870, B1981-B1984, B2024.

Although the new *target shell* design led to improved strength and reloadability, the addition of a plastic overlay meant it was more expensive to produce. B2664 (“[this] dual construction, however, is more expensive”), B111. Remington manufactured target shells with the reinforced asbestos basewad until 1968, when it eliminated asbestos from its target shells altogether, replacing it with a basewad made entirely of plastic. B2924¹⁴, B2025-B2027. Throughout this time, however, *it continued to manufacture its field load shells (those used by Eugene Schoepke) with its standard asbestos basewad*, without any added reinforcement.

Defendants Sold Hundreds of Millions of Asbestos Shotgun Shells

By 1964, Remington was using asbestos basewads in all of its 10, 12, 16, 20 and 28-gauge field hunting loads, as well as its 12-gauge target loads. B1974-

¹² Admitted as evidence (B2373-B2374)

¹³ Admitted as evidence (B2373-B2374)

¹⁴ Admitted as evidence (B2027-B2028)

B1976. It used hundreds of tons of asbestos per year. B2945¹⁵. In 1966, when Dr. Stopps noted “renewed concern” over asbestos due to evidence that short exposures to small amounts of asbestos can cause cancer decades later, Remington used a record amount of raw asbestos fiber (i.e., 580 tons). *Id.* 1966 marked Remington’s 150th Anniversary year and one of “record commercial volume”. B2962¹⁶. Manufacturing records demonstrate that Remington produced up to 600,000 asbestos-containing shotgun shells every day. B3036¹⁷, B1145, B2022. It sold “many millions” of asbestos-containing shotgun shells every year. B1147-B1148.

It is Defendants’ position that they stopped manufacturing asbestos shotgun shells in 1981, but Remington documents suggest it was 1983 or 1985 before asbestos was finally removed. Engineering drawings for Remington’s asbestos dry mold basewad and “SP” style shotgun shell bear obsolete dates of 1983 and 1985, respectively. B1944-B1951, B1971. By July 1985, however, it is clear that Remington was actively investigating how to get rid of its asbestos-wadded shells. B2106-B2107.

It is undisputed that Remington is the only company to ever use asbestos in shotgun shells. B1939-B1940. It is also undisputed that Defendants never provided any information to consumers that their shotgun shells contained asbestos - not

¹⁵ Admitted as evidence (B2010-B2011)

¹⁶ Admitted as evidence (B2373-B2374)

¹⁷ Admitted as evidence (B2077-B2080)

during the time period they were manufacturing the shells, nor at any time since. B2336.

D. Defendants Ignore the Hazard to Consumers (1970s and Beyond)

By 1968, if not before, DuPont was aware that Remington was using asbestos in its production process and that Remington employees were working with asbestos directly, and Remington's Medical Director was being copied on company-wide communications sent to DuPont Plant Physicians about asbestos matters. DuPont continued to communicate with Remington regarding asbestos throughout the 1970s. B2311. In 1971, Remington engineers wrote to DuPont's Haskell Lab describing a "friable projectile" with a formula nearly identical to that of its asbestos basewad, containing 36% asbestos, 53% wood fiber, 8% wax and 3% water. B2044-B2046. The doctors at Haskell responded that Remington should "seek a suitable substitute for asbestos" in the projectile. B2046-B2048.

Later that same year, in December 1971, the newly formed Occupational Safety and Health Administration (OSHA) issued an Emergency Standard for Exposure to Asbestos Dust, which standard it later made permanent, requiring that employers limit their employees' exposures to asbestos dust. B217-B219. In 1973, Remington began performing air sampling "in areas of the plant where asbestos was handled either in its raw form or as a Dry Molded Base Wad", instituting work practices and providing protective clothing to help limit its employees' exposure to

airborne asbestos dust. B3043¹⁸. Company records demonstrate that ventilation and dust collection equipment was installed throughout its plant, including on the firing ranges. B2987-B2988. Ray Anderson, a Remington retiree and former corporate witness, testified that Remington employees involved in the test-firing of asbestos-containing shotgun shells, as well as those involved in the cleaning of shotguns, were all provided with personal protective equipment. B1148-B1149. Asbestos warnings were also posted throughout the plant. B2041, B2312-B2313.

In 1975, the Environmental Protection Agency (EPA) adopted an amendment to its National Emission Standard for Hazardous Air Pollutants (NESHAPs), extending the Standard to include the manufacture of shotgun shells, which had been shown to be a source of asbestos emissions. B221-B222, B1436-B1438. The EPA noted that Remington was the only manufacturer of shotgun shells that utilized asbestos, and that they were using 500 tons of asbestos fiber per year. B1437.

In February 1977, Remington learned that the National Institute for Occupational Safety and Health (NIOSH) had recommended a 50-fold reduction in OSHA's asbestos exposure limit from 5 fibers per cubic centimeter (5 f/cc) to 0.1 f/cc. B2061-B2066. NIOSH reported that "excessive cancer risks have been demonstrated in all fiber concentrations studied to date", that "evaluation of all available human data provides no evidence for a threshold or a "safe level" of

¹⁸ Admitted as evidence (B2373-B2374)

exposure, and that the OSHA standard “should be set at the lowest level detectible by available analytical techniques.” B1438-B1443. Concerned that it could not meet the proposed standard and that standards could become “more and more restrictive”, Remington recommended at that time that its Research Department investigate an alternative material for shotgun shell basewads. B2063-B2066.

It was around that time in 1977 that the Consumer Product Safety Commission (CPSC) engaged a consultant to perform an investigation into the use of asbestos use in consumer products, the “major thrust” of which was “to identify and describe products to determine the amount and method of asbestos incorporation, to assess product use to determine if and how asbestos might be released, and to estimate consumer presence during conditions where activities might release asbestos.” B1443-B1447. The consultant’s report was published in April 1978, identifying Ammunition Shell Wadding as a product meriting further investigation. B1448. Based on interviews with three ammunition manufacturers (including Remington), it was noted that “only one manufacturer reports the present use of asbestos” (i.e., Remington) and that “substitutes have been developed.” B1449.

