IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

JOEY AND PAULA PARKHILL, a married couple, on their own behalf and on behalf of their minor children, VICTORIA PARKHILL, and REBEKAH PARKHILL,

Plaintiffs-Appellants,

v.

No. 29,120
Grant County
CV-05-57

ALDERMAN-CAVE MILLING AND GRAIN COMPANY OF NEW MEXICO,

Defendant-Appellee.

APPELLEE'S ANSWER BRIEF

John S. Thal
Atkinson, Thal & Baker, P.C.
201 Third Street, N.W., Suite 1850
Albuquerque, NM 87102
Attorneys for Defendant-Appellee

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Statement of Compliance

Pursuant to Rule 12-213A(1)(c) NMSA the body of Appellee's Answer Brief, inclusive of headings, footnotes, quotations and all other text, is 10,974 words in length, typed in proportionally-spaced Times New Roman typeface.

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I. SUMMARY OF ARGUMENT.

Plaintiffs-Appellants (collectively "Parkhills") seek to have this Court retreat from more than fifteen years of *Alberico-Daubert*[1] precedents, which hold it is error to admit expert testimony involving scientific knowledge unless "the party offering such testimony first establishes [its] evidentiary reliability." *State v. Torres*, 1999-NMSC-010, ¶24, 127 N.M. 20, 976 P.2d. 20. To prevail, Parkhills must secure a complete reversal of those precedents, because their claimed experts, Dr. Koury (a family doctor who concedes he is "no expert" in toxicology whatsoever) and Dr. Dahlgren (whose opinions were so unfounded the trial court described him as "close to a hired-gun") disregarded every scientific tenet and legal requirement for the development of reliable opinions in this toxic tort case. Not only had Koury/Dahlgren never studied the supposed toxin, an antibiotic-additive to livestock feed called monensin, they'd never heard of it before this litigation. When they formulated their opinions, neither knew that grain with monensin-additive had been fed to livestock world-wide for *more than 30 years*, or knew that the Parkhills were the *first people* ever to claim adverse effects from feeding livestock with this feed, or knew that three other persons who fed horses from the *same batch of feed* reported no symptoms whatsoever. R.P.1556; Exs.

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[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *State v. Alberico*, 116 N.M. 156, 861 P.2d 192 (1993) (hereafter "*Alberico-Daubert*").

1103,1104; Tr.125:24-126:24;151:17-153:6;158:2-159:4.[2] In their zeal to blame Parkhills' myriad of claimed medical symptoms on monensin they disregarded these undisputed facts, the applicable science and Parkhills' true (but concealed) medical history.

The trial court's exclusion of the Koury/Dahlgren opinions must be affirmed for each and any of four reasons. First, as the trial court specifically found, neither is qualified to render an expert opinion that monensin, to a reasonable medical probability, caused the Parkhills' panoply of symptoms. Tr.7-13-07, 5:15-6:7; R.P.3247-3248; 4407,COL3-8.

Second, their opinions fail the standards for admissibility expressed in Rule 11-702 NMRA and *Alberico-Daubert*, because as the trial court found, neither could demonstrate *any* of the requisite three elements for establishing the scientific reliability of a causation opinion in a toxic tort case: (1) "dose," or the amount of the substance to which the Parkhills were exposed; (2) general causation, meaning the substance is capable of causing the Parkhills' claimed injuries in the population in general; and (3) specific causation, meaning the Parkhills' toxic exposure caused their specific injuries. By arguing–contrary to the New Mexico decisions and the overwhelming weight of authorities from other jurisdictions– that *none* of these three elements are prerequisite to a valid toxicological causation opinion, Parkhills

[2] Unless otherwise indicated in this Brief, all transcript references are to the May 15-16, 2007 *Daubert* hearing.

concede both that they need reversal of the *Alberico-Daubert* precedents in order to prevail and that their experts failed to present scientifically reliable evidence on any of those elements.

Third, the Parkhills' "differential diagnoses" are unavailing. Parkhills' Brief-in-Chief ("BIC") glosses over Koury/Dahlgren's scientific errors by anointing their opinions as "differential diagnoses" and arguing that no scientific foundation for their opinions is required. The contention is meritless. A "differential diagnosis" necessarily requires that a specific diagnosis be differentiated from other scientifically possible causes of the same symptoms. It presumes that the physician has sufficient knowledge of the science surrounding the effects of a substance on humans generally—general causation—so he can make a rational decision as to its effects on the plaintiffs, specifically, based on a process of scientifically-based exclusion. Here, neither Koury nor Dahlgren could overcome that threshold hurdle.

Koury/Dahlgren's "differential diagnosis" opinions cannot be reconciled with their inability to demonstrate general causation. In addition, those opinions lack any scientifically reliable basis for specific causation. They were based upon ignorance of the critical fact of monensin's widespread use as a livestock feed without a single reported incidence of harm and upon two completely erroneous assumptions, founded in Parkhills' concealment of their actual medical histories.

The first, that Parkhills' symptoms immediately appeared with their first "exposure" to monensin was belied by Koury's own medical records demonstrating that Parkhills claimed no monensin-related symptoms for a period of nearly ten weeks after the claimed exposure. The second assumption, that "before exposure to monensin, they were a healthy family" (R.P.1603) and "prior to the exposure, Parkhill did not have medical problems" ((Ex.316-47) was utterly disproved by the discovery of Joey Parkhill's concealed prior lawsuit and claimed injuries, which asserted numerous symptoms identical to those claimed in this case. *Infra* pp.17-22. Confronted with irrefutable evidence that their opinions were based on entirely false medical histories, Koury/Dahlgren steadfastly refused to acknowledge any weakness in their opinions, demonstrating they were developed with no regard for scientific reliability, but for the sole purpose of advancing the Parkhills' litigation goals. Just as in the remanded *Daubert* case, "[p]ersonal opinion, not science, is testifying here." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995).

Fourth, and finally, Judge Sweazea's exclusion of the Koury/Dahlgren opinions should be affirmed because substantial evidence supported each of his findings and conclusions. The same applies to his related order dismissing Joey Parkhills' personal injury claims as a sanction for nondisclosure of his prior litigation, claimed injuries and extensive medical treatment. Parkhill's

"dishonesty" in his discovery responses, that was only "caught by the diligence of [AC-NM] counsel" (as the trial court termed it, Tr.7-8-08,480:2-4) was uncontroverted, pervaded every aspect of the case, and cannot be salvaged by Parkhills' counsel's polemic seeking to paint that dishonesty as "good faith." Each of Judge Sweazea's findings and conclusions on this issue were supported by substantial evidence and the sanction of dismissal of Parkhill's personal injury claims accords perfectly with New Mexico precedent and should be affirmed.

II. STATEMENT OF PROCEEDINGS.

The Parkhills are suing for millions of dollars for a variety of personal injuries allegedly caused by breathing dust from a batch of livestock feed sold by Defendant ("AC-NM")[3] that contained (in two out of thirteen tested samples) trace amounts (3 and 8 parts per million) of monensin. R.P.2041-2043. The remaining samples taken did not detect the presence of any monensin. Tr.172:10-24, 343:2-12. Parkhills are the first people ever to claim adverse effects from breathing or touching the dust associated with feeding livestock feed containing monensin. R.P.1556;Tr.14:14-18.

Koury/Dahlgren sought to testify that dust from the AC-NM feed was the sole cause of the medical symptoms described by the Parkhills since they fed the grain in April, 2004. The claimed symptoms include: nausea, headaches,

[3] All other defendants have been dismissed. R.P.4037-4038.

dizziness, insomnia, irritability, acne, diarrhea, eye irritation, bruising, brittle fingernails, hair loss, weight gain, nosebleeds, panic attacks, shortness of breach, lack of concentration, congestive heart failure, memory loss and brain damage. Ex. 316:61, 316:154, 316:11, 316:109-110; Tr.200:4-8.

AC-NM moved to exclude the Koury/Dahlgren opinions under Rule 11-702 NMRA and *Alberico-Daubert* and for a hearing pursuant to Rule 11-104 NMRA. AC-NM argued that Parkhills' experts' failure to have ever studied this substance, their complete ignorance of the amount of monensin to which the Parkhills were allegedly exposed and their failure to identify any scientific evidence that humans feeding livestock grain with added monensin will or have suffered any of the problems reported by Parkhills, rendered their opinions unreliable and inadmissible. R.P.1527-1714.

