IN THE SUPREME COURT OF MISSISSIPPI

2006-CA-01005

E. I. DU PONT DE NEMOURS AND COMPANY **DEFENDANT-APPELLANT**

v.

GLEN STRONG and CONNIE STRONG **PLAINTIFFS-APPELLEES**

Appeal from the Circuit Court of Jones County
Second Judicial District

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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"A trial is a proceeding designed to be a search for the truth." *Allen v. National R.R. Passenger Corp.*, 934 So.2d 1006, 1014 (¶ 21) (Miss. 2006). "A trial is not, and should not be, a display of theatrics or tactics of counsel . . . . It is, and should be, a decorous, orderly and fair search for truth, to the end that justice is served." *Walker v. State*, 671 So.2d 581, 617 (Miss. 1995). The goal of discovery is "to assure to the maximum extent practicable that cases are decided on their merits" and to prevent "trial by ambush." *Buskirk v. Elliott*, 856 So.2d 255, 260 (¶ 10) (Miss. 2003). The "[e]xclusion of evidence is a last resort." *Id.* (¶ 11).

This trial did not function as a search for truth. The search for truth was compromised from the outset of the case by the misjoinder of thousands of disparate claims (2200+) in two deficient complaints filed over 100 miles from where plaintiffs reside and DuPont operates. The search was compromised further by case management procedures that impeded DuPont's ability to prepare. The search was abandoned altogether when the trial court stripped DuPont of its experts and required it to proceed without a defense. The proceeding that resulted was designed to be a one-sided exhibition of plaintiffs' junk science theories rather than a search for truth. Justice was not served in this case.

I. Striking DuPont's Experts One Week Before Trial Was a Gross Abuse of Discretion That Fatally Tainted the Trial.

Striking DuPont's expert witnesses one week before trial because of plaintiffs' arbitrary refusal to depose them was inexcusable. Plaintiffs have effectively conceded they had *no reason* for refusing to depose DuPont's experts on available dates and had *no genuine need* to depose

DuPont's experts at all.[1] Plaintiffs have also effectively conceded that the "non-appearances" on which sanctions were premised resulted from a trap. Plaintiffs do not dispute that DuPont was ordered to do the *impossible*, i.e., to make its experts available in Dallas on dates when, for reasons beyond DuPont's control, its experts could not *be* in Dallas. The substantial personal and professional scheduling conflicts that kept DuPont's experts from appearing at plaintiffs' Dallas office on plaintiffs' unilaterally selected dates are thoroughly documented in the record and have never been disputed. R 122:17998-99 (chart) & R123:18047-57 (affidavits)(RE tab 9).

Plaintiffs complain that DuPont "suggests . . . entrapment." Br. at 25-26. But it is the facts themselves that "suggest" entrapment. Months before trial, DuPont disclosed its experts' opinions in writing and offered its experts for deposition. Plaintiffs were advised of DuPont's experts' conflicts and available dates on May 19, 2005 – reasonably in advance of trial given the truncated schedule imposed by the CMO. R 122:18005 (RE tab 9). Instead of using that information to obtain the depositions they say they wanted, plaintiffs acted thereafter only to prepare a sanctions motion based on anticipated "non-appearances." R 118:17349. Plaintiffs then delayed filing their "non-appearance" motion until the brink of trial.[2] If these facts suggest "an elaborate plan" to "entrap" DuPont in an unfair trial (Strong Br. at 25-26), it is because the facts speak for themselves.

Excluding witnesses for such "non-appearances" is so arbitrary and unreasonable that plaintiffs do not try to defend it. Instead they fall back on a verbal smokescreen they used

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[1] Plaintiffs do not dispute that DuPont's written expert disclosures were sufficient to allow plaintiffs to prepare for trial without deposing DuPont's experts. R 98:14298 (RE tab 6).

[2] Although they made no effort to obtain the depositions after May 19, plaintiffs delayed filing their sanctions motion until the end of July and then filed only in reaction to DuPont's notice that it had finally obtained a hearing date for its reconsideration motion. R 118:17343.

throughout the case – a litany of purported "prior misconduct" by DuPont. It does not matter that DuPont was ordered to do the impossible, they say, because ordering the impossible was in itself a "sanction" for other alleged "misconduct." Strong Br. at 39.

This Court has emphasized that, in discovery matters, "[e]xclusion of evidence is a last resort." *Buskirk*, 856 So.2d at 260 (¶ 11). Ordering a party to do the impossible and then excluding critical evidence because the impossible is not accomplished cannot be reconciled with this principle. Even if plaintiffs' "prior misconduct" contentions were supported by the record, which they are not, the alleged "prior misconduct" comes nowhere near justifying the draconian sanction imposed here. Plaintiffs cite no case supporting such a sanction.[3]

But plaintiffs' "prior misconduct" contentions are also baseless in fact. Even under the unduly deferential standard plaintiffs advocate in their brief, their contentions fail for lack of "substantial, credible, and reasonable evidence." *Illinois Central R.R. Co. v. Samson*, 799 So.2d 20, 22 (¶ 6) (Miss. 2001) (Strong Br. at 38). Plaintiffs cite no support for their contentions except their own conclusory assertions, which were incorporated verbatim in the sanctions order.[4] Plaintiffs argue these conclusory assertions now deserve the status of "findings of fact," which they say this Court must accept on appeal. That is hardly the case. This Court has recognized that fact findings adopted verbatim from party submissions are not entitled to special deference.