Remington continued to take steps internally to protect its employees from the hazard of asbestos exposure. In July 1978, Remington production personnel were advised that scrap basewad material must be contained in closed plastic bags and that containers of “*finished dry mold basewads should be kept covered to minimize*

dusting from rough handling.” B3046¹⁹ (emphasis added). In January 1979, Remington acknowledged that the “inhalation of asbestos dust and fibers in the atmosphere has been determined to be a health hazard” and that “the elimination of this hazard from Remington’s dry molded basewads is considered urgent.” B2073-B2074.

In October 1979, the Environmental Protection Agency (EPA) and the Consumer Products Safety Commission (CPSC) issued an Advanced Notice of Proposed Rulemaking (ANPR) to regulate the use of asbestos in consumer products. B3069²⁰. On the health risks of asbestos, the CPSC wrote that:

On the basis of current information, it appears that consumer products containing asbestos fibers can pose a health hazard if the asbestos fibers are released into the air and therefore are available for inhalation. The hazard may be undetectable in the ordinary use of asbestos-containing products, since some asbestos fibers may be visible only by means of optical or electron microscopy...

Extensive epidemiologic studies of health effects conducted in occupational settings provide the largest body of information on asbestos-related diseases. Since the early 1960s there has been increasing evidence as well of asbestos-related diseases in populations not occupationally exposed to asbestos. *Epidemiologic studies have demonstrated increased incidence of asbestos-related diseases, including lung cancer and mesothelioma (a cancer of the linings of the pleura and peritoneum) among nonoccupationally exposed populations, including individuals with only brief or intermittent ‘bystander’ exposures.*

¹⁹ Admitted as evidence (B2373-B2374)

²⁰ Admitted as evidence (B2373-B2374)

B3071 (emphasis added). The CPSC “concluded that *exposure to any respirable asbestos fibers presents a health risk* because there has not been demonstrated to be a threshold or no-effect level below which exposure to asbestos fibers would be considered safe.” B3072 (emphasis added). The EPA, NIOSH, OSHA, the World Health Organization (WHO) and International Agency for Research on Cancer (IARC) all agree that there is no known safe level of exposure to asbestos. B665-B666. Accordingly, the CPSC sought “the elimination of all non-essential uses of asbestos in consumer products from which asbestos fibers are released during reasonably foreseeable conditions of use, including misuse.” B3072. Among the products identified for further study was ammunition shell wadding - noted to contain potentially “*easily releasable fibers*”. B3082 (emphasis added).

Remington received and retained a copy of the ANPR in its corporate files. *Id.* DuPont also received copy, and a handwritten memo found in DuPont’s files with the heading “Use of Asbestos Fibers – EPA and CPSC ANPR’s” states that: “We have not searched the company chemical inventory but only know of use of asbestos as a material in one DuPont product – shotgun shells. Remington should comment...” B3083-B3084²¹, B2234-B2237. Shortly thereafter, EPA representatives reached out to Remington directly:

The Chairman said that our Public Relations people have been called by the EPA, inquiring about exposure of both factory employees and

²¹ Admitted as evidence (B2373-B2374)

shooters. We have told them that we are eliminating the use of asbestos, and have established a commitment to the Government to do so. Asked about their schedules for asbestos reduction, Bridgeport Production said that a major reduction would be made after the middle of the year, accelerating rapidly by the end of the year.

B3087²² (emphasis added).

In November 1980, Remington's Public Relations department prepared a confidential statement for use in answering any media inquiries about their use of asbestos in shotgun shells, which stated that the manufacturing process protects against the release of asbestos fibers during shooting, and that there was "no known hazard" to shooters, while noting that the statement was not intended for public release.²³ B3088-B3089²⁴. However, Remington and DuPont corporate representatives have repeatedly acknowledged that they performed no testing to determine whether asbestos is released from its shotgun shells or whether there was any hazard to shooters. B1148, B2161 ("no testing"), B2360 ("have not seen documents to support or refute that").

In December 1980, the CPSC issued its Final Rule, omitting Remington's shotgun shells. As noted by DuPont's corporate witness, the reason for this omission was not because the shells were determined to be safe, as Defendants now suggest

²² Admitted as evidence (B2373-B2374)

²³ There is no evidence this statement was ever released, or that the public was made aware of the presence of asbestos in shotgun shells.

²⁴ Admitted as evidence (B2373-B2374)

in their brief, but rather “because [Remington] had already said they would eliminate the use of the asbestos in 1980.” B2232-B2233. However, as we know, the Defendants continued to use asbestos in their shotgun shells into at least 1981, including in their 12, 16 and 20-gauge shells, and to sell them for some time thereafter. B3090²⁵. A cost comparison demonstrates that the cost of eliminating asbestos would amount to less than 1 penny per shell. B3091-B3092.

E. Eugene Schoepke’s Use of Defendants’ Asbestos Shotgun Shells

Eugene Schoepke was a lifelong farmer. Diagnosed with mesothelioma in February 2022, he died one month later at his home in Varna, Illinois, surrounded by his wife and children. B1507. Varna is a small farming community of 400 located in central Illinois. B1263. Gene and his wife Janet moved to Varna in 1960 where they farmed various crops and raised livestock, along with their eight children. B519-B521, B1268.

A medical record dated shortly before his death described Gene as a “retired farmer who lives in Varna. *He denies known exposure to asbestos.*” B1695 (emphasis added). Given Defendants never disclosed to consumers that their shotgun shells contained asbestos, this is hardly surprising. His obituary described a man who loved the outdoors, hunting and fishing. B1270-B1271.

²⁵ Admitted as evidence (B2373-B2374)

Hunting was both a source of recreation and a means of providing for his family. B1499. Janet testified at trial that he went hunting on a regular basis throughout their marriage. B1271. Gene taught his eldest son Jeff to hunt in 1968, when Jeff was 10 years old. B522. From that point forward, the two hunted together every year. B523. They shot rabbit, squirrel, dove, pheasant, geese, duck, raccoon, deer and quail. B524, B1500. Gene Schoepke used a 12-gauge shotgun, and he almost always used Remington shotgun shells. B523-B527.

Jeff estimated that 75% of the shells they used were Remington or Peters brand. B527. Gene's daughter Gloria recalled boxes of Remington and Peters shells lying around the house when she was growing up, although his wife recalled only Remington. B1273, B1501. The Remington shotgun shells came 25 to a box. B527. The 12-gauge Remington shells were green in color, while the Peters shells were blue. B528-B529.

