No. 123895 & No. 124002
(consolidated)

In the
Supreme Court of Illinois

PNEUMO ABEX LLC and OWENS-ILLINOIS, INC.,	)	Appeal from the Appellate Court of Illinois, Fifth District
	)	Case No. 5-16-0239
Defendants-Appellants,	)	
	)	Circuit Court of Richland,
v.	)	County, Illinois
	)	Case No. 13-L-21
JOHN JONES and DEBORAH JONES,	)	
	)	Hon. William C. Hudson, Judge Presiding
Plaintiffs-Appellees.	)	

DEFENDANT-APPELLANT OWENS-ILLINOIS, INC.'S REPLY BRIEF

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POINTS AND AUTHORITIES

INTRODUCTION

The Fifth District, without explanation, ignored the holding in *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102 (1999), that no reasonable jury could find clear and convincing evidence that Owens-Illinois ("O-I") engaged in a conspiracy of silence concerning asbestos-related health risks. The court made no effort to distinguish *McClure* on any ground, violating its obligation to follow the law as determined by this Court.

Plaintiffs try to justify the Fifth District's decision with a demonstrably false assertion that *McClure* did not involve a claim that O-I conspired with Owens Corning Fiberglas ("OCF"). Pls.' Br. at 15. In fact, the *McClure* plaintiffs—represented by the same lawyers who are before the Court here—pleaded, argued to the jury, and argued to this Court that O-I and OCF conspired *with each other*, as well as with the other "conspiracy defendants" named in the complaint. That is why they flooded the *McClure* record with the very same evidence of O-I/OCF business contacts that they rely on here—evidence the Court addressed in ruling for O-I and OCF as a matter of law.

The dispute in *McClure*, as here, was not about what the admittedly circumstantial evidence upon which Plaintiffs relied said or did not say. The dispute, as here, was solely about the permissible legal inferences that can be made from that circumstantial evidence under the innocent construction rule and the clear and convincing evidence standard. As McClure held, that is a question properly resolved by the Court.

Plaintiffs' brief abandons their legal position below (adopted by the Fifth District) that there is a purported difference between the summary judgment standard and the JNOV standard, supposedly rendering a series of unfavorable decisions irrelevant. *Jones v. Pneumo Abex LLC,* 2018 IL App (5th) 160239, ¶ 23 (following "cases applying a different, judgment *n.o.v.* standard … stands the concept of summary judgment on its head").

Plaintiffs now admit "[i]t is true the summary judgment standard and judgment n.o.v. are the same in key respects." Pls.' Br. at 19. They no longer dispute the rule in *Fooden v. Board of Governors,* 48 Ill. 2d 580 (1971), and *Cohen v. Chicago Park District,* 2017 IL 121800, that, where the evidentiary record is complete and an essential element of the claim remains unproven, it does not invade the province of the jury to grant judgment as a matter of law, either on summary judgment or on motion for JNOV. Indeed, Plaintiffs admit that the record here is "static" and "complete." Pls.' Br. at 21.

Plaintiffs instead argue that the 100+ decisions holding that O-I is entitled to judgment as a matter of law, which start with *McClure* itself, should now be overruled *not* because the evidence or the legal standard has changed, but rather because the courts finding against them have made the wrong "interpretation" of the record. Pls.' Br. at 21. They ask this Court to wipe from Illinois law its governing conspiracy jurisprudence based on speculative inferences about long-distant motives that cannot be reconciled with the very documents upon which they rely, let alone the innocent construction rule. The only exceptions to this

massive reversal of authority they would allow are *Adcock v. Brakegate*, 164 Ill. 2d 54 (1994) (which this Court has already distinguished as a case involving a default judgment where it "did not address the sufficiency of the evidence," *McClure,* 188 Ill. 2d at 153) and decisions below that are now expressly disavowed by the very courts that issued them.

The fundamental flaw in Plaintiffs' argument is its total disregard for the holding in *McClure* and its progeny that the parallel conduct rule, the innocent construction rule, and the clear and convincing evidence standard prohibit the "speculation" (188 Ill. 2d at 152) about a possible conspiracy based on a bulk sales agreement with OCF, sharing published articles, and stock ownership in OCF with significantly restricted voting rights.