On May 15 and 16, 2007, over Parkhills' objections, the trial court held a two-day *Alberico-Daubert* hearing to determine if Parkhills had met their burden to establish by a preponderance that their experts' causation opinions were scientifically reliable. Both Koury and Dahlgren testified (as did other witnesses) and were examined by AC-NM, which also put on the testimony of Dr. Fisher, its toxicology expert. Written closing arguments and replies were submitted following the hearing. R.P.2908-2968, 2971-3161; 3162-3168, 3169-3175.

In his post-hearing ruling, Judge Sweazea excluded Dahlgren's opinion as unqualified and unreliable. R.P.3247-3248; Tr.7-13-07,5:15-6:7. The court also excluded portions of Koury's opinions as unsupported and "contradicted by all of the other experts," and expressed concern that, like Dahlgren, Koury was entirely unaware of Joey Parkhill's prior "extensive medical history," which the hearing revealed had been concealed from the court, AC-NM, and Parkhills' proffered experts. *Id.* 5:6-14; 6:6-17, 8:19-9:20;R.P.3247-3248. However, the trial court initially accepted Parkhills' argument that Koury's differential diagnosis was not expert testimony requiring a scientific foundation and decided to allow that testimony. The court stated that, as a treating doctor, Koury was "on a different footing" than a retained expert. Tr.7-13-07,4:12-24. AC-NM moved for reconsideration of that ruling (R.P.3325-3353), explaining that Koury's claimed "differential diagnosis" was equally as unreliable as Dahlgren's causation opinion and that scrutiny of his opinion for scientific reliability was required. After consideration of the briefing and argument, the court entered findings and conclusions limiting Koury's testimony to his treatment of the Parkhills and excluding his toxicological causation opinion as unreliable under "Rule 702 and/or *Alberico-Daubert*." R.P.4406-4410.

The trial court's exclusionary rulings were also linked to Joey Parkhill's non-disclosure of prior litigation, claimed personal injuries and medical treatment

– discovery abuses which permeated the entire case and resulted in dismissal of his personal injury claims as a sanction. R.P.4400-4405. In Parkhill's sworn answers to Interrogatories, he testified that he had never been in a lawsuit before except a dispute over a "heat pump" in the late 1990's, that his pre-litigation medical history consisted of a 1995 head injury (with no symptoms similar to those claimed here), a hernia, and a knee injury with a "hay hook," and that "prior to being exposed to monensin in [AC-NM's] feed, I had not experienced any of the symptoms I experienced since the exposure." R.P.3290.

Those representations were entirely false. As a result of a 1997 accident involving a mule, Parkhill had sued the mule owner, brother of his friend Tommy Burnes (who was an original co-plaintiff in this case), claiming profound physical injuries that were similar or identical to many of those he claimed in this lawsuit, and as a result of which he had consulted over a dozen medical providers. R.P.3299-3319. The trial court found Parkhill had concealed his prior medical history from both Koury/Dahlgren, whose opinions therefore did not take his prior medical history into account – a factor relied upon by the court in excluding their opinions. R.P.4402, FOF 10.

AC-NM moved for dismissal of Parkhill's personal injury claims as a sanction for his nondisclosures in discovery, R.P.3251-3266, and Parkhills responded, arguing that the "disclosure" of a "1995 head injury" was a sufficient

response to the interrogatories asking about prior lawsuits, medical history and treatment, and that defense counsel had simply not been diligent in uncovering the prior undisclosed lawsuit, injury claims, and medical treatment. R.P.3558-3560.

The trial court entered detailed findings and conclusions that Parkhill had willfully given false answers to discovery, that AC-NM had been prejudiced thereby, and that dismissal of his personal injury claims (as opposed to the entire lawsuit) was the appropriate sanction. R.P.4400-4405. The parties resolved all claims relating to the horses, and final judgment was entered November 6, 2008. R.P.4819-4820.

Parkhills appeal the two orders excluding their experts' causation opinions and the sanctions order.

III. FACTS RELEVANT TO THE ORDERS APPEALED FROM.

A. USE OF MONENSIN AND THE SCIENTIFIC LITERATURE ON MONENSIN TOXICITY.

Monensin is an antibiotic that has been used since the 1970s as a medical additive in livestock feed. R.P.1558-1562; Tr.339:8-12. Monensin is added to livestock feed in amounts measured in grams per ton (or parts per million, "ppm"), and the acceptable doses vary widely by species. Exs.313:1, 4-12 (American Board of Veterinary Toxicology Study on Ionophore Toxicosis ("ABVT")). The ABVT recommends a dose for beef cattle ranging up to 400 grams of monensin per ton of feed (400 ppm) for increased weight gain. Ex.313:4.

An animal's sensitivity to monensin varies widely by species, with horses by far the most sensitive. Ex.313:7. For example, FDA regulations require that feed with monensin additive carry the statement "do not allow horses or other equines access to formulations containing monensin." 21 C.F.R. §520.1448a(c)(4)(iii). Monensin's manufacturer, Elanco, places the following warning on its packaging of its monensin product ("Rumensin"): "Do not allow horses or other equines access to formulations containing Rumensin." R.P.1570.

Consistent with federal law, Elanco issues a Material Safety Data Sheet ("MSDS") for the benefit of occupational workers who come in contact with the product as it is manufactured. Ex.1;Tr.423:22-424:6. Monensin is manufactured at full strength, then diluted to a potency of 24%, distributed and then mixed with livestock feed at the prescribed dosages. Tr.151:8-16. The MSDS warns that monensin, as manufactured at 100% strength and sold at 24% strength, is capable of irritation to the eyes and skin and if inhaled, to the respiratory tract. Ex.1, p.2.[4]

FDA regulations authorize specific "residual" amounts permitted in food for human consumption. 21 C.F.R. §556.240. There is only one reported incident of monensin toxicity in humans, and it had nothing to do with inhaling dust from livestock feed. In an effort to "become stronger," a 16-year old boy in Brazil

[4] The MSDS is silent as to what studies, if any, formed the basis for those warnings; the animal data cited in Sec.11, "Toxicological information," indicates there is only a "slight irritant" effect from skin exposure.

ingested 500 milligrams of liquid monensin at once (three times the lethal dose for cattle), presented with severe symptoms immediately, and died 11 days later from renal failure. Ex.316:287-291.

Given its widespread use in the livestock industry, there are numerous studies on the effects of varying levels of monensin on various animal species. *See, e.g.,* Exs.1202,1205; R.P.1567-1569,1579-1581. These studies report that at toxic levels, monensin acts immediately by breaking down the cell walls of muscle tissue, which in turn produces highly elevated blood levels of CPK (creatine phosphokinase). R.P.1587-1588. At highly toxic levels, the CPK products clog the kidneys, causing renal failure as suffered by the boy from Brazil, with symptoms occurring within hours of exposure. Ex.316:287-291.

During the *Daubert* hearing it was established that one of the most important concepts in determining toxicity of a substance is calculating the "no observed adverse effect level" (NOAEL), which is the level, or threshold, above which observable adverse effects in test animals may occur, but below which no toxicity has been observed. *See Manual on Scientific Evidence* (2d ed. 2000) (hereafter "*Manual*"), Reference Guide on Toxicology at 407; Tr.140:4-141:18.

Koury/Dahlgren did not attempt to calculate a NOAEL for monensin—indeed, Dahlgren provided the startling testimony he believed it was so toxic that no NOAEL existed. Tr.153:19-24. In contrast, Dr. Fisher did review the pertinent

literature to determine a scientifically-based NOAEL (Tr.384:1–385:13; Ex.1202) and concluded, based on these studies, that the NOAEL for numerous mammalian species (excluding horses) were at least 70 times greater than the highest conceivable dose to the Parkhills. Tr.396:2-5,Ex.368.

In summary, the animal studies, the ABVT studies, Elanco's MSDS, both parties' veterinary toxicologists and Dr. Fisher all agreed that the scientific evidence demonstrated the following:

- there are inter-species differences in sensitivity to monensin, with horses by far the most sensitive species;
- however, certain general conclusions can be generated about the dose required to create a toxic effect of monensin on mammals, as follows:
    - the amount of dose determines the effect on the animal–whether beneficial or detrimental–and for all animals studied, there are NOAEL, or levels of exposure which result in no ill effects;
    - with a toxic dose, the "target" organs are the skeletal and cardiac muscles;
    - breakdown of these muscles results in elevated CPK blood levels;
    - monensin is excreted within minutes of ingestion;
    - the effects of severe monensin toxicity are immediate.

See Ex.1; ABVT, Ex.313:4-12;Exs.1202,1205; Tr.340:17–342:9;403:17-404:18; R.P.1551-1555; R.P.3190-3192 (Affidavit of Dr. Gavin Meerdink, Board Certified Veterinarian Toxicologist).

