No. 103137

In The Supreme Court of Illinois

SALLY NOLAN, as Executrix of the Estate of CLARENCE NOLAN Plaintiff-Appellee, v. WEIL-MCLAIN Defendant-Appellant.	Appeal from a Decision of the Appellate Court of Illinois, Fourth Judicial District No. 4-05-0328 There heard on appeal from the Circuit Court for the Fifth Judicial Circuit Vermilion County, Illinois No. 01-L-117 Trial Judge: The Honorable Craig de Armond

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE ILLINOIS CHAMBER OF COMMERCE, CERTAINTEED CORP., EXXON MOBIL CORP., GENERAL ELECTRIC CO., GEORGIA-PACIFIC LLC AND UNION CARBIDE CORP. AS AMICI CURIAE IN SUPPORT OF APPELLANT

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POINTS AND AUTHORITIES

Page

ARGUMENT 3

I. INTRODUCTION 3

Lipke v. Celotex Corp., 153 Ill. App. 3d 498 (1st Dist. 1987), appeal dismissed, 536 N.E.2d 71 (Ill. 1989) 3-5

Kochan v. Owens-Corning Fiberglass Corp., 242 Ill. App. 3d 781 (5th Dist. 1993) 4

Spain v. Owens Corning Fiberglass Corp., 304 Ill. App. 3d 356 (4th Dist. 1999) 4

II. THE PRINCIPAL CONCEPTUAL UNDERPINNING OF THE *LIPKE* RULE – THAT IT IS IMPOSSIBLE TO KNOW WHICH EXPOSURE TO ASBESTOS IS A SUBSTANTIAL CONTRIBUTING FACTOR – IS WRONG AS A MATTER OF LAW AND SCIENCE 5

Kochan v. Owens-Corning Fiberglass Corp., 242 Ill. App. 3d 781 (5th Dist. 1993) 5

Spain v. Owens Corning Fiberglass Corp., 304 Ill. App. 3d 356 (4th Dist. 1999) 5

Lipke v. Celotex Corp., 153 Ill. App. 3d 498 (1st Dist. 1987), appeal dismissed, 536 N.E.2d 71 (Ill. 1989) 5

Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986) 5

Thacker v. *UNR Indus., Inc.* 151 Ill. 2d 343 (1992) 6

A. *Kochan* And Its Progeny, Including the Fourth District's Opinion Below, Are Based On Demonstrably False Legal Assumptions And Internally Inconsistent Reasoning 6

Kochan v. Owens-Corning Fiberglass Corp., 242 Ill. App. 3d 781 (5th Dist. 1993) 6

Lipke v. Celotex Corp., 153 Ill. App. 3d 498 (1st Dist. 1987), appeal dismissed, 536 N.E.2d 71 (Ill. 1989) 6, 7

POINTS AND AUTHORITIES

Page

Spain v. Owens Corning Fiberglass Corp.,
304 Ill. App. 3d 356 (4th Dist. 1999)....6

Nolan, 365 Ill. App. 3d at 965....6

B. The *Lipke* Rule, As Expanded By *Kochan* And *Spain*, Misconstrues The *Lohrmann/Thacker* Test To Wrongly Create A Judicial Presumption Of Proximate Cause....7

Lipke v. Celotex Corp., 153 Ill. App. 3d 498 (1st Dist. 1987),
appeal dismissed, 536 N.E.2d 71 (Ill. 1989)....7, 10

Kochan v. Owens-Corning Fiberglass Corp.,
242 Ill. App. 3d 781 (5th Dist. 1993)....7, 8

Lohrmann v. Pittsburgh Corning Corp.,
782 F.2d 1156 (4th Cir. 1986)....8, 10

Thacker v. *UNR Indus., Inc.* 151 Ill. 2d 343,
603 N.E.2d 449 (1992)....8-10

Nolan, 365 Ill. App. 3d at 968....8, 9

Spain v Owens Corning Fiberglass Corp.,
304 Ill. App. 3d 356 (4th Dist. 1999)....8

Johnson v. Owens-Corning Fiberglass Corp.,
284 Ill. App. 3d 669 (3rd Dist. 1996)....8

735 ILCS 5/2-1001....9

735 ILCS 5/2-1202....9

Pedrick v. Peoria & Eastern R.R. Co.,
37 Ill. 2d 494 (1967)....9

Cleary & Graham, Handbook of Illinois Evidence § 301.4
(7th ed. 1999)....9

Robert S. Hunter, Trial Handbook for Illinois Lawyers-Civil
§ 14.4 (7th ed. 1997)....9

Leonardi v. Loyola Univ. of Chicago,
168 Ill. 2d 83 (1995)....9

POINTS AND AUTHORITIES

Page

C. **The *Lipke* Rule Is Based On A Scientifically Unsupported Presumption of Negligence And Improperly Excludes Relevant Scientific Evidence** 11

Lipke v. Celotex Corp., 153 Ill. App. 3d 498 (1st Dist. 1987), appeal dismissed, 536 N.E.2d 71 (Ill. 1989) 11

Kochan v. Owens-Corning Fiberglass Corp., 242 Ill. App. 3d 781 (5th Dist. 1993) 11

1. **As The Trial Court Correctly Noted, No Scientific Evidence Supports The Theory That It Is Impossible Rule Out A Specific Exposure Or Exposures As A Substantial Contributing Cause Of Disease** 11

Kochan v. Owens-Corning Fiberglass Corp., 242 Ill. App. 3d 781 (5th Dist. 1993) 11

Lipke v. Celotex Corp., 153 Ill. App. 3d 498 (1st Dist. 1987), appeal dismissed, 536 N.E.2d 71 (Ill. 1989) 11, 13

Nolan v. Weil-McClain, 2005 WL 724041, at *31, *34 (Vermilion County Cir. Ct. Mar. 21 2005) 11-13

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) 13

Vogelsberger v. Owens-Illinois, Inc., 2006 WL 2404008 (Pa. Ct. Com. Pl. Aug. 17, 2006) 13

2. **Substantial Scientific Evidence Establishes That Different Exposures Carry Different Risks, Permitting Experts To Rule Out Certain Exposures As Causal** 14

Kochan v. Owens-Corning Fiberglass Corp., 242 Ill. App. 3d 781 (5th Dist. 1993) 14, 16

Nolan v. Weil-McClain, 2005 WL 724041, at *31, *34 (Vermilion County Cir. Ct. Mar. 21 2005) 14, 21

Thacker v. *UNR Indus., Inc.* 151 Ill. 2d 343, 603 N.E. 2d 449 (1992) 14, 15

Wehmeier v. UNR Indus., Inc., 213 Ill. App. 3d 6 (4th Dist. 1991) 14

POINTS AND AUTHORITIES

Page

Leng v. Celotex Corp.,
196 Ill. App. 3d 647 (1st Dist. 1990) 14

Harashe v. Flintkote Co.,
848 S.W.2d 506 (Mo. Ct. App. 1993) 15

Donaldson v. Central Ill. Pub. Serv. Co.,
199 Ill. 2d 63 (2002) 15

Lipke v. Celotex Corp., 153 Ill. App. 3d 498 (1st Dist. 1987),
appeal dismissed, 536 N.E.2d 71 (Ill. 1989) 16

Spain v. Owens Corning Fiberglass Corp.,
304 Ill. App. 3d 356 (4th Dist. 1999) 16

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EPA # 9345.4-06, at p. ii (USEPA, 2003) 16, 17

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29 CFR § 1910.1001 App. A 18

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NIOSH Manual of Analytical Methods 4th Ed. (1994) 18

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National Cancer Institute, *FactSheet Asbestos Exposure: Questions and Answers* (2003) 19, 20

Camus M., *et al.*, *Nonoccupational exposure to chrysotile asbestos and the risk of lung cancer*, 338 New Eng. J. Med., No. 22, 1565 (1998) 20

