COPY

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

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

Deborah D. Kuchler, MSB# [redacted]
ABBOTT, SIMSES & KUCHLER, APLC
5100 Village Walk, Suite 200
Covington, Louisiana 70433
Telephone: (985) 893-2991
Facsimile: (985) 898-0383

Robert D. Gholson, MSB # [redacted]
BURR & FORMAN, L.L.P.
535 North 5th Avenue
Laurel, Mississippi 39441
Telephone: (601) 425-0400
Facsimile: (601) 649-0088

John G. Corlew, MSB [redacted]
WATKINS & EAGER PLLC
400 East Capitol Street, Suite 300 (39201)
Post Office Box 650
Jackson, Mississippi 39205
Telephone: (601) 948-6470
Facsimile: (601) 354-3623

IN THE SUPREME COURT OF MISSISSIPPI

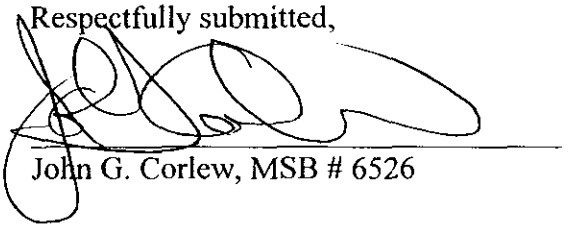
E. I. DUPONT DE NEMOURS CORPORATION	**DEFENDANT-APPELLANT**
v.	**NO. 2006-CA-01005**
GLEN STRONG and CONNIE STRONG	**PLAINTIFFS-APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. E. I. du Pont de Nemours and Company
2. Connie Ann Strong
3. Glen Ray Strong
4. Abbott, Simses & Kuchler, APLC, Counsel for E. I. du Pont de Nemours and Company
5. Burr & Forman, L.L.P., Counsel for E. I. du Pont de Nemours and Company
6. Watkins & Eager PLLC, Counsel for E. I. du Pont de Nemours and Company
7. Hopkins, Barvie & Hopkins, PLLC, Counsel for Plaintiffs
8. Baron & Budd, P.C., Counsel for Plaintiffs
9. Law Offices of Kathleen Smiley, Counsel for Plaintiffs
10. Romano, Eriksen, Cronin & Mullins, Counsel for Plaintiffs.

Respectfully submitted,



John G. Corlew, MSB # 6526

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STATEMENT OF ISSUES

1. Whether DuPont was unfairly prejudiced, and deprived of due process, by a series of inequitable pretrial rulings that deprived it of a reasonable opportunity to defend the claims brought against it and that culminated in the exclusion of DuPont's experts one week before trial because of plaintiffs' arbitrary refusal to depose them.

2. Whether the trial court erred in allowing plaintiffs to supplement the deposition testimony of Strong's treating physicians through affidavits prepared and subscribed in the middle of the trial and read to the jury and admitted into evidence.

3. Whether DuPont is entitled to judgment as a matter of law due to plaintiffs' reliance on "junk science" and failure to offer competent proof of either general or specific causation, and of actionable exposure.

4. Whether the trial court wrongfully refused instruction D-10, which would have accurately informed the jury of the "frequency, regularity, proximity" standard for toxic torts.

5. Whether the excessive size of the award – $15,500,000 for a disease Strong's doctors consider effectively cured – demonstrates the jury succumbed to passion and prejudice.

6. Whether the trial court erred in allowing plaintiffs' air modeling expert, Jim Tarr, to accuse DuPont of intimidating and deceiving regulatory agencies.

7. Whether the trial court erred in allowing plaintiffs' epidemiologist, Richard Clapp, to testify regarding the "Veterans Administration's position . . . with respect to dioxin and multiple myeloma" and to represent that this politically dictated policy constituted a relevant causation finding.

8. Whether plaintiffs' chemist, Rod O'Connor, was improperly permitted to opine about human health risks of dioxins – a subject beyond both his expertise and his designation –

and, further, to do so in grossly sensational and misleading terms that compounded the initial prejudice to DuPont.

9. Whether plaintiffs were improperly permitted to call a former DuPont employee, Victor Hawkins, to recount incidents that cast DuPont in a negative light with no legitimate relevance to the issues.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested. Oral argument would be of assistance to the Court in light of the size of the record (158 volumes plus exhibits) and the case's complex procedural history. DuPont respectfully requests an opportunity to explain the injustice visited upon it in the court below.

STATEMENT OF THE CASE

The judgment for plaintiffs is tainted by grossly prejudicial pretrial and trial errors, not least of which was a decision striking DuPont's expert witnesses one week before trial because of plaintiffs' arbitrary refusal – almost three months before trial – to depose them. Glen Strong's illness – multiple myeloma – has no known cause. But plaintiffs were permitted to imply otherwise through unqualified experts spouting speculative theories and making sweeping assertions about the alleged risks of a variety of chemicals and substances, especially the complex group of chemicals known as dioxins. The trial court's exclusionary ruling prevented DuPont from calling experts to refute these inflammatory assertions.

Given the complex scientific nature of the plaintiffs' claims, the trial court's ruling prohibiting DuPont from calling its experts was tantamount to entry of default. After that ruling, it was a foregone conclusion the verdict would be for plaintiffs. But the excessive size of the award – $15,500,000 for a disease Strong's doctors consider effectively cured – shows prejudice

greater than a simple default. It proves that plaintiffs' tactics caused the jury to lose sight of reason and to become consumed by passion and prejudice. This trial was not fair. The verdict is tainted and cannot be permitted to stand.

I. Course of Proceedings and Disposition Below.

A. DuPont Was Prejudiced by Improper Pleading and by Misjoinder of Over 2000 Unrelated Claims.

This broad assault on DuPont and its titanium dioxide plant in Harrison County was commenced in Jones County on December 20, 2002, with the filing of two substantially identical complaints listing over 2200 plaintiffs. The plaintiffs in this appeal – the Strongs – were included in a complaint styled *Govan*. R[1] 1:6-7 (*Govan* ¶ 5). The remaining plaintiffs were listed in a nearly 250-page complaint styled *Lizana*. R 65:9572-66:9673. The two complaints are identical except for the names of the plaintiffs listed therein, and they were effectively consolidated throughout this matter. There is no separate complaint for the Strongs' individual case.

The complaints were deficient for purposes of reasonable notice and joinder. The 2200-plus plaintiffs were identified by name only. No addresses were provided beyond the assertion that plaintiffs were "residing in Mississippi" at some time. R 1:6-7 (*Govan* ¶ 5), 65:9572-66:9673 (*Lizana* ¶ 5). No injury or injury-causing event was specified for any plaintiff. Instead, the complaints generically asserted that a multitude of "toxic chemicals" – attributable through multiple sources to multiple defendants – resulted in a list of vaguely described illnesses or

[1] The record includes 158 bound volumes and 12 boxes of Exhibits. Bound volumes 1 through 144 contain the Clerk's Papers and are cited "R [vol. #]:[page #]." Bound volumes 145 through 158 contain the Transcript and are cited "T [vol. #]:[page #]."

adverse health effects, some (but not all[2]) of which allegedly afflicted unspecified plaintiffs at unspecified times. Those alleged conditions

> include, but are not limited to: cancers, neurological problems, neuropsychological effects, respiratory effects, gastrointestinal effects, cardiac and cardiovascular effects, hemologic effects, immune system effects, metabolic effects, endocrine effects, genitourinary and/or renal effects, hearing problems, vision problems, integumentary effects, musculoskeletal effects, reproductive system effects, birth defects, child developmental effects and other miscellaneous health problems.

R 1:12-13 (*Govan* ¶ 8), 66:9678 (*Lizana* ¶ 8).

The list of chemicals at issue was so vague and expansive as to be meaningless. Well over 100 different chemicals, chemical families or other substances were alleged to be at issue, and the list was expressly made non-inclusive. Plaintiffs listed over seventy (70) substances or groups of substances that they purported to place at issue as against DuPont alone:

> The toxic chemicals . . . include, but are not limited to: arsenic; barium; beryllium; carbonyl sulfide; carbonyl chloride (phosgene); chlorine gas; chlorine; chromium; lead; manganese; mercury; nickel; vanadium tetrachloride; vanadium chloride; vanadium; zinc; tetrachlorodibenzo-p-dioxin; magnesium; methyl isobutyl ketone; soluble lead; thallium; toluene; 1,2 dichloroethane; aluminum oxide; aqueous sodium hydroxide solutions; acids; aqueous hydrochloric acid solutions; carbon monoxide; carbon dioxide; chlorinated benzenes; chlorinated styrene; dioxins; chlorinated dibenzofurans; chlorinated dibenzodioxins; cobalt; copper; ethylbenzene; ethylene dichloride; hexavalent chromium; antimony, hydrochloric acid; hydrogen chloride; ilmenite ore; iron chlorides including ferric chlorides and ferrous chlorides; iron; liquid titanium tetrachloride also known as "tickle;" metal sulfides; metal chlorides; metal carbonyls; methylene chloride; nitrous oxides; particulate matter; respirable particulate matter; selenium; silicon dioxide; sulfur dioxide, tetrachloroethylene also known as perchloroethylene; tin; titanium oxychloride; titanium tetrachloride; unreacted ore; unreacted coke; volatile metals; volatile metal chlorides; xylenes and radioactive materials including, but not

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[2] An unspecified number of conditions were included even though none of the 2000-plus plaintiffs suffered from them. R 1:12-13 (*Govan* ¶ 8) ("Plaintiffs . . . have suffered from *some but not all* of these injuries, illnesses and health related effects . . .") (emphasis added); R 66:9678-79 (*Lizana* ¶ 8) (same).

limited to uranium, thorium, plutonium and radium (*these chemicals are hereinafter and collectively referred to as the 'DuPont chemicals'*).

R 1:11-12 (*Govan* ¶ 8) (emphasis added); *see* R 66:9677-78 (*Lizana* ¶ 8) (same). Plaintiffs asserted a different, and even longer, list of chemicals, chemical families or other substances they purported to place at issue as against Ingram Industries.[3] R 1:18-19, 66:09684-85. Comparably expansive claims were asserted against the Waste Management defendants and against G.B. Boots Smith Corporation, a Laurel trucking company used to fix venue in Jones County.[4] R 1:6, 15-17.

