IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

DAN LOPER d/b/a RIO LECHE DAIRY CO.,

Plaintiff/Appellant,

v. **Court of Appeals No. 31357**

JMAR, a New Mexico general partnership,

Defendant/Appellee.

Appeal from District Court, Curry County
No. D-0905-CV-2007-0013
Honorable David P. Reeb, Jr.

APPELLANT'S BRIEF IN CHIEF

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I. SUMMARY OF PROCEEDINGS

A. Nature of the Case.

Rio Leche Dairy is a commercial dairy owned by Plaintiff-Appellant Dan Loper, Ph.D., a bovine nutritionist. Dr. Loper entered into a Lease Purchase Agreement with Defendant-Appellee JMAR in which JMAR agreed to build a new, turn-key fully operational dairy which Dan Loper called Rio Leche Dairy. The lease facilities were never completed and those that were delivered were defective. As a result, electrical current escaped and entered the cows' bodies, which adversely impacted the milk production of the cows. After suffering significant milk-loss damages, Dr. Loper brought claims against JMAR, and the electrician JMAR chose to wire the dairy, Snider Electric, for negligence and breach of contract. In support of his claims, Dr. Loper offered the expert testimony of LaVerne Stetson, an undisputedly qualified professional engineer, who opined that Dr. Loper's milk loss damages were caused by stray voltage at the Rio Leche Dairy and were the result of JMAR's defective design of the dairy and its choice of inexperienced contractors to build the dairy.

Prior to trial, Dr. Loper settled with Snider Electric, who had only worked on one dairy prior to Rio Leche, was unfamiliar with the requirements for wiring agricultural buildings, and had never heard of stray voltage. After the settlement with Snider Electric, the trial court made two rulings adverse to Dr. Loper. First,

the lower court granted JMAR's motion for summary judgment, which was based on the novel theory that under the doctrine of circuitry of actions, the settlement with Snider Electric barred Dr. Loper's direct claims against JMAR. In doing so, the trial court apparently determined, in error, that Dr. Loper's settlement with Snider Electric included both *design flaws*, which were the basis for the claims against JMAR, and Snider's flawed workmanship in wiring the dairy.

In its second ruling, the trial court granted JMAR's motion for partial summary judgment and motion in limine to exclude Professor Stetson's expert testimony. Although JMAR did not dispute there was stray voltage at the Rio Leche Dairy and that stray voltage can cause milk loss in dairy cows, the trial court concluded that Professor Stetson's testimony was unreliable because there was no documented direct evidence of stray voltage at the two volt level or greater at a cow contact. The district court also found that without that testimony, Dr. Loper could not prove causation with respect to his stray voltage claims.

In this appeal, Dr. Loper first seeks reversal of the trial court's decision to exclude the expert testimony of Professor Stetson and to grant summary judgment on the ground Dr. Loper could not prove causation. Professor Stetson, a professional engineer, was qualified to give his opinions, which were properly based on his extensive education, knowledge of, and experience with stray voltage. In addition, Professor Stetson's opinions were based on the evidence in the record

and were sufficient for a jury to make a factual determination whether Dr. Loper's milk-damages were caused by stray voltage arising from JMAR's defective design and choice of inexperienced contractors. Finally, Professor Stetson's testimony was reliable and based on techniques and standards that had been tested and were accepted in the industry and nationwide. The trial court erred in finding otherwise and dismissing Dr. Loper's negligence claims.

Dr. Loper also seeks reversal of the trial court's order applying and adopting the doctrine of circuitry of actions and granting JMAR summary judgment based on Dr. Loper's settlement and indemnification of Snider Electric. Dr. Loper asserted negligence claims against JMAR arising from its improper and defective design of the electrical system at Rio Leche Dairy and its failure to properly oversee construction of the dairy and select inexperienced contractors. These claims were separate from the electrician-workmanship claims asserted against Snider Electric, they were not based on the doctrine of respondeat superior, JMAR was not entitled to indemnification for these claims, and they survived the settlement with Snider Electric. The trial court therefore erred in applying the doctrine of circuitry of actions and finding Dr. Loper's settlement with Snider Electric precluded his direct negligence claims against JMAR.

B. Course of Proceedings and Disposition Below.

Dr. Loper originally brought negligence and breach of contract claims against JMAR and JMAR's agent Stanley Jones, and against Kyle Snider and Snider Electric, the electrician subcontractor chosen by JMAR's general contractor.[1] RP 12, ¶¶36-37. Prior to trial, Dr. Loper and Snider Electric settled for policy limits. Following this settlement, JMAR moved for summary judgment asserting all claims against it were extinguished by the settlement based on the doctrine of circuitry of actions. RP 3262. The district court entered summary judgment in favor of JMAR on September 9, 2009, applied the doctrine of circuitry and disposed of the claims asserted against JMAR that were based on both direct and vicarious liability. RP 3343-3344.

Earlier in the proceeding, JMAR had filed a motion for summary judgment on causation claiming Professor Stetson's expert opinions should be excluded and if excluded, causation could not be proved. RP 840-930, 940-941. On December 8, 2008 the trial court denied that motion finding that genuine issues of material fact existed. CD Dates: See attached, 12-8-08, 12:01:15. In April 2009, JMAR was permitted to renew its motion and on October 5, 2009, the trial court granted

[1] The breach of contract claims, which were unrelated to the stray voltage claims, were tried to a jury resulting in a verdict in favor of JMAR. The trial court dismissed the individual claims against Mr. Jones. Neither the contract claims nor the claims against Mr. Jones are the subject of this appeal.

the motion and disposed of the negligence claims based on the court's finding that Professor Stetson's testimony was not reliable and therefore Dr. Loper could not establish JMAR's negligence in designing the dairy and using inexperienced subcontractors was a cause of the stray voltage and milk-loss damages. RP 3081, RP 3411-3412.

