IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CONNIE LEA GIBSON ANDREWS,
Individually and as PERSONAL
REPRESENTATIVE OF TOMMY
LINDELL ANDREWS, DECEASED,
Plaintiff-Appellant;

COURT OF APPEALS OF NEW MEXICO
FILED
SEP 16 2009

vs.

No. 29,136 consolidated with
No. 29, 336

UNITED STATES STEEL CORPORATION,
CHEVRON U.S.A. INC.
CONOCOPHILLIPS COMPANY, and
RADIATOR SPECIALTY COMPANY,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT
FIFTH JUDICIAL DISTRICT, COUNTY OF CHAVES
HON. GARY L. CLINGMAN, PRESIDING

ANSWER BRIEF
UNITED STATES STEEL AND RADIATOR SPECIALITY COMPANY

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STATEMENT OF COMPLIANCE

By his signature at the end of this document, Rebecca Nichols Johnson states that, based on the word-count feature of Microsoft Office Word 2003, the body of this brief contains 1,374 words and, therefore, complies with the word limitation provision in Rule 12-213(F)(3) NMRA.

REFERENCES TO THE TRANSCRIPT

With leave of Court, the parties have submitted written transcripts of the two significant hearings held therein. Citations to the transcript of the *Daubert/Alberico* hearing held on August 18, 2008, will be with "Tr." and the page number of that written transcript. (*e.g.* "Tr. 18"). Citations to the written transcript of the hearing on the Bill of Costs held on January 5, 2009, will be with "Tr. 1/5/09" with the page number of that transcript. (*e.g.* "Tr. 1/5/09, p. 17").

TABLE OF AUTHORITIES

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Kirk Co. v. Ashcraft,
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Rule 11-803(F) NMRA (2009)..5, 6

Defendants-Appellees, United States Steel Corporation ("USS") and Radiator Specialty Company ("RSC"), **incorporate by reference the Answer Brief filed by Chevron USA Inc. ("Chevron") and ConocoPhillips Company ("ConocoPhillips").** In addition, USS and RSC make the following arguments, which are unique to them, as the Defendants involved in the production of Liquid Wrench, one of the products at issue in this case.

ARGUMENT

I. Facts Pertinent To The Manufacture Of Liquid Wrench

Appellant alleges that gasoline and Liquid Wrench contain benzene, and that the benzene in those products caused Mr. Andrews' death in January 2005. **BIC 2-3.** Appellant alleges that Mr. Andrews used gasoline purchased from Defendants ConocoPhillips and Chevron for solvent purposes and used Liquid Wrench, a penetrant product, manufactured by RSC, while working as a farmer and rancher from 1947 to 1971. Id. Benzene is naturally present in both crude oil (from which gasoline is derived) and coal (from which raffinate is derived). Beginning in 1959, records indicate that USS sold raffinate, described below, to RSC. **RP 1666.** RSC

manufactured and sold two formulations of Liquid Wrench penetrating oil[1] **RP 1665-1666.** After 1960, one formulation of Liquid Wrench penetrating oil used an ingredient known as "raffinate" which contained a percentage of benzene ("raffinated Liquid Wrench") and the other formulation did not contain raffinate ("deodorized Liquid Wrench"). **RP 1665-1666.**

II. Dr. Nicas' Only Evidence That Mr. Andrews Used Liquid Wrench With Benzene Is The Sham Affidavit Of Terry Andrews

In his Report, which attempted to quantify Mr. Andrews' alleged exposure levels to benzene, Dr. Nicas, Appellant's industrial hygienist, **assumed** that Mr. Andrews only used the raffinated version of Liquid Wrench. However, Dr. Nicas admitted in his deposition that he did not know which version of Liquid Wrench ("raffinated" or "deodorized") Mr. Andrews used prior to making his Report. **RP 2615.** Indeed, once Appellees filed their motion for summary judgment, and pointed this out, Terry Andrews, the decedent's son, and an interested party, prepared an Affidavit dated July 22, 2008 ("Affidavit No. 2"), which states that the Liquid Wrench can did not have the word "Deodorized" on it. **RP 4089**. Affidavit No. 2 was followed by a separate affidavit of Dr. Nicas, belatedly indicating that he is now relying on the

[1] The exact formula, ingredients or composition of either formula prior to 1960 was unknown, until fairly recently, when some additional documents were discovered by RSC, as is discussed in Footnote 3. Prior to 1960, neither formula contained raffinate.