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[3] *Mississippi Farm Bureau Mut. Ins. Co. v. Parker*, 921 So.2d 260 (Miss. 2005), quoted by plaintiffs at 37, provides them no support. *Parker* found the trial court had abused its discretion when it compelled compliance with discovery requests that were "grossly excessive in number, unduly burdensome, oppressive, confusing as drafted, and fail[ed] to comply with the above stated rules of civil procedure." 921 So.2d at 266 (¶ 21). The same thing happened to DuPont here. *See, e.g.*, R 36:5171 (12/23 order compelling massive production by 1/12). The record shows that the oppressive discovery burden imposed on DuPont contributed to the complete miscarriage of justice that resulted at trial. *See* Br. of Appellant at 7-8.

[4] Plaintiffs wrote the sanctions order, and the trial court signed without change. *See* R 124:18290 (RE tab 11) (order "presented by" plaintiffs).

Mississippi Dept. of Transp. v. Johnson, 873 So.2d 108, 111(¶ 8) (Miss. 2004) ("we have also stated that when the trial judge is sitting as the finder of fact, and chooses to adopt in toto a party's proposed findings of fact and conclusions of law, we will conduct a de novo review of the record"). That is certainly true for "findings" like these, which have not been tested by trial and are not supported by the record. The standard of review plaintiffs advocate is designed for facts found after a full presentation of the evidence at a bench trial. These purported "findings" are not facts – they are argumentative conclusions – and they are *not* the product of a trial, or even a proper hearing. They deserve no deference.

Under either standard, however, the "findings" are baseless. DuPont's purported "prior misconduct" consists of nothing more than its efforts to assert legitimate rights – including the right to seek federal removal of a diversity case[5] – in the face of the substantial, illegitimate prejudice created by plaintiffs' deficient pleadings and discovery delays and by the unreasonable schedule imposed by the CMO. In its opening brief, DuPont documented at length how it was unfairly prejudiced from the inception of this case, beginning with the improper joinder of thousands of disparate claims in two broadly worded complaints with no individualized facts about any plaintiff. Br. at 3-13. Plaintiffs' brief refutes none of those procedural facts. This record may well show misconduct *toward* DuPont; but it does not show misconduct *by* DuPont.

As anticipated, plaintiffs argue, without authority, that this Court's denial of a pretrial petition for interlocutory appeal affirmed the sanctions and precludes further review. That contention is completely without merit for reasons explained in DuPont's opening brief at 32-33.

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[5] The case that went to trial was a federal diversity case, just as DuPont anticipated. Plaintiffs defeated removal, just as they attained venue – through the joinder of local defendants whom they did not intend to pursue. Their procedural manipulations succeeded.

Plaintiffs do not acknowledge, much less refute, the controlling authority. *See, e.g., Mauck v. Columbus Hotel Co.*, 741 So.2d 259, 268 (Miss. 1999) (denial of an interlocutory appeal not a decision "on the merits" and "should not be viewed as an indication of how the issues should be resolved on appeal from a final judgment").

Finally, plaintiffs argue harmless error. The wrongful exclusion of DuPont's key experts does not matter, they say, because DuPont could have compensated by calling other witnesses, including experts Dr. James Thigpen and Dr. Yves Tondeur.

Plaintiffs' contention that Dr. Thigpen was "available" to DuPont at trial is make-believe. Whatever his availability earlier, Dr. Thigpen ceased to be "available" to DuPont in April 2005, when, at the trial court's direction (T 147:317 *et seq.*), DuPont designated experts specifically for the Strong trial.[6] The trial court made very clear that DuPont should designate only one expert per subject.[7] DuPont did not include Dr. Thigpen in that designation. R 98:14298-328 (RE tab 6). When the sanctions order was entered in August,[8] just a week before trial, Dr. Thigpen was no longer "available" as a witness for DuPont, because he was no longer designated as an expert for that trial. *Id.* It strains credulity to suppose that plaintiffs would have acquiesced to DuPont calling Dr. Thigpen as substitute expert witness, or that the trial court would have allowed DuPont to do so.

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[6] The earlier DuPont expert designation cited by plaintiffs applied to multiple "preliminary trial" cases, not just the Strong case. *See* R 23:3212 (RE tab 5).

[7] T 147:319 ("[T]his Court does not allow but one expert on any particular subject on any particular field. You pick the one you want and tell me today which one you want to bring. You're not going to have two on any subject."); *id.* at 320 ("I've already told you to choose one. And if you keep arguing with me I'll hold you in contempt of court.").

[8] R 124:18281 (RE tab 11).

Dr. Tondeur, whom plaintiffs also mention, was an analytical chemist designated for the limited purpose of addressing methods for determining the presence of dioxins in air and water discharges and the behavior of this class of compounds in the environment. R 98:14321 (RE tab 6). He could not address general or specific causation. *Id.* Standing alone, without DuPont's other designated experts, Tondeur's opinions would have made no sense to the jury.