All certified toxicologists (Drs. Oehme, Meerdink and Fisher) testified monensin is well excreted, leaving the bloodstream in minutes. Tr.347:4-348:3;401:11-15; Ex.8, p.2; R.P.3190, ¶6. Koury's opinion was the opposite—that monensin is never excreted, but accumulated in the Parkhills' bodies permanently.

Based on that uninformed opinion, described by Judge Sweazea as having "no scientific basis" (R.P.4408,COL8), Koury testified that was the reason, and the only reason, why the Parkhills continued to experience their various medical symptoms. Tr.80:19-24; 83:4-7;R.P.1608.

B. TIMELINE: MONENSIN IN THE HORSE FEED AND PARKHILLS' CLAIMED INJURIES

In April, 2004, Joey Parkhill purchased 80 50-pound sacks (two tons) of AC-NM's horse feed in Roswell. He delivered five bags to his friend, Tommy Burnes in Dexter (near Roswell) and 35 sacks to another horse facility in Dexter where some of his horses (10 to 30–the number is disputed) were boarded, and were being fed by his friends, Rusty and Michael Brisco. Exs.1103,1104. He took the remaining 40 sacks to a ranch in Lordsburg where he lived. R.P.154. Beginning April 19, 2004, the horses in Lordsburg were fed twice a day by the four Parkhills, and the horses in Dexter twice a day by Burnes and the Briscos. Ex.316:2, 316:47, 316:101, 316:-143; R.P.154; Exs.1103,1104. Within several days, one of the Dexter horses died and Brisco told Parkhill that "it must be the grain." Parkhill disagreed, and instructed Brisco to keep "feeding the grain to the horses." Ex.1103, ¶10. Additional horses then died at both facilities and the Parkhills, Briscos and Burnes stopped feeding the AC-NM product on May 1, 2004. Ex.316:47.

The New Mexico Department of Agriculture tested the feed in early May, 2004. Of the thirteen samples tested, eleven showed no detectable levels of monensin, one showed monensin levels of 8.9 ppm, one showed monensin at 3.0 ppm. R.P.2041-2043;Tr.343:2-15, R.P.1516. As Dr. Fisher described, the upper end of the ABVT recommended dose for beef cattle (400 ppm) is nearly *50 times* the highest recorded sample in the Parkhill feed. Tr.372:23–373:3.

By June 1, 2004, Parkhills had retained Lawrence Berlin as counsel. On that date, more than six weeks after the claimed initial exposure, Mr. Berlin wrote AC-NM, detailing claims for the horse losses and deaths related to monensin, and demanding a settlement. Ex.1022. Mr. Berlin's four-page letter is completely silent on any claimed health effects on the Parkhills.

Joey Parkhill saw Koury for the first time on June 30, 2004, nearly 10 weeks after the claimed initial exposure, complaining of being injured by a bull. Tr.30:1-24;18:9–19:14. On July 2, 2004, both Parkhills consulted again with Koury, who at that time spoke with Mr. Berlin. *Id*;R.P.1619,1634,1636 (Koury's progress note with Berlin's name and phone number noted in the left hand column). Following that discussion, Koury has blamed each and every health problem described by the Parkhills on one cause and one cause only—monensin.

Over the next two years, the four Parkhills consulted Koury for a myriad of symptoms they, and he, related to monensin. R.P.1628-1629. Numerous

diagnostic tests (including a heart biopsy for Joey Parkhill) have never revealed any damage to their heart or skeletal muscles or that CPK levels were elevated–the "marker symptoms" for monensin toxicosis. Tr.24:21-26:11;28:16-29:7; R.P.2814-2822 (negative biopsy; cardiac pathologist cautioning that a thorough scientific analysis should have been undertaken before Koury sought to "implicate a specific agent in an adverse event..."); R.P.3190-3192.

Parkhills retained Dahlgren as a causation expert in 2006. By that time they had learned through this litigation that the toxic effects of monensin on animals are manifested immediately, because the histories they gave to Dahlgren's investigator in 2006 conflicted sharply with the symptoms (or lack thereof) they had reported contemporaneously to Koury and other health care providers. For example, Joey Parkhill reported to Dahlgren's investigator that he "experienced severely itchy skin when he came in contact with the contaminated feed," and that beginning on April 19, 2004 (the day he began feeding the grain), he began to experience nausea, daily headaches, dry cough, difficulty breathing, and insomnia. Ex.316:47-48. In contrast, he reported no such problems to Koury on June 30-July 2, 2004. Paula Parkhill reported to Dahlgren's investigator that beginning in May, 2004, she had experienced daily migraines, sensitivity to light, canker sores, shortness of breath, wheezing, severe acid reflux, bloating, diarrhea, extremely dry skin and insomnia. Ex.316:144-45. In contrast, she reported to her health care

provider on May 10, 2004, that her health problems were "none." Ex.1012:0035-0036. Koury had seen both girls on July 8, 2004, and completed a school athletic physical form indicating Victoria was "normal" and noted that Rebekah had an "unremarkable exam." Tr.53:15-54:12; 54:19-55:4. In contrast, they too reported to Dahlgren's investigator that they had experienced immediate and varied symptoms following "exposure" to monensin in late April, 2004. Ex.316:2-4,316:101-102.

In Dahlgren's reports for each of the four Parkhills he opined that exposure to the horse feed containing monensin caused all of their numerous medical problems. Ex. 316:11; 316:61; 316:154. Contrary to the BIC's unsubstantiated "summary" (p.10), Dahlgren did not evaluate the "timing, nature and extent of monensin exposure" or "calculate exposure at six times maximum permitted by FDA," nor did he consider "dose-response relationships." *See infra* pp.32-36. Dahlgren admitted he had no idea how much monensin the Parkhills were exposed to—he had never even attempted to calculate dose—although knowledge of dose was essential to developing a toxicological causation opinion. Tr.144:24-145:2;164:18-25.

Dahlgren opined that Joey Parkhill's following medical problems were caused by monensin exposure:

- Nausea
- Daily headaches

- Dizziness and lightheadedness
- Breathing difficulties
- Insomnia
- Decreased energy
- Shortness of breath
- Irritability and becoming easily angered
- Lack of stamina
- Elevated blood pressure (hypertension)
- Tachycardia, and
- Lack of concentration and short term memory loss
- brain damage

Ex. 316:47-49, Tr.200:4-8. Dahlgren never examined the Parkhills or treated them. Tr.134:9-135:2. The only medical records he reviewed were Koury's. His opinions were based on his understanding that each of the Parkhills was in good health before the claimed exposure. *See, e.g.* Ex.316:47. Neither Koury/Dahlgren knew at the time they developed their opinions that the same batch of feed had been fed to horses by the two Brisco brothers and Tommy Burnes, and that none of them had reported any adverse reaction to the feed. Tr.126:4-10; Exs.1203-1204.

C. JOEY PARKHILL'S DISCOVERY ABUSES.

Parkhill told Koury/Dahlgren that prior to the monensin exposure, he had never experienced any of the symptoms that he suffered from after the exposure. That is also the testimony he gave in his verified answers in discovery:

> Int.No.12 [Describe any prior legal actions]:
>
> > *I was involved in a dispute over a heat pump....The outcome was that I paid for old heat pump.*

Int.No.20 [Provide complete prior medical history and identify any health professional who has examined or treated you]:

> *Subject to that [stock] objection and without waiving that objection,Parkhill answers:*
>
> *1990: broken ankle at Air Refrigeration*
> *1995: fractured skull University Medical Center, Albuquerque, New Mexico*
> *2003: hay hook in knee Hidalgo Medical Services, Lordsburg, New Mexico.*

Int.No.22 [Describe any pre-existing condition]:

> ***Prior to being exposed to Monensin in [AC-NM] Feed, I had not experienced any of the symptoms that I have experienced since the exposure.***

R.P.3286-3292. Concerned about the adequacy of the medical disclosures, AC-NM filed a motion to compel. R.P.108-137. At the 1/6/06 hearing on the Motion, Parkhills' counsel represented "we've listed every health care provider that I think Mr. Parkhill has seen in his adult life." R.P. 4371. After review of Dalhgren's later reports, AC-NM's counsel expressed concern that all pre-monensin medical providers had not been disclosed. In response, Parkhills' counsel again represented that, in fact, all medical providers had been disclosed. R.P.3575-3578.