The allegations regarding means of dispersion were also expansive to the point of incomprehension. The complaints encompassed dispersion through "sources including, but not limited to, piping, ditches, wells, tanks, stacks, vents, dumpsters, borrow pits, ponds, trucks, landfills" into "the air, water, soil, surface water, ground water and area bodies of water." R 1:13 (*Govan* ¶ 9), 66:9679 (*Lizana* ¶ 9). The complaints challenged the entire history of DuPont's operation at its Harrison County site. *Id.* The complaints ignored the basic rules of pleading and deprived DuPont of reasonable notice of the claims made against it.

B. The Prejudice to DuPont Was Compounded by a Series of Unfair Pretrial Rulings.

From January 2003 until February 2004, the *Govan* and *Lizana* cases were pending in federal court under removal jurisdiction. R 3:279. When proceedings recommenced in the trial court in March 2004, plaintiffs still had provided no individualized information whatever regarding the 2000-plus plaintiffs joined in the two cases.

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[3] The plaintiffs voluntarily dismissed the Ingram defendants before trial. R 25:3517-20, 25:3588.

[4] The plaintiffs also voluntarily dismissed the Waste Management defendants prior to trial. R 75:11060. Then, after Boots Smith declared bankruptcy, the plaintiffs took an order severing their claims against that defendant. R 137:20226-27

In March 2004, when it conducted its first hearing in this matter, the trial court had before it DuPont's motion for a more definite statement. That motion was denied outright. R12:1676 (RE tab 4). At the same time, while refusing to grant defendants any meaningful relief from plaintiffs' deficient pleading and misjoinder, the trial court insisted upon an expedited trial schedule. The same orders that rejected DuPont's request for a more definite statement set all 2000-plus claims for trial in March 2005. *Id.; see* R 74:10865.

Despite their insistence on an early trial date for their mass filing, plaintiffs thereafter refused to respond to discovery and continued to delay disclosure of even the most basic information about each of the plaintiffs – arguing, remarkably, that there were *too many plaintiffs* for such disclosures to be expected. *See, e.g.,* R 12:1608 (protesting "discovery served on *2,227 individual Plaintiffs*" (plaintiffs' 4/1/04 Motion for Protective Order)(plaintiffs' emphasis).[5] Plaintiffs pointed to the early trial date, which they desired, *as a reason to deprive defendants of basic discovery*, arguing the early trial date made such requests "ridiculous." T 145:26.

Before the adoption of the Case Management Order (CMO) in July 2004, plaintiffs used the absence of a CMO as another excuse for refusing to respond to basic discovery. R 12:1608. After a CMO was eventually entered, plaintiffs used its provisions, which they had advocated, to further delay basic discovery. R 23:3212 (RE tab 5). Imposing plaintiffs' proposed terms, the CMO protected plaintiffs indefinitely from any discovery about the vast majority of the plaintiffs and postponed open discovery until September 3, 2004, even for selected potential "trial" plaintiffs. *Id.*

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[5] *See also* R 13:1731 (protesting DuPont proposal that "Plaintiffs submit 'basic information' on more than ***2,200*** plaintiffs" (original emphasis)); R 13:1826 (same).

The CMO required plaintiffs to identify "Preliminary Trial Plaintiffs" by October 1, 2004, but not to disclose which case they intended to try in March 2005. Plaintiffs were not required to disclose which case they would try first until after the discovery deadline. The February 2005 discovery deadline applied to six "Preliminary Trial" cases, not just the case to be tried in March 2005. *Id.* at 3214. After discovery ended in February 2005 for all "Preliminary Trial" cases, four "Final Trial" cases would be selected to "be tried *seriatim*," without intervening additional discovery. R 23:3212, 3214 (RE tab 5). DuPont was thus required to complete all discovery for six "Preliminary Trial" cases simultaneously, without knowing which case plaintiffs actually intended to try. DuPont had to complete all this discovery in only four months. *Id.*

The time allowed for DuPont to discover plaintiffs' experts' theories and then to develop and disclose experts who could respond for all six "Preliminary Trial" cases was even more radically compressed. The CMO allowed plaintiffs to delay all disclosure regarding their experts until October 15, 2004. R 23:3214 (RE tab 5). Plaintiffs were permitted to defer disclosure of their experts' *opinions* indefinitely. The CMO's October 15 disclosure deadline was explicitly limited to plaintiffs' experts' "names and area of expertise" only. *Id.* Disclosure of plaintiffs' experts' opinions was not addressed. The CMO implied – but did not require – that plaintiffs' experts' opinions should be discovered by subsequent depositions, which could "commence" on October 15. *Id.* DuPont was granted one month from its receipt of the names – but not the opinions – of plaintiffs' experts to obtain and to identify any expert through whom it hoped to respond in any of the "Preliminary Trial" cases. *Id.*

Having effectively deprived DuPont of reasonable time to prepare, plaintiffs pressed their advantage by burdening DuPont with overwhelming demands for document production and other discovery, from which the trial court refused to grant meaningful relief. Plaintiffs' first set of

document requests alone, served in September 2004, demanded 356 broad categories of documents, and the requests were repeatedly expanded.[6] Plaintiffs' discovery requests spanned the entire history of this large and complex facility. Plaintiffs also insisted on obtaining information and documents on operations at other DuPont plants totally unrelated to operations at DeLisle. Despite a large mobilization of effort, at huge expense, it was impossible for DuPont to meet plaintiffs' expansive discovery demands on the schedule imposed by the CMO.[7] R 37:535 *et seq.*; R 40:5866 *et seq.*

At the same time, plaintiffs postponed or evaded the limited discovery that the CMO permitted to DuPont. Plaintiffs did not disclose their experts' anticipated opinions in response to DuPont's discovery requests. R 51:7418-19. In addition, plaintiffs maintained that their experts could not finalize opinions until DuPont's document production was completed. When DuPont deposed plaintiffs' experts in January 2005, DuPont was met with the contention that it could not rely upon the disclosed opinions being final because of plaintiffs' ongoing discovery of DuPont. R 51:7419.

As it was apparent that DuPont was being grossly prejudiced by the compressed scheduling of plaintiffs' mispled and misjoined cases, DuPont repeatedly sought relief in various forms, but relief was repeatedly denied.[8] Plaintiffs adamantly opposed any meaningful relief,

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[6] R 41:5886-6019 (plaintiffs' discovery requests); *see* R 28:4044 (DuPont 10/25/04 motion for protective order); R 36:5171 (12/23 order compelling massive production by 1/12); R 37:5351 (12/30 DuPont motion documenting discovery burden); R 40:5866 (1/14 motion further documenting burden).

[7] At plaintiffs' insistence (purportedly for the purpose of other "trial" cases), DuPont's production ultimately continued through the August 2005 trial of Strong's individual case. T 147:387-88 (plaintiffs requesting extension of discovery deadline until October for purpose of continuing discovery of DuPont documents).

[8] R 39:5673 & 5677 (motion for continuance); R 47:6918 (order denying continuance); R 51:7418 & 7472 (motion to strike experts or for continuance); R 65:9510 & 9908 (motion urging complete

including any postponement of the March 2005 trial or the subsequent *seriatim* 2005 trials. Plaintiffs insisted that they were ready for trial despite the ongoing discovery.[9] Plaintiffs had no objection to discovery continuing until the brink of trial. Plaintiffs expressed their intention to depose 18 DuPont experts and fact witnesses between March 1 and March 18 before the March 30 trial. R 84:12216.

On February 15, 2005, plaintiffs filed their Notice of Designation of Trial Plaintiffs, designating the Strongs as the plaintiffs for the March 30 trial. R 73:10756. On February 22, the trial court set trial dates for the next three "Trial Plaintiffs" under the CMO. R 75:10981. On February 24, plaintiffs voluntarily dismissed their claims against the Waste Management entities. R 74:10941. DuPont responded by removing the cases to federal court on grounds of fraudulent joinder. After that removal proved unsuccessful, venue-fixing local defendant G.B. Boots Smith Corporation filed for bankruptcy, and plaintiffs moved to sever it. R 95:13906. In light of these additional developments, DuPont again removed the cases. On this removal, the United States District Judge found that federal bankruptcy jurisdiction did exist but, nonetheless, remanded the case on April 12, 2005, as a matter of discretionary abstention. R 99:14526 Following the April 12 remand, the trial court announced on April 13 that the Strong trial had been rescheduled for August 17, 2005. R 104:15251 (4/26/05 order).

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severance due to prejudice on combined discovery of multiple claims); R 77:11278 (order denying same).

[9] R 42:6092 (1/14/05 response) ("Plaintiffs are ready to proceed with trial on March 30, 2005"), 6093 ("Yet, despite these continuing discovery delays, plaintiffs are ready to proceed with trial on March 30, 2005."), 6094 ("Plaintiffs have waited more than two years for a trial and plaintiffs are ready to proceed with trial on March 30, 2005.").

C. The Trial Court Abused its Discretion When it Excluded DuPont's Experts.

Although the new August trial date allowed substantial additional time for discovery, plaintiffs moved on May 10, 2005, to exclude 17 previously disclosed DuPont fact and expert witnesses from all anticipated trials as "sanctions," purportedly for the inadequacy of DuPont's previous disclosures.[10] R 105:15399. Plaintiffs' motion paid scant attention, however, to the real status of discovery. Plaintiffs made no attempt to explain why DuPont's prior expert disclosures, including DuPont's detailed April 4 disclosures, were insufficient to allow plaintiffs to prepare for trial.[11] Instead, plaintiffs vilified DuPont at length for having allegedly "undermined" the CMO in various ways, including through removal to federal court. R 105:15400. Plaintiffs' motion was thus a thinly veiled device seeking to punish DuPont for opposing their early trial date and for exercising its legitimate right to remove the case to federal court. Plaintiffs' goal was to strip DuPont of its defenses. Plaintiffs achieved their objective.

As an alternative to an order excluding defendants' witnesses outright at that time (with trial still over three months away), plaintiffs' May 10 motion alternately requested that all 17 witnesses be produced for deposition "at Plaintiffs' counsel's offices in Dallas, Texas," at DuPont's expense. R 105:15400. When the motion came up for hearing on May 16, 2005, *only* this alternate request was pressed. The trial court immediately granted the alternate request on terms that plaintiffs dictated into the record. As stated at the May 16 hearing, those terms

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[10] Plaintiffs' view of the propriety of additional discovery after the continuance was highly selective. Even while protesting that it was unfair for DuPont to use the additional time for disclosures regarding its experts, plaintiffs simultaneously insisted that the additional time justified renewed or additional discovery of DuPont on subjects of their choosing. R108:15911 (5/10/05 motion for entry upon land); T 147:343-52, 357-71 (plaintiffs arguing for additional discovery of DuPont); R 117:17200 (6/2/05 order compelling additional DuPont document production).