The notion that DuPont could have rendered the exclusion of its key experts harmless by calling one, or even two, experts and some additional company fact witnesses is simply fantasy. Plaintiffs used six experts. Those six experts presented a bewildering array of speculative theories – over 10 pages of plaintiffs' brief were used just to summarize them. DuPont could not refute such a barrage of theories without the experts who had been designated to respond to them. Unfairly stripped of its experts, DuPont focused on a key fact it could still prove – the fact that cancer specialists like Strong's treating physicians believe Strong's type of cancer has no known cause. In the middle of trial, DuPont was unfairly stripped of that defense, too, when plaintiffs were allowed to spring surprise affidavits that altered Strong's doctors' previously disclosed testimony. This Court has called "even handed fairness in legal proceedings" the "central meaning" of due process. *Mississippi Power Co. v. Goudy*, 459 So.2d 257, 270 (Miss. 1984). That quality was completely absent from this case.

Forcing DuPont to oppose plaintiffs' expert-dependent case without its corresponding experts was comparable to entry of default judgment on liability. But in its effect, the sanction was even more prejudicial than a default. With a default, plaintiffs' damages would have been tried standing alone, without liability evidence. Here, although DuPont had been stripped of any meaningful ability to oppose it, plaintiffs put on their full liability case anyway. Plaintiffs' junk-science experts were given free rein to dramatize their speculative theories before the jury, often

without regard to the limits of their expertise, their designations, or their prior disclosures. The effect on the jury is evident in the excessive size of the verdict.

The trial court's arbitrary and unreasonable exclusion of DuPont's experts caused a total miscarriage of justice. This unjust verdict cannot be permitted to stand.

II. The Court Improperly Permitted Strong's Attending Physicians to Testify by Affidavit.

Conceding that affidavits are not ordinarily admissible at trial, plaintiffs seek to excuse their use of surprise affidavits obtained during trial from Strong's doctors under the catch-all hearsay exception of MISS.R.EVID. 804(b)(5). But their reach exceeds their grasp.

Among other things, the catch-all exception requires the hearsay in question to be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts . . . ." MISS.R.EVID. 804(b)(5)(B). That cannot be said of these affidavits. Had they truly considered the doctors' testimony unclear, plaintiffs could have, with little or no additional effort, obtained evidence "more probative" than affidavits by asking a question or two more at the depositions.

The catch-all exception also requires a determination that "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." MISS.R.EVID. 804(b)(5)(B). That can hardly be said of a device calculated to evade both the rules of discovery and the right of cross-examination.

Finally, the hearsay rule categorically forbids use of the catch-all exception where the proponent has failed to make "his intention to offer" the hearsay "known to the adverse party *sufficiently in advance of the trial* . . . to provide the adverse party with a fair opportunity to prepare to meet it." MISS.R.EVID. 804(b)(5) (emphasis supplied). Plaintiffs do not argue they

complied with this requirement. How could they? The affidavits were not executed until five days *after* the trial commenced. Had plaintiffs advised DuPont in advance of trial of their intentions, DuPont could have redeposed the physicians and asked each of them the following question: "Doctor, isn't it true that medical science has been unable to determine what causes multiple myeloma?" Based on their deposition testimony we believe they both would have answered "yes." As it was, DuPont was unfairly surprised and unfairly deprived of the right to respond.

Strong also argues the admission of the affidavits was "harmless error" because the affidavit testimony was merely cumulative of what the doctors said in their depositions. One has to wonder why lawyers in the middle of a jury trial in Mississippi would take trouble to obtain affidavits from two busy Texas physicians in order to present "cumulative" testimony. Obviously, the testimony contained in these affidavits was anything but cumulative, as verified by the inordinate attention devoted to the affidavits in plaintiffs' closing argument. Contrary to plaintiffs' claim of harmless error, the trial court's ruling admitting the affidavits was an important element in plaintiffs' obtaining such a large verdict. The affidavits were worded to make it appear these two doctors intended to endorse plaintiffs' claim. This was made clear in summation when plaintiffs told the jury the doctors "heard what DuPont was trying to do with their testimony" and gave the affidavits to prevent DuPont from "distorting" their testimony. T156:1680-81.

Finally, plaintiffs do not even attempt to refute DuPont's argument of prejudice in the trial court permitting the affidavits to go to the jury room while the deposition testimony on which DuPont relied remained but a distant memory to the jurors.

There is no justification for plaintiffs' use of these surprise affidavits. Chief Justice Hawkins once denounced a case as "a trial of dirty tricks." *General Motors Corp. v. Jackson*, 636 So.2d 310, 349 (Miss. 1992) (dissenting). This, too, was a trial of "dirty tricks."

III. DuPont Is Entitled to Judgment Because Plaintiffs Failed to Establish Causation.

Plaintiffs' statement of the standard of review for this issue is mistaken. The issue is whether the proffered opinions were minimally competent to support a verdict. Plaintiffs bear the burden of proof on this issue. MISS.R.EVID. 702; *Mississippi Transp. Com'n v. McLemore*, 863 So.2d 31 (Miss. 2003). No deference is due to any reliability determination made by the trial court, because the trial court made no meaningful determinations.[9] *See McClain v. Metabolife Intern., Inc.*, 401 F.3d 1233, 1238 (11th Cir. 2005) ("A trial court, however, abuses its discretion by failing to act as a gatekeeper. In this case the trial court essentially abdicated its gatekeeping role."); *Elsayed Mukhtar v. California State Univ.*, 299 F.3d 1053, 1064 (9th Cir. 2002) ("Surely, however, the trial court's broad latitude to make the reliability determination does not include the discretion to abdicate completely its responsibility to do so.").

