



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

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INTRODUCTION

As set forth in Remington and DuPont’s opening brief, to establish “legal cause,” plaintiffs were required to show that defendants knew or should have known that shotgun shells containing basewads with encapsulated asbestos would likely cause mesothelioma in recreational hunters. OB 16. Plaintiffs’ answering brief does not meaningfully contend that the trial evidence satisfies this standard. Instead, plaintiffs dispute the standard. But defendants correctly articulate the governing standard drawn from the Illinois Supreme Court’s decision in *Lee v. Chicago Transit Authority*, 605 N.E.2d 493, 503 (Ill. 1992). Plaintiffs’ answering brief does not even mention *Lee*.

Plaintiffs also mischaracterize *McKinney v. Hobart Bros. Co.*, 127 N.E.3d 176 (Ill. App. Ct. 2018), claiming that *McKinney* is distinguishable because “[t]rial evidence established that it was ‘*physically impossible*’ for respirable asbestos to escape from the flux of the welding rods” that were at issue in that case. AB 35 (emphasis added). In fact, *McKinney* held the opposite, finding “no abuse of discretion in the admission of ... testimony that defendant’s welding rods *could release respirable asbestos fibers* when ‘properly manipulated’” (127 N.E.3d at 184 (emphasis added)) and “*disagree[ing]* with defendant that the record lacked *any* competent evidence that defendant’s welding rods were capable of releasing asbestos” (*id.* at 186 (first emphasis added)). Notwithstanding “competent

evidence” that the welding rods at issue “could release respirable asbestos”—and undisputed industry knowledge ““of the dangerous propensity of” raw asbestos” (*id.* at 186-87, 190 (citation omitted))—the *McKinney* court still overturned the jury verdict for plaintiff based on insufficient evidence of legal cause. That is because, under Illinois law, the inquiry for establishing legal cause turns on what the manufacturer knew or should have known about the danger of *the product*—not generic “asbestos” or “asbestos dust.” This Court should reach the same result as *McKinney* and reverse.

Plaintiffs also did not present evidence sufficient to establish “cause-in-fact” under the “frequency, regularity and proximity test,” i.e., (1) that the fibers were actually inhaled *and* (2) that the product released asbestos fibers in such amounts that Mr. Schoepke had more than *de minimis* contact with asbestos from the product. The cases plaintiffs cite involving occupational exposure at indoor plants and worksites involving raw or friable asbestos—in which workers handled bags of asbestos, or were covered in asbestos dust—only highlight the, at best, *de minimis* release of asbestos fibers here. Plaintiffs’ failure to present sufficient evidence to establish “cause-in-fact” at trial provides a separate, independent ground for reversal.

RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS

Plaintiffs' lengthy statement of facts is notable for what it does not dispute.

Among other things:

The product at issue contained encapsulated asbestos. As Remington and DuPont's opening brief emphasized, the shotgun shells at issue contained basewads with "encapsulated asbestos." OB 2, 4, 6-8, 14, 18-21. The trial court likewise stated that "[t]o formulate a basewad, a quantity of asbestos was mixed with other materials and bound together by subjecting the mixture to intense pressure" and that "[t]his bonding encapsulated the asbestos." Ex. C at 16. Plaintiffs do not dispute that the asbestos in the basewads was encapsulated.

Plaintiffs' state-of-the-art expert offered no opinion that similar products were understood to pose a mesothelioma risk. Remington and DuPont's opening brief noted that "Plaintiffs' state-of-the-art expert, Barry Castleman, Sc.D., offered no testimony regarding shotgun shells with asbestos-containing basewads" and that he did not "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." OB 6 (citing A690-788, A2340-50). Plaintiffs do not dispute this. Indeed, Plaintiffs' answering brief does not even mention Castleman.

Defendants' industrial hygienist's "worst case" dose calculation was below background levels. Remington and DuPont's opening brief states that their industrial hygiene expert, John Spencer—even using “highly conservative assumptions” designed to generate a “worst case” dose estimate—calculated Mr. Schoepke's dose as “0.035 f/cc-years *lower* than levels of asbestos present in background urban air levels.” OB 12 (citing A1501, A1506-08, A334). Remington and DuPont also note that, at trial, “Plaintiffs did not challenge Mr. Spencer's calculation.” OB 12. Plaintiffs do not challenge it on appeal either. Nor does plaintiffs' brief contest that 0.035 f/cc-years is lower than the urban background level.