When hunting dove, Gene and Jeff Schoepke would each shoot about 3 boxes (75 shells), whereas on pheasant or rabbit hunts they would shoot 6-10 shells each. B538-B543. Gene also went hunting with his sons Gary and Greg, his father Carl, his cousin John, and two since deceased close friends who belonged to area duck clubs. B543-B545. He also performed target practice by shooting at clay pigeons multiple times per year with his sons, using the same Remington and Peters field

load shells he used when hunting. B551-B553. Gene hunted up until the time he got sick with mesothelioma. B1499.

After he passed away in March 2022, his family found some of his old hunting gear, including an empty box of Peters shells and a handful of spent Remington shells. B562-B565 (referencing B3094²⁶ (Peters box) and B3095²⁷ (Remington shells)). At trial, Jeff Schoepke described how his dad had a habit of picking up the spent shells from the ground, after they were fired from the gun. B539-B540. He also described how the shotgun shells were ejected from the discharge chamber on the side of the gun, “*about 6-8 inches*” from Gene’s nose and mouth. B538 (emphasis added).

F. Asbestos Shotgun Shell Litigation History

On August 9, 2022, the Schoepke family filed suit in Cook County, Illinois, where it was placed on the court’s dedicated asbestos docket. On July 27, 2023, on Defendants’ *forum non conveniens* motion, the matter was transferred to rural Marshall County, where there is no dedicated asbestos docket, prompting the Schoepke family on September 7, 2023 to refile in Delaware, where both Defendants are domiciled and where the Superior Court maintains an active asbestos docket. B2542.

²⁶ Admitted as evidence (B563)

²⁷ Admitted as evidence (B564-B565)

Schoepke was originally set for trial in April 2025 along with a similar matter filed by Howard Altena, a farmer from Iowa also diagnosed with mesothelioma after years of shooting Defendants' shotgun shells. B3096. The two cases were consolidated for discovery and the parties agreed to an expedited *Daubert* schedule to test the admissibility of certain expected expert opinions. Defendants filed motions to exclude Dr. Steven Compton Ph.D., Dr. Arthur Frank M.D., and Dr. David Zhang M.D., and Plaintiffs filed a motion to exclude defense expert John Spencer. At the heart of Defendants' *Daubert* challenge was a study undertaken by Dr. Compton to investigate the release of asbestos during the discharge of Remington shotgun shells, which study he performed in connection with a case filed in Cook County, Illinois in 2017 by the Estate of Huntington Eldridge, Jr.

Like Eugene Schoepke and Howard Altena, Hunt Eldridge was also an avid hunter diagnosed with mesothelioma. Born in Lake Forest, Illinois, Eldridge began his career working at an investment bank in downtown Chicago. B3149. In the 1970s, he became increasingly involved with Ducks Unlimited (DU), an organization dedicated to wetland conservation. B3150, B3190-B3194. His roommates at the time testified that they would wake up at 4 in the morning to drive 45 minutes west to St. Charles, Illinois and spend 90 minutes duck hunting before racing back into the city for work. B3150, B3199-B3200. They went shooting all

year-round. B3151-B3152. Regardless of whether they were hunting or target shooting, they used Remington shells. B3153-B3154.

The *Eldridge* case was the first to allege that Defendants' shotgun shells had caused a shooter to develop asbestos disease. In connection with that case, plaintiff's counsel retained Dr. Compton to perform an investigation of Defendants' asbestos-containing shotgun shells. Dr. Compton is a materials scientist with a doctorate in physics and extensive experience studying the release of asbestos. B292-B303. After verifying that the shotgun shells contained asbestos, Dr. Compton designed an exposure experiment to determine whether respirable asbestos fibers are released from the shells when they are fired from a gun. B330-B387. Dr. Compton found that the firing of Defendants' asbestos-containing shotgun shells releases respirable asbestos fiber into the air around the gun, and directly into the breathing zone of a shooter. *Id.* In *Eldridge*, as here, the Defendants sought to exclude Dr. Compton and his exposure experiment. However, after briefing and oral argument, the Illinois court denied Defendants' motion. B3272. On the eve of trial, the case settled.

Here again, in connection with their *Daubert* challenge, Defendants argued that Dr. Compton's experiment was not a reliable simulation of a shooter's exposure because it did not "substantially replicate actual conditions" encountered by the Plaintiffs when shooting outdoors. B3129-B3131. Defendants also argued that the shotgun shells used by Dr. Compton in his experiment, given their vintage, were not

representative of the shotgun shells used by the Plaintiffs. B3131-B3133. The parties engaged in extensive briefing followed by a two-day evidentiary hearing in late November 2024.

On February 26, 2025, the Superior Court issued its ruling, denying both parties' motions, finding Dr. Compton's "exposure experiment" and testimony to be both reliable and admissible. B3113-B3139. It also noted that both Plaintiffs were avid hunters who used Remington shotgun shells to hunt and shoot recreationally from the 1960s through the 1980s. B3116.

In discussing the competing experts' experiments, the Court below explained that the Court as gatekeeper "must not concern itself with which expert's theory is stronger but rather focus on whether the expert's testimony is scientifically reliable based upon the reasoning or methodology underlying it." B3119-B3120. The Court below detailed the credentials of each expert and the methodologies employed in designing and carrying out their respective experiments. It considered that Dr. Compton performed his study indoors to make it more reliable and readily reproducible, and to avoid the uncontrolled release of asbestos fiber to the outdoor environment. B3125, B3131. As the Superior Court noted, "reliable test results require predictable and controlled testing conditions." B3130 (citing *Podrasky v. T&G, Inc.*, 2004 Del. Super. (Nov. 15, 2004)). It also considered that Dr. Compton employed air flow rates demonstrated by other peer-reviewed studies to be

representative of outdoor conditions. B3131. As to the vintage of the shells used in Dr. Compton's experiment, it noted that the shells appeared and performed as expected. B3132-B3133. It also noted that the shells were specifically designed by the Defendants to resist deterioration from environmental factors. B3132.