POINTS AND AUTHORITIES

Page

Camus, *et al.*, *Risk of mesothelioma among women living near chrysotile mines versus USEPA asbestos risk model: preliminary findings*, 46 Ann. Occup. Hyg. (Supp. 1) 95-98 (2002) 21

Case, B.W., *et al.*, *Preliminary findings for pleural mesothelioma among women in the Quebec chrysotile mining regions*, 46 Ann. Occup. Hyg., 128-131 (2002) 21

Price & Ware, *Mesothelioma trends in the United States: an update based on the Surveillance, Epidemiology and End Results program data from 1973 through 2003*, 159, Am. J. Epidemiology, (2) 107 (Jan. 15, 2004) 22

ATSDR *World Trade Center Fact Sheet*, Department of Health & Human Services, Agency for Toxic Substances and Disease Registry, Washington, D.C. (2006) 22, 23

USEPA *EPA-OSHA Fact Sheet: Environmental information from lower Manhattan for Residents, Area Employees, and Local Business Owners – Data Through September 30, 2001* (2001) 23

3. The *Lipke* Rule Improperly Excludes Admissible Scientific Evidence 24

Lipke v. Celotex Corp., 153 Ill. App. 3d 498 (1st Dist. 1987), appeal dismissed, 536 N.E.2d 71 (Ill. 1989) 24-26

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) 24, 26

Donaldson v. Central Ill. Pub. Serv. Co., 199 Ill. 2d 63 (2002) 24, 26

Wilson v. Clark, 84 Ill. 2d 186 (1981) (adopting F.R.E. 703, 705) 25, 26

Leonardi v. Loyola Univ. of Chicago, 168 Ill. 2d 83 (1995) 25

Nolan I, No. 01-L-117, 2005 WL 724041, *14, *16 26

POINTS AND AUTHORITIES

Page

III. THE ILLINOIS APPELLATE APPEARS TO BE ALONE IN CREATING A SPECIAL RULE FOR ASBESTOS THAT PROHIBITS OTHER-CAUSE EVIDENCE 26

Thacker v. *UNR Indus., Inc.*
151 Ill. 2d, 603 N.E.2d 449 (1992) 26, 27

Nolan, 365 Ill. App 3d at 974 .... 27, 28

AC and S, Inc. v. Asner,
686 A.2d 250 (Md. Ct. App. 1996) 27

O'Connor v. Raymark Industries, Inc.,
518 N.E.2d 510 (Mass. 1988) 27

Laney v. Celotex Corp.,
901 F.2d 1319 (6th Cir. 1990) 27, 28

Fibreboard Corp. v. Pool, 813 S.W.2d 658
(Tex. App. 1991), *cert. denied*, 509 U.S. 923 (1993) 28

Lipke v. Celotex Corp., 153 Ill. App. 3d 498 (1st Dist. 1987),
appeal dismissed, 536 N.E.2d 71 (Ill. 1989) 28

IV. RATIFICATION OF THE *LIPKE* RULE WILL EXACERBATE ILLINOIS' STATUS AS A MAGNET FOR NATIONAL ASBESTOS LITIGATION 29

Judicial Conference Ad Hoc Committee on Asbestos Litigation,
Report to the Chief Justice of the United States And Members of the Judicial Conference of the United States 2 (Mar. 1991) 29

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 29

The Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve The Asbestos Litigation Crisis*, Vol. 6, No. 6
(Nat'l Legal Center for the Pub.
Interest monograph) (June 2002) 29

Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001) 29

POINTS AND AUTHORITIES

Page

Stephen Carroll, *et al.*, *Asbestos Litigation*, 109-10 (Rand Institute for Civil Justice 2005) 29, 30, 32

Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383 (1993) 30

Lipke v. Celotex Corp., 153 Ill. App. 3d 498 (1st Dist. 1987), appeal dismissed, 536 N.E.2d 71 (Ill. 1989) 30, 31, 32

Bureau of the Census, 2000 Census 31

In re: The Flintkote Co., No. 1:04-BK-11300 (D.Del.) (filed May 1, 2004) 31

John Flynn Rooney, *Circuit Court Gets More Asbestos Cases*, 151 Chicago Daily Law Bulletin 1 (2005) 31

Kochan v. Owens-Corning Fiberglass Corp., 242 Ill. App. 3d 781 (5th Dist. 1993) 31, 32

Spain v. Owens Corning Fiberglass Corp., 304 Ill. App. 3d 356 (4th Dist. 1999) 32

Crawford v. AC&S Inc., No. 01-L-781 32

CONCLUSION 33

Pursuant to Illinois Supreme Court Rule 345(a), the Chamber of Commerce of the United States of America ("U.S. Chamber"), Illinois Chamber of Commerce ("Illinois Chamber"), CertainTeed Corp. ("CertainTeed"), Exxon Mobil Corp. ("Exxon"), General Electric Co. ("GE"), Georgia-Pacific LLC ("GP") and Union Carbide Corp. ("UCC") file this brief as *amici curiae* in support of appellant in the above-entitled case.

INTEREST OF THE AMICI CURIAE

CertainTeed, Exxon, GE, Georgia-Pacific Corp. and UCC have each defended hundreds of civil lawsuits in Illinois alleging personal injury from exposure to asbestos. CertainTeed, Exxon, GE, GP and UCC are each currently defending dozens, if not hundreds of such suits in Illinois. In fact, since February 2001, CertainTeed, GE, Georgia-Pacific Corp. and UCC have been sued more frequently in Illinois than any other state in the nation for claims involving mesothelioma, the disease at issue in this case. CertainTeed, Exxon, GE, GP and UCC will likely defend dozens, if not hundreds, more Illinois asbestos suits in the future. The issue presented by this case – *i.e.,* whether defendants in Illinois asbestos cases are subject to a special rule that prohibits them from introducing evidence that asbestos attributable to an entity not at trial caused the plaintiff's injury – is vital to every one of the cases. How the Court resolves the issue will, by operation of *stare decisis*, materially affect CertainTeed's, Exxon's, GE's, GP's and UCC's direct interest in pending and future suits by determining whether they have the same right as defendants in non-asbestos Illinois tort suits, and defendants in the rest of the United States in asbestos and non-asbestos tort suits alike, to introduce evidence that someone or something else caused a plaintiff's injury.

The U.S. Chamber is the world's largest business federation. The U.S. Chamber represents an underlying membership of nearly three million businesses and organizations of every size, in every business sector, and from every region of the country, including over 4,000 U.S. Chamber federation members in the State of Illinois. An important function of the U.S. Chamber is to represent the interests of its members in court on issues of concern to the business community. The U.S. Chamber, individually and on behalf of its members, has a continuing interest in the just and fair resolution of the asbestos crisis.

Similarly, the Illinois Chamber promotes the interests of Illinois business by educating and persuading the public and the government regarding the ramifications of policies to the business community in order to promote prosperity and opportunity for the citizens of Illinois. The Illinois Chamber has nearly three 2,500 members, including seventy statewide and regional organizations, as well as, over 200 local chambers of commerce and 100 associations. The Illinois Chamber members and affiliations rely upon the organization to provide information and insight regarding Illinois laws, regulations, legal proceedings and public policy initiatives that affect their businesses and affiliates. Collectively, the Illinois Chamber federation of business organizations covers all 102 Illinois counties and reaches nearly 100,000 employers.

The U.S. Chamber and the Illinois Chamber of Commerce have a unique perspective and information beyond the scope of what the lawyers for the parties will provide, particularly with respect to the manner in which application of the *Lipke* Rule harms Illinois businesses, attracts asbestos claimants to file their claims in Illinois, and hurts Illinois' reputation for administering a fair and reasonable tort system.

ARGUMENT

I. INTRODUCTION

The *Lipke* Rule is a judicially created evidentiary rule, seemingly unique to Illinois, that precludes defendants in asbestos cases from introducing evidence of a plaintiff's exposure to products manufactured by others that are not present at the time of trial. Under the *Lipke* Rule, if the evidence creates a jury question that the plaintiff was exposed to the defendant's product, the court presumes as a matter of law that such exposure caused the plaintiff's injury, and any evidence that another exposure caused the injury is deemed irrelevant and inadmissible.