As for the attempt by plaintiffs' causation expert, Dr. Arthur Frank, to describe the results of Dr. Compton's indoor chamber fiber-release experiment (up to 0.08 fibers/cc) as “bursts” supposedly capable of “overwhelm[ing]” the body's defenses (A1337, A1342-46), Remington and DuPont's opening brief notes that Dr. Frank admitted that the so-called “burst” concentration Dr. 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 over a 40-year working lifetime. OB 12-13 (citing A1341-43; A302). Again, plaintiffs' brief does not dispute this.

Plaintiffs had an industrial hygienist expert available but chose not to call him at trial. Remington and DuPont’s opening brief notes that plaintiffs “ha[d] access to an industrial hygienist” of their own but elected not to present such expert evidence at trial. OB 28 (citing A1347); *see also* OB 10 (“Plaintiffs ... offered no industrial hygienist ...”). Plaintiffs’ brief does not dispute this.

Plaintiffs’ own expert admitted it is “unprovable” that background levels of asbestos cause disease. As set forth in Remington and DuPont’s opening brief, plaintiffs’ expert Dr. Frank “admitted that it is ‘unprovable’ that background levels of asbestos cause disease.” OB 12 (citing A1214-15). Plaintiffs’ answering brief does not address this admission.

* * *

Instead of grappling with these concessions, plaintiffs’ answering brief attempts to deflect attention to irrelevant issues. For example, plaintiffs emphasize evidence of DuPont’s “management and control” of Remington. AB 5. Although DuPont continues to maintain that Remington, as the manufacturer, should have been the only party potentially subject to liability in this case, in the interest of narrowing the questions for this Court, DuPont has not appealed that issue. Plaintiffs’ emphasis of DuPont’s “management and control” of Remington is thus irrelevant to the issues on appeal.

Plaintiffs' discussion of DuPont's concern with *plant conditions for workers handling asbestos* (AB 6-8) and steps taken to protect *workers at Remington's plant* (AB 14-17) also has minimal (if any) relevance to the appeal. The risk to employees working eight-hour days indoors at a plant where millions of shells were manufactured and tons of raw asbestos was handled *before* being encapsulated in basewads under intense pressure as part of the manufacturing process is not comparable to recreational shooting of a finished shell, with a basewad containing encapsulated asbestos embedded in compressed wax, outdoors.

So too concerning the precise year that Remington last sold shells containing basewads with encapsulated asbestos. Remington and DuPont's opening brief states that Remington sold such shells through "approximately" 1981. OB 4, 6. Plaintiffs contend that "Remington documents suggest it was 1983 or 1985" (AB 13) or "at least 1981" (AB 20). The record shows that the basewads in question were phased out around late 1981 (*see* A310; A1865-66; A2657-58), but the exact date does not matter to this appeal. Nothing in the record suggests that the relevant state-of-the-art changed between 1981 and 1985.

Finally, plaintiffs' brief includes photos of "still images taken immediately after firing," supposedly to "demonstrate the propagation of dust from the end of the spent shell[.]" AB 29. Plaintiffs do not mention that the photos were taken under specialized "theater lighting" or "Tyndall lighting" (B317) because, according to

plaintiffs' own expert, "there was no visible dust unless you used Tyndall lighting" (B319). Plaintiffs' expert also acknowledged that "gunpowder creates smoke ... when you fire a shotgun shell" and that he "saw a lot of smoke come out when you fired the shotgun shell ... [e]ven more so when you're using Tyndall lighting."

B466. Plaintiffs' expert also conceded that Tyndall lighting photos do not scientifically quantify anything:

Q. And just so we're clear, Tyndall lighting, that's not used to quantify anything scientifically like the amount of asbestos in the dust? That's not what Tyndall lighting does, correct?

A. Correct.

B469.

Moreover, plaintiffs' expert could not recall a "notable difference" in how the smoke looked when firing Remington shells *without* asbestos-containing basewads:

Q. Now, you also fired off some Remington shells that did not contain asbestos base wads, correct?

A. That's correct.

Q. You didn't videotape that though, did you?

A. No. Those were just for baseline air samples.

Q. Okay. The smoke looked the same?

A. *I don't recall there being a notable difference*, but I can't tell you from memory.

B469-70 (emphasis added).

Apparently hoping that this Court will attribute more significance to specially lit photos of gunsmoke than plaintiffs' own expert's concessions will permit, plaintiffs omit these details from their brief.