Although the matters had been consolidated for discovery, the Court below denied Plaintiffs' request to consolidate the matters for trial. *Altena*, which involved a living plaintiff, was given priority and scheduled for trial in April 2025, settling moments before opening statements. *Schoepke* meanwhile was continued to July. On July 23, 2025, a unanimous jury found that Eugene Schoepke's mesothelioma and death were proximately caused by Defendants' negligence, assigning responsibility in the amount of 40% to Remington and 60% to DuPont. B3142-B3144. The jury awarded damages in the amount of \$9 million to compensate Schoepke's Estate and his nine surviving heirs. B3145²⁸.

G. Dr. Compton's Exposure Experiment

Dr. Compton's study was the first to investigate the release of asbestos fiber from Remington's shotgun shells. He staged his experiment indoors, in a test

²⁸ At no time either in post-trial motions or this appeal have the Defendants challenged the amount of the jury's verdict, which was designed to compensate 10 claimants. *See Barry v. Owens-Corning Fiberglass Corp.*, 668 N.E.2d 8 (Ill.App 1 Dist. 1996) and *Knecht v. Ford Motor Company*, 2020 Del. Super. LEXIS 132 (Del. Super. Mar. 3, 2020).

chamber of the type used by NIOSH and other peer-reviewed authors to conduct asbestos exposure studies. B300-B304. He explained at trial that he was not comfortable conducting the study in an outdoor environment for two primary reasons: (1) outdoor environments are uncontrolled and the conditions can never be replicated; and (2) he was not comfortable with the uncontrolled release of asbestos fiber. B301-B302. However, to simulate outdoor conditions, he used air flow rates found by other researchers to be representative of outdoor environments. B340-B342.

Dr. Compton's team conducted four tests involving three different types of Remington shotgun shells, all of which were 12-gauge plastic shells with asbestos basewads. B342-B388. They set up an air filter approximately 24" behind the shell ejector port, to represent where a shooter would be standing. *Id.* They placed an additional filter near the muzzle exhaust, another near the shell ejector port, and another to replicate the position of a bystander standing three feet from the shooter. *Id.* In three tests they fired two shells over the course of 15 minutes, while in the fourth test he fired eight shells over sixteen minutes. *Id.* In every test, and on every filter, they found respirable asbestos fibers. B363.

Using an electron microscopy method developed by the EPA, Dr. Compton reported airborne asbestos concentrations ranging from 1.0 to 1.9 asbestos structures per cubic centimeter (s/cc) in the shooter's position. B362, B387. As he noted at

trial, electron microscopes have been used by the National Institute for Occupational Safety and Health (NIOSH) since the late 1970s to investigate exposures to consumers from the use of asbestos-containing consumer products including hair dryers (which were shown to release 0.11 (s/cc)). B302-B303.

Dr. Compton also counted fibers using a phase contrast microscopy (PCM) method developed by OSHA for assessing workplace exposures. However, the PCM method is limited in that it uses an optical light microscope which cannot resolve fibers thinner than 0.25 micrometers in width, and the method does not count fibers shorter than five micrometers in length. B364-B368. As a result, the PCM method provides only an index of the total number of fibers released (“like the tip of an iceberg”). B367. Since the 1970’s, electron microscopy has been recognized as a superior method for identifying asbestos fibers. B2320-B2322. Critically, the PCM method misses many of those fibers that have been implicated in the causation of disease. B691-B695.

Dr. Compton testified that the filter set up in the shooter’s position was positioned to represent the “breathing zone” of a hypothetical shooter. B356. As discussed at trial, a breathing zone is the area around an individual’s nose and mouth – “the zone of area that they would be breathing”, which is defined as a sphere with a radius of ten inches centered on the nose and mouth, and a volume of approximately 50,000 cubic centimeters. B356, B506-B507. Dr. Compton’s

reported concentrations equate to approximately 100,000 asbestos fiber structures in his breathing zone samples. B506-B507. A series of still images taken immediately after firing demonstrate the propagation of dust from the end of the spent shell in the moments after firing.