A. There is No Competent Evidence that Dioxins Cause Multiple Myeloma in Anyone.

Neither plaintiffs nor their experts can cite a single peer-reviewed article anywhere that says what their experts said at trial, i.e., dioxins cause multiple myeloma. Attempting to dodge this problem, plaintiffs dismiss the question itself as "ridiculous" and assert, in effect, that "cause" is not a word epidemiologists use. Strong Br. at 31. Plaintiffs call the search "for such magical causation language" in peer-reviewed literature a "fool's endeavor." *Id.*

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[9] After refusing to allow a hearing, the trial court denied DuPont's *Daubert* motions summarily in conclusory orders and refused to reconsider them at trial. T 147:384-85; R 20232-34; T 149:641.

Plaintiffs were not always so contemptuous of the word "cause." To the contrary, they and their experts used it freely throughout trial (as plaintiffs do throughout their brief otherwise, except on this one point). Despite what plaintiffs say in their brief, Clapp told the jury that studying what "*causes* diseases" is " what an epidemiologist does." T 151:945 (emphasis added). Thereafter, purporting to speak as an epidemiologist, Clapp said, among other things: "dioxin" in Agent Orange "was the cause for" excessive cancers detected in "his" 1980's Massachusetts study (*id.*); carcinogens "like dioxins . . . *cause* cancer" (950, 952); and "dioxins *cause* multiple myeloma in humans" (962, 973) (emphasis added). The only time Clapp expressed difficulty using the word "cause" was when forced to admit he could not identify even "one scientifically peer-reviewed article that says dioxins cause multiple myeloma." T 151:1024-25.

On a different tack, plaintiffs say the lack of peer-reviewed endorsement for their theory does not matter, because *Poole v. Avara*, 908 So.2d 716 (Miss. 2005), says peer-reviewed studies are not required. But plaintiffs misconstrue the case. Unlike this case, *Poole* involved an unexceptional matter that had not attracted any peer-reviewed study at all. Noting the claim did not involve "ground-breaking medical history," *Poole* reasoned the unavailability of relevant peer-reviewed studies was not determinative under the circumstances:

> Though helpful when present, publication and peer review are not absolutely required; their absence does not constitute automatic inadmissibility. Simply because no author had written specifically on the theory of bursting an anastomosis seam through CPR does not mean it is truly ground-breaking medical history.

908 So.2d at 724 (¶ 17). *Poole* did *not* say relevant peer-review studies can be ignored where they exist, especially not on a claim that, if true, would constitute "ground-breaking medical history." *Id.*

What plaintiffs claim here, if it had any validity, would make "ground-breaking medical history" indeed. Plaintiffs claim that Clapp has established a "cause," not just of multiple myeloma, but of "*all* forms of human cancer." Strong Br. at 33 (citing T 151:958-59, plaintiffs' italics). This claim is not an unexceptional one on a subject that has attracted no peer-review study. To the contrary, plaintiffs claim to have answered one of the most pressing and studied questions of our time. Plaintiffs' problem here is not a *lack* of relevant peer-reviewed studies addressing the same question. It is that out of an abundance of such studies, and in spite of decades of keen worldwide scientific interest in this subject, plaintiffs can point to not one scientifically peer-reviewed study that says what their experts said at this trial.

Insistence upon peer-reviewed published support for such a claim is no "fool's endeavor." The *Daubert* peer-review criteria can be determinative of just this sort of claim. In the *Daubert* litigation itself, in fact, the federal courts were confronted with this same sort of purported "science" – "ground-breaking medical" conclusions that the sponsoring scientists were willing to acknowledge only in paid courtroom performances in support of multi-million dollar tort claims. In *Daubert*, the target of the for-jurors'-eyes-only "science" was the morning sickness drug Bendectin. The federal courts applied the peer-review criteria to determine that "science" was too suspect to qualify as competent evidence. *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311 (9th Cir. 1995) (on remand from 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)).

Examining the evidence on remand from the Supreme Court, the Ninth Circuit found the proffered "science" so lacking in reliability under the new standards[10] that it resolved the

[10] Among other things, the Supreme Court observed that "submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected." *Daubert*,, 509 U.S. at 593. For similar reasons, a claim that "has been able to attract only minimal support . . . may properly be viewed with skepticism." *Id.* at 594.

evidentiary issue at the appellate level, without remand to the trial court. *Daubert,* 43 F.3d at 1322. The court reasoned that the lack of peer-reviewed published support for plaintiffs' experts' proffered conclusions was especially significant in light of the worldwide importance such findings would have if valid:

> A conclusion that Bendectin causes birth defects would be of significant public interest both in this country (where millions of women have taken Bendectin and the FDA continues to approve its use) and abroad (where Bendectin is still widely used). *That plaintiffs' experts have been unable or unwilling to publish their work undermines plaintiffs' claim that the findings these experts proffer are "ground[ed] in the methods and procedures of science" and "derived by the scientific method."*

