

IN THE SUPREME COURT OF THE STATE OF DELAWARE

**GENERAL MOTORS CORPORATION and
FORD MOTOR COMPANY,**

Defendants Below,
Appellants,

v.

ROLAND LEO GRENIER, SR.,

Plaintiff Below,
Appellee.

Nos. 453,2007 & 578,2007
(consolidated)

Appeal from the Superior Court
of the State of Delaware
in and for New Castle County
C.A. No. 05C-11-257-ASB

CORRECTED REPLY BRIEF OF APPELLANTS
GENERAL MOTORS CORPORATION AND FORD MOTOR COMPANY

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TABLE OF CONTENTS

Page

I. PLAINTIFF'S CAUSATION EVIDENCE IS UNRELIABLE AND INADMISSIBLE UNDER *DAUBERT* BECAUSE IT RESTS ON AN UNPROVEN ASSUMPTION. 1

A. Plaintiff's Causation Expert Improperly Assumed That Friction Products Are Indistinguishable From Raw Asbestos. 1

B. Every Epidemiological Study To Have Examined The Issue Has Found No Greater Risk Of Mesothelioma Among Auto Mechanics. 5

1. Epidemiology is the best evidence of causation. 5

2. Plaintiff's dismissal of the extensive epidemiology is without legal or factual basis. 6

C. Whether Mesothelioma Is A Signature Disease Is Irrelevant. 13

II. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE PLAINTIFF FAILED TO PROVE CAUSATION. 14

III. PLAINTIFF'S NONDISCLOSURE OF HIS CLAIMS AGAINST H-W AND USG DESPITE DEFENDANTS' DISCOVERY DEMANDS AND THE TRIAL COURT'S ORDER DEPRIVED DEFENDANTS OF UNIQUE EVIDENCE OF ALTERNATIVE CAUSATION. 15

A. The Concealed Claims Are Unique Evidence Of Alternative Causation. 16

1. The H-W and USG claims are admissions against interest. 16

2. The concealed claims uniquely show Plaintiff's belief that non-friction products caused his mesothelioma. 18

B. Defendants Diligently Requested The Concealed Claims. 20

C. The Concealed Claims Are Admissible. 21

D. The USG Claim Could Have Been Filed Before The End Of Trial. 23

E. The Verdict Would Have Been Different Had The Concealed Claims Been Presented To The Jury. 23

F. Letting Plaintiff Evade His Discovery Obligations Is Bad Policy. 24

IV. THE TRIAL COURT MADE SEVERAL HIGHLY PREJUDICIAL EVIDENTIARY ERRORS. 25

A. The Gold Book Is Not Admissible Under D.R.E. 803(8). 25

B. Precluding Cross-Examination On Kent Cigarettes Was Error. 27

C. It Was Error To Admit Evidence Of How Much Defendants Have Spent On Experts To Defend Themselves In All Asbestos-Related Cases. 31

TABLE OF CONTENTS
(continued)

	Page
D. Admission Of The Never Authenticated 1948 Article Was Error.....	33
V. THE SUPPLEMENTAL JURY INSTRUCTION WAS MISLEADING AND PREJUDICIAL.	36
VI. PLAINTIFF'S INFLAMMATORY SUMMATION WARRANTS A NEW TRIAL.	37
A. The Reading Of A Document Not In Evidence Warrants A New Trial.....	37
B. Plaintiff's References To The \$19 Million Figure Was Prejudicial.....	38
C. Counsel's Reference to Plaintiff's Family Was Improper.....	38
D. The Inflammatory Closing's Cumulative Effect Warrants A New Trial.....	39
VII. THE CUMULATIVE EFFECT OF THE VARIOUS ERRORS WARRANTS A NEW TRIAL.	40
CONCLUSION.....	40

TABLE OF AUTHORITIES

Page

CASES

In re Asbestos Litig., 911 A.2d 1176 (Del. Super. 2006) 2, 14

Ballinger v. Brush Wellman Inc., No. 96-CV-2532 (Jefferson Cty. Dist. Ct. Colo. June 22, 2001) 1

Banks v. State, 845 So. 2d 9 (Ala. Crim. App. 2002) 17

Bd. of Educ. v. Ambach, 474 N.Y.S.2d 244 (N.Y. Sup. Ct. 1984) 26

Berger v. Amchem Prods., 818 N.Y.S.2d 754 (N.Y. Sup. Ct. 2006) .. 25, 33

Bowen v. E.I. DuPont de Nemours & Co., Inc., 906 A.2d 787 (Del. 2006) 6

Brzoska v. Olson, 668 A.2d 1355 (Del. 1995) 30

Buschlen v. Ford Motor Co., 310 N.W.2d 8 (Mich. App. 1981) 38

Caraker v. Sandoz Pharm. Corp., 188 F. Supp. 2d 1026 (N.D. Ill. 2001) 7

In re Celotex Corp., 196 B.R. 973 (Bankr. M.D. Fla. 1996) 26

Conde v. Velsicol Chem. Corp., 24 F.3d 809 (6th Cir. 1994) 7

Conde v. Velsicol Chem. Corp., 804 F. Supp. 972 (S.D. Ohio 1992) 6, 25

Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579 (1993) 5

DeAngelis v. Harrison, 628 A.2d 77 (Del. 1993) 37, 38

Dimino v. New York City Transit Auth., 64 F. Supp. 2d 136 (E.D.N.Y. 1999) 22

Ellis v. Int'l Playtex, 745 F.2d 292 (4th Cir. 1984) 26, 27

In re Federal-Mogul Global, Inc., 300 F.3d 368 (3d Cir. 2002) 6

General Elec. Co. v. Joiner, 522 U.S. 136 (1997) 4, 5

Glastetter v. Novartis Pharm. Corp., 107 F. Supp. 2d 1015 (E.D. Mo. 2000) 7

Hall v. State, 788 A.2d 118 (Del. 2001) 35

Hammond v. State, 569 A.2d 81 (Del. 1989) 34

Lightfoot v. Union Carbide Corp., 110 F.3d 898 (2d Cir. 1997) 22

McIntyre v. State, 897 A.2d 296 (Md. App. 2006) 27

McNally v. Eckman, 466 A.2d 363 (Del. 1983) 38

TABLE OF AUTHORITIES
(continued)

	Page
<i>Michael v. State</i> , 529 A.2d 752 (Del. 1987)	40
<i>Money v. Manville Corp. Asbestos Disease Comp. Trust Fund</i> , 596 A.2d 1372 (Del. 1991)	2
<i>Norris v. Baxter Healthcare Corp.</i> , 397 F.3d 878 (10th Cir. 2005)	7
<i>In re Paoli R.R. Yard PCB Litig.</i> , 35 F.3d 717 (3d Cir. 1994).....	5
<i>Pozefsky v. Baxter Healthcare Corp.</i> , 2001 WL 967608 (N.D.N.Y. Aug. 16, 2001)	7
<i>Prudential Ins. Co. v. U.S. Gypsum Co.</i> , 146 F. Supp. 2d 643 (D.N.J. 2001)	26
<i>Richardson v. Richardson-Merrell, Inc.</i> , 857 F.2d 823 (D.C. Cir. 1988)	14
<i>Sammons v. Doctors for Emergency Servs.</i> , 913 A.2d 519 (Del. 2006)...	36
<i>Schweitzer v. Westminster Invs.</i> , 157 Cal. App. 4th 1195 (Cal. App. 2007)	34
<i>Sheeran v. State</i> , 526 A.2d 886 (Del. 1987)	36
<i>Siharath v. Sandoz Pharm. Corp.</i> , 131 F. Supp. 2d 1347 (N.D. Ga. 2001)	6, 7
<i>Tracy v. Terminal R. Ass'n</i> , 170 F.2d 635 (8th Cir. 1948).....	17
<i>Vouras v. State</i> , 452 A.2d 1165 (Del. 1982).....	35
<i>Winchester Packaging, Inc. v. Mobil Chem. Co.</i> , 14 F.3d 316 (7th Cir. 1994)	22
<i>Wright v. State</i> , 2008 WL 343638 (Del. Feb. 7, 2008)	38
<i>Wright v. State</i> , 818 A.2d 950 (Del. 2003).....	26
<i>Zimmerman v. State</i> , 565 A.2d 887 (Del. 1989).....	36
<i>In re Zyprexa Litig.</i> , No. 07-CV-504 (E.D.N.Y.)	2

STATUTES, REGULATIONS, AND RULES

Asbestos, Manufacture, Importation, Processing and Distribution Prohibitions, 58 Fed. Reg. 58964 (Nov. 5, 1993)	27
Del. R. Evid. 103.....	30
Del. R. Evid. 103(a).....	34
Del. R. Evid. 104.....	26

TABLE OF AUTHORITIES
(continued)

	Page
Del. R. Evid. 201(b)	30
Del. R. Evid. 408	22
Del. R. Evid. 611	29
Del. R. Evid. 702	1
Del. R. Evid. 703	27
Del. R. Evid. 802	26
Del. R. Evid. 803(8)	25, 26
Del. R. Evid. 803(16)	35
Del. R. Evid. 803(17)	30
Del. R. Evid. 804	35
Del. R. Evid. 805	25
Del. R. Evid. 901(a)	34, 35
Del. R. Evid. 902(6)	35

MISCELLANEOUS

<p>A. Agudo, et al., <i>Occupation and Risk of Malignant Pleural Mesothelioma: A Case-Control Study in Spain</i>, 37 Am. J. Ind. Med. 159 (2000)</p>	11
<p><i>Asbestos, Asbestosis, and Cancer: The Helsinki Criteria for Diagnosis and Attribution</i>, 23 Scand. J. Work Env't & Health 311 (1997)</p>	8
<p>K.J. Butnor, et al., <i>Exposure to Brake Dust and Malignant Mesothelioma: A Study of 10 Cases with Mineral Fiber Analyses</i>, 47 Ann. Occup. Hygiene 325 (2003)</p>	13
<p>V.J. Castrop, <i>Recognition and Control of Fume and Dust Exposure</i>, in 5 Transactions: 35th National Safety Congress (1947)</p>	34, 35
<p>D. Coggon, et al., <i>Differences in Occupational Mortality from Pleural Cancer, Peritoneal Cancer, and Asbestosis</i>, 52 Occup. & Env'tl. Med. 775 (1995)</p>	11
<p>DII Industries, LLC Asbestos PI Trust Second Amended Trust Distribution Procedures ["H-W TDP"]</p>	16
<p>M. Goodman, et al., <i>Mesothelioma and Lung Cancer Among Motor Vehicle Mechanics: A Meta-Analysis</i>, 48 Ann. Occup. Hygiene 309 (2004)</p>	10, 32

TABLE OF AUTHORITIES
(continued)

	Page
S. Greenland, <i>The Need for Critical Appraisal of Expert Testimony in Epidemiology and Statistics</i> , 39 Wake Forest L. Rev. 291 (2004)	30
P. Gustavsson, et al., <i>Lung Cancer and Exposure to Diesel Exhaust Among Bus Garage Workers</i> , 16 Scand. J. Work Env't & Health 348 (1990)	7, 11
E.S. Hansen, <i>Mortality of Auto Mechanics: A Ten-Year Follow-Up</i> , 15 Scand. J. Work Env't & Health 43 (1989)	7, 11
P.A. Hessel, et al., <i>Mesothelioma Among Brake Mechanics: An Expanded Analysis of a Case-Control Study</i> , 24 Risk Anal. 547 (2004)	8, 10
J.T. Hodgson, et al., <i>Mesothelioma Mortality in Britain: Patterns By Birth Cohort and Occupation</i> , 41 Ann. Occup. Hygiene 129 (1997)	7, 11
M. Huncharek, <i>Brake Mechanics, Asbestos, and Disease Risk</i> , 11 Am. J. Forensic Med. & Path. 236 (1990)	8, 9
B. Järholm & J. Brisman, <i>Asbestos Associated Tumours in Car Mechanics</i> , 45 Br. J. Ind. Med. 645 (1988)	7, 9, 11
W.E. Longo, et al., <i>Crocidolite Asbestos Fibers in Smoke from Original Kent Cigarettes</i> , 55 Cancer Research 2232 (1995)	29
John C. Maxwell, Jr., <i>Historical Sales Trends in the Cigarette Industry: A Statistical Summary Covering 74 Years (1925-98)</i>	29, 30
A.D. McDonald & J.C. McDonald, <i>Malignant Mesothelioma in North America</i> , 46 Cancer 1650 (1980)	11
D.M. McElvenny, et al., <i>Mesothelioma Mortality in Great Britain from 1968 to 2001</i> , 55 Occup. Med. 79 (2005)	11
S. Milham & E. Ossiander, <i>Occupational Mortality in Washington State 1950-1999</i> (2001)	11
J.H. Olsen & O.M. Jensen, <i>Occupation and Risk of Cancer in Denmark: An Analysis of 93,810 Cancer Cases, 1970-1979</i> , 13 Scand. J. Work Env't & Health 1 (1987)	11
R. Spirtas, et al., <i>Malignant Mesothelioma: Attributable Risk of Asbestos Exposure</i> , 51 Occup. & Env'tl. Med. 804 (1994)	8, 11
R. Spirtas, et al., <i>Mesothelioma Risk Related to Occupational or Other Asbestos Exposure: Preliminary Results from a Case-Control Study</i> , 122 Am. J. Epidemiology 518 (1985)	8, 11
K. Teschke, et al., <i>Mesothelioma Surveillance to Locate Sources of Exposure to Asbestos</i> , 88 Can. J. Pub. Health 163 (1997)	8, 9, 11