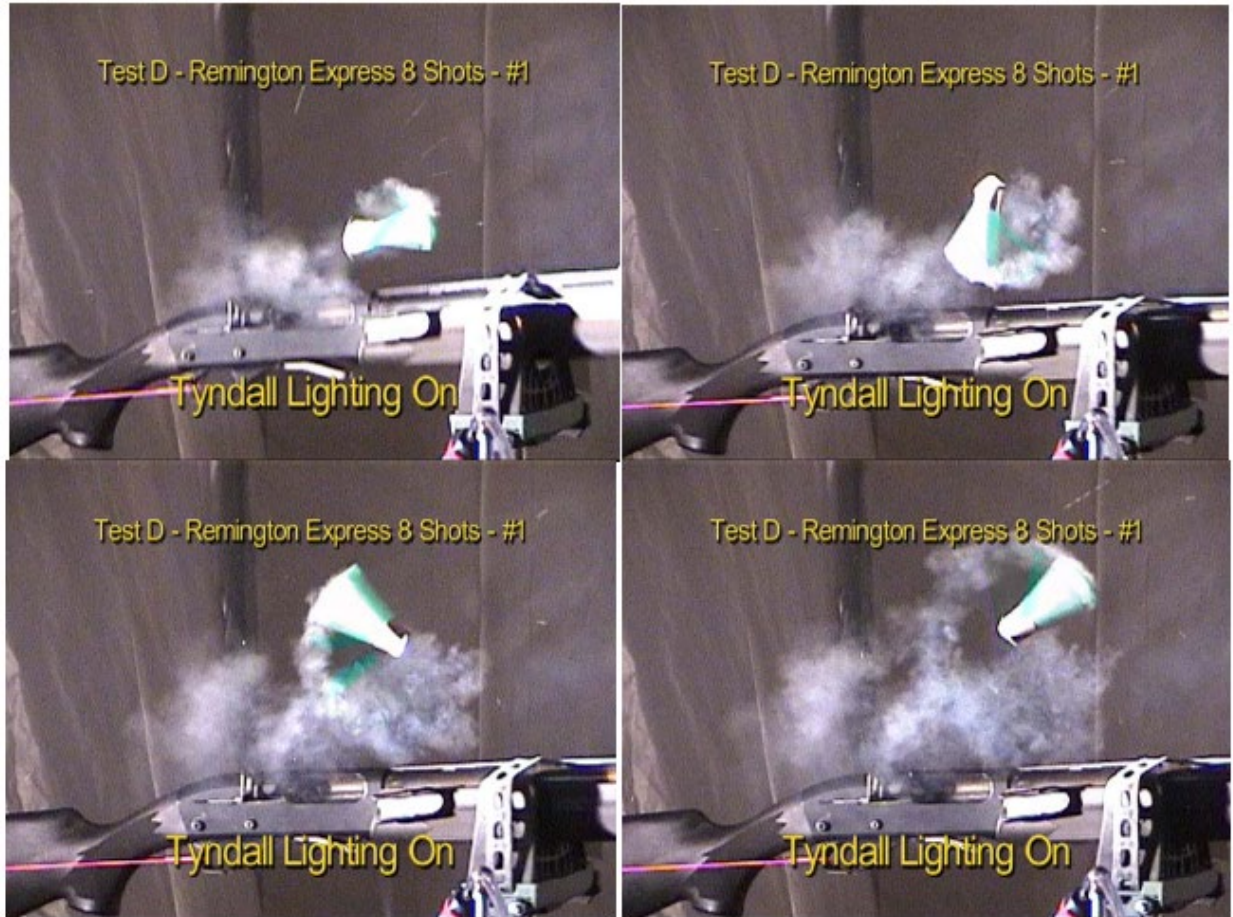


Figure 34. Still images, taken from video recording of Test D, demonstrating the propagation of dust from the end of the spent shell.

See B345-B346.

H. Dr. Frank's Substantial Factor Causation Opinion

At trial, Plaintiffs called Dr. Arthur Frank as their medical causation expert. Dr. Frank is a medical doctor and professor of public health who has been studying asbestos disease for over 50 years. B623-B629. He testified that asbestos diseases are dose-responsive, and that with increased exposure comes increased likelihood of disease. B653. The scientific consensus is that brief and low-level exposure to asbestos can cause mesothelioma. B706-B707. He testified that there is no known safe level of exposure to asbestos and that exposures as short as one day have shown to cause cancers including mesotheliomas. B645-B646, B659, B663. Studies have shown that the workplace exposure standards set by OSHA are designed to limit disease but are not protective of cancer, and that even at the current exposure limit, there is an excess risk of cancer. B674-B677. In an individual with mesothelioma and a documented exposure to asbestos, asbestos is understood to be the medical cause of their disease. B682-B683.

In forming his specific causation opinion, Dr. Frank relied on Dr. Compton's fiber release study as well as testimony from Schoepke's surviving spouse and children, who described the frequency and regularity with which he used Defendants' shotgun shells. B736-B738, B742-B744. Dr. Frank testified that Schoepke's exposures to asbestos from Defendants' shotgun shells were "***short-term intermittent high-level exposures***", "***several orders of magnitude greater than***

background.” B783 (emphasis added). He concluded that Defendants’ shotgun shells were “*the substantial factor*” in causing Schoepke’s mesothelioma. B744 (emphasis added). Indeed, despite Defendants’ suggestions in their brief to the contrary, there was no supported evidence at trial that Schoepke had any other exposure to asbestos than that which he suffered as a result of Defendants’ shotgun shells. B743-B744.

ARGUMENT

In an Illinois asbestos product liability case, plaintiffs must prove that the defendant's asbestos was a cause of the decedent's injuries. *Thacker v. UNR Indus., Inc.*, 603 N.E.2d 449, 455 (Ill. 1992). Causation requires proof of both "cause-in-fact" and "legal cause." *Id.*

I. PLAINTIFFS' LEGAL CAUSE EVIDENCE WAS SUFFICIENT

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?

B. Standard of Review

Whether a trial court erred in denying a motion for judgment as a matter of law is reviewed *de novo*. *Whittaker v. Houston*, 888 A.2d 219, 224 (Del. 2005). This Court reviews the Superior Court's denial of a motion for judgment as a matter of law to determine "whether the evidence and all reasonable inferences that can be drawn therefrom, taken in a light most favorable to the non-moving party, raise an issue of material fact for consideration by the jury." *Chrysler Corp. (Delaware) v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1034-1035 (Del. 2003). A jury's findings of fact shall not be disturbed on the basis of legally insufficient evidence if there is "any competent evidence upon which the verdict could reasonably be based." *Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co., Inc.*, 866 A.2d 1, 24 (Del. 2005). The findings of the jury, if supported by evidence, shall be conclusive. *Mercedes-Benz of North America Inc. v. Norman Gershman's Things to Wear, Inc.*, 596 A.2d 1358, 1362 (Del. 1991).

C. Merits of the Argument

Under Illinois law, “[a] manufacturer has a nondelegable duty to design a reasonably safe product.” *Jablonski v. Ford Motor Co.*, 955 N.E.2d 1138, 1154 (Ill. 2011). “In a failure to warn case against a manufacturer, the inquiry becomes whether the manufacturer, because of the ‘present state of human knowledge’, knew or should have known of the danger presented by the use or consumption of a product.” *Johnson v. Edward Orton, Jr. Ceramic Foundation*, 71 F.4th 601, 610 (7th Cir. 2023). For liability to attach, a plaintiff must prove that the defendant manufacturer knew or should have known of the danger that caused the injury. *Woodill v. Parke Davis & Co.*, 402 N.E.2d 194, 198 (Ill. 1980). As Illinois case law makes clear, in asbestos cases, the “danger” is the propensity of an asbestos product to release dust.

In challenging legal cause, Defendants rely on *McKinney v. Hobart Bros. Co.*, an Illinois appellate court decision from 2018. After Charles McKinney was diagnosed with mesothelioma, he filed suit against multiple defendants alleging exposure to asbestos from insulation and brakes had caused his mesothelioma. *McKinney v. Hobart Bros. Co.*, 127 N.E.3d 176, 179 (Ill.App. 4 Dist. 2018). He later added a claim that welding rods manufactured by defendant Hobart Brothers also contributed to cause his disease, alleging negligent failure to warn. *Id.* For a period

of time, some of Hobart's welding rods contained chrysotile asbestos, a type of asbestos that "can cause mesothelioma many years after one inhales it." *Id.*

McKinney's alleged exposure to asbestos from Hobart's welding rods was limited to an eight-month period in 1962 and 1963 when he worked as a welder for Portable Elevator in Bloomington, Illinois. *Id.* at 181. Although he did not personally use Hobart's asbestos-containing welding rods, he alleged they were used by others working on the floor above, and that the used welding rods ("stubs") fell through a grated mezzanine into the area where he worked. *Id.* He also testified that he had to climb stairs that were littered with stubs. *Id.* After the jury returned a verdict for the plaintiff, Hobart appealed, arguing that it could not have owed plaintiff a duty to warn of a hazard of which it and the industry were unaware. *Id.* at 178.