ARGUMENT

I. PLAINTIFFS' LEGAL CAUSE EVIDENCE WAS INSUFFICIENT.

Plaintiffs agree that, under Illinois law, it was plaintiffs' burden to prove both (1) legal cause, and (2) cause-in-fact. AB 32. As to "legal cause," plaintiffs' arguments do not change the conclusion that plaintiffs did not present sufficient evidence at trial.

First, as set forth in Remington and DuPont's opening brief, plaintiffs were required to show that defendants knew or should have known "that shotgun shells containing basewads with encapsulated asbestos would likely cause mesothelioma in recreational hunters." OB 2; *see also* OB 16 (citing *Lee v. Chi. Transit Auth.*, 605 N.E.2d 493, 503 (Ill. 1992)). Plaintiffs' answering brief does not meaningfully contend that the trial evidence met this burden.

Instead, plaintiffs dispute the legal standard. Plaintiffs assert that "the focus" for establishing legal cause in asbestos cases is on whether a defendant knew or "should have known that its asbestos product could potentially release asbestos-containing dust, a known hazard[.]" AB 39-40; *see also* AB 34 (arguing that "in asbestos cases, the 'danger' is the propensity of an asbestos product to release dust").

Plaintiffs are incorrect. In *Lee* (cited at OB 16), the Illinois Supreme Court held that: "Legal cause 'is essentially a question of foreseeability: a negligent act is a proximate cause of an injury if *the injury* is of a type which a reasonable man

would see as a *likely result* of his conduct.” 605 N.E. 2d at 503 (citation omitted) (emphasis added). As the Illinois Supreme Court further stated in *Lee*, legal cause turns on whether it was “foreseeable that injury *would result* if the warnings were inadequate.” *Id.* (emphasis added). Under *Lee*, the “legal cause” inquiry is whether the injury—mesothelioma—would be seen by a reasonable person as “likely” and whether it was foreseeable that the injury “would result”—not whether the product “could potentially release” asbestos.

Plaintiffs’ answering brief does not even discuss *Lee*. Nor do plaintiffs directly cite anything in support of their claimed standard. In fact, the cases cited in plaintiffs’ legal cause section largely do not even concern legal cause. *See Woodill v. Parke Davis & Co.*, 402 N.E.2d 194 (Ill. 1980) (cited at AB 34) (addressing “duty,” not legal cause); *Wehmeier v. UNR Indus., Inc.*, 572 N.E.2d 320 (Ill. App. Ct. 1991) (cited at AB 40) (cause-in-fact case); *Tragarz v. Keene Corp.*, 980 F.2d 411 (7th Cir. 1992) (cited at AB 40) (cause-in-fact case); *Startley v. Welco Mfg. Co.*, 78 N.E.3d 639, 647 (Ill. App. Ct. 2017) (cited at AB 40) (cited page addresses “substantial factor” and “frequency, proximity, and regularity” tests—i.e., “cause-in-fact,” not “legal cause”). And plaintiffs’ citation to *Johnson v. Edward Orton, Jr. Ceramic Foundation*, 71 F.4th 601 (7th Cir. 2023), expressly states that “the inquiry” is “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” (AB 34 (quoting 71 F.4th at 610) (emphasis added))—i.e., “the product” and not generic “asbestos dust.” The standard for legal cause set forth in defendants’ opening brief, drawn directly from the Illinois Supreme Court’s “likely result” and “would result” language in *Lee*, is correct.

Second, plaintiffs claim that *McKinney v. Hobart Bros. Co.*, 127 N.E.3d 176 (Ill. App. Ct. 2018), holds that establishing legal cause merely requires a plaintiff to present evidence that the product manufacturer knew, or should have known, that its product could “release asbestos.” AB 36. But plaintiffs mischaracterize *McKinney*:

What Plaintiffs Claim About <i>McKinney</i>	What <i>McKinney</i> Actually Holds
“Trial evidence <i>established that it was ‘physically impossible’</i> for respirable asbestos to escape from the flux of the welding rods” that were at issue in the case. AB 35 (emphasis added)	“[W]e find no abuse of discretion in the admission of Frank’s testimony that defendant’s welding rods <i>could release</i> respirable asbestos fibers when ‘properly manipulated.’ ... So, we <i>disagree</i> with defendant that the record lacked <i>any</i> competent evidence that defendant’s welding rods were capable of releasing asbestos.” 127 N.E.3d at 184, 186 (bold emphasis added)

Notwithstanding “competent evidence” that the welding rods at issue in *McKinney* “could release respirable asbestos”—and undisputed industry knowledge ““of the

dangerous propensity of raw asbestos” (127 N.E.3d at 187, 190 (citation omitted))—the *McKinney* court still overturned the jury verdict for the plaintiff based on insufficient evidence of legal cause.