Dr. Loper previously applied for interlocutory relief of the September 9, 2009 order on the circuitry doctrine (COA No. 29,852) and appealed the October 5, 2009 amended order (COA No. 30,030). This Court granted the application for interlocutory appeal and on November 2, 2009, the Court entered a Notice of Proposed Summary Disposition proposing summary reversal of the district court's September 9, 2009 order. On December 16, 2009 the two appeals were consolidated and the Court entered a Notice of Proposed Summary Disposition proposing to dismiss the appeals and quash the order granting the application for interlocutory appeal, finding the September 9, 2009 and October 5, 2009 orders were not final appealable orders since claims against JMAR remained.

The case was remanded to the district court and the breach of contract claims against JMAR were tried before a jury. The breach of contract claims did not overlap the stray voltage claims, but related to the failure to supply contracted improvements at the dairy site, such as additional buildings, sheds, and equipment. The jury returned a verdict adverse to Dr. Loper on April 7, 2011. RP 3996. A

final order was entered by the district court on May 3, 2011, and a timely appeal was filed on May 31, 2011. RP 3996, 4006.

II. SUMMARY OF THE FACTS

A. The Problems with the Construction of the Rio Leche Dairy.

Dr. Loper entered into a Lease Purchase Agreement with JMAR pursuant to which JMAR agreed to build a brand new fully operational dairy in Curry County, New Mexico. RP 3-4, ¶11. The lease was to be a turn-key operation designed to accommodate a dairy herd of 2000 cows and to allow them to be cared for, bred, calved, milked, and kept as a commercial herd. RP 3-4, ¶¶11-12.

The dairy facilities were never completed and those that were delivered were defective, but the defects were insidious and latent. RP 4, ¶12, RP 8-9, ¶24. The dairy as constructed and delivered allowed electrical current to escape from its conduits and travel on the pipes and parts of the dairy where it could enter the cows' bodies, adversely impact the cows' natural milk-release stimuli, and cause slow-developing, long term health and production losses. RP 9, ¶25. Concerned about the low milk production Dr. Loper considered and eliminated all other possible causes of the decreased production, including deficiencies in the milking system, nutritional needs of the cows, and milking practices. RP 1269-1275, ¶¶6, 18-23.

The stray electrical current was not constant and occurred intermittently and was transitory, for example, when the weather was wet, or other events impacted slight shifts or wear and tear in wiring, wire coverings or insulation. RP 3193, ¶7.4, RP 1267, 79:22-80:17. These events could be attributable to many factors such as a cow's body shifting or rubbing against a metal rod, causing its below-surface end to contact a buried wire that had inadequate or absent insulation, or causing a short because a ground wire was absent or disconnected. RP 3193, ¶7.4, 3193-3194 ¶9, RP 1267, 80:20-81:4, CD Dates: See Attached, 12-08-08, 10:14:15, 10:15:05.

It was JMAR's job to design, have built, and deliver the dairy. RP 5, ¶¶13-14. The evidence showed that JMAR did not engage an architect or engineer to draft a wiring schematic or plan. RP 3192, ¶7.1. No JMAR representative identified any plans for the electrical system, except for an engineer's drawing for the master switch panel. RP 3192, ¶7.1. There was no general wiring scheme, and there were no specifications for the nature, scope, or extent of the overall wiring. RP 3192, ¶7.1. Only the wall where the main electrical services was located was drawn or engineered. RP 3192, ¶7.1. The stray voltage emanated from failure to adequately ground the systems throughout, and from use of deficient materials, and not from any problem with the master switching boxes. RP 3191-3194.

JMAR hired an inexperienced general contractor to build the dairy, who in turn hired an inexperienced electrician, Kyle Snider of Snider Electric, to wire the dairy. Neither the general contractor nor Snider Electric knew about wiring dairy facilities. RP 3192 ¶7.2. Kyle Snider had been involved in building only one previous dairy facility—a facility built for JMAR. RP 3192, ¶¶7.1-7.2, RP 1284, 10:25-11:2. Snider Electric did not design the facility nor was Kyle Snider given any drawings or plans to do his work. RP 5-6, ¶¶13-14.

Dr. Loper sued JMAR for its direct liability resulting from an inadequate and deficient design of the electrical system (RP 12, ¶36), lack of supervision and hiring subcontractors with little or no experience with dairies (RP 5¶ 14), and for its failure to provide a turn-key operation. RP 6, ¶16, RP 9, ¶25. Dr. Loper's claims against Snider Electric and Kyle Snider arose from Snider's flawed and shoddy workmanship in wiring the dairy. RP 6, ¶14, RP 13, ¶37.3.

B. Professor Stetson's Expert Testimony.

Dr. Loper designated LaVerne Stetson, P.E., Professor Emeritus in the Department of Biological Systems Engineering (Ag Engineering), University of Nebraska Lincoln, as an expert to testify about the proper design and construction of dairy facilities, and that stray voltage at the Rio Leche Dairy caused by deficient wiring resulted in Dr. Loper's milk-loss damages. RP 3192-3194, 3197-3198. Professor Stetson is perhaps the most experienced and most published engineer to

have studied transient, or stray voltage, in farm buildings and its impact on dairy animals. RP 3162-3190.