[11] R 98:14298 (DuPont 4/4/05 expert disclosures) (RE tab 6).

required DuPont to make its witnesses available for deposition, at its expense, at Baron & Budd's offices in Dallas, Texas, between May 23 and June 10, but nothing more. T 147:352-57 (RE tab 7). The concept of allowing plaintiffs to unilaterally dictate the day and hour at which each witness was required to appear, without any consideration of the witness's other commitments or conflicts, was never discussed at the May 16 hearing. *Id.*

On May 18, plaintiffs began noticing depositions for arbitrarily selected dates between May 23 and June 10. R 116:17071-117:17177. On May 19, DuPont provided plaintiffs with dates when 16 of its 17 witnesses could travel to Dallas to be available for deposition between May 23 and June 10, just as ordered at the May 16 hearing. R 122:18005 (RE tab 9). DuPont explained that the 17th witness had prior commitments that precluded travel to Dallas throughout that period but offered to make him available in Dallas as soon as possible.[12] *Id.*

On Friday, May 20, the trial court signed the form of an order tendered by plaintiffs that, while nominally memorializing the May 16 bench ruling, added to the ruling a term never requested, or even mentioned, by plaintiffs at the hearing. In addition to requiring DuPont to produce its witnesses, at its own expense, at Baron & Budd's Dallas offices between May 23 through June 10, as ordered at the May 16 hearing, the written May 20 order also required the witnesses to appear "*on a schedule to be determined by Plaintiffs' counsel.*" R 117:17178 (RE tab 8) (emphasis added). The May 20 Order was thus crafted to confer on plaintiffs the unilateral right to arbitrarily dictate the day and hour when each DuPont expert had to appear at Baron & Budd's Dallas offices for deposition. Issued as it was on the Friday afternoon before the Monday

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[12] DuPont was unable to offer dates for the 17th witness, Dr. Krieger, by May 19, because Dr. Krieger was committed to a project in Africa for an extended time. R 122:17998-99 *and* 123:18055-57 (RE tab 9). By June 6, however, DuPont was able to offer to make Krieger available in Dallas for deposition anytime between June 21 and 24. *Id.* at 18058.

for which plaintiffs had unilaterally noticed the first deposition, the order effectively conferred on plaintiffs the right to command such compliance on less than one business day's notice.[13]

On Monday, May 23, DuPont filed a reconsideration motion explaining why it was impossible for nine of its experts to appear in Dallas on plaintiffs' arbitrarily noticed dates and providing dates when all its experts except one could be available for deposition in Dallas before June 10.[14] R 17:17180. Plaintiffs ignored the experts' genuine, substantial scheduling conflicts and refused to consider taking the depositions on days when the experts could in fact be available. Instead of deposing DuPont's experts on dates when they could be available, plaintiffs convened charade depositions on their unilaterally selected dates – knowing that the noticed expert could not be there – and created "Certificates of Nonappearance" for later presentation to the trial court. R 119:17550.

On July 20, DuPont noticed its reconsideration motion for hearing on August 2.[15] R118:17343. On July 26, plaintiffs filed their motion to strike the nine DuPont experts who were unable to appear at Baron & Budd's Dallas offices on plaintiffs' arbitrary, unilaterally dictated schedule. R 118:17349. Plaintiffs' July 26 motion was heard August 2, together with DuPont's reconsideration motion. After brief argument on August 2, the court took both motions under advisement.[16]

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[13] The first witness noticed was a DuPont employee. She was able to interrupt other plans and to appear, despite the short notice. All four witnesses who were DuPont employees were able to arrange to appear on plaintiffs' schedule. The other 13 witnesses were outside experts who had independent schedules and commitments. R 122:17998 (RE tab 9).

[14] The exception again was Dr. Krieger, who was subsequently offered in Dallas anytime between June 21 and 24. *See* n.12, *supra*.

[15] DuPont's attempts to obtain a hearing prior to August 2 were unavailing.

[16] T 147:374-79, 147:393-96 (RE tab 10).

On Tuesday, August 9 – a week and a day before the commencement of the August 17 trial – the trial court entered an order striking all nine DuPont expert witnesses, on grounds that those witnesses "failed to appear for their depositions that Plaintiffs had noticed on May 18, 2005, pursuant to the Sanctions Order" (sic).[17] R 124:18285 (¶ 11) (RE tab 11).

II. Statement of Facts.

Glen Strong is a smoker with a long list of chronic, serious health conditions other than the illness – now effectively cured – that he blames on DuPont. According to his doctor, Strong's current health problems include all of the following – none of which was blamed on DuPont at trial, even under the standards employed by plaintiffs' trial experts:

> He has coronary artery disease. He has mild congestive heart failure. He has a history of arrhythmia. He's a smoker. He has a history of chronic obstructive lung disease.

Ex. D-510 at 10 (deposition testimony of Dr. Giralt). In addition, Strong has suffered two heart attacks – one in 2003, another in 2004. T 155:1513-14. In his doctor's opinion, Strong's current health concerns do *not* include a significant risk of a recurrence of the illness Strong blames on DuPont, i.e., multiple myeloma. Ex. D-510 at 2, 4, 9-10. According to his doctor, Strong's "chances of dying from something else at this time are higher than him dying from recurrent myeloma." *Id.* at 10.

Strong was originally diagnosed with multiple myeloma in mid-1998. T 154:1493. He was treated at M.D. Anderson in 1998 and responded well. Ex. P-481 at 1-2. After a September 2000 recurrence, he was again treated at M.D. Anderson. His outcome was so satisfactory that

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[17] The "Sanctions Order" authorizing plaintiffs to schedule the depositions unilaterally was signed May 20, *after* plaintiffs served their unilateral notices on May 18. R 116:17071-117:17177 (notices); R 117:17178 (RE tab 8) (May 20 order). The finding that plaintiffs had noticed the depositions "pursuant to the Sanctions Order" is thus misleading.

his doctors consider his multiple myeloma effectively cured. According to Dr. Giralt, an M.D. Anderson specialist who treated him, Strong's last transplant was "a significant success and he's had no evidence of recurrent disease since." Ex. D-510 at 1. Dr. Giralt examined Strong four weeks before trial and found him to be in "complete remission." *Id.* at 1-2. Dr. Giralt testified Strong has a "relatively small" chance of the multiple myeloma returning. "It's not zero, but it's relatively low." *Id.* at 4.

Dr. Giralt and the other M.D. Anderson specialist responsible for Strong's care both testified that multiple myeloma has no known cause. Ex. D-510 at 2; Ex. D-511 at 1-2. The record does not say how or when Strong first came to believe that the cause of his multiple myeloma could be attributed to emissions from DuPont's plant.

DuPont's Harrison County plant has been operating in DeLisle, on St. Louis Bay, since 1979. Ex. P- 474 at 3. The plant makes titanium dioxide, a bright white pigment used in paints, plastics, paper and other products.[18] T 154:1404. DuPont's plant is approximately five miles, as the crow flies, from the Strongs' Bay St. Louis home. *Id.* at 1479-80. Glen Strong grew up in a fishing family in the city of Bay St. Louis. *Id.* at 1483.

At trial, plaintiffs maintained that multiple myeloma can be caused by exposure to environmental dioxins. Dioxins are a large group of chemical compounds generated by both natural and man-made sources. Dioxins are byproducts of combustion, including forest fires, municipal waste incineration, private trash burning, and diesel engines. Ex. P-474 at 4, T 150:781-82, T 152:1188. They are also produced in cigarette smoke. Dioxins are pervasive

[18] Despite the superficial similarity in the names, there is no contention that titanium dioxide is a dioxin or that titanium dioxide is hazardous in any way relevant to this case.

in the environment, and as a result all people have been exposed to them, mostly through foods, and have certain levels of dioxins in their bodies. T 153:1292-93.

The potential risks of dioxins have been a focus of public health concerns since the 1940s, when an industrial explosion caused an outbreak of a severe form of acne, called chloracne, among those exposed to the smoke. T 151:950-51. Strong makes no claim he is afflicted with chloracne.

SUMMARY OF ARGUMENT

Pre-Trial Exclusion of Experts. The trial court abused its discretion when it excluded nine DuPont experts one week before trial based on plaintiffs' arbitrary refusal to depose them. DuPont disclosed its experts' opinions in writing and repeatedly offered its experts for deposition. Three months before trial, DuPont offered to produce its experts for deposition, at no expense to plaintiffs, at plaintiffs' lawyers' office in Dallas. Plaintiffs then refused to depose any witness who could not appear on plaintiffs' unilaterally dictated schedule. The excluded experts could not do so. Plaintiffs refused to consider alternate dates, despite DuPont's standing offer to make the experts available.

DuPont's experts' could not appear on the schedule dictated by plaintiffs because of preexisting, substantial personal and professional commitments. One expert, for example, was *hospitalized* for *gallbladder surgery* on the date plaintiffs insisted on taking his deposition. Another was required to be at the side of his hospitalized wife. Two were out of the country, one in Africa, the other in Asia; and so forth.[19] Plaintiffs were promptly advised of the scheduling conflicts, but nevertheless refused to consider alternate dates.

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[19] The scheduling conflicts are documented and are undisputed. R 122:17998-99 (chart) & R123:18047-57 (affidavits)(RE tab 9).

In excluding DuPont's experts, the trial court lost sight of the purpose of discovery, which is "to assure to the maximum extent practicable that cases are decided on their merits" and not "by ambush." Exclusion of evidence is a last resort and is never proper in the absence of genuine surprise. Even faced with genuine surprise, a party who refuses reasonable remedial measures, like a deposition, waives the objection. Plaintiffs waived any legitimate objection when they refused to depose DuPont's experts.

In addition, plaintiffs never had genuine grounds for claiming surprise. Plaintiffs never attempted to explain why DuPont's written disclosures were not adequate for their purposes. Plaintiffs' responses to DuPont's Daubert motions show that DuPont's disclosures were in fact adequate. Plaintiffs knew perfectly well what to expect from DuPont's experts, without having deposed them. Plaintiffs' claim of prejudice was completely disingenuous. Excluding DuPont's experts was manifest error that gave plaintiffs a grossly unfair advantage at trial – tantamount to a default judgment. The issue mandates reversal.