Under the then-current Scheduling Order, discovery ended on November 30, 2006, the dispositive motions deadline was December 15, 2006, and trial was set for April 2, 2007. R.P.523. Because Joey Parkhill claimed that his health required incremental depositions, counsel agreed to complete his deposition on February 10,

2007. During that deposition (seven weeks before the scheduled trial and long past both the discovery and motions deadlines) Parkhill was asked about a reference to a mule accident noted in an attachment to Dahlgren's report. Parkhill then revealed for the first time that he had residual problems from the mule accident, including some lost hearing, lost vision, and memory loss, that the owner of the mule had filed "an insurance claim," and "that time in my life was pretty fuzzy." R.P.3294,3296. In that deposition Parkhill testified he did not remember any court proceedings, that his claims were limited to his medical costs, and he never made claims for personal injuries against the owner of the mule, Lester Burnes, brother of his friend and original co-plaintiff here, Tommy Burnes. R.P.3296.

Following the February 10 deposition, AC-NM's counsel investigated the court records of Chaves County, discovered the 1998 lawsuit, contacted defense counsel in that case and obtained copies of certain discovery responses, medical records, and depositions. Those documents revealed that in September, 1997, Parkhill was in an accident involving Burnes' mule, he lost consciousness for several minutes and was admitted to the emergency room. R.P.3312;Ex.355. Parkhill retained Albuquerque counsel and sued Burnes in 1998, claiming "severe, disabling injuries to his head, right eye, jaw, neck and body as a whole," and that "[t]hese injuries have necessitated extensive medical treatments to date and will continue to necessitate medical treatment in the future in an amount not now

known." *Id.* In that lawsuit Parkhill answered interrogatories, claiming the following:

> Headaches, dizziness, loss of hearing, loss of vision and coordination, loss of memory, head, neck and back pain. These are continuing....The injury has affected my ability to do everything I am accustomed to doing: from horse back riding to shoeing a horse, sheet metal and refrigeration work, remembering how to do simple tasks, etc.

R.P.3300-3303. In a medical summary and in depositions taken in that lawsuit, Joey Parkhill described his injuries from the mule accident as:

- Nausea
- Loss of hearing
- Loss of memory
- Personality change
- Frequent headaches
- Difficulty speaking or writing
- Weakness or clumsiness
- Loss of balance
- Dizziness

R.P.3311-3314. These were precisely the same neurologic symptoms he had described to Dahlgren as arising for the first time from exposure to monensin. Tr.205:10-212:12.

Paula Parkhill testified Joey couldn't ride in a vehicle for more than 30 minutes, couldn't ride a horse, that he suffered a personality change and was irritable and depressed. R.P.3316-3319. In fact, Parkhill was so disabled following the mule accident that the Parkhills had to stop training and breeding horses, and

sold most of their herd. R.P.3318-3319. Amazingly, the BIC characterizes Joey Parkhill's lawsuit, and the claimed catastrophic injuries, as "a claim filed ... against his friend's ... *homeowner's insurance*" which "included *boilerplate claims* of disabling injuries." BIC 13.

Medical records obtained following discovery of the lawsuit showed that Parkhill saw the following healthcare providers in connection with the mule accident:

- Eastern New Mexico Medical Center Emergency Room
- Steven Evans, ANS, MD
- Mark Berger, MD
- Kenneth Sheffield, MD
- P. Kelly, DO
- Richard Sidd, MD
- Phyllis Tulk, PA
- Kathleen Harner, MD
- Thomas Carlow, MD
- Stephen Chiulli, Ph.D
- Don Seelinger, MD

R.P.3301-3302,Exs.1014-1019. None of these providers were disclosed in Parkhill's sworn Answers in this case.

Following discovery of the prior lawsuit, AC-NM counsel attempted to recreate Parkhill's medical records for 1997-2000. The records of the Roswell Osteopathic Clinic, where the Parkhills had seen Phyllis Tulk, P.A., the family's treating nurse practitioner, were routinely destroyed after seven years. Consequently, none of Tulk's or the Clinic's records from before spring 2000 were

still in existence, other than those in the possession of defense counsel in the mule accident lawsuit. R.P.4386-4387.

The existing medical records from the mule accident were obtained a few days before the *Daubert* hearing on May 15-16, 2007, and Koury/Dahlgren were examined about them. Both admitted they were completely unaware of Parkhill's true health history at the time of their expert reports and depositions, and that they had been made aware of the records for the first time shortly before the hearing. Tr.55:15-21;57:1-21;210:20-211:14;218:12-17. In an effort to restore their credibility, on redirect Koury/Dahlgren testified that they didn't find the records of any significance, because purportedly all Parkhill's symptoms from the mule accident had fully resolved before the instant litigation and were unrelated. Tr.111:11-21;273:24-274:16. The trial court rejected that testimony as not credible, finding the history "important." Tr.7-13-07, 6:18-20.

Contrary to the BIC's argument that the trial court failed to consider their Sur-Response to the Sanctions Motion, it was in fact argued at the sanctions hearing, Tr.7-8-08, 419:1-2, 444:1-445:9, and its attached affidavits were insufficient to persuade Judge Sweazea that "memory loss" excused Parkhill's willful nondisclosure; indeed, he openly expressed his skepticism of that position. *Id.*,452:7-9.

IV. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING THE KOURY/DAHLGREN OPINIONS UNDER RULE 11-702 AND *ALBERICO-DAUBERT*.

The New Mexico Supreme Court has explained that Rule 11-702 creates three prerequisites for the admission of expert testimony: (1) the expert must be qualified; (2) the testimony must assist the trier of fact; and (3) the expert may testify only as to "scientific, technical or other specialized knowledge." *Alberico*, 116 N.M. at 166-67, 861 P.2d at 202-03. The proponent of the expert testimony must establish, by a preponderance of the evidence, that the prerequisites for admissibility have been satisfied. *Tartaglia v. Hodges*, 2000-NMCA-80, ¶30, 129 N.M. 497, 10 P.3d 176. Applying the proper standards of review, the trial court's rulings that the Parkhills failed to meet their burden as to each of those prerequisites are each supported by substantial evidence and must be affirmed.

A. THE STANDARD OF REVIEW FOR ADMISSIBILITY OF EXPERTS IS DEFERENTIAL.

"The rule in this State has consistently been that the admission of expert testimony or other scientific evidence is peculiarly within the sound discretion of the trial court and will not be reversed absent a showing of abuse of that discretion." *Alberico*, 116 N.M. at 169, 861 P.2d at 205. "Broad discretion in the admission or exclusion of expert evidence will be sustained unless manifestly erroneous." *Id.* "An abuse of discretion arises when the evidentiary ruling is

clearly contrary to logic and the facts and circumstances of the case." *State v. Armendariz*, 2006-NMSC-036, ¶6, 140 N.M. 182, 141 P.3d 526.

The threshold question of whether the trial court applied the correct evidentiary rule is subject to *de novo* review on appeal. *State v. Torres*, 1999-NMSC-010, ¶28, 127 N.M. 20, 976 P.2d 20. However, the appellate court "defer[s] to the trial court with respect to factual findings and indulg[es] all reasonable inferences in support of the trial court's decision." *State v. Hand*, 2008-NMSC-14, ¶6, 143 N.M. 530, 178 P.3d 165. The district court's orders limiting the Koury/Dahlgren testimony contained numerous findings of fact, RP 4406-4409; Tr.7-13-07, 6:18-7:7, which are entitled to deferential review. *Hand, supra.* In evaluating the Koury/Dahlgren testimony, the district court applied the correct standard as a matter of law.

B. THE TRIAL COURT'S FINDINGS THAT KOURY/DAHLGREN WERE UNQUALIFIED MUST BE UPHELD.

Under Rule 11-702, "a witness must qualify as an expert in the field for which his or her testimony is offered before such testimony is admissible." *Lopez v. Reddy*, 2005-NMCA-054, ¶15, 137 N.M. 554, 113 P.3d 377. If the expert is offering an opinion in a specialized field, as was the case before the trial court, New Mexico precedent requires that the court examine the proffered expert's qualifications to determine if his "knowledge, skill, training or education" qualify him to "be able to testify as to how and why he arrives at an opinion" in the

specialized field. *Lopez*, 2005-NMCA-054, ¶¶19, 22 (upholding exclusion of plaintiff's proffered expert, an oncologist, as unqualified to opine on the standard of care for performing a particular procedure—in that case, a breast biopsy).