There is no "new" evidence concerning decades-old conduct by O-I. Plaintiffs' proposed supplemental appendix is filled with material that is either identical to or of the same type as was rejected in McClure, is plainly inadmissible as to O-I, and/or is grossly mischaracterized. None of it meets the applicable legal standard for proving civil conspiracy.

The Plaintiffs' purported circumstantial evidence could not meet the legal standard for civil conspiracy set forth in *McClure* twenty years ago, and it does not meet it now.

ARGUMENT

I. THE PLAINTIFFS ALLEGED AND SOUGHT TO PROVE AN O-I/OCF CONSPIRACY IN *McCLURE.*

The plaintiffs in *McClure* expressly pleaded, argued to the jury, and represented to this Court that O-I conspired with OCF. They claimed that O-I had "a duty to not enter into a common scheme with Owens Corning, Unarco and Johns-Manville, among others, to breach the responsibilities each competitor had towards its own workers and customers." Brief of Appellee McClure as to Owens-Illinois at 61, *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102 (1999) No. 86192, 1999 WL 33657966, at *61. They chastised OCF because it waited until page 42 of its *McClure* brief before "Owens Corning mentions … that Owens-Illinois was an alleged co-conspirator of Owens Corning." Brief of Plaintiffs-Appellees as to Owens Corning at 52, *McClure,* 298 Ill. App. 3d 591 Nos. 4-97-0424, 4-97-0458, 4-97-0459.

They quoted their closing argument in their brief to this Court in *McClure*:

> "Now why is Owens Corning responsible? Why is Owens-Illinois responsible? Is it because they existed? No. It's because there was a common scheme to keep secret from the workers who were exposed to asbestos and the customers who were using asbestos products the dangers known to the companies that were marketing them."

Id. at 39.

The evidence they cited to support the claim in *McClure* mirrored the evidence here:

1. The 1953 Sales Agreement between O-I and OCF concerning the sale of Kaylo insulation.

2. The "non-toxic" ads that were issued by O-I, and later by OCF.

3. The claimed overlapping directors and the stock ownership of O-I in OCF.

4. O-I's sharing of two articles concerning asbestos and health in 1941, years before O-I even began its pilot plant operation regarding Kaylo.

5. The study of Kaylo insulation, unilaterally sponsored by O-I, involving exposures of laboratory animals at levels far above the then-recognized safe level of exposure.

None of this evidence makes any reference to any alleged co-conspirator except, in some instances, OCF.

It is not true that the *McClure* opinion is "largely silent as to O-I and OCF's relationship." Pls.' Br. at 18. An entire section of this Court's opinion in *McClure* is entitled "Owens Corning's Contacts with Owens-Illinois." 188 Ill. 2d at 125. In ruling that "the mere exchange of information by manufacturers of the same or similar products is common practice … and does not support an inference of an agreement," the Court made specific reference to the evidence that "Owens-Illinois lent Owens Corning two published articles about health effects of asbestos." *McClure,* 188 Ill. 2d at 147. The Court expressly rejected the claim that a conspiracy was shown because O-I and OCF supposedly met with other manufacturers of asbestos materials to discuss asbestos hazards: "Evidence that Owens Corning and Owens-Illinois met with other asbestos product manufacturers in 1979 and 1983 cannot … support a reasonable inference of the alleged agreement." *Id.* at 149.

As O-I noted in its opening brief, the *McClure* Court did make the unremarkable observation that the evidence of O-I/OCF business contacts was "only tangentially related" to whether those two companies also conspired with Johns-Manville and Unarco. O-I Br. at 1, 22. The jury verdict and judgment for plaintiffs that were reversed in *McClure,* however, were indisputably based on the same O-I/OCF conspiracy claim and evidence as presented here.

The Fifth District below nonetheless made only one reference to *McClure,* and then only for the general definition of civil conspiracy. *Jones,* 2018 IL (5th) 160239, ¶ 9. The court made no effort to distinguish the holding in *McClure* or otherwise explain why O-I was entitled to judgment as a matter of law there, but not here. The court never claimed that Plaintiffs' conspiracy theory or supporting evidence were different from that in *McClure.*

That was clear error.