Professor Stetson worked as an Agricultural Engineer for the United States Department of Agriculture's Agricultural Research Service. The Agricultural Research Service is one of the world's premier scientific organizations. RP 3162. As of the time of his first deposition, Professor Stetson had authored or co-authored 243 technical publications and was the principal author of the "Wiring Handbook for Rural Facilities" published by the Midwest Plan Service (3rd ed. 2006). RP 3171-3190, 3191 ¶ 2.[2] Professor Stetson was on the committee that drafted the first edition of the Handbook, and proposed most of the changes made to the second edition before completing a major revision of the third edition. RP 3168.

Professor Stetson has also made significant contributions to various sections of the National Electrical Code (NEC) ANSI/NFPA 70, including Article 455 "Phase Converters," Article 547 "Agricultural Buildings," and Article 675 "Electrically Driven or Controlled Irrigation Machines." RP 3167. Among his

[2] The Midwest Plan Service is a university-based publishing cooperative dedicated to publishing and disseminating research-based, peer-reviewed, practical, and affordable publications that support the outreach missions of the twelve North Central Region land-grant universities plus the U.S. Department of Agriculture. *See generally* www.mwps.org.

many awards, he was awarded a Lifetime Achievement Award and selected as a Top Engineer in 2006 by the International Biographical Center in Cambridge, England and selected as one of the Great Minds of the 21st Century by the American Biographical Institute in Raleigh, North Carolina. RP 3164-3166.

Professor Stetson testified that there were electrical design deficiencies at Rio Leche Dairy, that stray voltage existed at the dairy, and that the probable source of the stray voltage was its original construction. RP 3193-3194, ¶8-9, 3198, ¶7. Professor Stetson also testified that stray voltage can wax and wane and if a dairy is not properly grounded as was the case with Rio Leche Dairy, it can be permitted to traverse carriers of electricity, such as water and steel pipes and milking equipment. RP 3193, ¶¶7.3,7.4. When cows contact these areas, their bodies are shocked damaging the cows and causing a decline in milk production. RP 1270, ¶¶8, 9, RP 3193, ¶7.6. Professor Stetson testified the amount of stray voltage required to harm dairy cows is minimal, as little as .5 volts is enough. RP 3197, ¶¶2-4, 7.

In support of his opinion that JMAR under-designed and under-specified the dairy facility with the result that it contained latent design defects, which caused stray voltage and milk-loss in the cows, Professor Stetson testified that:

1. As the designer of the facility, JMAR was responsible for the problems that developed because the dairy was built with "no plans, drawings, or specifications... to govern the construction." RP 3192, ¶7.1.

2. JMAR hired inexperienced persons to build the dairy. RP 3192, ¶ 7.2.

3. Professor Stetson was "reasonably certain" that "the manner in which the dairy parlor was constructed [caused] its development of stray voltage over time." Professor Stetson further opined that this was "inevitable and stray voltage actually did develop within the facility because large amounts of electrical current are used in mechanical systems as complex as a dairy system, and to use it without injury to animals requires grounding in a reasonable fashion that complies with the constructions of MWPS-28, but this facility was not so designed." RP 3193-3194, ¶9, RP 3198, ¶7.

4. Stray voltage emanated from the original installation of electric parts and components at Rio Leche Dairy, and the level of stray voltage was sufficient to adversely affect the production of milk of the cows in the herd. RP 3198, ¶¶7.1, 7.2.

Peer-reviewed literature supported Professor Stetson's opinion that voltage levels of .5 volts adversely impact dairy cows. RP 3197-3198, ¶¶3-6. Direct

evidence from Precision Electric supported Professor Stetson's opinions that there was stray voltage at the Rio Leche Dairy sufficient to cause milk-loss RP 3143-3144, ¶¶3,4, RP 3153, 60:25-61:3, RP 3155, 67:12-68:8, CD Dates: See Attached, 12-8-08, 10:14:15, 10:15:05. Donald DeGray, an electrician with Precision Electric, found mis-wiring at the dairy in November 2005 and subsequently corrected the problem. RP 3160, 73:9-74:23. Mr. DeGray also testified to finding stray voltage at various locations of the dairy in excess of 2 volts. RP 3116, 66:10-68:11. Professor Stetson reviewed data obtained and documented in connection with Mr. DeGray's work, which showed a reading of .52 volts on the floor of the Rio Leche Dairy, at an area where the cows would make contact during the milking process. RP 1266, 42:10-44:15, RP 930. Professor Stetson also reviewed the files of Precision Electric; the deposition of Robert Seeley a Precision Electric electrician who performed testing at the dairy; Precision Electric inspection summaries; Snider Electric's answers to interrogatories and responses to requests for admission; the Affidavit of Vern Fry, who testified she had been shocked in the milking barn; and the deposition of Brandon Reid, the general contractor hired by JMAR. RP 3191-92, ¶4.

While Professor Stetson did not ***base*** his opinions on Mr. DeGray's oral testimony, his opinions were buttressed by Mr. DeGray's testimony that he had detected voltages in excess of 2 volts at various points in the dairy although those

voltages had not been memorialized in writing. RP 3143-44, ¶¶2-4, RP 3153, 60:25-61:3,61:6-16, RP 3155, 67:12-68:8. Mr. DeGray had found voltage measuring 115 volts on a fan located at the dairy, voltage measuring 10 volts between the neutral and transformer, and several instances of voltage greater than 2 volts at other locations in the dairy. RP 3116, 66:10-68:11. In Professor Stetson's opinion, Mr. DeGray's testimony indicated there was a stray voltage problem at the Rio Leche Dairy. RP 3157, 52:1-22.

In addition and in reaching his opinions, Professor Stetson considered evidence that the cows' milk production improved dramatically after the stray voltage problem was corrected, including documentation describing the response and improvement of the cows at the dairy after the stray voltage source was removed. RP 3192, ¶5. Professor Stetson relied, too, on evidence that other causes of decreased milk production had been ruled out. RP 3192, ¶4.