Contrary to the argument, BIC 30, that "New Mexico law does not mandate specialization or definitive experience and training for expert testimony," our precedents hold that toxicology is a specialized scientific discipline. *State v. Downey*, 2008-NMSC-061, ¶ 25, 145 N.M. 232, 195 P.3d 1244 (toxicologist's testimony required to establish retrograde blood alcohol level); *see also Manual* 415-418 (listing numerous indicia of expertise in the field of toxicology).

The trial court specifically found that Koury/Dalhgren were unqualified to render an opinion that monensin caused the Parkhills' symptoms. As to Koury:

> Dr. Koury is not, and never has been trained as, a toxicologist.
> Dr. Koury knew nothing about the ionophore, monensin, prior to the present lawsuit.
> Dr. Koury lacks the background, training and experience required to render a reliable opinion on the subject whether monensin was the external cause or etiology of the Plaintiffs' medical symptoms.

RP 4407-4408, ¶¶4, 5, 3. As to Dahlgren:

> [I]t did not appear from the evidence that [Dr. Dahlgren] had any specialized education in toxicology...I find that his qualifications certainly are less than stellar...And I believe that under all of the circumstances and particularly the prior medical information and Dr. Dahlgren's utter lack of familiarity with this compound and the manner it is used and handled in the industry, rendered his opinion unreliable and inadmissible.

Tr.7-13-07, 5:20-21,7:2-7;R.P.3247-3248. The record contained abundant evidence supporting the trial court's factual findings, which must therefore be upheld. *Hand*, 2008-NMSC-14, ¶6.

Koury is a family practice doctor, and he readily admitted that he does not consider himself to be an expert in toxicology by "education, training, or experience." Tr.10:22–11:13. He learned everything he knows about monensin for this lawsuit. Tr.11:14-13:17.

Dahlgren has no degree or advanced training in toxicology, is not board certified in toxicology or in the related disciplines of occupational, environmental medicine, or epidemiology, nor does he belong to any of the toxicology organizations described as having "strict criteria for membership." *Compare* requirements set out in *Manual*, p.417, *with* Tr.141:19–142:23;146:12–147:6. His entire knowledge of monensin was derived from work on this lawsuit. Tr.147:19-148:233;150:1-152:24;152:25-153:6. There was ample evidence to support the trial court's finding that his qualifications were "less than stellar."

In short, Parkhills' experts' opinions were generated solely for the purposes of advancing Parkhills' recovery, which casts doubts on their qualifications and the validity of their opinions. *See Daubert*, 43 F.3d at 1317 (emphasizing that "[o]ne very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted

independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying").

The trial court's exclusion of Parkhills' experts based on its findings of lack of qualifications must be affirmed.

C. THE TRIAL COURT PROPERLY APPLIED RULE 702 AND/OR *ALBERICO-DAUBERT* TO DETERMINE THE ADMISSIBILITY OF THE KOURY/DAHLGREN PROFFERED EXPERT TESTIMONY.

Parkhills' argue that *Alberico-Daubert* does not apply to a claimed "differential diagnosis" opinion because it is somehow exempt from scrutiny as to its "scientific reliability." BIC, *passim*. That position has no support in New Mexico law. New Mexico was, in 1993, one of the first states to adopt the analysis of the United States Supreme Court in *Daubert*, 509 U.S. at 587-89 (*see supra* note 1), a case which, like the present one, involved an assessment of expert testimony necessary to establish toxicological causation. As recently as last year, the New Mexico Supreme Court again confirmed its endorsement of *Daubert*'s holding that Rule 702 requires the trial court to act as "gatekeeper" to insure "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand" so that speculative and unfounded opinions do not reach the jury. *Downey*, 2008-NMSC-061, ¶ 25, citing *Daubert*, 509 U.S. at 597.

Daubert set out four factors that a trial court should consider in determining whether proposed expert testimony was both "reliable and relevant," as follows:

(1) whether a theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known potential rate of error in using the technique; and (4) whether the theory has been generally accepted in the particular scientific field. *Id.* at 593-94. The New Mexico courts apply the same factors to determine whether proposed expert testimony is indeed "scientific," and have added a fifth factor: "[w]hether the scientific technique is based upon well-recognized scientific principles and whether it is capable of supporting opinions based upon reasonable probability rather than conjecture." *State v. Anderson*, 118 N.M. 284, 291, 881 P.2d 29, 36 (1994). In this case, Dr. Fisher's expert toxicological testimony, (Tr.364:22-367:2) coupled with Koury's admissions (Tr.83:8-21), provided substantial evidence supporting the trial court's conclusions that none of the *Alberico-Daubert* factors were met.

In addition, expert testimony is admissible under Rule 702 only if it will assist the trier of fact, a requirement that "goes primarily to relevance." *Downey*, 2008-NMSC-061, ¶ 30, citing *Daubert* 509 U.S. at 591. "One aspect of relevance is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Id.*

The trial court properly applied these principles in excluding the Koury/Dahlgren opinions: "[A]pplying either a Rule 11-702 or a *Alberico-Daubert* standard, or both, to Dr. Koury's proposed testimony, the Court concludes

that his proffered opinions that monensin caused the Plaintiffs' symptoms are not scientifically reliable, are based on erroneous factual assumptions, will not assist the trier of fact, and should be excluded." R.P.4408-4409; Tr. 7-13-07, 7:2-7 (holding Dahlgren's opinions are "unreliable and inadmissible").

Parkhills' argument that a toxicological causation opinion is not subject to an *Alberico-Daubert* analysis is simply wrong. As the New Mexico Supreme Court held in *Torres*:

> Following the lead of the United States Supreme Court in *Daubert*, [] this Court has established that it is error to admit expert testimony involving scientific knowledge unless the party offering such testimony establishes the evidentiary reliability of the scientific knowledge.

1999-NMSC-010, ¶ 24; *see Downey*, 2008-NMSC-061, ¶¶ 14, 25. Under *Torres* and *Downey*, regardless whether plaintiffs seek to label the Koury/Dahlgren opinions as "differential diagnoses," opinions that a certain toxin caused certain injuries are indeed scientific evidence and are subject to *Alberico-Daubert*.

Parkhills' reliance (BIC 25) on *State v. Lente*, 2005-NMCA-111, 138 N.M. 312, 119 P.3d 737 and *Banks v. IMC Kalium Carlsbad Potash Co.*, 2003-NMSC-026, 134 N.M. 421, 77 P.3d 1014, is misplaced. In *Lente*, this Court held that a *Daubert* analysis was not required as a foundation for a treating physician's testimony when the physician was not offering an opinion as to sexual abuse, but merely reporting factual observations. 2005-NMCA-111, ¶8.

Banks held that its exception to *Alberico-Daubert* was appropriate in worker's compensation proceedings based on the statutory scheme peculiar to workers' compensation. 2003-NMSC-026, ¶¶28, 29, 38. Subsequent case law holds that *Banks* is limited to cases "in which the use of experts is subject to particular statutory standards," and refuses to apply that limitation in a civil, non-statutory case. *Lopez*, 2005-NMCA-054, ¶ 13. *Banks* does not apply.

No New Mexico case supports Parkhills' proposition that Koury/Dahlgren's toxicological causation opinions are not subject to *Alberico-Daubert.* Simply because a witness can testify to personal observations, as was the case in *Lente*, does not mean the witness may permissibly opine, without scientific foundation, as to the cause of personal injuries in a toxic tort case. *See State v. Morales*, 2002-NMCA-052, ¶19, 132 N.M. 146, 45 P.3d 406 (reversing admissibility of deputy's testimony that a field test "flashed purple *and was therefore positive for heroin*;" because "the deputy testified to more than mere observations .... [and] offered an opinion about the meaning of his observations but without the necessary scientific foundation.") (emphasis added). This Court in *Morales* rejected the State's attempt to intertwine the plainly observable with a scientific opinion, and reaffirmed that in New Mexico the "*Alberico-Daubert* standard applies to *all* scientific testimony." *Id.* at ¶20 (emphasis added).

D. KOURY/DAHLGREN'S FAILURES TO DEMONSTRATE ANY OF THE THREE ELEMENTS OF PROOF NECESSARY TO ESTABLISH CAUSATION IN A TOXIC TORT CASE – DOSE, GENERAL CAUSATION AND SPECIFIC CAUSATION – PROVIDE THREE INDEPENDENT REASONS FOR AFFIRMANCE.