TABLE OF AUTHORITIES
(continued)

	Page
M.J. Teta, et al., <i>Mesothelioma in Connecticut, 1955-1977: Occupational & Geographic Associations</i> , 25 J. Occup. Med. 749 (1983)	11
United States Gypsum Asbestos Personal Injury Settlement Trust Distribution Procedures ["USG TDP"]	17
H.J. Weitowitz & K. Rödelsperger, <i>Chrysotile Asbestos and Mesothelioma</i> , 19 Am. J. Indus. Med. 551 (1991)	4, 11
H.J. Weitowitz & K. Rödelsperger, <i>Mesothelioma Among Car Mechanics?</i> , 38 Ann. Occup. Hygiene 635 (1994)	4, 11

I. PLAINTIFF'S CAUSATION EVIDENCE IS UNRELIABLE AND INADMISSIBLE UNDER DAUBERT BECAUSE IT RESTS ON AN UNPROVEN ASSUMPTION.

A. Plaintiff's Causation Expert Improperly Assumed That Friction Products Are Indistinguishable From Raw Asbestos.

Defendants contended in their opening brief that the opinion of Plaintiff's causation expert that exposure to friction products causes mesothelioma should have been excluded as unreliable under DRE 702. Defendants explained that the expert's opinion was predicated entirely on the unproven assumption that refined chrysotile as used in friction products has the same biologic propensities as raw chrysotile. See Defs-Br. 11. Defendants showed that, contrary to that assumption, different types of asbestos in fact vary in degree of toxicity and that the particular substance at issue here—refined chrysotile in friction products—is not only significantly less potent than other forms of asbestos, but has been milled, subjected to high heat, embedded in a resin, and, through use, largely transformed into a harmless substance known as forsterite. See Defs-Br. 4-6.

Rather than attempt to defend his failure to proffer any evidence that *chrysotile in friction products* causes mesothelioma despite its physical form, Plaintiff litters his reply with exhaustive references to the risks presented by unspecified forms of "asbestos." See, e.g., Pl-Br. 15, 21, 22. Plaintiff speaks of unspecified forms of "asbestos" rather than of chrysotile in friction products because the scientific evidence uniformly shows no increased risk of mesothelioma from chrysotile-containing friction products.¹ The question whether such prod-

¹ This is why Plaintiff's amici, the so-called "Concerned Scientists," also speak of "asbestos" in general. See, e.g., Brief of Concerned Scientists (Pl-Amici-Br.), at 2 ("asbestos causes mesothelioma"). Plaintiff's amici may be concerned, but they are hardly disinterested. Several have testified repeatedly on behalf of asbestos plaintiffs, including some represented by the same firm as represents Plaintiff here. One, David Egilman, has been repeatedly sanctioned by courts for pro-plaintiff misconduct in the course of litigation. See Order, *Balinger v. Brush Wellman Inc.*, No. 96-CV-2532 (Jefferson Cty. Dist. Ct. Colo. June 22, 2001) (finding that "Egilman's testimony was motivated by his personal agenda and by his animosity, bias, prejudice, hostile-

ucts in particular cause mesothelioma has been the subject of extensive epidemiologic research. Although conducted by different scientists at different institutions using different methodologies studying different populations, the results of that research are remarkably uniform. As Plaintiff's causation expert admitted, **no** epidemiologic study has found an increased risk of mesothelioma from exposure to friction products. See Defs-Br. 6 n.12; A511; A587-A588; A618.²

As this Court has previously recognized, because each "asbestos product...differs with respect to its physical characteristics and the tendency of the product to release asbestos fibers when used," neither "asbestos products nor the extent of release of fibers from those asbestos products can be viewed as generic." *Money v. Manville Corp. Asbestos Disease Comp. Trust Fund*, 596 A.2d 1372, 1377 (Del. 1991). Inasmuch as Plaintiff claims injury from his exposure to friction products in particular, Plaintiff bore the burden of presenting a scientifically reliable basis for concluding "that exposure to friction products increases the risk of contracting" mesothelioma. *In re Asbestos Litig.*, 911 A.2d at 1202 (A433). As Judge Slights recognized, Plaintiff could meet this burden through reliance on evidence relating to chrysotile generally only if Plaintiff "present[ed] competent evidence that friction products, in certain circumstances, release respirable chrysotile fibers that are **indistinguishable in size and other characteristics** from unrefined chrysotile fibers." *Id.* (emphasis

ity and vindictiveness against [the] defendant" and that "Egilman is not a credible witness," striking Egilman's testimony in its entirety, and precluding him from testifying in any other case before the court) (SA270-SA272); *In re Zyprexa Litig.*, No. 07-CV-504 (E.D.N.Y. Feb. 13, 2007) (finding Egilman conspired to "deliberately thwart[] a federal court's power to effectively conduct civil litigation under the rule of law") (SA273-SA350; SA280; SA284); Egilman Decl. (Sept. 7, 2007), in *In re Zyprexa Litig.*, No. 07-CV-504 (E.D.N.Y.) (admitting under oath that he deliberately violated protective order to "benefit the plaintiffs" by "only put[ting] out one side of the story") (SA351).

² The supposedly "comprehensive analysis of mesothelioma in Australia" to which Plaintiff alludes (Pl-Br. 19) is not to the contrary. See pp. 11-13 *infra*.

added).³ Plaintiff failed to establish this necessary "evidentiary predicate" (*id.*) to admission of his causation evidence under *Daubert*, and Judge Slight's ruling to the contrary was an abuse of discretion.

Defendants identified in the *Daubert* proceedings and their brief on appeal at least six important characteristics of chrysotile as used in friction products that distinguish it from unrefined chrysotile and likely explain the extraordinarily well-documented lack of association between exposure to friction products and mesothelioma. See Defs-Br. 5-6. Plaintiff does not dispute any of these distinguishing characteristics. His sole responses are that the chrysotile in new brakes has yet to be transformed into forsterite, and some respirable fibers remain even after use. *Cf.* Pl-Br. 27. Those assertions, though true, are beside the point. They do not undermine the undisputed facts that: (1) chrysotile, even in raw form, is far less potent than amphibole asbestos; (2) when used in friction products, chrysotile is milled and subjected to high heat, processes that alter its physical and chemical properties and render it very different from raw chrysotile; (3) the same high heat that transforms over 99% of the chrysotile to forsterite during use also further alters the physical and chemical properties of the few remaining fibers; and (4) the chrysotile in friction products is embedded in resin, which substantially reduces the chance that any fiber, no matter what its physical and chemical characteristics, can be released and respired. See Defs-Br. 5-6.⁴

Despite such evidence, Judge Slight concluded that the properties of chrysotile asbestos in friction products were comparable to the properties of "chrysotile asbestos used in other applications." A417.

³ Such proof is necessary, not sufficient; friction products might still not cause mesothelioma because, *e.g.*, exposure levels are low.

⁴ Defendants do not argue (*cf.* Pl-Br. 21) that Plaintiff had to prove the cellular process by which mesothelioma occurs. Rather, Defendants maintain that absent knowledge of that process, it is impermissible to just assume—like Lemen—that refined chrysotile as used in friction products has the same toxicological effects as raw chrysotile.

Plaintiff does not dispute that Judge Slight's conclusion was based entirely on the testimony of Ronald Dodson, a microscopist. Nor does Plaintiff dispute any of the facts, detailed at pages 8-11 of Defendants' opening brief, establishing that Dodson's testimony does not support such a conclusion, including that: (1) Dodson could not know whether the fibers he took from tissue samples even came from friction products (see SA2; A455); (2) a fiber's morphology says nothing about its surface characteristics (see A513), some of which, Dodson conceded, could not be detected by the TEM microscopy technique he used (see A452, A513); and (3) both Dodson and Lemen testified that the surface characteristics that TEM microscopy could not detect (surface charge and surface chemistry) may affect the toxicity of asbestos fibers (see A451, A504-A505).⁵

Given (i) the insufficiency of Dodson's evidence, which Plaintiff concedes was the foundation of Judge Slight's ruling, to show that the

⁵ Plaintiff tries to bolster Dodson's plainly inadequate evidence by citing two statements in a World Trade Organization (WTO) report, one by Arthur Musk and the other by Peter Infante. Cf. Pl-Br. 26. Neither comes close to satisfying Plaintiff's burden of proving that the processed chrysotile used in friction products can cause mesothelioma. As an initial matter, the WTO report is not a peer-reviewed study, but a political document generated to resolve a trade dispute. Moreover, Musk's declaration that "[i]t is my opinion that there is a risk of disease from the release of chrysotile fibres from friction products" (Pl-Br. 26 (quoting B1175)), besides saying nothing about mesothelioma, is a conclusory statement devoid of evidentiary support, and is thus unreliable "opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Joiner*, 522 U.S. at 146. Infante's statement that "[e]xposure to chrysotile asbestos through...downstream manipulation of friction products...carries with it the risks associated with exposure to asbestos" (Pl-Br. 26 (quoting B1175)), is—to the extent it refers to mesothelioma—based on case reports published in 1991 by Weitowitz and Rödelberger that suggested "an increased incidence of mesothelioma among car mechanics." H.J. Weitowitz & K. Rödelberger, *Chrysotile Asbestos and Mesothelioma*, 19 Am. J. Indus. Med. 551, 553 (1991) (DDX 375; SA257). Cf. WTO Report ¶ 5.262 (citing Weitowitz & Rödelberger) (B1175). But Infante's reliance on those case reports is misplaced. Three years after the case reports had appeared but six years before the WTO report appeared, Weitowitz and Rödelberger published the final results of a case-control epidemiological study which examined those case studies and concluded that "there is no evidence that car mechanics are exposed to an increased risk of mesothelioma even if they do brake repairs." H.J. Weitowitz & K. Rödelberger, *Mesothelioma Among Car Mechanics?*, 38 Ann. Occup. Hygiene 635, 637 (1994) (A1367).

properties of chrysolite in friction products are like those of the asbestos that has been shown to cause mesothelioma, (ii) Plaintiff's inability to refute Defendants' contrary evidence that the properties of chrysotile in friction products differ significantly from those of such other asbestos (see pp. 3-4 *supra*), and (iii) the extensive epidemiological evidence that exposure to friction products does not increase the risk of mesothelioma (see pp. 5-13 *infra*), it was arbitrary and capricious for Judge Slights to allow Plaintiff's expert's causation testimony. Rule 702 "requires a *valid scientific connection to the pertinent inquiry* as a precondition to admissibility." *Daubert*, 509 U.S. at 592 (emphasis added). "[T]he requirement of reliability...extends to *each step* in an expert's analysis all the way *through the step that connects the work of the expert to the particular case.*" *In re Paoli*, 35 F.3d at 743 (emphasis added). In this case, the "pertinent inquiry" is whether friction products cause mesothelioma. Lemen conceded that his opinion that friction products cause mesothelioma rested on his **assumption** that the fibers associated with friction products "have the same...biological propensities as chrysotile fibers that were studied in other areas." A502-A503; cf. Defs-Br. 11, 30. For that opinion to be admissible, Plaintiff had to present scientifically reliable evidence that the assumption was correct. Because Plaintiff did not, "there [wa]s simply too great an analytical gap between the data and the opinion proffered." *Joiner*, 522 U.S. at 146.