Daubert, 43 F.3d at 1319 n.9 (emphasis added) (*quoting Daubert*, 509 U.S. at 590). The court observed that "[t]he ultimate test of [a scientific expert's] integrity is her readiness to publish and be damned." 43 F.3d at 1318 (quoting Peter W. Huber, *Galileo's Revenge: Junk Science in the Courtroom* 209 (1991)).[11] The court noted that plaintiffs' experts were no strangers to publication, "except with respect to the views expressed in this litigation." 43 F.3d at 1318 n.9. Given the worldwide importance of the issue and the years of study devoted to the subject both inside and outside courtrooms, the Ninth Circuit deemed the lack of peer-reviewed published support for plaintiffs' experts' conclusions to be proof that those conclusions were not legitimate science:

> None of the plaintiffs' experts has published his work on Bendectin in a scientific journal or solicited formal review by his colleagues. . . . . It's as if there were a tacit understanding within the scientific community that what's going on here is not science at all, but litigation.

43 F.3d at 1318.

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[11] Huber's book is the source for the quote plaintiffs attribute to Justice Breyer on page 29 of their brief. Justice Breyer cited Huber's book as his source. That reference was not an endorsement for the "anything goes" approach to expert testimony plaintiffs advocate in their brief.

All these observations apply with full force to Clapp's opinion. A reliable claim to have established a "cause" of any human cancer, not to mention "*all* human cancer," would be of worldwide importance. A scientist who could validly make such a claim would secure a place in history and a worldwide reputation. Yet Clapp, who is no stranger to publication otherwise, has never ventured to publish the conclusion he espoused at trial. And he can point to no one who has. T 151:1024-25. Clapp's problem is not a lack of studies. It is that despite an abundance of studies on one of the most pressing questions in modern medicine, no one agrees with him – no one, that is, who is willing to subject his conclusion to "normal scientific scrutiny through peer review and publication." *Daubert*, 43 F.3d at 1318.

Clapp reached his general causation conclusion by disregarding the contrary results of the only study he himself ever performed (T151:1024-25) and of other more reliable studies (R 127:18618 *et seq.*), and by reinterpreting isolated, weak studies to supply a conclusion the responsible scientists were unwilling to make themselves. T 151:1024-25. This "method" is patently result-oriented. On such a widely studied and important subject, and in the absence of published peer-reviewed support, a conclusion reached by such a "method" is not sufficiently reliable to be worthy of acceptance as evidence by this Court.

As a last resort, plaintiffs claim their case can survive without Clapp, because Sawyer opined not just on *specific* causation, but on *general* causation as well. But at trial plaintiffs made no discernable attempt to establish a general causation theory through Sawyer that was *independent* of the opinion previously given by Clapp, much less one that overcomes all the deficiencies already discussed. Plaintiffs called Sawyer after Clapp, and they examined Sawyer as if general causation had been established. Plaintiffs had the burden of demonstrating that any

expert opinion offered was at least minimally reliable.[12] They established no such opinion on general causation through anyone.

B. There is No Competent Evidence that Dioxins Were the Specific Cause of Strong's Multiple Myeloma.

Regardless of what label one might prefer for his "method," Sawyer's testimony was inadequate to establish a reliable theory of specific causation. To do that, plaintiffs were first required to establish a reliable method for determining whether Strong's particular case of multiple myeloma was precipitated by dioxins and not other possible causes, including idiosyncratic or unknown causes. Had that step been accomplished, it would still have remained for plaintiffs to demonstrate a reliable method for determining whether the dioxin, or dioxins, that purportedly caused Strong's particular case of multiple myeloma entered the environment improperly through DuPont emissions, to the exclusion of other sources. To have undertaken the latter step reliably, plaintiffs' method must have accounted for, at the very least, the following complicating facts: dioxins are a common by-product of many forms of combustion and are ubiquitous in the environment from an indeterminate multitude of sources; all human beings (and all animals) have certain levels of dioxins in their bodies; most human exposure to dioxins comes from the consumption of animal proteins; animal proteins of *all* types contain certain levels of dioxins; and the term "dioxin" does not refer to a single chemical entity, but encompasses a large and complex group of compounds that have different properties and are believed to pose different risks.

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[12] Plaintiffs say DuPont's opening brief conceded Sawyer's "conclusion" on general causation. Strong Br. at 33. DuPont conceded nothing.

With respect to what should have been the first step of the analysis, Sawyer did not even *identify* a method, much less demonstrate that the method was reliable, that he was competent to perform it, and that he had performed it reliably in this case. MISS.R.EVID. 702. Sawyer simply *presumed* that Strong's particular case of multiple myeloma was caused by dioxins, without even acknowledging the breadth of the question. *See* Strong Br. at 23-24 (summarizing Sawyer's "method"). That presumption was not justified. Plaintiffs never purported to prove that multiple myeloma occurs *only* as a result of dioxin exposure. If anything, they conceded otherwise.[13] Plaintiffs also never purported to establish diagnostic criteria, or any other method, for distinguishing purportedly dioxin-induced multiple myeloma from any other type. *See id.* Thus, even if it were competent otherwise (which it was not), plaintiffs' general causation theory did not supply an adequate foundation for even beginning a reliable specific causation analysis. It did not supply the minimal tools required to conduct one. Plaintiffs' specific causation proof completely skipped this first step.