The genesis of the *Lipke* Rule is a single paragraph in a 1987 First District case stating that a manufacturer of asbestos products that was guilty of negligently causing the plaintiff's injury could not escape liability by introducing evidence of exposure to the products of entities no longer parties to the litigation. *Lipke v. Celotex Corp.*, 153 Ill. App. 3d 498 (1st Dist. 1987), appeal dismissed, 536 N.E.2d 71 (Ill. 1989) (dismissed because, after two members of the court recused themselves, the court could not "secure the constitutionally required concurrence of four Judges for a decision…"). The *Lipke* court held that once it had been proven that a defendant's negligence proximately caused the plaintiff's harm, evidence that another's negligence might also have been a proximate cause was irrelevant and, therefore, properly excluded if its purpose was to foist off liability on a concurrent tortfeasor. *Lipke*, 153 Ill. App. 3d at 509. In subsequent years, the *Lipke* holding that other exposure evidence was irrelevant where proximate cause had been proven was expanded by two Illinois appellate courts to exclude evidence of other exposures, even when proximate cause had not yet been proven and remained contested.

See *Kochan v. Owens-Corning Fiberglass Corp.*, 242 Ill. App. 3d 781 (5th Dist. 1993), and *Spain v. Owens Corning Fiberglass Corp.*, 304 Ill. App. 3d 356 (4th Dist. 1999).

The practical effect of the *Lipke* Rule is that, even where, as in this case, the plaintiff proceeds against a single defendant and there is abundant evidence that the plaintiff was exposed to multiple asbestos-containing products unrelated to that defendant,[1] the jury is presented with the following syllogism: (i) the plaintiff suffers from incurable mesothelioma; (ii) the only known cause of mesothelioma is exposure to asbestos; and (iii) the plaintiff was exposed to an asbestos-containing product sold by the defendant and no other. As a result, the jury is misled, as it was in the trial below, into believing, contrary to the undisputed facts, that the only possible explanation for the plaintiff's disease is exposure to the defendant's product. The defendant is thereby deprived of its ability to present a principal defense: that its asbestos did not cause plaintiff's injury but rather, plaintiff's exposure to other asbestos did.

Because we are mindful of this Court's admonition that *amicus* briefs should not merely rehash the arguments of the merits brief, we do not focus here on the application of the *Lipke* Rule to the narrow facts of this case. Rather, our focus is on the larger impact of the *Lipke* Rule on *all* defendants: the pernicious effect of adopting by judicial fiat a doctrine with no support in logic, law or science; the deleterious affect of excluding sound science – and particularly developments in the science of relative risk subsequent to *Lipke* and its progeny – from the courtroom; the unfairness of depriving

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[1] This evidence often relates to manufacturers of dusty insulation products of the type identified as causes of asbestos-related diseases, virtually all of which are bankrupt, and many of which do not exist as viable sources of recovery for plaintiffs.

Illinois asbestos defendants of the right, available to asbestos defendants elsewhere, to introduce evidence that someone or something else was the sole proximate cause of plaintiff's injury; and the resulting mass influx of the most serious asbestos cases to Illinois to take advantage of the crippling effect of the *Lipke* Rule on defense of asbestos litigation in this state. Thus, while we inevitably touch on the facts below to illustrate the infirmities of the *Lipke* Rule, we devote the vast majority of our brief to facts and issues not treated in the merits brief and critical to understanding the larger impact of the *Lipke* Rule on asbestos litigation in this state.

II. THE PRINCIPAL CONCEPTUAL UNDERPINNING OF THE *LIPKE* RULE – THAT IT IS IMPOSSIBLE TO KNOW WHICH EXPOSURE TO ASBESTOS IS A SUBSTANTIAL CONTRIBUTING FACTOR – IS WRONG AS A MATTER OF LAW AND SCIENCE.

In *Kochan*, cited with approval in *Spain* and by the Fourth District below, the Fifth District expanded the *Lipke* Rule, in principal part, on the ground that:

> Our courts recognize that it is impossible to determine whether a specific exposure or even several exposures to a particular asbestos product caused or contributed to the cause of the injury. On the other hand, it is equally impossible to find that a specific exposure or several exposures did not cause or contribute to the injury.

Kochan, 242 Ill. App. 3d at 790.

Because of this supposed impossibility of determining which asbestos exposures, among many, was a substantial contributing cause of plaintiff's injury, *Kochan* and its progeny, including the Fourth District below, substituted a judicially created presumption that evidence meeting the test for summary judgment or directed verdict, articulated in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986) and adopted by

this Court in *Thacker* v. *UNR Indus., Inc.* 151 Ill. 2d 343 (1992), presumptively constituted proximate cause of plaintiff's injury. This reasoning should be rejected because it is based on demonstrably false legal principles, internally inconsistent reasoning and a fundamental misunderstanding of the well-developed science of relative risk in the asbestos context.

A. *Kochan* And Its Progeny, Including The Fourth District's Opinion Below, Are Based On Demonstrably False Legal Assumptions And Internally Inconsistent Reasoning.

The first problem with *Kochan* and its progeny is that they proceed from mutually exclusive legal principles. On the one hand, for purposes of justifying the *Lipke* Rule, they bar the jury from hearing evidence that plaintiff was exposed to other asbestos products on the supposed ground that it is "impossible to determine whether a specific exposure or several exposures to a particular asbestos product caused or contributed to the cause of the injury." See, *e.g.*, *Kochan*, 242 Ill. App. 3d at 790. On the other hand, in response to defendants' argument that this judicial "presumption" deprives defendants of the right to contest proximate causation, in derogation of settled common law principles, these same courts, in these same opinions, reverse course and insist that juries are perfectly competent to determine whether a particular exposure or exposures is a proximate cause of plaintiff's injury. For example, the Fourth District reasoned below, citing *Kochan* and *Spain*, that the defendant could show that a particular exposure was not a substantial contributing cause of plaintiff's injury (despite having reasoned a few paragraphs previously that such a finding was impossible) by "proving (i) decedent was not exposed to its product, (ii) his exposure was insufficient to cause injury, or (iii) its product contained too low an amount of asbestos to be hazardous." *Nolan,* 365 Ill. App. 3d at 965; see also, *Spain*, 304 Ill. App. 3d at 365 (same); *Kochan*, 242 Ill. App. 3d at 790

(defendant could have "negated liability" by showing, *inter alia*, that the plaintiff's exposure to its product was insufficient to cause the injury or that its product contained such a low amount of asbestos that it could not have caused the harm.)

The arguments of the courts propounding the *Lipke* Rule thus proceed on inconsistent, and indeed materially exclusive assumptions. While they purport to find, in the context of justifying the *Lipke* Rule, that it is impossible to sort out which among many exposures is a substantial contributing cause, they recognize for all other purposes, that juries are perfectly competent to resolve the proximate cause issue and to eliminate those exposures that are "insufficient to cause injury." But once it is conceded that *it is possible* to determine whether an asbestos exposure or exposures caused or contributed to the cause of injury, the conceptual foundation of the *Lipke* Rule collapses. There is no logical reason why depriving juries of critical evidence of a plaintiff's other exposures should facilitate fair resolution of proximate cause issues. Conversely, there is every reason to believe that providing such evidence would assist them in their deliberations. Indeed, there is something perverse about propounding a rule, ostensibly in the name of responding to the difficulty of resolving issues of proximate cause in asbestos litigation, that geometrically heightens that difficulty by depriving juries of critical evidence of other exposures and misleading them (as the jury in this case was misled) into believing that the only explanation for the plaintiff's injury is exposure to the defendant's product.

B. The *Lipke* Rule, As Expanded By *Kochan* And *Spain*, Misconstrues The *Lohrmann/Thacker* Test To Wrongly Create A Judicial Presumption Of Proximate Cause.