A. This Case Turns on the Legally Permissible Inferences That Can Be Drawn From Circumstantial Evidence Under the Innocent Construction Rule, Not a Disputed Question of Fact.

Plaintiffs' repeated insistence that there are disputed issues of fact that preclude summary judgment completely misconceives both the record and the legal issue in this appeal. Here, as in *McClure,* Plaintiffs admit that there is no direct evidence of conspiracy by O-I and they rely on purely circumstantial evidence. That evidence says what it says (or does not say), and Plaintiffs recognize that they are dependent on "inferences" about O-I's supposed motives

to establish conspiratorial agreement. *E.g.*, Pls.' Br. at 25 (circumstantial evidence "raise[s] the inference" of conspiratorial agreement).

McClure holds that, under the innocent construction rule, it is for the Court to determine whether an inference of non-conspiratorial conduct, based on the circumstantial evidence, is just as reasonable as an inference of conspiratorial agreement. 188 Ill. 2d at 140-41. If so, the evidence fails as a matter of law under the clear and convincing evidence standard—even where the plaintiffs dispute those inferences. 188 Ill. 2d at 147 ("Even reviewing this evidence in the light most favorable to plaintiffs, we find that it does not permit a reasonable inference of the alleged agreement. . . . At most, these facts are as consistent with innocent as with guilty conduct.").

The *McClure* Court made this ruling despite repeated protestations from the plaintiffs—just like the protestations here—that the circumstantial evidence of O-I/OCF business contacts "create[d] jury questions on the participation of O-I in a common scheme." Brief of Appellee McClure as to Owens-Illinois at 22, *McClure*, 188 Ill. 2d 102 No. 86192, 1999 WL 33657966, at *22. *McClure* rejected that claim and made a legal determination about the permissible inferences that could be drawn from that evidence. The Court did not remand the case with instructions to hold another jury trial, perhaps with different jury instructions, but rather remanded with instructions that judgment be entered for O-I and OCF. 188 Ill. 2d at 154.

There was no disputed issue of fact in *McClure* and there is none here. There is only a legal dispute about permissible inferences from purely circumstantial evidence and the proper application of the clear and convincing evidence standard.

B. Under *McClure*, Even Purported Evidence of Knowingly Selling a Dangerous Product Without Warnings and Failure Adequately to Protect One's Own Employees, Without Evidence of Agreement, is Legally Insufficient to Prove Conspiracy.

Much of Plaintiffs' brief is devoted to condemning O-I's unilateral conduct in manufacturing and selling Kaylo without warning labels and allegedly failing to warn its own plant workers, which supposedly strips O-I of the protection of the parallel conduct rule and the innocent construction rule, and justifies an inference of conspiratorial agreement. *E.g.*, Pls.' Br. at 39-43. Because O-I presents evidence that explains its unilateral conduct, Plaintiffs argue that there is a disputed issue of fact about whether O-I acted reprehensibly. Pls.' Br. at 24. Illinois law rejects that argument. *Alm v. Gen. Tel. Co.,* 25 Ill. App. 3d 876, 880 (4th Dist. 1975) (Whether defendant rightfully or wrongfully terminated the plaintiff "is irrelevant on the issue of whether a conspiracy was proved.").

McClure held that, even if it were shown that defendants were negligent, i.e., "(1) knew that asbestos could cause disease at the time they sold asbestos-containing products; (2) sold these products without warning of these diseases; (3) failed to warn employees and consumers of these diseases; and (4) failed to adequately protect their employees from exposure to asbestos dust," under the

innocent construction rule this evidence of "parallel conduct alone is insufficient to establish a civil conspiracy by clear and convincing evidence." *Id*. at 146.

As demonstrated in O-I's opening brief, (O-I Br. at 6-8, 11-12) there is abundant record evidence concerning a non-conspiratorial construction of O-I's conduct: 1) the perceived safe level of exposure to asbestos dust in the 1940s and 1950s (the Threshold Limit Value or "TLV"); 2) the published epidemiological study of asbestos insulation workers during this period (the Fleischer-Drinker study) that concluded that the TLV was not exceeded and that asbestos insulation work was "not a dangerous occupation"; 3) the massive exposure levels (many multiples of the TLV) that were used in the Saranac animal studies of Kaylo; and 4) the objective evidence that the federal government, the American College of Chest Physicians, and many noted scientific authorities declared during the relevant period that asbestos was "non-toxic."