In order to establish causation in a toxic tort lawsuit, a plaintiff must demonstrate three elements. The first is "dose," or the levels of toxin to which the plaintiff was exposed. *Mitchell v. Gencorp, Inc.*, 165 F.3d 778, 781 (10th Cir. 1999). As Dahlgren acknowledged in deferring to the *Manual*, knowledge of dose is the most important concept in toxicological causation, because "the dose makes the poison." Tr.145:6-8; *Manual* at 419. The second element is general causation, which is whether a substance is capable of causing a particular injury or condition in the general population. *Hollander v. Sandoz Pharmaceuticals Corp.*, 289 F.3d 1193, 1209-1211 (10th Cir.2002). The third element is specific causation, which is whether the substance, in the amounts to which the plaintiffs were was exposed, caused their particular injuries. *See* authorities cited *supra* this Section D. This methodology employing these three elements is so widely accepted as to be beyond dispute.[5] Dr. Fisher testified to them, as did Dahlgren. Tr.140:13-141:18;154:1-155:22;16:19-24;169:8-172:2.

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[5] *See, Manual*, 401, 403, 419; C.H. Buckley Jr. & C.H. Haake, *Separating the Scientist's Wheat from the Charlatan's Chaff: Daubert's Role in Toxic Tort Litigation*, 28 Envtl.L.Rep. 10, 293 (June 1998).

Failure to demonstrate any of those elements constitutes an independent ground for exclusion of the Koury/Dahlgren opinions. Under *Daubert*, "any step that renders the analysis unreliable ... renders the expert's testimony inadmissible." *Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 780 (10th Cir. 2009), citing *Mitchell*, 165 F.3d at 781.

The Koury/Dahlgren causation opinions met none of the *Alberico-Daubert* or Rule 11-702 criteria for scientific reliability. The trial court applied the proper standards to decide that Koury/Dahlgren had failed to establish dose, general causation, or specific causation and that the label "differential diagnosis" does not provide an escape hatch from the requirements of scientific reliability. R.P.4406-4409; 3247-3248.

1. Plaintiffs' Experts Made No Attempt to Quantify Parkhills' Exposure—"Dose."

Koury/Dahlgren failed to establish the first element necessary for an admissible causation opinion in a toxic tort case–the reliable estimation of dosage. An absolute prerequisite for establishing causation in toxic tort cases is a scientifically reliable estimate of the plaintiff's exposure to the defendant's toxic substance. *Mitchell*, 165 F.3d at 781. "Dose is the single most important factor to consider in evaluating whether an alleged exposure caused a specific adverse effect." D. Eaton, "Scientific Judgment and Toxic Torts–A Primer in Toxicology for Judges and Lawyers," 12 J.L. & Pol'y 5, 11 (2003); *see also McClain v.*

Metabolife International, Inc., 401 F.3d 1233, 1240 (11th Cir. 2005) (reversing jury verdict based on inadmissible expert testimony, because the expert's opinion "draws speculative conclusions about Metabolife's toxicity...while at the same time, neglecting the hallmark of the science of toxic torts–the dose-response relationship").

Koury admitted he had no idea how much monensin the Parkhills were exposed to. Tr.23:16-21; R.P.4408,COL4. Although Dahlgren agreed that knowledge of the dose-response relationship is the cornerstone of a toxicological opinion, he made no attempt to quantify the Parkhills' exposure. Tr. 144:24–145:2; Tr. 296:1-8 ("I didn't know any way to really accurately estimate the quantitative dose"); Tr.171:11-172:15 ("We didn't quantify, we talked about [the amount of exposure] in *qualitative* terms, namely that they picked up the chemical with their hands...but in terms of actually doing a quantitative measurement or model, we didn't do that"). There is no scientific reference, in the *Manual* or anywhere else, validating some fuzzy concept of "qualitative" measurement and as Dr. Fisher explained, Dahlgren's novel "qualitative" concept is not recognized in the scientific community. Tr.365:14–366:5.

The BIC's statement at 33 that Dr. Dahlgren "calculated exposure at six times maximum permitted by FDA" has no basis in the record. The supporting

citation references Dahlgren's testimony which, on cross-examination, was revealed as utterly unfounded:

> Q: You have no idea how the FDA came up with that number; isn't that correct?
> A: That is correct. ... I don't see where they came up with that number. I don't know the basis of it.

Tr. 517:13-20.

Parkhills seek to evade the requirement of demonstrating dose by contending that when exposure cannot be quantified precisely, then quantification is no longer "imperative." BIC 31-33. That proposition has no support in the cited authorities, because in each case the court determined substantial exposure had in fact occurred, notwithstanding that the precise amount could not be measured. *See, e.g., Westberry v. Gummi AB*, 178 F.3d 257, 263 (4thCir.1999) (employees worked in clouds of talc so thick that footprints were visible on the floor); *Curtis v. M&S Petroleum, Inc.*, 174 F.3d, 661, 670 (5th Cir. 1999) (workers were frequently soaked with benzene, and expert calculated they were exposed to levels several hundred times above the permissible exposure level).[6]

[6] *Christian v. Gray*, 2003 OK 10, ¶ 54, 65 P.3d 591, is inapposite. That case reversed and remanded for a *Daubert* hearing and stated, in *dicta*, "the testimony of the expert should reveal a reliable method for determining the quantity of the toxin necessary to cause injuries of the type experienced by plaintiff (general causation), unless plaintiff can show that the circumstances are such that general causation should not be necessary."

Here, given that samples of the feed were actually tested, the Parkhills' estimated exposure was *not* impossible to quantity. Indeed, Dr. Fisher calculated the greatest conceivable dose to which the Parkhills might have been exposed.[7] His estimates rested on known facts about the amount of monensin in the feed and the manner in which monensin could be absorbed by inhalation. At all times, he utilized assumptions that, however unlikely, would have maximized the Parkhills' level of exposure. Exs.366,367,368; Tr. 390:11–393:1. Dr. Fisher calculated the amount of monensin that could be inhaled within a one-hour feeding time, concluding that "a one-hour exposure to this [worst-case] scenario, this very dusty scenario, would deliver .038 milligrams per kilogram [of body weight] to any of the individuals." Tr.393:8–395:19. Comparing this reconstructed worst-case exposure level to the NOAELs reported in the literature for varying species of mammals, Dr. Fisher concluded that the Parkhills' maximized exposure was less than $1/70^{th}$ the NOAEL for monensin as reported in lab studies on animals. Exs.1202, 366; Tr.384:1–385:13;387:18–388:14. Further, the .038 mg/kg estimated exposure is about $1/50^{th}$ of the exposure experienced by workers feeding the recommended cattle feed mix daily, and who have done so for decades without reported health effects. Ex.316:4-12.

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[7] Unlike Dahlgren, Dr. Fisher's qualifications as a toxicologist are unimpeachable, including the fact that most of his work is performed outside of the litigation arena. *See* Ex. 1200; Tr. 357:14 – 359:16.

Dr. Fisher's testimony and the scientific literature he examined conclusively destroys the Koury/Dahlgren opinions disregarding a dose-response relationship and concluding that any amount of monensin in the feed–no matter how miniscule–caused the varying and conflicting symptoms reported by Parkhills.

2. Koury/Dahlgren Failed to Establish General Causation by a Preponderance of the Evidence.

a. Koury/Dahlgren could point to no evidence of general causation in the scientific literature.

The trial court properly excluded the experts' opinions for failure to establish general causation by a preponderance of the evidence. R.P.4408,COL5. "In a toxic tort lawsuit, a plaintiff must show both general and specific causation." *Farris v. Intel Corp.,* 493 F.Supp.2d 1174, 1180 (D.N.M.2007) (excluding physician's opinion on general causation as unreliable because he "did not identify a single article, study, or report...to support his theory of injury in this case"), citing *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 991 (10th Cir.2005).

Koury/Dahlgren produced no competent evidence of general causation in the scientific literature. Tr.14:14-15:15;125:15-127:13. Dahlgren's attempt to show general causation from the MSDS or from a single study involving the effects of monensin on a single cell was thoroughly discredited. Tr.367:18-369:4. Indeed, Dr. Fisher's testimony provided substantial evidence there was no scientific literature anywhere supporting that feeding grain containing monensin in this

manner and at these levels can cause the kinds of symptoms in the general population that the Parkhills complain of here. To avoid that reality, the BIC (33-36) argues that proof of general causation is not "necessarily required" in this case because of claimed "unique circumstances;" a position that is contrary to the explicit requirements of both the *Manual* and the overwhelming weight of authority.

b. This case does not present "unique circumstances" because feeding livestock grain with monensin-additive is a common occurrence.