Having improperly promulgated the fiction, for purposes of justifying the *Lipke* Rule, that juries are incapable of resolving the issue of proximate cause, *Kochan* and its progeny compounded the error by adopting a judicial presumption, supposedly based on

Lohrmann and *Thacker*, that if the plaintiff met the test set forth in those cases for summary judgment or directed verdict, the court should *presume* that exposure to the defendant's product was a substantial contributing cause of plaintiff's injury. As the Fourth District explained this presumption in its opinion below, in order to respond to "the difficulty in determining whether a specific asbestos exposure caused or contributed to a person's asbestos-induced injury or death ... the supreme court adopted the 'frequency, regularity and proximity' or *'de minimis,'* test in *Thacker*, 151 Ill. 2d 334, 359, 603 N.E. 2d 449, 457 (1992)." *Nolan*, 365 Ill. App. 3d at 968; see also, *Spain*, 304 Ill. App. 3d at 364-65, citing *Kochan*, 242 Ill App. 3d at 790. The Fourth District went on to explain that, in Illinois, "[o]nce a plaintiff satisfies the *Thacker* test, a defendant is presumed to be a proximate cause of a decedent's asbestos injury ... requir[ing] the trier of fact to independently [of evidence of other exposures] evaluate whether the exposure was a substantial factor in causing decedent's injury, thereby making evidence of other asbestos exposures irrelevant." *Nolan*, 365 Ill. App. 3d at 968.

The first problem with this analysis is that it completely misconstrues the *Lohrmann/Thacker* test. *Thacker* adopted *Lohrmann* and articulated the standard that a plaintiff must meet to create a jury issue as to whether a particular exposure could survive a motion for directed verdict. The same test applies at the summary judgment stage. *Johnson v. Owens-Corning Fiberglass Corp.*, 284 Ill. App. 3d 669, 671 (3rd Dist. 1996) ("We ... hold that the *Lohrmann* 'frequency, regularity and proximity' test for asbestos product exposure applies at the summary judgment stage."). But creating a jury issue is not the same as creating a judicial presumption or winning the case outright. A plaintiff must create a jury question on the issue of causation in order to avoid summary judgment,

directed verdict or judgment *n.o.v.*. 735 ILCS 5/2-1001; 735 ILCS 5/2-1202; *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494 (1967). Assuming plaintiff withstands summary judgment, directed verdict and judgment *n.o.v.* on all other elements of its cause of action, he has made a *prima facie* case. But that *does not* mean that the plaintiff prevails on the merits. Instead, the defendant must then choose whether to rest on the case made by the plaintiff or rebut that case with evidence of his own. Cleary & Graham, Handbook of Illinois Evidence § 301.4 (7th ed. 1999); Robert S. Hunter, Trial Handbook for Illinois Lawyers-Civil § 14.4 (7th ed. 1997). If the defendant elects to rebut the plaintiff's case, he is entitled to do so by any available means, including "show[ing]" any "evidence that negates causation." *Leonardi v. Loyola Univ. of Chicago,* 168 Ill. 2d 83, 94 (1995).

In *Leonardi*, this Court held, in a medical malpractice action, that where there is evidence of multiple causes of a plaintiff's injury, the defendant must be permitted to introduce evidence of other potential causes so the jury can resolve whether some other cause was, or causes were, the sole proximate cause of the injury. *Leonardi*, 168 Ill. 2d at 92, 95. The Fourth District "distinguished" *Leonardi* by holding that it did not apply to asbestos cases and that the special presumptions supposedly set forth by this court in *Thacker* for resolving issues of causation governed instead. *Nolan*, 365 Ill. App. 3d at 967-68. But this analysis misreads both *Leonardi* and *Thacker*.

Nothing in *Leonardi* suggests that asbestos cases were excluded from its reasoning. And there is nothing in *Thacker* about presuming proximate cause if the "frequency, regularity and proximity" test is met, let alone a holding that such a presumption should exclude other exposure evidence. In fact, the court in *Thacker*

admitted other exposure evidence including that: (a) the plaintiff's employer purchased considerably more raw asbestos from a third party than it did from the underlying defendant, Johns-Manville, and (b) the plaintiff's job included opening bags of the *other* supplier's raw asbestos. 151 Ill. 2d at 350, 355, 360. Likewise, the trial court in *Lohrmann,* from which *Thacker* was derived, heard evidence that the plaintiff was exposed to products of at least two parties who were not present at trial. *Lohrmann*, 782 F.2d at 1163-64. And, importantly, although the *Thacker/Lohrmann* test has been adopted in many jurisdictions around the country for surviving motions for directed verdicts, no jurisdiction of which we are aware outside of Illinois has ever interpreted it to create presumptions about proximate cause or to preclude defendant from introducing evidence at trial of other exposures. To the contrary, courts applying the *Thacker/Lohrmann* test outside of Illinois routinely permit juries to hear the evidence of other exposures that is barred by the *Lipke* Rule in Illinois.

The second problem with transforming the *Lohrmann/Thacker* test into a judicial presumption of causation is that it relies on perfectly circular logic. Under the *Lipke* Rule, the court first excludes evidence of other exposures by presuming that the defendant's product must have been a substantial contributing cause of plaintiff's injury, and then asks the jury to resolve the very causation issue it has assumed away, without permitting the jury to hear the critical evidence of other exposures necessary to fairly answer the question. Such "heads I win, tails you lose" reasoning has, to our knowledge, never been adopted outside of Illinois and has no place in the jurisprudence of this state in asbestos litigation.

C. The *Lipke* Rule Is Based On A Scientifically Unsupported Presumption Of Negligence And Improperly Excludes Relevant Scientific Evidence.

The foundation of the expanded *Lipke* Rule, as we have said, is the *Kochan* court's sweeping pronouncement that it is impossible to either determine whether a specific exposure caused or substantially contributed to plaintiff's injury, or to exclude it as such a cause. As we have also said, this finding is insupportable as a matter of law since even under the *Lipke* Rule, juries can and do determine whether particular exposures in multiple exposure cases are significant enough to be a substantial contributing cause (albeit without other exposure evidence) and juries outside of Illinois routinely resolve the proximate cause issue in multiple exposure cases (though with the benefit of other exposure evidence). As we demonstrate below, not only is the *Lipke* Rule insupportable as a matter of law, it is also irreconcilable with sound science and the principles governing its admission in Illinois trials.

1. As The Trial Court Correctly Noted, No Scientific Evidence Supports The Theory That It Is Impossible Rule Out A Specific Exposure Or Exposures As A Substantial Contributing Cause Of Disease.

If it were true, as *Kochan* found for purposes of its *Lipke* analysis, that it is impossible to rule out a specific exposure as a substantial contributing cause of an injury, then there would be no minimum threshold below which a particular exposure could be ruled out as a proximate cause. But that proposition is a creature of judicial fiat, not a conclusion supported by scientific evidence. Indeed, even the plaintiff's experts in this case openly acknowledged that the proposition is based not on affirmative scientific proof of its correctness but on the supposed *inability* to prove it wrong. *Nolan v. Weil-McLlain,* 2005 WL 724041, at *31, *34 (Vermilion County Cir. Ct. Mar. 21 2005) (*Nolan I*). In

fact, every expert to address asbestos risk in the trial court here acknowledged that there is no epidemiologic proof that low doses of asbestos, particularly chrysotile asbestos, cause mesothelioma. *Id.* at *6, *9, *18 (citing Tr. 1122, 1369-70, 1375, 1376-78, 1390, 2032-33).

As the trial court properly summarized the testimony:

> Most of the medical scientific experts testified, in one form or another that, (a) no one knows at what level of exposure any form of asbestos causes mesothelioma, (b) no one knows whether there is a minimum level of exposure; either by incident or over time, below which there is no risk of mesothelioma, (c) no studies have shown an incidence of mesothelioma occurring at levels below the minimum allowable exposure limits set by OSHA and others, (d) no studies have shown chrysotile asbestos to cause mesothelioma in humans at any level, (e) that the incidence of mesothelioma due to asbestos exposure does not follow the linear dose-response model used by OSHA since there are no known cases of mesothelioma at the very lowest levels of exposure.