It is undisputed that O-I's industrial hygienist throughout this period, Bill Hazard, reviewed the TLV and the Fleischer-Drinker report, and made an independent judgment that the use of Kaylo was not dangerous and that a warning was not required. C08527, 08648-50; *see also Gillenwater v. Honeywell Int'l, Inc.,* 2013 IL App (4th) 120929, ¶¶ 48-51. O-I sponsored the Saranac Kaylo study alone and even Plaintiffs' own expert admits that O-I did not consult its competitors about it and did nothing to alter or suppress the content of the publication. C07543, 08996 ("Q. Owens-Illinois' decision to retain the Saranac

Laboratory to study Kaylo, was Owens-Illinois acting on its own, right? A. Yes. I would think so.").

Plaintiffs' answer that, in the 1990s, the then-current medical director of OCF gave an opinion (in a proceeding where O-I was not a party) that the "non-toxic" characterization of Kaylo was inaccurate is not even admissible evidence as to O-I, let alone evidence of a conspiracy. Plaintiffs cannot establish the *existence* of the conspiracy through such alleged co-conspirator hearsay, particularly when it is merely retrospective commentary about the past acts of others. *People v. Eddington,* 129 Ill. App. 3d 745, 772-73 (4th Dist. 1984) ("Declarations that are merely narrative as to what has been done or will be done are incompetent, however, and should not be admitted except as against the defendant making them or in whose presence they are made. The co-conspirators' exception to the hearsay rule does not extend to statements of past facts. Casual, retrospective comments made about past facts, as opposed to those with the purpose to advance the objective of the conspiracy, are inadmissible."); *Alm,* 27 Ill. App. 3d at 881 (Hearsay exception for statements of alleged co-conspirators "is not applicable here because the existence of an agreement between defendant and Harris McBurney or any other telephone company to wrongfully deprive plaintiff of his livelihood had not been established by clear and convincing evidence.").

Plaintiffs' request that the Court infer that O-I agreed with others not to warn its own plant workers fails for an even more profound reason. Dick Grimmie, the manager of O-I's Kaylo plant, testified that O-I—unlike its alleged

co-conspirators—advised its workers in the 1940s and 1950s about potential asbestos hazards, used dust collectors and mandatory respirators to protect the workers, and found no asbestos disease in those workers in its standard x-ray program while O-I owned the Kaylo business. C08727-28, C08732-36, C08743-44, C08748-61; *McClure,* 188 Ill. 2d at 145 ("Richard Grimmie testified that Owens-Illinois did warn its employees that asbestos could cause asbestosis."). That testimony is undisputed in this record[1] and is inconsistent with the conspiracy alleged.

C. O-I Did Not Mislead the Court about the Record Evidence in *McClure.*

The plaintiff's asbestos exposure in *McClure* took place solely in Unarco's Bloomington plant and there was no allegation that he was exposed to Kaylo products. 188 Ill. 2d at 107 ("[P]laintiffs alleged no exposure to Owens Corning or Owens-Illinois products and no employment relationship between defendants and their husbands."). Nor was there any claim that O-I supplied raw asbestos to Unarco (Johns Manville was alleged to be a source of Unarco's asbestos fiber). Nowhere in their 68-page brief to this Court in *McClure* did plaintiffs claim that

[1] Plaintiffs' brief makes no reference whatsoever to Mr. Grimmie's testimony. In *McClure*, the plaintiff tried to dispute Mr. Grimmie's testimony with testimony from a former employee of OCF (never O-I) who said in hearsay testimony that, after OCF bought the Kaylo Division in 1958, he was never informed by *former* O-I employees about such risks. In this case, however, Plaintiffs have abandoned any reliance on this inadmissible hearsay. Not even the "supplemental appendix" of Plaintiffs contains any reference to this inadmissible hearsay, so the omission cannot be said to be inadvertent.

the source of O-I's asbestos fiber—O-I never mined asbestos—proved the alleged conspiracy.