JNOV. DuPont is entitled to judgment as a matter of law because plaintiffs lacked competent proof of causation. Multiple myeloma has no known cause. No medical doctor testified dioxins from DuPont's plant caused or contributed to Strong's multiple myeloma. To the contrary, the only medical doctors to testify about Strong's cancer, his treating physicians, stated there is no known cause of multiple myeloma. Plaintiffs' theories do not constitute competent proof for either general or specific causation. In addition, plaintiffs lacked competent proof any effect on Strong was attributable to dioxins emitted from DuPont's plant, as opposed to dioxins admittedly present in the environment and food supply generally, or to sources of risk Strong willingly assumed, like smoking cigarettes for 30 years.

Plaintiffs' general causation expert, Clapp, was not reliable. The only study Clapp ever performed himself showed *no link at all* between dioxins and multiple myeloma – the exact *opposite* of what Clapp was hired to say at trial. To reach the opinion he gave at trial, Clapp thus had to disregard his own study. Clapp also had to disregard the conclusions of *all the peer-reviewed scientific studies he knew of*, not one of which had concluded that dioxins cause multiple myeloma. Finally, Clapp had to disregard the opinions of Strong's doctors, specialists in the treatment of multiple myeloma, who testified the cause of multiple myeloma is not known.

To justify his assertion that, contrary to the published literature and the view held by Strong's doctors, a cause of multiple myeloma is known, Clapp pointed to isolated epidemiological studies suggesting weak associations between illness and occupations assumed to involve exposures to dioxins. Clapp then supplied those studies with a conclusion of his own invention – a conclusion not reached in the studies themselves, or in any peer-reviewed literature. Clapp's opinion was fundamentally unreliable.

Lacking a competent theory of general causation, plaintiffs had no valid basis for even beginning a specific causation analysis. Thus, plaintiffs should never have been allowed to present testimony on specific causation because they had not established general causation. In addition, determining specific causation is physician's work, and the only physicians who testified about multiple myeloma said it cannot be attributed to a known cause. To contradict Strong's doctors on this fundamental issue, plaintiffs called not a medical doctor, but a professional witness/toxicologist. Plaintiffs' toxicologist was not qualified to determine the specific causation of Strong's illness, and his opinion was not reliable.

Testimony by Affidavits. Plaintiffs called the two M.D. Anderson specialists who treated Strong's multiple myeloma to testify at trial, by video depositions, as treating physicians. Under

cross-examination by DuPont, both testified multiple myeloma has no known cause. At these depositions, Strong's lawyers had an opportunity to explore these doctors' opinions on this subject but refrained from doing so. After the deposition testimony was shown to the jury, plaintiffs were allowed to introduce surprise hearsay affidavits, in identically worded language obviously crafted by counsel, which dramatically changed the doctors' testimony about the cause of multiple myeloma. The affidavits were read to the jury, admitted as exhibits, and emphasized by plaintiffs in closing argument. Allowing plaintiffs to undercut these witnesses' testimony by admitting affidavits into evidence flagrantly violated the rules of evidence and seriously prejudiced DuPont.

Refusal of Instruction D-10. DuPont tendered instruction D-10 to require the jury to follow the "frequency, regularity, proximity" standard for toxic torts. The instruction correctly stated the law as required by the facts and was improperly refused. No other sufficient instruction was given on the issue, and as a result, the instructions as a whole misstated the applicable law in a manner prejudicial to DuPont's substantial rights.

Excessive Verdict. The $15,500,000 award includes $12,600,000 for Strong's pain and suffering and $1,500,000 for his wife's loss of consortium. The evidence is undisputed that plaintiff's multiple myeloma has been effectively cured since 2001, that his chance of a recurrence is very low, and that he is much more at risk from other, unrelated, current health conditions than from recurrent multiple myeloma. On these facts, the award is excessive to a degree that demonstrates passion and prejudice. Reversal, or remittitur, is required.

Other Evidentiary Errors. Numerous other evidentiary errors further prejudiced DuPont. Plaintiffs' air modeling expert was improperly allowed, based on sheer speculation, to accuse DuPont of intimidating and deceiving regulatory agencies. The accusations were improper

character evidence in the form of "other . . . wrongs, or acts" – evidence that the rules declare inadmissible *per se*.

Plaintiffs' epidemiologist was improperly allowed to testify regarding the "Veterans Administration's position . . . with respect to dioxin and multiple myeloma" and to represent that this politically dictated policy constituted a relevant causation finding. The testimony was not founded in fact or legitimate opinion, and it was substantially misleading and more prejudicial than probative.

Plaintiffs' chemist was improperly permitted to opine about human health risks of dioxins – a key subject in the case that was beyond both his expertise and his designation – and was permitted to do so in grossly sensational and misleading terms, like "getting hit with an atom bomb, a car bomb, two hand grenades and a few other things."

Plaintiffs were improperly permitted to call former DuPont employee Hawkins for the purpose of recounting irrelevant incidents that cast DuPont in prejudicial light. Hawkins detailed his personal injuries from maintenance accidents and suggested that DuPont had deceived regulators regarding his injuries and other matters. Allowing DuPont to be randomly disparaged by a former employee on unrelated issues in this manner was unjustifiable and seriously prejudicial to DuPont in the eyes of the jury.

ARGUMENT

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

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

Plaintiffs' evidence was incompetent to establish either general or specific causation. Proof of both types was necessary for plaintiffs' case, for reasons one court has explained as follows:

> Toxic tort cases usually require proof of both "general" and "specific" causation with regard to the effects of the toxic substance. "General causation" exists when a substance is capable of causing a particular injury or condition in the general population, while specific causation exists when a substance causes a particular individual's injury.

Mobil Oil Corp. v. Bailey, 187 S.W.3d 265, 270 (Tex. App. 2006) (citations omitted).

As proof of general causation, plaintiffs relied upon their epidemiologist Clapp's opinion that dioxins cause multiple myeloma. The proponent of expert opinion must demonstrate that the opinion is sufficiently reliable to qualify as admissible proof. MISS.R.EVID. 702; *Mississippi Transp. Com'n v. McLemore*, 863 So.2d 31, *passim* (Miss. 2003) (discussing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)). Clapp's opinion does not satisfy the test of minimal reliability.

Clapp could not rely upon the results of any study he had performed himself as support for the opinion he gave at trial. Clapp admitted that he had once participated in a relevant study. Clapp's study, however, proved the opposite of what he was hired to say at trial – it found *no link at all* between dioxin exposure and multiple myeloma:

> A: . . . **in that study we did not find an excess or a deficit of multiple myeloma**. We actually combined pre and multiple myeloma. So I don't have any subsequent research of my own as you've asked the question.

. . . .

Q: **So the answer was no,** you haven't done any individual study of your own to prove your notion that dioxins cause multiple myeloma, even though you've held that opinion for 12 years?

A: **Correct.**

T 151:1024 (emphasis added). Clapp had to disregard the results of his own study to support the opinion he offered at trial.

Next, Clapp had to disregard the conclusions of all peer-reviewed studies he knew of. Clapp conceded he could *cite no peer-reviewed articles that say dioxins cause multiple myeloma*:

Q: Again, **you can't direct us to one scientifically peer-reviewed article that says dioxins cause multiple myeloma, can you?**

A: You know, individual scientific peer-reviewed articles almost never conclude that the study shows that there is a cause and effect relationship in that study. So I can't cite such an article, because articles almost never say that in their conclusory statement.

Q: **So the answer to my question was no?**

A: **The answer is no** . . . .

T 151:1024-25 (emphasis added). Finally, Clapp had to disregard the view held by Strong's doctors, specialists in treating multiple myeloma, who believe the disease has no known cause. Ex. D-510 at 2 *and* Ex. D-511 at 1-2 (quoted and discussed below beginning at 33).

To justify his opinion, Clapp reinterpreted isolated studies suggesting weak associations between illness and occupations *assumed* to involve exposures to some forms of dioxin. R 127:18618 *et seq*; T 151:1025-35. Clapp relied on weak studies while ignoring stronger studies that found no relevant associations. R 127:18618 *et seq*. He then formulated from the weak studies a conclusion the studies' authors had not themselves made and that neither he nor anyone else has made in peer-reviewed scientific literature. T 151:1024-25. Clapp's opinion was not reliable. There was no competent proof of general causation. Plaintiffs' failure to prove general causation warrants judgment for DuPont.

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

Plaintiffs relied on William Sawyer to voice an opinion on specific causation, i.e., on the cause of Strong's particular case of multiple myeloma. Only Sawyer testified that Strong's multiple myeloma was caused by dioxins and not other causes. Only Sawyer testified that the responsible dioxins were from DuPont's plant and not from any of many other known sources of dioxins to which Strong was exposed, including the cigarettes Strong smoked for 30 years. Sawyer was not qualified to opine on either point, and his opinions were not reliable.

Before he expressed his opinion on specific causation, Sawyer disqualified himself to do so. Sawyer is a toxicologist, not a medical doctor. T 153:1218. He testified toxicologists "determine what chemicals cause what diseases." *Id.* at 1219. Sawyer then told the jury, "I do not make diagnoses" and "I do not attempt to diagnose . . . ." *Id.* at 1226. He was compelled to say that because had he not, he would have been practicing medicine without a license. *Joseph v. District of Columbia Board of Medicine*, 587 A.2d 1085, 1089 (D.C. 1991) (testifying as an expert witness on diagnosis constitutes practice of medicine). In fact, plaintiffs' general causation witness, Clapp, insisted specific causation was for a medical doctor to determine. Clapp avoided cross-examination on certain points by disclaiming any intent to offer an opinion on specific causation. Clapp agreed he was not qualified to render such an opinion because he is not a medical doctor:

> A: I think what you're now moving into is what's called individual causation, did this person get his disease or her disease because of specific levels in his or her blood, and *I'm not rendering an opinion on that.*
> Q: Because you're not qualified to give a specific causation opinion. Is that right?
> A: Well, in general *that's what physicians do.*

T 151:1020-21 (emphasis added).