B. Every Epidemiological Study To Have Examined The Issue Has Found No Greater Risk Of Mesothelioma Among Auto Mechanics.

1. Epidemiology is the best evidence of causation.

Confronted by sixteen epidemiologic studies finding no evidence that friction products cause mesothelioma, Plaintiff asserts that "[n]o court in any jurisdiction has ever embraced [the] radical position" that extensive, uniform epidemiology trumps contrary evidence of causation. Pl-Br. 22. Plaintiff seemingly failed to read Defendants'

opening brief, which cites numerous decisions from various jurisdictions excluding expert causation testimony, or granting defendants judgment as a matter of law, because the causation testimony proffered was contrary to the great weight of epidemiological evidence. See Defs-Br. 26-27, 33 (citing overwhelming authority). Rooted in the widely shared understanding that "epidemiological studies provide 'the primary generally accepted methodology for demonstrating a causal relation between a chemical compound and a set of symptoms or disease,'" *Siharath*, 131 F. Supp. 2d at 1356 (quoting *Conde*, 804 F. Supp. at 1025-26), those cases—which Plaintiff does not even discuss, let alone distinguish—make clear that Defendants' position is neither "radical" nor one that "[n]o court in any jurisdiction has ever embraced." Defendants' position instead represents the consensus view of the many courts to have previously considered the issue.

2. Plaintiff's dismissal of the extensive epidemiology is without legal or factual basis.

Describing them as "inconclusive and often irrelevant" (Pl-Br. 21), Plaintiff dismisses the many epidemiologic studies that have, without exception, found no evidence that exposure to friction products causes mesothelioma. Plaintiff's criticism is fundamentally misguided, both as a matter of law and as a matter of fact.⁶

Plaintiff ignores that he has the burden of proving the reliability of his expert's proffered testimony.⁷ See *Bowen*, 906 A.2d at 795. The

⁶ Plaintiff's reliance (Pl-Br. 16) on *In re Federal-Mogul Global, Inc.*, 300 F.3d 368 (3d Cir. 2002), is misplaced. The court—which was deciding a question of appellate jurisdiction—did not have before it and thus could not have considered epidemiologic evidence like that presented in this case, and certainly did not find it to be in equipoise with Plaintiff's evidence after due deliberation.

⁷ Plaintiff's amici make the same error, and mischaracterize Defendants' position in the process. Defendants do not claim that the epidemiologic studies finding no evidence that exposure to friction products causes mesothelioma provide "conclusive proof that no person can ever contract disease from working with asbestos brakes." Pl-Amici-Br. 6. Defendants argue only that Plaintiff has failed to carry his burden of offering scientifically reliable evidence that friction products do cause mesothelioma. Nor do Defendants argue that "there must be an

relevant question is not whether Defendants have conclusively disproved its reliability, but whether Plaintiff has affirmatively proved it. As recognized in numerous cases cited by Defendants but ignored by Plaintiff, criticism of contrary epidemiology does not satisfy Plaintiff's "affirmative duty to establish the scientific reliability of [his own] expert's proposed testimony." *Pozefsky*, 2001 WL 967608, at *7; accord, e.g., *Norris*, 397 F.3d at 886; *Siharth*, 131 F. Supp. 2d at 1358; *Conde*, 24 F.3d at 814; *Caraker*, 188 F. Supp. 2d at 1034.

In any event, Plaintiff's criticism of the extensive epidemiology uniformly finding no evidence that friction products cause mesothelioma is factually unfounded. According to Plaintiff, "many of the studies do not follow the cohort long enough to cover the latency period for mesothelioma." Pl-Br. 23. But of the 16 studies Defendants cite (see Defs-Br. 6 n.12), only three—those by Gustavsson, Hansen, and Järvalho and Brisman—are cohort studies and thus even theoretically susceptible to Plaintiff's criticism. The remainder are either case-control, proportionate mortality ratio, or proportionate incidence ratio studies, none of which even use cohorts.⁸

Invoking an article by Michael Huncharek, Plaintiff also claims that epidemiologic study of every occupation before one can conclude that asbestos exposure in that occupation causes mesothelioma. *Id.* Instead, Defendants argue that one cannot simply assume, as Plaintiff and amici do, that studies of other occupations exposed in greater quantities to other more toxic forms of raw asbestos are applicable to auto mechanics exposed to refined chrysotile in friction products when it is undisputed (see p. 3 *supra*) that the properties of refined chrysotile in friction products differ in at least six significant ways from the properties of the other more toxic forms of asbestos—particularly when numerous epidemiologic studies have unanimously concluded there is no evidence that friction products cause mesothelioma.

⁸ See Defs-Br. 6 n.12. Although the Hodgson study reports data broken out by cohort, it is not a cohort study; rather, it is a retrospective proportionate mortality ratio study that examines how that ratio has changed over time. Moreover, even if it were a cohort study, the cohorts for which it provides data were born between 1883 and 1963 (see A1098); thus, since it relies on data collected through 1993, it looks back between 30 and 110 years, which would be ample time to detect mesothelioma given that the disease has, based on Plaintiff's own evidence, a latency period as short as 10 years and "generally on the order of 30 to 40 years." *Asbestos, Asbestosis, and Cancer*, 23 Scand. J. Work Env't & Health 311, 313 (1997) (B1158).

studies of auto mechanics as an occupational group are "not scientifically valid, for the simple reason that 'automotive mechanics' have dramatically different levels of asbestos exposure." Pl-Br. 18 (citing Huncharek, *Brake Mechanics, Asbestos, and Disease Risk*, 11 Am. J. Forensic Med. & Path. 236, 237 (1990) (B1142)). But Huncharek offers scant support for Plaintiff's assertion that "'automotive mechanics' have dramatically different levels of asbestos exposure" depending on the extent to which they directly engage in "grinding [and] beveling." Pl-Br. 18. Moreover, Plaintiff's suggestion that none of the studies controlled for the purportedly higher levels of exposure experienced by brake mechanics, as distinct from other auto mechanics, is false. At least four of the epidemiologic studies that have found no increased risk of mesothelioma from friction products focused on brake mechanics specifically. See Hessel, *Mesothelioma Among Brake Mechanics*, 24 Risk Anal. 547 (A1091-A1094); Spirtas, *Mesothelioma Risk Related to Occupational or Other Asbestos Exposure*, 122 Am. J. Epid. 518 (A1283); Spirtas, *Malignant Mesothelioma*, 51 Occup. & Env'tl. Med. 804 (A1275-A1282); Teschke, *Mesothelioma Surveillance to Locate Sources of Exposure to Asbestos*, 88 Can. J. Pub. Health 163 (A1336-A1341). If one accepts Plaintiff's assumption that brake mechanics have greater exposure to friction products than auto mechanics generally, studies that focus on brake mechanics in particular should show an increase in mesothelioma if friction products do in fact cause mesothelioma. But each of the four studies that examined brake mechanics in particular reached the same conclusion as the studies that examined auto mechanics in general, namely that there is no evidence of increased risk of mesothelioma from exposure to friction products. See, e.g., Teschke, 88 Can. J. Pub. Health at 166 ("As with vehicle mechanics in the occupational analysis, a history of brake lining installation or repair

had a risk estimate below 1.0.") (A1339).⁹

Moreover, the Huncharek article on which Plaintiff relies does not support his assertion that epidemiologic studies of auto mechanics as an occupational group "are not scientifically valid." Pl-Br. 18. On the contrary, Huncharek, writing in 1990 about "brake mechanics and garage workers," calls for "further investigations of *this occupational group*," and says that "[m]ore extensive analyses such as [the Järholm and Brisman study cited by Defendants] are needed to define more clearly the possible risk of asbestos-related disease in *this occupational group*." Huncharek, *supra*, at 238 (B1143) (emphasis added). Notably, the Järholm and Brisman study extolled by Huncharek, whom Plaintiff cites for the proposition that studies of auto mechanics as an occupational group are invalid, examined "car mechanics" as an occupational group. See A1112.

Further, any criticism of the epidemiologic studies finding no increased risk of mesothelioma among "auto mechanics" applies equally to the studies upon which Plaintiff implicitly relies (*cf.* Pl-Br. 21) finding an increased risk among "miners," "shipbuilders," and other occupational groups. Because occupational groups include individuals who perform different tasks and are employed for different lengths of time, there will always be varying degrees of exposure within every occupational group studied: an asbestos "miner" may have worked underground extracting the mineral or at the surface operating the elevator, and a "shipbuilder" may have worked in the hold applying asbestos cement or sat high above operating a crane; each may have worked in the industry five years or fifty. The variance in degrees of exposure does not undermine the validity of an epidemiologic study. One of the very strengths of epidemiology is that, by aggregating data over large

⁹ Significantly, although Teschke found no increased risk of mesothelioma among brake mechanics, he *did* find a "[s]trongly elevated" risk among people like Plaintiff who repaired boilers and renovated buildings. Teschke, 88 Can. J. Pub. Health at 165-66 (A1338-A1339).

numbers of people, extreme outliers—whether people with atypically high or low exposure—cancel each other out, allowing researchers to generalize about occupational groups.

Moreover, given his own work history, it is utterly disingenuous for Plaintiff to say that studies of auto mechanics are “irrelevant” to his case. Plaintiff submitted a sworn affidavit in which he specifically described his occupation from 1942 to 1980 as “*auto mechanic*.” A789 (emphasis added). He also testified under oath that, when working as an auto mechanic, he did not just do brake and clutch jobs, but “[e]verything,” including tune-ups, motor work, exhaust work, and alignments. See B4, B8, B12. Moreover, Plaintiff claims to have contracted mesothelioma not only through the brake jobs he did himself, but also through those done by others when he was merely present in the garage. See Pl-Br. 6 (claiming “that he breathed dust from jobs he was not personally doing”) (citing (B10)). There is, therefore, no basis—either in epidemiologic theory or the facts of this case—to disregard the many studies of “auto mechanics” that have uniformly found no evidence that exposure to friction products causes mesothelioma.

Describing the “the scientific basis for the defense” as “handsomely funded by Defendants” (Pl-Br. 51), Plaintiff next insinuates that Defendants have financed many if not all of the epidemiologic studies that have found no evidence that friction products cause mesothelioma. That is false. Of the 16 epidemiological studies Defendants cite (see Defs-Br. 6 n.12), only one—the Hessel study—was financed by them.¹⁰ The others, all of which were conducted by independent researchers, were funded by diverse and respected entities such as the National Cancer Institute, the Washington State Department of Labor and Industries, the U.K. Health and Safety Executive, the Spanish Ministry of Health, the German Federal Ministry of Science and Technology, and the Danish

¹⁰ The Goodman meta-analysis, which analyzes the various studies, was also funded by Defendants.

Anti-Cancer League.¹¹ Regardless of funder, each reached the identical conclusion: there is no evidence friction products cause mesothelioma.