It is in this context that O-I stated in its *McClure* brief that it "had nothing to do with Unarco, its plant, the asbestos *used there*." C07265 (emphasis added).[2] The plain purpose of the statement was to emphasize that O-I did not supply the asbestos to which the plaintiff in *McClure* was exposed and was not involved in the management of Unarco's Bloomington plant. Even now, Plaintiffs do not cite evidence to the contrary.

Rather, they cite testimony about O-I's source of asbestos fiber. That testimony was *not* in the record in *McClure*. It was given by a former O-I employee in 1983, in an unrelated case, over thirty years after the deponent was last employed by O-I as "plant chemist" and a decade before the *McClure* case was filed. C07730, 07737-38, 07741. O-I has never been able to find any documentary evidence to support the assertion made.

Even if the *McClure* plaintiffs had put O-I's source of asbestos fiber in issue, a buyer/seller relationship is insufficient evidence of civil conspiracy. In *McClure* itself, this Court so held with respect to record evidence that OCF bought the entire Unarco Bloomington plant. 188 Ill. 2d at 150 ("an arm's-length transaction between competitors … do[es] not permit an inference of conspiracy"); *see also*

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[2] The other alleged misrepresentations were attributed to counsel for OCF and none of them purported to concern evidence of O-I's conduct or an agreement to suppress the health effects of asbestos. Brief of Appellee McClure as to Owens-Illinois at 8, 17, *McClure,* 188 Ill. 2d 102 No. 86192, 1999 WL 33657966, at *8, 17.

Rodarmel v. Pneumo Abex, 2011 IL App (4th) 100463, ¶ 107 ("Buying asbestos from Johns-Manville cannot logically serve as evidence in addition to the parallel conduct, because buying asbestos already is presupposed in the parallel conduct."); *United States v. Townsend,* 924, F.2d 1385, 1394 (7th Cir. 1991); *United States v. Kimmons*, 917 F.2d 1011, 1016 (7th Cir. 1990).

II. PLAINTIFFS' "NEW" EVIDENCE FAILS AS A MATTER OF LAW.

Plaintiffs' only citation to support their charge that O-I made boxes for Kaylo after selling the Kaylo Division to OCF in 1958 (Pls.' Br. at 11) is to an unverified pleading, signed by a lawyer for OCF, filed in a 1990s era contract arbitration. SA243. It is axiomatic that a lawyer's argument is not evidence. *See, e.g., Johnson v. Lynch,* 66 Ill. 2d 242, 246 (1977) ("Pleadings, answers to interrogatories, and argument of counsel are not evidence[.]"). Even if the law were otherwise, however, Plaintiffs can point to no authority that merely selling boxes made pursuant to the purchaser's design specification permits a reasonable inference of an illegal agreement to suppress information.

Plaintiffs admit, as they must, that overlapping board membership between O-I and OCF ended in 1949—decades before Mr. Jones's alleged asbestos exposure in this case—pursuant to a consent decree with the U.S. government. Pls.' Br. at 28. What they fail to tell the Court is that this consent decree (which arose from concern over monopolization of the technology used to make fiberglass) prohibited O-I from voting its stock in OCF, sharing Board members with OCF, or otherwise controlling the business of OCF, with only very narrow exceptions that

were subject to Department of Justice approval. *See United States v. Owens-Corning Fiberglas Corp.,* Civil No. 5778, 1973 WL 897 (N.D. Ohio Oct. 23, 1973). This evidence therefore contradicts the very inference that Plaintiffs ask this Court to draw about the ongoing ability of O-I to control the actions of OCF concerning Kaylo.

Plaintiffs cite no authority for the proposition that having a stockholder's interest in another company (particularly an interest with restricted voting rights) proves conspiratorial agreement, by clear and convincing evidence. Any suggestion by this Court that it does would turn the securities markets upside down.

