# COOK COUNTY ASBESTOS LITIGATION CONFERENCE

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## COOK COUNTY TRIALS IN THE PAST YEAR

**David Barrett, Esq.**
Cooney & Conway
Chicago, IL

**Thomas J. Burns, Esq.**
von Briesen & Roper, s.c.
Chicago, IL

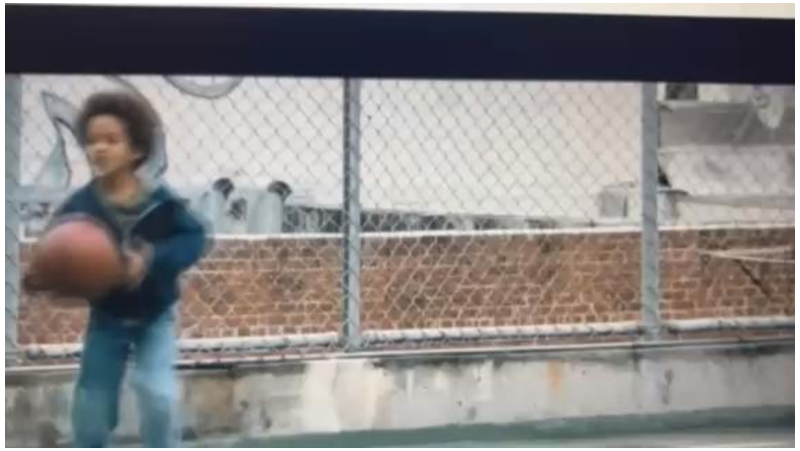
**Kasia Nowak, Esq.**
Foley Mansfield
Chicago, IL

**Joseph P. Trunk, Esq.**
Simmons Hanly Conroy LLP
Alton, IL

# Retaining and Disclosing Trial Experts

*Lessons from Illinois Rule 213 and Bassett v. Merck*

**A Practical Guide for Trial Attorneys**



# Three rules govern expert disclosure — and one case shows the stakes

**Rule 213(f)** defines **what must be disclosed** for every controlled expert witness

**Rule 213(g)** establishes that disclosure **limits what can be said at trial**

**Rule 213(i)** imposes a **continuing duty to supplement** as new information emerges

**Bassett v. Merck** shows how **preparation determines admissibility** at trial

ILLINOIS RULE 213(f)

# Four specific disclosures are required for every controlled expert witness

**Controlled expert witness** = *the party, the party's current employee, or the party's retained expert*

| | |
|---|---|
| **i. SUBJECT MATTER**<br>The topic on which the witness will testify | **ii. CONCLUSIONS & OPINIONS**<br>The witness's conclusions and the bases supporting them |
| **iii. QUALIFICATIONS**<br>Credentials establishing the witness as an expert in the field | **iv. REPORTS**<br>Any reports the witness prepared about the case |

ILLINOIS RULE 213(g)

# Disclosure sets the ceiling on direct testimony — undisclosed opinions invite exclusion

THE RULE

## What was disclosed is what can be said.

Information disclosed under 213(f) or in a discovery deposition limits the witness's direct testimony at trial.

WHAT THIS MEANS IN PRACTICE

- **Burden shifts to the proponent** to prove an opinion was disclosed
- **Evidence deposition opinions** not previously disclosed are inadmissible absent good cause
- **Cross-examination is broader** — you can elicit undisclosed opinions, with one exception
- **Aligned co-parties** cannot elicit undisclosed opinions on shared issues

ILLINOIS RULE 213(i)

# The duty to disclose does not end at the initial response — it continues through trial

**THE RULE**

*“A party has a duty to seasonably supplement or amend any prior answer or response whenever new or additional information subsequently becomes known to that party.”*

## Why it matters in practice

**1**

**Update promptly**

Disclosures must be revised whenever new opinions or facts emerge

**2**

**Cover the full record**

Late-discovered medical records, depositions, and reports trigger supplementation

**3**

**Protect admissibility**

Supplementation preserves the expert’s ability to testify to the latest opinion at trial

CASE STUDY | BASSETT v. MERCK & CO.