As to duty (legal cause), Hobart argued that the trial record was "devoid of any evidence that any manufacturer should have reasonably foreseen that the use of asbestos-containing welding rods in particular might pose a risk of exposing coworkers in the same building to respirable asbestos fibers." *Id.* at 186. Trial evidence established that it was "physically impossible" for respirable asbestos to escape from the flux of the welding rods because (1) the asbestos fibers were "chemically bound to" and "completely covered by" sodium silicate and were too large to inhale; and (2) the high welding temperature burned the asbestos fibers such

that none could be released from the welding fumes. *Id.* at 179-180. Moreover, the plaintiff in *McKinney* failed to offer any substantive evidence at trial that the welding rods could release asbestos when manipulated in the manner described by the plaintiff (*ie.* when dropped, jostled or stepped upon). *Id.* at 184-186.

McKinney argued that evidence presented at trial definitively established asbestos as the cause of mesothelioma in 1960, and that Hobart itself “tacitly admitted” that it knew of the hazards of asbestos as early as 1947. *Id.* at 187-188. As the court noted however, plaintiff presented no evidence to justify the conclusion “that Hobart knew, or should have known, in 1962 or 1963, that merely stepping on its welding rods, dropping them, inserting them into a Stinger, or jostling them around in a box or bucket would release asbestos fibers.” *Id.* at 190. Nor did plaintiff offer any evidence to support such a theory. As stated by the court:

[T]he existence of a duty is an essential element of plaintiff’s cause of action, and, in 1962 and 1963, defendant could not have owed plaintiff a duty to warn plaintiff of a ***hazard*** that, at that time, was unknown to the industry to which defendant belonged, ***namely, the ability of its welding rods to release encapsulated asbestos fibers if the welding rods were simply rubbed together or stepped on.***

Id. (emphasis added).

As is clear from *McKinney*, to establish legal cause, asbestos plaintiffs must present evidence that the product manufacturer knew, or should have known, that its product could release asbestos. On this issue, *Daniels v. ArvinMeritor, Inc.*, a case decided shortly after *McKinney*, is instructive. *Daniels* involved allegations of

exposure to defendant John Crane's packing and gasket materials, which contained encapsulated asbestos. *Daniels v. ArvinMeritor, Inc.*, 146 N.E.3d 655 (Ill.App. 1 Dist. 2019). Plaintiff claimed that John Crane negligently failed to warn him about the asbestos in its products. *Id.* at 662. After the jury returned a verdict in the plaintiff's favor, John Crane appealed, alleging *inter alia* that the trial court erred in instructing the jury regarding both proximate cause and the state of the art. *Id.* at 661. John Crane argued that because there was no evidence presented that it knew its encapsulated gaskets and packing were hazardous, the plaintiff had to rely on what John Crane should have known, which is determined by industry knowledge, i.e., the state of the art. *Id.* at 675.

In upholding the verdict, the appellate court noted testimony that John Crane learned that asbestos could cause diseases such as mesothelioma in 1970, and thereafter instituted practices at its manufacturing plant to limit employee exposures to dust generated from its gaskets and packing. *Id.* at 664. Furthermore, John Crane was aware that pipefitters like the plaintiff who worked with its gaskets and packing removed them with scrapers and wire brushes, which created dust. *Id.* The court found this evidence of defendant's direct knowledge to be sufficient to establish a duty to warn, notwithstanding any evidence regarding the state of the art. *Id.* at 677.

As stated by the *Daniels* court, "[e]vidence of industry standards, i.e. state of the art, may be presented as an aid to the jury in determining the feasible practices

and what defendant knew or should have known, but state of the art evidence is not wholly necessary where there is evidence that the defendant knew or should have known that injury may occur if no warning is provided.” *Daniels v. ArvinMeritor, Inc.*, 146 N.E.3d 655, 676 (Ill. App. Ct. 2019). What a manufacturer should have known is determined by the “present state of human knowledge” at the time. *Johnson v. Edward Orton, Jr. Ceramic Foundation*, 71 F.4th 601, 614 (7th Cir. 2023) (citing *Woodill v. Parke Davis & Co.*, 402 N.E.2d 194, 198 (Ill. 1980). In *McKinney*, “defendant’s direct knowledge was not at issue”, and plaintiff failed to prove that contemporaneous knowledge existed in the industry about the propensity of welding rods to release dust as alleged by the plaintiff. *Daniels v. ArvinMeritor, Inc.*, 146 N.E.3d 655, 677 (Ill. App. Ct. 2019).

In this case, Plaintiffs presented extensive evidence regarding Defendants’ direct, contemporaneous knowledge regarding the hazards of asbestos dust and the propensity of its asbestos shotgun shells to release dust during use. The release of dust during discharge of the shells is readily apparent in the still images captured during Dr. Compton’s experiment. It is referenced in Remington lab notebooks documenting “dusting tests” performed by Remington in 1963 and 1964 during test firing of shotgun shells with asbestos-containing basewads. B2781-B2788, B2837-B2842, B2847-B2859, B2861-B2866. And it is further referenced in Remington’s 1965 patent filing, which described a “modified process [which] is useful to cut

down on the amount of ‘dusting’ which occurs when basewads made according to the original process are used.” B2665.

Plaintiffs presented evidence that Remington took measures at its manufacturing plant to cover containers of finished basewads to “minimize dusting from rough handling.” B3046. It installed ventilation and dust collection equipment and performed periodic air sampling in areas where asbestos was handled either in its raw form or as a dry molded basewad. B3043. It even provided personal protective equipment for employees involved in the firing of asbestos-containing shotgun shells. B1148-B1149.