None of the annual reports of O-I that Plaintiffs cite makes any reference whatsoever to the activities of the Kaylo Division, either before or after the sale of that business to OCF. C07356-80. Plaintiffs' own expert admits that he has never found any evidence that O-I tried to control or influence OCF's sale of Kaylo after it sold the business in 1958: "Q. Are you aware, Doctor from your review of Owens-Illinois' internal documents of any consideration of asbestos after 1958 by Owens-Illinois? A. No, not until they got involved in litigation." C05616.

Plaintiffs claim that, because O-I's glass plants—just like virtually every other manufacturing plant during the 1970s and 1980s—had some asbestos containing materials in place, it is permissible to infer O-I's ongoing participation in a conspiracy with companies that (unlike O-I) actually made those products on an ongoing basis. Pls.' Br. at 2, 11, 38. This evidence concerns indisputably

unilateral efforts by O-I, decades after it sold the Kaylo Division, to adjust its in-plant practices to conform to new OSHA regulations. The result was an OSHA compliance policy that outlined extensive efforts to advise workers how to avoid asbestos-related health risks. Pls.' Br. at 12; SA109-23; C07875-83.

The parallel conduct rule and the innocent construction rule preclude reliance on this evidence as proof of conspiracy. Indeed, *McClure* expressly held that meeting with other asbestos product manufacturers in 1979 and 1983 in response to federal government actions concerning asbestos "does not support an inference of agreement" because such exchange of information "is a common practice." 188 Ill. 2d at 147.

The obvious inference to draw from the sale of the Kaylo Division was that O-I wanted out of the asbestos insulation business. Plaintiffs have presented no evidence, let alone clear and convincing evidence, that O-I had any other intention or retained any ability to control whether or how the Kaylo business was thereafter conducted. The innocent construction rule and the clear and convincing evidence standard preclude an inference that O-I conspired in the 1960s, the only period relevant in this case.

III. *GILLENWATER* DOES NOT SUPPORT THE FIFTH DISTRICT'S DECISION.

Plaintiffs do not dispute, because they cannot, that *Gillenwater* held that O-I is entitled to judgment as a matter of law concerning civil conspiracy where, as here, the plaintiff's alleged asbestos exposure started years after O-I sold the Kaylo

Division in 1958. Nor do they dispute that the *Gillenwater* court's musings about evidence concerning a conspiracy before O-I left the business in 1958 are *dicta*. Pls.' Br. at 17. [3]

Rather, they ask this Court to embrace the *dicta* as if it were a holding, but reject the actual *Gillenwater* holding. *Id.* They have it backwards.

The *Gillenwater* plaintiff, like Mr. Jones, alleged asbestos exposure beginning in the 1960s. *Gillenwater* held that the reasonable inference to draw from the sale of the Kaylo Division in 1958 was clear and that an inference of conspiratorial agreement by O-I during the period relevant to the case was unwarranted. 2013 IL App (4th) 120929, ¶ 143 ("the additional evidence plaintiffs presented did not qualify as plus factors: it did not reasonably tend to exclude the possibility that the defendants were acting independently"; *McClure* precluded the court "from drawing speculative, and therefore unreasonable, inferences in the plaintiffs' favor").

It is black letter law in Illinois that O-I did not have a duty to warn about the products made and sold by others, *Gillenwater,* 2013 IL App (4th) 120929, ¶¶ 119-121, particularly when it was not itself a manufacturer of such products in the 1960s. Plaintiffs' own expert admits that there is no evidence to support a claim of

[3] As noted in its opening brief, O-I does not discuss the Third District's holding in *Johnson v. Pneumo Abex,* because it is a Rule 23 decision. O-I Br. at 26 n.3. Contrary to Plaintiffs' suggestion, O-I only cited this Court's denial of the petition for leave to appeal in *Johnson. See id.* at 25-26. Plaintiffs' citation to the reasoning in *Johnson* violates Rule 23.

post-1958 involvement by O-I in other companies' decisions about asbestos warnings. C05615 ("I don't see why it would have come up after 1958.").