Despite the unanimous conclusion of every epidemiological study to have examined whether exposure to friction products causes mesothelioma, Plaintiff claims that "the epidemiological data" are not "as uniformly negative as Defendants contend." Pl-Br. 19. In support of this baseless assertion, Plaintiff points to "[a] comprehensive analysis of mesothelioma in Australia" which purportedly "demonstrated a five-fold increase in mesothelioma risk for those exposed to asbestos through brake work." *Id.* But the analysis to which he alludes, based on data collected by the Australian Mesothelioma Registry (AMR), is indisputably flawed. As an initial matter, the AMR is *not* an epidemiological study; it is not a cohort study, a case-control study, or any other form of analytic epidemiology. See Leigh Depo. (DDX 78) SA95. As its name suggests, the AMR is simply a registry of cases. *Id.* at SA95-SA96. According to Plaintiff's own expert, registries like the AMR "suffer from a lot of problems." SA13. The AMR case data are particu-

¹¹ The studies (cited at Defs-Br. 6 n.12) were conducted and funded by the following entities: Agudo (A1001) conducted at the Institute for Epidemiology and Clinical Research and funded by the Spanish Ministry of Health; Coggon (A1043) conducted at the University of Southampton and funded by the U.K. Health and Safety Executive (U.K.H.S.E.); Gustavsson (A1079, A1084) conducted at Karolinska Hospital and the Swedish Nat'l Institute of Occupational Health, and funded by Folksan Insurance Group; Hansen (A1087, A1090) conducted at the University of Odense, and funded by the Danish National Anti-Cancer League); Hodgson (A1097) conducted and funded by the U.K.H.S.E.; Järholm & Brisman (A1114-A1115) conducted at Sahlgren Hospital and funded by the Swedish Metalworkers Union and the Swedish Work Environment Fund; McDonald & McDonald (A1151) conducted at St. Mary's Hospital Medical School, and funded by the Quebec Asbestos Mining Ass'n; McElvenny (A1160) conducted and funded by the U.K.H.S.E.; Milham & Ossiander, (SA160) conducted by the Washington State Dept. of Health and funded by the Washington State Dept. of Labor and Industries; Olsen & Jensen (A1186) conducted and funded by the Danish Cancer Society; Spirtas, (A1283-A1285) conducted and funded by the National Cancer Institute; Spirtas (A1275) conducted and funded by the National Cancer Institute; Teschke (A1336) conducted at the University of British Columbia and funded by the British Columbia Health Research Foundation; Teta (A1342) conducted at the Yale School of Epidemiology and Public Health and funded by Yale School of Medicine and the National Cancer Institute; Woi-towitz & Rödel-sperger (A1365) conducted at Justus-Liebig University and funded by the German Ministry of Science and Technology.

larly problematic. James Leigh, the AMR's long-time coordinator, has conceded that many of the mesothelioma cases he had ascribed to brake mechanics without any other exposure to asbestos were erroneously classified. See Leigh Depo. SA105-SA159. In fact, Plaintiff's causation expert, Lemen, acknowledged that more than half of the ascribed cases were improperly classified. See SA5-SA7.

As problematic as the underlying AMR data are, Leigh's calculations based on that data—which purportedly “demonstrat[e] a five-fold increase in mesothelioma risk” to brake mechanics—are even more problematic. For example, when calculating the incremental risk to brake mechanics, Leigh assumed a background rate of one mesothelioma case per million people per year. See Leigh Depo. SA101-SA102. That estimate, which is on the low end of the generally accepted range for the global background rate, is wildly too low for analyzing the AMR data because Australia—thanks to a major crocidolite mine and the widespread use of crocidolite in housing construction—has the highest incidence of mesothelioma in the world. See Leigh Depo. SA97-SA100; *accord* SA10; SA11-SA12. By assuming an unrealistically low background rate, Leigh understated the number of brake mechanics who would be expected to contract mesothelioma by virtue of living in Australia, thereby exaggerating the incremental risk they purportedly face by virtue of their occupation.¹² Similarly, when calculating the relative risk Australian brake mechanics purportedly face by virtue of their occupation, Leigh based his calculation on a lifetime risk factor that was averaged over males and females, even though women are known to have a significantly lower incidence of mesothelioma and most if not all of the mesothelioma cases Leigh identified among brake mechanics occurred in men. See Leigh Depo. SA103-SA104; SA18. By using a lifetime risk that was aver-

¹² Leigh's calculations do not control for proximity to the Wittenoom crocidolite mine, for living in a house constructed with crocidolite, or any other exposure to amphibole asbestos.

aged across both genders as the basis for his analysis, Leigh understated the number of brake mechanics who would be expected to contract mesothelioma by virtue of being male, thereby exaggerating the incremental risk they purportedly face by virtue of their occupation. Indeed, Leigh admits that had he instead used the male lifetime risk as the basis for his calculation, his analysis would have shown **no** increased risk among brake mechanics. See Leigh Depo. SA104; accord SA19-SA20. According to Plaintiff's causation expert, Leigh's "crude" calculation violated generally accepted epidemiologic methodology. SA14-SA18. Though not a surprise, since the AMR is not an epidemiologic study, it does make clear that there is no foundation for Plaintiff's assertion that the epidemiologic evidence with respect to friction products is anything other than "uniformly negative."

C. Whether Mesothelioma Is A Signature Disease Is Irrelevant.

Plaintiff and his amici make much of their claim that mesothelioma is a "signature" disease for asbestos exposure. Pl-Br. 19-20; Pl-Amici-Br. 3-6. But they ignore the undisputed fact that some mesotheliomas are idiopathic, *i.e.*, without any apparent cause, and others may be caused by something other than asbestos, *e.g.*, therapeutic radiation. See Butnor, *Exposure to Brake Dust and Malignant Mesothelioma*, 47 Ann. Occup. Hygiene 325, 329 (2003) (A1015)); SA8; SA21-SA22. Moreover, the argument again improperly conflates all types of asbestos in all settings. Even assuming mesothelioma is a signature disease for asbestos exposure, that tells us only that a person with mesothelioma was exposed to some sort of asbestos at some point in the past. It tells us neither the type of asbestos to which the person was exposed nor the setting in which the exposure occurred. The fact that mesothelioma may be a signature disease for asbestos exposure does not even logically suggest, let alone constitute scientifically reliable evidence, that friction products cause mesothelioma.

II. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE PLAINTIFF FAILED TO PROVE CAUSATION.

Although Plaintiff now contends that he was not required to prove general causation (see Pl-Br. 30-31), at trial he never disputed that requirement, which Judge Slight and Judge Johnston both understood to exist.¹³ In any event, as Plaintiff concedes, the semantic distinction he attempts to draw between general causation as an "element" and as an analytic category is "ultimately immaterial in this case." Pl-Br. 31. Regardless what it is called, Plaintiff bears the burden of proving it. See Defs-Br. 32-33 (citing cases). If refined chrysotile as used in friction products does not cause mesothelioma, then it could not have caused—and thus could not have been "a substantial factor" in—Plaintiff's contraction of mesothelioma.

Plaintiff, who bears the burden of proving causation, does not address the numerous gaps in his non-epidemiologic causation evidence identified by Defendants. See Defs-Br. 34-35. Nor does Plaintiff discuss, let alone distinguish, any of the many cases cited by Defendants in which courts have granted defendants JMOL because the causation testimony the plaintiff proffered was contrary to the overwhelming weight of epidemiological evidence. See *id.* at 32-33. As those cases hold, the (deeply flawed) non-epidemiologic evidence that Plaintiff offered is legally insufficient "in the face of the overwhelming body of contradictory epidemiological evidence." *Richardson*, 857 F.2d at 830. Defendants are therefore entitled to judgment as a matter of law.

¹³ See SA55 (acknowledging that "[t]he general causation matter...has been properly presented to the court"); SA56 (allowing "the issue of general causation" to go to the jury); *In re Asbestos Litig.*, 911 A.2d at 1201 (A432) (discussing Plaintiff's "proffered expert testimony on general causation").

III. PLAINTIFF'S NONDISCLOSURE OF HIS CLAIMS AGAINST H-W AND USG
DESPITE DEFENDANTS' DISCOVERY DEMANDS AND THE TRIAL COURT'S ORDER
DEPRIVED DEFENDANTS OF UNIQUE EVIDENCE OF ALTERNATIVE CAUSATION.

Plaintiff does not dispute that Defendants specifically demanded, and Judge Slights expressly ordered, that he produce all claims he had filed seeking compensation for asbestos-related injuries. Nor does Plaintiff, who failed to produce his claims against H-W and USG until trial was safely concluded, dispute that he violated that court order and Rule 26 of the Superior Court Rules of Civil Procedure. Plaintiff likewise does not deny that those undisclosed claims, swearing that he had contracted mesothelioma as a result of his exposure to non-friction products, bore directly on the central issue at trial—namely, whether Plaintiff could have contracted mesothelioma because of his exposure to non-friction asbestos products rather than to friction products like those manufactured by Defendants. Yet Plaintiff asserts that this Court should disregard his flagrant discovery violation and the harm it caused Defendants because, he says, the evidence he concealed “could have been discovered with Defendants’ due diligence.” Pl-Br. 34. Plaintiff’s assertion is false: the record is unequivocal that it was not Defendants, but Plaintiff and his counsel, who failed to exercise due diligence, or worse intentionally withheld key evidence. Plaintiff’s approach, in which it is defendants’ responsibility to catch plaintiffs concealing evidence before the trial is over, violates public policy and would wreak havoc in the courts.

Plaintiff’s assertion that the concealed claims were “merely cumulative of other evidence” (Pl-Br. 35) is also false, belied by an examination of the claims themselves and the “other evidence” he cites. None of the other evidence, to the extent it even exists, constituted, as do the concealed claims, *admissions* by Plaintiff that he had suffered “*meaningful*” exposure to non-friction products, and that he believed such exposure *caused* his mesothelioma. It is those unique as-

pects of the concealed claims that would have refuted Plaintiff's contentions at trial that his exposure to non-friction asbestos was insubstantial and that his mesothelioma thus must have been caused by his exposure to friction products, like those Defendants manufactured.

Plaintiff's efforts to underplay the impact of his discovery omissions are based on gross distortions of the record: He misrepresents what was asked of him at deposition, mischaracterizes the documents he did produce, and gives a misleading account of when he gave Defendants information that he (mistakenly) suggests constituted an adequate substitute for the evidence he improperly concealed.

A. The Concealed Claims Are Unique Evidence Of Alternative Causation.

1. The H-W and USG claims are admissions against interest.

Unable to identify any other evidence that he had admitted suffering "meaningful" exposure to non-friction products, Plaintiff disputes that the H-W and USG claims actually constitute such admissions, averring claimants "need only present evidence that the bankrupt entity's product was 'present at the time of the alleged exposure.'" Pl-Br. 38 (quoting H-W TDP § 5.7(c) (A823)). Plaintiff errs. The provision Plaintiff selectively quotes does not obviate a claimant's obligation to provide proof of "meaningful" exposure. The H-W trust expressly requires that a mesothelioma claimant present evidence of "Company Exposure," which is defined to mean "*meaningful* and credible exposure...to asbestos-containing products...manufactured by...[H-W]." A810; A823 (emphasis added). Section 5.7(c) of the H-W TDP explains "[t]hat meaningful and credible exposure evidence must be established by...an affidavit or other credible evidence that establishes...that asbestos-containing products...manufactured by...Harbison-Walker...were present at the time of the alleged exposure." A823. That requirement merely defines the method of proof by which a claimant must satisfy the credibility prong of the "meaningful and credible exposure" standard;

such proof is necessary, but not sufficient to satisfy the claimant's independent obligation to establish meaningfulness. Regardless, the argument is wholly inapplicable to the USG TDP, which, while allowing different methods of proof, expressly requires that a claimant "demonstrate...meaningful...exposure" to a USG product. A942.

Moreover, as Defendants noted in their opening brief (at pp. 18-19), the concealed claims are unique, non-cumulative evidence not only because they constitute sworn admissions by Plaintiff that he suffered "meaningful" exposure to non-friction products, but **also** because they are sworn admissions by Plaintiff that he believes he is entitled to compensation for his mesothelioma by virtue of his exposure (whether meaningful or not) to those companies' non-friction products. To that point, Plaintiff has no reply. Indeed, Plaintiff apparently concedes that the H-W and USG claims constitute admissions of his "personal belief" that his mesothelioma was "cause[d]," at least in part, by his exposure to non-friction products. Pl-Br. 39.