Having disclaimed the ability to render a diagnosis, Sawyer proceeded to do just that. He side-stepped unlawfully practicing medicine by telling the trial court what he was doing was "assessing" rather than "diagnosing." T 153:1229-30. Over DuPont's objection, Sawyer testified "Strong's 19 year exposure to dioxin from the DuPont plant . . . caused his multiple myeloma." *Id.* at 1263. Sawyer further stated he "arrived at his opinion through *a differential examination of the facts*." *Id.* at 1264. He talked to Strong and visited his house. He eliminated lawn chemicals, gasoline stored in Strong's house and neighborhood motor vehicle traffic as potential sources of dioxin. *Id.* According to Sawyer, that left only dioxins produced by DuPont as the cause of Strong's illness.

What Sawyer did is exactly what he said he could not do; he performed a "differential diagnosis." As stated in *Valentine v. PPG Industries, Inc.*, 821 N.E.2d 580, 598 (Ohio App. 2004) (emphasis added):

> Differential diagnosis is defined as the method by which a physician determines what disease process caused a patient's symptoms. *The physician considers all relevant potential causes of the symptoms and then eliminates alternative causes based on a physical examination, clinical tests, and a thorough case history.*

That is exactly what Sawyer did to connect Strong's multiple myeloma to DuPont. Although at trial, he disavowed the word "diagnosis," Sawyer wasn't as careful in his deposition. There, he described the process of elimination he went through in "assessing" Strong as follows:

> Q: Now, tell me, if you would, as a toxicologist, what the next step that you take is in reviewing a person's history and exposure for specific causation.
> A: A big portion of what I do is exactly what I did in this case, and that is directly visit the exposed individuals or survivors and obtain as much information as possible with respect to discovering other possible contributing factors to either the disease or the exposure.
> Q: Okay. And that process you're talking about, is that process generally accepted in the medical and scientific community that you're discussing?
> A: Yes, *it's actually the basis for a differential diagnosis* or in toxicology causation to be able to rule out other potential factors.

R 62:9163 (emphasis added). In their opposition to DuPont's post-trial motion, plaintiffs conceded Sawyer was "diagnosing." R 143:21115 ("[Sawyer] employed the standard practice of *differential diagnosis* to assess whether any other probable causes led to Glen Strong's cancer") (emphasis added).

That brings us to the more fundamental problem with Sawyer's opinions; not only did he deny his own qualifications to testify on specific causation, he was simply not competent to tell the jury the cause of Strong's multiple myeloma. The farthest this Court has gone in permitting non-physicians to testify about the effects of chemicals on people is *Thompson v. Carter*, 518 So.2d 609 (Miss. 1987). There a toxicologist was permitted to testify because a "toxicologist would be at least equally competent to testify concerning what effect a certain drug would have *on the human body*." 518 So.2d at 614 (emphasis supplied). But that's general, not specific, causation. Clapp testified about general causation; however, the critical evidence necessary to take the case to the jury was specific causation, i.e., what caused Strong's multiple myeloma. Because Sawyer was the only witness to address that issue, and because he was not qualified to express an opinion on that subject, plaintiffs' case fails as a matter of law. *Richardson v. Methodist Hospital*, 807 So.2d 1244, 1248 (Miss. 2002) (nurse not qualified to opine as to cause of death because "[t]he cause of a stroke . . . is a complex medical issue."); *Sheffield v. Goodwin*, 740 So.2d 854, 857 (Miss. 1999) (nurse practitioner's opinion disallowed because not qualified "on causation and the standard of care.").

Thompson v. Carter is distinguishable on several other bases. First, the issues were admissibility of a "package insert" and whether a toxicologist could testify on a physician's standard of care. Specific causation was not an issue in *Thompson v. Carter*. 518 So.2d at 610.

More importantly, the substance in question was a "pharmaceutical product" available by prescription only. *Id.* This Court can take judicial notice that in this country prescription drugs, and their effects and side effects, are some of the most studied substances in existence. Permitting a toxicologist to testify about a known allergic reaction to a prescription drug, as was done in *Thompson v. Carter*, is quite a stretch from allowing a toxicologist to attribute Strong's specific case of multiple myeloma to minuscule quantities of compounds emitted by DuPont. And this is particularly true in the face of the testimony of Strong's two physicians, specialists in treating multiple myeloma, who believe no cause is known for this illness. Ex. D-510 at 2 *and* Ex. D-511 at 1-2 (quoted and discussed below beginning at 33).

Had he been permitted to do so, DuPont's expert Gary Krieger, *a medical doctor* who specializes in what causes diseases, "would have testified that there is no known cause for multiple myeloma" and "that there is no scientific literature that supports Dr. Sawyer's specific causation opinion that dioxins . . . cause multiple myeloma." Ex. D-507. The facts in this case are, therefore, a far cry from those in *Thompson v. Carter*, where the information about which the toxicologist testified was set out in "recognized pharmacological literature." 518 So.2d at 615.

There is yet another problem in recognizing Sawyer's testimony as sufficient to get the case to the jury. Just as with Clapp, Sawyer was challenged under *Daubert*. Like Clapp, Sawyer should have been barred from testifying on causation because he could not cite even one peer-reviewed article supporting his opinion that the dioxin exposure which he claimed Strong experienced was sufficient to cause multiple myeloma. R 62:9106. *Mississippi Transp. Com'n v. McLemore*, 863 So.2d at 37 (¶ 13) (citing *Daubert*, 509 U.S. at 592-94).

Furthermore, Sawyer's testimony, like that of all of Strong's experts, was hopelessly self-contradictory and unworthy of belief. Sawyer testified dioxins are everywhere. "All human

beings have some certain level of background dioxin in their blood." T 153:1293. According to Sawyer, most people absorb 100 picograms of dioxins *every day*. *Id.* at 1254. Yet he also testified that "[d]ioxins are the most powerful carcinogen known to man," and, more strikingly, there is no "safe dose of dioxin." *Id.* at 1255 & 1330. Moreover, according to Sawyer, the daily "body burdens" of dioxins everyone experiences are too high; they promote cancer and multiple myeloma. T 153:1254-55. If this testimony is not sufficiently fantastic and alarmist (we must all be suffering from multiple myeloma as a result of exposure to background levels of dioxins), Sawyer further raised the ante. Although it is uncontroverted that cigarette smoke contains dioxins,[20] Strong's 30 year pack-a-day habit can be eliminated as the cause of his cancer because "it was inconsequential . . . ." T 153:1331. How can he so testify while, at the same time, telling the jury there is no safe level of exposure to dioxins?[21]

Lastly, Sawyer testified human beings who have not experienced "abnormal dioxin exposure" can and do contract multiple myeloma. T 153:1294. Plaintiffs did not even purport to prove that dioxins cause *all*, or even *most*, multiple myeloma. Yet Sawyer, in the course of his differential "diagnosis" of the cause of Strong's cancer, did nothing to rule out any potential cause *other than Strong's exposure to dioxins*. An expert cannot "simply pick the cause that is most advantageous to [plaintiffs'] claims." *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 424 (5th Cir.

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[20] Sawyer also admitted that a male smoker such as Strong has a 39.4% higher blood dioxin than a non-smoker. T 153:1332-34.

[21] The testimony of plaintiffs' general causation expert Clapp was the same. There is nothing "more carcinogenic than" TCDD. T 151:952. "There is no safe level of exposure to dioxin." T 151:990-91. However, "we all have dioxins in our body." T 151:955. And the dioxin in everyone's body is at an "unacceptably high" level. T 151:989. Moreover, without consideration of anything DuPont did, "[w]e're already above a safe level." T 151:991. Then, inexplicably, the dioxins Strong ingested through 30 years of smoking had no adverse effect on his health. Clapp had "no opinion" about whether the dioxin produced in smoking cigarettes contributed to Strong's dioxin levels. T 151:955, 152:1064.

1987). Rather, the expert must explain why he ruled out other possible explanations, including random or idiosyncratic occurrence. *See Wheat v. Pfizer, Inc.*, 31 F.3d 340, 342-43 (5th Cir. 1994) (concluding the evidence was insufficient to establish causation where plaintiff failed to exclude other potential causes of illness). Because his causation "assessment" is incomplete, Sawyer's opinion has no probative value and is insufficient to create a prima facie case on liability.

II. DuPont is Entitled to a New Trial.

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

This Court has emphasized that the goal of discovery is "to assure to the maximum extent practicable that cases are decided on their merits." *Buskirk v. Elliott*, 856 So.2d 255, 260 ¶ 10 (Miss. 2003) (emphasis added) (quoting *Harris v. General Host Corp.*, 503 So.2d 795, 796 (Miss. 1986)). Thus "[e]xclusion of evidence is a last resort" and that "[e]very reasonable alternative means of assuring the elimination of any prejudice to the moving party and a proper sanction against the offending party should be explored before ordering exclusion." *Buskirk*, 856 So.2d at 260 ¶ 11 (emphasis added) (quoting *McCollum v. Franklin*, 608 So.2d 692, 694 (Miss. 1992)). The Court has instructed:

> Lower courts should be cautious in either dismissing a suit or pleadings or refusing to permit testimony . . . . The reason for this is obvious. *Courts are courts of justice not of form. The parties should not be penalized for any procedural failure that may be handled without doing violence to court procedures.*

Beck v. Sapet, 937 So.2d 945, 949 ¶ 7 (Miss. 2006) (emphasis added, quoting *Robert v. Colson*, 729 So.2d 1243, 1247 (Miss. 1999), and prior cases).

The purpose of discovery is to prevent unfair surprise at trial, or "trial by ambush." *Buskirk*, 856 So.2d at 260 ¶ 10; *Robert*, 729 So.2d at 1246 ¶ 18; *Jones v. Hatchett,* 504 So.2d 198, 201 (Miss. 1987); *Harris,* 503 So.2d at 796 (Miss. 1986). Accordingly, the ultimate test for prejudice sufficient to support an order excluding relevant evidence is whether the complaining party was genuinely surprised and thus deprived of a fair opportunity to respond at trial. *Buskirk*, 856 So.2d at 260 ¶ 10.

Even if a discovery order is somehow violated, the existence of genuine surprise remains a key consideration, and draconian remedies remain options of last resort. Thus, before an order excluding evidence will be affirmed, this Court has indicated it will consider all of the following factors:

> (1) whether the discovery violation resulted from willfulness or an inability to comply; (2) whether the deterrent value of Rule 37 could not have been achieved through lesser sanctions; (3) whether the other party's trial preparation has been prejudiced; (4) whether the failure to comply is attributable to the party itself, or their attorney; and (5) whether the failure to comply was a consequence of simple confusion or a misunderstanding of the trial court's order.