The cases cited in the BIC for the proposition that there can be "unique circumstances" where general causation need not be shown, (pp.33-36) are inapposite to the undisputed facts of this case. Here, livestock grain containing monensin in concentrations many times the highest conceivable dose the Parkhills may have been exposed to, has been fed world-wide for decades, and as Parkhills' expert Dr. Oehme testified, with 50 years of experience in the industry, "I've never known a human that was affected." R.P.1527. In addition, the Briscos and Burnes fed horses with the same batch of grain for the same period of time and experienced no health effects. There are no "unique circumstances" in this case.

Given the undisputed facts and overwhelming weight of authorities requiring proof of general causation, Parkhills resort to the one case in the country, *Kuhn v. Sandoz Pharmaceuticals Corp.*, 14 P.3d 1170 (Kan.2000), which utilized the

"sporadic accident" theory, a theory that was apparently invented in that case. *Kuhn* is inapposite, not only because its reasoning is faulty (that the first plaintiff to concoct a novel theory of toxic harm is exempt from scrutiny of the scientific validity of its theory) but because the Kansas courts have never adopted the *Daubert* analysis employed in New Mexico. As *Kuhn* notes, its reasoning should be distinguished because of "the different legal standards employed in [other] jurisdictions." 14 P.3d at 1184.

c. A claimed differential diagnosis assumes general causation, but cannot establish it.

Parkhills seek to avoid proving general causation through the differential diagnosis label BIC, *passim*. The term "differential diagnosis" assumes that the physician can reliably demonstrate general causation—that the substance at issue is understood in the scientific community to cause the symptoms that the physician observes in his patient. In other words, the expert must be able to "rule in" that scientifically reliable evidence demonstrates a substance is capable of causing harm in general before he can "rule out" other potential causes of the injury specifically to plaintiff. *See In re Breast Implant Litigation*, 11 F.Supp.2d 1217, 1230 (D.Colo. 1998) ("the final suspected 'cause' remaining after this process of elimination must actually be capable of causing the injury. That is, the expert must 'rule in' the suspected cause as well as 'rule out' other possible causes").

Thus, by definition, differential diagnosis opinions assume that general causation is established, but where it is not, the opinions fail. As the often-cited discussion in *Cavallo v. Star Enterprise*, 892 F.Supp. 756,771 (E.D. Va. 1995), aff'd on this ground, rev'd on other grounds, 100 F.3d 1140 (4th Cir. 1996) explains:

> The process of differential diagnosis is undoubtedly important to the question of "specific causation." ... But, it is also important to recognize that a fundamental assumption underlying this method is that the final suspected "cause" remaining after this process of elimination must actually be capable of causing the injury. That is, the expert must "rule in" the suspected cause as well as "rule out" other possible causes. And, of course, expert opinion on this issue of "general causation" must be derived from a scientifically valid methodology.

Id.; see, e.g., Hollander, 289 F.3d at 1210 (holding that differential diagnosis may be used to establish specific causation only when general causation has been established); *Siharath v. Sandoz Pharmaceuticals Corp.*, 131 F. Supp. 2d 1347, aff'd 295 F.3d 1194 (11th Cir. 2002); *see* accumulated cases citing *Cavallo.*

The BIC argues throughout that a differential diagnosis is a valid scientific method, setting up a straw man: AC-NM has never contended that a differential diagnosis, scientifically performed and predicated on proof of general causation, may not be used to demonstrate specific causation. The glaring deficiency here, of course, is that the label "differential diagnosis" was applied in an effort to mask the underlying flaws in the methodology—a complete lack of evidence of dose-

response relationship or any scientific literature supporting general causation. None of the cases cited by Parkhills (BIC 28-29) support the proposition that a differential diagnosis, without evidence of a dose sufficient to result in a substantial exposure, general causation, and/or strong positive temporal relationship, can establish causation in a toxic tort case.

Under the great weight of authority, including Parkhills' own cited cases, the trial court properly excluded the experts' opinions for failure to demonstrate general causation based on "scientifically valid methodology," without which a claimed differential diagnosis opinion is inadmissible under *Alberico-Daubert.*

3. Koury/Dahlgren Failed to Establish Specific Causation by a Preponderance of the Evidence and that Failure Is Not Excused by Their Purported "Differential Diagnosis."

The third element under *Alberico-Daubert* for establishing causation in a toxic tort case is specific causation – that the toxin to which plaintiff was exposed, and at the dose to which he was exposed, caused his specific injuries. *Farris*, 493 F.Supp.2d at 1185. As they did in failing to provide evidence of the other requisite elements of the methodology used to establish causation in a toxic tort case, Parkhills seek to excuse their failure to show specific causation by labeling their experts' opinions "differential diagnoses."

A proper differential diagnosis is admissible only if based upon a proper foundation. *See Westberry*, 178 F.3d at 262 ("A reliable differential diagnosis ...

is performed after physical examinations, the taking of medical histories, and the review of clinical tests); *Manual*, Reference Guide on Medical Testimony at 469 (identifying as relevant: patient history, records, examination, testing, and temporal relationship, *i.e.*, timing of disease onset and response to removal from exposure). As described herein pp.13-17,41-42, Koury/Dahlgren's claimed "differential diagnosis" neither followed this methodology or was based on evidentiary facts of record.[8]

a. Koury/Dahlgren disregarded the lack of a positive temporal relationship between the exposure and the claimed onset of the Parkhills' symptoms.

Parkhills' contemporaneous health records establish there is *no* positive temporal relationship between their first exposure to monensin in April, 2004, and the manifestation of their symptoms, which were first fully reported in 2006 to Dahlgren's investigator. In fact, as of more than two months after their exposure, none of them had reported a single monensin-related health problem to any health care provider. *Supra* pp.14-16.

Parkhills cite (BIC 33-34, note 14) the few unusual cases where courts have held that a strong and undisputed temporal connection between exposure and onset of symptoms can create specific causation, but the fact that such connections are missing here renders those cases inapposite. Not only did the Parkhills exhibit

[8] For a more detailed description of the shortcomings of the Koury/Dahlgren "differential diagnoses," *see* R.P. 3154-3160, AC-NM's Closing Argument.

none of the classic symptoms shown in animal studies—immediate effects which are exhibited by damage to heart and skeletal muscles and elevated CPK—during the period of time they were actually feeding their horses with AC-NM feed, in their contemporaneous medical records they described themselves as having no medical problems whatsoever for a period of months following the exposures. The unrefuted scientific evidence verified that the Parkshills' symptoms were unequivocally *not* consistent with the animal studies, which showed that symptoms manifested immediately upon exposure. *Supra* pp. 10-12; Tr. 340:17–341:16; Ex.1202; Ex.313:6, 9. Consequently, the factual foundation for the Koury/Dahlgren differential diagnoses—a presumed temporal relationship between exposure and onset—was in error.

"Experts may, and often do, base their opinions upon factual assumptions, but those assumptions in turn must find evidentiary foundation in the record." *Downey*, 2008-NMSC-061, ¶ 34. In this case, Parkhills' experts' opinions failed the *Downey* test. Substantial evidence supports that the exclusion of those opinions be affirmed.

b. Koury/Dahlgren's purported "differential diagnosis" was not based on truthful prior health histories, did not exclude other obvious causes and did not acknowledge testing results.

"Expert testimony may be received if, and only if, the expert possesses such facts as would enable him to express a reasonably accurate conclusion as

distinguished from mere conjecture." *Downey*, 2008-NMSC-061, ¶32. The trial court found, and it is undisputed, that at the time they developed their opinions, neither expert had any knowledge of Joey Parkhill's true medical history and litigation, which included complaints of injuries and symptoms (including "memory loss") also complained of in this lawsuit. R.P.4402. Neither expert credibly explained the discrepancy in the Parkhills' contemporaneous reports to health providers that their health was good for a period of at least two months following the claimed exposure, and their conflicting litigation-related reports to Dahlgren's investigator (and later to Koury), that immediately following that exposure, they began experiencing a multitude of adverse reactions.

Substantial evidence supported Dr. Fisher's conclusions that the adult Parkhills' hypertension was more probably than not attributable to the usual risks, i.e., family history, obesity, sleep apnea, Tr.380:13-381:10; 410:2:10; 414:10-415:2, and that their other symptoms were more likely caused by factors other than monensin, Ex.1204. All of that was ignored by Koury/Dahlgren. In addition, both experts ignored that the extensive clinical testing was always negative for any of the "marker" symptoms of monensin toxicity, namely heart and skeletal muscle damage. Tr. 366:6-9; 403:17-405:24. Koury/Dahlgren's invalid differential diagnoses had no evidentiary factual support, and their exclusion must be affirmed.

V. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DISMISSING JOEY PARKHILL'S PERSONAL INJURY CLAIMS AS A SANCTION FOR WILLFUL NON-DISCLOSURE OF HIS PRIOR LAWSUIT AND SIMILAR CLAIMED INJURIES.

A. STANDARD FOR DISMISSAL

Dismissal is an appropriate sanction for false answers during discovery when a party's misrepresentations are made willfully or in bad faith. *Reed v. Furr's Supermarkets, Inc.*, 2000-NMCA-091, ¶ 9, 129 N.M. 639, 11 P.3d 603. A trial court's dismissal of a plaintiff's case for discovery violations is reviewed for abuse of discretion. *Reed*, 2000-NMCA-091, ¶ 10. "Dismissal is a severe sanction, but the district court is justified in imposing the sanction and does not abuse its discretion 'when a party demonstrates flagrant bad faith and callous disregard for its [discovery] responsibilities.'" *Id.* Furthermore, when confronted with glaring discovery violations, the district court is "not required to impose lesser sanctions before it imposes the sanction of dismissal." *Id.*

The party moving for dismissal is not required to show that the misrepresentations deceived the moving party, or that the party relied on the false information—although both indisputably were true here. *Medina v. Foundation Reserve Ins. Co.*, 117 N.M. 163, 166, 870 P.2d 125, 128 (1994). In addition, the undisclosed information does not have to be critical to preparation for trial, although again, the concealed information went to the heart of this case. *Id.*

Applying these tests to the facts in this case compels the conclusion that the trial court properly exercised its discretion in sanctioning Joey Parkhill.

B. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION UNDER CONTROLLING NEW MEXICO AUTHORITIES IN IMPOSING SANCTIONS ON JOEY PARKHILL.

A trial district court's discretion to impose discovery sanctions must be based on findings, as the trial court entered here, that the false information was provided as a result of willfulness, bad faith, or callous disregard for discovery obligations. *Medina,* 117 N.M. at 166, 870 P.2d at 128. In making those findings, the court is entitled to assess the credibility and truthfulness of the party's explanation as to why the concealment occurred. *Reed*, 2000-NMCA-091, ¶ 25. In this case, the trial court properly evaluated the credibility of the myriad excuses offered by Parkhill and applied the appropriate standards in imposing the sanction of dismissal of Parkhill's personal injury claims for willfully and deliberately providing false answers to discovery.

The trial court made detailed findings (RP 4400-4403), which were supported by substantial evidence, that in his responses to AC-NM's written interrogatories, Parkhill "concealed the existence of the mule accident lawsuit, the health care he received in connection with that lawsuit, the symptoms he claimed to have suffered as a consequence of that accident, and the damages that he claimed to have suffered in that accident, from both AC-NM and his own health

care professionals and expert witnesses in the current case;" that Parkhill's symptoms described in the mule accident case "were similar to or identical to some of the symptoms that he describes in the current case as having arisen from his claimed exposure to monensin;"and that "the existence of that information would have been essential to the Defendants' preparation of the case." Finally, the court concluded "Mr. Parkhill's false discovery responses were willful and deliberate." *Id.*; *see also* Tr.7-8-08, 480:2-10 ("This violation was willful and deliberate, in my view").

The Parkhills' BIC does not challenge these findings or conclusions or the substantial evidence that supports them. Parkhills' sole arguments that this Court reverse the trial court's careful exercise of discretion are that Parkhill has a bad memory, and that his answer that he had "a head injury in 1995" was a sufficient disclosure of the 1997 mule accident, the ensuing litigation for a period of years against the brother of his best friend, and medical treatment that continued for three years. BIC 39-45. The same arguments were made below and properly rejected by the trial court:

> THE COURT: I find it hard to believe, as a practical matter, that Mr. and Mrs. Parkhill didn't discuss, in detail, their answers [to interrogatories] and what their answers should be, and things so that even if he had a hard time remembering, even if one believes that part of the explanation, that she didn't say, oh, don't you remember, we had this lawsuit.

Tr.7-8-08,463:18-24. Parkhill's testimony in his Interrogatory Answers and deposition as to the details of a lawsuit over a heat pump in the late 1990s (R.P.3322) (the same time frame as the mule accident), and his complete failure to disclose years of litigation and medical treatment arising out of an accident with a friend's mule in the same time period, speaks volumes about the credibility of the "bad memory" excuse.

The trial court simply did not believe that Parkhill "misremembered" the accident and lawsuit, where both Parkhill and his wife were deposed, and in which they testified that by virtue of the profound injuries Parkhill claimed to have suffered, his life was forever changed. R.P.3317, 3319. Based on substantial evidence, the trial court determined Parkhill was dishonest in his discovery responses. The court considered the range of sanctions available to address this willful and deliberate discovery violation (R.P.4403 ¶8), and concluded to enter the lesser sanction of dismissing his personal injury claims (R.P.4404), instead of the entire lawsuit.

New Mexico case law entirely supports the trial court's ruling. *Sandoval v. Martinez*, 109 N.M. 5, 780 P.2d 1152 (Ct.App.1989), which affirmed the trial court's ultimate sanction of dismissal, has almost identical, but less egregious, facts – plaintiff responded to interrogatories about prior medical history with the false statement that she had none, and she actively concealed that history. The

BIC's attempt to distinguish *Sandoval* is unavailing.[9] And, although the New Mexico Supreme Court in *Medina*, 117 N.M. at 166-67, 870 P.2d at 128-29, clarified that *Sandoval* does not require as a precondition to dismissal that the party seeking dismissal be deceived in fact, that the party relied on the information, or that the undisclosed information be critical to trial preparation, here the trial court made factual findings, based on substantial evidence, that all of these conditions were met. RP 4402-4403, FOF 12-13, COL 1-8. In *Reed*, this Court affirmed dismissal of plaintiff's complaint because, as the trial court found, she lied in deposition, and her detailed affidavit explaining her answers was simply not credible. 2000-NMCA-091, ¶¶ 5, 12, 33. As Parkhills do here, in *Reed* the party argued that there was no prejudice to defendant's trial preparation efforts, and this Court of Appeals held that such a showing was not required. "Rather, the overriding concern is abuse of the discovery process ..." *Id.* ¶ 29. As did the trial court in *Reed*, the trial court here "sufficiently set forth the discovery violations that formed the predicate for dismissal." *Id.* ¶ 30; RP 4401-4404, FOF 10-13, COL 2-5.

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[9] The BIC's attempt to distinguish *Sandoval* with repeated mischaracterizations of Mr. Parkhill's interrogatory answers and deposition testimony as "consistently cooperative and forthcoming," that he made "early disclosure of the injury," "in good faith," was "as fully cooperative as his brain damaged memory allowed", "forthright", "never lied and was consistently cooperative and forthcoming, telling the truth" and made "complete and honest disclosures," are simply belied by the undisputed facts upon which the trial court relied. *See* BIC pp. 6, 40-44.

Joey Parkhill's discovery abuse was pervasive and adversely affected the "integrity of the truth-seeking function of the [district] court." *United Nuclear v. General Atomic Co.,* 96 N.M. 155, 238, 629 P.2d 231, 315 (1980). The deposition where he mentioned the mule accident for the first time occurred long after expert discovery had closed and weeks before trial was then scheduled to commence. *Supra* pp. 18. Had it not been discovered and the trial setting vacated, the entire case would have been tried upon that fundamental lie. "When a party has displayed a willful, bad faith approach to discovery, it is not only proper, but imperative, that severe sanctions be imposed to preserve the integrity of the judicial process and the due process rights of the other litigants." *Id.*, 96 N.M. at 241, 629 P.2d at 317. The trial court properly exercised its discretion and should be affirmed.

V. CONCLUSION.

For the foregoing reasons, AC-NM requests that Judge Sweazea be affirmed as to his rulings on the three Orders at issue in this appeal.

Respectfully submitted,

ATKINSON, THAL & BAKER, P.C.

By _____

John S. Thal
201 Third Street, NW., Suite 1850
Albuquerque, NM 87102
(505) 764-8111
Attorneys for Defendant-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September, 2009, the foregoing **APPELLES' ANSWER BRIEF** was served via e-mail and the U.S. Postal Service, First Class Mail, postage prepaid, on the following:

Edward P. Moriarity, Esq.
Bradley L. Booke, Esq.
Moriarity, Badaruddin & Booke
8 East Broadway, Suite 312
Salt Lake City, UT 84111

Laurence M. Berlin, Esq.
4205 E. Skyline Drive
Tucson, AZ 85718

_____
John S. Thal