Rather than deny that point, Plaintiff asserts that his "personal belief that a product was a cause of his disease is insufficient to prove causation" *Id.* But it is irrelevant whether Plaintiff's sworn admissions are *alone* sufficient to prove alternative causation; they are certainly probative of the point. To warrant a new trial, the newly discovered evidence need only have been likely sufficient "in conjunction with" all other evidence presented at trial to result in a different verdict. *See Banks v. State*, 845 So.2d 9, 23-24 (Ala. Crim. App. 2002); *accord Tracy v. Terminal R. Ass'n*, 170 F.2d 635, 640 (8th Cir. 1948). Given that it was not Defendant's "burden to prove [alternative] causation," as Plaintiff asserts (*see* Pl-Br. 39-40), but Plaintiff's burden to prove causation, all Defendants had to do to prevail at trial was to create sufficient doubt as to Plaintiff's cau-

sation theory.¹⁴ The concealed claims would surely have done that. Evidence of "Mr. Grenier's personal belief that a [non-friction] product was a cause of his disease" (Pl-Br. 39) would have strongly buttressed Defendants' scientific showing that friction products could not have been the cause. See Defs-Br. 40-43. Any doubt about the importance of this alternative causation evidence is dispelled by Plaintiff's emphasis on its absence at trial. See *id.* at 42; *accord* p. 23 *infra*.

2. The concealed claims uniquely show Plaintiff's belief that non-friction products caused his mesothelioma.

Claiming that Defendants "squandered opportunities" to prove that he had been meaningfully exposed to non-friction products (Pl-Br. 40), Plaintiff suggests that Defendants would not have made use of the H-W and USG claims at trial even if he had produced them. In support, Plaintiff claims that Defendants "never sought to introduce evidence of Mr. Grenier's bankruptcy claims related to other non-friction products such as Quigley refractory cement." Pl-Br. 35 (citing B18-B69). But Plaintiff's contention distorts the record. The only bankruptcy claims produced to Defendants were claims against Johns-Manville, H.K. Porter, and Quigley. See B18-69. Yet each of those claims related to Plaintiff's purported exposure as an auto mechanic, and were thus—unlike the H-W and USG claims—irrelevant to Defendants' alternative causation defense.¹⁵ Accordingly, the fact that Defendants did not of-

¹⁴ Had Defendants brought third-party claims against H-W and USG, then they would have had to prove causation as to H-W and USG; but they were under no obligation to pursue such claims, and did not.

¹⁵ Although the Johns-Manville claim (B33-B41) does not identify a particular product, it clearly arises from Plaintiff's exposure to friction products. According to the claim, Plaintiff's alleged exposure occurred between 1942 and 1980, the period that corresponds to Plaintiff's time as an auto mechanic. See B33. Moreover, as Plaintiff's counsel acknowledged on the record, in his deposition and on his Work History Sheet, Plaintiff specifically identified Johns-Manville as having manufactured brake linings to which he was exposed. See SA67, SA68; SA30; A895. Similarly, Plaintiff's claim against H.K. Porter (B48-B57) gives his date of alleged exposure as between 1952 and 1980, which corresponds precisely to the period he worked at Lumb Motors (see A891), and identifies his occupation at the time as "brake mechanic" and "clutch mechanic." B48. The Quigley claim (B58-B69) like-

fer those claims at trial in no way supports the inference that Defendants would not have offered the H-W and USG claims at trial, neither of which arose from Defendants' work as an auto mechanic.¹⁶

Plaintiff makes a similarly disingenuous claim that because Defendants failed to "offer the [settlement] documents as evidence" at trial, Defendants must have made a strategic "decision not to use" them and thus likewise would not have used the H-W and USG claims had Plaintiff produced them. Pl-Br. 36. But *Plaintiff never produced—and even after trial persisted in refusing to produce—any settlement documents.* See Dkt. No. 546, at 3-4 (SA267-SA268).¹⁷ It is, therefore, highly improper for Plaintiff to contend that Defendants' failure to "offer the [settlement] documents as evidence" is indicative of anything, let alone a strategic decision by Defendants not to use alternative causation evidence purportedly available to them.¹⁸ Of

wise relates to Plaintiff's work as an auto mechanic. It gives 1942 as the first year of alleged exposure, identifies Plaintiff's "Occupation/Trade at the time of Exposure" as "auto mechanic," and identifies "Frank Cook Oldsmobile/Chevrolet" and "Lumb Motors, a GM Franchise" as sites at which he was exposed to Quigley's products. B59; B61.

¹⁶ Nor does Plaintiff's production of the Johns-Manville, H.K. Porter, and Quigley claims—each of which relates to Plaintiff's work as an auto mechanic—detract from the suspicious fact that the only claims Plaintiff failed to produce were those that evidenced his meaningful exposure to *non-friction* products, *i.e.*, those that provided substantial support for Defendants' theory of the case.

¹⁷ It is questionable whether Plaintiff actually entered settlements with defendant non-friction manufacturers. Although he tells this Court that he entered "settlements with non-friction product manufacturers Aquachem/Cleaver Brooks, Riley Stoker, and Westinghouse" (Pl-Br. 36), he told the trial court a different story. In a letter sent to the court during post-trial briefing, Plaintiff identified "the entities with whom Plaintiff has settled or reasonably expects to settle" as "Abex, Bendix, Borg Warner, Bridgestone, Chrysler, Harbison Walker, H.K. Porter, Johns-Manville, Maremont, Metro, Pfizer, and US Gypsum." SA269. The letter, which expressly represents that it reflects "all settlements" Plaintiff had entered, makes no mention of non-friction product manufacturers Cleaver Brooks, Riley Stoker, and Westinghouse. But even if he had entered such settlements, he never provided the settlement documents to Defendants, and thus they cannot possibly cure his failure to produce his claims against H-W and USG.

¹⁸ Plaintiff's assertion that Defendants had "other evidence against USG and H-W which they failed to use" (Pl-Br. 39 (citing Dkt. 550, at 3-4)) is similarly misleading. The "evidence" to which Plaintiff alludes are interrogatory answers from USG and H-W in another case that contain no evidence linking Plaintiff to their products.

course, even if documents memorializing Plaintiff's purported settlements with non-friction defendants existed and had been produced (*but see* n.17), it is unlikely they would contain attested admissions—like those in Plaintiff's claims against H-W and USG—that he believed his exposure to those manufacturers' non-friction products was "meaningful" and caused his mesothelioma. Settlement agreements typically do not contain such sworn averrals. Regardless, none were produced.¹⁹

B. Defendants Diligently Requested The Concealed Claims.

Brazenly attempting to blame Defendants for his concealment of the H-W and USG claims, Plaintiff contends that the evidence he hid "could have been discovered with Defendants' due diligence." Pl-Br. 34. Yet again, the record belies Plaintiff's contention.

Plaintiff misleadingly claims that despite having "timely notified Defendants of settlements with non-friction product manufacturers" "Defendants did not question Mr. Grenier about these products." Pl-Br. 36. What Plaintiff neglects to mention is that his "timely" notice of the alleged settlements was not given until long after Plaintiff's deposition had occurred, and just days before trial began. See B108, B110-B111. Similarly misleading is Plaintiff's assertion that "Defendants never deposed Mr. Grenier about his work with USG's Durabond, nor other specific non-friction products and manufacturers identified on his work history sheet and interrogatory responses," and that Defendants had a "strategy of ignoring the identity of manufacturers of

¹⁹ Likewise meritless is Plaintiff's assertion that "the evidence Mr. Grenier was required to provide" in connection with the H-W and USG claims "was no different from his work history, produced 18 months before trial." Pl-Br. 38. As Plaintiff's counsel conceded below, Plaintiff's Work History Sheet does not even disclose his exposure to Metalcased Firebrick, the product that is the basis of his claim against H-W (*see* A777), or any other H-W product. See SA83-SA93; SA82 (acknowledging Plaintiff had not disclosed his exposure to H-W asbestos products prior to trial). Moreover, unlike the claims he concealed, the Work History Sheet is merely a listing of some of the many asbestos products to which Plaintiff was exposed; it contains no admission that he believes those exposures were "meaningful," caused his mesothelioma, and entitle him to compensation—facts the jury surely would have found probative on the question of causation.

non-friction products." Pl-Br. 37. Contrary to Plaintiff's assertion, Defendants did depose Plaintiff about his work with joint compounds (such as Durabond) and other non-friction products, but Plaintiff repeatedly disclaimed any knowledge of who had manufactured those products. See, e.g., SA25-SA26 ("Q: Is it true you cannot give the manufacturer of any of the joint compounds that you ever worked with? A: I don't know. Q: So you don't know the name? A: No, I don't."); SA31 ("Q. Can you offer any testimony about the manufacturer of any of that sheet rock mud? A. No. Q. Or joint compound? A. No, I can't.").²⁰ Defendants also deposed Plaintiff about any bankruptcy claims he might have filed, but he repeatedly denied any knowledge of those too.²¹ In short, it is undeniable that during discovery Defendants diligently sought information about Plaintiff's exposure to non-friction products and any bankruptcy claims that might reflect relevant information concerning such exposure, and that the dearth of compelling evidence of Plaintiff's meaningful exposure to such products is attributable to Plaintiff's flagrant, admitted violation of his discovery obligations.

C. The Concealed Claims Are Admissible.

Plaintiff erroneously asserts that the H-W and USG "claims are not admissible." Pl-Br. 37. He invokes no legal authority for the assertion, and there is none. The only conceivable ground for the claims'

²⁰ Accord, e.g., SA24 ("Q: Do you remember the name of the [insulation] manufacturer they were using? A: I don't know."); SA27-SA28 ("Q. Sir, changing subjects to your description of having worked around the furnace or boiler at the school. Do you know the manufacturer, the supplier of that particular boiler or furnace? A. Standard. Q. American Standard? A. Yeah. Q. Sir, do you remember the names of any other boiler or furnace trade name - A. No, I don't. Q. - that you may have worked around either in an employment setting or in your home remodeling work? A. No. No, I don't.").

²¹ See SA32-SA33 ("Q. Do you know if you've filed any claim with any bankruptcy trust? A. No. Q. [E]arlier you mentioned Johns-Manville, do you [know] if you made a claim with the Manville bankruptcy trust? A. No. I don't think so. Q. Do you know if you made a claim? A. I don't know. Q. Do you know if you made a claim with the [C]el[o]tex bankruptcy trust? A. Geez, I don't remember. Q. Do you have any recollection of signing any paperwork that is in essence a claim form that you submitted to any bankruptcy or settlement trust?...THE WITNESS: Not that I recall.").

exclusion would be DRE 408, which governs the admissibility of offers to compromise. But DRE 408 does not preclude the claims' admission. First, it is by no means clear that Plaintiff's claims against H-W and USG even fall within the scope of DRE 408. There is no evidence that Plaintiff believed that he was entitled to greater compensation from H-W or USG than he would receive by filing his claims or that he had recourse against H-W or USG, two bankrupt entities, apart from his claims. Thus, there is no basis for concluding that Plaintiff, in submitting his claims, was offering to forego part of what he believed due him or to relinquish a legal right in exchange for satisfaction of his claims. Thus, it is doubtful that Plaintiff's claims constitute "offer[s] to accept...valuable consideration in *compromising*...a claim." DRE 408 (emphasis added). Cf. *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 909 (2d Cir. 1997); *Winchester Packaging, Inc. v. Mobil Chem. Co.*, 14 F.3d 316, 319 (7th Cir. 1994); *Dimino v. New York City Transit Auth.*, 64 F. Supp. 2d 136, 163 (E.D.N.Y. 1999).

Even if the claims did fall within the scope of DRE 408, they would not be inadmissible under that rule. DRE 408 provides only that evidence of settlement of a claim "is not admissible to prove liability for or invalidity of *the claim* or *its* amount." DRE 408 (emphasis added). The rule "does not require exclusion when the evidence is offered for another purpose." *Id.* Here, Plaintiff's claims against H-W and USG would not have been offered to prove the "validity or invalidity" of those claims, but rather to prove—in connection with an entirely different claim against entirely different entities (namely, Plaintiff's claim against Defendants)—Plaintiff's admissions that he suffered a "meaningful" exposure to non-friction products and believes such exposure caused his mesothelioma. Nothing in DRE 408 precludes the introduction of Plaintiff's claims for that purpose.