Professor Stetson also considered Kyle Snider's admissions that Snider Electric had no prior experience with wiring dairy facilities, noting that the electrical subcontractor had not heard of stray voltage and did not know what it was at the time the dairy was constructed. RP 3192, ¶7.2. Professor Stetson also had available to him and reviewed the reports of Sidney Beale, an engineer, who had inspected the dairy, found fault with JMAR's design, and suggested changes to

improve the milking system and protect the cows at the dairy. RP 3192-3192, ¶¶4, 4.1-4.9.[3]

Professor Stetson's opinion was supported by the testimony and opinions of expert witness, Dr. Robert Corbett, a licensed veterinarian. RP 1272, ¶¶9,17.[4] Dr. Corbett practices in the area of production medicine and is consulted by dairymen across the United States. RP 1271, ¶14. Dr. Corbett testified that stray voltage at low levels intermittently, inhibit the important "milk letdown impulse" that causes or allows a dairy cow to give up her milk. RP 1270, ¶¶8-9. Without a satisfactory milk impulse response due to interference from stray electrical current or "stray voltage," the cow milks incompletely and is vulnerable to mastitis and other illnesses. RP 1270, ¶8. Dr. Corbett is a veterinarian practicing in the area of production medicine. RP 1271, ¶ 14. Dr. Corbett performed a differential diagnosis and concluded the diminished milk production and financial losses suffered by Dr. Loper were caused by undetected stray voltage at the dairy. RP 1274, ¶ 24.

JMAR argued that Professor Stetson's opinions about the existence and effect of stray voltage should be excluded because they were not based on reliable

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[3] Mr. Beale was hired by Dr. Loper's prior counsel but subsequently passed away.

[4] JMAR moved in limine to exclude the opinions of Dr. Corbett arguing Dr. Corbett's methodology was flawed. RP 2408. The motion was denied in its entirety by the trial court. RP 3053.

evidence in the record. RP 3081. Citing peer-reviewed literature, JMAR argued that in order for Professor Stetson's opinions to be reliable, a minimum of 2 volts had to be detected at Rio Leche Dairy where the cows made contact with a conductor of current. RP 3081. JMAR argued that even if Mr. DeGray's testimony were considered, it was inadequate evidence of causation because it did not provide evidence of stray voltage at or above 2 volts at a cow contact point. RP 3081. JMAR also objected to Professor Stetson's methodology as unreliable because it was based on Precision Electric's electrical survey records and testimony of its employees that mis-wiring was discovered and corrected. RP 3081. Although the trial court accepted Mr. DeGray's testimony that there was stray voltage greater than 2 volts at the Rio Leche Dairy, the trial court accepted JMAR's argument that there had to be evidence of voltages measuring in excess of 2 volts at a cow contact point to support Professor Stetson's opinion, and excluded the expert testimony. RP 3411.

C. Dr. Loper's Settlement With Snider Electric.

After Dr. Loper settled with Snider Electric, JMAR moved for summary judgment of Loper's claims against JMAR on the basis of the doctrine of circuitry of actions. The settlement with Snider was confidential and JMAR was not privy to the language and terms of the settlement agreement. The district court

subsequently required that the settlement agreement be disclosed and reviewed the agreement *in camera*.[5] The settlement agreement provides, in pertinent part that:

> Loper agrees to defend, indemnify, and hold Snider and his insurer harmless from and against any claims, or judgment of liability for indemnity or contribution which arises by, through, or under JMAR or Jones... which arises in any way from the circumstances and claims set forth in the lawsuit.

RP 3321-22.

The settlement agreement continues:

> Loper agrees to reduce any judgment which is obtained against JMAR and Jones to whatever extent is necessary to extinguish any claim which JMAR or Jones would otherwise have against Snider for indemnity or contribution. It is the intent of the parties that neither Snider nor his insurer have any liability to any person or entity as a result of the lawsuit beyond the payment of $1 million described in ¶ 1 of this agreement.

RP 3322, ¶ 2.3.

The district court, after reviewing the settlement agreement, concluded that both the direct and vicarious liability claims asserted against JMAR were precluded under the doctrine of circuitry of actions because Dr. Loper had settled with and agreed to indemnify Snider Electric. RP 3343.

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[5] While the settlement agreement itself is not part of the record, relevant portions of the agreement were cited in the briefing by the parties.

III. ARGUMENT

A. Standard of Review.

"Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Self v. United Parcel Serv., Inc.*, 1998 NMSC 046, ¶ 6, 126 N.M. 396, 970 P.2d 582. Questions of whether there are no genuine issues of material fact and whether the movant is entitled to judgment as a matter of law are legal questions reviewed *de novo*. *Id.* In doing so, the appellate tribunal is "mindful that summary judgment is a drastic remedial tool which demands the exercise of caution in its application...." *Woodhull v. Meinel*, 2009 NMCA 015, ¶ 7, 145 N.M. 533, 202 P.3d 126 (citation to quoted authority omitted). The record must be viewed in the light most favorable to support a trial on the merits. *Id.* Only when reasonable minds cannot differ on an issue of material fact is summary judgment proper. *Id.* In New Mexico, summary judgment is viewed with disfavor because a trial on the merits is preferred. *Romero v. Phillip Morris, Inc.*, 2010 NMSC 035, ¶ 8, 148 N.M. 713, 242 P.3d 280.