# Judge Cleary's standing order set the bar for expert preparation in a 4-week trial

THE TRIAL

**4+**

weeks of trial

**Presiding judge:**
Hon. Judge Cleary

### Standing order — documents required upon assignment

- Short statement of the case for voir dire, including trial duration
- Jointly prepared witness list to be read to the jury
- Complete joint list of all exhibits and demonstratives, with noted objections
- **A complete copy of all Rule 213 disclosures**
- Any stipulations between the parties
- Rule 216 Requests for Admission of Facts and responses
- Motions in limine and proposed jury instructions (marked and unmarked)

# Only the experts with proper qualifications, the full record, and full disclosure gave specific testimony

| CRITERIA | DR. ARTHUR FRANK | DR. MICHELE CARBONE | DR. JADEE NEFF |
|---|---|---|---|
| **Qualified on issue**<br>*(genetics expertise)* | **No**<br>Not a genetics expert | **Yes**<br>World-renowned genetics expert | **Yes**<br>Molecular pathologist |
| **Reviewed depositions** | **No** | **Yes** | **Yes** |
| **Reviewed full medical records** | **No** | **Yes** | **Yes** |
| **Plaintiff-specific opinion** | **No**<br>General susceptibility only | **Yes**<br>Specific to Mr. Bassett | **Yes**<br>Specific to Mr. Bassett |

**OUTCOME AT TRIAL:** Dr. Frank limited to **general susceptibility** only | Drs. Carbone & Neff testified to **plaintiff-specific genetic causation**

KEY TAKEAWAYS

# Three principles separate experts who testify from experts who don't

1

**Match the expert's qualifications to the specific issue**

A general expert cannot give specific causation testimony — Dr. Frank could only opine on general susceptibility, not on the plaintiff's genetics

2

**Provide every expert with the full record before they form an opinion**

Complete medical records and deposition testimony are the foundation for plaintiff-specific opinions that survive cross-examination

3

**Disclose every opinion in both the report and the Rule 213 answers**

Belt-and-suspenders disclosure preserves the opinion under 213(g) and keeps the duty to supplement under 213(i) clear

# Retaining and Disclosing Experts

*When it goes wrong*

# Rule 213(f) defines what must be disclosed for every controlled expert witness:

*Vogelzang* group of cases where I am called in and defendant has no witness disclosures on file.

**So what happens?**

- ✓ Defendant over-pays
- ✓ Defense firm was fired

# Rule 213(f) defines what must be disclosed for every controlled expert witness:

*Cooney* group of cases where I am called in and defendant has no reports and the wrong witness disclosures on file.

**So what happens?**

- ✓ Defendant over-pays
- ✓ Defense firm was fired

# Wrong Witness Disclosure

Dr. Roggli will give an opinion that Del Griffith's use, installation, removal or contact, if any, with American Light & Fixture's products or component parts cannot and did not cause or contribute to his alleged asbestos-related disease, including all types of mesothelioma, lung cancer, laryngeal cancer, bladder cancer, colon cancer and asbestosis.

# Correct Witness Disclosure

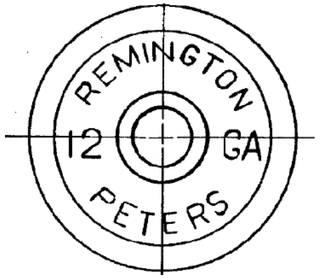
Dr. Roggli will give an opinion that Del Griffith's use, installation, removal or contact, if any, with American Light and Fixture's products or component parts cannot and did not cause or contribute to his alleged asbestos-related disease, including all types of mesothelioma, lung cancer, laryngeal cancer, bladder cancer, colon cancer and asbestosis. Dr. Roggli will testify that the sole proximate cause of Del Griffith's disease was caused by amphibole containing asbestos thermal insulating products manufactured by companies other than American Light and Fixture such as pipe covering, cloth, thermal insulating cement, dry-wall, joint compound and/or spray on insulation.

# Rule 213(i) imposes a continuing duty to supplement as new information emerges:

*Cooney* case with Dave where I am called in and defendant has no reports, the correct witness disclosures on file but nothing to supplement regarding **the amphibole exposure**.