D. The USG Claim Could Have Been Filed Before The End Of Trial.

Plaintiff, who has yet to submit a sworn affidavit setting forth when he filed the USG claim, makes contradictory representations with respect to its filing date. In the trial court (Dkt. No. 566, at 1), and in the body of his brief in this Court (Pl-Br. 34), Plaintiff represents that the claim was filed "nearly two months after trial," which ended March 2, 2007. On that account, he filed the claim around the end of April 2007. But, in a footnote to his brief, Plaintiff, relying on the date appearing at the bottom of the printed claim form, represents (clearly, albeit implicitly) that his claim was not filed until June 21, 2007. See Pl-Br. n.3.²² At least one of those representations is false. In any event, Plaintiff does not deny that, at minimum, he could have filed his USG claim before the end of trial, in which case the claim would have been subject to disclosure under Standing Order No. 1. See Defs-Br. 44 n.37. Nor does he deny that he filed the H-W claim almost five months before trial. See *id.* at 19.

E. The Verdict Would Have Been Different Had The Concealed Claims Been Presented To The Jury.

The claims against H-W and USG go directly to the central issue in the case—causation. See Defs-Br. 40-43. At trial, Plaintiff repeatedly minimized his exposure to non-friction products and emphasized that despite his having allegedly disclosed "everything [Defendants] needed" to prove their alternative causation theory, the only evidence Defendants were able to offer was of Plaintiff's exposure to products

²² Plaintiff's evidence that the claim was filed on June 21, 2007 is highly dubious. That date appears at the bottom of each page of the claim form, which—given the URL that appears beside the date—was plainly printed from the internet. See B978-B992. The date that appears on such an internet print-out generally reflects the date the web page was printed, not the date that its content was created. Contrary to Plaintiff's assertion, Defendants did not redact the copy of the claim form they provided to this Court. *Cf.* A852-A866. While the line at the bottom of the page containing the date and URL was cut off on most pages of the copy, that was simply an unintended and unnoticed artifact of the copying process (as suggested by the fact that the top of the line is visible on A855). The copy Plaintiff provided the Court also cuts off much of the line on some pages. See, e.g., B982; B988.

made by other "brake manufacturers," which failed to show an alternative causation. A748 (emphasis added)). On appeal, Plaintiff contends that Defendants were not harmed by that argument because the jury had been instructed that "argument [by counsel] is not evidence." Pl-Br. 40. But that misses the point. Though argument by counsel is not evidence, it can be persuasive when supported by evidence or the lack of it. The force of Plaintiff's argument, which the jury obviously accepted, was greatly enhanced by, and indeed depended on, Plaintiff's concealment of his claims against H-W and USG. The jury saw no compelling evidence of Plaintiff's admittedly meaningful exposure to non-friction products, not because the evidence did not exist, but because Plaintiff in violation of discovery obligations had failed to disclose it. By emphasizing the dearth of such evidence in closing argument, Plaintiff's counsel ensured that the jury would consider its absence.²³

F. Letting Plaintiff Evade His Discovery Obligations Is Bad Policy.

Plaintiff admits he violated his discovery obligations (see A760); he should not be allowed to do so with impunity. Were his concealment of evidence sanctioned by this Court, it would encourage other litigants to act similarly. Failure to enforce Judge Slight's Order and the Rules of Civil Procedure would mean open season for asbestos plaintiffs, many of whom are represented by the same firms representing Plaintiff in this action. There are more than 700 asbestos cases pending in Delaware, and bankruptcy claims such as those at issue here are relevant in many if not all of those cases. Plaintiff's improper conduct in this case should not be countenanced lest other plaintiffs in other cases decide that they will try get away with the same thing.

²³ Plaintiff's assertion that the only difference, had the evidence been presented, would have been "a different allocation" on the verdict form (Pl-Br. 40), conflates Defendants' right to present alternative causation evidence in their defense with a supposed obligation to prove hypothetical third-party claims that Defendants did not, and had no obligation to, pursue. Had Plaintiff disclosed his claims against H-W and USG, the difference would have been a different verdict, not a different allocation among non-existent (third-party) defendants.

IV. THE TRIAL COURT MADE SEVERAL HIGHLY PREJUDICIAL EVIDENTIARY ERRORS.

A. The Gold Book Is Not Admissible Under D.R.E. 803(8).

Plaintiff disputes neither that the Gold Book constitutes hearsay within hearsay, nor that hearsay within hearsay is inadmissible under DRE 803(8) unless the secondary hearsay itself "conforms with an exception to the hearsay rule." DRE 805. Given that Plaintiff does not—and cannot—identify an exception to the hearsay rule that would allow admission of the secondary hearsay contained within the Gold Book, it is inadmissible. See Defs-Br. 49 (citing cases).

Further, whatever statutory authority the EPA may have had to compile the Gold Book hearsay, the only factual findings admissible under DRE 803(8) are those "resulting from an *investigation made pursuant to authority granted by law.*" Facts offered under that rule thus must be observed during the course of a legally authorized investigation. But the alleged facts presented in the Gold Book do not meet this requirement because they were allegedly observed by **non-governmental** parties acting **without authorization of law.** See Defs-Br. 48 (citing cases). Plaintiff cites only one case to the contrary, *Conde v. Velsicol Chem. Corp.*, 804 F. Supp. 972 (S.D. Ohio 1992). Even if *Conde* accurately stated Delaware law, it is readily distinguished. There, the party opposing admission had itself relied on a very similar document, thus calling into question the sincerity of its objection, and did "not challenge[] the studies" upon which the document was based. *Id.* at 993. Here, by contrast, Defendants do not rely on anything like the Gold Book, and—for good reason, namely their lack of epidemiologic foundation—do challenge the studies upon which it is based.²⁴

²⁴ Plaintiff cites four cases in support of the proposition that courts "have routinely relied on the Gold Book and similar 'guidance documents' in cases involving asbestos exposure." *Cf.* Pl-Br. 43. But none of those cases has anything to do with the admissibility of hearsay under Rule 803(8). In *Berger v. Amchem Prods.*, 818 N.Y.S.2d 754 (N.Y. Sup. Ct. 2006), the court was deciding whether to admit certain expert testimony; its consideration of the Gold Book in that context says

As noted in Defendants' opening brief (Defendants-Br. 48-49 & n.45), the Gold Book was inadmissible under Rule 803(8)(E) for the independent reason that its "sources of information...indicate lack of trustworthiness." Plaintiff responds that trustworthiness goes "to the weight...of the evidence, not its admissibility." Pl-Br. 44. But that is incorrect: DRE 803(8) plainly provides that a document whose "sources of information...indicate lack of trustworthiness" is **"not within this exception to the hearsay rule."** Absent such an "exception to the hearsay rule," hearsay is not admissible. See DRE 802; *Wright v. State*, 818 A.2d 950, 952 (Del. 2003). Plaintiff's citation to *Ellis v. Int'l Playtex*, 745 F.2d 292 (4th Cir. 1984), is of no avail. The government reports at issue there, which the trial court had excluded under 803(8)(E) for lack of trustworthiness, were three government-run case-control studies whose results appeared in a leading peer-reviewed journal. The court of appeals reversed precisely because "the studies possess[ed]" these "ample indicia of trustworthiness." *Id.* at 301. The Gold Book, by contrast, whose sources include a TV show and an outdated study whose results had, even before the Gold Book's publication, already been repudiated by its authors, bears no such "indicia of trustworthiness" and Plaintiff makes no argument to the contrary.

Defendants also noted in their opening brief that the court should not have allowed expert testimony about the Gold Book because it does not contain facts or data of the kind "reasonably relied upon by ex-

nothing about whether the Gold Book is admissible since, as provided in DRE 104, a court "is not bound by the rules of evidence" when making such preliminary determinations. In *Prudential Ins. Co. v. U.S. Gypsum Co.*, 146 F. Supp. 2d 643 (D.N.J. 2001), the issue was when a party had been put on notice of a potential danger; because the documents relied on by the court were not offered for the truth of the matters asserted therein, they were not hearsay. In *In re Celotex Corp.*, 196 B.R. 973 (Bankr. M.D. Fla. 1996), the guidance book in question was cited only for background purposes; it was not in evidence and the court did not rely on it for any matter in controversy. In *Bd. of Educ. v. Ambach*, 474 N.Y.S.2d 244 (N.Y. Sup. Ct. 1984), the court cited a government report for the sole purpose of defining a technical term as to which there was no controversy.

perts" in epidemiology. Defs-Br. 49-50 (quoting DRE 703). Plaintiff fails to refute this point or to make any argument whatsoever that the Gold Book is the type of document on which epidemiologists regularly rely. Nor could he. Experts rely on peer-reviewed studies, not compendia of hearsay from television shows and other sources.

The court's erroneous admission of the Gold Book and Plaintiff's expert's testimony invoking the Gold Book were highly prejudicial. Its admission and the repeated references to it throughout the trial (see, e.g., A567, A573; SA40; SA58-SA65; SA79; SA80; A751) created the false impression that the EPA has concluded that friction products cause mesothelioma when in fact the agency decided *not* to ban such products when it did finally formally consider the matter several years after the Gold Book's publication. See 58 Fed. Reg. at 58966. Plaintiff's suggestion (Pl-Br. 44) that the prejudice from the repeated references to this inadmissible hearsay would have been dispelled by the testimony of Dr. Anderson is mistaken. Where a party has greatly emphasized inadmissible evidence at trial, particularly through a key witness, as indisputably occurred here, courts are prone to find prejudice. See, e.g., *McIntyre v. State*, 897 A.2d 296, 307 (Md. App. 2006). That is particularly true where, as here, the inadmissible evidence is of a kind likely to impress a jury, like a document promulgated by a person or institution of great stature. Despite Anderson's criticisms, the jury likely accorded the Gold Book's unreliable pronouncements undue weight because "[a]s a governmental publication and the voice of a prestigious [agency], the [Gold Book] carries with it an imprimatur of impartiality and reliability." *Ellis*, 745 F.2d at 302.

B. Precluding Cross-Examination On Kent Cigarettes Was Error.

In our opening brief, we noted that Defendants had ample basis to cross-examine Plaintiff's expert witnesses, who testified on causation and mesothelioma, about whether smoking Kent cigarettes might have

caused Plaintiff's mesothelioma: Plaintiff had admitted that he had smoked several packs of cigarettes a day during the 1950s and that Kent cigarettes were his favorite brand, Kent cigarettes sold during the 1950s are known to have contained asbestos-laden filters, and one of Plaintiff's expert witnesses had authored a study proving that those Kent filtered cigarettes cause mesothelioma. In reply, Plaintiff does not dispute that he smoked Kent filtered cigarettes in the 1950s, that in the 1950s Kent filtered cigarettes contained crocidolite, the most toxic form of asbestos, or that his expert authored a study showing that people who smoked the Kent filtered cigarettes are at an increased risk of contracting mesothelioma. Nonetheless, Plaintiff maintains that Defendants were properly precluded from cross-examining his expert witnesses about these uncontested facts because, he asserts, as a predicate to any such cross-examination, it was purportedly Defendants' burden to prove with certainty that the cigarettes he smoked contained crocidolite. Yet again, there is no merit to Plaintiff's effort to shift the burden of proof to Defendants.²⁵

Defendants showed that a good-faith basis for believing that the factual predicate for a relevant line of questioning exists is all that is required—a point Plaintiff does not and cannot deny. Nor can Plaintiff deny that Defendants had a good faith basis for believing that only one type of Kent cigarette was sold during the 1950s.