Id. at *34.

To be sure, plaintiff's experts nevertheless insisted at trial "that every exposure to asbestos contributes to the development of DMM [diffuse malignant mesothelioma] ****" *Id.* at *6 (citing Tr. 1123-29). The basis for their theory, however, was not affirmative evidence but the fact that "there are no studies which show that commercial chrysotile does *not* also cause mesothelioma." *Id.* at *9 (citing Tr. 1392) (emphasis

addded). The trial court below thus properly concluded that "[t]here apparently is no scientific evidence upon which to base this assumption." *Id.* at *34. As the court went on to observe:

> It would appear that asbestos litigation may be one of the only areas where, although there is no known scientific proof for a plaintiff's claim that mesothelioma was caused by chrysotile asbestos exposure, since there are concomitantly no studies showing that it does not, that is enough to establish liability.

Id. at *32. In other words, the court presumes, for purposes of the *Lipke* Rule, that any exposure, no matter how inconsequential, can be a proximate cause of plaintiff's disease simply because there is allegedly no science proving that it could not.[2]

We think it self-evident that critical legal presumptions should not follow from the *absence* of supporting scientific evidence. Yet for purposes of determining the relevance and admissibility of "other exposure" evidence, the *Lipke* Rule adopts plaintiff's entirely speculative theory that no exposure, however small, can be ruled out as a cause of disease and rejects, as a matter of law, defendant's theory that some exposures are too insignificant to be a substantial contributing cause of disease. This would be wrong under any circumstance. It is particularly egregious here for two

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[2] Courts in other jurisdictions have actually ruled as a matter of law that testimony that every exposure, no matter how small, is a proximate cause of disease is not admissible because it fails to satisfy the *Frye* standard. See *Vogelsberger v. Owens-Illinois, Inc.*, 2006 WL 2404008 (Pa. Ct. Com. Pl. Aug. 17, 2006).

reasons. First, as we show below, there is abundant scientific evidence, and highly developed methodologies measuring relative risk, from which reasonable juries can sort out causal from non-causal exposures and eliminate insignificant exposures. Second, we are not arguing here that plaintiffs and their experts should be forbidden from arguing to the jury that even insignificant exposures could have proximately caused a plaintiff's disease. Rather, we simply argue that the issue should not be resolved by a judicial presumption with no moorings in science and that Illinois juries, like juries elsewhere in the United States, should resolve the issue only after hearing evidence of the plaintiff's entire exposure history and scientific testimony, from both sides' experts, on the relative risk of injury posed by such exposures.

2. Substantial Scientific Evidence Establishes That Different Exposures Carry Different Risks, Permitting Experts To Rule Out Certain Exposures As Causal.

Highly developed science, much of which developed after *Kochan*, now provides powerful tools to determine which exposures, among many, substantially contributed to a plaintiff's injury. The ability to parse out which exposures contribute significantly to asbestos-related disease and which do not derives from the fact that not all asbestos exposures are the same. Even plaintiff's experts below acknowledged this fact, conceding that higher doses present more risk than lower doses and that amphibole asbestos presents more risk of causing mesothelioma than chrysotile. *Nolan I*, at *3, *5, *6 (citing Tr. 828, 1074, 1123-29). Indeed, that different exposures present different risks is virtually beyond controversy, and has been acknowledged by numerous Illinois courts. See, *e.g.*, *Thacker*, 151 Ill.2d at 364; *Wehmeier v. UNR Indus., Inc.*, 213 Ill.App.3d 6, 31 (4th Dist. 1991); *Leng v. Celotex Corp.*, 196 Ill. App. 3d 647, 651 (1st

Dist. 1990) ("asbestos products vary drastically as to the risk of harm they present, partially due to the fact that there are six different types of asbestos silicates") (declining to adopt market share liability, in part on basis that different asbestos fibers have different health effects); see also *Harashe v. Flintkote Co.*, 848 S.W.2d 506, 507 (Mo. Ct. App. 1993) (noting that, while chrysotile asbestos can be dangerous to health, "it is not the cause of mesothelioma," which instead is primarily caused by the "amphibole family . . . with crocidolite the most dangerous and amosite somewhat less dangerous.").

Experts in the trial court below disagreed on the question of whether the plaintiff's minor exposure to chrysotile asbestos was a substantial contributing cause of the plaintiff's mesothelioma or whether his much greater exposure to the concededly more potent amphibole asbestos in products sold by others was the sole proximate cause of his disease. That, of course, was a dispositive question at the trial. But that question could not be fairly resolved unless the jury was presented with the evidence from which it could weigh the relative contributions to the plaintiff's disease risk that each exposure presented. Those that were insubstantial factors or immaterial elements in comparison to the whole of the plaintiff's exposure risk are, by definition, not the proximate cause of plaintiff's disease. See *Thacker*, 151 Ill. 2d at 354-55; *Donaldson v. Central Ill. Pub. Serv. Co.*, 199 Ill. 2d 63, 90-91 (2002) (noting that "cause in fact" in toxic tort cases requires "showing that defendant's conduct was a material element and substantial factor in bringing about the alleged injury"). And the *only* way to conduct this analysis, as a matter of sound science, is to consider *all* of the plaintiff's known lifetime asbestos exposures and other exposures that could potentially cause the same disease.

In fact, since the *Lipke* court announced its decision in 1987 there has been a mountain of scientific proof that all asbestos exposures do not present the same risk such that some exposures can properly be deemed insubstantial when compared to others by taking into consideration the dose, type, and morphology of the particular exposures. The *Kochan/Spain* view that it is "impossible to find that a specific exposure or several exposures did not cause or contribute to the injury" simply cannot be reconciled with evolving scientific knowledge about disease etiology, relative risk methodologies and epidemiology, much of which was not available at the time of the *Kochan/Spain* opinions.

For example, in October 2003, the United States Environmental Protection Agency ("USEPA") issued its Final Draft: Technical Support Document For A Protocol To Assess Asbestos Related Risk. This document purports to implement the USEPA's "national policy" in "exercising its discretion in implementing the National Contingency Plan." Berman & Crump, *Final Draft: Technical Support Document For A Protocol To Assess Asbestos Related Risk*, EPA # 9345.4-06, at p. ii (USEPA 2003). The USEPA acknowledged that its existing assessment of asbestos toxicology, which had not formally changed since 1986, was outmoded because it treated all mineral forms of asbestos and all asbestos fibers to be of equal carcinogenic potency, when, in reality, "substantial improvements in asbestos measurement techniques and in the understanding of the manner in which asbestos exposure contributes to disease" have been made since that time. *Id.* at 1.1 Upon extensive review of all of the published literature, as well as the underlying data for several of the principal asbestos-related epidemiology studies, the

USEPA report concluded that chrysotile asbestos is significantly less potent than amphibole asbestos in causing mesothelioma, and may not cause it at all:

> Amphibole is estimated as being about four times as potent as chrysotile for lung cancer (although the difference is not significant) and about *800 times as potent as chrysotile* for mesothelioma (a highly significant difference). Moreover, the data are consistent with the hypothesis that *chrysotile has zero potency toward the induction of mesothelioma.*

Id. at 7.50 (emphasis added).[3] The USEPA also concluded that the fiber dimensions (length and width) play a critical role in distinguishing the carcinogenicity of various asbestos exposures. Again examining the available published literature it concluded that "[f]ibers less than a minimum length between 5 and 10 μm do not appear to contribute to risk." *Id.* at 6.128. Optimizing the model to fit the available studies, the agency assigned all fibers shorter than 10 μm zero potency in its updated risk model:

> The optimal adjustment found for fiber size and type that best reconciles the published literature assigns equal potency to fibers longer than 10 μm and thinner than 0.4 μm and assigns *no potency* to fibers of other dimensions.