**So what happens?**

- ✓ Defendant over-pays
- ✓ Defense firm was fired




# Schoepke v. Remington (and DuPont)

$9,000,000 jury verdict entered July 2025 (New Castle County, DE)

Mesothelioma case involving deceased 84yo Illinois farmer

Originally filed in Cook County in 2022, transferred to Marshall County

Refiled in Delaware in September 2023

Jury allocated responsibility as follows:

- 40% Sporting Goods Properties, Inc. fka Remington Arms Company
- 60% EIDP, Inc. fka E. I. du Pont de Nemours & Company (’Old DuPont’)

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# Jury Instructions

## Illinois substantive, Delaware procedural

Instruction No. 21 – NOT AGREED
CAUSATION IN ASBESTOS CASES

[Defendants' Proposed Instruction]
In a case involving claims of asbestos-related injuries like this one, a plaintiff must establish, among other things, that the injured individual inhaled enough asbestos fibers (i.e., more than a de minimis amount) from the defendant's product to be a **substantial factor** in causing his disease. Not all exposures to asbestos are sufficient to find that a particular asbestos exposure caused the injured individual's disease.
*Thacker v. UNR Indus.,* Inc., 603 N.E.2d 449, 459 (Ill. 1992); *Krumweide v. Tremco, Inc*., 2020 IL App (4th) 180434, ¶ 72 (Illinois law "dictates that plaintiffs must show more than a de minimis exposure to defendant's asbestos"), appeal denied; *McKinney v. Hobart Brother Company*, 2018 IL App (4th) 170333, ¶ 78 (2018).

PLAINTIFF'S OBJECTION(S): Plaintiff objects to this instruction as a misstatement of law and the *Thacker* case. There is no duty to quantify dose under Illinois law. *Thacker* requires only that Plaintiff demonstrate frequent, regular, and proximate exposure to the asbestos-containing product to satisfy causation in Illinois asbestos cases. Furthermore, no model instruction for "Causation in Asbestos Cases" exists under Illinois law.

MR. MORTL: Well, I think they need to be told proximate cause here is substantial factor, and I think that's all this instruction.

THE COURT: Yes. And that's exactly what Illinois says not to do. And I agree in principle, and I know a lot of other states' laws do that and I've looked at cases and transcripts from instructions that this Court has given applying other states' law.

But the Illinois Court seems to say when you're mention substantial factor you're injecting numbers and numbers not to be injected. And that's what the Johnson versus Owens Corning case seem to say.

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# *Johnson v. Owens-Corning, 313 Ill.App.3d 230 (2000)*

Injecting the terms "frequently" and "regularly" into the jury's deliberations without further explanation carries with it the danger that jurors may interpret their instructions to mean that a plaintiff must prove that he was exposed to a substantial number of the defendant's asbestos fibers.

In actuality, **the substantial-factor test** is not concerned with the quantity of asbestos but its legal significance. ***238** *Wehmeier v. UNR Industries, Inc.*, 213 Ill.App.3d 6, 157 Ill.Dec. 251, 572 N.E.2d 320 (1991).

Where there is competent evidence that one or a *de minimis* number of asbestos fibers can cause injury, a jury may conclude the fibers were a **substantial factor** causing a plaintiff's injury. *Wehmeier*, 213 Ill.App.3d 6, 157 Ill.Dec. 251, 572 N.E.2d 320.

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# Appellate Issues

Plaintiff's **<u>Legal Cause</u>** Evidence was Insufficient

"To constitute the legal cause of Mr. Schoepke's injury, Illinois law required plaintiffs to prove that, during the relevant period of approximately 1960 through 1981, it was known to or reasonably foreseeable by the defendants that a hunter's use of Remington shotgun shells in an outdoor environment would likely cause mesothelioma."

No studies of hunters being at increased risk of developing cancer
No concern that encapsulated asbestos created any hazard

Citing *McKinney v. Hobart Bros. Co.*, 127 N.E.3d 176 (Ill. App. Ct. 2018)

But compare to *Daniels v. Arvinmeritor, Inc.*, 146 N.E.3d 655 (Ill. App. Ct. 2019)

# Appellate Issues

Plaintiff's **<u>Cause-in-Fact</u>** Evidence was Insufficient

"Evidence that a product is *capable* of releasing respirable asbestos fibers, without other evidence regarding under what circumstances the defendant's products released respirable asbestos fibers such that they could be actually inhaled by decedent, is insufficient as a matter of law."

Plaintiff's indoor chamber study using 40-60 year old shotgun shells does not show exposure
In any event, exposure comparable to background and no more than *de minimis*

Citing *McKinney;* also *Krumwiede v. Tremco, Inc.*, 148 N.E.2d 764, 780 (Ill. App. Ct. 2020)
Citing *Nemeth v. Brenntag North America*, 194 N.E.3d 266 (N.Y. 2022)

But compare to *Zickuhr v. Ericsson, Inc.*, 962 N.E.2d 974 (Ill. App. Ct. 2011)

# Questions?