Affidavit of Terry Andrews to ascertain the type of Liquid Wrench used **(RP 4068)**.[2] In any event, nothing in Terry Andrews' Affidavit No. 2 supports that the Liquid Wrench used by Mr. Andrews prior to 1960 contained raffinate or benzene. Furthermore, Terry Andrews' Affidavit No. 2 contradicts his earlier deposition testimony that the Liquid Wrench can he saw Mr. Andrews use did not contain a skull and crossbones (**RP 2707**). After 1964, Liquid Wrench labeled without the skull and crossbones would not have contained raffinate at all. **RP 1666-1667**.

These Defendants-Appellees adopt by reference the authorities dealing with the sham affidavit doctrine set forth in the Answer Brief filed by Defendants-Appellees Chevron and ConocoPhillips, which authorities support that the Court did not abuse its discretion in finding that Terry Andrews' Affidavit No. 2 should be disregarded under the sham affidavit doctrine. Without this evidence, there is no underlying data to support Dr. Nicas' dermal absorption estimates for Liquid Wrench with benzene.

This lack of evidence to support that the Liquid Wrench used by Mr. Andrews contained benzene, and Nicas' mere assumption that it did contain benzene, in and of itself, indicates a faulty methodology on the part of Dr. Nicas in calculating his dermal

[2] Appellant implies that some of the "deodorized version" of Liquid Wrench might contain benzene but cites to no supporting evidence. **BIC 39-40**.

exposure levels for Liquid Wrench. *See* ***Mitchell v. Gencorp Inc.***, 165 F. 3d 778, 782 (10th Cir. 1999) ("nothing . . . requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert"), quoting ***General Electric v. Joiner***, 522 U.S. 136, 118 S.Ct. 512, 519 (1997). Therefore, the Court did not abuse its discretion in finding Dr. Nicas' methodology unreliable. **FOF 47, 58-60; COL 9, 12-13 (RP 5314-5317; 5323-5324).**

III. A Corporate Records Custodian May Offer Testimony Regarding The Contents Of Records Created Prior To His Employment With The Corporation, Or The Absence of Records.

Appellant attacks the Affidavit of James Wells ("Wells"), the plant manager for RSC, the manufacturer of Liquid Wrench. **BIC 16.** Wells was Plant Manager from 1972-2001, when he retired as Vice President of Operations. **RP 1665.** Wells specifically states that he reviewed RSC's business records and containers pre-dating his employment. Id. Based on that review, he states, "The exact formula, ingredients or composition of either Deodorized or Raffinated Liquid Wrench prior to 1960 is

unknown."[3] **RP 1666**. Appellant attacks this statement, since it opines about a period that predates Wells' employment with RSC. **BIC 16**.

Rule 11-803(F) NMRA (2009) sets forth the business records exception to the hearsay rule. It states, in pertinent part,

> A memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness . . . .

Rule 11-803(F). "To admit a business record under Rule 11-803(F), the testifying witness need not be the person who supervised the creation of the record or actually created the record." ***Roark v. Farmers Group, Inc.***, 2007-NMCA-074, ¶ 24, 142 N.M. 59, 162 P.3d 896 (citing ***State v. Ruiz***, 94 N.M. 771, 775, 617 P.2d 160, 164

[3] This statement in the Affidavit of James D. Wells, dated June 13, 2008, was true at the time Mr. Wells signed the Affidavit. **RP 1669**. However, in approximately late April-May 2009, Larry Beaver, a current employee with RSC, located some historical documents that had been stored in a fireproof file cabinet, which did contain some formulas for Liquid Wrench prior to 1960. *See* Deposition of Larry Beaver, taken on June 30, 2009, in ***Knapper v. Safety Kleen Systems, Inc., et al.***, Civil Action No. 9:08-CV-84, pending in the United States District Court for the Eastern District of Texas, Lufkin Division, at pp. 55-58, 75-76, 83-86, 155-160. Regarding the benzene content of Liquid Wrench, the testimony of Larry Beaver in the deposition, based on his review of the documents found, indicates that the drip oil used in the Liquid Wrench prior to 1960 had a boiling point some 20 degrees higher than the boiling point of benzene, being indicative that **in the 1950s the Liquid Wrench likely did not contain benzene**. This information, of course, is not in the record in this case.