Given the complexity of the step that was skipped, plaintiffs' toxicologist would not have been competent to fill the gap in plaintiffs' proof, even had he recognized it. According to plaintiffs, Sawyer's expertise was "in evaluating the effects of chemical exposures." Strong Br. at 22. More than that was required to determine whether Strong's particular case of multiple myeloma could be attributed to any specific cause. Nothing in Sawyer's training or experience qualified him to understand or opine about the mechanism or progress of a disease as complex as cancer in anyone. Sawyer's training may explain why he assumed chemicals were at fault, but his training did not qualify him to determine the nature or origin of Strong's particular case of

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[13] Sawyer admitted human beings who have not experienced "abnormal dioxin exposure" can and do contract multiple myeloma. T 153:1294.

cancer. Given the medical complexity of that question, a physician, at least, would be required to make such a determination, if it could be made by anyone.

To the extent Sawyer explained a "method" for reaching any of the opinions he gave at trial, the method he described pertained to what should have been the *second* step of plaintiffs' specific causation proof, i.e., determining the source of the purportedly culpable dioxins. The things Sawyer said he did in the performance of his "differential examination of the facts" were all directed toward that task, and that task only. T 153:1264. Sawyer's "differential examination of the facts" was, however, inadequate to reliably accomplish even that task. Stripped of the technical-sounding jargon he used to embellish the story, what Sawyer did was talk to Strong, visit his house, and look around his neighborhood. *Id.* From little more than that, Sawyer was prepared to fix blame for the purportedly culpable dioxins on DuPont alone, to the exclusion of all other sources in the world. Sawyer's "*ipse dixit*" opinion is not sufficiently reliable to qualify as evidence. *McLemore*, 863 So.2d at 37.

Finally, in an attempt to defend the obviously irrational aspects of their experts' methods, plaintiffs invoke a standard of review that applies to fact witnesses, not experts. Thus plaintiffs ask the Court to ignore their experts' contortions of logic by deeming them "credibility" questions for the jury's eyes only. Strong Br. at 36. Expert opinion, however, is not entitled to the such deference.[14] The proponent of expert opinion has the burden of proving threshold "reliability" as a condition of basic evidentiary competence. MISS.R.EVID. 702. The proponent must

[14] Even with fact witnesses, deference has its limits. *Southwest Miss. Elec. Power Ass'n v. Harried*, 773 So.2d 365, 374 (Miss. App. 2000) ("The jury will not be warranted in finding the existence of a fact on the positive testimony of a witness which is contrary to conceded facts or matters of common knowledge, or to all reasonable probabilities.").

establish, among other things, that the expert "has applied [reliable] principles and methods reliably to the facts of the case." *Id.* Methods that produce irrational results are not reliable.

Plaintiffs' experts' willingness to defy logic in the service of plaintiffs' cause was on vivid display in their opinions about smoking. Plaintiffs' experts assured the jury that research has proved smoking does not cause multiple myeloma. T 151:987, 153:1263. Logically, since cigarette smoke contains dioxins, that same research must also be evidence that *dioxins* do not cause multiple myeloma. Plaintiffs' experts, however, not only ignored *that* logical inference, they turned logic on its head and effectively insisted the research means dioxins ingested through smoking are the only dioxins in the world that are *safe*. According to plaintiffs' experts, there is no safe dose of dioxins, except the dose delivered by cigarettes. *See* T 151:990-91; 153:1255 & 1330. Since they also had to concede that smoking is associated with a 39% increase in blood levels of dioxins in men (T 153:1334), plaintiffs' experts' insistence that the dioxins Strong ingested through smoking posed no risk at all to him defies common sense. Plaintiffs' experts offered no "reliable principles [or] methods" for bridging these contradictions. MISS.R.EVID. 702. Here again, plaintiffs depend on conclusions supported in the end only "by the *ipse dixit* of" their experts. *McLemore*, 863 So.2d at 37. Single-minded devotion to "pick[ing] the cause that is most advantageous to [the plaintiff's] claim" is a hallmark of unreliable opinion. *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 424 (5th Cir. 1987).

Plaintiffs' experts' causation opinions were not products "of reliable principles and methods" applied "reliably to the facts of the case." MISS.R.EVID. 702. They do not constitute competent evidence of either general or specific causation. Since plaintiffs thus lack competent evidence of a material element of their claim, DuPont is entitled to judgment as a matter of law.

IV. Other Evidentiary Errors Substantially Harmed DuPont, Compounding the Prejudice.

A. It was Error to Allow Speculative Assertions about Corporate "Intimidation" of Regulatory Agencies.

Plaintiffs' defense of Tarr's testimony proves DuPont's point. Speculation about "excessive releases by DuPont" that were not "identified and stopped by regulatory agencies" (Strong Br. at 43) had no legitimate place in this trial. Instead of establishing admissibility, this purported "relevance" underscores why the testimony should have been excluded. Tarr was permitted to tell the jury that DuPont used its "power" as a "major corporation" to intimidate "young, inexperienced" government regulators and evade the law. T 149:683. The accusations were sheer biased speculation, and they were an open invitation to the jury to punish DuPont for supposed abuses of corporate "power" that were not proved and not relevant.