Rulings concerning admission or exclusion of expert testimony are reviewed under an abuse of discretion standard, which requires an appellate court to find the district court's decision "is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Zia Trust, Inc. v. Aragon,* 2011 NMCA

076, ¶ 14, ___ N.M. ___, 258 P.3d 1146, cert. denied, 2011 N.M. Lexis 270 (June 8, 2011) (citation to quoted authority omitted). "An abuse of discretion standard of review, however, is not tantamount to rubber-stamping the trial judge's decision. It should not prevent an appellate court from conducting a meaningful analysis of the admission [of] scientific testimony to ensure that the trial judge's decision was in accordance with the Rules of Evidence and the evidence in the case." *State v. Alberico*, 116 N.M. 156, 170, 861 P.2d 192, 206 (1993).

B. The Trial Court Erred When It Excluded the Testimony of Professor Stetson and Found Dr. Loper Could Not Establish Causation.

Dr. Loper identified Professor Stetson to explain stray voltage to a jury, its transient nature, how it manifests itself in an agricultural dairy setting, how it is corrected, its causes, whether it existed at Rio Leche Dairy and if so whether it affected the cows. Professor Stetson, a highly educated professional engineer with vast experience in stray voltage, proffered opinions based on relevant evidence in the record and techniques and standards accepted and used in the industry and nationwide. As such, his opinions were relevant and reliable and would have been of assistance to the jury in considering the claims and defenses of the parties. The jury therefore should have been allowed to give the testimony the weight it deemed appropriate in deciding whether stray voltage at the Rio Leche Dairy caused the decrease in milk production. Instead, the trial court went beyond its gatekeeping

role and improperly weighed the evidence. Its decision excluding Professor Stetson's testimony was an abuse of discretion and should be reversed.

"If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise." Rule 11-702 NMRA. "The purpose of Rule 11-702 is to assist the trier of fact to understand the evidence and to determine the issues of fact." *Lee v. Martinez*, 2004 NMSC 027, ¶ 15, 136 N.M. 166, 96 P.3d 291 (quotation marks and quoted authority omitted).

It is well-established that expert testimony is admissible where: (1) the expert is qualified to give an opinion in the relevant field; (2) the testimony assists the trier of fact, that is, it is relevant or sufficiently tied to the facts of the case such that it will aid the jury in deciding factual disputes; and (3) the expert testifies to scientific, technical or other specialized knowledge in which he or she is qualified. *Alberico*, 116 N.M. at 166, 861 P.2d at 202; *State v. Anderson*, 118 N.M. 284, 291, 881 P.2d 29, 36 (1994); *State v. Downey*, 2008 NMSC 061, ¶ 30, 145 N.M. 232, 195 P.3d 1244. Any doubt whether scientific evidence should be admitted is resolved in favor of admission, rather than exclusion. *State v. Fry*, 2006 NMSC 001, ¶ 55, 138 N.M. 700, 126 P.3d 516.

JMAR did not attack Professor Stetson's credentials and qualifications to offer the opinions he expressed in this case. It is undisputed that Professor Stetson was well-qualified in the field of stray voltage at dairies given his vast education, knowledge and experience in that area. RP 840, RP 3081. The dispute focused on the third factor, whether Professor Stetson's opinions are reliable and admissible as scientific knowledge. Under that prong, "the proper inquiry under Rule 702 is whether the subject of the expert's testimony is grounded in valid, objective science," that is 'scientific, technical or other specialized knowledge,' and whether the underlying scientific method is reliable enough to prove what it purports to prove, that is probative, so that it will assist the trier of fact." *Alberico*, 116 N.M. at 168, 861 P.2d at 204.

In determining if scientific testimony is reliable, a court considers several non-exclusive factors, which should serve as guidelines rather than the sine qua non for admissibility: (1) whether a theory or technique can be tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known potential rate of error using the technique and the standards controlling the technique's operation; (4) whether the technique has been generally accepted in the scientific field; and (5) "whether 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." *Alberico*, 116 N.M. at 167-68, 861 P.2d at 203-04; *Anderson*, 118 N.M. at 291, 881 P.2d at 36.

In this case, there was no dispute that stray voltage can be tested and detected, there was no dispute there was stray voltage at the Rio Leche Dairy, and there was no dispute that stray voltage can adversely impact a cow's milk production. Instead, the dispute centered on what level of stray voltage is needed to cause harm to cows and whether the voltage at the Rio Leche Dairy was sufficient to affect the cows and to cause Dr. Loper's milk-losses.

Professor Stetson's opinion that stray voltage at the Rio Leche Dairy caused by deficient wiring resulted in Dr. Loper's milk-loss damages was properly based on his education, knowledge and experience, and appropriate engineering methodology. RP 3147-3149, RP 3157, 51:3-54:3, RP 3191-3194, RP 3196, 78:2-81:17, RP 3197-3198. He clearly identified specifically what agricultural engineers like himself rely upon in forming opinions about stray voltage and relied on peer-reviewed literature to support his testimony that voltage levels of .5 volts adversely impact cows. RP 3191-3194, RP 3197-3198. As an engineer his opinions were properly expressed to an engineering probability and not scientific certainty. RP 3198, ¶7.

Professor Stetson's opinions, including his opinion about the presence of stray voltage and its cause at Rio Leche Dairy, were also properly based on the

factual record in this case. RP 3143-3146, 3191-3194. Professor Stetson properly relied upon the data obtained and documented by Precision Electric during its investigation of the electrical system at the dairy. RP 3196, 78:2-81:17. *See Bustos v. Hyundai Motor Co.,* 2010 NMCA 90, ¶¶ 24-25, ___ N.M. ___, 243 P.3d 440, cert. granted, 2010 N.M. Lexis 620, 243 P.3d 1147 (Oct. 18, 2010) (trial court properly admitted expert testimony as reliable that was based in part on testing performed by the manufacturer of vehicle in rollover testing despite fact expert did not personally perform the test or calculate the actual forces at work in the crash, where expert applied specialized knowledge gained through education and experience). Professor Stetson also reviewed the files of Precision Electric; the deposition of Robert Seeley, who performed the testing for Precision Electric; information summaries, answers to interrogatories and responses to requests for admission; and the reports of Sidney Beale, an engineer now deceased, who had suggested possible changes to the milking system at the dairy. RP 3191-3192, ¶4. Professor Stetson testified that the data upon which he based his opinions was reliable. RP 3157, 53:16-54:3.