Beck, 937 So.2d at 949 ¶ 6.

Since genuine surprise remains a key consideration, where, as here, expert disclosures are provided in writing well in advance of trial, a claim of prejudice at trial should be met with skepticism. *See Buskirk*, 856 So.2d at 262 ¶ 18. In such cases, the complaining party should be prepared to offer a plausible explanation for his claimed inability to prepare for trial. *See id.* Plaintiffs here were never required to do so.

Finally, a party who fails to take advantage of reasonable opportunities to cure any surprise will be deemed to have waived the right to press for extreme remedies. Thus a party who declines an opportunity to depose a surprise witness, even shortly before trial, should be deemed

to have waived any claim of prejudice. *See, e.g., AmSouth Bank v. Gupta*, 838 So.2d 205, 219 ¶ 48 (Miss. 2002). In *Gupta*, this Court found the complaining party waived its claim of prejudice by failing to depose an expert tendered for deposition *less than 30 days prior to trial*. Here, all but one of DuPont's witnesses were tendered for deposition *more than 60 days before trial*.[22]

By these standards, the trial court's August 9 order striking DuPont's nine experts a week before the August 17 trial was an extreme abuse of discretion.[23] First, DuPont's experts' opinions were disclosed to plaintiffs in writing on April 4. Written expert disclosures are presumptively sufficient under the Mississippi rules. They are in fact the *only* expert discovery that the Mississippi rules allow as a matter of course. MISS.R.CIV.P. 26(b)(4)(A). Expert depositions are not a right; they must be justified by motion. *Id.* Plaintiffs here made no such motion, and they never demonstrated need.[24] But even if need is assumed, plaintiffs waived the right to assert surprise when, with trial still weeks away, they *refused* to depose DuPont's experts. *See AmSouth Bank*, 838 So.2d at 219 & 220 (¶¶ 48 & 51).

Second, DuPont's inability to comply with plaintiffs' unilateral scheduling, and by implication, with the May 20 order, could not justify the draconian remedy imposed here even if the May 20 order were enforceable, because DuPont's inability resulted not from willfulness,

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[22] Even the complaining party's failure to seek a continuance may constitute waiver. *Gupta*, 838 So.2d at 220 ¶ 51 (citing *Nichols v. Tubb*, 609 So.2d 377, 386-87 (Miss. 1992)).

[23] The sequence of events leading to the August 9 decision is summarized chronologically in section I of the Statement of the Case, *supra*.

[24] In fact, plaintiffs proved DuPont's written disclosures were sufficient to allow them to respond to DuPont's experts. In their pretrial responses to *Daubert* motions, plaintiffs responded to DuPont's experts' opinions in detail, without taking any depositions. R121:17748 (February 2005 Sawyer affidavit responding to DuPont expert Beck); R 130:19083 (responding to Beck); R 130:19130 (Clapp affidavit responding to Cole); R 130:19170 (O'Connor affidavit responding to Beck); R 130:19207 (Dellinger affidavit); R132:19373 (Sawyer affidavit); 132:19430 (Tarr affidavit). Plaintiffs knew what to expect from DuPont's experts, and they were prepared to respond.

but from genuine impossibility caused by circumstances beyond DuPont's control. Ultimate remedies are reserved for willful violations and are not appropriate where compliance is impossible. *Beck*, 937 So.2d at 949 ¶ 6.

It was *impossible* for DuPont to comply with the day and hour of the plaintiffs' unilateral scheduling. DuPont's experts had preexisting personal or professional conflicts precluding them from traveling to Dallas for the dates arbitrarily dictated by plaintiffs – an eventuality that could not have come as a surprise to plaintiffs, or to the trial court. The scheduling conflicts were substantial and their validity is undisputed.[25] Moreover, even with the short notice and the witnesses' outside commitments, by May 19, DuPont succeeded in offering plaintiffs dates on which *16 of the 17 witnesses* could be available for deposition in Dallas between May 23 and June 10, just as the plaintiffs said they wanted at the May 16 hearing.[26] T 147:357 (RE tab 10) ("We'll present an order to the Court that we skip a week, and we'll have three weeks to finish the depositions in Dallas"); R 122:18005 (RE tab 9) (5/19/05 email offering such dates). By any reasonable measure, DuPont achieved substantial compliance with the trial court's orders.[27]

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[25] Dr. Sidhu was hospitalized with gallbladder surgery. Dr. Cooper was required to be at the side of his hospitalized wife. Dr. Reible was traveling to Uzbekistan. Dr. Krieger was on a mine-reclamation tour in Zambia. Dr. Cole had a prior professional engagement in California. Dr. Beck was being deposed in an unrelated matter in Boston. Dr. Wade had an important personal commitment in New Mexico. R 122:17998-99 (chart) & R123:18047-57 (affidavits)(RE tab 9).

[26] There was an extended discussion at the May 16 hearing of how the depositions would be scheduled, but the idea of conferring absolute authority on plaintiffs to dictate the *order* of the depositions, or the specific day and time for each deposition, was never mentioned. According to plaintiffs' counsel, the only important thing about the timing of the depositions was to get them done within three weeks. T 147:353-58.

[27] By June 6, DuPont had also offered to make the 17th witness, Dr. Krieger, available in Dallas for deposition anytime between June 21 and 24. R 123:18058 (RE tab 9); *see also* text and n.12, *supra*.

Third, the May 20 written order was in itself an abuse of discretion, especially in its after-the-fact adoption of plaintiffs' unilateral scheduling, and therefore cannot be used to justify the subsequent sanctions. The May 20 order granted plaintiffs dictatorial authority to unilaterally enforce deposition notices that had already been served.[28] The timing of the order's issuance left DuPont with less than one business day to react before the first unilaterally noticed deposition took place. As already noted, the May 20 order rested on no showing of need at all. R 117:17178 (RE tab 8); *see* MISS.R.CIV.P. 26(b)(4)(A), *supra*. Moreover, no conceivable need could have justified the terms imposed. Granting plaintiffs the unilateral authority to dictate, on just days notice, the day and hour on which every DuPont expert had to present him- or herself in Dallas for deposition, regardless of personal circumstances or scheduling conflicts, was arbitrary and unreasonable.[29]

Plaintiffs never even attempted to demonstrate a legitimate need for the arbitrary authority conferred by the May 20 order. At the May 16 hearing, when permitted to dictate the terms they desired into the record, plaintiffs never discussed needing or wanting such arbitrary authority. Unilateral scheduling was never mentioned in the hearing and was not part of the court's May 16 bench ruling. T 147:352-57. Plaintiffs offered no credible basis for their position in their July 26 motion. R118:17349. At the August 2 hearing, instead of defending the requirement, plaintiffs argued the *court* had dictated the deposition schedule and that they had therefore been powerless

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[28] *See* n.17, *supra*.

[29] The May 20 order also violated the rules by reversing expert costs in the absence of "manifest injustice." MISS.R.CIV.P. 26(b)(4)(C) ("*Unless manifest injustice would result*, (i) the court *shall require* that the party seeking discovery pay the expert"). No "manifest injustice" would have resulted from requiring plaintiffs to bear the usual cost of the additional expert discovery they were seeking. DuPont had borne the cost of deposing plaintiffs' experts, even though DuPont had been required to depose them to discover their opinions, which were not provided in writing. So even the basic terms of the May 20 order were completely unjustified.

to deviate from it. T 147:377 ("if we changed anything that was set up per the schedule, we would have violated the Court's order ourselves"). Plaintiffs' refusal to depose DuPont's experts on alternate available dates was so unreasonable that plaintiffs could not credibly defend it. *Id.* These proceedings were calculated to place DuPont in an impossible position, and they succeeded. The trial court seriously abused its discretion.

DuPont's experts were prepared to refute every aspect of plaintiffs' expert-dependent case. Among other things, Dr. Gary Krieger, a medical doctor with expertise in the etiology of disease, would have thoroughly refuted Sawyer's speculative specific causation opinion. Ex. D-507 ¶ 3 (RE tab 12). Dr. Krieger would have confirmed that there is no scientifically recognized cause of multiple myeloma and that there is no reasonable medical probability that Strong's multiple myeloma was caused by exposure to dioxins. *Id.* Because Krieger was in Zambia at the time plaintiffs insisted on deposing him, there was no medical doctor available to testify at trial on whether dioxins caused Strong's multiple myeloma.

In addition, Dr. Philip Cole, a medical doctor and epidemiologist, would have refuted Clapp's general causation theories, pointing out how Clapp ignored the weight of the epidemiological literature and selected the least persuasive publications as support for his assertions. Ex. D-507 ¶ 2 (RE tab 12); R 127:18618 (Cole affidavit). Other DuPont experts would have refuted every other significant aspect of plaintiffs' experts' theories.[30]

Strong will argue this Court affirmed the trial court's exclusion of DuPont's experts when it denied DuPont's petition for permission to appeal from the August 9 order. But denial of an interlocutory appeal is not a decision "on the merits" and "should not be viewed as an indication

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[30] The anticipated testimony of all DuPont's experts' was formally proffered as Exhibit D-507 (RE tab 12). *See* T 155:1593.

of how the issues should be resolved on appeal from a final judgment." *Mauck v. Columbus Hotel Co.*, 741 So.2d 259, 268 (Miss. 1999); *In re Knapp*, 536 So.2d 1330, 1333 (1988); *Anderson v. R&D Foods, Inc.*, 913 So.2d 394, 400 (Miss. App. 2005) ("In fact, an appellate court's refusal to entertain an [interlocutory] appeal has no precedential effect whatsoever.")

Excluding DuPont's experts effectively deprived DuPont of a defense. A trial in which the defendant has been stripped of the right to respond is fundamentally unfair and a deprivation of due process. MISS. CONST. § 14; U.S. CONST. amend. XIV; *Mississippi Power Co. v. Goudy*, 459 So.2d 257, 270 (Miss. 1984) (the "central meaning [of due process] simply is even handed fairness in legal proceedings"). DuPont was deprived of due process in this trial.

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

Prior to trial, two of Strong's attending physicians were deposed at M.D. Anderson Hospital in Houston. Portions of their videotaped testimony, as designated by the parties, were shown to the jury at trial. The first deposition was that of Dr. Sergio Giralt. He testified he is a board certified hematologist, oncologist and internist. His area of expertise is blood and bone marrow transplants. Approximately half of his practice is treating patients with multiple myeloma. Ex. P-481 at 1. Dr. Giralt testified that the cause of multiple myeloma is unknown:

> Q: Dr. Giralt, what causes multiple myeloma?
> A: We do not know the cause of multiple myeloma.