Plaintiffs' waiver contention is not valid. "Rule 404(b) is an issue of relevancy," and an objection on "grounds of relevancy" invokes the rule sufficiently for appellate review. *Carter v. State*, 722 So.2d 1258, 1261 (Miss. 1998). As a general matter, moreover, objections are deemed to incorporate grounds that "are apparent from the context." *Id.* *See* MISS.R.EVID. 103(a)(1) (specific grounds required only if "not apparent from the context"). DuPont repeatedly objected to this testimony on multiple grounds of relevancy. *See* T 149:682-85, 149:725-26. This Court is not limited in the law it can consider in examining the error.

Rule 404 encompasses any evidence that a defendant acted wrongfully in matters other than the matter at issue, including "other crimes, wrongs, or acts." MISS.R.EVID. 404(b). The unfair prejudice resulting from such evidence is so well recognized that Rule 404 excludes it categorically, even though the same evidence could also be excluded for lack of Rule 402 relevance, or under the Rule 403 balancing test. *See* MCCORMICK ON EVIDENCE §186 at 650 n.3

(5th ed. 1999) ("The exclusionary rule already reflects the judgment that the outcome of the balancing test should preclude admission."). The existence of a specific rule underscores the importance of the principle.

Plaintiffs' subsequent claim that "none of [Tarr's testimony] purported to discuss DuPont specifically" or "accuse DuPont" (Strong Br. at 42) contradicts both the record and their own earlier claim of relevance. Tarr named DuPont explicitly as duping regulators and evading the law. *See* T 149:683 (". . . they can be intimidated by the power that they perceive that a major corporation like DuPont might bring to bear if they didn't give DuPont what they want."). There was also nothing incidental about this testimony. It was planned and presented at length – the colloquy takes up nearly five pages of the transcript – at a point calculated for emphasis, i.e., the conclusion of Tarr's direct examination. T 149:682-86. Admitting the evidence was serious error, highly prejudicial to DuPont.

B. It Was Error to Allow Testimony about Veterans Administration Policy.

Plaintiffs defend Clapp's testimony about Veterans Administration coverage of certain medical conditions by saying that "determination of causation by a federal agency" is relevant. Strong Br. at 43. But plaintiffs did not prove that the agency actually made a determination of "causation" that was in any way relevant to the issues in this case. T 151:961-62. Lacking such a foundation, the testimony was irrelevant and more prejudicial than probative.

It cannot be simply assumed that the Veterans Administration made a relevant "determination of causation" regarding Agent Orange. When Agent Orange theories were presented in support of product liability claims in a national class action, the federal courts granted summary judgment for the defendant chemical companies, finding a total lack of legally competent support for them. *In re "Agent Orange" Product Liability Litigation MDL No. 381*,

818 F.2d 187, 193 (2d Cir. 1987) ("Now, some 15 to 25 years after military personnel were exposed to Agent Orange, we have considerably more information about the effects of Agent Orange. [E]pidemiological studies of those very personnel and their families fail to show that Agent Orange was hazardous, even with regard to chloracne and liver damage."); *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1223, 1231 (E.D.N.Y. 1985) ("No acceptable study to date of Vietnam veterans and their families concludes that there is a causal connection between exposure to Agent Orange and the serious adverse health effects claimed by plaintiffs.").

The trial court let plaintiffs pass off an emotionally charged political compromise as governmental endorsement of Clapp's causation opinions. The error was highly prejudicial.

C. It Was Error to Allow Sensational Assertions About Human Health Risks through a Witness Who Was Neither Designated nor Qualified on the Subject.

Plaintiffs concede that chemist O'Connor was hired to supervise a sampling procedure and called to testify about that procedure. *See* Strong Br. 16-18 (summarizing his testimony). Opining about the human health risks of dioxins was not within his expertise or part of his role at trial as plaintiffs themselves describe that role in their brief. *See id.* Allowing O'Connor to exceed his expertise and his designation to make sweeping statements about the "toxicity" of dioxins was error. T 150:778. Allowing him to compare the purported toxicity to "getting hit with an atom bomb, a car bomb, two hand grenades and a few other things" compounded the error. T 150:831-33.

D. It Was Error to Allow a Former Maintenance Employee to Malign DuPont with "Other Acts" Evidence.

Disabled former maintenance man Hawkins served no legitimate role at trial. The releases he discussed, and which plaintiffs reference in purported defense of his testimony, were never

linked to a legitimate issue. As recounted by Hawkins, however, the incidents created an image of continuous, hidden wrongdoing by DuPont on matters not relevant to the case. Here once again, plaintiffs made deliberate use of improper "other wrongs or acts" evidence to malign DuPont. MISS.R.EVID. 404(b).

The personal injury testimony that plaintiffs dismiss as "brief" and incidental (Br. at 45) was in actuality detailed, sensational and deliberately brought out. *See* T 154:1447-48 ("Have you ever been injured in one of these releases?" "I was burned with HC1, hydrochloric acid, all down the side of my arm. I was water blistered from about my neck to my belt line."); *id.* at1452-53. Plaintiffs admit that they were using Hawkins to implicate DuPont in systematically "avoiding regulatory oversight" (Br. at 45) – an issue not properly part of the case. All this testimony was inadmissible under Rule 404(b) and was more prejudicial than probative on any issue the jury properly had to decide. The harm to DuPont was substantial.