Professor Stetson's opinions were further bolstered by Mr. DeGray's testimony that he had found voltage measuring 115 volts on a fan located at the dairy, voltage measuring 10 volts between the neutral and transformer, and several instances of voltage greater than 2 volts at other locations in the dairy. RP 3143-

44, ¶¶2-4, RP 3153, 60:25-61:3, 61:6-16, RP 3155, 6712-68:2. In fact, the trial court accepted Mr. DeGray's testimony that there were greater than 2 volts at various locations at the dairy. CD Dates: See Attached, 12-8-08, 12:01:45.

In addition, Professor Stetson considered evidence that the cows' milk production improved dramatically after the stray voltage problem was corrected, including documentation describing the response and improvement of the cows at the dairy after the stray voltage source was removed. RP 3192, ¶5. Professor Stetson relied on evidence that other causes of decreased milk production had been ruled out and on the testimony of one of the milkers at Rio Leche Dairy who had been shocked in the dairy barn. RP 3192, ¶¶4.8, 5. Professor Stetson considered that Snider Electric had no prior experience with wiring dairy facilities, noting that the electrical subcontractor had not heard of stray voltage and did not know what it was at the time it constructed the dairy. RP 1224, ¶5, RP 1284, 10:25-11:2, 31:16-32:5, RP 3192, ¶7.2.

JMAR accepted Professor Stetson's expertise and testimony about what he constitutes reliable scientific evidence. CD Dates: See Attached, 7-20-09, 1:55:07. JMAR accepts Professor Stetson's testimony that if he had documented measurements of 2 volts at cow contact points he could say to a scientific certainty that the levels of stray voltage were sufficient to adversely affect the dairy cows and their production, but then rejects Professor Stetson's testimony, wherein he

applied the same expertise, that documented evidence of .5 volt together with the other factual evidence in the record is enough for him to express opinions to an engineering probability that stray voltage existed at levels sufficient to adversely affect the cows and their milk production. RP 3197-3198.

The trial court concluded that despite the factual evidence in the record and the testimony of Professor Stetson that he has reliable data upon which he could base his engineering opinions, it was insufficient for Professor Stetson to express a reasonably accurate conclusion as distinguished from mere conjecture, and that only if Dr. Loper could produce a measurement of 2 volts at a cow contact point could Professor Stetson's opinions be reliable. RP 3081, RP 3313. While a measurement of 2 volts at a cow contact point would have been conclusive that stray voltage was present in levels sufficient to adversely affect the cows, it is not the ***only*** evidence that supports such a conclusion. Professor Stetson, a well-qualified agricultural engineer, relied on evidence of a kind generally relied upon by experts like himself and generally accepted by scientists engaged in his profession. RP 3198, ¶7. His methodology was based on well-recognized engineering principles and was capable of supporting his opinions based upon a reasonable probability rather than conjecture. In rejecting the evidence that supported Professor Stetson's opinion that stray voltage existed at the dairy, and

was adversely affecting the dairy cows, the trial court exceeded its gatekeeping function, it weighed the evidence, and it performed the function of factfinder.

"Given the capabilities of jurors and the liberal thrust of the rules of evidence," any doubt regarding the admissibility of Professor Stetson's opinions should have been resolved by the trial court in favor of admission, rather than exclusion of his testimony. *Lee v. Martinez*, 2004 NMSC 027, ¶ 16. The appropriate remedy was not exclusion of Professor Stetson's testimony, but cross-examination, presentation of rebuttal evidence, and argument to the factfinder. *Id.* ¶ 48 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 596 (1993)).

Adding to this error, the trial court apparently also adopted JMAR's argument regarding causation, ignored existing New Mexico case law and applied a causation standard that has not been adopted in New Mexico. RP 3313-3314. Proximate cause is generally a question of fact for the jury, and is concerned with whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred. *Calkins v. Cox Estates,* 110 N.M. 59, 61, 792 P.2d 36, 38 (1990); *Herrera v Quality Pontiac*, 2003 NMSC 018, ¶ 8, 134 N.M. 43, 73 P.3d 181. Causation is decided as a matter of law only if no facts are presented that could allow a reasonable jury to find proximate cause. *Calkins*, 110 N.M. at 65 n.6, 792 P.2d at 42 n.6. The issue for the jury is one of causal link,

not the potential legal issue of foreseeability of linkage. *See Herrera*, 2003 NMSC 018, ¶¶ 6-8.

In support of summary judgment, JMAR advanced an argument that Dr. Loper had to prove general and specific causation in order to prove his case, relying heavily on *Easum v. Miller*, 92 P.3d 794 (Wyo. 2004). *Easum* was a stray voltage case involving an electrical injury to a human where the court required and found that the expert had established both general and specific causation of reflex sympathetic disorder despite the lack of medical literature to support this opinion. *Id.* at 803-04.