Instead, Plaintiff argues that preclusion of Defendants' intended cross-examination was a proper exercise of the trial court's discre-

²⁵ Plaintiff asserts that "[i]f Defendants truly believed Kent cigarettes contributed to Mr. Grenier's mesothelioma, they had plenty of time to bring Kent's manufacturer in as a defendant and to adduce the evidence needed to prove this claim." Pl-Br. 45. But, just as they had no obligation to pursue third-party claims against the manufacturers of the other non-friction asbestos products to which Plaintiff was exposed (see n.14 *supra*), Defendants likewise had no obligation to pursue such a claim against Kent's manufacturer. Their choice not to do so does not deprive them of the right to defend themselves against Plaintiff's claim by eliciting evidence of alternate causation, as to which they have no burden of proof, through cross-examination.

tion because under DRE 611 "cross-examination is limited to the subject of direct examination or, in the exercise of the court's discretion, additional matters." Pl-Br. 47. But that rule does not support Plaintiff's conclusion. Defendants intended to cross-examine Lemen and Longo on the increased risk of contracting mesothelioma as a result of having smoked Kent cigarettes. That subject fell squarely within the scope of their direct examinations. The question of what causes mesothelioma was the prime focus of Lemen's direct examination. See, e.g., SA35-SA39. During his direct examination, Longo discussed the content of his resume (which lists his article on crocidolite in Kent cigarettes), his research on asbestos-containing products from the 1950s, and Plaintiff's exposure to asbestos. See SA47-SA49, SA52-SA53; SA259. Thus, because it was within "the subject of direct examination," Defendants' right to conduct the precluded cross-examination did not depend on an exercise of the trial court's discretionary grace.²⁶

We noted (Defs-Br. 51-52) that the court refused to allow Defendants to cross-examine Plaintiff's experts regarding the possibility that smoking Kent cigarettes caused Plaintiff's mesothelioma based on a flat-out misrepresentation of the historical record that Plaintiff's counsel had made to the trial court, when he stated—falsely—that "Kent made lots of different kinds of cigarettes" during the 1950s. Plaintiff does not deny that the trial court precluded Defendants' intended cross-examination entirely based on this misrepresentation. Nor can he deny that it is in fact a misrepresentation and that only one type of Kent cigarette—the type Plaintiff's own expert says causes mesothelioma—was manufactured in the 1950s. See Maxwell, Historical Sales Trends in the Cigarette Industry: A Statistical Summary Covering 74 Years (1925-98), at 15. Rather than offer any reason to doubt the ac-

²⁶ Plaintiff's assertion that Defendants "declined to cross-examine" Longo on the Kent cigarette subject is disingenuous. The trial court had specifically precluded that line of questioning. See A558.

curacy of the Maxwell data, Plaintiff instead attacks Defendants for having the purported temerity to bring it to the attention of this Court. Yet it is perfectly permissible to cite, in an appellate court, a published report that contains facts of which the Court may take judicial notice under DRE 201(b) and that would be admissible under DRE 803(17) (*see, e.g., Brzoska v. Olson*, 668 A.2d 1355, 1357 n.1 (Del. 1995))—particularly when the need to do so arises only from Plaintiff's persistent misrepresentations.²⁷ In any event, Defendants' legal argument does not depend on the (uncontroverted) truth of the Maxwell data. At trial, Defendants presented a good-faith basis for believing that Plaintiff's exposure to Kent cigarettes may have caused his mesothelioma and contend on appeal that this good-faith basis was a legally sufficient ground upon which to cross-examine Plaintiff's witnesses about that possibility. The Maxwell report merely confirms that Defendants' good-faith basis was not only in good faith, but accurate.

Plaintiff's suggestion that Defendants failed to make a sufficient proffer is baseless. The nature of the evidence being excluded—*i.e.*, testimony that Kent cigarettes in the 1950s contained crocidolite asbestos, and that having smoked such cigarettes carries an increased risk of mesothelioma—was made clear to the court. See A554-A555. DRE 103(a)(2) demands no more.²⁸

²⁷ Indeed, Plaintiff himself has cited to a published article outside the record, only he has done so for the truth of the matter asserted with no justification as to why he can do so, and certainly not to refute any false statement by anyone. See Pl-Br. 17 (citing Greenland, *The Need for Critical Appraisal of Expert Testimony in Epidemiology and Statistics*, 39 Wake Forest L. Rev. 291 (2004)).

²⁸ Plaintiff's assertion that at trial "Defendants had ample opportunity to present evidence regarding the types of Kent cigarettes available during the pertinent time" (Pl-Br. 46) is inaccurate and irrelevant. It is inaccurate because Defendants—who had no reason to anticipate Plaintiff's misrepresentation of the historical record, and therefore no reason to procure Maxwell's report in advance—did not have the Maxwell report in hand. It is unrealistic to expect Defendants' trial counsel to have been able to identify, locate, and acquire the obscure publication in the midst of trial. Regardless, the question whether Defendants had a genuine opportunity to present such evidence is irrelevant because as a matter of law Defendants were not

Preclusion of the cross-examination was prejudicial error. The excluded evidence strongly supported Defendants' theory that exposure to non-friction products, rather than friction products, caused Plaintiff's mesothelioma, as the uniform epidemiology finding no connection between friction asbestos and mesothelioma indicates must have occurred. Had the jury known that Plaintiff for years smoked Kent cigarettes that may have been laden with the most toxic form of asbestos, and that Plaintiff's own expert had found that people who smoked asbestos-laden Kent cigarettes were at an increased risk of mesothelioma, it may well have concluded that Plaintiff's exposure to this non-friction asbestos could have caused his mesothelioma, and may well have reached a different verdict as a result.

C. It Was Error To Admit Evidence Of How Much Defendants Have Spent On Experts To Defend Themselves In All Asbestos-Related Cases.

Defendants pointed out in their opening brief that Plaintiff had improperly been permitted to introduce the fact that Defendants have spent \$19 million on experts while defending themselves against asbestos-related claims, and that Plaintiff, in an effort to discredit Defendants' experts, then mischaracterized what that sum represented, falsely telling the jury that Defendants had paid that \$19 million to experts in this case alone. See Defs-Br. 54-56. Plaintiff responds that his references to how much Defendants have spent on all experts in defense of all asbestos cases was proper because "[t]his evidence was not offered to show their experts' bias, but to illustrate the bias of the underlying studies upon which their testifying experts relied." Pl-Br. 49. Again, however, Plaintiff is playing games with the numbers, and his argument does not add up.

As an initial matter, Plaintiff's assertion that he only told the jury that the amount was spent on science is untrue. His counsel told obligated, and should not have been required by the trial court, to adduce such evidence, which was more than a good-faith basis required, before conducting their intended cross-examination.

the jury that this is "a **case** where Ford and General Motors feel it's appropriate to invest 19 million dollars in their defense" A731 (emphasis added)), thereby indeed suggesting that Defendants had paid \$19 million to the experts in this case alone—a suggestion that, though untrue, naturally caused the jury to question the credibility of Defendants' experts. But there is an even greater flaw with Plaintiff's argument. The \$19 million that Defendants spent was **neither** for experts in this case alone **nor** solely for scientific studies. Rather, the vast majority of the money was spent on **case-specific** activities, such as reviewing medical files of plaintiffs, in thousands of **other** cases. Although the precise sums are not broken out, the interrogatory answers from which the \$19 million figure is taken make clear that the total amount reported "includ[es] case-related payments." See, e.g., SA44-SA45. Thus, the \$19 million figure grossly overstates what Defendants paid for the experts in this case and what they have paid for scientific studies, as well as what they spent for both together.

And Plaintiff did not merely tell the jury that the \$19 million had bought Defendants' testifying experts and some of the studies on which they relied; rather, he suggested to the jury that it had bought *all* of the epidemiology on which Defendants relied, thereby falsely suggesting to the jury that there were *no independently* funded epidemiological studies supporting Defendants' position. See A733 ("So what do we know about epidemiology? First, it took over 19 million dollars to create this science."). That, of course is untrue: only one of the sixteen epidemiological studies to have found no evidence that friction products cause mesothelioma had, like Goodman's meta-analysis of those studies, in fact been financed by Defendants. See n.11 *supra*.²⁹

Had Plaintiff's true purpose been, as he claims now, merely "to il-

²⁹ In addition to Hessel's epidemiological study and Goodman's meta-analysis, Defendants also funded two studies by Paustenbach, on exposure and state-of-the-art, that were discussed at trial.

lustrate the bias of the underlying studies upon which [Defendants'] testifying experts relied" (Pl-Br. 49), he would have asked Defendants in discovery which scientific studies they had funded at what cost and then used that information at trial, but he did not. Rather, he chose to introduce the inapposite interrogatory answers Defendants had given in another case. See A621-A626. Even lacking the easily discoverable relevant information, all Plaintiff had to do at trial to accomplish his purported purpose was to elicit testimony identifying which particular studies relied upon by Defendants' testifying experts had been financed by Defendants. In fact, Plaintiff elicited precisely that testimony when cross-examining Defendants' experts. See B275; B277; B282. But he chose not to limit himself to such testimony because the truth of the matter—namely, that only a few of the many studies relied on by Defendants' experts at trial had been funded by Defendants—did not accomplish Plaintiff's actual goal of misleading and inflaming the jury into believing that Defendants' experts and all the science on which they predicated their opinions were biased.³⁰

Because its (at most) marginal probative value was substantially outweighed by its prejudicial effect, admission of the \$19 million figure and Plaintiff's repeated gross distortions of what it represented constitutes reversible error.³¹

D. Admission Of The Never Authenticated 1948 Article Was Error.

Eager to divert attention from the fact that he never authenticated

³⁰ Plaintiff cites *Berger*, 818 N.Y.S.2d at 757-58, for the proposition that the court below "is not the first court to permit a jury to learn that defendants bought the 'science' behind their defense." Pl-Br. 50-51. But *Berger* is wholly inapposite: it addressed whether a *Frye* hearing was needed before certain experts could testify; it has nothing to do with the admission of inflated numbers used to prejudicial effect.

³¹ Plaintiff's assertion that Defendants waived their objection to the trial court's admission of interrogatory answers showing that Defendants have spent \$19 million on experts while defending themselves against asbestos-related claims (*cf.* Pl-Br. 41 n.4) is meritless. Defendants objected to Plaintiff's reading of the interrogatory answers, and then renewed that objection, before the answers were read to the jury. See A575-A577; SA42. Nothing more is required

the 1948 National Safety News article, Plaintiff makes a frivolous claim that Defendants waived their objection to its admission. The trial court denied Defendants' motion in limine to exclude the article on authentication grounds. See A546-A548.³² Having obtained a "definitive ruling on the record," Defendants had no obligation to renew the objection when Plaintiff offered the article at trial. DRE 103.

Under DRE 901(a), a document may only be admitted if it is authenticated. Unable to defend the article's admission under that actual rule, Plaintiff fabricates a new one, according to which a document may be *excluded* only if it is proved *inauthentic*. See Pl-Br. 53-54. Thus, he exhaustively complains, Defendants failed "to present evidence on the issue." Pl-Br. 53; *accord* Pl-Br. 54 (arguing that Defendants "cite no retraction or contradiction by Castrop [or] by GM" that would prove the article inauthentic). But yet again, Plaintiff inverts the actual burden. "The proponent of any evidence always has the burden of establishing its admissibility." *Hammond v. State*, 569 A.2d 81, 91 (Del. 1989).³³ Plaintiff does not—and could not—claim that he met that burden. Rather, he conclusorily asserts that the article was self-authenticating. But, for the reasons explained by the authorities

³² Contrary to Plaintiff's assertion that they "never lodged their current accusation that the article was not in fact authored by Mr. Castrop" (Pl-Br. 53), Defendants, after informing the court that Castrop's 1947 presentation contained no mention of asbestos but the 1948 article Plaintiff sought to introduce did, told the court that "there is no indication in the article how two paragraphs that were not presented at the seminar suddenly pop up in this article." A546-A548.

³³ Because Defendants bear no burden of proof on this issue, their citation to Castrop, *Recognition and Control of Fume and Dust Exposure*, in 5 Transactions: 35th National Safety Congress (1947), which shows that the 1948 National Safety News article is *inauthentic*, is unnecessary and the Court need not rely on it to rule in Defendants' favor on this issue. That said, Defendants' citation to the document was wholly permissible. Defendants cited it not for the truth of the matters asserted therein, but to allow the Court to see that it states what it states and does not contain the key passages pertaining to asbestos that appear in the purportedly "condensed" (A1030) article Plaintiff introduced. This Court is certainly entitled to take judicial notice of its contents, not for the truth of the matters asserted therein, but for the limited purpose of determining what its contents are (and are not)—the only purpose for which it is cited. See, e.g., *Schweitzer v. Westminster Invs.*, 157 Cal.App.4th 1195, 1203 n.3 (Cal. App. 2007).

cited in Defendants' opening brief (at pages 57-58), which Plaintiff does not try to refute, purported authorship—the critical issue here, since the trial court admitted the article as a party admission—is not a matter subject to self-authentication under DRE 902(6).³⁴

Again rewriting the Delaware Rules of Evidence, Plaintiff asserts that "doubts about the provenance of a document go to its weight, not its admissibility." Pl-Br. 54. None of the cases he cites support that view³⁵ and the plain language of DRE 901(a), which characterizes authentication as "a condition precedent to admissibility," squarely forecloses it. The article's admission was therefore erroneous.