That is because “legal cause” does not turn on whether the defendant knew or should have known of the danger of “asbestos” or “asbestos dust” generally. It turns on *the product* at issue. As the Illinois appellate court explained: “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 (emphasis in original; internal citations omitted). Even with competent evidence of asbestos release from the welding rods, *McKinney* still found insufficient evidence of legal cause. So too here. Whether welding rods or shotgun shell basewads, the law is the same: standing alone, evidence that the product “could release” asbestos is not sufficient to establish legal cause.

Third, plaintiffs assert that the court in *Daniels v. ArvinMeritor, Inc.*, 146 N.E.3d 655, 677 (Ill. App. Ct. 2019), found “evidence of defendant’s direct knowledge to be sufficient to establish a duty to warn, notwithstanding any evidence regarding the state of the art.” AB 37 (citing 146 N.E.3d at 677). Plaintiffs mischaracterize *Daniels*. The issue on appeal in *Daniels* was whether “the trial court erred when it failed to accept [defendant’s] nonpattern jury instruction” regarding

state of the art. *Daniels*, 146 N.E.3d at 675. The *Daniels* court's ruling regarding the jury instruction was thus not a ruling about sufficiency of the evidence at all.

Finally, plaintiffs' citation of generic lab notebook references to "dusting tests" or a patent filing's discussion of reducing "dusting" (AB 38-39) says nothing about *asbestos* in the dust, and plaintiffs cite no evidence establishing that these references had anything to do with asbestos, let alone that they signal concerns about health effects resulting from exposure to such "dusting" through recreational hunting. Nor do protective steps taken at the Remington factory to reduce employee occupational exposure in an indoor setting where raw asbestos was processed (AB 39) using "hundreds of tons of asbestos per year" and producing "up to 600,000 asbestos-containing shotgun shells every day" (AB 13) provide evidence of "direct or indirect knowledge" of danger to recreational hunters outdoors. Plaintiffs identify no trial evidence equating manufacturing conditions at the plant with recreational outdoor use of finished shells.

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

Plaintiffs' answering brief also does not change the conclusion that they did not present sufficient evidence to establish "cause-in-fact" at trial.

First, plaintiffs note that "Illinois courts do not require a finding of the *exact quantity* of asbestos fibers a decedent was exposed to." AB 44 (emphasis added). But defendants never disputed that. *See, e.g.*, OB 29 ("[Q]uantification of the exact number of fibers released by a product is not necessary for a finding of liability under Illinois law[.]").

Rather, defendants' argument is based on Illinois law holding that, to establish "cause-in-fact" under the "'frequency, regularity, and proximity' test," 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." OB 25 (citing *Krumwiede v. Tremco, Inc.*, 148 N.E.3d 764, 781-82 (Ill. App. Ct. 2020)). Using that correct test, the trial evidence was insufficient to establish cause-in-fact.

This case involves recreational use of a product, outdoors, with a dose—even using highly conservative assumptions—lower than background urban air levels. As set forth in defendants' opening brief, none of plaintiffs' experts opined that Mr. Schoepke actually inhaled asbestos. OB 9-11, 25. Notably, plaintiffs had an

industrial hygienist expert who could have estimated Mr. Schoepke's inhalation levels, but plaintiffs chose not to call him. OB 10, 28. Plaintiffs do not dispute this, but instead argue that the jury could nonetheless "infer inhalation." AB 46. "Infer[ing]" inhalation or more than minimum contact did not prevent the courts from reversing jury verdicts for the plaintiffs in *McKinney*, *Krumwiede*, and *Nemeth*. The result here should not be different.