New Mexico courts do not impose a similar burden of proof on causation and do not divide causation into subcategories of general and specific causation in general negligence cases. Instead, New Mexico has discussed the general and specific causation only with respect to toxic torts:

> "Scientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to such quantities, are minimal facts necessary to sustain the plaintiffs' burden in a toxic tort case." *Allen v. Pa. Eng. Corp.*, 102 F.3d 194, 199 (5th Cir. 1996). Therefore, to establish cause in a toxic tort case, the evidence must show both "general causation" and "specific causation." *See Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 881 (10th Cir. 2005) (discussing causation in toxic tort cases in terms of general causation and specific causation). "General causation is whether a substance is capable of causing a particular injury or condition in the general population and specific causation is whether a substance caused a particular individual's injury." *Id.* at 881; *see also Federal Judicial Center, Reference Manual on Scientific Evidence, Reference Guide on Medical Testimony,* 481, 483 (2d. ed. 2000) (stating that "[g]eneral causation is established by

> demonstrating (usually by reference to a scientific publication) that exposure to the substance in question causes (or is capable of causing) disease" and that "[s]pecific, or individual, causation is established by demonstrating that a given exposure is the cause of an individual's disease").

Andrews v. U.S. Steel Corp., 2011 NMCA 032, ¶ 9, 149 N.M. 461, 250 P.3d 887.

Thus, the general/specific causation approach is only used with respect to toxic tort cases. The trial court therefore erred in imposing that additional burden on Dr. Loper. Nevertheless, even if that approach to causation were applicable here, the distinction does not defeat Dr. Loper's claims given Professor Stetson's testimony that: (1) electrical current in low amounts harms dairy cows; (2) such amounts were present at the Rio Leche Dairy; and (3) the cows at the dairy were harmed by stray voltage. RP 3197-3198, ¶¶4, 7, 7.1-7.2.

Moreover, in granting the motion for summary judgment on causation, the trial court ignored the testimony and opinions of veterinarian Dr. Robert Corbett offered in opposition to JMAR's motion. RP 1223-1224, ¶¶1, 2, 7-10, RP 1269-1275. Dr. Corbett properly performed a differential diagnosis to conclude the cause of Loper's diminished milk production and attending financial loss was the presence of undetected stray voltage in the dairy facility. RP 1274, ¶24. *See Easum*, 92 P.3d at 801-03 (allowing testimony of differential diagnosis of physician that plaintiff's condition was caused by receiving significant number of electrical shocks over sustained period of time although there were no

epidemiological studies, peer-reviewed articles, animal studies or laboratory data to support physician's opinion, finding the methodology was reliable); *Parkhill v. Alderman-Cave Milling & Grain Co. of N.M.*, 2010 NMCA 110, ¶¶ 23-31,___ N.M. ___, 245 P.3d 585 (recognizing use of differential diagnosis can be legitimate means of proving external cause of disease, but excluding testimony of treating physician who was not qualified, who had not performed adequate research or analysis, and who based his opinion on assumption that had no scientific basis).

Dr. Corbett's methodology was sound, and apart from the testimony and opinions of Professor Stetson, created genuine issues of fact upon which a jury could conclude Dr. Loper's damages were caused by stray voltage which was a result of the design flaws created by JMAR and its selection of inexperienced contractors.

Professor Stetson's opinions were properly based on his vast education, knowledge, and experience, on peer-reviewed literature, and on the factual record. Professor Stetson testified that his opinions were formed with sufficient data of a kind generally relied upon by an expert like him. RP 3198, ¶7, RP3157, 53:16-54:3. His methodology supported his opinions and was based on reasonable probability, not conjecture. The trial court erred when it ruled that Professor Stetson's testimony was not reliable, and erred when it found, as a matter of law,

that JMAR's negligence in designing the Rio Leche Dairy was not a cause of Dr. Loper's milk-loss damages, particularly given Dr. Corbett's supporting testimony and opinions.

Professor Stetson's testimony and opinions demonstrate that issues of stray voltage are complicated. JMAR focused on just one piece of evidence that would support a scientific conclusion that stray voltage existed at the dairy sufficient to harm the dairy cows and adversely affect their milk production. On the other hand, Professor Stetson considered all of the factual evidence as the basis for his engineering opinions and conclusions in this case. JMAR admitted Professor Stetson's testimony about what is scientifically reliable should be accepted. CD Dates: See Attached, 7-20-09, 1:55:05. Professor Stetson's testimony that he had reliable data to support his opinions to an engineering probability should likewise be accepted. RP 3157, 53:8-54:3, RP 3197-3198. This testimony of Professor Stetson satisfied the gatekeeping function of the trial court and his opinions and testimony should have been allowed. The lower court abused its discretion and its decision should be reversed.

C. The Trial Court Erred in Adopting and Applying the Doctrine of Circuitry of Actions and Granting Summary Judgment in Favor of JMAR on that Basis.

The district court erred in granting JMAR's motion for summary judgment based on Dr. Loper's settlement with Snider Electric and the doctrine of circuitry

of actions. No New Mexico appellate court has applied the circuitry doctrine in any circumstance and certainly not under the circumstances presented in this case, where Dr. Loper asserted direct liability claims against JMAR that were separate from the workmanship claims asserted against the electrician subcontractor. Dr. Loper's milk-loss damages stemmed from defects in the electrical system's design, not just Snider Electric's artisanship while building out JMAR's design. The electrical subcontractor, doing as told, was saddled with JMAR's insufficient design and inadequate instructions. Dr. Loper could release and indemnify Snider Electric while reserving the related, but distinct defective design claims against JMAR. The lower court's decision holding otherwise was in error and should be reversed.