Id. at 7.60 (emphasis added).

Also in 2003, the Agency for Toxic Substances and Disease Registry ("ATSDR") convened a panel of experts to discuss "the state of the science on how fiber length

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3 Moreover, the hypothesis that chrysotile and amphibole are equally potent in causing mesothelioma was clearly rejected ($p < 0.0007$). *Id.* at 7.49.

relates to toxicity of asbestos," which came to essentially the same conclusion. ATSDR, *Report on the Expert Panel on Health Effects of Asbestos and Synthetic Vitreous Fibers: The Influence of Fiber Length*, v-vi. (Eastern Research Group, Inc., Lexington, MA 2003). Like the USEPA, the panel concluded that health effects from asbestos are functions of fiber dose, fiber length and diameter, and fiber persistence in the lung, and that "there is a strong weight of evidence that asbestos . . . shorter than 5 μm are unlikely to cause cancer in humans."[4] *Id.*, at vi.

In 2002, the United States Geological Survey ("USGS") published a report on asbestos mineralogy and health effects in which they too acknowledge that there are marked differences between the potency of chrysotile and amphiboles for mesothelioma. Robert L. Virta, *Asbestos, Geology, Mineralogy, Mining and Uses.* U.S. Dept. of the Interior, US Geological Survey/Open File Report 02/149 (2002). As the USGS notes:

> A further consensus developed within the scientific community regarding the relative carcinogenicity of the different types of asbestos fibers. There is strong evidence that the genotoxic and carcinogenic potentials of asbestos fibers are not identical; in particular mesothelial cancer is most strongly associated with amphibole fibers.

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[4] It is thus no mistake that the method of assessing risk utilized for compliance with OSHA occupational airborne asbestos standards only considers fibers greater than 5 μm in length. 29 CFR § 1910.1001 App. A; NIOSH 7400 *Asbestos and Other Fibers by PCM*, NIOSH Manual of Analytical Methods 4th Ed. (1994).

Id. at 14.

Likewise, in 2006 the Institute of Medicine of the National Academy of Science Committee on Asbestos published a monograph on the association of asbestos with non-respiratory cancers. Institute of Medicine of the National Academy of Science Committee On Asbestos: Selected Health Effects, *Asbestos: Selected Cancers* (National Academies Press, Washington, D.C. 2006). In the course of that review, the authors note that the potency of asbestos fibers is a function of their size, shape, and dissolution rates. While not completely exonerating chrysotile,[5] they too acknowledge that these characteristics differ between chrysotile and amphibole fibers and that because of this chrysotile has "a generally lesser degree of potency than amphibole fibers." *Id.* at 3-4.

In 2003, the National Cancer Institute ("NCI") published a fact sheet on asbestos on its website which also acknowledges the different carcinogenic potential of the different fiber types and makes risk distinctions based on dose. Under the heading, "Who is at risk," the NCI notes:

> Nearly everyone is exposed to asbestos at some time during their life. However, most people do not become ill from their exposure. People who become ill from asbestos are usually those who are

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[5] While there continues to be debate regarding whether chrysotile causes mesothelioma, the notion that all exposures are the same regardless of the type, size and dose of asbestos has been rejected almost universally in the modern era. These precise differences allow experts today to distinguish significant versus insignificant exposures in the causal chain.

> exposed to it on a regular basis, most often in a job where they work directly with the material or through substantial environmental contact.

National Cancer Institute, *FactSheet Asbestos Exposure: Questions and Answers* (2003), *available at* http://www.cancer.gov/cancertopics/factsheet/Risk/asbestos. The NCI also acknowledges, as every other reputable researcher and organization has, that "different types of asbestos fibers may be associated with different health risks. For example, results of several studies suggest that amphibole forms of asbestos may be more harmful than chrysotile, particularly for mesothelioma." *Id.*

In light of the fact that all asbestos exposures are not the same, it is no surprise that USEPA and OSHA risk assessment models developed back in the 1980s that blindly assume that they are (*i.e.*, that employ a linear no-threshold risk model assumption and do not distinguish between fiber types) greatly over-predict the carcinogenic risk of environmental asbestos exposures, particularly to chrysotile. In a paper published in the New England Journal of Medicine in 1998, a group of Canadian researchers found that the risk to women who lived near certain Canadian chrysotile mines of lung cancer due to massive environmental exposures (in excess of 25 f/cc*years) was negligible. Camus M., *et al.*, *Nonoccupational exposure to chrysotile asbestos and the risk of lung cancer*, 338 New Eng. J. Med., No. 22, 1565 (1998). The study found that USEPA's risk assessment overestimated these risks by at least a factor of 10. *Id.* at 1568; see also *Nolan I,* 2005 WL 724041, at *18 (citing Tr. 2018-19).

These same researchers also studied the population of women surrounding these mines for mesothelioma and compared rates to that predicted by the USEPA risk

assessment models. Camus *et al.*, *Risk of mesothelioma among women living near chrysotile mines versus USEPA asbestos risk model: preliminary findings*, 46 Ann. Occup. Hyg. (Supp. 1) 95-98 (2002). They found that the USEPA monolithic, no-threshold model overestimated risk by up to 150 times for mesothelioma. As the authors note:

> [T]he observed incidence was orders of magnitude smaller than that predicted by the US EPA model. Although risk assessments should be based on conservative or precautionary assumptions, a two order of magnitude overshoot for chrysotile exposures could be an overkill that would hinder risk management if it went unrecognized, particularly when comparing the risks of chrysotile to the risks of substitute fibers.

Id. at 97. A companion paper found the mean environmental exposures of the mesothelioma cases to be a truly massive 226.1 f/cc*years. Case, B.W., *et al.*, *Preliminary findings for pleural mesothelioma among women in the Quebec chrysotile mining regions*,46, Ann. Occup. Hyg., 128-131 (2002). To put these figures into context, Weil-McLain's industrial hygiene expert estimated that the activities engaged in by the plaintiff with Weil's products would have produced exposures less than 0.0095 f/cc* years over a 30-year working lifetime. *Nolan I*, 2005 WL 724041, at *16 (citing Tr. 1902-03). He likewise testified that everyone is exposed to asbestos from the ambient air we breathe and that typical average lifetime environmental exposures over 70 years are on the order of 1.2 f/cc*years. *Id.* at *14 (citing Tr. 1825).

Additional studies involving the general U.S. population establish that these typical environmental exposures, which consist almost exclusively of chrysotile asbestos, do not measurably increase the risk of mesothelioma at all. A 2004 study examining the Surveillance, Epidemiology and End Results ("SEER") data tracking mesothelioma deaths in numerous mostly urban areas around the United States between 1973 and 2003, found that the rate of mesothelioma in women, whose exposures are primarily environmental, has not changed in the last 30 years, despite that fact that environmental exposures increased appreciably starting in the 1940s. Price & Ware, *Mesothelioma trends in the United States: an update based on the Surveillance, Epidemiology and End Results program data from 1973 through 2003*, 159, Am. J. Epidemiology, (2) 107 (Jan. 15, 2004). As the authors note, had these exposures measurably increased the risk of mesothelioma, the rate of disease in women would have increased. But it did not. *Id.* at 111. As they conclude: "It is unlikely that low environmental exposure to asbestos, or any other type of low-level asbestos exposure, is associated with more than a negligible risk of mesothelioma." *Id.*

That there are *de minimis* levels asbestos of exposure that do not present a significant risk of disease is also supported by public statements made by USEPA, OSHA, and ATSDR in the aftermath of the World Trade Center collapse in 2001. As a result of the collapse, lower Manhattan was inundated with low levels of airborne asbestos, much of it chrysotile, which abated over time. But the ATSDR acknowledges that such exposures are "very unlikely" to cause disease:

> Exposure to high levels of asbestos for a long time can cause serious illness. However, the low levels of asbestos

> detected [after the tower collapse] and the short length of exposure make it very unlikely that people will become ill from that exposure.