Ex. D-510 at 2.

Next, the deposition of Dr. Donna Weber was shown to the jury. She is a specialist in malignancies in plasma cells. She was the first physician to diagnose Strong as suffering from multiple myeloma, which is a malignancy of plasma cells. She is familiar with the medical literature on multiple myeloma and has herself published articles on that illness. More than half

her patients have some form of myeloma. Dr. Weber also testified that there is no known cause of multiple myeloma:

> Q: Dr. Weber, what causes multiple myeloma?
> A: Currently, I can't name a specific link.
> Q: Has anything been identified within the scientific community as a causative agent of multiple myeloma?
> A: There are no clear cut case-controls.
> Q: Okay. Did you ever advise Mr. Strong that his cancer was caused by Dioxin?
> A: No.
> Q: Did you ever tell Mr. Strong that his cancer could have been caused by Dioxin?
> A: I told Mr. Strong the same thing I mentioned here: There are no case-control studies that link – have any links.

Ex. D-511at 1-2.

These doctors' depositions were taken in February 2005. On August 17, DuPont told the jury in opening statement that the testimony of Strong's attending physicians would convince them that there is no known cause of multiple myeloma. T 149:610-11. Thereafter, Strong's lawyers procured identical (except for the signatures) affidavits from Dr. Giralt and Dr. Weber in Houston. Exs. P-477 & -478 (RE tabs 13 & 14). Over DuPont's objections, the affidavits, dated August 22, 2005 (5 days after the start of the trial), were read to the jury and introduced into evidence.[31] T 154:1410-14. They are identical in verbiage and each includes the following testimony:

> At the deposition on February 24, 2005, regarding Mr. Strong, I was not testifying as an expert witness regarding the causation of Mr. Strong's multiple myeloma. I do not have an opinion as to the cause of Mr. Strong's multiple myeloma. I do not know the cause of Mr. Strong's multiple myeloma, and I have never attempted

[31] Strong wished to play the video depositions of the treating doctors for the jury, but only after certain testimony was deleted therefrom. T 151:920-25. DuPont objected to the proposed deletions. The trial court decided to permit all the deposition testimony to be shown to the jury, but "to be fair to both sides," the affidavits were admitted into evidence. T 153:1281-82.

> to determine the cause or form any opinion as to the cause of his disease. My sole purpose is to treat Mr. Strong's multiple myeloma, not to reach opinions about its cause.

T 154:1411-14; Exs. P-477 & -478 (RE tabs 13 & 14).

It is "blackletter" law that affidavits cannot be read to the jury or admitted into evidence at a trial on the merits. As stated in 2A C.J.S. *Affidavits* §57 (2003):

> The use of affidavits is generally inappropriate in considering the merits of the case, and generally cannot be admitted as substantive evidence.

The principal objection to the use of affidavits at a trial is the opponent's inability to "cross-examine." According to *Doug Sears Consulting, Inc. v. ATS Services, Inc.*, 752 So.2d 668, 670 (Fla. App. 2000):

> An affidavit is ordinarily not admissible to prove facts in issue at an evidentiary hearing . . . because it is not subject to cross-examination. . . . .[32]

The erroneous admission of the affidavits of Strong's treating physicians into evidence was substantially prejudicial to DuPont. The trial judge excluded DuPont's expert witnesses who would have testified that dioxins do not cause multiple myeloma. That ruling left DuPont with only the deposition testimony of Dr. Giralt and Dr. Weber to address the cause of Strong's disease. The *ex parte* testimony contained in the affidavits was intended to and did undermine

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[32] *See also Queen v. Belcher*, 888 So.2d 472, 477-78 (Ala. 2003) (affidavit is inadmissible hearsay); *Krause v. Vance*, 428 S.E.2d 595, 618 (Ga. App 1993) ("Ex parte affidavits should not be allowed in evidence in any trial where the evidence is finally adjudicated because it denies the privilege of cross-examination . . ."); *Gilboe v. Doerflinger Realty Co.*, 614 S.W. 2d 4, 6-7 (Mo. App 1981) (absent "agreement of the parties, an affidavit may not be considered as evidence at trial"); *Bill C. Harris Construction Co. v. Powers*, 554 S.W.2d 332, 341 (Ark. 1977) (reversible error to read an affidavit to the jury: "An affidavit is not admissible to prove a fact in issue."); *Bailes v. Guardian Realty Co.*, 186 So. 168, 173 (Ala. 1939) ("manifest error" to permit a party "to read into evidence two *ex parte* affidavits"). Mississippi law is in accord. *See, e.g., Columbian Mut. Life Assur. Soc. v. Harrington*, 139 Miss. 826, 104 So. 297, 301 (1925).

DuPont's position and proof on this issue. Plaintiffs compounded the prejudice by relying heavily on the affidavits in closing argument:

> [DuPont] told you in opening statement they were going to bring you these doctors from M. D. Anderson and these doctors were going to tell you that nobody can know the cause of multiple myeloma. It is unknowable . . . . Well, that was a half truth because the truth of the matter is that when Dr. Giralt and Dr. Weber heard what DuPont was trying to do with their testimony, distort it, half-truth it, say it meant something it didn't mean, they raised their hands again, swore to tell the truth, entered an affidavit in this case so that you could be certain to not do with the Weber and Giralt testimony what DuPont is encouraging you to do. . . .
>
> See, the whole truth is that they came to be fact witnesses, not expert witnesses. The whole truth is that they do not hold themselves out as people who know what causes multiple myeloma. You know why that is? Because they say in their affidavits they've never attempted to determine the cause. Their sole purpose is to treat him. They've not reached opinions about cause. Their work as hematologists and oncologists focuses – does not focus on the cause of multiple myeloma, but rather the treatment of multiple myeloma.

T 156:1680-81.

This erroneously-admitted evidence was thus used effectively to defeat DuPont's remaining defense, causation. Without these affidavits, Strong could not have made this closing argument. DuPont was substantively prejudiced by the trial court's ruling allowing these affidavits into evidence.

As a final matter, the trial court compounded the error involving these affidavits, which were read to the jury, by admitting them into evidence, rather than merely marking them for identification as was done with the deposition transcripts. *See* Exs. P-477, 478 (RE tabs 13 & 14). DuPont's no-known-cause argument was based on deposition testimony the jury heard, but could not review during deliberations. Plaintiffs' countervailing affidavits were read to the jury and then sent to the jury room as admitted exhibits for review during deliberations. The affidavit testimony was thereby given undue and improper emphasis. *Tibbs v. Tibbs,* 359 S.E.2d

674, 675 (Ga. 1987) ("[I]t is unfair and places undue emphasis on written testimony for the writing to go out with the jury to be read again during deliberations, while oral testimony is received but once."). *See also Berrier v. Bizer,* 57 S.W.3d 271 (Ky. 2001), *Young v. State,* 645 So.2d 965 (Fla. 1994).

DuPont had no opportunity to cross-examine Strong's doctors about the surprise testimony presented through these affidavits. Had cross-examination been permitted, the case well may have been decided differently. A $15,500,000 verdict cannot be based on such obviously inadmissible evidence.

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

DuPont was prejudiced by a series of additional evidentiary errors that substantially affected the trial.

1. Plaintiffs' air modeling expert, Tarr, was permitted to testify about how industry in general intimidates and deceives regulatory agencies in general.[33] This speculative and irrelevant testimony had nothing to do with DuPont in particular or any of the specific state and federal agencies that regulate DuPont. The testimony was not based on personal knowledge and was not qualified as opinion, and in any event was more prejudicial than probative. The accusations were, moreover, improper character evidence in the form of "other . . . wrongs, or acts" – evidence that the rules declare inadmissible *per se*. MISS.R.EVID. 404(b). Rule 404 encompasses any evidence that a defendant acted wrongfully in matters other than the matter at issue, including "other

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[33] T 149:683 (". . .the people who are what I call in the trenches of the regulatory agency tend to be young, inexperienced, and sometimes 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." "They're generally not told everything"). *See* T 149:682-85 (repeated contemporaneous objections overruled); T 149:725-26 (motion for mistrial denied).

crimes, wrongs, or acts."[34] *Id.* Rule 404(b) deems such evidence more prejudicial than probative as a matter of law.[35]

2. Plaintiffs' epidemiologist, Clapp, was allowed to testify regarding the "Veterans Administration's position . . . with respect to dioxin and multiple myeloma." T 151:960. Over repeated objection, Clapp testified that the VA policy of treating multiple myeloma as a compensable illness for Vietnam veterans was based on the VA's belief that dioxins in Agent Orange cause multiple myeloma. T 151:961-62 ("That's based on the weight of the evidence that the VA has reviewed"). Despite specific objection (*id.*), plaintiffs were not required to establish that the VA's "determination" was based on a standard in any way comparable to the standard required for Strong's claim, or even that the VA had actually made a scientific "determination." According to Clapp himself, "*Congress* directed the VA what they were to compensate veterans for" in the Agent Orange Act. *Id.* (emphasis added). Clapp was thus allowed to pass off a political decision by Congress as governmental endorsement of his general causation theory. It would have been unfair to require DuPont to refute such testimony even with prior notice. But DuPont also had no prior notice. Plaintiffs had not disclosed the purported VA "determination"

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[34] *See* MISS.R.EVID. 404 comment (exclusion required because "[t]o do otherwise is to prejudice the person, to render him in the eyes of jurors liable, not because of what he did nor did not do in the instant case, but because of what he has done or failed to do in the past."); MCCORMICK ON EVIDENCE § 189 at 655-56 ("Character for Care in Civil Cases") ("Evidence of negligent conduct of the defendant or his agent on other occasions may reflect a propensity for negligent acts, thus enhancing the probability of negligence on the occasion in question, but this probative force has been thought too slight to overcome the usual counterweights.").

[35] *See* MCCORMICK ON EVIDENCE §186 at 679 (5th ed. 1999) ("Character: In General") ("These rules categorically exclude most 'character evidence' – evidence offered solely to prove a person acted in conformity with a trait or character on a given occasion"); *id.* at 650 n. 3 ("If a rule forbids the use of evidence for a particular purpose, then there is no need for *ad hoc* balancing of probative value as against prejudice, distraction and the like. (described *supra*, §185). The exclusionary rule already reflects the judgment that the outcome of the balancing test should preclude admission.").

as a basis for Clapp's opinion. The testimony was unqualified, misleading, and more prejudicial than probative, and it was substantially prejudicial to DuPont, particularly given the exclusion of DuPont's experts. MISS.R.EVID. 702, 403.