As noted above, the consent decree issued in 1949 prevented O-I from voting its OCF stock or otherwise controlling the even a single seat on the OCF Board of Directors, unless expressly approved by the Department of Justice. "It would be unfair to impose liability on a manufacturer for a defect in a product unless the manufacturer had the opportunity to avoid liability by stopping the assembly line that produced that particular product.… To make Owens-Illinois liable for the Kaylo that Owens Corning continued to churn out would make Owens-Illinois an insurer of Owens Corning." *Gillenwater,* 2013 IL App (4th) 120929, ¶ 122.

Plaintiffs seek nothing less than to impose unlimited liability on O-I for claims relating to the activities of OCF after the 1958 sale of the Kaylo Division. That would require reversal of this Court's pronouncement that it is "necessary to protect manufacturers from becoming insurers of their industry." 188 Ill. 2d at 142. The Court would also have to abandon its commitment to place "fair and rational limits" on the civil conspiracy theory and to require "more than speculation and conjecture." *Id.*

The *dicta* in *Gillenwater* concerning a possible inference of an O-I/OCF conspiracy prior to the sale of the Kaylo Division in 1958 had nothing to do with the legal question framed by the case itself and, in any event, relied on the 1953

bulk sales agreement. The 1953 agreement was before the Court in *McClure* and was entitled to the innocent construction rule articulated therein.

IV. PLAINTIFFS' SUPPLEMENTAL APPENDIX CHANGES NOTHING.

Plaintiffs take the extraordinary step of submitting a 389-page "supplemental appendix" of documents they did not place in the record below, and as to which they ask the Court to take "judicial notice." They call this "a small number of pages/exhibits" and request that the Court consider this material in addition to the 662 pages of materials they appended to their response to O-I's motion for summary judgment in the trial court. Pls.' Br. at 3-5.

It is, of course, black letter law that material not presented and considered in the trial court or placed in the record on appeal "cannot be considered by the Court." *Kazubowski v. Kazubowski,* 45 Ill. 2d 405, 415 (1970). Even if the Court were to look past that, the Plaintiffs' supplemental appendix is full of documents that do not qualify for judicial notice because they do not relate to facts that are commonly known or are readily verifiable from sources of indisputable accuracy. *Murdy v. Edgar,* 103 Ill. 2d 384, 394 (1984) ("Courts may take judicial notice of matters which are commonly known or of facts which, while not generally known, are readily verifiable from sources of indisputable accuracy."). It also contains "evidence" that is plainly inadmissible against O-I. *Complete Conference Coordinators, Inc. v. Kumon N. Am., Inc.*, 394 Ill. App. 3d 105, 108 (2d Dist. 2009) (evidence not admissible at trial cannot be used to support or oppose a motion for

summary judgment); *Rodriguez v. Frankie's Beef/Pasta & Catering*, 2012 IL App (1st) 113155, ¶ 14 (same).

Plaintiffs' excerpt from an opening statement by a lawyer for OCF in a contract arbitration in the 1990s (SA298-306; C07383-91) is not evidence of anything concerning O-I. It is a hearsay statement of an adverse lawyer's belief that cannot properly be the subject of judicial notice or be relied upon to draw an inference of conspiratorial agreement. The existence of the arbitration actually supports O-I's position: "The documentation of the arbitration between O-I and Owens Corning for asbestos claims actually supports the notion that these two companies treated each other at arm's length and support defendant's contention of no conspiracy." June 28, 2012 Order, Adams County (Drummond, J.). A419; C05572.

The same is true of Plaintiffs' reliance on an unverified pleading filed by OCF in this same contract arbitration with O-I (SA225-52), supposedly to prove that "O-I continued to manufacture packaging for Kaylo for OCF into the late 1960s." SA243; Pls.' Br. at 11. This is hearsay from an adverse lawyer with no personal knowledge made decades after the supposed facts, hardly something as to which a court can take judicial notice. *See Vincent v. Williams,* 279 Ill. App. 3d 1, 6 (1st Dist. 1996) (holding that a police report should not have been judicially noticed because it is "an inadmissible hearsay document of unproved verity"). It proves nothing in any event, given the absence of any proof that O-I had any control over OCF's box specifications.