ATSDR *World Trade Center Fact Sheet*. Department of Health & Human Services, Agency for Toxic Substances and Disease Registry, Washington, D.C. (2006), *available at* http://www.atsdr.cdc.gov/asbestos/asbestos/types_of_exposure/fact_sheet.html.

Likewise, the USEPA and OSHA issued a joint fact sheet shortly after the tower collapse reporting concentrations of airborne asbestos between 0.0013 and 0.086 f/cc around the site. They report that these levels are "consistent with safe and acceptable standards" and further note that:

> Levels of asbestos above the AHERA standard do not imply that there is an immediate health threat to the public. Asbestos exposure becomes a health concern when high concentrations of asbestos fibers are inhaled over a long period of time.

USEPA *EPA-OSHA Fact Sheet: Environmental information from lower Manhattan for Residents, Area Employees, and Local Business Owners – Data Through September 30, 2001*, (2001), http://www.epa.gov/wtc/summaries/epa-osha03.htm. Notwithstanding the linear, no-threshold risk models they developed during the 1980s, the USEPA and OSHA (and ATSDR) now appear to acknowledge – as confirmed by the Price, *et al.* (2004) study noted above – that there *are* concentrations of asbestos exposure that do not present a significant risk of disease.

This new science demonstrates beyond peradventure that exposure to a single fiber is not sufficient to cause disease, that the relative risk that a particular exposure will cause a particular disease differs widely depending on, among other things, the dose, morphology, and the type of asbestos at issue, and that scientists have devised sophisticated methodologies for measuring relative risks and for sorting out which exposures are substantial contributing causes and which are not.

3. The *Lipke* Rule Improperly Excludes Admissible Scientific Evidence.

Notwithstanding the existing state of asbestos-related science described above, the expert testimony in this case conceding that different exposures create different relative risks, and the uncontested facts that the plaintiff here had been exposed to far higher doses of far more toxic asbestos from other sources, the *Lipke* Rule effectively required the court to determine as a matter of law – without any hearing and in the face of contrary scientific causation evidence – that the amount and character of other exposures is scientifically irrelevant in determining the cause of plaintiff's disease. This approach ignores ongoing, evolving scientific debate and wrongly excludes from the courtroom relative risk methodologies, which, by definition, require comparisons of the relative impact of different exposures to different types of asbestos at different doses.

Moreover, this evidence is barred even though it meets this state's criteria for admission of sound scientific evidence. But whether the jury should hear scientific evidence about causation should be determined not by judicial fiat but by Illinois law governing the admissibility of scientific testimony. See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *Donaldson*, 199 Ill. 2d at 76-77. Under that law, experts are permitted to rely on materials that may otherwise be inadmissible if they are the type of

materials relied on by experts in their field of expertise. F.R.E. 703, 705; *Wilson v. Clark*, 84 Ill. 2d 186, 196 (1981) (adopting F.R.E. 703, 705). *Lipke* did not purport to change these standards. Thus, at the very least, evidence of other exposures should be admitted in the context of expert testimony where it forms the basis of an expert's opinion. Yet, as we have seen, although the circuit court below believed the excluded testimony was competent, the effect of the *Lipke* Rule was to preclude Weil-McLain from offering scientific testimony either (i) to rebut the obvious implication that defendant's product must have caused plaintiff's illness because it was the plaintiff's only exposure; or (ii) to establish that the relative risk of contracting disease from exposure to the defendants' asbestos in the context of the plaintiff's full exposure history was insubstantial or immaterial.

With respect to the first precluded argument, even where there is abundant evidence that the plaintiff was exposed to multiple asbestos-containing products unrelated to the defendant, as there was in this case, the practical effect of the *Lipke* Rule is to mislead the jury into believing, contrary to the undisputed facts, that the only possible explanation for the plaintiff's disease is exposure to the defendant's product. The defendant is thereby deprived of its ability to present a principal defense: that its asbestos did not cause plaintiff's injury but rather, plaintiff's exposure to other parties' asbestos did. See *Leonardi*, 168 Ill.2d at 101 (a defendant has "the *right* to endeavor to establish by competent evidence that the conduct of a third person, or some other causative factor, is the sole proximate cause of plaintiff's injuries") (emphasis added).

With regard to the second precluded argument, the *Lipke* Rule prevents a defendant from offering any scientific evidence that it did not cause the plaintiff's illness

because of his other exposures. Indeed, as proffered in *Nolan*, a defendant's scientific proof often rests in part on the notion that relative to the plaintiff's other exposures, the risk presented by the exposure to defendant's products was negligible. Yet, to determine whether any particular exposure was a substantial factor in causing an illness *requires* knowledge of all of the factors that led to the illness. By excluding evidence of other exposures, the court prevents the jury from assessing whether the defendant's role was "substantial."

The testimony proffered by Weil-McLain here would have established that plaintiff's exposures to asbestos from its products amounted to no more than a drop of water in an ocean of exposure to amphibole asbestos from other sources. Indeed, Weil-McLain's expert testified that the plaintiff's exposures to asbestos from Weil's product were below environmental background exposures. *Nolan I*, No. 01-L-117, 2005 WL 724041, *14, *16 (citing Tr. 1825, 1902-03). While this testimony would undoubtedly have been contested, a jury could nevertheless reasonably have concluded on these facts that the risk posed by the boiler exposures (if any) were insubstantial when compared with plaintiff's other much more potent amphibole exposures. The *Lipke* rule precludes offering this evidence, even though it would be otherwise admissible under the Illinois *Frye* standard. Exclusion of such evidence cannot be squared with the principles announced in *Donaldson, Wilson*, and their progeny.

III. THE ILLINOIS APPELLATE APPEARS TO BE ALONE IN CREATING A SPECIAL RULE FOR ASBESTOS THAT PROHIBITS OTHER-CAUSE EVIDENCE.

In *Thacker*, decided nearly twenty-five years ago, Illinois adopted the substantial factor test as embodied in Section 431 of the Restatement (Second) of Torts. See *e.g.*,

Thacker, 151 Ill. 2d at 354-55. As recognized by Justice Steigmann in his dissent, Section 431 explicitly recognizes the "possibility that a case may arise in which the defendant's conduct may have had *some effect* in causing the plaintiff's harm, but when viewed in the totality of all the evidence in the case, a reasonable trier of fact could find that the effect of defendant's conduct was 'negligible' or 'insignificant.'" *Nolan*, 365 Ill. App. 3d at 974.

Thus, in courthouses all over the country outside of Illinois, juries instructed under Section 431's substantial factor test hear the evolving scientific debate about the relative risks of particular exposures to particular types and shapes and sizes of asbestos and then resolve the dispositive fact issue of which exposures are substantial contributing causes of plaintiff's disease and which are not. Such regularly resolve causation in asbestos cases after hearing *all* the evidence of a plaintiff's exposure history. See, *e.g.*, *AC and S, Inc. v. Asner*, 686 A.2d 250 (Md. Ct. App. 1996) ("A factual defense may be based on the negligible effect of a claimant's exposure to the defendant's product, or on the negligible effect of the asbestos content of a defendant's product, or both. In such a case the degree of exposure to a non-party's product and the extent of the asbestos content of the non-party's product may be relevant to demonstrating the non-substantial nature of the exposure to, or of the asbestos content of, the defendant's product."); *O'Connor v. Raymark Industries, Inc.*, 518 N.E.2d 510, 511 (Mass. 1988) (jury entered verdict in favor of lone defendant at trial on the basis that, in context of plaintiff's exposure to numerous products from parties not present at trial, plaintiff's exposure to asbestos from asbestos blankets manufactured by the defendant was not a substantial contributing factor in the formation of plaintiff's mesothelioma); *Laney v. Celotex Corp.*,

901 F.2d 1319, 1321 (6th Cir. 1990) (ordering new trial in case involving Michigan law where "[d]efendant was denied an opportunity to present evidence in its defense," and stating that "[E]vidence of Plaintiff's exposure to other asbestos products goes to the fundamental question of cause. A jury may consider all evidence of contributing factors to determine which, if any, were substantial factors in causing Plaintiff's injury. The substantial factor analysis cannot be made in a vacuum."); *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 694-95 (Tex. App. 1991) (holding that it was an abuse of discretion for the trial court to exclude evidence of a plaintiff's exposure to the asbestos products of non-parties, even if the evidence pertained to insolvent companies), *cert. denied*, 509 U.S. 923 (1993).