(Ct.App.1980) ("The phrase 'other qualified witness' should be given the broadest interpretation . . . ." (internal quotation marks and citation omitted), superseded by statute on other grounds, NMSA 1978, § 30-14-1 (1995)). In ***Kirk Co. v. Ashcraft***, Kirk Company sought to introduce its credit files under the business record exception to the hearsay rule. 101 N.M. 462, 468, 684 P.2d 1127, 1133 (1984). Ashcraft objected, in part, because Kirk Company designated its sales manager as the "qualified witness" under Rule 11-803 to lay a foundation for the trustworthiness of the records. Id. The New Mexico Supreme Court held that the trial court did not abuse its discretion in determining that the sales manager was a "qualified witness." Id. The court held that the sales manager's testimony that the Kirk Company "kept the exhibits as a regular business practice and that the notations on the exhibits were made regularly in the course of conducting ... business," **even though the sales manager lacked "[personal] knowledge of the accuracy of the dates or signatures on the exhibits,"** was sufficient to properly authenticate the records. Id. [emphasis added].

The Tenth Circuit agrees. "[T]here is no requirement that the party offering a business record produce the author of the item. . . ." ***FDIC v. Staudinger***, 797 F.2d 908, 910 (10th Cir.1986). "Instead, a foundation for the business record hearsay exception may be established by **any-one who demonstrates sufficient knowledge of the record keeping system that produced the document.**" ***Hardison v. Balboa Ins. Co.***, 4 Fed. Appx. 663, 670 (10th Cir. 2001). Surely, this principal would relate to the

absence of documents as well. Accordingly, a plant manager and/or vice-president of operations, may properly testify regarding business records or the absence thereof, even though he was not present or employed when the records were created or would have been created. Afterall, Appellant has come forth with no evidence to refute the absence of records to show the benzene content of Liquid Wrench prior to 1960. In any event, as indicated in Footnote 2 above, documents have came to light in April-May 2009 which tend to refute that any Liquid Wrench prior to 1960 contained benzene. *See* ***Mitchell***, supra ("our review of the record suggests that the information relied upon by Plaintiffs' experts with respect to Mitchell's level of exposure was 'so sadly lacking as to be more guesswork.'"). 165 F.3d at 781.

In any event, it is Appellant that bears the burden of proof on this issue, not Appellees, as suggested by Appellant. Therefore, the Court did not abuse its discretion in finding that Dr. Nicas' underlying exposure data was unreliable and that his testimony should be excluded.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Answer Brief of Defendants-Appellees, United States Steel Corporation and Radiator Specialty Company, which arguments these Appellees adopt, this Court should affirm the District Court's exclusion of Appellant's experts, and the grant of summary judgment

in favor of all Defendants-Appellees, and grant such other and further relief as this Court thinks is just and proper.

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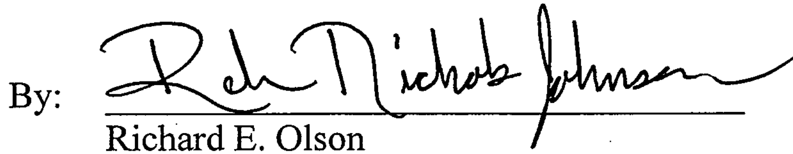
By: 
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CERTIFICATE OF SERVICE

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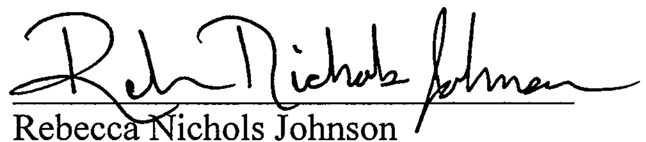

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