The supplemental appendix contains a series of communications that are entirely internal to OCF about its motives in gathering information about asbestos health effects in 1941—at a time when neither O-I nor OCF made asbestos insulation. Pls.' Br. at 9-10, 26-27. Plaintiffs offer no foundation that this hearsay evidence of OCF's motive was the type of "commonly known" facts about which a court could take judicial notice. Without citing any evidence whatsoever that OCF communicated its motives to O-I, Plaintiffs simply assume that OCF's motives are attributable to O-I. Pls.' Br. at 10 ("O-I helped OC develop its 'weapon in reserve.'").

In fact, there is uncontradicted testimony in the record that belies Plaintiffs' unsupported assumption. The O-I employee who lent OCF the published scientific articles in question in 1941 (Bill Hazard), denied any knowledge of OCF's motives in this regard: "I don't know what prompted his request.… Q. Did you at any time in the early 1940s become aware of a campaign by Owens-Corning to invade the contracting market with their fiberglas products? A. No." C08582-83. Plaintiffs therefore seek an impermissible inference under *McClure*.

Illinois law admits hearsay evidence of a statement of a co-conspirator, but *not* for the purpose of proving that a conspiracy existed. Rather, plaintiffs must first present independent proof of the conspiracy alleged. *People v. Goodman,* 81 Ill. 2d 278, 283-84 (1980); *Alm,* 27 Ill. App. 3d at 876. Neither the law nor common sense permit Plaintiffs to rely on these communications solely inside OCF, that make no reference whatsoever to O-I, to prove that O-I was in a conspiracy.

The material in the supplemental appendix, if the Court chooses to consider it, changes nothing. Plaintiffs still have no evidence establishing who at O-I supposedly agreed to the alleged conspiracy, with whom he or she purportedly agreed, when the agreement was supposedly reached, or how the agreement was supposedly going to be implemented and enforced. All this Court is given on those subjects is lawyer's speculation.

V. SOUND PUBLIC POLICY SUPPORTS REAFFIRMING THE HOLDINGS IN *MCCLURE* AND ITS PROGENY.

This is not a case about holding O-I accountable for "exposing a generation of workers" to a product that O-I made and sold. Pls.' Br. at 44. It is the antithesis of that: a lawsuit seeking to hold O-I liable for products made by someone else (OCF) long after O-I stopped making Kaylo. Plaintiffs ask the Court to ignore the fact that they have claims against the $5 billion bankruptcy trust established by OCF expressly to pay such claims (*see* Lloyd Dixon, et al., Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts 27 (2010), *available at* https://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR872.pdf)), as well as against the dozens of solvent defendants they sued for making the other asbestos products to which Mr. Jones was exposed.

Every year, O-I receives and resolves literally thousands of claims brought by individuals who allege actual use of the Kaylo products that O-I made. Its public disclosures detail the enormous ongoing costs of doing so (*see* Owens-

Illinois, Inc., Annual Report (Form 10-K) (Feb. 14, 2019)), belying Plaintiffs' suggestion that upholding *McClure* and its progeny means that O-I "can no longer be held accountable" to individuals who claim injury from O-I Kaylo. Pls.' Br. at 44.

No sound public policy of this state is served by overturning more than 100 decisions granting O-I judgment as a matter of law concerning Plaintiffs' endlessly recycled asbestos conspiracy claim. The parallel conduct rule, the innocent construction rule, and the clear and convincing evidence standard were established to provide a bulwark against that result.

CONCLUSION

Plaintiffs do not contest that there is no jurisdiction in the country that allows jury trials against O-I to proceed based on the conspiracy theory and evidence presented here. The Fifth District erred. O-I therefore respectfully requests that the Court reverse the decision of the Fifth District, affirm the judgment of the trial court, and remand with instructions to enter judgment in favor of O-I.

Respectfully submitted,

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RULE 341 CERTIFICATION

I certify that this brief conforms to the requirements of and 341(a) and (b). The length of this brief excluding the pages or words contained in the Rule 341(d) cover, 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 5,762 words.

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NOTICE OF FILING AND PROOF OF SERVICE

The undersigned certifies under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, that the statements set forth in this instrument are true and correct. On May 1, 2019 Defendant-Appellant Owens-Illinois, Inc.'s Reply Brief was served upon the Clerk of the Illinois Supreme Court and was served by email on counsel of record below:

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