V. The Trial Court Erred in Refusing Instruction D-10.

Plaintiffs' contention that the "frequency, regularity, proximity" standard applies only to asbestos cases has no merit. Nothing about the standard itself or this Court's opinions restricts the standard to asbestos cases.

When it adopted the "frequency, regularity, proximity" standard, the Court recognized the standard was an application of basic evidentiary principles to a "necessary element of causation" presented by toxic exposure claims generally. *Gorman-Rupp Co. v. Hall*, 908 So.2d 749, 755 (¶ 19) (Miss. 2005) (quoting *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986)). The Court cited as an example a claim of "expos[ure] to hazardous levels of formaldehyde from fibers that drifted from the defendant's plant." *Id.* at 757 (¶ 22) (citing *Wright v. Willamette Industries, Inc.*, 91 F.3d 1105 (8th Cir.1996)). The Court observed that the standard

describes the "quantum of circumstantial evidence necessary to support a finding of a causal connection" in such cases and requires that "permissible inferences must be within the range of reasonable probability." *Id.* (citing *Lohrmann*, 782 F.2d at 1163). The Court noted that the standard is "in effect a *de minimis* rule in that a plaintiff is required to prove more than a casual or minimal contact with the product." *Id.* at 756 (¶ 22) (quoting *Chavers v. General Motors Corp.*, 349 Ark. 550, 79 S.W.3d 361, 368 (2002)). The relevance of these observations is in no way limited to asbestos cases.[15]

Plaintiffs' related notion that the standard is somehow reserved for summary judgment motions only is equally invalid. It should go without saying that legal standards applicable to summary judgment remain applicable throughout the case. Jury instructions are required to "fairly announce the law of the case." *Wal-Mart Stores, Inc. v. Johnson*, 807 So.2d 382, 390 (¶ 20) (Miss. 2001). A formulation that expresses a legal standard applicable to a "necessary element of causation" presented by the facts fairly announces the law of the case. *Gorman-Rupp Co.*, 908 So.2d at 755 (¶ 19).

The facts of this case present the "necessary element of causation" that the "frequency, regularity, proximity" standard was designed to address. Much as in the typical asbestos case, the important question here is *not* whether Strong was exposed to the substance at all, and it is not *simply* whether he was exposed to a sufficient quantity of the substance to cause the claimed effect, regardless of source. Here, *source* was a critical question. Even if cause were proven as a general matter (which it was not), plaintiffs still had to link the cause to DuPont's plant sufficiently to support liability. Proving that Strong was exposed to dioxins *originating from*

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[15] *Monsanto Co. v. Hall*, 912 So.2d 134 (Miss. 2005), cited by plaintiffs, merely reiterates the standard is *required* for asbestos claims, not that it is limited to them.

DuPont's plant to an extent sufficient to cause the claimed effect was thus a necessary element of plaintiffs' case. The fact that Strong, like all people, was admittedly exposed to dioxins from many sources made the question all the more important for a fair resolution of the case.

Plaintiffs' jury-confusion argument turns jury-instruction law on its head. In essence, plaintiffs argue that a "frequency, regularity, proximity" instruction was *not* required because they *offered* proof on the subject at trial. Strong Br. at 46 ("Here, the expert proof established in any number of ways that Mr. Strong was exposed to dioxins and heavy metals from the DuPont facility."). The law, of course, views the matter the other way around: "A party is entitled to have the jury instructed regarding a genuine issue of material fact so long as there is credible evidence in the record which would support the instruction." *First Investors Corp. v. Rayner*, 738 So.2d 228, 234 (Miss. 1999).

Finally, plaintiffs' objection to the word "proximity" has no merit. No reasonable juror could have taken DuPont's instruction to require proximity to DuPont's *plant*. The instruction explicitly links that concept to "emissions" only and never even mentions DuPont's "plant."

DuPont's proffered instruction accurately stated the law applicable to a necessary element of causation the plaintiffs purported to prove at trial. DuPont was entitled have the jury properly instructed on that issue.

CONCLUSION

The judgment should be reversed and judgment entered for DuPont. Alternatively, the judgment should be reversed and the case remanded for new trial.

Dated: January 26, 2007.

Respectfully submitted,

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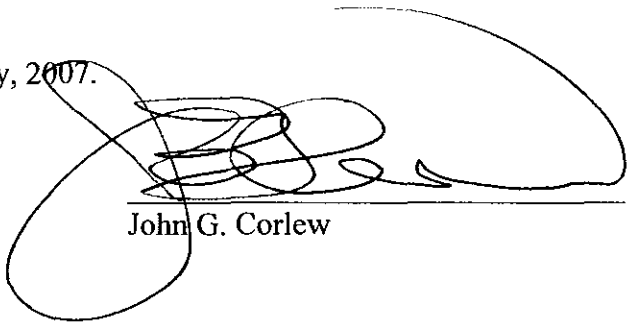
This the 26th day of January, 2007.



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