The doctrine of circuitry of actions is a doctrine of insurance law adopted in states such as Texas and relates to the distinction between a release and a covenant not to sue, or a release with reservation of claims. The effect of the doctrine of circuitry generally is to extinguish a plaintiff's claim when, as a result of indemnification obligations or settlement agreements between the parties, the plaintiff would end up indemnifying another party for its own claim. *Refinery Holding Co., LP v. TRMI Holdings, Inc.,*, 302 F.3d 343, 349-50 (5th Cir. 2000) (recognizing that the doctrine of circuitry was superseded by Texas' adoption of the comparative fault doctrine and a non-settling defendant would no longer have a

right to contribution, but instead a settlement with one tortfeasor would reduce the liability of the non-settling tortfeasor to the extent of the percentage of causation allocated to the settling tortfeasor).

The doctrine of circuitry has not been adopted in New Mexico. In fact, only one case was found in which the circuitry of actions doctrine is mentioned in New Mexico appellate jurisprudence. In *Trujillo v. CS Cattle Co.*, 109 N.M. 705, 710, 790 P.2d 502, 507 (1990), the court referred to the doctrine in connection with its holding that a water company was estopped by the terms of a deed from asserting rights contrary to the deed. Thus, the court did not decide the case based on the circuitry of actions doctrine.

The circuitry doctrine is used occasionally, but rarely, outside New Mexico in cases involving insurance issues and releases and special circumstances not present here. *See, e.g., Refinery Holding, supra*; *Moore v. Southwestern Electric Power Co.,* 737 F2d. 496, 501 (5th Cir. 1984) (doctrine applied where power company statutorily entitled to indemnification from employer and employer was contractually entitled to indemnification from employee where employee was killed on the job); *Ward v. IHC Health Servs.,* 173 P.3d 186, 191-92 (Utah Ct. App. 2007) (holding doctrine of circuitry applied in medical malpractice action where hospital was contractually entitled to indemnification for claims arising out of the operation at issue).

Furthermore, the doctrine of circuitry of actions does not release a principal if the agent is released. A release of an agent releases a principal only where the principal's liability arises by virtue of the doctrine of respondeat superior, and not through any independent negligence of the agent. *Valdex v R-Way, LLC,* 2010 NMCA 068, ¶ 1, 148 N.M. 477, 237 P.3d 1289. Thus, under New Mexico law, only the claims against JMAR based on vicarious liability were affected by the settlement with Snider Electric.

This is aptly demonstrated in *Harrison v. Lucero,* 86 N.M. 581, 525 P.2d 941 (Ct. App. 1974). There, the plaintiff was injured by the defendant's agent and then settled with and released the agent. The defendant, as principal, raised the agent's release as a defense to vicarious liability. This court dispensed with the issue as follows:

> Since under * * * [the doctrine of respondeat superior] "* * * [t]he liability of the master to a third person for injuries by a servant in the course of his employment and within the scope of his authority, is derivative and secondary, while that of the servant is primary, **and absent any delict of the master other than through the servant,** exoneration of the servant removes the foundation upon which to impute negligence to the master."

Id. at 584, 525 P.2d at 944 (emphasis added; internal quotation marks and quoted authority omitted); *see also Kinetics, Inc. v. El Paso Prods. Co.*, 99 N.M. 22, 27, 653 P.2d 522, 527 (Ct. App. 1982) (following *Harrison*).

Valdex, *Kinetics* and *Harrison* make it clear a principal is released only where the agent is released for a claim involving the agent's fault and the principal's vicarious fault. Where the injured party has claims for which the principal has direct and primary tort liability, and not just vicarious liability, then the injured party is free to seek a recovery on those direct claims against the principal.

Dr. Loper sued JMAR on direct claims for negligent design, negligent misrepresentation, and negligent hiring and supervision. Dr. Loper sued, settled, and then released Snider Electric on workmanship claims that were based solely on Snider's shoddy work in wiring the Rio Leche Dairy. There was no evidence Snider Electric was JMAR's agent; to the contrary, the uncontroverted evidence was that it was an independent subcontractor, hired by the general contractor, which in turn, was hired by JMAR. RP 3298, ¶3c. Snider Electric was not responsible for the design of the dairy, it was not responsible for JMAR's misrepresentations to Dr. Loper, and it was not responsible for the selection, hiring, and supervision of the contractors and subcontractors working on the Rio Leche Dairy. RP 3298, ¶3a-e. Snider Electric was only involved in wiring the dairy pursuant to the design for which JMAR is solely liable.

The district court erred in holding that Dr. Loper's settlement with Snider Electric and the doctrine of circuitry of actions precluded Dr. Loper from pursuing

his claims against JMAR. Dr. Loper asserted direct liability claims against JMAR that were separate from the workmanship claims asserted against and settled with Snider Electric. The lower court's decision should be reversed.

IV. CONCLUSION

In this appeal, Dr. Loper seeks reversal of the trial court's order excluding the expert testimony of Professor Stetson and granting summary judgment in favor of JMAR based on failure to prove causation. Dr. Loper also seeks reversal of the trial court's decision that adopted and applied the doctrine of circuitry of actions and granted JMAR summary judgment based on Dr. Loper's settlement and indemnification of Snider Electric. Dr. Loper respectfully requests that this case be remanded for a jury trial on merits of Dr. Loper's negligence-based claims against JMAR.

V. REQUEST FOR ORAL ARGUMENT

Dr. Loper requests oral argument and submits it would be helpful to the Court because the factual issues underlying the admissibility of Professor Stetson's expert testimony are technical and the legal issue of circuitry of actions is novel and the trial court's application of that doctrine is unprecedented. *See* Rule 12-214(B)(1) NMRA.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above Appellant's Brief was sent by ☒ First-class U.S. mail; ☐ Facsimile; ☐ E-mail on October 21, 2011, to:

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