3. Plaintiffs' chemist, O'Connor, who was hired to supervise a sampling procedure and called to testify about that procedure, was not restricted to subjects for which he had been designated or on which he was qualified. Over objection, O'Connor was allowed to exceed the scope of his designation and limits of his expertise to opine about human health risks of dioxins. T 150:778. O'Connor was subsequently permitted, over further objection, to reiterate those opinions in wildly sensational and misleading terms. T 150:831-33 (likening exposures to "getting hit with an atom bomb, a car bomb, two hand grenades and a few other things"). Allowing this unqualified and sensational testimony on a key scientific issue was serious error that further compounded the prejudice from the exclusion of DuPont's experts. MISS.R.EVID. 702, 402, 403.

4. Plaintiffs were improperly permitted to call former DuPont employee Victor Hawkins to recount incidents that cast DuPont in a negative light with no legitimate relevance to the issues. T 154:1417-63. Hawkins, who has a 9th grade education, worked for DuPont as a maintenance employee until he retired on medical disability. *Id.* at 1419. Hawkins detailed personal injuries he suffered in maintenance accidents and suggested that DuPont improperly ordered him to return to work injured in order to misreport an incident. *Id.* at 1447-49, 1452-53. In other testimony (and over further objection), Hawkins accused plant management of undermining safety and of deceiving both DuPont headquarters and the Mississippi Department of Environmental Quality about safety matters by preparing for inspections. *Id.* at 1454-58. No legitimate purpose was served by this testimony. MISS.R.EVID. 404(b), 402, 403. Allowing DuPont to be disparaged by

a former employee on unrelated issues in this manner was unjustifiable and unfairly prejudicial to DuPont in the eyes of the jury.

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

This toxic tort case went to the jury on a negligence theory. The only instruction on causation given by the trial court was P-4, the substantive portion of which read as follows:

> If you find by a preponderance of the evidence that: [¶] 1. DuPont negligently released toxic chemicals from and/or within its facility; and [¶] 2. Exposure to those toxic chemicals proximately contributed to cause Plaintiff's injuries, then you should find for the Plaintiffs on Plaintiffs' claim of negligence.

R 139:20423.

The trial court erred in refusing DuPont's instruction D-10 which read in pertinent part as follows:

> The court instructs the jury that in a toxic tort case such as this, the plaintiffs must prove by a preponderance of the credible evidence that the plaintiff was (1) exposed to a dioxin, dioxin-like compound and/or heavy metal emitted by DuPont and (2) was exposed to such emission with sufficient frequency and regularity, and (3) was exposed in sufficient proximity to such emissions so that (4) it is more probable than not that exposure to DuPont's emissions caused Glen Strong's multiple myeloma.

R 139:20445.

Instruction D-10 is substantially identical to the liability standard adopted by this Court for application in toxic tort cases in *Gorman-Rupp Co. v. Hall*, 908 So.2d 749, 757 (Miss. 2005). While it is true that the product at issue in *Gorman-Rupp* was asbestos, courts have applied the "frequency, regularity, proximity" standard in cases involving other products. *Vassallo v. American Coding & Marking Inc.*, 784 A.2d 734 (N.J. Super. 2001) (marking ink); *Laico v. Atlantic Richfield Co.*, 2001 WL 1571634 (Cal. App. 6th Dist. 2002) (petroleum). More importantly, the Fifth Circuit embraced the functional equivalent of the "frequency, regularity,

proximity" standard *in a case involving exposure to dioxins* in *Thompson v. Southern Pacific Transportation Co.*, 809 F.2d 1167, 1169 (5th Cir. 1987) (verdict for plaintiff reversed and rendered for failure to prove "degree," "amount" and "duration" of exposure to dioxins).

Application of the "frequency, regularity, proximity" standard is particularly appropriate here because all of Strong's expert witnesses testified naturally-occurring dioxins are present in "background" amounts *everywhere*. If Strong did not convince the jury he was exposed to *DuPont's* dioxins in amounts sufficient to meet the "frequency, regularity, proximity" standard, then he failed to carry his burden of eliminating "background" dioxins as the cause of his multiple myeloma. At a minimum, DuPont was entitled to an instruction presenting its theory of the case. Under *Eckman v. Moore*, 876 So.2d 975, 979-82 (Miss. 2004), it is reversible error to deny an instruction on causation where there is evidence supporting the instruction. Just as occurred in *Eckman*, the multi-million dollar verdict for plaintiffs here should be reversed on account of the trial court's refusal of the defendant's instruction on causation. The trial court denied DuPont its right to a causation instruction in refusing D-10, and DuPont is entitled to a new trial.

E. The Excessive Size of the Verdict Demonstrates Passion and Prejudice.

The jury awarded Strong $14,000,000 and his wife $1,500,000. R 139:20450. Neither award is supported by the evidence. To the contrary, the verdict on damages is so excessive as to warrant a new trial *on both liability and damages*. In *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So.2d 31, 61 (Miss. 2004), this Court recognized that where "there is a substantial basis to believe that the damages awarded by the jury were based entirely on passion and prejudice . . . this issue alone merits a new trial." The same is true in the case at bar; either a new trial on liability and damages or a substantial remittitur under MISS. CODE ANN. § 11-1-55 is required.

The jury was obviously sympathetic with Strong's suffering as a result of his cardiac problems and multiple myeloma. DuPont is not unsympathetic with Strong's various illnesses; however, the evidence is undisputed that Strong's cardiac problems pose a greater hazard to his health and are a more significant factor in causing his disability than is his multiple myeloma. In returning a $15,500,000 verdict on his multiple myeloma claims, the jury ignored the evidence concerning Strong's heart condition.

As noted in DuPont's Statement of Facts, Strong's treating physician in Houston testified his multiple myeloma is in "complete remission." Ex. D- 510 at 1. Strong has only a "relatively small" chance of a recurrence of the myeloma. *Id.* at 4. Strong's heart condition is a greater impediment to his health now than is his cancer. According to Strong's principal doctor, he is more likely to die as a result of his other health problems than from multiple myeloma. *Id.* at 9-10. Finally, even though the doctor had some question as to the extent of Strong's disability, his ability to work is more affected "by his cardiac situation than by his cancer situation." *Id.* at 4-5.

Strong's medical expenses came to $676,230. T 155:1529. His economist testified the present value of his lost wages was $683,424. Deducting those amounts from his $14,000,000 verdict shows that the jury awarded Strong $12,640,000 for pain and suffering. Such an award is excessive. According to this Court: "When the amount of the verdict evinces passion, prejudice or bias, it is the *duty* of this Court to order a remittitur." *Entergy Mississippi, Inc. v. Bolden*, 854 So.2d 1051, 1058 (Miss. 2003) (emphasis added). Moreover, remittitur is appropriate when "the damages [are] contrary to the overwhelming weight of the evidence," and an inference of "corruption, passion, prejudice or bias" can be drawn when the verdict amount and the "hard" damages are disparate. *Id.* In *Bolden*, the plaintiff's lost wages and medical expenses totaled $41,286. The jury there awarded $532,000, which meant $490,000 of the verdict

was for pain and suffering . The size of that pain and suffering award "shock[ed] the conscience" of this Court to the extent that the defendant was granted a remittitur of $300,000. *Id.*

Here, in addition to awarding $12,640,000 for pain and suffering, the jury, in complete disregard of the testimony of Strong's doctors that his cardiac condition was his biggest current medical problem, gave Mrs. Strong $1,500,000 for loss of consortium. That award is *ten times* the largest loss of consortium verdict which this Court has ever permitted to stand. *Purdon v. Locke*, 807 So.2d 373 (Miss. 2001) ($150,000); *General Motors Corp. v. Jackson*, 636 So.2d 310 (Miss. 1994) ($150,000).

CONCLUSION

The judgment should be reversed and judgment should be entered for DuPont. Alternatively, the judgment should be reversed and the case remanded for new trial, or the award remitted to an amount reasonably supported by the evidence.

Dated: December 7, 2006.

Respectfully submitted,

John G. Corlew, MSB # [redacted]
WATKINS & EAGER PLLC
400 East Capitol Street, Suite 300 (39201)
Post Office Box 650
Jackson, Mississippi 39205
Tel: (601) 948-6470

Deborah D. Kuchler, MSB# [redacted]
ABBOTT, SIMSES & KUCHLER, APLC
5100 Village Walk, Suite 200
Covington, Louisiana 70433
Telephone: (985) 893-2991
Facsimile: (985) 898-0383

Robert D. Gholson, MSB #[redacted]
BURR & FORMAN, L.L.P.
535 North 5th Avenue
Laurel, Mississippi 39441
Telephone: (601) 425-0400
Facsimile: (601) 649-0088

ATTORNEYS FOR E. I. DU PONT DE NEMOURS AND COMPANY

CERTIFICATE OF SERVICE

I certify that I have this day forwarded, via postage-paid United States mail, a photocopy of the above and foregoing document to:

Alben N. Hopkins
Hopkins, Barvie & Hopkins, PLLC
2701 24th Avenue
Post Office Box 1510
Gulfport, MS 39502-1510

Allen M. Stewart
Baron & Budd, P.C.
3102 Oak Lawn Avenue, Suite 1100
Dallas, Texas 75219-4281

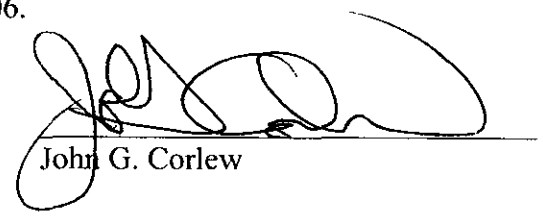
John F. Romano
Romano, Eriksen, Cronin & Mullins
1005 Lake Avenue
Lake Worth, Florida 33460

Kathleen L. Smiley
Law Offices of Kathleen L. Smiley
12303 Highway 49 North
Gulfport, Mississippi 39503

ATTORNEYS FOR PLAINTIFFS

The Honorable Billy Joe Landrum
Circuit Court of Jones County, Second Judicial District
P.O. Box 658
Laurel, MS 39441

This the 7th day of December, 2006.



John G. Corlew