Plaintiff suggests that the error likely was not prejudicial, but that assertion is belied by his repetitious invocation of the article at trial. See Defs-Br. 56 (citing transcript). He did so not only to try to show negligent failure by GM to ameliorate purportedly known risks, but also to buttress his weak case that friction products pose a risk to auto mechanics, which lacked any epidemiologic support. See, e.g., A582-A584 (using Castrop article, which discusses manufacturing only, to suggest that auto mechanics experience asbestos exposure similar to that of workers in asbestos-product manufacturing plants).

³⁴ Whether the article would be admissible, as Plaintiff contends, either as a statement against interest under DRE 804(b)(3) or as an ancient document under DRE 803(16) is irrelevant because in either instance authentication remains a condition precedent to admissibility.

³⁵ Plaintiff cites *Hall v. State*, 788 A.2d 118 (Del. 2001), and *Vouras v. State*, 452 A.2d 1165 (Del. 1982), for the proposition that doubts about a document's authenticity go to its weight, not its admissibility. But neither case helps Plaintiff. *Hall* is not an authentication case; the question there was whether a witness's inability to recall a prior statement in detail violated the Confrontation Clause. In *Vouras*, which concerned the admissibility of audio tapes, the proponent of the tapes' admission offered testimony identifying the voice, thereby satisfying the requirement, not satisfied here, that the proponent "produce 'evidence sufficient to support a finding that the matter in question is what [the] proponent claims.'" 452 A.2d at 1169 (quoting DRE 901(a)).

V. The Supplemental Jury Instruction Was Misleading and Prejudicial.

Plaintiff's suggestion that Defendants missed "opportunities" to challenge the misleading supplemental jury instruction (Pl-Br. 57) is frivolous; the instruction arose in response to a jury question and Defendants acted immediately (see A758).³⁶ Contrary to what Plaintiff argues, the likelihood that the court's instruction—telling the jury it could not see the studies because "these documents have not been admitted as evidence" (A757)—caused the jury to disregard the studies' contents was in no way reduced by the prior instruction that documents in evidence "have no more or less weight than the other evidence presented.'" Pl-Br. 58 (quoting B305). The prior instruction warns against giving more or less weight to matters *in evidence* based on their form; it did nothing to clarify that the contents of the scientific studies were, in fact, *in evidence* despite the court's instruction that the "documents have not been admitted as evidence."³⁷ Plaintiff's suggestion that both parties were equally harmed by the court's instruction is meritless. Defendants' defense relied on the epidemiologic studies finding no evidence that friction products cause mesothelioma; Plaintiff's case depended on the jury disregarding them.³⁸

³⁶ Supplemental jury instructions are, like all jury instructions, subject to *de novo* review. Plaintiff's argument for a discretion standard, citing *Sammons v. Doctors for Emergency Servs.*, 913 A.2d 519, 540 (Del. 2006), is misplaced; *Sammons* relied on *Zimmerman v. State*, 565 A.2d 887, 891 (Del. 1989), which in turn cites *Sheeran v. State*, 526 A.2d 886, 893 (Del. 1987), which indicates the abuse-of-discretion standard applies only to the trial court's decision *whether* to give a supplemental instruction; the *content* of such an instruction is still reviewed *de novo*. It would be extremely odd if supplemental jury instructions were subject only to abuse-of-discretion review while original instructions are subject to more searching *de novo* review.

³⁷ Plaintiff argues that "[t]here is every reason to believe that had the jury been in any way confused by this response, it would have submitted another question to the court, *just as it had done on other matters.*" Pl-Br. 58 (emphasis added). But the jury never asked a question seeking clarification of any prior supplemental instruction.

³⁸ Moreover, while the scientific evidence upon which Defendants relied had only been read to the jury, the unscientific Gold Book, upon which Plaintiff relied, was an exhibit in the jury's hands.

VI. PLAINTIFF'S INFLAMMATORY SUMMATION WARRANTS A NEW TRIAL.

Plaintiff's claim that Defendants "fail[ed] to object contemporaneously" to Plaintiff's inflammatory summation is disingenuous. The court specifically told the parties "to place objections on the record at the close of arguments" (SA78), which Defendants did. Even "where no objection" to improper argument "is forthcoming until after summations," "the trial court is obliged to act firmly with curative instructions." *DeAngelis*, 628 A.2d at 80. Here, the court's refusal to issue curative instructions entitles Defendants to a new trial.

A. The Reading Of A Document Not In Evidence Warrants A New Trial.

Plaintiff read in closing portions of an article that was not in evidence, violating the rule that a party may not argue "facts" not in evidence—particularly inflammatory ones like those contained in this article. Plaintiff responds that he had used the article during cross-examination.³⁹ But that does not cure the fundamental error. The article indisputably was not in evidence and thus was an improper subject for closing. See Defs-Br. 62-64 (citing cases). Plaintiff claims the article merely "summarize[d] Dr. Lemen's three-day testimony." Pl-Br. 62. Even if true, that would not justify reading from an article not in evidence; and it is not true. While Lemen disagreed with Defendants' position, he never accused them of having "corrupted medical literature to escape liability," as did the inflammatory article Plaintiff quoted (A750).⁴⁰ Plaintiff's improper argument, which falsely (see pp.10-11 & n.11 *supra*) attacked Defendants and the science on which they relied, was highly prejudicial. As there can be no doubt about "the centrality of the issue affected by the error" or the lack

³⁹ Appellate counsel erred in stating to the contrary and apologize for the error. Neither electronic searches of the transcript in LiveNote software by author, journal, date of publication, and full title, nor diligent purusal of the hard copy transcript, uncovered the reference.

⁴⁰ The article's primary author is the same David Egilman who signed Plaintiff's amicus brief and has been repeatedly sanctioned by courts for improper pro-plaintiff conduct. See n.1 *supra*.

of "mitigation" (628 A.2d at 81), a new trial is warranted.

B. Plaintiff's References To The \$19 Million Figure Was Prejudicial.

During closing, Plaintiff repeatedly referred to and mischaracterized the \$19 million Defendants have spent on experts while defending themselves against asbestos-related claims. See pp. 31-33 *supra*. In so doing, he undermined the credibility of Defendants' experts and the science upon which they relied. Plaintiff's incessant repetition and mischaracterization of the \$19 million figure reflected a "'studied purpose'...to inflame or prejudice the jury improperly." *McNally*, 466 A.2d at 375 (quoting *Buschlen*, 310 N.W.2d at 12), *overruled on other grounds, Wright*, 2008 WL 343638.⁴¹ A new trial is therefore warranted.

C. Counsel's Reference to Plaintiff's Family Was Improper.

Plaintiff does not deny that his counsel referred in closing to "the plaintiffs" plural or told the jury that Plaintiff's "family will get all the sympathy they need when they stand at Roland Grenier's grave site after this cancer kills him." A740. Plaintiff says his counsel told the jury these things "to reiterate the court's admonition not to base its decision on sympathy or passion." Pl-Br. 65. That explanation, belied by the statements' clear subtext, is not credible.

Neither is Plaintiff's attempt to justify his counsel's reference to the presence of his son in the courtroom. Plaintiff argues that counsel merely sought "to assure the jury that this case was important to Plaintiff, even though he could not personally attend, to contrast the attitude of Defendants, who 'brought no one to see you in this courtroom,' and to explain why Plaintiff had to use deposition testimony from Defendants' corporate representatives, instead of calling them live." Pl-Br. 66. But the presence of Plaintiff's son in the courtroom is not a fact in evidence, and thus not a proper subject of comment during summation; even if it were in evidence, it indicates only that

⁴¹ Because Defendants objected, the improper remarks are subject to closer appellate scrutiny here than in *McNally*. *Cf.* 466 A.2d at 375.

the case is important to Plaintiff's *family*, not to Plaintiff. Moreover, the presence of Plaintiff's son had nothing to do with the (in any event irrelevant) absence of Defendants' corporate representatives. The true reason why Plaintiff "had to use deposition testimony from Defendants' corporate representatives, instead of calling them live" is because *Plaintiff chose* to; he never subpoenaed Defendants' corporate representatives, preferring for tactical reasons to use deposition testimony taken in another case. His argument on appeal is as misleading as his summation at trial was inflammatory.

D. The Inflammatory Closing's Cumulative Effect Warrants A New Trial.

Plaintiff concedes that this Court reviews improper remarks for their cumulative impact, but argues that "[i]f the jury was impassioned and prejudiced" then "surely [it] would have awarded punitive damages, or awarded compensatory damages in an amount to shock the court's conscience, but even Defendants were not so troubled by the damages as to seek remittitur on appeal." *Id.* That argument misses the mark. As a matter of law, Defendants are not obliged to raise every available argument on appeal, and their decision to not seek a remittitur in this Court does not cure Plaintiff's inflammatory summation below. Moreover, Plaintiff does not cite, and Defendants are not aware of, any case holding that an award of punitive or conscience-shocking compensatory damages is a prerequisite to finding that a jury acted out of passion or prejudice. As a practical matter, a jury might be impassioned, but not completely out of control. Though high, the damages awarded do not necessarily shock the conscience *given* the jury's verdict on liability. It is that verdict, which is against the overwhelming weight of scientific evidence, that is a product of passion and prejudice. It resulted from Plaintiff's inflammatory closing, which falsely cast Defendants as venal entities that had attempted to buy a meritless defense at the expense of a sympathetic family.

VII. THE CUMULATIVE EFFECT OF THE VARIOUS ERRORS WARRANTS A NEW TRIAL.

The trial court's multiple errors, identified above and in Defendants' opening brief, reinforced one another, both bolstering Plaintiff's claim that his mesothelioma was caused by exposure to Defendants' friction products and undermining Defendants' contrary contention that Plaintiff's mesothelioma was caused by his exposure to non-friction products. See Defs-Br. 68-69. In response, although Plaintiff of course denies that the trial court's rulings were erroneous, he does not dispute that they had a cumulative effect.

Seeking to avoid the consequences of that fact, Plaintiff misreads *Michael v. State*, 529 A.2d 752 (Del. 1987). Cf. Pl-Br. 69. *Michael* does not stand for the proposition that errors found to be harmless individually necessarily remain harmless when viewed cumulatively. On the contrary, although the *Michael* Court had "in each instance...determined that the [individual] error was harmless," it nonetheless proceeded to engage in cumulative review because, "where there are several errors in a trial, a reviewing court must," even if the individual errors are harmless, "also weigh the cumulative impact to determine whether there was plain error from an overall perspective." 529 A.2d at 764. Although the *Michael* court found that the errors in that case remained harmless when added together, it made clear that its fact-bound determination was made "in the context of [that] case." *Id.* at 765. Here, the errors are not harmless even individually, and assuredly not harmless when viewed cumulatively.

CONCLUSION

For the reasons set forth above, and in Defendants' opening brief, judgment should be entered for Defendants, or, in the alternative, a new trial should be ordered.

Respectfully submitted,

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Dated: May 6, 2008

IN THE SUPREME COURT OF THE STATE OF DELAWARE

**GENERAL MOTORS CORPORATION and
FORD MOTOR COMPANY,**

Defendants Below,
Appellants,

v.

ROLAND LEO GRENIER, SR.,

Plaintiff Below,
Appellee.

Nos. 453,2007 & 578,2007
(consolidated)

Appeal from the Superior Court
of the State of Delaware
in and for New Castle County
C.A. No. 05C-11-257-ASB

CERTIFICATE OF SERVICE

I, Christian J. Singewald, Esquire, do hereby certify that on this 6th day of May, 2008, a copy of the foregoing **CORRECTED REPLY BRIEF OF APPELLANTS GENERAL MOTORS CORPORATION AND FORD MOTOR COMPANY** was delivered via LexisNexis File & Serve upon:

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