Defendants’ focus on the state of the art regarding the hazards of encapsulated asbestos products is misplaced. Defendants were the only manufacturers of asbestos-containing shotgun shells, a wholly unique product, and thus the only ones with any reason to investigate whether the dust generated during use of their shotgun shells contained asbestos. The manufacture and use of a shotshell basewad is radically different than the asbestos-containing flux in a welding rod. An asbestos basewad is placed down into the bottom of a shotgun shell, covered by gunpowder, and subject to a violent explosion. Defendants should have known that it could release asbestos.

Plaintiffs are not required to prove, as Defendants argue, that knowledge existed in the industry “that shotgun shells containing basewads with encapsulated

asbestos would likely cause mesothelioma in recreational hunters.” App. Op. Br. 7. As is clear from a review of the relevant case law including *McKinney*, the focus in an asbestos duty analysis is on whether a defendant should have known that its asbestos product could potentially release asbestos-containing dust, a known hazard, which fact was readily established at trial. That injury - specifically mesothelioma - can result after minor exposure to asbestos dust has long been recognized both in the medical and scientific literature, as well as by Illinois courts. *Wehmeier v. UNR Industries, Inc.*, 572 N.E.2d 320, 337 (Ill.App. 4 Dist. 1991); *Tragarz v. Keene Corp.*, 980 F.2d 411, 420-421 (7th Cir. 1992); *Startley v. Welco Mfg. Co.*, 78 N.E.3d 639, 647 (Ill.App. 1 Dist. 2017).

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

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?

B. Standard of Review

See Point I.B, above.

C. Merits of the Argument

The standard for proving cause-in-fact in Illinois asbestos cases is well-settled. Plaintiffs can prove cause-in-fact under either the "but-for" test or the "substantial factor" test. *Thacker v. UNR Indus., Inc.*, 603 N.E.2d 449, 455 (Ill. 1992). "The substantial factor test is not concerned with the quantity of asbestos but rather its legal significance." *Johnson v. Owens-Corning Fiberglas Corp.*, 729 N.E.2d 883, 889 (Ill.App. 3 Dist. 2000) (citing *Wehmeier v. UNR Industries, Inc.*, 572 N.E.2d 320, 337 (Ill.App. 4 Dist. 1991)). A plaintiff's burden of production is met when evidence viewed most favorably allows a reasonable fact finder to conclude that the element has been proven. *Thacker v. UNR Indus., Inc.*, 603 N.E.2d 449, 454 (Ill. 1992). While mere conjecture or speculation is insufficient, circumstantial evidence may be used to show causation. *Id.* The question of whether an alleged tortfeasor's conduct constitutes a substantial factor is usually a question

of fact, but if a contrary decision is clearly evident from a review of all the evidence, Illinois courts rule in favor of the defendant as a matter of law. *Id.* at 455.

In *Thacker*, the Illinois Supreme Court adopted the “frequency, regularity and proximity” test as “a means by which an asbestos plaintiff can prove more than minimum contact to establish that a specific defendant’s product was a substantial factor in being a cause of a plaintiff’s injury.” *Nolan v. Weil-McLain*, 910 N.E.2d 549, 558 (Ill. 2009). A plaintiff can show that he was exposed to a defendant’s asbestos through proof that he was regularly in an area where defendant’s asbestos was frequently used and in sufficient proximity to the area so as to come into contact with the defendant’s asbestos. *Johnson v. Owens-Corning Fiberglas Corp.*, 729 N.E.2d 883, 887 (Ill.App. 3 Dist. 2000). In *Thacker*, the “controlling issue” was proximity, and whether, given the expanse of plaintiff’s workplace, and the fact that defendant’s asbestos was processed in areas of the plant far removed from where the plaintiff worked, plaintiff’s evidence was sufficient for a jury to infer causation. *Thacker v. UNR Indus., Inc.*, 603 N.E.2d 449, 459 (Ill. 1992). Ultimately, the *Thacker* court found that it was within the ability of jurors to conclude, even absent expert testimony, “that visible indoor dust is likely to travel significant distances from its source, ***eventually being inhaled*** by those who come into contact with it.” *Id.* at 460 (emphasis added).

Contrary to Defendants' argument, Illinois courts do not require an asbestos plaintiff to prove that he "actually inhaled" a "substantial number" of defendant's asbestos fibers to establish that a specific defendant's product was a substantial factor in being a cause of his injury. "When there is competent evidence that one or a *de minimis* number of asbestos fibers can cause injury, a jury may conclude the fibers were a substantial factor in causing a plaintiff's injury." *Johnson v. Owens-Corning Fiberglas Corp.*, 729 N.E.2d 883, 889 (Ill.App. 3 Dist. 2000) (citing *Wehmeier v. UNR Industries, Inc.*, 572 N.E.2d 320, 337 (Ill.App. 4 Dist. 1991)). The *Thacker* standard attempts to strike a balance "between the needs of the plaintiff (by recognizing the difficulties of proving contact) with the right of the defendant (to be free from liability predicated upon guesswork)." *Nolan v. Weil-McLain*, 910 N.E.2d 549, 558 (Ill. 2009). It is "not a rigid test with an absolute threshold level necessary to support a jury verdict", and "the frequency and regularity prongs become less cumbersome when dealing with cases involving diseases like mesothelioma which can develop after only minor exposures to asbestos fibers." *Startley v. Welco Mfg. Co.*, 78 N.E.3d 639, 647 (Ill.App. 1 Dist. 2017); *Tragarz v. Keene Corp.*, 980 F.2d 411, 420-421 (7th Cir. 1992). The test is "less vital" in cases involving direct evidence, and "even less rigid for purposes of proving substantial factor when dealing with cases in which exposure to asbestos causes mesothelioma... [as] mesothelioma can result from minor exposures to asbestos products." *Id.* To be

clear, Illinois courts do not require a finding of the exact quantity of asbestos fibers a decedent was exposed to. *Zickuhr v. Ericsson, Inc.*, 962 N.E.2d 974, 986-987 (Ill.App. 1 Dist. 2011).