The cases plaintiffs cite in support of their argument that the trial record was sufficient to establish cause-in-fact only underscore the, at best, *de minimis* release of asbestos fibers here. *See, e.g., Thacker v. UNR Indus., Inc.*, 603 N.E.2d 449, 452-53, 457 (Ill. 1992) (cited at AB 41-43) (occupational, employee exposure at indoor plant during year in which "at least 75 tons of defendant's raw asbestos was processed at the plant" in a job that included "opening bags of asbestos"); *Johnson v. Owens-Corning Fiberglas Corp.*, 729 N.E.2d 883, 885-86 (Ill. App. Ct. 2000) (cited at AB 41-43) (occupational, employee exposure at indoor plant involving multiple asbestos products, including "external pipe insulation" containing friable asbestos that "emitted substantial amounts of dust" simply from being "removed from its packaging"); *Wehmeier v. UNR Indus., Inc.*, 572 N.E.2d 320, 324-25 (Ill. App. Ct. 1991) (cited at AB 43) (occupational, employee exposure at plant where "asbestos blankets, ropes, and pipe covering were made" and in which plaintiff worked in "one big room, long and narrow" in which "asbestos ... was ground up"

and “there were 10 different machines in the plant that worked with asbestos and each one gave off dust”); *Tragarz v. Keene Corp.*, 980 F.2d 411, 415, 417 (7th Cir. 1992) (cited at AB 43) (occupational, employee exposure of sheet-metal worker who “worked alongside insulators” such that the “record is replete with evidence that [plaintiff] was sometimes covered with asbestos dust during his work”). The facts of those cases are nothing like this one.

Second, plaintiffs again mischaracterize *McKinney*, asserting that “[f]atally, plaintiff did not present any substantive evidence at trial that defendant’s asbestos-containing welding rods were capable of releasing dust under any circumstances.” AB 44. As noted above, *McKinney* held the opposite, “find[ing] no abuse of discretion in the admission of [Dr.] Frank’s testimony that defendant’s welding rods *could release respirable asbestos fibers* when ‘properly manipulated’” (127 N.E.3d at 184 (emphasis added)). The court thus “*disagree[d]* with defendant that the record lacked *any* competent evidence that defendant’s welding rods were capable of releasing asbestos.” *Id.* at 186 (first emphasis added).

Despite the “competent evidence” that the product “could release respirable asbestos fibers,” the *McKinney* court still found insufficient evidence to establish cause-in-fact. *Id.* at 186-87. *McKinney* 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.* at 193. So too here.

Plaintiffs also try to distinguish *Krumwiede*, 148 N.E.3d 764, on the ground that “again, there was no evidence in the trial record showing when and under what circumstances defendant’s asbestos product released respirable asbestos fibers.” AB 45. In fact, the *Krumwiede* court expressly found that “there was sufficient evidence presented from which the jury could determine that Tremco’s 440 Tape and Mono caulk *were capable of releasing asbestos fibers.*” 148 N.E.3d at 779-80 (emphasis added). *Krumwiede* nonetheless held that “our determination that the record contains sufficient evidence to support a finding that Tremco’s products were *capable* of releasing asbestos fibers does not end our inquiry” and that the evidence was not sufficient to establish cause-in-fact. *Id.* at 780, 785.

Finally, regarding *Nemeth v. Brenntag North America*, 194 N.E.3d 266 (N.Y. 2022) (discussed at OB 27-28), plaintiffs claim that “[u]nderstanding that Illinois case law does not support their argument, Defendants urge this Court to apply New York law instead.” AB 47. Defendants made no such argument; defendants’ position is based on controlling Illinois authority.¹ Defendants cite

¹ See, e.g., OB 2 (discussing “governing Illinois law”); OB 3 (“Under Illinois law ...”); OB 6 (same); OB 8 (“Illinois law required ...”); OB 15 (Question Presented section “under Illinois law”); OB 21 (relying on “Illinois law as expressed

Nemeth as additional persuasive authority from the highest court of a sister State. *Cf. People ex rel. Latimer v. Bd. of Educ. of Chi.*, 68 N.E.2d 305, 309 (Ill. 1946) (stating that a New York Court of Appeals decision considering “striking[ly] similar[.]” facts and questions “must be held at least persuasive authority by this court”); *Bizarro v. Ziegler*, 627 N.E.2d 122, 125 (Ill. App. Ct. 1993) (“we find the New York Court of Appeals’ decision ... persuasive”). Alongside the multiple other authorities defendants cite, *Nemeth* is appropriate for this Court to consider as persuasive authority.

in *McKinney*”); OB 24 (Question Presented section “under Illinois law”); OB 29 (argument “[a]pplying Illinois law”).

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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