After investigating the law of the fifty states, we found no state which has adopted a rule that excludes other-cause evidence solely in asbestos litigation. Thus, in Illinois, and apparently Illinois alone, the science debate regarding asbestos has been frozen in time by the *ipsi dixit*, court-made *Lipke* Rule that every exposure is presumed the proximate cause of a plaintiff's injury. And in Illinois, and apparently Illinois alone, relative risk methodologies, which, by definition, require comparisons of the relative impact of different exposures to different types of asbestos at different doses, are singled out for exclusion from the courtroom in asbestos cases. Moreover, this evidence is barred even though it meets Illinois' criteria for admission of sound scientific evidence.

Illinois' status as a judicial outlier rightfully "troubl[ed]" Justice Steigmann. *Nolan*, 365 Ill. App. 3d at 977. As Justice Steigmann noted, Illinois is free to adopt its own special evidentiary rule in asbestos cases. *Id.* However, the fact that jurisdictions everywhere else believe that juries can resolve the issue of causation in asbestos cases

based on all of a plaintiff's exposures to asbestos certainly casts doubt on the Illinois Appellate Court's conclusion that Illinois juries cannot. Ultimately, a rule limited to Illinois that bars today's competent science due to court-made presumptions based on yesterday's knowledge underestimates Illinois jurors and has no place in our jurisprudence.

IV. RATIFICATION OF THE *LIPKE* RULE WILL EXACERBATE ILLINOIS' STATUS AS A MAGNET FOR NATIONAL ASBESTOS LITIGATION

As far back as 1991, the Judicial Conference described asbestos litigation as a looming "disaster of major proportions." Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States And Members of the Judicial Conference of the United States* 2 (Mar. 1991) (the "Judicial Conference"). The United States Supreme Court has recognized that this country is in the midst of an "asbestos-litigation crisis." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

Since the Supreme Court's pronouncement, the crisis has worsened. *See* The Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve The Asbestos Litigation Crisis*, Vol. 6, No. 6 (Nat'l Legal Center for the Pub. Interest monograph) (June 2002), *available at* http://www.nlcpi.org. Claims continue to pour in at an extraordinary rate; dozens of employers have been forced into bankruptcy; and payments to the truly sick are threatened. *See* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001); Stephen Carroll, *et al.*, *Asbestos Litigation* 109-10 (Rand Institute for Civil Justice 2005) ("Rand Report") (identifying 74 asbestos-related bankruptcies; 37 of which occurred in or after 2000). The rate of new filings and the mounting number of pending cases have

exacerbated the crisis, and the total cost to the economy has been staggering. *See* Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383 (1993).

Recent analysis estimates that 730,000 asbestos claim have been filed against 8,400 different defendants through 2002. Rand Report at 70-71, 79. Moreover, "[a]sbestos litigation has spread well beyond the asbestos-related manufacturing and installation industries where it began to touch almost every form of economic activity that takes place in the United States." *Id.* at 81. Defendants and insurers reportedly have spent $70 billion to compensate asbestos claimants through 2002, and "future costs of asbestos litigation could total $130 billion to $195 billion." *Id.* at at 105-6.

Illinois courts are among those at the epicenter of the crisis. Because the *Lipke* Rule is apparently unique to Illinois and because it puts defendants in an "undefendable" posture, it has been instrumental in attracting hundreds of out-of-state mesothelioma cases to Illinois courts. The extraordinary influx of such cases resulted, among other things, in huge asbestos trial dockets in Madison County and Cook County in recent years. Since February 2001, plaintiffs allegedly suffering from asbestos-induced mesothelioma have filed more complaints in Illinois against CertainTeed, GE, GP and UCC than in any state in the United States. Even more notably, during that same period, plaintiffs suffering from mesothelioma have filed suits against CertainTeed, GE, GP and UCC in the Madison County Circuit Court than in any other court in the nation, many of which lack any legitimate connection to the forum. Madison County has outpaced New York City for mesothelioma suits between February 2001 and the present despite the fact that Madison County's population (258,941) is only 3% of New York City's (8,008,278).

See Bureau of the Census, 2000 Census, available at www.uscensus.gov.[6] Likewise, between 2003 and 2004, Cook County experienced a near 40% increase in the number of asbestos filings. John Flynn Rooney, *Circuit Court Gets More Asbestos Cases*, 151 Chicago Daily Law Bulletin, 1 (2005).[7]

In addition to its negative impact on a defendant's ability to get a fair trial, the *Lipke* Rule's looming presence generally coerces defendants to settle, even at premium values, rather than risk trying cases on so tilted a playing field. Thus, despite experiencing the greatest number of mesothelioma filings in recent years, Illinois asbestos defendants take a disproportionately low percentage of cases to trial compared to other jurisdictions. Since 1993, the year *Kochan* was decided, Illinois has never ranked

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[6] The Flintkote Company's ("Flintkote") April 30, 2004 asbestos-related bankruptcy evidences the ruinous effect that Illinois asbestos litigation imposes on corporate defendants. Flintkote's bankruptcy petition identified Madison County asbestos plaintiffs attorneys among two of its top three unsecured creditors, together representing roughly 40% of Flintkote's total unsecured debt. See *In re: The Flintkote Co.*, No. 1:04-BK-11300 (D. Del.) (filed May 1, 2004).

[7] Many of these claims involve out-of-state residents who select Illinois jurisdictions in which to file. In cases in which a plaintiff alleges even slight Illinois exposures among a long list of exposures in other jurisdictions, *forum non conveniens* motions are often denied. Likewise, trial courts often wait to resolve choice of law motions until the time of trial, when the possibility that the *Lipke* rule will be applied has already operated to deter the defendant from risking trial and thus has coerced a settlement.

among the top five states for trying asbestos cases to verdict. See, *e.g.*, Rand Report at 63-65. And several of the small number of defendants who risked trial experienced predictably catastrophic results under the *Lipke* Rule. See, *e.g.*, *Spain*, 304 Ill. App. 3d at 360 ($1.8 million verdict); *Kochan*, 242 Ill. App. 3d at 788 ($5 million verdict, plus damages for disability and past and future pain and suffering); Andrews Asbestos Litigation Reporter, Dec. 20, 2001, at 3 (citing *Crawford v. AC&S Inc.*, No. 01-L-781 (Madison County Cir. Ct.).

These developments give Illinois a reputation for litigiousness and damage its reputation for fairness. According to a 2006 survey conducted by Harris Interactive, Inc. on behalf of the U.S. Chamber's Institute for Legal Reform (the "Harris Survey"), Illinois ranks forty-fifth among all states based on the perceived reasonableness and fairness in the tort system. See assist.neded.org/06rankings harris.pdf. Madison County and Cook County both ranked among the bottom four among all jurisdictions in the nation with respect to these attributes. *Id.* Evidence exists that the perception of Illinois as a "magic jurisdiction" also damages Illinois' economy by scaring off business, as sixty-nine percent of those who participated in the Harris Survey indicated that a state's litigation environment would likely affect important business decisions such as where to locate. *Id.*

CONCLUSION

For these reasons, and for the reasons set forth in the merits brief of Weil-McLain, *amici* respectfully request that this Court reverse the judgment of the circuit court.

Respectfully submitted,

Dated: January 3, 2007

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CERTIFICATE OF COMPLIANCE

I certify that this *amicus* brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief is 34 pages. There is no appendix.

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