As stated in *McKinney*, “[t]he causal criteria of frequency, proximity and regularity are calculated to insure [sic] that the defendant’s contribution to the plaintiff’s loss was more than trivial.” *McKinney v. Hobart Bros. Co.*, 127 N.E.3d 176, 191 (Ill.App. 4 Dist. 2018). As discussed above, *McKinney* was a case where plaintiff claimed exposure to asbestos brakes over the course of a 40-year career as an automobile mechanic. *Id.* at 181. His personal physician noted his history of asbestos exposure from working with brakes, and plaintiff’s medical expert admitted that his brake exposures were a substantial factor in causing his mesothelioma. *Id.* He also claimed exposure to asbestos insulation materials. *Id.* at 179. Later, he added a claim that he was exposed as a bystander to welding rods. *Id.* Fatally, plaintiff did not present any substantive evidence at trial that defendant’s asbestos-containing welding rods were capable of releasing dust under any circumstances, let alone when dropped, stepped on or jostled, such that the decedent could have been exposed to and inhaled defendant’s asbestos. *Id.* at 193. Without any evidence of fiber release, plaintiff could not establish that decedent was sufficiently exposed such that defendant’s product could constitute a substantial factor. *Id.* In other

words, there was no evidence that “defendant’s contribution to plaintiff’s loss”, given his extensive other exposures to asbestos, was “more than trivial.” *Id.* at 191.

The *McKinney* court revisited “cause-in-fact” in *Krumwiede*, a case involving allegations of exposure to asbestos-containing caulking material. *Krumwiede v. Tremco, Inc.*, 148 N.E.3d 764 (Ill.App. 4 Dist. 2020). There again, there was no evidence in the trial record showing when and under what circumstances defendant’s asbestos product released respirable asbestos fibers “such that they could be ‘actually inhaled’” by the decedent, and whether such circumstances were of the type regularly encountered by decedent. *Id.* at 781. And there again, there was evidence of extensive other exposure. *Krumwiede*’s lawsuit named more than fifty other defendants (*Id.* at 767), and lung tissue taken from the decedent at autopsy revealed elevated concentrations of amosite asbestos, a type of asbestos not used in defendant’s caulking. *Id.* at 773-774. The *Krumwiede* court reaffirmed that Illinois courts do not require asbestos plaintiffs to quantify the number of asbestos fibers decedent was exposed to in order to prove causation. *Id.* at 781-782. However, given “an absence of evidence in the record to show under what circumstances [defendant’s] products released asbestos fibers”, the court found it speculative to conclude that asbestos was released from defendant’s products with any frequency or regularity while decedent worked in proximity to those products” such that it could constitute a substantial factor. *Id.* at 781.

In this case, proximity is not an issue. Plaintiff presented direct and competent evidence that the release of asbestos fibers during use of Defendants' shotgun shells occurs in the breathing zone, such that a reasonable jury could infer inhalation. Schoepke's exposure was exceedingly proximate. It was also frequent and regular, given he was an avid hunter who went hunting multiple times every year over the course of many years, firing multiple shells each time. He fired 75 shells every time he went dove hunting. B538-B543. He also used Defendants' shotgun shells when hunting other game, including rabbit, squirrel, pheasant, geese, duck, raccoon, deer and quail. He also used Defendants' shotgun shells when target shooting with clay pigeons. B543-B553. This evidence is sufficient to establish Defendants' asbestos as a substantial factor in causing his mesothelioma.

Furthermore, and unlike in *McKinney* and *Krumwiede*, there is no competent evidence here that Schoepke was exposed to any other source of asbestos. His wife Janet testified that he did "a few" side jobs for in the 1970s, but wasn't sure what they did. B1275-B1276. Defendants' industrial hygiene expert, John Henshaw, acknowledged that he doesn't know what if any other asbestos Schoepke may have been exposed to. B1472 ("I don't know what he was exposed to"). Similarly, Defendants' medical causation expert, Dr. Gregory Diette, testified that he had no evidence that Schoepke was exposed to asbestos during construction work or in any other way. B1707-B1708. Dr. Diette simply testified that Schoepke's mesothelioma

was not related to any identified asbestos exposure and was spontaneous in occurrence, caused by “bad luck” and natural cell replication errors. B1713. However, the jury clearly did not credit Dr. Diette’s explanation, given its explicit finding that Schoepke’s mesothelioma was caused by asbestos exposure. B3143.

	<i>McKinney/Krumwiede</i>	<i>Schoepke</i>
Asbestos Product	Welding Rods/Caulking	Shotgun Shells
Conditions of Release	Not Established	Normal Firing of Shells
Proximity	Uncertain/Bystander	6-8” from Nose and Mouth
Frequency/Regularity	No Proof of Contact	Decades of Regular Shooting
Competing Exposures	Insulation and Brakes	No Other Exposures

Understanding that Illinois case law does not support their argument, Defendants urge this Court to apply New York law instead. But *Nemeth* is not the law in Illinois, and it is not the law here. As Illinois courts have repeatedly affirmed, there is no specific dose requirement in Illinois. Illinois plaintiffs must present competent evidence of asbestos fiber release, and evidence that the plaintiff used the product in such a way as to come into contact with defendant’s asbestos. Here, Plaintiffs have done precisely that. Plaintiffs have presented evidence that Schoepke was exposed to asbestos each time he fired Defendants’ shotgun shells, in concentrations “orders of magnitude” above background, exposures that he suffered on a frequent and regular basis throughout the 1960s, 1970s and 1980s. This is sufficient under Illinois law to establish cause-in-fact.

CONCLUSION

The jury heard evidence that Defendants knowingly incorporated hundreds of tons of asbestos into millions of consumer shotgun shells, documented that the asbestos basewads dusted when fired, and nevertheless provided no warning. It also heard evidence of testing showing that ordinary firing released respirable asbestos in the shooter's breathing zone, testimony that Eugene Schoepke repeatedly fired Defendants' shells, and expert testimony that those exposures substantially contributed to cause his mesothelioma.

Plaintiffs' trial evidence was sufficient under Illinois law to support the jury's verdict. Defendants were aware of the hazards of asbestos at the time they manufactured and sold their asbestos-containing shotgun shells, and they should have known that recreational shooters like Eugene Schoepke could be exposed to asbestos when firing their asbestos-containing shotgun shells. Plaintiffs presented competent evidence that the use of Defendants' shotgun shells released asbestos, resulting in exposures "several orders of magnitude" above background levels, exposures that Schoepke would have suffered on a regular basis for years. This is sufficient under Illinois law to establish causation in a mesothelioma case. Therefore, this Court should summarily dismiss the Defendants' appeal and allow the Schoepke family to receive what the Jury found to be reasonable compensation and close this sad chapter of their life.